

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 217 OF 2020

Sonu Budhu Yadav
Aged 32 Years, Occ. Driver,
R/at. Near Room No.99,
Sagar Nagar, Banganga,
Malbar Hill, Mumbai.

..Appellant

Vs.

1. The State of Maharashtra
(At the instance of Malbar Hill
Police Station vide C.R. No.24/2018)

2. Sunita Sonu Mahadik
Aged 45 Years,
R/at. DX.170, Near Shimla Nagar,
Rahivashi Sangh Zopadpatti,
Napean Sea Road, Malbar Hill,
Mumbai.

..Respondents

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Ms. Anjali Patil a/w. Mr. Akshay Topiwala, for the Appellant.
Mr. R. M. Pethe, APP for the Respondents / State.

CORAM : C.V. BHADANG, J.
DATE : 16 NOVEMBER 2021

Judgment :

. By this Appeal, the Appellant is challenging the judgment and order dated 17 January 2020 passed by the learned Sessions Judge at

Greater Bombay in POCSO Special Case No.259/2018. By the impugned judgment, the Appellant – Accused has been convicted for the offence punishable under Section 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 (‘the said Act’) and Section 376 of the Indian Penal Code read with Section 4 of the said Act. For the offence under Section 6, the Appellant has been sentenced to ten years of Rigorous Imprisonment with fine of Rs.15,000/- and in default, to undergo Rigorous Imprisonment for three months. For the offence under Section 8, the Appellant has been sentenced to suffer Rigorous Imprisonment for three years and to pay a fine of Rs.5,000/- and in default, to undergo Rigorous Imprisonment for one month. No separate sentence has been awarded under Section 376 of IPC and Section 4 of the said Act.

2. The victim girl (P.W.2) was born on 22 July 2002 and has studied upto 9th standard. The victim alongwith her parents, brother and sister had come to reside at Banganga, Mumbai in April 2016. There were 5-6 men who were residing in the neighbourhood of the P.W.2. According to P.W.1 Sunita Mahadik who is the mother of the victim, there was a quarrel between the Complainant and these persons which includes the Appellant – Accused. On account of the said dispute, P.W.1 alongwith her family members had shifted to Shimla House somewhere in the year 2018. After Complainant and victim shifted to Shimla House, the victim had suffered stomach

pain and was vomiting. She was taken to Doctor and on examination was found to be pregnant. On inquiry, P.W.2 is alleged to have informed P.W.1 that it was the Appellant who had sexual intercourse with her on multiple occasions from August 2017 to February 2018 at the residence of P.W.2 which is a room situated at Simala Nagar, Rahivashi Sangh Zopadpatti, Malbar Hill, Mumbai. P.W.1 accordingly lodged report, on the basis of which an offence came to be registered and upon investigation, a chargesheet came to be filed.

3. The learned Special Court framed charge for the offence punishable under Section 376 of IPC and Section 4, 6 and 8 of the POCSO Act. The Appellant pleaded not guilty and claimed to be tried. The defence of the Appellant is one of total denial and false implication on account of the disputes and the quarrel between the Appellant and P.W.1 and her family members.

4. At the trial, the prosecution examined in all four witnesses namely P.W.1 Sunita Mahadik - Complainant, P.W.2 who is the victim girl, P.W.3 WPSI Nazia Sayyad and P.W.4 PI Jitendra Rathod and produced the record of the investigation. The Appellant did not lead any evidence in defence.

5. The learned Special Court has convicted the Appellant as aforesaid. Hence, this Appeal.

6. I have heard Ms. Patil, the learned counsel for the Appellant and Mr. Pethe, the learned APP for the Respondents / State. With the assistance of the learned counsel for the parties, I have gone through the record.

7. It is submitted by the learned counsel for the Appellant that the evidence of P.W.1 would indicate that the complaint was lodged only on account of previous quarrel between P.W.1 and her family members on one hand and the Appellant and other persons residing with him. The learned counsel has taken me through the evidence of P.W.1 and P.W.2 in order to submit that the Appellant is not shown to be perpetrator of the offence or responsible for the pregnancy of P.W.2. The learned counsel pointed out that the report of DNA analysis is inconclusive as held by the learned Sessions Judge on account of the manner in which the specimen samples were obtained. In the submission of learned counsel, the prosecution has failed to produce the best possible evidence on account of which an adverse inference needs to be drawn against the prosecution. The learned counsel for the Appellant has placed reliance on the following decisions.

1. *Amol s/o. Dudhram Barsagade Vs. State of Maharashtra*¹;
2. *Sadhu Vs. State of Maharashtra*² ;
3. *Paramesha Vs. State of Karnataka*³ ;
4. *Nagesh Vs. The State of Maharashtra*⁴ ;
5. *State of Sikkim Vs. Arpan Limboo*⁵.

8. The learned APP has supported the impugned judgment. It is submitted that there were 5-6 persons who were residing in the neighbourhood as claimed by the P.W.1 with whom the P.W.1 had previous quarrel. Learned APP pointed out that thus the Complainant had no reason to single out the Appellant as the person who was responsible for the act. It is pointed out that P.W.1 also claims that quarrel was regarding the involvement of victim and the Appellant. He therefore submitted that the evidence of P.W.1 and P.W.2 is sufficient to bring home the charge against the Appellant. Learned APP also placed reliance on Section 29 of the said Act in order to submit that there is a presumption in favour of the prosecution in an offence of the present nature which has not been rebutted. He submitted that notwithstanding the fact that the evidence as to the DNA analysis is inconclusive, the conviction can

¹2019 ALL MR (Cri.) 435

²2019 ALL MR (Cri.) 342

³2021(2) Kar.L.J. 483 Karnataka High Court

⁴2019 ALL MR (Cri.) 2224

⁵2018 SCC Online Sikk 245

be sustained on the basis of the evidence of P.W.1 and P.W.2. Learned APP pointed out that it is not in dispute that P.W.2 was pregnant and pregnancy was required to be aborted.

9. I have carefully considered the rival circumstances and the submissions made.

10. It has come on record that P.W.2 who is the victim was born on 22 July 2002. The incident is alleged to have happened in the year 2018 when the victim was about 15-16 years of age and was studying in 9th standard. It has further come in the evidence of P.W.1 and P.W.2 that they had shifted to the tenanted premises at Banganga in April 2016. It has also come on record that the said room was situated on the first floor and the landlord was residing on the ground floor. There was a staircase from outside which was leading to the first floor room where P.W.1 and P.W.2 alongwith other family members were residing. There were about 5-6 men who were residing in the adjoining room who are referred to by P.W.1 and P.W.2 as 'Bhaiyaas', the Appellant being one of them. It is the evidence of P.W.1 and P.W.2 that there were previous quarrel between them and the Appellant and the other residents which is prior to the incident in question. P.W.1 states that in the year 2018 they had shifted to Shimla House. P.W.2 has clearly stated that there was no incident of any sexual assault by the Appellant at Shimla

House. It has clearly come on record that the Banganga locality where the victim was residing is thickly populated area. With this background, it is necessary to examine the evidence of P.W.2 and for the matter of that P.W.1. P.W.2 states that her parents used to go out for work from 7.00 a.m. to 4.00 p.m. Her sister was also going to school. Her brother who used to be at home was addicted to liquor. The school time of P.W.2 was from 6.30 a.m. to 12.30 p.m. She used to go to school alongwith her sister. However, she used to return alone. Her sister was going to school at 12.00 noon and was returning at 6.00 p.m. P.W.2 claims that when her parents were away for work, the Appellant came to her house and had forcible sexual intercourse with her, as a result of which, she got pregnant. It was only after she was taken to Doctor that the said fact was revealed. P.W.2 and P.W.1 specifically claimed that they had no intention to lodge report. However, as the Doctor informed that the pregnancy cannot be terminated unless the report is filed, that the complaint came to be filed against the Appellant. P.W.2 clearly states that the Doctor informed that if no report is lodged, pregnancy cannot be terminated. She stated that as there was quarrel with the Appellant before they left Banganga, her mother lodged report against the Appellant. She also categorically stated that she does not know from whom she was pregnant. She also stated that she had given evidence on the say of her mother and she had no complaint against the Appellant. P.W.1 who is mother of the

victim has categorically stated that she wanted to terminate the pregnancy for which P.W.2 was admitted to Bhatia Hospital. She did not want to lodge any complaint against any person. However, she was informed that the pregnancy cannot be terminated unless the report is lodged. P.W.1 in categorical terms has stated that when she was asked to lodge report, she lodged a report against the Appellant as earlier she had a quarrel with the Appellant.

11. In my considered view, the evidence of P.W.1 and P.W.2 is not sufficient to establish the complicity of the Appellant in the offence beyond reasonable doubt. In all probability, the complaint is an outcome of the previous quarrel as admittedly P.W.1 alongwith her family members were required to shift to Shimla House from Banganga on account of the quarrel. It is necessary to note that even according to P.W.2 there was no incident of any sexual assault after she had shifted to Shimla House. She went to the extent of stating that she does not know as to from whom she got pregnant and she had no complaint against the Appellant. With this evidence, it is doubtful whether it is the Appellant who is responsible for the pregnancy of the P.W.2. In this case, the prosecution had conducted DNA examination. However, the learned Sessions Judge after finding that P.W.2 was pregnant 20 weeks and that the pregnancy was terminated has noticed that DNA report was inconclusive as the samples were not properly collected. Thus, from the evidence in the

form of DNA sampling is not supporting the prosecution case. Reliance placed on behalf of the prosecution on Section 29 in my view is misplaced in this case. It is well settled that any such presumption statutory or otherwise requires the establishment of fundamental facts. In any event the presumption is rebuttable at the instance of the Accused. It is now well settled that the Accused can discharge the burden of rebuttable of presumption, on preponderance of probability. The same can be done on the basis of the cross examination of the prosecution witnesses and other prosecution evidence which has come on record. In the present case, in my considered view, even assuming for the sake of argument that the presumption can be raised, the same stands rebutted in view of the evidence of P.W.1 and P.W.2. Considering the over all circumstances, I do not find that the impugned conviction can be sustained. In the result, the following order is passed.

ORDER

1. The conviction and sentence awarded to the Appellant is hereby set aside.
2. The Appellant is acquitted of the offences as charged.

3. The Appellant be set at liberty forthwith, if not, required in connection with any other offence.
4. Fine, if paid be refunded.

C.V. BHADANG, J.