

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 247 OF 2017

Vikas Yashwant Madavi
Age : 42 years
R/at : Tukaram Nivas,
168/2/7, Sector – 9,
Divegaon, Airoli,
Navi Mumbai, Thane
Occupation : Owner of Chinese
food stall, Opp. Residence.

...Appellant

Versus

1. State of Maharashtra
Rabale Police Station, Thane,
Navi Mumbai.

2. Ms. X (minor)

...Respondents

Mr. Abhaykumar Apte for the Appellant.

Mr. S.V.Gavand, A.P.P for the Respondent No.1-State.

CORAM : REVATI MOHITE DERE, J.
DATE : 9th FEBRUARY, 2021

JUDGMENT

1. By this appeal, the appellant has impugned the judgment and order dated 16/12/2016 passed by the Learned District Judge – 08 and Special Judge (POCSO Act), Thane, convicting and sentencing him as under :

- for the offence punishable under Section 376 (2)(f)(i) of the Indian Penal Code, to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine, to undergo further rigorous imprisonment for 6 months;
- for the offence punishable under Section 3(b) read with Section 4 of the Protection of Children From Sexual Offences Act, 2012, to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.500/-, in default of payment of fine, to undergo further simple imprisonment for 10 days;
- for the offence punishable under Section 5(m) read with Section 6 of the Protection of Children From Sexual Offences Act, 2012, to undergo rigorous imprisonment for 10 years and pay a fine of Rs.500/-, in default of payment of fine, to undergo further simple imprisonment for 10 days;
- for the offence punishable under Section 342 of the Indian Penal Code, to pay a fine of Rs.500/-, in default of payment of fine, to undergo further simple imprisonment of 10 days;
- for the offence punishable under Section 361 of the Indian Penal Code, to suffer rigorous imprisonment for 6 months and to pay a fine of Rs.500/-, in default of payment of fine, to undergo further simple imprisonment of 10 days.

All the aforesaid sentences were directed to run concurrently.

The appellant was however, acquitted of the offences punishable under Sections 354, 377, 511 and 172 of the Indian Penal Code and under Section 5(i) of the Protection of Children From Sexual Offences Act, 2012.

2. The prosecution case in short is as under ;

On 04/12/2012, the victim girl aged 3 ½ years (hereinafter referred to as 'X') and her cousin (PW-5) aged 5 years, had gone to play on the playground adjacent to their building. It is the prosecution case that at around 7.00 p.m., 'X' and her cousin (PW-5) had gone to the house of the appellant for playing. The appellant's sister-in-law – Anu Madhvi was an acquaintance of the complainant ('X's mother). At around 8.30 p.m., the appellant is alleged to have come with 'X' and PW-5. The appellant is stated to have brought an ice-cream pack, asking it to be distributed to the girls. In the night, at around 10.00 - 10.30 p.m., 'X' complained of pain near her private part and started weeping. When the complainant asked 'X' as to what had happened, 'X' disclosed that the appellant had removed her nicker and after placing her on the bed had inserted his finger in her private part; and that as she started crying, the appellant brought her back home. When the complainant asked PW-5, aged 5 years about the same, PW-5

disclosed that the appellant had taken 'X' to his bedroom and closed the door. According to PW-5, when she opened the door, she noticed that 'X' was on the bed and the accused was putting on her nicker. Pursuant thereto, 'X's mother lodged a complaint/FIR as against the appellant with the Rabale Police Station, Thane alleging offences punishable under Sections 342, 361, 376, 377, 511, 354 and 172 of the Indian Penal Code and Sections 3(b), 5(i) and 5(m) of the Protection of Children From Sexual Offences Act, 2012. After investigation, chargesheet was filed as against the appellant in the Special Court.

3. The appellant pleaded not guilty to the charges and claimed to be tried.

4. The prosecution, in support of its case, examined seven witnesses i.e. PW-1 - 'X's mother and complainant; PW-2 – Iiyas Ahjaj Shaikh (panch to the spot panchanama); PW-3 – Mrs. Geetanjali Vijay Shinde (Special Executive Officer), who recorded the statement of 'X' aged 3 ½ years and of PW-5, aged 5 years; PW-4 – Dr. Sumedha Modi Gupta (the Medical Officer at Navi Mumbai Municipal Corporation Hospital, Vashi); PW-5 – 'X's cousin sister, aged 5 years; PW-6 – Kishor Bhikan Bhojee (Police constable attached to Rabale Police Station at the relevant

time) and PW-7 – Ajit Ramchandra Sule (the Investigating Officer). Having regard to the 'X's tender age, she was not examined and a pursis to that effect was filed by the prosecution. Thereafter, the appellant's statement under Section 313 of The Criminal Procedure Code was recorded. The defence of the appellant in his 313 statement is of false implication. According to the appellant, the complainant resides in his cousin brother's house and that as there is a dispute between him and his cousin, he has been falsely implicated. It may be noted here, that the said defence taken by the appellant in his 313 statement is contrary to the appellant's defence as suggested in the cross-examination to the witnesses.

After considering the evidence on record, the learned Special Judge, Thane was pleased to convict and sentence the appellant as stated aforesaid in para 1.

5. Learned Counsel for the appellant assailed the impugned judgment and order on several counts. He submitted that the evidence on record is not sufficient to convict the appellant for the aforesaid offences. He further submitted that the medical evidence does not support the prosecution case, that 'X' was sexually assaulted. He submitted that the appellant has been falsely implicated because of some dispute between 'X's family and the appellant's sister-in-law.

6. Learned APP supported the impugned judgment and order. He submitted that after considering the entire material on record, both documentary and oral, the learned Judge has rightly come to the conclusion that the appellant was guilty of the aforesaid offences. He submitted that the appellant has not discharged the burden cast on him under Section 29 of the Protection of Children From Sexual Offences Act, 2012. He submitted that even the defence taken by the appellant in his statement under Section 313 of the Criminal Procedure Code, is in variance and is contrary to the defence taken by the appellant whilst cross-examining the witnesses. He submitted that both the witnesses i.e. PW-1 ('X's mother) and PW-5 ('X's cousin, aged 5 years) inspire confidence and that the said evidence is corroborated by medical evidence i.e. the evidence of PW-4 – Dr. Sumedha Gupta. He submitted that the appellant had taken advantage of a young girl aged 3 years and had sexually assaulted her and that there is sufficient evidence to show the appellants' complicity in the crime.

7. Perused the evidence on record. After considering the submissions canvassed by the learned Counsel for the appellant and the learned APP and having regard to the evidence on record, no infirmity is found in the impugned judgment and order convicting the appellant, for the

reasons stated hereinunder.

8. PW-1 – 'X's mother and the complainant, has in her evidence stated that her daughter ('X') aged 3 ½ years at the relevant time, was studying in junior K.G. PW-1 has stated that she was residing with her parents, husband, daughter ('X'), son and her sister and her sister's two daughters (one of them is PW-5) at the relevant time. According to PW-1, the appellant was staying in the house opposite theirs; that on 04/12/2012, at about 7.00 p.m., her daughter ('X') and niece (PW-5) had been to the appellant's sister-in-law's house for playing as usual; that at around 8.00 p.m., she sent her other niece to call her daughter and PW-5; that her daughter did not return; that her niece disclosed to PW-1 that she ('X') was playing in the appellant's house and will come later; on hearing this, PW-1 went to the balcony and called out to her daughter ('X') and asked her to come home, pursuant to which, the appellant came on the terrace and told her that her daughter was playing and that he would come and drop her after some time. PW-1 has stated that around 8.30 p.m., the appellant came home with her daughter ('X') and PW-5. She has stated that the appellant had brought ice-cream (family pack) and asked her to distribute the same to the girls. According to PW-1, in the appellant's presence, her daughter ('X') complained of pain in the lower part of the body; however, she

ignored the same, thinking that the pain was because of playing; that at around 10.00 - 10.30 p.m., her daughter ('X') again complained of pain around her private part and started weeping. PW-1 has stated that she picked up her daughter, and removed her nicker. She has stated that as she noticed blood on her daughter's private part, she asked her daughter what had happened, to which, her daughter told her that uncle (appellant) had asked her whether she wanted to pass urine or stool and asked her to remove her nicker; that when she told the appellant that she did not want to pass urine or stool, yet uncle (appellant) removed her nicker, placed her on the bed and inserted his finger inside her private part; that as she started crying and told him that she wanted to go home, uncle brought her home. PW-1, on hearing the said disclosure made by her daughter ('X'), asked PW-5, who was with her daughter in the appellant's house, at the relevant time. PW-1 has stated that PW-5 (aged 5 years) told her that when they were playing in the hall, the appellant took 'X' in the bedroom; that when she told that she would also come to play in the bedroom, the appellant refused and told her that he would take only 'X'; that the appellant took 'X' to the bedroom and closed the door; that after some time, when she opened the door of the bedroom, she noticed that the appellant was in a towel and 'X' was on the bed and the accused was putting on her nicker. PW-1, thereafter, disclosed the said incident to her husband and mother. In the

morning, 'X' was taken to the Municipal Hospital at Rabale, Navi Mumbai. After 'X' was examined, they were asked to go to Vashi and from there, they were again asked to go to the Police Station, where, PW-1 lodged a complaint/FIR with the Rabale Police Station. The said FIR is at Exh.16. Thereafter, the Police sent 'X' for medical examination at Navi Mumbai Municipal Hospital, Vashi.

9. Certain omissions were brought on record in the cross-examination of the said witness. However, the said omissions cannot be said to be material omissions. The omissions are with respect to a few details given by PW-1. The evidence of PW-1 is consistent on all material aspects; of 'X' going to the appellant's house; the appellant bringing her daughter ('X') and PW-5 back home, bringing ice-cream for them; of 'X' complaining pain in her lower legs; of her thinking the pain was because of playing and thus ignoring the same; that after dinner, when they were going to sleep, her daughter ('X') started weeping and when she asked her, she disclosed that there was pain in her private part and that uncle (appellant) had taken her to the bedroom, removed her nicker and inserted his finger in her private part; that she noticed redness on her daughter's private part; that on questioning PW-5, PW-5 disclosed that the appellant had taken 'X' to his bedroom and that she had seen the appellant putting on

‘X’s nicker. Nothing material has been elicited in the cross-examination of the said witness so as to disbelieve or discard her testimony. Although, a suggestion was made to the said witness that the redness on ‘X’s private part was possibly a result of a fall or an insect bite, the same has been denied by her. PW-1 has also denied the suggestions that with a view to extort money from the appellant, a false complaint was lodged against him; that the complainant’s relatives and social workers met the appellant and demanded Rs.25,00,000/- for withdrawing the case against him; and that prior to the incident, there was a quarrel between the complainant and the appellant, on account of which, a false complaint was lodged.

10. The evidence of the said witness i.e. PW-1 is duly corroborated by PW-5, ‘X’s cousin. PW-5, at the time of the incident, was aged 5 years and when she was examined in Court, was about 8 years. She was administered Oath, as she understood the sanctity of Oath. The evidence of PW-5 shows that the appellant had taken her cousin (‘X’) to his bedroom. She has stated that initially the appellant was wearing shorts and that when she saw him later, he was wearing a towel. She has stated that she saw the appellant putting on her cousin’s nicker and thereafter, the appellant brought ice-cream for them. PW-5, in her cross-examination, has stated that after the incident, her cousin (‘X’) was crying. Having perused the

evidence of PW-5, there is nothing in her cross-examination to disbelieve her testimony. PW-5 has emerged as a truthful witness. Her evidence is consistent with what was disclosed by her to PW-1, when questioned.

11. The evidence of both the aforesaid witnesses i.e. PW-1 and PW-5 is duly corroborated by PW-4 Dr. Sumedha Gupta, the Medical Officer, who was attached to the Navi Mumbai Municipal Corporation Hospital at Vashi. PW-4 Dr. Gupta has stated that she was working in Navi Mumbai Municipal Corporation Hospital at the relevant time and that Dr. Shabnam Singh was also working in the said hospital. PW-4 has identified the signature of Dr. Shabnam Singh on the certificate issued by the said hospital. She has stated that Dr. Shabnam Singh had examined 'X' aged about 3 years, brought by Rabale Police and that 'X's father had accompanied the girl. The history was given by 'X's father saying that the appellant had taken 'X' to the bedroom and had sexually molested her. PW-4 stated that 'X' 'showed her fingers'. It was observed that 'X' was of average built, her mental status was good, but she was withdrawn. Inflammation was seen at 6 o'clock position. No other injuries were seen except redness on labia minora; the clitoris was inflamed; there was redness on vaginal mucosa and inflammation seen at vaginal fourchette in 6 o'clock. The hymen was found intact and hymenal orifice admitted one

finger. Dr. Gupta has stated that history recorded shows probability of sexual assault, but it cannot be taken as 100% proof. The doctor has however, not ruled out probability of sexual assault. This evidence is consistent with the evidence of PW-1 and PW-5. No plausible reason has come on record for either PW-1, much less for PW-5 (aged 5 years) to falsely implicate the appellant, inasmuch as, from the evidence on record, the relations between the complainant and the appellant appear to be cordial, and it is also evident that the girls would go to play in the appellants house. The complaint/FIR was lodged promptly by PW-1 on the very next day, i.e. on 05/12/2012, for an incident which took place on 04/12/2012 at around 7.30 – 8.00 p.m. and which came to light on the same day at 10.00 -10.30 p.m. Thus, the evidence on record clearly shows, that the prosecution has proved its case beyond reasonable doubt as against the appellant.

12. Merely because 'X' was not examined having regard to her tender age, also cannot be a ground to reject the testimony of all the witnesses and disbelieve the prosecution case. In the facts, the evidence of both the witnesses i.e. PW-1 and P.W.-5 inspires confidence and is duly corroborated by medical evidence. Thus, non-examination of the prosecutrix, in the facts, is not fatal to the prosecution.

13. It is also pertinent to note that in the cross-examination, the appellant's case is that he was falsely implicated in the said case; that the complainant and social workers had demanded Rs.25,00,000/- for withdrawing the case against him, and that prior to the incident, there was a quarrel between the complainant and the appellant, pursuant to which, a false complaint was lodged. The said defence is contradictory and inconsistent with the defence taken by the appellant in his statement recorded under Section 313 of the Criminal Procedure Code. The answer given to question No.33 by the appellant is as under;

Question No.33 :- Why have the witnesses deposed against you ?

Answer :- The complainant resides in my cousin brother's house and there is a dispute between my brother and me and therefore, I have been wrongly framed.

14. It is pertinent to note that no such defence has been put by the appellant in the cross-examination to any of the witnesses. In fact, the tenor of the cross-examination of the witnesses is to the effect that 'X' and PW-5 would regularly visit the appellant's house; that the appellant would take 'X' for urination whenever she wanted to urine. Thus, the false defence taken by the appellant is an additional circumstance as against the

appellant. No plausible reason has come no record to show why the witnesses would falsely implicate the appellant. In the facts, the appellant has also not discharged the burden cast on him under Section 29 of the Protection of Children From Sexual Offences Act, 2012.

15. The circumstances on record unerringly point to the complicity of the appellant.

16. Considering the material on record, no interference is warranted in the impugned judgment and order. The appeal is accordingly dismissed.

REVATI MOHITE DERE, J.