

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

APPEAL NO. 838 OF 2019

Janardan Pandurang Kapse ..Appellant

v/s.

The State of Maharashtra ..Respondent/s

Mr. Ravindra L. Chalke a/w. Sanjay Kape for the Appellant/s.
Mr. S.V. Gavand, APP for the Respondent-State.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 26th AUGUST, 2021.**

JUDGMENT.

1. This is an appeal under Section 374 of Cr.PC. directed against the judgment dated 15.05.2019 passed by Addl. Sessions Judge, Thane in Special Case (POCSO) No. 61 of 2018. By the impugned judgment, the learned Judge has held the Appellant guilty of offences punishable under Section 376 and 354(A)(1)(i) of the Indian Penal Code and Section 4 and 8 of Protection of Children from Sexual Offences Act, 2012, and has sentenced him as under:

(i) Rigorous imprisonment for seven years and

fine of Rs.5000/- i.d. to suffer rigorous imprisonment for six months for offence punishable under Section 376 IPC.

(ii) Rigorous imprisonment for three years and fine of Rs.5000/- i.d. to suffer rigorous imprisonment for six months for offence punishable under Section 354(1)(A) IPC.

(iii) Rigorous imprisonment for seven years and fine of Rs.5000/- i.d. to suffer rigorous imprisonment for six months for offence punishable under Section 4 of POCSO Act, 2012

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(iv) Rigorous imprisonment for seven years and fine of Rs.5000/- i.d. to suffer rigorous imprisonment for six months for offence punishable under Section 8 of POCSO Act, 2012.

2. The crime against the Appellant was registered pursuant to the First Information Report lodged by PW1- mother of the victim

(PW2). PW1 had alleged that on 13.12.2017 at about 12.00 a.m. she heard her daughter crying. She was complaining of pain in her vagina. When questioned, her daughter narrated that whenever she and her friends used to go to play in the room of the Appellant, he used to give them chocolates. The Appellant used to send her friends out, and then latch the door from inside and touch and insert his finger in her private parts. The first informant confirmed that there was an injury on the private parts of the victim. She informed her husband about the incident and lodged the FIR (Exhibit 17) on 16.12.2017.

3. Upon registration of the Crime, the Investigating Officer recorded the statement of the victim girl (PW2). He conducted the scene of offence panchanama (Exh. 30) in presence of PW4 Roshan Belosay and PW4 Santosh Morey. He referred the victim girl for medical examination . She was examined by PW8 Dr. Nandini Deshmukh, a gynecologist at Thane Civil Hospital. On completing the investigation, chargesheet came to be filed.

4. Charge was framed against the Appellant for offences under

Section 376, Section 354(1)(i) Indian Penal Code and Section 4 of Protection of Children from Sexual Offences Act, 2012 and Section 8 of Protection of Children from Sexual Offences Act. The Appellant pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 10 witnesses. Statement of the Appellant was recorded under Section 313 of Cr.P.C. The defence of the Appellant was of total denial. He had claimed that there was a quarrel between him and the first informant over leakage of water from his toilet. He claimed he has been falsely implicated since he had not acceded to the request of the first informant to repair the toilet. The Appellant examined DW1 Rajkumar More to establish the plea of alibi. Upon considering the ocular as well as documentary evidence on record, the learned Judge held the Appellant guilty and convicted and sentenced him as stated above. Being aggrieved by this conviction and sentence, the Appellant has preferred this appeal.

5. Heard Mr. Chalke, learned Counsel for the Appellant. He submitted that there is considerable delay in lodging the FIR. He submitted that the evidence of the victim does not inspire

confidence and is not supported by medical evidence. He further submitted that the prosecution has not examined material witnesses and that conviction cannot be sustained in view of inconsistencies and contradictions in the evidence of the victim. He submits that the learned Judge has failed to appreciate the evidence of DW1 and take note of the plea of alibi raised by the Appellant. He submits that this is a clear case of false implication due to previous enmity.

6. Shri Gavand, learned APP submits that the delay in lodging the FIR in cases relating to sexual offences is of no significance. He submits that the evidence of the victim amply proves that the Appellant herein had touched her private parts. Learned APP further submits that the Appellant had not raised the plea of alibi at the trial or in the statement under Section 313 of Cr.PC. and that the defence of alibi is nothing but an after thought.

7. I have perused the records and considered the submissions advanced by learned Counsel for the Appellant and the learned APP for the State.

8. The first informant (PW1) had set the law in motion on the basis of the narration given by the victim (PW2), a child of 5 years. The testimony of PW1 indicates that she, her husband and her daughter (PW2) were residing on the fourth floor of Building No.4 whereas the Appellant was residing on the 5th floor of the said building. PW1 was working as a cook and her husband was serving at Kapurbavdi. The victim was studying in Senior K.G. in Holy Trinity High School, Thane. Her school timings were from 8.00 a.m. to 11.00 a.m. PW1 has deposed that after school hours the victim used to stay in the house of their neighbor Lilavati Shetty, who was also residing on 4th floor of the said building.

9. PW1 has deposed that on 13.12.2017 at about 12.00 a.m. she heard her daughter crying. When questioned, her daughter complained of pain in her vagina. Her daughter narrated that whenever she and her friends used to play on the 5th floor of the building, the Appellant used to give them chocolates. He used to take her in the room, latch the door from inside and thereafter touch and insert his finger in her private parts. PW1 informed

her husband about the incident and on the next day she narrated the incident to her neighbor Lilawati Shetty and also to the parents of the other children who used to play with the victim. On 16.12.2017 she lodged the FIR (Exhibit 17).

10. The victim (PW2) has deposed that she and her friends were playing bat and ball on the 5th floor. She deposed that the Appellant took them to his room and offered them chocolates. He sent her friends out of the room and thereafter he closed the door, made her lie down on the bed, removed her pant and touched her private parts. He told her not to disclose the incident to her mother. She has stated that on the relevant date the wife and children of the Appellant were not in the house. She has deposed that the Appellant had committed similar act previously about four times during afternoon and in the evening, and earlier while they were residing at Vartak Nagar.

11. The evidence of PW2 does not indicate that the Appellant had inserted his finger in her vagina. It is also to be noted that the victim was examined by PW8 Dr. Nandini Deshmukh. She has

deposed that there were no injuries on the private parts of the victim and that everything was normal. The medical evidence therefore rules out the possibility of insertion of finger in the vagina of the victim. Thus the evidence adduced by the prosecution does not support the charge of rape within the meaning of Section 375(b) of IPC or penetrative sexual assault as defined under Section 3 of POCSO Act, 2012.

12. The Appellant has also been held guilty of offence of 'sexual harassment' and 'sexual assault' as defined under Section 354(A) (i) of IPC and Section 7 of the POCSO Act. The learned Judge has held the Appellant guilty of these offences solely on the basis of the statement of the victim who is a child of 5 years of age. It is well known that a child witness, by reason of his/her tender age is a pliable witness. He/she is amenable to tutoring and inducement and is often prone to telling imaginative and exaggerated stories. Hence the evidence of a child witness needs to be scrutinized with extreme care and caution.

13. In the instant case, PW2 claims that the accused had

touched her private parts. She claims that the Appellant had committed such acts previously about four to five times. Her evidence indicates that the Appellant had also sexually assaulted her while they were residing at Vartak Nagar. She has admitted in her cross examination that her parents were present at the time of recording her statement under Section 164 of Cr.P.C.. She has stated that her parents had told her how to give the statement. She has further stated that she was questioned by the police about the incident and that her mother had given the answers, which were taken down in writing. She has admitted that her parents had told her how to depose before the Court.

14. PW2 on her own admission is a tutored witness and hence no implicit reliance can be placed on her evidence. It is in the evidence that the Appellant, his wife and two children live in a room on the 5th floor, which is above the room of the first informant. The first informant has admitted that there was a quarrel between her and the Appellant over leakage of water from his toilet. Hence the possibility of false implication cannot be ruled out.

15. It is also pertinent to note that PW2 has admitted that she had not stated to the police that the Appellant had earlier touched her vagina about 4 to 5 times during afternoon and evening hours. She has also admitted that she had not told the police that the Appellant had also touched her vagina while she was residing at Vartak Nagar. She has also admitted that she had not stated in her statement under Section 164 Cr.P.C. that the Appellant had removed her pant. Though she has stated in the examination-in-chief that the Appellant had sent her friends out, in her cross-examination she has stated that the Appellant had committed the act of sexual assault in presence of her friends Sanu, Anaya, Hed and Purva. It could be thus seen that PW2 has made material improvement in her evidence. Learned Judge has not taken into consideration these material omissions and discrepancies which render the evidence of PW2 unreliable.

16. PW1 has stated that the victim (PW2) used to return from school by 11.00 a.m. and that she used to stay with her neighbor Lilavati Shetty from 11.00 a.m. to 5.45.p.m. She has also stated

that on 13.12.2017 her daughter was with Lilawati from 11.00 a.m. to 5.45 p.m. PW2 has also stated in her cross examination that she was in the house of Leela Aunty the whole day when she had narrated the incident to her mother. The prosecution has not examined said Leela Shetty, and has not offered any explanation for not examining this material witness who could have affirmed whether the victim was in her house or whether she had gone with her friends to the room of the Appellant on the 5th floor of the building.

17. It is to be noted that the alleged incident had taken place on 13.12.2017 and the victim had narrated the incident to the first informant on the same night PW1 has stated in her cross examination that she had seen the injury on the private part of the victim. She has also stated that the victim had complained that she was passing reddish color urine. She has admitted that she had not taken the victim to the doctor till lodging of the FIR on 16.12.2017.

18. It is well known that in matters relating to sexual offences

the victims are hesitant to approach the police and/or report such incident. Hence the delay in lodging the FIR is not of significance. However the conduct of the PW1 in not taking the victim to the doctor, despite noticing an injury on her private parts and the victim complaining of passing reddish colour urine, is unnatural and casts a doubt on the truthfulness and credibility of the entire prosecution version.

19. Considering the totality of the evidence, in my considered view, the prosecution has failed to establish the case beyond reasonable doubt. Hence the conviction as well as sentence cannot be sustained. In the result, the Appeal is allowed. The impugned judgment is quashed and set aside. The Appellant is acquitted of offences under Section 376 and 354(A)(1)(i) of the Indian Penal Code and Section 4 and 8 of Protection of Children from Sexual Offences Act, 2012. He shall be set at liberty forthwith, if not required in any other case. His bail bonds stand discharged. Fine amount, if deposited, be refunded to the Appellant.

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(ANUJA PRABHUDESSAI, J.)