

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 874 OF 2018

Mahammad Kalin Mehamood Hasan Shaikh
@ Mohammad Kalim Mohammad Hasan Shaikh
Age 48 years, Occ.: Tailor,
R/at. Sayali Apartment, A Wing,
Room No.205, Amrut Nagar,
Mumbra, Thane.

..Appellant

Vs.

1. State of Maharashtra

2. Zarina Sayyed Najib
Age 40 years, Occ. House Servant,
Aayan Residency, Room No.203,
Nassem Baig, Darga Road,
Shaadimahar Road, Mumbra,
District Thane & Anr.

..Respondents

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Mr. Sandeep R. Karnik, for the Appellant(Appointed).
Mr. S. R. Agarkar, for the Respondent/ State.

CORAM : C.V. BHADANG, J.
DATE : 14 DECEMBER 2021

Judgment:

. The challenge in this Appeal, is to the judgment and order dated 19 June 2018 passed by the Special Court at Thane in Special Case (POCSO) No.06/2015. By the impugned judgment, the

Appellant – Accused has been convicted for the offence punishable under Section 376 and 354 of IPC and Section 3, 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (‘the POCSO Act’, for short). The Appellant has been sentenced to suffer Rigorous Imprisonment for seven years with fine.

2. The brief facts necessary for the disposal of the Appeal may be stated thus-

That the Appellant is a tailor by profession. The Complainant Zarina Sayyed Najib (P.W.1) is residing in the same locality where the Appellant was residing and is having a tailoring shop. According to the Complainant, she used to get her clothes stitched from the Appellant. On 22 August 2014, there was a dispute and altercation between the Complainant and the Appellant as Appellant had allegedly damaged the clothes of the husband of the complainant. According to prosecution, the Appellant used to call the victim (P.W.2) who is the daughter of the complainant and another girl both of whom were minors, to his shop. The material allegation is that he used to remove her pant and touch her vagina with his penis as well as by his mouth.

3. On the basis of a complaint dated 23 August 2014 lodged by P.W.1, an offence came to be registered against the Appellant with Police Station Mumbra, under the relevant sections. P.W.3 who is

the Investigating Officer referred both the victim girls for medical examination. The record discloses that the parents of both the victims refused to get the victims medically examined. The Investigating Officer recorded the statement of witnesses. The Appellant was arrested and after completion of the investigation, a chargesheet was filed.

4. The learned Special Court framed charge against the Appellant under the aforesaid sections to which the Appellant pleaded not guilty and claimed to be tried. The defence of the Appellant is one of total denial and false implication. According to the Appellant, the Complainant had been to his house on 23 August 2014 and had met his wife and there was some altercation between them. The Complainant had allegedly assaulted the wife of the Appellant for which the wife of the Appellant had lodged a report prior to the FIR by the Complainant. According to the Appellant, the present complaint is by way of counterblast to the complaint lodged by wife of the Appellant.

5. The prosecution has examined in all three witnesses namely Complainant - Zarina Sayyed Najib (P.W.1), victim (P.W.2) and the Investigating Officer – Shivaji Vithoba Pawar (P.W.3) and produced the record of the investigation. The Appellant examined his wife Samshulnisa Narsul Hasan Shaikh (D.W.1) in his defence.

6. The learned Special Court by the impugned judgment has found the Appellant guilty. Hence, this Appeal.

7. I have heard the learned counsel for the Appellant and the learned APP. With the assistance of the learned counsel for the parties, I have gone through the record.

8. It is submitted by the learned counsel for the Appellant that the FIR is outcome of the prior non cognizable case (NC case) registered at the instance of the wife of the Appellant against the Complainant. It is submitted that the Complainant (P.W.1) has turned hostile and has not supported the prosecution. The learned counsel pointed out that the other victim girl who was allegedly subjected to a similar abuse has not been examined nor the maternal aunt of the victim who had allegedly accompanied the victim to the shop of the Appellant is examined as the prosecution witness. The learned counsel has taken me through the evidence of victim in order to submit that it will be unsafe to rely on the uncorroborated testimony of the lone witness. He submitted that the observations of the learned Special Court in para 16 are dehorse of the evidence of P.W.2.

9. Learned APP has supported the impugned judgment. Learned APP has pointed out, the answer given by P.W.2 in response to question No.14 in order to submit that the victim has narrated the sexual abuse in sufficient particulars, which can be expected from a child witness. He submitted that notwithstanding the other victim not being examined and P.W.1 has turned hostile, the conviction can be based on the testimony of P.W.2. He therefore submitted that the Appeal be dismissed.

10. I have given my anxious consideration to the rival circumstances and the submissions made.

11. Before adverting to the rival contentions, it is necessary to note that the Appellant had sent a communication through jail, stating he does not want to prosecute the Appeal, as it is not being heard from 2018. This Court by an order dated 23 November 2021 found that, for the said reason the Appeal cannot be allowed to be withdrawn as in all probability it was sent in exasperation. On that day, as there was no appearance on behalf of the Appellant, Advocate from Legal Aid was appointed to represent the Appellant. Today, the learned counsel representing the Appellant from Legal Aid has argued the matter and accordingly it is being disposed of on merits.

12. It is a matter of record that D.W.1 who is the wife of the Appellant had lodged a complaint against P.W.1 on 23 August 2014 at about 12.00 noon. According to D.W.1, the complainant (P.W.1) had been to her house at 10.30 a.m. alongwith 2 to 3 women and had inquired about the whereabouts of her husband i.e. the Appellant making complaint about the improper stitching of clothes of her husband (Complainant's husband) by the Appellant and asking for a refund of the amount paid. According to D.W.1 when she refused to pay the amount, she was manhandled and was assaulted, because of which she had sustained injury to her shoulder. The matter was accordingly reported and on the basis of the same, a N.C. (Exh.18) was registered with the concerned Police Station. It is necessary to note that after registration of the said N.C at about 12.00 noon on 23 August 2014, P.W.1 subsequently lodged the complaint at about 2.30 p.m. As noticed earlier, P.W.1 has not supported the prosecution.

13. P.W.2 had stated that on one occasion the Complainant alongwith her maternal aunt had also followed her to the shop of the Appellant in order to verify the allegations. The prosecution has neither examined the maternal aunt, nor the other victim girl who was allegedly subjected to similar abuse. In such circumstances, the prosecution is entirely based on the testimony of the child witness i.e. P.W.2. Although in a given case the evidence of the child witness

can be accepted to base the conviction, the question would depend upon facts and circumstances of each case. After having carefully gone through the evidence of P.W.2 and in the context of the fact that there was a refusal on the part of the parents of both the victims to get them medically examined and therefore, there is no medical evidence to corroborate the evidence of P.W.2, in my considered view, it will be unsafe to place implicit reliance on the evidence of P.W.2, particularly when PW No.1 her mother has not supported the prosecution. It is well settled that the offences under said Act are of a serious nature inviting stringent punishment and therefore requires a standard of proof as held by the Division Bench of this Court at Nagpur in *Ravi Anandrao Gorpude Vs. State of Maharashtra*.¹ Applying said principle, in my considered view, it is unsafe to rely on the uncorroborated testimony of P.W.2 in this case.

14. The learned Sessions Judge has dealt with the aspect of the Complainant (P.W.1) turning hostile in the face of the evidence of P.W.2 more particularly in para 16 of the judgment in which learned Sessions Judge has observed as under-

It is pertinent to note here that the complainant turned hostile and has not supported the prosecution. She was reluctant to pursue the matter. In cross examination on behalf of the learned APP she has denied that due to compromise she deposed falsely. Thus the complaint is certainly not duly proved in the evidence of the informant. However, the victim was

¹In 2017 ALL MR (Cri.) 1509

just six years old at the time of incident. She had made statement before Police as well as before the Magistrate describing the incident. In witness box the victim girl has confidently described the acts at the hands of accused. She has specifically deposed that the accused used to remove his clothes, her clothes and used to touch her vagina by mouth. The confident statement of the victim in the Court is certainly reliable. Considering the nature of incident the complainant might have thought not to carry on the matter, but the victim did not resile from her statement and narrated the entire story as happened. Thus, the statement of the victim girl is sufficient to conclude that the prosecution has proved the sexual assault upon the victim girl by the accused.

15. P.W.2 has not stated about the Appellant touching her vagina with her penis. She has only stated that the Appellant used to kiss her on the face and touch his tongue to the vagina. The highlighted observation in my considered view, are against the evidence of P.W.2 on record. P.W. 2 has not stated about the Appellant removing his clothes anywhere. Undisputedly, there was constant dispute between the complainant and the Appellant and on 23 August 2014 the complaint was lodged by D.W. 1, the wife of the Appellant against the complainant (P.W. 1), on the basis of which a non cognizable case was registered. The complainant thereby lodged the present complaint at about 02:30 p.m. Thus, possibility of complaint being outcome of the dispute between the complainant and the Appellant cannot be ruled out. Looking to the nature of the prosecution

evidence in which P.W. 1 has not supported the prosecution and on the basis of the evidence of D.W.1, in my considered view, the Appellant has probalised the defence.

16. Considering the over all circumstances, I find that the Appellant is entitled to benefit of doubt. In the result, the following order is passed.

ORDER

1. The Appeal is allowed.
2. The Appellant is acquitted of the offences, as charged.
3. The Appellant be set at liberty forthwith, if not required in any other case.
4. Fine, if paid, be refunded.

C.V. BHADANG, J.