

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

CRIMINAL APPEAL NO.1142 OF 2019

Shailesh Ramesh Jaiswal

...Appellant/Applicant

Versus

The State of Maharashtra and Anr.

...Respondents

....

Mr. Dinesh Tiwari with Mr. Mikhail Dey, Ms Rajni Mishra, Mr. Aush Karnawat i/b. Mr. Dinesh Tiwari and Associates for the Appellant.

Mr. S.V. Gavand, APP for Respondent -State.

Ms Deepa Amati for Respondent No.2

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 25th OCTOBER, 2021.

ORAL JUDGMENT:-

This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 challenging the judgment and order dated 22/07/2019 in POCSO Special Case No.482 of 2014, Greater Bombay.

2. By the impugned judgment, the learned Special Judge, Greater Bombay has held the Appellant (hereinafter referred to as 'the accused') guilty of offences punishable under Sections 376(2) and 506 of the IPC and sentenced him to undergo rigorous

imprisonment for 10 years with fine of Rs.25,000/- i/d to undergo rigorous imprisonment for three months for offence punishable under Section 376(2) of the IPC and rigorous imprisonment for one year with fine of Rs.5,000/- i/d rigorous imprisonment for one month for offence punishable under Section 506 of the IPC.

3. Brief facts necessary to decide this appeal are as under:-

PW1- WPC Ms Yogita Rahane, attached to Jogeshwari Police station lodged a report at the same police station alleging that on 09/09/2014 while she was on duty, wife of the accused had come to the police station alongwith the victim, stated to be her cousin and had reported that the accused had sexual relationship with the victim and had threatened her not to disclose the incident to anyone. Since the wife of the accused and the victim were not ready to lodge the report, PW1 lodged the report on behalf of the State.

4. Pursuant to the said report, PW8- API Santosh Khandekar registered the crime for offences punishable under Sections 376(2) and 506 of the IPC and under Sections 6 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), conducted

spot panchanama at Exhibit-27 and arrested the accused under arrest panchanama at Exhibit-34 and referred the accused and the victim for medical examination. PW9-PSI Hasina recorded the statement of the victim. Further investigation was conducted by PW11-PI Suryakant. He seized the clothes of the accused. He also seized CPU of HCL Company, monitor of HCR and LCR Company, keyboard, mobile, etc. under seizure panchanama at Exhibits-29 and 32. He recorded statements of the witnesses and upon completion of the investigation submitted the charge sheet.

5. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined 12 witnesses. The statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. Defence of the accused was of total denial and of false implication. In defence, the accused examined DW1-Sadhna, his wife-Geeta (DW2) and Ram Manohar (DW3).

6. Learned Judge upon appreciation of evidence on record has held that the prosecution has failed to establish that the victim

was below 18 years of age and consequently failed to prove that the victim was a 'child' within the meaning of Section 2(d) of the POCSO Act. The learned Judge therefore acquitted the accused of offences punishable under Sections 6 and 12 of the POCSO Act. Relying upon the evidence of PW4 the learned Judge held that the Accused herein had repeated sexual intercourse with the victim without her consent and against her wish and that he had threatened her not to disclose the incident to anyone. The learned Judge therefore held the accused guilty of offences punishable under Sections 376(2) and 506 of the IPC and sentenced him as stated above. Being aggrieved by the judgment, the Appellant has filed this appeal under Section 374 of the Cr.P.C.

7. Heard Mr. Dinesh Tiwari, learned counsel for the accused, Mr. S.V. Gavand, learned APP for Respondent No.1 and Ms Deepa Amati for Respondent No.2. I have perused the records and considered the submissions advanced by learned counsel for the respective parties.

8. Learned Judge has already recorded a finding that the

prosecution has failed to prove that the victim was below 18 years of age at the time of the incident and has therefore acquitted the accused of the offences under the POCSO Act. In view of these findings, the only question for consideration is whether the prosecution has established beyond reasonable doubt that the accused had sexual intercourse with the victim against her will and without her consent.

9. The case of the prosecution rests mainly on the testimony of the victim (PW4). The evidence of the victim reveals that she was a native of Uttar Pradesh. DW2-wife of the accused is her aunt and she was residing at Jogeshwari. The victim came to Mumbai in the year 2012 and lived with the accused and his wife -Geeta till the year 2014. She has deposed that Geeta was working with one NGO and her office timings were from 10.00 to 8.00 p.m. The accused was working as a journalist and his office timings were from 3 pm. to 12 am. She used to take care of the minor children of the accused and Geeta and do all other household work.

10. PW4 has deposed that the accused used to show her blue

films on his computer as well as on his mobile. Sometime he used to embrace her. When she told him that she would inform Geeta about the incident, he threatened her that he would defame her and send her to her native place. She has deposed that sometime in the year 2014 the accused had forcible sexual intercourse with her. She has deposed that he once again had sexual intercourse with her some time around Raksha Bandhan Festival in the year 2014. He later told his wife that she was the cause of quarrel between them and that she should be sent to her native place. PW4 claims that she had told the accused that she would call her father and return to her native place within 4 to 5 days. She has deposed that she did not have meals for about two days. Later on she narrated the incident to Geeta and her mother Prabhavati. She has deposed that the accused denied having committed any such act. Geeta therefore took her to the police station. She has stated that she called the accused and after talking to him for some while Geeta told her not to lodge the complaint.

11. In her cross examination she has admitted that one lady by name Reshma was working in the house of the accused. She has further admitted that she had gone to her native place in March-2014

and returned to Mumbai some time in the month of June-2014. She has further admitted that her brother had come to Mumbai in June-2014 in search of a job and he too was residing with the accused and Geeta. She has stated that her brother returned to the native place after Raksha bandhan festival. She has further admitted that she had returned to her native place in the year 2015 i.e. after the alleged incident. She has admitted that she had made phone calls to the accused on 6 to 7 dates during night time. She has stated that there used to be constant quarrels between the accused and his wife and that she would frequently go to the police station to lodge a complaint against him.

12. The evidence of this witness indicates that in the year 2014 she had gone to her native place after the incident. She did not disclose this incident to her parents or any other person, on the contrary she returned to Mumbai along with her brother and stayed in the house of the accused. She did not disclose about the incident to her brother. Her evidence further indicates that in the year 2015 she had returned to the native place and that she had made phone calls to the accused during night time. The conduct of the victim

indicates that the relationship, if any, was consensual. Under the circumstances, it would not be safe to place implicit reliance on the testimony of the victim.

13. Under the circumstances and in view of discussion supra, the impugned judgment dated 22/07/2019 passed by learned Designated Judge under Protection of Children from Sexual Offences Act, 2012 for Greater Bombay in POCSO Special Case No.482 of 2014 is quashed and set aside. The Appellant/accused stands acquitted. He be released forthwith, if not required in any other crime.

14. The appeal stands disposed of in above terms.

(SMT. ANUJA PRABHUDESSAI, J.)