

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

CRIMINAL APPEAL NO. 322 OF 2020

Amit Maruti Kamble @ Bhutya .. Appellant

V/s.

The State of Maharashtra ..Respondent

Ms. Vrushali Maindad for the Appellant.

Mr. Yogesh Dabake, APP for the Respondent/State.

CORAM : C.V. BHADANG, J.

DATE : 18 NOVEMBER, 2021

JUDGMENT

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1. By this appeal, the appellant is challenging the Judgment and Order dated 24.01.2019 passed by the Special Court, Mumbai in POCSO Special Case No. 34 of 2017. By the impugned Judgment, the appellant/accused has been convicted for the offence punishable under Section 376 (2) of the IPC and Section 4 of the Protection of Children from the Sexual Offences Act, 2012. The appellant has been sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.50,000/- and in default to undergo rigorous imprisonment for one year. The appellant has also been convicted under Section 8 of the said Act and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.10,000/- and in

default to undergo rigorous imprisonment for six months. The appellant however has been acquitted from the offence punishable under Section 363, 366A and 506(1) of IPC.

2. The prosecution case may be briefly stated thus:

That the victim was a girl aged about 15 years at the time of the incident. On 16.07.2016, she had gone for having snacks with her friend. However as she did not return home, a report was lodged by her family members on 17.06.2016 upon which an offence at Crime No. 264 of 2016 was registered. However, on the same day, the victim returned to her house at about 12.30 p.m.. She informed that she had gone to the house of one 'Bhabhi' for collecting money. The appellant contacted her on the mobile of Bhabhi and asked her to come to Panchsheel Nagar. The Appellant is alleged to have threatened her that if she did not come to Panchsheel Nagar, he will show her photographs with other boys to her uncle. On account of the threat, the victim went to Panchsheel Nagar. The appellant is alleged to have taken her to a nearby forest and had forcible sexual intercourse with her. The victim then went to one Bhavna at Mulund at about 12.30 a.m. Bhavna is stated to be the friend of victim and she narrated the incident to Bhavna's mother. She then returned to her home after which the complaint

came to be lodged to Bhandup police station. The Investigating Officer referred the victim for medical examination, made seizures, recorded the statement of the witnesses. The appellant was arrested on 26.10.2016 and he was referred for medical examination. The seized articles were sent for chemical anyliser. After completion of investigation, a chargesheet came to be filed.

3. The learned Special Judge framed charge against the appellant for the offence punishable under Section 363, 366A, 376(2), 506 part I and 323 of IPC and Section 4 and 8 of the POSCO Act. The appellant pleaded not guilty to the charge and claimed to be tried. The defence of the appellant is one of the total denial and false implication. It is the specific defence that the appellant had a quarrel with one Ashish, who was the boyfriend of the victim at a birthday party and on account of the same, he is falsely implicated.

4. At the trial, the prosecution examined in all ten witnesses and produced the record of investigation. The appellant did not lead any evidence in defence. The learned Session Judge by the impugned Judgment has found the appellant guilty. Hence, this appeal.

5. I have heard Ms. Vrushali Maindad, the learned counsel for the appellant (appointed) and the learned APP. With the assistance of the learned counsel for the parties, I have gone through the record.

6. It is submitted by the learned counsel for the appellant that the friend of the victim i.e. Bhavna and her mother have not been examined. It is submitted that even the lady whom the victim calls 'Bhabhi' is also not examined by the prosecution. The learned counsel pointed out that according to the victim, the appellant had made a call on the mobile phone of Bhabhi. However, Call Data Record (CDR) of the mobile phone of Bhabhi has also not been recovered, in order to show that indeed the appellant had made a call on the mobile phone of Bhabhi asking the victim to come to Panchsheel Nagar. It is submitted that the complaint was lodged as there was a quarrel between the appellant and Ashish who is the boyfriend of the victim.

7. The learned APP has submitted that evidence of PW-3 who is the victim along with the complainant PW-1, who is the father of the victim and her uncle PW-2 is natural and one which inspires confidence. It is submitted that the evidence of PW-6, who is the

Medical Officer who has examined the victim clearly shows that the victim was subjected to sexual intercourse. It is thus submitted that evidence of PW-3 is corroborated by the medical evidence and merely because Investigating Officer had failed to recover the CDR is not been sufficient. The learned APP also pointed out that there were incidence in which the appellant had threatened the prosecution witnesses and that is the reason why the prosecution could not examine any other witnesses which in the submission of the learned APP will not affect the prosecution case.

8. The evidence of PW-3 shows that her date of birth is 12.09.2001 and at the relevant time, she was studying in 10th standard in Barrister Nath Pai school. She had stated that the appellant used to stand outside her school. On 16.06.2016 she had gone to the house of 'Bhabhi' for collecting money where the appellant made a call on the mobile of 'Bhabhi' asking her to come to Panchsheel Nagar. The appellant threatened that else he will show her photographs to her uncle, on account of which she went to Panchsheel Nagar. The appellant caught hold of her hand and took her to nearby forest and thereafter, had forcible sexual intercourse with her. She also claimed that she made an attempt to shout , however the appellant hit her and also threatened her. She states

that her statement was recorded on 17.06.2016 by the police. She was taken to Sion hospital, where she was examined. Nothing significant has come in the cross-examination except that there are two to three omissions about appellant having hit her under the ear and with fist blows and having closed her mouth. In my considered view, the said omissions which have been brought on record in paragraph 8 of the cross-examination do not strike at the root of the veracity of her evidence. PW-3 was also cross-examined as to the place of the incident. The learned counsel for the appellant pointed out that there is some discrepancy about the spot as to whether the incident happened in the forest or in a hut. In my considered view, the said part of the cross-examination will not come to the aid of the appellant as PW-3 has not stated in her evidence about the incident having happened in any hut. There is a spot panchnama recorded which has been duly proved on record. The defence that the appellant has been falsely implicated on account of certain dispute and quarrel between the appellant and Ashish is too remote to be accepted. Normally a lady would not falsely implicate any person for such an act leaving the real perpetrator. PW-6 Dr. Mahesh Sable had examined PW-3 and on local examination, he found that hymen was ruptured at 6 O'clock position. The tear was fresh. Margines were irregular. There was no bleeding or oedema mark was present.

Edges were edematous. Age of the injury on genital region (VI f) was noted to be fresh and of injury (V) of 3-4 days. The Medical Officer has clearly opined that finding are consistent with recent sexual intercourse. Thus, the evidence of PW-3 is corroborated in material particulars by the medical evidence. It is now well settled that evidence of the victim, if found to be natural and acceptable and one inspiring confidence can be a basis for conviction.

9. The non examination of Bhavana and for the matter of that Bhabhi, in my considered view cannot displace the evidence of PW-3 which is otherwise cogent and natural and one inspiring confidence. The appeal is without any merit and is accordingly, dismissed.

10. In view of dismissal of the Appeal, nothing survives in the Interim Application. Hence, the same is disposed of as infructuous.

(C.V. BHADANG, J.)