

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 625 OF 2020

Santosh @ Banti s/o Ram Ghogre	... Appellant
Versus	
The State of Maharashtra	... Respondent

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Mr. U. B. Bilolikar, Advocate for appellant
Smt Geeta L. Deshpande, APP for respondent - State

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CORAM : R. G. AVACHAT, J.

**RESERVED ON : 10th FEBRUARY, 2022
PRONOUNCED ON : 07th JULY, 2022**

J U D G M E N T :-

. This is an appeal against conviction. The appellant has been convicted for the offence punishable under Section 376(2)(j) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and therefore, sentenced to suffer rigorous imprisonment (R.I.) for a period of twenty (20) years and to pay fine of Rs.5,000/-. In default of payment of fine, the appellant has been directed to undergo R.I. for one year.

2. Facts giving rise to the present appeal are as follows:

PW1-“S” (victim) was six years of age at the relevant time. The victim has been to the house of the appellant for watching television program. It was on 02.04.2018, the appellant took her close to him. He pulled down her undergarment upto knees and placed his private part at the private part of the victim. The victim had pains. The appellant offered her chocolate, biscuits and ice-cream. The victim then left the appellant's house. The victim complained burning sensation at her private part. She related the same to her mother. The parents of the victim thought that pains might have been due to scorching heat and ointment was therefore applied at her private part for 2 – 3 days. The victim, then, related her parents what the appellant did with her. The parents of the victim, therefore, approached the concerned police station. PW3 (informant) lodged the First Information Report (FIR) Exh-28 at Mukhed Police Station. Crime for the offence punishable under Section 376(2) of the Indian Penal Code and under Section 4 of the POCSO Act therefore came to be registered against the appellant.

3. PW6 – Kavita, Police Sub Inspector was entrusted with the investigation of the crime. She recorded the victim's statement.

The victim was medically screened. Scene of offence panchanama was drawn in the presence of panch witnesses. Clothes on the person of both, the victim and the appellant, came to be seized under the panchanama. The seized articles were forwarded to the Forensic Science Laboratory, for examination and report. The statement of the persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant came to be proceeded against by filing charge-sheet. Charge (Exh.6) was framed against the appellant. He pleaded not guilty. His defence was of false implication.

4. The prosecution examined six witnesses and produced in evidence certain documents. The learned Additional Sessions Judge, Mukhed, on appreciation of the evidence, convicted the appellant and consequentially sentenced as stated above.

5. Heard.

Learned Advocate for the appellant would submit that the victim was of 6 – 7 years of age at the relevant time. The FIR has been lodged on the fifth day of the alleged incident. There is every possibility of the victim to have been tutored. Her parents were with

her. When her statement was recorded by the police. Her father had accompanied her to the Court while her evidence was to be recorded. He would further submit that in the cross examination of the father of the victim, it has come on record that relationship between the two families, was not good. Possibility of false implication therefore could not be ruled out. At the time of the alleged incident, the family members of the appellant were at his house. It was therefore just impossible for the appellant to commit the alleged offence. According to the learned Advocate, except hymen tear, there is nothing to suggest penetrative sexual assault. Hymen tear can occur by other reasons also. The victim had not been taken to the hospital, immediately. Parents applied ointment without consulting the medical practitioner. Redness on private part might have been the result of application of wrong ointment. According to the learned Advocate, no true account of the incident has come on record. He, therefore, urged for allowing the appeal.

6. The learned APP would, on the other hand, submit that seven year old victim did not have a reason to falsely implicate the appellant. Medical evidence makes out the offence. She reiterated the reasons given by the trial Court in support of the impugned

judgment and order. The learned APP ultimately urged for dismissal of the appeal.

7. Let us appreciate the evidence in the case.

Six witnesses were examined by the prosecution. PW1 is the victim. PW2 – Gauraokumar is a panch witness to the scene of offence panchanama Exh.24 and seizure of clothes of the appellant and the victim under two different panchanamas Exh.23 and Exh.25 respectively. PW3 is the father of the victim. PW4 was the Head Mistress of the school wherein the victim was taking education. She placed on record the victim's school admission form, wherein the date of birth of the victim is recorded as 18.04.2012. PW5 – Dr. Mohan had medically screened the victim. PW6 was the Investigating Officer.

8. The evidence of PW2 panch witness is not being adverted to, for the reason that it is of not much assistance for the prosecution. Similarly, the evidence of PW4 – Sangita, Head Mistress, is not reproduced since the date of birth of the victim has not been disputed before this Court.

9. Evidence relevant for deciding the present appeal would be that of the victim, her father and the Medical Officer. Let us advert thereto.

10. The victim, in her examination-in-chief testified;

“I know Bunty Bhaiya. He resides near my house. I had gone to Bunty Bhaiya’s house for watching T.V. Bunty Bhaiya pulled down my pant to my knees. He had put a long thing at my place of urine therefore, I had pains. Afterwards he told me that I will give you biscuits, chocolate and cadbury. Afterwards I went to my home.”

During her cross examination, it has come on record that on the next day of the alleged incident, she went to school and then onwards also she regularly attended the school. She would play with her friends. She would ride bicycle. Skip rope. Due to scorching heat, there use to be burning sensation at her private part. The victim denied to have given evidence against the appellant at the instance of her parents.

11. It is in evidence of her father (PW3) that on 02.04.2018, by 6.00 p.m., his wife told him that the victim complained of pain at her private part. They thought the same was due to summer heat. The mother of the victim, therefore, applied ointment. For next 2 – 4

days, the victim continued to complaint pains. Swelling and redness noticed on her private part. Inquiry was therefore made with the victim to learn from her that, after she came back home from school, she had been to the house of the appellant for watching television program. She told them that the appellant took her close to him. He offered her chocolate and ice-cream. Pull her pant down to her knees. He, then, tried to insert his private part into her private part. When she complained of pains, the appellant released her. It is further in his evidence that then he approached the concerned police station on 06.04.2018 and lodged the FIR Exh.28.

12. PW3 was subjected to searching cross examination. It has come in his evidence that the appellant is his relative. The appellant lives along with his parents and three brothers. He denied to have been in the accompany of the victim while her evidence being recorded in the Court. He admitted to have had not taken the victim to a medical practitioner no sooner she complained pains in her private part. He thought it to be due to summer heat. The victim had earlier burning sensation due to heat. He has categorically denied to have had applied a wrong medicine to the victim's private part. It has also come in his evidence that one Sangita Anil Ghogre,

relation of the victim has lodged a complaint against his two real brothers alleging them to have molested her. According to her, a false complaint was lodged by Sangita only with a view to pressurise him to settle the present case.

13. Then, we have the evidence of PW5 – Dr. Mohan. It is in his evidence that he medically screened the victim on 06.04.2018. History was given by her mother. Mother gave history of sexual assault for 4 - 5 times at the house of the appellant. It is further in his evidence that on local examination of genitals, he found hymen injury was present. Old healed hymenal tear present at 6, 7, 9 O'clock and 12 and 5 O'clock position. He took the blood sample and vaginal swab for chemical analysis (C.A.). He gave provisional opinion Exh.35. According to him, overall findings were consistent with sexual intercourse. He, however, reserved final opinion, pending C.A. reports. He, then, referred to the C.A. report Exh.16. He, then, reiterated his opinion.

During cross examination, he denied that the injuries mentioned in the medical certificate of the victim are possible due to cycling and due to fall from the cycle. He admitted that labia majora and minora were intact. These are the external parts of

female genital. He admitted that the C.A. report does not support the prosecution case. According to him, the C.A. report is negative. There were no fresh injuries. There were old hymen tear. He has not mentioned the age of injury in the medical certificate. There was no reason for the victim to falsely state incriminating against the appellant. She has, however, deposed to the effect that the appellant had placed his private part at her private part. Since she experienced burning sensation at her private part, her parents applied some medicine/oointment without consulting the medical practitioner. When she disclosed the parents what the appellant did with her, the FIR came to be lodged on the fifth day of the incident. The C.A. reports (Exh.16) are negative. The Medical Officer who examined the victim found old healed hymenal tear. He did not give age thereof or of the swelling and redness noticed at the private part of the victim. Victim's father testified that he was told by the victim that the appellant tried to insert his private part into her private part.

14. True, to constitute an offence of rape, slight penetration is sufficient. I have also perused the Marathi version of the victim's evidence, wherein she has stated that the appellant touched/placed some long thing at her private part. Same caused her pain.

15. In view of this Court, the evidence of the victim and her father undoubtedly suggest it to be a case of an attempt to commit rape. It is reiterated that C.A. reports are negative. The Medical Officer found old healed hymenal tear. He did not notice any fresh injury at victim's private part. He did not give age of injury or hymenal tear. In the history given by the mother of the victim, she has stated that victim was subjected to sexual intercourse 4 – times at the house of the appellant. The mother has not been examined. The incident dated 02.04.2018 is the subject matter of the prosecution case. The appellant was 19 years of age at the time he committed the crime.

16. True, one would be short of words to condemn heinous act. The trial Court, for convicting the appellant, relied on the evidence of the doctor and that of the victim. The trial Court has sentenced the appellant to suffer imprisonment for a period of twenty (20) years. Section 4(1) of the POCSO Act came to be amended with effect from 16.08.2019 enhancing the punishment for the offence of penetrative sexual intercourse from the minimum period of seven years to ten years. Maximum sentence provided for the said offence is of life imprisonment. While for the offence under

Section 376(2)(i), punishment provided was of imprisonment which shall not be less than ten years and which may extend to imprisonment for life. It was so as on the date of the offence in question. The trial Court has wrongly sentenced the appellant for a term of imprisonment of twenty years. Since this Court has found it to be a case of an attempt to commit rape punishable under Section 376 read with 511 of I.P.C. and under Section 18 of the POCSO Act, the Court proposes to reduce the quantum of sentence to a period of seven years.

17. For the reasons given herein above, the appeal partly succeeds in terms of the following order:

ORDER

- (i) The appeal is partly allowed.
- (ii) The judgment and order dated 16.06.2020 passed by the learned Additional Sessions Judge-2, Kandhar, Link Court Mukhed, in Special Case (POCSO) No.05 of 2018, convicting and sentencing the appellant for the offences punishable under Sections 376(2)(j) of I.P.C. and under Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, is hereby set aside.

- (iii) Instead, the appellant is convicted for the offence punishable under Section 376 read with Section 511 I.P.C. and under Section 18 of the POCSO Act and therefore, sentenced to suffer rigorous imprisonment for seven (7) years and to pay fine of Rs.5,000/- In default of payment of fine, the appellant shall undergo rigorous imprisonment for six months.
- (iv) The appellant be given set off in terms of Section 428 Cr.P.C.

[R. G. AVACHAT, J.]

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