

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

CRIMINAL APPEAL NO.128 OF 2022

Kailash Ratan Unawane Appellant
Versus
The State of Maharashtra
and another Respondents

Mr. Prasanna Shahane, Advocate (appointed) for the Appellant.

Mrs. Veera Shinde, APP, for the Respondent No.1-State.

Ms. Priyanka H. Chavan, Advocate (appointed) for Respondent No.2-orig.complainant.

CORAM : M.G. SEWLIKAR, J.

DATE : 19th JULY, 2022

ORAL JUDGMENT :

1. This is an appeal preferred by the original accused, being aggrieved by the judgment and order passed by the learned POCSO Special Court, Mumbai in POCSO Special Case No.478/2015 dated 31st January, 2019 whereby the Appellant/original accused has been convicted under Section 376(2)(i), 354-B and 506 of Indian Penal Code and Sections 6 and 8 of the Protection of Children from Sexual

Offences Act, 2012 (POCSO Act). Under Section 6 of the POCSO Act, the appellant was sentenced to ten years rigorous imprisonment and fine of Rs.3,000/-, under Section 354-B of the Indian Penal Code the appellant was sentenced to suffer rigorous imprisonment for three years with fine of Rs.1000/-, under Section 8 of the POCSO Act the appellant was sentenced to suffer rigorous imprisonment for three years with fine of Rs.1,000/- and under Section 506 of the Indian Penal Code, the appellant was sentenced to suffer rigorous imprisonment for one year. All the sentences were directed to run concurrently. Learned Special Court convicted the appellant under Section 376 of Indian Penal Code but did not record separate sentence.

2. The facts giving rise to this appeal are that :

The sister of the victim is the informant. The informant is the wife of the appellant. The victim was 14 years old at the time of the incident. Mother of the victim passed away in the year 2008. Her father passed away after some years.

3. The appellant, the informant and the victim were living together. In the night of the incident, the Appellant was insisting on the victim to sleep near the cot, which the victim did not approve of. In the night, at around 2.30 a.m., she noticed that somebody was moving his hand on her body. She woke up and found that it was the appellant. The appellant against her wish had sexual intercourse with her. Immediately thereafter, the victim informed her sister (informant) about the incident. On the next day, the informant went to the police station along with victim and lodged the report against her husband (appellant). FIR was registered. The appellant was arrested. The victim was sent for medical examination. She was medically examined. Statements of the witnesses were recorded and after disclosure of the offence, charge-sheet came to be filed against the Appellant in the Special Court dealing with POCSO cases.

4. Learned Special Judge framed charge at Exhibit-6. It was read over and explained to the appellant. He pleaded

not guilty to it and claimed to be tried. His defence was of total denial.

5. After examining the witnesses, the learned Special Judge recorded the conviction and sentenced the appellant, as stated above.

6. Heard learned counsel Shri Prasanna Shahane for the appellant, learned A.P.P. Smt. Veera Shinde for the State and learned counsel Ms. Priyanka Chavan for the informant.

7. Shri Shahane vehemently submitted that testimony of the victim is not free from doubt. It is full of contradictions. He further submitted that the room in which the appellant, the victim and the informant were living together is a small room of 17 ft. x 12 ft dimensions in which there is a wash-room. Therefore, it was virtually impossible to perform the act as alleged by the victim. He further submitted that there is discrepancy in the evidence of the informant and the evidence of the medical officer as regards

the time of examination of the victim. He further submitted that there are discrepancies between the testimony of the victim, informant and other witnesses. The victim did not have any injury on her person, which indicates that the appellant has been falsely implicated.

8. He further submits that the appellant was on cross terms with his wife. There used to be frequent quarrels between the appellant and his wife (informant herein). He submits that to wreck vengeance, this false FIR has been registered against the appellant by the informant.

9. He submits that on the basis of such scanty evidence, learned Special Judge committed grave error in holding the appellant guilty. He further submits that the appellant does not have any criminal background. This is his first offence and, therefore, lenient view may be taken.

10. Learned APP and learned Counsel for the informant submit that the victim was 14 years of age at the time of the incident. The appellant is her brother-in-law.

Therefore, she was not in a position to resist the appellant. They further submit that there is ample evidence showing involvement of the appellant in such a heinous offence. They, therefore, submit that the appellant does not deserve any kind of leniency.

11. The victim PW-4 has stated that in the night of the incident at about 11.00 p.m., quarrel started between the victim and her husband. The appellant wanted the victim to sleep near the cot under the fan. The appellant was sleeping on the cot, her sister was near the cot, her son was near her and thereafter the victim was sleeping. She has further stated that at about 2.30 p.m., (it should have been 2.30 a.m.. It appears that it is wrongly typed as 2.30 p.m. All learned Advocates also admit that it should be 2.30 a.m.), she felt that someone was moving his hand on her breast and kissing on her neck. The appellant said to her that it was he and she should remain silent. She remained silent because of his fear. He removed her trousers and forcibly committed sexual intercourse with her. She narrated the

incident to her sister immediately. On the next day, her sister went to the Bhandup police station along with the victim.

12. The victim was subjected to searching cross examination. However, nothing of substance could be elicited from her cross-examination.

13. Learned Counsel Shri Shahane submits that the victim has admitted in the cross examination that she had stated before the police that the appellant had inserted private part into her private part forcefully. This statement does not appear in the statement under Section 161 of Cr.PC. and she could assign no reason for the same.

14. Learned Counsel Shri Shahane submits that because of these contradictions, the testimony of the victim is rendered untrustworthy.

15. This submission cannot be accepted. The victim in her 164 Cr.PC. statement has stated that the appellant had committed rape on her. She may not have stated in so many

words as she has stated in the examination-in-chief. In the statement under Section 164 of Cr.P.C. before the Judicial Magistrate First Class, she stated that the Appellant committed rape on her. These two statements convey the same meaning. Therefore, there is no scope for holding that there is contradiction so as to render the testimony of the victim untrustworthy.

16. The medical evidence also supports the testimony of the victim. The medical report suggest that hymen of the victim was torn. The Medical Officer Dr. Narendrakumar has stated that the injury was fresh.

17. It is pertinent to note that the victim had no axe to grind against the appellant. Relations between the appellant and the informant were also good. Of course there were bickerings between them. However, the relations were not so strained as to involve the appellant in a false case. The evidence on record clearly suggests that the appellant had committed sexual intercourse with the victim. The victim was not in a position to offer resistance to the

appellant. She lost her mother and father. The only support she had was of her sister and the appellant. In addition to this, she was minor and, therefore, was not in a position to resist his overtures.

18. Having regard to the circumstances brought on record, it has to be stated that learned Special Judge has appreciated the evidence correctly and I do not find any infirmity in the appreciation made by learned Special Judge.

19. The offence under Section 6 of the POCSO Act is punishable with twenty years in view of the amendment made in the POCSO Act in the year 2019. This offence is of 2015. At that time, the offence under Section 6 was punishable for imprisonment for 10 years, which may extend to imprisonment for life. Learned Special Judge recorded the conviction and sentenced the appellant to imprisonment for ten years which was minimum punishment at that time. The Court has no discretion to reduce the punishment. Moreover the circumstances in which the incident took place do not call for any leniency.

20. In this view of the matter, the appeal is devoid of any substance. Hence, the appeal is dismissed. Fees of the appointed learned counsel for the appellant is quantified at Rs.10,000/- which is to be paid by the Legal Services Authority, Mumbai.

(M.G. SEWLIKAR, J.)

Deshmane (PS)

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by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
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