

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.99 OF 2016

WITH

CRIMINAL APPLICATION (APPA) NO.1398 OF 2018

WITH

INTERIM APPLICATION NO.213 OF 2021

Vitthal Rajendra Jogade,
Age 30, Occu: Agri/Service,
R/o. Chungi, Tal. Akkalkot,
Dist. Solapur
At present in Solapur Jail.

.....Appellant.

Vs.

The State Of Maharashtra

.....Respondent.

Ms. Shraddha D. Sawant, appointed Advocate for the Appellant.
Smt. S.S. Kaushik APP, for the Respondent-State.

CORAM : A.S. GADKARI, J.
RESERVED ON : 14th JUNE, 2022.
PRONOUNCED ON : 11th AUGUST, 2022.

JUDGMENT:-

By the impugned Judgment and Order dated 13th January, 2016, the Appellant has been convicted under Section 376(2)(i) of the Indian Penal Code (for short, "*the IPC*") and under Sections 4 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, "*the*

POCSO Act”) and is sentenced to suffer maximum rigorous imprisonment for 10 years and to pay a total fine of Rs.15,000/-, in default of payment of fine to further suffer simple imprisonment of specified term, by the learned Special Judge, Solapur in Sessions Case No.202 of 2014.

2 Heard Ms. Sawant, learned Advocate appointed by the High Court Legal Services Committee, Mumbai to represent Appellant and Smt. Kaushik, learned APP for the State. Perused entire record.

3 The victim in the present crime was aged about 11 years on the date of lodgment of the crime and with a view to protect her identity and in consonance with the provisions of Section 228(A) of the IPC and Section 33(7) of the POCSO Act, the detailed narration of facts and other details disclosing her identity and/or identity of her mother are hereinafter avoided.

4 The prosecution case in nutshell is that, victim was 11 years of age on the date of commission of crime i.e. on 22nd April, 2014 and was studying in 4th Standard in Z. P. School. Victim is handicapped by leg. Appellant was also resident of the same village and engaged in the business of connection of cable TV. On the day of incident, the victim was at home due to summer vacation. The father of victim had gone to Akkalkot for work. Under the instructions of her mother (PW-2), victim (PW-3) called Appellant for connection of cable TV in their newly constructed house. Appellant accordingly visited the house of the victim. As there was

shortage of electric wire, the mother of victim brought it from the nearby shop and gave it to the Appellant for doing necessary work. While the Appellant was busy in his work of connecting cable TV, Smt. Nagarbai Salgare (PW-4) came to the house of victim (PW-3) and asked her mother (PW-2) to accompany her to the agricultural field. On inquiry with Appellant, he informed the mother of victim that, after completion of cable TV connection work he would leave their house. That, due to the assurance by the Appellant, the mother of victim went along with Smt. Nagarbai Salgare (PW-4) to her agricultural land.

5 It is the further prosecution case that, after completion of cable TV connection work, Appellant closed the door and window of the house, raised volume of the TV; pulled the victim towards him and pressed her body. Appellant thereafter removed her nicker and inserted his fingers in her vagina. Victim therefore started to shout whereupon the Appellant threatened her to keep quiet. Victim started heavily sweating and looking the same, Appellant ran away from her house. At that time, nobody was present in the vicinity of the said house. Victim thereafter called her cousin brother by name Amol on his mobile and informed the fact of Appellant misbehaved with her. Cousin brother of the victim immediately approached her mother and both of them came to their house. Victim narrated the incident to her mother. After returning of the father of victim from his work, her mother (PW-2) along with father and other persons approached

Akkalkot North Police Station and lodged the present crime.

6 After lodgment of crime, the victim was immediately referred to the Civil Hospital, Solapur. Dr. Prabhakar S. Gavandi (PW-5), examined victim and prepared necessary case papers (Exh-22 colly.). He also prepared medical case record (Exh-24). After completion of investigation, investigating Officer Shri. Ganeshprasad Bharate (PW-6) submitted charge-sheet for the offence alleged against Appellant before the Special Court.

7 Trial Court framed charge below Exh-6 under Sections 376(2) (i) of the IPC and under Section 3(b) r/w Section 4 and under Section 9 r/w Section 10 of the POCSO Act. The contents of the charge were read over and explained to the Appellant in vernacular language. Appellant pleaded not guilty and claimed to be tried. The defence of Appellant is of false implication.

8 Prosecution has examined in all six witnesses in support of its case namely, Amol Patil (PW-1) panch witness to seizure of clothes of victim (Exh-11) and clothes of Appellant (Exh-12); mother of victim (PW-2); Victim (PW-3); Smt. Nagarbai Salgare (PW-4); Dr. Prabhakar Gavandi (PW-5), examined the victim on the date of lodgment of crime and (6) Ganeshprasad Bharate (PW-6), Investigating Officer.

9 After recording evidence of the prosecution witnesses, Trial Court recorded statement of Appellant under Section 313 of the Code of Criminal Procedure (Exh-35). The Appellant submitted his written

explanation (Exh-36).

The defence of the Appellant as can be gathered from the cross-examination of material witnesses was that, Mr. Sarjerao Jogade was previously the Deputy Sarpanch of the said village. Sarjerao Jogade is paternal uncle of the accused. The husband of PW-2 was having friendly relationship with Sarjerao Jogade. That, Court proceedings were pending between the father of the Appellant and Sarjerao Jogade out of partition of agricultural land and therefore on the say of Sarjerao Jogade, the present case has been filed against the Appellant by the informant.

10 Amol Patil (PW-1) is a panch witness to seizure of clothes of victim and Appellant. His evidence is formal in nature.

Victim (PW-3) in her testimony has deposed that, on the date of incident, she was at home for summer vacation. She had appeared for final examination of 4th Standard. Victim and her mother were at home at the relevant time. Her mother asked her to call the TV cable operator and therefore she called the Appellant to her house. Appellant asked her to bring electric wire as there was shortage of electric wire in their house. Her mother brought it from the shop of Mallu Swami. In the meantime, Smt. Nagarbai Salgare (PW-4) came to their house and asked her mother to accompany her to the agricultural land. Mother of victim asked Appellant whether he would fixed the cable properly, to which the Appellant replied positively. The mother of victim and Smt. Nagarbai Salgare (PW-4) left for

her agricultural land. After the said two witnesses left the house of the victim, Appellant completed work of fixing cable. Victim was standing in front of TV, Appellant dragged her towards him and pressed her body. He thereafter removed her nicker and inserted his fingers in her vagina. When the victim started shouting, Appellant asked her to keep quiet. When the victim started sweating, the Appellant ran away from the house. At that time, no one was present in the vicinity of the house. Victim thereafter called her cousin brother Amol on his mobile. She tried to narrate the incident to him, however she could not tell him the entire incident. After some time, her mother and brother Amol came to their house at that time victim was crying. After they came to house, victim narrated the entire incident to them. Victim, her mother and other persons thereafter approached to the police station and lodged the present crime. Victim was subsequently referred to hospital at Solapur and her statement was recorded.

The version of victim has been duly corroborated by her mother (PW-2) and Smt. Nagarbai Salgare (PW-4) on all counts. Mother of victim has in detailed narrated the facts up to the arrival of Smt. Nagarbai Salgare (PW-4) to her house and leaving their house in the company of Smt. Nagarbai Salgare (PW-4) to go to her agricultural land. PW-2 has also narrated that, between 2.00 to 2.30 p.m. the victim called her cousin brother Amar (Amol) on his mobile phone and narrated the ordeal faced by

her at the hands of Appellant. PW No.2 has proved the Birth Certificate (Exh-15) of the victim. Smt. Nagarbai Salgare (PW-4) has also fully corroborated the version of PW-2 and PW-3.

In the detailed and elaborate cross-examination of the abovesaid three witnesses, nothing beneficial to the defence has been brought on record. The facts narrated by the victim (PW-3), her mother (PW-2) and Smt. Nagarbai Salgare (PW-4) have not at all shaken in their cross-examination.

11 After lodgment of crime, the victim was referred to the Civil Hospital for medical examination. Dr. Prabhakar Gavandi (PW-5) had examined victim on 23rd April, 2014. In his deposition, he has stated that, the victim gave history of sexual assault on 22nd April, 2014 at about 2.00 p.m. by the Appellant. She gave history of fondling with breast and insertion of finger in her vagina. He did not find fresh injury on the person of victim. He referred the victim for further opinion of forensic expert in respect of other injuries of her person. That, as per the expert opinion, there was contusion present over the right side of chest of victim, admeasuring 1 cm supromedial to right nipple size 1cm x 1.5cm red in colour. Second injury was linear abrasion over posterior lateral aspect of left arm in lower half of length 3.5 cm read in colour. He opined that, both the injuries were simple in nature and were caused within one day prior to the date of examination. He has proved the medical case papers (Exh-22)

and the other medical documents including Medical Certificates (Exh-24).

In his cross-examination he has admitted that, the said injuries were possible by fall from bicycle and on hard surface. However, has denied the suggestion that, he is deposing falsely about the injuries suffered by the victim.

12 It is the settled position of law that, absence of any injuries on the person of the prosecutrix who was the helpless victim of rape might not by itself discredit the statement of the prosecutrix and in such a situation the non-production of a medical report would not be of much consequence if the other evidence was believable. That, corroboration is not the *sine qua non* for a conviction in a rape case. That, the evidence of prosecutrix stands at higher pedestal than injured witness and needs no corroboration.

13 The version of the victim about sexual assault by the Appellant has been corroborated by the testimony of Dr. Prabhakar Gavandi (PW-5). It is thus clear from the evidence of aforesaid witnesses that, the prosecution has proved beyond reasonable doubt that, on the date and time of the incident, the Appellant committed the act as contemplated under Section 376(2)(i) of the IPC and under Section 3(b) punishable under Section 4 of the POCSO Act.

14 The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. Proportion between crime and punishment is a

goal respected in principle and in spite of errant notions, it remains a strong influence in the determination of sentences. Reliance is placed on a decision of the Supreme Court in the case of *Adu Ram Vs. Mukna & Ors. Reported in (2005) 10 SCC 597*.

In the present case, the date of commission of offence is 22nd April, 2014. Prior to amendment of 2019 to Section 4 of the said Act which came into effect from 16th August, 2019, the minimum sentence prescribed was 7 years. After taking into consideration the facts involved and overall view of the present case this Court is of the opinion that, imposition of sentence of 8 years rigorous imprisonment for the Appellant would subserve the ends of justice.

15 In view of the above deliberation, the conviction of the Appellant under Section 376(2)(i) of the IPC and under Sections 4 and 10 of the POCSO Act is hereby upheld. However Appellant has been directed to undergo maximum rigorous imprisonment for 8 years for the said offences committed by him. Impugned Judgment and Order dated 13th January, 2016 is modified to that extent. Rest of the operative part of the impugned Judgment and Order dated 13th January, 2016 is maintained.

Appeal is partly allowed in the aforesaid terms.

16 In view of disposal of Appeal itself, Criminal Application (APPA) No.1398 of 2018 and Interim Application No.213 of 2021 do not survive and are also disposed off.

17 Before parting with the Judgment, this Court places on record, appreciation for the efforts put in by Ms. Sawant, learned Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing cause of Appellant, as she was thoroughly prepared in the matter and rendered proper assistance to the Court.

(A.S. GADKARI, J.)