

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

CRIMINAL APPEAL NO.200 OF 2020

Nagesh Sadashiv Bhandari	Appellant
Versus	
The State of Maharashtra & Anr.	 Respondents

WITH
INTERIM APPLICATION NO.1981 OF 2021
WITH
INTERIM APPLICATION NO.724 OF 2022
IN
CRIMINAL APPEAL NO.200 OF 2020

Mr. Nagesh Sadashiv Bhandari, the appellant present in-person.
Mr. S.R. Agarkar, APP, for the Respondent No.1-State.
Mr. Amit Mane, Advocate (appointed) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

**DATE : 30th NOVEMBER, 2022, &
01st DECEMBER, 2022**

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 4.1.2020 passed by the Special Judge under POCSO Act, Dindoshi in Special Case No.58/2018. The appellant was convicted and sentenced as follows :

- i. He was convicted for commission of the offence punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012 ('POCSO Act') and was sentenced to suffer RI for twelve years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer RI for one year.
- ii. He was further convicted for commission of the offence punishable under Section 506 of IPC and was sentenced to suffer RI for one year and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for one month.
- iii. Both the substantive sentences were directed to run concurrently.

The appellant was acquitted of the offence punishable under Sections 323, 504 of IPC. He was granted set off under Section 428 of Cr.PC.

2. The prosecution case, in short, is that the appellant was a neighbour of PWs-1 & 2. PW-2 is the victim in this case. Her date of birth is 16.9.2000. There is not much dispute about her age. The prosecution case is that since two years before lodging of the FIR on 12.11.2017, the appellant was committing rape on

the victim. The prosecution case is that the victim was having low IQ. Her mother PW-1 was having affair with the appellant and that when the victim was alone in the house, the appellant used to take advantage of the situation and commit rape on the victim. The FIR was lodged at Powai police station on 12.11.2017. The appellant was arrested on 14.11.2017. Since then he is in custody.

3. After registration of the FIR, investigation was carried out. Spot panchnama of the house was conducted. The victim was sent for medical examination. Statements of witnesses were recorded. The statement of the victim was recorded under Section 164 of Cr.PC. At the conclusion of the investigation, charge-sheet was filed.

4. Heard Shri Nagesh Bhandari, the appellant appearing in-person, Shri S.R. Agarkar, learned APP for the respondent No.1-State and Shri Amit Mane, learned appointed counsel for the respondent No.2.

5. During trial, the prosecution examined seven witnesses including the victim, her mother, Medical Officer, one

neighbour and three police officers who had taken part in the investigation at various stages. The defence of the appellant was of total denial. Significantly neither the victim nor her mother supported the prosecution case. They were declared hostile. In spite of that learned Judge relied on the contradictory statements made by them before the police. He also relied on the statement of the victim recorded under Section 164 of Cr.P.C. He disbelieved the witnesses themselves to the extent that they had not supported the prosecution case and ultimately convicted and sentenced the appellant as mentioned earlier.

6. PW-2 is the most important witness in this case. She is the victim. Her date of birth is 16.9.2000. There is no dispute about her date of birth. No submissions were made even at the trial stage regarding her date of birth. She has deposed that in the year 2017 she was staying at Powai with her mother, grandparents and another sister. She had completed her education upto 10th standard in her native place. She deposed that she had given complaint against the appellant. He used to reside near their

house. She has then specifically deposed that the appellant used to scold her, she told her mother falsely that the appellant had forcible sexual intercourse with PW-2. She further explained that the appellant had proposed marriage to her mother. He wanted to get married with her mother. Hence in the rage of anger, she had told a lie to her mother that the appellant had forcible sexual intercourse with her. After she made those allegations, her mother took her to police station for lodging FIR. At the police station, the police enquired with her. She told the police that the appellant had forcible sexual intercourse with her. Thus, according to PW-2, she had made false accusations against the appellant. This was contrary to the prosecution case. Therefore, learned APP was permitted to put questions in the nature of cross-examination. Following this permission, learned APP asked questions in the nature of cross-examination. In answer to those questions, she further deposed that she had told the police that the appellant had claimed that he had some divine power. Her mother had taken her to him so that PW-2's IQ would improve. The appellant had asked her to perform some pooja. She has then

told that he used to commit forcible sexual intercourse with her. She also admitted that she had told the police that he committed this act repeatedly and had threatened her. In August, 2017 also he had forcible sexual intercourse with her. She had told these allegations to her mother. There was quarrel between her mother and the appellant. She had also told the police that on 9.11.2017 and 12.11.2017, the appellant had come to their house and had quarreled with her mother. He had asked her mother to stay with him. Her mother had refused. He had abused her and then PW-1 and PW-2 went to police station and have given written complaint. PW-2 had also signed that complaint. She identified the photograph of the appellant. She admitted that her statement was recorded under Section 164 of Cr.P.C. However, that statement was not shown to her.

In the cross-examination conducted on behalf of the appellant, she further admitted that the appellant used to frequently visit their house. Her mother had love-affair with the appellant. When he used to visit her house and when he found PW-2 watching T.V. with loud volume he used to scold her;

because of which, she used to get irritated. He used to advise her to watch news channel and not the programme she was watching. She used to get irritated on this count also. She has categorically admitted that she had not liked her mother having affair with the appellant and, therefore, she did not like the appellant. She has further admitted in clear words that she had falsely stated before the police that the appellant had forcible sexual intercourse with her. She further confirmed it by saying that the appellant never had sexual intercourse with her. She admitted that she had a boyfriend with whom she had sexual relations. According to her, she had given false history to the medical officer. She did not know the contents of the complaint which her mother had given to the police, which is produced on record at Exhibit-32. The trial Court put her 'court-question' as to why she had told her mother that the appellant used to have forcible sexual intercourse with her. To that question, she answered that the appellant was proposing to her mother for performing marriage with him which PW-2 did not like and, therefore, she had made false allegations against the accused.

7. PW-1 was the mother of PW-2 and she had lodged the FIR. She has deposed that she had deserted her husband as he was addicted to liquor. She had come to Mumbai from Chennai eight years before lodging of the FIR. Her maternal uncle's house was adjacent to her house in Powai. She had given that room to the appellant. He was unmarried and was not doing any work. She used to visit the appellant's house. According to her, PW-2 was having low IQ. PW-1 used to provide food to the appellant. She has further admitted that she had sexual relations with the appellant. He had promised PW-1 that he would marry her. Her daughters, including PW-2, did not like PW-1's relations with the appellant. She had some misunderstanding with the appellant. They had quarreled. The appellant left their room and went to his native place. As her daughters did not like the appellant he used to scold them and tried to dominate them. PW-1 was trying to get separated from him, but, he insisted that he wanted to perform marriage with her. When the appellant went to his native place he would continuously call her and harass her. He used to say that he loved her but she refused his proposal by saying that she did

not want to perform marriage with him. He returned from his native place and kept on requesting her to marry him. He threatened that he would commit suicide. Because of this harassment, she went to the police station and lodged FIR against him. According to her, the police did not read and explain the complaint given by her. Thus, she did not support the prosecution case and, therefore, learned APP was permitted to put questions in the form of cross examination. The contrary portions from her statement were put to her. Those portions were proved from the evidence of the police officers who had recorded that statement.

The FIR lodged by her is produced on record at Exhibit-26 and the contradictory statements in that FIR were exhibited at Exhibits-48, 50 and 51. Her signatures were marked at Exhibit-27. In those contrary portions, she had described the incident of commission of rape repeatedly by the appellant on PW-2 as was told by PW-2 to this witness. Surprisingly the statement of PW-2 recorded under Section 164 of Cr.P.C. was shown to this witness and was marked as Exhibit-31. This particular statement however was not shown to PW-2. The complaint which she had

given to the police station on 10.11.2017, was a separate complaint from the FIR. It was brought on record at Exhibit-32. However, on that document she had only admitted her signature. The contents of that document Exhibit-32 were not put to her in the form of contradictions and no questions were asked as to why there were contrary versions in that Exhibit-32 from her deposition in the Court.

In the cross-examination conducted on behalf of the appellant she deposed that she had quarreled with the appellant and in the rage of anger she lodged FIR against him. She did not know the contents of the FIR. She had signed wherever the police had asked her to sign. She had also lodged an NC complaint.

8. PW-3 was a neighbour of PWs-1 and 2. She also knew the appellant. She has deposed that she did not know anything about the accused. Her evidence is completely innocuous and unnecessary.

9. The spot panchnama was admitted by the defence but it only shows description of the house and it does not show any

incriminating material against the appellant.

10. PW-4 Dr. Deokar is an important witness. He had examined PW-2 on 12.11.2017 at KEM Hospital. He had given history told to him in which PW-2 had narrated about the rape committed on her. However, this particular history was not put to PW-2 to bring out contradiction in her deposition and this history. On medical examination, PW-4 had observed multiple old healed tears on the hymen suggestive of chronic vaginal penetration, and therefore, according to him this finding was consistent with the history. He has deposed that PW-2 was sent for ossification test and her age was found to be between 15 to 17 years.

11. PI Yogesh Kale was PW-5. He was attached to Powai police station. He has deposed that PW-1 had given complaint at Exhibit-32 to the police station. He had recorded statement of PW-1 which was treated as FIR. This statement was recorded on 12.11.2017. He proved the contradictory portions from her FIR at Exhibits-48, 49, 50 and 51. He had registered C.R. No.539/2017 at Powai police station. He had referred PW-2 for medical

examination. He had arranged for recording of PW-2's statement under Section 164 of Cr.PC.. Importantly he has produced Exhibit-47 on record. This NC complaint was lodged by PW-1 on 3.10.2017. It is mentioned in that NC that PW-1 and the appellant knew each other. The appellant used to reside in the neighbourhood one month before lodging of that NC complaint. In September, 2017 he had gone to reside in Karnataka. The appellant wanted to marry PW-1 but she was not willing. She was avoiding the appellant and, therefore, he was angry with her. He used to call her telephonically and used to abuse her. He was threatening and harassing her. This was the NC lodged by PW-1. Here, there is absolutely no reference to the sexual offence committed by the appellant on PW-2.

12. PW-6 PSI Dhiware had recorded the police statement of PW-2. In the cross-examination, she denied that PW-2 had low IQ.

13. PW-7 API Lad had conducted and concluded the investigation. He conducted spot panchnama and recorded

statements of neighbours. He had filed the charge-sheet. In the cross-examination he admitted that his investigation revealed that there was love affair between the appellant and PW-1. He had not referred the victim for her IQ test.

14. The appeal was argued by the appellant himself as party-in-person, who was given permission to appear and plead his case before this Court. Accordingly he made his submissions. He submitted that the prosecution has failed to prove their case against the appellant beyond reasonable doubt. The main witnesses i.e. PWs-1 & 2 had not supported the prosecution case. PW-3 has also not deposed anything against him. The investigation is formal in nature. Therefore, the prosecution case depended only on the evidence of PWs-1 & 2 and since they have not supported the prosecution case the only logical conclusion was that the appellant was entitled for acquittal.

15. He submitted that the statement of the victim which was recorded under Section 164 of Cr.P.C. was not brought to the notice of the victim to bring out contradictions if any. The

procedure of getting that statement on record through the evidence of mother of the victim is not right and that statement, therefore, cannot be taken into consideration. He further submitted that both these witnesses have given reasons for false implication and those reasons are not imaginary.

16. On the other hand, the prosecution has not explained why there are no other circumstances against him. He submitted that considering the entire evidence the appellant deserves to be acquitted. He submitted that the medical evidence does not really support the prosecution case. Because though the medical evidence shows that the victim was subjected to sexual intercourse but, she herself had admitted that she had a boyfriend with whom she had physical relations. Therefore, even the medical evidence is not incriminating against him.

17. Learned counsel for the respondent No.2 as well as learned APP submitted that the fact that PWs-1 & 2 did not support the prosecution case would not mean that the prosecution case is not true. The contradictions in their statements before the

police are properly proved through the police officers who had recorded their statements and, therefore, based on these contradictory portions from their police statements the prosecution has proved its case against the appellant. The medical evidence in fact shows that the victim was subjected to forcible sexual intercourse on many occasions and, therefore, even to that extent the medical evidence supports the prosecution case.

18. They further submitted that the accused had taken advantage of the vulnerable position of the victim and, therefore, the appellant should not be shown any sympathy. The appellant has not taken a consistent stand in his answers to the examination under Section 313 of Cr.P.C. They submitted that it is apparent that PWs-1 & 2 are won-over by the appellant and the appellant should not be given benefit of that.

19. I have considered these submissions. As rightly submitted by both sides the most crucial evidence in this case is that of the victim herself, followed by her mother PW-1. PW-2 has categorically denied that the appellant has committed any such

offence. There is no evidence on record to show that PW-2 was having low IQ. In fact, PW-6 who had recorded her statement has denied that PW-2 was having low IQ.

20. Learned Judge, who has recorded deposition of PW-2, has also not noted that her IQ was low. The answers given by PW-2 are quite clear, unambiguous, rational and intelligent. She has also given answers with clarity to the questions put to her by the Court. Therefore, it can safely be held that PW-2 has given deposition with clarity. Therefore, her stand assumes importance. According to her, the appellant has not committed this offence and that she had made allegations against him to her mother and that she had made these allegations to her mother in the rage of anger. She has given two reasons for that: the first reason was that the appellant used to scold her; and more important reason was that he had proposed to marry her mother which she did not like. On both these counts, she had grievance against the appellant and, therefore, she made these false allegations. This explanation is given by the victim herself.

21. PW-1's evidence also shows that she was in physical relations with the appellant. After some time their relations did not continue to remain good and according to her, the appellant was harassing her throughout and, therefore, she took this step of lodging FIR. Even she has not supported the prosecution case. She has admitted that because of his continuous harassment she had gone to police station and lodged this FIR. Both these witnesses have not denied that they had given contrary statements to their deposition before the police but they have explained that they had deliberately done so because they were holding grudge against the appellant for different reasons as mentioned by them.

22. PW-1 has admitted in her cross-examination that she had quarreled with the appellant and in the rage of anger she had gone to police station and lodged FIR against him, but, she denied the contents of the FIR. Thus, she has admitted only the fact of going to the police station and making grievance against the appellant. She has not supported the main allegations of the appellant committing rape on her daughter.

23. In a given case, evidence of the hostile witnesses can be taken into account if the Court is satisfied about the attending circumstances and if the truth and falsehood can be separated from the depositions of such hostile witnesses. But, in this case it is not possible to do so. The evidence of both these witnesses is not of such a nature where only some portion from their deposition can be accepted as truth. It is not possible to differentiate the facts to hold that only part of their depositions is true. Therefore, it will not be fair to the appellant to rely on the statements made before the police as true statements and the depositions made under oath before the trial Court as false statements. In the facts of this particular case it is not possible to base the conviction relying only on their police statements. Significantly contrary portions from the 164 Cr.P.C. statement of PW-2 were not put to her. Therefore, that statement can also not be relied on by the prosecution. In respect of history that was given to the medical officer, the contradiction in the history vis-a-vis her deposition was not brought to her notice in the Court. Her attention was not drawn to that contrary portion. Hence even that

history can not be used against the appellant.

24. In this particular case, the deposition before the trial Court carries more weight than the previous statements. In any case both these witnesses have given reasons for making false allegations against the appellant. This is quite significant.

25. As far as medical record is concerned, as rightly submitted by the appellant himself that PW-2 had accepted that she had a boyfriend with whom she had physical relations. Therefore, the observations in the medical evidence can be connected with this admission and, therefore, the medical evidence cannot be used against the appellant because other possibility is brought on record by the appellant through the cross-examination of PW-2. This possibility is also reasonable.

26. There is one more important factor in this case and that is Exhibit-47 which is an NC lodged by PW-1 herself against the appellant. That NC was lodged on 3.10.2017. Thus it was lodged around 12 days prior to lodging of the FIR. In that NC there is reference to the relations between PW-1 and the present

appellant and about the harassment caused by the appellant to PW-1. However, there is absolutely no reference to any act of rape committed by the appellant on PW-2.

27. Learned Judge while convicting the appellant has relied on the contrary portions mentioned by PW-1 & PW-2 in their police statements. He has also relied on the statement of PW-2 recorded under Section 164 of Cr.P.C.. This approach is not correct in the facts of this case as discussed earlier for the reasons mentioned hereinabove.

28. PW-3 who was a neighbour has also not deposed against the appellant. She is not declared hostile. Thus, there is no reliable evidence against the present appellant. Since the allegations are serious, the prosecution needed to prove its case beyond reasonable doubt based on the acceptable evidence. However, as discussed earlier, the prosecution has failed to prove its case beyond reasonable doubt and, therefore, benefit of doubt must go to the appellant. With the result, the appeal succeeds. Hence, the following order :

:: O R D E R ::

- i. The appeal is allowed.
- ii. The appellant's conviction and sentence recorded vide impugned judgment and order dated 4.1.2020 passed by the Special Judge under POCSO Act, Dindoshi in Special Case No.58/2018 is set aside.
- iii. The appellant is acquitted of all the charges levelled against him.
- iv. The appellant is in jail. The appellant be released after completing the formalities unless he is required in some other case.
- v. Criminal Appeal is disposed of accordingly. With disposal of the appeal, connected applications are also disposed of.

Digitally signed
by
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(SARANG V. KOTWAL, J.)

Deshmane (PS)