

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

CRIMINAL APPEAL NO.482 OF 2018

Vijay Sakharam More	 Appellant
Versus	
The State of Maharashtra	 Respondent

Ms. Megha S. Bajoria, Advocate for the Appellant.
Mr. R.M. Pethe, APP for the Respondent-State.

CORAM :SARANG V. KOTWAL, J.

DATE : 26th AUGUST, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 26.2.2018 passed by the Additional Sessions Judge, Palghar in Special Case No.19/2014. The trial Court convicted the appellant for the offence punishable under Section 376(2) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The appellant was sentenced to suffer RI for ten years and to pay fine of Rs.1000/- and in default of payment of fine to suffer RI for one

month for the offence punishable under Section 376(2) of IPC. In view of the provisions of Section 42 of the POCSO Act no separate sentence was imposed for the offence punishable under Section 6 of the POCSO Act. The appellant was granted set off under Section 428 of Cr.P.C.

2. The prosecution case is that the appellant was uncle of the victim, who was mentally and physically challenged. On 25.5.2014 in the morning he took her to his house and committed rape on her. This was seen by the victim's younger sister. She went there and took the victim back to her house. The victim's sister informed about the incident to their neighbour, who in turn informed the victim's mother. In the night, the FIR was lodged against the appellant vide C.R. No.I-101/2014 at Boisar police station.

3. The appellant was arrested. The investigation was carried out. The victim's statement was recorded under Section 164 of Cr.P.C. with the help of an interpreter. The statements of other witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. The case was committed to

the Court of Sessions.

4. Heard Ms. Megha Bajoria, learned counsel for the appellant and Shri R.M. Pethe, learned APP for the State.

5. During trial, the prosecution examined eight witnesses including the victim, her mother, her sister, Medical Officer and the investigating officer.

6. The evidence led by the prosecution in brief is as follows:

(i) PW-1 was the mother of the victim. She has deposed that the appellant was her brother-in-law. PW-1 was residing with her husband and four daughters. In the year 2014, the victim was thirteen years of age. Her sister PW-3 was twelve years of age. The appellant was unmarried. He was residing separately with his mother i.e. PW-1's mother-in-law. His house was adjacent to PW-1's house. The victim was handicapped. Her legs and hands were not functional. She was unable to speak clearly. However, she used to watch and understand TV programmes. PW-1 has deposed that five to six months prior to the incident in question, the victim used to tell her that she had pains in her private parts.

She used to point towards her private parts by using her leg. PW-1 used to observe swelling but she used to ignore that.

On 25.5.2014, in the morning, PW-1 and her husband had left to attend their work. Her four daughters were in the house. In the evening, at about 4.30 p.m., PW-1 came back home. That time her neighbour named Vinay Mishra told her that the appellant had taken her elder daughter to his house and had committed rape on her. After that PW-1 made enquiries with his other daughter, who is examined as PW-3. She told PW-1 that she had seen the appellant taking the victim to his house. She had also seen the appellant lying on the person of the victim. She had told the incident to the neighbour Vinay Mishra. PW-1 then checked the private parts of the victim and saw swelling there. In the evening at about 5.30 p.m., PW-1's husband came home. PW-1 told him about the incident. Then they went to Boisar police station and lodged the report. The FIR is produced on record at Exhibit-10. At this point, it is important to note that, in the FIR, it is mentioned that the incident had taken place on "26.5.2014" at about 4.30 p.m. Information was received at the police station on 27.5.2014 at about 2.00 a.m. and the FIR was lodged at that time.

PW-1 has further deposed that on the next day, the police came to her house. She showed the spot of incident. They seized clothes of the victim from PW-1. The victim's statement was recorded by the Magistrate in Palghar Court in PW-1's presence and in the presence of an expert.

In the cross-examination, she deposed that she herself had got married in the year 2000. After marriage, she started residing separately with her husband from the appellant and other family members. There were three rooms of the family. In one of the rooms PW-1 was residing with her husband and her family, in another room the mother-in-law was residing and in the third room neighbour Vinay Mishra was residing on rent. She denied the suggestion that, before the incident she had asked the appellant to give the open space for construction of room to which he had denied. She also denied the suggestion that the appellant had obstructed the construction of toilet near her house. But, she admitted that after three to four days of the incident, the mother-in-law had objected for such construction. She was thinking of constructing a room for her daughter adjacent to her house in the open place. Her mother-in-law's property was ancestral property.

She admitted that whenever she went out for work, her mother-in-law used to take care of her daughters. The neighbour Vinay Mishra was residing with his family in the room owned by PW-1's mother-in-law. She deposed that she had mentioned while lodging the FIR that PW-3 had told her that the appellant was lying on the person of the victim, but, this particular averment from her deposition was not found in the FIR. She could not explain as to why it was not so mentioned. She admitted that PW-1 and her husband's mobile phone numbers were with her daughters.

In the FIR statement the date of incident is mentioned as "25.5.2014".

(ii) PW-2 Vikram Saini is the pancha for spot panchnama carried out at the house of the appellant. However, his evidence is not of much importance.

(iii) PW-3 is the younger sister of the victim. She is an important witness. She claims to be an eye witness. She has deposed that the appellant was her uncle. The victim was not able to walk since her birth. She was not able to speak like normal person. PW-3 has referred to the incident which according to her

had taken place three years before her deposition. She has deposed that, on the date of incident, she returned from school at 11.30 a.m. She did not find the victim in or around her house. She then went to the house of the appellant to search for the victim. She saw the victim and the appellant on one cot. Neither of them was wearing clothes. She has deposed that the appellant was doing bad thing with the victim. He was lying on the person of the victim. On seeing PW-3, the appellant went to the bath-room. PW-3 and her elder sister went inside and helped the victim in wearing clothes. They took the victim to their house. While going they locked the door from outside and threw the key inside the room. At that time, PW-3's grand-mother reached there. She asked PW-3 as to why the room was locked. At that time, PW-3 told her about the incident. PW-3 further stated that she told the incident to Vinay Mishra, who was residing next to their house. He in turn told her that she should tell this incident to her mother. PW-3 asked him instead to tell the incident to her mother. Her mother returned in the evening. Vinay Mishra told the incident to her mother. After that her mother asked PW-3 about the incident. Her mother did not believe occurrence of the incident and she did not lodge the

complaint immediately. PW-3 has categorically stated that her mother lodged the FIR after one month. This statement is very important in the context of this case. PW-3's statement was recorded under Section 164 of Cr.P.C.

In the cross-examination, she deposed that she narrated the incident to Vinay Mishra at around 12.00 p.m.. At about 6.30 p.m., when her mother had gone to the house of Vinay Mishra then he told PW-3's mother about the incident. On the same day, at about 7.00 p.m., her mother asked PW-3 about the incident. PW-3 has deposed that her mother lodged FIR on 28th of that month. She could not explain why her police statement did not mention that she had narrated the incident to her grand-mother and that she had helped the victim in wearing clothes and then had taken her out of the room.

Her statement was recorded under Section 164 of Cr.P.C. In that statement she had not described the incident of penetrative sexual assault. She had stated that when she went to the appellant's house he was not wearing clothes and the victim was also not having any clothes on her person. Beyond that she has

not stated anything.

(iv) PW-4 Vishal Ganar was an expert who had helped in recording the statement of the victim before the Magistrate. His help was also sought while recording the deposition of the victim before the trial Court.

(v) The victim was examined as PW-5 with the help of PW-4. She was shown a photograph of the appellant and she identified that photograph as that of her uncle. It is further recorded by the trial Court that when the victim was asked as to what the appellant did with her, she lifted her right leg and pointed towards her private parts. When she was asked as to what he actually did, she again pointed to her private parts. On further question, she uttered the word “Mari”.

Her cross-examination was short but nothing much could be asked to her.

Learned trial Judge observed thus, “She is handicap and not able to stand and walk. Her hands are not freely moving like ordinary person. She is only able to speak some words”. Thus, nothing much could be gathered from the evidence of the victim

herself. Her short deposition was open for interpretation and even then she hardly made any signs or uttered any words of significance.

(vi) PW-6 Dr. Vaishali Sakpal is an important witness. She has deposed that the victim was brought for examination to the Sub-District Hospital at Dahanu on 27.5.2014. She has deposed that she had not seen any external or internal injury on the genitals or other private parts of the victim. There was no injury to the hymen. In spite of that she had opined that the sexual intercourse/assault could not be ruled out. The medical certificate issued by her is produced on record at Exhibit-30. Samples of finger nails, vaginal swab, urethral swab and blood were collected by her and handed over to the police.

She deposed in the cross-examination that she had examined the victim after one month of the assault. In the history given by the mother of the victim it was mentioned that only two days' prior to the examination the mother was told by the neighbour about the incident. She was shown the CA reports and her opinion was sought in the cross-examination regarding the

rape. To that she stated that she could not tell whether rape was not committed on the victim. She admitted that her report categorically mentioned that injury to the hymen was absent.

The medical reports are produced on record at Exhibit-30. In these reports, it is mentioned that the sexual assault had taken place one month back. There was no other indication in the clinical examination supporting the theory of rape or even of sexual intercourse. Provisional opinion was given that the evidence of sexual intercourse/assault could not be ruled out and, therefore, the final opinion was kept pending till result of Forensic Science Laboratory report was available. After that final opinion was not given and in the cross-examination she admitted that she could not give any definite opinion about whether rape was committed or not.

The CA reports are produced on record. There is nothing in the CA reports implicating the appellant.

(vii) PW-7 PSI Baburao Rathod had conducted the investigation. He has deposed about registration of FIR, carrying out spot panchnama, seizure of the victim's clothes and collection

and sending of articles including different swabs. He had recorded statements of various witnesses. He caused recording of the statements of the victim and the witnesses under Section 164 of Cr.P.C.

In the cross-examination, he admitted that the statement of Vinaykumar Mishra was recorded but offered no explanation on his own why his evidence was not recorded during trial. He proved the omissions from the statement of PW-3.

(viii) PW-8 was Dr. Manoj Shinde. He had medically examined the appellant. He could not give a firm opinion that the appellant was capable of performing sexual intercourse.

. This in short is the prosecution evidence.

7. The defence of the appellant was of total denial. His defence was that PW-1 wanted his land. He refused to give his land and, therefore, this false case was filed against him. Learned trial Judge believed the evidence of PWs-1, 3 and 5. He disbelieved the probable defence of the appellant and convicted and sentenced the appellant as mentioned earlier.

8. Learned counsel for the appellant submitted that PW-1 was neither an eye witness nor the person to whom the incident was disclosed at the first instance. The crucial witness Vinay Mishra to whom PW-3 had narrated the incident is not examined by the prosecution. The medical evidence does not support the prosecution case. Admittedly there was dispute between the appellant and PW-1 and, therefore, he is falsely implicated. PW-1 wanted to construct a room in the open space commonly belonging to the family. The deposition of the victim is not helpful to the prosecution as it is not clear enough. The date of incident is not clearly established. It is not even proved on which date actually the incident had taken place. At different stages, different witnesses have deposed about different dates. The conduct of PW-3 was extremely unnatural. She had not narrated the incident to her mother but instead had reposed faith in a neighbour. The grandmother of the victim was not examined. This was important because PW-1 has deposed that in her absence the grand-mother used to look after PW-3 and her sisters. The elder sister was not examined. Her examination was important in the context of the case because of PW-3's evidence is not acceptable and there was no

clear evidence regarding the date of incident. She, therefore, submitted that serious doubt is created about the prosecution case and, therefore, the appellant must be acquitted.

9. Learned APP opposed these submissions. He submitted that there was no reason for the prosecution witnesses to depose against the appellant who was a close relative. Though the medical evidence does not fully support the prosecution case, the ocular evidence must prevail. He further submitted that since the medical examination was conducted at least two days after the incident, therefore, it was not unusual that there was no injury found by the medical officer. He submitted that the victim herself was unable to give clear answers but the answers were interpreted with the help of an expert and, therefore, her evidence should be believed.

10. I have considered these submissions. The prosecution case basically relies on the evidence of PW-3 as she claims to be an eye witness. The victim's own deposition is very cryptic and unclear. Learned Judge has also observed that she was hardly able to move her hands and legs and was hardly in a position to speak. Whatever signs she made really did not convey anything which

could be understood clearly to connect the appellant with the alleged crime.

11. Therefore, in this context evidence of PW-3 is very important. As rightly submitted by learned counsel for the appellant her conduct was extremely unnatural. According to her, she had witnessed the incident in the morning at around 11.30 a.m. Though she claims to have told this fact to her grand-mother, this part is an omission from her police statement. This is an improvement that means she has not told her grand-mother about the incident. The evidence shows that the sisters, including PW-3, had telephone numbers of their parents and yet she had not called her parents telephonically. Even after her mother returned home, she did not tell her mother about the incident. She went to a neighbour who was a stranger to their family to narrate the incident and requested him to tell her mother. Her entire conduct appears to be very unnatural.

12. The most important feature in this case is about the vagueness about the date of incident. It is not at all clear as to what is the prosecution case regarding the date of incident. PW-3 has

categorically deposed that after she told the mother PW-1 about the incident, the FIR was lodged after one month from that date. Whereas the FIR itself mentions that the incident had taken place on 26.5.2014. Her mother's evidence shows that according to her i.e. according to PW-1 the incident had taken place on 25.5.2014. This discrepancy is not a minor discrepancy to be brushed aside lightly in view of the serious allegations made against the appellant. The medical papers also mention that the history which was given to the doctor mentioned that the incident had taken place one month prior to the examination which was conducted on 26.5.2014. All this does not tally with the narration in the FIR that the incident had occurred on "25.5.2014". PW-1's evidence had only limited value. She is not an eye witness. She was told about the incident by a neighbour Vinay Mishra. She had lodged the FIR in the night between 26th and 27th May, 2014. Tough she claims that in the evening she came to know about the incident and in the night itself she lodged the FIR, however, these dates do not match. The incident, according to her, has taken place on 25.5.2014 and the FIR was lodged at about 2.00 a.m. in the night on 27.5.2014. There is absolutely no reference as to what happened on 26.5.2014.

In such cases, the delay in lodging the FIR is acceptable but in this particular case since the dates are important, complete silence regarding 26.5.2014 is important and raises doubt about the prosecution story.

13. All this will have to be looked in the background of the bad relations between the parties. PW-1 has admitted that after her marriage, she had started residing separately from her husband's family i.e. from the appellant. She admitted that she wanted to construct a room in the open space. The appellant's defence is that he had not permitted such construction and, therefore, he was falsely implicated. Thus, there already were bad relations between the parties. The mother of the appellant i.e. mother-in-law of PW-1 was not examined to clear this particular aspect of the prosecution case.

14. The most important witness Vinaykumar Mishra on whose information the investigation was initiated by PW-1 by lodging the FIR; is not examined. No explanation is offered whatsoever as to why he was not examined. Therefore, in this particular case adverse inference needs to be drawn against the

prosecution in that behalf. The investigating officer has accepted that his statement was recorded during investigation. Therefore, it was all the more necessary to have examined him because he was the first person who came to know about the incident from PW-3.

15. As far as the medical evidence is concerned, it is completely silent about commission of rape. The medical officer in her cross-examination has admitted that after receiving the CA reports, she was not in a position to give a definite opinion as to whether sexual intercourse / assault was committed or not. Therefore, even to that extent the appellant must get benefit of doubt.

16. Considering the above discussion, a serious doubt is created regarding the prosecution case and prosecution evidence. Since the evidence led by the prosecution falls short of the necessary degree of proof or credibility, even Section 29 of the POCSO Act does not operate against the present appellant. In view of this discussion, the benefit of doubt must go to the appellant and he deserves to be acquitted. Hence, the following order :

:: O R D E R ::

- i. The appeal is allowed.
- ii. The impugned judgment and order dated 26.2.2018 passed by the Additional Sessions Judge, Palghar in Special Case No.19/2014, is set aside.
- iii. The appellant is acquitted from the charges faced by him. The appellant is in jail. He shall be released forthwith, if not required in any other case.
- iv. Criminal Appeal is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)

PRADIPKUMAR
PRAKASHRAO
DESHMANE

Deshmane (PS)

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