

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

CRIMINAL APPEAL NO.543 OF 2018

Shyamlal Rajkishor Vishwakarma
Age 25 years, Occ : Labour
R/o : Near Jamana Prasad Laundry,
Akbar Lala Compound, Azad Nagar,
Ghatkopar West, Mumbai – 400 086 Appellant

versus

1. State of Maharashtra
2. XYZ Respondents

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- Mr. Tariq Khan, Advocate for Appellant.
- Mr. P. H. Gaikwad, APP for the State/Respondent No.1.

CORAM : SARANG V. KOTWAL, J.
DATE : 16th NOVEMBER, 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 17/03/2018 passed by the Additional Sessions Judge, Greater Mumbai, in POCSO Special Case No.242 of 2016. The Appellant was convicted for commission of offence punishable u/s 354(A), 376(2)(i),(j) of the Indian Penal Code and u/s 8 and 12 of the Protection of Children from Sexual Offences Act,

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2012 (POCSO) and was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1,000/- and in default of payment of fine, to suffer simple imprisonment for six months.

He was convicted for commission of offence punishable u/s 8 of POCSO and was sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs.500/- and in default of payment of fine to suffer simple imprisonment for three months.

He was convicted for commission of offence punishable u/s 12 of POCSO and was sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs.500/- and in default of payment of fine to suffer simple imprisonment for three months.

He was further convicted for commission of offence punishable u/s 354-A of the Indian Penal Code, but no separate

sentence was imposed on him for that offence. All the substantive sentences were directed to run concurrently. The Appellant was given set off u/s 428 of Cr.P.C.

2. Heard Mr. Tariq Khan, learned counsel for the Appellant and Mr. P. H. Gaikwad, learned APP for the State.

3. The prosecution case is that the victim was about 3 ½ years of age on the date of incident i.e. on 26/03/2016. Her date of birth was 21/09/2012. She was playing outside house of one Deva. She did not return for quite some time. Therefore her parents went in search of her. The father, who was examined as P.W.2, saw that the Appellant had removed her clothes and was touching her inappropriately. He immediately snatched the victim from the clutches of the Appellant. He also caught hold of the Appellant. The police were informed. The Appellant was taken to police station. The father of the victim then lodged his FIR. The victim was sent for medical examination. There was injury on her labia majora. The FIR was lodged vide C.R.No.153/2016 at Ghatkopar police station. The Appellant

was arrested. Investigation was carried out. Spot panchanama was carried out. Statements of witnesses were recorded. At the conclusion of the investigation, charge-sheet was filed. The case was conducted before the Special Court, as mentioned earlier.

4. During trial the prosecution examined 7 witnesses including the victim, her father, two medical officers, two Panchas and the Investigating Officer. The defence of the Appellant was of total denial. In addition, he submitted that he was doing carpentry work in the house of the first informant. He used to demand his dues. To avoid making payment, he was involved and implicated in this false case. On the date of incident, he was called on the pretext of returning his dues. But he was caught and handed over to police. Besides the oral evidence, the prosecution also produced the C.A. report of the blood, nail clippings and the clothes of the Appellant as well as the victim. However, the C.A. reports will not help either the prosecution or the defence. Therefore they are left out of consideration.

5. Learned Judge believed the evidence of the father of the victim and the medical evidence. On the basis of their evidence, he convicted and sentenced the Appellant as mentioned earlier.

6. The victim was examined as P.W.1. She was five years of age at the time of her deposition. She has deposed that her father used to go to work and her mother used to cook food. She used to go to school. She had friends. She has deposed that one uncle caught her and put his hand inside her undergarments. He also kissed her. She started crying. Her parents were searching for her. She told them what that uncle had done. She identified the Appellant in the Court.

In the cross-examination she had named two friends with whom she was playing. Her father took her home. She did not know the name of that uncle.

7. P.W.2 father of the victim is the most important witness in this case. He had seen major part of the incident. He has deposed that the date of birth of the victim was 21/09/2012. At that time she was attending a playgroup. On 26/03/2016 he returned home at around 07.00 p.m. from his work. P.W.1 was not in the house. She was playing opposite one Deva's house. He asked his wife to call P.W.1. She called P.W.1 loudly, but she was not found. So he and his wife went in search of P.W.1. They came near Deva's house. The Appellant was present inside the house. P.W.2 saw that the P.W.1 was without clothes. The Appellant had removed all her clothes. He was touching the victim on her breast and all the over the body. He kissed her. P.W.2 then lifted his daughter and caught the Appellant. In the meantime, owner of the house Deva came there. He asked Deva regarding the Appellant. Deva told the Appellant's name. P.W.2 then called the police by dialing number 100. The police came on the spot. They took the Appellant to the police station. He along with the victim went to the police station. His FIR was recorded. It was produced on record at Ex.19. He showed the spot to the police.

He gave birth certificate of his daughter. It is produced at Article 1. The victim told him about the incident. She was sent for medical examination at Rajawadi hospital. She was produced before Court at Sewree. There her statement was recorded. He identified the Appellant before the Court.

In the cross-examination he was mainly asked about the situation of the chawl and the locality. He was asked about the articles in Deva's room. He did not know about TV, fridge and other articles in the house and therefore it was suggested to him since he did not go to Deva's house, he did not have any knowledge of these articles. He denied that suggestion. Some minor omissions from the FIR were put to him. The FIR lodged by him substantially corroborates his version. The birth certificate was produced by him. The date of birth was 21/09/2012. There is no serious challenge to that birth certificate.

8. P.W.3 was a Pancha in whose presence the clothes of the victim were produced and seized.

9. P.W.4 was the another Pnahca in whose presence, the clothes of the Appellant were seized on 31/03/2016. These two Panchanamas are produced on record at Ex.23 and 25 respectively.
10. P.W.5 Dr. Narendra Kumar had examined the Appellant on 28/03/2016. He found two injuries; one was contusion of 10 x 6 cms on the left upper scapular region and the second injury was another contusion of the size 7 x 2 cms. He was found to be capable of performing sexual intercourse.
11. P.W.6 Dr. Shashikant Avhad is another important witness. He had examined the victim on 27/03/2016 at 03.00 a.m. She was brought by a woman police constable. He obtained consent from the victim's mother. The history was given by the victim's mother. The history mentioned the use of fingers on the genitals of the victim. During examination he found nail scratch mark on the left forearm of the victim. More importantly he

found laceration of 2 x 1 cm with minimal bleeding on right side of labia majora. He collected different swabs and nail clippings. The medical papers are produced by him at Ex.29 collectively. He deposed that as per his opinion, upon considering history and examination of the victim, sexual assault could not be ruled out.

In the cross-examination he deposed that the victim was 4 years of age. He talked with the victim. She answered his questiones. The father of the victim also had come to the hospital. He admitted that the scratch mark can occur if the persons scratches his own body part. If the victim inserts any object including finger in her private part, the bleeding was possible.

12. P.W.7 PSI Pranit Pardhi had conducted the investigation. He has deposed that on 26/03/2016, at about 09.30 p.m., a police van came to the police station with the victim and her parents. The Appellant was also brought by the

same van. He was in the custody of this police officer. Father of the victim narrated the incident. On the basis of his statement, the FIR was registered at C.R. No.153/2016 at Ghatkopar police station. Statement of the victim was recorded in a separate room by a lady officer. The victim was sent for medical examination at Rajawadi hospital. He then conducted the investigation. He carried out the spot panchanama, seized clothes of the victim as well as the Appellant and recorded statement of witnesses.

13. Learned counsel for the Appellant submitted that P.W.2 has not spoken of a word about the penetrative sexual assault. He has not spoken about the penetration by finger or by any other object. The victim herself has not deposed about the penetration. There was delay in conducting medical examination. The incident had allegedly taken place at 07.30 a.m. and the medical examination was conducted at about 03.45 a.m. in the night. No explanation is offered for this delay. There was sufficient time and so there was possibility that the parents of the victim could have caused that small injury to labia majora

of the victim to give a serious colour to the offence. He further submitted that verifying the fact that the FIR was lodged u/s 376 of IPC before conducting any medical examination or before recording any statement to that effect. This shows that the police and the victim's father wanted to implicate the Appellant in a false case. There is doubt whether the mother of the victim was with the P.W.2 when he saw the incident. There are indications that one Navil Ahmed Hashmuddin Malik was arrested in this connection, but the Investigating Officer had given vague answers in the cross-examination and there are indications that the said Navil could be the real culprit. He further submitted that the land owner of the house, Deva, was a very important witness because the incident had taken place in his house and he had told the name of the Appellant to the victim's father. Deva's non examination during trial should invite drawing adverse inference against the prosecution case.

14. Learned APP on the other hand relied on the evidence of P.W.2, father of the victim and P.W.1 the victim herself. He also

relied on the evidence of P.W.6. He submitted that the version of all these three witnesses are consistent and this ocular evidence is supported by the medical evidence. He therefore submitted that there was no scope to argue that the penetrative assault had not taken place.

15. I have considered these submissions. As far as the defence of the Appellant is concerned, it hardly inspires any confidence. There is absolutely no details given by the Appellant either in the form of evidence or in the answers to the question put u/s 313 of Cr.PC. He had not given details as to what work he had done at the victim's father's house and how much amount was due and payable by the victim's father to him. The defence to that extent is not acceptable. In any case, the prosecution case will have to be decided independently. It depends on the evidence of P.W.1, P.W.2 and P.W.6.

16. P.W.2 father of the victim had seen the major part of the incident when he went in search of his daughter and he saw that

the Appellant had removed clothes of the victim and was touching her inappropriately all over her body. This particular act was seen by him and he had immediately caught the Appellant on the spot. That is how subsequently the Appellant was brought to the police station. P.W.2 had immediately called the police. Therefore there is no scope to argue that the Appellant was implicated falsely as an afterthought or that he was caught as a result of a pre-plan and was handed over to police. It is difficult to believe that father of a 4 years old child would go to that extent unnecessarily to involve his daughter. More over, it is even more difficult to accept as learned counsel for the Appellant submitted that the parents of the victim could have caused bleeding injury to labia majora of the victim. As deposed by P.W.2 the victim and the Appellant were taken to the police station by the police immediately. His evidence is corroborated by the Investigating Officer. Thereafter the victim was immediately sent for medical examination and the injury was seen.

17. As far as registration of FIR u/s 376 of IPC is concerned, I do not see how it is so unusual because the father had seen major part of the incident. These are circumstances indicated that it was a serious case. This was confirmed by the medical examination.
18. Even P.W.1 has deposed about the incident as far as she could. Considering her tender age, there was no possibility that she could be tutored to say all these things which she deposed in the Court.
19. The most important piece of evidence is in the form of medical evidence given by the Doctor who was examined as P.W.6. He has deposed about the injury to labia majora of the victim. Learned Judge has relied on the specific explanation to section 375 of IPC. He has reproduced section 375 of the IPC with its explanation. The explanation-1 of section 375 of the IPC covers labia majora. There was a definite bleeding injury to labia majora and hence the act of penetrative sexual assault is proved by the prosecution beyond reasonable doubt.

20. The corroborating piece of evidence in the form of C.A. certificate neither helps the prosecution nor the defence. Therefore as mentioned earlier it is left out of consideration.

21. Thus taking into account the impact of the evidence led by the prosecution, I am of the opinion that the prosecution has proved its case beyond reasonable doubt. Learned judge has considered all these aspects of this case and recorded conviction and sentence rightly. Thus I do not find any merit in the Appeal. The Appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)