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

**CRIMINAL APPEAL NO. 730 OF 2017
WITH
INTERIM APPLICATION NO. 1419 OF 2021**

Idris Rajaram Morya]... Appellant/Applicant

V/s.

The State of Maharashtra]
(through Mankhrud Police Station,
Mumbai in C.R. No. 215 of 2014)] ... Respondent

Mr. Prosper D'souza, Appointed Advocate for the Appellant/
Applicant.

Mr. S.S. Hulke, APP for the Respondent/State.

**CORAM : S.S. SHINDE &
N.R. BORKAR, JJ.**

**RESERVED ON : 04.01.2022.
PRONOUNCED ON : 14.02.2022.**

JUDGMENT (PER : N.R. BORKAR, J.)

1] This appeal takes an exception to the judgment and order dated 21.12.2016 passed by the Special Court for Protection of Children from Sexual Offences Act, Greater Bombay in POCSO Case No. 437 of 2014. By the impugned judgment and order, the appellant, who was accused before the trial court, has been convicted for the offence punishable

under section 376 (2)(f) of the Indian Penal Code, 1850 (for short “IPC”) and sentenced to suffer life imprisonment. The appellant/accused has been further convicted for the offence punishable under section 6 of Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”) and sentenced to suffer life imprisonment. Both the substantive sentences are directed to run concurrently.

2] It is the case of the prosecution that during the relevant period, the complainant Seemavati (PW-2) was residing with her husband (accused), her daughter (the prosecutrix aged about 10 years), her son (PW-4) aged about 11 years and one more daughter aged about 7 years at Annabhau Sathe Nagar, Haunmant Chawl, Mankhurd, Mumbai. PW-2 was working as Sweeper in the office at Navi Mumbai. The son (PW-4) was studying and staying in the hostel at Gandhi Dham in State of Gujarat.

3] According to the prosecution, on 13.06.2014, PW-2 had gone to Gujarat to drop her son (PW-4) at his hostel and came back on 15.06.2014. During the said period, the accused, the prosecutrix and the younger daughter of PW-2 were at home. According to the prosecution, during the said period the accused committed rape on the prosecutrix.

4] According to the prosecution, the prosecutrix disclosed about the alleged incident to PW-2 on 04.08.2014. PW-2 then lodged the report with Mankhurd Police Station.

5] On the basis of said report, crime vide Crime No. 215 of 2014 was registered for the offences punishable under section 376 (2)(f) of the IPC and section 6 of the POCSO Act against the accused. On completion of investigation, the charge-sheet was filed against the accused for the said offences.

6] The accused was charged and tried for the abovesaid offences. The trial court, by the impugned judgement and order, convicted the accused.

7] We have heard the learned counsel for the appellant/accused and learned APP for the respondent / State.

8] The learned counsel for the appellant/accused submits that there is a delay in lodging the FIR. It is submitted that according to the prosecutrix (PW-1), she narrated the incident to her mother (PW-2) whereas according to PW-2, the prosecutrix (PW-1) never narrated the incident to her. He submits that according to the prosecution, the alleged incident took place in absence of PW-2 on 15.06.2014, however, the evidence of PW-2 would show that she was in Mumbai on 15.06.2014.

9] It is further submitted that the evidence would show that there used to be frequent quarrels between PW-2 and the accused and therefore, the possibility of false implication cannot be ruled out.

10] It is further submitted that admittedly, the prosecutrix on the date of incident was aged about 10 years and therefore, the possibility of tutoring her cannot be ruled out. It is submitted that the trial court lost sight of all these facts and committed an error in convicting the appellant/accused for the alleged offences. It is submitted that the impugned judgment and order thus needs to be set aside and the appellant/accused needs to be acquitted of the alleged charges.

11] On the other hand, the learned APP for the respondent / State submits that admittedly, the appellant/accused is the father of the prosecutrix and thus it is unlikely that she would make false allegation against her own father. It is submitted that there is no material on record to infer that the prosecutrix was tutored either by PW-2 or anybody else. It is submitted that the medical evidence is also consistent with the prosecution case. It is submitted that considering the facts and circumstances, the trial court was justified in convicting the appellant/accused for the alleged offences.

12] According to PW-1/the prosecutrix, on the the day of incident, her mother had gone to Gujrat to drop her brother (PW-4) at his hostel. She, her younger sister and her father (accused) were at home. PW-1 has stated that her father removed her clothes and then his clothes too. She has stated that her father had then committed sexual intercourse with

her. She narrated the incident to her mother (PW-2) and brother (PW-4). Her mother (PW-2) then took her to police station where she narrated the incident to the police. The police then referred her to Doctor for examination. She narrated the incident to the Doctor.

13] In the cross-examination, PW-1 has admitted that her father (accused) was not doing any work and therefore, there used to be frequent quarrels between her mother and her father. After dinner, they all used to sleep together in one room. She has further admitted that there are many huts in their area. There are no windows to their hut. She has further admitted that one can hear what talks are going on in the adjacent hut. She has admitted that when her mother took her to the police station the persons from NGO were present there and the persons from NGO were dictating the statement to the police and she was sitting there.

14] The only submission is that PW-1 being child witness the possibility of being tutored by PW-2 her mother, due to her strain relations with the accused, cannot be ruled out. It would be therefore, appropriate to refer to the evidence of PW-2.

15] According to PW-2/the complainant, her son (PW-4) was studying and staying in hostel at Gandhi Dham in State of Gujrat. In the month of June 2014, she went to Gujrat to drop her son (PW-4) and at that time, the prosecutrix, her younger

daughter and her husband/accused were in the house. She came back from Gujrat on 15.6.2014.

16] PW-2 has further stated that in the month of August, 2014, she came to know about the incident in-question from her son (PW-4). According to PW-2, she then made inquiry with the prosecutrix who then disclosed to her about the incident in-question. Thereafter, she took prosecutrix to the police station and the police recorded her statement and statement of the prosecutrix.

17] PW-2 has further stated that the police took her daughter (prosecutrix) to the hospital for medical examination. The prosecutrix narrated the incident to the Doctor also.

18] In the cross-examination, PW-2 has admitted that there used to be frequent quarrels between her and her husband. The accused used to beat her children. She has further admitted that she came back from Gujrat on 15.06.2014 in the morning. She has admitted that in the police station, the persons from NGO were sitting and in her presence, they were dictating statement to the police. She has further admitted that from 13.06.2014 to 04.08.2014, her husband (accused) was continuously in the house and thereafter, he left the house. She has further admitted that from 13.06.2014 to

04.08.2014, she was not knowing anything about the incident.

19] PW-2 has further admitted that the huts in their area are adjacent to each other and talks from adjacent huts can be heard. She has stated that one person by name Nazir is known to her. She has admitted that there used to be frequent quarrels between said Nazir and her husband in relation to some money transactions. She has further admitted that she assured Nazir that she will pay the amount borrowed by her husband.

20] Except the fact that there used to be frequent quarrels between PW-2 and her husband (accused), there are no other facts and circumstances on record to infer that the relations between PW-2 and the accused were so strained, that she would go to the extent of involving the accused in a false case of such a serious nature by tutoring her 10 years old daughter. It is well settled that child witness if found competent to depose the facts and reliable the evidence of such child witness can be basis of conviction. In the present case, we find the evidence of PW-1 trustworthy and reliable.

21] In addition to above, according to PW-6 Dr. Rajesh Dhere, Assistant Professor with Sion Hospital, on 07.08.2014, the prosecutrix was brought to the hospital with alleged history of sexual assault. The prosecutrix gave history of sexual abuse by her father when her mother was out of city.

22] According to PW-6, on local examination, he found that hymen was not intact, old tear at 7 o'clock position. According to him, overall findings were consistent with the old sexual intercourse.

23] PW-6 has admitted that at the time of examination, mother of victim (PW-2) was present. He has denied the suggestion that the history was narrated by the mother of prosecutrix. He has further denied the suggestion that at the time of examination, there was no external injury on the vital parts. He has stated that there were no injuries except injury on genitals.

24] From the evidence of PW-6, it is apparent that the prosecutrix (PW-1) was subjected to sexual intercourse. We are therefore of the view that testimony of PW-1, the prosecutrix is well corroborated by the medical evidence.

25] Learned counsel for the appellant/accused has submitted that according to the prosecution the alleged incident took place on 15.06.2014. However, while framing the Charge by the trial court it was put to the accused that he committed the alleged act on 04.08.2014. It is submitted that the purpose of framing of Charge is to put the accused on notice as to what charge he has to meet. It is submitted that thus, the whole trial is vitiated and the accused needs to be acquitted. However, it is not shown that the accused has

suffered any prejudice due to said irregularity or inadvertent mistake.

26] In the facts and circumstances of the case, no doubt can be raised in relation to the prosecution case on the ground of delay in lodging the FIR.

27] As regards quantum of sentence, the Hon'ble Supreme Court in the case of ***State of Himachal Pradesh vs. Asha Ram***¹, has observed :

"22. Here is a case where the crime committed by the respondent not only delicts the law but it has a deleterious effect on the civilized society. Gravity of the crime has to be necessarily assessed from the nature of the crime. A crime may be grave but the nature of the crime may not be so grave. Similarly, a crime may not be so grave but the nature of the crime may be very grave. Ordinarily, the offence of rape is grave by its nature. More so, when the perpetrator of the crime is the father against his own daughter it is more graver and the rarest of rare, which warrants a strong deterrent judicial hand. Even in ordinary criminal terminology a rape is a crime more heinous than murder as it destroys the very soul of a hapless woman. This is more so when the perpetrator of the grave crime is the father of the victim girl. A father is a fortress, refuge and the trustee of his daughter. By betraying the trust and taking undue advantage of trust reposed in him by the daughter. Serving food at odd hours at 12.30 a.m. he ravished the chastity of his daughter. He jeopardized her future prospect of getting married, enjoying marital and conjugal life, has been totally devastated. Not only that, she carries an indelible social stigma on her head and deathless shame as long as she lives."

1 (2005) 13 SCC 766

28] Considering the above facts and circumstances of the case, no interference is called for in the impugned judgment and order. In the result, the following order is passed.

ORDER

- a] Criminal Appeal stands dismissed.
- b] Criminal Interim Application does not survive and accordingly, the same is also disposed of.

(N.R. BORKAR, J.)

(S.S. SHINDE, J.)