

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

CRIMINAL APPEAL NO.841 OF 2018

Prabhakar Jagganath Patil
Age : 55 years, Occ : Labourer
Residing at Lalucha Bhat
Mukam Pada, Jyoti Shop, Agashi
Virar (W), Tal : Vasai, Dist : Thane
currently lodged in Kolhapur Central Jail

.... Appellant
(Org. Accused)

versus

1. The State of Maharashtra
(At the instance of
Arnala Police Station, Thane)
Vide C.R. No.58 of 2014
 2. Bhagwan Waman Patil
Age : 42 years, Occ : Sweeper,
Residing at – Arnala, Kaluchabhat,
Tal – Vasai, Dist - Thane
- Respondent
(First Informant)

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- Mr. P. B. Naiknawre a/w Satish K. Goud a/w Ms. Savanee S. Patil, Advocate for Appellant.
- Mr. R. M. Pethe, APP for the State/Respondent No.1.

CORAM : SARANG V. KOTWAL, J.
DATE : 17th AUGUST, 2022

JUDGMENT :

1. This is an Appeal challenging the judgment and order dated 06/06/2018 passed by the learned Additional Sessions

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Judge-1, Vasai in Special Case No.40 of 2014. The Appellant was convicted for the offence punishable u/s 6 of Protection of Children from Sexual Offences (POCSO) Act, 2012. He was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.25,000/-, in default to suffer rigorous imprisonment for one year. He was acquitted from the charges of offence punishable u/s 354 of the Indian Penal Code and section 10 of POCSO Act. The Appellant was granted set of u/s 428 of Cr.P.C. Out of fine amount, Rs.15,000/- were directed to be paid to the victim.

2. The Appellant was also charged for commission of offence punishable u/s 376 (2)(f)(j) and (i) of IPC as well as section 377 of IPC. However, learned trial Judge observed that the punishment prescribed for the offence punishable u/s 376(2) is similar to the punishment prescribed for the offence punishable u/s 6 of the POCSO Act and in view of section 42 of POCSO Act, no separate punishment was imposed for the offence punishable u/s 376(2) and 377 of the IPC.

3. The office noting shows that the Respondent No.2 is served.
4. Heard Mr. P. B. Naiknawre, learned counsel for the Appellant and Mr. R. M. Pethe, learned APP for the State.
5. The prosecution case is that the victim in this case was having low intelligence quotient. She was 17 years of age. The Appellant was her uncle. On 24/04/2014 at about 02.00 p.m. the Appellant took the victim in a garden and committed penetrative sexual assault, which was punishable u/s 376 and 377 of IPC as well as u/s 6 of POCSO. It amounted to aggravated penetrative sexual assault in view of section 5 (k) of POCSO. There are allegations that 15 days prior to 24/04/2014 the Appellant had pressed her breasts. At the conclusion of the trial he was acquitted from this part of the incident which had taken place 15 days prior to 24/04/2014.
6. The FIR was lodged on 27/04/2014 vide C.R.No.58 of 2014 at Arnala Police Station, Thane. The Appellant was

arrested. The investigation was carried out and the Appellant faced the trial as mentioned earlier. During trial, the prosecution examined 10 witnesses. The prominent witnesses were the victim, her father, her cousin and her friend. The defence of the Appellant was that the victim's father's house was small. He wanted to built a new house. He did not have sufficient space or land. He asked for some land from the Appellant, but the Appellant refused. This was the reason for Appellant's false implication in the case. Another reason was that the victim's other uncle's brother in law was harassing the Appellant's daughter and on that account there was quarrel between the Appellant and the first informant's family and therefore the Appellant is falsely implicated.

7. After considering the evidence on record, the defence of the Appellant and after hearing parties, learned Judge convicted and sentenced the Appellant as mentioned earlier. He however observed that the incident which had allegedly taken place 15 days prior to 24/04/2014 was not proved because the

victim had admitted that prior to 24/04/2014 no other incident had taken place.

8. The important witness in this case is the victim herself. Learned Judge has observed that she was suffering from mental disability. But she gave answers with sufficient clarity. She has stated that she was referring the Appellant as 'Daddy'. On the date of incident her mother had gone to cast her vote and her father had gone to attend his job. Her grandmother was at home. The Appellant took the victim towards a tree. On the way he gave her Ice Gola. At that time, other boys and girls were present there. After that she was taken near that tree. He removed her clothes and committed penetrative sexual assault, which is covered u/s 3 of POCSO as well as 376 and 377 of the IPC. Because of his acts, she was in pain. She disclosed this incident to her aunt and then to her mother. She identified the Appellant, who was sitting in the Court. The police had recorded her statement. In the cross-examination she stated that she used to play with other boys and girls in the small garden. She

admitted that there were similar gardens around the place where the incident had taken place. The garden where the incident had taken place was known as 'Chafawadi'. People used to pluck flowers in that garden. She admitted that at the time of incident some people were plucking the flowers in the gardens surrounding the garden, where the incident had taken place.

9. She further admitted that their used to be quarrel between her own mother, her other aunts and the Appellant's wife. She disclosed this incident to one of the aunts. She further stated that her aunt tutored her to depose in the Court. But she denied the suggestion that the aunt threatened her that if she did not depose against the Appellant, she would be beaten by her. She was asked about some details of the actual act, which she had mentioned in the police statement.

10. P.W.2 was the father of the victim. He produced the birth certificate of the victim at Ex.19. He has deposed that when the victim was 7 years old, she had fallen from the upper floor and had received injury on her head and since then, her

behaviour had changed. She was admitted to school for mentally challenged students. The Appellant was his cousin. He resided opposite to P.W.2' house. On 26/04/2014, at about 07.00 p.m. P.W.2 was told by his brother, his wife and P.W.2's wife about the incident of rape committed by the Appellant on P.W.2's daughter. He then questioned P.W.1. She narrated the incident to him. He went to the Appellant's house to make enquiries. He could not meet the Appellant. On the next day also he went to the Appellant's house to make enquiries. But the Appellant avoided to answer his questions. After that, the P.W.2 went to the police station and lodged his FIR. The FIR is produced on record at Ex.20. After lodging of the FIR, the victim was examined at Civil Hospital, Thane. This witness had handed over clothes of the victim to the police.

11. In the cross-examination he denied the suggestion that P.W.1 was more than 18 years of age. He denied the suggestion regarding quarrel between the families regarding harassment caused to the Appellant's daughter. He returned home at 06.00

p.m. on the date of incident. His residential locality was thickly populated. He clarified that he was not keeping well and so was not going for job. The flowers were plucked at 06.00 a.m. from the garden and taken up for sale at 08.00 a.m. In the afternoon the work of watering was going on. Chafyachi wadi was about 2 minutes walk from his house.

12. In this context, the next important witness is P.W.8, who is cousin of the victim. He was 12 years of age at the time of incident. He could understand the questions. He gave rational answers. After verifying that he was knowing sanctity of oath, he was given oath. He has deposed that the victim was his cousin. He knew the Appellant. On the date of incident, he along with the victim had gone to have Ice Gola. At that time, the Appellant was present there. P.W.8 paid for his own Ice Gola and the Appellant paid for the victim's Ice Gola. After that the Appellant took the victim to Chafyachi Wadi. This witness then went to play. He has deposed that apart from him there were two other girls and a boy with him when he had gone to get Ice Gola.

13. P.W.3 Apurva Atul Prabhavalkar, was an expert serving as Psychologist in the school for mentally challenged students. Her job was to assess the Intelligence Quotient (I.Q.) of such students. The victim was studying in her school. On 29/04/2014, the police came to her school and requested for her assistance. She went to the house of the victim. Victim's statement was recorded by police in her presence. The process of recording statement was videographed. P.W.3 has stated that the victim's test showed mild retardation. The victim had no difficulty in hearing and speaking. P.W.3 has stated that the victim's statement was recorded as per her narration. The victim was having 50% of I.Q. She denied the suggestion that the victim's family members were present at the time of recording her statement. However, she admitted that the informant's mother was present to explain Arnala dialect.
14. P.W.5 Amol Suresh Ghag, was a Pancha for spot panchanama. He did not support the prosecution case and therefore was declared hostile.

15. P.W.7 Shriram Ramjarak Yadav was the Ice Gola seller. He has deposed that on the date of incident at about 02.00 p.m. the victim came there to buy Ice Gola. She was accompanied by her brother and an unknown person. That unknown person paid money for the victim's Ice Gola. He did not identify the Appellant. He was declared hostile. In his police statement he had named the Appellant as the person who had given money for Ice Gola. That contradiction was brought out by the learned APP in his cross-examination.
16. P.W.6 Dr. Ujjay Ramesh Jadhav had conducted medical examination on the Appellant on 28/04/2014. According to this witness there was nothing to suggest that the Appellant was incapable of performing sexual intercourse. He collected Appellant's blood sample, pubic hair, semen and nail clippings. Kept them in sealed condition and sent them for chemical analysis. In the cross-examination he admitted that there were no injuries on the private parts of the Appellant. He did not conduct any physical or other examination in support of his opinion.

17. P.W.9 Dr. Priyanka Mahajan, is an important witness. She had medically examined the victim on 02/05/2014 at Thane Civil Hospital. The victim had given history that she was sexually abused by her paternal uncle and was threatened not to tell it to anyone. On local examination of the victim, P.W.9 did not find any injuries. But there was tenderness around anal and vaginal region. The victim was suffering from pain in that region. On 10/05/2014 the victim was examined by another Medical Officer i.e. Dr. Sangita Jadhav, who was a Gynaecologist. In response to the query, this witness gave opinion that the the patient had tenderness in the anal and vaginal area and there was possibility that it could be caused due to rape. But final opinion was reserved for receipt of C.A. report. On 27/06/2014 this witness was asked by the police about the mental fitness for recording the victim's statement. This witness examined the victim and found that her I.Q. was 51 and she fell in the category of mild retardation, but she was able to recite the incident and she was fit to give the statement in the

Court. This witness's opinion certificate is produced on record at Ex.40. In the cross-examination this witness denied the suggestion that tenderness in that area was possible due to excessive sweating, itching or viral infection. She denied the suggestion that in case of mild mental retardation there was a possibility that patient could state what she was tutored to state. This witness then volunteered that in case of moderate and severe mental retardation that possibility is more, but in case of mild mental retardation this possibility is the least. She further stated that the tenderness can be due to other reason as well as due to sexual penetration. In the victim's case hymen rupture was not fresh as on 10/05/2014. The hymen rupture could be due to various reasons. The aforementioned medical reports are produced at Ex.38, 39 and 40.

18. P.W.10 API Sandeep Shantaram Shivle was the Investigating Officer. He recorded statements of the witnesses. He collected birth certificate of the victim. She was referred to medical examination. The clothes of the accused were recovered

at his instance from the house. The spot panchanama was conducted by him in the presence of Panchas. It is produced at Ex.54. According to him PSI Mhaske recorded the statement of the victim. He received C.A. reports which are produced at Ex.63 to 66. In the cross-examination he admitted that there was floriculture land around the spot of incident. He did not find any eyewitness. He did not find stick attached to Ice Gola. The spot was in the land owned by one Nandkumar Gharat. But his statement was not recorded. He did not record statements of other boys and girls who had gone to buy Ice Gola.

19. Apart from this oral evidence, the C.A. report shows that there were semen stains on the knicker of the victim. However ABO grouping was inconclusive.

20. Learned counsel for the Appellant submitted that the age of the victim is not proved. Ossification test was not conducted to fix her age. The incident had taken place in a crowded locality and no other witness had supported the

prosecution case. There is delay in lodging the FIR. The incident had taken place on 24/04/2014 and the FIR was lodged on 27/04/2014 and no explanation is given for lodging the FIR belatedly. He submitted that the charge was framed for offence punishable u/s 376 and 377 of IPC. But no sentence was recorded by the learned trial Judge and this is a serious lapse. According to learned counsel, the FIR was lodged because of dispute between the victim's father the Appellant. The Appellant is therefore falsely implicated.

21. Learned APP opposed these submissions. According to him, there could not have been any independent witness because the incident had taken place at a secluded spot in a garden. It is neither the defence case nor the prosecution case that at that point of time people were present in the garden. He submitted that even at the time of deposition in the Court the victim was frightened which is recorded by the learned Judge and therefore it was not unusual that the FIR was not lodged immediately. He submitted that the medical certificate

corroborates the version of the victim. There is no reason to disbelieve the medical evidence. Apart from that, the C.A. report shows presence of semen on the victim's knicker, which is also an incriminating circumstance.

22. I have considered these submissions. The victim's evidence is sufficiently clear. Though she has stated that her aunt had tutored her, she had denied the suggestion that she was forced to depose in the Court. The expert Medical Officer has explained that in case of children with mild mental retardation, they deposing on the basis of tutoring was least possible. There is a specific answer given by P.W.9 Dr. Mahajan. Thus there is no force in the submission that the victim's deposition before the Court was a result of tutoring.

23. The victim's version is corroborated by the medical evidence. P.W.9 has given details of injuries suffered by the victim. There were no external injuries, but there was tenderness around anal and vaginal region. This witness had deposed that it could be caused due to rape.

24. Though final opinion was reserved for receipt of C.A. in this case the medical examination was conducted after a few days and therefore finding of any other circumstance was difficult. In any case, the C.A. report shows presence of semen on victim's knicker. Thus, the medical evidence and the C.A. report support the victim's version.

25. Apart from that the evidence of PW.8 is also important. He was knowing both, the victim as well as the Appellant. He has supported the prosecution case to the extent that the victim was paid money by the Appellant to buy Ice Gola and thereafter the Appellant had taken the victim further. This witness had gone back to play with his other friends. Thus the beginning of the incident is corroborated by the evidence of this witness.

26. The birth certificate is produced on record at Ex.19. There is absolutely no reason to disbelieve this birth certificate, which was issued by the Gram Vikas Officer, Gram Panchayat,

Wadvale. The birth certificate shows her date of birth as 27/02/1998. The date of incident is 24/04/2014. Thus the victim was below 18 years of age. Section 5 (k) of POCSO makes the penetrative sexual assault aggravated because the accused had taken advantage of the victim's mental disability.

27. Learned trial Judge has convicted the Appellant for commission of offence punishable u/s 6 of POCSO and has sentenced him to suffer rigorous imprisonment for 10 years and fine of Rs.25,000/-. In paragraph No.69 he has given reason why he was not recording separate order for commission of offence punishable u/s 376 (2) and 377 of IPC. He has relied on the provisions of section 42 of the POCSO. Thus there is no reason to interfere with the impugned judgment and order. The prosecution has proved its case beyond reasonable doubt.

28. The Appeal is therefore dismissed.

(SARANG V. KOTWAL, J.)