

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

CRIMINAL APPEAL NO. 849 OF 2018

Avinash Navnath Lakade
R/o. At and Post – Pimpri,
Tal. Koregaon, Dist. Satara

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Rajaram V. Bansode a/w. Mr. Kiran Nikam for Appellant.
Mr. P. H. Gaikwad, APP for State/Respondent No.1.

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

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 05/06/2018 passed by learned Additional Sessions Judge, Satara in Special (POCSO) Case No.48 of 2016. By the impugned Judgment and order the Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s.7 r/w. Section 8 of the

Protection of Children from Sexual Offences Act (for short 'POCSO') and was sentenced to suffer R.I. for 3 years.

ii) He was convicted for commission of offence punishable U/s.5 (l), (m) r/w. Section 6 of POCSO and was sentenced to suffer R.I. for 10 years.

iii) He was convicted for commission of offence punishable U/s.3 r/w. Section 4 of POCSO and was sentenced to suffer R.I. for 7 years.

The Appellant was imposed in all fine of Rs.10000/- and in default of payment of fine he was sentenced to suffer S.I. for 1 year.

All the substantive sentences were directed to run concurrently.

The Appellant was acquitted from the offences punishable U/s.452 and 506 of I.P.C. The fine amount was directed

to be paid to the victim as compensation.

In paragraph 39 of the impugned Judgment and order it was also observed that the ingredients of offence under Section 376(2)(f)(i) of I.P.C. were also made out, but in view of Section 42 of the POCSO separate sentence was not awarded.

2. Heard Shri. Rajaram Bansode, learned counsel for the Appellant and Shri. Gaikwad, learned APP for State/Respondent No.1.

3. The prosecution case is that the victim was about 10 years of age at the time of incident. The Appellant was known to her. He was residing in her neighborhood. He used to come to her house when no one was in the house and used to commit rape on her. After a few months the victim started getting pain in her stomach, therefore, she narrated the incident to her mother and her grand-mother. They took her to a private doctor who refused to treat her. Then she was taken to another hospital. Again there treatment was refused because, according to the Medical Officer it was a police case. The victim's mother then informed the victim's

father who was working in Mumbai. He advised the mother of the victim to lodge F.I.R. Therefore, she approached Rahimatpur police station and C.R.No.27 of 2016 was registered on 31/03/2016. The Appellant was about 21 years of age. He was arrested on 01/04/2016. Both, the victim and the appellant were sent for medical examination. During investigation, victim's clothes were seized, and statements of the witnesses were recorded. At the conclusion of the investigation, charge-sheet was filed and the case was committed to the Court of Sessions.

4. During trial, the prosecution examined 7 witnesses including the victim, her mother, Medical Officer, panchas and the Investigating Officers. PW-1 was mother of the victim. She has deposed that, she had a son and a daughter. Her son was 11 years of age at that time and her daughter was 10 years of age. The date of birth of her daughter was 08/02/2006. Her husband was working in Mumbai. Her daughter was studying in 5th standard. PW-1 herself and her mother-in-law used to go to their agricultural field for work. On 27/03/2016, when they returned in the evening, her daughter told her that she was having pain in her

chest, stomach and thighs. PW-1 asked her the reason of that pain. At that time, her daughter told her that the Appellant used to come to their house when nobody was around. He would remove her clothes, he would insert finger in her private part and then he used to commit rape on the victim. But as he was not successful in penetration, he would still continue with his acts. The PW-1 then telephoned her husband and told him about the incident. He told her that, he would tell her what to do after he returned. After that two days passed, but the pain increased. Therefore, PW-1 took her daughter to a private doctor's dispensary. That doctor examined PW-1's daughter-victim. But the Doctor did not take her case and advised them to go to a Government hospital. They went to Government hospital at Rahimatpur. There they were informed that it was a police case and therefore, treatment could not be given to PW-1's daughter. PW-1 then telephoned her husband. He then told her to lodge police complaint. Therefore, she went to Rahimatpur police station and lodged her complaint on 31/03/2016. The F.I.R. is produced on record at Exhibit 31. PW-1 explained that, she did not lodge the F.I.R. immediately, though

she came to know about the incident on 27/03/2016 because she was shocked. She had already washed her daughter's clothes, but they were produced before the police and they had seized those clothes. Her husband came on the next day. He called a meeting. The Appellant and his parents attended the meeting. The Appellant told them that from then onwards such incident would not be repeated. After lodging of F.I.R. the victim was given medical treatment in Civil Hospital, Satara.

In the cross-examination, some omissions from her F.I.R. were put in respect of the victim was not telling her about the pain in her stomach or increase of pain. Apart from that, there was nothing much in her cross-examination. She deposed that, her mother-in-law was residing in the third room in their house. Except this minor omission regarding victim not telling PW-1 about the pain, rest of the F.I.R. corroborates her deposition.

5. PW-2 is the victim herself. She has deposed that, her date of birth was 08/02/2006. She deposed that, she knew the Appellant. He was residing near their house and used to come to

her house when no one was around. He would remove her clothes and sleep on her person. He would insert his private part in her private part, but as he would not be successful, he would still continue with his acts. On a specific query by the trial Court, PW-2 deposed that the Appellant did this act on 4 to 5 occasions. She did not disclose this incident to anybody. She deposed that the Appellant had threatened her that he would kill her. Subsequently, she told about this incident to her mother as she was having pain in her stomach and thighs. She told her mother everything.

In the cross-examination, she deposed that, her grandmother was residing separately. She further deposed that the Appellant used to come to their house when PW-2's brother was not in the house. She denied the suggestion that, there was a quarrel between the Appellant and her family. She identified the Appellant in the Court.

6. PW-3 Dr. Pradnya Bhosale was attached to Civil Hospital, Satara. She examined the Appellant, as well as, the victim on 01/04/2016. While recording the medical history, she had noted

down the victim's version regarding penetrative sexual assault. PW-2 had told her that such incident had occurred for 4 to 5 times. On medical examination, her hymen was found to be intact. In the column No.15 (f) it was mentioned as told by the victim that penetration was by penis and by finger in vagina. The Appellant's medical examination did not reveal much. The medical certificate mentions that, he was sexually active and potent. The radiological age of the victim was between 11 to 12 years.

7. PW-4 Raju Mane was a pancha for spot panchanama and for panchanama of seizure of clothes of the victim and the Appellant.

8. PW-5 Baban Rokade was a pancha for arrest panchanama of the Appellant. The Appellant was arrested on 01/04/2016.

9. PW-6 Yeshwant Dhage, A.P.I. was the investigating officer who has carried out major part of the investigation. He produced the birth certificate of the victim-PW-2 on record at Exhibit 51 showing her date of birth as 08/02/2006.

10. PW-7 Shriganesh Kangude, A.P.I. had carried out other part of the investigation and had recorded some statements.

This was the evidence led by the prosecution. After that the statement of the Appellant was recorded U/s.313 of Cr.p.c. His specific defence was that, there was a dispute regarding plots of the Appellant and the complainant's family and because of that dispute he was falsely implicated.

11. Learned counsel for the Appellant submitted that, the victim did not mention any specific date of any of the instances. The victim has not given details of those dates. It is unbelievable that she would have pain regarding that act after three months from those instances. It was also unbelievable that, though pain increased, the mother of the victim did not take any steps to give her any medical treatment. The medical evidence does not support the prosecution case. The hymen was intact. No other witness from the village was examined, though admittedly, there was a meeting between different people after the incident. There was delay in lodging of F.I.R. The mother of the victim came to know about the

incident on 27/03/2016 and yet F.I.R. was lodged on 31/03/2016. The explanation offered was not acceptable. The birth certificate is not properly proved. The Investigating officer has not led any evidence to show from where this birth certificate was procured. Learned counsel finally submitted that, even assuming that there was some incident, the main ingredient of penetrative sexual assault is not proved because the victim has deposed that the Appellant was not successful in penetration. He, therefore, submitted that the conviction U/s.6 of POCSO was not right.

12. Learned APP, on the other hand, submitted that the victim's evidence itself is sufficient to base the conviction. He further submitted that, even ingredients of penetrative sexual assault as defined U/s.3 of POCSO are clearly made out not only from the evidence of PW-2-victim, but from the evidence of PW-1 victim's mother and more importantly from the medical history recorded by the Doctor.

13. I have considered these submissions. So far as delay in lodging of F.I.R. is concerned, the PW-1 has given sufficient

explanation. Her husband was not in the village; he was in Mumbai. He had advised her to wait till he returned. The private doctor and the doctor in the Government hospital refused to treat the victim. Her immediate concern was to give treatment to the victim. There was no other male family member to offer help and guide the PW-1. In any case, the delay is not too much. She came to know about the incident in the evening of 27/03/2016 and then F.I.R. is lodged on 31/03/2016. The explanation given by the PW-1 in that behalf is acceptable.

14. There is no force in the submission of learned counsel for the Appellant that it was unbelievable that the pain would occur after 3 months from the incident. The medical evidence does not show that the pain which the victim was suffering from, was directly related to the incident of rape. It was incidental that she was suffering from pain. Because of the pain she had disclosed the incident to her mother. Otherwise, the victim was scared and the evidence shows that she was threatened by the Appellant who was 21 years of age and the victim was hardly 10 years of age. Therefore, the victim's silence for about 3 months is also

acceptable.

15. So far as, date of birth of the victim is concerned, there could not be any dispute about that. Her birth certificate is produced on record at Exhibit 51. It was based on the public record. Though, there was some dispute about the name of the mother of the victim, that does not go to the root of the matter; because the name of the father of the victim is correctly recorded. Even otherwise, the radiological age recorded in the medical papers during medical examination of the victim was between 11 years and 12 years. Therefore, the prosecution has successfully proved that the victim was below 12 years of age at the time of incident.

16. The only question now that remains is whether there was penetrative sexual assault. In that connection, though the victim in her deposition has stated that the Appellant tried to insert his private part in her private part and when it could not be inserted, he would still continue with his acts. The F.I.R. itself shows that she had told her mother that there was penetration.

Apart from that, she had told her mother as is reflected from the F.I.R. that he had inserted his fingers. The medical history given by the victim herself also mentions that there was penetration. This history was given by the victim. Therefore, considering this evidence and the tender age of the victim, there is no substance in the submission that, according to her deposition there was no penetration. The entire record of the case including medical history, her mother's evidence and her own evidence leads to the conclusion that there was penetrative sexual assault. Since it was done repeatedly and since the victim was below 12 years of age, it was an aggravated form of penetrative sexual assault as defined U/s.5 of POCSO; punishable U/s.6 of the POCSO. In this view of the matter, the conviction and sentence is properly recorded by the learned trial Judge and therefore, calls for no interference.

17. Considering all these aspects, the Appeal is dismissed.

(SARANG V. KOTWAL, J.)