

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

CRIMINAL APPEAL NO.640 OF 2017

Shrinivas Narsimharao Saryadu	Appellant
Versus	
The State of Maharashtra & another	...Respondents

Mr. Prashant D. Patil, Advocate (appointed) for the Appellant.

Mr. R.M. Pethe, APP for Respondent No.1-State.

Ms. Priyanka Chavan, Advocate (appointed) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 4th AUGUST, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 7.7.2017 in POCSO Case No.469/2014 passed by the Special Court under POCSO Act for Greater Bombay. By the impugned judgment and order, the appellant was convicted for the offences punishable under Section 363, 366, 376(i)(m), 323, 324 of the

Indian Penal Code and under Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act'). From the nature of the charge and the prosecution case, it appears that Section 376(i)(m) is a typographical error and the correct sentence would be under Section 376(2)(i) & 376(2)(m) of IPC. The punishment for the offence under Section 376 of IPC and Section 4 of the POCSO Act is greater in degree than other offences and hence the appellant is sentenced under these two sections to suffer RI for 20 years and to pay fine of Rs.25,000/- and in default of payment of fine to undergo RI for six months. Rs.15,000/- out of this amount was directed to be paid to the victim.

2. Heard Shri Prashant Patil, learned counsel appointed for the appellant, Shri R.M. Pethe, learned APP for Respondent No.1-State and Ms. Priyanka Chavan, learned counsel appointed for Respondent No.2.

3. The prosecution case, in brief, is as follows :

On 4.7.2014 the father of the victim had left the victim, aged six years, with his aunt and had gone to attend his work. When he returned at about 9.00 p.m., his aunt told him that the

victim was sent to bring Paan for her from a nearby hotel, but she had not returned. The victim's father went to bring her back but she was not found anywhere in that area. He took search for her but she was not found and, therefore, he gave his FIR at Meghwadi police station about her missing. He had mentioned that somebody had abducted the victim and, therefore, the offence was registered vide C.R. No.187/2014 at Meghwadi police station under Section 363 of IPC. On the next day morning, the police informed him that his daughter was found in an injured condition. He went to the police station and from there he went to Trauma Care Hospital, Jogeshwari. He saw his daughter. Her face was swollen. She was wearing somebody else's clothes. She told him that one unknown person had sexually assaulted her. It was revealed that serious offences were committed and, therefore, investigation was carried out.

4. During investigation, a confidential report was received that the present appellant was also missing from his house in the same area from 1.7.2014 and that there were similar acts committed by him. Search was taken for the appellant. He was

resident of Andhra Pradesh. The police team went there and brought him to Mumbai on 17.7.2014. There were bite marks on the lips of the victim. Therefore, dental impression of the appellant was taken and it was examined by the Forensic Expert. It was found that the bite marks on the victim's lips corresponded to the appellant's teeth. Therefore, he was put under arrest on 31.7.2014. The investigation was carried out and the charge-sheet was filed. During trial, the prosecution examined ten witnesses. The appellant examined two defence witnesses. His defence was of total denial. According to the defence witnesses, the appellant was suffering from some leg injury and was not seen from 1.7.2014. After appreciating the evidence and hearing the arguments, learned trial Judge convicted and sentenced the appellant as mentioned earlier.

5. Learned Judge mainly relied on the evidence of the expert who was examined as PW-4 and of PW-8 Police Inspector. Learned Judge found that the evidence of the expert was clinching and based on that she recorded the conviction and sentence.

6. The prosecution evidence, in short, is as follows:

PW-1 was the victim herself. At the time of recording of

her evidence, she was seven years of age. Her date of birth, as mentioned by her father, was 30.10.2008. She has deposed that she was studying in Junior K.G. About the events on the date of incident, she deposed that one uncle told her to bring paan. He snatched her money. He took her to jungle. In the jungle he removed her clothes and threw them away. He bit on her lips. Then he beat her. He assaulted her on her private parts. It was raining. She got frightened. He pressed her neck and threw her in water. Afterwards one woman came there in the morning. She gave her clothes to wear. She took her to hospital. Her father came to the hospital and talked with her. She narrated the incident to her father. She then went to the police station. She deposed that she could identify the person who had taken her to jungle but, the appellant was not shown to her.

In the cross-examination, she admitted that she could not see the man who had taken her to jungle as he had covered her face with his hands. She admitted that she did not know who that man was. She admitted that when photograph was shown to her, she could not identify the offender.

7. PW-2 is the victim's father. After narrating the incident about his daughter's missing and his lodging complaint about it, he has deposed that he met his daughter on the next day morning. Her lips and mouth were swollen. She was injured. Her face was swollen. She was wearing someone else's clothes. She was in the hospital till 17.7.2014. She had again complained of pain. She was admitted in the hospital for 4 to 5 days. She narrated the incident of rape and assault to him. He has described the incident in detail. It shows how the victim was assaulted badly. There was penetrative sexual assault on her. The assailant then pressed her neck and threw her in water. He then left the place. In the morning, she woke up. One lady saw her. She made enquiries. She gave clothes of her daughter to the victim to wear and took her to the hospital. The police and PW-2 tried to show different photographs to the victim, but she could not identify anyone. He produced the birth-certificate of the victim. He has deposed that afterwards he came to know that the appellant was arrested. He has further deposed that PW-2 was knowing him but was not knowing his name. The appellant used to visit his friend's place.

The complaint lodged with the police about the missing of the victim is produced on record at Exhibit-12.

In the cross-examination, he admitted that his daughter had not recognized any person from the photographs shown to her. The police had shown him the photograph of the present appellant.

8. PW-3 Archana Hiwale is the lady who had helped the victim. She has stated that she had left her house at 7.00 a.m. on 5.7.2014. She was passing through the road which goes to jungle from Arey Colony. She saw a four year old girl without clothes. It was raining. She was shivering. She was not able to speak. She was crying. Her lips were injured and bleeding. PW-3 sought help of others in the locality. They gathered there. In the meantime, the police also came there. One lady brought bedsheet and clothes. The victim was made to wear the clothes. She was taken to hospital by the police.

In the cross-examination, she stated that she has not seen anybody with the victim. She had not seen the victim previously. She herself had not noticed any injury. The victim was unknown to her. In the cross-examination, she has further stated

that she felt that the injury to the lips might have been caused due to fall.

9. PW-9 Sachin Khairwar was a pancha to the spot panchnama. It was conducted at about 8.45 p.m. on 5.7.2014. He has deposed that, from the spot, one road goes towards Jogeshwari-Vikhroli link-road and other towards Arey colony. The spot panchnama is produced on record at Exhibit-41. At that time, the victim was not there. About 10 to 15 people were present when the spot panchnama was carried out.

10. PW-6 PSI Rahul Lad had taken down the FIR vide C.R. No.187/2014 at Meghwadi police station. PW-7 WPSI Mukta Phadtare went to the Trauma Care Hospital at Jogeshwari. She met the victim. The victim's grand-mother was present there. She noticed bite marks on the cheeks of the victim and on the other parts as well. The victim was shifted to KEM Hospital for further treatment. The victim told her about the incident. This witness had recorded the statement of the victim after taking permission from the doctor. At that time, the victim's aunt and father were present. There was swelling on the lips of the victim and there were

teeth marks on her lips.

11. PW-10 PI Vijay Bane had referred the victim for recording her statement under Section 164 of Cr.P.C. before the Magistrate on 22.8.2014. After completion of investigation, he filed the charge-sheet. In the cross-examination, he has stated that he had sent the accused for Narco analysis test. He had received the report but the report of Narco test was not enclosed in the charge-sheet. He denied the suggestion that it was deliberately suppressed.

12. PW-5 Dr. Mahendra Wankhede had examined the victim at KEM Hospital on 5.7.2014 at about 11.55 p.m. He had noticed eleven injuries on the person of the victim. They were as follows :

1. Semi circular intermittent abrasions site superior order of upper lip and covering some area of upperlip proper, size 4 cm x 1 cm margins irregular, colour reddish, swelling present, nature of injury simple.
2. Semi circular intermittent, abrasion, site inferior border of lower lip, size 2 cm x .5 cm, margins irregular colour reddish, swelling present, nature of injury simple.
3. Three small abrasions, site left angle of mouth, size .8 cm x .5 cm each, margins irregular, colour

- reddish, swelling absent, nature of injury simple.
4. Contusions, site left side of chest, size 4 cmx 3.5 cm, colour reddish, swelling absent, nature of injury simple.
 5. Trangular abrasion, site left lateral aspect of chest, in midclavicular line, size 3.5 cm x 2 cm, colour reddish, swelling absent, nature of injury simple.
 6. Abrasion with scab, site posterior aspect of right elbow joint, size 1 cm x 1 cm, reddish brown colour, swelling absent, nature of injury simple.
 7. Multiple abrasions, site lateral aspect of right buttock, ranging from .5 cm x .2 cm to .5 cm x .5 cm. reddish in colour, swelling absent, nature of injury simple.
 8. Two abrasions, site lateral aspect of middle third of right thigh, size .5 cm x .5 cm each above 1 cm apart, reddish colour, swelling absent, nature of injury simple.
 9. Abrasion, site medial aspect of knee joint, size 1 cm x 1cm, colour reddish, swelling absent, nature of injury simple.
 10. Liner abrasion, site anterior aspect of left knee joint, 3 cm x .5 cm reddish, swelling absent, nature of injury simple.
 11. Multiple abrasions, site Thoracolumbar region of back in the area of 15 cm x 10 cm., size .2 cm x .2 cm each., reddish in colour swelling absent,

nature of injury simple.

He also found superficial tear vertical in nature on labia minora. Lacerations were seen on the vagina at vaginal introitus and lateral vaginal wall. There was injury to hymen. It was torn. There was no active bleeding. Edema seen. Position of tears was multiple. Evidence of perinial tear was seen. It was second degree perinial tear. There was para urethral tear, which was approximately 2 to 3 mili meters. On vaginal examination, posterior vaginal volve tear of 2.5 to 3 mili meters was found. There was tear on anus anal orificial skin at 6.00 O'clock position approximately 0.5 cm. In his opinion, there was recent forceful vaginal penetration. There was evidence of forceful penetration. There was evidence of physical assault. There was clear opinion that there was sexual assault committed on the victim.

In the cross-examination, his evidence remained unaffected.

13. Thus, from this evidence, it is more than clear that the victim was brutally sexually assaulted. It was an inhuman act. It

was a brutal attack on the victim who was barely five years of age. She was badly assaulted. The penetrative sexual assault had caused physical trauma and mental trauma. In fact, the Department of Psychiatry had issued a report which was produced on record. It mentions that the victim was conscious but not very cooperative. It was difficult to establish rapport. She was clinging to her aunt. She communicated through her aunt. Her mood was irritable and affect was congruent. The impression of the Medical Officer was that she was suffering from “acute stress disorder”. It is a heinous crime. The medical opinion mentioned on the examination report at Exhibit-28 gives a clear opinion as follows :

1. There is evidence of recent forceful vaginal penetration.
2. There is evidence of forceful anal penetration.
3. There is evidence of physical assault.

. This evidence has remained unchallenged.

14. The connection of the appellant with this offence is proved through the evidence of PW-4 Dr. Hemlata Pande who was the expert examined by the prosecution and PW-8 PI Dnyaneshwar Ganore, who had first suspected the appellant.

15. In respect of this evidence, learned counsel for the appellant submitted that the victim has not identified the appellant either in the court or even before that during investigation. The case against the appellant is based purely on circumstantial evidence. The expert's opinion cannot form sole basis for conviction of an accused. The appellant was missing on 1.7.2014 and a report to that effect was lodged on 7.7.2014 by his brother.

16. Learned counsel submitted that there are no eye witnesses and there is nobody who had seen the appellant in or around the area where the incident had taken place. He further submitted that the evidence of the defence witnesses is not properly considered by the learned trial Judge and they have consistently deposed that the appellant was missing. In this connection, learned counsel relied on the evidence of DW-1 Santosh Barwa and DW-2 Munna Mirza. DW-1 Santosh Barwa has deposed that he was a childhood friend of the appellant. On 25.6.2014, the appellant had met this witness. There was injury to his leg. He did not have money. DW-1 took him to a hospital. Thereafter he met this witness

again on 30.6.2014. On that day, he was not able to walk due to the injury to his leg. He told this witness that he would be going to his native place to bring money. After that, he had not seen the appellant.

In the cross-examination, he admitted that he did not know where the appellant was residing. He denied knowledge that on two to three occasions in the past the appellant had assaulted any woman.

17. DW-2 Munna Mirza has deposed similarly. He deposed that he had met the appellant on 26.6.2014. He was having leg injury. He took this witness's bank account number for transferring money from his native place, but, no money was transferred. He had informed this witness that he was going to his native place and after that, he had not met the appellant.

In the cross-examination, he has stated that he had given Rs.1500/- to the appellant's brother as the appellant was not found. He was unable to recollect whether the appellant's mother had sent Rs.1500/- in this witness's bank account.

Learned counsel for the appellant relied on this evidence to show that the appellant as suffering from leg injury, he had gone to his native place and, therefore, he could not have committed this offence.

18. Learned counsel for the respondent No.2 as well as learned APP opposed these submissions. They relied on the evidence of PW-4 Dr. Pande and PW-8 PI Ganore. They submitted that the evidence of these two witnesses is clinching. It can form basis of the conviction.

19. Learned counsel for respondent No.2 relied on the observations of the Hon'ble Supreme Court in the case of **Mukesh and another Vs. State (NCT of Delhi) and others**¹ to contend that the Odontology report and expert's evidence can be a clinching evidence in such trials.

20. I have considered these submissions and as rightly submitted by the parties, the case depends on the evidence of PW-4 Dr. Pande and PW-8 PI Ganore. PW-8 PI Ganore has deposed that at

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the relevant time he was attached to Meghwadi police station. The investigation of C.R. No.187/2014 was handed over to him on the same day of lodging of the FIR. On 7.7.2014, one more missing complaint was lodged at Meghwadi police station and that was in respect of missing of the present appellant. While making investigation in that behalf it was revealed that the appellant was also residing in the vicinity of the victim. He was unmarried. The police received confidential information that four to five times this appellant had attempted to commit offences against women. His brother informed PW-8 that on 1.7.2014, the appellant had spoken with him on telephone and then onwards there was no trace of the appellant. PW-8 then searched for the appellant and he was found at his native place in Andhra Pradesh. On 17.7.2014, the police team of Meghwadi police station brought the appellant to Mumbai. During inquiry the appellant was deliberately talking irrelevant. The mother and brother of the appellant gave consent for the appellant's medical examination. After that examination, the bite marks on the lips of the victim matched with the teeth of the appellant. Therefore PW-8 arrested the appellant on 31.7.2014.

In the cross-examination he stated that the appellant's brother also accompanied the appellant at the time of medical examination. He denied making deliberate false investigation and false implication of the appellant.

21. PW-4 Dr. Hemlata Pande is the main crucial witness in this case. She had done her Masters in Forensic Odontology. She was attached to KEM Hospital as Registrar, Department of Forensic Medicine. On 7.7.2014, a letter was received from Meghwadi police station for analysis of bite marks on the victim's body in this case. When this witness met the victim, she was crying and resisting the examination of injuries. PW-4 noticed two injuries on her face i.e. on her upper and lower lips. The victim was examined under anesthesia. Photographs were taken. There were two bite marks on upper and lower lips around 3.8 cm X 1.5 cm. Bite marks were semi circular in shape with two 'C' shape marks facing each other. The arch exhibited characteristic features of biting edges midline of upper arch and liner mark indicating position of upper front lip of the accused. The lower lip injury was approximately 2 cm X 1.5 cm. Those injuries were fresh injuries caused within 24 hours.

The appellant was brought to PW-4 on 18.7.2014 for detailed examination and collection of dental impression. His consent was obtained. Photograph of his teeth and then dental impressions were collected. Dental models were prepared using his dental impression. The teeth in his upper jaw were well aligned and intercanine distance was approximately 3.6 cm to 3.8 cm. The teeth in the lower jaw were irregular and exhibited crowding with right central inciser slightly rotated and placed labial to right lateral inciser. Generalized attrition was present. The photographs taken by PW-4 were in digital format. Physical dental impression of the appellant was taken. Then she scanned the dental model on a flat bed scanner converting it into digital format. She obtained the digital photographs of dental model of the appellant and the digital photographs of bite marks of the victim. After comparative analysis, she observed following features :

- (i) Size of Arch, that is inter canine distance.
- (ii) Shape of Arch.
- (iii) Presence of teeth.
- (iv) Location of teeth.
- (v) Size of individual teeth.
- (vi) Rotation of individual teeth.
- (vii) Shape of individual teeth.

. Based on these features, it was concluded that the pattern of bite marks injury seen on upper and lower lips of the victim was consistent with the pattern of upper and lower teeth arrangement of the appellant. The report is produced at Exhibit-18 during trial. She also produced the model of the teeth of the appellant under Article-1 Collectively, CD of images of bite marks and injuries on the victim's face as well as image of the appellant's teeth. She was cross-examined about the procedure of maintaining record before examination. However, as far as the main analysis is concerned, there is hardly any cross-examination. Thus, her evidence about the actual analysis has remained unchallenged.

22. In this context, the observations of the Hon'ble Supreme Court in the case of **Mukesh and another** from paragraphs-237 to 246 are important. Hon'ble Supreme Court referred to the opinions of experts in the field and observed that the forensic odontology deals with the proper handling and examination of dental evidence. There were important reasons for considering forensic odontology a well defined and independent

subject because it deals with the examination of bite marks with a view to the subsequent elimination or possible identification of a suspect as the originator. In the case before the Hon'ble Supreme Court, the odontology report linked two accused with the crime in question. In that case, the bite marks found on the body of the victim were compared with the dental models of the suspects and the analysis showed that at least three marks were caused by accused Ram Singh whereas one bite mark was identified as having been caused by accused Akshay. It is observed in paragraph-245 that Forensic Odontology is a science and the most common application of the Forensic Odontology is for the purpose of identification of persons from their tooth structure. In paragraph-246, it was observed that the Forensic Odontology has established itself as an important and indispensable science in medico-legal matters and expert evidence through various reports which have been utilised by the courts in the administration of justice. In the case before the Hon'ble Supreme Court, the report was accepted as wholly credible because of matching of bite marks with tooth structure of the accused persons.

In the present case also the evidence of PW-4 Dr. Hemlata Pande is wholly reliable. She has given reasons for her deep analysis after conducting full examination of the bite marks and the dental model. As is observed by the Hon'ble Supreme Court, this evidence can be treated as a wholly credible piece of evidence.

23. Thus, based on the evidence of PW-4 and PW-8, it can safely be held that the prosecution has established its case against the appellant beyond reasonable doubt. The defence witnesses do not help the accused's case at all. All they have deposed is that from 30.6.2014 he was not seen. It was for him to have explained as to where he was from 30.6.2014 to 17.7.2014 when he was brought to Mumbai and in particular he had to explain about his whereabouts on the night of the incident i.e. on 4.7.2014 particularly in the background of the complaint lodged by the appellant's brother about his missing from 1.7.2014. It is not possible to hold that the prosecution has created this evidence of bite marks or teeth model of the appellant. PW-4 Dr. Hemlata Pande is a totally independent expert witness. There is no reason to doubt

her evidence. Considering the trauma the victim has faced, it is understandable that the victim was unable to identify the offender.

24. Considering all these aspects, I am of the firm opinion that the prosecution has established its case beyond reasonable doubt. The offence is very serious. The victim was traumatized mentally and physically. Therefore, there is no scope to reduce the sentence. In this view of the matter, the appeal fails and is dismissed.

25. The State of Maharashtra is directed to give all the benefits under their various schemes to the victim in this particular case at the earliest.

(SARANG V. KOTWAL, J.)

PRADIPKUMAR
PRAKASHRAO
DESHMANE

Deshmane (PS)

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