

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

CRIMINAL APPEAL NO. 947 OF 2018

Sachin Hiranman Patil

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Aniket Vagal for Appellant.

Smt. J. S. Lohokare, APP for State/Respondent No.1.

Ms. Dr. Dhanlaxmi Iyer (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 12th AUGUST 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 25/04/2018 passed by the learned Additional Sessions Judge, Nasik in Special Case No.258 of 2016. By the impugned Judgment and order, the Appellant was convicted and sentenced as under:

i) The Appellant was convicted for commission of offence punishable U/s.376(2)(i), 376(2)(f), 377, 201 and 506 of IPC and under section 3(1) r/w. 4 of the Protection of Children from Sexual Offences Act (for short 'POCSO').

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ii) The Appellant was sentenced to suffer R.I. for 10 years and to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for six months, for the offence punishable U/s.376(2)(i) and 376(2)(f) of IPC.

iii) The Appellant was sentenced to suffer R.I. for 10 years for the offence punishable U/s.377 of IPC and U/s.3(1) punishable U/s. 4 of POCSO and was sentenced to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for six months.

iv) He was sentenced to suffer R.I. for 3 years for the offence punishable U/s.201 of IPC and was sentenced to pay a fine of Rs.1000/- and in default of payment of fine, to suffer S.I. for one month.

v) He was sentenced to suffer R.I. for 3 years for the offence punishable U/s.506 of IPC and was sentenced to pay a fine of Rs.1000/- and in default of payment of fine to suffer S.I. for one month.

All the sentences were directed to run concurrently.

The Appellant was given set off U/s.428 of Cr.p.c. for the period of detention spent by him as undertrial prisoner since his arrest on 21/09/2016 till the date of the impugned Judgment.

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

The victim was around 5 years of age at the time of incident dated 14/09/2016. Her date of birth was 20/03/2011. The Appellant was known to the victim. On that day, in the evening, the Appellant took the victim to a secluded toilet block and committed the act which would fall under the definition of Section 4 of POCSO of penetrative sexual assault, as well as, U/s.376 of IPC. During the incident, he scratched and beat the victim on various parts. He threatened her. After some time, he allowed the victim to go from there. While the victim was returning, other boys and her cousin saw her. She was not walking properly and she was in disturbed state; physically and mentally. She was taken to her house. Her mother inquired with her. She narrated the incident to her mother. Then family members of the victim and others took her to the police station. Victim's mother

lodged her F.I.R. which was registered as C.R.No.152 of 2016 at Adgaon police station U/s.376(2)(i), (j), 506 of IPC and U/s.3 and 4 of POCSO. The F.I.R. was lodged at midnight around 12.17a.m. on 15/09/2016. The Appellant was arrested in the same night. The victim was sent for medical examination. Considering her state, she was admitted to the hospital for a couple of days. In the meantime, spot panchanama was recorded. The Appellant's shirt's buttons were found at the spot. His clothes were seized. The victim's clothes produced by her mother were seized. The victim's statement was recorded. The investigation was conducted. Statements of various witnesses were recorded. Some of the statements were recorded U/s.164 of Cr.p.c. The seized articles were sent to Forensic Lab for chemical analysis and at the conclusion of the investigation, the charge-sheet was filed.

3. During trial, the prosecution examined 13 witnesses. Those included the victim, her mother, the victim's cousin, the boy who saw her coming in disturbed state, the Medical Officer who had examined the victim and the appellant, the panchas to spot panchanama and seizure of clothes panchanama, the carrier of

articles to Forensic Lab and the police officer who had conducted the investigation. Apart from oral evidence, the C.A. reports and other documentary evidence were also produced on record.

4. The prosecution case heavily relied on the evidence of the victim herself. She was examined as PW-1. Her deposition was recorded by the trial Judge on 10/02/2017. She had come to the Court with her mother and grand-mother. Learned Judge has observed that the witness was alert and was able to answer necessary questions. Thereafter her deposition was recorded. At the first instance, when the learned APP asked her about her scratch marks on the cheek, she straight away told the Court that the Appellant had done it. He was residing in her neighbourhood. During the course of her deposition, she also identified the appellant in the Court. She deposed that the Appellant had taken her to a toilet block behind the shop of one "Gendya". PW-1 was dragged by the Appellant and was taken there. After that, she has narrated the incident in detail. She has deposed that, he had scratched her left cheek, right side of nose, he caught her lips and scratched them. He also bit her hands and then bit her private

parts. She has deposed that the Appellant touched her private part with his private part. Importantly, she has also deposed that the Appellant committed an act of penetrative sexual assault by putting his private part in her mouth. Then he spit in her mouth. He pressed her neck and threatened to kill her if the incident was disclosed to anybody. He then threw water on her person. He touched her entire body. He then left the place. Then only the victim could come out. She went towards her cousin who was in a small pendal. She fell down there and then her cousin took her to her mother. In the Pandal, other boys were present. She disclosed this incident to her mother and then they went to the police station. From there she was taken to hospital. She showed the spot of incident to police.

In the cross-examination, she answered in the affirmative to the question as to whether she had told the Court whatever her mother had told her to tell. However, she denied the suggestion that the incident did not take place.

5. PW-2 is mother of the victim. She was working in a

bottle factory as a labourer. She was residing in a joint family consisting of 12 persons including her brother-in-law's family, her husband and his parents along with children. On 14/09/2016, she had gone to attend her work. In the evening, at about 6.00p.m. she returned. There was *aarti* in the pendal. It was festival time. All the children had gone to attend *aarti*. After some time, the victim was brought to her house by PW-2's niece. The victim was having scratches all over her face and body. Her clothes were wet. There were bite marks on her lips. She inquired with the victim. The victim told her about the incident. PW-2 then called her husband and they went to Adgaon police station. The F.I.R. was lodged. The F.I.R. is produced on record at Exhibit 19. The victim was sent to Civil Hospital, Nasik where her medical examination was conducted. She was admitted to the hospital for two days. Her clothes were produced by this witness before the police. After that, spot of incident was shown by the victim. She produced birth certificate of the victim on record at Exhibit 21. The victim's date of birth was 20/03/2011.

In the cross-examination, she denied the suggestion

that, since the Appellant refused to stand as a surety in obtaining loan by the victim's father, he was implicated falsely after that.

6. PW-3 is PW-1's cousin. PW-3 was 11 years of age. She was present when the victim had come back. She has deposed that, she saw the victim coming towards her. Her walk was not normal. She was almost falling down. PW-3 rushed towards her and helped her. Other two boys, who were present there, came there to help the victim. The victim's clothes were wet. Her hair were disturbed as spread all over her face. She had taken the victim to the victim's mother. Then she narrated that the victim told everything about the incident. She denied the suggestion that, she had learnt the police statement by heart and then deposed before the Court. She denied the suggestion that, somebody else has tutored her for the deposition. She denied the suggestion that, she was deposing falsely at the instance of PW-2. In short, there was hardly any material in favour of the defence in her cross-examination.

7. In this connection, evidence of PW-11 is also important. He was a boy who was present when the victim came back after

the incident. He has stated that the victim was in a bad state. She could not walk properly. He went there and helped her. Thus, his evidence is supporting the evidence of PW-1 and PW-3. He was an independent witness.

8. PW-7 Jagdish Ahire was a pancha in whose presence spot panchanama was conducted. It is brought on record at Exhibit 36. The spot panchanama mentions that, two pieces of buttons of a shirt were found at the spot. Apart from that, some tobacco pouch, lime powder and a nicker was found at the spot. They were seized. The articles were carried by PW-5 Kalim Kazi attached to Adgaon police station to Forensic Science Lab at Kalina, Mumbai.

9. PW-8 Rajendra Sonawane was a pancha in whose presence victim's frock was seized. Seizure of clothes of the victim and the appellant is hardly of any consequence, because C.A. report concerning these clothes does not reveal any incriminating circumstance against the appellant. The only material circumstance from the C.A. report is about the buttons found at the spot. They matched with the other buttons on the shirt of the

appellant which was seized from him and that is an important piece of evidence. C.A. reports are produced on record at Exhibit 59 to 62.

10. PW-12 Dhanashri Patil, A.P.I. had carried out the investigation. She had sent the victim for medical examination. She had arrested the accused. She had seized the clothes of the victim and the appellant and had sent those articles for chemical analysis. She had completed the investigation and had filed the charge-sheet.

11. PW-13 Dipak Pagare was a photographer who had taken the photographs at the spot.

12. Apart from these witnesses, two other important witnesses are PW-6 Dr. Chittaranjan Thakare and PW-10 Dr. Mahesh Khairkar. PW-6 had deposed that, he was attached to Civil hospital as Medical Officer. The victim was brought to him. The history mentioned that, there was sexual assault on that day. The history was given by the mother of the victim. He carried out physical examination and found following injuries:--

i) Multiple abrasions over nose, left cheek and upper lip.

ii) There was swelling over external genital.

iii) There was redness and edema over external genitals.

iv) The labia majora had swelling. There was edema. It had bruises and abrasions. There was redness. There was no injury to hymen. The injuries were over left side of suprapubic and left side of labia majora externally. There were abrasions. The medical certificate is produced on record at Exhibit 32.

13. PW-10 Dr. Khaikar was also attached to Civil hospital, Nasik. He had conducted physical examination of the appellant. He had found abrasion over face below right eye. In his opinion, there was nothing to suggest that the person was incapable of performing sexual intercourse.

14. PW-4 Dr. Kantilal Jagtap was attached to Civil Hospital, Nasik as Medical Officer and Gynecologist. On 14/09/2016, he

was on duty and he had conducted the medical examination. He has also given the same evidence as that of PW-6 Dr. Thakare. He has clearly opined that, according to him, there was genital injury. Though, there were no penetrative injuries, the injuries were fresh caused by teeth and nails. The injuries were of sexual assault.

15. This, in short, is the evidence led by the prosecution. The defence of the appellant through various suggestions and through the statement U/s.313 of Cr.p.c. is that the victim's father wanted to purchase a small vehicle. He wanted the appellant to stand as a surety for obtaining loan, but the appellant had refused. The victim's father and PW-2 then had gone to the appellant's residence and had fought with him. They were demanding expenses which they had incurred for getting loan. The victim's father had threatened him eight days prior to the incident. He had threatened to lodge a complaint and, therefore, this false case was lodged against him.

16. Learned trial Judge after considering the entire evidence, hearing the parties and taking into account the defence held that,

the prosecution had proved its case against the appellant and had convicted and sentenced the appellant. During discussion, the learned Judge observed in paragraph 36 that, absence of semen did not affect the prosecution case. He observed that the witnesses were reliable. The defence taken by the appellant was not probable and he finally convicted and sentenced the appellant.

17. Learned counsel for the appellant submitted that the offence U/s.4 of POCSO or U/s.376 of IPC is not made out. The prosecution has not proved the penetration which was the most important ingredient of the offence under this head. He submitted that, therefore, the offence does not travel beyond Section 10 of POCSO, for which, maximum punishment is 7 years. The appellant is already in custody since 14/09/2016 and, therefore, he should be acquitted from major offence and his sentence should be reduced. He submitted that, there was delay in recording victim's statement. After two days, for the first time, allegations of penetrative sexual assault were made. In the F.I.R. there is nothing to suggest that there was penetrative sexual assault. The victim was very much present in the police station when the F.I.R. was

registered and there was no reason as to why allegation of penetrative sexual assault was not made at the time of lodging of the F.I.R. He submitted that, version of PW-2 is highly exaggerated. The police themselves have not supported her theory that the appellant was brought to the police station. The F.I.R. was lodged after deliberation with other relatives. Therefore, there was strong possibility of false implication.

18. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that the victim's version cannot be brushed aside. There is no reason for a 5 year old child to implicate anyone falsely. Her evidence is supported by medical evidence. The victim, right from her first statement before the police had given details about the incident, which makes out a case of penetrative sexual assault.

19. I have considered these submissions. So far as, version of the victim is concerned, there is absolutely no reason to doubt the truthfulness of her version. She had immediately narrated this incident to her mother. She was taken to the police station. Her

deposition is supported by PW-3 and PW-11 who themselves were young children. PW-11 was an independent witness. PW-3 and PW-11 had seen the victim coming towards them after the incident and they had described her disturbed state of mind and her disturbed physical state. Immediately, the victim had narrated the incident to her mother in presence of PW-3. Thus, this part of the evidence of PW-1 is sufficiently corroborated by PW-3 and PW-11. So far as, PW-2 is concerned, her evidence is on the point of lodging of F.I.R. There is hardly any delay any lodging F.I.R. After the victim had narrated the incident, she was immediately taken to the police station and the F.I.R. was lodged. There was no reason for PW-2 to concoct this false story. The defence of the appellant is unacceptable. It is not possible to believe that, for the ground mentioned by the appellant, he would be implicated falsely by parents of a child of 5 years of age. Most importantly, the victim's version is corroborated by the medical officer i.e. PW-6 Dr. Thakare.

20. There were injuries to the private part as mentioned earlier. There were scratch marks on the cheek and lips. There

were bite marks. They are strongly suggestive of sexual assault. So far as, prosecution case of penetrative sexual assault is concerned, the version of victim is very specific. According to her, there was a penetrative sexual assault on her mouth. She had consistently given this narration right from the time when her statement was recorded by the police. There was no substance in the argument that, there was belated disclosure of penetrative sexual assault. Because, considering the state in which the victim was on that day she was admitted in the hospital for two days, it was understandable that her statement could be recorded by the police only after two days. Ultimately, in these cases, the statement of the victim is the most important piece of evidence. In this particular case, the victim's version is truthful. It is supported by an independent witness, her cousin and in particular by medical officers. There are injuries to her private part, as well. Therefore, there is no substance in the argument that, it was not the case of penetrative sexual assault. In fact, since she was below 12 years of age, it was aggravated penetrative sexual assault. She was only 5 years of age.

21. Absence of any incriminating circumstance, so far as, D.N.A. report was concerned, it does not make any particular difference in this case. The other incriminating circumstance is of finding of shirt's buttons of the appellant at the spot. The victim had shown the spot and from there buttons were recovered; which matched with the buttons of the shirt of the appellant. Thus, it is a corroborative evidence led by the prosecution. Considering all these aspects, the prosecution has sufficiently proved its case against the appellant beyond reasonable doubt. There is no reason to interfere with the impugned Judgment and order.

22. Hence, the Appeal is dismissed.

(SARANG V. KOTWAL, J.)