

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

CRIMINAL APPEAL NO.1339 OF 2018

Samiulla Karim Shaikh @
Marwadi Kaka
Age : 42 years, Occu: - Nil,
Residing at : Karkala Bypass Circle,
In front of Zilla Parishad School,
Manglur Karnataka

Thangade Tilekar Plot,
Paud Phata, Kave Road,
Pune
(At present Yerawada jail)

.... Appellant

versus

1. The State of Maharashtra
through Kothrud Police Station

2. ABC

3. XYZ

.... Respondents

.....

- Ms. Tahera Abdul Rashid Qureshi, Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent No.1.
- Ms. Ameeta Kuttikrishnan (Appointed Advocate) for Respondent Nos.2 and 3.

CORAM : SARANG V. KOTWAL, J.
DATE : 21st NOVEMBER, 2022

JUDGMENT :

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V
NESARIKAR

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1. The Appellant has challenged the Judgment and Order dated 15/03/2018 passed by Additional Sessions Judge, Pune, in Special POCSO Sessions Case No.209 of 2015. The Appellant was convicted and sentenced as follows;

- He was convicted for commission of offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012 and u/s 377 of the Indian Penal code so far as victim No.1 was concerned and was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer simple imprisonment for three months.
- He was convicted for commission of offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012 and u/s 377 of the Indian Penal code so far as victim No.2 was concerned and was sentenced to suffer rigorous

imprisonment for 10 years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer simple imprisonment for three months.

- Both the substantive sentences were directed to run concurrently.
- The Appellant was given set off u/s 428 of Cr.P.C.
- Out of fine amount Rs.7,000/- were directed to be paid to each of the victims.

2. The prosecution case is that the victims and the Appellant were residing in the same vicinity. The first victim was 8 years of age and the second victim was 9 years of age at the time of incident. On 04/04/2015 the Appellant took them to his room under the pretext of giving them chocolate and performed unnatural sex and thus committed the offence alleged against him.

3. The FIR was lodged on 08/04/2015 by mother of one of the victims. The Appellant was arrested on 08/04/2015 and since then he is in custody. The investigation was carried out. Both the victims were sent for medical examination. Statements of witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. The trial was conducted before the Special Court and at the conclusion of the trial the Appellant was convicted and sentenced as mentioned earlier.

4. During trial the prosecution examined 7 witnesses including two victims, the first informant, Pancha for Arrest and Spot Panchanama, Medical Officers conducting medical examination and the Investigating Officer. The defence of the Appellant was specific as he answered in the examination u/s 313 of Cr.P.C. It is reproduced in his own words as follows ;

“Both victims used to beat me, used to throw dirty water on me while reading Namaz. They used to tease me like Kalya, Dholya while going. I

complained their parents about above act of victims. Therefore false case is filed against me. On the day of incident victim boys beat me. I used to go work at 7.00 a.m. and used to return at 8.00 p.m.”

5. Learned Judge believed the prosecution evidence and ultimately convicted the Appellant.
6. Heard Ms. Tahera Abdul Rashid Qureshi, learned counsel for the Appellant, Ms. Ameeta Kuttikrishnan, learned counsel for Respondent Nos.2 and 3 and Mr. S. R. Agarkar, learned APP for the State.
7. P.W.1 was the first victim. At the time of deposition he was 11 years of age. He has deposed that in the year 2015 he was studying in 4th standard. He did not remember his date of birth. He referred to the Appellant as ‘Marwadi Uncle’ residing near him. The Appellant used to come to his house to take tiffins. P.W.1’s mother used to make tiffins. P.W.1 has further deposed that the Appellant used to treat him and the second

victim in bad manner. He has deposed that the Appellant used to call both the victims to his house. He used to bolt the door from inside. The he used to remove pants of both the victims and used to remove his pant. He further deposed that the Appellant used to put his private part in their mouth and then he used to send them back. PW.1 has further deposed that he narrated this fact to his mother. The Appellant used to give chocolate to the victims. After that the police came to their house and recorded his statement. At the time of recording of statement his mother was present. PW.1 was taken to Sassoon hospital for examination. He gave history to the Doctor. He identified the Appellant in the Court. PW.1 deposed that the Appellant did those acts on 2-3 occasions.

In the cross-examination he could not explain as to why it was not mentioned in his police statement that the Appellant did those acts on 2-3 occasions. Significantly he admitted that the Appellant used to scold him and they had got angry with the Appellant. PW.1 also admitted that they used to

tease him and go away and at that time the Appellant used to shout at them. Once he had also beaten them and therefore they were having grudge against the Appellant.

8. P.W.2 was the second victim. He has deposed that at the time of his deposition, he was 10 years of age. He has deposed that he was studying in the 2nd standard. He has given his birth date as 27/12/2007. He knew one Marwadi Uncle, who resided near their house. He used to call him and the first victim to his house and give chocolate. After calling them to his house he used to remove their pants. He has then described the incident in the same manner as the description given by P.W.2. However, importantly he has stated that the said incident took place with him only once. When he went back to his house he had fever. He narrated the incident to his mother. After that the police came to his house and recorded his statement in the presence of his mother. He was sent for medical examination. He has identified the Appellant as Marwadi Uncle.

In the cross-examination he admitted that from time to time they used to tease the Appellant and used to run away. So he used to scold them. He denied that the Appellant used to beat them. However he admitted that since the Appellant used to shout and scold them, they were having grudge against him.

9. P.W.6 was the mother of P.W.2. She has deposed that P.W.2 was 8 years of age at the time of incident. His date of birth was 27/12/2007. P.W.6 knew the Appellant as he resided near them on rent. The incident had taken place in the year 2015. P.W.1 and P.W.2 were suffering from fever. P.W.6 took P.W.2 to one hospital of Nikam at Paud Phata. P.W.2 was frightened. She made enquiries with him. At that time he told her that when they were playing outside their house, the Appellant called both the victims in his house for giving chocolate and then he committed the act as described by the P.W.1 and P.W.2. She identified the Appellant in the Court. P.W.6 then had a discussion with P.W.1's mother, who told P.W.6 that she also learnt about the incident from P.W.1 and he was also suffering from fever. Then P.W.6

lodged the FIR against the Appellant with Kothrud police station. The FIR is produced at Ex.35.

In the cross-examination she deposed that she learnt about the incident on 06/04/2015 from P.W.2 and the report was filed by her on 06/04/2015. In the FIR it was mentioned that the incident had taken place on the previous Saturday though her deposition does not mention it. In the charge framed against the Appellant the date of incident is mentioned as 04/04/2015.

10. P.W.3 Sumit Sunil bangale was a Pancha for Spot Panchanama produced at Ex.19 and for Arrest Panchanama of the Appellant, which is produced at Ex.20. Both these Panchanamas were conducted on 08/04/2015. He deposed that he knew the Appellant. He knew the victims as they were residing in that area. When he went to the spot after hearing noise, the victim's mother told him about the incident. He has deposed that he enquired with the Appellant about the incident and the Appellant replied that he had committed the act by mistake.

In the cross-examination he admitted that his police statement did not mention the fact that he went to the spot.

11. P.W.4 Dr. Abhijit Jagdale has conducted the medical examination of both the victims. He has deposed that he had examined both the victims on 08/04/2015. On examination of both these victims he found that there was no injury in peri-anal region and on whole body of either of the victims. However, still he opined as per history and clinical examination, possibility of penetrative oral sexual intercourse could not be ruled out. There was no evidence of injuries to anal or peri-anal region. However attempt of penetrative anal sexual intercourse could not be ruled out according to him.

12. P.W.7 Vijay Jadhav was an Associate Professor, Forensic Medicine Department, Sassoon Hospital, Pune. He had also examined both the victims. He also did not see any external injury. There was no evidence of any injury to anal or peri-anal region. There was no evidence of any bleeding or discharge from

anus. In spite of those observations in the clinical observation, he still opined that an attempt of penetrative anal sexual intercourse could not be ruled out.

13. P.W.5 API Jagannath More was the Investigating Officer. He was attached to Kothrud police station. He had investigated the offence which was registered vide C.R.No.173/2015 at that police station. He has deposed about conducting the spot panchanama, collecting medical report, sending nails, blood samples and swabs to Chemical Analysis Laboratory at Pune and then filing of the charge-sheet.

This was the prosecution evidence.

14. Learned Judge believed the prosecution evidence and disbelieved the defence taken by the Appellant and then convicted and sentenced the Appellant as mentioned earlier.
15. Learned counsel for the Applicant submitted that the Appellant has given reason for his false implication and that

reason is accepted by both the victims in their cross-examination; though the victims have not accepted that it was a case of false implication. But they have accepted that they were holding grudge against the Appellant. According to learned counsel, the prosecution did not lead evidence of any independent witness who could have seen both the victims going to the house of the Appellant. According to her, the incident could not have taken place because they were two victims and they could have easily run away or could have easily raised shouts. There was serious contradictions between the evidence of both the victims as the second victim P.W.2 has deposed that the said incident had taken place only once and P.W.1 had deposed that it had taken place on 2-3 occasions. No specific dates are mentioned by either of the victims. The FIR is lodged belatedly. No explanation is offered. The mother of the P.W.1 is not examined. There is no evidence to show that P.W.2 and P.W.1 had fever after the incident. The medical evidence does not support the prosecution case.

16. Learned APP as well as learned counsel for the Respondent No.2 submitted that both the victims were minors and there is no reason to disbelieve them. In such cases delay in lodging FIR does not really matter. Since the incident had taken place a few days earlier, their medical examination did not show anything of significance.

17. I have considered these submissions. In this case both the medical officers had opined that attempt to commit penetrative anal sexual intercourse was not ruled out and the possibility of oral sex was not ruled out. It is not supported by the clinical examination. Both these medical officers have not given reason for their opinion in the absence of injuries or other indications in the clinical examination. Both these medical officers have categorically deposed that there were no signs of injuries which would suggest that the victims were subjected to the act as complained by them. In spite of absence of injuries or any other signs, both the Medical Officers have given opinion in respect of a vague possibility regarding the incident. These opinions are not supported by any material whatsoever.

18. Learned APP and learned counsel for Respondent No.2 also could not submit as to how this medical opinion could have been arrived at by both P.W.4 and P.W.7. This evidence does not show any corroborative material in the form of injury or signs on the persons of the victims.

19. This leaves the evidence of both the victims for serious consideration. There is major discrepancy between the evidence of P.W.1 and P.W.2. P.W.1 has deposed that this incident had taken place on 2-3 occasions whereas P.W.2 has deposed that it had taken place only once. This is important. If those incidents had occurred more than once, then P.W.2 would not have failed to mention it. According to the prosecution case and both these witnesses, they were subjected together for this act by the Appellant. Therefore there could not have been such major discrepancy in their evidence.

20. As far as the incident after which the FIR was lodged is concerned, no dates or particulars are given by either of the victims. Both of them had attained the age of understanding at

least to give dates. That was not done. But neither of the victims has deposed about date or day of incident. P.W.1's mother is not examined. She could have corroborated the version of P.W.6 and P.W.1. The prosecution has not brought any evidence on record to show that both the victims were suffering from fever prior to lodging of the FIR. This is important because P.W.6 has deposed that P.W.2 was taken to a hospital for treatment of his fever and only since his fever was not being controlled, she enquired with P.W.2. Therefore in the context of the case the fact that P.W.2 was suffering from fever assumes importance and prosecution could have easily brought some evidence in that behalf on record.

21. There is substance in the submission of learned counsel for the Appellant that the incident could not have taken place in the manner in which it is described. According to the prosecution case and the evidence of P.W.1 and P.W.2; both of them were taken together by the Appellant to his house. It is not their case that either of the victim was tied or was confined. Therefore if one of them was being subjected to this act, the

other one was free to raise shouts, to go outside or at least make an attempt to get help. The evidence does not show that either of the victims did that. This can be seen in the light of the admission given by the both the victims that they used to tease the Appellant and they used to run away and that they were having grudge against him. It is also difficult to believe that if they were entertaining grudge against him and if they were on these bad terms, then the victims would go to his house.

22. As far as the evidence of P.W.3 is concerned, he is basically examined as Pancha for arrest and spot panchanama. His evidence is vague. He made enquiries with P.W.6 - mother of one of the victims. But his interaction with the Appellant and the Appellant's alleged admission is not mentioned by P.W.6 in the FIR, particularly when she was always present at the spot. Therefore his evidence is not trustworthy. The evidence also shows that the mother of one of the victims had told him the incident. Therefore his evidence also does not help the prosecution case as far as the incident is concerned.

23. In this background, the defence taken by the Appellant is reliable. It is particularly supported by the admissions given by P.W.1 and P.W.2. They have admitted that they used to tease him and run away and that they were holding grudge against him. Thus sufficient doubt is created about the prosecution case and the Appellant has been successful in rebutting the presumption against him based of the prosecution evidence itself.

24. Considering all these aspects I do not feel it safe to maintain the conviction and sentence. The prosecution has failed to prove its case beyond reasonable doubt. Hence the Appeal deserves to be allowed and the Appellant is entitled for acquittal.

25. Hence, the following order :

ORDER

- (i) Appeal is allowed.
- (ii) The Judgment and Order dated 15/03/2018 passed by Additional Sessions Judge, Pune, in

Special POCSO Sessions Case No.209 of 2015, is set aside.

- (iii) The Appellant is acquitted of all the charges.
- (iv) He is directed to be released forthwith if not required in any other case.
- (v) Appeal is disposed of accordingly.

(SARANG V. KOTWAL, J.)