

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 972 OF 2021

Royston Xavier Parera	]	
Age 41 years, Occ. Service	]	
R/at. BIT, Block No.2,	]	
Room No. 42, Vithal Chavan Marg,	]	
Parel, Mumbai.	]	... Appellant

V/s.

1. The State of Maharashtra	]	
At the instance of Bhoiwada Police Station	]	
Vide C.R. No. 320/2015	]	
2. Victim in CR No.320/2015	]	... Respondents

Ms. Manisha A. Devkar, Appointed Advocate for Appellant.

Mr. S.S. Hulke, A.P.P. for Respondent No.1-State.

Mr. Pawan Mali, Appointed Advocate for Respondent No.2

CORAM : A.S. GADKARI, J.

DATE : 18th July 2022.

ORAL JUDGMENT :

1. Appellant has impugned Judgment and Order dated 8th May 2019 passed by the learned Special Judge under POCSO Act, Greater Mumbai in POCSO Special Case No. 585 of 2015 in C.R. No. 320 of 2015 dated 27th September 2015 registered with Bhoiwada Police Station, Mumbai, convicting

him under Sections 4 & 10 of The Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and under Section 376(2) of The Indian Penal Code (for short, 'I.P.C.') and is sentenced to suffer maximum rigorous imprisonment for 10 years and to pay a total fine of Rs.27,000/-.

2. Heard Ms.Devkar, learned Advocate appointed by High Court Legal Services Committee, Mumbai to represent and espouse the cause of Appellant, Mr.Hulke, learned A.PP for Respondent No.1-State and Mr.Mali, learned Advocate appointed by High Court Legal Services Committee, Mumbai to represent Respondent No.2. Perused entire record.

3. In the present case, it is an admitted fact on record that, the date of birth of victim is 23rd July 2001 and she was 'child' within the meaning of Section 2(d) of POCSO Act on the date of lodgment of present crime. With a view to protect identity of victim and in consonance with the provisions of Section 228(A) of I.P.C. and Section 33(7) of POCSO Act, the facts and/or details disclosing her and/or her close relatives identity is herein after avoided.

4. It is the prosecution case that, on 27th September 2019 i.e. date of lodgment of crime, the victim (PW-1) was 15 years old and was studying in 9th standard in Auxilium Convent School at Wadala, Mumbai. The victim along with her parents was residing in Room No. 51 in the building. Appellant along with his wife was staying in Room No.42 on the same floor of the said

building. Appellant was having a dog by name 'Scotch'. The victim used to visit the house of Appellant to play with his dog. On 16th June 2015 at about 6.30 pm, Appellant was alone in his house and thereafter he called victim to his house and inappropriately touched her breast. When the victim resisted him, Appellant threatened her that if the victim tells said fact to her mother she will not believe in the victim. Appellant used to call victim at his house when his wife Ana had been to her work and his mother was in kitchen. On 23rd July 2015 at about 6.30 pm Appellant called victim in his house by whistling and was inappropriately caressing her, which was noticed by her mother (PW-2). The mother of victim called her outside and slapped her. The said act of Appellant continued till 31st July 2015. That on 26th September 2015 victim studied late in the night as she was having exams. 27th September 2015 was a Sunday. Victim could not get up early to go for mass prayer in the Church. At about 6.30 am her mother and father went for prayer in the Church by locking the door of their house from outside, leaving the victim alone at home. Spare keys of the house were kept in the house of Appellant. There was a common toilet outside the room. As the victim wanted to go to washroom, she called Ana's father to open the door. Ana's father did not come, but Appellant came with the keys and opened door. Victim questioned him as to why he came, to which Appellant answered that Ana's father had sent him. Victim thereafter went to washroom and came back.

Appellant was sitting in the house of the victim on the bed and the lights were switched off. Victim kept bucket in the kitchen, washed her hands and put on lights of her kitchen. She asked Appellant to go out of the house, however Appellant closed the door of the house from inside. Appellant thereafter lifted victim and made her lie on the bed and by removing her clothes, committed an act as defined under Section 3(a) of POCSO Act. Appellant thereafter told the prosecutrix to have a wash and went by locking the door. Prosecutrix followed instructions of Appellant. As the prosecutrix was scared, she immediately gave a phone-call to her friend, namely Vijay Pawar (PW-4). He (PW-4) told her that, she may inform the said fact to her mother. Victim was trembling, crying and was tense. She noticed that, her immediate opposite door neighbour Smt.Andrey Moniz (PW-3) was there and told her to come. Prosecutrix found extra set of keys in her house, which she gave to Smt.Andrey Moniz (PW-3), who opened the door immediately. The victim told entire incident to Smt.Andrey Moniz (PW-3). As the victim was trembling Smt.Andrey Moniz (PW-3) took out holy water from the aulter and applied it on the forehead of the victim and told her to relax.

The parents of victim came back at around 7.30 am. They saw Smt.Andrey Moniz (PW-3) sitting at their house. Smt.Andrey Moniz (PW-3) asked the victim to told the said incident to her mother. As the victim was not in a position to told the said fact to her mother, Smt.Andrey Moniz (PW-3)

told it to her mother. Mother of victim immediately went to the house of Appellant, questioned him as to what he did. Initially Appellant declined, by saying he did not do anything. However, the father of victim beat him and thereafter he confessed that he did the said act with victim.

5. Mother of victim called police, Appellant was apprehended and taken to the Police Station. At Police Station PSI Pravin Daingade (PW-6) was on duty. The statement of victim was recorded by Women PSI Smt.Nayna Jadhav (PW-7), which was treated as First Information Report. PSI Pravin Daingade thereafter conducted Spot Panchanama i.e. scene of offence panchanama (Exh.23) and also drew Sketch of spot of incident (Exh.23-A) in presence of Devendra Mane (PW-5). PSI Pravin Daingade seized clothes of victim by effecting Seizure Panchanama (Exh.25) dated 27th September 2015. The clothes of Appellant were seized by effecting Panchanama (Exh.27). Prosecutrix was referred for medical examination to Lokmanya Tilak Municipal Medical College and Municipal General Hospital, Sion, Mumbai. Dr. Rajesh Dere (PW-9) examined victim and prepared Medical Report (Exh.33-colly). Further investigation was carried out by Police Inspector Sanjay Naik (PW-8). After receipt of Forensic Reports from the Laboratory, PW-8 submitted chargesheet before the Special Court.

6. Trial Court framed charge below Exh.6 for the offence punishable under Section 376(2) of IPC and under Sections 6, 10 & 12 of POCSO Act.

The contents of charge were read over and explained to Appellant, to which he pleaded not guilty and claimed to be tried. The defence of Appellant was of total denial and false implication. He pleaded innocence. It is his further defence, as can be gathered from the cross examination of material witnesses and as answered to question No.87 in his statement recorded under Section 313 of Cr.P.C. that, before marrying Ana, the financial status of Ana's family as well as victim's family was of lower middle class. After his marriage with Ana, the financial status of his in-laws was improved because of his earnings. However, the victim family's financial status remained same as was earlier. The victim's family members therefore were jealous of him and his in-laws and therefore the relation between said two families were not good. That due to the upgraded financial status of his in-laws from lower middle class to upper middle class and due to the handsome earnings of Appellant, out of jealousy and revenge the victim's family had lodged a false case against him.

7. Prosecution examined in all 9 witnesses in support of its case, namely, (i) Victim (PW-1); (ii) Mother of victim (PW-2); (iii) Smt.Andrey Moniz (PW-3), neighbour of victim; (iv) Vijay Pawar (PW-4), friend of victim; (v) Devendra Mane (PW-5), panch to Spot Panchanama (Exh.23); (vi) PSI Pravin Daingade (PW-6), conducted initial stages of investigation; (vii) WPSI Smt.Nayna Jadhav (PW-7); (viii) PI Sanjay Naik (PW-8), Investigating Officer, completed investigation and submitted chargesheet; and (ix) Dr.Rajesh Dere

(PW-9), examined the victim, proved Medical Report (Exh.33-colly).

After recording of evidence of prosecution witnesses, Trial Court recorded statement of Appellant under Section 313 of Cr.P.C. (Exh.35). Trial Court has convicted and sentenced Appellant by its impugned Judgment and Order, as noted hereinabove.

8. Ms.Devkar, learned Advocate for Appellant submitted that, there are material inconsistencies in the evidence of victim (PW-1), her mother (PW-2) and neighbour Smt.Andrey Moniz (PW-3). She submitted that, Appellant has brought on record various omissions and contradictions, which belies the version of prosecutrix of the act, alleged to have been committed by Appellant on 27th September 2015 between 6.30 am to 7.00 am in the house of the victim. She submitted that, the alleged extra judicial confession given by Appellant to Smt.Andrey Moniz (PW-3) has been proved to be an omission in the cross-examination of the said witness. She submitted that, the extra judicial confession alleged to have been given by Appellant to mother of victim (PW-2) and Smt.Andrey Moniz (PW-3) have not been proved by the prosecution. That, the cumulative reading of medical reports clearly indicates that, no offence as defined under Section 3(a) and/or 3(b) of POCSO Act has been committed by Appellant. That, Medical Officer did not find any injury on the private part of victim, which is not supportive of the alleged sexual assault on the victim by Appellant. She submitted that, there was every reason for the

family members of victim to falsely implicate the Appellant in the present crime. That, no stains and/or any other incriminating material found on the clothes of victim by the experts of F.S.L., which also suggests that, Appellant did not commit any act as alleged against him. She therefore prayed that, the Appellant may be acquitted from the charges levelled against him by allowing present Appeal.

9. Per contra, Mr.Mali, learned Advocate appointed to represent Respondent No.2 vehemently opposed the appeal. He submitted that, the evidence of victim is a direct piece of evidence and would fall within the purview of Section 60 of The Evidence Act. He submitted that, the evidence of victim does not require further corroboration, as the said witness is fully reliable and trustworthy. That, Appellant had given extra judicial confession to the mother of victim (PW-2), which is not disturbed and/or shaken in her cross-examination. He submitted that, the evidence of medical documents, which are proved by Dr.Rajesh Dere (PW-9), clearly suggests sexual assault on victim and Appellant is the culprit of the said crime. He therefore prayed that, present appeal may be dismissed.

10. Mr.Hulke, learned A.P.P. supported the arguments of Mr.Mali, learned Advocate for Respondent No.2 and submitted that, the evidence of victim (PW-1), mother of victim (PW-2) and Smt.Andrey Moniz (PW-3), neighbour of victim, is fully reliable. He submitted that, immediately after the

alleged incident, victim confided it with PW-3, which clearly discloses that, victim had suffered ordeal at the hands of Appellant. He therefore prayed that, present appeal may be dismissed.

11. Victim in her examination-in-chief has stated the facts which are recorded in para (04) hereinabove and for the sake of brevity, repetition of it is hereby avoided. Mother (PW-2) of victim has fully corroborated the version of victim on all counts. She has stated that, after she came back from Church to home and after hearing the ordeal faced by victim, she immediately called Appellant to her house, whereupon he initially said sorry. Her husband therefore beat him. Appellant was telling her husband not to call police. He admitted of committing an act of insertion of his penis in vagina of victim for one minute only and thereafter he said sorry. This extra judicial confession of Appellant has gone unchallenged in cross-examination of PW-2, though it is contended by learned Advocate for Appellant that the said extra judicial confession by Appellant that 'he inserted his penis in victim's vagina for one minute only' is an omission. A minute perusal of cross-examination and in particular para No.20 thereof would clearly indicate that, it is not an omission and PW-2 has explained it to the Court that, the said version mentioned in her statement by the police is not as per her words. That is all and nothing more.

12. Smt.Andrey Moniz (PW-3) is the neighbour. Her house is situated just opposite to the house of victim. After Appellant committed the alleged act

with the victim, locked the door and went away; victim had called Smt.Andrey Moniz (PW-3) and gave her a duplicate key set to open the door. Victim had confided the act of her ravishment to PW-3. This witness has supported the evidence of victim (PW-1) and mother of victim (PW-2) on all its counts. Her contention with respect to extra judicial confession given by Appellant in her presence cannot be accepted, because in her cross-examination in para No.9, she has admitted that what Appellant had said to the mother of victim was not heard by her.

13. Vijay Pawar (PW-4) is a friend of victim to whom she had given a phone call immediately after Appellant locked the door from outside and left victim inside her house. He has stated that, he has received a phone-call at about 7.00 am from the victim and she had sought his help. Victim had told him that, one Parera residing near her house had raped her and whether PW-4 can help her. Victim was crying. PW-4 therefore advised her to tell her mother and thereafter the victim disconnected phone. In his elaborate cross-examination, nothing beneficial to Appellant has been brought on record. The testimony of PW-4 establishes a vital circumstance in the entire chain of events. That immediately after commission of offence by Appellant, victim had given him a call at about 7.00 am. Though it is the settled position of law that, the testimony or evidence of victim in a crime of rape does not require corroboration, the evidence of PW-3 and PW-4 duly corroborates the events

which took place immediately after Appellant left the victim inside the house by locking its door from outside.

14. This leads me to deal with the medical evidence. Dr.Rajesh Dere (PW-9) was a Professor of Forensic Medicine at Sion Hospital. He has proved the medical reports (Exh.33-colly). Perusal of medical reports clearly suggests that, there was penetrative assault on the victim which had caused 'minimal redness present in right side of Labia Minora' and PS/PV examination of victim revealed that, 'white, sticky discharge was present in the vagina'.

15. Hon'ble Supreme Court in the case of *Ranjit Hazarika Vs. State of Assam, reported in (1998) 8 SCC 635*, has held that, non rupture of hymen or absence of injury on victim's private parts does not belie her testimony as she nowhere stated that she bled per vagina and her statement remained virtually unchallenged in cross-examination. It is further held that, to constitute rape penetration, however slight is sufficient. In the case of *Aman Kumar & Ors. Vs. State of Haryana, reported in AIR 2004 SC 1497*, the Hon'ble Supreme Court has held that, the evidence of prosecutrix in a case of an offence of rape stands at higher pedestal than injured witness and needs no corroboration in the same. In the case of *State of Himachal Pradesh Vs. Shree Kant Shekhari, reported in AIR 2004 SC 4404 : (2004) 8 SCC 153*, the Hon'ble Supreme Court has held that, the prosecutrix is not accomplice in crime of rape.

16. In the case in hand, the prosecutrix has in detailed narrated the penetrative sexual assault committed by Appellant and the ordeal faced by her on 27th September 2015. As noted earlier, it is an admitted fact on record that, victim was a 'child' on the date of lodgment of present crime. Perusal of entire evidence on record reveals that, the prosecution has proved all the charges framed against Appellant beyond reasonable doubt. It is to be noted here that, after a full fledged trial, Trial Court has held Appellant guilty for an offence punishable under Section 6 of POCSO Act. Perusal of impugned Judgment clearly indicates that, the Trial Court has not committed any error either in law or on facts, while passing it.

There are no merits in the Appeal.

Appeal is accordingly dismissed.

17. Before parting with the Judgment, this Court places on record a word of appreciation for the efforts put in by learned Advocates Ms.Devkar and Mr.Mali, both appointed by High Court Legal Services Committee, Mumbai, to represent Appellant and Respondent No.2 respectively, as they were thoroughly prepared in the matter and rendered proper assistance to the Court.

[A.S. GADKARI, J.]