

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

CRIMINAL APPEAL NO. 1281 OF 2018

Rahul Rajendra Gondhali	..Appellant
Versus	
The State of Maharashtra & Anr.	..Respondents

Mr. Aniket Vagal a/w. Kunal Pednekar for Appellant.
Smt. M. R. Tidke, APP for State/Respondent No.1.
Mr. Amit Mane (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 20th SEPTEMBER 2022

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 22/12/2017 passed by Designated Judge under Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO') Thane, passed in Special Case No.128 of 2015. 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.376(2)(i) of I.P.C. and was sentenced to suffer R.I. for 10 years and to pay a

fine of Rs.25000/- and in default of payment of fine to suffer S.I. for two months.

- ii) The Appellant was convicted for commission of offence punishable U/s.376D of I.P.C. and was sentenced to suffer R.I. for 20 years and to pay a fine of Rs.25,000/- and in default of payment of fine to suffer S.I. for two months.
- iii) The Appellant was convicted for commission of offence punishable U/s.342 of I.P.C. and was sentenced to suffer R.I. for 6 months and to pay a fine of Rs.1,000/- and in default of payment of fine to suffer S.I. for 5 days.
- iv) The Appellant was convicted for commission of offence punishable U/s.4 of POCSO, but in view of Section 42 of POCSO no separate sentence was imposed for this offence.
- v) The Appellant was convicted for commission of offence punishable U/s.8 of POCSO, but again in

view of Section 42 of POCSO no separate sentence was imposed for this offence, as the sentence was already imposed for commission of offence punishable U/s.376(2)(i) of I.P.C.

vi) The Appellant was convicted for commission of offence punishable U/s.12 of POCSO, but again no separate sentence was imposed for this offence.

All the substantive sentences were directed to run concurrently. The Appellant was granted set off U/s.428 of Cr.p.c. The fine amount, if recovered, was directed to be paid to the victim as compensation.

2. Heard Shri. Aniket Vagal, learned counsel for the Appellant, Smt. Tidke, learned APP for State/Respondent No.1 and Shri. Amit Mane, learned Appointed Advocate for the Respondent No.2.

3. The prosecution case is that the victim who was about 10 years and 7 months of age at the time of incident dated

12/04/2015 was staying with her maternal grand parents and Aunt. On 12/04/2015, in the evening she was taken to the house of the appellant by other accused who was a minor at that time. He is mentioned as 'R' in this case. There the Appellant committed the act which would fall within the meaning of penetrative sexual assault. Since two accused were involved in this case, it also falls within the meaning of 'gang rape' as defined U/s.376D of I.P.C. The victim was threatened, therefore, she did not disclose the incident to anybody. In the evening her maternal aunt came to know about some incident. She confronted the applicant, but she did not know the exact seriousness of the incident. On the next day in the morning the victim told the entire incident to her grand-mother and mother. Her grand-mother confronted the Appellant. She slapped him in front of many people and then lodged her F.I.R. vide C.R.No.169 of 2015 at Kalwa police station. The investigation was carried out. The victim was sent for medical examination. The Appellant was arrested. The spot panchanama and panchanama of seizure of clothes were carried out. At the conclusion of the investigation the charge-sheet was filed. The case was committed

to the Special Court under POCSO.

4. During trial, the prosecution examined 10 witnesses including the victim, her grand-mother, her mother, Medical Officer, panchas and the Investigating Officers. The defence of the appellant was of total denial. In addition, it was his case that, on 12/04/2015 a small scuffle took place between him and the victim on account of badminton ground. The victim's Aunt confronted the Appellant and slapped him. The matter was closed, but on the next day the grand-mother of the victim came to his house and assaulted him. She threatened him and told him that she would teach him a lesson and then she lodged this false case against him. Learned Judge believed the prosecution evidence and convicted and sentenced the appellant as mentioned earlier.

5. The main evidence in this case is that of the victim. She was examined as PW-3. She has deposed that, she was born on 05/09/2004. She produced her birth certificate on record at Exhibit 28. She knew the appellant and 'R'. Both of them were residing in her society. The Appellant was not produced before the

trial court at the time of her deposition, but his identity was not disputed by the defence. She has deposed that the incident had occurred on 12/04/2015. She was playing near her building from 5.30p.m. to 7.30p.m. At that time, 'R' came there and told her that the Appellant's mother was calling her. She went to the Appellant's house. The Appellant himself was standing on the staircase. She entered his house. The Appellant then closed the door of his flat and switched off the light. The Appellant forced her to sleep on the sofa. He removed her clothes. The Appellant and 'R' then removed their clothes. Thereafter, both of them slept over her. She has further deposed that the Appellant forced her to drink white coloured discharge. Thereafter, 'R' asked her to shake his private part. The Appellant also asked her to shake his private part. (It is mentioned in the original Marathi deposition). When the victim was leaving, 'R' gagged her mouth and the Appellant caught her hands. In the meantime, victim's friends came at the appellant's flat and inquired about her with the Appellant. The Appellant told them that the victim was not in the house. She told the Appellant to leave her and told him that she would tell this to her mother. At

that time, the appellant told her to give some excuse that something had happened to her brother and asked her to go from the terrace.

6. The victim told all these facts to her friend. She was frightened and, therefore, did not tell these facts to anybody except her friend. When her mother returned on the next day in afternoon she narrated this fact to her. The police recorded her statement.

In the cross-examination, she deposed that she was in the flat of the Appellant for about 30 minutes. She could tell about her friends who had come to call her at the appellant's place. After the incident when she went home, that time, her maternal aunt was in the house. Her grand-mother was in her shop. She could not tell this to her mother when her mother had returned home in the night, because she had gone to sleep early. She did not tell about this incident to anybody in the house on 12/04/2015. On that day when she returned home, her Aunt spoke with her. She had told her Aunt that there was some quarrel while playing

badminton. Then her Aunt went to the Appellant's house and confronted him. The Appellant told her that, there was no quarrel and that PW-3 was lying. She further deposed that, she told about the actual incident first to her mother and then within a short time to her grand-mother. After that, they went to the police station. Her grand-mother first dragged the appellant to the ground floor. People from the society gathered there. Her grandmother questioned the Appellant about the incident as told by PW-3. On 13/04/2015 she was in the police station till 6.30p.m. from about 1.30p.m. Her statement was recorded. The police made inquiries with her for 1 or 2 hours. The inquiries were made by a woman police officer and it was taken down in writing by a male police officer. There were some omissions from her statement. She was asked whether she had stated before police that the appellant had told her that his mother was in the kitchen. She had also told the police that both of them slept over her. However, these facts were not mentioned in her police statement. She had also told the police in her statement that, while she was leaving, 'R' gagged her mouth and the Appellant caught her hands. She could not assign any

reason as to why those facts were not mentioned in her police statement. On 13/04/2015 she woke up at about 8.30a.m. Then she went to her grandmother's shop and then to play. She wore the same clothes from evening of 12/04/2015 to the morning of 13/04/2015. They were kept on a hanger in the bathroom. Later on, those clothes were given to the police. On 13/04/2015, clothes of all family members were washed early in the morning, therefore, she had kept the clothes on the hanger of the bathroom. She denied the suggestion that there was only a minor quarrel and scuffle on 12/04/2015 and the incident of rape had not taken place.

During cross-examination she voluntarily stated that the appellant touched his penis to her private part and tried to insert it. The appellant pressed her neck and therefore, there was a mark on her neck. The Appellant also told her to drink white discharge.

7. The other two important witnesses are PW-1 victim's grandmother and PW-2-victim's mother. PW-1-victim's

grandmother has deposed that, at the relevant time, she was residing with her husband, her daughter, son and with the victim who was daughter of her elder daughter. Both the accused were residing in the same building. One of PW-1's friend told her on 13/04/2015 that on the previous day i.e. on 12/04/2015 the victim had gone to the house of the Appellant to take badminton racket. The victim's friend then went to the Appellant's house. At that time, victim's *chappal* were outside of the appellant's flat. The victim's friend then told this to her mother who was PW-1's friend. PW-1 suspected something. She inquired with her other daughter who was victim's Aunt. She told PW-1 that she had already confronted the Appellant regarding the incident. At that time, he had told her that nothing had happened. Then PW-1 inquired with the victim-PW-3 by taking her in confidence. Then victim-PW-3 told her the incident. She told her that, when she went to the appellant's house, he removed his clothes. He told the victim to hold his private part and shake it. He slept on her. He tried to insert his private part. At that time, other accused was also there and he had caught the victim. After hearing this, PW-1 went to the

appellant's house and beat him. She took him to the ground floor and inquired with him in front of other residents. But he denied the incident. Then she went to Kalwa police station and lodged her F.I.R. The F.I.R. is produced on record at Exhibit 19. The F.I.R. was registered at 4.30p.m. In the F.I.R. the incident was described in the same manner as it is described by the victim in her deposition.

In the cross-examination of PW-1 she deposed that her younger daughter i.e. victim's aunt did not tell anything on her own. She was asked about the omission from the F.I.R. regarding the victim's friend going to the Appellant's house to inquire about the victim. She deposed that, when she was beating the appellant, at that time, 15 to 20 persons were watching from their balconies and 10 to 15 people had gathered on the ground. That was going on for 10 to 15 minutes in front of all those people. Thereafter, at about 1.00 to 1.30p.m. she along with her husband went to the police station. Before that, the victim's mother had returned home at about 12.30p.m. on 13/04/2015.

8. PW-2 was mother of the victim. She deposed that, she

returned to her mother's place at 12.30p.m. to 1.00p.m. on 13/04/2015. Her daughter-victim complained her about pain in her abdomen. When PW-2 inquired with her she started crying and then narrated the incident to her. The victim had told her that the Appellant tried to insert his private part in her private part but he was unsuccessful. Even he inserted his private part in her mouth and discharged in her mouth. She was asked to drink that discharge. When PW-2's mother (PW-1) returned home from her shop, PW-2 told her about the incident. Then she told PW-1 to go to the police station with the victim and PW-2's father and that she would follow with her brother on a two wheeler.

In the cross-examination, she deposed that the victim told her about the incident on 13/04/2015 when PW-1 was not in the house. She further deposed that, PW-3 first disclosed that incident to her and then again narrated the incident to PW-1. She deposed that, she had told the police that her daughter had mentioned that the Appellant had inserted his penis in her mouth and discharged in her mouth. She could not assign any reason as to why this particular part was not appearing in her police

statement. Her sister did not tell her about any incident till 13/04/2015.

9. PW-4 Rohan Sawant was a pancha for spot panchanama. But he did not support the prosecution case and he was declared hostile.

10. PW-6 Sangeet Desai was a pancha for panchanama regarding seizure of clothes of both the accused. The panchanama is produced on record at Exhibit 39.

11. PW-8 Nazim Shaikh was a pancha in whose presence the clothes of the victim were seized. That panchanama is produced on record at Exhibit 50.

12. The spot panchanama is produced on record through the evidence of PW-9 Dilip Randive, P.S.I.. He carried out major part of the investigation. He has deposed that, he had carried out the spot panchanama. He seized clothes. He had arranged to conduct the medical examination.

In the cross-examination, he accepted that he did not

record the statement of any of children who were playing in the society on 12/04/2015. He proved the omission from the F.I.R. regarding victim's friend making inquiry about the victim with the appellant at the time of incident. He also proved the omission from the police statement of PW-2 that her daughter had told her that the appellant had inserted his private part in her mouth and had discharged in her mouth.

13. The statement of the victim was recorded by P.S.I. Ghadge. She was examined as PW-10. She had recorded the statement of the victim in question answer form. She has deposed that the victim had not mentioned that she had told her Aunt about the incident on 12/04/2015, or that her two friends had come to the appellant's flat searching for her. She did not see any injury mark over the person of the victim. The victim had not told her that she had suffered any abrasion over her neck and wrist.

14. PW-7 Ajmuddin Mulla, P.I. had filed the charge-sheet after completion of the investigation.

15. The other important witness was PW-5 Dr. Nafisa Shaikh

who had examined the victim. She was attached to the hospital at Kalwa as Medical Officer. She had examined the victim. At the time of examination, the victim had told the history to her. On examination, PW-5 found abrasion over right wrist and over neck of the victim. Nothing abnormal was found. Her private parts were normal. Accordingly, she issued the certificate which is produced on record at Exhibit 34.

In the cross-examination, she admitted that the injury over wrist was possible while playing and that both these injuries could be self inflicted. The victim had not stated about these injuries in the history given by her. However, she denied the suggestion that she had not found any medical observation showing sexual abuse of the child. The medical certificate is produced on record at Exhibit 34. This certificate is important because it records history given by the victim in her own words as follows:

“The victim was called by ‘R’ to the Appellant’s residence and was compelled to perform oral sex and attempt of penetrative sexual intercourse was

made.”

The impression was ‘no evidence of penetrative sexual intercourse’. The articles were sent for chemical analysis. Except semen stains on the underwear of the appellant nothing much was of any significance was found. Even that particular aspect cannot be held against the appellant. Therefore, C.A. Certificates can be excluded from consideration.

16. Learned counsel for the Appellant submitted that the prosecution case is not true; it is not even probable. The important witness i.e. victim’s friend who had gone to the appellant’s flat searching for the victim was not examined. The victim’s maternal Aunt was not examined. The friend of PW-1 through whom she came to know about the incident is not examined. All the persons who had gathered when PW-1 was allegedly beating the appellant are not examined. Non examination of all these witnesses is material and adverse inference should be drawn. The victim was silent on 12/04/2015 and only on the next day she narrated the incident. This was unnatural. Her statement appears to be tutored. Her statement U/s.164 of Cr.p.c. was not recorded. The victim’s

conduct does not show that she had suffered from any such offence. There are important omissions in the evidence of PW-1 and 2. There are indications that, during recording of her evidence, after recess, suddenly some important statements were made by the victim in her deposition indicating that her deposition was based on her tutoring by her grandmother and mother. From the evidence, it appears that, at the highest there was some scuffle between the victim and the appellant and, therefore, the victim's Aunt did not take this matter any further. He submitted that, assuming some part of the deposition of the victim was true, still the offence of penetrative sexual assault as defined U/s.3 of POCSO, as well as, offence of rape as defined U/s.375 of IPC is not made out and, therefore, conviction and sentence U/s.376D of IPC is not proper. Shri. Vagal further submitted that the deposition of the victim does not show that there was any penetration or any act which would fall within the meaning of Section 3 of POCSO and U/s.375 of I.P.C.

17. Learned counsel for the Respondent No.2, as well as, learned APP opposed these submissions. According to them,

conduct of the victim was natural. She had informed her mother before anyone else. Her grandmother was also informed. The victim's case was immediately put on record through the F.I.R. and it is not an afterthought. Importantly, there are no major omissions from the evidence of PW-3-victim. The medical history was also consistent with her case.

18. I have considered these submissions. So far as, C.A. reports and other corroborative pieces of evidence are concerned, they are not really incriminating. They did not support either the prosecution or the defence and, therefore, those circumstances can safely be ignored. The prosecution case depends on the evidence of PW-1, 2, 3 and 5. There is no dispute about the victim's age. Her birth certificate is produced on record showing her date of birth as 05/09/2004. The incident had occurred on 12/04/2015, hence, she was about 10 years and 7 months of age. This particular evidence is not seriously challenged. The main thrust of argument of Shri. Vagal is that there was no penetrative sexual assault and there was no penetration as required under the aforementioned sections. For that purpose, it is necessary to reproduce those

sections. Section 3 of POCSO reads thus:

3. Penetrative sexual assault. - A person is said to commit “penetrative sexual assault” if

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- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

19. This definition is almost similar to the definition of ‘rape’ mentioned U/s.375 of I.P.C.

Section 376D of IPC defines ‘gang rape’ as under:

“376D. Gang rape. - Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that persons’s natural life, and with fine.”

20. In the present case, the argument was that there is nothing to show that there was any penetration. In this context, the evidence of the victim is important. Her words are quoted herein above while discussing her evidence. There are specific allegations that the appellant had asked her to shake his private part and had forced her to drink his white discharge. There cannot be any other interpretation of this act, but the fact that he had committed an offence as defined U/s.3 of POCSO, particularly, attracting clause (d) of Section 3 of POCSO and Clause D of Section 376 of IPC. The medical history given by the victim herself to the doctor mentions that she was compelled to perform oral sex and there was an attempt of penetrative sexual intercourse with

the victim. Learned trial Judge has observed that the penetration even to small extent would still constitute 'rape' and the learned Judge has given his reasoning in paragraph 47. He has referred to Explanation – 1 of Section 375 and has held that, even slight insertion in outer part of labia majora would constitute an offence of rape within the meaning of Section 375 of I.P.C. He has rightly observed in paragraph 48 that, since the appellant forced the victim to drink white coloured discharge from his private part, it was sufficient to draw an inference that he had penetrated his private part in her mouth. Even the victim had told her mother-PW-2 that the Appellant had tried to insert his private part in her private part, but he was unsuccessful and there is no omission from the evidence of PW-2 in respect of this statement. The victim had disclosed this fact to her mother. This evidence of PW-3 sufficiently establishes the offence of rape as defined U/s.375 of IPC and the offence of penetrative sexual assault U/s.3 of POCSO. Her version is not an afterthought. All these facts are mentioned in the F.I.R. which was lodged immediately after the disclosure. Therefore, some omissions from the evidence of PW-2 who is

mother of the victim will not help the defence because the victim's own evidence is sufficiently strong enough to attract all the ingredients of the offence for which the appellant was convicted and sentenced. There is no omission as far as, the main incident is concerned and the I.O. has not proved any such omission in his evidence in respect of statement given by the victim to the police during investigation. There is also no substance in the submission that the victim improved her version after recess during her deposition. Because, in her first part of deposition itself she had narrated the incident with sufficient details. Her injuries on neck and wrist and her omission to depose about those injuries will not make any difference to the case. The victim was merely 10 years of age at the time of incident. Nothing further could be expected from her regarding disclosure of the incident. The Appellant has not discharged his burden to disprove the case as required U/s.29 of POCSO which reads thus:

29. Presumption as to certain offences. - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or

abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

21. Therefore, I am of the opinion that the prosecution has proved the case against the Appellant beyond reasonable doubt. Since there were two accused who had actively participated in the incident, therefore, the offence would fall within the meaning of 'gang rape' as defined U/s.376D of I.P.C. and the minimum sentence prescribed under that section is for 20 years. The trial Judge has imposed minimum sentence on the Appellant and, therefore, there is no scope to reduce it.

22. Considering this discussion, I do not find any merit in the Appeal. The Appeal is dismissed.

(SARANG V. KOTWAL, J.)