

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

CRIMINAL APPEAL NO.1071 OF 2018

Kiran Shivaji More	 Appellant
Versus	
The State of Maharashtra	
another	Respondents

**....
WITH
INTERIM APPLICATION NO.1820 OF 2021
IN
CRIMINAL APPEAL NO.1071 OF 2018**

.....
Ms. Nasreen S.K. Ayubi, Advocate (appointed) for the Appellant.
Mr. S.R. Agarkar, APP for the Respondent No.1-State.
Ms. Vilasini Balsubramanian, Advocate (appointed) for the
Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.

DATE : 18th NOVEMBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 17.9.2016 passed by the Special Judge, Niphad in Special Case No.7/2014. The appellant was convicted as follows :
- i. He was convicted under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities)

Act, 1989 (hereinafter referred to as the 'Atrocities Act') and was sentenced to suffer SI for five years and to pay fine of Rs.2,000/- and in default of payment of fine to suffer further SI for three months.

- ii. He was convicted for commission of offence punishable under Section 376(2)(i) of IPC and was sentenced to suffer RI for ten years and to pay fine of Rs.51,000/- and in default of payment of fine to suffer further RI for one year. Out of the fine amount, Rs.50,000/- were directed to pay to the victim as compensation.
- iii. All the substantive sentences were directed to run concurrently.
- iv. He was granted set off under Section 428 of Cr.P.C.
- v. He was acquitted from the charges of commission of offence punishable under Section 3(2)(v) of the Atrocities Act.
- vi. The appellant was also charged for commission of offence punishable under Section 4 of the Protection of Children From Sexual Offences Act (hereinafter referred to as the 'POCSO Act'). In paragraph-49 of the impugned judgment it is mentioned that he was also held guilty of offence punishable under Section 4 of the POCSO Act. In view of Section 42 of the POCSO Act and also taking into account the sentence awarded under Section 376(2)(i) of IPC separate sentence was not awarded for commission of

offence under Section 4 of the POCSO Act.

2. The prosecution case is that the victim was about six years of age on the date of incident. Her date of birth was 27.8.2008. The incident took place on 14.9.2014. The appellant was a neighbour. On that date, in the evening the victim was playing outside her house. She was taken to a power maintenance room of a Mobile company on the terrace of the upper floor of the building. It is alleged that the appellant then committed penetrative sexual assault on her amounting to these offences. The victim was belonging to a Scheduled Caste and the appellant was aware of her caste and, therefore, the provisions under the Atrocities Act were also applicable. In the evening the victim did not have food and she told her mother that she was having pains in her private parts. On the next day, the mother while giving bath to her noticed swelling on the victim's private parts. She made enquiries with the victim. Then the victim narrated the incident to her. The victim's mother then consulted her family members and the FIR was lodged on 17.9.2014. The

investigation was carried out. The appellant was arrested on the same day and since then he is in custody. The clothes of the victim and the appellants were sent for chemical analysis and DNA testing. The statements of the witnesses were recorded. On the day of registration of FIR, the victim was sent for medical examination. After completion of investigation, charge-sheet was filed and the case was committed before the Special Court, as mentioned earlier. At the conclusion of trial, the appellant was convicted and sentenced, as mentioned above.

3. During trial, the prosecution examined four witnesses : PW-1 was the victim herself, PW-2 was her mother, PW-3 was the Medical Officer who had conducted the medical examination of the victim, and PW-4 was the investigating officer.

4. The evidence of the victim PW-1 is important. She has deposed that on the date of incident she and her elder sister were playing. At that time the appellant came there. He called her to come upstairs to play there. He took her to a room and closed the room. He asked her to remove her clothes. She removed her

clothes. He then kissed on her cheeks and pierced something in her private parts. It was painful. Then he left her. She put on her clothes and went to her house. She told her mother about the incident. She has then deposed about recording of her statement by the police and also in the Court thereafter. She identified the appellant in the Court.

In the cross-examination, hardly anything of importance was brought out on record. She denied all the adverse suggestions. Her statement recorded under Section 164 of Cr.P.C. was produced on record at Exhibit-27.

5. The victim's mother was examined as PW-2. She has deposed that on the day of the incident she had returned back from Jalgaon at around 4.30 p.m.. Her daughters were playing outside. At about 5.00 p.m. to 5.30 p.m., PW-1 came to their house from the terrace and sat on the cot. At the time of dinner, PW-1 did not eat anything. She told PW-2 that she was having pain in her stomach and in her private parts. In the morning, she was giving bath to PW-1. At that time, she saw that the victim's

private parts had turned reddish. PW-2 then made enquiries with her. At that time, PW-1 told her details of the incident and told her how the appellant committed rape. After that, PW-2's parents-in-law came to their house. On that day, there was *bandh* in their village and, therefore, they went to the police station next day and lodged FIR. The FIR is produced on record at Exhibit-29. The police referred the victim to Civil Hospital, Nashik for medical examination. PW-2's statement was recorded under Section 164 of Cr.P.C., which is produced on record at Exhibit-30. She also produced the caste certificate. It is produced on record at Exhibit-31.

In the cross-examination, she could not explain as to why it was not mentioned in her police statement that the appellant had pierced stick in her private parts though she had stated so before the Court. On the next day of the incident, the victim was sent to school as her examinations were going on. PW-2 had not accompanied the victim for medical examination. PW-2 volunteered that she had an infant child and, therefore, she

could not accompany the victim to the hospital and on that day her husband and sister-in-law accompanied the victim. She explained that because of the *bandh* she could not lodge the FIR immediately. She had gone to the police station at about 10.00 a.m. and again at 5.00 p.m. to 5.30 p.m. on 17.9.2014. The FIR is produced on record at Exhibit-29. Except for those minor omissions, the FIR substantially corroborates her evidence.

6. PW-3 Dr. Pramod Chaudhary is another important witness in this case. He had examined the victim and had found following injuries :

- i. Labia majora and labia minora were swollen and bruised.
- ii. hymen showed recent tear of multiple size with bruise, tender margin.

According to his opinion, the injuries were consistent with recent sexual assault.

In the cross-examination, he further deposed that the hymen was completely torn. He further deposed that labia majora

and labia minora could be swollen because of local trauma i.e. assault by any foreign object like stick or any other object, fall on perineum or severe infection with etching. He answered in the cross-examination that labia can be swollen depending on the force and frequency of rubbing. He produced the medical papers on record at Exhibit-40.

7. PW-4 was the Sub-Divisional Officer Shri Sandip Atole. He had conducted the investigation. He has deposed about the steps taken in the investigation.

In the cross-examination, he deposed that he did not remember on which date exactly there was bandh between 14.9.2014 to 16.9.2014.

. This was the evidence led by the prosecution.

8. The defence of the appellant was of total denial. Except accepting the fact that the victim's family belonged to the Scheduled Caste, he has not given any explanation.

9. Learned Judge at the conclusion of the trial, after

considering all this evidence, statement of the appellant and the arguments, convicted and sentenced the appellant as mentioned earlier.

10. Learned counsel for the appellant submitted that the victim's friend was playing with her when the appellant took the victim to the terrace. However, that friend had not informed the victim's mother. This is unnatural. The prosecution has not chosen to examine that friend. Therefore, adverse inference needs to be drawn. She further submitted that the incident had taken place on 14.9.2014 and the FIR was lodged on 17.9.2014. There was deliberate delay and the record shows that the FIR was lodged after much deliberation. Therefore, there is a strong possibility of concoction of false story. She further submitted that the investigating officer has not given any clear answer as to on which day the *bandh* was observed. Therefore, delay in lodging the FIR remained unexplained.

11. She submitted that PW-2's evidence shows that on the next day she had gone to the house of the appellant but she did

not make any grievance to his family members. This conduct was also unexplained.

12. Learned counsel further submitted that on the evening of the date of incident the victim had told her mother about the pains she was suffering from but the mother did not pay attention to her. This also shows that nothing had taken place because the mother had not taken the victim seriously in the evening. She further submitted that the DNA report and the CA report are not incriminating and the appellant should get benefit from that.

13. Learned counsel further submitted that the time of incident was around 5.30 p.m. and it was not possible that nobody else could have seen the appellant taking the victim on the terrace. She, therefore, submitted that the prosecution has not proved its case beyond reasonable doubt and, therefore, the appellant deserves to be acquitted.

14. Learned APP as well as learned counsel for the respondent No.2 submitted that the victim was hardly six years of age at the time of incident; and it was not possible to tutor her.

She was telling the truth and her evidence is acceptable. Her evidence is supported by the deposition of her mother i.e. PW-2. More importantly the medical officer PW-3 has described the injuries which are supporting the version of the victim. The prosecution has sufficiently proved its case beyond reasonable doubt.

15. I have considered these submissions. The deposition of the victim herself is precise and clear. She had narrated the incident with sufficient details. Her evidence is in consonance with the evidence of the Medical officer. The injuries noted by him are directly attributable to the acts committed by the appellant. The hymen was completely torn. Labia majora and labia minora were swollen. This was a result of the acts committed by the appellant. There is no other explanation coming forth. There is no reason to disbelieve PW-1 who has named the appellant. According to her, the appellant was responsible for the incident as well as for those injuries.

16. PW-2 has admitted that the victim had told her about

the pains in that evening itself but she made inquiries on the next day after observing that the victim's private parts were swollen. PW-2, the victim's mother, had narrated the incident to her husband. Only after that, the FIR was lodged. There is no force in the submission that the FIR was lodged belatedly and, therefore, the prosecution case is doubtful. The first informant i.e. PW-2 has explained that there was bandh observed in the village and, therefore, she could not approach the police immediately. In any case, in such cases, deliberation amongst family members and some delay in lodging the FIR is acceptable. It does not go to the root of the matter to destroy the prosecution case. Though the CA report and DNA report do not indicate anything incriminating, the accused cannot take advantage of this fact because based on other evidence the prosecution has proved its case beyond reasonable doubt. As rightly submitted by learned APP, on the next day the victim had taken bath and, therefore, the traces of any foreign substance would have been washed out. The mother came to know about details of the incident only at the time of giving

bath to the victim. The CA report and the DNA report not revealing anything will not matter in the facts of this case.

17. Considering all these aspects, it is clear that the prosecution has proved its case beyond reasonable doubt. There is no merit in the appeal. The appeal is dismissed. With dismissal of the appeal, nothing survives in the accompanying application and it is also disposed of.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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