

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

CRIMINAL APPEAL NO.1301 OF 2018

Vilas Shantaram Kaldhone	 Appellant
Versus	
The State of Maharashtra & Anr.	Respondents

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WITH
INTERIM APPLICATION NO.2946 OF 2021
IN
CRIMINAL APPEAL NO.1301 OF 2018

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WITH
INTERIM APPLICATION NO.1103 OF 2021
IN
CRIMINAL APPEAL NO.1301 OF 2018

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WITH
INTERIM APPLICATION NO.3138 OF 2022
IN
CRIMINAL APPEAL NO.1301 OF 2018

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Mr. Aashish Satpute, Advocate (appointed) for the Appellant.
Smt. M.R. Tidke, APP, for the Respondent No.1-State.
Smt.Manisha Devkar, Advocate (appointed) for Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.

DATE : 23rd NOVEMBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 12.4.2018 passed by the Additional Sessions Judge and Designated Judge for POCSO, Greater Bombay in POCSO Special Case No.364/2014. The appellant was convicted and sentenced as under :

- i. He was convicted for commission of offence punishable under Section 377 of the Indian Penal Code and was sentenced to suffer RI for ten years and to pay fine of Rs.20,000/- and in default of payment of fine to suffer RI for six months. On realization of fine amount, it was directed to be paid to the victim boy as compensation.
- ii. He was convicted for commission of offence punishable under Section 506 Part I of IPC and was sentenced to suffer RI for two years and to pay fine of Rs.5,000/- and in default of payment of fine he was sentenced to suffer RI for three months. On realization of fine amount it was directed to be paid to the victim boy as compensation.

- iii. The appellant was convicted for commission of offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'). He was sentenced to suffer RI for ten years and to pay fine of Rs.20,000/- and in default to suffer RI for six months. On realization of fine amount, it was directed to be paid to the victim boy as compensation.
 - iv. The appellant was acquitted from the charges of commission of offence punishable under Section 6 of the POCSO Act.
 - v. All the substantive sentences were directed to run concurrently and he was given set off under Section 428 of Cr.P.C.
2. Heard Shri Aashish Satpute, learned appointed counsel for the appellant, Smt. M.R. Tidke, learned APP for the respondent No.1-State and Smt.Manisha Devkar, learned appointed counsel for the respondent No.2.
3. The prosecution case is that the victim boy was around 17 years of age at the time of incident dated 7.5.2014. The victim's

date of birth was 10.5.1997. He was residing with his elder brother and two sisters. His parents had separated. His father had remarried and was residing at Wadala with his second wife i.e. step mother of the victim. According to the prosecution case, the victim used to help his elder brother in selling vegetables. On the day of the incident, there was some quarrel between the victim and his brother. The victim was slapped by his brother. The victim got annoyed and angry. He left his house after midnight. He was going towards his father's house at Wadala. On the way, the appellant who was riding his motorcycle enquired with him and offered to give him lift upto his father's house. The victim sat on his motorcycle. They first went to a pan-stall. The appellant then took him to a secluded spot on the terrace of a building and committed the offences which would fall within Section 377 of IPC and Section 4 of the POCSO Act. The victim was shown a knife and, therefore, he got scared. He did not resist. The appellant then gave him his phone-number. The victim had noticed a peculiar key-chain of the appellant. He had noticed his description. The victim was left somewhere near his father's house by the appellant. The victim

went home and told his father about the incident. The victim's father and the victim then went to Antop Hill police station. However, since the incident had started in the jurisdiction of the Sion police station, ultimately FIR was registered at Sion Police Station. Initially FIR was lodged vide C.R. No.00 of 2014 at Sion police station. The investigating officer was entertaining doubt whether the offence could be registered at Sion police station, but, subsequently he was convinced since the incident started in the jurisdiction of Sion police station, the FIR was registered at the same police station vide C.R. No.155/2014. Initially the first C.R. No.00/2014 was registered on 7.5.2014 and the offence vide C.R. No.155/2014 was registered on 13.5.2014. In the meantime, the victim was sent for medical examination. He, initially because of fear, could not show the spot but after two or three days he gave his supplementary statement and showed the spot. The police recorded the spot panchnama. They recorded his supplementary statement. The investigation was carried out. The appellant was arrested on 20.5.2014. His key-chain was recovered. The victim was called to the police station and was shown the key-chain. He

identified the key-chain. The test identification parade was held on 5.7.2014 in Arthur Road Prison. At that time the victim identified the appellant. The blood sample and other articles were sent for chemical analysis and DNA testing. The DNA report showed that the semen stains on the underwear of the victim matched with the DNA profile of the appellant. At the conclusion of the investigation, charge-sheet was filed and the trial was conducted before the Special Judge, as mentioned earlier.

4. The defence of the appellant was of total denial but some part of the incident he admitted. He admitted that the victim was with him in the night though he denied the actual incident. After considering the prosecution evidence and the defence taken by the appellant and after hearing the arguments, learned Judge convicted and sentenced the appellant as mentioned earlier. Learned Judge observed that since the appellant had admitted that the victim was with him in the night, the question of identification did not survive. He relied on the medical evidence and the DNA report to hold the appellant guilty of the offence.

5. The prosecution examined eleven witnesses during trial. They included the victim, his father, panchas, investigating officer, Medical Officers and the Naib Tahsildar who had conducted the test identification parade.

6. The main evidence in this case is, of course, that of the victim himself, who was examined as PW-1. He has deposed that his parents had separated and his father had got married with his second wife. The victim was staying at Sion with his elder brother and two sisters. His father was staying at Wadala with his second wife. The incident took place on 7.5.2014 in the night. On 6.5.2014, he had fought with his brother and had left his house for going to his father's house at Wadala. He left his house at 1.30 a.m. on 7.5.2014. His father was staying about fifteen minutes walking distance from his house in Sion. When he reached Shanmukhananda Hall, the appellant came on his two-wheeler. He enquired with the victim where he was going. PW-1 told him that he was going to his father's house at Wadala. The appellant offered to drop him there. He told PW-1 that he was a police personnel.

PW-1 then sat on his motorcycle. The appellant did not stop his vehicle near the house of the father. PW-1 instead took him to a pan-stall in Matunga. The appellant had tea and smoked cigarette. The appellant was talking with his friends there. While waiting near the two-wheeler, PW-1 observed the key-chain with the name of the appellant on it. After that the appellant took him to a building named 'Kohinoor'. The area was deserted. The appellant showed him a knife and threatened him. He took PW-1 to the terrace of the building and at the point of knife committed the offence. He forced the appellant to hold his private parts in his hand and also forced him into oral sex. Then he committed the act which would amount to unnatural carnal intercourse. He again threatened him. Both of them wore their clothes. They got down from the building. The appellant took him near the place where his father was staying. It was around 3.30 a.m.. The appellant took up a piece of paper and wrote his mobile number on it and gave it to him and asked PW-1 to call him on 10.5.2014. He then left. PW-1 then went to his father's house and informed the incident to him. In the morning at around 7.30 a.m., PW-1, his father and his step

mother went to Antop Hill police station. His statement was recorded there but they were advised to go to Sion Police station. They went to Sion Police Station. There again his statement was recorded. He gave description of the appellant. The statement was treated as FIR. It is produced on record at Exhibit-14. His clothes were seized by the police. On 9.5.2014, he gave his supplementary statement mentioning the phone-number of the appellant which the appellant himself had given him. Again on 12.5.2014, he went to the police station. His further statement was recorded. He took the police to the spot of incident. Spot panchnama was made on 14.5.2014. The wooden ladder used for climbing the terrace was still there. On 20.5.2014 he was again called to the police station. The police showed him the key-chain with the name of the appellant inscribed on it. He identified it. On 5.7.2014, he was called to Arthur Road Prison to identify the appellant. He identified the appellant in the test identification parade. His statement was also recorded under Section 164 of Cr.P.C.. He produced a photocopy of his birth-certificate showing the date of birth as 10.5.1997. He deposed about the medical examination. He identified the

appellant in the Court.

In the cross-examination, he denied that PW-1 himself had asked the appellant to stop his motorcycle. PW-1 had not noted the number of the motorcycle. He accepted that the appellant had not forced him to sit on his motorcycle. He also accepted that there was a police chowki just opposite the pan-stall where they had stopped. He described the clothes worn by the appellant at that time. He was asked about the omissions from his FIR about the appellant's showing him a knife when they had reached the building. However, his FIR does mention that the appellant had shown him a knife on the terrace. There was minor omission about whether the appellant had left him at Wadala. According to PW-1, the culprit was approximately 40 to 45 years of age. He also accepted that the police had shown him the photograph of the appellant and he had identified his photographs. PW-1's evidence is substantially corroborated by his FIR which describes the appellant as well as the key-chain.

7. PW-2 was father of the victim. He has deposed that on

7.5.2014 at about 5.30 a.m. PW-1 reached his house and told him about the entire incident. They then went to Antop Hill police station and reported the matter to the police. They were directed to Sion police station. There the FIR was registered and PW-1 was sent for medical examination to Nagpada hospital.

8. PW-3 Dr. Baban Shinde was working as a Medical Officer at Police Hospital, Nagpada at the relevant time. He has deposed that he examined PW-1 on 8.5.2014 between 1.30 a.m. to 2.30 a.m. and found following injuries :

- Examination of sphincter revealed normal tenderness.
- There were injuries to anus. First, anal tear at 12 O'clock position of perianal region, broader at periphery and tearing at medial region, 0.8 cm in length and 0.4 cm in width, red in colour, (superficial) skin deep (tenderness present). Second injury was tear at 6 O'clock position at perianal region, broader at periphery and tearing at medially. .04 cm in length and 0.2 cm in width skin deep (superficial) red in colour (tenderness present).

The age of injury was within 24 hours. Anal swab was collected. The victim was not accustomed to anal intercourse. This witness accordingly opined that the findings were suggestive of recent anal intercourse. The age of the victim was 16 to 17 years. X-rays of victim for ossification test were taken. The injuries observed were consistent with the history narrated by the victim. He had collected samples of anal swab, blood for grouping and nail clipping of the victim.

This witness also examined the appellant on 21.5.2020. From his examination nothing was found to suggest that he was impotent. Blood for grouping was collected.

In the cross-examination, he denied the suggestion that he gave opinion and findings at the instance of the police. He produced the medical papers at Exhibits-21 and 23.

9. PW-4 Dayanand Mahato was a pancha, in whose presence the appellant produced his clothes from his house. This witness has given the date of panchnama incorrectly as 7.5.2014. However, the panchnama, which is produced on record at Exhibits-

26 & 27 mentions the said date as 20.5.2014. The clothes of the accused were produced by the accused himself after giving a memorandum statement. This particular piece of evidence is not very material because there was nothing incriminating in the CA report concerning the appellant's clothes.

10. PW-5 Arvind Rai was having a pan-stall at Dadar railway station. He has deposed that on 7.5.2014 at about 2.45 a.m. the appellant and one boy came to his pan-shop. The appellant was known to this witness by face. He gave the appellant a pan and a cigarette. The boy was about 16 to 17 years of age. This witness's evidence is in fact accepted by the appellant in his examination under Section 313 of Cr.P.C.

11. PW-6 Pradip Chavarkar was a Naib Tahsildar who had conducted the test identification parade on 5.7.2014 at Arthur Road Prison. However, even this witness's evidence is not material. In the context of the case because the appellant has admitted that the victim was with him in the night of the incident. Thus, identity of the appellant is not in dispute. The only question which falls for

consideration is whether the appellant had committed the offence against the victim as told by him.

12. PW-7 Aamir Baig was a pancha in whose presence the clothes of the victim were produced on 7.5.2014. He was in the Sion hospital. The victim i.e. PW-1, his father PW-2 and police officers were present. He identified the clothes produced in the Court as Articles No.1, 2 & 3. He also identified his panchnama which he produced on record at Exhibit-35.

In the cross-examination, he accepted that his clothes were kept on a table of the police station at the time of seizure of those clothes. He has also admitted that PW-2's sister was this witness's wife. But he clarified that he was not on talking terms with PW-2.

The panchanama at Exhibit-35 shows that it was conducted between 7.00 p.m. to 7.35 p.m. on 7.5.2014 at Sion police station. PW-2 produced a full shirt and a full pant and an underwear worn by the victim at the time of the incident. The underwear showed the semen stains.

13. PW-8 Rajesh Gupta and PW-9 Satish Gupta were the panchas for spot panchnama but they have turned hostile. They did not support the prosecution case.

14. PW-10 PSI Ravindra Lande was attached to Sion police station on 7.5.2014. He had carried out the initial part of the investigation. He has deposed that PW-1 and PW-2 came to his police station at about 3.00 p.m. on 7.5.2014. PW-1 described the incident. His statement was recorded. In the evening PW-1's clothes were produced and seized. On 9.5.2014, supplementary statement of PW-1 was recorded. At that time, PW-1 gave mobile phone number of the appellant. On 12.5.2014, PW-1 showed the spot of incident. On 13.5.2014, after confirming that the investigation was required to be conducted by the Sion police station papers, crime was registered vide C.R. No.155/2014. A copy of the birth-certificate of PW-1 was collected. On 14.5.2014 this witness along with P.I. Koli (since deceased) went to the spot along with the panchas and spot panchanama was prepared. It is produced on record at Exhibit-40. On 20.5.2014, PI Koli arrested the appellant.

During his search, the key-chain mentioned earlier was seized. The appellant produced his clothes. PW-10 identified the appellant in the Court. PW-10 has further deposed that the appellant was a constable and was suspended from his service much before the incident of this case. PI Koli then sent the articles and blood samples for chemical analysis. He produced the certified photocopy of the birth-certificate of the victim. It was verified with the original and was marked as Exhibit-50. The photo-copy of the PW-1's Aadhaar card after comparing with the original was taken on record at Exhibit-51. PI Koli conducted the investigation and filed the charge-sheet. Since PI Koli had passed away, PW-10 deposed about the investigation carried out by him. He has produced all the necessary documents including the forwarding letters to FSL, identification forms of the appellant as well as PW-1, for collecting the samples for DNA testing and he also produced the most important document in this case i.e. the DNA report at Exhibit-48/6. The DNA report mentions that the DNA profile of the semen detected on Exhibit-6 i.e. on the underwear of PW-1 and blood sample of the appellant were identical and were from the

same source of male origin. The DNA profile matched. Thus, it is conclusively proved that the semen stains on the underwear of PW-1 was that of the appellant's semen.

15. PW-11 was Dr. Pramod Dode attached to J.J. Hospital at the relevant time. On 25.6.2014, PW-1 was brought to him for medical examination. This witness collected anal swab, blood sample for sending it to FSL. He explained the DNA report produced at Exhibit-48/6 showing how the semen on the underwear of PW-1 matched with the DNA of the appellant.

. This was the evidence led by the prosecution.

16. The defence taken by the appellant was of denial of the incident. However, he admitted certain facts as follows :

- (i) According to him, at the Shanmukhananda Hall, PW-1 raised his hand for lift. The appellant stopped his vehicle. Both of them sat together.
- (ii) PW-1 told him about the divorce of his parents and second marriage of his father. He also told him about the fight

between him and his elder brother and that he was going to his father's house.

- (iii) When the appellant was about to drop him near his father's place, PW-1 told him to accompany him to Wadala Railway Station to tea as he was afraid that his father would beat him. The appellant suggested to him that instead of taking tea they would have paan at Dadar. They did not go to Matunga as deposed by PW-1, but, they went to a pan-stall opposite Dadar Railway Station in front of a hotel.
- (iv) PW-1 invited the appellant for his birthday on 10.5.2014. The appellant declined because he was a politician and had busy schedule. The appellant told him that they would talk on phone. The appellant gave him his phone number which PW-1 wrote down on a chit of paper.
- (v) He accepted that the police had seized his key-chain and it was the same which was produced in the Court at Article 4.
- (vi) He also accepted that the test identification parade was held in Arthur Road Prison on 5.7.2014 and that PW-1 had

identified him at the parade. He denied the incident and according to him he had dropped the victim at his house.

(vii) He was specifically asked about the analysis regarding Exhibit-43. To question No.166, he gave his answer as follows :

PI Koli had called the appellant in the cabin of the police station having returned from J.J. Hospital. He said that due to pressure from the senior officers, he is required to send all these things to FSL and in the police station itself the appellant was required to give sample of his semen.

. He was specifically asked about Exhibit-48 collectively as to what he had to say about the reports. To which he only answered that he had received copies of the report in answer to question No.171. However, to the specific question regarding DNA report he simply answered that it was false. His specific defence was that he was President of a Political Party of Wadala Constituency. A niece of a big-leader of the same political party wanted to contest the election of 2014 from the same constituency. The appellant was opposing her and, therefore, to remove him from

the post of President a false case was fabricated against him and he was implicated in a false case.

17. Learned counsel for the appellant submitted that the procedure for test identification parade was not proper. It was held much belatedly. The clothes recovered from the victim on 7.5.2014. They were sent much belatedly on 11.6.2014. That gave scope to the police to tamper with the clothes and, therefore, ultimately the DNA report based on seizure of his clothes became doubtful. He submitted that the doctor, who had conducted the DNA test, is not examined. Even the doctor who had collected the blood sample for DNA test was not examined. This was important because a specific procedure, filing of specific forms and collection in a specific kit is required for collecting blood sample for DNA testing. The prosecution has not proved any of these. He submitted that the incident is improbable and, therefore, the prosecution has not proved its case beyond reasonable doubt.

18. Learned counsel for the appellant relied on the judgment of a Single Judge Bench of this Court at Aurangabad

Bench decided on 13.7.2017 in Criminal Appeal No.413/2015 in the case of **Suresh Karbhari Wadge Vs. The State of Maharashtra** to contend that the procedure for collecting DNA samples and examination of the medical officer are important steps. Unless the prosecution proved these factors, the DNA report could not be used against the accused even if such DNA report was supporting the prosecution case.

19. Learned counsel for the respondent No.2 as well as learned APP submitted that PW-1's ocular evidence is supported by the medical evidence. The DNA report is clinching in this case. The appellant has admitted his presence with the victim in the night of the incident which is also quite incriminating.

20. I have considered these submissions. PW-1 has described the incident in detail. The appellant has admitted that PW-1 and he himself were together in the night and had travelled on the appellant's motorcycle. It is admitted that they stopped at a pan-stall. Thus except for the portion of going to the terrace and commission of offence, the rest of the narration given by PW-1 is

admitted by the appellant. This is important. Therefore, the identity of the appellant in this case cannot be disputed. The appellant has admitted his presence. Therefore, the evidence of PW-6 the Naib Tahsildar does not decide fate of this case.

21. The admission given by PW-1 that appellant's photograph was shown by the police also loses its significance because the appellant himself has admitted his presence with PW-1 and thus has not disputed his identity.

22. One of the most incriminating pieces of corroboration in case in this case is the DNA report. It specifically mentions that the semen stains found on the underwear of PW-1 were connected directly with the appellant. This DNA report cannot be overlooked. Thus, though learned counsel tried to submit that there is a possibility of tampering with the clothes of the victim PW-1, it still does not answer the question as to how the appellant's semen stains would appear on the PW-1's underwear. The defence taken by the appellant that his semen was collected in the police station is hardly acceptable. No such suggestion is given to the investigating officer.

No such grievance is made by the appellant anytime before or during the trial.

23. The prosecution has produced the identification forms of the appellant as well as of the victim showing their photographs and signatures at Exhibit-43. These forms are necessary to be filled at the time of drawing blood samples for DNA test in the testing kit. These forms are produced on record. Neither photograph nor signature nor filling of the form is disputed by the defence. Therefore, the submission that the samples were not drawn for DNA and the prosecution has not led proper evidence in that behalf is not acceptable.

24. In that context, this case differs from the facts of the case concerning **Suresh Wadge's** case (supra) and, therefore, the observations in that case are not applicable to the facts of this case. The prosecution has sufficiently proved the blood samples of the victim and the appellant were properly sent for DNA test which has ultimately resulted in the DNA report which is clinching incriminating material.

25. Even besides all these matters, there is one more important factor against the appellant, i.e., in the form of medical evidence given by PW-3. The victim was immediately sent for medical examination after registration of FIR and the medical officer has noted the injuries which are mentioned hereinabove. Those injuries, according to him, were caused within twenty-four hours of the examination. These injuries proved that the offence was committed against PW-1. In that context, the evidence of PW-1 is sufficiently corroborated by the medical evidence. PW-1 has named the appellant as the offender. All these factors considered together or even separately, point unerringly to the guilt of the appellant. The prosecution has proved its case beyond reasonable doubt.

26. Learned trial Judge has properly appreciated all these aspects and has convicted the appellant. He has given proper reasons.

27. As far as the sentencing part is concerned, the applicant is in custody for more than eight years. He was an under-trial

prisoner for a considerable period. He has sent applications through jail annexing various certificates showing that his conduct in the jail is good and satisfactory. He has helped his co-prisoners and was granted various certificates for his good behaviour. In the meantime, he has lost his mother. He was in custody for a long period. At the time of commission of offence, the minimum punishment provided under Section 4 of the POCSO Act was seven years. He has undergone one year more than the minimum sentence. His conduct in the jail is satisfactory. Therefore, I am inclined to reduce the substantive sentence imposed on him to the period which he has already undergone. It is more than the minimum sentence that was provided under Section 4 of the POCSO Act on the date of offence. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction recorded against the appellant vide judgment and order dated 12.4.2018 passed by the Additional Sessions Judge and Designated Judge for

POCSO, Greater Bombay in POCSO Special Case No.364/2014 is maintained.

- iii. However, instead of substantive sentence of ten years, the appellant is sentenced to suffer RI for the period which he has already undergone. The sentence of imposing the fine amount remains unchanged.
- iv. With these observations, the Criminal Appeal is disposed of. With disposal of Criminal Appeal, nothing further survives in the connected applications. They are also disposed of.

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(SARANG V. KOTWAL, J.)

Deshmane (PS)