

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

CRIMINAL APPEAL NO.1444 OF 2019

Mahadeo @ Nana Gundiba Khandale Appellant
Versus
The State of Maharashtra &
another Respondents

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Mr. Sachin S. Punde, Advocate for the Appellant.
Ms. M.R. Tidke, APP for the Respondent No.1-State.
Ms. Rebecca Gonsalvez, Advocate (appointed) for the Respondent
No.2.

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CORAM : SARANG V. KOTWAL, J.

DATE : 20th DECEMBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 17.10.2019 passed by the Additional Sessions Judge, Baramati in Special (POCSO) Case No.8/2015. The appellant was convicted and sentenced as under:

- i. He was convicted under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) read with Section 376(2h) of the Indian Penal Code and was sentenced to suffer RI for ten years and to pay fine of

Rs.10,000/- and in default of payment of fine to suffer RI for four months.

- ii. He was convicted for commission of offence punishable under Section 4 of the POCSO Act and was sentenced to suffer RI for seven years and to pay fine of Rs.2,000/- and in default of payment of fine to suffer RI for two months.
- iii. He was convicted for commission of offence punishable under Section 8 of the POCSO Act and was sentenced to suffer RI for three years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for one month.
- iv. He was further convicted for commission of offence punishable under Section 12 of the POCSO Act and was sentenced to suffer RI for one year and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for one month.
- v. All the sentences were directed to run concurrently.
- vi. He was granted set off under Section 428 of Cr.P.C.

Though the operative part mentions Section 376(2h) of IPC, the correct Section would be Section 376(2)(i) of IPC.

2. Heard Shri Sachin Punde, the learned counsel for the appellant, Smt. M.R. Tidke, the learned APP for the Respondent

No.1-State and Ms. Rebecca Gonsalvez, the learned appointed counsel for the respondent No.2.

3. The prosecution case, in brief, is that the applicant was a distant relative of the victim. The date of birth of the victim was 18.5.2010. The incident took place on 28.11.2014. The victim had gone to the shop of the appellant to buy sweets. The appellant took advantage of the situation and took her inside his house and committed rape on her. The victim returned home and told this incident to her mother, who went to the appellant's shop but it was closed. Thereafter she approached the police station and lodged her complaint. The FIR was lodged at Yavat police station vide C.R. No.366/2014. The victim was sent for medical examination at Sassoon Hospital. Her clothes were seized. The appellant was arrested on 28.11.2014 in the night itself. His clothes were also seized. The statements of witnesses were recorded. The clothes were sent for chemical analysis. At the conclusion of the investigation, the charge-sheet was filed. The case was committed to the Special Court.

4. During trial, the prosecution examined seven witnesses including the victim, her mother, the panchas, the medical officer and the investigating officer. The defence of the appellant was that the victim's family owed almost Rs.40,000/- to him. There was some property dispute and, therefore, he was implicated falsely. It was also his case that he was not in the shop at the time of the incident.

5. The learned Judge considered the evidence of the prosecution and the defence of the appellant. He believed the evidence of the prosecution and convicted and sentenced the appellant, as mentioned earlier.

6. The important witnesses in this case are the victim and her mother. The victim was examined as PW-1. She was about seven years of age at the time of her deposition. She has deposed that a person named 'Nana' gave her sweets. Then he took her inside his house. After that she has described the incident of rape. She went home. She was crying. Her mother inquired with her. At that time, PW-1 told her mother about the incident. PW-1

specifically identified the appellant in the Court on video screen.

The learned counsel for the appellant cross-examined her. It was tried to suggest to her that the injuries were caused because of the ant bites. Some more suggestions were put to this witness. While answering the questions in the nature of suggestions, she deposed that her mother and grand-mother had taught her how to speak in the Court. She also accepted that her mother had told her to tell the Court that the appellant had committed rape on her and she had accordingly deposed before the Court. She also accepted that there was dispute between her mother and the appellant. She has further deposed that it was true to say that the appellant had not touched her. But she also denied the suggestion that the appellant had not committed rape on her. She also denied that she was deposing falsely.

7. PW-2 was the victim's mother. She deposed that the incident took place on 28.11.2014 at about 1.00 p.m. to 2.00 p.m. in the house of the appellant. This witness was having her lunch in her house. The victim returned home from school. She went

out again to purchase sweets. For a long time, she did not return. The victim was uncomfortable and was constantly touching her clothes. Then she narrated the entire incident to PW-2. She told her mother that the appellant gave her sweets and took her inside the house. He then committed penetrative sexual assault on her. PW-1 was frightened. After this, PW-2 examined the victim and found that there was swelling on her private parts. There were also injuries on right wrist and left elbow. PW-2 then went to the house of the appellant, but, the house was locked. She then informed other family members and then went to Patas outpost to report the matter. She gave her complaint. The FIR was taken on record at Exhibit-30. She identified the clothes of the victim PW-1.

In the cross-examination, she deposed that the appellant's house was situated two houses after her house. It was not situated in an isolated place. Her husband and her brother-in-law had not accompanied her for lodging the complaint. According to her, they were not at home at that time. She accepted that her family did not have any land. She denied the

suggestion that their family had demanded share in the property of the appellant. She denied the suggestion that there was quarrel. She also accepted that her mother-in-law could have purchased the articles of around Rs.60/- to Rs.70/- from the appellant on credit, but denied that PW-2 and her mother-in-law were annoyed when the appellant demanded them money. The defence wanted to suggest that because of the dispute of this money and for asking share in the property, the appellant was implicated falsely.

8. PW-3 Sanjay Shendage was a pancha in whose presence clothes of the victim and clothes of the appellant were recovered. Those panchnamas are produced on record at Exhibits-33 & 34 respectively. The clothes of the victim were seized between 7.00 p.m. to 8.00 p.m. on 28.11.2014 and those of the appellant were seized between 12.30 a.m. to 1.00 a.m. on 29.11.2014.

9. PW-4 Constable Rupali Pawar had recorded the statement of the victim on 9.12.2014. She has further deposed

that on 28.11.2014 she herself had taken the victim to Sassoon Hospital for medical examination.

10. PW-5 Rohini was an Anganwadi worker. The victim was studying in her school. This witness knew the appellant. He was residing near her Anganwadi and had small stall for selling candies and biscuits. On 28.11.2014, after the school was over, this witness had left the victim near the stall of the appellant. Then this witness had returned to her work. After some time she heard noise from outside the house of the victim. She made enquiries. PW-2 then told her about the incident. She was suggested that there used to be quarrels between the children in her school. She denied the suggestion that because of these quarrels, they used to make abrasions/scratches to each other.

11. PW-6 Dr. Supriya Rode is an important witness. She had examined PW-1 at 4.00 a.m. in Sassoon Hospital. She took consent of PW-1's grand-mother for such examination. The history was given by PW-1 and her grand-mother. On examination of PW-1, she found that there were two abrasions. One was of the

size 5 cm on right forearm and there was swelling. The other abrasion was on the left leg of 3 cm size. On genital examination, she found that her hymen was intact but perihymenal inflammation/abrasion was present from 2 O'clock to 6 O'clock and then 7 O'clock to 11 O'clock. There was no bleeding. From history and clinical examination she found that there was evidence of genital handling or fingering with possibility of attempt of penetrative vaginal intercourse. She had issued the medical certificate, which is produced at Exhibit-44.

In the cross-examination, she deposed that abrasion was possible due to sharp object and if there was ant bite a person would get rash. She denied the suggestion that there was no injury on the victim's genital parts. Perihymenal inflammation /abrasion was possible due to intense itching but she volunteered that oedema was not possible because of itching.

12. PW-7 API Gorad was attached to Patas outpost and Yavat Police Station and had conducted the investigation. He has deposed about registration of the FIR. He carried out the spot

panchnama and seized the bed-sheet. He seized the clothes of the victim and of the appellant. He had arrested the appellant at around 11.30 p.m. on that very date. He produced the certificate showing the date of birth of the victim from Anganwadi school. He had sent the appellant for his medical examination. He had sent the articles for chemical analysis. He had recorded the statements and had filed the charge-sheet. The CA report at Exhibit-55 showed that semen was found on the frock and nicker of the victim though the blood group of the semen was inconclusive. Semen was not detected in the smear and swab of the victim.

. This in short was the prosecution case.

13. As mentioned earlier, the defence of the appellant was that he was implicated falsely because of the dispute regarding Rs.40,000/- which PW-2 owed to him. He also stated in his examination under Section 313 of Cr.P.C. that at the time of incident he had gone to an agricultural field.

14. After considering the evidence on record and the

defence of the appellant, as mentioned earlier, the learned Judge convicted and sentenced the appellant.

15. The learned counsel for the appellant submitted that PW-1 the victim in her cross-examination has accepted that she deposed in the Court as was told to her by her mother and grandmother. She had also accepted that the appellant had not touched her. He, therefore, submitted that the main evidence against the appellant in the form of victim's deposition is extremely doubtful and the benefit must go to the appellant.

16. He further submitted that the medical evidence does not really support the prosecution case because the doctor has accepted that the rashes on the body can occur because of ant bites. Perihymenal swab and smear did not show presence of semen. That is another circumstance in favour of the appellant.

17. He submitted that there was a definite reason for PW-2 to implicate the appellant falsely. There is no other independent witness to prove that the victim had gone to the house of the appellant. The house was situated in a crowded locality. The

victim had not immediately raised shouts after coming out of the house of the appellant. When the mother of the victim had gone to the house of the appellant, it was found locked. The medical evidence does not fully corroborate the evidence of the victim. The medical history is not consistent. The learned Judge has applied wrong section of IPC and, therefore, the conviction is wrong.

18. On the other hand, the learned counsel for the respondent No.2 and the learned APP submitted that the victim was barely four years of age. At the time of deposition, she was seven years of age. It was difficult for such a young child to stand against fierce cross-examination and understand the suggestions. Even then, her truthfulness is evident. There was nothing wrong if her mother had told her how to speak in the Court. Significantly, she has denied the suggestion that she was deposing falsely and she maintained that the appellant committed rape on her.

19. They submitted that the sequence of events shows that the victim had immediately complained to her mother, who in

turn had immediately gone to the police to give her complaint. After that, the victim's clothes were seized in the evening. The appellant was arrested in the night and the victim was medically examined at around 4.00 a.m. There was no time gap between these steps and, therefore, there was no scope for concoction of the story. They further submitted that the medical evidence does support the prosecution case.

20. I have considered these submissions. The victim was examined as PW-1. She has given clear evidence. Though there are some admissions in the cross-examination; considering the tender age of the victim, her deposition in the examination-in-chief cannot be wiped out by her answers to some suggestions. Significantly as rightly submitted by the learned counsel for the respondent No.2, she had not denied the actual incident of rape. She has consistently maintained her stand that the appellant had committed rape on her. The appellant was a distant relative and hence she was knowing him. She had even identified the appellant in the Court.

21. Her evidence regarding the events which had taken place after the incident is fully supported by the deposition of her mother PW-2. She has narrated how the victim came home and told her about the incident. She has also spoken about her own examination of the victim. She had found that there were injuries on her private parts. She had immediately gone to the house of the appellant to confront him, but, he was not found there. Then she had gone to the police station.

22. There was no scope or time for concocting false story to implicate the appellant falsely. The investigation was carried out immediately. Clothes were seized. The appellant was arrested, his clothes were seized and the victim was sent for medical examination. This was done within a reasonably short span of time. Therefore, there was no scope for either the witnesses or the police to manipulate the investigation and their stories. Therefore, their depositions are truthful and clear. The medical evidence does support the prosecution story. As mentioned earlier, the doctor PW-6 had found penetrative act on perihymenal place

and odema was also present. In the cross-examination the doctor has explained that though perihymenal inflammation/abrasion was possible due to itching but oedama was not possible. In this case, even oedama was present. She had given her opinion that there was evidence of genital handling or fingering with possibility of attempt of penetrative sexual vaginal intercourse. As per the definition of 'rape' mentioned in Section 375 of IPC, in the facts of the case, the ingredients of Section 375 of IPC are covered. Even the definition of 'penetrative sexual assault' mentioned under Section 3 (a) & (b) of the POCSO Act are applicable in the facts of this case. Since the victim was below twelve years of age, Section 5(m) of the POCSO Act makes it an aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. The offence punishable under Section 376(2)(i) of IPC is clearly made out on the basis of the prosecution evidence.

23. Another incriminating circumstance is finding of semen on the frock and nicker of the victim. That is a strong incriminating circumstance against the appellant. The victim's

clothes were seized immediately in the same evening and they were sent for chemical analysis. Again, there was no scope for manipulation.

24. The appellant has also taken inconsistent defence though it was possible for him to maintain consistency. While giving suggestion to PW-2, it was suggested to her that there was dispute regarding credit of Rs.60/- to Rs.70/- in respect of the articles which PW-2's mother-in-law had taken. In the statement under Section 313 of Cr.P.C., the stand was taken that there were outstanding dues to the tune of Rs.40,000/-. These two figures cannot be reconciled and there is inconsistency in the defence taken by the appellant at different stages. Though the appellant was not required to take a specific defence; but when specific defence was taken it was expected to be consistent. This has to be considered in the light of the presumption which is raised against him under Section 29 of the POCSO Act. The appellant has not discharged that burden.

25. Considering all these factors, the prosecution has

proved its case beyond reasonable doubt. Though the operative part of the impugned judgment could have been better mentioning the exact and correct section applicable under IPC. However, the charge framed against the appellant clearly makes out a case under Section 376(2)(i) of IPC as it then existed on the date of incident. The appellant was rightly convicted under Section 6 of the POCSO Act and for both these offences the major punishment imposed on him was for ten years which was the minimum sentence which could be imposed. Therefore there is no further scope to show leniency because of the prescribed minimum sentence. Hence, I do not find any merit in the appeal and the appeal is dismissed, with the modification that, instead of 'Section 376(2h)' of IPC in the operative part of the judgment; it should be read as 'Section 376(2)(i)' of IPC.

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(SARANG V. KOTWAL, J.)