

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

CRIMINAL APPEAL NO.1548 OF 2018

Dinesh Keshav Tambe Appellant
Versus
The State of Maharashtra & Anr. Respondents

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Ms. Anjali Patil, Advocate for the Appellant.
Mr. S.R. Agarkar, APP, for the Respondent No.1-State.
Mr Shashikant P. Chaudhari, Advocate (appointed) a/w. Snehal
Chaudhari, Manasi Pawaskar, for Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.

DATE : 7th OCTOBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 29.11.2018 passed by the Designated Judge for POCSO, Greater Bombay in POCSO Special Case No.497/2014. The appellant was convicted for commission of offence punishable under Section 376(2) of the Indian Penal Code and was sentenced to suffer RI for ten years and to pay fine of Rs.15,000/- and in default of payment of fine to suffer RI for four months. The appellant was also convicted for commission of offence punishable under Section 6 of the Protection of Children from Sexual

Offences Act, 2012 (POCSO Act) and was sentenced to suffer RI for ten years and to pay fine of Rs.15,000/- and in default of payment of fine to suffer RI for four months. On payment of the fine amount, it was directed to be paid to the victim. The substantive sentences were directed to run concurrently. The appellant was granted set-off under Section 428 of Cr.PC.

2. The prosecution case is that the appellant was residing in the neighbourhood of the victim. The date of birth of the victim was 17.3.2008. The incident is dated 25.9.2014. The appellant's sister and the victim were friends. On the date of incident, the appellant took the victim to his house. He then committed penetrative sexual assault on the victim. The victim came back home. She was bleeding at her private parts. Her mother made inquiries with her. Then the victim narrated the incident to her. The victim's father was informed by her mother. Then they went to the police station. She was sent for medical treatment. After that the FIR was registered. The appellant was arrested on 26.9.2018. The investigation was carried out. Spot panchnama was conducted. The clothes of the victim and the

accused-appellant were seized. The articles and other samples were sent for CA examination. Statement of witnesses were recorded. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Special Court.

3. During trial, the prosecution examined eight witnesses, including the victim, her mother, Medical Officers, a pancha and the police officers. Besides this, the documentary evidence in the form of birth certificates of the victim and the appellant as well as CA reports were produced on record. The defence of the appellant was that mother of the victim was having affair with the victim's uncle. The appellant was aware of that. The victim's mother had threatened him that she would lodge a false complaint against him and the present prosecution is the result of the same.

4. Learned Judge considered the evidence on record. He believed the evidence led by the prosecution. He disbelieved the defence of the appellant; and thus, convicted and sentenced him as mentioned earlier.

5. Heard Smt. Anjali Patil, learned counsel for the

appellant, Shri S.R. Agarkar, learned APP for the respondent No.1-State and Shri Shashikant Chaudhari, learned appointed counsel for respondent No.2.

6. The prosecution case is reflected in the evidence of mother of the victim, who is examined as PW-1. She has stated that she was residing with her two children, husband and brother-in-law in a chawl at Chembur, Mumbai. The victim's date of birth was 17.3.2008. Hence, at the time of incident, the victim was six years old. As a routine, PW-1's husband used to leave the victim to her class at 9.00 a.m. and then used to proceed to his office. The victim used to return home at about 11.30 a.m. with her friends. Then she would leave for school between 1.00 p.m. to 5.45 p.m. On 25.9.2014 at about 11.30 a.m., the victim had gone out of the house. She had not attended her classes on that date. She returned home within ten to fifteen minutes. She was having pain on her private parts. She told PW-1 that there was bleeding because of injury by nails to her private parts. PW-1 examined her. There was very bleeding from her vagina. PW-1's brother-in-law was present in the house. He made enquiries with the victim.

The victim then told them about the acts committed by the appellant. He had taken the victim to his house. There was no one else in his house. He inserted his fingers in her private parts and then penetrated with his private parts. He also inserted his private parts into her mouth and discharged a liquid. She informed them that he was doing such acts in the past as well. He had threatened the victim and therefore she could not tell anything. PW-1 then called her husband telephonically. He rushed home. PW-1's parents also reached there. All of them went to Govandi police station. Since there were injuries suffered by the victim, she was referred to Nagpada Hospital. They were in that hospital for some time and then they were referred to Rajawadi Hospital. The doctor there treated the victim. Then they returned to the police station late in the night. Her FIR was registered around midnight. It was registered at 12.15 a.m. on 26.9.2014. The FIR is produced on record at Exhibit-9. PW-1 had also narrated the incident to the doctor. After registration of the FIR, the police came to their house. They went to the spot and carried out spot panchnama. They seized clothes of the victim. PW-1 had carried those clothes to the police station. She also gave a copy of

the birth certificate to the police. The victim's statement was recorded by the police after 2-3 days after she had calmed down. Her statement was recorded under Section 164 of Cr.P.C. as well. PW-1 then identified the appellant in the Court. The original birth certificate was brought by this witness in the Court. A copy of the same was produced on record at Exhibit-10, which shows the victim's date of birth as 17.3.2008.

Her cross-examination was directed mainly regarding her relations with her brother-in-law i.e. uncle of the victim. He was married and on that date his wife had gone to her native place. She deposed in the cross-examination that there were two chawls facing each other. In one of the chawls, the appellant was residing. She accepted that there was an L-shaped iron angle in that area and that there was a small brick wall adjacent to that angle. She denied the suggestion that the victim was playing with that angle, she slipped and sustained those injuries. She also denied that there were illicit relations between herself and her brother-in-law. She denied the suggestion that the appellant witnessed their relationship and made it viral and she had

suspected the appellant for spreading rumors. She explained that they reached the police station at around 12.00 p.m. on the date of incident but since there was bleeding they were referred to the hospital. She deposed that nobody had tutored her daughter how and what to depose before the Magistrate and the police had not guided her and the victim what to depose before the Magistrate.

7. PW-2 was the victim herself. She has deposed that the appellant was residing near her house. On the date of incident, she was returning home. The appellant pulled her and took her to his house. His sister was the victim's friend. The appellant's mother and the victim's friend left their house. There was no one else in the house. Then he committed the act which is described in the evidence of PW-1. The victim narrated the same facts in her deposition. According to her, the appellant had committed similar acts in the past.

Her cross-examination was full of suggestions about falsely deposing. She denied all these suggestions. There is nothing much in her cross-examination. Her statement recorded under Section 164 of Cr.P.C. is produced on record at Exhibit-12.

It substantially corroborates her evidence.

8. The next important witness is PW-4 Dr. Kalyani Kale, who had examined the victim on that date. She was attached to Rajawadi Hospital. She produced the medical papers. She had recorded the history narrated by the victim and her mother. The history was in consonance with the facts narrated by PWs-1 & 2 before the trial Court. She had mentioned that she conducted the examination after 6 hours and 44 minutes from the occurrence. There was vaginal bleeding and abdominal pain. On local examination, she found that both labia minora were seen bruised and congested. There was minimal bleeding. Hymen was ruptured and hymenal tags were seen. Her swabs were collected. In the opinion of this witness, the victim had suffered penetrative penial sexual assault about 6 hours and 45 minutes prior to examination. The clinical evidence, was suggestive of vaginal penetration. The victim was prescribed treatment and was referred to pediatric department. The findings and clinical examination was consistent with the history narrated by the victim and her mother.

In the cross-examination, she denied the suggestion that the injuries to the victim were possible by sliding down while playing with L-shaped iron angle. She further deposed that the injuries to the vagina may be possible by fall of girl on a rough shaped brick wall, but she explained that in such case it must be associated with the injuries on the other body parts, such as, thighs, abdomen etc.. She further deposed that the genital area is naturally protected area and, therefore, any isolated injury to that area was unlikely. She further deposed that she had recorded the history as narrated by the mother of the victim.

9. PW-3 Dr. Rohan Thorat attached to J.J. Hospital had examined the accused-appellant. He was brought with the history given by the appellant of beating by police below both his ears. On his examination, no fresh visible injury was noted anywhere on the body.

10. PW-6 Jitu Yadav was a panch witness. In his presence, spot panchanama was conducted and the bed-sheet was seized. That panchnama is produced on record at Exhibit-20. On the next day, the clothes of the accused were seized. That panchnama is

produced on record at Exhibit-23. He was also present when PW-1 produced clothes of the victim which were seized. That panchnama is produced on record at Exhibit-22. Nothing much turns on his evidence as the CA report does not help either the prosecution or the defence. The CA reports are in respect of the bed-sheet and clothes of the victim and the appellant. The nicker and frock of the victim showed presence of 'A' group blood. The appellant's under-pant showed presence of blood but the group was inconclusive and also showed presence of semen. Thus the CA report does not conclusively point to any incriminating circumstance against the appellant and, therefore, it does not help the prosecution or the defence.

11. PW-5 PSI Archan Hande was attached to Govandi police station. He was present when the victim's mother made complaint to him. She was accompanied by the victim-PW-2. He had recorded the statement of PW-1. He had then visited the spot of incident. He had arrested the appellant on 26.9.2014 at 2.15 a.m. The appellant was referred to medical examination. PW-5 had seized the clothes.

In the cross-examination, he deposed that he did not enquire with the residents of the chawl. He did not find any independent witness who had seen the victim being taken to the house of the appellant.

12. PW-7 WPC Panchal had carried the articles to FSL, Kalina.

13. PW-8 PI Sunil Kadam had carried out the remaining part of the investigation and had filed the charge-sheet.

14. Learned counsel for the appellant submitted that the FIR is lodged belatedly i.e. after more than twelve hours from the incident. This shows false concoction of the story. She submitted that as per the defence of the appellant since he was aware of the affair between PW-1 and her brother-in-law, the appellant was falsely implicated. This defence is probable.

15. She further submitted that the police should have recorded the FIR first and then should have forwarded the victim for medical examination. There was delay in recording statement under Section 164 of Cr.P.C. It was recorded on 1.10.2014. No explanation is offered for this delay. Even the victim's police

statement was recorded on 27.9.2014, which is belatedly recorded. This is also not explained.

16. She submitted that there was a possibility of the victim suffering these injuries while playing as is brought out in the cross-examination of the victim as well as of the medical officer.

17. Learned APP as well as learned counsel for the respondent No.2, on the other hand, opposed these submissions. They submitted that the evidence of the mother of the victim, the victim herself and PW-4 sufficiently corroborate each other. The ocular evidence is supported by the medical evidence. There was no delay in lodging the FIR because the first priority was to give treatment to the victim.

18. I have considered these submissions. As far as the argument that there was delay in lodging the FIR is concerned, this argument has no substance because proforma of the FIR shows that the information was received at the police station at 12.30 p.m on that date immediately. The victim was initially sent for medical treatment and the Medical Officer has given her opinion that about 6 hours and 45 minutes prior to her medical

examination this incident had taken place. The injuries appeared to be fresh and there was no delay on the part of PW-1 in approaching the police or the doctor. The victim naturally was in shock and, therefore, her police statement was recorded on 27.9.2014. Her statement before the Magistrate was recorded on 1.10.2014. Therefore, in these circumstances it cannot be said that there was delay in recording her statements.

19. As rightly submitted by learned APP and learned counsel for respondent No.2 the evidence of PWs-1, 2 and 4 is consistent. PW-1 had immediately narrated the history to the doctor (PW-4). The recorded history was exactly similar to the prosecution case and the deposition of witnesses PWs-1 & 2 as well as the FIR. Thus, narration in the FIR is also similar to the depositions of PWs-1 & 2. There is no inconsistency in all these statements. Thus, there is FIR, history given to the doctor, 164 Cr.P.C. statement of the victim and the deposition of the mother. All these statements are consistent with each other. Moreover they are supported by the medical examination conducted by the doctor which showed that they were fresh injuries as described.

The victim was merely six years of age and she has narrated the incident in detail. She was knowing the appellant closely and, therefore, there was no question of mistaken identity.

20. In his statement recorded under Section 313 of Cr.PC., the appellant's birth date was mentioned as 10.2.1996. It was also reflected in his SSC passing certificate. He was over 18 years of age on the date of incident. The victim was about six years of age. Her date of birth was 17.3.2008. Her birth certificate is duly proved by the prosecution.

21. Thus, the prosecution has proved every single ingredient of offences charged against the appellant. The appellant is awarded minimum sentence provided under those sections. Therefore, there is no scope to argue for reduction of the sentence. Thus, based on this discussion, I do not find any merit in the appeal. The appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
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