

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.115 OF 2020

Abhijeet s/o Anurag Pethkar,
Age 28 years, Occu. Education,
R/o Umbre Kotha, Osmanabad,
Tq. & Dist. Osmanabad

... APPELLANT

VERSUS

1) The State of Maharashtra
through Police Inspector,
City Police Station, Osmanabad
Tq. & Dist. Osmanabad

2) X Y Z

... RESPONDENTS

.....
Mr. S.J. Salunke, Advocate holding for
Mr. S.A. Wakure, Advocate for appellant
Mr. K.N. Lokhande, A.P.P. for respondent No.1.
Ms Poonam Bodke Patil, Advocate for respondent No.2.
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CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 19th April, 2023

Date of pronouncing judgment : 19th August, 2023

J U D G M E N T :

The challenge in this appeal is to a judgment and order dated 24/12/2019, passed by learned Special Judge, Osmanabad in Special (POCSO) Case No.45/2018. The

appellant has been convicted for the offences punishable under Section 376 of the Indian Penal Code and Sections 4, 6, 8 and 10 of the Protection of Children from Sexual Offences Act (POCSO Act for short). He has been sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.20,000/-, in default to undergo rigorous imprisonment for 6 months for the offence punishable under Section 6 of the POCSO Act. No separate sentence has been awarded for offences punishable under Section 376 of the IPC and Sections 4, 8 and 10 of the POCSO Act.

2. In short, the case of the prosecution is as follows :—

The appellant was residing at village Umbar Kotha, Taluka and District Osmanabad. The victim was then a 5 year old girl. She would reside along with her parents and other family members in the vicinity in which the appellant would reside. The incident took place by little past 1.00 p.m. on 17/1/2018. The victim had returned home from school. Then she left home to play near a temple. The appellant took the victim to his residence. Removed her knicker and took bite at her private part and cheek. The appellant gave her a two rupee coin and then let her go. The victim came home. She

related the incident to her mother (P.W.3). The mother, in turn, called her husband (P.W.2) on phone. He came home. All of them went to City Police Station, Osmanabad. The father (P.W.2) lodged the First Information Report (F.I.R. - Exh.14). Crime vide C.R. No.11/2018 came to be registered. The victim was medically screened. Her statement was also recorded. Scene of offence panchanama was drawn. Statements of persons acquainted with the facts and circumstances of the case were recorded by police. The appellant was arrested. On completion of the investigation, he was proceeded against by filing the charge sheet.

3. The trial Court framed the charge (Exh.9). The appellant pleaded not guilty. His defence was of false implication. He examined one witness in his defence.

4. To bring home the charge, the prosecution examined 10 witnesses and produced in evidence certain documents. The trial Court, on appreciation of the evidence in the case, convicted the appellant and consequently sentenced as stated above.

5. Heard. Learned counsel for the appellant would submit that, there is no eye witness to the incident. The victim

was just 5 years of age. The child witness is prone to tutoring. The evidence of the mother of the victim indicates that, she was not on talking terms with the mother of the appellant. Medical examination report of the victim indicates no injury at her private part. The same falsifies the prosecution case. The learned counsel ultimately urged for allowing the appeal.

6. The learned counsel for the informant and the learned A.P.P. for the State would, on the other hand, submit that, the victim was little over 5 years of age. She immediately related the incident to her mother. As such, the testimony of the victim gets reinforced. According to them, the medical evidence is of little consequence since the victim was medically screened about 12 hours after the incident. The appellant failed to make out a case of having been falsely implicated. Both the learned counsel ultimately urged for dismissal of the appeal. Reliance was placed on the case of Ramchandra Shrimant Bhandare Vs. The State of Maharashtra (Criminal Appeal No.982/2017) decided on 3/8/2022.

7. Let us advert to the prosecution evidence. The incident did take place at 1.30 p.m. on 17/1/2018. Admittedly, the victim

was 5 years of age at the relevant time. It is in her (victim's) evidence (P.W.1) that after her return from the school, she was playing at the temple near to her house. There was house of one Chavan Aaji in the nearby. Mama came from the said house. He took her in the house. Latched the door. He removed her knicker and took bite of her private part and cheek. She identified the appellant in the photograph shown to her as that "Mama" who did behave with her such way. It is further in her evidence that, on return to her house, she related the same to her mother and grandmother. Her parents took her first to the police station. She was referred for medical examination. The doctor there examined her. She was admitted to the hospital for a day. Police made enquiry with her. She related them about the incident. It is further in her evidence that her statement was also recorded by a lady Judge.

8. During cross-examination, she denied to have lodged a false report at the instance of her mother. She denied to have seen the appellant for the first time in Court. All other questions suggesting the defence of the appellant have been denied by her. Before recording of her evidence in the Court, the learned Judge had put her certain questions to find her to be a competent witness.

9. P.W.2 is the father of the victim. He lodged the F.I.R. (Exh.14). It is in his evidence that, on the given day he was away

from his home. His wife made him a phone call and asked to return. He, therefore, came home. His parents told him what happened with their granddaughter (victim). He learnt about the incident from the victim as well. It is further in his evidence that, he therefore took his daughter first to the police station and then to the Civil Hospital. The daughter was examined in the hospital. Thereafter he lodged the F.I.R. (Exh.14). His statement was also recorded by a Magistrate, being statement under Section 164 of the Code of Criminal Procedure. The same is at Exh.15.

He denied to have lodged a false report. His evidence would indicate that he would run a library at his residence. His wife would run flour mill. She would also serve tea to the customers (run tea stall).

10. The evidence of P.W.2, father of the victim is relevant only to the extent of setting the criminal law in motion. He claimed to have been informed by his father and even victim as well of the incident. The victim, however, did not state in her evidence to have related the incident to him.

11. P.W.3 is the mother of the victim. It is in her evidence that, the incident took place on 17/1/2018. The victim had returned from the school. The victim went out of the home for playing near a temple. After half an hour, the victim returned. She had a two

rupee coin with her. On enquiry, she told to have been given by an uncle. The victim pointed the house of the appellant. She (P.W.3) beat up the victim as she had taken a 2 rupee coin from the appellant. The victim related her what the appellant did with her. It is further in her evidence that, thereafter she accompanied her husband and the victim to the police station and then to the hospital.

12. She was subjected to a searching cross-examination. She was confronted with her police statement to bring on record many omissions therein. Her police statement is silent to record that she beat up her daughter for receiving Rs.2/- from uncle. She admitted to have not been on talking terms with the family of the appellant. Her statement recorded under Section 164 of the Code of Criminal Procedure is consistent with what has been stated by her in her examination-in-chief.

13. P.W.4 Sushila was a resident of the very vicinity. The appellant was residing as a tenant in her premises. Her evidence is not of much relevance. It is in her evidence that, on hearing shouts, she came out of her house. She accompanied the victim and her mother to the house of the appellant. The victim told her of the incident. Nothing helpful for the defence has come on record in response to the questions put to her during cross-examination. Her police statement has been recorded two days after the incident.

14. P.W.5 Sunil and P.W.6 Bhairu are the panch witnesses to the seizure of a cell phone. Both these witnesses did not stand by the prosecution. It is not known as to why a cell phone of the appellant was seized when it has no relevance with the prosecution case.

15. P.W.7 Akash is a witness to the scene of offence panchanama (Exh.26). He is also witness to the panchanamas of seizure of clothes of the victim and the appellant. The same has also no relevance in view of the nature of the crime.

16. P.W.8 Dr. Rekha was a Medical Officer on duty at Civil Hospital, Osmanabad. She examined the victim by 9.00 p.m. on 7/1/2018. According to her, the victim stated her history as - One uncle took teeth bite at her lips, mouth and private part. The medical examination report, however, indicates that the history was given by the grandfather of the victim. It is further in her evidence that, on examination of the victim, no injury was noticed/ found on the victim's private part or lips. According to her, superficial teeth bite marks disappear after two hours. If it is a case of deep teeth bite injury, then marks of it remain for little over 24 to 48 hours. She had obtained oral and verbal swab of the victim for analysis. The medical examination report of the victim is at Exh.34.

17. P.W.9 Manisha, an employee of Municipal Council,

Osmanabad tendered in evidence an extract of birth register, indicating the date of birth of the victim being 12/7/2012.

18. P.W.10 Pandurang is the investigating officer. It is in his evidence that, he drew the scene of offence panchanama. Seized the clothes of both, the victim and the appellant. Blood and Saliva of the appellant was also obtained for analysis. He tendered in evidence C.A. reports (Exhs.48 and 49).

19. The trial Court referred to the evidence of each and every witness examined for the prosecution. She then relied on Sections 29 and 30 of the POCSO Act and observed the appellant to have failed to rebut the presumption.

APPRECIATION OF EVIDENCE :

20. In Dattu Ramrao Sakhare Vs. State of Maharashtra [(1997) 5 SCC 341], the Hon'ble Supreme Court held as follows : SCC p.343, para 5. :-

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution

which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/ her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

21. Admittedly, the victim was 5 years of age at the relevant time. She had returned home from school. Went to play at the nearby temple. The appellant allegedly took her to his house and did the things alleged. As per the case of the prosecution, the appellant himself let the victim go her home. Admittedly, the appellant would reside along with his mother. There is nothing in the evidence to suggest where was the appellant's mother at the relevant time. Admittedly, the victim neither raised alarm nor weep or cry. If the appellant took bite, natural reaction on the part of the victim should have of either raising an alarm or cry a loud. She returned home with a two rupee coin in her hand. On having found a coin, her mother beat her up. She then related what had happened with her. The victim's mother and grandmother as well, therefore, went to the house of the appellant. He denied to have done anything with the victim. The father of the victim (P.W.2) came home in response to a phone call. It is he who set the criminal law in motion by lodging the F.I.R. (Exh.14). The incident took place by 1.30 p.m. The F.I.R. has been lodged little past 8.30 p.m. All the family members were together before they went to the Police

Station. The victim was medically screened. Neither injury nor redness was noticed either at her private part or on cheek. True, she was medically examined 12 hours after the incident. Admittedly, the Medical Officer had obtained vulval and oral swab of the victim and the appellant as well. The C.A. records in that regard (Exhs.48 and 49) are negative, meaning thereby, no saliva stains were found at the private part of the victim. It is not known as to why the statement of the victim was recorded on 19th January i.e. two days after the alleged incident. The same suggests that, setting of criminal law in motion and everything as part of investigation did take place based on hear-say F.I.R. Furthermore, statements under Section 164 of the Criminal Procedure Code of the victim and her family members were recorded on 24/1/2018 onwards i.e. 7 days after the alleged incident. As such, it is a case based on sole testimony of the victim, a 5 year old girl at the material time.

22. The victim's parents would run a Library, Tea Stall and operate a flour mill at their residence. The appellant examined D.W.1 Amar in his defence. It is in his evidence that once he had seen a quarrel between appellant and family members of the victim over money matter. It is further in his evidence that, on the fateful day, by 2.30 p.m. he had been to the residence of the victim. He saw a quarrel between the appellant and the family members of the

victim. He had intervened in the quarrel.

23. Needless to mention that evidence of defence witness carries weight equal to that of a prosecution witness. He was cross-examined by the learned A.P.P., wherein he was suggested that the police had called him in connection with the said case. Police had even enquired with him. The investigating officer, however, did not record his statement. He admitted to have not stated to anyone about the quarrel between the appellant on one hand and the victim's family on the other. Admittedly, the mother of the victim was not on talking terms with the appellant's mother.

24. It is reiterated that, the F.I.R. was based on hear-say. The victim's statement was recorded two days after the alleged incident. The victim neither raised alarm nor weep or cry after the alleged incident. The medical examination report and C.A. reports (Exhs.48 and 49) run counter to the prosecution case. As such, the case is based on the sole testimony of the victim, then a 5 year old girl. It is common knowledge that child witness is prone to tutoring. A petty incidence might even have been blown out of proportion. On proof of the offence with which the appellant was charged, a minimum sentence of 10 years R.I. has been prescribed.

25. In case of Noor Aga Vs. State of Punjab & arr. (2008) 16 SCC 417, the Apex Court observed in paragraph No.56 as

under:

“56. . . . The Court must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab V. Baldev Singh* (1999) 6 SCC 172, it was stated (SCC p. 199, para 28)

“28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed.”

26. The Apex Court was dealing with the provisions of Section 35 read with Section 54 and Section 53-A of the Narcotic Drugs and Psychotropic Substances Act, which are para materia with Sections 29 and 30 of the POCSO Act. In paragraph 58 of its judgment, the Apex Court observed :

“56. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof

required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused.

27. Even the appellant fails to make out his case of having been falsely implicated, the prosecution's burden to establish the offence beyond reasonable doubt does not get lessened. The appellant was in jail for about three months during investigation, enquiry and trial. He is in jail since 24/12/2019. As such, he is in jail for little over 3 years and 8 months besides the period of three months behind the bars during enquiry, investigation and trial. In view of this Court, the sole testimony of the victim although said to have been corroborated by the evidence of her mother fell short to observe the prosecution to have proved the offence beyond reasonable doubt. This is so because the case rests on the sole testimony of a victim whose statement was recorded 48 hours after the incident. This Court is, therefore, not at one with the findings recorded by the trial Court. Interference with the impugned order of conviction and consequential sentence is, therefore, warranted.

28. Perused the judgment of this Court in case of Ramchandra Vs. State (supra). Needless to mention, each case has to be decided on its facts and circumstances. The victim in the said case, when gave evidence, was in 4th Standard i.e. she might have been little over 8 years of age. After the incident, she was

crying all along. The appellant therein was sentenced to suffer rigorous imprisonment for 5 years. While the facts of the present case indicate that the victim's medical screening report runs counter to the prosecution case. In view of this Court, therefore, reliance on the judgment in case of Ramchandra Vs. State (supra) is of no assistance to the prosecution. For all the aforesaid reasons, the appeal succeeds. Hence the order :-

ORDER

(i) The Criminal Appeal is allowed.

(ii) The order of conviction and sentence dated 24/12/2019, passed by learned Special Judge, Osmanabad in Special (POCSO) Case No.45/2018 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 376 of the Indian Penal Code and Sections 4, 6, 8 and 10 of the Protection of Children from Sexual Offences Act.

(iii) The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to the appellant.

(iv) Fees of Ms Poonam Bodke Patil, learned counsel appointed for the respondent No.2 is quantified at Rs.10,000/- (Rupees ten thousand).

(R.G. AVACHAT, J.)

fmp/-