

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

CRIMINAL APPEAL NO. 510 OF 2020

Subhash Harchand Mahajan
Age; 51 years, Occ; Labour,
R/o; A-2/102, Panvelar Sankul,
Kharvai Naka, Badlapur (E),
District; Thane

...APPELLANT
(Orig. Accused)

VERSUS

1. The State of Maharashtra,
2. XXX,
Victim-minor through her father,
Bhausahab Barku Mahajan,
Age; 36 years, Occ; Labour,
R/o; Wade, Tq. Bhadgaon,
District; Jalgaon.

...RESPONDENTS
(Respondent No. 2-
Victim-Through her father)

...
Advocate for Appellants : Mr.Kulkarni Mukul S. (appointed)
APP for Respondent No. 1-State : Ms.R.P.Gaur
Advocate for Respondent No. 2 : Mr.Parikshit P. Dawalkar
(appointed)

...

CORAM : R. G. AVACHAT, J.

DATE : 28.04.2023.

JUDGMENT :

1. This is an appeal against conviction. The appellant has been convicted for the offences punishable under Sections 376(2)(i) of the Indian Penal Code (for short “IPC”) and Section 3, 4, 5(m) and 6 of the Protection of Children from Sexual Offences Act (for short “POCSO Act”) and therefore, sentenced to suffer rigorous imprisonment for 14 years and to pay fine of Rs. 5,000/- with default stipulation.

All the substantive sentences have been directed to run concurrently.

2. Heard learned appointed Advocate for the appellant, learned APP for the State and learned Advocate appointed to represent respondent No. 2.

3. The appellant was residing in the neighbourhood of the victim. It is the case of the prosecution that the appellant called the victim to his residence on 18.12.2016 and committed rape (oral sex) on her. For deciding the present appeal, the relevant evidence would be that of the informant, Bhausahab (PW-2) (the father of the victim), the victim herself (PW - 3) and Dr. Ramesh (PW-8).

4. Bhausahab (PW-2) testified that he returned home by 12.00 noon on 18.12.2016. His daughter (victim) told him that the appellant had called her to his residence. She went there. The appellant committed rape on her in his house. It is further in his evidence that he therefore, went to the house of the appellant. The appellant was not present there. He took search for him. After four days i.e. on 22.12.2016, he saw the appellant returned his house. He, therefore, went to the house of the appellant. The appellant, however, closed his door. Bhausahab (PW-2), therefore, went to the police station and lodged First Information Report (for short "F.I.R.") (Exh. 47). It is further in his evidence that he preferred application (Exh. 48) requesting for conducting medical examination of his daughter, victim.

5. Bhausahab (PW-2) was subjected to searching cross-examination. He had categorically admitted that there was quarrel between him and the appellant, on account of cultivation of agricultural field. According to him, the appellant did not give him his remuneration for cultivation of the land. On account of the same, the relations between the two were disturbed. He went on to admit that both appellant and he

himself have, therefore, lodged complaints against each other. Bhausahab (PW-2) has further admitted that since the appellant did not pay him the amount due to him, he had grudge against him and therefore, lodged the complaint against him.

6. The learned APP and the learned Advocate representing the victim would submit that the above admission in the evidence of Bhausahab (PW-2) is to be considered regarding other complaints lodged against the appellant and not the present one. Needless to mention that the accused can make out his defence based on preponderance of probability. If this was so, the concerned Additional Public Prosecutor ought to have re-examined Bhausahab (PW-2) to clear the doubt.

7. PW-3 is the victim. It is in her evidence that at the relevant time, she was 11 years of age. On the given day, by 11.00 a.m., the appellant called her to his residence. She went there. He closed the door from inside, made her lie on the ground. The appellant placed his private part in her mouth. She got frightened and ran away from there. She narrated the incident to her father, as soon as he came home.

8. Admittedly, the statement of the victim had been recorded by police for the first time on 12.01.2017 i.e. about 24 days after the incident. The victim also testified that the wife and children and even daughter-in-law of the appellant were all at home on the day of the incident.

9. The learned APP drew the Court's attention to the history given by the victim to the medical officer. The victim had informed Dr. Ramesh (PW-8) that she had been to the house of her neighbour by 11.30 a.m. on 18.12.2016. The neighbour touched her breast and asked her for oral intercourse. She refused. The neighbour removed her clothes and had sexual intercourse with her. He ejaculated in her mouth.

10. The Court do not propose to rely on the history given to the Medical Officer. The victim was just 11 years of age by that time. Her father was very much interested to teach a lesson to the appellant. The history given to the Medical Officer appears to have been after-thought.

11. The learned APP would point out that there were linear abrasions present over right suprascapular region and left ankle of the victim. Admittedly, the victim was medically examined 5 days after the incident. The injury on her person therefore, could not be connected with the crime in question.

12. The appreciation of the evidence produced in support of the charge, indicates that the father of the victim had grudge against the appellant. There were criminal complaints lodged against each other in the past. On the given date, all the family members of the appellant were at home. FIR has been lodged 4 days after the alleged incident. The explanation offered for delayed FIR does not appeal to the reason. The victim's statement was recorded 24 days after the alleged incident. To top it, the informant admitted to have lodged the complaint against the appellant since he had grudge against him, as he was not paid his amount due on account of 'Batai' (cultivation of land).

13. For all these reasons, the impugned judgment of conviction and consequential sentence is unsustainable in law.

It is unfortunate that the appellant is behind the bars for over six years. In the result, the appeal succeeds. Hence the following order :

ORDER

1. Appeal is allowed.
2. The impugned Judgment of conviction and order of sentence dated 17.09.2020, in Special Case (POCSO) No. 09 of 2017, passed by the learned Additional Sessions, Jalgaon, is set aside.
3. The appellant is acquitted of the offences punishable under Sections 376(2)(i) of the Indian Penal Code and under Sections 3 read with Section 4 and Section 5(m) read with Section 6 of the Protection of Children From Sexual Offences Act.
4. The appellant be released forthwith, if not required in any other case.
5. Fine amount deposited by the appellant, if any, be refunded to him.
6. Learned Registrar (Judicial), of this Court is requested to ensure the release of appellant from jail forthwith.
7. The fees of learned Advocates appointed to represent the appellant and respondent No. 2 is quantified at Rs.

10,000/- (Rs. Thousand Only), each.

(R. G. AVACHAT)
JUDGE

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