

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.110 OF 2023

Samir Rajesh Sathe @ Samir Hussain .. Appellant
Shaikh

Versus

The State of Maharashtra & Anr. .. Respondents

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Mr.Sunil R. Pandey with Mr.Raju Manpal for the Appellant.

Ms.Anamika Malhotra, A.P.P. for the State.

Ms.Vrushali Raje, Appointed Advocate for the Respondent
No.2.

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CORAM: BHARATI DANGRE, J.

DATED : 06th APRIL, 2023

P.C:-

1. The Appellant is convicted, by the judgment of the Special Judge under the POCSO Act, Gr.Mumbai on 22/11/2022 in POCSO Special Case No.294 of 2022. He stand convicted for the offences punishable under Sections 354 and 354-A of the Indian Penal Code (for short, “**the IPC**”) and directed to undergo R.I. for two years and to pay fine of Rs.10,000/-, in default to suffer S.I. for six months.

2. Being aggrieved by the said judgment, he has preferred the present Appeal, which is admitted on 06/02/2023. Notice

was issued to Respondent No.2 and considering the sentence undergone, Appeal was directed to be listed for final hearing.

Advocate Vrushali Raje came to be appointed through Legal Aid to represent Respondent No.2.

Since the R & P is received, I have perused the same with the assistance of the learned counsel appearing for the respective parties and taken up the Appeal for final hearing.

3. The Appellant was charged for committing the offences under Sections 8 and 12 of the Protection of Children from Sexual Offences Act (for short, **“the POCSO”**) and Sections 354, 354-A and 354-D of IPC, in the wake of the following allegations:-

“That on 05/02/2022, from 01.30 p.m. to 07.00 p.m. towards Mahalaxmi station in front of HDFC Bank behind the bus stop you used criminal force on the 17 year old victim girl, assaulted her, pulled her hair, slapped her, gave abuses for forcing her to keep love relation with you, so also at Churchgate you forcible held her hand demanding love relation from her and thereby committed the said act with sexual intent an offence of sexual assault punishable under Section 8 of POCSO Act.”

In the aforesaid incident, he is also charged for outraging modesty of the victim and, thus, committing an offence under Section 354 of IPC and by forcibly demanding love relation from her, he is charged for committing the offence under Section 354-A of IPC.

4. In support of the case of the prosecution, the victim girl entered into the witness box as PW 1, whereas a friend, who

was accompanying her, came to be examined as PW 2. An eye witness, a lemonade vendor present at Mahalaxmi Railway Station, came to be examined as PW 4.

The incident is alleged to have been recorded in CCTV footage, installed outside Mahalaxmi Race Course and PW 6, the Security Officer of Zenith House Pvt. Ltd., has been examined for the purpose of proving the CCTV footage. The Investigating Officer is examined as PW 7.

5. The statement of the Accused under Section 313 of Cr.P.C. is recorded, where he denied the prosecution case and when asked as to why the prosecution witnesses have deposed against him, he responded as under :-

“I had told her, I don't want to be in relation. I had seen her with her boy friend. I did not beat her. She said, if I do not come in relation with her she will do many things, implicate me. I have photos and videos of our relationship.”

6. The victim girl disclosed her date of birth as 09/03/2005 and she deposed in the witness box that she was studying in 12th standard, when the incident occurred on 05/02/2022. According to her, she was in relationship with the Appellant and on previous night, she had telephonic conversation with him, when she expressed her intention to end the relationship between them, upon which the Appellant asked her to meet for the last time and it was decided that they would meet at Churchgate station. One common friend was also to arrive there.

As per PW 1, while was waiting for her friend to arrive at Churchgate Station, she did not indulge in conversation with the Appellant. As per her version, the Appellant took her phone and on checking the same, found one contact of her friend, whom she had blocked and he suspected that on account of the relationship with that friend, she is ending the relationship with him. The Appellant called that friend from the phone of PW 2-Rasika, who told the Appellant that he is not carrying any relationship with PW 1, still the Appellant blamed the person at the other end to be lying.

As per PW 1, when she wanted to leave, she was hit on the face and before the Court, she gave long version about how she was taken to Haji Ali and again hit there in public. As per her version, she again got into the train towards Churchgate, when he pleaded that she should start the relationship afresh. He held her hand and snatched her mobile phone, when she was attempting to call her paternal uncle. As per her version, he pulled her hair in the bus and she got angry and hit him on the face and deboarded the bus. Her uncle reached there, when it is alleged that the Appellant spoke in bad language about her.

This resulted in lodging a complaint with Colaba Police Station, which was exhibited through her as Exh.11. On the investigating machinery being set into motion, her statement under Section 164 of Cr.P.C. was also recorded.

7. In her cross-examination, PW 1 specifically admitted that she was knowing the Accused for last two and half years

and they were in a relationship and often used to roam around together and used to click pictures. She was confronted with a photograph marked as Article-A, where they are seen in an intimate position.

She also admit that Accused had blocked her in the mobile contact and she requested him to unblock her, though she denied the suggestion that it is at her instance, they had decided to meet.

8. When the cross-examination of PW 1 is perused, it is full of omissions and these omissions are on the vital aspect about the narration of the complainant about her journey on the date of incident to Haji Ali, by train and about her demeanor, when she refused to indulge the Accused as well as she being hit by him in public and the manner in which, she was alleged to have been carried in the luggage compartment.

These omissions are proved through the Investigating Officer (PW 7) and on the omissions being proved, the case of the prosecution loses it's credibility to a great extent and call for close scrutiny of version of PW 1.

9. The case of the prosecution is that the victim was accompanied by her friend Rasika, who is examined as PW 2, but she denied knowing the Accused. Through her deposition, an entirely different version has come on record, when she state that on a particular date, she alongwith her another friend and the victim had gone to Haji Ali and after having snacks, when they were walking towards Mahalaxmi Station,

victim's boyfriend was with her. She deposed that at Churchgate, the victim was present with the Accused and all of them boarded the train to Mahalaxmi and, thereafter, took train back to Churchgate and reached to their respective houses. She categorically state that no incident happened in her presence between the victim and the Appellant.

In cross-examination, she admit that they were having an affair for last two years and she further clarified that she heard about their affair from outside sources. PW 2, thus, do not support the version of PW 1, which otherwise suffer from several inconsistencies and omissions.

10. The lemonade vendor, who is examined as PW 4, is brought in by the prosecution to establish that, the Accused hit PW 1.

In the examination-in-chief, he depose that on a particular date, which date, he do not recollect, one boy and three girls were sitting near the bus-stop and the boy gave 2-4 slaps to the girl and pulled her down by catching her hair. Thereafter, public gathered and shouted on the boy and all four of them went inside the railway station.

However, in the cross- examination, he admit that his place of business is around 40 ft. from the station and, since, 8 to 10 months have lapsed from the incident, he do not remember much about it. He also admit that he had not seen what they were talking and what was the quarrel about, as they were sitting at a distance of 15 ft. away from him. He specifically state that he had not worn spectacles on that day.

He also states that he can't see the things at far distance and he cannot even notice the small things.

While being asked to identify the Accused, he was unable to identify him.

The testimony of this witness, therefore, do not take the case of the prosecution any further.

11. Another witness examined by the prosecution is, the Security Officer of Zenith House Pvt. Ltd., situated outside the Mahalaxmi Race Course and this witness is examined to prove the contents of a CCTV footage of the alleged incident and to establish the case of the prosecution, that PW 1 was hit by the Accused.

On receipt of letter from Colaba Police Station, PW 6 operating as the Security Officer, transmitted the footage of 05/02/2022 (05.02 to 05.17 mins) from their PC into the pen drive brought by the lady constable. He brought on record the certificate dated 09/03/2022 issued under Section 65-B of the Evidence Act, under his signature and rubber stamp of the company. He was confronted with a pen drive marked as Article A and the label marked as Article A/1, which contained a footage of one boy at the bus-stop beating a girl younger to him. The footage on being played before the Court, reveal the place to be a footpath, near the bus-stop, where a boy was seen assaulting a girl by kicks and blows and pulling her hair and, being rescued by another girl.

In the cross-examination, PW 6 admit that he do not know how to read and write English, though he understand it.

He admit that he is not in a position to read the contents in the certificate at Exhibit 22 i.e. the 65-B certificate. PW 6 admit that the contents in the certificate were given by his office, and he had signed it without reading the same and admit that he had signed it, as told by the company. Apart from this, he depose that he do not know how to transfer the data on pen drive. He also admit that he did not give the data on the pen drive. Apart from this, when specifically asked, whether the image of the boy can be clearly seen in the pen drive, he states that only when the image is zoomed, the face can be seen.

12. The above witness of the prosecution has also failed to add any credibility to the prosecution case, as the procedure prescribed under Section 65-B, though followed, is of no consequences as the one who issued the certificate, has admitted that he has not read it's contents and has merely signed it, as he was asked by the company to sign it.

13. The testimony of the prosecution witnesses, including the complainant herself, has clearly created a huge dent in the prosecution case. The certificate issued by PW 6, which has certified that the computer in which the information was stored and generated was under his control and the pen drive contain the footage information from the computer, which is under his control, loses it's evidentiary value.

It is trite law that the prosecution must establish it's case beyond reasonable doubt and the Investigating Officer, who stepped into the witness box as PW 7, in order to prove the

prosecution case, has relied upon the spot panchnama as well as the CCTV footage drawn on the pen drive from Zenith House Pvt. Ltd., in presence of panchas. Through him the omissions in the statement of the key witness of the prosecution i.e. PW 1 are clearly brought on record. He has specifically admitted that the pen drive, containing the video, was not sent to forensic analysis to identify whether the boy and the girl seen in the video are PW 1 and the Accused. He has also not adopted the technical procedure of obtaining the hash value of the recording. He categorically admitted that there was love affair between the victim and the Accused.

In the wake of this material being placed on record, with a specific case of denial by the Accused in his statement under Section 313 of Cr.P.C., the learned Judge found the Accused/Appellant guilty of committing the offences under Sections 354 and 354-A of IPC.

14. Worth it to mention that Section 354-A prescribe penalty for sexual harassment and from the version of PW 1, no case of sexual harassment is made out as the essentials of sexual harassment are not even alleged by PW 1. As far as Section 354 is concerned, it punishes an act of a person, who assault or use criminal force to any woman with an intent to outrage or knowing it to be likely that he will thereby outrage her modesty. From the evidence led before the trial Judge, the offence is not at all made out and the learned Judge, in the impugned judgment, has referred to some past criminal antecedents of the Accused and appear to have been carried away by his track record, though it is specifically recorded that

he is not found to be guilty for the said offences. The learned Judge proceeding on moralistic ground, referred to a CR registered with Colaba Police Station in the year 2018, where a case was alleged by the prosecutrix against the Accused and the material reflected that the DNA report established that he was the biological father of the child born out of the relationship. In this background, the learned Judge has concluded that the complainant has rightly decided not to continue her love affair with him and, therefore, she was assaulted when they met for the last time on 05/02/2022.

The observations of the learned Judge in paragraphs 31 and 32 of the impugned judgment do not deserve confirmation, since the narration of PW 1 itself do not prove the prosecution case, and her version is not corroborated by her friend (PW 2), who shared friendship with her from first standard to tenth standard. The occurrence of the incident itself is doubtful and the learned Judge has fallen in grave error in not accepting the fact that the two were in a relationship, which can be seen through the photograph (Article A) and the chat messages brought on record.

True it is that dignity of a woman is to be protected at any cost, but that itself do not absolve the prosecution of establishing it's case beyond reasonable doubt and, since the prosecution has miserably failed to discharge the burden caste on it, the benefit must necessarily go to the Accused.

15. In view of the discussion above, the Appeal deserve to be allowed, by setting aside the impugned judgment dated

22/11/2022 passed in POCSO Special Case No.294 of 2022, holding the Appellant guilty of the offences under Sections 354 and 354-A of IPC and sentencing him to suffer R.I. for two years. The Appellant stand acquitted of the charges levelled against him.

16. It is informed that upon the judgment delivered on 22/11/2022, the Appellant is in custody. He deserve his liberty in the wake of reversal of the impugned judgment. He shall be set at liberty forthwith, if his custody is not warranted in any other case, registered against him.

16. Before I part, I deem it appropriate to record appreciation for Advocate Vrushali Raje, who has effectively represented the case of respondent No.2. The Legal Services Authority is directed to pay her legal remuneration within a period of six weeks from today.

(SMT. BHARATI DANGRE, J.)