

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

CRIMINAL APPEAL NO.775 OF 2019

Sangram Vilas Jagtap	Appellant
Versus	
The State of Maharashtra & Anr.	 Respondents

Ms. Anjali Patil, Advocate a/w. Mallika Sharma for the Appellant.

Mr. S.R. Agarkar, APP, for the Respondent No.1-State.

Ms. Rebecca Gonsalvez, Advocate (appointed) for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 13th FEBRUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 23.4.2019 passed by the Special Judge under the POCSO Act, Greater Mumbai in POCSO Special Case No.243/2017. The applicant was convicted and sentenced as follows :

- (i) He was convicted for commission of the offence punishable under Section 376(1) of IPC and he was sentenced to suffer RI for ten years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer SI for seven days.

- (ii) He was convicted for commission of the offence punishable under Section 377 of IPC and was sentenced to suffer RI for five years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer SI for seven days.
- (iii) He was convicted for commission of the offence punishable under Section 323 of IPC and was sentenced to suffer RI for six months and to pay fine of Rs.500/- and in default of payment of fine to suffer SI for seven days.
- (iv) He was convicted for commission of the offence punishable under Section 341 of IPC and was sentenced to suffer RI for one month and to pay fine of Rs.100/- and in default of payment of fine to suffer imprisonment for three days.
- (v) And lastly, he was convicted for commission of the offence punishable under Section 354 of IPC and was sentenced to suffer RI for one year and to pay fine of Rs.500/- and in default of payment of fine to suffer SI for five days.

All the substantive sentences were directed to run concurrently. He was given set-off under Section 428 of Cr.P.C.

2. The prosecution case is that the appellant was residing in the same vicinity as that of the victim. She was about ten years of age at the time of incident. Her date of birth was 6.1.2007. The incident took place on 1.3.2017. On that day, at around 12.30 p.m., the victim was playing outside the house of the appellant.

He took her on the mezzanine floor of his house on the pretext of showing some video for children. Taking advantage of the situation, he committed rape on her. She came out of the house. Her friends noticed that she was crying. One of the neighbours informed her mother. The mother enquired with her. She narrated the incident to her. The mother of the victim went to the house of the appellant and thereafter went to the police station along with the victim. The mother of the victim lodged her FIR. The investigation was carried out. The appellant was arrested. The spot panchnama was conducted. The victim and the appellant were sent for medical examination. The statements of the witnesses were recorded. The articles were sent for chemical analysis. At the conclusion of the investigation, the charge-sheet was filed and the case was tried before the Sessions Court.

3. During trial, the prosecution examined nine witnesses including the victim, her mother, a neighbour, two friends, the Medical Officer; and the police officers. The defence of the appellant was of total denial. After hearing both the parties,

learned Judge convicted and sentenced the appellant as mentioned earlier.

4. The victim was examined as PW-1. She has deposed as follows :

She was residing with her elder brothers and parents. Her school timing was from 6.45 a.m. to 1.00 p.m. Her date of birth was 6.1.2007. On the date of incident, she had a half-day school. She reached home at around 10.00 a.m.. Then at around 12.00 p.m., she went out to play. She went to the house of the appellant for playing with the appellant's niece. One of her friends was with her. Therefore, in the house; the appellant, the victim, her friend and two small boys were present. The victim's friend's mother called her, so victim's friend went to her house. Two small children were playing on the ground floor. The appellant told the victim that he had a C.D. for children and that he would show it to her. He took the victim on the mezzanine floor. When they reached there, he removed his clothes and also removed her clothes. Then he committed rape on her. He had put

his private parts in her private parts. He did it for a long time. She slapped him. He slapped her back. He pressed her chest. She did not remember what he did on the backside but she had pain there. She could not shout because of fear. She kicked him, took her clothes hurriedly and came out. She started crying outside the house. Her friend “S” came there and enquired with her as to what had happened. The victim did not tell her anything. Two other friends came there. They enquired with her. She did not tell them anything. The appellant’s mother came there. She did not tell them the real reason why she was crying. Finally, she narrated the incident to one Rinku Didi. She narrated the incident to one Mami. Said Mami called the victim’s mother. Her mother came and went to the appellant’s house and quarreled with him. The victim’s mother brought the victim to their house. She told the victim’s brother to call the victim’s father, who in turn informed the police. They came to the house of the appellant and arrested the appellant. After that, her father came home. She along with her parents went to the police station and narrated the incident to the police. She identified her clothes in the Court.

After recording her statement, the police sent her for medical examination. She narrated the history to the Medical Officer. Her statement was recorded in the Court under Section 164 of Cr.P.C. The statement is produced on record at Exhibit-12. She identified the appellant on Video-Conferencing facility.

In the cross-examination, she stated that PW-4 Nalini was residing opposite her house and she was her mother's friend. The appellant's house was at one minute walking distance from the victim's house. One of the children, who was in the house at the time of the incident was less than five years of age. She was then cross-examined regarding her knowledge of anatomy of her private parts. She was asked about the omissions from her police statement where she had not stated that the incident occurred for a long period. She further deposed that she did not remember whether her private parts had become reddish. According to her, there was some white sticky liquid on her private parts. After recording this answer, the learned Judge had recorded that the victim – PW-1 had requested the defence counsel to ask questions

point by point so that she could understand them. She further added that she was not sure about whether her private parts was reddish but there was some white sticky liquid on her private parts and on her clothes. She admitted that, before going to the police station her mother had slapped the appellant. She added that the other young boy present in the appellant's house was even younger than the five year old boy. Her statement recorded under Section 164 Cr.P.C. sufficiently corroborates her evidence.

5. PW-2 was the mother of the victim. She has deposed that the victim's date of birth was 6.1.2007. The incident occurred on 1.3.2017. PW-2's husband had brought her home from the school and had gone to attend his job. She went out for playing at around 12.30 p.m. After that PW-2's friend Nalini called her. She went to her house. She saw that PW-1 was there and she was frightened. Nalini told her that the appellant had done something with the victim. PW-2 then asked PW-1. She narrated the entire incident to PW-2. Both of them came back to their house. She narrated the facts in detail. PW-2 contacted her

husband. He, in turn, contacted the police control room. The police came near the spot. PW-2 went to the appellant's house with the police. The appellant was about to leave his house. The police apprehended him. They took him to the police station. PW-2, her husband and PW-1 went to the police station. PW-2 lodged her FIR. It is produced on record at Exhibit-16. She handed over the victim's clothes to the police. She deposed that the victim was sent for medical examination. The victim's statement was recorded under Section 164 of Cr.P.C. PW-1 produced the victim's clothes before the police. They were seized. PW-2 produced the original birth certificate before the Court. It is taken on record at Exhibit-17. In that birth certificate, the victim's date of birth was shown as '6.1.2007'.

In the cross-examination, she stated that she checked the private parts of the victim and found that it was reddish in colour and there was slight swelling. The record shows that the FIR was lodged at 4.15 p.m. but the police station was informed at 2.10 p.m. regarding the incident which had taken place between

12.30 p.m. to 1.15 p.m.. The FIR substantially corroborates the evidence of PW-2.

The spot panchnama is produced on record at Exhibit-18. The seizure of the victim's clothes panchnama is produced on record at Exhibit-19 and the seizure of the appellant's clothes panchnama is taken on record at Exhibit-20. The accused clothes were seized on 4.3.2017.

6. PW-4 Nalini was a neighbour. She deposed that, on 1.3.2017 at about 1.00 p.m., the victim knocked her door. The victim and one girl "T" were standing there. The victim was crying but she did not tell anything out of fear. She narrated part of the incident. Therefore, PW-4 called the victim's mother from her window. She came there. Then she took the victim with her to their house.

In the cross-examination, she stated that the appellant's mother was a house-wife and used to always remain in the house. The appellant was studying in the Engineering College. In the cross-examination, she admitted that the part of

the incident, which the victim had narrated to her, was not told by her to the police in her police statement.

7. PW-5 “S” was the victim’s friend. She saw the victim standing outside the appellant’s house and crying. She along with other friends went to the victim and asked about the reason for her crying. She did not narrate the incident to them. She took her to a neighbour’s house. At that time, she narrated the incident. All of them went to the house of PW-4. The victim narrated the incident to PW-4, who in turn called the victim’s mother. PW-2 called the police. This witness identified the appellant before the Court.

8. PW-6 “T” was another friend. She has narrated the incident in the same manner as is narrated by PW-5. She also identified the appellant before the Court.

In the cross-examination, she stated that she had complained to her mother that the appellant had misbehaved with her about eight days prior to this incident. The appellant used to make objectionable gestures towards her.

9. PW-3 WPSI Surwanshi was attached to Bhandup police station. On 1.3.2017 at about 2.15 p.m., PW-2 came to the police station with the appellant and the victim. They were accompanied by Beat Marshal-4. She recorded the statement of the first informant. She identified the FIR at Exhibit-16. She registered the offence vide C.R. No.84/2017. She went to the spot and conducted the spot panchnama. She seized the bed-sheets from the spot.

In the cross-examination, some minor contradictions from the FIR were proved by her.

10. PW-7 API Randhwa had recorded the statement of the victim on 1.3.2017. This witness was in the civil dress at that time. She was cross-examined on the point whether she had inquired with the victim about what she meant by private parts. She proved some omissions from the victim's statement but they do not really destroy the victim's evidence.

The defence admitted the medical examination report of the appellant. It is produced on record at Exhibit-28. In that

report, it was mentioned that there was nothing to suggest that he was not capable of performing sexual intercourse.

11. PW-8 Dr. Narendra Kumar had examined the victim medically. He has deposed that he had examined the victim on 1.3.2017. The history was narrated by the victim's mother. The victim was examined at 10.45 p.m. on 1.3.2017. On examination, he did not find any injury on her body. On local examination, he did not find evidence of any injury or redness. Her hymen was intact. There was no bleeding, no odema, no perineal tear. Her swab was preserved for Forensic examination. He gave the opinion that the evidence of sexual intercourse / assault could not be ruled out. He had kept his final opinion pending till receipt of FSL report. The report is produced on record at Exhibit-31. He was shown CA report at Exhibit-32. He deposed that even after reading the CA report, his opinion was the same. The C.A. report mentions that neither blood nor semen was detected on the bed-sheets, clothes of the victim and the clothes of the appellant.

In the cross-examination, he deposed that the victim

was brought for examination after eight to ten hours. According to him, if there was redness on private parts or bleeding; it could not be cured within eight to ten hours. He had not noticed any redness or injury on her private parts. He reiterated that he was firm on his opinion that sexual assault or intercourse could not be ruled out even if the CA report was nil. He agreed that if the medical history and other papers were excluded, he would not be in a position to give positive finding in this case.

12. PW-9 PI Chavan had conducted the investigation in C.R. No.84/2017 of Bhandup police station. He had sent the clothes and the samples for Chemical analysis. He had filed the charge-sheet. On 18.3.2017 he had sent the victim for recording statement under Section 164 of Cr.P.C.

. This, in short, was the evidence led by the prosecution.

13. The learned Judge observed that the prosecution had not proved the source of the birth certificate at Exhibit-17 and, therefore, the prosecution has failed to prove that the victim was a child within the meaning of Protection of Children from Sexual

Offences Act. On this ground, the learned Judge acquitted the appellant from the offences punishable under POCSO Act. However, he accepted that the victim was telling the truth and based on the sole testimony which inspired confidence according to him; he convicted the appellant under various sections of IPC. Though the observations of the learned Judge regarding acquittal under POCSO Act do not appear to be correct in law and on facts; the State has not challenged that finding. There is no appeal against acquittal as far as those charges are concerned.

14. Learned counsel for the appellant submitted that the evidence of the victim does not inspire confidence. This is not a case where her sole testimony can lead to the only conclusion of the guilt of the appellant. She strongly relied on the medical evidence and the CA report to contend that these two factors do not corroborate the victim's evidence at all. According to learned counsel, the incident was going on for a long time as was deposed by the victim and, therefore, at least some signs should have appeared on the person of the victim. The victim had narrated

that there was white liquid in her private parts and yet the CA report does not indicate anything of that nature which falsifies her story.

15. She further submitted that the incident could not have been possible because there were two small boys in the house and the appellant could not have committed this offence in their presence. There are important omissions from the evidence of not only the victim and her mother but even from the evidence of the neighbour.

16. Learned counsel for the respondent No.2 as well as learned APP opposed these submissions. They submitted that there is no reason to hold that the evidence of the victim was not sufficient in this particular case. There was no reason for her to implicate the appellant falsely. There is nothing to show that there was any previous reason of such a grave nature to drive the victim to make such serious allegations against the appellant. The evidence shows that the victim had full faith in the appellant and she innocently went to his house. The appellant had called her

on the pretext of showing some C.D. for children. He took advantage of this situation and then committed this offence.

17. They submitted that, as per the definition provided under Section 375 of IPC, even a small penetration is enough to constitute the offence. Therefore, if there was no visible indication on the private parts of the victim that does not mean that the penetration did not take place. They submitted that the victim's age is very important in this case. Nothing further could be expected from a ten year old child. She was not in a position to explain in detail about the factors on which the defence is harping. They submitted that the learned Judge has recorded time and again as to how disturbed the victim was during her cross-examination and, therefore, her evidence will have to be tested in that background.

18. Learned counsel for the respondent No.2 relied on the observations of the Hon'ble Supreme Court in the case of **State of Himachal Pradesh Vs. Manga Singh** as reported in (2019) 16 SCC 759 to contend that absence of injuries on the private parts of the

victim by itself is no reason to doubt the evidence of the prosecutrix.

19. I have considered these submissions. While it is true that the medical examination does not show any visible injuries on the person or the private parts of the victim, but, it also must be kept in mind that her medical examination was conducted at 10.45 p.m. on 1.3.2017 whereas the incident had taken place at around 1.00 p.m.. There was considerable time gap. The victim or her mother PW-2 in their examination-in-chief have not deposed that there was redness or injury to the victim's private parts. PW-2 was asked in her cross-examination about such redness. Therefore, absence of redness will not falsify the prosecution story. As rightly submitted by learned counsel for the respondent No.2 and the learned APP that even small penetration was enough to constitute this offence as is provided in the definition under Section 375 of IPC. Considering the tender age of the victim, it is also understandable that she may not exactly know anything about the liquid. Her cross-examination shows that

after she gave that particular answer, she had complained that the questions were put to her which she was not able to understand easily. Therefore, absence of any indication in the CA report about such liquid will not help the defence in this case. The clothes of the accused were seized on 4.3.2017 and the incident had taken place on 1.3.2017. The CA report regarding these clothes is therefore not indicating anything of importance.

20. Therefore, everything depends on the testimony of the victim herself. After scrutinizing her deposition carefully, I do not find any infirmity in her deposition raising a reasonable doubt about the prosecution case. The sequence of events shows that she had immediately come out of the house of the appellant after the incident. She was seen crying. She met her friends. She was in a frightened state. All this is deposed by her two friends and the neighbour. To that extent, they have corroborated her depositions showing her frame of mind. Immediately after that, her mother was informed. She narrated the incident to her mother. The police were informed immediately. They came at the

spot and the appellant was arrested immediately. There is absolutely no time gaps between these events. Therefore, it cannot be said that PW-1's story is concocted. Any pre-planning or concoction of story is totally ruled out. I, therefore, see absolutely no reason to disbelieve her case. In this regard, reliance can be placed on the case of **Manga Singh** (supra). The relevant paragraphs i.e. paragraphs-10 and 15 are relevant, which are as follows :

“10. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.

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15. Insofar as the second ground on which the High Court gave the benefit of doubt to the respondent-accused that the medical evidence was inconclusive, it is to be pointed out that Dr. Neerja Gupta (PW 6) in her evidence has categorically stated that merely because there was no injury marks it cannot be said that there was no question of sexual intercourse. In her chief-examination Dr. Neerja Gupta (PW 6) has further stated that in case of small/slightest penetration the hymen will not rupture; the hymen will rupture only in case of complete penetration with force. As discussed earlier, the respondent-accused made the prosecutrix (PW-4) to sleep with him and inserted his private part in the private part of the prosecutrix which constitutes rape. This may not have ruptured the hymen. In the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix. The prosecutrix being a small child of about nine years of age, there could be no question of her giving consent to sexual intercourse. The absence of injuries on the private part of the prosecutrix can be of no consequence in the facts and circumstances of the present case.”

22. Considering all this discussion, I am of the opinion that the prosecution has proved its case beyond reasonable doubt. There is no reason to interfere with the conviction and sentence recorded by the trial Court. With the result, the appeal is dismissed.

(SARANG V. KOTWAL, J.)

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