

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

CRIMINAL APPEAL NO.907 OF 2019

Dhanaji Baliram AdasulAppellant
Versus
The State of Maharashtra & Anr. Respondents

Mr. Aniket Vagal, Advocate a/w. Kunal Pednekar, Divesh Mehani, for the Appellant.

Smt. M.R. Tidke, APP for the Respondent No.1-State.

Mr. Sushan Mhatre, Advocate (appointed) for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 22nd FEBRUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 15.2.2019 passed by the Special Judge, Thane under the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') in Special Case No.64/2017. The appellant was convicted as under :

(i) He was convicted for commission of the offence

punishable under Section 376(2)(f),(i) and (n) of IPC and under Section 5(l),(m),(n) read with Section 6 of the POCSO Act and was sentenced to suffer RI for ten years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer SI for six months;

- (ii) He was convicted for commission of the offence punishable under Section 354-A of IPC and was sentenced to suffer RI for one year and to pay fine of Rs.5,000/- and in default of payment of fine to suffer SI for three months;
- (iii) He was convicted for commission of the offence punishable under Section 342 of IPC and was sentenced to suffer RI for one year and to pay fine of Rs.1,000/- and in default of payment of fine to suffer SI for six months;
- (iv) He was also convicted for commission of the offence punishable under Section 9(l),(m) and (n) of the POCSO Act and was sentenced to suffer RI for five years and to pay fine of Rs.10,000/- and in default of

payment of fine to suffer SI for six months;

The amount of fine, if recovered, was directed to be paid to the victim girl as compensation under Section 357 of Cr.P.C. after expiry of the appeal period. The substantive sentences were directed to run concurrently. He was given set off under Section 428 of Cr.P.C.

2. Heard Shri Aniket Vagal, learned counsel for the appellant, Smt. M.R. Tidke, learned APP for the respondent No.1-State, Shri Sushan Mhatre, learned appointed counsel for the respondent No.2.

3. The prosecution case is that the victim's date of birth was 24.10.2007. The appellant was her father. The incident took place on 5.12.2016. At that time, no one else was in the house. The appellant committed rape on the victim. After four to five days, when the victim's mother had told the appellant to take the victim to the school, the victim got frightened. She concealed herself in the house of her aunt. The appellant was under the influence of liquor at that time. The victim's aunt, who was residing at five minutes walking

distance from the victim's house, some how saved her on that day. The victim narrated the incident to her aunt, who in turn, informed the victim's mother. They went to the police station and lodged the FIR. The FIR was registered vide C.R. No.I-427/2016 at Rabale police station. The victim was sent for medical examination. The statements of witnesses were recorded. The victim's statement was recorded under Section 164 of Cr.P.C.. At the conclusion of the investigation, the charge-sheet was filed. The case was committed before the Special Court.

4. During trial, the prosecution examined seven witnesses including the victim, her mother, her aunt, a pancha, the Medical Officer and the investigating officers. The defence of the appellant in the answers given in statement under Section 313 of Cr.P.C. was that the appellant's wife i.e. the victim's mother was insisting that the appellant should not give shelter to his mother; otherwise she would implicate him falsely in cases and, therefore, at her instance he is falsely implicated. The victim's aunt had lodged other case of similar

nature against another person and she has settled that matter by getting an amount of Rs.5 Lakhs. His further defence is that his brother i.e. the victim's aunt's husband wanted share in the appellant's property. He had threatened the appellant and at their behest this false case is lodged against him.

5. Learned Judge considered the evidence, the arguments and the defence in this case and at the conclusion of the trial, convicted and sentenced the appellant as mentioned earlier.

6. The victim is examined as PW-2. She has stated that the appellant was her father. Her mother used to work in a garden and the appellant was a driver. On the date of the incident, her mother had gone to attend her work. PW-2 came back from her school. It was around noon time. Her grandmother went out for some work. The appellant came home. He sent the victim's brother outside. He latched the door from inside. After that, he removed the clothes of the victim and his own clothes. He committed rape on the victim. She has

specifically mentioned that the appellant inserted his private part in her private part. She was crying but the appellant gagged her mouth. After that, one woman, residing in the neighborhood, knocked the door. The appellant wore his clothes and made the victim wear her clothes. He threatened the victim not to disclose that incident to anyone else, otherwise he would throw her under the train. She has further deposed that on a previous occasion the appellant had taken her near a tank situated near a mine and at that time he had taken her in a hut. He had asked her to remove her clothes. At that time, she had shouted loudly. One woman passing by that area had come there and further incident was prevented.

PW-2 has further deposed that she told her aunt (PW-4) about the incident. After that, her mother lodged a complaint in the police station. The police inquired with her. She narrated the entire incident to them. She was sent to a hospital for medical examination. Her statement was also recorded under Section 164 of Cr.P.C. on 14.12.2016. It was

produced on record at Exhibit-21.

Her cross-examination was very cryptic. It was only about suggestion that the incident was not true and that her mother had tutored her how to depose before the police and the Court. All these suggestions were denied by the victim. However, she admitted that there used to be quarrels between the appellant and her mother. There was absolutely no cross-examination on the main aspects. The main part of her evidence has remained unchallenged in the cross-examination. The 164 Cr.P.C. statement, which is produced on record, substantially corroborates the victim's evidence.

7. PW-1 was the mother of the victim. She has deposed that the victim was around ten years of age at the time of incident. She was studying in the 4th standard. PW-1 used to go to attend her job between 8.00 a.m. to 6.00 p.m.. According to her, the appellant was addicted to liquor and smoking. PW-4's house was at some distance from their house. The incident took place in the year 2016. There was

parent's meeting in the victim's school. PW-1 was unable to attend the meeting and, therefore, the appellant was to take the victim to the school. But, he was under the influence of liquor. Therefore, the victim got frightened. She went to the house of PW-4 and concealed herself. After some time, PW-1 went to the house of PW-4, who in turn, told her that they should go to the police station and lodge a report. In spite of the threats given by the appellant, she lodged the report at the police. She deposed that she did not know what had happened with the victim but she has further deposed that afterwards the victim disclosed to her that the appellant had removed her clothes. He had caught her. She had shouted and thereafter he had left her. She told PW-1 that such incident has taken place on two occasions. Therefore, on the next day, PW-1 again went to the police station and lodged the report on 12.12.2016. That FIR is produced on record at Exhibit-13. The police recorded the victim's statement and then her supplementary statement.

In the cross-examination, she admitted that her

mother-in-law and her husband (the appellant) were residing together with PW-1. She had good relations with the appellant. However, he used to quarrel with her. There used to be many quarrels. Once or twice she had gone to the police station to lodge the report against the appellant. But the police did not take cognizance. On 5.12.2016 i.e. on the date of incident she had gone to attend her work. She was there till the evening. She did not know who was present in the house at that time. PW-4's house was at a distance of five minutes walk from her house. She admitted that she came to know about the incident through PW-4.

8. PW-4 was the victim's aunt. She has narrated that she was married to the appellant's brother. Her house was at a distance of two to three minutes walk from the victim's house. On 10.12.2016 at about 11.00 a.m., the victim came to her house. She was crying. She told PW-4 that the appellant was taking her to the school forcibly. The appellant followed the victim to PW-4's house. At that time, he was under the influence of liquor. Somehow PW-4 could manage to send him

back. After that, she made enquiries with the victim in the presence of two to three women. At that time, the victim told them that about 4 to 5 days earlier, when she was alone in the house the appellant had removed their clothes and had slept on her. Somebody had knocked on the door and, therefore, the appellant made her wear her clothes, he also wore his clothes and he had threatened the victim. Again there was hardly any cross-examination of this important witness.

9. PW-3 Santosh Gaikwad was a pancha for spot panchnama which is produced on record at Exhibit-23. Nothing much turns on his evidence.

10. PW-5 Dr.Jaya Srinivasan was the Medical Officer, who had medically examined the victim. She deposed that the history was given by the victim. She had mentioned that there was sexual assault by the appellant by touching her private part with hands and with his private part 3 to 4 times over a period of four months. The last incident had taken place before the medical examination which was conducted on

24.12.2016. On examination, she did not find any external injury on the person and on the private parts of the victim. The hymen was intact. According to her, possibility of sexual assault could not be ruled out.

In the cross-examination, she admitted that in her report there was no indication of rape.

11. PW-6 API Santosh Patil was the investigating officer. He has conducted the investigation in C.R. No.I-427/2016 registered at Rabale police station. He had conducted the spot panchnama. He had sent the victim and the appellant for medical examination.

12. PW-7 Satish Kamble was the Headmaster of the school where the victim was studying. He produced the birth-certificate at Exhibit-37. It mentioned the victim's date of birth as 24.10.2007.

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

13. Learned counsel for the appellant made the

following submissions :

- i. There was delay of almost seven days in lodging the FIR.
- ii. The grand-mother was not examined. The neighbour, who had knocked the door at the time of incident, was neither examined in the Court nor her statement was recorded by the police.
- iii. The date of the incident is not mentioned by the victim. The allegations about the earlier incident are quite vague. There was delay in lodging the FIR.
- iv. The spot of the earlier incident was shown by the victim's mother but there is nothing to suggest or indicate as to how the mother of the victim came to know about this spot because the victim had not deposed when she had shown that earlier spot to her mother.
- v. Surprisingly, the victim did not tell anything to her mother, which was quite unnatural. She had narrated the incident to PW-4. The version given by PW-1 and PW-4 is quite different from the version of the victim

herself.

- vi. The other women in whose presence PW-4 had made enquiries with the victim are not examined.
- vii. There is a possibility of exaggeration and, therefore, the victim's evidence cannot be stretched to the extent of holding that there was actual penetration when neither the FIR nor the evidence of PW-1, PW-4 nor the medical history mention any such allegations of penetration.
- viii. The medical evidence, in fact, supports the defence case as there were no injuries to the private parts or to the person of the victim.

14. Learned APP as well as learned counsel for the respondent No.2 opposed these submissions. According to them, considering the tender age of the victim, it was not expected from her to give further details than those which she had deposed before the Court. There was no cross-examination in respect of her version. In fact, that itself proves the prosecution case. The absence of injuries to her private parts or to her person will not mean that the incident

had not taken place as per the definition of rape given under Section 375 of IPC as well as for the offence under Section 3 of the POCSO Act. The penetration even to the smallest possible extent would still constitute the offence of rape. In this case, the evidence of the victim carries more weight than the evidence of PW-1 and PW-4. The victim was not confronted with the medical history recorded by the doctor and, therefore, it cannot be used against the victim.

15. I have considered these submissions. As rightly submitted by learned counsel for the respondent No.2 and learned APP, the most important piece of evidence in this case is that of the ocular evidence of the victim herself. She had clearly mentioned that on that particular date the appellant had committed rape on her. He had inserted his private part in her private part. There is absolutely no cross-examination in respect of this particularly damaging piece of evidence.

16. The victim has given the same narration in her statement recorded under Section 164 of Cr.P.C. Even that

statement is consistent with her case and there is no cross-examination in respect of that statement as well. Therefore, based on her evidence itself the prosecution has proved its case.

17. Though there is no injury mentioned by the medical officer; as rightly submitted by learned APP and learned counsel for the respondent No.2, even the penetration to the smallest possible extent will still constitute the offence of rape as defined under Section 375 and also for the offence defined under Section 3 of the POCSO Act. Therefore, the evidence of medical officer will not help the defence in this particular case.

18. As far as the evidence of PWs-1 & 4 is concerned, though they did not speak particularly about the penetration, their evidence cannot override the evidence of the victim herself. The victim's evidence is more important than their evidence because the victim has undergone the trauma of that particular offence. She knows the details of the offence. She

has deposed about the offence before the Court when her deposition was recorded and also before the Magistrate when her statement under Section 164 of Cr.P.C. was recorded. That is the very purpose for recording her statement under Section 164 of Cr.P.C. so that the Court removes all the apprehensions from her mind and her statement is recorded in a free atmosphere.

19. In this context and in this background, the statement given by the victim before the Magistrate Court under Section 164 of Cr.P.C. as well as during the deposition at the time of trial, definitely carry more weight than the evidence of PW-1 her mother and PW-4 her aunt. I do not find any lacuna in the evidence of the victim. In such a case, her evidence alone is sufficient to base the order of conviction and sentence against the appellant.

20. In this case, the evidence shows that the victim was under fear. She was residing with the appellant and therefore it is understandable that she had narrated the

incident to her aunt after a few days. Hence, delay in lodging the FIR will not make much difference in this particular case.

21. The defence taken by the appellant is not supported by any other material. In any case, it does appear improbable. The dispute with the appellant's wife was quite trivial. There is no further details about his dispute with own brother and PW-4. There is nothing to suggest that the victim was deposing as tutored by PW-4 or PW-1.

22. In this view of the matter, there are no circumstances in favour of the defence. On the other hand, the prosecution has proved its case beyond reasonable doubt through the deposition of the victim. Therefore, I do not find any merit in the appeal. The appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

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