

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

CRIMINAL APPEAL NO.882 OF 2019

Chandrakant Mahadev Tawade	...Appellant
Versus	
The State of Maharashtra and Anr.	...Respondents
....	

Mr. Pramod Kathane for the Appellant.
Mr. S.V. Gavand, APP for Respondent No.1-State.
Ms Grishma Lad for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT PRONOUNCED ON :09/01/2023

JUDGMENT:-

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order dated 22/02/2019 in Special Case No.2 of 2017, Ratnagiri.

2. By the impugned judgment, the learned Special Judge (POCSO) has held the Appellant (hereinafter referred to as 'accused') guilty of offences punishable under Sections 376(2)(i)(j), 354, 504 and 506 of IPC and under Sections 3 r/w 4 and 7 r/w 8 of the Protection of

Children from Sexual Offences Act, 2012 ('the POCSO Act'). The accused has been sentenced to undergo rigorous imprisonment for 10 years with fine of Rs.25,000/- i/d. to suffer simple imprisonment for six months for offence punishable under Section 4 of the POCSO Act. He is also sentenced to undergo rigorous imprisonment for two years each for offences punishable under Sections 504 and 506 of the IPC.

3. The case of the prosecution in brief is that on 20/11/2016 at about 5.00 p.m. the victim, a child of about 12 years of age had gone to the house of the accused to give him an invitation card. It is alleged that that the accused sexually assaulted her and subjected her to penetrative sexual assault. The accused is also alleged to have threatened the victim not to disclose the incident to anyone. The victim narrated the incident to her mother PW7 and sister-(PW2). She questioned the accused about the incident but the accused denied having committed any offence. He further abused and threatened them. PW7 called her husband, who was in Mumbai and told him about the incident. After he returned home, the victim lodged the FIR against the accused. Pursuant to which crime was registered against the accused for offences punishable under Sections 376(ii), 504, 506 of IPC and Section 4 of the POCSO Act. PW10-PSI Anjana Phalake investigated the crime. She recorded the statements of the

victim, referred the victim for medical examination, conducted scene of offence panchanama and seized all the incriminating material including the clothes of the victim. She recorded the statements of the witnesses and upon completion of the investigation filed the charge sheet against the accused.

4. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined 10 witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. Defence of the accused was of total denial and of false implication.

5. The learned Judge after evaluating the evidence adduced by the prosecution held that the victim was a child within the meaning of Section 2(d) of the POCSO Act. Relying upon the testimony of the victim, the learned Judge held the accused guilty of the offences and sentenced him as stated above. Being aggrieved by the judgment the accused has filed this appeal.

6. Mr. Pramod Kathane, learned counsel for the Appellant submits that the evidence of the victim is not reliable and hence conviction cannot be based on the sole testimony of the victim. He further states that the

evidence of the victim is not corroborated by medical evidence. He submits that the victim is not reliable and hence conviction cannot be based on the sole testimony of the victim. He states that there is delay in lodging the complaint. He further states that though the victim has alleged that the accused had subjected her to penetrative sexual assault, evidence of PW8-Dr. Ramchandra Mestri clearly indicates that there were no injuries on her private parts and that hymen was intact. He therefore contends that medical evidence rules out possibility of penetrative sexual assault. Learned counsel for the accused submits that the CA report also does not support the case of the prosecution.

7. Mr. S.V. Gavand, learned APP states that the victim was a child of 12 years of age. Her evidence clearly indicates that the accused had sexually abused her. He submits that partial penetration of the penis is sufficient to constitute the offence under Section 3 of the POCSO Act. He submits that absence of injuries is no ground to disbelieve the evidence of the victim. He further submits that conduct of the victim in reporting the incident immediately to her mother and the conduct of the mother disclosing the incident to her neighbours and questioning the accused is a natural conduct, which only points towards the guilt of the accused. He submits that the learned Special Judge has considered the evidence thread

bare and has arrived at a conclusion that the accused had subjected the victim to penetrative sexual assault. He urges that there is no reason to interfere either with the order of conviction or sentence.

8. I have perused the records and considered the submissions advanced by learned counsel for the respective parties.

9. The accused is charged for subjecting the victim, a child of 12 years, to penetrative sexual assault. The evidence of the victim (PW1) as well as the evidence of PW3 and PW7, the parents of the victim reveals that the victim (PW1) was a student of class eight and that her date of birth is 03/02/2004. The prosecution has also placed on record the extract of birth certificate at Exhibit-72 issued by the Panchayat, a perusal of which clearly indicates that the victim was 12 years of age and a child within the meaning of section 2(d) of the POCSO Act.

10. The next and most crucial question for consideration is whether the accused had subjected the victim to penetrative sexual assault.

11. The evidence of PW1 reveals that on 20/11/2016 at about 5.00 p.m. her mother had sent her to the house of the accused to give a wedding invitation card of her uncle. She has deposed that the

accused was alone in the house. He was sitting on a bed in the kitchen. She told him that she had come to invite him for the wedding of her uncle. He pulled her on the bed and started pressing her breast and kissing her. He undressed her and sucked her breast. He also put fingers in her private parts and inserted his penis in her vagina and discharged some secretion in her vagina. He threatened her not to disclose the incident to anyone.

12. PW1 has deposed that she went home crying and told her mother (PW 7) and sister (PW2) about the incident. She has deposed that her mother narrated the incident to the neighbours(PW4) and Vanita. The victim, her mother and two ladies went to the house of the accused and they questioned him about the incident. The accused abused them and threatened them not to report the incident to the police. She has stated that her father (PW3) had gone to Mumbai and that they had informed him about the incident on phone. He returned home on 22/11/2016 and took them to the police station. She lodged the complaint at Exhibit-29, which is in her handwriting and with her signature. The victim has explained the delay in lodging the first information report by stating that her father had gone to Mumbai and there was no other elderly person at home.

13. In her cross-examination the victim has stated that she did not raise an alarm as she was frightened. Her evidence indicates that she resisted the act. She pushed the accused and tried to hit him. She has denied the suggestion that the accused did not have any physical relation with her. She has admitted that the accused and her father were friends. They had cordial relations with the family of the accused and they would visit each other. She has denied the suggestion that her mother did not like her father partying and spending time with the accused. She has denied the suggestion that prior to the incident there was a quarrel between her sister and the accused. She was not aware whether her father was sitting with the accused on the birthday of her sister and that when she had gone to the house of the accused to call her father, the accused had told her that he would not send him. She has denied the suggestion that her sister had threatened the accused that she would teach him a lesson, which he would remember throughout his life. The victim has also denied that she, her sister and mother were not in good term with the accused.

14. PW7 is the mother of the victim. She has deposed that her husband had gone to Mumbai on 19/11/2016. On 21/11/2016 at 5.00 she had told the victim to distribute wedding invitation cards in the village. At

about 6.30 p.m. her daughter returned home crying and that she told her that when she had gone to the house of the accused to give the invitation card, he pulled her on the bed, undressed her, kissed her and inserted his finger in her private part. Her daughter also narrated to her that the accused had rubbed his penis in her vagina and further threatened to kill her in case she disclosed the incident to anyone. She has deposed that she was in a total state of shock and narrated the incident to her neighbours. She went to the house of the accused along with the daughter and the neighbours and questioned him about the incident. He denied having committed any such act. He abused and threatened them in case they disclosed the incident to anyone. She has stated that she did not report the incident to the police since her husband was not at home and there was no other male member in the family. Moreover, it was a question of the reputation of the family. She has stated that she had told her husband on phone that the accused had harassed her daughter. Her husband told her that he would hire a vehicle and return home immediately. He returned home on 22/11/2016 and took them to the police station and thereafter the complaint came to be lodged.

15. PW7 has admitted in her cross examination that prior to the incident, the relation between her husband and the accused were cordial.

They would often have meals together. She has admitted that her husband had gone to the house of the accused on the birthday of her elder daughter and that she and her daughter had gone to the house of the accused to call her husband. She has denied that she had threatened the accused that she would teach him a lesson which he would remember forever. She has denied that a false complaint has been lodged against the accused in order to teach him a lesson.

16. PW2 is the elder sister of the victim. She has deposed that on 20/11/2016 her mother had instructed the victim to distribute wedding invitation cards in the village. The victim had left the house at about 5.00 p.m. to distribute cards. She returned home crying at about 6.00 p.m. and when questioned, she narrated that when she had gone to the accused to give invitation card, he pulled her on the bed and raped her and further threatened to kill her in case she disclosed the incident to anyone. She has deposed that the victim was frightened and was crying. She has stated that she and her mother were also frightened and that her mother called the neighbours and narrated the incident to them. They went to the house of the accused and questioned him about the incident. She has deposed that the accused denied the incident. He abused and threatened them. She has stated that they were scared. On the next date her mother

narrated the incident to her father, who was in Mumbai. Her father returned home on 22/11/2016 and thereafter they approached the police and lodged the complaint.

17. PW2 has admitted in her cross examination that the relation between her father and accused were cordial and that they would often have meals together. She has denied that her mother did not like her father associating with or visiting the house of the accused. She has admitted that her father was in the house of the accused on her birthday and that she had gone to the house of the accused to call her father. She has denied that the accused had told her that he would not allow her father to go. She has denied that there was quarrel between her mother and the accused over the said issue and that her mother had threatened to teach him a lesson.

18. PW-4 is the neighbour, who was informed about the incident. She has deposed that on 20/11/2016 the mother of the victim (PW7) came to her house along with her elder daughter (PW2) and another neighbour and informed them that the accused had sexually abused her younger daughter when she had gone to his house to give the invitation card. She has deposed that she went to the house of the accused along

with the mother and sister of the victim and questioned him about the incident. She has deposed that the accused denied having committed any such act and abused and threatened them.

19. PW3 is the father of the victim. He has deposed that on 19/11/2016 he had gone to attend marriage ceremony of his cousin. On 21/11/2016 during afternoon hours, he received a phone call from his wife stating that her minor daughter was harassed. His wife appeared to be frightened and was crying. He engaged a private vehicle and returned home on 22/11/2016. When he reached home, he found that his wife and daughters were frightened and crying. His daughter narrated the incident to him. He went to the police station along with his daughter and wife thereafter, a complaint came to be lodged.

20. The evidence of PW1, the child victim, clearly indicates that when she had gone to the house of the accused, the accused pulled her on the bed, undressed her and sexually abused her by kissing her breasts, inserting his finger as well as penis in her vagina. Though this witness was cross-examined at length, nothing has been elicited to impeach the credibility of the witness. In State of *Himachal Pradesh v/s. Manga Singh (2019) 16 SCC 759*, the Hon'ble Supreme Court has held that the

conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. It is held that corroboration of the testimony of the prosecutrix is not a requirement unless there are compelling reasons which necessitate the Courts to insist for corroboration. In the instant case, as noted above, the testimony of the child witness is beyond reproach and inspires confidence and as such there is no reason to doubt her testimony. Furthermore, the evidence on record clearly indicates that immediately after the incident, the victim had come home crying and had reported the incident to her sister (PW2) and mother (PW7). The conduct of the mother narrating the incident to her neighbour (PW4) and going to the house of the accused to question him about the incident is also a relevant factor, which corroborates the testimony of the victim.

21. It is pertinent to note that the victim was referred for medical examination and she was examined by PW8 – Dr. Ramchandra Mestri. He has deposed there were no external injuries to genital organs and hymen was intact. He had collected vaginal swab and smear, which was later forwarded to CFSL for examination along with the clothes of the victim. The CFSL report indicates that no semen was detected on the vaginal smear and swabs and the clothes of the victim. Learned counsel for the accused has strenuously argued that absence of injuries on the genitals of

the victim as well as absence of semen on the clothes and vaginal smear and swabs belies the prosecution case.

22. It may be mentioned that Section 3 of POCSO Act, defines 'penetrative sexual assault'. This Section provides that - A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

23. A plain reading of this section as well as section 375 of the IPC would indicate that even slightest penetration would constitute sexual intercourse or penetrative sexual assault. In *State of UP vs. Babulnath (1994) 6 SCC 291* it has been held that even partial or slightest penetration of the male organ within libia majora or the vulva or pudendum with or without any emission of semen or even an attempt of penetration into the private part of the victim would be enough for the purpose of Sections 375 and 376 of the IPC. Similarly, in *Aman Kumar vs. State of Haryana (2004) 4 SCC 379* it is held that even slight penetration in the vulva is sufficient to constitute offence of rape and rupture of the hymen is not necessary. It is held that vulva penetration with or without violation is as much rape as vaginal penetration. It has been held in order to constitute 'penetration', there must be evidence to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman no matter how little.

24. It is thus well settled that injuries on genitals or rupture of hymen is not sine qua non for the offence of rape. The statute merely requires evidence of penetration of penis or any object or part of the body to any extent into the vagina, mouth, urethra or anus. In the instant case, the evidence of the victim shows that the accused had inserted his finger

and thereafter penis in her vagina and discharged some secretion. The evidence of the victim thus proves that there was not only penetration but also emission of semen in the vagina. Her evidence cannot be disbelieved for absence of injuries or rupture of hymen. It is also pertinent to note that the evidence of the victim indicates that she had a bath after the incident and had changed her clothes. Her vaginal smear and swab were taken three days after the incident. Similarly, the clothes, which were probably washed were attached three days after the incident. In such circumstances, absence of semen on vaginal smear and swab and the clothes of the victim is no reason to disbelieve the evidence of the victim.

25. The accused has raised a defence that he has been falsely implicated as the mother of the victim did not like his close association with her husband. It will be worthwhile to refer to the decision in ***State of Punjab v/s. Gurmeet Singh (1996) 2 SCC 384*** wherein the Apex Court has held that while evaluating the evidence, the Courts must remain alive to the fact that in a case of rape, no self respecting woman would come forward in Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. It is held that inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are the factors which the Court should not overlook. In

the instant case, the evidence on record reveals that the accused was known to the family of the victim. Their relations were cordial and they would visit each other. It is highly improbable that PW7, the mother of the victim, would put honour, dignity and reputation of her minor daughter at stake merely because she did not like her husband associating with the accused. In fact, the testimony of PW7 indicates that apprehension of scar on the honour and reputation of the family was one of the reasons for not reporting the incident to the police immediately. Hence, the defence of false implication is not probable.

26. It is well settled that delay in lodging the FIR is no reason to doubt the prosecution case and/or to discard the same. There are several factors for not reporting the incident immediately. For instance, the victim and the family has to muster courage to come out in open and to complain about the incident which concerns the reputation of the prosecutrix and the honour of the entire family. In fact, many such incidents go unreported because of the reluctance of the victim and her family to go to the police due to conservative societal attitude and fear of social stigma. In the instant case, the evidence on record reveals that the father of the victim was in Mumbai and there was no other male member in the family. It was only after the father returned home that he took the prosecutrix to the

police station and the FIR came to be lodged. The delay in lodging the FIR is barely of 03 days, which has been satisfactorily explained.

27. The Trial Court has considered analysed the evidence in depth and has rightly held the accused guilty of committing offence of rape and penetrative sexual assault. The impugned judgment does not suffer from any illegality or infirmity and hence does not warrant any interference.

28 Under the circumstances and in view of discussion supra, the appeal is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)