

THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 947 of 2019
WITH
INTERIM APPLICATION NO.300 OF 2023
IN
CRIMINAL APPEAL NO. 947 OF 2019

Banarasi Rajaram Gupta .. Appellant
Versus
The State of Maharashtra & Anr .. Respondents
...

Mr.Sushil Upadhyay i/b Ashok M. Saraogi for the appellant.
Ms.P.N. Dabholkar, APP for State/Respondent no.1.
Ms.Shraddha Sawant, Appointed Advocate for respondent no.2.

CORAM: BHARATI DANGRE, J.
DATED : 20th MARCH, 2023

JUDGMENT:-

1 The victim girl, aged six years, complained of the sexual assault upon her by the appellant, who is residing in the neighborhood. She narrated the same to her aunt (PW 1) when she suffered pain in her genitals. On being taken to a clinic near the house, the Doctor examined her and informed that it was a case of sexual abuse. At that time, the girl disclosed that that on the pretext of giving her ice-cream, she was taken to his house and made to lie on the floor and he tried to insert his penis in her

vagina and also gave his penis in her mouth. He slept over her, kissed her and moved himself back and forth over her body. She was also threatened that if she narrate the incident to anyone, he would asked her father to beat her.

2 The aforesaid sequence of events resulted in lodging of a complaint by PW 1, the aunt of the victim girl who reported that on 16/2/2018, the victim along with her other family members visited her house and she accompanied them to Panvel. In the night of 17/2/2018, the niece told her that she is having excruciating pain in her private part and therefore, she applied oil. On the next day night, she again complained of the same, but somehow by convincing her, she made her sleep, and on 19/2/2018, she was taken to the Doctor, who expressed that she has been sexually abused and asked them to report to the police station. On inquiry, the victim gave her version, which was set out in complaint which was exhibited through PW 1.

PW 1, who stepped into the witness box, reiterated the sequence of events and also the narration of the victim when she was inquired about the incident.

3. The statement of the victim girl was recorded on 9/3/2018 before the Magistrate, 52nd Court, Kurla, Mumbai, and she categorically stated that she had been to the house of the accused on 6th floor, since he assured to give her ice-cream, which he did not give, but he touched his private organ, removed the

knicker, kissed her and put his penis in her mouth.

The victim came to be examined as PW 2, who disclosed that at the time of recording her evidence, she was aged 6 years. The learned judge arrived at a conclusion that she is capable of having sufficient understanding and administered oath.

On being examined in-camera, she deposed that her uncle and aunt reside on 6th floor and the person whom she referred to as 'Bhaiyya' also reside on 6th floor. She also disclosed his name and further stated that he told her he would give ice-cream and play 'Nangu Pangu'. Thereafter, she described the incident as under :-

“His name is Banarasi Gupta. He said to me that he will give me ice-cream. He did not give. He told that we will play 'Nangu Pangu'. He removed my clothes and asked me to lie on his body. He asked me to take his penis in my mouth. He said that he will urinate and I should touch. I have not gone to any other court. I have narrated the incident to my aunt Ranjana and her husband”

4. The prosecution also examined the Doctor as PW 5, who had medically examined the victim after obtaining consent of her aunt (PW 1). She noted the history narrated by the aunt of the victim and the circumstances in which she was brought for medical examination.

On examination, she made notings in the proforma of

medical examination report of alleged victim of rape/sexual assault which was exhibited at Exhibit-24.

PW 5 deposed that on local examination of genitals, she found the hymen to be intact, but there was presence of redness and based on this, she opined that sexual intercourse/assault cannot be ruled out.

In cross-examination, PW 5 specifically stated that victim was examined four days after the incident and also admitted that redness can be possible due to rubbing on private part and as per history, oil was applied on the urethra of the victim.

5. In Exhibit-24, there is a reference of history stated by the aunt of the victim and also narration of history by the victim herself. In the history given by aunt i.e. PW 1, it is the reiteration of the complaint and the event that was deposed by PW 1 before the Court, but as far as the history stated by the victim, is specifically recorded in the following words:-

“History stated by victim – victim gave history of removal of her dress and inserted penis in her mouth by accused. Accused touched his penis to her private part. She also gives history of similar episode twice. However, is not aware of exact date or month and by roughly correlating events probably one month”.

6. Mr.Suraj Aage, PSI from Nehru Nagar police station who had reduced the complaint received in the police station on

19/2/2018, stepped into the witness box as PW 6. He deposed that the report given by the complainant was recorded as per her say and considering the contents therein, an offence came to be registered by him u/s.376, 377 of IPC and section 4, 6 of POCSO Act. The spot panchnama was prepared by PW 6 and the accused was arrested.

In the cross-examination, PW 6 specifically assert that the complainant was accompanied by her relatives when she lodged the report and he had recorded whatever was stated by the complainant and deny the suggestion that the complaint was taken on the say of persons accompanying the complainant and social worker. The Investigating Officer Shri Shirish Yedekar also stepped into the witness box and proved the seizure of clothes of the accused and that of the victim. He also produced the original birth certificate of the victim which was exhibited at Exhibit-30. He admitted that the C.A report is negative and denied the suggestion that the charge-sheet is filed under the pressure of the superiors.

7. The accused was charged of committing rape on the victim girl was made to face the trial u/s.376 IPC and also section 4 of the POCSO Act, for committing penetrative sexual assault and under Section 6, of the POCSO Act for committing aggravated penetrative sexual assault as the girl was below 12 years. He also faced a charged u/s.10 of the POCSO Act.

In his statement recorded u/s.313 of the Cr.P.C, he adopted a stand of denial and when questioned, why the prosecution witness had deposed against him, he responded by stating that before some days, there was quarrel between the Gaikwad and his wife regarding money and he came to know about it later. He stated that he is falsely implicated in the case.

8. The victim, aged 5 years, narrated her ordeal to PW 1 when inquired as, she suffered pain in her private part. She was taken to the clinic and the Doctor immediately revealed that it was the case of sexual abuse and this resulted in registration of the C.R, in which the appellant was indicted as the accused. The victim in her statement recorded u/s.164, briefly referred to the act of the accused by stating that he inserted his penis in her mouth and also touched it to her body.

Before the Court, she further elaborated the incident, but is consistent on her version, that the accused asked her to take his penis in her mouth. The victim specifically deposed that she had narrated the incident to her aunt and her husband.

9. PW 1 stepped into the witness box and affirmed the said narration. Through her, the FIR is exhibited and from the cross-examination of these two witnesses, nothing which could be extracted by defence, which would adversely affect the case of the prosecution.

In the cross-examination, PW 1 admitted that the victim's parents reside at Kurla and victim reside with her parents but on some occasions, she used to visit her. She also admitted that the family is on visiting terms with the accused, but deny that there was any monetary transaction with them.

It is also admitted that the victim knows the accused as she used to go to his house for playing. As far as PW 2 is concerned, though it is sought to be argued by the learned counsel for the appellant, by inviting my attention to her cross-examination that she was tutored, I do not think that the learned counsel is right in his submission.

What the witness has admitted in the cross-examination is that she was asked to tell what had happened after removing her knicker and that the accused has given his penis in her mouth. In short, she has stated that she was told to depose about the acts done by the accused.

It not for the first time that the victim is deposing before the Court against the accused as in her 164 statement which is recorded immediately after the incident, where she has roughly referred to the incident and one can just imagine the trauma and suffering of the young girl who was taken to the Magistrate to record a statement. One cannot expect her to be very detailed in her statement, but she has briefly pointed out to the act of the accused which would attract an offence u/s.376 IPC

and POCSO Act.

Mere non-examination of the parents would also not create any dent in the prosecution case as the aunt of the victim has stepped into the witness box, as the act complained of, was first revealed to her by the victim. The medical evidence also support the case of the prosecution as PW 5 has specifically admitted that redness was noticed on the hymen and it can be due to insertion of penis.

10. It is this material produced on record through the prosecution and the same being found to be convincing and as the testimony of the victim girl having inspired confidence, whereas the accused failing to bring any material to establish his case of false implication, the learned Special Judge has rightly arrived at a conclusion, by recording a finding of guilt.

Further, there is no reason which can be contemplated why the little girl aged 5 years would speak against the accused, whose house she used to frequently visit to play. Furthermore, no parents would like to undergo the ordeal of the trial and hence, no reason has featured on record why the accused could have been falsely implicated.

11. On the finding of conviction being recorded by the impugned judgment, the Special Judge has imposed a befitting punishment which do not warrant any interference and upholding the impugned judgment by the Special Judge, under

the Protection of Children from Sexual Offences Act, 2012, in POCSO Special Case No.278/2018 dated 04/5/2019, the Appeal stand dismissed.

In view of the dismissal of the Appeal, Interim Application do not survive and is disposed off.

(BHARATI DANGRE, J)