

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1143 OF 2022

Mrs. Poonam Kalidas Waghela
Age 42 years, Occ:Housewife
R/o. Building No.3, Room No.423
Government Colony, Bandra East
Mumbai-400 051

..... Appellant.

Versus

1. Mr.Gaurav Vijay Jawale
Aged 20 years,
R/o. Building No.3, Room No.402
Government Colony, Bandra East
Mumbai-400 051.

2. The State of Maharashtra
(At the instance of Kherwadi Police
Station)

.... Respondents.

.....

Mr Shailesh Kantharia @ Harshada Morey for the Appellant.

Mr V.B.Konde-Deshmukh, APP for State.

.....

**CORAM: NITIN W. SAMBRE &
R.N.LADDHA, JJ.**

DATE : 21 FEBRUARY 2023.

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Judgment (Per R.N.Laddha) :

Heard Mr Shailesh Kantharia, the learned Counsel for the Appellant/first informant and Mr V.B.Konde Deshmukh, the learned Additional Public Prosecutor for the Respondent No.2/State.

2. The challenge in this Appeal is to the judgment and order of the learned Special Judge for Protection of Children from Sexual Offences Act, 2012, of Greater Bombay, in POCSO Special Case No.750 of 2019, directing acquittal of Accused/Respondent No.1 (hereinafter referred to as the 'Accused'). The Accused faced trial for offences punishable under Sections 376 and 354 (d) of the Indian Penal Code r/w Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter called as "POCSO Act").

3. The facts which are essential to be exposited for the disposal of this Appeal are that the first informant is the mother of the victim girl. At the relevant time, the victim was aged about 17 years of age and was studying in Standard X. The victim girl and the Accused, who was 20 years of age, along with their family members, were residing in the same building at Government Colony, Bandra (East). It is the case of the prosecution that the

father of the victim girl had seen the victim on the motorcycle of the Accused. In 2018, also the victim's parents found the Accused with their daughter/victim in their house. In the first week of July 2019, they also noticed their daughter chit-chatting with the Accused in City Park, BKC. On 13.7.2019, the victim girl apprised her parents about her love affair with the Accused and desired to cohabit with him. The parents of the victim girl took her to Police Station, where she refused to return home with her parents. Therefore, she was sent to Children's Shelter Home, where, on 24.7.2019, she returned home. She disclosed to her parents that the Accused, in September 2018, gave her allurements of marriage and established penetrative sexual intercourse with her in their house. According to the prosecution, the Accused used to follow the victim girl and insisted her to continue to have sexual relations with him. The first informant, thus, approached the police station and lodged a report against the Accused.

4. Post investigation, the Accused was sent for trial before the Designated Court under the POCSO Act. During the course of the trial, the learned Special Judge recorded the evidence of four witnesses for the prosecution, viz. the first informant-complainant (PW1), the victim (PW 2), PSI Sambhaji Nana Thorat (PW 3)-who registered a complaint against the Accused and Mr Anant

Ramchandra Shivne (PW 4) the Investigating Officer. The statement of the Accused under Section 313 of the Code of Criminal Procedure, 1973, came to be recorded. The defence of the Accused was that of false implication. He claimed innocence. The Accused did not lead any evidence in his defence.

5. After evaluation of the evidence and the documents tendered for its perusal, the learned Special Judge was persuaded to acquit the Accused of the offences punishable under Sections 376 and 354 (d) of the Indian Penal Code r/w Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012, holding, *inter alia* that the omissions and contradictions elicited during cross-examination of the first informant and the victim girl, render it unsafe to place reliance on their testimonies in regard to those allegations and thus, were liable to be discarded. Being aggrieved by and dissatisfied with the impugned judgment of acquittal, the first informant/mother of the victim girl has preferred this Appeal.

6. Mr Shailesh Kantharia, the learned Counsel for the Appellant/first informant, submitted that the trial Court should not have discarded the evidence of PWs 1 and 2. According to him, the impugned judgment of acquittal suffers from total misappreciation of evidence. The inconsistencies appearing in the substantial evidence of the prosecution witnesses are only in the

nature of minor discrepancies. These discrepancies, according to Mr Kantharia, were not so incompatible with the credibility of the version of the victim girl as to enable the trial Court to reject the evidence. It is submitted that the victim girl/PW 2 categorically stated in her evidence that the Accused did wrong things to her. This, according to learned Counsel for the Appellant, was sufficient to fasten the guilt on the Accused.

7. At this stage, it is proper to consider and clarify the legal position regarding an Appeal against the judgment of acquittal. In an Appeal against the judgment of acquittal, interference is warranted only when there are compelling and substantial reasons for doing so. There is a presumption of innocence in favour of the Accused, which the acquittal has strengthened. Interference with the trial Court's decision in a casual manner where another view is possible should be avoided unless there are good reasons for such interference. The trial Court, which has the advantage of watching the demeanour of the witnesses, is the best judge of the credibility of the witnesses. All these aspects were highlighted in the case of *Shivaji Sahebrao Bobade & Anr. Vs. State of Maharashtra*¹.

8. In *Sunil Kumar Sambhudayal Gupta (Dr) & Ors. Vs. State of Maharashtra*², the Hon'ble Supreme Court, in para 38 and 39,

1 AIR 1973 SC 2622.

2 (2010) 13 SCC 657.

while dealing with this issue, observed as under :

“38. It is a well-established principle of law, consistently reiterated and followed by this Court that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether views of the trial court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanour of the witnesses is the best judge of credibility of the witnesses.

39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration. The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court’s acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court is a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.”

9. In view of above analysis and conspectus of law, the limitation on the power of the Appellate Court in overturning the order of acquittal needs to be borne in mind. Similarly, by a catena of judicial pronouncements, the legal position is clear to the effect that an Appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded. The instant case is required to be examined in light of the aforesaid exposition of law.

10. The trial Court first dealt with the prosecution case relating to the age of the victim girl. It found that on the birth certificate, the victim's birth date is 11.4.2002. The defence has not seriously disputed the age of the victim. In the cross-examination, the victim stated that in 2017, she was studying in Xth Standard and was aged about 17 years. If the birth date of the victim mentioned in the birth certificate is taken into consideration, the victim was a minor as of the date of commission of the offence.

11. There were a lot of improvements and contradictions in the evidence of the victim girl (PW 2). She had stated, for the first time, that she did not say her birth date to the police and that one day when her parents were not at home, the Accused phoned her, came to her house, showed the sharp-pointed article and asked her

to go inside the house, closed the door, came towards her, took her near him, shut her mouth and did wrong things with her. Further, she stated that the Accused threatened her that if she disclosed it to anyone, he would do something to her brother. None of this was mentioned in her statement recorded by the police. Nor had it been recorded therein that the Accused had asked to roam with him, he will sell her body parts, and that she was crying a lot, but she did not disclose anything to her parents as she was scared. Further, she had not stated in her police statement that when her mother asked her if any ragging is done to her in the College, she did not disclose anything, and she was taken to Kherwadi Police Station by her parents.

12. More so, though, the victim (PW 2) had stated to the police while recording her statement that in 2017 she and the Accused together were roaming on the bike and was noticed by her father, and in 2018 on the day of Ekadashi at her house when they were chit chatting, her father came and gave understanding to them, that on 13.7.2019 she disclosed to her parents that she loves the Accused and going to reside with him and therefore, her father took her to the police station where she refused to come back to home and then was sent to Shelter Home. However, she, in her evidence before the Court, denied that she stated all this to the police.

13. The version of the victim girl (PW 2) bristles with omissions, contradictions and improvements, which cannot be said to be simple explanations or elaborations of her version. These are the material contradictions and/or vital omissions. Her version lacks credence. Moreover, the conduct of the victim was unnatural. The explanation furnished by her was that as she was scared, she did not disclose the alleged sexual assault to her parents and instead preferred to go to the police station and then to the Shelter Home. She even did not disclose the alleged incident to the police. Moreover, she had admitted in her cross-examination that her parents had given her understanding as she was roaming with the Accused on his bike. She had admitted that after the alleged incident also, she was doing all the routine work at home and had regularly gone to College. Further, she admitted that from 2017 till 27.7.2019, she had a friendship with the Accused and that on 27.7.2019, she returned home from the Shelter Home and till 30.8.2019, her family members discussed the matter and subsequently lodged the complaint.

14. The testimony of the mother of the victim girl (PW 1) is no way different, as she had also made significant contradictions and improvements. The contradictions are such that they undermine her entire testimony.

15. In this backdrop, the trial Court was justified in not placing reliance on the evidence of the prosecution witnesses, and no case for upsetting the view of the trial Court is made out. That being so, we are not inclined to interfere in this Appeal which is, accordingly, dismissed.

[R. N.LADDHA, J.]

[NITIN W. SAMBRE, J.]