

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

CRIMINAL APPEAL NO.1505 OF 2018

Ajay Bhiku Kharva
Age 25 years, Occ.-Nil,
R/a Near Church, Bhim Dongri,
Nalasopara (East), Dist – Palghar
(at present lodged at
Yerwada Central Prison, Pune)

.... Appellant

versus

1. State of Maharashtra

2. XYZ

.... Respondent

.....

- Mr. Daulat G. Khamkar, Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent No.1.
- Smt. Megha Bajoria (Appointed) Advocate for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 08th FEBRUARY, 2023

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 26/03/2018 passed by the Additional Sessions Judge, Vasai, in POCSO Special Case No.12 of 2017. By the impugned Judgment and Order, the Appellant was convicted and sentenced as follows ;

- (a) He was convicted for commission of offence punishable u/s 342 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of one year and to pay a fine of Rs.500/- and in default of payment of fine to suffer rigorous imprisonment for 15 days.
- (b) He was also convicted for commission of offence punishable u/s 376 (2) of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of 10 years and to pay a fine of Rs.2,000/- and in default of payment of fine to suffer rigorous imprisonment for one year.
- (c) Both the sentences were directed to run concurrently.
- (d) The Appellant was given set off u/s 428 of Cr.P.C.

Paragraph No.51 of the impugned Judgment mentions that since the punishment was imposed u/s 376(2) of the IPC, no separate punishment was imposed u/s 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) as per section 42 of the said Act.

2. Heard Mr. Daulat G. Khamkar, learned counsel for the Appellant, Smt. Megha Bajoria, learned counsel for the Respondent No.2 and Mr. S. R. Agarkar, learned APP for the State.

3. The prosecution case is that the victim was about 12 years of age at the time of incident dated 28/10/2016. The Appellant was residing in the same area as the victim. At the time of commission of offence, she was confined in his room. The charge mentions that the original accused No.2, who was ultimately acquitted, helped the Appellant in confining her. The Appellant had committed rape on the victim. The neighbours, who saw the incident through the holes in the tin shed, reported the incident to the victim's mother. The victim's mother and others went to the house of the Appellant, but he was not found there. They went to Tulinj police station and lodged the FIR vide C.R.No.600/2016. The Appellant was subsequently arrested. His wife i.e. the accused No.2 surrendered. The investigation was carried out. The victim and the Appellant were sent for medical examination. Their clothes were seized. The statements of the

witnesses were recorded. At the conclusion of the investigation, the charge-sheet was filed. The Appellant and his wife faced the trial as mentioned earlier.

4. The defence of the Appellant was that the Appellant's family was residing peacefully. The victim's family was jealous of their business of selling old clothes. The Appellant's mother had quarreled with the victim's mother, as the Appellant's mother had told the victim's mother not to send the victim and her sister to the Appellant's house. Because of these reasons the Appellant and his wife were falsely implicated.
5. At the conclusion of the trial, the Appellant was convicted and sentenced as mentioned earlier. The accused No.2 was acquitted.
6. During trial, the prosecution examined 11 witnesses including the victim, her mother, two eyewitnesses, the Medical Officers and the Police Officers.

7. The victim is examined as P.W.2. She was unable to tell her date of birth. She has deposed as follows;

Her parents were in the business of collecting old clothes. She was residing with her parents, brother and sister. Her parents used to leave their house at around 09.00 a.m. for work and return at around 07.00 p.m. The incident took place on the Diwali day. The victim's parent had gone for their work. At 05.30 p.m. the accused No.2 i.e. the Appellant's wife called her to their house. Both the accused were in the house. They were watching TV. The victim's sister went out for playing. The Appellant bolted the door from inside. He told his wife – accused No.2 – to hold the victim's hands. After that, the Appellant removed her clothes and committed rape on her. A lady from the neighbourhood knocked on the door. The Appellant left the victim. He opened the door. That neighbour enquired with the Appellant. She took the victim to her house. When her parents returned, she told the incident to them. They went to the house of the Appellant. Both the accused were not

found in their house. Then the victim was taken to the police station. She has narrated the incident to the police. They recorded her statement. It was treated as FIR. It is produced on record at Ex.23. She was referred to medical examination. She identified the Appellant and his wife before the Court.

8. In the cross-examination she denied the suggestion that there was quarrel between her mother and the Appellant's mother. The cross-examination is only about the suggestions which the victim had denied. The FIR substantially corroborates her version.

9. The victim's mother is examined as P.W.1 she has deposed that the victim was in the house on 28/10/2016. P.W.1 and her husband returned home at around 05.00 p.m. P.W.2 started crying. She described the incident to P.W.1. Both of them then went to the house of the Appellant. Both the accused were not present in the house. They went to the police station with the victim.

In the cross-examination, she deposed that she could not tell the exact distance between her room and the room of the Appellant. After the incident the neighbours had dropped the victim to her house, but she could not tell the name of those neighbours. She denied the suggestion that because of the quarrel with the Appellant's mother, they had strained relations.

10. P.W.5 Sandhya Kamble was a neighbour. She has deposed that the incident had taken place on 28th but she did not remember the month and the year. She heard the shouts of a girl. There were holes to the tin shed of the room of the Appellant. P.W.5 looked inside the room from those holes. She saw that the victim/P.W.2 was lying on the floor and the Appellant No.1 was having forcible intercourse with her. P.W.5 got frightened. She rushed towards the house of P.W.6. P.W.5 narrated the incident to her. They came back to the house of the Appellant. Other neighbours also followed them. They knocked on the door of the Appellant. He opened the door after 2 to 3 minutes. P.W.6 confronted the Appellant. She brought the victim

to her parent's house. P.W.5 identified the Appellant before the Court.

In the cross-examination, she denied the suggestion that there was quarrel between the Appellant's mother and the victim's mother. P.W.5 had seen the victim's mother at the house the Appellant on two occasions. She denied the suggestion that she was not telling the truth before the Court.

11. P.W.6 Usha Ingle is the another important witness. P.W.5 had called her after she had seen the incident. P.W.6 accompanied P.W.5 to the house of the Appellant and saw inside the room from the hole. She also saw the same incident. The other neighbouring women gathered there. P.W.6 then knocked on the door of the Appellant. He opened it after 2 to 3 minutes. P.W.6 confronted him. He denied the incident. P.W.6 then brought the victim back to her house. She narrated the incident to the victim's father. There was hardly any effective cross-examination of this witness.

12. P.W.7 Hitesh Shah was a Pancha for Spot Panchanama. It is produced on record at Ex.34. He has deposed that the room of the Appellant was consisted of tin sheds. They were having holes. The Spot Panchanama was carried out on 29/10/2016 at 09.00 a.m. The Appellant was not present in the house, but the lock was opened by taking key from the Appellant's sister.
13. P.W.4 Dr. Suresh Rathod had examined the Appellant on 31/10/2016. He did not notice any injury on his person. According to Dr. Rathod, the Appellant was able to perform sexual act.
14. P.W.8 Dr. Rani Badalani was examined in respect of medical examination of the Appellant. She had also given similar opinion as was given by Dr. Rathod. The opinion is produced on record at Ex.36.
15. P.W.3 Dr. A. M. Kamble had conducted ossification test

of the victim. It was concluded that the victim was 11 to 12 years of age. That report is produced on record at Ex.27.

16. P.W.9 Dr. Mukdha Jungari had examined the victim at 06.00 p.m. on 29/10/2016. The victim had given a history of sexual assault by the Appellant without her consent on multiple times. The last assault was on 28/10/2016. She also gave history of physical abuses. On medical examination P.W.9 found that the victim's hymen was torn. The opinion was that the findings were consistent with sexual intercourse/penetrated sexual assault. She had collected samples of nail clipping, vaginal swab and blood for analysis. There was no evidence of fresh injuries to the genitals.

17. P.W.10 API Sudarshan Potdar, was the first Investigating Officer. He received the complaint and FIR for investigation. He inquired with the complainant. He went to the spot of incident and conducted the Spot Panchanama. He arrested the Appellant. The victim's clothes were produced on 30/10/2016 at 11.30

a.m. He referred the Appellant for medical examination. The victim was referred for medical examination on 29/10/2016. She was also sent for ossification test. He filed the charge-sheet after completion of the investigation.

18. P.W.11 Ritesh Solanki was a Pancha in whose presence the clothes of the victim were produced and clothes of the accused were seized. They are produced on record at Ex.52 and 54. Besides his oral evidence, the prosecution produced the C.A. certificate on record. It is neither incriminating, nor helping the accused.

19. Learned counsel for Appellant submitted that the medical history given by the victim to the Doctor is inconsistent with her deposition. Her case is only in respect of the incident dated 28/10/2016. There was no other incident referred to by her and therefore medical history given to the Doctor is inconsistent. The medical examination does not support the prosecution case. There was no fresh injury to the victim. The

C.A. reports do not support the prosecution case. Even the medical examination of the Appellant does not show any injuries. Even otherwise the incident is improbable that could not have occurred as was described by the victim. The evidence of eyewitnesses is not reliable. Their conduct is unnatural. He submitted that the based on the same evidence, the accused No.2 was acquitted and the same benefit of doubt should be extended to the Appellant.

20. Learned counsel for the Respondent No.2 and learned APP opposed these submissions. They submitted that there was no reason to disbelieve the victim. The evidence is supported by two eyewitnesses. The Spot Panchanama shows that there were holes to the tin shed. Even medical report supports the prosecution case. The conduct of the victim and her parents after the incident is natural and there is no delay in lodging the FIR. There was no scope to concoct a story falsely.

21. I have considered these submissions. As far as the

evidence of the victim is concerned, I do not find any infirmity in her deposition. The learned Judge has given benefit of doubt to the Appellant's wife by observing that even she could be under pressure from the Appellant. The victim has narrated the incident in detail. Her version is sufficiently corroborated by the evidence of the two eyewitnesses i.e. PW.5 and PW.6. Both of them were neighbours and hence were the natural witnesses. PW.5 had gone to the house of PW.6 after witnessing the incident. Both of them came back and looked inside the house through the holes. The fact that there were holes to the tin shed, is proved through the evidence of the Pancha for Spot Panchanama and the Spot Panchanama itself. PW.5 had immediately gone to PW.6 and both of them had come back to the house of the Appellant. They had seen the incident. This evidence of PW.2, PW.5 and PW.6 is absolutely consistent as far as the actual incident is concerned.

22. After that, the victim was taken back to her house and she narrated the incident to her parents immediately. All of them

went to the police station and the FIR is also lodged promptly. The Appellant was not available at his house even on the next day. He was subsequently arrested. The medical evidence does show that the victim's hymen was torn, though there was no fresh injury. The prosecution case is that she was overpowered by the Appellant and therefore there was no struggle. The medical history also shows that it was not an isolated incident and in the past also she was subjected to similar acts. The Medical Officer P.W.9 has clearly opined that the finding was consistent with sexual intercourse/penetrated sexual assault. Thus, I do not find any infirmity in the prosecution case.

23. Though, the learned Judge has convicted the Appellant u/s 376(2) of the IPC, he has not specified under which sub-clause, the conviction was recorded. However, section 376(2)(i) as it stood then, provides punishment for committing rape where the victim was under 16 years of age. The ossification test has proved that the victim was between 11 and 12 years of age. Therefore, the prosecution has proved the offence u/s 376(2)(i)

of the IPC. It provides for punishment not less than 10 years, but which may extend to imprisonment for life. In this case, the sentence imposed is for 10 years. In view of the sentence imposed u/s 376(2) of IPC, no separate punishment was imposed u/s 4 of the POCSO Act. In this view of the matter, I do not find any reason to interfere with the impugned Judgment and Order. With the result, the Appeal is dismissed.

(SARANG V. KOTWAL, J.)