

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

CRIMINAL APPEAL NO. 505 OF 2020

Kiran Masa Bhosale

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Sanjeev P. Kadam a/w. Prashant P. Raul, Varsha Thorat and Pratik Deshmukh i/b. Atul R. Patil for Appellant.

Mr. Swapnil V. Walve, APP for State/Respondent.

Mr. Vikrant B. Shinde (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 25 JUNE 2024

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 05.03.2020 passed by the Ad-hoc Special Judge-1, Barshi, in Special Case No.26 of 2017. The Appellant was convicted and sentenced as follows:

- i. The Appellant was convicted for the offence punishable under section 452 of the I.P.C. and was sentenced to suffer R.I. for seven years and to pay a fine of Rs.500/- and in default to suffer R.I. for one month.

- ii. He was convicted for the offence punishable under section 4 of the Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act') and was sentenced to suffer R.I. for ten years and to pay a fine of Rs.25000/- and in default to suffer S.I. for six months.
- iii. He was convicted for the offence punishable under section 8 POCSO Act and was sentenced to suffer R.I. for three years and to pay a fine of Rs.500/- and in default to suffer R.I. for one month.
- iv. He was convicted for the offence punishable under section 12 POCSO Act and was sentenced to suffer R.I. for three years and to pay a fine of Rs.500/- and in default to suffer R.I. for one month.

All the substantive sentences were directed to run concurrently. The Appellant was given set off U/s.428 of the Cr.p.c.

2. The learned Judge, in paragraph-69 of his Judgment observed that, in view of Section 42-A of the POCSO Act it was not necessary to convict the Appellant U/s.376 of the I.P.C., but he could be punished U/s.3 r/w. 4 of the POCSO Act, though, the charge was also framed U/s.376 of the I.P.C.

3. The prosecution case is that, the date of birth of the victim was 15.08.2002. The Appellant was a relative. The victim was residing with her parents and two brothers. Her two elder sisters were married. On 16.07.2017, the Appellant came to their house. He sent the victim's brothers outside the house for purchasing *vada pav*. The parents of the victim were not in the house. Taking advantage of the situation, he committed penetrative sexual assault on the victim. After her mother came home, the victim narrated the incident to her. Because of fear, the F.I.R. was not lodged immediately. The mother went to Vairag police station on 01.08.2017 and lodged her F.I.R. vide the C.R.No.249 of 2017. It was registered at 9:27p.m. The investigation was carried out. The Appellant was arrested. The charge-sheet was filed and the trial was conducted before the Special Judge, as mentioned earlier.

4. During trial, the prosecution examined 13 witnesses including the victim, her mother, her brother, the panchas, the Head Mistress of her school, the Village Development Officer to prove her date of birth, the J.M.F.C. who recorded the statements

of the witnesses U/s.164 of the Cr.p.c., the Medical Officer who conducted the medical test of the victim and the Investigating officer.

5. The Appellant, on the other hand, examined two witnesses in his defence. From their evidence, the defence taken by the Appellant was that the victim was already married on the date of the incident. At the time of her marriage, the victim's father had taken loan from the Appellant. When the Appellant demanded back refund of that loan, this false case was lodged. There is another defence taken that the Appellant was having friendly relations with the victim's mother. To save themselves from the defamation, the victim's family lodged this false F.I.R. against the appellant.

6. The learned Judge considered the evidence on record, the defence taken and the arguments advanced and thereafter convicted and sentenced the appellant, as mentioned earlier.

7. The most important evidence in this case is obviously that of the victim herself who is examined as PW-2. She has stated

that, at the time of the incident her two sisters were already married. The Appellant was a relative. On 16.07.2017, at 4:00p.m. the Appellant came to her house. At that time, PW-2 and her two brothers were in the house. The Appellant sent the two brothers outside the house to bring *vada pav* and also gave cell phone to them. She further described that the Appellant then had forcible sexual intercourse with her and then he went away. At 5:00p.m. her mother returned home. She narrated the incident to her mother. It is her case that the Appellant had kept forcible physical relations with her against her will. After that, they went to Vairag police station and her statement was recorded. The J.M.F.C., Barshi also recorded her statement U/s.164 of the Cr.p.c. That statement is produced on record at Exhibit-20. It is her case that, at the time of the incident, her age was 15 years and her date of birth was 15.08.2002. She produced the original school leaving certificate. It was taken on record at Exhibit-21. She identified the Appellant in the Court.

In the cross-examination, she deposed that there was a road in front of her house and the local people were using that

road. There was no compound wall to her house. The neighbours could see who had entered her house and the neighbours could hear shouts from her house. She had studied in Z.P. High School up to 7th standard. She explained that the Appellant was son of maternal aunt of her father. She had shouted at the time of the incident. The Appellant was working as mason. He used to visit Barshi daily for work. She denied the suggestion that he was not in her village at the time of the incident. She could not tell which clothes the Appellant was wearing at the time of the incident. There were good relations between the Appellant and her family. She denied the suggestion that the Appellant had given hand-loan of Rs.70000/- to her father in her marriage and on that count there used to be quarrel between her parents and the Appellant. She further denied that the Appellant used to frequently visit her mother and, therefore, there was quarrel between her father and the Appellant. At the time of lodging report, one Ramhari Bhosale was with her. She denied the suggestion that with collusion of Ramhari this false case was lodged. She deposed that, she had not sustained any injuries during the incident. She had not taken

medical treatment after the incident. Her statement recorded U/s.164 of the Cr.p.c. is produced on record at Exhibit-20. That statement is consistent with her deposition.

8. PW-1 was mother of the victim. She has stated that, she had three daughters and two sons. On 16.07.2017, she and her husband had gone out for some labour work. She had gone to the field of one Anna Thonge. The victim and her two sons were in the house. When she returned home at about 5:00p.m., the victim told her about the incident. Her husband returned at about 7:30p.m. She narrated the incident to her husband. She specifically deposed that, to save honour of her family they kept quiet, but on 01.08.2017 she lodged her report at Vairag police station. The F.I.R. is produced on record at Exhibit-17. At the time of the incident, the victim's age was 15 years. Their statements were recorded U/s.164 of the Cr.p.c. Her statement is produced on record at Exhibit-18. She identified the Appellant in the Court. The police seized the clothes of the victim. She identified those clothes produced in the Court.

In the cross-examination, she deposed that all her three

daughters were married. The victim had a child from her marriage. The Appellant was a relative. He was a mason. He used to visit Barshi daily. He used to reside with his parents, brothers, their wives and their children in a vasti outside the village. The Appellant was unmarried. There was a road in front of PW-1's house and there were other houses around her house. She denied the suggestion that, at the time of the incident, the victim was not staying with her. On the date of the incident she thought it necessary to get the victim examined medically. She took the victim to the hospital in their village. She could not remember the name of the Doctor. The doctor used to visit her village. She herself, her husband and Ramhari went to lodge the report. She denied the suggestion that the report was lodged as per say of Ramhari. She denied the suggestion that the Appellant had given Rs.70000/- by selling his gold at the time of marriage ceremony of her daughter and that she had promised to repay that amount within four months. She denied the suggestion that, on that count, there were frequent quarrels between the two families. She denied the suggestion that, she herself had illicit relations with the

Appellant and that since her husband came to know about it, a false case was lodged by her against the Appellant.

9. PW-1's F.I.R. is produced on record at Exhibit-17. The narration in the F.I.R. is similar to her deposition. In the F.I.R. it was mentioned that her elder daughters were married and the victim used to be in her house along with her two sons aged 14 years and 11 years.

10. PW-6 is another important witness. He was the younger brother of the victim. He has stated that on 16.07.2017 his brother and the victim were in the house. His parents had gone for doing labour work. At that time, the Appellant came to her house. He gave his cell phone and asked them to bring *vada pav*. The brothers went out. When they returned, they saw the victim was sleeping by folding her hands and legs and the Appellant was sleeping next to her. Thereafter the Appellant, his brother and he himself ate the *vada pav* and then the Appellant left their house. In the evening, he heard the victim narrating the incident to her mother. She told her that the Appellant had manhandled her.

In the cross-examination, he deposed that the Appellant used to frequently visit their house to meet their parents. His parents used to borrow money from the Appellant. He denied the suggestion that, there was quarrel between his parents and the Appellant on account of money. He denied the suggestion that, he was deposing as per the instructions given by his parents. According to him, he had not stated to the police that he had heard the victim telling their mother that the Appellant had manhandled her. He could not assign any reason as to why it was not mentioned in his statement recorded by the police that the Appellant had left their house after eating *vada pav*.

11. PW-4 was known to the father of the victim. His evidence is purely hearsay because he had narrated that on 16.06.2017 the victim's father told him about the incident. His deposition is hearsay, and therefore, is inadmissible.

However, in the cross-examination he deposed that the victim was married prior to three years. This witness's evidence was recorded on 05.07.2019. He deposed that victim's marriage was solemnized at the vasti of Ramhari. He admitted that the

Appellant was his close relative. The Appellant had given Rs.60000/- to the victim's parents and there used to be frequent quarrels between the Appellant and the victim's parents on that count. He further deposed that, there was some talk in the village about the love affair between the Appellant and the victim's mother. This ofcourse is hearsay and inadmissible. He further deposed that, two days prior to lodging of the F.I.R., there was a quarrel between the victim's father and the Appellant because of the relationship between the victim's mother and the Appellant. This witness had seen that quarrel. It is his case that the victim's father had threatened that he would implicate the Appellant in a big case.

12. To prove the victim's age, the prosecution examined PW-5 Ratan Vhankalas. She was Head Mistress of the victim's school at her village. She produced the school leaving certificate of the Z.P school which mentions the victim's date of birth as 15.08.2002. PW-5's school issued certificate showing the same date of birth. It was produced on record at Exhibit-21.

13. PW-8 Mukund Jagdale was the Village Development

Officer. He had issued the birth certificate of the victim from the register maintained in his office. The birth certificate was produced at Exhibit-36. It also showed the date of birth of the victim as 15.08.2002. Thus, Exhibit-21 School leaving certificate and Exhibit-36 birth certificate both show the date of birth of the victim as 15.08.2002. Therefore, the prosecution has sufficiently proved that, on the date of incident, the victim was a minor girl.

14. PW-9 was the J.M.F.C. who had recorded the statements of the witnesses U/s.164 of the Cr.p.c.

15. PW-3 was a pancha in whose presence the victim's clothes were produced. However, said clothes do not take the prosecution case any further. The C.A. report regarding those clothes was not incriminating. In any case, the F.I.R. itself was lodged after 17 days and, therefore, this evidence is not material.

16. PW-7 Samadhan Kamble was a pancha for spot panchanama. It only shows the situation in the house.

17. PW-12 Ganpati Khodawe was a *vada pav* vendor. He had turned hostile. But his statement before the police that the

victim's brother had come to him to purchase *vada pav* on that day is produced on record through the evidence of PW-13 API Ravindra Khandekar who had recorded his statement.

PW-12 had admitted that he knew the Appellant and he had friendly relations with the Appellant and his family. His statement before the police is brought on record by way of contradiction from his deposition and it is produced on record at Exhibit-50, in which, he had stated that around 4:15p.m. on 16.07.2017 the victim's brothers had come to his stall and had taken 5 *vada pav*.

18. PW-10 Dr. Hasina Shaikh was the Medical Officer who had conducted the medical examination of the victim. In the history given by the victim, she had described the incident as per her deposition. She noticed that as per the history, the incident had taken place 17 days prior to the examination. Her examination shows there was hymen injury, but there was no evidence of bleeding. There was no evidence to show application of force. Her opinion was that, evidence of sexual intercourse/assault could not be ruled out, but final opinion was kept pending till receipt of

F.S.L. report. The record does not show that any further opinion was given by this doctor.

19. PW-11 API Ravindra Khandekar who was examined as PW-13 was already examined as PW-11. He was the investigating officer. He has deposed about the investigation carried out by him including registration of the F.I.R., carrying out of spot panchanama, seizure of victim's clothes, sending the articles to F.S.L. etc.

In the cross-examination, he admitted that, he had not recorded the statements of the neighbours of the victim. According to him, nobody had told him during the investigation that quarrel had taken place between the Appellant and the victim's parents on account of money. His investigation did not reveal any such quarrel.

20. The Appellant's statement U/s.313 of the Cr.p.c. was recorded. He denied the incident. He examined DW-1 Popat Bhosale. He has deposed that, he knew the Appellant. He worked with this witness. He deposed that the victim's marriage was

solemnized within a month after Diwali of 2016. He was present in that marriage. It was performed at Ramhari's vasti. There was money transaction between the victim's father and the Appellant. The Appellant kept demanding money and there was quarrel between the Appellant and the victim's father after six months from the marriage of the victim. It is his case that the victim's father and others told the Appellant not to keep contact with the victim's mother.

In the cross-examination conducted by the learned APP, he admitted that the Appellant was his relative. This witness had not given any written application to the police stating that the Appellant was with him at the time of the incident. But, according to him, he had told API Khandekar about it.

21. The Appellant examined one more witness DW-2 Mukund Janrao. He has stated that on 16.07.2017, the Appellant and DW-1 were working with him from 10:00a.m. to 6:00p.m. He was examined to show that the Appellant was not present with the victim at 4:30p.m. on that day.

In the cross-examination, he admitted that the Appellant's father was his real maternal uncle.

This was the evidence in this case.

22. Shri. Kadam, learned counsel for the Appellant made the following submissions -

The conduct of the victim and her two brothers was not natural. There is evidence to show that the victim was already married and hence, was not residing in that house. The conduct of the brothers, in particular, was unnatural and their evidence is not consistent with that of the victim. It is highly improbable that even after the incident the Appellant would stay in the house and could peacefully enjoy the *vada pav* with the victim's brothers. No case U/s.452 of the I.P.C. is made out. The medical evidence does not support the prosecution case. On the other hand, the defence witness established the alibi of the Appellant. The defence witness also establishes the fact that the Appellant had given Rs.70000/- to the victim's father at the time of her marriage and when he demanded it back, there used to be quarrels and the victim's father

had threatened to lodge a false complaint. There was delay in lodging the F.I.R. The incident had taken place on 16.07.2017 and the F.I.R. was lodged on 01.08.2017. He submitted that, PW-1's evidence shows that the victim was taken to the Medical Officer on the date of the incident, but no such evidence is brought on record. No such Medical Officer is examined.

23. Learned APP, as well as, learned counsel for the Respondent/victim supported the prosecution case. According to them, the defence of the Appellant was not acceptable. There was no evidence to show that the victim was married. If she was already married, some independent witness or some other evidence could have been available to the defence. There is no reason to disbelieve the victim. The medical evidence does show that there was injury to hymen and, therefore, to that extent the medical evidence is supporting the prosecution case. They submitted that the conduct of the brothers and the victim was not unnatural.

24. I have considered these submissions. In this case, the most important piece of evidence is that of the deposition of the

victim and, therefore, it has to be scrutinized with care and caution. I find that her evidence is clear, unambiguous and consistent throughout. She had stood the test of cross-examination. As far as the submission that she was already married is concerned, the F.I.R. itself mentions that, on the date of lodging of the F.I.R. only her two elder sisters were married and the victim was residing with her parents and brothers. Though, the Appellant has tried to putforth a defence that she was already married, but no proof of such marriage is brought on record. No independent witness from the village is examined. No photographs are produced. No certificate is produced. The only evidence is that of the defence witnesses who were the close relatives of the appellant. Therefore, the defence taken by the Appellant about her marriage is not acceptable. I do not find that her conduct was not natural. The Appellant was known to the victim. He entered her house on some pretext and sent her brothers out to bring *vada pav*. He also gave the cell phone to them and in the meantime, till they returned, he committed this act. After that, he ate *vada pav* with the brothers, but the victim was lying on the cot. Only when

her mother returned, she told about the incident to her mother. It is not unnatural that she would wait till her mother returned to tell about the incident. She could not have told about it to her younger brothers. The fact that the brothers were sent out and when they returned, the appellant was lying on the cot is deposed by the victim's brother PW-6. When the mother returned, the victim immediately narrated the incident to her. Though, the submission is made that there was delay in lodging the F.I.R., the mother had explained in her deposition that to save her own defamation and to save honour of family, the F.I.R. was not immediately lodged. But subsequently, they decided to lodge the F.I.R. Even this conduct is not unnatural.

25. The other submission was that the mother had deposed that the victim was taken to a doctor on that very day and the prosecution has not brought any evidence to that effect. However, the victim who was examined as PW-2 was not asked about such medical examination. She had categorically deposed in her cross-examination that she had not taken any medical treatment after the alleged incident. The victim's evidence in that behalf is more

important.

26. As far as her date of birth is concerned, there is consistent evidence of the above two witnesses namely PW-5 and PW-8. The certificates are produced on record. There is hardly any dispute about her age.

27. The Medical Officer PW-10 had examined the victim after about 17 days from the incident and, therefore, it was possible that the medical officer could not find any injuries. But in the present case, ocular evidence of the victim is strong enough.

28. The defence taken by the Appellant does not pass the test of probability. The main defence was that the Appellant had given Rs.70000/- to the victim's father at the time of marriage of the victim and he was demanding it back. As discussed earlier, there was no evidence to show that the victim was married six months prior to the incident. The prosecution evidence is clear enough that she was unmarried and she was residing with her parents. The defence did not bring on record any other independent witness or circumstance corroborating the defence

that the victim was married six months prior to the incident. Therefore, the theory that the Appellant had given Rs.70000/- to the victim's father at the time of her marriage is not probable. The second aspect of the defence was the alleged illicit relations between the victim's mother and the Appellant. Again, regarding that, as mentioned earlier, the defence witnesses had relied on the talks in the village which would be obviously hearsay. Therefore, even to that extent, the defence could not establish that, that could be a reason for lodging the F.I.R. In any case, the learned Trial Judge has rightly held that the mother of the victim would not go to that extent of implicating the Appellant falsely by concocting the story involving the victim regarding the offence of rape committed on her. The learned Trial Judge thus has given sufficiently cogent reasons in deciding the case before him.

29. In this view of the matter, I do not see any reason to interfere with the impugned Judgment and order. The Appeal is dismissed.

(SARANG V. KOTWAL, J.)