

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

CRIMINAL APPEAL NO.966 OF 2023

Gajanan Maruti KilledarAppellant
Versus
The State of Maharashtra
and anotherRespondents

Ms. Saima Ansari, Advocate (appointed) for the Appellant.
Mr. Swapnil V. Walve, APP for the Respondent No.1-State.
Mr. Harshad Sathe, Advocate (appointed) for the Respondent
No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 07th AUGUST, 2024

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 31.8.2019 passed by the Special Judge (POCSO), Gadhinglaj, District-Kolhapur in Special Case (POCSO) No.9/2017. The Appellant was convicted and sentenced as under :

- [i] The Appellant was convicted for the offence punishable under Sections 376(2)(f) of IPC and he was sentenced to suffer RI for ten years and to pay fine of Rs.5,000/- and in default of payment of fine to undergo SI for one month;
 - [ii] The Appellant was convicted for the offence punishable under Section 5(n) read with Section 6 of the Protection of Children From Sexual Offences Act, 2012 (for short, 'POCSO Act') and he was sentenced to suffer RI for ten years and to pay fine of Rs.5,000/- and, in default of payment of fine, to undergo SI for one month;
 - [iii] The Appellant was convicted for the offence punishable under Section 506 of IPC and he was sentenced to suffer RI for three years and to pay fine of Rs.2,000/- and, in default of payment of fine, to undergo SI for fifteen days;
2. The substantive sentences were directed to run concurrently. The Appellant was given set off under Section 428 of Cr.PC. for the period undergone as under-trial prisoner.
3. Heard Ms. Saima Ansari, learned counsel for the Appellant, Mr. Swapnil Walve, learned APP for the Respondent No.1-State and Mr. Harshad Sathe, learned counsel for the Respondent No.2.

4. The prosecution case is that the Appellant is the father of the victim. The date of birth of the victim was 24.5.2000. According to the prosecution case, on 5.3.2017, the Appellant took the victim to a lodge on the pretext of visiting temples at different places. It is alleged that the Appellant committed rape on the victim in the room of that lodge. On 11.4.2017, the victim narrated the incident to her aunt. Both of them approached Ajara Police Station. The victim gave her FIR. It was registered as C.R. No.43/2017 at Ajara police station. The investigation was carried out. The supplementary statements of the victim were recorded on 12.4.2017 and 13.4.2017. The room of that particular lodge was shown by the victim. The spot panchnama was conducted. The registers from the lodge were seized. The Appellant was arrested and at the conclusion of the investigation, the charge-sheet was filed. The case was committed before the Special Court under POCSO Act.

5. During trial, the prosecution examined six witnesses, including the victim, her aunt, her mother, the lodge owner, the investigating officer and the J.M.F.C., Ajara who had recorded the

victim's statement under Section 164 of Cr.PC. 1973. The victim, her aunt and her mother turned hostile and did not support the prosecution case at all. Apart from the ocular evidence, the prosecution produced the medical certificate at Exhibit-40 which is admitted by the defence. Her birth-certificate issued by the Grampanchayat was produced by the investigating officer. The defence of the Appellant was that he had argued with his sister-in-law regarding money and land and, therefore, he was falsely implicated.

6. Learned Judge considered the evidence on record and the arguments of the parties. He referred to Section 29 of the POCSO Act regarding the presumption. The learned Judge relied on the medical report produced at Exhibit-40 showing that the hymen was ruptured and there was possible penetration. The learned Judge relied on the statements in the FIR given by the victim regarding penetrative sexual assault. He also relied on the spot panchnama. He further observed that there was total failure on the part of the Appellant to successfully put forth his story. On these reasons, the learned Judge convicted and sentenced the

Appellant, as mentioned above.

7. The victim was examined as PW-1. She has stated that her date of birth was 24.5.2000. Her father-the Appellant was a mason. At the relevant time, she was studying in the 11th standard. She has deposed that all of them stayed in a lodge at Sawantwadi. There was a quarrel between her parents and, therefore, on the next day they returned home. She denied that on 12.4.2017, the Appellant had taken her alone to Sawantwadi for visiting the temples. The victim did not support the prosecution case and, therefore, she was declared hostile. She was cross-examined by the learned Prosecutor. In the cross-examination, she deposed that they had gone to Sawantwadi by a bus from Ajara. They reached there at around 2.30 p.m.. Then PW-1 and the Appellant visited a temple. After that they stayed at a lodge. Then she denied that the Appellant committed rape on her and that he had threatened her. She also denied that her father used to talk with her in filthy language at home. She accepted that her statement was recorded by the police on 11.4.2017. She denied that her supplementary statements were

recorded on 12.4.2017 and 13.4.2017. She deposed that she had not narrated the portions marked 'A', 'B' and 'C' in the statement dated 11.4.2017 and the supplementary statements dated 12.4.2017 and 13.4.2017. She could not assign any reasons as to why those portions appeared in her statements. However, she admitted her signatures on all the three statements and that she had signed after reading all the statements. She identified her signatures and, therefore, only the signatures were marked as Exhibits-19, 20 and 21. She further deposed that her medical examination was conducted. She has further deposed that her statement was not recorded in the Court; but, she was shown the statement recorded by the learned Magistrate. She identified her signature which was marked as Exhibit-22 and the statement was marked as Exhibit-23 for identification. Her clothes were seized during investigation. She denied the suggestion that she wanted to help her father and, therefore, she was deposing falsely. In the cross-examination conducted on behalf of the Appellant, she deposed that she signed those documents at Exhibits-19, 20 and 21 prepared by the police as per say of the

police. She had not narrated those portions marked 'A', 'B' and 'C' in those statements. The portion marked 'A' from the FIR was shown to PSI Jadhav who was examined as PW-5 and that portion is marked as Exhibit-55. In this portion, she had stated that on a Sunday of the earlier month on the 12th day they had gone to a lodge at Sawantwadi and at that time the Appellant had committed rape on her. However, significantly the portions marked 'B' and 'C' in the supplementary statements dated 12.4.2017 and 13.4.2017 were not shown to the I.O. and those portions were not proved.

8. PW-2 was the maternal aunt of PW-1. She turned hostile and did not support the prosecution case at all. According to her, PW-1 had come to her house on 8.4.2017 but she denied that PW-1 had told her about the incident that her father had committed rape on her. She denied that she had stated portion marked 'A' from her statement. In any case, her information about the actual incident can only be hear-say. She could at the highest depose that the victim had complained to her about the incident but, even that part, she had not deposed before the

Court and she had not supported the prosecution case.

9. PW-3 is the mother of the victim. She has also not supported the prosecution case. She was declared hostile. In the cross-examination conducted by the learned Prosecutor she denied that the victim had told her that her father had committed rape on her in the lodge. She denied having stated portion marked 'A' from her statement before the police. In her cross-examination conducted by the Appellant she deposed that she had signed on a blank paper.

10. PW-4 was the owner of the lodge. He produced the register dated 5.3.2017 showing an entry in the name of the Appellant. He deposed that he had given them room No.6 and had taken entry in the register showing that the room was given to two persons who were daughter and father. He produced the extract of the register at Exhibit-47. He deposed that he could identify the Appellant if shown to him. But, his deposition does not show as to whether the Appellant was actually shown to him so that he could identify the Appellant in the Court.

11. PW-5 PSI Jadhav was the investigating officer. He has stated that, on 11.4.2017, at about 11.12 p.m., PW-1 had approached the Police Station and had informed that the Appellant had sexually assaulted the informant. PW-1 & 2 both had come to the police station to lodge a complaint. He deposed that the portion marked 'A' from the complaint was recorded as per say of PW-1. That portion marked 'A' was exhibited at Exhibit-55. On 12.4.2017, the Appellant was arrested. He was subjected to medical examination. The clothes of the Appellant and the victim were seized on 13.4.2017. He visited the concerned lodge with the panchas. PW-1 showed the spot of incident. The spot panchnama was conducted. It was produced at Exhibit-38. The video-shooting of the spot panchnama procedure was made. It was produced on record at Exhibits-56 & 57. He made arrangement so that PW-1's statement could be recorded under Section 164 of Cr.P.C.. He sought birth certificate of the victim from the Grampanchayat of her village. It was produced on record at Exhibit-66. In the cross-examination conducted on behalf of the Appellant he was asked about the

discrepancy in the date in the FIR and the victim's supplementary statements.

12. PW-6 was the Judicial Magistrate First Class, who was posted at Ajara on 12.4.2017. He had recorded the statement of PW-1 under Section 164 of Cr.P.C. in the presence of PW-1's mother. He identified that statement which was produced on record for identification at Exhibit-23.

. This, in short, was the ocular evidence led by the prosecution.

13. Learned counsel for the Appellant submitted that the prosecution has failed to prove its case beyond reasonable doubt. The victim, her mother and her aunt have not supported the prosecution case at all. They have turned hostile. The deposition before the trial Court is important and when these witnesses have not supported the prosecution case, the benefit has to go to the present Appellant. She submitted that the alleged contradictory portions from PW-1's earlier supplementary statements were not proved by the prosecution and no explanation is sought from her

specifically in respect of the statement recorded under Section 164 of Cr.P.C.. There is discrepancy in the date of incident and the entry in the lodge. The Appellant was falsely implicated because of the dispute. It appears from the evidence that there was quarrel between the parents of the victim.

14. Learned counsel appearing for the Respondent No.2 in consonance with the deposition given by PW-1, supported the Appellant's counsel. He also submitted that considering that PW-1 has turned hostile in this case, the order of conviction cannot be sustained.

15. Learned APP, however, opposed these submissions. According to him, the portion marked 'A' from the FIR is proved through the evidence of the I.O. and, therefore, that portion can be relied on. He further submitted that the statement of PW-1 recorded under Section 164 of Cr.P.C. is also produced on record which can also be taken into consideration. He further submitted that the entry in the register of the lodge is a corroborative piece of evidence, which supports the prosecution case. He, therefore, submitted that the learned Judge has recorded the conviction

based on the correct reasoning and, therefore, the Appeal be dismissed.

16. I have considered these submissions. As mentioned earlier, the documentary evidence consists of the birth-certificate produced at Exhibit-66 and the medical report of the victim's examination, which is produced at Exhibit-40. The medical evidence is admitted by the defence, which showed that the hymen was ruptured and that there was penetration in the private parts of the victim in the past. The question is whether the Appellant has committed this offence. To answer that question, the deposition of PW-1 would be the most important piece of evidence. As discussed earlier, PW-1 has not supported the prosecution case at all. The prosecution has not proved the portions marked 'B' & 'C' from her supplementary statements through the police officer who had recorded those supplementary statements. In portion marked 'A' from her FIR, her case was that she and the Appellant had gone to Sawantwadi on 12th of the earlier month, that would be 12.3.2017 because the FIR is lodged on 11.4.2017. The prosecution has produced the entry in the

register of the lodge and has also examined the lodge owner. That entry is in respect of the visit dated 5.3.2017. No entry is produced regarding the date 12.3.2017. That was important because according to the FIR, the Appellant and the victim had gone to that lodge on 12th of earlier month. This discrepancy is important but the prosecution has not explained this discrepancy.

17. As discussed earlier, the prosecution has not proved the portions marked 'B' & 'C' from her supplementary statements dated 12.4.2017 and 13.4.2017. Apart from that, importantly no question was asked to PW-1 regarding the contrary statements given by her in the statement recorded by J.M.F.C., Ajara, under Section 164 of Cr.P.C. PW-1 was not given any opportunity to explain as to why her narration was contradictory in that statement recorded under Section 164 of Cr.P.C.. She was only made to identify her signature on that statement.

18. Therefore, though, PW-6 has stated that PW-1 had narrated the incident supporting the prosecution case in the statement recorded under Section 164 of Cr.P.C., since the prosecution has failed to ask any question regarding truthfulness

of that statement when her deposition was recorded before the trial Court, the prosecution cannot rely on her statement recorded by the learned J.M.F.C., Ajara.

19. There is no corroborative evidence in the form of C.A. certificate which could be termed as incriminating in respect of seizure of the clothes of the victim or the Appellant.

20. As far as the allegations of using filthy language at home against PW-1 are concerned, even those allegations are not supported by PW-1 or her mother who is examined as PW-3. The learned trial Judge has not considered that the prosecution has not put the important relevant questions in respect of PW-1's statement recorded under Section 164 of Cr.P.C. to her when her deposition was recorded by the trial Court. He has also not considered that the portions marked 'B' & 'C' are not proved by the prosecution.

21. As a result of this discussion, it is clear that the prosecution has not proved its case beyond reasonable doubt and, therefore, the Appellant could not have been convicted in this case.

22. Hence, the following order :

:: O R D E R ::

- i. The Appeal is allowed.
- ii. The judgment and order dated 31.8.2019 passed by the Special Judge (POCSO), Gadhinglaj, District-Kolhapur in Special Case (POCSO) No.9/2017 convicting and sentencing the Appellant, is set aside.
- iii. The Appellant is acquitted from all the charges.
- iv. The Appellant is in custody. He shall execute a bond in the sum of Rs.30,000/- for his appearance in case an Appeal is preferred against his acquittal, for ensuring his presence. After such a bond is executed, the Appellant be released forthwith if not required in any other case.
- v. Criminal Appeal is disposed of accordingly.

(SARANG V. KOTWAL, J.)

Deshmane(PS)

Digitally signed
by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
Date:
2024.08.12
15:50:41
+0530