

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

CRIMINAL APPEAL NO.267 OF 2018

Rahul Gajanan Tumbada
Age – 24 years,
Residence-Sharja Mori, Post-Kaman
Taluka-Vasai, Dist – Palghar,
Presently at Amravati Central Jail

...Appellant
(Org. Accused)

Versus

1. State of Maharashtra
Through Waliv Police Station,
Crime No. I-31/2014

2. XYZ (PW7) Father of victim
Age – 47, Occ - Labour
Address – Sharja Mori, Post Kaman
Taluka – Vasai.

...Respondents

Mr. Prashant Jadhav a/w Ms. Shabana Syed, for the Appellant.

Mr. R. M. Pethe, A.P.P. for the Respondent No.1– State.

Ms. Priyanka B. Chavan, Appointed Advocate, for the Respondent No.2.

***CORAM : REVATI MOHITE DERE &
MANJUSHA DESHPANDE, JJ.***

RESERVED ON : 7th MARCH 2024

PRONOUNCED ON : 15th APRIL 2024

JUDGMENT (Per Revati Mohite Dere, J.) :

1. This appeal is directed against the judgment and order dated 8th February 2018 passed by the learned Additional Sessions Judge-1, Vasai, in POCSO Special Case No.10 of 2014, convicting the appellant, as under:

- for the offence punishable under Section 302 of the Indian Penal Code, to suffer rigorous imprisonment for life, and to pay a fine of Rs.5,000/- in default, to suffer rigorous imprisonment for one year;
- for the offence punishable under Section 376(2) of the Indian Penal Code, to suffer rigorous imprisonment for life, which shall not be less than thirty years without remission and to pay a fine of Rs.5,000/- in default, to suffer rigorous imprisonment for one year.

Both the aforesaid sentences were directed to run concurrently.

It is pertinent to note that since the trial Court found the appellant guilty of the offences punishable under Sections 302 and 376(2) of the Indian Penal Code ('IPC') and having sentenced the appellant for imprisonment for life, did not award any separate sentence for the offences punishable under Sections 4 and 8 of the Protection of Children from Sexual Offences Act ('POCSO Act'), as the punishment prescribed under Section 4 and 8 of the POCSO Act, is less than the punishment prescribed under Section 376 of the IPC.

2. The prosecution case, in brief, is as under:

On 16th January 2014, the victim girl aged 12 years went to school, after which she did not return. The parents of the victim girl, relatives and neighbours searched for the victim girl, however, she could not be traced, pursuant to which a missing complaint was lodged by the victim girl's father PW7-Gurunath Kashinath Dhinda on 17th January 2014. On 18th January 2014, the victim girl's dead body was found in the field of PW1-Vinayak Dayanand Hadal (complainant), pursuant to which, PW1 lodged an FIR with the Waliv

Police Station, as against unknown persons, for the offences punishable under Sections 302 and 376 of the Indian Penal Code ('IPC'). On 19th January 2014, the appellant was arrested.

The police recorded the statements of the witnesses during the course of the investigation, collected evidence in the said case and thereafter, filed charge-sheet as against the appellant in the Court of the learned Judicial Magistrate First Class, Vasai. Since the offences were triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions, for trial.

On 16th February 2015, charge was framed as against the appellant, to which he pleaded not guilty and claimed to be tried.

The prosecution, in support of its case, examined as many as twenty-one witnesses i.e. PW1-Vinayak Dayanand Hadal (complainant), who lodged the FIR as against unknown persons; PW2-Manoj Gajanan Mhatre, panch to the inquest panchanama;

PW3-Avdesb Lahari Saroj, Panch to the spot panchanama; PW4-Prashant Ramesh Deshmukh, panch to the recovery of clothes of the appellant; PW5-Pravin Bhaskar Raut, panch to the seizure of the clothes of the deceased (hostile); PW6-Dr. Harshal Radhakrushna Thube, the doctor who conducted the postmortem on the deceased; PW7-Gurunath Kashinath Dhinda, father of the deceased, who had lodged a missing complaint on 17th January 2014; PW8-Santosh Yashwant Shende, the Police Constable, carrier of the DNA samples; PW9-Kiran Kisan Salunkhe, Police Naik, who carried the muddemal to FSL; PW10-Shaila Agafit Rodrigues, Head Mistress of the school, to prove the age of the victim; PW11-Shiva Rama Sule, the teacher who produced the muster roll to show that the victim had attended the school on 16th January 2014; PW12-Pandharinath Shriram Bhoir, Naib Tahsildar, who conducted the Test Identification Parade; PW13-Pramila Namdev Dhapshi, who allegedly last saw the deceased with the appellant (hostile); PW14-Ashok Dnyandev Kharpude, photographer, who took the photographs of the spot; PW15-Anil Shivaji Rokade, panch to the arrest memo of the appellant; PW16-

Kanji Bhau Rafukya, panch to the seizure of the clothes of deceased; PW17-Dr. Aasma Kalim Siddiqui; PW18-Anandibai Kashinath Dhinda, Grandmother of the victim girl; PW19-Aqil Gulam Shaikh, mechanic who had detached tyres of the motorcycle; PW20-Mubarak Ali Mumtaz Ali Khan, who had taken specimen of the tyre marks (plaster of Paris) and PW21-Rani Laxman Puri, Investigating Officer.

The defence of the appellant was that of total denial and false implication. No witness was examined by the appellant in support of his defence.

3. After a full-fledged trial, the learned Additional Sessions Judge-1, Vasai, convicted and sentenced the appellant in POCSO Special Case No.10 of 2014, as stated aforesaid in para 1 of this judgment.

4. Heard learned counsel for the appellant, the learned A.P.P. for the respondent No.1-State and learned appointed advocate, for the respondent No.2.

5. Mr. Jadhav, learned counsel for the appellant submitted that the prosecution has failed to prove the circumstances as against the appellant, beyond reasonable doubt. He submitted that the prosecution has failed to prove that it was the appellant and the appellant alone, who was responsible for the sexual assault on the victim girl and consequently responsible for her death. He submitted that there is no evidence of last seen of the appellant with the deceased, inasmuch, PW13-Pramila Dhapshi, aunt of the deceased had turned hostile. He submitted that thus, even the Test Identification Parade ("TIP") cannot be relied upon, since PW13 had turned hostile. Even otherwise, learned counsel submitted that the TIP was held after almost more than 5 months from the date of arrest of the appellant, making the identification doubtful. It is submitted that even the TIP suffers from severe infirmities. It is submitted that even recovery of the appellant's clothes and motorcycle, at the behest of the appellant is suspicious and doubtful. Mr. Jadhav, learned counsel for the appellant further submitted that the motorcycle stood in the name of the

appellant's father according to the prosecution, however, no document in support thereof, was produced by the prosecution. He submitted that in this light of the matter, there being no cogent, reliable and admissible evidence adduced by the prosecution, the appellant be acquitted of the offences, for which he is convicted.

6. Admittedly, the prosecution case rests on circumstantial evidence and hence before we proceed to analyse the evidence adduced by the prosecution, it would be apposite to consider the law vis-a-vis circumstantial evidence.

7. *In Sharad Birdhichand Sarda v/s State of Maharashtra*¹ the Apex Court has laid down the five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 of the said judgment is reproduced hereinunder:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

1 (1984) 4 SCC 116

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra² where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
- (3) the circumstances should be of a conclusive nature and tendency,*
- (4) they should exclude every possible hypothesis except the one to be proved, and*
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

8. We have perused the evidence adduced by the prosecution and for the reasons set-out herein-under, are of the opinion that the prosecution has failed to prove the case against the appellant beyond reasonable doubt.

² (1973) 2 SCC 793

9. At the outset, we may note that it is not seriously disputed that the deceased was sexually assaulted and that she died a homicidal death. The evidence of PW6-Dr. Harshal Thube, who conducted the postmortem of the deceased has opined the cause of death as “Evidence of head injury with throttling with anogenital injuries; however final opinion reserved pending for accessory examination reports.” At the same time, the age of the deceased has also not been seriously disputed. Hence, it is not necessary for us, to deal with the said evidence.

10. The only question that arises for consideration before us, is whether the appellant is the author of the same.

11. The prosecution has relied essentially on three circumstances i.e. last seen evidence, recovery of clothes of the deceased and finding of the tyre mark of the motorcycle used by the appellant at the spot of the incident.

12. As noted above, the victim girl, aged 12 years went to school on 16th January 2014, after which she did not return. Pursuant thereto, the victim girl's father i.e. PW7 lodged a missing complaint on 17th January 2014. The dead body of the victim girl was found in the field of PW1-Vinayak Hadal (complainant) on 18th January 2014, two days after the victim girl went missing. It is the prosecution case that PW13-Pramila had last seen the deceased going with a boy on a motorcycle on 16th January 2014. The said witness identified the appellant as being the person who accompanied the deceased, in the TIP, which was held five months after the arrest of the appellant i.e. the appellant was arrested on 19th January 2014, whereas the TIP was held on 28th June 2014. It is pertinent to note, that PW13-Pramila is the aunt of the deceased. The said witness has turned hostile and has not supported the prosecution case. She has not only denied seeing the deceased last with the appellant but has also denied the holding of the parade and that the appellant was shown to her, in the said TIP.

13. In this view of the matter, the prosecution has not been able to adduce any evidence with respect to last seen of the deceased with the appellant.

14. As far as the finding of tyre marks at the spot of the incident is concerned, the prosecution has examined PW3-Avdesb Saroj, PW19-Aqil Shaikh, and PW20-Mubarak Khan, in support of the said circumstance.

15. According to PW3-Avdesb Saroj, panch to the spot panchanama, the police seized some clothes/school uniform, one water bottle, one black colour shoe, a sock and a school bag from the spot. He has stated that there were motorbike tyre marks and that the tyre marks were taken by applying plaster of paris.

16. PW19-Aqil Shaikh, has stated that on 24th February 2014, the police showed him one motorcycle and suggested him to remove the tyres of the motorcycle, pursuant to which he detached the tyres of the motorcycle i.e. Bajaj Pulsar Brand bearing No.MH48-Q-6367. It

is pertinent to note that the said tyres were detached after more than a month of the incident in question.

17. PW20-Mubarak Khan, has stated that he did labour work relating to plaster of building and that on 19th January 2014, the police called him to the spot of the incident and showed him tyre marks at the spot and asked him to apply plaster of paris and to take specimen of tyre marks, pursuant to which, he with the help of liquid plaster of paris took tyre marks from the spot of incident. In his cross-examination, the said witness has stated that he had prepared 3 to 4 specimens of tyre marks.

18. As noted earlier, admittedly the motorcycle on which the victim girl was allegedly taken by the appellant did not belong to the appellant. It is also not the prosecution case that it belonged to the appellant. According to the prosecution, the motorcycle belonged to the appellant's father, however, the prosecution has not brought on record any document to show the ownership of the said vehicle and as such considering the said evidence that has come on record, it is

difficult to come to the conclusion that the tyre marks found at the spot of the incident, were that of the motorcycle which was recovered at the instance of the appellant. Implicit reliance cannot be placed on the said circumstance.

19. The next circumstance is that of recovery of the appellant's clothes at his instance. In order to prove the said circumstance, the prosecution has examined PW4-Prashant Deshmukh, panch to the recovery panchanama. PW4-Prashant Deshmukh has deposed that pursuant to the disclosure statement by the appellant that he would produce the clothes, the appellant took him alongwith other witnesses and police to his house and produced blue colour jeans, white colour with blue striped shirt having black colour collar and one khaki colour half-pant. He has stated that the shirt had stains and the jean pant was smeared with earth. In his cross-examination, there is an omission with respect to what was disclosed by him in his examination-in-chief i.e. that the clothes had stains and earth.

20. Thus, there is material omission with respect to finding of blood stains/soil on the clothes of the appellant in the cross the said witness.

21. It is pertinent to note that even the panchanama does not record finding of any blood stains on the T-shirt produced by the appellant under Section 27 of the Evidence Act.

In this view of the matter, the recovery of clothes at the instance of the appellant, cannot be implicitly relied upon.

22. As far as DNA the report is concerned, there are several discrepancies with respect to the same, in particular, as to when the semen of the appellant was collected, and sent. There is variance in Exhibits 71 and 72. The variance, creates doubt with respect to the correctness of the procedure adopted. The same is also not supported by the witnesses.

23. As noted above, we may note that there is no dispute with respect to the age of the victim girl and as such, it is not necessary to consider the evidence adduced by the prosecution with respect to the same.

24. Overall considering the circumstances as stated aforesaid, we find that the prosecution has failed to prove the complicity of the appellant in the crime, beyond reasonable doubt. We find that the prosecution has not been able to prove the chain of circumstances by cogent, legal and admissible evidence and as such it is difficult for us, to come to the conclusion, that it is the appellant and the appellant alone, who committed the offences in question.

25. Having regard to what is stated aforesaid, we pass the following order:-

ORDER

- i) The Appeal is allowed;
- ii) The Judgment and Order dated 8th February 2018 passed by the learned Additional Sessions Judge-1, Vasai, in POCSO Special

Case No.10 of 2014, convicting and sentencing the appellant, is quashed and set aside;

iii) The appellant is acquitted of the offence, with which he is charged. The appellant be set at liberty forthwith, if not required in any other case. The fine amount, if paid, be refunded to the appellant.

26. Appeal is allowed and accordingly disposed of.

27. We would like to record a word of appreciation for the able assistance provided and the efforts taken by Ms. Priyanka Chavan, as an appointed advocate for the respondent No.2, in conducting the appeal. High Court Legal Services Committee to award fees of the learned Appointed Advocate, as per Rules.

All concerned to act on the authenticated copy of this judgment.

MANJUSHA DESHPANDE, J.

REVATI MOHITE DERE, J.