

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1117 OF 2019

Deepakkumar Ganpat Dangi : Appellant/Original Accused
Vs.
The State of Maharashtra & Anr. : Respondents

Adv. D. U. Mirajkar a/w Adv. Avdhesh Maurya, for the Appellant.
Mr. A. R. Patil, APP for the Respondent/State.
Adv. Monali Patil, Appointed through Legal Aid for the Respondent No.2.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 7TH FEBRUARY, 2024
PRONOUNCED ON : 23rd FEBRUARY, 2024

PC. :

1. This Appeal is by a convict held guilty for the offences punishable under Sections 376, 354-B, 376(2)(i) & 342 of the Indian Penal Code, 1860 and Under Sections 3 & 7, punishable under Sections 4 & 8 of Protection of Children from Sexual Offences Act, 2012 ("POCSO" for short) by the learned Special Judge (POCSO), Dindoshi, Mumbai in Special Case No.369 of 2016 by judgment dated 10.7.2019. The Appellant is sentenced to suffer 10 years rigorous imprisonment and to pay fine of Rs.15,000/- for the offence punishable under Section 376(2)(i) of the Indian Penal Code. He is directed to suffer R.I. for 1 year and pay fine of Rs.1000/- in default

to undergo simple imprisonment for 1 year. No separate sentence is awarded under the POSCO and under Section 354-B of the Indian Penal Code as Section 376(2)(i) provides higher punishment.

2. It is the case of the prosecution that the Accused committed penetrative Sexual assault on the victim. On the date of the incident mother of victim was informed by one neighbour namely Rani Bidlan that her daughter aged 6 years was taken by the accused to his house and has confined her in his house. On this she immediately went to the house of the accused and found that the door was closed. The informant therefore started knocking the door. The Accused opened the door. From the door she saw that her daughter was in the house, her mouth was tied by the handkerchief & she was in naked condition. On asking the victim told that the accused had taken her to his house he tied handkerchief in mouth and removed her knicker & thereafter started fingering the victim. By that time a mob had gathered in front of the house of accused. Someone from the mob called the police. Police rushed to the spot. The Police arrested the accused and took him to the police station. Informant and the victim also went to the police station to lodge the F.I.R. immediately on 29.09.2016.

3. On receiving the information the police registered an F.I.R. and filed charge sheet after investigation. The prosecution examined total

11 witnesses in support of the prosecution. The prosecution also proved the Medical Certificate, Recovery Panchnama, Memorandum Panchnama etc., which will be discussed in the later paragraphs. On a trial learned Special Judge found accused guilty of the offences & awarded punishment as stated above.

4. The learned Advocate for the Appellant at the outset very fairly submits that, in this case taking the prosecution case as it is, at the most case is made out under Section 7 of the POSCO wherein maximum punishment is only 5 years. The Appellant has already suffered more than 5 years sentence during trial. He submits that the conviction be converted into one under Section 7 of the POSCO instead of Section 3. He submits that, there is no medical evidence to show penetrative sexual assault. There is no medical evidence to corroborate story of fingering of the victim by taking to the medical evidence and her deposition as PW-8.

5. Learned APP and learned Advocate for Respondent Nos.2 vehemently opposes the Appeal stating that the prosecution has clearly established the guilt of the accused age of the victim is only 6 years looking to the gravity of the offence & looking to the evidence the Trial Court has rightly convicted the Appellant. There is medical evidence showing that there is injury to the vagina of the victim. There is recovery panchnama

showing recovery of handkerchief & a rope at the instance of the accused. To prove the penetrative sexual assault it is not always necessary to prove the injuries to the vagina of a child. In this case the medical evidence shows that there was injury of 0.5 cm x 0.5 cm to the vagina of the child indicating penetrative sexual assault and prays for dismissal of the Appeal. The evidence laid by the prosecution in short is as under.

6. PW-1 the informant deposed about the incident as narrated in the F.I.R. She has corroborated the victim's version about fingering. In the cross-examination nothing much has come to disbelieve the evidence of the witness. In the cross a suggestion was put to her that the victim voluntarily had gone to the house of the accused when he was sleeping the same is denied. The statement of victim under Section 164 (5) of the Cr.P.C. was recorded the said is also proved in the trial. The victim has clearly stated that, her mouth was tied by handkerchief by the accused, he thereafter tied her hands with the rope. Thereafter he removed her knicker and lastly he also removed his cloths. Thereafter the accused inserted his finger in her vagina. Her mother immediately came there. The mother removed her handkerchief from her mouth and beaten up the accused.

7. The victim is examined as PW-2 in her evidence she deposed on the lines of her statement under Section 164. In her deposition she

clearly stated that, the accused called her to his house. In his house he tied her mouth by handkerchief, removed knicker & thereafter inserted his finger in her private part. The other story is also consistent with her statement. Though she is cross-examined nothing is brought on record in the cross. She has clearly denied the suggestion that the accused has not committed any Act as alleged.

8. PW-3 is the father of the victim. He stated that the neighbour who informed the mother of the victim came and woke him up saying that his wife is calling him to the house of the accused. He saw the mob gathered in front of the house of the accused his wife was holding the victim. In his cross, it is tired to suggest that the F.I.R. was lodged against the accused at the behest of neighbour Rani and she had a quarrel with the accused.

9. PW-4 is the neighbour. Who informed the mother of the victim that victim was taken in the house of the accused. She stated that while she was washing clothes outside her house, she saw the accused calling victim to his house. After victim went to his house he closed the door of the house on that she suspected the conduct of the accused. She therefore peeped from the corner window of the room and saw that accused had removed the clothes of the victim he was also in a nude condition, she saw

that the her mouth was tied with the handkerchief. She immediately reported this to mother of the victim.

10. PW-5 is the panch of seizure panchnama. He proved the panchnama.

11. PW-6 is another panch who proved recovery panchnama under Section 27 of the Evidence Act. The Accused produced a towel, rope and the handkerchief. The suggestion was put to him that the panchnama was already prepared and his signature was obtained lateron however he denied the said suggestion. Thus the recovery panchnama is also proved.

12. PW-7 is the doctor working in J.J. Hospital. At the relevant time. He examined the accused & collected the blood sample, nail clipping, penile-swab, urethral swab & pubic hair for chemical analysis.

13. PW-8 is the doctor, who examined the victim. She deposed that on the local examination of victim, she observed 0.5 c.m. x 0.5 c.m. circular opening in the vagina. She stated that such opening is possible due to fingering or insertion of any foreign body. She opined that the possibility of sexual assault cannot be ruled out. In the cross only suggestion given to her was that such an injury is possible by self infliction. She proved the medical certificate.

14. PW-9 is PSI, who recorded the F.I.R. He referred the victim for

medical examination at Cooper hospital. He also arrested the accused. In the cross he denied the suggestion that informant was not present when the F.I.R. was lodged. He also stated in cross that since it was offence against women, he directed women PSI to record the F.I.R. He accepted that this statement of the victim is not recorded in his presence. This Court finds that nothing is brought on record in his cross to disbelieve the prosecution case.

15. PW-10 is the investigating officer. He proved recovery panchnama, who deposed about the investigation. He identified Article B-1- Towel, Article-B-2 handkerchief, Article-B-3 rope recovered at the instance of the accused. In the cross nothing much is taken by the accused.

16. PW-11 is the teacher, teaching in the school where the victim was taking education. He proved the *bona fide* certificate of the victim to prove the age showing the date of birth of the victim is 05/06/2010 as per the school record.

17. The defense also examined three witnesses. DW-1 deposed that the accused was sleeping in the room at the time of incident. This witness was also with the accused in the said room. He stated about the quarrel between the accused and Rani Bidlan on account of water tap in the locality suggesting that because of such quarrel she made the

informant to lodge false F.I.R. against the accused. He further deposed that when he was present in the house suddenly two ladies came in the house and assaulted accused.

18. DW-2 is one Sajan Saav who deposed that when the accused was sleeping in this room, suddenly 2-3 women entered the house of the accused and started quarreling. Thereafter 3-4 men also entered the house of accused. Bolted the door from inside and assaulted the accused. On that accused called his brother and this witness.

19. DW-3 is Nareshkumar Dangi who deposed that, he was residing with the accused. He saw the accused sleeping in the house. He saw people gathered around his house and started quarreling. Before some time of the incident, he was in the room, he went out to bring curd. When he returned home he saw people had gathered around his house quarreling with the accused. People did not allow him to enter his house. On that he told Sagar to make phone call to his brother and called police. It is thereafter police came at the spot and police took Deepak with them. He did not see any girl in the house. He stated about strained relation between them and Rani Bidlan.

20. DW-4 is Santoshkumar Dangi, a neighbour of the accused. He stated that there are four rooms to the house. He received the phone call

that some people are beating accused, he told this to the police but police did not take his complaint. He therefore dialed number 100. He also stated about strained relation between Rani Bidlan and the accused.

21. Considering all these evidence this Court finds that the prosecution has clearly proved that the victim was called by the accused in his room. PW-1 mother of the victim, PW-4 neighbour of the victim namely Rani Bidlan, PW-3 father of the Victim have clearly stated about the presence of the girl in the house of the accused. It is also clearly established that the mouth of the victim was tied by handkerchief, her hands were tied with rope. Her knicker was removed. The accused was also there only on a towel wrapped around his waist. On going to the room of the accused the victim immediately told about the incident that the accused inserted his finger in the vagina of the victim.

22. Learned Advocate has therefore not argued much on the entire incident. In view of his submission what is required to be seen is as to whether on the these facts whether the offence is under Section 3 of the POSCO or under Section 7 as tried to be canvased by the accused. Section 3 defines the penetrative sexual assault which reads as under:-

“3. Penetrative sexual assault.- A person is said to commit “penetrative sexual assault” if-

- (a) -----
- (b) *he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person: or*
- (c) -----
- (d) -----”

23. About penetrative sexual assault there is direct evidence of victim PW-2 corroborated by PW-1 who immediately went to the room where the offence took place. This is further corroborated by oral testimony of PW-4, who was also present when the victim narrated the incident. This is further proved by statement recorded under Section 164 of the victim.

24. So far as the Medical Evidence is concerned. PW-8 a Medical Officer has clearly recorded in medical certificate that she found a circular injury of 0.5 cm x 0.5 cm circular opening to the vagina. She deposed that such opening is possible due to fingering or insertion of foreign body. In the cross-examination of this Medical Evidence except a suggestion that such injury can be a self-inflicted injury there is nothing taken from her cross. In the 313 statements except telling prosecution story as false the accused has not given any other explanation. The only explanation has come that the F.I.R. was lodged at the behest of Rani Bidlan/PW-3.

25. So far as evidence of accused is concerned. The evidence of defence witnesses do not inspire confidence. From their evidence it is proved that the mob had gathered at the house of the accused and the accused was assaulted. That evidence cannot be used to disbelieve the story of the prosecution. If at all there was quarrel between Rani Bidlan & accused, there is no explanation as to why mob had gathered near the house of the accused. Their evidence only shows that, they are trying to save the accused.

26. Thus, considering all these aspects, this Court clearly find that, prosecution has proved the case of penetrative sexual assault and do not find any error committed by the Trial Court in convicting the accused for offences punishable under Sections 4 & 8 of the POSCO. The argument of the Appellant that the case would at the most fall under Section 7 does not hold any water.

27. While dealing with this matter it is unfortunately seen that no charge was framed for the offence punishable under Section 5(m) of the POSCO. Looking to the age of the victim, it is clear that she was 6 years of age. Since the charge framed was not under Section 5(m) in this Court cannot remand the matter or can issue notice against the Accused as to why he should not be convicted for offence punishable under Section

5(m). Learned Judge is therefore expected to be more careful while dealing with sensitive cases like POSCO. It was necessary for the learned Special Prosecutor who conducted the trial to take proper steps to see that proper charges are framed. In this case even the prosecution has not brought this to the notice of the Trial Judge. The Copy of this judgment be therefore specifically brought to the notice of the learned Judge, who conducted the trial. One copy of the judgment also be forwarded to the Secretary of Law and Judiciary State of Maharashtra. So that necessary steps can be taken to properly train & sensitize special prosecution who conduct such cases. For ready reference Section 5(m) is reproduced below:-

“5. Aggravated Penetrative Sexual Assault.-

- (a)* -----
- (b)* -----
- (c)* -----
- (d)* -----
- (e)* -----
- (f)* -----
- (g)* -----
- (h)* -----
- (i)* -----
- (j)* -----
- (k)* -----
- (l)* -----

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) -----
(o) -----
(p) -----
(q) -----
(r) -----
(s) -----
(t) -----
(u) -----”

28. In view of the above discussion, this Court finds that, no case is made out of acquittal of the Accused.

29. Appeal therefore is dismissed.

(KISHORE C. SANT, J.)