

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1152 OF 2023
WITH
INTERIM APPLICATION NO. 3774 OF 2023

Umesh @ Bali Chotelal Vishvakarma }
Aged about 39 years, Occu-Service, }
residing at L.B.S. Marg, Azad Nagar, }
Room No. 12, Akbar Lala }
Compound, Liyaqatali Chawl, } Appellant
Ghatkoper (W), Bombay-400 086 } (orig. accused)

V/s.

The State of Maharashtra and Anr. ... Respondents

Ms. Keerti Gupta a/w. Ashley Cusher, for the appellant.

Mr. A.R. Patil, APP, for the State.

Adv. Shrushti S. Tupe, for the respondent no. 2.

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CORAM : KISHORE C. SANT, J.

RESERVED ON : 28TH MARCH 2024.

PRONOUNCED ON : 3RD APRIL 2024.

JUDGMENT: (PER KISHORE C. SANT, J)

1. The present appeal has been preferred by the appellant– accused, being aggrieved by the Judgment and Order dated 10th August 2023 passed by Special Judge, under POCSO Act, Greater Bombay, in Special Case No. 455 of 2021, wherein the appellant is

convicted for the offences punishable under section 354 of Indian Penal Code (“IPC”, for Short) and under section 10 of Protection of Children from Sexual Offences Act, 2012, (“POCSO”, for short) and sentenced to suffer Rigorous Imprisonment for 5 years and to pay Rs. 5,000/- (Rs. Five Thousand Only) in default, to suffer further Simple Imprisonment for 1 month. Since punishment is awarded under section 10 of POCSO, no separate punishment is awarded under section 354 of IPC. Hence, this appeal.

2. Such of the facts necessary for the decision of the appeal, are as follows:

3. The appellant-accused was made to face the trial on the allegation that on 21/02/2021. He called a victim of 4 years of age under the pretext of giving her a chocolate and took her in rickshaw. After sitting in the rickshaw, the appellant opened zip of his pant and asked the victim to take his male organ in her hands. On that, the victim got frightened and rushed to home. Since she was frightened, the mother of the victim asked her as to why she got frightened. After knowing the fact, mother-informant took the victim to the police station and lodged a report. On the basis of the said report, Crime No. 90/2021 was registered at Ghatkoper Police Station, Mumbai on

22/02/2021. The prosecution in support of his it's examined (PW-1)-victim, (PW-2)-her mother (informant), (PW-3)- Panch witness (spot) and (PW-4)-the Investing Officer. There is no medical evidence in this case.

4. On this evidence, the trial Court came to conclusion that the offence is proved and had passed the order.

5. A short question in the present appeal is as to whether the offence is proved by the prosecution. Looking to the nature of the allegations it is clear that this is a case of oral evidence only and for that it needs to be seen carefully as to whether oral evidence is consistent and of sterling quality sufficient to prove the guilt of the appellant.

6. PW-1, the victim, in her short examination-in-chief stated about the incident. From her evidence, it is seen that she has deposed as per the FIR and as per the statement under section 164 of Cr.P.C. recorded by the Magistrate. The accused was known to victim as 'Bali Mama'. He is thus identified as he was person known to the victim. She gave the answers to questions put to her by the Special PP. In the cross-examination only thing that was asked was that the road where incident allegedly took place was a crowded. A suggestion was given to

her that she is deposing as per dictate of her mother and police. Another suggestion was given that the accused-appellant had love affair with her mother. Except that nothing is taken to disbelieve the version of the victim.

7. PW-2-informant, also deposed on the same lines. She stated that when she was at home in the evening, the victim came to home in a scared condition. On asking she stated about the incident. On that, the victim and her mother (informant) went to see the rickshaw owned by brother of the accused-appellant. The accused-appellant was not found near rickshaw. The brother of the informant therefore called the accused-appellant by making phone call. Accused-appellant came to home after 2 hours. Accused-appellant was asked by the informant and the relatives about the incident on which he denied the said fact. However, the victim told that the accused is telling lie. On that, they went to police station at 12.00 in the mid-night and the FIR came to be recorded. Thereafter, even under Section 164 of Cr.PC came to be recorded of a victim.

8. In the cross-examination it was asked that the reputation of the accused was not good and still he was allowed to visit the house of the victim. It was further suggested that the accused-appellant was

having love affair with the informant and she wanted to marry with the accused-appellant, as accused-appellant denied to marry her. It is thus tried to suggest that because of other disputes, this false complaint is filed. She proved the allegations from the FIR and 164 statement of the victim.

9. Next witness is the panch, who is the panch to spot panchnama. To this panch, it was also put in cross that the accused - appellant and the informant were having love affair and accused was not carrying good reputation in the locality.

10. PW-4, is the Investigating Officer, who deposed about the investigation and sending the victim for medical examination. In the cross-examination it is only taken that though CCTV footage was collected, it was not of use to prosecution. It is also taken the statement of the victim though was recorded by the Children Welfare Committee, is not filed along with the charge-sheet.

11. The learned advocate for the appellant/accused argues that in this case the evidence is only oral evidence. The victim is a child of 6 years of age when she was examined and before the Court. It is not safe to rely on the evidence of a child witness as they are likely to be tutored. It has come in the evidence of the victim and her mother that

sister-in-law of the victim's was mother also present in the house still she is not examined. Mother of the informant is also not examined. Owner of the rickshaw though was stated as a witness is also not examined. It is thus submitted that though evidence was available, the same is not produced by the prosecution. He further submits that the presumption under section 29 of the POCSO Act is attracted only when foundational facts are proved by the prosecution. In this case, prosecution has not proved the facts required to invoke such presumption. The child witness has not correctly answered the questions that as to where the accused resides. No sufficient number of questions were asked to the victim to ascertain whether she can depose correctly before the Court. He pointed out certain contradictions in the timing that appears in the evidence and in the FIR. He relied upon the judgments reported in the case of "*Shailendra @ Munna s/o Hiranman Gajbhiye v/s. State of Maharashtra and Anr*"¹, "*Radhey Shyam v/s. State of Rajasthan*"² and in the case of "*Pradeep V/s. The State of Haryana*"³,

12. Learned APP vehemently opposes the appeal. It is submitted from the cross-examination that nothing is extracted to

1 (2023) ALL MR (Cri.) 3369

2 AIR (2014) SC (Supp) 773

3 Cri. Appeal No. 553 of 2012

disbelieve the version of the prosecution case. The prosecution has proved its case beyond reasonable doubt. The victim and informant are consistent and there evidence is corroborated by each other. The foundational facts are clearly proved and therefore, rightly presumption under section 29 is invoked. It is thus fit for dismissal of the appeal.

13. Considering the above submissions and judgment this Court has to first see as to whether the evidence is sufficient to prove guilt of the appellant. It is true that the case is totally based on oral evidence and there is no other evidence available to prove the case of the prosecution. The submission of learned advocate for the appellant, therefore, needs to be considered. As to whether the evidence of the child is of sterling quality or not.

14. In the judgment of Supreme Court in the case of ***“Pradeep Vs. The State of Maharashtra”*** (supra), it is held by the Supreme Court that it is well settled principle that that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence and the Court must apply its mind to the question whether there is a possibility of the child witness being tutored. In the case of ***“Radhey Shyam v/s. State of Rajasthan”*** (supra), the Supreme Court held that

the evidence of child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell. In the case of **“Shailendra @ Munna s/o Hiranman Gajbhiye v/s. State of Maharashtra and Anr”** (supra), this Court has also considered the aspect of presumption. In the case of **“Navin Dhaniram Baraiye V/s. State of Maharashtra”**⁴ decided by Nagpur Bench of this Court, considered the question of presumption under Section 29. It is held that the prosecution has to first prove foundational facts against the accused, beyond reasonable doubt.

15. In the present case, this Court finds that the victim child has immediately reported the incident to her mother. Her mother has also immediately called the accused and after calling the accused and asking him, immediately FIR is lodged. There is no scope to say that the accusation is made with any other motive. The evidence of the victim is exactly on the lines and consistent with the statement under section 164 of Cr.P.C. The mother of the victim also corroborates the evidence of the victim.

16. Minor contradiction is then about the time in the FIR and the Examination-in-Chief. In FIR it is stated to be 9.00p.m. to 9.30p.m. whereas in the examination-in-chief she has stated 8.30p.m. to 8.45

4 AIR online 2018 Bom 986

p.m. This minor contradiction about the time does not affect the evidence of both witnesses. This Court finds that when there is nothing to disrupt the evidence of the informant and the victim, it is not necessary to look for further evidence. Non examination of other witnesses is not material. CCTV footage was collected. It is not the case of the accused that in CCTV footage everything is clearly seen which can benefit the accused. From the evidence of the victim the prosecution has sufficiently proved case. The judgments cited by the appellants are not helpful the case of the accused.

17. Considering all above facts, this Court finds that no interference is called for and the appeal deserves to be dismissed and the same is hereby dismissed.

18. In view of the above, Interim Application, if any pending, does not survive and the same is disposed of.

(KISHORE C. SANT, J)