



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 288 OF 2024

XYZ ...Appellant

Vs.

1. **Arsalan Muniroddin Shaikh**
Age : 21 years, Occ. Education
R/o. 130, Siddheshwar Peth,
Solapur.

2. **Kayant Muniroddin Shaikh**
Age : 22 years, Occ. Education
R/o. 130, Siddheshwar Peth,
Solapur.

3. **Sumaiyya Muniroddin Shaikh**
Age : 16 years, Occ. Education
R/o 130, Siddheshwar Peth,
Solapur

...Respondents

Mr. Prasad B. Kulkarni	Advocate for the Appellant
Mr. Ashok B. Tajane	Advocate for the Respondent
Mr. A. S. Gawai	APP for Respondent-State
PSI Manoj More	Jailroad Police Station, Solapur

CORAM : S. M. MODAK, J.

DATE : 23rd SEPTEMBER 2024

JUDGMENT :-

1. Heard learned Advocate Shri Kulkarni for the victim-first informant and learned Advocate Shri Tajane for Respondent Nos. 1 to 3/original accused and learned APP for the Respondent-State.

2. The present appeal is against the judgment of acquittal passed by the Court of Additional Sessions Judge, Solapur dated 10.04.2017. The charge-sheet was filed on the basis of the F.I.R.. which is registered at Jail Raod, Police Station, Solapur on 20.02.2013 on the complaint of the present Appellant. It was registered for an offence punishable under Sections 354, 323, 504, 506 read with 34 of the Indian Penal Code and under Section 12 of the Protection of Children from Sexual Offences Act. Respondent Nos. 2 and 3 are Sisters of Respondent No. 1. Out of them Respondent No. 3-Sumaiyya was Juvenile at the time of commission of an offence. She was tried by the Court of Juvenile Court Solapur and acquitted on 16.12.2015. Whereas other two Respondents were acquitted by Sessions Court, Solapur on 10.04.2017 vide impugned judgment.

3. By this appeal, the Appellant/victim is praying for setting aside the acquittal passed by Sessions Court and praying for convicting all

three Respondents.

4. I have heard both of them finally at the stage of admission. It is true that law on the point interference by the Appellate Court is well settled.

Scope of an appeal

5. Learned Advocate Mr. Tajane relied upon the observations in case of *Chandrappa and Others Vs. State of Karnataka*¹ and more specifically observations in para no. 42. The presumption of innocence is reinforced and Appellate Court should be slow in the interfering judgment of the acquittal, unless it is perverse.

6. Whereas according to learned Advocate Shri Kulkarni, this general principle will not be applicable if there is an offence under the Protection of Children from Sexual Offences Act and he referred the provisions of Sections 29 and 30 of the Protection of Children from Sexual Offences Act. Section 29 deals with the presumption as to certain offences. Whereas Section 30 deals with presumption of culpable mental state.

7. It is true that charge was framed under Section 12 of the Protection of Children from Sexual Offences Act. This Section is not

¹ (2007) 4 SCC 415

inserted in Section 29 of the Protection of Children from Sexual Offences Act. The reason may be an offence under Section 12 of Protection of Children from Sexual Offences Act is not as serious as compared to other offences mentioned in Section 29 of the Protection of Children from Sexual Offences Act.

8. Whereas Section 30 also empowers the Court to draw presumption about existence of mental state. This can be drawn when culpable mental state is ingredient of an offence. It is true that Section 12 lays down the punishment for an offence under Section 11 of the said Act. Sexual intent is an ingredient for an offence under Section 11 of the said Act. So Section 30 will certainly applicable, if there is prosecution under Section 12 of the Protection of Children from Sexual Offences Act.

9. There are judgments which says about when the presumption under the Protection of Children from Sexual Offences Act will be invoked. Just because there is prosecution under the Protection of Children from Sexual Offences Act, the presumption cannot be invoked at the beginning. This presumption comes into play only when ingredients of offence are proved. That is to say when

foundational facts are proved.

About incident

10. The incident in respect of which the F.I.R. is lodged took place on 20/02/2013 at about 8.30 p.m.. The victim had gone to Iyengar bakery for purchasing cold-drink. There are guests in her house. When she was returning home the incident took place. The details are as follows:-

- a) Respondent No. 3-Sumaiyya gave signal through eyes to her elder Sister Respondent No.2-Kayant indicating her that the first informant is coming.
- b) The first informant has neglected and she then proceeded to her house. At that time the Respondent No. 2-Kayant had thrown garbage towards her.
- c) At that time, the Respondent No. 1-Arsalan pulled her hand. She resisted due to which her sweater was torn. Afterwards, all the Respondents beaten her with slaps and abused her loudly.

About investigation

11. She informed this incident to her parents. As a result, all of them

went to Jail Road Police Station and F.I.R. is registered at about 22.30 hours on 20.02.2013. The offence was investigated by PW No. 5-API Sarojini Patil. During her investigation, she came to know that the Respondent No. 1-Arsalan had gone to Sangli to play Net ball tournament. Accordingly, she had made correspondence and collected the documents. Appellant contends that father of these Respondents is working in the Police department that is why Police have favoured the Respondents. Whereas Respondents during cross-examination have tried to bring on record their contention that the father of the Appellant is running matka business and that is why Police have favoured the Appellant. It was denied by the prosecution witnesses.

12. As it was disclosed to the Investigating Officer about the attending tournament, she submitted a report under Section 169 of the Criminal Procedure Code on 03.06.2013. The Appellant opposed the prayer. It was rejected by the Court of the JMFC, Solapur as per Order dated 06.12.2013. Thereafter, charge-sheet was filed.

13. Now the issue before this Court is whether the appeal needs to be admitted. It seems that the relationship in between the families of the Appellant and Respondents are strained that is admitted by the

prosecution witnesses. Now after judgment of acquittal even the Respondents have filed suit for damages for malicious prosecution. According to learned Advocate Mr. Kulkarni, the suit has not got any relevance to this appeal.

14. It is true that Criminal case has to be decided on its own merits depending upon the evidence and the suit in malicious prosecution has to be decided on the basis of the principles enunciated by various judgments. The prosecution has to be malicious prior to grant compensation.

About evidence

15. I have gone through the evidence of six prosecution witnesses and the defence witness, in the form of Sidram Lagamgonda Patil, he is office bearer of the Sangli Net ball association. They have organized the tournament on 20th and 21st February 2013. Respondent No. 1 contention is he was not present at the time of incident, but he had gone to Sangli for attending that tournament. Through this witness-Sidram, he relied upon two documents:-

- a) The certificate of participation issued by witness. It is in original form and

b) the score-card which is photocopy.

16. Admittedly, except PW No. 1-victim, there are no eye-witness.
PW No. 2-Anisa is mother of the Appellant. Whereas PW No. 3-Shaikh Rais Ahmad Mustafa is their neighbour. The family of the Appellant and family of the Respondent resides in the same chawl at Solapur. PW No. 3 – Rais heard noise of the quarrel. He was told by mother of the first informant about the incident. Admittedly, he had also not seen the incident. PW No. 4 is the Police Officer who has recorded the F.I.R.. The statement of the victim is at Exh. 18. Whereas at Exh. 26 is printed form of F.I.R.. The signature of the victim is not there. According to learned Advocate Mr. Kulkarni this procedural irregularities does not vitiate the prosecution.

17. Whereas PW No. 5-Sarojini is investigating officer and PW No. 6 is panch witness. He has not supported. Both of them have invited my attention to their evidence and the findings of the trial Court. I have perused it.

Findings by trial Court

18. The trial Court predominantly acquitted the two Respondents for the reason that the evidence of the victim is not supported by any

other witnesses, because she is only eye-witness. The Police have not seized torn sweater. As the plea of alibi was taken by Respondent No. 1, the trial Court discussed this evidence in para nos. 16 and 17. Lastly, the trial Court acquitted the Respondents for the reason that the ingredient of the sexual intent is absent (Para no. 20).

19. It is true that whether it is an offence under Section 12 of the Protection of Children from Sexual Offences Act or whether it is an offence under Section 354 of the Indian Penal Code, there has to be intention behind that act. The nature of the incident contemplated under Section 354 of the Indian Penal Code is for outraging the modesty. Whereas under Section 11 of the Protection of Children from Sexual Offences Act, it is the act done with sexual intent. In other words, if such intent is absent, it cannot be said that an offence is committed under those Sections.

20. When the evidence of PW No. 1 is considered, what we find is, it is the Respondent No. 2 who has thrown the garbage, and it is Respondent No. 1 who has pulled the hand of the victim and during this scuffle sweater of the first informant was torn and thereafter, all of them, slapped her. When the judgment of the trial Court is perused, so

far as Respondent No. 1-Arsalan is concerned, it proceeds on the basis of that he was not present at the spot.

Case against Respondent No. 1

21. Learned Advocate Mr. Kulkarni vehemently argued that the plea of the alibi is not proved. He invited my attention to the answers given by the defence witness-Sidram in cross-examination. About this score-card, witness contends that record is sent to State Association. The witness admits that for forwarding the documents to State Association, he has not having any documents except bear words.

22. According to learned Advocate Mr. Kulkarni why the testimony of the victim should be believed on the basis of such incomplete documentary evidence. According to him, the procedure for proving the documents was also not followed and if photocopy is to be produced, it can be produced only when the provisions of Sections 65 and 66 of the Indian Evidence Act are fulfilled.

23. It is true that as per the Criminal jurisprudence, the burden on the accused is not heavy as that of prosecution. The accused is not supposed to prove particular fact beyond reasonable doubt. The test of the preponderance of the probability is applicable. It is true that

original score-card is not there, but it's photocopy. It is true that forwarding letter written to State Association is not filed by Witness Sidram.

24. According to learned Advocate Mr. Tajane the trial Court record also contends the photographs of the Participants and one of them is Respondent No. 1. It is true that Respondents have made an attempt before the trial Court for exhibiting these documents. There is an application dated 27.02.2017 for exhibiting few of the documents collected by Police during investigation. It was rejected by the trial Court on the same date. When defence witness has attended, these documents are not shown to him. **So we have got only certificate of participation. It is at Exh. 45.** I have perused it. It contains name of Respondent No. 1. It contains the duration of tournament from 20th to 21st February 2013.

25. Whereas during cross-examination the witness has deposed that all the players had come to Sangli in the night of 19.02.2013 and the time of tournament is from 08.00 a.m. to 12.00 noon and from 03.00 p.m. to 10.00 p.m. of 20.02.2013. There was only one match of Solapur team. It started at 08.00 p.m.. The Respondent No. 1 was

member of the Solapur team. The date of the incident is 20.02.2013 at about 8.30 p.m.. About attending the tournament suggestions are also given to other prosecution witness, and they have denied it.

26. So the evidence before trial Court is of the victim and this defence witness. When the Court has to balance in between two kinds of evidence, the Court has to see which of this evidence is reliable. The law says that in such a scenario, the Court has to find out the corroborative material. The trial Court has done this exercise. The trial Court concluded that there is no corroboration to the evidence of the victim in the form of any other eye-witnesses. Other witnesses are on the point of subsequent disclosure by the victim to them, or they came on the spot after hearing noise, and they were told by the mother of the victim. It has come in the evidence that spot is surrounded by the houses and the shops. It has also come in the evidence that relationship in between both the families are strained. Furthermore, it has come in the evidence that sweater of the victim was not seized by the Police.

27. Learned Advocate Mr. Kulkarni submitted that why the victim should suffer when it is fault of the investigating officer. According to him, the investigating officer has tried to help the Respondent since

beginning by submitting a report under Section 169 of the Criminal Procedure Code. It has come in the evidence that father of the Respondent is in Police department. It is also fact that the State has not preferred an appeal against this judgment of the acquittal. Merely because the father of the Respondent is in Police department, Court cannot infer that the investigation is tainted one. There has to be additional material.

28. For the above discussion, this Court feels that the trial Court has correctly given the benefit of the doubt to Respondent Nos. 1 and 2. I do not find that the findings are perverse. They are perverse when particular piece of evidence is not considered or the evidence is appreciated by neglecting the provisions of law. This is not the case.

29. The presumption under Section 30 of the Protection of Children from Sexual Offences Act will not come into picture because the trial Court has found the presence of the Respondent No. 1 as doubtful. The plea of alibi is only to be considered for the purpose of the appreciating the evidence of the victim. Court is not supposed to give findings that Respondent No. 1 was present at Sangli. If there could have been other witnesses deposing that Respondent No. 1 was very

much present at the spot, additional material could have been available before the trial court. This lacuane is there.

30. The trial Court is right that sexual intent is missing in the incident. Against Respondent No. 2, there is allegation of throwing garbage. This circumstance cannot be believed as prosecution case against Respondent No. 1 is not believed. So I do not think that case for interference in the judgment of the acquittal is made out. No case for admission is made out. These are my observations for deciding the issue involved in this appeal.

31. With these observations, an appeal is dismissed.

[S. M. MODAK, J.]