

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

CRIMINAL APPEAL NO.455 OF 2024

Raju Param ThappaAppellant
Versus
The State of Maharashtra
and anotherRespondents

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WITH
INTERIM APPLICATION NO.1863 OF 2024
IN
CRIMINAL APPEAL NO.455 OF 2024

Mr. Ankit Dhindale, Advocate for the Appellant.
Mr. Vinit A. Kulkarni, APP for the Respondent No.1-State.
Ms. Priyanka H. Chavan, Advocate (appointed) for the
Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 03rd SEPTEMBER, 2024

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 9.2.2024 passed by the District Judge-1 & Additional Sessions Judge, Vasai in Special Case No.181/2020. The Appellant was convicted and sentenced as under :

- [i] The Appellant was convicted for the offence punishable under Section 10 of the Protection of Children From Sexual Offences Act, 2012 (for short, 'POCSO Act') and he was sentenced to suffer RI for five years and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo SI for one month;
- [ii] The Appellant was convicted for the offence punishable under Section 323 of IPC and he was sentenced to suffer RI for six months.

2. Though the Appellant was convicted for the offence punishable under Section 354 of IPC and under Section 12 of the POCSO Act, no separate sentence was imposed on him as the Appellant was sentenced for the offence punishable under Section 10 of the POCSO Act. The substantive sentences were directed to run concurrently. The fine amount of Rs.1,000/- was directed to be paid to the victim as compensation under Section 357(3) of Cr.P.C. after the Appeal period was over. The Appellant was given set off under Section 428 of Cr.P.C. for the period undergone in jail.

3. Heard Mr. Ankit Dhindale, learned counsel for the

Appellant, Mr. Vinit Kulkarni, learned APP for the Respondent No.1-State and Ms. Priyanka Chavan, learned appointed counsel for the Respondent No.2.

4. The prosecution case is that the Appellant was working as a Watchman. He was residing in a room on the second floor of the building where the victim was residing. The date of birth of the victim was 14.8.2009. The incident occurred on 27.10.2020. Thus, she was around eleven years of age at the time of the incident. On the date of incident in the evening, the victim was going from the first floor where her grand-parents were residing to the 3rd floor where the victim and her mother were residing. She was going there by the stair-case. When she reached the second floor, the Appellant pulled her inside Room No.205. He tried to remove her pant but the victim rescued herself and pushed the Appellant. While she was coming out of the room, the Appellant kicked the door, which hit the victim on her cheeks causing injury. She managed to come down to her grand-mother's place. She narrated the incident to her aunt, who in turn, informed her mother telephonically, who was at her

workplace in the vicinity. The mother of the victim rushed home. The victim narrated the incident to her. The mother went to the police station and lodged the FIR. The Appellant was arrested. The investigation was carried out. The victim was sent for medical examination. The statements of the witnesses were recorded. The spot panchnama was conducted. The statement of the victim and her mother were recorded under Section 164 of Cr.P.C.. After conclusion of the investigation, the charge-sheet was filed. The case was committed to the Special Court.

5. During the trial, the prosecution examined six witnesses including the victim, her mother, the Medical Officer, the pancha for the spot panchnama, the Appellant's employer and the Investigating Officer. The defence of the Appellant was of total denial. According to him, he was from Nepal and there was no one to support him. He was wrongly blamed for the offence.

6. The learned Judge considered the evidence and the defence. At the conclusion of the trial, the learned Judge convicted and sentenced the Appellant, as mentioned earlier.

7. The main witness, in this case, is the victim herself. Her birth certificate was produced on record through the evidence of PW-6 ASI Survase, who was the investigating officer. It is produced on record at Exhibit-48, which shows her date of birth as '14.8.2009'. There is hardly any dispute about her date of birth. Therefore, it is established that on 27.10.2020, she was below twelve years of age.

8. The victim was examined as PW-2, as mentioned earlier. She has stated that she was studying in the school on the date of the incident. The lock-down was imposed in the year 2020 and on the date of the incident her school was being conducted on-line. Her mother used to go to attend her work. During that period, she used to stay with her grand-parents. Her mother used to go for her work between 9.30 a.m. to 9.00 p.m.. On 27.10.2020, she was going from the first floor to the third floor to take her books. It was evening time. She was going by the staircase. When she had reached on the second floor, one man caught her hand, pressed her mouth and pulled her inside the room. He took PW-2 to a corner room on the second floor.

She has categorically stated that she did not know the name of that man. She has further deposed that said person tried to remove her pant. She pushed him and tried to run out of the room. At that time, he kicked the door. Her face got stuck between the door and the door-frame causing injuries to her cheeks. Then she went downstairs on the first floor and told the incident to her maternal aunt, who in turn called the victim's mother. She came home. The victim PW-2 told her mother about the incident. Then they went to the police station. The police referred PW-2 to the hospital. She has again specifically stated that she had not seen that person prior to the incident and that she did not know him. She added that she had seen that person 2-3 times after the incident. The Appellant was shown to her through video-conferencing in the Court during recording of her evidence. The victim identified him as the same person, who had committed the offence.

In the cross-examination, she denied that she was deposing as per what her mother had told her. There was CCTV installed on the ground-floor. There were six flats on each of the

three floors. She was acquainted with the people living in her building. At the time of the incident, neither she nor the Appellant had put the face-masks. She knew the people from the second floor. She deposed that there was one hall in the house where she was pulled inside. She admitted that the offender had quarreled with her grand-father in the past. She admitted that she had not told the incident to anyone else in her building. She denied the suggestion that because of the Appellant's quarrel with her grand-father, the Appellant was falsely implicated.

9. PW-1 was the mother of the victim. She has deposed that she was residing with her daughters and son in another flat of the same building where her parents and two brothers were residing. When she used to attend her job, her children used to wait in her mother's flat till she came back. On 27.10.2020, when she was still at her job, at about 8.00 p.m., her sister-in-law called her on her phone and asked her to return home as early as possible because of the incident with PW-1's daughter. PW-1 returned home within 5-6 minutes. PW-2 started crying and narrated the incident to her. She further deposed that the

Appellant was a watchman in a hotel. According to her, before she reached the building, the people from her building had brought the Appellant downstairs. He was already apprehended. The people from her building had called the police. After that she went to the police station and lodged her FIR. The FIR is produced on record at Exhibit-19. The FIR mentions that the information was received at the police station at 12.45 a.m. on 28.10.2020 i.e. in the mid-night. It may be noted at this stage that the Appellant was arrested at 9.55 a.m. on 28.10.2020 as per the arrest form produced at Exhibit-45 through the evidence of PW-6.

PW-1 has further deposed that she had gone to the hospital along with the victim PW-2. She had shown the flat No.205, which was the spot of the incident, to the police. Her statement was recorded under Section 164 of Cr.P.C.

In the cross-examination, she admitted that she knew the Appellant since about 2-3 years prior to the incident. For some days, the Appellant used to work as a Watchman where she herself was working. She denied the suggestion that prior to the

incident her father had quarreled with the Appellant. PW-1 deposed that her husband was not living with her since about 7-8 years prior to the incident. She denied the suggestion that the victim had suffered injuries on her cheeks because she fell in her house. The victim weighed around more than 16-17 KGs.

10. PW-3 Dr. Kokare had examined PW-2 on 27.10.2020 at about 9.15 p.m.. The medical certificate is produced by him at Exhibit-31. He deposed that on examination of PW-2, he found blackish discoloration on bilateral side of face. He admitted that the victim's mother, aunt and grand-mother had told the medical officer that the victim was assaulted by an unknown person. Same fact is reproduced in the medical certificate at Exhibit-31.

11. PW-4 Vilas Ubale was a pancha for the spot panchnama. It is produced on record at Exhibit-34. He has stated that one black button was seized from room No.205 and the victim had identified that button as belonging to her. The spot panchnama shows that it was in the nature of a hair-clip.

12. PW-5 Jeol Tuscano was running a restaurant where

the Appellant was working as a Watchman before changing the job. This witness had helped the Appellant in getting a room. He produced a copy of the rent agreement at Article A. However, there are no further details produced on record and that particular agreement is not properly proved in the evidence.

In the cross-examination, he deposed that the Appellant had not misbehaved with any lady customers or other customers in his restaurant.

13. PW-6 ASI Survase was the Investigating Officer. He deposed that the investigation of C.R. No.388/2020 registered at Vasai police station was handed over to him on the date of its registration. On 28.10.2020, he arrested the Appellant and prepared the arrest panchnama. It is produced on record at Exhibit-45, as mentioned earlier. He conducted the spot panchnama. He seized that particular rubber button from the spot. The victim's statement was recorded. Her birth-certificate was collected. He completed the investigation and submitted the charge-sheet. In the cross-examination, he added that at the time of the incident the CCTV cameras in the victim's building were

not functioning.

. This, in short, is the evidence led by the prosecution.

14. Learned counsel for the Applicant submitted that the incident, as alleged by PW-2, could not have been taken place. It was highly improbable. The prosecution has not examined the important witnesses, like, the maternal-aunt of the victim to whom the victim had narrated the incident at the first instance. Even her grand-mother and maternal uncle, who had accompanied her at the time of her medical examination, were not examined.

15. Learned counsel submitted that nobody from the building was examined. This was important because the prosecution case according to PW-1, is that the Appellant was caught by the people in the building and he was brought down before PW-1 had reached the building. Nobody from that building was examined. No explanation was offered for not examining any of them. He submitted that the manner in which the injuries were suffered on the cheeks is also improbable.

Considering the tender age of the victim, it was not possible that she could have pushed the Appellant and could rescue herself. He submitted that the identity of the Appellant is extremely doubtful and the prosecution has not proved its case beyond reasonable doubt.

16. Learned APP as well as learned counsel for the Respondent No.2 submitted that the age of the victim is not disputed. The police were immediately informed. There was no delay and there was no possibility of concoction of a false story. There was no reason to implicate the Appellant falsely. The medical report corroborates the victim's narration. Finding of the hair-button at the spot is also an incriminating circumstance against the Appellant.

17. I have considered these submissions. Having perused the evidence, there are some circumstances which require serious explanation from the prosecution, which is not forthcoming. It is the specific case of PW-2 that she had not seen the offender prior to the incident. She did not even know him. She did not know the name of that offender. Therefore, in this case it was

necessary for the investigating agency to have conducted the test identification parade. However, no such effort was taken by the prosecuting agency. Undoubtedly, the victim has identified the Appellant in the court through video-conferencing. However, her evidence was recorded on 17.2.2023. There was quite a long gap between the date of incident and date of recording of her evidence. This has to be considered in the backdrop of her admission that she had seen the offender 2-3 times after the incident. The prosecution case is that after the incident the Appellant was immediately apprehended by the people from the building and then on the very next day he was put under formal arrest. Therefore, there was no occasion for the victim to have seen the Appellant 2-3 times after the incident. That could only mean that the victim was shown the Appellant during that period and, therefore, her identification of the Appellant in the Court loses its significance in the facts of this particular case.

18. Apart from the above infirmity, the medical certificate shows that the history given to the medical officer recorded that the victim was assaulted by an unknown person. At that time,

the victim's uncle and grand-mother were present who had given this information. This is again contrary to the prosecution case because PW-1 had stated that the people in the building had caught the Appellant and had brought him down. In fact, his name was mentioned in the FIR. Therefore, it was important for the prosecution to have explained as to why it was mentioned before the Medical Officer that the assault was committed by an unknown person.

19. The FIR mentions that when PW-1 enquired with PW-2 about the incident, at that time, PW-2 had described the incident by specifically naming the Appellant. This again is contrary to the PW-2's own version that she neither knew the offender nor knew his name.

20. As rightly submitted by learned counsel for the Appellant, the important witnesses in this case are not examined by the prosecution. In the context of this case, the uncle, grand-mother and the persons who had allegedly caught the Appellant, were the important witnesses. None of them was examined which raises serious doubt about the genuineness of the prosecution

case as far as the identity of the culprit is concerned.

21. It is also important to note that according to PW-1, the Appellant was caught by the people in the building before she had even reached her building, after coming to know about the incident from her sister-in-law. In that case, the Appellant was already apprehended. According to her, the police were informed by those people. There is no explanation as to where the Appellant was kept throughout the night, because the FIR was lodged in the next morning and the information regarding the offence was received by the police station only after mid-night. The Applicant was put under arrest at about 9.55 a.m. on the next day. All these circumstances and timings do not tally with each other. Thus, the learned counsel for the Appellant has made out a case for strong possibility of mistaken identity or wrong implication. Sufficiently reasonable doubt is created about the prosecution case as far as the identity of the offender is concerned. In this view of the matter, the conviction and sentence recorded against the Appellant cannot be sustained. He has to be given benefit of doubt. With the result, the Appeal is required to

be allowed.

22. Hence, the following order :

:: O R D E R ::

- i. The Appeal is allowed.
- ii. The judgment and order dated 9.2.2024 passed by the District Judge-1 & Additional Sessions Judge, Vasai convicting and sentencing the Appellant in Special Case No.181/2020, is set aside.
- iii. The Appellant is acquitted from all the charges.
- iv. The Appellant is in custody. He shall be released forthwith if not required in any other case. Before his actual release from the prison, the Applicant shall execute a PR bond in the sum of Rs.30,000/- (Rupees Thirty Thousand Only) ensuring his availability in case Appeal against acquittal is preferred.
- v. The Appeal and the companion Applications are disposed of.

(SARANG V. KOTWAL, J.)