

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

CRIMINAL APPEAL NO.800 OF 2023

Kisan Haribhau Damodar @ RamugademamaAppellant
Versus
The State of Maharashtra
and anotherRespondents

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WITH
INTERIM APPLICATION NO.172 OF 2024
IN
CRIMINAL APPEAL NO.800 OF 2023

Mr. Amit Mane, Advocate for the Appellant.

Mr. V.B. Konde-Deshmukh, APP for the Respondent No.1-
State.

Ms. Pranali P. Kakade, Advocate (appointed) for the
Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 08th JULY, 2024

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 2.2.2019 passed by the Special Judge under POCSO Act at Greater Bombay in POCSO Special Case No.124/2016. At the conclusion of the trial, the Appellant was convicted and sentenced as follows :

- [i] He was convicted for the offence punishable under Section 376(2)(n)(i) of IPC and was sentenced to suffer R.I. for twenty years and to pay a fine of Rs.20,000/- and in default of payment of fine to suffer further RI for six months.
- [ii] He was convicted for the offence punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer R.I. for twenty years and to pay fine of Rs.20,000/- and in default to suffer further R.I. for six months.
- [iii] He was convicted for the offence punishable under Section 10 of the POCSO Act and was sentenced to suffer R.I. for five years and to pay a fine of Rs.5,000/- and in default to suffer further R.I. for

two months.

2. All the sentences were directed to run concurrently. The Appellant was given set off under Section 428 of Cr.P.C. for the period already undergone as under-trial prisoner.

3. Heard Mr. Amit Mane, learned counsel for the Appellant, Mr. V.B. Konde-Deshmukh, learned APP for the Respondent No.1-State and Ms. Pranali Kakade, learned appointed counsel for the Respondent No.2.

4. The prosecution case is that the victim was around eight years of age in December, 2015. The Appellant was a neighbour of her grand-mother. On 18.12.2015, the Appellant took the victim inside the house and committed rape on her. It is alleged that the others gathered at the spot and saved the victim. The victim's elder sister ran to her mother and informed about the incident. The mother rushed to the spot. She made inquiries with the daughter. She narrated the incident. Thereafter FIR was lodged by the

mother. The investigation was carried out. The Appellant was arrested. He faced the trial. During trial, the prosecution examined ten witnesses including the victim, her mother, her sister, a neighbour, Medical Officers, a pancha and the police officers.

5. The Appellant examined himself as a defence witness. The defence of the Appellant was that he was a painter by profession. He has carried out the painting/colouring work in the victim's house, but, the mother of the victim was not willing to pay the amount. On one occasion, the Appellant confronted the mother regarding the payment. However, there was a quarrel and because of that quarrel this false case is lodged against him.

6. The learned Judge considered all these aspects and convicted and sentenced the Appellant as mentioned earlier.

7. The important witness in this case is the victim herself, who is examined as PW-1. She has stated that her

date of birth was 24.11.2007. There was no particular cross examination in this regard. Therefore, this date of birth is not seriously disputed by the Appellant. She further deposed that the incident took place on 18.12.2015. She used to reside with her parents and sisters. The Appellant was residing near the house of her grand-mother. He was doing the painting jobs. On that day, PW-1 and her sister were passing from their grand-mother's house. The victim was sitting on a swing. The Appellant came there. He gagged her mouth and took her inside the house forcibly. It is alleged that he committed rape on her inside the house. She started shouting. One of her friends PW-3 knocked the door. The Appellant wore his clothes quickly and opened the door. PW-3 then took her to the house of her grand-mother. In the meantime, her mother came there. PW-1 narrated the incident to her. It is her case that the Appellant had committed the same act during Diwali time. At that time he had shown a knife and had threatened her. Since she was threatened, she did not disclose this incident to anybody.

After the FIR was lodged, she was referred for medical examination. Even her statement under Section 164 of Cr.P.C. was recorded. It is brought on record at Exhibit-4. She identified her clothes in the court. She also identified the Appellant.

In the cross-examination she stated that the Appellant was called to her house for painting the house. She did not know whether his dues were paid to him. She denied that when she and her mother along with her sister were passing from the house of the Appellant, he had demanded money and there was a quarrel and, therefore, this false case is lodged. She denied that she was tutored to depose in the Court.

8. PW-2 was the elder sister of the victim. She has stated that on 18.12.2015, she had gone to Ashok Mill. While returning, the victim followed them. The victim was playing and sitting near a ladder. After sometime, PW-2 came back and saw that there was a crowd near their grandmother's house and that the victim was crying loudly. PW-3

was standing there. She made inquiries with the victim. PW-1, the victim, then narrated the incident to her. PW-2 then rushed to their mother and told her about the incident. The mother also came to the spot and made inquiries with PW-1. Again, the victim narrated the incident to her. The victim also referred to the incident that had happened during Diwali when the Appellant had committed the similar act.

In the cross-examination, she was generally asked about the earning capacity of her parents. She admitted that the Appellant had painted their house. She admitted that on one occasion, the Appellant had gone to their house to demand his dues. Painting was done prior to Diwali. PW-3 resided near their house. She denied the incident in which allegedly there was quarrel between the Appellant and the victim's mother when he had demanded his dues.

9. PW-3, was the friend, who was referred to by the victim in her deposition. He has stated that he used to reside near the house of the victim's family. On 18.12.2015

he had seen that the Appellant was talking with the victim. He took the victim to his house. For some time the victim did not come out. This witness then became suspicious. He went to the Appellant's house and knocked on the door. He saw from the window that the victim was crying and she was lying on the floor. Her clothes were scattered around her. PW-3 then pushed the door. A crowd gathered there. The victim was crying. She informed the incident to this witness and her sister. After some time, the victim's mother came there. He identified the clothes worn by the victim at the time of incident. In the cross-examination, he deposed that at that time he was studying in 12th standard. The Appellant's house was near the house of her grand-mother. He admitted that the victim's mother was his aunt and thus they were related.

10. PW-4 was the mother of the victim. She has narrated the incident and the events, as narrated by PW-1, PW-2 and PW-3. She further deposed that she went to the police station and lodged her FIR, which is produced on

record at Exhibit-18. Thereafter the victim was sent for medical examination to the hospital.

In the cross-examination, she deposed that her husband was earning Rs.10,000/- per month. They were residing in a rented premises. She denied that the Appellant had done the painting work in their house. She denied that she had not paid the dues of the Appellant. She denied the allegations that when the Appellant demanded his dues, there was a quarrel and this false case was lodged against him.

11. PW-5 Nasir Shah was a pancha for the spot panchnama. PW-5 was shown the house of the Appellant where the incident had allegedly taken place. The clothes of the Appellant were also taken charge of in his presence. The spot panchnama is produced on record at Exhibit-20.

12. PW-6 Dr.Sidharth Sabale had examined the Appellant medically. He had opined that the Appellant was capable of performing sexual intercourse. His report is

produced on record at Exhibit-22. In that report, the date of birth of the Appellant was mentioned as '26.4.1953'.

13. PW-7 Dr. Mahesh Sable had examined the victim at Sion Hospital on 21.12.2015. He noticed the following four injuries :

- [i] swelling of right half of upper lip;
- [ii] abrasion of size 0.5 x 0.5 cm present at area above upper lip at right side, reddish in colour;
- [iii] contusion of size 1 x 1 cm present over ulna aspect of left forearm at cover one third region reddish;
- [iv] abrasion of size 0.5 x 0.1 cm present over antifreeze aspect of right forearm at lower 1/3 region reddish.

On medical examination of the genitals, he found that the hymen was ruptured. There was no evidence of fresh or old hymeneal tear margin irregular. In his opinion, the probable age of injury was less than twelve hours and overall finding was consistent with old sexual

intercourse. He produced the medical certificate at Exhibit-24. After reading the FSL report, he came to the conclusion that overall findings were consistent with old sexual intercourse however possibility of recent sexual intercourse could not be ruled out. The CA report is produced on record at Exhibit-11. The C.A. reports produced on record do not show any incriminating conclusion against the present Appellant. He denied the suggestion that the injuries mentioned hereinabove were possible due to fall from the swing. The medical certificate is produced on record at Exhibit-24.

14. PW-8 PI Gaikwad had lodged the FIR, had conducted the spot panchnama and had arrested the Appellant. He had referred the accused for medical examination.

15. PW-9 PSI Khade had recorded the victim's statement.

16. PW-10 API Raut had seized the clothes of the

victim and had conducted part of the investigation and had filed the charge-sheet.

17. The Appellant examined himself as the defence witness, as mentioned earlier. According to him, he was implicated falsely because of the quarrel, mentioned hereinabove. According to him, in the quarrel he had sustained head injury and he was sitting in the house. After that the police came to his house and took him to the police station.

18. Learned counsel for the Appellant submitted that the prosecution story is not true. There are sufficient indications that the Appellant is falsely implicated. The fact that he had completed the painting job is indicated through the evidence of the victim's sister. The mother has denied this fact. This shows that the mother is not a truthful witness. He further submitted that the evidence of PW-3 did not see that the victim was forcibly taken inside the house. Therefore, the evidence of the prosecution witnesses is not consistent. He further submitted that the medical evidence of

the victim's examination does not support the prosecution case. The CA reports are not incriminating. Therefore, the prosecution has failed to prove its case beyond reasonable doubt.

19. Learned APP as well as learned counsel for the Respondent No.2 submitted that the evidence of the prosecution witnesses is consistent and there is no reason to disbelieve them.

20. I have considered these submissions. I have perused the impugned judgment. The victim has narrated the incident in detail. That was not an isolated incident and she had deposed that even in the past during Diwali vacation, the Appellant had committed the same act, but, at that time she had not told about it to anyone because of the fear. On this occasion, the Appellant could be apprehended because PW-3 and others came to her rescue. The evidence shows that PW-3 had got suspicious as the victim was inside the Appellant's house and therefore he knocked the door and thereafter he could see that the victim was not wearing any

clothes. She was on the floor. The Appellant was thus found immediately in the house with the victim in that objectionable situation. The victim immediately narrated the incident to PW-3 as well as to her sister PW-2. The mother was informed immediately and the FIR was lodged without any delay. It was lodged at about 6.30 p.m. on 18.12.2015. It was registered at C.R. No.577/2015 at Dharavi police station, Mumbai. Therefore, there is hardly any scope or time for concocting a false consistent story against the Appellant. This, if tested in the background of the defence taken by the Appellant, the defence does not appear to be probable. If there was a quarrel in the presence of others, no other witness has supported the Appellant's defence. On the other hand, the victim who was barely eight years of age, has truthfully narrated the incident immediately to PW-2 & PW-3.

21. Even the medical evidence, as discussed above, has supported the prosecution case. The medical officer did not rule out the recent sexual intercourse. There was

rupture of hymen. There was having indication of old sexual intercourse, which was relatable to the incident which had taken place during the Diwali vacation. Apart from that the victim was found to have four injuries, as discussed in the evidence of the Medical Officer. These injuries are strong indications of the truthfulness of the victim's version. Therefore, though the C.A. reports are not incriminating, it has not wiped out the effect of the victim's evidence. The victim's age is not really disputed. The incident had occurred more than once.

22. The learned Judge has rightly appreciated all these aspects. Therefore, the conviction of the Appellant is rightly recorded and I do not see any reason to interfere with the finding of guilt of the Appellant.

23. The next question is about the sentence imposed on the Appellant. Learned counsel for the Appellant, in that behalf, submitted that leniency be shown to him because he is now seventy years of age. There are no antecedents against him. He is suffering from heart ailment. His

behaviour and conduct in the prison is satisfactory. He submitted that on the date of the incident, the minimum sentence provided under the POCSO Act as well as under the IPC was ten years. The learned Judge has imposed the sentence of twenty years. Learned counsel for the Respondent No.2 as well as learned APP submitted that considering the gravity of the offence, the sentence more than the minimum sentence be imposed on the Appellant. They submitted that the sentence of twelve years be imposed on the Appellant in the facts of this case.

24. I have considered these submissions. The date of birth of the Appellant, as mentioned in the history given to the Medical Officer, is 'April, 1953'. That part is brought on record by the prosecution itself. Therefore, as of today he is more than seventy years of age. The Appellant is suffering from heart ailment and other ailments related to his age, as submitted by learned counsel for the Appellant. The Appellant is in custody continuously from 18.12.2015 i.e. for more than eight and half years. Even during the period of

spread of pandemic, the Appellant was inside the prison. He was not released. There are no further allegations against the Appellant. The offence undoubtedly is grave and serious. Therefore, unnecessary leniency need not be shown to him but the sentence more than the minimum sentence can be imposed on him to meet the ends of justice. Therefore, I am accepting the submissions of learned APP and learned counsel for the Respondent No.2 to impose at least twelve years of imprisonment. Hence, the following order :

:: O R D E R ::

- i. The Appeal is partly allowed. The judgment and order dated 2.2.2019 passed by the Special Judge under POCSO Act at Greater Bombay in POCSO Special Case No.124/2016, is modified as under.
- ii. The conviction of the Appellant under Section 376(2)(n)(i) of IPC and under Sections 6 & 10 of the POCSO Act, is maintained. For the offence punishable under Section 376(2)(n)(i) of IPC, the Appellant is sentenced to suffer RI for twelve years instead of twenty years

and to pay fine of Rs.20,000/- and in default to suffer further RI for six months.

- iii. For the offence punishable under Section 6 of POCSO Act, the Appellant is sentenced to suffer RI for twelve years instead of twenty years and to pay a fine of Rs.20,000/- and in default to suffer RI for six months.
- iv. For the offence punishable under Section 10 of the POCSO Act, the Appellant is sentenced to suffer RI for five years and to pay fine of Rs.5,000/- and in default to suffer further RI for two months.
- v. All the sentences shall run concurrently. The Appellant is entitled for set off under Section 428 of Cr.PC. for the period undergone as under-trial prisoner.
- vi. Rest of the operative part of the impugned judgment, which is not inconsistent with this operative order, is retained as it is.
- vii. Criminal Appeal is disposed of accordingly.

PRADIPKUMAR
PRAKASHRAO
DESHMANE

(SARANG V. KOTWAL, J.)

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