

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.977 OF 2022

WITH

INTERIM APPLICATION NO.2370 OF 2024

IN

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WITH

INTERIM APPLICATION NO.2367 OF 2024

IN

CRIMINAL APPEAL NO.977 OF 2022

Rajkumar @ Vikykumar Avadhkishor
Choudhary

.... Appellant/
Applicant

versus

The State of Maharashtra & Anr.

.... Respondents

.....

- Mr. Vaibhav V. Ugle, appointed advocate a/w Shubham Vasekar, Advocate for Appellant/Applicant.
- Smt. Manisha R. Tidke, APP for the State/Respondent.
- Mr. Chaitanya A. Chavan, appointed advocate, for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
RESERVED ON : 06th AUGUST, 2024
PRONOUNCED ON : 09th AUGUST, 2024

JUDGMENT :

1. The Appellant has challenged the Judgment and Order

dated 12/04/2022 passed by the Special Judge under POCSO Act, in POCSO Case No.533 of 2019. By the impugned Judgment and Order, the Appellant was convicted as follows ;

- (a) He was convicted for commission of offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012 and was sentenced to suffer rigorous imprisonment of 10 years and to pay a fine of Rs.20,000/- and in default of payment of fine to suffer rigorous imprisonment for six months.
- (b) The Appellant was also convicted for commission of offence punishable u/s 376(1) of the Indian Penal Code. But considering the sentence imposed u/s 4 of the Protection of Children from Sexual Offences Act, 2012 being greater in degree, no separate sentence was imposed on him.

The Appellant was the original accused No.1. There was another accused i.e. accused No.2 in this case. He was acquitted from the case.

- 2. Heard Mr. Vaibhav V. Ugle, learned counsel for the Applicant, Mr. Chaitanya A. Chavan, learned counsel for the

Respondent No.2 and Smt. Manisha R. Tidke, learned APP for the State.

3. The prosecution case is that the victim was around 14 years and 5 months old at the time of the incident. Her date of birth was 01/01/2005. The incident occurred on 10/06/2019. The victim and the Appellant were residing in the same vicinity. On that day, in the afternoon, the victim went to the first floor for throwing garbage in the creek. The Appellant was residing on the first floor of that structure. He pulled the victim inside the room. Accused No.2 was present inside the room. It is alleged that the Appellant committed rape on the victim. The accused No.2 put a bed-sheet over them and also took some photographs of them. After some time, the victim's brother came and called for her. The Appellant opened the door. The victim came out crying. The victim and her brother went back to their house. She told her mother about the incident. The victim's family decided to lodge the FIR. Accordingly, on the next day morning, they went to Cuffe Parade police station and lodged their FIR on 11/06/2019 vide C.R.No.90/2019. The

investigation was carried out and the Appellant was arrested on 16/06/2019. The charge-sheet was filed and the case was committed to the Special Court.

4. During the trial, the prosecution had examined 12 witnesses including the victim, her mother, her brother, the medical officers, the principal of her school, the Panchas and the Investigating Officer. Besides the oral evidence, the prosecution had led documentary evidence in the form of CA report. The defence of the Appellant was that the victim's parents were running a Mess and the Appellant used to eat there. They were providing poor quality food. Therefore, the Appellant confronted the victim's parents and asked about their license. There was a quarrel and both of them had threatened the Appellant. Because of this enmity, the Appellant was falsely implicated.

5. Learned Trial Judge considered the evidence on record and the defence of the Appellant. She found that the Appellant had committed the offence. As far as the accused No.2 was concerned, the learned Judge observed that the victim had named the accused No.2 for the first time only in her

supplementary statement. There was no consistent evidence on record about the accused No.2 and about his presence at the spot, at the time of incident. Therefore, it was held that the accused No.2 was entitled for acquittal. Consequently, only the Appellant was convicted and sentenced as mentioned earlier.

6. The important witness in this case is the victim herself. She has stated that her date of birth was 01/01/2005. She was residing with her parents and two brothers. On 10/06/2019, at about 03.00 p.m., she cleaned her house and went to the first floor of a structure near the creek for throwing garbage. The Appellant was residing in a room of that first floor. He called the P.W.2/victim to his room. He caught her and pulled her inside the room. He closed the door. She has deposed that accused No.2 was also present in the room. The Appellant then committed rape on her. He threatened P.W.2. She further deposed that the accused No.2 did not do anything. She added that the accused No.2 put a bed-sheet on her and the Appellant. She further deposed that the Appellant asked the accused No.2 to take their photographs. Her brother came looking for her to

the Appellant's house. He knocked at the door. The Appellant opened the door. She returned home crying. Her mother enquired with her. Initially, she did not tell her. But around 09.00 p.m., she told her mother about the incident. Her mother told about it to her father and then they went to the police station. She was taken for medical examination. Her statement was recorded. Her clothes were seized. She identified the bed-sheet as Article 4. She identified the Appellant. She identified the accused No.2 present before the Court.

In the cross-examination, PW.2 deposed that she went to the police station on 10/06/2019 at about 10.00 p.m. The police recorded her statement at that time. She admitted that her father used to go to the Appellant's house to give him tiffin. She used to go for throwing the garbage after the tiffins were prepared. It was a slum area. There were people present on the road, when she used to go for throwing garbage. There were four rooms on the ground floor and four rooms on the first floor and people were residing in all these rooms. She admitted that she had not stated in the statement recorded u/s 164 of

Cr.PC. that the Appellant had called her to his house. There was some improvements in her deposition compared to her police statement. Those improvements were put to her in the cross-examination. She could not assign any reason as to why it was not mentioned in her police statement that the Appellant had asked the accused No.2 to take photographs or that the accused No.2 put the bed-sheet on them. She was not knowing the friend of the Appellant, who was inside the room. But she gave his name as the Appellant had called the accused No.2 by his name. This is her explanation so far as the accused No.2 is concerned. She produced her clothes before the police. She showed the spot to the police.

7. P.W.1 was the mother of the victim. She had lodged the FIR. She has deposed that on 10/06/2019, at about 03.00 p.m., P.W.2 had gone out to throw garbage. The Appellant used to reside 2 to 3 houses away from their house. When the victim returned home, she narrated the incident to her. P.W.1 went to the police station and lodged her report. The FIR is produced on record at Ex.18, which shows that the incident was reported to

the police at 08.45 a.m. on 11/06/2019 and the FIR was lodged at about 09.00 a.m. on 11/06/2019.

In the cross-examination, she deposed that she used to prepare tiffins and her husband carried them to different persons. She denied that the Appellant was taking tiffins from them. The victim returned home at around 04.00 p.m. She was crying. The tiffins were given in the morning and evening. The victim narrated the incident at about 09.00 p.m. P.W.1 had not sought help from her neighbours.

8. P.W.3 is another important witness. He was the brother of P.W.2. He has deposed that in the afternoon since the victim did not return, their mother told him to search for the victim in the chawl. P.W.3 could not find her. Then he went to the Appellant's room. The door was closed. He knocked on the door. The Appellant opened the door. The Appellant tried to hide behind the door. But the victim came outside the room crying. According to P.W.3, there was one more person in the room. He identified the Appellant, but he could not identify the accused No.2.

In the cross-examination, he deposed that he had visited the Appellant's home on many occasions. The victim was not always going there. He deposed that he did not know that the victim was in that room. But he knocked at that door because all the others rooms were locked. When he was asked a specific question, as to when he knocked at the door of the Appellant, whether other people were sleeping in that room, P.W.3 did not answer that question. He deposed that the Appellant used to take tiffin to his house from his father and hence they knew the Appellant.

9. P.W.4 WPSI Madhuri Patil had taken down the FIR and the supplementary statement of the P.W.2. She recorded the statement of P.W.3 as well.
10. P.W.5 Dr. Nidhi Kurkal had examined P.W.2 on 11/06/2019. On examination of P.W.2, P.W.5 found that there was no fresh injury. However, there was old healed complete hymenal tear. After examination, the opinion was given that the evidence of sexual assault cannot be ruled out and the final opinion was kept pending for FSL report.

In the cross-examination, she deposed that there were no fresh tears. The hymenal tear could be due to other reasons and hymenal injuries may heal within 24 hours.

11. P.W.6 was the Principal of P.W.2's school. P.W.2 had taken admission in that school in the year 2018. For age proof she had given Aadhar card and certificate of a Doctor. The date of birth was mentioned as 01/01/2005.

In the cross-examination, he deposed that the victim had not gone to school earlier and therefore under RTE Act, she was given admission directly in the 5th standard. He also admitted that the date of birth i.e. 01/01/2005 was written in different ink on the admission form, which was filled by the victim's father.

12. Thus, there was some doubt about the victim's date of birth. But then, the investigation agency got her ossification test done.

13. P.W.7 Sunil Jawale was the Assistant Professor of J.J. Hospital. On 11/06/2019, he conducted ossification test and according to that examination, her age was opined to be between 14 to 15 taking into account margin of error. The report is produced on record at Ex.36.

14. P.W.8 Nitin Bangera was a Pancha under the arrest Panchanama, when the Appellant was arrested and his clothes were seized.

15. P.W.10 Vijay More was a Pancha in whose presence, the victim's clothes were seized.

16. P.W.9 PSI Lahu Pawar had registered the FIR and had conducted the Spot Panchanama. The victim had pointed out the bed-sheet and it was seized from the spot.

In the cross-examination, he deposed that when they went to the spot, the room was not locked. The same bed-sheet was forwarded to FSL.

17. P.W.11 Caroline Shaikh was the Pancha for the spot

Panchanama. The Spot Panchanama is produced on record at Ex.42.

18. P.W.12 API Shashikant Jadhav was the Investigating Officer. He had conducted the major part of the investigation. He had arrested both the accused.

19. Apart from the ocular evidence, the prosecution has brought C.A. reports on record. However, there is nothing significant in those C.A. Reports except the finding of semen on the bed-sheet seized from the spot. There was blood found on the clothes of the victim, but except for mentioning that it was of human origin, its grouping was inconclusive. Human blood and semen stains were found on the bed-sheet, but the blood group was inconclusive. The other C.A. reports are not incriminating in any manner.

20. Learned counsel for the Appellant submitted that the story given by the victim is unbelievable. She had not raised any shouts when she was dragged inside. There was no reason for the P.W.3 to knock only at the door of the Appellant because it

was their case that the victim had gone to that room without the knowledge of her brother and mother. He further submitted that the version is not the complete truth because the learned Judge has disbelieved her version regarding the presence of the accused No.2 inside the room. The Appellant was convicted u/s 4 and not u/s 6 of the POCSO Act. Therefore, benefit of doubt should also be given to the present Appellant because the victim's story was not held to be completely true. He further submitted that there is no other corroborating circumstance. The bed-sheet was found on the spot. But when the Spot Panchanama was conducted, the room was open. He further submitted that the finding of semen on the bed-sheet is not an incriminating circumstance against the Appellant. The bed-sheet was allegedly found in his own room. It does not have any connection with the alleged offence of rape. He further submitted that the medical examination does not show that the victim had suffered any injuries. Therefore, the medical evidence cannot be used by the prosecution against the Appellant. He submitted that there was doubt about the date of birth of the victim as the evidence of the Principal of the school i.e. PW.6,

shows that the documentary evidence about the date of birth was not made available.

21. Learned counsel for the Respondent No.2 as well as learned APP submitted that the date of birth of the victim was not really in doubt. The ossification test shows that the victim was between 14 to 15 years of age at the time of incident. They further submitted that the victim in usual course had gone on the first floor to throw garbage in the sea. It was not possible to throw garbage from the ground floor. The Appellant took advantage of this fact. The Appellant dragged her inside and committed rape on her. Therefore, there is no reason to disbelieve the version of the P.W.2/victim. They further submitted that the brother had given explanation as to why he knocked only on the room of the Appellant. According to P.W.3, the other rooms were locked and therefore he did not knock on those doors. They further submitted that though some part of the victim's evidence is disbelieved by the learned Judge, that does not mean that her entire evidence should be discarded. The rest of her deposition is believable and reliable. Therefore, the

Appellant may not be acquitted in this case. They further relied on the finding of blood and semen stains on the bed-sheet found at the spot.

22. I have considered these submissions. As far as the age of the victim is concerned, the evidence led by the Principal of the school is not very reliable. However, the prosecution has proved the ossification test reports through evidence of P.W.7. Therefore, even accepting the margin of error, still the victim would be below 18 years of age and hence the provisions of POCSO Act would be attracted if the offence committed by the Appellant was proved.

23. So far as the evidence regarding the actual incident is concerned, the P.W.2 has described the incident. She had gone to the first floor to throw garbage. She was dragged inside the room by the Appellant and he had committed rape on her. Though her evidence is not very clear about presence of the second person and the learned Judge had acquitted the accused No.2, her evidence against the Appellant, in particular, is cogent and reliable. Moreover, her version against the Appellant is

supported by the P.W.3 who had come to look for her. The learned Judge has observed that the prosecution has failed to prove that the offence is committed by the second person as observed in paragraph No.31 of his judgment. That finding is not challenged by the State. But the offence is proved beyond a reasonable doubt against the Appellant only.

24. P.W.3 has deposed that when he knocked at the room of the Appellant, the victim was inside the room. The Appellant was trying to hide himself. P.W.3 referred to the presence of another person but he had not identified the accused No.2. The prosecution has not proved beyond reasonable doubt that there was any other person in the room. Leaving that part aside, the prosecution through the evidence of P.W.3 has proved that the victim was found in the room of the Appellant who was also present inside the room. To that extent, P.W.2's version is corroborated by the evidence of the P.W.3. There is hardly any delay in lodging the FIR. The victim/P.W.2 narrated the incident to her mother at 09.00 p.m. and immediately on the next morning they had approached the police to lodge their FIR. In

the fact of the present case, lodging of the FIR on the next day morning cannot be termed as delayed reporting. Thus, it can be seen that the victim and her family had taken recourse to approach the police as soon as possible. There was no reason for P.W.2 to implicate the Appellant falsely. Explanation given by the Appellant in his statement recorded u/s 313 of Cr.P.C. does not appear to be probable. There are no details of quarrel between the Appellant and the victim's family in respect of the quality of food served to the Appellant.

25. The medical evidence also supports the prosecution case, as P.W.5 has deposed that, after the examination it was concluded that the evidence of sexual assault could not be ruled out. There was recovery of bed-sheet, soon after the incident, from the spot showing the presence of blood and semen stains. This is an additional circumstance against the Appellant. It was recovered from his own room. In this view of the matter, though the prosecution has failed to prove the presence of another person inside the room beyond a reasonable doubt, the prosecution has proved its case beyond reasonable doubt against

the present Appellant. The Appellant was rightly convicted for the commission of offence punishable u/s 4 of POCSO and 376 (1) of the Indian Penal Code.

26. The next question is about the sentence imposed on the Appellant. Learned counsel for the Appellant submitted that the Appellant was 24 years of age at the time of the incident. He is continuously in custody since 16/06/2019. He was never released on temporary period for any reason. He was in custody throughout, even during the period of pandemic. All this has already caused immense mental hardship to him. He submitted that in these circumstances, some leniency be shown to the Appellant. His sentence be reduced from 10 years to 7 years rigorous imprisonment.

27. Learned APP as well as learned counsel for the Respondent No.2 opposed these submissions. According to them, considering the age of the victim and also the nature of the incident, leniency may not be shown to the Appellant. The sentence of 10 years is justifiable in this case. It is the minimum sentence u/s 376(1) of the Indian Penal Code.

28. The minimum sentence u/s 376(1) of the Indian Penal Code at the relevant period was 10 years. Therefore, considering the provisions of section 42 of the Protection of Children from Sexual Offences Act, there is no scope to reduce it below the minimum period of 10 years. Therefore, even the sentence cannot be reduced.

29. With the result, the Appeal is dismissed.

30. With dismissal of the Appeal, the companion Interim Applications are also disposed of.

(SARANG V. KOTWAL, J.)