

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPEAL NO. 327/2016

Shri Ajay s/o Harichandra Dhengre
Aged about 42 years, occu: Labour
R/o Panchsheel Nagar, Nagpur
Old R/o Peth Budhwar, Tah.Katol
Dist. Nagpur.

.. **APPELLANT****versus**

- 1) The State of Maharashtra
Through Police Station Pachpawli, Nagpur.
- 2) Mers. Maya Suryakant Mendhe
Aged about 35 years, occu: Pot Washing
- 3) Ku.Payal d/o Ajay Dhengre
Aged about minor occu: education
Both R/o Bhankheda, Behind Sidarth Library
near the house of Mahadeo Nagrare, Nagpur 26.
(Respondent no.2 is the guardian
at present for the minor respondent no.3)

.. **RESPONDENTS**

.....
Ms. Deepali V. Sapkal, Advocate (appointed) for the appellant
Mr. Amit Chutke, Additional Public Prosecutor for respondent no.1 -State
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CORAM: MRS.SWAPNA JOSHI, J.
DATED : 5th June, 2018

ORAL JUDGMENT:

1. This Appeal has been directed against the judgment and order dated 20th June, 2016 passed by the learned Principal District & Sessions Judge, Nagpur in Special Criminal Case No.48/2016, convicting the appellant under section 354 and 323

of the Indian Penal Code and Section 8 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act"). The appellant was sentenced to suffer R.I. for three months u/s 323 of the IPC. No separate sentence was passed u/s. 354 of IPC. The appellant was further sentenced to suffer R.I. for five years and to pay a fine of Rs. 5000/- in default to suffer S.I. for three months, u/s. 8 of the POCSO Act.

2. The prosecution case in a nutshell can be summarized thus,

The prosecutrix is the daughter of the appellant. The prosecutrix was residing with her parents and younger brother in a rented premises at Katol, Dist. Nagpur, The prosecutrix was studying in XI standard. It is the case of the prosecution that on the night of the incident i.e. 9.8.2015, while the prosecutrix (PW1) was sleeping at about 12.30 am, the appellant came near her and fondled her breasts so also the private part. The said act was continued by the appellant for about 2 to 3 nights. The prosecutrix was scared with the said act of the appellant, The prosecutrix thereafter went to the house of her maternal aunt, namely, Smt.Maya Suryakant Mendhe (PW2). It is the case of the prosecution that on 15th August,2015 also, the prosecutrix was assaulted by her father and therefore she left her house and went to Nagpur and started residing with her maternal aunt (PW 2). At that place also, the father of prosecutrix (i.e accused) visited the house of PW 2 and started abusing PW2-Maya and also tried to take away the prosecutrix from that place. However, the maternal aunt of the prosecutrix did not allow the appellant to take the prosecutrix with him. Meanwhile, the prosecutrix narrated the said incident to the mother of the prosecutrix (DW1). Thereafter

the prosecutrix was admitted in Government Children's Home for Girls i.e Balgriha at Katol Road Sadar, Nagpur. The prosecutrix stayed in the said home for about one-and-a-half months. However as she was not keeping good health, her maternal aunt again brought the prosecutrix to her house. It is the case of the prosecution that since the mother of the prosecutrix felt that an opportunity is to be given to her husband (appellant) to improve himself, she did not lodge any complaint against the appellant. However the appellant visited the house of the maternal aunt of the prosecutrix, abused and assaulted her at that place. On 7.1.2016 the appellant again abused and assaulted the prosecutrix, her maternal aunt as well as her grandmother and also tried to take away the prosecutrix and her mother from that place forcibly. Therefore, the prosecutrix along with her maternal aunt proceeded to Women Cell at Nagpur and lodged a complaint at Pachpaoli Police Station, Nagpur.

3. An offence was registered on the basis of the said complaint lodged by the prosecutrix u/ss. 354, 323, 504 of the IPC and u/ss 7 and 8 of the POCSO Act, 2012 vide C.R. No.12/2016 on 7.1.2016. The investigating agency recorded the spot panchnama. The appellant came to be arrested. The statement of the witnesses were recorded and after completion of the investigation, the Police filed the charge-sheet against the appellant before the Special Court under POCSO Act. The charge was framed by the Special Court. The trial was conducted and on appreciation of evidence, the learned trial Judge convicted the appellant as aforesaid.

4. The learned Advocate for the appellant, Ms. D.V. Sapkal, (appointed) for the appellant strenuously argued that the learned Judge has failed to consider that there was an inordinate delay in lodging the complaint by the prosecutrix. She has not even disclosed the incident to her mother at the earliest available opportunity. It was contended that the learned trial Judge has not considered the evidence of the prosecution witnesses in its right perspective and, therefore, has erroneously convicted the appellant.

5. Mr. Amit Chutke, the learned Additional Public Prosecutor contended that the allegations were made by the prosecutrix who was a young girl of 15 years against her own father and also gave an opportunity to the appellant to improve himself, however since the appellant did not mend his ways, the prosecutrix was constrained to file a report against her father with the assistance of her maternal aunt. The learned APP submitted that the learned trial Judge has rightly convicted the appellant.

6. Perused the record and proceedings of the case minutely. In order to verify the rival submissions made by the learned Advocates appearing for the respective parties, it would be beneficial to go through the evidence of the prosecution witnesses. The prosecution has examined in all four witnesses PW1 is the prosecutrix; PW2-Maya Mendhe is the maternal aunt of the prosecutrix; PW3-Mrs.Sujata Deshmukh is the Probation Officer, Government Children Home for Girls and PW4-Nandkumar Khenche is the Investigating Officer. It is the defence of the appellant that the prosecutrix was a spoilt child and she was of loose moral character and that the prosecutrix was influenced

by her maternal aunt who was not in good terms with the parents of the prosecutrix. In order to substantiate its defence, the defence examined as many as two witnesses- DW1-Smrt.Seema Dhengre is the mother of the prosecutrix and DW2-Dhiraj Moon who is the maternal uncle of the prosecutrix.

7. As far as testimony of PW1-prosecutrix is concerned, PW1 has deposed before the Court in a natural manner. Her deposition shows that the evidence was recorded in the chamber of the learned special Judge and at the relevant time, the learned APP and the learned defence counsel were present in the chamber. An arrangement was made that the appellant sat at the back side of the prosecutrix and the prosecutrix was not aware about the presence of the appellant in the said chamber. The prosecutrix appeared to be scared and, on enquiry, she informed that her maternal uncle and her mother pressurised her not to depose against her father (accused). Despite the fact that the mother and maternal uncle of the prosecutrix pressurized her not to depose against the appellant, the prosecutrix has deposed before the Court very boldly and without fear. The prosecutrix has, in terms, stated that on 9th August, 2015 while she was sleeping, at about 12.30 am, her father came near her, the mother of the prosecutrix was sleeping near her and by the side of her mother her brother was sleeping and after them her father was sleeping. The father got up came towards her and moved his hands for her breasts and private part and, therefore, she woke up. She then went to sleep to the other side of her mother. The prosecutrix stated that she did not disclose the incident to her mother in the morning and thereafter her father continued the

same act for about 2 to 3 days. At that time also, she did not narrate the incident to her mother. On 15th August, 2015 her father beat her on consuming liquor, therefore, she proceeded to the house of her maternal aunt. Her father came to the house of her maternal aunt and tried to take her back. At that time, the prosecutrix narrated the entire episode to her maternal aunt. Her maternal aunt then communicated the same to the mother of the prosecutrix. The prosecutrix categorically stated that she did not lodge the complaint against her father as she thought that her father will improve his behaviour. The appellant again tried to take the prosecutrix back to his house. At that time prosecutrix contacted Child Line and started staying in Government children's Home for Girls. She stayed there for about 1 to 2 weeks, however as she was sick her maternal aunt brought the prosecutrix to her house. The appellant again tried to take back the prosecutrix to his house and quarreled with the maternal aunt of the prosecutrix. The appellant also assaulted her as well as her mother in the house of her maternal aunt. The prosecutrix then proceeded to the Police Station and lodged a complaint against the appellant (Exh.7). The version of the prosecutrix has not at all been shattered in her cross-examination. The prosecutrix denied that as there was property dispute, she had lodged a false complaint against her father at the instance of her mother and maternal aunt. The testimony of prosecutrix is in consonance with the contents in FIR (Exh.7). Thus, the prosecutrix is found to be reliable witness and her testimony inspires confidence as such.

8. The deposition of PW2-Maya, who is the maternal aunt of the prosecutrix,

shows that the prosecutrix informed her that her father touched her body inappropriately during night time. She informed about the said incident to the mother of prosecutrix. PW 2-Maya stated that she gave an understanding to the appellant so also one opportunity to improve himself, however the appellant did not mend his ways and as such, the prosecutrix was sent to Children Home. The prosecutrix then went to the house of her maternal aunt again and a report came to be lodged. In the cross-examination, PW2-Maya stated that the prosecutrix stayed with her since her childhood as her mother used to go to work at the relevant time. PW2-Maya was cross-examined by the defence, however nothing intangible could be elicited from her cross-examination.

9. On scrutinizing the testimony of PW1-prosecutrix and PW2-Maya carefully, it is noticed that their testimony corroborates with each other and is cogent, consistent and has not been shattered in the cross-examination. There are no material improvements, exaggerations or embellishments in the testimony of the witnesses. Thus, PW1 and PW2 are found to be reliable witnesses, There was no reason for the prosecutrix who was a young child of 15 years, to depose against her own father, despite the fact that her mother as well as her maternal uncle tried to pressurize her not to depose against the appellant. Only because the allegations were made against the prosecutrix that she was of loose character, it cannot be said that the prosecutrix would depose against her own father in such adverse circumstances.

10. The contention of the learned counsel for defence that the prosecutrix

should not be relied upon as there is an inordinate delay in lodging the complaint does not hold any substance as the prosecutrix was constrained to lodge the report against her own father as she did not feel safe in her own house and was required to run from pillar to post and then lodged the complaint against her own father. So also the prosecutrix has explained the delay satisfactorily by stating that she had given opportunity to her father to improve himself. However she did not find any improvement in his behaviour. The prosecutrix after giving a full thought has lodged complaint against her own father. Thus, the delay is properly and convincingly explained by the prosecutrix. So also, it is a settled law that the delay in lodging complaint, in case of sexual offences is to be considered in favour of victim if her testimony inspires confidence as under normal circumstances, the reputation of the entire family of victim is at stake.

11. As regards the testimony of DW1-Seema Dhengre, who is the mother of the prosecutrix, she testified that on the night of the incident, the prosecutrix did not tell her anything about the incident. According to DW1 the prosecutrix had lodged a false complaint. During the night of incident, the prosecutrix did not scream or cry and she was normal and did not appear to be frightened. DW1-Seema however stated that she did not ask the prosecutrix as to why she changed the place and came to her other side for sleeping. The said version makes it clear that during the night of incident, the prosecutrix had changed her place and slept beside her mother. The said fact supports the case of the prosecutrix that as the appellant was misbehaving with her, she was compelled to change her position and slept besides her mother. DW1 stated that the

prosecutrix was seen with one boy for 2 to 3 days and she was accosted while she was talking with the boy. The testimony of DW1 appears to be afterthought probably because she tried to support her husband as she was trying to save her family. Apart from the statement that the prosecutrix was of bad character and was chit-chatting with the boy, nothing has been elicited in the testimony of DW1. Even assuming that the prosecutrix was talking with some boys that does not mean that the prosecutrix was of a bad character. Nothing is brought on record by the defence to doubt her fidelity.

12. It is not at all disputed by the defence that at the time of the incident the prosecutrix was 15-years old. According to DW 1-Seema, who is the mother of the prosecutrix, the date of birth of the prosecutrix is 27th July,2000 which makes it clear that on the date of the incident the prosecutrix was below the age of 18 years i.e. "child" within the meaning of Section 2 of POCSO Act.

13. The testimony of DW2-Dhiraj Moon does not throw any light on the point of incident. It only shows that most of the times, the prosecutrix was staying with her maternal uncle i.e. DW 2.The testimony of DW2 is of no assistance to the defence. The overall assessment of the evidence led by the prosecution as well as the defence and on going through the judgment passed by the Special Judge, I am of the considered opinion that the learned Special Judge has rightly considered the evidence of the prosecutrix in its right perspective and there is no scope for any interference as such.

14. It is worth noting that the Parliament has enacted the POCSO Act,2012 with an object to protect the children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child. In view of the facts and circumstances, the following order is passed :

ORDER

- (i) Criminal Appeal No. 327/2016 is hereby dismissed.
- (ii) The impugned judgment and order of conviction and sentence dated 20th June, 2016 in Special Criminal Case No.48/2016 passed by the learned Principal District & Sessions Judge, Nagpur is maintained.
- (iii) The professional fees of the learned counsel for the appellant are quantified at Rs.5,000/- (rupees five thousand).

JUDGE

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