



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.440 OF 2019

Mahadev Gaur Bishwas .. Appellant
Versus
The State of Maharashtra & Anr .. Respondents

...

Ms.Mallika Sharma i/b Anjali Patil for the appellant.
Mrs.A.A. Takalkar, APP for the State.
Mr.Ujwal Agandsurve for respondent no.2.
PSI M.N. Kudmate from Chembur police station.

CORAM: BHARATI DANGRE, J.
DATED : 15th MARCH 2023.

JUDGMENT:-

1 'Little girls dance their way into your heart, whirling on the tips of angel wings, scattering gold dust & kisses in our paths'.

One such little girl, "X", born on 9/6/2014 underwent a harrowing experience, barely 3 years five months, when she was sexually outraged by a man residing in her neighborhood whom she referred to as 'uncle', her friend's father.

Tilak

2 On 6/11/2017, in the afternoon hours, while she was playing with her siblings, with her mother just around, she was taken to the house by the accused and he fingered her, as a result she started bleeding. The little girl rushed to her mother and took off her panty and went to toilet. She was unable to pass urine and was touching her private part and shouting in pain and agony. The mother noticed blood coming out and when she inquired, the victim disclosed to her that it was Sanya's father, the accused, who had put his finger in the place of urinating, which was paining.

3 Upon the said incident having taken place, Vijaylaxmi (PW 5) residing in the neighborhood was called by the complainant (PW 2) and was told that her daughter was having pain while urinating and was also told that it is the accused who had fingered her. The mother and daughter, both were crying and were told by PW 5 that the girl should be taken to the hospital or she can wait till the husband return.

In the night at 10.30 p.m, when husband of PW 2 returned home, the incident was narrated to him. The victim was taken to the family Doctor (PW 4) on the next day, who advised that she should be taken to 'MAA' hospital, but on being taken there, she was asked to be taken to Rajawadi Hospital. The parents were informed that they should first lodge a report and

Tilak



hence PW 2 approached the police station where the complaint was reduced into writing by API attached to Chembur Police Station (PW 8).

The victim was medically examined by PW 3 in Rajawadi hospital and the report of medico legal examination was prepared.

4 The above incident set the investigating machinery rolling and the girl was examined on the basis of the consent given for her medical examination by her mother and accordingly, PW 3, a Gynecologist attached to Rajawadi police station, examined the girl after noting down the history given by PW 2 and the medico legal examination report (Exhibit-19) was issued under her signature.

The spot panchnama was prepared, the birth certificate of the victim girl was obtained and the statement of the victim was recorded before the Metropolitan Magistrate, Kurla, Mumbai. The accused was arrested and on completion of investigation, the charge-sheet was filed.

The accused was charged of raping the victim girl, aged 4 years by penetrating his finger into the vagina, and thereby committing an offence punishable u/s.376(2) of IPC. He was also charged of committing offence of aggravated penetrative sexual assault punishable u/s.6 of the POCSO Act.

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On pleading not guilty, he was subjected to trial in POCSO Special Case No.23/2018 before the Sessions Judge (POCSO) Greater Mumbai.

5 In order to establish the guilt of the accused, the prosecution examined eight witnesses. The victim girl came to be examined and when specifically questioned by the learned Judge about the act committed by Sanya's father (accused), she answered that he put his finger in her private part. She also further stated that lot of blood came out, upon his act which was committed inside his house. She further deposed that she went home and narrated the incident to her mother and was taken for medical examination.

The victim testified that Sanya's father reside next to her house though she could not identify the accused and she refused to identify him on the basis of his photograph affixed on the arrest panchnama.

5 The learned Judge recording the evidence thereby made the following noting:-

“Witness if of very tender age. She is giving answers after long time and she gave answers by coming near to me or in my ear. She was fiddling with the things on table while giving answers”

On being subjected to cross-examination, the victim answered that she was regularly visiting the house of Sanya and

Tilak

her parents and they were giving her food. She categorically deny that she had falsely stated about the act committed by the accused.

6 PW 2, the mother of the victim deposed about the narration of events by her daughter and admitted that the accused was residing adjoining to their house since about 7 years prior to the incident and the victim was habituated of visiting their house and she admitted that the wife of the accused was taking good care of her.

7 PW 2 specifically deposed that blood had stopped oozing out of the private part of the victim and there were nail marks on the side of the place of urinating and therefore, she applied Betnovate(C) to the injury. In the cross-examination, the mother answered that she had inquired with her daughter whether she had scratched her private part with her finger and she had answered in the negative.

8 PW 3, the Doctor who examined the victim girl, recorded the history given by the mother, of putting finger in the vagina, after removing her undergarments.

PW 3 deposed that on medical examination, she noticed minimal fresh abrasion of 0.5 cm on the left side of the fourchette. She opined that there was fresh abrasion due to fingering, and also opined that the injury is possible by finger nail. In the cross-examination, she admitted that there was no

Tilak

bleeding out of the injury at the time when she had examined and also expressed a possibility that the injury may be possible if the victim herself scratches her private part.

9 In light of the aforesaid evidence brought on record through PW 1, PW 2, PW 5 and PW 3 – the Medical Officer, along with the evidence of PW 8 to PW 10, the Special Court recorded a finding that the case of the prosecution inspire confidence and the evidence on record prove his guilt, since no other conclusion is possible. The learned Judge recorded that the accused has not discharged the burden cast upon him as per Section 29 of the POCSO Act, by bringing probable evidence on record to prove his case that there was a dispute between the family of the complainant and his family about drying clothes in front of his house, which he has set out in his statement recorded u/s.313 of Cr.P.C.

Another circumstance which strengthened in the prosecution case recorded by the learned Judge, is absence of any reason for the complainant to go to the extent of involving her small child, barely 4 years old, to falsely implicate the accused.

Recording that the testimony of the complainant and the victim is consistent, and stand supported by the medical evidence, the omissions which were attempted to be brought on record was held not to carry any noteworthy significance, materially affecting the outcome of the trial.

Tilak

On appreciating the entire evidence, the learned Judge was convinced about the credibility of the witnesses and on finding that the prosecution has proved its case beyond all reasonable doubt, recorded a finding of guilt against the accused and convicted him for the offence punishable u/s.376(2) and Section 6 of the POCSO Act.

10 The Appeal is taken up for final hearing in the wake of the order passed by this Court on 27/1/2023, where it was recorded that the appellant/applicant who has sought his release on bail, pending the Appeal, was incarcerated in more than five years.

11 The learned counsel Ms.Mallika Sharma i/b Mrs.Anjali Patil, for the appellant, would submit that the judgment impugned is apparently fallacious, as it do not consider certain important aspects and has also failed to take into consideration the omissions and contradictions in the deposition of PW 2. The learned counsel would submit that the appellant has been falsely implicated in the case and has been wrongly convicted, despite an important circumstance that the victim did not identify the accused or his photograph, when shown to him. Apart, the learned counsel would submit that the prosecution has failed to adduce evidence of any independent witnesses and in fact, though PW 2 has specifically deposed that her three children

Tilak

were playing together, none of the children is examined by the prosecution and even the statement of Sanya/Sonai (friend of the victim) was not recorded by police during the course of investigation. Non-examination of the material witnesses has materially affected the trustworthiness of the prosecution case, is the submission advanced on behalf of the appellant.

The argument is, that this has created a dent in the case of the prosecution when the surrounding circumstances are not taken into consideration while a finding of guilt has been recorded.

12 I do not find any merit in the said submission, since it is worth to note that the victim is well acquainted with the accused, as father of Sanya, as the family is residing in the neighborhood and the victim was on visiting terms with them, and PW 2 has gone to the extent of saying that his wife used to take good care of the victim. Apart from this, even PW 5, the landlady has also corroborated her version by deposing that the children of the complainant used to play at the house of the accused and he used to take care of them. It cannot be expected from a little girl, barely four years old, to focus on the photograph and identify the person, specifically as a child of that age may not be able to focus on a point due to underlying anxiety or being distracted by external stimuli. In the case of this girl, the stressful situation, she was facing, may also be one of its cause.

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The learned Judge has immediately recorded the behaviour of the victim, which she noticed and recorded that the girl was not confident to disclose the incident openly, but was whispering in the ears of the Judge and she was also distracted, as she was fiddling things on the table while answering.

I do not think more responsible behaviour can be expected from a little girl of this age, and it must have been an arduous task for the Special Judge to extract her version, but she clearly described the act committed by the accused and denied that she was giving false statement.

13 Another submission of the learned counsel is also not worth consideration, when she submit that when the Doctor examined the victim, there was no blood nor there was any blood seen on the hands of the victim or on her knicker.

PW 2 specifically deposed that when she saw the victim girl who rushed into the house and was wailing in pain, while urinating, but she was unable to urinate and she noticed that blood was coming out. That is why she inquired with the little girl and the incident was divulged to her. The first person who has witnessed the victim and her mother, after the incident took place, is PW 5. In the cross-examination, she categorically admitted that she herself had seen the injury and the blood was coming out of the injury. It is not necessary that the blood was

Tilak

transferred on the hands of the victim or to her knicker, as it is not known whether the knicker was removed by the accused, when the act was committed, and in fact when the victim girl went to the toilet, she took out her panty and it is quite possible that the blood did not appear on her panty.

14 Another ground which has been pressed into service by the learned counsel for the appellant is the place of insertion of the finger. PW 8 – the Officer on duty at Chembur police station recorded that the complainant informed that accused inserted his finger in the place of toilet of the victim, whereas what is narrated by PW 2 is, her daughter was having pain in her place of urinating and she was told by the victim that Sanya's father had put his finger in the place of urinating and that is why she is having pain.

The victim girl, PW 1 deposed that Sanya's father put finger in her private part.

15 The Doctor who examined the victim was given history of fingering in the vagina of the victim, after removing her undergarments. That is the reason why PW 3 examined the private part of the victim and noticed abrasion of left side of fourchette, and in the report of medico legal examination, she has opined as under :-

“There is evidence of physical and sexual violence. Fresh abrasion of 0.5 cm x 1 cm near fourchette at left side”.

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16 A little girl of 3 ½ years who is not even introduced to her own organs, cannot be expected to give exact description of her private parts, but in her statement recorded u/s.164, she has categorically stated that Sanya's father had touched her at the toilet place by his nails. The little girl further says that he is a bad uncle, "गंदे अंकल हैं". When she deposed before the Court, she clearly stated that finger was put in her private part, as a result of which lot of blood came out. She was not surely in a position to exactly describe the incident, on account of her simplicity and purity, not yet spoiled by mundane affairs. This guileless innocent girl did not realize its seriousness, and that is why the Doctor (PW 3) before whom she appeared for medical examination, deposed that she was normal, being unaware of the seriousness of the act forced upon her.

17 On the medical examination of the victim, an opinion is recorded of physical and sexual violence, the act being committed by the accused, clearly fall within the purview of Section 6 of the POCSO Act, which prescribe punishment for committing aggravated penetrative sexual assault and the act of the accused would fall within clause (m) of Section 5 and on recording the finding of guilt, he has been sentenced to suffer RI for 10 years and to pay fine of Rs.25,000/-.

18 There is no reason to disbelieve the victim girl as she has deposed before the Court and attributed the specific act to the accused and the girl is relatively ingenuous, not capable of understanding the consequences of the act to which she has fallen prey and that it amount to an offence. There is no reason why the victim girl has attributed the act of sexual violence to the accused and there is also no reason why the mother should tutor the child of tender age to be a participant in such an churlish act, of which she complained.

The evidence that is placed on record by the prosecution, thus clearly establish the guilt of the accused and since the prosecution has proved its case beyond reasonable doubt, and established that he has committed penetrative sexual assault on a child, who is below 12 years of age, he has been held guilty of penetrative sexual assault and punished in terms of Section 6 of the POCSO Act, which is a special enactment, intended to protect the children from offences of sexual assault and sexual harassment.

Though the little girl could not be protected from the sexual offence committed upon her, the wheels of justice have been turned to her, by convicting the appellant for the wrong which he has done, resulting into a trauma which has remained unexpressed but may leave a long lasting impact upon her and by imposing adequate sentence.

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For the reasons referred above, the Appeal do not deserve any consideration, being without any merits, the same is dismissed.

19 The judgment and order of conviction passed by the Special Judge under the Protection of Children from Sexual Offences Act, 2012, in POCSO Special Case No.23/2018 dated 28/2/2019, convicting the appellant and imposing sentence is upheld.

The appellant shall undergo the remaining sentence.

(SMT.BHARATI DANGRE,J)