

Bombay High Court

Shri. Sandeep @ Sanjay Deoram ... vs State Of Maharashtra Thr. Police ... on 25 September, 2017

Bench: Swapna Joshi

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J-c

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

Criminal Appeal No.158 of 2017

Shri Sandeep @ Sanjay Deoram Meshram  
age 24 years, Occ.-Labour  
R/o. Adyal Tekdi, Tah. Bramhapuri,  
District-Chandrapur.

.... Ap

-Versus-

State of Maharashtra,  
Through Police Station Officer  
Police Station, Bramhapuri  
District-Chandrapur.

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Mr. S.B. Bissa, Additional Public Prosecutor for State.  
Shri V. P. Mohod, Advocate (Appointed) for the Accused.  
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Coram : Mrs. Swapna Joshi, J.

th Dated : 25 September, 2017.

ORAL JUDGMENT This appeal has been directed against the judgment and order passed by the learned Special Judge and Ad-hoc Additional Sessions Judge No.2, Chandrapur in Special POCSO Case No. 71/2014, delivered on 11.4.2016, whereby convicting the accused under Sections 376(2)(i)(j) of the Indian Penal Code sentencing him for rigorous imprisonment of ten years and a fine of Rs.5,000/-, in default to undergo simple imprisonment of three months. The accused was further convicted for the offence punishable under Section 3 read with section 4 of the Protection of Children from 2 J-cra 158-17 .odt Sexual Offences Act, 2012 and was sentenced to undergo for rigorous imprisonment for ten years and a fine of Rs.5,000/-, in default to undergo simple imprisonment for three months. 2] I have heard Mr. S.B. Bissa, the learned Additional Public Prosecutor for the State. The appellant/accused and his Counsel remained absent. With the assistance of the learned APP, I have carefully gone through the record of the prosecution case. 3] The facts leading to prefer this appeal can be summarised as under :-

The complainant- Smt. Nutan Yogesh Madavi (PW-1) was residing at Adyal Tekdi, Tah. Bramhapuri, District-Chandrapur with her husband and two daughters, aged about five and two years old respectively. The complainant Smt. Nutan and her husband were working as labourers in the field. The victim who was aged about five years, was studying in Anganwadi. The house of the accused was just after two houses from the house of the complainant. On the date of incident i.e. 18.9.2014 at about 6.00 a.m., the husband of the complainant left the house and proceeded for his work. The

complainant after finishing her work proceeded for her work at about 11.00 a.m. Her daughters were at home. At about 6.00 p.m. she along with her husband returned from the work. Her both the daughters went to sleep after having dinner. Thereafter, the cousin 3 J-cra 158-17 .odt sister of the complainant namely Kajal visited her house. Kajal informed the complainant that at about 12.00 p.m. the daughter of the complainant and niece of the accused were playing near the Baniyan tree. At that time the accused called the victim to his house on the pretext of giving eatable-sweets to her. He took the victim to his house and closed the door. Kajal told the complainant that the ladies from that area namely Shantabai, Geetabai, and Gaya were discussing about the said incident. On 19.9.2014, when the daughter of the complainant was awakened at about 7.00 a.m., at that time the complainant enquired with her as to what happened, when she was playing below the Baniyan tree. At that time her daughter (victim) informed her that on the earlier day when she was playing with Chhakuli, the accused took her in his house on the pretext of giving sweets to her. He took her inside his house and closed the door. He removed her clothes, made her to lie down, he also removed her clothes and laid down on her body. She informed that the accused was shaking his waist. She started crying, thereafter the accused released her from his clutches. Thereafter, the victim put on her clothes and came out of the house of accused. The complainant and her husband proceeded for their work to the field and on returning back from their work, the victim informed the complainant that there was a pain in her private part while urinating. The complainant then 4 J-cra 158-17 .odt proceeded to the police station along with her husband and daughter. The police recorded the complaint (Exh.9).

4] At the relevant time API Namdeo Sonkusre (PW-6) was attached to Bramhapuri Police Station. He recorded the complaint (Exh.9) of PW-1. On the basis of said complaint, he registered the offence. PW-6 arrested the accused on 20.9.2014. PW-6 referred the victim for medical examination to Rural Hospital, Bramhapuri. API Mahadev Parate (PW-7) recorded the spot panchnama (Exh.16). PW- 7 took charge of clothes Exh.11. PW-7 recorded the statements of the witnesses. He referred the accused for his medical examination to the hospital. After completing necessary investigation, chargesheet was filed. The learned trial Judge framed the charge. On analysis of the evidence and after hearing both sides, the learned trial Judge convicted the accused as aforesaid.

5] The learned counsel Mr. Mohod (State appointed) vehemently argued that learned Judge has not considered the evidence of the witnesses in right perspective and has erroneously convicted the accused. The learned Additional Public Prosecutor contended that learned trial Judge has rightly convicted the accused after scrutiny of the evidence of the prosecution witnesses. 6] In order to appreciate the rival contentions of both sides, it would be advantageous to go through the testimony of complainant 5 J-cra 158-17 .odt (PW-1), victim- PW-2, PW-4 grandmother of the victim and Medical Officer Dr. Smt. Jaya Bhongale. (PW-5).

7] So far as the testimony of the complainant is concerned, according to the complainant (PW-1), the victim was aged about five years old at the time of incident. The incident occurred on 18.9.2013. In the morning, she along with her husband proceeded for work. Her daughter and her father were at home. She returned to home at 5.00 p.m. She prepared food. Both of her daughters went to sleep. Thereafter, at 8.00 p.m. her cousin sister Kajal came to her house. She informed that her neighbours Shantabai, Gaya and Gitabai told her that accused took the victim inside the house and closed the

door. The incident occurred in the afternoon. In the next morning at about 7.00 a.m., PW-1 enquired with her daughter. On this, the victim informed to PW-1 that the accused said that he will provide 'Khao' (sweets) to her and took her to his house. The accused closed the door of his house, made her to lie down on his bed and he was moving his waist, before that he removed her clothes. When she tried to scream, accused pressed her mouth, since she got pain, the accused released her. In the evening PW-1 proceeded to police station and lodged her complaint (Exh.9).

8] During the cross-examination PW-1 stated that she asked Shantabai, Gayabai and Gitabai as to why they had not 6 J-cra 158-17 .odt banged the door of the house of the accused when he closed it after taking her daughter inside. They said that they knocked the door but he did not open it. PW-2 asked them as to whether they shouted. On this they said that on raising their shouts many persons gathered there. They broke open the door and went inside the house of the accused. He was dragged out of his house. It appears that the PW-1 has exaggerated her version. It was suggested to PW-1 that there was no injury on the private part of the victim. PW-1 however, denied it. It was also suggested that two months back her husband had taken a hand-loan of Rs.2,000/- from the accused and the accused demanded the said amount, there was quarrel between PW-1 and the accused. PW-1 denied the said suggestion. The testimony of PW-1 is not shattered in cross-examination and she is found to be a truthful witness.

9] The prosecution has examined PW-2 who is the victim. PW-2 was aged about 5 years old when she deposed before the Court. The learned trial Judge found that the victim was unable to understand the sanctity of oath, hence oath was not administered to her. There is no impediment that the testimony of the child is to be disbelieved, if oath is not administered to her. No doubt, the evidence of the child witness is to be scrutinized carefully. According to the victim (PW-2), she knows the accused Sanjay. He stays at Adyal 7 J-cra 158-17 .odt Tekadi. On the day of incident, he called her saying that he will provide sweets (Kaho). The accused took her inside his house, made her to lie down on the cot. PW-2 then gestured before the Court by moving her waist to say that the accused did such act with her. PW-2 then deposed that the accused had removed her clothes as well as his clothes and closed the door from inside. During cross-examination PW-2 admitted that her mother told her that the accused is a bad person. PW-2 admitted during her cross-examination that she will have to tell the police that the accused removed her clothes and that the accused moved his waist. The testimony of victim (PW-2) indicates that she being a child witness, she stated before the Court that her mother had instructed her to tell before the police. There was no suggestion that the victim was instructed to depose before the Court as such. Thus, the victim has deposed before the Court whatever she remembered. The victim categorically stated after the incident on the next day. She narrated the incident to her mother. Finally, the victim denied that she was deposing falsely before the Court. She also denied that since there was quarrel with the accused on the say of her mother, she narrated the incident to police falsely. The testimony of the victim is not shattered on material aspects. 10] The testimony of PW-1 corroborates the testimony of PW-2. So far as the testimony PW-4 is concerned, she is 8 J-cra 158-17 .odt grandmother of victim. She deposed that she knows that the incident took place on 18.9.2014. She returned from work at 5.30 p.m. The victim informed her that the accused called her on his house, removed her clothes, made her to sleep on the bed and he committed sexual intercourse with her, therefore, she started crying. Therefore, PW-4 along with the victim's mother (PW-1) proceeded to the house of the accused. However, he

was not available at home. During cross-examination, it was suggested to the victim that she asked the victim as to what had happened and she narrated the incident. However, it is not clear from the cross-examination as to what was exactly stated by PW-4. In view thereof, it can be said that testimony of PW-4 is not shaken during the cross-examination. Thus, the testimony of PW-2 is corroborated to PW-1 and PW-4. 11] So far as medical evidence is concerned, the Medical Officer Smt. Jaya Bhongale (PW-5) examined the victim on 20.9.2014. She found that her hymen was torn, circumferential, slightly oedematous margine oedema. She issued the medical certificate (Exh.23). PW-5 categorically stated that as per her medical examination, it could be considered that sexual intercourse had occurred. She opined that victim has been raped. It was suggested in the cross-examination of the Medical Officer that she has not clarified that the injury was old or fresh. She further stated that it is possible 9 J-cra 158-17 .odt that if a small finger of any person inserted in vagina of a 5 years old, it may also result in tear of hymen.

12] The testimony of PW-5 indicates that the hymen of the victim was found torn, circumferential slightly oedematous margine oedema, indicates that the victim was sexually assaulted although from the testimony PW-5 it is clear that there was circumferential slightly oedematous margine oedema on the hymen which indicates that the injury was fresh and certainly not old. Thus, the prosecution has proved its case beyond reasonable doubt. There is no reason for the complainant to make false accusation against the accused by putting the reputation of her daughter and family at stake. 13] In this regard, Section 29 of POCSO Act reads as under :-

"29..... Presumption as to certain offences.-- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

This clause provides for presumption as to certain offences. It provides that where a person is prosecuted for violating any of the provisions under clauses 3, 5, 7 and 9 of the proposed legislation, and where the victim is a child below the age of sixteen years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

14] In case of State of H.P. v. Sanjay Kumar alias Sunny reported in 2017(3) Mh.L.J. (Cri.)(S.C.) 68, the Hon'ble apex Court 10 J-cra 158-17 .odt has held in paragraph 31 as under :-

"31. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the Courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted

upon without corroboration. She stands at a higher pedestal than an injured witness does. If the Court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance."

15] In the instant case, during the cross-examination the testimony of the victim is not shattered on the material aspects. The victim disclosed the incident to her mother and her mother has accordingly lodged complaint in the police station. Under no circumstances a mother would like to put the reputation of the family at stake. The medical evidence supports the case of prosecution. 16] In (1996) 2 SCC 384 in case of State of Punjab v.

11 J-cra 158-17 .odt Gurmit Singh and others, in paragraph 8 the Hon'ble apex Court has held as under :-

"8. ....The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged."

17] In case of Aman Kumar and another v. State of Haryana, reported in (2004) 4 SCC 379, the Hon'ble apex Court has held as under :-

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional."

18] In view of the facts and circumstances, it is held that the prosecution has proved its case beyond reasonable doubt. There is no infirmity in the judgment and order delivered by the learned trial Judge. The learned trial Judge had an opportunity to examine the demeanour of the victim as well as her mother and on analysing of the prosecution evidence, the learned trial Judge has rightly convicted the accused. There is no illegality or perversity in the judgment passed by the learned trial Judge. Hence, the order.

ORDER

i] Criminal Appeal No.158 of 2017 is dismissed.

ii] The judgment and order passed by the learned Special

Judge and Ad-hoc Additional Sessions Judge, No.2, Chandrapur in Special POCSO Case No. 71/2014 on 11.4.2016 is confirmed and maintained.

iii] Accused shall surrender to his bail bond. iv] The fees, payable to learned counsel Shri V. P. Mohod appointed by the High Legal Services Sub Committee, Nagpur for the appellant, is quantified at Rs.5,000/- (rupees five thousand only).

JUDGE ingole