Sambhaji Uttam Suryavanshi vs The State Of Maharashtra And Anr on 14 December, 2024

Author: Bharati Dangre

Bench: Bharati Dangre

2024:BHC-AS:50223-DB

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.836 OF 2021
ALONGWITH
INTERIM APPLICATION NO.2439 OF 2021
IN
CRIMINAL APPEAL NO.836 OF 2021

Sambhaji Uttam Suryavanshi] ..
vs.
State of Maharashtra & Anr.] ..

Ms.Anjali Patil, for the Appellant.
Dr.Ashvini Takalkar, APP for the State.
Mr.Satyajeet Rajeshirke a/w Shubham Vasekar for Responden

CORAM : BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ

RESERVED ON : 21st OCTOB
PRONOUNCED ON: 14th DECEM

JUDGMENT (PER BHARATI DANGRE, J) :

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1. Despite a special enactment in form of Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") being enacted more than a decade ago, yet one another child barely 3 years, had fallen to prey to a loathsome, disdained and an abhorrent act and this time at the hands of her own

biological father.

The little girl, for years after the incident, would wonder if it was her fault that she was born or that she was begotten by such a man, RAJSHREE by RAJSHREE KISHOR KISHOR MORE MORE Date: 2024.12.20 16:21:10 +0530 J-Apeal-836-2021.doc who ravished her, though he was expected to protect her and nurture her, so that she blossom into a woman.

He ravished her when she did not even know what he was doing; He exploited her, taking advantage of her helplessness, ripping her essence to shreds.

We have before us an Appellant, the accused father who is brought to justice and punished by the trial Court by recording a finding of his guilt and by imposing a befitting punishment upon him.

2. The Appellant, the father of a girl child aged two and half years, was charged by the Special Judge (POCSO) and Additional Sessions Judge, Pune in Special (POCSO) Case No.107/2018, for repeatedly committing rape on his own daughter and therefore, liable to be punished under Section 376(2)(f)(i)(n) of the Indian Penal Code, 1860 as well as under Section 5(l)(m)(n) as well as Section 6 of the POCSO Act. He also faced charge under Section 323 and 506 of the IPC.

Since he pleaded not guilty, he was tried for the aforesaid charges.

3. In support of the case of the prosecution, 5 witnesses were examined, which included the mother of the victim i.e. the wife of the accused Renuka, the informant, one Panch witness Sunil Chavan, Two Medical Officers, PW 3 Dr.Raghav Arora and PW 4 Dr.Yuga Mohan who had examined the victim girl and expressed their opinion upon the alleged sexual assault when she was taken for medical examination in Sasoon Hospital. The Investigating Officer PSI Madhumati Shinde who carried out investigation including recording statement of the informant is examined as PW 5.

J-Apeal-836-2021.doc Upon the prosecution witnesses deposing before the trial Judge, in support of the accusations levelled against the accused, a conclusion was drawn that the evidence of the prosecution witnesses is cogent, reliable and acceptable and the accused has failed to prove that he was falsely implicated by reason of trifle quarrels or for any other reason. Recording that there was no reason why the first informant, his own wife, would implicate him falsely, and finding her testimony to be believable and supported by medical evidence, an inference was drawn about his guilty intention and culpable state of mind.

Recording that the evidence of prosecution is consistent and witnesses have corroborated each other, leaving no scope for any doubt, an inference was drawn that the prosecution has established its case of forcible sexual assault on the victim who was two years old, by her own father and this act was repeated.

The accused was, therefore, convicted under Section 6 of the POCSO Act read with 376(2)(f)(i)(n) of the IPC and Section 506 of the IPC.

On hearing the accused on sentence, and on considering that the perpetrator of the wrong to the minor girl was no one else than her own father, who indulged in an inhuman and despicable act and the victim of tender age had to suffer trauma, which will remain with her for the whole of her life, the Judge expressed that it is not proper to show any leniency, as such type of offences are increasing day by day and children of tender age are not safe even in their homes, expected to be the safest place on the earth, the conviction under Section 5(l)(m)(n) of the IPC punishable under Section 6 of the POCSO Act resulted into imposing sentence of imprisonment for life upon the accused alongwith a fine of Rs.8,000/-, in default to suffer Simple Imprisonment for 6 J-Apeal-836-2021.doc months. Separate sentences have been awarded on being convicted under Section 506 of the IPC, the sentences having been directed to run concurrently.

He was allowed set off against the period undergone, since he remained in custody since 06/12/2017 i.e. from the date of his arrest.

4. Being aggrieved by the finding of conviction as well as sentence imposed, the present Appeal is filed, seeking its reversal on the ground that the impugned Judgment has failed to appreciate the evidence on record and the conclusion derived, is contrary to the principles laid down not only by the statutory provisions, but against the principles of law laid down by the Apex Court. It is urged that there is no evidence on record to substantially prove the case of the prosecution. It is also pleaded in the Appeal Memo that there are matrimonial disputes and differences of opinion and quarrel between the husband and wife and, therefore, by a revengeful attitude she had lodged a false complaint.

It is also one of the ground raised, that though it is imperative that the victim girl child under POCSO, must be examined by a woman doctor, the medical examination of victim was conducted by PW 3. Further, the improvements and omissions which are brought on record from the cross-examination of the First Informant, PW 1, is also projected as a ground for questioning her credibility. In addition, it is also a ground that the medical report of the victim is not sufficient to sustain the conviction.

5. We have heard learned Advocate Ms.Anjali Patil in support of the Appellant and Advocate Satyajeet Rajshirke for Respondent No.2 as well as Dr. Ashvini Takalkar, the learned APP for the State.

J-Apeal-836-2021.doc Ms.Anjali Patil has raised doubt about the medical opinion given by Dr. Raghav and according to her, he has found petechial hemorrhages and has recorded that the perihymenal area indicated inflammation, but the hymen was intact. According to the Doctor, if the victim is between 10 to 12 years, hymen might not be torn, but in cross-examination he has admitted that redness of the injury will remain upto 14 days.

According to Ms.Patil, the opinion of vaginal inflammation given by the medical Officer based on only petechial hemorrhage is unscientific. It is submitted by her that the opinion of the Medical Officer as regards finding suggestive of vaginal penetration, should have caused rupture of hymen, injuries over over labia, majora and minora and there should have been some signs of struggle and

injuries on part of the victim, but in absence of any positive finding to that effect, vaginal penetration is not proved.

She has placed reliance upon the necessary excerpt from the Text Book approved by MUHS, written by Shri K. Narayan Reddy, 34th Edition where it is categorically stated that, "Rupture of Hymen occurs with the first intercourse which is the main evidence of rape".

In addition, reliance is placed upon the international research by an Author and some material to that effect is placed on record, depicting the medical etiology of petechial hemorrhages which is not result of any injury.

Apart from this, Ms. Patil has also reiterated that the prosecution case suffers from great lacuna which the learned Judge has failed to take note of, and therefore, the finding of conviction as well as the sentences imposed, deserve a reversal.

J-Apeal-836-2021.doc The learned counsel representing Respondent No.2 as well as the learned APP have supported the impugned Judgment by submitting that the accused was found guilty of a heinous act of forcing himself on his own daughter, aged two and half years and since the medical evidence has established that sexual assaults have occurred and medical experts have deposed in no uncertain terms, from the symptoms which they have noticed on examining the victim girl, according to them, the trial Judge has rightly appreciated the evidence on record and rendered the finding of conviction to be followed by appropriate sentence.

6. PW 1, the mother of the victim gave her date of birth as 16/06/2015 and deposed that in November, 2017, the victim was two and half year old. She described the accused as her husband working as a driver and alleged that he used to harass her alongwith her daughter regularly.

While deposing about the incident, she had narrated that she made the victim ready for the school, but she did not go to the school. In the afternoon her husband returned home and she gave him food to eat, which he threw away and assaulted the young girl by a waist belt showing his disapproval that she did not go to the school. When she went to her rescue, he also started beating her and hit her in the stomach, which caused severe pain to her, as she was carrying a pregnancy.

She went to washroom, which was situated near the house and it took 5 to 10 minutes for her to come back. She heard shrieks of her daughter and when she rushed out of the bathroom and entered the house, she narrated as under :-

> J-Apeal-836-2021.doc "I came out from bathroom and went in the house and saw that accused slept on person of victim, victim was having only top on her person and there was no panty on her person. Accused was undressed, his underwear was up to his thighs and he entirely slept on person of victim. I shouted on him. I took aside victim towards me from him. Victim was crying. My husband threatened me not to disclose incident to anyone, otherwise he would kill me and victim. I took victim at washroom, I saw that there was swelling at her private part (vagina). There was

> redness. I did not take victim in hospital. After eight days, accused started doing similar act with victim and forced on her, he beat me and victim. Next day I went to police station and lodged report."

7. The victim was, thereafter, taken to Sasoon Hospital for medical examination where the mother gave the history of the assault on her daughter and her consent was obtained prior to her examination.

Even statement of PW 1 was recorded under Section 164 of the Cr.P.C. where she narrated the incident dated 30/11/2017 to the Magistrate, describing the events, matching her deposition before the Court.

8. The evidence of PW 1 will have to be read alongwith the evidence of medical experts i.e. PW 3 and PW 4.

On being taken to Sasoon Hospital, Pune, the victim was attended by Chief Resident Surgeon, Dr. Raghav Arora. After recording the history of the incident given by the mother of the victim, he clinically examined the victim in presence of Respondent No.4 Dr.Yuga Jamdade.

PW 3 in his examination in chief deposed as under :

> "2. After taking history, I clinically examined victim. On local examination of external genital area, I noticed that there was petechial hemorrhages present at perihymenal area, suggestive of inflammatory changes. Hymen was intact. From history and clinical examination findings are consistent with vaginal penetration with no evidence of any other physical injury and no hymenal injury. Accordingly, I issued medical certificate which is in my handwriting. It bears my signature, contents re correct. It is at Ex.32 (colly). Victim was 2 years old, so her hymen was intact. In case of sexual intercourse of the victim aged 10 to 12 years, hymen might not be torn, as characteristic of hymen is elastic. Labia minora was normal."

J-Apeal-836-2021.doc He also issued certificate of examination of the victim in the prescribed format where he filled up the necessary columns and recorded that the victim is examined after about 6 days of the incident and in the column of opinion, he scribed as under :

> "History and clinical examination findings are consistent with vaginal penetration with no evidence of any other physical injury and no hymenal injury."

9. The evidence of PW 3 is corroborated by PW 4 who confirmed that the consent, history of the patient was taken in her presence alongwith the samples and after medical examination the certificate was issued.

PW 4 is not the author of the document and, therefore the Medical Certificate Exh.32 do not bear her signature.

10. On reading of the evidence of the mother alongwith the evidence of PW 3, the medical expert who had categorically deposed about her medical condition and inferred from the history and clinical examination that there was vaginal penetration, with no hymenal injury. He categorically stated before the Court that since the victim was of tender age, her hymen was intact and in case of sexual intercourse of victim who is in the age group of 10-12 years, hymen may not torn as it is elastic.

PW 3 was extensively cross-examined with the suggestion being given that the lady doctor must have examined the victim and, therefore, it was not proper for PW 3 to carry out the examination.

He denied the suggestions given to him, confirming his finding in the certificate (Exh.32) when he responded by stating as under :

> "It is not possible that private part of the victim will become red in case of insect bite in the age of 2 /2 years. Redness injury will remain in existence upto 14 days."

J-Apeal-836-2021.doc He denied the suggestion that the victim was not examined by him.

In addition, he also offered explanation in the observation in the report (Exh.32) that the hymen was intact by explaining that in case of sexual intercourse of the victim aged 10-12 years, hymen might not be torn, as it is elastic in nature.

Thus, we find that the version of PW 1, the mother corroborated by PW 3 in terms of his report (Exh.32).

11. A serious attempt is made by Ms.Patil, the learned counsel for the Appellant to canvass before us that PW 1 is untrustworthy in the wake of her inconsistent version and particularly against her version contained in the FIR lodged on 06/12/2017 and her statement recorded by the Magistrate under Section 164 of the Cr.P.C.

On careful reading of her deposition as well as the two statements, unfortunately, we are unable to accept the said submission.

In examination-in-chief, PW 1 has deposed that the accused while assaulting her, kicked in her stomach and, therefore, she went to the washroom. In her complaint, though she state that her daughter was thrashed by the accused on the ground as she did not attend the school and when she intercepted, even she was assaulted.

The only improvement in her statement before the Court is, PW 1 deposed that her husband kicked her in the stomach and that she was pregnant.

In her 164 statement, PW 1 is consistent when she state that she was carrying pregnancy of 3 months and the accused hit her in the stomach and she had pain.

PW 5 PSI Shinde, who recorded the statement of the informant has deposed that the statement was recorded as per her say, based on which FIR (Exh.16) was recorded.

J-Apeal-836-2021.doc Unfortunately, no suggestion is given to the Investigating Officer to prove the improvement or inconsistency in the version of PW 1, while she deposed about the incident.

PW 1 is consistent on the material aspect of the incident of which she complained, by stating that when she went to the bathroom, she heard bowling of her child and when she came inside, she saw her without her underwear and with a T-shirt on her person and the accused lying on her with his undergarment pulled down. She assertively deposed before the Court that the accused was undressed, in the following terms :-

> "Accused was undressed, his underwear was upto his thighs and he entirely slept on person of victim.".

12. It is worth to note that according to PW 1, when she immediately checked on the victim, by taking her to the bathroom, she noticed swelling on her private part (vagina) and noticed redness, but she did not take the victim to the hospital immediately. However, once again when the accused attempted the abhorrent act he assaulted her as well as the victim, she approached the Police Station and lodged the report.

The cross-examination of the PW 1 about her previous marriage, with an intention to discredit her, has no relevancy. A suggestion is given to her that she was in the habit of consuming liquor and accused found the bottles of whisky in the house and, therefore, the quarrel ensued, is also not of any consequence.

Despite specific suggestions given to PW 1 to the effect that the accused was not present in the house on the day of incident and had left for Goa and he established telephonic contact with her, she denied it. The case of the accused to that effect cannot be accepted, as J-Apeal-836-2021.doc except giving suggestions in the cross-examination, no positive evidence is tendered by the accused at the time of trial to prove his innocence.

13. The Protection of Children from Sexual Offences Act, 2012, a special enactment to protect children from offence of sexual assault, sexual harassment or pornography, has assigned definite meaning to different terms including penetration, sexual assault, aggravated penetration, penetrative sexual assault as well as sexual assault and aggravated sexual assault.

The accused faced the charge under Section 5(n), which cover relative of the child, through blood or adoption or marriage, with a parent of the child or who is living in the same or shared household with the child, who commits penetrative sexual assault.

Section 18 of the Act prescribe punishment for attempting to commit an offence, which is punishable with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of

imprisonment provided for that offence or with fine or with both.

14. Section 29 of the POCSO Act, is a special provision, which reads thus :-

> "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."

J-Apeal-836-2021.doc Similarly another presumption of culpable mental state on part of the accused also exist in Section 30, which prescribe that in any prosecution for an offence under the Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state, but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution."Culpable mental state"

> as per the explanation appended includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

15. With the aforesaid provisions contained in the POCSO Act, when the accused face a charge under Section 5(l)(m)(n) read with Section 6 of the POCSO Act, with the evidence brought on record by the prosecution through PW 1, who has remained consistent about her imputations against the accused for committing sexual assault upon her daughter, as well as the evidence of the two medical experts, the Special Judge has recorded a conclusion that the accused has committed penetrative sexual assault on his two and half year old daughter, who was incapable of even understanding the nature of the act.

The Special Court also recorded as under while accepting the case of the prosecution in its entirety :-

> "35. Accused failed to adduce evidence to prove that on the day of incident at relevant time he was not in house and went to Goa, thereafter to Dive Agar. Per contra, evidence of first informant is sufficient and acceptable to prove that on the day of incident she, accused and victim were in house, when she went to washroom she heard sound of crying of victim and she saw actual incident. There is clear opinion in the medical certificate about vaginal penetration and observation about petechial hemorrhage to perihymenal area of victim. Accused failed to give explanation for the same. Moreover, it is not believable and acceptable that first informant made serious allegations against accused only to falsely implicate him to grab money. Therefore, foundational facts are proved by prosecution and J-Apeal-836-2021.doc accused failed to rebut presumptions under section 29 and 30 of POCSO Act."

16. The conclusion drawn by the Special Judge is specifically highlighted in Para 36 of the impugned Judgment, which reads thus :-

> "36. In the light of above discussions, it is clear that evidence of prosecution witnesses is cogent, reliable and acceptable. Accused failed to prove that he was falsely implicated by reason of triffle quarrels or previous litigations or any other reason. As discussed above, there is no reason for first informant to falsely implicate accused on above grounds. Conduct of first informant is natural/relevant. There are no inimical terms between first informant and accused. Her evidence is inspiring confidence about the incident. Her testimony is believable and same is supported by medial evidence. Incident took place within four walls. Considering this, non examination of other witnesses is not fatal. First information report is immediately filed by first informant. There is no delay in preparation of panchanama. Guilty intention and culpable state of mind of accused can be gathered from the acts itself. Therefore, there are no doubtful circumstances in the evidence of prosecution witnesses. Their evidence is consistent and corroborative with each other."

17. On reading of the impugned Judgment, we do not find any legal infirmity in the finding recorded by the learned Judge.

Examination of the accused under Section 313 of the Cr.P.C. is also perused by us, where the accused had responded in the negative, when each and every incriminating circumstance brought on record before the Court was put to him. When specifically asked, whether he wanted to state anything more, he had answered as below :-

> "False case is filed. First informant demanded Rs.15 lakh to me and divorce from me. She threatened me of filing the case and accordingly filed false case and she cheated me."

With the presumption existing in the POCSO Act, since the prosecution had conclusively proved the charge against the accused, a finding of his guilt is recorded.

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18. As far as sentence is concerned, the learned Judge had heard the accused on the point of sentence and he had pleaded that he is innocent and the only earning member of the family, he is in custody since the date of his arrest and he prayed for showing leniency by imposing minimum sentence.

Per contra, the prosecution urged that the offence was committed by him despite he being father of a young girl and before she could blossom and flourish as a woman, he forced himself upon her and indulged into a sexual assault, causing a life long trauma to her. Balancing the interest of the victim as against that of the accused, the Special Judge found that the aggravating circumstances recorded warrant severe punishment and since no material was brought on record to impose minimum sentence, the Special Judge deemed it appropriate to impose the maximum punishment due to the gravity of the offence and its impact, not only upon the victim, her family members, but society at large and thus deemed it appropriate to sentence him to suffer imprisonment for life and to pay fine

of Rs.8,000/-

19. Since we do not find any fault with the sentence awarded, upon a finding of conviction being rendered in the impugned Judgment, by upholding the same, the Appeal is liable to be dismissed and despite vehement arguments advanced by Ms. Patil, we are not convinced to absolve the Appellant of the charges levelled against him or to show any leniency as regards the sentence imposed on him.

In the wake of above, Appeal is dismissed, alongwith pending Applications.

(MANJUSHA DESHPANDE, J.) (BHARATI DANGRE, J.)