IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 1897 of 2018

With
CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO. 1 of 2023
In R/CRIMINAL APPEAL NO. 1897 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE S.V. PINTO

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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MERAJUDDIN @ MULLAJI KAMRUDDIN MOHD. CHHEDI SHAIKH
Versus
STATE OF GUJARAT

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Appearance:
MR. JARJEESKHAN(7235) for the Appellant(s) No. 1
MS JIRGA JHAVERI, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE S.V. PINTO**

Date : 30/04/2024

ORAL JUDGMENT

1. The appellant has preferred the present appeal

under section 374(2) of the Code of Criminal Procedure, 1973 against the judgment and order of conviction dated 19.7.2018 rendered by learned Additional Sessions Judge, (Special), Ahmedabad (Rural), Mirzapur, Ahmedabad in Special POCSO Case No.80 of 2016 whereby the learned trial Court sentenced the appellant accused to undergo imprisonment for ten years and to pay fine of Rs.25,000/-, in default, to undergo further simple imprisonment for three months for the offence under section 376(2)(i) of the Indian Penal Code and also convicted and sentenced the appellant accused to undergo imprisonment for ten years and to pay fine of Rs.25,000/-, in default, to undergo further simple imprisonment for three months for the offence under section 4 of the Protection of Children from Sexual Offences Act, 2012. The appellant is hereinafter referred to as the accused as he stood in the original case for the sake of convenience, clarity and brevity.

2. The short facts giving rise to the present appeal are that the complainant has alleged that the victim

(daughter of the complainant) was aged around 6 years at the time of the incident. It is alleged that on 11.8.2016 i.e. the day of incident, her husband went for work and her mother-in-law went to attend a social function and at around 11:00 am, her daughter took Rs.2/- to purchase chocolate and thereafter returned back after half an hour wherein she looked scared and it appeared that she had fever and slept. It is alleged that her daughter woke up and started crying and complaining about pain in her stomach and upon inquiry, she was informed that the accused committed a wrongful act with her and the First Information Report came to be lodged on 14.8.2016 at 22.15 hours under section 376 of IPC and sections 4 and 6 of the POCSO Act.

2.1 In pursuance of the complaint, the accused was arrested on 15.8.2016 and the Investigating Officer carried out the investigation and collected the necessary evidence and filed the chargesheet against the accused. That the accused was produced before the learned trial Court and

after the copies of the chargesheet were given to the accused free of cost under section 207 of the CrPC, the charge was framed against the accused at Exh.5 and the statement of the accused was recorded at Exh.6 wherein the accused pleaded not guilty to the charge and claimed to be tried.

2.2 In order to bring home the guilt, the prosecution has examined twelve witnesses and produced nine documentary evidences on record.

2.3 At the end of the trial, after recording the statement of the accused under section 313 of the CrPC and hearing the arguments on behalf of the prosecution and the defence, the learned trial Court delivered the judgment and order of conviction, as stated above.

3. Being aggrieved by the same, the appellant has preferred the aforesaid Criminal Appeal before this Court.

3.1 By way of preferring the present appeal, the appellant has mainly contended that the learned trial Court

has failed to appreciate the evidence on record and has wrongly recorded the order of conviction. It is further contended that the learned trial Judge has not appreciated the evidence on record in its proper perspective and in fact, there was no appreciation of evidence so far as the defence of the appellant is concerned and hence, the impugned judgment and order of conviction is required to be reversed, as such.

4. This Court has heard Mr.Jarjeeskhan, learned advocate for the appellant and Mr.Bhargav Pandya, learned APP for the respondent State.

5. Mr.Jarjeeskhan, learned advocate for the appellant has mainly argued that in the instant case, the prosecution has miserably failed to prove the charge against the accused beyond reasonable doubt and the case of present accused requires consideration. That the learned trial Judge has erred in appreciating the fact that most of the panchas have not supported the case of prosecution and

they have been declared hostile and the learned trial Judge has erred in appreciating the deposition of the complainant i.e Sajiabanu Mehboobbhai Sipai who came to examined vide Exh. 9 wherein, the deposition of the said witness doesn't appear to be trustworthy and reliable in view of the fact that the said witness admits that the alleged incident in question took place on 11.08.2016 and the First Information Report was registered after three days of the alleged incident on 14.08.2016 which shows that the same is registered belatedly after applying legal mind with an oblique and malice motive to harass and pressurize the present accused. The attention of this Court is also drawn to the fact that the said witness mentions the time of incident between 8:00 and 8:30 in her deposition though she has stated the time of 11:00 am in the First Information Report.

5.1 Mr.Jarjeeskhan has submitted that the learned trial Judge has erred in appreciating the deposition of the victim who came to be examined vide Exh.18 wherein the

deposition of the said witnesses is highly doubtful and there has been great amount of contradictions and improvement in the said deposition. Mr.Jarjeeskhan has further submitted that the learned trial Judge has also erred in appreciating the deposition of Dr.Janki Bharatbhai Patel who came to be examined vide Exh.19 wherein the said witness has stated in the chief examination that upon asking the victim about the history, she stated that sexual assault has been committed upon her but no injury was found on the body or private part of the victim. It is submitted that the said witness admits in her cross examination that the history was given to her by the victim, her mother and her grandmother. Mr.Jarjeeskhan has further submitted that the learned trial Judge has erred in appreciating the deposition of Mehboobbhai Yusufbhai Sipai (Father of the Victim) who came to be examined vide Exh.26 wherein the said witness has stated that he got knowledge of commission of alleged offence on the very same day from her wife i.e. 11.08.2018 and the said witness has been declared hostile by the prosecution.

5.2 Mr.Jarjeeskhan has further submitted that the learned trial Judge has erred in appreciating fact that Farukbhai Karimbhai Memon who happens to be the shop owner came to be examined vide Exh.27 wherein he has been declared hostile and he has not supported the case of prosecution. Mr.Jarjeeskhan has further submitted that the learned trial Court has erred in appreciating the deposition of the Police Inspector Girirajsinh Chauhan who came to be examined vide Exh.45 wherein it appears that the Investigation Officer has not carried out the investigation in fair and impartial manner. The attention of this Court is drawn by the learned advocate for the appellant accused to the fact that as per the jail remarks, the appellant accused has already undergone the sentence of seven years, one month and 21 days as on 22.1.2024. Lastly, Mr.Jarjeeskhan has has requested this Court to allow the present appeal.

6. On the other-hand, Mr.Bhargav Pandya, learned APP has supported the judgment rendered by learned trial

Court. Mr.Pandya has argued that the learned trial Court has rightly believed the evidences recorded in the case. Mr.Pandya has further argued that the learned trial Court has recorded ample reasons based on the evidence on record for convicting the appellant and, therefore, this Court should not disturb the findings recorded by the learned trial Court, as such.

7. This Court has minutely gone through the impugned judgment rendered by learned trial Court as well as the evidence on record in the nature of paper book. As per the prosecution version, the victim (daughter of the complainant) was aged around 6 years at the time of incident. It is the case of the prosecution that on the day of alleged incident, the husband of the complainant went for work on 11.8.2016 and her mother-in-law went to attend the social function wherein at around 11:00 am, her daughter took Rs.2/- to purchase chocolate and thereafter returned back after half an hour wherein she looked scared and she had high fever and therefore she slept. That

thereafter, her daughter woke up and started crying complaining about pain in stomach wherein upon inquiry, she was informed that the present accused had committed a wrongful act with her and thereby the accused committed the offence, as alleged.

8. The prosecution has examined PW 1 – Sajiyabanu Mahebubbhai Sipai at Exh.9 and the witness is the mother of the victim and the complainant. The witness has stated that on 11.8.2016 the victim had gone to by some eatable at the shop nearby and the accused called the victim and took her to his house and made her lie down and removed her leggings till her ankle. That the accused thereafter lifted his lungi and slept on the victim and moved about and ejaculated. The accused thereafter took the victim to the bathroom and washed her with water. That he thereafter made her wear her clothes and threatened her. That the victim came home and started crying and her body was very hot and she told the mother about the incident. That she went to Aslali Police Station on 14th and filed the complaint

which is produced at Exh.10. The witness has also produced the birth certificate of the victim at Exh.11. During the cross examination by the learned advocate for the accused, the witness has stated that the shop where the victim had gone was at a distance of about 6 to 7 houses away from her house and the victim had gone at around at 8.00 am and returned after half an hour. That when the victim had returned, she was afraid and the victim had told her about the incident on 14.8.2016 and the accused had called the victim and hence, she had gone to the accused.

8.1 The prosecution has examined PW 2 – the minor victim at Exh.18. The victim has narrated the entire incident that had taken place. The victim has also stated that when the accused called her, he took her to the room on the first floor and thereafter the victim has described the entire incident that had taken place. During the cross examination, the victim has also admitted that the wife and the son of the accused were not at home.

8.2 The prosecution has examined PW 3 – Dr.Janki Bharatbhai Patel at Exh.19. The witness is the Medical Officer who has examined the witness on 14.8.2016 at about 16.00 hours. The witness has produced the medical certificate of the victim at Exh.20. During the cross examination, the witness has stated that the information about the incident was given to the witness by the victim, her mother and her grandmother.

8.3 The prosecution has examined PW 4 – Dr.Manish Jayantilal Gandhi at Exh.22. The witness is the Medical Officer who has examined the accused on 16.8.2016 at around 3.38 pm. The witness has stated that the accused was sent along yadi produced at Exh.23 and the accused had himself in the history stated that he was residing at Fatehwadi, Juhapura for last 10 years and the victim who was around 6 years old was residing near his house. That on 11.8.2016 at around 11.00 am, he called the victim and took her to the first floor and removed her lower clothes and lifted his lungi and slept over the victim. That

he did not penetrate the private part of the victim and then she went away and told her mother. That he ran away on 12.8.2016 and on 15.8.2016 himself surrendered before the Police Station at 4.00 pm. That he was not educated and was married and the police had seized his clothes. The witness has produced the medical certificate of the accused at Exh.24 and the yadi of the sample taken at Exh.25. During the cross examination, the witness has deposed that the accused had himself given the details in the history and if no such incident had occurred, the accused had no reason to give the history as stated before the witness.

8.4 The prosecution has examined PW 5 – Mahebubbhai Yusufbhai Sipai at Exh.26. The witness is the father of the victim who has stated that on 11.8.2016 when he had gone for labour work and his wife, victim and his mother-in-law were at home and when he returned in the evening, his wife – Sajiya had told him about the incident. That his wife had filed the complaint at the Police Station and they had taken the victim to the VS Hospital.

During the cross examination, the witness has admitted that when he came back home in the evening, the victim had fever and she was sleeping. The witness has also admitted that the accused is married and has son who is driving rickshaw.

8.5 The prosecution has examined PW 6 – Farukbhai @ Bhurabhai Karimbhai Memon at Exh.27. The witness is the owner of the shop where the victim had gone to buy chocolate. The witness has stated that the minor daughter of Sajiyabanu Sipai had come to buy some food item but he does not know as to whether the incident had taken place or not. The witness has been declared hostile as he has not supported the case of the prosecution.

8.6 The prosecution has examined PW 7 – Raees Abdul Hakim Shaikh at Exh.28 and PW 10 – Salim Bagdadbhai Shaikh at Exh.37. Both these witnesses are the panch witnesses of the panchnama by which the clothes of the victim have been seized by the Investigating Officer

and the panchnama is produced at Exh.29. Both the witnesses have not supported the case of the prosecution and they have been declared hostile.

8.7 The prosecution has examined PW 8 – Hasanbhai Iqbalbhai Shaikh at Exh.32 and PW 9 – Iqbalkhan Nizamkhan Malek at Exh.37. Both these witnesses are the panch witnesses of the panchnama of place of offence which is produced at Exh.33. Both the witnesses have not supported the case of the prosecution and they have been declared hostile.

8.8 The prosecution has examined PW 11 – Maheshkumar Babulal Parmar at Exh.41, PSO of Aslali Police Station who has registered the complaint of the complainant at I – CR No.114/2016 and had entered the same in the station diary of the police station. The witness has produced the station diary at Exh.42.

8.9 The prosecution has examined the Investigating

Officer Mr.Girirajsinh Pratapsinh Chauhan at Exh.45. The witness is the Investigating Officer who has fully supported the case of the prosecution and has narrated all the procedure undertaken by him during investigation. During the cross examination by the learned advocate for the accused, the witness has stated that the offence had taken place on 11.8.2016 and the complaint was filed on 14.8.2016. That at the time of incident, the victim had gone to the shop of Farukbhai to buy chocolate and the accused is known as “Molaji” in the area. That when the complainant came to file the complaint, the victim was with her but she was afraid.

9. The learned trial Court has appreciated all the evidence and has discussed each and every aspect that has come on record. The learned trial Court has also considered the deposition of the victim which is at Exh.18 and has also appreciated that nothing adverse has come on record during the cross examination to help the case of the accused. The learned trial Court has mainly relied upon the history given

by the accused before the Medical Officer – PW 4 – Dr.Manish Jayantilal Gandhi at Exh.22 and has also considered that during the cross examination of the witness, nothing adverse has come on record.

10. At this juncture, it would be appropriate to refer to the provisions of Section 29 of the POCSO Act which 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."

11. Learned APP has relied upon the decision of the Honourable Supreme Court in the case of State of Himachal Pradesh Vs Manga Singh, reported in (2019) 16 SCC 759

and in paragraphs 11, 12, 13 and 20, the Honourable Supreme Court has observed as under.

> "11. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contradictions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.
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> 12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the

evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.

13. In State of Punjab v. Gurmit Singh and Others, (1996) 2 SCC 384, it was held as under:-

"8. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations

which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains

of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?.....". (Underlining added).

14. xxx xxx xxx

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19. xxx xxx xxx

20. Observing that there are number of unmerited acquittals in rape cases and that the courts have to display a greater sense of responsibility and to be more sensitive while dealing with the charges of sexual assault on woman, in State of Rajasthan v. N.K. The Accused– (2000) 5 SCC 30, this Court has held as under :

"9. ...A Doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal.

An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat:- (1983) 3 SCC 217 this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion. We need only remind ourselves of what this Court has said through one of us (Dr A. S. Anand, J. as his Lordship then was) in State of Punjab v. Gurmeet

Singh:- (1996) 2 SCC 384 : p. 403, para 21)

"[A] rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very should of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. The must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case."

10. The questions arising for consideration before us are: whether the prosecution story, as alleged,

inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been in victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the FIR?"

12. In view of the above settled principles of law and in cases filed under the POCSO Act where the Special Court has to presume that a person has committed the offence and reappreciating the entire evidence produced by the prosecution on record, it is proved that on 11.8.2016, the accused had called the minor victim and had committed the act with her. The deposition of the victim who is minor child of around six years at the time of incident is believable and very natural and she has narrated the entire incident that had taken place with her. As observed by the Honourable

Apex Court in Manga Singh (supra), absence of injuries on the private part of the victim does not conclude that no act had taken place and absence of injuries on the private part of the victim are of no consequences in the facts and circumstances of the present case. The testimony of the victim is extremely vital and there are no compelling reasons or any instances that have come on record that would find that the accused had not committed an act with the victim. The testimony of the victim inspires confidence and is found reliable. The learned trial Court has observed that the accused has himself described the entire act before the Medical Officer Dr.Manish Jayantilal Gandhi and the learned trial Court has believed the medical history stated by the accused before the Medical Officer. There is nothing on record to suggest that the Doctor had himself fabricated the facts and if the medical certificate produced at Exh.24 is perused, the history is written in the words and language of the accused. It had also surfaced that at the time of commission of an act, penis of the accused had touched the private part of the victim as during the commission of the

act, the accused had removed the leggings of the victim till her ankle and had lifted his lungi and slept on the victim and moved on the victim and ejaculated and the learned trial Court has thus concluded that the offence under section 3 of the POCSO Act is made out. The learned trial Court has also considered that the victim being the minor girl of about six years had no reason to falsely implicate the accused and there is nothing on record to suggest that there was any enmity between the complainant and the accused and reason for the complainant to falsely implicate the accused. As far as delay in filing of the FIR is concerned, has not been challenged by the learned advocate for the accused and it appears that after the incident occurred on 11.8.2016 the victim had high fever and the complaint was filed on 14.8.2016, but in the conservative society, it is natural for the parents to not rush immediately to the police station to file the complaint. The learned trial Court has also considered the presumption under section 29 of the Act which is not rebutted by the accused either by means of direct or circumstantial evidence and unrebuttal

presumption supports the conviction of the accused and hence, the prosecution has conclusively proved that the accused had committed the offence under section 3 of the POCSO Act. As far as medical evidence is concerned, the Medical Officer has admitted that there were no injury on genital area of the victim to show that there was penetrative sexual assault, but in various decisions, the Honourable Apex Court has taken the view that the complete penetration is not necessary to constitute the offence of rape and even the slightest penetration is sufficient to make out the offence of rape and depth of penetration is immaterial. It has also been observed that vulva penetration has been held to be sufficient for conviction of rape. In the instant case, the learned trial Court has discussed and concluded that as the accused had removed the undergarments of the victim and had also lifted his lungi and had ejaculated on the victim; the penis of the accused had touched vulva of the victim; as this would be sufficient to cause penetration to any extent with emission of semen, it is sufficient to constitute the offence under section 3 of the POCSO Act and

presumption of offence available under section 29 of the POCSO Act leaves no doubt that the accused had in fact committed the offence of penetrative sexual assault under section 3 of the POCSO Act.

13. In view of the aforesaid nature of evidence, it is clear that there is clinching, cogent and reliable evidence beyond reasonable doubts to confirm the conviction and the learned trial Court has rightly convicted the accused for the offence in question. Therefore, this Court is in complete agreement with the findings recorded and ultimate conclusion arrived at by the learned trial Court.

14. For the reasons recorded above, the appeal fails and the same is hereby dismissed. The judgment and order of conviction dated 19.7.2018 rendered by learned Additional Sessions Judge, (Special), Ahmedabad (Rural), Mirzapur, Ahmedabad in Special POCSO Case No.80 of 2016 is hereby confirmed. R & P be sent back to the trial Court, forthwith.

15. In view of the above, Criminal Misc. Application (for suspension of sentence) No.1 of 2023 in R/Criminal Appeal No.1897 of 2018 does not survive and the same stands disposed of accordingly. Rule is discharged.

(S. V. PINTO,J)

H.M. PATHAN