

Corrected in terms of the order dated 16/10/2023

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.818 OF 2018

Fulsing Mohanlal Khushwah .. Appellant

Versus

The State of Maharashtra & Anr. .. Respondents

...

Mr.Hemant Ingle with Mr.Pratik Ingle and Mr.Prashant Goyal i/b
Mr.Vedang S. Deshpande for the Appellant.

Mr.S.R.Agarkar, A.P.P. for the State/Respondent.

Mr.Tanvir Abdul Hamid Shaikh, for the Respondent No.2.

...

CORAM: BHARATI DANGRE, J.
DATED : 31st AUGUST, 2023

ORAL JUDGMENT :-

1. The case of the prosecution, which has surfaced before me is, on 02/07/2014 at about 00.30 to 00.40 hours in front of Room No.20-21 of at Vasanji Pasu Chawl, Hariyanwala Lane, Kurla (W), the Appellant/Accused committed sexual assault upon the minor victim, aged 9 years, by moving hand on the victim's chest and further inserting hand in his bermuda and by moving the hand over his penis and, thereby, he committed an offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (for short, "**the POCSO Act**").

Upon the charge being explained to him, the Accused pleaded not guilty and preferred to be tried.

This is how, the Accused faced the trial before the POCSO Special Judge in POCSO Special Case No.367 of 2014, under Section 8 of the POCSO Act.

2. In support of the prosecution case, five witnesses are examined; the victim boy being examined as PW 1, his mother/ Informant being examined as PW 2, the panch witness is examined as PW 3 and the Investigating Officers were examined as PW 4 and PW 5.

On coming to the conclusion that the victim boy is capable of understanding the sanctity of oath, he was examined on oath.

In the examination-in-chief, he deposed that in the intervening night of 01/07/2014 and 02/07/2014, at around 12 to 12.30 a.m., his nani (maternal grandmother) asked him to throw the garbage and, therefore, he went towards the stairs and threw the garbage in the dustbin. At that time, Accused came and touched him inappropriately. He went running and told this fact to his mother and nani. He also categorically deposed that, when Fulsing did this, 2-3 persons were coming upstairs.

When specifically asked, how did he know Fulsing, he responded by saying that, he used to reside in their neighbourhood. Another question posed to him was, whether any person was present, when Fulsing did this act, he responded by stating, "I was alone".

He was subjected to extensive cross-examination and in response to the question as to why he was residing at the relevant date in Room No.20-21, he stated that, since the repairing work was going on in Room No.14 on the ground floor, he was residing in Room No.20-21. When asked as to who resides in Room No.15, he gave the name of Deepak Farsan. The victim boy has confidently faced the cross-examination, by giving answers in the assertive, with assertion.

3. The statement of the victim boy, recorded under Section 164 of Cr.P.C., is also on record, where he give the following narration about the said incident:-

“On 02/07/2014 at 12.30 p.m. I went to throw garbage as told by my grandmother. Therefore, I was going by staircase. That time four persons were there. One of them named Phulsing put his hand in my road and stopped me and moved his hand on my chest and put it in my pant and also moved it on my penis. Hence I felt very awkward and dirty. Hence I narrated incident to my grandmother and mother. Dhruv is my younger brother aged 3 years. Phulsing is behaving like this with me and my brother since 3 to 4 months. Phulsing resides near our house.”

4. The mother of the victim, the Informant, corroborate him, when she deposed that on 02/07/2014, at about 12.30 a.m., while she was working, her son came running to her in a frightened condition and told that one man, residing in Room No.15 in their chawl, caught hold of him and touched him inappropriately. As a result, she followed her son to Room No.15 and he pointed out to the person, who committed the act. She interrogated her son, whether such incident had taken place in the past and he disclosed to her that, on prior 2-3 occasions, such act was done by the Accused.

She also deposed that on that date, when she was removing the clothes from the string, she had seen the Accused wandering in the chawl.

On the next day, the report came to be lodged, when her husband returned from Shrirampur and this resulted in registration of the subject C.R.. Her son was taken for medical examination and his statement under Section 164 of Cr.P.C. was recorded.

In the cross-examination, PW 2 state that she had narrated the incident to the police, as narrated to her, by her son. Though she admit that it took 19 hours to lodge the report, she offered an explanation that, she was waiting for her husband to return and on his return, the complaint came to be filed. In the cross-examination, she is confronted with the place, where the incident took place and there are certain contradictions to which I will refer to a little later.

A suggestion was given to her that because of the previous animosity, there is a possibility of wrongful indiction of the Accused.

5. Though she has admitted in the cross-examination that when this incident was narrated by her son to her, her mother was also present, admittedly the prosecution has not examined her mother/nani.

The First Information Report is exhibited through the said witness as Exh.14, where she refer to the incident narrated by her son, by deposing that while she was working in her house and the children were playing in the gallery, her

son rushed to her and informed that the person residing in Room No.15 had come closer to him and touched him inappropriately. Thereafter, when she approached the said Room accompanied with her son to confront the said person, her son pointed a finger towards the said person and she came to know that his name was Fulsing. She also told that such incident was earlier committed by the Accused with her son, the victim.

After recording of the complaint, her supplementary statement came to be recorded a week after, where she cleared the conundrum about Room No.14 and Room No.20-21, where she was currently habitating.

6. Mr.Manohar Waingankar, the panch to the spot panchnama, is examined as PW 3 and he state that the victim boy showed the place to the police and police prepared the panchnama. He specifically deposed that in the panchnama it is mentioned that the chawl was baithi chawl (ground floor chawl), but it is an incorrect statement. He also admit in the cross-examination that it is incorrect that the spot of incident is the gallery in front of Room No.20-21.

The spot panchnama (Exh.17) record that the husband of the informant and the son had shown the spot, which is a gallery in front of Room No.20-21 and it was located on the first floor and the victim specifically pointed out to the gallery and described it as the spot, where he was sexually abused by the Accused.

7. The two Investigating Officers stepped into the witness box as PW 4 and PW 5.

PW 4 is the PSI, who at the relevant time, was attached to Kurla Police Station. He registered the crime, visited the spot and conducted the spot panchnama in presence of the panchas. He was specifically confronted with Exh.17 and he admitted his signature on the spot panchnama. In the cross-examination, the witness admitted that it is ground floor plus one floor chawl and at one point of time, states that the spot of incident was in front of Room No.14, but in the second breath, he state as under :-

“It would not be correct to say that, incidence took place in the gallery. Witness volunteers that the informant for some days was residing at her parents house in Room No.20 and 21. I again say that incidence took place in the gallery in front of Room no.20 and 21. I do not remember whether incidence took place in the staircase.”

As far as the registration of NC is concerned, as the case of the prosecution is that an attempt was made to threaten the witnesses, he specifically say that he is not aware that an NC complaint was registered on 21/07/2017 with Kurla Police Station.

8. PW 5 is the Investigating Officer, who recorded the statement of the victim boy and who arrested the Accused. He also recorded the supplementary statement of the mother (PW 2), where she had narrated that the incident took place in front of Room No.21 and 22, instead of Room No.14.

In the cross-examination, he admit that he has not recorded the statements of three boys, who were referred to in the statement of the victim boy and though there were attempts to search them, they were not found. He also admit that he had not recorded the statement of any independent witness from the chawl and deny the suggestion that the Accused surrendered himself before the police and then he was arrested.

9. On completion of the examination of the prosecution witnesses, the Accused was examined under Section 313 of Cr.P.C., where he was confronted with the incriminating material, brought on record through the prosecution witnesses and he deny the questions put to him. As far as Question No.25 is concerned, he state that he himself surrendered before the police and then he was arrested. As regards the documents in form of birth certificate, FIR/report, NC, spot panchnama and Arrest Form, he adopted a stand that they are false documents. When asked, as to why the prosecution witnesses are deposing against him, his answer is to the following effect :-

“I do not know. We go to work from 6.00 a.m. to 12.00 o’clock in night.”

Though he expressed his desire to examine himself as a witness in his defence, he filed evidence closure pursis.

10. The above evidence, which was placed before the learned Special Judge, was appreciated and a conclusion is derived,

that there is no reason to disbelieve the testimony of the victim about the offensive act of the Accused and in fact, when the mother went in his search at the say of her son, he was specifically identified and this occurred within a very short span of time.

The learned Judge relied upon the corroboration by the mother (PW 2) as well as the statement of the victim recorded under Section 164 and arrived at a conclusion that the prosecution has discharged the burden by proving the basic facts bringing the guilt of the Accused under Section 8 of the POCSO Act, with a presumption operating under Section 29 of POCSO Act, and, since, no cogent evidence was lead to prove to the contrary, the case of the prosecution against the Accused is proved beyond reasonable doubt.

However, considering the fact that the Accused is a young boy and by assessing the impact of the sentence, which was to be imposed, the learned Judge deemed it appropriate to sentence him to suffer rigorous imprisonment (RI) for three years and to pay fine of Rs.1,000/-, in default to suffer simple imprisonment for 30 days. The compensation of Rs.10,000/- was also directed to be paid to the child.

It is informed that the compensation and the fine amount has already been paid.

11. Heard the learned counsel Mr.Ingale for the Appellant, the learned A.P.P. for the State and the learned counsel Mr.Tanvir Shaikh for Respondent No.2.

In order to bring home the guilt of the Accused, it is the duty of the prosecution to prove it's case beyond reasonable doubt, through cogent and reliable evidence, which shall establish the guilt of the Accused. The evidence placed before the Court must inspire confidence and the witnesses, who deposed before the Court, must lend credence to its reliability and in case of any loophole or lacuna in the case of the prosecution, the benefit of the same should go to the Accused.

This being the settled principle of criminal jurisprudence, when the evidence on record is scanned, I do not find that the learned Special Judge was right in recording a finding of conviction, based on the evidence, which suffers from several inconsistencies, which definitely are gross, which make the case of the prosecution doubtful and this doubt ought to have yielded in favour of the Accused.

The two key witnesses of the prosecution, being PW 1 and PW 2, contradict each other on the material aspect, making the case of the prosecution irresolute.

It is the mother's version that she has reported the incident as narrated to her, by her son and she had not seen actual incident happened and this narration is the basis of the F.I.R.

In her complaint, she reported that her son was playing outside, in the gallery and he complained about the behaviour of the Accused, who had touched him inappropriately. She, therefore, followed her son to the Room, since the Accused was residing in the chawl and confronted him. She also states that upon taking in confidence, her son told her that on previous 2-3 occasions, he had indulged in such a act.

The victim boy, on being examined by the Court, however, gives a version that he was asked by her grandmother to throw garbage and, therefore, he went to the staircase and at the time, 2-3 persons were coming upstairs, which included the Accused, who fondled him.

The contradiction in the version of PW 1 and PW 2 is glaring, particularly when PW 2 narrated the happenings, as per version of her own son.

In the examination-in-chief, the son was specifically asked whether the incident had happened earlier also, and he has answered by stating that prior to 1-2 months, such incident took place with his younger brother, whereas the mother has reported that when she took the child in confidence, he disclosed that such incident was committed by the Accused with him, at prior point of time.

It is the version of PW 1 that on that particular date, they took dinner late, as his exams were going on and when asked, whether he was studying, when his nani asked him to throw the garbage, he respond in the positive. But, in the cross-examination, the mother deny the said version, by stating that it was incorrect that her son was studying that night.

12. Apart, the major inconsistency in the prosecution case, which has affected it's credibility is the spot of incident. The learned counsel for Respondent No.2 would vehemently submit that it is irrelevant, where the incident had occurred, since there is no witness to the said incident and only PW 1, is

to be believed, but his credibility must be tested on the touchstone of his testimony before the Court, as well as the statement given by him to the Magistrate and, the issue of spot assumes significance.

As per PW 1, after throwing garbage as directed by his grandmother, when he approached the stairs, the accused alongwith 2-3 persons was coming upstairs. However, when asked, when the act was committed, any other person was there, he categorically answer in the negative. Even a suggestion was given to him that while Fulsing was coming with other persons, he obstructed their way and they just pushed him aside, but he denied the said suggestion.

This necessarily lead to an inference that it is the case of the prosecution that the Accused was accompanied with 2-3 persons/3-4 persons, when he crossed path with the victim and this is the specific reason, why PW 5 in his cross-examination states that he has not recorded the statement of the three boys, who are referred to in the statement of the victim boy. An explanation was offered that, there was an attempt to search, but they were not to be found.

13. This hiatus in the case of the prosecution, assumes significance, as it is only the version of PW 1 that the incident of sexual assault had taken place. Though the mother is not an eye witness, nor is the grandmother, who was present when the incident was narrated by the victim to his mother, but who is not examined, and in that case, chain of circumstances could have led to a plausible inference about the guilt of the Accused,

but when there is inconsistency in the version of PW 1 himself and when it is juxtaposed with the evidence of PW 2 i.e. the mother, it become doubtful.

In the cross-examination, in paragraphs 5 and 6, PW 2 has deposed as under :-

“5. It would not be correct to say that, the report lodged by me is incorrect. It is not true to say that, as my earlier statement was incorrect so I corrected the spot of incidence as the stairs infront of Room No.20-21 in my suppelementary statement. It would not be correct to say that, incidence took place in the gallery infront of Room No.20-21. It is not true to say that, the fact the accused inserted hand in my son barmuda and moved his hand on his place of urination is incorrect fact. It is not true to say that, my earlier statement before police is incorrect.

6. It is true that, repair work was going on in Room No.14 so I went to reside at my mothers room in Room No.20-21. Witness volunteers, I went to reside for this reason also and also for the reason that my husband was out of station. My brother, my parents and my brothers son were residing in Room No.21-21.”

14. PW 2 deposed that what she had stated before the police is correct. Her statement before the police is specific, that her son was playing in the gallery and he dragged her to Room No.15. In her supplementary statement, recorded after the spot panchnama was conducted, she offered a clarification that in the FIR, she had given the spot of incident to be her own room i.e. Room no.14, as she was resident of the said room and, therefore, inadvertently, she had mentioned the said Room Number, but the place of incident is Room No.20-21, which belong to her parents and located near the staircase.

PW 3 has further caused dent in the case of the prosecution, where he state that the spot panchnama is

carried out at the place, which was shown by the child and the spot is in front of Room No.21-21.

When the spot panchnama is carefully perused, there appears to an overwriting on the wordings of 'Room No.20-21' and a signature of the Investigating Officer is affixed there. Even it is apparent that there is reference of number '4', which is overwritten to be '2' and then this place is referred to as gallery, situated on the first floor. The spot panchnama record that there are 14 rooms located on the first floor and there is a common gallery for the said rooms. The panchnama does not refer to the actual location of the staircase, but has described the spot of incident to be the gallery abutting or in front of Room No.20-21.

This contradict the version of PW 1, who is assertive by stating that the incident occurred on the staircase. Apart from this, the version of PW 4, which has surfaced through the cross-examination about the actual spot of incident, makes the prosecution case doubtful.

15. The aforesaid evidence placed, has thus, failed to conclusively establish that the Accused sexually ravished the victim boy and the benefit must definitely go to the Accused, as the prosecution has failed to conclusively establish the charge under Section 8 of the POCSO Act.

This aspect is completely missed by the learned special Judge and, hence, the judgment passed and sentence must deserve a reversal.

The Appeal is allowed.

It is informed that the Appellant has already undergone imprisonment of 291 days as a under-trial prisoner.

Today, the Appellant is on bail and is present in the Court.

The Appellant stand acquitted of the charge for which he faced trial, by holding him entitled for benefit of doubt. He is set at liberty. The bail bond furnished stand cancelled.

(SMT. BHARATI DANGRE, J.)