

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1064 OF 2019

Kalim Attarli Shaikh

Age : Adult, Convict No.17469.

Residing at : Plot No.40/Q/4, Road No.13,

Bainganwadi, Govandi, Mumbai.

(Presently lodged at Yerwada Central Jail, Pune).

...Appellant

Versus

1) The State of Maharashtra

(at the instance of Shivaji Nagar Police Station
in C.R.No.221 of 2013.

2) X Y Z

Age : 37 years, R/at : Plot No.40/06,

Road No.13, Near Baudhvihar,

Bainganwadi, Gowandi, Mumbai – 43.

... Respondents

Mr. Vaibhav Hari i/b. Mr. Kushal Mor, for the Appellant.

Mr. Tanveer Khan, APP for the Respondent – State.

CORAM: SHYAM C. CHANDAK, J.

RESERVED ON : 7th NOVEMBER, 2025

PRONOUNCED ON : 14th NOVEMBER, 2025

JUDGMENT :-

1. This Appeal seeking an exception to the Judgment and Order dated 15/02/2017, in POCSO Special Case No.1094/2013, passed by the learned Designated Judge under the Protection of Children from Sexual Offences Act (“**(POCSO Act)**”), for Gr. Bombay thereby the Appellant was convicted for commission of the offence punishable under Section 354 of the Indian Penal Code, 1860 and under Section 10 of the POCSO Act. Under Section 354 of I.P.C., the Appellant was sentenced to suffer S.I. for one year and to pay fine of Rs.1000/-. In default, he was further sentenced to suffer S.I. for

one month. Under Section 10 of the POCSO Act, he was sentenced to suffer S.I. for five years and to pay fine of Rs.5,000/-. In default, he was further sentenced to suffer S.I. for one month.

2. Heard Mr Hari, the learned Counsel for the Appellant and Mr Khan, the learned APP for the Respondent-State. Perused the record.

3. The prosecution story is that, the victim girl, aged 5 years (PW1) was daughter of the first informant 'Mrs. R' (PW2). The Appellant and the family of PW2 were residing in neighbour. On 28/07/2013, at about 11.00 a.m., PW2 was present at her work place. At that time, her daughter 'M' came there and told PW2 that the people residing in their *Chawl* had called her and she should come home soon. Therefore, immediately, PW2 came home. A crowd had gathered in front of her room. On enquiry, the members of the crowd told her that, at about 11:00 a.m., PW1 came out of the house of the Appellant by shouting. Therefore, PW2 inquired with PW1 and the later told her that the Appellant outraged her modesty. Then, the people gathered there inquired with the Appellant and tried to catch him, but he fled away. At that time, PW1 was crying. Then, PW2 took PW1 inside her room and inquired with her. PW1 disclosed that, "*I was playing with 'Ms. A' in the lane, at the time, Salman's brother Kalim, residing in neighbour, showed an orange, and said us that, 'will give you an orange to eat', therefore, we both went to his room, but he told 'Ms. A' to go away by giving her an orange and took me in his arms, removed my nicker and kissed me.*" Further, pointing at her genital, PW1 told that, "*and touched the hand here.*" Therefore, PW2 filed the Report (Exh.10) with Shivaji Nagar Police Station, at Govandi, Mumbai therein she narrated as above. PW6 PSI Kamble recorded the Report and registered the FIR bearing C.R.No.221/2013, under Sections 354 of I.P.C. and under Section 8 of POCSO Act.

4. During the investigation, the Police referred the victim for medical, recorded the Spot Panchanama and the statements of the witnesses. Additionally, the police obtained the statements of the witnesses recorded under Section 164 of Cr.P.C. The appellant was arrested. On completion of the investigation, police submitted the charge-sheet for the said offences.

5. However, the trial Court framed the charge under Section 354 of the I.P.C. and under Section 10 of the POCSO Act. The Appellant abjured the guilt and claimed to be tried. His defence was of denial and false implication.

6. The prosecution examined 6 witnesses, *i.e.*, the victim, her mother, sister, the Civil Judge Senior Division who had recorded the statement of the victim under Section 164 of Cr.P.C., Medical Officer and PW6 PSI Vinod Kamble who had recorded the FIR and conducted the investigation.

7. In his statement recorded under Section 313 of Cr.P.C., the Appellant denied the incriminating evidence and stated that, he was not residing in Govandi and that, the witnesses have deposed against him as they wanted to extract money from him.

8. On appraisal of the prosecution evidence, the trial Court held the Appellant guilty of the offence punishable under Section 354 of I.P.C. and under Section 10 of POCSO Act. Hence, convicted and sentenced the Appellant as noted above. Aggrieved, the Appellant is before this Court.

9. Mr Hari, the learned Counsel for the Appellant submitted that there is material inconsistency in the evidence of PW1, PW2 and PW5. The incident was witnessed by PW1's friend 'A', but she was not examined. The evidence indicates that a crowd had gathered in front of the house of the

victim. However, no independent person from the said crowd was examined to corroborate the version of PW1, PW2 and PW5. The medical evidence does not show that PW1 had sustained any injury due to the alleged act by the Appellant. PW1 and PW2 have not identified the Appellant as the person who had sexually assaulted and outraged modesty of PW1. Therefore, the evidence of these three witnesses was not reliable. However, the trial Court and the appellate Court have relied upon their testimonies and accepted the prosecution case, which is erroneous. Therefore, the impugned judgment and Order of conviction and sentence is not correct, and it may be quashed and set-aside.

10. In contrast, Mr Khan, the learned APP submitted that PW1 has categorically stated that the Appellant had called her and her friend 'Ms A', on the pretext of giving an orange. However, the Appellant asked the victim's friend to go away and took her inside the room. Further, the Appellant removed PW1's nicker and sexually assaulted her, who was just aged 5 years. Therefore, PW1 cried and immediately came out of the room. Then, PW1 went home and disclosed the incident to PW5. Both PW2 and PW5 have corroborated the version of the victim. The Report (Exh.10) was lodged very promptly, and it ruled out the possibility of falsely implicating the Appellant in this case. That apart, the witnesses had no reason to depose false against the Appellant. Therefore, the trial Court relied upon the prosecution story and convicted the Appellant. As such, the Appeal is devoid of any merit.

11. To appreciate these submissions, it is necessary to look into the evidence on record. Considering the offences for which the Appellant has been convicted, the testimony of the victim-PW1 is very important.

12. PW1 deposed that, 'M' was her sister. Her mother PW2 was working. Kalim (Appellant) was residing in her neighbour. At the time of the incident, she was playing with 'A' and other girls in the lane. Kalim showed them an orange and called her to eat. She went to Kalim, but he held her hand and took her inside his room. She deposed that then Kalim gave an orange to 'A' and told her to go away. She deposed that Kalim then did a bad act with her. She deposed that he removed her nicker and moved his hand on her place of urination. Therefore, she cried. But he told her to keep quiet. She deposed that she then went home running. Her mother had gone for work and her sisters were at home. She deposed that she told the incident to her sisters 'S' and 'M'. The latter suggested to call their mother. She deposed that sister 'M' called PW2. PW1 deposed that, she told the incident to PW2, therefore, PW2 went to the room of Kalim to search him but the room was locked. PW1 deposed that PW2 took her to the police station. The police had inquired with her. She had disclosed the incident to the police. She was sent to the hospital along with PW2.

In the cross-examination, PW1 deposed that her father had not come to the police station. Her friend 'A' was residing near her house. She has stated that the Appellant was residing to the side of her house. Police had told her as to what she should state.

13. PW2 deposed that at the time of the incident, she was at her workplace. Her daughter 'M' came there, and informed that one *Mosambiwalla* took PW1 in his room on the pretext of giving a sweet lime and thereafter, PW1 started crying and he sent her outside. PW2 deposed that, therefore, she came home alongwith daughter 'M' and inquired with PW1. At that time, PW1 told her that the *Mosambiwalla* took her inside his house, removed her nicker and when she started crying, he sent her out. PW2 deposed that she then went to the house of *Mosambiwalla*, but his

room was locked, and he had run away. PW2 deposed that then she called her husband on the phone. Thereafter, she went to the police station alongwith her husband and PW1. PW2 deposed that she narrated the incident to the police. The police recorded her statement-cum-Report as per her narration. The police referred PW1 for the medical. PW2 has identified her Report (Exh.10). PW2 deposed that, Kalim's father was residing in front of her house. At the time of the incident, Kalim had come to his father's house.

In the cross-examination, PW2 deposed that it is not mentioned in her police statement that her daughter 'M' had informed her about the incident. She was present with PW1 at the time of recording her statement. She has denied that she herself was giving the information to the police instead of PW1. She has admitted that she went to the police station 2 to 3 hours after she came to know about the incident. She has denied that her neighbour told her about the incident and asked her to lodge a false report against the Appellant. She has denied that the Report (Exh.10) is false. She has denied that, she has deposed falsely against the Appellant.

14. PW5, sister of the victim, deposed that on the date of the incident, at about 11.00 a.m., her parents had gone out to work and they four sisters and a brother were at home. PW1 and her friend 'A' were playing in the lane. PW5 deposed that Kalim had called PW1 in his house, therefore, she went there. Then, Kalim removed PW1's nicker, touched her private part and kissed her on mouth. She deposed that then PW1 pulled up her nicker. PW5 deposed that he then gave a sweet lime to PW1 and told her to go home and not to disclose the incident to anybody. She deposed that PW1 came home and told her the entire incident. PW5 deposed that she then went to Kalim's house and questioned him as to why he had committed the said act. But, he denied having committed the said act. She deposed that on

hearing her noise, people from the *chawl* gathered there. At that time, Kalim ran away from the backside door of his room. She deposed that she then called her mother from her work place, and they told the incident to the mother. Thereafter, her mother PW1 to the police station. PW5 deposed that Kalim was residing near her house, therefore, she can identify him. Her statement was recorded by the police.

In the cross-examination, PW5 deposed that she had gone to the police station as PW2 had insisted her to give her statement. She has admitted that when she had gone to the police station, PW2 had accompanied her.

15. PW3 Savita Mahale, CJSD deposed that she had recorded the statement (Exh.12) of PW1 under Section 164 of Cr.P.C., in the presence of PW2. She has identified the said statement.

16. PW4 Dr. Supe deposed that she was working in Obsc. and Gynec. Department at Rajawadi Hospital. On 28/07/2013, at about 06:37 p.m., the police had brought PW1 to Rajawadi Hospital for medical examination. PW1 was aged years. She examined PW1 with the prior consent of PW2. PW1 and PW2 gave the history of fondling with the lower genital organs on 28/07/2013, at about 10:13 a.m., PW1 stated that she was tempted with fruit. There was no history of penetration. No history of bleeding P.V., spotting P.V. and no history of injury on her body. Accordingly, she issued the medical certificate (Exh.14).

17. PW6, the investigating Officer has testified that on 28/07/2012, at about 14.15 hrs., PW2 had visited the police station along with PW1 and neighbors. PW2 narrated him the incident. He recorded her narration as per her say *vide* Report (Exh.10) and registered this crime No.221 of 2013.

PW6 deposed that the father of PW1 showed him the spot of the incident. There, he recorded the spot panchanama (Exh.18) in present of two panchas. He referred PW1 for medical examination alongwith WPC 379. Further, he recorded the statement of witnesses. He deposed that further investigation was done by API Jadhav, who arrested the accused, recorded the statement of some witnesses and filed the charge.

In the cross-examination, PW6 stated that one Mr Meraj was the owner of the room of the Appellant. He has denied that he has registered a false report against the Appellant on the say of PW2. He has denied that the Appellant was falsely implicated in this case.

18. On careful scrutiny of the testimonies of PW1, PW2 and PW5, I find that their testimony is very consistent. Said testimonies clearly show that the offender had called PW1 and her friend 'A' at his room on the pretext of giving them fruit and then the offender told 'A' to go away. Further, the offender took PW1 inside the house, pulled her nicker and moved his hand on her place of urination. Immediately, PW1 pulled up the nicker, came out of the house and went home. At that time, PW1 was crying, which was very natural. Further, their testimonies show that, on being home, immediately, PW1 disclosed the incident to her sisters 'S' and 'M'. In turn, 'M' went to the place of working of PW2 and called her. Then, PW2 came home and enquired with PW1. At that time also, PW1 disclosed the same incident to PW2. Thus, the conduct of PW1, PW2 and PW5 appears very natural. This is followed by a prompt lodging of the Report (Exh.10). The history given to PW4 also supports what the three witnesses have deposed. There is absolutely nothing in the prosecution evidence to accept that the said Report was filed after deliberation and concocting a false story. The testimony of PW1 is also consistent with her statement under Section 164 of the Cr.P.C. Therefore, there is no hurdle to rely upon the said evidence of

PW1, PW2 and PW5 that, at the time of the incident, the offender called PW1 at his room on the pretext of giving her an Orange and then, sexually assaulted her. This act was certainly an offence punishable under Section 354 of I.P.C. and Section 10 of the POCSO Act.

19. No doubt, there is some inconsistency in the testimony of PW1, PW2 and PW3. The inconsistency is in respect of whether an Orange was offered or a Sweet Lime. Another inconsistency is that, as stated in the Report (Exh.10) and deposed by PW5, the offender had kissed PW1 on the mouth. This fact is not deposed by PW1 and PW2 in their examination-in-chief. However, said inconsistency is not sufficient to disbelieve the version of PW1 that the offender had removed her nicker and moved his hand on her place of urination.

20. Now the question is, whether the Appellant has committed this offence or not. In the examination-in-chief, to a question, "*Will you be able to identify Kalim if shown to you?*", PW1 replied "Yes". However, when the learned APP questioned her as "*Is the person present in the Court is the same Kalim, who resides by the side of your house and committed the filthy act with you?*" PW1 answered, "*No, he is not the same person.*" At this juncture, the trial Court observed that, "It was noticed that after seeing the accused the child was scared and looked frightened, and she avoided to look in the direction of the accused, and stated that she does not want to depose further." This was followed by a Court question that, "*Is it true that the person standing before the Court is the same Kalim who resides by the side of your house and who removed your nicker and moved his hand in your urination?*" PW1 answered that, "*I do not know. (Nahi malum)*". The next Court question was, "*Did your mother tell you that today you have to attend the Court?*". PW1 answered in the affirmative. Finally, she was

questioned, *“What else did your mother tell you?”* She had answered, *“Mummy told me to tell that Kalim did not do the filthy act with me.”*

21. In the examination-in-chief, PW2 was specifically asked as to whether the Appellant was the same Kalim whose name was mentioned in her statement and against whom she had filed the complaint. Instead of answering ‘yes’ or ‘no’, PW2 was giving evasive answers and was asking the Court how she could identify him when she had not seen him earlier. Further, the learned trial Judge noted that, it appears that the witness was reluctant to give a specific answer, and she was under some pressure.

22. Thus, PW1 and PW2 have not supported the prosecution to prove that the Appellant was the same person who had sexually assaulted PW1. Therefore, the learned counsel for the Appellant urged that there is not even an iota of evidence to connect him with the commission of the offence and, in fact, it stands disproved that the appellant is the person who had committed this crime against the PW1. However, based on the demeanor of the witnesses and circumstantial evidence, the learned Judge of the trial Court held that the identity of the Appellant was proved and accordingly, held him guilty of the said offences. In this regard, the learned Judge observed as under.

“25. From the observations of my learned predecessor who recorded the demeanor of the victim (PW-1) and the informant (PW-2), it appears that both the victim and the informant were under pressure while identifying the accused. The victim on being asked specifically has gone to the extent of saying that her mother had told her not to tell that Kalim did the filthy act with her. Though in the cross-examination which was conducted after 2½ months of recording the examination-in-chief, she on being questioned by the learned advocate of the accused has stated that her mother did not tell her to tell what

she should be telling in the court, but the police had told her what she should be saying. Had this been the case that she had been deposing as per the directions of the police, I am of the opinion that she would have definitely identified the accused in the court. From the evidence of the victim (PW-1) and the informant (PW-2) it is evident that the person Kalim who according to them had committed the offence was residing near the house of the victim. The informant (PW-2) had gone to the extent to say that Kalim had come to his father's house at that time. Even Dr. Supe (PW-4) who had recorded the history as given by the victim and the informant had deposed that it was told to her that the offence had been committed by the tenant neighbour. As far as the victim's sister (PW-5) is concerned, she had gone to Kalim's house to question him about the incident. It implies that Kalim was known to her. She had also stated that she could identify Kalim as he was residing near her house. It is further observable that on the day of recording of the evidence of sister of the victim (PW-5), the advocate of the accused had filed exemption application for the accused (Exh.16) and had not disputed the identity of the accused. So it would imply that the accused, if shown to the sister of the victim (PW-5) would have been identified by her as stated by her in her examination-in-chief and also as per the exemption application (Exh.16) of the advocate of the accused."

23. As noted by the learned Judge of the trial Court, as per the FIR (Exh.10), the address of the Appellant was the same as that mentioned in the Spot Panchanama (Exh.18) and the Arrest Form (Exh.22) and was of the same locality as that of the victim. The Spot Panchanama was admitted by the defence. The arrest form noted that the Appellant was residing at Plot No.40/Q/4, Road. No.13, Bainganwadi, Govandi, Mumbai. PSI Kamble (PW6) stated that the Appellant was residing in the same locality as that of the victim, and he was the neighbour of the victim. PW6 has identified the Appellant in the Court, as on the day of his arrest, *i.e.*, 22.09.2013, he was present in the police station. While recording the Appellant's

statement under Section 313 of the Cr.P.C., when he was asked that the victim knew him and he was residing by the side of her house, he answered the question in the affirmative. On a further question being put to him as to whether at the time of the alleged incident, his father was residing in front of the house of the informant and at that time he had come to his father's house, he had again answered in the affirmative. On another question, he had stated that he was not residing at the address mentioned in the arrest form, *i.e.*, Plot No.40/Q/4, Road. No.13, Bainganwadi, Govandi, Mumbai, but had come there only for one day. There is no cross-examination of the witnesses whether there was any other person by the name Kalim, who was residing in the locality of the victim and who had committed the said act with the victim. In the wake of the above, the trial Court held as under:

“29. Considering the evidence on record it is amply clear that the incident had taken place. Further, though the victim and the informant had not identified the accused in court, but their demeanor and evidence of the other witnesses as to the place where the accused was residing at the relevant time, makes it clear that the accused was the person *i.e.* Kalim, who had committed the said offence. ...”

24. Section 9 of the Evidence Act deals with the facts necessary to explain or introduce relevant facts etc. Said Section 9 reads:

“9. Facts necessary to explain or introduce relevant facts.— Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at

which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.”

25. When the identification of a person is at issue, the information that is most beneficial in determining his identity is considered as a relevant fact. On their own, certain pieces of evidence may seem devoid of significance, but when considered in conjunction with other facts, they may acquire meaning. Certain facts support to draw an inference. This category of fact is neither relevant as fact or a fact in issue, but where such fact support or oppose the inference provided by the facts in issue or relevant facts, they become relevant.

26. In the backdrop of the above discussion, considering the demeanor of PW1 and PW2 and the facts and circumstances established by the prosecution evidence, I am in agreement with the finding recorded by the learned Judge of trial Court that the Appellant was proved to be the same Kalim, who had outraged the modesty of PW1. Additionally, I noticed that immediately after the incident, the Appellant fled away. The Appellant has not explained as to why he had fled, if he was innocent. Therefore, and considering the presumptions in the POCSO Act, an inference is permissible that since the Appellant had committed this crime, he ran away. In this regard, illustration (c) below said Section 9 is relevant and it reads:

“(c) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section 8, as conduct subsequent to and affected by facts in issue. The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain

the fact that he left home suddenly. The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.”

27. It is also apt refer to the decision in *Visveswaran v. State REP. BY S.D.M.*¹, therein, the Appellant before the Hon’ble Supreme Court had abducted the victim (PW1) and her husband (PW2) in the night time. He then took the victim in a hotel and committed rape on her. The Appellant had no mustache and beard at the time of committing the crime. However, when the victim and her husband were examined in the Court, said Appellant had mustache and beard and was wearing a *Dhoti*. Therefore, the couple could not identify him and deposed that said person is not in the Court. The other relevant witnesses also did not identify him. In the backdrop, in paragraph 11, the Hon’ble Supreme Court observed that, “It does not mean that the acquittal is to follow as a natural corroboratory from the statements of PW1 and PW2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt.” Hence, in paragraph 13 it is observed as under:

“**13.** ..., it is no doubt true that if the evidence of witnesses is examined in isolation, without having regard to the aforesaid principles, there may be considerable force in the submission that the identity of the appellant

1. (2003) 6 SCC 73.

has not been established and likewise as a result of defective investigation of not holding test identification parade, the benefit should go to the appellant. However, when the case is examined having regard to the aforesaid legal principles, the result would be otherwise. Circumstances which have been taken into consideration against the appellant by the trial court as well as the High Court are that the appellant, a Police official, was caught from a room in a hotel. The proprietor of the hotel was examined as PW3. The hotel record (Exhibits P-4 and P-5) showed booking of the room in that hotel by the appellant and also payment of advance of Rs.100/-. PW3 had also been examined by PW14. The appellant could not explain his whereabouts during the time the offence was committed. He was not cooperative during investigation. He declined to give sample of his semen. He was having different appearance at the time of examination of PW1 and PW2 in Court. At the time of commission of offence, he did not have beard and the moustaches. However, when PW1 and PW2 were examined in Court, he had beard and the moustaches and was wearing Dhoti. The testimony of PW1 and PW2 was straightforward. The witnesses, immediately after the commission of offence, had named the appellant. The non-holding of the test identification parade, having regard to the facts of the case, is not fatal and does not create any reasonable doubt in the case of the prosecution. We are unable to accept the contention that the identity of the appellant had not been proved. From the proved circumstances, it has been fully established that PW1 was picked up and raped in a hotel room as per the case set up by the prosecution by a police constable who was none other than the appellant. There is no infirmity in the impugned judgment of the High Court. ”

28. In the wake of the above, I hold that the prosecution has proved its case beyond reasonable doubt. The Appellant is rightly

convicted and sentenced for the commission of the offence of Section 354 of I.P.C. and Section 10 of the POCSO Act. Therefore, I do not see any reason to set aside the conviction and the sentence imposed on the Appellant. With the result, the Appeal is dismissed.

(SHYAM C. CHANDAK, J.)