

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

CRIMINAL APPEAL NO.1070 OF 2021

XYZ

Age : 39 Years, Occupation : House wife,
Residing at : Room No.37, Building No.5,
3rd Floor, Dadar Police Station Compound,
B S Road, Dadar (West), Mumbai : 400 028. **...Appellant**

Versus

1. **Arun Shankar Khutale**
Aged 48 Years, Occupation : Service,
Residing at : R.No.34, 3rd Floor, Bldg. No.5,
Dadar Police Quarters, Dadar, Mumbai.
2. **The State of Maharashtra**
(At the instance of Sr.P.I. Dadar Police
Station in C.R. No.276 of 2018). **...Respondents**

Mr. Jayant Bardeskar a/w Mr. Deepak Kurne	Advocate for the Appellant
Ms. Anjali Patil a/w Mr. Tohid Shaikh	Advocate for the Respondent No. 1
Mr. H. J. Dedhia	APP for Respondent-State

CORAM : S. M. MODAK, J.

DATE : 17th OCTOBER 2025

JUDGMENT :-

1. The Appellant (the mother of the victim, who is a minor girl) is

aggrieved by the judgment of acquittal pronounced by the Special Judge under the Protection of Children from Sexual Offences Act, 2012 (“**POCSO Act**”, hereinafter) Greater Mumbai, on 27th August 2021. She intends to challenge the said judgment. The offences are under **Section 354** of the Indian Penal Code, 1860 (“**IPC**, for short”) and under **Sections 8 and 12** of the POCSO Act. The case is registered as POCSO CASE NO. 712 of 2018.

2. This is a case instituted on a police report. The Appellant has sought for leave to prefer an Appeal. The First-Informant being the mother of the victim has also to be treated as a victim. With consent, I have heard learned Advocate Shri Bardeskar for the Appellant and learned Advocate Ms. Anjali Patil for Respondent No.1/Accused and learned APP. The Appeal is taken up for final hearing at an admission stage. Leave granted. Admit the appeal, copies of evidence is already on record.

3. It is an admitted fact that at the time of giving of evidence, the victim was not available as she died on 12th May 2019. There are two witnesses examined on behalf of the prosecution. They are:-

- (i) PW No.1 – Mother of the victim and
- (ii) PW No.2 – The Investigating Officer.

4. The defense of the accused is that of denial and false implication. He has also taken a defense of '*alibi*'. To prove the same, he has examined Head Constable–Dayanand Alkunte. The trial Court acquitted the Accused. The points which are raised in this Appeal are as follows:-

- (a) The statement recorded of the victim as per the provisions of Section 164 of Cr.P.C., **whether it can be considered as an evidence** when the victim is not available for evidence?
- (b) The facts stated by the victim to her mother immediately after the happening of the incident, **whether it can be considered as an evidence and its effect?**
- (c) Whether the **presumption** under Sections 29 and 30 of the POCSO Act is of any help to the prosecution?
- (d) Whether the trial Court was right **in accepting** the evidence on the point of '*alibi*'?
- (e) Whether the judgment requires interference?

Presumptions under Sections 29 and 30 of POCSO Act

5. The learned trial court Judge in para no. 6 of the impugned judgment has given categorical findings about applicability of the provisions of the POCSO Act because victim girl is of 15 years old and

she was minor and even the learned Judge has referred about the presumption under Section 29 of the POCSO Act. This is rebuttal presumption.

6. The learned Judge observed, '*if the foundational facts are proved then presumption comes into picture*'. The learned Judge observed "*accused has adduced evidence to rebut the presumption*". According to learned Advocate Mr. Bardeskar this finding is incorrect. He tried to point out lacunae in the evidence of the defence witnesses. The Section of the POCSO Act which is invoked is Section 8. It describes the punishment for **sexual assault**. Meaning is given in Section 7 of the said Act. Whereas **Section 29** lays down the presumption which can be invoked when there are offences under Sections mentioned therein. The offence which are mentioned are Sections 3, 5, 7 and 9. There is no mention of Section 7 read with Section 8 in Section 29. So the presumption under Section 29 will not come into picture.

7. **Section 30** of the said Act refers to presumption of culpable mental state. Any of the offence under POCSO Act is not specifically mentioned therein. The offences which requires culpable mental state, if invoked, then this Section comes into picture. Section 7 lays down

“*any act done with sexual intent*”. It indicates culpable state of mind. It is settled law that for invoking the presumption ‘*foundational facts needs to be proved*’. Just because the provisions of the POCSO Act are invoked, it does not mean that the Court should since beginning presume about culpable mental state. For this purpose the evidence needs to be considered to certain extent.

Prosecution Case

8. The prosecution case as depicted from the evidence needs to be re-stated. It is as follows:-

- (i) As said above, only two witnesses are examined. They are the mother of the victim and the investigating officer. The victim was not available at the time of the trial, because she has expired.
- (ii) Father of the victim was working in Police department so also accused. Their families were staying in Police quarter. The victim was studying in 9th std at Convent Girls High School. It is but natural that both the families knows each other.
- (iii) The incident took place on 10.11.2018 at about 9.30

p.m.. The family members of the accused had gone to his native place on account of Diwali. The Mother of the victim was busy in her kitchen work. Accused came to their house and requested the victim to assist him for taking out the books from suitcase. The victim was busy on phone call, she told that she will come after phone call is over. This was heard by the Mother.

(iv) Thereafter, the victim went to the room of the accused.

Admittedly, the Mother has not seen what happened in the room of the accused.

(v) Immediately, after returning home, the victim has not disclosed to her Mother about happening of the incident inside the room of the accused. Mother saw the victim standing in kitchen by putting the light off. The Mother-in-law of the PW No. 1 found the conduct of the victim abnormal. She inquired with the victim, then she started crying.

(vi) Then role of the mother starts and she took her daughter in confidence. At that juncture, the victim

disclosed about the objectionable conduct of the accused. When the victim was about to take out the books, the accused caught her from the back side and tried to have inappropriate touch. The clothing of accused at that time also important. He had worn only underwear. This is what victim disclosed to her Mother.

(vii) The mother disclosed this incident to her husband. By way of natural conduct, the husband went to the house of the accused. Before approaching the Police, parents have discussed with family members and then reported to the Dadar Police Station on 12.11.2018. That is how an offence under Section 8 of the POCSO Act and under Section 354 of the Indian Penal Code came to be registered.

9. When the accused was tried by the Court of the Special Judge under POCSO Act, Greater Mumbai, the defense of the accused was not of fully denial but of defense of '*alibi*'. According to him, he was not present in his room but in fact he was on his duty at Shivaji Park

Police Station. That is why, there is examination of HC Dayanant Alkunte, according to him, the accused was on duty from 03.00 p.m. to 10 p.m. on 10.11.2018 and he was given the duty on vehicle mobile van at 05.00 p.m.. He also produced relevant entries from the register. Learned Advocate Shri Bardeskar tried to submit that the Police quarters and Shivaji Park Police Station are not far away. It is very easy to go to the room of the accused on the date of the incident. According to him, the evidence of this witness is not trustworthy.

10. As said above, the mother of the victim is not eye-witness, but she heard what victim has said after the incident. According to learned Advocate Shri Bardeskar, this will be relevant as per the provisions of Section 6 of the Indian Evidence Act. "*If certain facts are forming part of the same transaction*", it becomes relevant fact.

11. Whereas according to learned Advocate Ms. Anjali Patil even though they may be relevant, the Court cannot draw inference about the proof of the guilt of the accused. According to her, at the most what can be presumed is that the victim has narrated about the incident to her mother. According to her, this single piece of evidence is not sufficient to arrive at guilt of the accused.

12. With their assistance, **I have read the evidence of the mother of the victim.** She has stated that on the date of the incident, the accused was on official duty from 10 a.m. to 10 p.m.. Whereas the incident took place at 9.30 p.m.. On the date of incident, the accused returned from his native place in the morning. The witness has also admitted that she had no occasion to see the accused from 9.30 p.m. till 11.00 p.m.. There are certain documents which is brought to the notice of the mother. It is recorded in para no. 7.

13. About the death of the daughter, the Mother was put certain questions. She expired on 12.05.2019 at that time, the mother had gone to attend the marriage of her relative at Thane. Daughter was alone in the house. The Mother has locked the house from the outside. The suggestion was put to her about committing the suicide, it was denied. Even the accused tried to put questions about character of the victim, it was denied by the Mother. The Mother has admitted that daughter has failed in 9th std. The mother was aware about the friendship with Swaraj and one Omkar. The accused tried to blame the Mother for falsely implicating him. It is for the reason the victim was having relationship with those two boys and accused has objected and

that is why he has been falsely implicated. However, this was denied by the Mother.

14. The evidence of the investigating officer is about investigation which he has carried out. Even he has arranged the recording of the statement of the victim with the help of lady Police Officer. Even the investigating agency was cautious enough to record the statement of the victim as per the provisions of Section 164 of the Criminal Procedure Code. There is an emphasis by learned Advocate Shri Bardeskar on considering this statement as an evidence. The Investigating Officer admits that the F.I.R. is registered after two days. There is much emphasis on this delay by learned Advocate Ms. Anjali Patil. Whereas according to learned Advocate Mr. Bardeskar the relatives are reluctant to approach the Police when the offence involves minor girl. It has come in his cross-examination that there is Police Station below police quarter where the incident took place.

Findings by the trial court

(A) The learned trial Court Judge has given weightage to answer given by the mother about not seeing the accused from 9.30 p.m. to 11.00 p.m.. The learned trial court

judge has given weightage to the doors of the house remained to be open. (para no. 12)

(B) Learned trial Court Judge has considered there is time gap of two days from the date of incident till lodging of the F.I.R. (para no. 13). After the incident, the mother went to her parents house at Santacruz and then lodged the complaint.

(C) The learned trial Court Judge has emphasized on the conduct of the victim in not disclosing about the incident immediately after returning home. (Para no. 14)

(D) In para no. 15, the trial court has commented on the improvements of the evidence of PW No. 1-Complainant.

(E) Apart from the mother of the victim, no independent witnesses were examined. (Para no. 16)

(F) About plea of alibi, the trial court has observed in para no. 19 that probability of the accused remaining present in the house is very less.

(G) In para no. 20, the leaned trial court Judge gave his opinion about the conduct of the parents to put lock on

the room and leaving the house for marriage and by keeping the girl inside the room. The learned trial court observed that parents were strict with the girl. There is also reference of her death on 12.05.2019. It is important to note that the trial court was conducting the inquiry about the incident that took place on 10.11.2018 and was not conducting the inquiry about death of the deceased on 12.05.2019. In fact the cause and incident of death are not related to each other. If they wanted the Court to believe, the Court about the character of the victim, they have made an attempt to cross-examine the mother, however they have failed. Even law does not permit challenging the character of the victim to a great extent.

(H) In para no. 21, the learned trial court judge has quoted and given his opinion about entire prosecution case.

According to learned Advocate Mr. Bardeskar this is the only reasoning in the impugned judgment. He is not correct. In para no. 21 is summary of his conclusion, whereas in earlier paragraphs, learned trial court judge has given its opinion.

15. Now the issue in this appeal is “*what is the evidentiary value of the disclosure made by the victim to her mother immediately after the incident and whether this disclosure is sufficient to convict the accused*” and “*what is evidentiary value of the statement recorded under Section 164 of the Criminal Procedure Code*”. This issue needs to be decided by considering the settled provisions of law that there is minimum interference when there is judgment of acquittal.

16. When the evidence of mother of the victim is perused and even if we consider disclosure made by the victim to her mother as relevant under Section 6 of the Evidence Act, we can only draw an inference that victim has narrated the incident to her mother and that is how she has deposed in the Court. It is true that every time, for proving an offence, direct evidence may not be available; either there may be direct evidence of the person who has heard it, who has seen it and who has perceived it by his senses.

17. There can be circumstantial evidence depending upon the facts of the case. When we say that the mother has deposed whatever the victim has stated to her, no doubt it is direct evidence, but direct evidence of what? It is direct evidence of whatever she has heard. This

cannot be treated as direct evidence of what has happened in the room of the accused. **We cannot draw an inference better than this.**

18. On the point statement of the victim recorded under Section 164 of the Criminal Procedure Code, it is true that it is recorded by Judicial Magistrate. He is an independent person. In this case, the concerned Magistrate is not examined. Even if such Magistrate is examined what is weightage to such evidence. It is nothing but a witness who is narrating the incident of which such witness has stated. It can be used for corroboration of the primary evidence. It is settled law that such statement before Judicial Magistrate cannot take place of substantial evidence. If such evidence is considered as corroborative evidence, the question is that this is corroborative to which kind of evidence. Can we consider it as corroborative to the disclosure made by the victim to her mother. This statement can be considered as corroborative to the facts deposed by maker of the statement before the Court. Ultimately, the victim was not available when the trial took place.

19. No doubt the Court dealing with an offence under the POCSO Act needs to be sensitive about the incident considering the nature of such offence. While dealing with them the Court cannot overlook the

settled principles of appreciation of the evidence. Unfortunately, there is no evidence on the point of the actual incident. Even if there could have been evidence about hearing conversation, if any, in between the victim and the accused at the time of the incident, the question could have been different. It is not there.

20. For this aspect, I do not think that the judgment of the acquittal can be interfered with.

21. For these reasons, I am not going into plea taken by the accused about *alibi*. This is case wherein not only different view can be taken but this is a case wherein the findings of the trial court needs to be confirmed. Hence, I do not find any merit in the appeal. Hence, the following order:-

ORDER

- (i) Criminal Appeal is dismissed.
- (ii) Accordingly, Criminal Appeal is disposed of.
- (iii) Pending, Interim Application, if any, also stands disposed of.

[S. M. MODAK, J.]