

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.239 OF 2015

ABHIJEET @ BABALU AVINASH KADAM)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Mr.Ujwal Agandsurve, Advocate for the Appellant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 19th NOVEMBER 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 19th December 2014 passed by the learned Special Judge, Solapur, in Sessions Case No.218 of 2013, thereby convicting the appellant/accused of the offence punishable under Section 6 of the Protection of Children from

Sexual Offences Act, 2012, (hereinafter referred to as POCSO Act for the sake of brevity) and sentenced him to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.20,000/- and in default, to undergo further rigorous imprisonment for 6 months.

2 Facts leading to the prosecution of the appellant/accused can be summarized thus :

- (a) PW3 Laxmi who is the First Informant in the instant case used to reside at Damani Nagar, Solapur. PW1 is the victim female child, who happens to be daughter of PW3 Laxmi. At the time of alleged offence, the PW1/victim female child was eight years old. She was taking education in 3rd Standard. The appellant/accused used to reside in the neighbourhood of the First Informant/PW3 Laxmi. The alleged incident took place on 26th March 2013. It was the day of festival of Holi. At about 4.00 p.m. of that day, the appellant/accused allured the PW1/victim female child by offering some eatables and took her at the secluded place

near his house. She was taken by the backside of a four wheeler vehicle. The appellant/accused then committed penetrative sexual assault on her.

- (b) It is case of the prosecution that in the evening of that day, the PW1/victim female child did not take food. In that night, she woke up with a sense for urination. However, she found it difficult to urinate. In the morning hours the PW1/victim female child again suffered trouble while urinating. Her mother PW3 Laxmi then found private part of the PW1/victim female child in swollen condition. The PW1/victim female child was then taken to the hospital of Dr.Urmila Jagtap. PW3 Laxmi was then told by the hospital authorities to take the PW1/victim female child to the Civil Hospital, Solapur. Thereafter, PW3 Laxmi made enquiry from her daughter by taking her into confidence. Thereupon, the PW1/victim female child divulged the details of penetrative sexual assault on her by the appellant/accused. That is how, PW3 Laxmi lodged report Exhibit 23 of the incident to Police

Station Foujdar Chawadi, Solapur, on 27th March 2013. Accordingly, Crime No.70 of 2013 came to be registered against the appellant/accused.

- (c) The PW1/victim female child was sent for medical examination to the Civil Hospital, Solapur, where she was medically examined by PW5 Dr.Varsha Patil. During the course of investigation clothes of the PW1/victim female child as well as that of the appellant/accused came to be seized by preparing Panchnamas Exhibits 34 and 35 respectively. The spot came to be inspected and Panchnama Exhibit 32 came to be recorded. Seized articles were sent for chemical analysis and on completion of routine investigation, the appellant/accused came to be charge-sheeted.
- (d) The learned Special Judge, Solapur, then framed the Charge for the offence punishable under Section 376(2)(f) of the Indian Penal Code as well as under Section 6 of the POCSO

Act against the appellant/accused. He pleaded not guilty and claimed trial.

- (e) In order to bring home the guilt to the appellant/accused the prosecution has examined in all six witnesses. The victim female child is examined as PW1. Her neighbour Shivaji Bhosale is examined as PW2. However, this witness failed to support the prosecution case. First Informant Laxmi who happens to be mother of the PW1/victim female child is examined as PW3. The report lodged by her is at Exhibit 23. Sarojani Patil, Police Sub-Inspector, is examined as PW4. Medical Officer, Civil Hospital, Solapur, Dr.Varsha Patil is examined as PW5. Exhibits 27 and 29 are the documents of medical examination of the PW1/victim female child. Investigating Officer Abdul Karim Korbu, Police Sub-Inspector is examined as PW6.

- (f) Defence of the appellant/accused was that of total denial. According to the defence, the prosecuting party was

interested in removing him from the locality with the help of a Corporator named Sunil Khatake, and therefore, he is falsely implicated in the crime in question. After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused of the offence punishable under Section 6 of the POCSO Act. Accordingly, he was sentenced as indicated in the opening paragraph of this judgment.

3 I have heard the learned counsel appearing for the appellant/accused. By taking me through the evidence of prosecution witnesses and particularly through the evidence of the Investigating Officer PW6 Abdul Karim Korbu, it was argued that the PW1/victim female child was initially taken to Dr.Urmila Jagtap. However, this witness is not examined by the prosecution. It is further argued that evidence of the Investigating Officer shows that Dr.Urmila Jagtap was unable to give opinion regarding sexual assault on the PW1/victim female child. It is further argued that the PW1/victim female child was also taken to

Dr.Halsurkar. However, this Medical Officer is also not examined by the prosecution. Non-examination of the doctors who had firstly attended the PW1/victim female child casts a shadow of doubt on the case of the prosecution. The learned counsel for the appellant/accused further argued that the appellant/accused at the most could have been convicted for the offence punishable under Section 376 of the Indian Penal Code and adequate sentence could have been imposed on him instead of convicting him under the stringent provisions of the POCSO Act.

4 The learned APP supported the impugned judgment and order of conviction and the resultant sentence.

5 I have carefully considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution. As per provisions of Section 2(d) of the POCSO Act any person below the age of 18 years is a child. The term “penetrative sexual assault” is also defined by Section 3 of the said Act. It reads thus :

“3. Penetrative sexual assault -

A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

Perusal of the definition of penetrative sexual assault, as such, makes it clear that even penetration of penis to a slightest extent into the vagina of a child is sufficient to make out the offence of penetrative sexual assault. Similarly, as provided by Section 5 of the said Act, commission of penetrative sexual assault on a child

below 12 years of age amounts to the offence of aggravated penetrative sexual assault which is made punishable under Section 6 of the said Act. Minimum sentence prescribed for this offence is that of 10 years and it can extend up to imprisonment for life. Section 42 of the POCSO Act provides for the alternate punishment and if the act constitutes the offence punishable under Section 376 of the Indian Penal Code, so also the offence punishable under the POCSO Act, then the court is required to impose punishment which is greater in degree on the accused guilty of the offence punishable under the POCSO Act as well as under the relevant provisions of the Indian Penal Code. Keeping in mind these aspects, let us consider the case in hand.

6 The PW1/minor female child is the victim of the offence alleged against the appellant/accused. Her deposition reflects that at the time of entering in the witness box, she was 9 years of age. The incident took place on 26th March 2013 and this minor female child entered in the witness box on 18th October 2014. Her evidence regarding her age is not even challenged by

the defence in the cross-examination. As per version of the PW1/victim female child, the appellant/accused offered her some eatable and took her behind a white coloured four wheeler vehicle where she was denuded by the appellant/accused. Then, as deposed by the PW1/victim female child, the appellant/accused laid on her person. This child witness did not disclose the incident to her friends nor made any hue and cry about the incident. However, in chief-examination itself she had disclosed that the appellant/accused had threatened her by saying that if she disclosed the incident to anybody, he will finish her entire family. She denied the suggestion that she had deposed at the instance of her mother.

7 So far as age of the PW1/victim female child is concerned, her mother PW3 Laxmi categorically deposed that at the time of the incident, the PW1/victim female child was just 8 years old. This evidence is also not challenged in cross-examination. As such, I see no reason to disbelieve the evidence regarding age of the PW1/victim female child adduced by the

prosecution. It is, thus, clear that at the time of the incident in question, the PW1/victim female child was about 8 years of age. Considering her tender age, it is explicit that she was not in a position to narrate in detail the act committed by the appellant/accused on her by taking her to the secluded place. Evidence regarding the penetrative sexual assault coming from the mouth of the prosecutrix will have to be appreciated by keeping in mind tender age of the victim child. Perusal of cross-examination of the PW1/victim female child does not reflect that she is a tutored witness. Her cross-examination does not reflect any reason for false implication of the appellant/accused in the crime in question.

8 It is well settled that while deciding the cases of sexual assault on minor children, the court is bound to show a great responsibility and such cases are required to be dealt with utmost sensitivity. The court is required to keep in mind broader probabilities of the prosecution case. Minor discrepancies and contradictions which are not fatal in nature cannot be used to

jettison otherwise reliable prosecution case. Similarly, if evidence of the victim of the sexual assault is found reliable and trustworthy, then there is no need to corroborate the same with other evidence. However, in the case in hand, version of the PW1/victim female child is gaining corroboration from evidence of PW5 Dr.Varsha Patil, Medical Officer, working in Civil Hospital, Solapur, who examined her on the very next day i.e. on 27th March 2013. Evidence of PW5 Dr.Varsha Patil which is corroborated by the contemporaneous medico legal documents goes to show that on clinical examination of the PW1/victim female child, this witness had found severe pain and inflammation at vagina of the PW1/victim female child. This witness deposed that skin all over the pubis, labia majora, labia minora, fourchette and around anal canal of the PW1/victim female child was found inflamed and the PW1/victim female child was suffering severe pain on even touch to that part of her body. Thus, this finding, upon examination of private part of the PW1/victim female child indicates penetration, which is sufficient to make out the offence punishable under Section 6 of the POCSO Act. In cross-

examination, PW5 Dr.Varsha Patil had rightly denied the suggestion that such type of injuries can be suffered by a person by a fall on rough surface. Thus, medical evidence also supports the version of the PW1/victim female child regarding penetrative sexual assault on her by the appellant/accused.

9 PW3 Laxmi – mother of the PW1/victim female child has narrated the narrations of the PW1/victim female child to her in the morning hours of the next day of the incident in question. PW3 Laxmi deposed that after taking the PW1/victim female child to the hospital of Dr.Smt.Jagtap, she took the PW1/victim female child in confidence and enquired from her as to what happened. Thereupon, the PW1/victim female child disclosed her that the appellant/accused took her behind the car and committed penetrative sexual assault on her. These recitals of the PW1/victim female child made to her mother are admissible under Section 157 of the Evidence Act. Therefore, evidence of the PW1/victim female child is gaining corroboration from the evidence of PW3 Laxmi.

10 It is seen that the mother of the PW1/victim female child had taken her initially to a private hospital of Dr.Urmila Jagtap. However, Dr.Urmila Jagtap had referred the PW1/victim female child to the Civil Hospital. The prosecution has not examined Dr.Urmila Jagtap though Dr.Urmila Jagtap was cited as a prosecution witness. Similarly, it is seen that the PW1/victim female child was also taken to Dr.Halsurkar, who is also not examined by the prosecution. However, non-examination of these Medical Officers would have been of some consequence, if the defence could have shown that available evidence is lacunae or insufficient. Such is not the case in hand. Therefore, non-examination of these two witnesses by the prosecution is of no consequence.

11 As the prosecution has established penetrative sexual assault on the PW1/victim female child, who at the relevant time was 8 years of age, it cannot be said that the learned Special Judge erred in convicting the appellant/accused of the offence punishable under Section 6 of the POCSO Act. Minimum sentence

prescribed for this offence is that of 10 years. Therefore, I find no merit in submission of the learned counsel for the appellant/accused that as the appellant/accused has already undergone 5 years of jail sentence, he deserves leniency.

12 In the result, the appeal is devoid of merit, and hence the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)