

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

CRIMINAL APPEAL NO. 507 OF 2018

WITH

CRIMINAL APPLICATION NO.709 OF 2018

ALONGWITH

CRIMINAL APPLICATION NO.710 OF 2018

Akhil Ismail Pinjari

Age : 35 years, Occ. : Labour,

Residing at Lane No. 54,

H.P., Lohiya Nagar, Ganjpeth,

Pune.

.... Appellant

Vs.

The State of Maharashtra

.... Respondent

Mr. Abhishek R. Avachat for the Appellant/Applicant

Mr. Y.M. Nakhwa, APP for the State.

Coram : Smt. Sadhana S. Jadhav, J.

Date : 21st November, 2018

JUDGMENT :

1 Heard.

2 Appeal is admitted.

3 The appellant herein is convicted of the offence punishable under Section 354 of the Indian Penal Code and

sentenced to suffer rigorous imprisonment of one year and fine of Rs.1,000/-, in default of payment of fine, simple imprisonment for two months. The appellant is also convicted for an offence punishable under Section 7 read with 8 of Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for three years and a fine of Rs.2,000/-, in default of payment of fine, simple imprisonment for three months by the Additional Sessions Judge, Court No. 4, Pune in Special Case (POCSO) No. 227 of 2017 vide judgment and order dated 11th April 2018. Such of the facts necessary for the decision of this appeal are as follows :

It is the case of the prosecution that on 27th March 2017 at about 9.15 pm., Ms. "X", aged about 4 years had left her house alongwith her brother aged about 11 years to buy sweets. When she returned home, she was crying. Upon enquiry, she had disclosed to her mother that the present appellant had tried to gag her mouth and she felt hurt. The brother of the victim-minor girl, who had accompanied her returned home 10 minutes after the victim had

returned home, however, he had not disclosed anything to his mother. In the meanwhile, the uncle of victim namely Akram Nayab had disclosed to the mother of victim-minor girl that he had seen the accused/appellant gagging the mouth of victim and attempting to take her alongwith him. That he had raised hue and cry and therefore the accused had released the victim and rushed to his house. The mother of the victim-minor girl alongwith witness Akram Nayab and others rushed to the house of the accused/appellant and had taken him to Khadak police station and lodged a report.

4 On the basis of report lodged by the mother of victim-minor girl, Crime no.141 2017 was registered against the accused for the offence punishable under Section 354 of Indian Penal Code and Section 7 read with 8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO Act”). The appellant was shown to be arrested on 28th March 2017 and since then he has been in custody.

5 After completion of investigation, the charge-sheet was filed. The case was committed to the Special Court and registered as Special Case (POCSO) No. 227 of 2017. The prosecution has examined five witnesses to bring home the guilt of the accused.

6 PW-1, Ms. "X" happens to be the victim. All that she has stated before the Court is that on the day of the incident, she had been to a shop alongwith her brother for bringing sweets and at that time the accused/appellant had gagged her mouth and was trying to take her home. Her uncle Akram had seen the incident. He raised shouts and thereafter she was taken home by her uncle. She had deposed before the Court that her statement was recorded by a lady police and at that time, she was accompanied by her parents. She had admitted in the cross-examination that there was a quarrel between her father and Kalu. She has further admitted that after purchasing sweets, her brother, Awez had dropped her at their house. She had denied the suggestion that many people had gathered on the spot by hearing her shouts. She had denied the suggestion that she has been tutored.

7 PW-2, Naziya Israr Shaikh, who happens to be the mother of victim-minor girl has deposed before the Court that on 27th March 2017, the victim-girl had been to purchase sweets alongwith her brother, she returned home by crying and upon enquiry, she had refused to disclose anything. However, after some time, Akram had come home and informed that the victim-girl has been rescued by him when she was being taken by the accused-appellant. It is further deposed that the mother of victim had been to the house of the accused/appellant alongwith family members and thereafter he was taken to the police station. She has proved the contents of the F.I.R., which is marked at Exhibit 14. According to PW-2, Kalu happens to be the son of the accused/appellant. It is also admitted that her son had returned home 10 minutes after arrival of victim-minor girl. That according to her, Akram happens to be her cousin brother-in-law. She is confronted with her 164 Cr.P.C. statement and has failed to assign reason for some material omissions.

8 PW-3, Akram Nashid Nayab, who happens to be the star witness of the case has disclosed that on the day of the incident when he was working in front of his workshop, he had seen the accused/appellant taking the minor girl towards his house by gagging her mouth. He raised hue and cry and therefore the accused had released her and fled from the spot and then victim went towards her house by crying. He went to the house of victim and disclosed the incident to her mother. People had gathered near the spot. The accused came out of house and threatened the people and returned the house and thereafter the police had arrived on the spot and taken the accused alongwith them. In the cross-examination, it is admitted that there were no people nearby the place of incident, however, he alongwith other people gathered in front of the house of accused within five minutes. That he was present in the police station when the F.I.R. was lodged. His statement was recorded two days thereafter.

9 P.W.-4, Sima Lahu Chowdhary was attached to Khadak police station. On 27th March 2017, she has recorded F.I.R. (Exhibit

14). She has investigated the case. She had arrested the accused and thereafter prepared spot panchanama. The statement of victim was recorded by PSI, Smt. Jankar. It is a matter of record that PSI, Jankar has not been examined by the prosecution. She has disclosed that the accused was brought to the police station by the people in the locality of Lohiyanagar. That she has recorded the statements of 10 to 12 persons from the mob, however, she was not aware about the presence of witness- Akram at the police station at the time of lodging the F.I.R. She has admitted in the cross-examination that she had recorded the statement of eye witnesses, who were present in that mob. It is pertinent to note that none of the eye witnesses to the incident except Akram have been examined by the prosecution.

10 PW-5, Sultana Rauf Patel happens to be an independent witness. According to her, on the day of incident, when she was preparing garlands in front of her house, she had seen the accused passing gestures at her. She is not an independent witness as far as the incident is concerned. The prosecution has examined her only to bring on record the negative side of the character of the

accused/appellant.

11 Learned counsel for the applicant has vehemently submitted that in fact the learned Court had not verified the understanding of the victim-girl and that she was only asked to identify the articles kept in the chamber. It is submitted that according to the victim, Akram had taken her to her house. It is not known as to why the statement of brother of the victim-girl has not been recorded nor he is examined by the prosecution. Moreover, PW-2 i.e. mother of the victim-girl has also not disclosed as to whether she had enquired about the incident that Awez was in the company of the victim at the relevant time. It is further submitted that the evidence of the victim-girl appears to be a tutored version only to falsely implicate the accused/appellant. It appears from the evidence that the child had not disclosed anything to her mother and the whole incident was narrated by none other than Akram. PW-2 has categorically stated that she alongwith Akram and other relatives had taken the accused/appellant to the police station, however, the said version is not supported by PW-3. According to him, the

accused had threatened the people of dire consequences and therefore the police had come to his house and taken him to the police station. The version of Akram is also falsified by PW-4, who has categorically stated that accused was brought to the police station by a mob. It is further pertinent to note that Awez had returned home 10 minutes later than the victim and had not disclosed anything to his mother and therefore it is doubtful as to whether the victim was in the company of Awez or not. It appears that PW-3 has given an exaggerated version of the whole incident. He has also reiterated in the cross-examination that the accused was taken to Lohiyanagar police chowki by police. It is doubtful as to whether he had accompanied the complainant to the police station. There is inherent inconsistency in respect of the version of the witnesses as to the nature of arrest of the accused.

12 PW-5 has not deposed anything about the relevant incident and therefore it would not be necessary to consider her evidence. It is not known as to why PSI, Smt. Jankar has not been examined by the prosecution.

13 Be that as it may, the only allegation against the accused is that he had tried to gag the mouth of the victim-girl. The accused/appellant has been convicted of the offences punishable under Section 7 of the POCSO Act, which reads as follows :

7. Sexual Assault : Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

14 It appears that the learned court has partly considered Section 7 as far as the requirement “or does any other act with sexual intent, which involves physical contact without penetration is said to commit sexual assault”. In fact, there is nothing on record to even remotely indicate that the accused had gagged mouth of the victim on the public road with an intention to commit sexual assault. There is also nothing to indicate that she was bring dragged by force to the house of the victim and therefore it is clear that the prosecution has miserably failed to prove the offence punishable under Section 7 of the POCSO Act.

15 As far as Section 354 of the Indian Penal Code is concerned, the question would be as to whether gagging of mouth of the victim-girl would by itself amount to assault or criminal force with intent to outrage her modesty. In fact, Section 354 of Indian Penal Code would be applicable to a woman who has attained majority and the provisions of POCSO Act would override the provisions of Indian Penal code, in this case. The special statute has been drafted and brought into force in the year 2012 to cover any and every act against the child and the child is defined under Section 2(d) of the POCSO Act as 'child' means any person below the age of eighteen years. Section 42 of the POCSO Act reads as follows :

“42. Where an act or omission constitutes an offence punishable under this Act and also under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

16 The punishment contemplated under Sections 7 and 8 of the POCSO Act and 354-A of Indian Penal Code are for not less than three years. In any case, Section 26 of the General Clauses Act, 1897 contemplates as follows :

“26. Provision as to offences punishable under two or more enactments.-- Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

Hence, it can be safely inferred that the allegations against the present appellant are that he had gagged the mouth of the victim-minor girl. There is no material on record to infer an intention on the part of the appellant that the act was committed with an intention to outrage her modesty or commit sexual assault.

17 From the nature of evidence that is adduced by the prosecution, it would be difficult to maintain the conviction of the accused/appellant either under Section 354 of Indian Penal Code or under Section 7 of the POCSO Act, 2012. The prosecution has failed to bring home the guilt of the accused. The accused/appellant is in

custody since 27th March 2017. The appellant deserves benefit of doubt and deserves to be acquitted of all charges levelled against him by extending benefit of doubt. Hence, the following order :

ORDER

- i) The appeal is allowed.
- ii) The judgment and order dated 11th April 2018 passed by the Additional Sessions Judge, Court No.4, Pune in Special Case (POCSO) No. 227 of 2017 against the appellant is hereby quashed and set aside.
- (iii) The appellant be set free forthwith, if not required, in any other offence.
- (iv) The fine amount be refunded to the appellant, if paid.
- v) The appeal is allowed in above terms and stands disposed of.
- (vi) In view of disposal of the appeal, the above criminal applications also stand disposed of.

(*Smt. Sadhana S. Jadhav, J*)