

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.204 OF 2015

Sikandar Mehfus Alikhan,
Age : 25 years, Occu. Rickshaw Fitter,
R/o.Shanti Nagar, Rahematpura,
2nd Mohalla, Bhiwandi, Dist. Thane,
(Presently detained at Nashik Road
Central Prison, Nashik).

.... **Appellant**

V/s.

The State of Maharashtra

... **Respondent**

.....

Mr.Pravin Dabade i/b. Mr.Vikas Shivarkar, Advocate for the
Appellant.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 5th DECEMBER 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order dated 24/07/2014 passed by the learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for the sake of brevity) and Additional Sessions Judge, Pune in Special Case No.47 of 2013 thereby convicting the appellant/accused of the offences punishable under Section 376(2)(i) of the Indian Penal Code as well as under Section 4 read with Section 3 and

under Section 6 read with Section 5 of the POCSO Act. For the offence punishable under Section 376(2)(i) of the Indian Penal Code is sentenced to suffer imprisonment for ten years apart from imposition of fine of Rs.500/- and default sentence of rigorous imprisonment for six months. For the offence punishable under Section 6 read with Section 5 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for ten years apart from payment of fine of Rs.500/- and default sentence of rigorous imprisonment for six months. For the offence punishable under Section 4 read with Section 3 of the POCSO Act, the appellant/accused is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.500/- and in default to undergo further rigorous imprisonment for six months. Substantive sentences were directed to run concurrently. Moreover, the appellant/accused is directed to pay compensation of Rs.10,000/- to the victim child.

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

- (a) First Informant/P.W.No.2 Rabiya used to reside near Darvesh Darga of Khed Shivapur in Haveli Taluka of Pune District along with her husband Ahmed and three children. The victim of the crime in question is her minor female child/P.W.No.1, who at the relevant time was eight years of age. Father of the minor female victim/P.W.No.1 so also her mother P.W.No.2 Rabiya used to work at Darvesh Darga of Khed Shivapur. They used to reside near that Darga. The

incident in question took place in the afternoon of 06/05/2013. Along with other children, the minor female victim/P.W.No.1 was playing by the side of the Darvesh Darga of Khed Shivapur. The appellant/accused came there. He shut the mouth of the minor female victim/P.W.No.1 and took her to the sugarcane field. He pull down her salwar, removed his pant and committed penetrative sexual assault on the minor female victim/P.W.No.1 causing bleeding from her private part. After committing the act, the appellant/accused ran away from the spot, but he was chased and apprehended by the villagers from the godown of Shriram Automobile Finance Company.

- (b) P.W.No.2 Rabiya then took the minor female victim/P.W.No.1 to the Sassoon Hospital, Pune for giving medical treatment to her. She lodged report of the incident on 06/05/2013 itself, which has resulted in registration of Crime No.84 of 2013 for the offence punishable under Section 376 of the Indian Penal Code with Police Station Rajgarh.
- (c) During the course of investigation, statements of witnesses came to be recorded, clothes of the victim child so also that of the appellant/accused came to be seized. Seized articles then sent for chemical analysis. On completion of investigation, the appellant/accused came to be charge-sheeted.

- (d) Charge for the offences punishable under Section 376 of the Indian Penal Code as well as under Section 4 read with Section 3 and Section 6 read with Section 5(m) of the POCSO Act came to be framed and explained to 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 minor female victim is examined as P.W.No.1. Her mother Rabiya is examined as P.W.No.2. Exhibit 20 is the FIR lodged by P.W.No.2 Rabiya. Dr.Swati Kagane, Medical Officer, Sassoon Hospital, Pune is examined as P.W.No.3. Exhibit 24 is the Medico Legal Certificate issued by this Medical Officer. Bapat Bhilare, Security Guard working with Shriram Automobile Finance Company of Khed Shivapur is examined as P.W.No.4. Investigating Officer Yashwant Gavari is examined as P.W.No.5. Investigating Officer Sanjay Bothe is examined as P.W.No.6.
- (f) The defence of the appellant/accused is that of total denial. As per the defence version, the appellant/accused is implicated in false case.
- (g) After hearing the parties, the learned trial Court was pleased to convict the appellant/accused of the offence punishable under Section 376(2)(i) of the Indian Penal Code as well as

under Section 4 read with Section 3 and under Section 6 read with Section 5(m) of the POCSO Act. He was accordingly sentenced as indicated in the opening paragraph of this Judgment.

3 I heard the learned Advocate appearing for the appellant/accused. He vehemently argued that as per version of the victim, the incident was seen by a woman as well as some other persons. They are not examined by the prosecution. Even statement of the victim is recorded belatedly. Forensic evidence is not supporting the case of the prosecution and, therefore, the appellant/accused is entitled for acquittal.

4 As against this, the learned Additional Public Prosecutor argued that evidence of the victim child is supported by the medical evidence adduced by the prosecution and identification of the appellant/accused is established from the evidence of the minor female victim/P.W.No.1 as well as her mother P.W.No.2 Rabiya. Statement of the appellant/accused under Section 313 of the Code of Criminal Procedure shows that he has admitted the fact that his jean pant was having stains of blood. The appellant/accused has admitted his identification in the test identification parade. Therefore, in submission of the learned Additional Public Prosecutor, the appeal is devoid of merit.

5 I have carefully considered the submissions so advanced and also perused the Record and Proceedings including the oral as well as documentary evidence.

6 In the case in hand, the prosecution has claimed that clothes of the appellant/accused so also that of the minor female victim/P.W.No.1 were seized, but panch witnesses to that seizure panchanama are not examined. Even from evidence of P.W.No.6 Sanjay Bothe, the prosecution has failed to prove seizure panchanama of clothes of the minor female victim/P.W.No.1. In this situation, it is necessary to refer to the of the Honourable Apex Court in the matter of *State of Punjab v. Gurmeet Singh*¹, wherein it is held that while dealing with the rape cases, the Court needs to shoulder a greater responsibility and such cases are required to be dealt with utmost sensitivity. The relevant observations of the Honourable Apex Court are thus :

“It is an irony that while we are celebrating woman's rights in all spheres we show little or no concern for her honour. It is a sad reflection on the attitude or indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a

1 1996 Cr.L.J. 172.

rapist degrades the very soul of helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations”.

7 The prosecution has examined the minor female victim as P.W.No.1. The learned trial Court after putting several questions to this witness has come to the conclusion that she is in position to give rational answers to the question put to her, but she is unable to understand sanctity of the oath. Therefore, the learned trial Court has recorded her evidence without administering oath to her. The minor female victim/P.W.No.1 has deposed that at the time of the incident, she along with her parents and other family members was residing near Darvesh

Darga, where her parents used to work for earning livelihood. As per her version, on that day, she was playing with her brother and sister by the side of the Darga and one person came and took her by shutting her mouth. She was taken to the sugarcane field, where said person committed rape on her by pulling down her *salwar*. In her words, the person who kidnapped her inserted something in her private part causing bleeding to her. She deposed that she then shouted and two women came. As such, the accused ran away. He was caught by some persons, but again biting the arm of that person, he ran away. Then, the minor female victim/P.W.No.1 has duly identified by the appellant/accused in the witness box as a person, who had committed rape on her.

8 Cross-examination of this minor female victim was directed to bring on record the fact that the backside of Darga where the incident took place is a populous area as stream flows from there. Because of this, people goes there for washing clothes, taking bath and for going to the toilet. The minor female victim/P.W.No.1 admitted the fact that when she was taken to the field, few persons were working at a distance. She denied the suggestion that the appellant/accused had not done anything wrong with her.

9 As per version of P.W.No.2 Rabiya, who happens to be

mother of the minor female victim/P.W.No.1, on 06/05/2013, a person named Mama came shouting towards her to tell her that her daughter is raped. This witness then saw her daughter i.e. the minor female victim/P.W.No.1 with a *salwar* stained with blood. P.W.No.2 Rabiya testified that there was bleeding from private part of her daughter. As per her version, then the accused was brought to her by five to six persons and he told his name as 'Sikandar Mehafujali Khan'. Thereafter, as stated by P.W.No.2 Rabiya, she took her daughter to the Sassoon Hospital, Pune. She has also stated that on the very same day, she lodged the FIR (Exhibit 20)

10 In her cross-examination, it is brought on record that at the backside of Darga, there is a flowing stream and then there is a field of sugarcane crop. P.W.No.2 Rabiya stated that she went to the field and saw her son and daughter. She was not knowing the appellant/accused prior to the incident. From cross-examination of this witness, it is brought on record that there was stain of blood on clothes of the appellant/accused, but she denied the fact that the appellant/accused was having bleeding injury.

10A. At Sassoon Hospital, Pune, the minor female victim/P.W.No.1 was examined by P.W.No.3 Dr.Swati Kagane, the resident Doctor. As per her version, she found the following injuries on person of the victim.

“Hymen and posterior forchette was completely torned.

There was tear to annal sphinter at 12 o'clock position with intact rectal mucosa.

There was Posterior vaginal tear approximately 5 c.m. Long in length and full thickness at 6 o'clock position.

There was also lateral vaginal tear at 5 o'clock position approximately 3 cm. in length.”

As per opinion of this Medical Officer, the findings were suggestive of third degree perenial injury indicating forcible sexual assault on the victim. She denied the suggestion that the injury found on the person of the victim can be caused by insertion of a finger in the private part.

11 Cumulative effect of evidence of these three prosecution witnesses shows that the claim of the minor female victim/P.W.No.1 in respect of penetrative sexual assault on her is substantiated by the version of P.W.No.3 Dr.Swati Kagane, the Medical Officer, who had immediately examined her soon after the incident. Findings recorded by P.W.No.3 Dr.Swati Kagane unerringly points out extensive damage to the vagina of the minor female victim/P.W.No.1. In this view of the matter, even if it is assumed that the place of incident was used to be frequented by several persons, the incident in question, in fact, took place and the minor female victim/P.W.No.1 was subjected to the penetrative sexual assault.

12 So far as identity of the appellant/accused is concerned

as a perpetrator of the crime in question is concerned, the minor female victim/P.W.No.1 has categorically stated that the appellant/accused is the same person, who had committed penetrative sexual assault on her. She denied the suggestion that she is implicating the appellant/accused on the say of her parents. Nothing could be brought on record from the cross-examination of the minor female victim/P.W.No.1 to infer that she has committed any mistake in identifying the appellant/accused as the perpetrator of the crime. The incident in question took place at about 4.30 p.m. and that too in the open field of having sugarcane crop. As such, there was every opportunity with the minor female victim/P.W.No.1 to see and remember the face and posturer of the appellant/accused, who had committed rape on her.

13 Identity of the appellant/accused as a perpetrator of the crime in question is also established by the prosecution from the evidence of P.W.No.4 Bapat Bhilare, Security Guard working with the Shriram Automobile Finance Company. His evidence shows that godown of the Shriram Automobile Finance Company is situated at the backside of the Darga and there is one gate to the compound of the godown facing towards the Darga. From cross-examination of this witness, it is brought on record that near the Darga, there is a stream and there is a sugarcane field and footpath from that field leads to the godown where P.W.No.4 was working. On this backdrop, in chief-examination, this witness has stated that at about 4.45 p.m. of 06/05/2013, his colleague shouted that a thief had entered in the premises. That is how, as

per version of this witness, the appellant/accused came to be apprehended by them. Soon thereafter, a mob of ten to fifteen persons from Khed Shivapur gathered there and those were saying that the apprehended person had committed rape on a minor girl. P.W.No.4 Bapat Bhilare has identified the appellant/accused as a person, who was caught by them and has stated that thereafter, custody of the appellant/accused was handed over to those persons, who gathered there.

14 In the wake of this evidence of P.W.No.4 Bapat Bhilare, evidence of P.W.No.2 Rabiya assumes importance. As seen from her evidence, the appellant/accused was then brought before her and she had witnessed that his jean pant was stained with blood. This fact is rather admitted by the appellant/accused in his statement under Section 313 of the Code of Criminal Procedure. Thus, these circumstances are corroborating the version of the minor female victim/P.W.No.1 that it was the appellant/accused, who had committed rape on her by taking her in the sugarcane field. Case of the prosecution is certainly established with this evidence.

15 Evidence of the minor female victim/P.W.No.1 so also that of her mother P.W.No.2 Rabiya regarding age of the minor female victim/P.W.No.1 is not at all challenged even in the cross-examination. Even the learned trial Court noticed the

fact that the minor female victim/P.W.No.1 is a child witness with a tender age. Evidence of P.W.No.2 Rabiya, who happens to be mother of the minor female victim/P.W.No.1 makes it clear that the victim of the crime in question was aged about eight years at the time of the incident. Therefore, the offence punishable under Section 376(2)(i) of the Indian Penal Code is certainly made out. However, it is seen that the learned trial Court has convicted the appellant/accused for the offence punishable under Section 4 so also that of the offence punishable under Section 6 of the POCSO Act. Offence of penetrative sexual assault as defined by Section 3 of the POCSO Act is made punishable under Section 4 of the said Act. Further, when such act of penetrative sexual assault is committed by certain persons falling in categories mentioned in Section 5 of the POCSO Act, then the offence of penetrative sexual assault becomes the offence of aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Thus, the offence punishable under Section 6 of the POCSO Act is the aggravated form of the offence punishable under Section 4 of the said act. The learned trial Court ought not to have imposed different punishment on both these counts on the appellant/accused. In the result, the following Order :

ORDER

- (i) The Appeal is partly allowed.

- (ii) Conviction of the appellant/accused for the offence punishable under Section 376(2)(i) of the Indian Penal Code as well as under Section 4 and under Section 6 of the POCSO Act recorded by the learned trial Court is confirmed.
- (iii) Sentence imposed on the appellant/accused by the learned trial Court for the offence punishable under Section 376(2)(i) so also for the offence punishable under Section 6 read with Section 5(m) of the POCSO Act is also maintained.
- (iv) However, sentenced imposed on the appellant/accused for the offence punishable under Section 4 read with Section 3 of the POCSO Act is quashed and set aside as the appellant accused is already sentenced for the graver offence.
- (v) Rest of the Judgment and Order of the learned trial Court is maintained.
- (vi) The Appeal is accordingly disposed of.

(A.M.BADAR J.)