

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.29 OF 2017

PRADEEP RAMNAYAN YADAV)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant.

Ms.P.N.Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 4th MARCH 2019

JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 23rd December 2016 passed by the learned designated Judge under the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as POCSO Act for the sake of brevity), Mumbai, in POCSO Special Case No.1172 of 2013, thereby convicting him of the offence punishable under

Section 363 of the Indian Penal Code and under Section 10 of the POCSO Act. On the first count, the appellant/accused is sentenced to suffer simple imprisonment for 3 years apart from direction to pay fine of Rs.5,000/- and default sentence of simple imprisonment for 1 month. On the second count, he is sentenced to suffer simple imprisonment for 5 years apart from direction to pay fine of Rs.5,000/- and in default to undergo further simple imprisonment for 1 month. The learned trial court directed that substantive sentences shall run concurrently.

2 Facts, in brief, leading to the prosecution of the appellant/accused and his resultant conviction, can be summarized thus :

- (a) PW2 Shabana, the First Informant, is mother of the victim female child, who at the relevant time was four years old. PW2 Shabana was residing at Juhu Koliwada area of Santacruz, Mumbai, with her husband and four children. On 18th October 2013, her four year old daughter was playing in the locality. The appellant/accused, who was

working as an office boy in the nearby office of Integrated Technical Services, took her to his office and assaulted her sexually by moving his hand on her buttocks. The victim female child/PW1 ran away from the said office by opening the door.

- (b) In the evening of that day, her mother PW2 Shabana had taken the victim female child/PW1 to the Mac Donald Restaurant. However, the victim female child/PW1 refused to eat. Thereafter, she told her mother i.e. PW2 Shabana as well as her father that one person lifted her, took her to the nearby office and sexually assaulted her by moving his hands on her body.
- (c) On the next day i.e. on 19th October 2013, PW2 Shabana and her husband took the victim female child/PW1 to the office premises which was shown by the victim female child/PW1 to them. In that office, the victim female child/PW1 pointed to the appellant/accused as the person

who had taken her and had sexually assaulted her. Then, PW2 Shabana lodged report of the incident (Exhibit 12) on that day itself with Santacruz Police Station. Accordingly, Crime No.600 of 2013 for offences punishable under Section 363 and 354 of the Indian Penal Code as well as under Sections 8 and 12 of the POCSO Act came to be registered.

- (d) During the course of investigation, the appellant/accused came to be arrested in presence of PW4 Mukesh Shah vide Panchnama Exhibit 15. The spot of the incident, as shown by the victim female child/PW1, was inspected and Spot Panchnama Exhibit 17 was prepared in presence of PW5 Nadeem Ansari – panch witness, who was employee of the Integrated Technical Services, at whose office the incident in question took place. The victim female child/PW1 was sent for medical examination to Bhabha Hospital where she was examined by PW8 Dr.Suresh Tikone. The appellant/accused was also got medically examined by PW6 Dr.Manish Bharti of Bhabha Hospital, Bandra. On completion of routine

investigation, the appellant/accused came to be charge-sheeted.

- (e) The learned designated Judge under the POCSO Act framed the Charge and the same was explained to the appellant/accused. He pleaded not guilty and claimed trial.
- (f) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. The victim female child is examined as PW1. Her mother Shabana is examined as PW2. The First Information Report (FIR) lodged by her on 19th October 2013 is at Exhibit 12. Bhaskar Payar, Electrical Design Engineer with the Integrated Technical Services is examined as PW3. Mukesh Shah – panch witness to the Arrest Panchnama Exhibit 15 is examined as PW4. Nadeem Ansari – panch witness to the Spot Panchnama Exhibit 17 is examined as PW5 Nadeem Ansari. Dr.Manish Bharti, who examined the appellant/accused, is examined as PW6. Maruti Kadam, Police Sub-

Inspector, is examined as PW7. Dr.Suresh Tikone, who examined the victim female child/PW1 is examined as PW8. Sudhir Kudalkar, Police Inspector, is examined as PW9.

- (g) Defence of the appellant/accused was that of total denial. According to the defence, the appellant/accused is falsely implicated in the crime in question because of enmity with a person named Jerry, who was earlier working as sweeper in his office.
- (h) After hearing the parties, the learned trial court was pleased to convict the appellant/accused and sentenced him, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Nasreen Ayubi, the learned advocate on the panel of the High Court Legal Aid Services, who is appointed to represent the appellant/accused at the costs of the State. She argued that the victim female child/PW1 has failed to identify the appellant/accused as the perpetrator of the crime in question, and therefore, this is a case of mistaken identity. The

appellant/accused deserves acquittal on this ground itself. There is no other evidence to connect the appellant/accused with the crime in question. As against this, the learned APP supported the impugned judgment and order by contending that though the victim female child/PW1 has not identified the appellant/accused, her evidence is gaining corroboration from other evidence adduced by the prosecution. Evidence of PW3 Bhaskar Payar as well as that of PW2 Shabana establishes identity of the appellant/accused as the person who had sexually assaulted the victim female child/PW1.

4 I have considered the submissions so advanced and perused the record and proceedings including oral as well as documentary evidence.

5 So far as age of the alleged victim of the crime in question i.e. PW1 is concerned, evidence of her mother PW2 Shabana, which is to the effect that at the time of commission of the crime in question, she was aged about four years, is not at all

challenged by the defence. The prosecution has placed on record Birth Certificate Exhibit 33 issued by the Registering Authority and Municipal Council Ratnagiri showing date of birth of the victim female child/PW1 as 24th August 2009. The incident in question, allegedly, took place on 19th October 2013. As such, on the date of the alleged incident, the victim female child/PW1 was certainly below 12 years of age.

6 Now let us examine whether the prosecution has established the fact that the appellant/accused had taken the victim female child/PW1 out of keeping of her lawful guardian and then had sexually assaulted her in the office of the Integrated Technical Services on 18th October 2013. The victim female child/PW1 has clearly described the incident in question by stating that when she was playing near her house, one uncle came, lifted her and took her to the office where he moved his hands on her hips. She, further, stated that, she opened the door and ran away. Thereafter, as per her version, she disclosed the incident to her mother. She, further, stated that, she took her mother and father

to the office of that uncle and showed that uncle to them. However, the victim female child/PW1 has stated that she is unable to identify the appellant/accused as the person, who had taken her and assaulted her sexually.

7 The victim female child/PW1, at the relevant time, was just four years of age. She had entered in the witness box after more than seven months of the incident. As such, her inability to identify the accused as the person who had kidnapped her and molested her, will not cast shadow of doubt on the case of the prosecution, if by other evidence the prosecution establishes identity of the appellant/accused.

8 In order to establish identity of the appellant/accused, the prosecution is placing heavy reliance on evidence of PW3 Bhaskar Payar and PW2 Shabana. PW3 Bhaskar Payar is Electrical Design Engineer working with Integrated Technical Services. Evidence of PW5 Nadeem Ansari, panch witness to the Spot Panchnama, who again is an employee of the Integrated Technical

Services, has stated in his evidence that the victim female child/PW1 had showed the office of the Integrated Technical Services as the spot of the incident, and accordingly, the Spot Panchnama Exhibit 17 came to be recorded on 19th October 2013 i.e. on the very next day of the incident. Evidence of PW5 Nadeem Ansari makes it clear that the appellant/accused was working as an office boy in Integrated Technical Services. In the light of this evidence adduced by the prosecution, version of PW3 Bhaskar Payar, Electrical Design Engineer in the said office, will have to be considered.

9 It is in evidence of PW3 Bhaskar Payar that the appellant/accused worked in his office as an office boy. On 18th October 2013, the appellant/accused had brought a female child to the office and then this witness as well as other members in the office questioned this behaviour of the appellant/accused. As stated by PW3 Bhaskar Payar, then the appellant/accused took that female child out of the office. He, further, stated that, on the very next day, two male and one female came to the office and

took the appellant/accused outside the office and had beaten him. Thereafter, police took the appellant/accused to the police station. Evidence of PW7 Maruti Kadam, Police Sub-Inspector with Santacruz Police Station, is corroborating version of PW3 Bhaskar Payar. PW7 Maruti Kadam, Police Sub-Inspector, has deposed that on 19th October 2013, PW2 Shabana came to the police station with her husband and her daughter. She disclosed the incident and he recorded the FIR (Exhibit 12) and simultaneously sent a team of police to bring the appellant/accused to the police station. This is how, as stated by PW3 Bhaskar Payar, police reached to his office and took the appellant/accused from there to the police station.

10 Version of PW2 Shabana is to the effect that when she had taken her daughter/PW1 to the Mac Donald Restaurant, her daughter refused to eat. Then her daughter disclosed to her that one uncle had taken her to the office and moved his hand over her nicker. PW2 Shabana has stated that, thereafter, she took her daughter/PW1 to the office and her daughter showed that uncle,

who had sexually assaulted her, by pointing a finger at him. PW2 Shabana, then, lodged the FIR (Exhibit 12). While in the dock, PW2 Shabana has stated that her daughter/PW1 had pointed the appellant/accused as the person who had taken her and sexually assaulted her. Cross-examination of PW2 Shabana shows that it was a person named Jerry, who told her that her daughter had gone with a person. She admitted that said Jerry was, previously, working as a sweeper in that office. With this material, it is hard to believe that the appellant/accused is falsely implicated in the crime in question, particularly when PW3 Bhaskar Payar, who is working in the office, has categorically stated that the appellant/accused had brought a female child to the office on the date of the incident. Evidence of PW2 Shabana is fully corroborating version of the victim female child/PW1.

11 It is, thus, seen from evidence of the prosecution that the appellant/accused was working as an office boy in the office of Integrated Technical Services. He was very much present in his office on the day of the incident, as seen from evidence of PW3

Bhaskar Payar. On the day of the incident i.e. on 18th October 2013, the appellant/accused had brought a female child in the office, as stated by PW3 Bhaskar Payar. In the evening of 18th October 2013, the victim female child/PW1 has disclosed to her mother PW2 Shabana that one uncle lifted her, took her to the office and sexually assaulted her. On the very next day i.e. on 19th October 2013, the victim female child/PW1 had pointed out the office of the Integrated Technical Services, so also the appellant/accused, as the person who had sexually assaulted her. This evidence, coming on record through PW2 Shabana, PW3 Bhaskar Payar and PW5 Nadeem Ansari, makes it clear that it was the appellant/accused who had taken the victim female child/PW1 out of lawful custody of her parents and had sexually assaulter her by moving his hand on her buttocks, in the office of the Integrated Technical Services, situated near her house, on 18th October 2013. Thus, the prosecution has successfully proved the offence punishable under Section 363 as well as under Section 10 of the POCSO Act, for which appropriate sentence is awarded to him by the learned trial court.

12 No case for interference in appeal, as such, is made out. Therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)