

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.46 OF 2018

RIYAZ ALIAS GORA RASHID SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.N.S.K.Ayubi, Appointed Advocate for the Appellant.

Mr.Amit Palkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

**DATE : RESERVED ON 27th AUGUST 2019
PRONOUNCED ON 9th SEPT. 2019**

JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 28th November 2017 passed by the learned Designated court under Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act for the sake of brevity) Mumbai, in POCSO Case No.51 of 2014, thereby convicting him of the offence punishable under

Section 354 of the Indian Penal Code as well as under Section 8 of the POCSO Act. The appellant/accused is sentenced to suffer rigorous imprisonment for 5 years apart from direction to pay fine of Rs.5,000/- and in default, to undergo rigorous imprisonment for 2 months.

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

- (a) The PW1/victim female child was residing at Jai Bhawani Chawl located in Dharavi area of Mumbai along with her parents. The appellant/accused was also residing in the same area.
- (b) The appellant/accused used to stalk the PW1/victim female child from June 2013. He used to outrage her modesty by uttering that he would kidnap and rape her. The PW1/victim female child disclosed such instances to her mother PW2 Indu, who, in turn, narrated the same to the mother of the appellant/accused.

- (c) The incident in question took place in the evening hours of 8th December 2013. The PW1/victim female child was going to meet her friend. At that time, the appellant/accused came from behind and attempted to embrace her. He caught hold of hand of the PW1/victim female child and uttered that he likes her and wants to marry her. The appellant/accused also uttered that he wants to enjoy honeymoon with her. Upon seeing that her daughter is being held by the appellant/accused, PW2 Indu intervened. The appellant/accused assaulted and abused PW2 Indu and threatened her. The PW1/victim female child then took PW2 Indu to Sion Hospital for medical treatment. Because of fear of the appellant/accused, no First Information Report (FIR) was lodged. However, subsequently, when people in the locality supported, the PW1/victim female child lodged FIR against the appellant/accused on 11th December 2013, which resulted in registration of Crime No.491 of 2013 with Police Station Dharavi.

- (d) Routine investigation followed. On completion of investigation, the appellant/accused came to be charge-sheeted.
- (e) The learned trial court framed and explained the Charge 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 four witnesses. The victim female child is examined as PW1 whereas the report lodged by her is at Exhibit 10. Her Secondary School Certificate reflecting her date of birth is at Exhibit 11. Indu – mother of the PW1/victim female child is examined as PW2. Prasad Raut, Assistant Police Inspector, who investigated the crime, is examined as PW3. Dr.Madhuri Chavan, Medical Officer, working with Sion Hospital, is examined as PW4.

(g) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused and sentenced him accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Nasreen Ayubi, the learned advocate appointed to represent the appellant/accused at the costs of the State. She vehemently argued that apart from evidence of interested witnesses viz. PW1/victim female child and her mother PW2 Indu, no other evidence is adduced by the prosecution, in order to bring home the guilt to the appellant/accused. She argued that the incident took place in thickly populated area of Dharavi and that it was duty of the prosecution to examine independent witnesses to prove guilt of the appellant/accused. It is further argued that age of the alleged victim female child is not proved by the prosecution. As against this, the learned APP supported the impugned judgment and order of conviction and the resultant sentence.

4 I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence.

5 Considering the nature of offence, fate of the prosecution case, to a large extent, hinges on testimony of the PW1/victim female child as well as that of PW2 Indu. So far as issue of non-examination of independent witness is concerned, the position of law is settled that if available evidence is discrepant, then only non-examination of other witness assumes importance. Let us, therefore, ascertain whether evidence made available by the prosecution is suffering from inconsistency or discrepancy.

6 The PW1/victim female child has deposed about stalking by the appellant/accused since June 2013 as well as his lewd remarks addressed to her. So far as the incident in question is concerned, the PW1/victim female child has candidly stated that at about 5.30 p.m. of 8th December 2013, when she was going to meet her friend, the appellant/accused followed her, caught

hold of her hand and uttered that he likes her and wants to marry her and enjoy honeymoon with her. The PW1/victim female child testified that when she tried to push him, the appellant/accused caught hold of her hand and tried to hug her. He fondled her breast. As per her version, her mother then intervened but the appellant/accused assaulted her mother, threatened her and left the place. The PW1/victim female child has categorically stated that as she was afraid, she did not approach the police. She has also spoken about her date of birth as 2nd April 1999.

7 Case of the prosecution is cemented by the material elicited from cross-examination of the PW1/victim female child. It is brought on record from cross-examination that as she was under threats of the appellant/accused, she could not lodge the FIR on the day of the incident. It is further brought on record from cross-examination of the PW1/victim female child that on the very next day of the incident i.e. on 9th December 2013, the appellant/accused came in front of the PW1/victim female child carrying three beer bottles. Then, he extended threats to kidnap

the PW1/victim female child as well as to kill her parents and throw the beer bottles. Thereafter, he demanded an amount of Rs.600/- from mother of the PW1/victim female child, apart from extending threats of commission of rape on the PW1/victim female child. Because of fear, her mother was required to bolt the door from outside in order to restrain the appellant/accused from entering her house. Cross-examination of the PW1/victim female child further shows that, at that time, the appellant/accused was openly proclaiming that he would fuck the PW1/victim female child in presence of her mother.

8 It is seen from evidence of the PW1/victim female child that when she was shown the appellant/accused, she became terrified and started shivering as well as weeping.

9 There is nothing in cross-examination of the PW1/victim female child to disbelieve her version about the incident in question. Rather, the incident in question is not challenged in the cross-examination but another incident of

outraging the modesty of the PW1/victim female child is brought on record from her cross-examination by the defence.

10 Version of the PW1/victim female child is duly corroborated by evidence of her mother PW2 Indu. This witness deposed that in the evening of 8th December 2013 when her daughter was going to the house of her friend, the appellant/accused came from behind, caught hold of her daughter, tried to hug her daughter and moved his hand on chest of her daughter. PW2 Indu further testified that when she caught hold of collar of shirt of the appellant/accused, he assaulted her by stone, causing bleeding injury to her.

11 Cross-examination of PW2 Indu has failed to bring on record anything which would doubt her version regarding the incident. On the contrary, it is elicited from her evidence that till midnight of the date of the incident, she was in the hospital for treating the injury caused by the appellant/accused.

12 One may argue that case of the prosecution is suspect due to delay in lodging the FIR. However, evidence of the PW1/victim female child as well as her mother makes it clear that they both were terrified because of the overt acts of the appellant/accused, committed not only on the day of the incident, but also a day later. They could muster courage to lodge the FIR against the appellant/accused only when local residents supported them. Hence, I hold that there is no delay in lodging the FIR.

13 So far as age of the PW1/victim female child is concerned, apart from her oral evidence, the certificate issued by the Secondary School Examination Board shows that the PW1/victim female child was born on 2nd April 1999. In the matter of **Mahadeo S/o. Kerba Maske vs. State of Maharashtra and Another**¹ it is held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007 is applicable to determine the age of the victim of a rape case. As per provisions of that Rule, the Matriculation or equivalent certificate, and in absence thereof, Birth Certificate given by the Corporation, Municipal

¹ (2013) 14 SCC 637

Authority or a Panchayat can be used and considered for determining the age. In the case in hand, the Matriculation certificate of the PW1/victim female child shows her date of birth as 2nd April 1999 and as such, on the date of the incident, the PW1/victim female child was just 15 years of age, and as such, a child.

14 In the light of foregoing reasons, no infirmity can be found in the impugned judgment and order of conviction as well as the resultant sentence. The appeal, as such, is devoid of merit, and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)