

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.68 OF 2018

BABLU SHOUKAT KALAL

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mrs.Nasreen Ayubi, Appointed Advocate for the Appellant.

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

CORAM : A. M. BADAR, J.

**DATE : RESERVED ON 29th AUGUST 2019
PRONOUNCED ON 16th SEPT.2019**

JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 25th August 2016 passed by the learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act for the sake of brevity), Ichakaranji, District Kolhapur, in Sessions (POCSO) Case No.21 of 2013, thereby convicting him of

offences punishable under Sections 4, 5, 8 and 10 of the POCSO Act. For the offence under Section 3 punishable under Section 4 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.3,000/- and in default, to undergo simple imprisonment for 3 months. For the offence under Section 4 punishable under Section 5(1)(m)(n)&(p) of the POCSO Act, he is sentenced to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.5,000/- and in default, to undergo simple imprisonment for 6 months. For the offence under Section 7 punishable 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.2,000/- and in default, to undergo simple imprisonment for 2 months. For the offence under Section 9(1)(m)(n)&(p) punishable under Section 10 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.3,000/- and in default, to undergo simple imprisonment for 3 months.

2 Though the appellant/accused is convicted of offences punishable under Sections 376 and 377 of the Indian Penal Code, in view of provisions of Section 42 of the POCSO Act, no fresh sentence came to be awarded to him on those counts. The learned trial court directed that all sentences shall run concurrently.

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

- (a) The appellant/accused is father of the victim girl, who came to be examined as PW4. She was six years old at the time of commission of the alleged offence. First Informant/PW1 is Farzana, who lodged report against the appellant/accused with Police Station Karad City, Karad, on 22nd February 2013 and accordingly, Crime No.0 of 2013 came to be registered against the appellant/accused for the offence punishable under Section 377 of the Indian Penal Code. The

First Information Report (FIR) was then sent to Hatkanangale Police Station, Hatkanangale in Kolhapur District, alleging the offence being committed within the territorial jurisdiction of that Police Station, where Crime No.22 of 2013 came to be registered against the appellant/accused.

- (b) It is case of the prosecution that the appellant/accused and his wife/ First Informant/PW1 Farzana were residing at Daulat Colony, Karad. However, as the First Informant /PW1 Farzana had lodged report against the appellant/accused at Karad City Police Station, Karad, since one year prior to lodging of the FIR, Exhibit 24, she started residing separately from the appellant/accused, by keeping her three children with her. Subsequently, the appellant/accused shifted his residence to Hatkanangale town in Kolhapur, where he started working in a mutton shop.

- (c) It is case of the prosecution that on 23rd December 2012, the appellant/accused came to Karad and without seeking permission of First Informant/PW1 Farzana, took their two children with him including the PW4/victim female child.
- (d) On 21st February 2013, some persons from the locality reached the children to First Informant/PW1 Farzana by informing her that those were seen at Gate No.1 of Marketyard at Karad.
- (e) First Informant/PW1 Farzana then questioned her children and then the PW4/victim female child disclosed that in the night hours, after closure of the mutton shop, her father i.e. the appellant/accused, used to put his penis in her mouth. In the night hours of 21st February 2013 itself, First Informant/PW1 Farzana then went to Police Station Karad City, Karad, and lodged the FIR.

- (f) On 22nd February 2013, the PW4/victim female child came to be examined by PW5 Dr.Dhondiram Jadhav, Medical Officer working with the Sub-District Hospital, Karad, along with another Medical Officer named Dr.Tejas Jadhav. Both these Medical Officers noted ruptured hymen and minor abrasion and redness at anal area of the PW4/victim female child and accordingly, they recorded his fact in Medico Legal Case Papers Exhibit 44.
- (g) On the next day of lodging the report i.e. on 22nd February 2013, the PW4/victim female child disclosed to her mother that the appellant/accused used to commit penetrative sexual assault on her. She, therefore, again took the PW4/victim female child to the Police Station Karad City, Karad. That is how, the PW4/victim female child was got examined by the police from PW5 Dr.Dhondiram Jadhav and his colleague, Dr.Tejas Jadhav at Sub-District Hospital, Karad.

- (h) PW7 Anil Sankpal, Police Inspector of Hatkanangale Police Station, on registering Crime No.22 of 2013 proceeded to investigate the same. Spot of the incident came to be visited along with panch witnesses PW2 Sunil More and PW3 Anant Jadhav. The Spot Panchnama came to be prepared. Statement of witnesses came to be recorded. The appellant/accused came to be arrested. The PW4/victim female child was again got examined at the CPR Hospital, Kolhapur and DW1 Dr.Sandesh Admuthe examined her. On conclusion of investigation, the appellant/accused came to be charge-sheeted.
- (i) The Charge as well as Additional Charge Exhibit 3 came to be framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.
- (j) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses whereas the appellant/accused has examined Dr.Sandesh Admuthe

of CPR Hospital, Kolhapur, as the defence witness. The defence of the appellant/accused is that of false implication by his wife i.e. First Informant/PW1 Farzana.

- (k) After hearing the parties, the learned Special court, was pleased to convict the appellant/accused and sentenced him accordingly, as indicated in the opening paragraph of this judgment.

4 I have heard Mrs.Nasreen Ayubi, the learned advocate appointed to represent the appellant/accused at the costs of the State. She vehemently argued that the appellant/accused, who happens to be the husband of First Informant/PW1 Farzana, came to be falsely implicated in the crime in question because of matrimonial dispute between the parties. Cross-examination of this witness shows that she had lodged the FIR for the offence punishable under Section 498A of the Indian Penal Code against the appellant/accused and had roped in her in-laws, in the year 2012 itself. She further argued that, she had agreed to settle that case by accepting an amount of Rs.30,000/- but the appellant/

accused refused to give that amount and that is how, he has been falsely implicated. The learned advocate further argued that, evidence of the child witness is not believable, in the wake of evidence of defence witness Dr.Sandesh Admuthe, who had not noticed any injuries on person of the PW4/victim female child on 23rd February 2013.

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

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

7 In the case in hand, undisputedly, the PW4/victim female child, at the time of the alleged commission of the offence, was just six years old. She, being a child witness, her testimony needs to be examined carefully as well as cautiously, as children are generally prone to tutoring. However, if ultimately it is found

that the child is deposing the truth, then such evidence can be accepted without seeking any corroboration. In the case in hand, the PW4/victim female child, who happens to be the victim of the crime in question, was specifically questioned on the point of tutoring by the learned defence counsel. She was very firm and categorical in stating that she is not deposing at the instance of anybody and nobody has told her as to what she should depose before the court. She denied the suggestion that she was tutored by her mother at her residence as to what she should speak against her father in the court. It needs to be noted that the learned Special Judge had put some elementary questions to this child witness in order to understand her intelligence and competency to testify. The learned Special Judge came to the conclusion that the PW4/victim female child is understanding the nature of questions and she is answering the same. However, considering her young age, it was chosen not to administer oath to her. In the light of this fact situation, if one peruses the chief-examination of the PW4/victim female child, then it is seen that she has deposed about the happenings in a very natural way

without hiding anything. She has stated that when her father tried to take them, her one sister managed to run away, but she as well as her brother were taken by her father i.e. the appellant/accused to Hatkanangale town and they both then started residing with him, at the mutton shop itself. It is in her evidence that in the night hours, her father i.e. the appellant/accused, used to remove her clothes and used to touch her vagina and also used to insert his finger therein. The PW4/victim female child deposed that the appellant/accused used to put his penis on her vagina. When she used to protest, her father used to beat her. She further deposed that, then her father left her as well as her brother at Karad and went away. Subsequently, driver of the auto rickshaw reached them to their home and she disclosed the incident to her mother. There is nothing in cross-examination of this child witness to disbelieve her testimony. She candidly accepted the fact that apart from her father, other persons used to work in the mutton shop. However, no further question is put to her that those other persons also used to stay at that mutton shop. Hence, this halfhearted cross-

examination is not of any assistance to the defence. She accepted that other shops were also situated in the vicinity of the shop, where her father was working. Existence of other shops in the vicinity cannot create any dent in version of the PW4/victim female child.

8 Evidence of the PW4/victim female child is duly corroborated by evidence of her mother i.e. First Informant/PW1 Farzana. She has deposed about taking away her children i.e. the PW4/victim female child and five year old son by the appellant/accused on 23rd December 2012 and their return to the house on 21st February 2013. Initially, the PW4/victim female child, as stated by her, had disclosed about the appellant/accused putting his penis in the mouth of the PW4/victim female child and that is how, this mother lodged the FIR Exhibit 24. The FIR, therefore, is to the extent of disclosure of the PW4/victim female child to that effect only. First Informant/PW1 Farzana stated that on the next day i.e. on 22nd December 2013, her minor daughter disclosed about penetrative sexual assault by the appellant/

accused and therefore, she inspected private part of the PW4/victim female child. She found some injuries in the form of abrasion and also noticed that the private part of her daughter had turned reddish in colour. Therefore, the PW4/victim female child was again taken to the Police Station Karad City, Karad, from where she was sent to the Sub-District Hospital for medical examination. Theory of false implication suggested by the defence in her cross-examination is not worthy of acceptance because if really this mother wanted to implicate her husband falsely in the case in hand, then she would have added spice to her FIR by concocting the case against the appellant/accused. However, this is not done by her. Initially, she lodged the report about penetrative sexual assault in the form of putting penis in the mouth of the PW4/victim female child. The FIR is registered with that allegation only. On the next day, there was disclosure about other details of the incident. In this view of the matter, suggestions to First Informant/PW1 Farzana to the effect that she lodged the FIR of the offence punishable under Section 498A of the Indian Penal Code against her husband and in-laws and that

she had demanded Rs.30,000/- for settling that case, are not useful for holding that the appellant/accused is falsely implicated. In Indian setting, a mother would not put future of her tiny tot in peril with such allegations, and that too, against her own husband.

9 On 22nd February 2013 itself, PW5 Dr.Dhondiram Jadhav along with Dr.Tejas Jadhav examined the PW4/victim female child. They both noticed that hymen of the PW4/victim female child was ruptured. However, there was no vaginal bleeding. As per observations of both these Medical Officers, at the material time, there was tenderness and redness over labia majora. In per anal examination of the PW4/victim female child, both these doctors noticed presence of minor abrasion with redness perennially present and tenderness. PW5 Dr.Dhondiram Jadhav has spoken about these facts and proved Medico Legal Case Papers Exhibit 44 reflecting these facts. In cross-examination it was brought on record that he had not brought Medico Legal Register in the court in which they used to note down the injuries

noticed on the victim. It was suggested and he accepted that except injuries on vagina and anal region, there were no injuries on the PW4/victim female child. It was also suggested to him that such injuries might be possible due to thrusting of a thumb.

10 Non-bringing of the Medico Legal Register is of no consequence because the document at Exhibit 44 is a contemporaneous document in which findings are recorded at the time of medical examination of the PW4/victim female child, apart from condition of the private part of the victim of the sexual assault. Document at Exhibit 44 is not a document prepared on the basis of Medico Legal Case Register. The observations and findings recorded in the Medico Legal Case Papers are corroborating the version of PW5 Dr.Dhondiram Jadhav.

11 The defence has examined Dr.Sandesh Admuthe of the CPR Hospital, Kolhapur. This witness examined the PW4/victim female child on 23rd February 2013 and had not noticed any injuries on her private part. This Medical Officer has deposed that

he did not notice any fresh injury, swelling or redness on private part of the PW4/victim female child. Her hymen was intact.

12 DW1 Dr.Sandesh Admuthe had examined the PW4/victim female child on 23rd February 2013. The PW4/victim female child had returned to her house on 21st February 2013. The injuries in the nature of abrasion and swelling can be healed within this period. PW5 Dr.Dhondiram Jadhav could notice those injuries because the PW4/victim female child was examined by him immediately. Even otherwise, when evidence of the victim of sexual assault is found to be cogent and trustworthy, no corroboration by medical evidence is required.

13 In the case of **State of Punjab vs. Gurmeet Singh**¹ the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

1 1996 Cri.L.J. 172

“....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of 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 rapist degrades the very soul of the 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 and 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.”

14 It is a settled legal position that the medical evidence is also a corroborative piece of evidence but where the medical evidence does not support the otherwise clinching and trustworthy ocular evidence of any material witness then, the testimony of such ocular evidence will prevail on the medical opinion and not vice versa. In the case of [Ranjit Hazarika v. State of Assam](#)², the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw over board an otherwise cogent and trustworthy evidence of the prosecutrix.

2 (1998) 8 SCC 635

15 The Honourable Apex Court in **B.C.Deva v. State of Karnataka**³, inspite of the fact that no injuries were found on person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Honourable Apex Court upheld the conviction of the accused. The Court observed that :

“18 The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

16 With this, I conclude that the appellant/accused was touching and fingering the vagina of his daughter i.e. the PW4/victim female child and was committing penetrative sexual assault on her by putting his penis on her vagina. This was used to

3 (2007) 12 SCC 122

be done regularly by the appellant/accused during the stay of the PW4/victim female child at his house from 23rd December 2012 to 21st February 2013. At the time of penetrative sexual assault on her, the PW4/victim female child was below 12 years of age and the appellant/accused was her father, and as such, a person in possession of trust and authority over her. The penetrative sexual assault on the PW4/victim female child by the appellant/accused was more than once. Thus, the appellant/accused is certainly guilty of aggravated penetrative sexual assault made punishable by Section 5 of the POCSO Act. The appellant/accused is also punished for causing penetrative sexual assault on the PW4/victim female child under Section 4 of the POCSO Act as well as for causing sexual assault on her punishable under Section 8 of the POCSO Act and for aggravated sexual assault punishable under Section 9 thereof.

17 The appellant/accused, as seen from the impugned judgment and order, is convicted for causing penetrative sexual assault, aggravated penetrative sexual assault, sexual assault as

well as aggravated sexual assault and consequently, he is punished separately for offences punishable under Sections 4, 6, 8 and 10 of the POCSO Act. At this juncture, Section 71 of the Indian Penal Code needs to be look into and it reads thus :

“71 Limit of punishment of offence made up of several offences -

Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.”

Perusal of Section 71 of the Indian Penal Code makes it clear that where several acts, of which one or more than one would by itself

or themselves constitute an offence, when combined also constitute a different offence, then in that situation, though the accused can be convicted for all those offences, but he needs to be punished with a more severe punishment prescribed for one of such offences and he need not be punished for such several acts, which are also, independently, an act of offence. In the case in hand, the appellant/accused used to remove clothes of the PW4/victim female child, used to touch her vagina and also used to insert his finger therein, apart from inserting his penis in her vagina. Thus, in this process, the appellant/accused used to commit sexual assault and penetrative sexual assault on the PW4/victim female child and these offences turns to take aggravated form because the appellant/accused, who happens to be the father, was holding position of trust and authority over the PW4/victim female child, who was below 12 years of age. As such, the appellant/accused ought to have been sentenced only for the offence punishable under Section 6 of the POCSO Act i.e. for aggravated penetrative sexual assault. This is the offence for which most severe punishment is prescribed. However, apart from

separately punishing the appellant/accused for offences of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault and aggravated sexual assault, the learned trial court has failed to convict him for the offence punishable under Section 6 of the POCSO Act i.e. for the aggravated penetrative sexual assault. Rather, with some confusion, as seen from the operative portion of the order, the learned trial court inflicted punishment prescribed by Section 4 of the POCSO Act i.e. punishment for penetrative sexual assault for the offence defined in Section 5 of the said Act i.e. offence of penetrative sexual assault, which is, infact, punishable vide Section 6 of the POCSO Act.

18 In the light of the foregoing discussion, the appeal deserves to be partly allowed. Therefore, the following order :

ORDER

- i) Conviction of the appellant/accused for offences punishable under Sections 376 and 377 of the Indian Penal Code as

well as for offences punishable under Sections 4, 6, 8 and 10 of the POCSO Act is maintained.

- ii) However, the sentences imposed on the appellant/accused for offences punishable under Section 4 (twice) as well as for offences punishable under Sections 8 and 10 of the POCSO Act, are quashed and set aside.
- iii) Instead, for the offence punishable under Section 6 of the POCSO Act, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.5,000/- and in default, to undergo further rigorous imprisonment for 6 months.
- iv) With this modification in the impugned judgment and order, the appeal stands disposed off.

(A. M. BADAR, J.)