

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.371 OF 2016

Vaibhav Vyankatesh Deshak
Age 24 years, R/o.17, Varun Apartment,
Aasara, Solapur. The applicant is lodged
at Solapur Central Prison. ... **Appellant**

Versus
The State of Maharashtra
(At the instance of MIDC, P.I. Solapur,
Police Station.) ... **Respondent**

....

Mr.Jayant Joseph Bardeskar, Advocate for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 26th SEPTEMBER 2019.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order dated 13/04/2016 passed by the learned Special Judge under Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for the sake of brevity) Additional Sessions Judge, Solapur in Sessions Case No.169 of 2015 thereby convicting him of the offences punishable under Section 376 of the Indian Penal Code and as well as Section

6 of the POCSO Act. He is sentenced to undergo rigorous imprisonment for a period of ten years apart from direction to pay fine of Rs.10,000/- and in default he is directed to suffer simple imprisonment for six months.

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

- (a) The victim of the alleged crime is eight years old female child, who is examined as P.W.No.2. She was taking education in 3rd Standard at Praniti Shinde School of Solapur. Her father P.W.No.1 Iliyas was doing the work of collecting scrap and her mother/P.W.No.3 Naseem is a house-wife.
- (b) The alleged incident took place at Jay Photo Studio of Nayi Jindagi Area of Solapur at about 11.30 a.m. of 11/05/2015. As photographs of the victim female child/P.W.No.2 were required for the purpose of making application for Government Scholarship, P.W.No.3 Naseem had sent her daughter the victim female child/P.W.No.2 to the photo studio along with P.W.No.4 Sameer and another boy named Abid. P.W.No.4 Sameer is cousin of the victim female child/P.W.No.2 and had been to her house for spending summer vacation.
- (c) According to the prosecution case, the victim female child/P.W.No.2 accompanied by P.W.No.4 Sameer and Abid

had been to be Jay Photo Studio where the appellant/accused used to work. The appellant/accused, on the pretext of taking photograph of the victim female child/P.W.No.2 had committed penetrative sexual assault on her by putting his penis in her mouth. The victim female child/P.W.No.2 on returning to her house started vomiting. Her mother P.W.No.3 Naseem questioned her. Thereafter, the victim female child/P.W.No.2 disclosed the incident to her mother in presence of her cousin P.W.No.4 Sameer. Then, P.W.No.3 Naseem telephonically informed the incident to her husband P.W.No.1 Iliyas. They, then went to the photo studio and questioned the appellant/accused. He was then taken to the Police Station, MIDC, Solapur City and P.W.No.1 Iliyas lodged report, which has resulted in registration of Crime No.76 of 2015 against the appellant/accused.

- (d) Routine investigation followed. The spot of the incident came to be inspected in presence of P.W.No.7 Ameer Mohd. and spot panchanama (Exhibit 34) came to be recorded. The camera and the memory card came to be seized vide panchanama (Exhibit 32) in presence of P.W.No.5 Abdul Sattar Shaikh. The appellant/accused came to be arrested vide panchanama Exhibit 30 and clothes of the victim female child/P.W.No.2 came to be seized in presence of P.W.No.5 Abdul Sattar Shaikh. On completion of investigation, the appellant/

accused came to be charge-sheeted.

- (e) The charge came to be framed and 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 eight witnesses. Defence of the appellant/accused was that of false implication. The appellant/accused is examined as D.W.No.1 and has examined his employer Sushant Shinde as D.W.No.2.
- (g) 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 heard Shri.Bardeskar, the learned Counsel appearing for the appellant/accused at sufficient length of time. By taking me through the entire evidence adduced by the prosecution so also by pointing the defence evidence, he argued that the photo studio was having a shutter and then there was a glass partition. The spot of the incident was a shop block on the road having heavy traffic and other photo studios were also situated in the vicinity. Therefore, the incident, as alleged, could not happen at such busy place. He further argued that evidence of the victim female child/P.W.No.2 so also that of P.W.No.4 Sameer shows that apart

from the appellant/accused, there was one more person in photo studio and, therefore, the possibility of mistaken identity cannot be ruled out. The learned Counsel further argued that evidence of D.W.No.1 i.e. the appellant/accused goes to show that the shop block where the photo studio was located came to be purchased by a person named Hiroli and he was insisting D.W.No.2 Sushant Shinde to vacate that shop block. For getting shop block vacated, the appellant/accused is falsely implicated in the crime in question.

4 The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence.

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 Fate of the prosecution case to a large extent hinges on testimony of the victim female child/P.W.No.2 as well as another child witness P.W.No.4 Sameer, who happens to be cousin of the victim female child/P.W.No.2. Therefore, the Court will have to scrutinize the evidence of both these child witnesses carefully and cautiously as such witnesses are prone to the tutoring. Let us, therefore, examine what the victim female child/P.W.No.2 has

deposed about the incident. She is examined by the learned Special Judge without administering the oath to her due to her tender age. Her deposition is recorded in question-answer form. She has stated that accompanied by her cousin P.W.No.4 Sameer and neighbourer Abid, on the day of the incident, she had been to the photo studio for taking her photographs. As per her version, the photo studio was situated near her house. She stated that after taking her one snap, she was sent back to her house by the Photographer by saying that colour of her eyes is seen as red in the photographs. By washing her face, she again went back to the photo studio. Then, as per version of the victim female child/P.W.No.2, on the pretext of taking her photograph, the appellant/accused put her penis in her mouth. She further deposed that on reaching her house, she vomited and then she disclosed the incident to her mother P.W.No.3 Naseem as well as her brother P.W.No.4 Sameer. As per version of the victim female child/P.W.No.2, when she was taken for taking photograph, the appellant/accused had directed P.W.No.4 Sameer to go outside and as such, P.W.No.4 Sameer and Abid were sitting outside the photo studio. The victim female child/P.W.No.2 has duly identified the appellant/accused as a person who committed penetrative sexual assault on her. Even in cross-examination, the victim female child/P.W.No.2 reiterated her stand that she had been to the photo studio of the appellant/accused, who has seen by her on the screen of the television set. This was obviously because the

evidence was being recorded by securing presence of the appellant/accused by video conferencing. The victim female child/P.W.No.2 stated that adjacent to Jay Photo Studio, there are Afiya Photo Studio and City Photo Studio. She further admitted that one more boy was in the photo studio and she shouted at the time of the incident. She denied that she is tutored as to how to depose in the Court.

7 Now, let us consider the other evidence adduced by the prosecution on record so also the defence evidence in order to ascertain whether the victim female child/P.W.No.2 is a witness of truth or not. This is required to be done in view of the defence that the appellant/accused is falsely implicated in the crime in question for getting the shop block, where photo studio was managed, vacated from his employer. P.W.No.1 Iliyas, who happens to be the father of the victim female child/P.W.No.2 was not having any personal information regarding the incident in question which he heard from his wife. However, he had taken the appellant/accused to police station for lodging the FIR. P.W.No.3 Naseem is mother of the victim female child/P.W.No.2 and her evidence shows that as teacher of the victim female child/P.W.No.2 has asked her for her photographs for the purpose of getting the scholarship, she sent the victim female child/P.W.No.2 along with P.W.No.4 Sameer and Abid to the photo studio for snapping the photograph of the victim female child/P.W.No.2. This

witness further deposed that after some time they returned and the victim female child/P.W.No.2 started vomiting. As per version of P.W.No.3 Naseem, then the victim female child/P.W.No.2 told her that at the photo studio, Abid was standing outside and Sameer was told to go outside. Thereafter, the Photographer took her inside the photo studio and asked her close her eyes. Thereafter, the Photographer put his penis in her mouth. P.W.No.3 Naseem had told that she accompanied by her husband went to photo studio and took the appellant/accused to the police station. In cross-examination, this witness has stated that she is unable to state the distance between the photo studio and her house and is not aware about the fact that whether other shops are located adjacent to the said photo studio or not. She stated that she gives Rs.30/- to her daughter though Rs.40/- are required for getting the photographs. However, P.W.No.3 Naseem further clarified that she had told her daughter that Rs.10/- would be paid at the time of collecting the photographs.

8 Thus, it is clear from evidence of father as well as the mother of the victim female child/P.W.No.2 that they were not aware as to who was the owner of the photo studio and who was the employee of the owner of the photo studio. It was not suggested to either of them that they were interested in getting the shop block vacated, where the photo studio was operating, from the tenant. Rather it was not suggested to any of them as to the

fact that they were aware that the photo studio was operating in the tenanted premises owned by a particular person. It was not suggested to these witnesses that they were interested in getting that shop block vacated from the tenant for some reason. It is not suggested to any of these witnesses that purchaser of the shop block was known to them and that they had any interest in transfer of possession of the shop block.

9 On this backdrop, it is in evidence of the appellant/accused, who is examined himself as defence witness, that on 11/05/2015, the victim female child/PW.No.2 accompanied by two boys came to the photo studio and he snapped the photograph of the victim female child/PW.No.2. The appellant/accused deposed that he demanded an amount of Rs.50/- from those children, but they paid Rs.30/- to him and left the photo studio by saying that they will bring the remaining amount. Then, one woman came to the photo studio claiming to be the mother of the victim female child/PW.No.2. She quarreled with him on account of money and, therefore, he handed over copies of photograph of the victim female child/PW.No.2 to her. Thereafter, mob of 15 to 20 boys had been to the photo studio. They pelted stones at the studio and one person from the mob said that the work is done. This self-serving evidence is of no assistance to the defence in the event that nothing was suggested to the parents of the victim female child/PW.No.2 regarding their interest in vacating the shop

block. Similarly, cross-examination of the appellant/accused goes to show that for eight copies of the photographs, he charged Rs.40/- to the customer. In this view of the matter, how he demanded the amount of Rs.50/- from those children is not clarified by the appellant/accused. Similarly, how within the short period of time he was having photographs ready for delivery to P.W.No.3 Naseem is also not clarified by the appellant/accused. Even if what the appellant/accused has stated is held to be true, then also it is hard to believe that he is falsely implicated in the crime in question. He plainly stated that he handed over copies of photographs to P.W.No.3 Naseem without insisting for balance payment of Rs.10/-. As such, there was no cause that P.W.No.3 Naseem to create rucks by calling mob of people at the place.

10 The appellant/accused deposed that Yasmin Nasir Shaikh was the owner of the shop block where the photo studio was operating. The appellant/accused further deposed that he was employee of the photo studio run by D.W.No.2 Sushant Shinde in that shop block. It is further deposed by him that one Hiroli had purchased the said photo studio and had directed D.W.No.2 Sushant Shinde to vacate the shop block. The appellant/accused has admitted that such a request was made in writing and he is not aware about full name and address of Hiroli.

11 As against this, D.W.No.2 Sushant Shinde deposed that Yasmin Shaikh had sold the shop block to his relatives. But he is not knowing the name of the purchaser. As per version of D.W.No.2 Sushant Shinde, he agreed to vacate the shop block on availability of another shop. D.W.No.2 Sushant Shinde claims to be Photographer. His cross-examination shows that no notice was issued to him for vacating the said premises nor any suit was filed for this purpose. He was regularly paying the rent of that shop block. His cross-examination further shows that photograph of the victim female child/P.W.No.2 was snapped at his photo studio.

12 If really somebody wanted to get the shop block vacated by falsely implicating somebody for that purpose, then D.W.No.2 Sushant Shinde, who was the tenant of the said shop block was the perfect person, who could have been trapped for getting the desired result. D.W.No.2 Sushant Shinde was the tenant of the shop block where the photo studio was being operated. For getting the shop block vacated, D.W.No.2 Sushant Shinde could have been a better choice for false implication in the offence for securing vacant possession of the shop block. Even this tenant was not required in the writing to vacate the shop block. As such, it does not stand to reason that for getting the shop block of D.W.No.2 Sushant Shinde vacated, his employee i.e. the appellant/accused is falsely implicated in such type of heinous offence and that too by persons unconcerned with that property.

Non-questioning the parents of the victim female child/P.W.No.2 on this aspect falsifies the defence taken by the appellant/accused. Moreover, the defence is not probable and plausible for the reason that parents of a teen aged female child would not put future of their own daughter at stake by making such false allegation against the appellant/accused involving chastity of her daughter as well as honour of the family.

13 Version of the victim female child/P.W.No.2 is fully corroborated by P.W.No.4 Sameer. His evidence also shows that when they went to photo studio one person was sitting outside and one person was sitting inside the photo studio. He stated that Abid stood outside the photo studio and he himself and the victim female child/P.W.No.2 had gone inside the photo studio. As per version of this witness, the appellant/accused asked him to go outside the photo studio and, therefore, he waited along with Abid outside the photo studio. As per version of P.W.No.4 Sameer, as door of the photo studio was not opened despite passage of some time, he knocked the door and after some time, the victim female child/P.W.No.2 came out of the photo studio. P.W.No.4 Sameer has also spoken about subsequent event of vomiting by the victim female child/P.W.No.2 and disclosure of the incident by the victim female child/P.W.No.2 regarding penetrative sexual assault suffered by her.

14 P.W.No.4 Sameer is cross-examined to bring on record that one man and one boy were sitting in the photo studio. In cross-examination, P.W.No.4 Sameer reiterated that the man present in the photo studio was the appellant/accused and that he has personally seen the appellant/accused at that time. Some omissions were sought to be brought on record from evidence of this witness, but as those were not put to the Investigating Officer, those are not proved.

15 The victim female child/P.W.No.2 as well as P.W.No.4 Sameer has categorically stated about identity of the appellant/accused as the perpetrator of the crime in question. It was not suggested to any of these witnesses that the crime in question was committed not by the appellant/accused but by the other person who was present at the photo studio. In this view of the matter, it cannot be said that identity of the appellant/accused is doubtful.

16 It is sought to be demonstrated that happening of the incident is not probable because there was a glass partition to the photo studio and that glass was transparent. Perusal of the spot panchanama (Exhibit 34) shows that glass panel was broken probably because of ransacking the studio by public after the incident. There were some shops adjacent to the photo studio which was on the road having traffic. However, evidence of

P.W.No.4 Sameer shows that the victim female child/P.W.No.2 was taken inside and the door was closed. It is a matter of common knowledge that photographs are not snapped in the photo studio at a place open and visible to all. Photographs are always snapped in a hall with proper light and such hall is a close place. Therefore, it cannot be said that as the place of the incident was visible to all, the incident, as alleged, is improbable.

17 In the result, the appeal is devoid of merit and, therefore, the Order :

ORDER

The appeal is dismissed.

(A.M.BADAR, J.)