

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.339 OF 2018
WITH
CRIMINAL APPLICATION NO.1768 OF 2018
IN
CRIMINAL APPEAL NO.339 OF 2018**

RAMESH MAIKU KANOJIYA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Sushil Inamdar, Appointed Advocate for the Appellant.

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

CORAM : A. M. BADAR, J.

DATE : 16th SEPTEMBER 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 30th March 2017 passed by the learned Designated court under the 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.432 of 2014, thereby convicting him of offences punishable under Sections 376, 506 and 342 of the Indian Penal Code as well as

under Sections 4, 8 and 12 of the POCSO Act. The learned trial court was pleased to sentence the appellant/accused to suffer rigorous imprisonment for 7 years apart from directing him to pay fine of Rs.25,000/- and in default, to undergo rigorous imprisonment for 6 months for the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act, but had not awarded any separate punishment for offences punishable under Sections 506 and 342 of the Indian Penal Code as well as under Sections 8 and 12 of the POCSO Act by holding that punishment for offences under Sections 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act is greater in degree than offences punishable under Sections 506 and 342 of the Indian Penal Code as well as under Sections 8 and 12 of the POCSO Act. It is reported that State has not challenged this judgment and order of conviction and resultant sentence despite the fact that instead of punishing the appellant/accused for the offence punishable under Section 6 of the POCSO Act, he is convicted and sentenced for the offence punishable under Section 4 of the POCSO Act, so also, no separate punishment was inflicted

on the appellant/accused for offences of criminal intimidation and wrongful confinement of the victim female child.

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

- (a) The PW1/victim female child, at the relevant time, was below 12 years of age. She was taking education in 6th Standard at the Municipal school at Mumbai and was residing along with her parents and other relatives including First Informant/PW2 Manda. The appellant/accused was having a shop in the locality and he was doing the work of ironing the clothes from that shop and the PW1/victim female child used to visit the shop of the appellant/accused for delivering clothes for ironing.
- (b) The incident in question, allegedly, took place on 7th July 2014. On that day, after returning from school, the PW1/victim female child had been to house of her friend

Radha. While she was returning to her own house, the appellant/accused called her inside his shop. He then put down the shutter of his shop and asked her to remove her knicker. When the PW1/victim female child refused, the appellant/accused pulled down her pant and knicker and committed penetrative sexual assault on her.

- (c) PW3 Kartik Naidu, resident of the locality, was informed by one boy that the appellant/accused had taken the PW1/victim female child inside his shop and therefore, PW3 Kartik Naidu had been to the shop of the appellant/accused. On finding that shutter of the shop of the appellant/accused was down, he knocked it. The appellant/accused informed him that the shop would be opened at 4 p.m., by partially opening the shutter. PW3 Kartik Naidu waited in front of the shop and after sometime, the PW1/victim female child came out of the shop and disclosed the incident to PW3 Kartik Naidu. He, then, called PW2 Manda, grandmother of the PW1/victim female child on the spot. The incident was

also narrated to her. She, then, lodged report of the incident Exhibit 13 on 7th July 2014 itself with Police Station D.N.Nagar, Mumbai, and that is how Crime No.428 of 2014 came to be registered against the appellant/accused.

- (d) The PW1/victim female child was sent for medical examination to the Cooper Hospital where she was examined by PW6 Dr.Nithya Iyer. Clothes of the PW1/victim female child were taken to the police station by her aunt Reshma and as they were found to be wet, after effecting seizure thereof in presence of PW5 Anil Rale, those were kept in the armoury of the police station, which was then locked. On the next day i.e. on 8th July 2014, those dried clothes came to be seized under Panchnama Exhibit 22 in presence of PW4 Vijaykumar Gupta. The appellant/accused came to be arrested and his clothes were also seized. Routine investigation followed and ultimately, the appellant/accused came to be charge-sheeted.

- (e) The learned trial court framed Charge for offences punishable under Sections 4, 8 and 12 of the POCSO Act as well as under Sections 376, 506 and 342 of the Indian Penal Code. The appellant/accused, upon being explained the Charge, 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. It is seen that the learned trial court had also appointed a Court Commissioner, who has furnished his report Exhibit 48, after examining panch witness Shamsuddin Habib Khan. 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 the learned advocate appointed to represent the appellant/accused at the costs of the State. He argued that evidence of the PW1/victim female child is not worth

relying. Though in the Seizure Panchnama, white stains were seen on seized pants of the PW1/victim female child, the Chemical Analyser's Report shows that semen was found on T-Shirt of the PW1/victim female child and therefore, evidence of the prosecution is unreliable. According to the learned advocate for the appellant/accused, there is no other evidence to connect the appellant/accused with the crime in question. He argued that medical evidence is also not supporting the case of the prosecution.

4 The learned APP supported the impugned judgment and order of conviction as well as the resultant sentence.

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

6 Considering the nature of offence, case of the prosecution hinges on the testimony of the PW1/victim female

child, who happened to be 11 years of age, at the time of the alleged incident in question. The defence has not disputed the age of the PW1/victim female child. The PW1/victim female child has categorically deposed that she was 11 years old and was taking education in the Municipal school at D.N.Nagar. This part of her testimony is not challenged by the defence. In cross-examination of PW6 Dr.Nithya Iyer, the defence has elicited the fact that when the PW1/victim female child was brought before her, the PW1/victim female child was 10 years of age. Apart from this, PW9 Kishor Sawant, the Investigating Officer, had also collected bonafide certificate of the PW1/victim female child from the Municipal school, which is marked as Exhibit 42 by the learned trial court. This bonafide certificate shows that the PW1/victim female child was born on 5th August 2004. With this evidence, it needs to be held that the prosecution has established the fact that the PW1/victim female child was below 12 years of age, at the time of the alleged incident.

7 Now let us examine whether the prosecution has established that after wrongfully confining the PW1/victim female child and by criminally intimidating her, the appellant/accused had committed penetrative sexual assault on her on 7th July 2014.

8 The PW1/victim female child, in her chief-examination, has categorically deposed that when she was returning to her house, the appellant/accused called her in his shop. After pulling down the shutter of his shop, he asked her to take out her knicker, but she refused, and therefore, by forcibly taking out her knicker, the appellant/accused had committed penetrative sexual assault, which resulted in discharge of semen on her pant.

9 It is evidence of the PW1/victim female child that she was knowing the appellant/accused as he was running a shop, where he was doing business of ironing clothes and she was visiting that shop for delivering clothes for ironing. She had duly identified the appellant/accused before the court. She further

deposed that, when she came out of the shop, she disclosed the incident to PW3 Kartik Naidu and thereafter, to her grandmother PW2 Manda and to her aunt.

10 It is well settled that evidence of child witness is required to be scrutinized with due care and caution as a child witness is prone to tutoring. However, if on deep scrutiny of evidence of such witness, the same is found to be truthful, then the same can be acted upon. Let us, therefore, test evidence of this child witness on the touchstone of material brought on record from her cross-examination. It is revealed from her cross-examination that when she was called inside the small shop, there were no customers thereat. She accepted the fact that shop of the appellant/accused always used to be full of clothes and on the day of the incident also, there were lot of clothes lying in the shop. Her cross-examination further reveals that there was nobody on the road when she was called inside the shop by the appellant/accused. Similarly, there were no shops adjacent to the shop of the appellant/accused, which was at the end of the

locality. Similarly, the PW1/victim female child admitted in her cross-examination that she raised shouts but neither PW3 Kartik Naidu nor her parents came inside the shop to rescue her. In cross-examination, she further stated that her pant was not totally removed but it was partially removed, so also her knicker was not fully removed.

11 From material elicited from cross-examination of the PW1/victim female child, it is clear that at the time of the incident, there was nobody in the vicinity to render help to the PW1/victim female child. No doubt, she claimed to have shouted and stated that PW3 Kartik Naidu did not come to her rescue, but it is not in her evidence that she was called inside the shop in presence of PW3 Kartik Naidu. As such, PW3 Kartik Naidu rushing to the shop for rescuing the PW1/victim female child is out of question.

12 So far as evidence of PW3 Kartik Naidu is concerned, the learned trial court had not granted opportunity of cross-

examining him to the defence, and as such, his evidence cannot be used against the appellant/accused. By noting down absence of the advocate of the appellant/accused, the learned trial court asked whether the appellant/accused was willing to cross-examine PW3 Kartik Naidu. By noting down that he declined to cross-examine the witness, evidence of PW3 Kartik Naidu was closed by the learned trial court. This approach of the learned trial court is not in consonance with law, and more particularly, in view of provisions of Sections 303 and 304 of the Cr.P.C. which provides that an accused is entitled for legal aid in absence of his counsel, it becomes the duty of the court to provide legal aid to the accused in such eventuality. Mandate of Article 21 of the Constitution is ignored by the learned trial court while adopting such course of action. Therefore, evidence of PW3 Kartik Naidu cannot be used to further the case of the prosecution. (See **(a) Baliram Madhukar Dalvi vs. State of Maharashtra**¹, **(b) Hussainara Khatoon and Others (IV) vs. Home Secretary, State of Bihar, Patna**², **(c) Suk Das and another vs. Union Territory of**

1 2008 ALL MR (Cri) 2042

2 (1980) 1 Supreme Court Cases 98

Arunachal Pradesh³, (d)Khatri and Others (II) vs. State of Bihar and Others⁴, (e) Madhav Hayawadanrao Hoskot vs. State of Maharashtra⁵ and (f) Sagri vs. State of Madhya Pradesh⁶).

13 Thus, scrutiny of evidence of the PW1/victim female child shows that there is nothing in her cross-examination to doubt her version in respect of the incident. This child witness has candidly stated that she had personally given history of the incident to the doctor, who has written the same in English language. Evidence of this witness does not reflect that she was tutored and had deposed something which had not actually happened. Similarly, her evidence does not reflect that this child witness had an axe to grind against the appellant/accused. In this view of the matter, I see no reason to doubt testimony of the PW1/victim female child.

3 AIR 1986 Supreme Court 991

4 (1981) 1 Supreme Court Cases 627

5 (1978) 3 Supreme Court Cases 544

6 (1991) 1 Crimes (HC) 580

14 PW2 Manda is grandmother of the PW1/victim female child. She is the First Informant, who lodged report Exhibit 13 on the basis of disclosure made to her by the PW1/victim female child. It is in her evidence that PW3 Kartik Naidu had informed her about the incident and therefore, she went to the spot of the incident. Upon being asked, her granddaughter i.e. the PW1/victim female child, had disclosed the incident to her. From cross-examination of this witness, it is brought on record that the PW1/victim female child was sitting on the chair at the spot of the incident as the people, who gathered on the spot of the incident, had made her to sit there. It was attempted to show that PW3 Kartik Naidu and the appellant/accused were not having cordial relations but this witness has stated that she is not aware about this fact. It is, thus, clear from evidence of PW2 Manda as well as that of the PW1/victim female child that soon after the incident, the PW1/victim female child had disclosed the incident to her grandmother. Thus, evidence of PW2 Manda is corroborating version of the PW1/victim female child.

15 PW6 Dr.Nithya Iyer had medically examined the PW1/victim female child on the day of the incident i.e. on 7th July 2014 itself, after taking the history from the PW1/victim female child. The same was recorded by her in the Medico Legal Case papers. Perusal of the Medico Legal Case papers proved by PW6 Dr.Nithya Iyer, shows that the PW1/victim female child had immediately disclosed the attending Medical Officer that it was the appellant/accused, who had committed penetrative sexual assault on her. Thus, the papers of Medico Legal Case proved by PW6 Dr.Nithya Iyer also corroborate the version of the PW1/victim female child.

16 Evidence of PW6 Dr.Nithya Iyer shows that there were no signs of force or forcible penetration on person of the PW1/victim female child. This Medical Officer concluded that as per history narrated by the victim, there was a partial penetration. It is not always necessary that version of the victim of the sexual assault should be corroborated by the medical evidence. In the case of **State of Punjab vs. Gurmeet Singh**⁷ the Honourable Apex

7 1996 Cri.L.J. 172

Court took a view that the Courts dealing with the rape cases should shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

“....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.”

17 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](#)⁸, the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and

8 (1998) 8 SCC 635

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.

18 The Honourable Apex Court in **B.C.Deva v. State of Karnataka**⁹, 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.”

9 (2007) 12 SCC 122

19 As version of the PW1/victim female child is found to be trustworthy and reliable, absence of positive evidence regarding injuries on the PW1/victim female child is of no consequence. Section 3 of the POCSO Act makes it clear that even slightest penetration is sufficient to constitute the offence of penetrative sexual assault on a child.

20 The clothes of the PW1/victim female child were produced before the police on 7th July 2014 itself and as seen from evidence of the Investigating Officer, they came to be seized vide Panchnama Exhibit 27. This fact is also vouched by PW5 Anil Rale. Those wet clothes were then kept for drying in the armoury of the police station in locked condition. Evidence of PW4 Vijaykumar Gupta shows that those clothes were then seized on 8th July 2014 vide Panchanama Exhibit 22, as by that time, those clothes had dried. Seizure Panchnama at Exhibit 22 shows stains on the pant of the PW1/victim female child. Those clothes were sent for chemical analysis and the Chemical Analyser's Report Exhibit 51 shows that there was stain of semen on half T-Shirt of

the PW1/victim female child, which was seized vide Panchnama Exhibit 22. Stain on the pant, seen by the Investigating Officer and panchas, does not necessarily mean that it was the stain of semen. Forensic examination of the PW1/victim female child reflected presence of semen on her T-Shirt and this aspect certainly corroborates the version of the PW1/victim female child.

21 Defence of false implication because of quarrel over the issue of drinking water between the appellant/accused and PW2 Manda reflected in statement under Section 313 of the Code of Criminal Procedure of the appellant/accused is also not useful for furthering the defence of the appellant/accused for the simple reason that this theory was not put up to PW2 Manda.

22 It is, thus, clear that, by adducing cogent and trustworthy evidence, the prosecution has certainly established that after wrongfully confining the PW1/victim female child in his shop and by criminally intimidating her, the appellant/accused had committed penetrative sexual assault on her. In this view of

the matter, no case for interference in conviction of the appellant/accused is made out. The appeal, as such, is devoid of merits, and therefore the order :

ORDER

- i) The appeal is dismissed.
- ii) Consequently, Criminal Application bearing No.1768 of 2018 also stands disposed off.

(A. M. BADAR, J.)