

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1558 OF 2018

SHIVRAM @ BALU KHANDU JAGTAP)...APPELLANT

V/s.

**1) THE STATE OF MAHARASHTRA)
2) SARITA SANTOSH GUPTA)...RESPONDENTS**

Mr.D.H.Kumthekar, Advocate for the Appellant.

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

CORAM : A. M. BADAR, J.

DATE : 3rd OCTOBER 2019

JUDGMENT :

1 By this appeal, the appellant/convicted accused is challenging the judgment and order dated 3rd November 2018 passed by the learned Designated Judge for the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act for the sake of brevity), Greater Mumbai, in POCSO Special Case No.333 of 2016 convicting him of offences

punishable under Sections 363, 376 and 354 of the Indian Penal Code as well as under Sections 4 and 8 of the POCSO Act. For the offence punishable under Section 363 of the Indian Penal Code, the appellant/convicted accused is sentenced to suffer rigorous imprisonment for 5 years apart from direction to pay fine of Rs.1,000/- and in default, to undergo further rigorous imprisonment for 1 month. For offences punishable under Section 376 of the Indian Penal Code and under Section 4 of the POCSO Act, he is separately sentenced to suffer rigorous imprisonment for 15 years apart from direction to pay fine of Rs.2,000/- and in default, to undergo further rigorous imprisonment for 2 months. Similarly, for offences punishable under Section 354 of the Indian Penal Code and under Section 8 of the POCSO Act, he is separately sentenced to suffer rigorous imprisonment for 5 years apart from direction to pay fine of Rs.1,000/- and in default, to undergo further rigorous imprisonment for 1 month. Substantive sentences are directed to run concurrently.

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

(a) PW1 Sarita, who is mother of the victim female child/PW5 used to reside at Siddharth Colony of Chembur, Mumbai, along with her husband and three children. Her children used to study at B.D.Shukla School, Mumbai. The victim of the crime in question is a female child, who at the relevant time was aged about 5 years. The incident in question allegedly took place after 3.00 p.m. of 8th May 2016. On that day, father of the victim female child/PW5 returned to his house in the afternoon. He gave one rupee to the victim female child/PW5 for having a chocolate. The victim female child/PW5 then left the house for purchasing the chocolate. She, then, went for playing.

(b) According to the prosecution case, the appellant/convicted accused is the resident of the locality where the victim female child/PW5 used to reside with her parents. He met the

victim female child/PW5 and allured her with an ice-candy. He took her at the mezzanine floor of the house of PW6 Sajan Rupwate. At that time, inmates of that house had been to Nashik for attending a marriage. The appellant/convicted accused used to fill water at the house of PW6 Sajan Rupwate and therefore, he had left the keys of that house with neighbour Vandana Ugde. That is how, the appellant/convicted accused came in possession of the keys of that house. After taking the victim female child/PW5 to that house, the appellant/convicted accused removed her underwear and inserted his finger in her private part. She started weeping. The appellant/convicted accused applied coconut oil on her vagina and gave namkeen to her for eating. He, then, took her downstairs and left her on the pretext that he was going for purchasing the ice candy.

- (c) The victim female child/PW5 returned to her house and at that time, her lips were red. Upon being questioned by her mother – PW1 Sarita, she told her that the uncle had given

ice candy to her for eating. Immediately thereafter, the victim female child/PW5 also disclosed to her mother that the said uncle had taken her to mezzanine floor of the house and committed penetrative sexual assault on her.

- (d) Upon hearing the incident of penetrative sexual assault on her daughter i.e. the victim female child/PW5, PW1 Sarita took her daughter to the locality by asking her to show who is that uncle. Her daughter – the victim female child/PW5 then took her to a chicken shop and showed one person standing in front of that shop. She disclosed that the said person had committed sexual assault on her. PW1 Sarita then identified the said person as the appellant/convicted accused. She tried to catch hold of him. However, he ran away. Thereafter, PW1 Sarita went to Police Station Chembur and lodged the First Information Report (FIR) Exhibit 15 which resulted in registration of Crime No.155 of 2016 against the appellant/convicted accused.

- (e) Routine investigation followed. The victim female child/PW5 was sent for medical examination to the Sion Hospital, Mumbai. The spot was inspected in presence of PW2 Pradeep Yadav – panch witness and Spot Panchnama Exhibit 17 came to be prepared on 9th May 2016. Bottle of oil as well as namkeen “shev” lying there came to be seized from the mezzanine floor of the said house vide said Spot Panchnama. Clothes of the victim female child/PW5 so that of the appellant/convicted accused came to be seized in presence of PW3 Vicky Gupta vide Panchnama Exhibit 19 on 11th May 2016. Blood stained pillow covers lying on the spot of the incident came to be seized in presence of PW4 Ratna Vimal vide Seizure Panchnama Exhibit 21 on 9th May 2016. On completion of routine investigation, the appellant/ convicted accused came to be charge-sheeted.
- (f) The learned trial court framed and explained the Charge to the appellant/convicted accused. He pleaded not guilty and claimed trial.

- (g) In order to bring home the guilt to the appellant/convicted accused, the prosecution has examined in all nine witnesses. Defence of the appellant/convicted accused was that of total denial.
- (h) 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 counsel appearing for the appellant/convicted accused. He vehemently argued that evidence of the prosecution is not consistent and particularly PW1 Sarita and PW2 Pradeep Yadav are not corroborating each other. He further argued that age of the victim female child/PW5 is not proved. Medical evidence is not corroborating the version of the victim female child/PW5 regarding the penetrative sexual assault. The learned counsel further argued that according to the prosecution case, the victim female child/PW5 was playing with boys in the locality, but statement of not a single boy is recorded.

The Test Identification Parade was not conducted by the prosecution. The learned counsel further argued that as the medical evidence is not corroborating the version of the victim female child/PW5 and as hymen of the victim female child/PW5 was found intact, neither the offence punishable under Section 4 of the POCSO Act nor that of Section 376 of the Indian Penal Code is proved.

4 The learned APP supported the impugned judgment and order of conviction and 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 In the case in hand, the prosecution will have to prove that the victim female child/PW5 was a child as defined by Section 2(d) of the POCSO Act and at the time of commission of the alleged incident, she was below 18 years of age. The

prosecution has placed on record Birth Certificate of the victim female child/PW5 issued by the Sub-Registrar under the Registration of Births and Deaths Act, 1969. This Birth Certificate is issued under the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 as well as Rules 8 and 13 of the Maharashtra Registration of Births and Deaths Rules, 2000. As per provisions of Rule 9 of the Maharashtra Registration of Births and Deaths Rules, 1976, this Certificate is issued by the Sub-Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969. Section 7 thereof deals with appointment of Registrars for each local area comprising the area within the jurisdiction of the Municipality, Panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. The Act provides for maintenance of register for recording birth and death within the local area. That is how, certificate came to be issued by the Sub-

Registrar as per provisions of Sections 12 and 17 of the said Act. The Birth Certificate, as such, is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. The same is admissible in evidence by mere production thereof in view of provisions of Section 77 of the Evidence Act. Section 17 of the Registration of Births and Deaths Act, 1969, provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The Birth Certificate is, infact, the extract of Birth Register in respect of entry of birth of the victim child/PW5, and as such, admissible in evidence. Section 35 of the Evidence Act, 1872, makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes the relevant fact and admissible in evidence. Section 35 of the Indian Evidence Act lays

down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. It is, thus, clear that the Birth Certificate issued by the statutorily appointed competent authority is relevant and admissible. The same is a public document and it constitutes primary evidence. Proof of contents of a public document can be had by production thereof as envisaged by Section 77 of the Evidence Act. In this view of the matter, no formal proof of the Birth Certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969 and Rules framed thereunder is required.

7 This court in the case of **Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.**¹ has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“Rule 12(3) : In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

- (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the

1 (2013) 14 SCC 637

Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

8 The Birth Certificate at Exhibit 44A shows that the victim female child/PW5 was born on 27th July 2011 and the incident in question took place on 8th May 2016. As such, at the relevant time, she was about 5 years of age and certainly below 12 years of age. The learned trial court, as such, ought to have framed the Charge for the offence punishable under Section 6 of the POCSO Act. However, no such Charge for the aggravated penetrative sexual assault was framed. The appellant/convicted accused is not convicted for the offence of aggravated penetrative

sexual assault punishable under Section 6 of the POCSO Act. Thus, State has not challenged the impugned judgment and order on that count.

9 Be that as it may, now let us examined evidence of the victim female child/PW5. As stated, she was about 5 years of age and as such, she is a child witness. The question is whether the testimony of the child witness can be relied upon for basing conviction in such a serious offence. The Hon'ble Supreme Court in Radhey Shyam Vs. State of Rajasthan² has laid down the law regarding appreciation of evidence of child witness. Paragraph 12 of that judgment reads thus :

“12 In Panchhi, (1998 SCC (Cri) 1561) after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy pray to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate

2 (2014) 5 SCC 389

corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles."

10 Now let us examine whether evidence of the victim female child/PW5 is reliable and trustworthy and whether it is free from infection of tutoring. It is in evidence of the victim female child/PW5 that by taking amount of one rupee from her father, she purchased a chocolate and ate it. Thereafter, she was

playing and one uncle came. He told that he would give an ice candy to her, if she comes with him. As per version of the victim female child/PW5, she then went with that uncle to his home. She was taken at the first floor. He laid her down, removed her underwear and inserted his finger in her private part. Thereafter, he gave namkeen "shev" to her for eating. She was then taken downstairs. The victim female child/PW5 further stated that then that uncle told her that he would bring ice candy for her. This is the narration of incident by the victim female child/PW5 before the court. In cross-examination she admitted that she had been to the court twice or thrice on earlier occasion along with her parents and police uncle. She admitted that she never went to the house of the appellant/convicted accused till date. She admitted that at the police station, police in uniform made inquiries from her. She stated in her cross-examination that after the incident, the appellant/convicted accused was not shown to her and she had seen him for the first time in the court. Some minor omissions were sought to be brought on record from her cross-examination but those are not on material particulars. Not visiting the house of

the appellant/convicted accused is an irrelevant factor, as according to the prosecution case, the victim female child/PW5 was taken by the appellant/convicted accused to the house of PW6 Sajan Rupwate and not to his own house. Inquiry with the victim female child/PW5 by the police cannot throw any doubt on her version. Similarly, if the victim female child/PW5 attended the court for the purpose of recording her evidence and if that work was not done, the victim female child/PW5 cannot be blamed. Cross-examination of the victim female child/PW5 does not show that she was tutored by anybody else to depose a lie against the appellant/convicted accused.

11 As per version of the victim female child/PW5, after the incident she returned to her house. Therefore, evidence of her mother PW1 Sarita becomes important. PW1 Sarita has stated that when the victim female child/PW5 returned back, she noticed her lips and hands were stained with red colour. Her daughter then informed her that it was because she had ice candy given by the uncle. PW1 Sarita disclosed that her daughter i.e. the victim

female child/PW5 narrated the incident to her by stating that she was taken to the mezzanine floor of the house by the uncle and there the said uncle inserted finger in her vagina. PW1 Sarita stated that the victim female child/PW5 had disclosed to her that as she started crying, said uncle applied oil to her vagina and gave some namkeen to her for eating. As per version of this mother – PW1 Sarita, then her daughter – the victim female child/PW5 took her near the chicken shop and told that the person standing in front of that chicken shop is the same uncle, who had taken her. Evidence of PW1 Sarita shows that she was knowing that person as he used to be at the flour mill in the locality. She, therefore, attempted to apprehend him but he ran away. Hence, as per version of PW1 Sarita, she went to Chembur Police Station and lodged report Exhibit 15 on the very same day. From cross-examination of this witness, some insignificant omissions are brought on record. It is further brought on record that she was not on visiting terms with the appellant/convicted accused nor she used to talk with him.

12 Perusal of evidence of PW1 Sarita shows that she has proved the former statement made to her by her daughter – the victim female child/PW5, which gives vivid details of the incident of commission of penetrative sexual assault on the victim female child/PW5 by the appellant/convicted accused. While in the witness box, the victim female child/PW5 as well as her mother PW1 Sarita have duly identified the appellant/convicted accused as the person who committed penetrative sexual assault on the victim female child/PW5 and the person who was pointed out as the perpetrator of the crime in question, by the victim female child/PW5.

13 During the course of investigation, the Spot Panchnama came to be prepared in presence of PW2 Pradeep Yadav. As per version of this panch witness, on 9th May 2016 itself, this was done. During inspection of this spot, this panch witness found bottle containing oil on the spot of the incident, so also namkeen “shev” thereat. While effecting spot panchnama Exhibit 17, those articles came to be seized by the Investigator.

This evidence reflecting situation prevalent on the spot of the incident, corroborates version of the victim female child/PW5 in respect of penetrative sexual assault on her.

14 Evidence of PW6 Sajan Rupwate shows that the house, where the incident took place, belongs to him and he and his family members were away from his house from 6th May 2016 as they had gone to attend the marriage at Nashik. Evidence of this witness shows that he was called back due to the incident and in presence of the police, he broke open the lock of his house. Thereafter, the spot panchnama came to be prepared. This implies that situation on the spot of the incident was undisturbed till PW6 Sajan Rupwate opened his house, in the night intervening 8th May 2016 and 9th May 2016. His evidence further shows that the appellant/convicted accused used to fetch water at his house and for that purpose, he had given keys of his house to his neighbour Vandana Ugde. Evidence of the victim female child/PW5 stands corroborated by this evidence.

15 The victim female child/PW5 was sent for medical examination to the Sion Hospital, Mumbai. Report of her medical examination is at Exhibit 23. The same was read in evidence by exhibiting it by the learned trial court because the same came to be admitted by the defence. Perusal of this undisputed report of medical examination of the victim female child/PW5 shows that she was taken to the Sion Hospital immediately after the incident and on 8th May 2016 itself. History given to the Medical Officer by the victim female child/PW5 as well as her mother – PW1 Sarita is also reflecting in this undisputed document. History recorded by the Medical Officer is to the effect that the victim female child/PW5 was taken by the appellant/convicted accused. She was given some snacks for eating. The victim female child/PW5 further stated that the appellant/convicted accused removed undergarments of the victim female child/PW5 and inserted his finger into her vagina. Thus, soon after the incident, the victim female child/PW5 had given the history of penetrative sexual assault on her which is reflected from the medical case papers.

16 Report of the medical examination of the victim female child/PW5 at Exhibit 23 shows that hymen of the victim female child/PW5 was intact and there was no bleeding from her vagina. On this aspect, material elicited from cross-examination of the victim female child/PW5 is relevant. She was questioned by the cross-examiner as to, to what extent the finger was penetrated in her vagina. She answered that the penetration was slight. This material from cross-examination of the victim female child/PW5 clarifies as to why her hymen was intact and there was no bleeding. Even otherwise, 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](#)³, 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

³ (1998) 8 SCC 635

over board an otherwise cogent and trustworthy evidence of the prosecutrix.

17 The Honourable Apex Court in B.C.Deva v. State of Karnataka⁴, 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.”

4 (2007) 12 SCC 122

18 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 imposed on the appellant/convicted accused by the learned trial court. The appeal, as such, is devoid of merits. Therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)