Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1006 OF 2019

Ali Mohammed Shaikh
Age : 28 years; Indian inhabitant
Residing at : Dhobi Ghat, Patel Wadi,
Near Naka Dahisar (W), Mumbai
(Presently lodged in Amravati Central Prison,
Amravati) ....Appellant

Vs.

1. State of Maharashtra
(At the istance of Kandivali
Police Station)

2. XYZ ..... Respondents

Mr.Tanveer Khan through Legal Aid, for the Appellant.
Dr.F.R.Shaikh, APP for the Respondent – State.

CORAM : S. S. SHINDE &
M. S. KARNIK, JJ

RESERVED ON : 12th AUGUST, 2020
PRONOUNCED ON : 14th DECEMBER, 2020

JUDGMENT (PER M. S. KARNIK, J) :

. The challenge in this Appeal is to the judgment rendered by the Court of Special Judge under the Protection of

Children From Sexual Offences Act, 2012 (for short 'POCSO' Act) at Borivali Division, Dindoshi, Mumbai whereby the appellant is convicted for the following offences and sentenced as under :

a) under section 363 Indian Penal Code (for short IPC) Rigorous Imprisonment for 7 years and fine of Rs.2,000/-, in default of payment of fine, to suffer Simple Imprisonment for 3 months ;

(b) under section 366(A) of IPC, Rigorous Imprisonment for 7 years and fine of Rs.2000/- , in default of payment of fine, Simple Imprisonment for 3 months;

(c) under section 326 of IPC Rigorous Imprisonment for 7 years and fine of Rs.2,000/-, in default of payment of fine, to suffer Simple Imprisonment for 3 months;

(d) under section 376 of IPC and under section 5 read with section 6 of the POCSO Act, Rigorous Imprisonment for life and fine of Rs.5,000/-, in default of payment of fine, Simple Imprisonment of 6 months.

The facts of the prosecution case in brief are as under :-

2. At around 23.00 hours on 20/08/2014, the victim aged 6 to 7 years, her mother (P.W.1), her 4 year old brother & grandmother (P.W.2) were sleeping on the platform near Kala Hanuman Mandir, Thakkar Dairy, M.G.Road, Kandivali (West),

Mumbai. The victim and her mother were awake till 2.30 a.m.. Thereafter they fell asleep. In the morning at about 6.00 a.m., when P.W.1 woke up, she realised that the victim was not in her bed. She went in search of her daughter. She found the victim crying in a nearby lane. The victim's grandmother was by her side. She noticed a broom inside the private part of the victim. There was blood around the person of the victim. The passersby gathered there on hearing her cry. The first informant took the victim to Dr. Babasaheb Ambedkar Hospital for medical treatment.

3. The police came to the hospital and registered the crime under sections 363, 366(A), 376 and 326 of IPC and under section 3(A) (B) and 4 of POCSO Act against unknown person. According to victim's mother – first informant, one person by name Anand was eyeing the informant and her daughter with some ill intention. P.W.1 suspected him to be the perpetrator. The police searched for the person in the light of information disclosed by the informant and they nabbed the appellant - Ali Mohammed Shaikh. The informant told the police that he is the same person who was eyeing them with ill intention and that he was the one who took the victim to a lonely place and sexually abused her. The police collected C.D.R. of the mobile phone

which reveals that the accused was in that area at the relevant time. The appellant came to be arrested. The clothes of victim and accused were seized and sent to C.A. for analysis. The charge-sheet was submitted by Investigating Officer -Anil Desai of Kandivali Police Station.

4. The charge came to be framed at Exhibit 9 under sections 363, 366(A), 376, 326 of IPC and under sections 3 (A) (B) & 4 of the POCSO Act. The charge was later altered by the designated Judge. The charge under section 5 read with section 6 of the POCSO Act at Exhibit 9-A also came to be framed against the appellant. The appellant – accused denied the charge and claimed to be tried. The defence of the accused is of false implication. According to the accused, there is no evidence to show that he is the author of the crime.

5. The prosecution examined as many as 11 witnesses and relied upon as many as 30 documents in support of the prosecution case. The Special Judge convicted the appellant as hereinbefore mentioned.

6. Learned Counsel for the appellant submitted that the

learned Special Judge committed an error in convicting the appellant as possibility of false implication cannot be ruled out. Inviting our attention to the medical evidence on record, other evidences and deposition of the prosecution witnesses, he would submit that it would be unsafe to convict the accused as the prosecution has failed to prove the involvement of the accused beyond all reasonable doubt.

7. Learned APP on the other hand submitted that it is the accused who is responsible for the commission of offence alleged. The evidence on record supports the prosecution case that the accused has committed the offence beyond all reasonable doubt. Learned APP invited our attention to the findings recorded by the trial Court and submitted that the said findings are based on a correct appreciation of evidence on record and therefore do not call for any interference.

We have heard learned Counsel for the appellant and learned APP at length. With the assistance of learned Counsel for the parties, we have gone through the evidence on record.

CONSIDERATION

8. The prosecution examined as many as 11 witnesses.

The first informant – mother of the victim is examined as P.W.1 at Exhibit 17. The grandmother of the victim is examined as PW.2 at Exhibit 19. Mr.Ulkesh Sudhir Patel deposed as P.W.3. It is alleged that the victim was assaulted by the accused in the open varandah of the residential house belonging to P.W.3. P.W.3 identified the articles found at the spot. Mr.Arvind Gopal Gupte - P.W.4 is examined as a panch witness for the spot panchanama at Exhibit 21. The panchanama is at Exhibit 22. The victim is examined as P.W.5 at Exhibit 27.

9. The victim was brought to the hospital on 21/08/2014. She was examined by Dr.Pawan Ramdarji Sabale (P.W.6) at Exhibit 29. She was unable to walk as the broom was thrust inside her vagina. The same was removed at the hospital. On examination it was observed that 25 c.m. part of broom was inside the vaginal canal. The broom length was 90 cm with circumference of 11 c.m. The victim underwent an operation. On examination of the victim, following injuries were noticed by P.W.6.

> "1. Multiple crescentric abrasions of seize ranging from 0.5 cm. X 0.1 cm. to 2 cm. X 0.1 cm., reddish in colour were seen in an area of 5 x 5 cm. over right anterior aspect of neck, 2 cm. away from mid-line, and 5 cm. below mandible.

2. Multiple crescentric abrasion of size ranging from 0.5 x 0.1 cm. to 2.5 x 0.1 cm., reddish in colour in an area of 6 x 5 cm. over left anterior aspect of neck, 2 cm. away from midline and 5 cm. Below mandible.

3. Scratch abrasion of size 1 x 0.1 cm, reddish in colour over right lateral aspect of neck, 6 cm. Below angle of mandible.

4. Scratch abrasion size 1.5 x 0.1 cm. reddish in colour over lateral aspect of neck, 6 cm. below mastoid process.

5. Scratch abrasion size 1.5 x 0.1 cm. reddish in colour, over left lateral aspect of neck, 6 cm. below angle of mandible.

6. Contusion of size 3 x 2 cm.reddish in colour over lower back in mid-line, point 8 cm. coccyx.

Her blood pressure was 100/70 MM Hg.

Examination of anal and perianal region.

1. Per rectal examination was painful and tenderness present,

2. Per rectal examination admits three fingers due to tear of rectal and sphincter.

3. Blood and fecal matter was present around anal region.

4. There was grade IV perennial tear present.

5. Anal laceration was present,

6. Detail examination and repair was carried out in operation theater under general Anesthesia.

Labia Major and Minora were swollen.

Vestibule was torn.

Hymen was completely torn.

Vaginal canal was bruised and lacerated.

Fourchette and posterior commissure was completely torn."

10. The Medical Officer – P.W.6 deposed that the victim had the following injuries on her private part.

"1. Tear of size 7 x 2 cm. X full thickness was present over posterior vagina wall. Anteriorly it was extending from fourchette.

2. Tear of size 5 x 1 cm. X full thickness was present over anterior wall of rectum. Anteriorly it was extending from anal opening.

3. There was tear of external anal sphincter anteriorly.

4. Slit like full thickness a tear of size 5 x 2 cm. was seen in posterior fournix, communicating into abdominal cavity.

5. Serosal of size 6 x 2 cm. was seen over anterior wall of rectum, upto lower part of sigmoid colon.

6. Serosal tear of size 4 x 2 cm, was seen over anterior wall of mid sigmoid colon.

After examination, tears were sutured, and reconstruction was done."

11. The evidence of Doctor – P.W.6 reveals that the victim suffered forceful penetrative sexual assault. The medical evidence on record discloses the brutality of the assault on the

minor victim hardly 6 to 7 years of age at the relevant time. To say the least, the assault on the child is barbaric, inhuman and shocking.

12. So far as the age of the victim is concerned, P.W.6 conducted the age determination test and gave his opinion. P.W.6 while carrying out the test for determination of age of victim examined the teeth, growth of bones, hair of the victim and then opined that she was 6 to 7 years old at the relevant time. Even in the evidence of victim (P.W.5), she deposed that at the relevant time, she was in the first standard. Nothing has been elicited in the cross examination of P.W.6 which would create a doubt on the opinion of P.W.6. The prosecution therefore has established that on the date of the incident, the victim was below 12 years of age so as to attract the provisions of sections 5 & 6 of the POCSO Act.

13. The informant (P.W.1) is the mother of the victim. She deposed that on 20/08/2014, she was sleeping along with her children, her aged mother on the platform near the milk dairy. When P.W.1 woke up in the morning at 6.00 a.m., she realised that victim was not next to her. P.W.1 and her mother

(P.W.2) searched for her. After returning back, she saw the victim was crying in a nearby lane. P.W.1 noticed a broom inside her private part with blood oozing out. With the help of people who had gathered, the victim was taken to Dr. Babasaheb Ambedkar Hospital whereupon she was treated by P.W.6. P.W.1 deposed that when police arrived at the hospital, the victim told them that she was picked up by one person. That person after sexually assaulting her, pushed the broom in her private part. She deposed that the contents of the FIR dated 21/08/2014 at Exhibit 18 are true and correct. P.W.1 says that the name of the accused was Ali. P.W.1 says that she knew the accused as he used to come to drink tea at the same tea stall as P.W.1. The accused tried to start a conversation with her. P.W.1 deposed that the person who assaulted his daughter is present in the Court. She says that he is the accused. P.W.1 identified the clothes which the victim was wearing at the time of incident as Article 'A'. She identified the bracelet (painjan) belonging to the victim marked as Article 'B'. She further identified the blue coloured knicker worn by the victim which is marked as Article 'C'. She identified the broom marked as Article 'D'.

14. In cross examination she deposed that since her husband left her due to marital discord, she is residing with her

mother. P.W.1 deposed that she did not name anybody as perpetrator during the course of the enquiry in the hospital. She says that she does not know much about the accused. P.W.1 admits to stating the name of accused as ‘Ali’ for the first time in the Court. She admits that she saw the accused at the tea stall and thereafter in the Court. She denied the suggestion of deposing falsely that the accused was continuously eyeing and following her.

15. We find from the evidence of P.W.1 that she is not an eyewitness to the incident. It is further seen from her evidence that the accused was trying to engage her in a conversation and following her. Her evidence further reveals that P.W.1 had separated from her husband due to some dispute and not residing in the matrimonial home. The evidence of P.W.1 reveals that between 2.00 a.m. & 6.00 a.m. on 21/08/2014, the perpetrator committed the gruesome act.

16. The grandmother of the victim deposed as P..W.2. P.W.2 & P.W.1 went in search of the victim when she realised that the victim was not in bed. P.W.2 found victim crying in nearby lane with broom in her vagina. She was then moved to the

hospital.

17. P.W.3 – Ulkesh Patel is the owner of the house which has an open varandah in front. The said house is situated near Thakkar Milk Dairy. In the morning, he saw blood was lying on the spot and noticed one knicker of a small child and payal (bracelet). When P.W.3 came to know that a small girl was raped, he handed over the knicker and payal to the police. The varandah in front of the house of P.W.3 is the spot of the incident where the victim was assaulted. P.W.4 is the panch of the spot panchanama at Exhibit 22. The evidence reveals that the victim was assaulted in the open varandah of the house belonging to P.W.3.

18. Let us now examine the evidence of victim (P.W.5) . As indicated earlier the incident happened on 21/08/2014 when victim was 6 to 7 years of age. The victim deposed on 16/11/2018. The victim stated that she is staying in BJ child care home. She deposed that she will be able to identify her perpetrator. She says that she can identify the accused if shown to her. She says that he is the same person. She further says that the accused is a friend of her father. She further says that

one person lifted her at night from the place where she was sleeping and then he committed the act near the milk dairy. She further deposed that he then inserted a broom inside her private part. She says that she gave details of identity of perpetrator when the police had come to the hospital. During the course of trial, the accused was shown to the victim by asking him to pass from first door to the second door of the chamber of the Judge. The victim deposed that he is the same person who committed the act.

19. In cross examination the victim deposed that prior to the date of incident, she never saw the person who committed the act. She further says that it is not true that since the day of sexual assault by her perpetrator, there was no occasion for her to see him again. She deposed that her perpetrator was coming to meet her father. She further says that she knows him very well. She denied that before deposing in the Court, the police and her teacher tutored her.

20. The evidence of victim would reveal the barbaric manner in which the perpetrator assaulted her. Now the question is whether the appellant is the perpetrator of the crime.

P.W1 & P.W.2 are not the eyewitnesses. P.W.1 suspects the appellant to be the perpetrator as he tried to talk to her at the tea stall and followed her with some bad intention.

21. The evidence reveals that the victim identified the accused for the first time in the Court. The victim was 6 to 7 years of age on the date of the incident. No test identification parade was held. Learned Counsel for the appellant relied upon the decision of the Hon'ble Supreme Court in the case of [1]**Raja Vs. State by the Inspector of Police** to contend that mere dock identification is no identification in the eye of the law unless corroborated by previous Test Identification Parade before the Magistrate. According to him failure to hold the test identification parade is fatal to the prosecution case.

22. In our opinion, in the present case, failure to hold the test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification by P.W.5- victim is undoubtedly a matter for the Courts of fact. However, the Court has to be satisfied that the evidence can be safely relied upon even in the absence of test identification parade. Test identification parades do not

1 2020 AIR (SC) 254

constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. It is trite that substantive evidence is the evidence of identification in Court. We find from the evidence of P.W.5 that she deposed 'accused is a friend of her father'. The accused being known to the victim, probably, could be the reason for not holding the test identification parade.

23. In the case of **Raja** (*supra)*, Their Lordships in paragraph 18 observed thus :

> "18. It is, thus, clear that if the material on record sufficiently indicates that reasons for "gaining an enduring impression of the identity on the mind and memory of the witnesses" are available on record, the matter stands in a completely different perspective. This Court also stated that in such cases even non-holding of identification parade would not be fatal to the case of the prosecution. Applying the tests so laid down to the present case, in view of the fact that each of the eyewitnesses had suffered number of injuries in the transaction, it can safely be inferred that every one of them had sufficient opportunity to observe the accused to have an enduring impression of the identity of the assailants. It is not as if the witnesses had seen the assailants, in a mob and from some distance. Going by the injuries, the contact with the accused must have been from a close distance."

24. In the case of **Malkhansingh & Ors vs State Of Madhya Pradesh**[2], the Hon'ble Supreme Court after considering various earlier decisions on the question of test identification parade in paragraph 7 observed thus :

2 (2003) 5 SCC 746

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the

evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad Vs. Delhi Administration : AIR 1958 SC 350; Vaikuntam Chandrappa vs. State of Andhra Pradesh : AIR 1960 SC 1340 ; Budhsen vs. State of U.P. : AIR 1970 SC 1321 and Rameshwar Singh vs. State of J & K : (1971) 2 SCC 715). “

25. We therefore find that the victim who was subjected to the brutal act by the perpetrator had every reason for gaining an enduring impression on her mind and memory as to the identity of the perpetrator. Thus, failure to hold test identification parade would not be fatal to the prosecution case.

26. Let us now examine whether the evidence of P.W.5 can be regarded as truthful and reliable. P.W.5 was 6 to 7 years of age at the relevant time. She deposed that she can identify the accused if shown to her. When the accused was shown to her, she deposed that he is the same person. Further she says that the accused is a friend of her father. She then says that she has given details of identification of that person to the police and that he is having scar on the left side of his face. P.W.5 admits

that prior to the date of the incident, she did not see the person who committed the act. She further deposed as true that since the day of incident, there was no occasion for her to see him again. She then says that the accused was coming to meet her father. P.W.5 further deposed that she knows him very well. In the light of the deposition, the evidence of the victim who is a child - witness has to be appreciated with great care and caution. No doubt the nature of the assault is shocking but we still have to bear in mind that even if the offence is shocking, gravity of offence can not by itself overweigh as far as legal proof is concerned.

27. The testimony of the victim so far as the identity of the accused is concerned, appears to be inconsistent. When the evidence of the P.W.5 was recorded in the Chamber of the learned Judge, the appellant was shown to her and she identified him in the Court saying that he is a friend of her father. The victim then deposed that she did not see the person prior to the date of offence committed on her, but then goes on to say that he used to meet her father and that she knew him well. It is in her evidence that she had an occasion to see the appellant again since the day she was assaulted. Considering these inconsistencies in her evidence, the version of the victim has to

be scrutinized carefully.

28. At this stage it is material to mention that the evidence of her mother – P.W.1 reveals that according to her the appellant is the perpetrator. P.W.1 formed this impression as he tried to talk to her near the tea stall and followed her with some ill intention. It is in evidence of P.W.1 that she has a dispute with her husband and therefore is not staying with him. P.W.1 as a concerned mother was with the victim throughout the period she was treated in the hospital. After discharge from the hospital, it is in evidence that the victim was residing in the Ashram. The trial Court came to the conclusion that as P.W.5 was staying in the Ashram, there was no occasion for P.W.1 to meet P.W.5 & therefore possibility of tutoring is ruled out. The incident in question happened on 21/08/2014 and the evidence of the victim was recorded on 26/11/2019. We find it improbable that P.W.1 would not have met her daughter all these years.

29. The testimony of P.W.5 would reveal that she knew the appellant well as he used to meet her father and further knows him as a friend of her father. In the next breath she deposed that she did not see the appellant prior to the date on

which the offence was committed on her. Considering these inconsistencies and the ones noticed earlier, coupled with the evidence of P.W.1 – the victim's mother who always had an impression that the appellant is the perpetrator and therefore we would have to look for further corroboration.

30. Let us now consider the forensic evidence. Forensic Report of the semen detected on the frock of the victim and blood sample of the appellant reveals that semen detected on the frock of the victim did not match with the male haplotypes of blood samples of the appellant. The Assistant Director of the Forensic Science Laboratory in his report which is at page 174 of the paper-book has opined that the semen detected on the frock of the victim and blood sample of the appellant is not from the same paternal progeny. Apart from this, DNA report would indicate thus :

> "1) Male haplotypes of semen detected on ex-1 frock of Reshma Uttam Posugade in F.S.L.M.L. Case No. DNA – 1237/14 did not match with the male haplotypes of blood sample of Mohd.Abdul Malik Shahkkal Alam Shaikh.
>
> 2) Male haplotypes of semen detected on ex-1 frock of Reshma Uttam Posugade in F.S.L.M.L. Case No. DNA – 1237/14 did not match with the male haplotypes of blood smaple of Ali Mohammad Shaikh

Opinion :

1) DNA profile of semen detected on ex-1 frock of Reshma Uttam Posugade in F.S.L.M.L. Case No. DNA – 1237/14 and blood sample of Mohd. Abdul Malik Shahkkal Alam Shaikh is not from the same paternal progeny.

2) DNA profile of semen detected on ex-1 frock of Reshma Uttam Posugade in F.S.L.M.L. Case No. DNA – 1237/14 and blood sample of Ali Mohammad Shaikh is not from the same paternal progeny."

31. It is thus seen that the forensic evidence does not support the prosecution case for establishing the complicity of the accused. The DNA analysis is not disputed by the prosecution.

32. The trial Court brushed aside the DNA profiling observing that

"No doubt the C.A. report is not in favour of the prosecution but the evidence of the victim (P.W.5), evidence of medical officer (P.W.6) and the injury report Exh.30 with Article D i.e. broom are clearly stating that the heinous act of the physical assault on the victim committed by the accused in that night."

33. We find that there is no corroborative evidence on

record to support the version of P.W.1. If at all the accused is to be convicted, the same will have to be based on the sole testimony of the victim (P.W.5). Being a child witness, her evidence had to be scrutinized with great care and caution. No doubt, if the same inspires confidence and otherwise there is no possibility of tutoring, the same can form the basis for conviction if found truthful and reliable. We are conscious that a high degree of sensitivity is expected while dealing with the evidence of a child witness who has been abused in such a barbaric manner. We however find that the evidence of P.W.5 in the instant case creates a doubt regarding the identity of the accused. In these circumstances, it would be highly unsafe to convict the appellant solely on the basis of the testimony of the victim.

34. We are not impressed with the arguments of the learned APP that the presumption under section 29 of the POCSO Act will operate and therefore it shall be presumed that the appellant committed the offence unless the contrary is proved. Learned Counsel for the appellant relied on the decision in the case of [3]**Navin Dhaniram Baraiye Vs. The State of Maharashtra** to contend that the presumption under section 29

3 2018 ALL MR (Cri) 4919

of POCSO Act is not absolute and that it would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under section 29 of the POCSO Act to operate. The prosecution has failed to do so in the present case. The scope of section 29 has been succinctly dealt with by the learned Single Judge of this Court in **Navin Dhaniram Baraiye**. After referring to the various decisions of the Apex Court and this Court, in paragraph 23 it is held thus :

> "The above quoted views of the Courts elucidate the position of law insofar as presumption under Section 29 of the POCSO Act is concerned. It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability. "

35. Considering the material inconsistencies brought on record by the defence during the cross examination of P.W.5, regarding the identity of the perpetrator, it will be unsafe to rely on her sole testimony as the possibility of tutoring cannot be ruled out. It is improbable that P.W.1 did not interact or meet the victim during the period she was in Aashram. On the date of the incident, the victim was 6 to 7 years of age. Even the victim's mother (P.W.1) says that she knew accused as 'Anand'. P.W.1 suspected him to be the perpetrator as he was trying to talk to her and followed P.W.1. It is during the course of her evidence that she identified the accused as 'Ali' . The evidence of P.W.5, the medical evidence though firmly establishes the brutality of the assault, but the forensic reports do not support the prosecution case that appellant is the perpetrator. We find it unsafe to convict the accused only on the basis of the testimony of P.W.5 without there being a further corroboration to her testimony showing the complicity of accused. It is therefore not possible for us to uphold the conviction of the appellant rendered by the trial Court. The appeal therefore deserves to be allowed.

36. We place on record the able assistance rendered by learned Counsel Mr.Tanveer Khan appearing for the appellant through legal aid. We quantify his fees at Rs.15,000/- (Rs. Fifteen

Thousand only). The said amount shall be disbursed within four weeks.

Hence, the following order.

O R D E R

i) The Appeal is allowed.

ii) The impugned judgment dated 05/02/2019 passed by the Special Judge under the Protection of Children From Sexual Offences Act, 2012 at Borivali Division, Dindoshi, Mumbai is quashed and set aside.

iii) The convition of the appellant - Ali Mohammed Shaikh is quashed and set aside.

iv) The appellant - Ali Mohammed Shaikh is acquitted of the offence in Special Case No. 81 of 2015 punishable under section 363, 366(A), 326, 376 of IPC and section 5 read with section 6 of the POCSO Act for which he was charged with before the trial Court. The appellant-accused shall be set at liberty forthwith unless he is required in any other case.

v) In terms of provisions of Section 437A of the Code of Criminal Procedure, 1973, the appellant shall furnish bail bonds in the sum of Rs.25,000/- with one or more sureties of the like amount to the satisfaction of the trial Court.

37. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(M.S.KARNIK, J.) **(S.S.SHINDE, J.)**

Urmila P. Ingle

Digitally signed by Urmila P. Ingle
Date: 2020.12.14 14:52:38 +0530