

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 1087 OF 2019**

Kailas Gangaprasad Yadav

Age 36 years,

R/o. Krishna Society Chawl, Saki Vihar Road,

Sunder Nagar, Tunga Gaon, Powai,

Mumbai – 400 072

Presently undergoing sentence in the

Yerwada Central Prison, Pune

... Appellant

V/s.

1. The State of Maharashtra

At the instance of Powai Police Station

2. The Learned Public Prosecutor

High Court at Bombay

... Respondents

Ms.Devyani Kulkarni appointed Advocate by High Court Legal Services Committee, Mumbai for Appellant.

Mr.Amit Palkar, A.P.P. for Respondent-State.

CORAM : A.S. GADKARI, J.

DATE : 16th September 2020.

ORAL JUDGMENT :-

Appellant has impugned, the Judgment and Order dated 29th March 2019 passed by the learned Special Judge under P.O.C.S.O. Act, Greater Mumbai, in POCSO Special Case No. 266 of 2014 in C.R. No. 157 of 2014 registered with Powai Police Station, Mumbai, thereby convicting the

appellant under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "P.O.C.S.O. Act) and sentenced him to suffer rigorous imprisonment for 14 years and to pay a fine of Rs.5,000/-, in default of payment of fine to further suffer simple imprisonment for 1 month. The appellant is also convicted under Section 342 of the Indian Penal Code for short, "I.P.C.") and is sentenced to suffer rigorous imprisonment for 1 year and to pay a fine of Rs.500/-, in default of payment of fine to further suffer simple imprisonment for 7 days. As the appellant was convicted and sentenced under Section 6 of the P.O.C.S.O. Act, the trial Court did not award separate sentence under Section 376 of the I.P.C., as per the provisions of Section 42 of the P.O.C.S.O. Act. The trial Court has directed that, all the sentences shall run concurrently.

2. Heard Ms.Kulkarni, learned Advocate appointed by High Court Legal Services Committee, Mumbai for the appellant and Mr.Palkar, learned A.P.P for the respondent-State.

Perused the entire record.

3. The prosecutrix in the present crime was aged about 6 years on the date of incident and with a view to protect her identity and in consonance with the provisions of Section 228(A) of the Indian Penal Code and Section 33(7) of the POCSO Act, the names of material witnesses and detailed narration of facts from their evidence is hereby avoided.

4. The prosecution case in brief is that, on 9th April 2014, PW-7 Sarla S. Vasave, Woman Police Inspector, then attached to Powai Police Station, was on day duty. On the basis of a call received on Police-100 Number, she visited the spot, i.e. house of the mother (PW-1) of victim girl and brought the victim and her mother to the Police Station. The mother (PW-1) of the victim girl (PW-2) lodged the First Information Report against the appellant alleging sexual assault on her 6 years old daughter (PW-2). The date and time of incident was 9th April 2014 at about 3.00 pm. F.I.R. is lodged at about 7:00 pm on the same day.

It is the further prosecution case that, on 9th April 2014, the PW-1, i.e. mother of victim girl, was at her home along with her children namely, son (PW-3) aged about 11 years, the prosecutrix (PW-2) aged about 6 years and her younger daughter Ms.Shruti. It was holiday for the school. Children of PW-1 along with other 2-3 children were playing infront of her room. At about 3.00 pm PW-1 went on the neighbouring terrace for placing the clothes for drying. At that time her elder son (PW-3) came running towards her and told her that, one uncle has taken the prosecutrix inside his room and has closed the door. PW-1 therefore rushed to the said room shown by the PW-3. PW-1 knocked the door. The door was opened after about 5 minutes. PW-1 pulled her daughter towards her and asked the person inside the room, as to why he had taken her daughter in the room and closed the door. The person inside

the room abused PW-1. PW-1 returned to her house with her daughter (PW-2). PW-1 thereafter called her friend Ms.Guddi at her home and asked her to see what the said person (appellant) had done with her daughter. Ms.Guddi took the prosecutrix on her laps and made enquiry. The prosecutrix confided with Ms.Guddi that, the said person (appellant) gave her one rupee for toffee. She bought the toffee and went in his room. The person asked prosecutrix (PW-2) to have the toffee and therefore she ate it. Thereafter the appellant laid down prosecutrix (PW-2) on bed. He asked her to remove her clothes and accordingly she removed her clothes. The appellant also removed his clothes. The appellant thereafter laid on her person and committed forcible sexual assault on the PW No.2. The mother (PW-2) of prosecutrix thereafter called her husband and narrated the said incident to him. They immediately gave a call to police on 100 number and subsequently lodged the present crime.

5. After lodgement of crime, the victim (PW-2) was examined at Rajawadi Municipal Hospital by Dr. Vinod Padwale. He issued Medico Legal Certificate (Exhibit-40) to the Investigating Agency. During the course of investigation, the statement of prosecutrix (PW-2) under Section 164 of Cr.PC. was recorded by the learned Metropolitan Magistrate, 12th Court, Bandra, Mumbai. After completion of investigation, the Investigating Officer, Smt. Sarala Vasave (PW-7) submitted charge-sheet against the appellant in the Court of competent jurisdiction.

6. The trial Court framed charge below Exhibit 5-A for the offences punishable under Section 342 & 376 of the I.P.C. and under Section 4 & 6 of the P.O.C.S.O. Act. The said charge was read over and explained to the appellant in vernacular language to which he denied. The appellant pleaded not guilty and claimed to be tried. The defence of the appellant, as can be seen from the line of cross-examination of the prosecution witnesses is that, he had bickering with the mother of the victim on the earlier day and at that relevant time, the PW-1 had threatened him that, she will implicate him in a false case and accordingly, the present crime is registered immediately on the next day.

The prosecution examined in all 7 witnesses in support of its case. Trial Court after recording evidence and after hearing the learned counsel for the respective parties has convicted and sentenced the appellant by its impugned Judgment and Order dated 29th March 2019 as noted earlier.

7. Perusal of record would indicate that, the PW-1 in her examination in chief has stated the facts as narrated herein above in sub para No.4. In her cross examination, omissions that, the victim had told her that the appellant had asked her to remove clothes and accordingly victim removed her clothes; that the appellant laid on the body of the victim and inserted his penis in her vagina have been brought on record. The said omission is further proved by the defence in the cross-examination of PW-7

i.e. the Investigating Officer. The Investigating Officer has admitted that, the aforestated sentences i.e. removal of clothes by prosecutrix and penetrative sexual assault by the appellant on victim have not been stated by the PW-1 in F.I.R. to the police.

8. It is to be noted hear that the statement of prosecutrix recorded under Section 164 of the Criminal Procedure Code (for short, "Cr.P.C.") is at Exhibit-17. The said statement is proved by PW-1 i.e. mother of victim girl. Major portion of the said statement is recorded in English language and some sentences stated by the prosecutrix are intermittently recorded in Hindi language. At the end of the said statement, an endorsement is put by the learned Magistrate that, the said statement was recorded as per the version of the prosecutrix, the contents of the same are explained to her in vernacular and the same are true and correct as per the knowledge and facts mentioned by the prosecutrix. That the said statement was read over and explained to the victim girl in the presence of her mother.

A perusal of said statement would indicate that, the prosecutrix was not well conversant with English language and therefore, she had narrated her version in Hindi language. It appears that, the prosecutrix was conversant with only Hindi language and not with English language. The learned Magistrate therefore ought to have recorded entire statement given by the prosecutrix in Hindi Language i.e. the language with which she was well

conversant. The prosecutrix was aged about 6 years on the date of alleged incident and her recording of statement under Section 164 of Cr.P.C. by the learned Magistrate. According to me, the recording of the said statement by the learned Magistrate was not as per the settled principles of law.

May that as it may, much credence to the said statement cannot be given in view of the facts of the present case, as the prosecutrix in her testimony has narrated different facts than what has been stated in her statement recorded under Section 164 of the Cr.P.C..

9. The prosecutrix in her testimony has stated that, one uncle came near her and by giving one rupee to her, told to come at his house by taking a toffee. She bought a toffee and went to his room. He took her inside the room and drove away her brother and her other friends. He laid her down; removed her clothes and was inserting his private part in her urinal part. He threatened prosecutrix not to cry, otherwise he would assault her. At that time, her mother knocked the door of the appellant's house. The appellant asked her to wear the clothes and thereafter, he wore the towel and opened the door. Her mother scolded the appellant and took the prosecutrix along with her. One aunty had been to her house. She took the victim in her laps and asked about what had happened. The victim narrated the facts to her and thereafter they went to the Police Station.

In her cross-examination, she has admitted that, she was having

doubt that, the appellant may be the same person.

10. PW-3 is the brother of victim. He was aged about 11 years on the date of alleged incident. In his testimony, he has narrated the fact of calling the victim by the appellant; giving one rupee to her and asking her to bring toffee. He has stated that, he thereafter went in the room of the appellant. The appellant asked him and his friends to go out and closed the door from inside. He therefore rushed to his mother and informed her about the incident. It is to be noted here that, he has failed to identify the appellant as the same person. An omission has been brought on record in his cross-examination that, he was playing with his younger sister. He has admitted that, he was unable to recollect which toffee was bought by victim.

It is thus clear that, the prosecutrix and her brother have failed to identify the appellant as the same person who had committed the alleged sexual assault on the prosecutrix.

11. In this background, the material admissions given by the Investigating Officer PW-7 Smt.Sarla Vasave in her cross-examination are relevant. She has stated that, she was not aware of the fact that, whether the appellant was beaten by the mob which was present at the time of opening of the door by the appellant. She has admitted that, the house of the victim and the appellant are near to each other, but their entrance are on opposite side. That the locality is a slum area. She has not recorded statement of the

shopkeeper from where the victim has purchased the eatable/toffee. The victim in her evidence has admitted that, when the appellant opened the door, some neighbours were gathered there. PW-1 has also admitted that, when she knocked the door of the appellant, many people had gathered there.

12. It is to be noted hear that, the prosecution has not examined a single person from the said mob. The prosecution has not taken any pains to examine any of the person either from the said mob or neighbours of the appellant and the prosecutrix. The prosecution has also failed to examine important witness, namely, Ms.Guddi, i.e. the friend of PW-1, with whom the prosecutrix had confided about the alleged sexual assault immediately after coming to home with her mother. The spot panchanama (Exh.22) is silent about the presence of the wrapper of toffee either inside or outside of the house of the appellant or just nearby to it. Though the witnesses have stated that the appellant asked the prosecutrix to lie on a bed, in the spot panchanama no bed was found in the house of the appellant and instead only a mattress was found. There are material contradictions in the version of prosecution witnesses in that behalf.

13. Dr.Prajakta Goswami (PW-6) has proved the Medical Report(s)/Certificates signed by Dr. Vinod Padwale, who had examined the victim on 9th April 2014. The Medical Report(s) are at Exhibit-40 collectively. As per the Medical Report, after examination of prosecutrix Dr. Padwale had expressed

his opinion that, “As per the history there is attempt of penetration with penis, however there are no signs of force used which could be nature of assault”. The evidence of PW-6 along with the Medical Report nowhere suggests that there was even slightest of penetration by the appellant. The Medical Report discloses that, there were no abrasion or any sign of force used by the appellant. The Medical Report also does not suggest that, the appellant had made any attempt to commit the offence as contemplated under Section 6 of the P.O.C.S.O. Act.

14. As noted earlier, it is the specific defence of the appellant from the line of cross-examination and even in his statement under Section 313 of the Cr.P.C. that, the witnesses have falsely implicated him in the present case. That he had little controversy/bickering with the mother of the victim girl 2 days prior to alleged incident and as per the threat extended by the mother of the prosecutrix, he has been falsely implicated in the present crime.

Apart from the lacune in the prosecution case as mentioned in para No.12 above, further minute perusal of entire evidence on record would indicate that, there is substance in the defence adopted by the appellant. The prosecution has failed to prove beyond reasonable doubt that, the appellant is the perpetrator of the alleged crime.

15. After taking into consideration the entire evidence available on record, this Court is of considered view that the appellant deserves to be given

benefit of doubt and the same is accordingly extended to him.

16. Hence, the following Order :-

- (i) The impugned Judgment and Order dated 29th March 2019 passed in POCSO Special Case No. 266 of 2014 is hereby quashed and set-aside.
- (ii) Appellant is directed to be released from Jail forthwith, if not required in any other case.
- (iii) Fine amount, if any deposited by the appellant, be refunded to him on production of the duly authenticated copy of the present Order.
- (iv) Appeal is allowed in the aforesaid terms.

17. Before parting with the Judgment, this Court places on record its appreciation for the efforts put in by the learned Advocate Ms.Devyani Kulkarni appointed by the High Court Legal Services Committee, Mumbai in ably assisting this Court for espousing the cause of the appellant. The professional fees of Ms.Devyani Kulkarni is quantified at Rs.7,500/-. The said fees be paid by the High Court Legal Aid Services Committee within 4 weeks from the date of receipt of the present Judgment and Order.

18. This Order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or e-mail of a digitally signed copy of this Order.