

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1492 OF 2018

Mohammad Arif Asik Ali Raain	]	
Age 24 years, Occ. Driver	]	
Residing at : New Gautam Nagar,	]	
Plot No.2, Near Gausia Masjid,	]	
Sonapur Road, Govandi, Mumbai	]	
(At present in Mumbai Central Jail)	]	... Appellant

Vs.

1. State of Maharashtra	]	
At the instance of Deonar Police Station	]	
C.R. No. 78 of 2013	]	
2. Sharafatali Fida Hussain Sawant	]	
Age 32 years, Occ. Worker	]	
R/o. New Gautam Nagar, Plot No.2,	]	
Near Gausia Masjid, Near Delai Mobile Shop	]	
Govandi, Mumbai – 43	]	... Respondents

Mr. Harshawardhan Salgaonkar for Appellant.
Mrs.Rutuja Ambekar, A.P.P. for Respondent-State.

CORAM : A.S. GADKARI, J.
DATE : 9th September 2020.

ORAL JUDGMENT :-

The appellant has impugned Judgment and Order dated 10th September 2018 passed in POCSO Special Case No.1 of 2014, by the learned

Special Judge under the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”), Greater Mumbai, thereby convicting him;

- i] under Section 8 of POCSO Act and is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 2,000/- (Rupees Two Thousand Only) in default of payment of fine, to undergo simple imprisonment for two months.
- ii] under Section 341 of the Indian Penal Code and has been directed to pay fine of Rs. 500/- (Rupees Five Hundred Only) in default of payment of fine, to undergo simple imprisonment for fifteen days.
- iii] under Section 354(A) of the Indian Penal Code, however, as the appellant has already been convicted and sentenced under Section 8 of the POCSO Act, he was not separately punished as per the provisions of Section 42 of the POCSO Act by the Trial Court.
- iv] The appellant has also been directed to pay a compensation of Rs.20,000/- (Rupees Twenty Thousand Only) to be paid to the victim girl as contemplated under Section 33(8) of the POCSO Act, in default of payment of compensation, the appellant has been directed to further undergo simple imprisonment for six months.

2. Heard Mr. Salgaonkar, learned Advocate for the appellant appointed by the High Court Legal Services Committee, Mumbai in pursuance of Order dated 19th July 2019 and Mrs.Ambekar, learned APP for respondent–State. Perused the entire record.

3. The prosecutrix in the present crime was aged about 11 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 21st May 2013 at about 9.00 a.m. the appellant initially threatened the prosecutrix and thereafter took her in a nearby shop gala and closed its shutter. He untied the lace/string of the salwar of the prosecutrix and asked her to hold his private part in her hand. He also caressed the prosecutrix with bad intention. The prosecutrix was scared due to the said act committed by the appellant and started crying. The appellant, therefore, opened the shutter of the said gala and sent the prosecutrix out. The prosecutrix immediately after coming out of the shop gala informed the said fact to her cousin sister namely Ms. 'M' (she was also a minor on the date of incident), who in turn informed the said fact to the mother of the prosecutrix. Mother of the prosecutrix told the said fact to her husband i.e. the father of the prosecutrix at about 9.00 p.m., after he came back from his vocation. Father of the prosecutrix, thereafter, lodged F.I.R. at about 00.30 a.m. of 22nd May 2013.

5. The appellant came to be arrested at about 3.10 a.m. on the same day. After completion of investigation Shri Nitin Dhere (PW-5), the

Investigating Officer, submitted charge-sheet before the Court of Competent Jurisdiction. The Trial Court framed Charge below Exhibit-2 against the appellant under Section 354(A) and 341 of the Indian Penal Code read with Section 8 of the POCSO Act. The Charge was read over and explained to the appellant in vernacular language with which he was conversant. The appellant pleaded not guilty and claimed to be tried.

The Trial Court recorded plea of the appellant below Exhibit-3. The prosecution examined in all six witnesses in support of its case. The appellant examined Ms. 'M', the cousin sister of the prosecutrix as his defence witness (DW-1). The statement of appellant under Section 313 of Criminal Procedure Code (Cr.P.C.) was recorded by the trial Court below Exhibit-28/A. The defence of the appellant was of total denial and false implication.

The Trial Court after hearing the learned Advocate for the appellant and the learned Special PP. was pleased to convict and sentenced the appellant by its impugned Judgment and Order Dated 10th September 2018.

6. Mr. Salgaonkar, learned Counsel for the appellant submitted that, the identity of the appellant has not been properly established by the prosecution. He further submitted that, PW-1 i.e. the father of the prosecutrix has not explained in his testimony as to how he knew the name of the appellant. He submitted that, PW-1 in his testimony had referred the place of incident as garage near his house; the prosecutrix (PW-2) in her testimony

had deposed that, it was a shop gala with a shutter; however the DW-1 has denied the entire occurrence of the incident. He, therefore, submitted that, the identity of the appellant so also the place of exact occurrence has not been proved by the prosecution beyond reasonable doubt. That, there is variance in the testimony of witnesses about the actual place and uncertainty about it. He further submitted that, though Ms. "M" (DW-1) was cited as a witness by the prosecution in the charge-sheet, she was not examined by it. That, the said Ms. 'M' has been examined by the appellant as his defence witness who has supported his case. He submitted that, DW-1 has denied the occurrence of any such incidence and has categorically stated that, no such incidence ever occurred. He submitted that, the appellant has been falsely implicated in the present crime. He submitted that, taking into consideration the evidence available on record, the appellant deserves to be acquitted from the offences charged against him.

7. Learned APP vehemently opposed the Appeal and pointed out the relevant material available against the appellant. She submitted that, the identity of the appellant has been proved by the victim herself. She submitted that, there are no merits in the present Appeal and therefore, the Appeal may be dismissed summarily.

8. The record indicates that, the prosecution in support of its case has examined in all six witnesses. PW-1 is the father of the victim/

prosecutrix. PW-2 is the prosecutrix herself who was aged about 11 years on the date of incident. PW-3 is Mr. Aslam Razaq Shaikh, panch witness to the scene of offence panchnama, who did not support the prosecution case and has been declared hostile. PW-4 is Mr. Husain Ibrahim Shaikh another panch witness to the spot panchnama (Exh.-19) who has proved the said panchnama. PW-5 is Mr. Nitin Dhere, the Investigating Officer of the present crime. PW-6 is Mr. Abdul Kaiser Jabbar, the Principal of the School where the prosecutrix was studying. This witness has proved the bonafide certificate (Exh.25), issued in favour of the prosecutrix, for ascertaining her date of birth. The appellant has examined Ms. 'M' as defence witness (DW-1) in support of his case.

9. Though the prosecution has examined the aforesaid six witnesses in support of its case, the evidence of PW-1 i.e. father of the prosecutrix and PW-2 prosecutrix herself is relevant to decide the present Appeal. The evidence of other witnesses is on the periphery of the matter and does not touch the core of the prosecution case i.e. the actual sexual assault on the prosecutrix by the appellant, as alleged by the prosecution.

Perusal of record would indicate that, facts narrated by the prosecutrix in her testimony are as mentioned in the forgoing paragraph No.4 and for the sake brevity the repetition of the same is hereby avoided. The prosecutrix (PW-2) in her substantive evidence has narrated the entire episode

of sexual assault by the appellant. During the course of recording of evidence in Court, she has identified the appellant as the person who had committed sexual assault on her on the date and time of incident. The record further indicates that, the statement of prosecutrix under Section 164 of Cr.P.C. was recorded by the learned Metropolitan Magistrate, 54th Court, Mazgaon (Sewree), Mumbai. It is at Exhibit-8. In the cross-examination of the Investigating Officer (PW-5), the fact of recording of the statement of prosecutrix under Section 164 of Cr.P.C. (Exh.8) has been brought on record. Undoubtedly, the said admission is detrimental in the interest of the appellant.

A bare perusal of statement of prosecutrix recorded under Section 164 of Cr.P.C. as noted earlier, and her testimony would clearly disclose that, there is consistency in her version about the sexual assault committed by the appellant on her on the date and time of incident. The testimony of prosecutrix is wholly reliable and trustworthy. The credibility of her statement is not at all shaken by the appellant in her cross-examination. The appellant has failed to bring on record any material during the course of examination of the material witnesses, even to remotely infer that, there was any animosity between the parents of the prosecutrix and the appellant as a result thereof he has been falsely implicated in the present crime.

10. It is to be noted here that, during the course of investigation, the statement of Ms. 'M' (DW-1) was recorded by the Investigating Officer and she

was cited as witness No.6 in the charge-sheet. However, she was not examined as a prosecution witness, may be for obvious reasons and therefore the appellant has examined her as his defence witness (DW-1). The prosecution did not to examine her as she might not had supported the prosecution case. In her testimony she has stated that, no incidence ever took place with the prosecutrix and the police never recorded her statement. During her cross-examination by the learned A.P.P., the DW-1 has flatly refused all the suggestions put to her.

11. At this stage useful reference can be made to two decisions of the Hon'ble Supreme Court in the case of (I) *State of Himachal Pradesh Vs. Shree Kant Shekhari*, reported in *AIR 2004 SC 4404* and (ii) *Aman Kumar & Ors. Vs. State of Haryana*, reported in *AIR 2004 SC 1497*. The Hon'ble Supreme Court has held that the prosecutrix is not an accomplice in the crime. Mere delay in lodging the F.I.R. does not render prosecution version brittle. It is held that, the evidence of prosecutrix stands at higher pedestal than an injured witness and it needs no corroboration.

Thus, it is clear that, the prosecutrix is not accomplice in crime of sexual assault and her testimony stands on her pedestal than an ordinary witness.

12. In the premise this Court is of the clear view that, the prosecution has proved beyond reasonable doubt, the sexual assault committed by the

appellant on the prosecutrix and therefore the conviction of the appellant under Section 8 of the POCSO Act and under Sections 341 with 354(A) of the Indian Penal Code is upheld.

13. This leads me to consider the quantum of sentence imposed upon the appellant by the Trial Court.

The learned counsel appearing for the appellant submitted that, the appellant is not a hardened criminal. That, there are no antecedents at his discredit. The offence committed by the appellant is not an aggravated form of offence as contemplated under the provisions of POCSO Act. He submitted that, despite the said, the trial Court has awarded maximum sentence prescribed under Section 8 of the POCSO Act to the appellant. He therefore submitted that, leniency may be shown to the appellant by awarding him minimum sentence.

14. The act of sexual assault alleged against the appellant is briefly narrated in the forgoing paragraph No.(4). It is true that, the offence alleged against the appellant is not an aggravated form of offence as contemplated under the provisions of POCSO Act. The appellant has undergone 2 years 25 days in incarceration as of today. Taking into consideration, the nature of sexual assault, this Court is of the view that, the sentence of the appellant under Section 8 of the POCSO Act can be reduced and he be directed to undergo sentence of 3 years of rigorous imprisonment.

15. Hence, the following Order :-

- (i) Appeal is partly allowed.
- (ii) The appellant is hereby convicted for the offence punishable under Section 8 of the POCSO Act, 2012 and is sentenced to suffer Rigorous Imprisonment for Three (3) Years and to pay a fine of Rs.5,000/- (Rupees Five Thousand Only), in default of payment of fine, to further undergo Simple Imprisonment for Two (2) months.
- (iii) The conviction and sentence of the appellant under Section 341 of the Indian Penal Code imposed by the Trial Court is maintained.
- (iv) The amount of compensation and in default of sentence thereof imposed by the Trial Court is also maintained.
- v) All the sentences to run concurrently.

16. Before parting with the Judgment, this Court places on record its appreciation for the efforts put in by the learned Advocate Mr. Harshwardhan Salgaonkar 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 Mr. Salgaonkar 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.

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

(A.S. GADKARI, J.)

Omkar S.
Kumbhakarn

Digitally signed
by Omkar S.
Kumbhakarn
Date:
2020.09.22
18:12:09 +0530