

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.341 OF 2018

Shaikh Saddam s/o Shaikh Kadu,
Age : 22 years, Occu. Nil,
R/o Waladgaon, Taluka and
District Aurangabad

APPELLANT
(Original Accused)

VERSUS

1. The State of Maharashtra,
through the Police Station
Incharge Officer,
Satara Police Station,
Tq. and District Aurangabad

RESPONDENT

2. Shaikh Rehan Shaikh Ayyub
Age : 11 years (Minor)
through Guardian (Mother)
Jareena Shaikh Ayyub,
Age : 49 years, Occu. Business,
R/o C/o Anwarbhai Kacchi,
Infront of Kasimwali Darga,
Near Karim Masjid, Padegaon,
Aurangabad

RESPONDENT
(Victim)

Mr. Chetan T. Jadhav, Advocate for the appellant
Mr. R.B. Bagul, A.P.P. for the respondent/State
Mr. S.S. Panale, Advocate for respondent No.2

CORAM : MANGESH S. PATIL, J.

DATE OF JUDGMENT RESERVED : 08.07.2021
DATE OF JUDGMENT PRONOUNCED : 09.07.2021

JUDGMENT :

This is an appeal under Section 374(2) of the Code of

Criminal Procedure against the judgment and order dated 02.01.2017 passed by the Special Judge, Aurangabad in Special Case (POCSO) No. 12 of 2015, convicting the appellant for the offence punishable under Section 4 read with Section 3 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO Act”) and Section 506 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years and to fine of Rs.1000/-, in default to suffer rigorous imprisonment for one month and rigorous imprisonment for two years and fine of Rs.500/-, in default to suffer rigorous imprisonment for fifteen days, respectively.

2. Shorn of the verbiage, the allegations against the appellant are to the effect that the victim (PW2), who was then barely seven years of age, was flying kite. The appellant was also present there. Under the pretext of fetching kite string, he asked the victim to fetch it from a nearby house. He followed the victim, bolted the door from inside and committed penetrative sexual assault by indulging in carnal intercourse. It is alleged that the appellant also threatened the victim if the incident was disclosed. The victim went back home while weeping and narrated the incident to his grandmother. The landlady Archana (PW3) was also called. The parents of the victim had gone for work. After their arrival, they were also narrated the incident. The mother of the victim – Jarina (PW1) then took the victim to the police station. The victim was sent for medical examination. In the meanwhile, the FIR (Exh-18) was lodged and the offence was registered.

3. The victim was medically examined by Dr. Vikas (PW5). The perianal swabs were taken. A sample of the blood of the victim was also drawn. The appellant was arrested. He was medically examined by Dr. Nilesh (PW4). His blood sample was drawn. The jeans pant of the victim was seized as also underwear of the appellant. All these samples and clothes were sent for chemical analysis.

4. Though no semen was detected in the peri-anal swab, the blood group of the victim was found as 'O'. The blood group of the appellant was also found to be 'O'. So far as the clothes are concerned, the chemical analysis report (Exh-63) certified that there were few blood stains ranging from 0.5 cm to 2 cm in diameter, mostly on back portion of both legs, one semen stain of 0.5 cm in diameter on back lower portion of right leg of the victim's pant. Few blood stains were also found on the underwear of the appellant of about 0.5 cm to 1 cm in diameter on front middle portion. The semen detected on the pant of the victim was found to be 'O' group and blood stains that had appeared on the underwear of the appellant were also found to be of 'O' group.

5. Dr. Vikas (PW5), on examination of the victim, noticed that there was a laceration of 6 x 2.5 cm subcutaneous deep, encircling the anal region, reddish tenderness present and bleeding present at lacerated site. He formed an opinion that the finding was consistent with recent forceful penetrative

sexual assault. After receipt of chemical analysis reports, a final opinion was sought from him and he once again confirmed that the findings were consistent with recent forceful penetrative sexual assault (Exh-38).

6. After conclusion of the investigation, a chargesheet was filed in the Special Court. The learned Special Judge conducted the trial and convicted and sentenced the appellant as mentioned hereinabove.

7. The learned Advocate for the appellant would submit that there is a delay in lodging the FIR. Though the incident is alleged to have taken place at 10.00 a.m. and the mother of the victim Jarina (PW1) had reached home at 11.00 a.m., it took her 15.10 hours to lodge the FIR though she admits the distance between her residence and the police station to be of 10 to 15 minutes drive. He would further submit that even the version of the victim does not appeal to the reasonable mind. Though it was not a holiday, he had not gone to the school. He says that though other people were around, it was only the appellant who was flying the kite with him. His version that he was sent inside the house under the pretext of fetching kite string is also improbable. The victim even states that the incident was going on for about an hour, which further improbabilizes his version. Even there is dispute about the exact place of the incident. There is no evidence to clear the doubt about the actual place. There are no independent witnesses. The learned Special Judge has grossly erred in casting the burden on the appellant. The appellant is innocent and has been falsely implicated. The

impugned judgment and order is grossly illegal and erroneous.

8. The learned A.P.P. and the learned Advocate for respondent No.2-victim support the impugned judgment and order. They submit that there is no material inconsistency in the evidence of the prosecution. Though there is few hours' delay, no inference can be drawn much less about concoction. Nothing could be elicited during the cross-examination of the prosecution witnesses, particularly the victim (PW2) to disprove his version. The medical evidence clearly corroborates his version. By virtue of Section 29 of the POCSO Act, there is a presumption in favour of the victim. The appellant has not been able to dislodge it. The learned Special Judge has rightly appreciated the evidence and all the above mentioned facts and circumstances, including in raising a presumption under Section 29 of the POCSO Act and has rightly convicted and sentenced the appellant.

9. I have carefully considered the rival submissions and perused the record. At the outset, it is necessary to note that though the appellant has been convicted for the offence punishable under Section 4 read with Section 3 of the POCSO Act and sentenced to suffer rigorous imprisonment for ten years. The State has not preferred any appeal for enhancement of the sentence.

10. To begin with, as far as age of the victim (PW2) is concerned, the appellant has not seriously disputed it at any point of time. According to the

prosecution, the victim (PW2) was barely seven years of age on the date of incident and was of around ten years on the date of his testimony. In fact, this is an information which has been elicited during the cross-examination of the victim's mother Jarina (PW1) wherein it has been solicited by way of information that at the time of incident, her son was seven years of age. The fact about his age has also not been sought to be disputed during the cross-examination of victim (PW2) either. Even there is no cross-examination of Dr. Vikas (PW5) on this point so as to dispute the age of the victim. Consequently, one can safely proceed on the premise that the victim (PW2) was indeed a child within the meaning of Section 2(1)(d) of the POCSO Act.

11. As far as the actual incident is concerned, obviously the testimony of the victim (PW2) would be important. Since other prosecution witnesses, particularly victim's mother Jarina (PW1) and the landlady Archana (PW3) being not the eye witnesses, their version as regards the incident is of no consequence.

12. So far as the testimony of victim (PW2) is concerned, suffice for the purpose to observe that he has narrated the plight by saying that while he was flying a kite with the appellant, the latter asked him to fetch kite string from a nearby house, when he entered into it, the appellant followed him and closed the door from inside and thereafter he narrated as to how the appellant indulged in carnal intercourse. He thereafter stated as to how he went home and narrated the incident to his grandmother and sister and

thereafter, his parents took him to police station wherefrom he was sent to Ghati hospital. A careful perusal of his cross-examination clearly shows that the appellant has not been able to shake his trustworthiness. In spite of probing cross-examination, he could stick to the version as narrated in examination-in-chief. One needs to bear in mind that the incident had taken place when he was barely seven years of age and the testimony was recorded after about three years thereafter when he was almost ten years of age. If one bears this fact in mind, his version that the duration of the incident was about one hour cannot be said to be any exaggeration. It could be a sheer matter of perception of the victim. No capital can be allowed to be made out of his such a reply as to the duration of the incident. Pertinently, though it was suggested to him that he was tutored by his mother and the Advocate, he flatly denied it. More importantly, he denied the suggestion that he had sustained the bleeding injury by fall.

13. All in all, in spite of probing attempt, the appellant has not been able to shake victim's testimony in material particulars. More importantly, even nothing could be elicited during his cross-examination so as to attribute some ulterior motive to falsely implicate the appellant.

14. This takes us to the medical evidence. As has been mentioned hereinabove, Dr. Vikas (PW5), is the Resident Doctor of Government Medical College and Hospital, Aurangabad. He states to have examined the victim aged seven years and to have noticed laceration and bleeding from the

lacerated site, encircling the anal region. He opined about the finding being consistent with the recent forceful penetrative sexual assault. Though it was elicited during his cross-examination that the injury is possible by insertion of some object other than penis, the suggestion and the information elicited is without any basis or foundation in the cross-examination of the victim (PW2). It has not been suggested to the victim (PW2) that he had sustained the injury otherwise than by way of the alleged sexual assault. One can, therefore, safely ignore this suggestion in the cross-examination of Dr. Vikas (PW5).

15. As is mentioned hereinabove, the chemical analysis reports turn out to the effect that blood group of the appellant as well as the victim is 'O'. The blood stains of human blood were found, both on the backside of the victim's pant and on the front middle portion of the appellant's underwear. Similarly, a semen spot of 'O' group was also found on the backside of the victim's pant. Such scientific evidence is clearly compatible with the prosecution version about appellant having caused penetrative sexual assault on the victim. Needless to state that Dr. Vikas (PW5), in his final opinion, stuck to his preliminary opinion and certified (Exh-38) that the findings are consistent with the recent forceful penetrative sexual assault, after going through the reports of the chemical analysis.

16. In the result, the version of the victim about penetrative sexual assault stands duly corroborated and confirmed by the medical evidence in

the form of testimony of the Medical Officer – Dr. Vikas (PW5) and the chemical analysis reports.

17. In this respect, one can also refer to the testimony of the landlady Archana (PW3), who though turned hostile to the prosecution, stated that she noticed some red stains on the back of the victim's pant when she was called to his house. Her such narration has not been questioned during her cross-examination. Meaning thereby, her version about having noticed red stains on the back side of the victim's pant also is a material piece of evidence corroborating the prosecution version.

18. As far as the legal aspect is concerned, a Special Court conducting trial under the POCSO Act is expected to draw a presumption under Section 29 of the POCSO Act, which reads thus :

“29. Presumption as to certain offences. - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

19. As an exception to the principles which hitherto were governing the criminal jurisprudence, Section 29 expects an accused person to prove contrary else the Special Court has to presume that the offences under sections 3, 5, 7 and 9 of the Act have been committed by the person. Therefore, no fault can be found with the learned Special Judge in the matter

in hand, in drawing such presumption and expecting the appellant to have dislodged it. Apart from the fact that the cross-examination of the victim (PW2) does not make out anything which would rebut the presumption, even the appellant has been conspicuously silent about it during his cross-examination under Section 313 of the Code of Criminal Procedure. If this be so, the learned Special Judge was right in drawing the presumption and apart from the evidence, relying upon such presumption to convict the appellant. He has clearly considered the evidence in the proper perspective and has come to a correct conclusion about prosecution having proved the guilt and has rightly convicted and sentenced the appellant. There is no merit in the appeal and it is liable to be dismissed.

20. The appeal is dismissed.

21. Since learned Advocate Mr. S.S. Panale was appointed by this Court to represent respondent No. 2, he shall be paid fees of Rs.5000/- (Rupees Five Thousand).

[MANGESH S. PATIL]
JUDGE

