

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.44 OF 2021

Mukesh Krishnand Mishra

...Appellant

Versus

The State of Maharashtra and Anr.

...Respondents

....

Mr. Aniket Vagal for the Appellant.

Mr. P.H. Gaikwad, APP for Respondent -State.

Mr. Shashikant P. Chaudhari for Respondent No.2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 1st DECEMBER, 2021.

ORAL JUDGMENT :-

1. This appeal under Section 374 of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 11/07/2019 passed by the learned Additional Sessions Judge, Mumbai in Special Case No.467 of 2014.

2. By the impugned judgment, the learned Special Judge has held the Appellant (hereinafter referred to as 'the accused') guilty of offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentenced him to

undergo rigorous imprisonment for 7 years and to pay fine of Rs.10,000/- i/d to suffer further rigorous imprisonment for one month.

3. The case of the prosecution in brief is that the Appellant was working as a watchman in CBM School wherein the prosecutrix (PW3) was studying. On 03/09/2014 the prosecutrix informed her grandmother (PW1) that the watchman of the school had inserted his fingers into her vagina. On the next day PW1 went to the school along with the prosecutrix. The prosecutrix identified the accused as the watchman, who had sexually abused her. PW1 therefore lodged the FIR against the accused for subjecting the prosecutrix to penetrative sexual assault.

4. Based on the said FIR, PW7-Swapnil Juikar, the Investigating Officer registered the crime against the accused for offence under Section 5 r/w Section 6 of the Protection of Children from Sexual Offences Act (POCSO) and Section 376 of the IPC. He conducted scene of offence panchanama, arrested the accused,

recorded the statement of the prosecutrix and other witnesses and seized the clothes of the accused and the prosecutrix. He also recovered and played the CCTV footage in presence of pancha witnesses and transferred the same on a pen drive and seized the same under panchanama. Upon completion of the investigation, he submitted the charge sheet against the accused for offence punishable under Section 6 of the POCSO Act and Section 376 of the IPC.

5. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined 9 witnesses. The statement of the accused was recorded under Section 313 of the Cr.P.C. Defence of the accused was that of total denial and examined one witness in defence.

6. Upon appreciating the evidence adduced by the prosecution as well as the evidence in defence, the learned Judge held that the prosecutrix was a child within the meaning of Section 2 (d) of the POCSO Act. Learned Judge further held that the evidence adduced by the prosecution does not prove the offence of penetrative

sexual assault but proves the offence of aggravated sexual assault. The learned Judge therefore acquitted the accused of offence punishable under Section 6 of the POCSO Act and Section 376 of the IPC and held him guilty of offence under Section 10 of the POCSO Act. Being aggrieved by this judgment and order, the accused has preferred this appeal.

7. Mr. Aniket Vagal, learned counsel for the accused, states that the prosecution has failed to prove that the accused was working as a watchman in C.B.M. School. He contends that there is no evidence to prove aggravated sexual assault. He submits that even if the accused is held guilty of the offence of sexual assault the maximum punishment prescribed under Section 8 is for a term of 5 years. He therefore contends that the learned Judge was not justified in imposing sentence of rigorous imprisonment for a term of 10 years. He therefore prays that the sentence of imprisonment be scaled down to 5 years, which is the maximum sentence under Section 8 and minimum sentence under Section 10 of the POCSO Act.

8. Mr. P.H. Gaikwad, learned APP for Respondent No.1-State submits that the prosecution has established beyond reasonable doubt that the accused had subjected the prosecutrix to sexual assault. He submits that the accused has not denied that he was working as a watchman in the said school. Moreover, the prosecutrix was below 12 years of age. Hence, the act constitutes aggravated sexual assault.

9. Mr. Shrikant P. Chaudhari, learned counsel for Respondent No.2 submits that the prosecutrix was barely 7 years of age and while the accused was 37 years of age. He submits that the accused, who is involved in committing such heinous crime cannot seek leniency.

10. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

11. The evidence of the prosecutrix, more particularly the

birth certificate of the prosecutrix at Article-D shows that the prosecutrix was born on 13/01/2008. The incident was of the year 2014. Hence, as on the date of the incident, the prosecutrix was 6 years and 9 months old and hence a child within the meaning of Section 2(d) of the POCSO Act.

12. The evidence on record clearly indicates that the prosecutrix was a student of C.B.M. at Antop Hill. On 03/09/2014 the prosecutrix told her grandmother that she did not want to attend the school the next day. She disclosed that while they were playing outside, the watchman of the school inserted his fingers in her private part. PW1 called the mother of the prosecutrix and the next day they went to the school along with the prosecutrix. The prosecutrix identified the watchman. They brought him to the Antop Hill Police Station and lodged the FIR (Exhibit-17). PW2 is the mother of the prosecutrix. She has deposed that PW1 had informed her about the incident and that they had gone to the school along with the prosecutrix. She has deposed that the prosecutrix has identified the accused and hence they had lodged the complaint

against the accused.

13. The prosecutrix (PW3) has deposed that on 03/09/2014 she had gone to school for extra classes, which were till 12 p.m. After the classes she was sitting outside the school since it was raining. The other children were playing. She has stated that the watchman sat beside her and he put his hand in her skirt and inserted his fingers in her private part. When she cried he threatened to cause injury with a razor.

14. The prosecution has also examined PW6-Sadam Ansari, a technician, who had installed CCTVs in that C.B.M. High School. He has deposed that he had given CCTV footage of 30/09/2014 to the police in a pen drive. He has produced the certificate under Section 65(b) of Indian Evidence Act. PW5- Manikanandan Devan is a witness to panchanama at Exhibit-24. He has deposed that a technician had attached a pen drive to the computer. One folder of CBM was opened. The said folder had CCTV footage, which showed a watchman inserting his hand in the clothes of a small girl. accused had subjected the prosecutrix to sexual assault.

15. The learned Judge has observed that the medical certificate of the prosecutrix does not disclose any injury to the hymen. The learned Judge has held that the CCTV footage supported by expert evidence proves that the accused had inserted his hand in the skirt of the prosecutrix. He had touched her private part inappropriately, pulled her towards him and kissed her on her cheek. The learned Judge has held that act committed by the accused constitutes sexual assault and not penetrative sexual assault. Considering that the accused was a watchman of the school, and the prosecutrix was below 12 years of age, the offence falls in the category of aggravated sexual assault.

16. Learned counsel for the accused has not challenged the findings that the accused had subjected PW3 to sexual assault. His contention is that having failed to prove that the accused was working as a watchman in the said school, he cannot be held guilty of offence of aggravated sexual assault.

17. It is to be noted that evidence of PW1 as well as PW3 clearly indicates that the accused was working in a school as watchman. This statement has not been denied. Moreover, the prosecutrix was below 12 years of age. The accused has subjected a child below 12 years of age to sexual assault and hence in terms of Section 9(m) of the POCSO Act the offence committed by the accused falls within the definition of aggravated sexual assault. Section 10 of the POCSO Act, which prescribes punishment for aggravated sexual assault provides that whoever commits aggravated sexual assault, shall be punished with imprisonment for either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine.

18. The learned counsel for the accused seeks leniency on the ground of medical condition of the accused. The accused has examined Dr. Neena Sawant, Professor (Additional) in the Department of Psychiatry, KEM Hospital. She has deposed that the sister of the accused had brought him to the Department of Psychiatry on 10/04/2015 with history of buzzing sound in ears

followed by visual disturbances and confusion of surrounding in the episode and headache. The Doctor has deposed that mental status examination revealed that there was no psycho pathology, his IQ was 49, suggestive of moderate mental retardation. His work performance was fair and his behaviour was found to be normal.

19. The evidence in defence does not suggest that the accused was of unsound mind or that as on the date of the incident he was incapable of knowing the nature of the act. Even otherwise the accused had not raised the plea of insanity. Hence, the mere fact that he has subsequently reported to psychiatric department with complaints of buzzing sound and visual disturbance cannot be considered as mitigating circumstances.

20. It is pertinent to note that the accused, a man of 37 years of age has sexually abused the prosecutrix, who was less than 7 years of age. He has made a child of tender years victim of his lust. The nature of the offence thus reflects total mental depravity of the accused. The incident will certainly have a long lasting devastating

effect on her psychological and emotional well being. Moreover, the crime committed by the accused is not a crime against an individual but a crime against the society. In such circumstances, showing undue sympathy to the accused would frustrate the object of the POCSO Act and erode the faith of public in criminal justice system.

21. Under the circumstances, in my considered view no case is made out to interfere with the sentence imposed by the learned Judge. Hence, the appeal is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)