

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.209 OF 2020

Abdul Rehman @ Rauf Kasam Shaikh]
R/at Room No.1, Nerlekar Chawal,]
Dada Bhai Cross Road,]
Near Bhavana College, Tape Village,]
Andheri (W), Mumbai-58]..Appellant

Vs.

The State of Maharashtra]
(At the instance of Daulatnagar,]
Police Station Mumbai,]
Districit-Mumbai & Anr)]..Respondents

Mr.Aniket Vagal for the Appellant.

Mr.S.R. Agarkar, APP, for the Respondent-State.

CORAM : C.V. BHADANG, J.

DATE : 16 NOVEMBER 2021

JUDGMENT :

. By this Appeal, the Appellant is challenging the judgment and order dated 21 January 2020 passed by the learned Special Judge, Dinoshi, Mumbai in POCSO Special Case No.184 of 2016. By the impugned judgment the Appellant/Accused has been convicted for the offence punishable under Section 5(l)(m) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO' for short) and Section 506 of the Indian Penal

Code ('IPC' for short). For the offence under Section 5(l)(m) read with Section 6 of the said Act the Appellant has been sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for one year. For the offence under Section 506 of IPC the Appellant is sentenced to suffer rigorous imprisonment for two years and pay a fine of Rs.5,000/- and in default to suffer rigorous imprisonment for six months. The substantive sentences are directed to run concurrently.

2. The victim in this case is a girl who at the relevant time was six years of age. She has been examined as PW-2. PW-1 is her mother who is the complainant. The incident is alleged to have happened in the year 2016 when PW-2 was studying in Ist standard in Rajhans Vidyalaya, Andheri (W), Mumbai. Her school time was 8.00 a.m. to 2.45 p.m. She used to go to school by school bus which according to the prosecution was engaged by the school. The Appellant was working as a driver on the said bus. PW-2 had long recesses at about 12.00 noon.

3. On 11 February 2016 PW-2 came back from school, when PW-1 noticed a white spot on her clothes. Upon enquiry PW-2 did not state anything. The following morning when again an enquiry was made PW-2 informed that in the long recess she was

taken aside by one “Uncle” . He removed her clothes, inserted his finger in her vagina and pressed her chest.

4. According to PW-2 the same incident was repeated on 12 February 2016. The incident was reported to the Management of the school as well as to the police, upon which an offence came to be registered under Section 376(2)(i), 354(A)(B), 506(II) and 323 of IPC and under Section 4, 8 and 12 of the POCSO Act at D.N. Nagar Police Station. Upon investigation a charge-sheet came to be filed. It may be mentioned that during the course of the investigation the statement of the victim was recorded under Section 164 of the Criminal Procedure Code (‘Cr.P.C.’ for short). An identification parade was held in which PW-2 is alleged to have identified the Appellant to be the one who was involved in the said incident.

5. The learned Special Judge framed charge for the offence punishable under Section 376(2)(n), 506 of the I.P.C. and Section 5(l)(m) read with Section 6 of the POCSO Act, 2012. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant is one of total denial and false implication.

6. The prosecution examined as many as 15 witnesses including the victim and her mother and two doctors and produced

the record of the investigation. The Appellant did not lead any evidence in defense.

7. The learned Sessions Judge has convicted the Appellant for aggravated penetrative assault which is punishable under Section 5(l)(m) of the POCSO Act and Section 506 of the IPC and he has been sentenced accordingly.

8. I have heard Mr.Aniket Vagal, the learned counsel for the Appellant and Mr.S.R. Agarkar, the learned Additional Public Prosecutor. With the assistance of the learned counsel for the parties I have gone through the record.

9. Although the learned counsel for the Appellant has sought to challenge the conviction, it is alternatively submitted that the conviction is liable to be modified to one under Section 9(l)(m) read with Section 10 of the POCSO Act. According to the learned counsel the prosecution evidence does not show that there was any 'penetrative sexual assault', within the meaning of Section 3 of the POCSO Act. It is submitted that the Medical Officer who examined the victim has not been examined as a prosecution witness and instead the prosecution has examined PW 7 Dr. Pramila Yadav.

10. It is submitted that the email sent by PW-6 also does not state about any 'penetrative sexual assault'. It is also submitted that the Appellant who was engaged as a driver on the school bus which was hired by the school cannot be said to be staff of the school so as to bring the offence within the ambit of Section-9(c) of the POCSO Act. It is submitted that in that event the offence would fall under Section-7 which is punishable under Section-8 of the said Act with maximum of 5 years of imprisonment. It is submitted that the Appellant is in custody from the date of incident and has served sentence of more than 5 years and 9 months. It is submitted that the statement under Section 164 of Cr.P.C. is not a substantive evidence and the prosecution cannot rely on the same for establishing the charge under Section 5(l)(m) of the said Act. Reliance for the purpose is placed on the decision of this Court in ***Iman Shabbir Gauri V/s. The State of Maharashtra***¹

11. The learned Additional Public Prosecutor has supported the impugned judgment. It is submitted that PW-2 in categorical terms has stated in her statement under Section 164 of Cr.P.C. that she was taken on one side by the Appellant, he removed her clothes, inserted his finger in her vagina, and pressed her chest. The allegations would indicate that there was a penetrative sexual assault. In the submission of the learned Additional Public Prosecutor the

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absence of the injury on the person of PW-2 is not material when there is clear evidence of PW-2 and PW-1 about the nature of the Act.

12. I have carefully considered the circumstances and the submissions made. The contention on behalf of the Appellant that the prosecution evidence is not sufficient to establish the charge and seeking an acquittal cannot be accepted. I have gone through the evidence of the girl and the same is natural and one inspiring confidence. The only question is whether the Appellant can be found guilty of aggravated penetrative sexual assault as defined under Section 5 or an aggravated sexual assault within the meaning of Section of 9(f) of the POCSO Act.

Section-3 defines Penetrative Sexual Assault as under:-

“3. Penetrative Sexual Assault :- A person is said to commit “penetrative sexual assault” if

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

13. Section 5 defines an Aggravated Penetrative Sexual Assault.

14. Section 7 defines ‘Sexual Assault’ as under:-

“7-Sexual Assault – Whoever, with sexual intent touches the vagina penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

15. Section 9(f) which is relevant for the purpose defines an ‘Aggravated Sexual Assault’ as under:-

“Section-9(f) Whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution;”

16. The evidence of PW-1 and PW-2 does not show that there was any penetration of the finger by the Appellant in the private part of the PW-2. All that PW-2 states is that the Appellant touched her. Even in the email which is at ‘Article-A’ there is no allegation that there was any penetration or insertion. The learned

counsel for the Appellant to my mind is right that the evidence is not sufficient to establish a 'penetrative sexual assault' within the meaning of Section 3. The evidence at the highest establishes a aggravated sexual assault under Section-9(f).

17. At this stage it is necessary to note that I have not examined the question whether a person who is engaged as a driver or attendant on a school bus engaged by the school for conveyance of the students, would be a 'staff' of the school, for the reason that the learned counsel for the Appellant has restricted the submission for conversion of the conviction to one under Section 9(l)(m) of the Act.

18. In the circumstances, the evidence only shows an aggravated sexual assault and not an aggravated penetrative sexual assault as held by the learned Special Court. As rightly submitted on behalf of the Appellant the statement under Section 164 of Cr.P.C. is not a substantive piece of evidence (see the case of *Iman Shabbir Gauri*). In the evidence of the girl before the Court there is nothing to show that there was any insertion as such, so as to lead to 'penetrative sexual assault'.

19. The record shows that the Appellant was arrested on 12 February 2016. He is in jail since then. The Appellant has served a

sentence of about 5 years and 10 months. The offence under Section 9(l)(m) is punishable under Section 10 of the said Act with imprisonment of either description for a term which shall not be less than five years which may extended to seven years and fine. In my considered view the Appellant can be sentenced to imprisonment already undergone by maintaining the fine. The conviction and sentence insofar as the offence under Section 506 of the IPC is concerned is required to be maintained. In the result, the following order is passed.

ORDER

- (i) The conviction of the Appellant under Section 5(l)(m) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 is modified to one under Section 9(l)(m) r/w Section 10 of the said Act.
- (ii) The appellant is sentenced to period already undergone and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer rigorous imprisonment for three months.
- (iii) The conviction and sentence awarded under Section 506 of Indian Penal Code is hereby maintained.
- (iv) The substantive sentences are directed to run concurrently.

(v) The Appellant be set at liberty forthwith, on payment of fine, if not paid and if not, required in connection with any other offence.

C.V. BHADANG, J.