

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

CRIMINAL APPEAL NO.366 OF 2017
IN
POCSO SPECIAL CASE NO.322 OF 2015

Sunil Ganpat Suryavanshi, Age 21 years,
Occ.Service, R/o.At Siddhivinayak Chawl,
No.6, Room No.2, Maharashtra
Mankhurd, Mumbai-88
(Presently lodged in Taloja Prison)

Appellant

versus

1. The State of Maharashtra
2. Ms.J. Age 7 years, through her guardian
Swaroop J. Karangutkar,
R/o.Siddhivinayak Chawl,
Room No.56, Chawl No.6, Mankhurd,
Mumbai.

Respondents

Mr.Aniket Vagal for appellant.
Mr.A.R.Kapadnis, APP, for respondent no.1 State.
Mr.Surel S. Shah for respondent no.2.
Mr.Arun Mahadik, PSI, Trombey Police Station, present.

CORAM : PRAKASH D. NAIK, J.

Date of reserving the judgment : 11th December 2020

Date of pronouncing the judgment : 7th January 2021

JUDGMENT :

1. This appeal under Section 374 of Code of Criminal Procedure is directed against judgment and order dated 4th April 2017 passed by Special Judge under POCSO Act, Greater Mumbai in POCSO Special Case No.322 of 2015. The appellant has been convicted for

the offence under Section 6 r/w 5(m) of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'). He is sentenced to suffer rigorous imprisonment for ten years and pay fine of Rs1,000/-. The appellant is also convicted for the offence u/s 376 of Indian Penal Code. However, in view of Section 42 of POCSO Act, no separate punishment was awarded. The appellant is directed to pay compensation of Rs.20,000/- to the victim girl as per Section 33(8) of POCSO Act.

2. The prosecution case in nutshell is as follows :

(a) Report was lodged with police by the informant on 23rd April 2015 alleging that her daughter (the victim) told her to remove her underwear and wash her. The informant asked her, what has happened. The victim did not talk. On examining her underwear the informant noticed liquid substance;

(b) The victim disclosed that the accused called her in his house and closed the door from inside. He made her sleep on the floor and removed her clothes. The accused poured oil on her private part. The accused inserted his private part in her place of urination and slept on her body. When she cried, he put on her underwear. The accused also told her not to disclose the incident to any other person and told her to go home. The informant washed victim's place of urination and kept underwear aside. Complainant went to house of accused and asked him about the act done by him. He was alone. He said that he played prank and ran away.

3. On the basis of statement of informant, crime was registered vide CR No.106 of 2015 for the offences punishable under Sections 376 of IPC and Sections 4,8,12 of POCSO Act;

4. Investigation proceeded. Spot panchanama was conducted. The clothes of the victim and the accused were seized. Statement of victim and other witnesses were recorded. Appellant-accused was arrested on 23rd April 2015. Medical examination of the victim was conducted. Accused was also medically examined. On completing investigation charge sheet was filed.

5. Charge was framed as follows : “Firstly the accused on 23.04.2015 around 11.15 p.m at Chawl No.06, Room No.2, Maharashtra Nagar, Mankhurd, Mumbai-88 committed aggravated penetrative sexual assault on victim girl by name Kumari Janhavi aged 7 years and thereby committed an offence punishable u/sec.6 r/w 5(m) of POCSO Act, 2012. Secondly, the accused on above said date, time and place committed aggravated sexual assault on victim by name Kumari Janhavi aged 7 years by touching her private part and body with sexual intent and thereby committed an offence punishable u/sec.10 r/w 9(m) of POCSO Act, 2012. Thirdly, the accused on the above said date, time and place rape on victim by name Janhavi aged 7 years and thereby committed an offence punishable u/sec.376 of IPC and within the cognizance of this Court”.

6. The prosecution examined nine witnesses. PW-1 is the victim girl. PW-2 is the complainant (mother of victim), PW-3 is the aunt of

victim, PW-4 is the panch witnesses for seizure panchanama. PW-5 is social worker in whose presence the statement of victim was recorded. PW-6 is PSI who conducted the investigation. PW-7 is medical officer who examined the victim and accused. PW-8 is PSI who recorded the statement of victim and PW-9 is Police Inspector who is the investigating officer.

7. The prosecution relied upon documents, such as, report Exhibit-11, printed FIR Exh.11-A, seizure panchanama of victim's clothes Ex-15, arrest panchanama Ex.19, arrest form Ex.20, spot panchanama Ex.21, medical report Ex.24, discharge summary Ex.25, medical examination report of accused Ex.26 and C.A.report Exh.9 collectively.

8. Learned advocate for appellant submitted that the appellant has been falsely implicated in this case. The victim has been tutored by the complainant. The mother of victim had read the statement to the victim before deposition. The statement was not read over to the victim. She was not aware about the contents of statement. The victim admitted that unusual words were told to her by mother. No semen was noticed on the undergarment of the victim, when panchanama Exh.15 was recorded. The C.A.report, however, shows stains of semen. There were no injuries on the genitals of victim. The final opinion about the sexual assault was pending till receipt of FSL report. No such report was received by the investigating machinery. There was no final opinion about sexual assault. PW-5 is an illiterate person. The victim child has not referred to her presence while recording her statement. There are discrepancies in the investigation. There is no cogent evidence to establish the offence.

In the alternative, it was submitted that ocular evidence and medical evidence would at the most establish the offence u/ss.7 and 8 of POCSO Act. The offence u/s 6 of POCSO Act is not made out. There was no penetrative sexual assault. The complainant has exaggerated the incident and tried to make out case of aggravated penetrative sexual assault by tutoring the victim. The appellant is in custody for a period of about five years and eight months. The appellant is a young boy. The appellant can be released on the basis of sentence undergone by him.

9. Learned APP submitted that evidence of victim child inspires confidence. She was cross examined. In the cross-examination she was able to deal with the questions put up by defense. The victim has asserted that there was penetrative sexual assault. There is no reason to doubt the evidence of the child witness. The medical evidence supports the prosecution case. The defense could not shake the evidence of complainant and the victim and other witnesses through cross-examination. The statement of victim was recorded in the presence of PW-5. The victim has categorically stated that she was aware about the incident. She has identified the accused. Specific role has been attributed to the accused. There is evidence on record to prove aggravated penetrative sexual assault.

10. Learned counsel for respondent no.2 had adopted the arguments by prosecution. In addition he submitted that the victim has supported the prosecution case. In the cross-examination, the victim has categorically stated that she was sexually assaulted by the accused. The testimony of the victim cannot be discarded. Her evidence is sufficient to convict the accused. She has firmly stated

that it was penetrative sexual assault. There is no reason to falsely implicate the accused in the crime. History was provided by the accused to the medical officer about commission of sexual assault. The statement would amount to extra judicial confession which corroborates the case of prosecution. There is substantial evidence on record to establish that the accused has committed aggravated penetrative sexual assault.

11. I have scrutinized the evidence which is in the form of ocular and documentary evidence. The alleged incident had occurred on 23rd April 2015. PW-1 (victim) was aged about 7 years. She identified accused in Court. She was sitting on the parapet of house of accused. He took her in his house. He closed the door and bolted it from inside. The accused removed her clothes. He poured oil on her private part. He slept on her body. He put his chuni in her sonu. The victim pointed private part. She felt pain and started crying. The accused put her chaddi back and told her not to disclose the incident anyone. She went to her mother. She told her mother to remove her chaddi and wash it and that the accused poured oil on her sonu and slept on her. Her mother went to the house of accused. The complaint was lodged to police. She narrated the incident to police. She was sent to Doctor. She identified her clothes which she was wearing on the date of incident. She do not recollect whether doctor had asked her about incident. No enquiry was made by any other person.

12. PW-2 is the mother of victim. Accused was their neighbour. On 23rd April 2015 her daughter (victim) told her to remove her nicker and wash her. She found white substance on her undergarment. The

victim disclosed that the accused called her at his room and bolted the door from inside. He removed her underwear and poured oil on place of urination. He put his chunni in her place of urination. The victim started crying. The accused put on her nicker and told her that she should not disclose this act to any other person and sent her back home. She washed off the place of urination. She found white substance on victim's nicker. She went to the house of accused and asked him whether he touched his daughter's nicker. He said he played a prank. He ran away. She went to Trombey Police Station along with victim and lodged the report. She handed over clothes of the victim to police. The statement of victim was recorded u/s 164 of Cr.P.C. She identified clothes of victim. Her statement was marked as Exh.11. The proforma of FIR was marked as Exh.11-A. The statement of victim was marked as Exh.12.

13. PW-3 Smt.Varsha Kargutkar is aunt of victim. On 23rd April 2015 she was on duty. She stated that on 23rd April 2015 she received call from PW-2. She was informed that accused had sexually assaulted the victim. In the afternoon she spoke to victim. She was informed about the incident. They went to police station. Her statement was recorded on 2nd May 2015.

14. PW-4 Aashiki Patil acted as panch witness. According to her, she was called by police on 23rd April 2015. The girl's mother produced clothes. Police seized the clothes. Seizure panchanama was recorded Exh.15.

15. PW-5 Jayshri is the social worker. According to her, PSI Patil from Trombey Police Station called her and informed that statement

of the victim girl is to be recorded. She went to police station. The statement of victim was recorded in her presence. The victim child in her presence stated that the accused had slept over her body and sexually assaulted her. Statement of victim was shown to her. Her thumb impression on the statement was marked as "X" for identification.

16. PW-6 Pankaj Khairnar was PSI attached to Trombey Police Station. He stated that statement of the complainant was recorded on 23rd April 2015 and crime was registered. Accused was arrested. Arrest panchanama was recorded (Exh.19). Clothes of the accused were seized (Exh.17). The clothes of the victim were also seized (Exh.15). Spot panchanama was conducted (Exh.21). Statement of father of the victim was recorded. Further investigation was conducted by P.I.Mondkar. He forwarded blood samples, nail clippings, swabs for chemical analysis vide letter dated 28th April 2015 (Exh.22).

17. PW-7 is the medical officer Dr.Rajesh Dere. He was attached to Lokmanya Tilak Municipal Medical College and Hospital at Sion. According to him, the victim was examined on 23rd April 2015. History was given by mother and victim. As per the history, victim had gone to the house of accused at 10.30 am.. Accused locked the door from inside, removed her clothes and tried to penetrate his genital inside the vagina. He could not penetrate completely and ejaculated over the perineal area. The victim started crying and she was sent home. The victim narrated this incident to mother and the mother complained to the Police Station. There were no external injuries present over body of victim on local examination. There was

no injury over the external genitals. Vaginal perineal and buccal swabs were preserved for chemical analysis. Opinion was given that evidence of sexual intercourse/assault cannot be ruled out, hence final opinion was kept pending till receipt of FSL report. The said report was written in his handwriting (Exh.24). If there was attempt of sexual act without penetration, then there may be no injuries present over the female external genitals. The victim was admitted to Sion Hospital on 23rd April 2015 and discharged on 25th April 2015. The discharge summary was marked as Exh.25. He examined the accused on 24th April 2015 brought by Head Constable Gaikwad. As per history given by the accused, the victim came to his house on 23rd April 2015. He was alone. He locked the door from inside. The clothes of the victim were removed. He applied coconut oil to her genitals and tried to penetrate inside her vagina but could not succeed. He ejaculated his semen at her perineum. The victim started crying and was allowed to go by accused. There was no external injury over the body of accused. Medical report is marked as Exh.26.

18. PW-8 PSI Samiksha Patil conducted investigation. She was attached to Trombey Police Station. She recorded statement of the victim in the presence of social worker Jayshri Ghodke and her mother in question and answer form. The statement bears her signature and thumb impression of social worker and signature of victim's mother. PW-9 Krishna Mondkar was Police Inspector attached to Trombey Police Station. He conducted further investigation. He recorded statement of two witnesses Varsha Kargutkar and Swati Parkar. The victim was sent to Court for recording statement u/s 164 of Cr.PC. Victim was produced before

Child Welfare Committee. He received C.A Reports (Exh.9 colly.) On completing investigation he submitted charge sheet.

19. The prosecution case is primarily based on the testimony of victim and the medical officer who had examined the victim. The victim is a child aged about seven years. It is trite law that evidence of child witness should be carefully scrutinized as there is likelihood of tutoring. Duty is cast upon Court to evaluate and assess the evidence of child witness with other evidence on record. In **Dattu Ramrao Sakhare Vs. State of Maharashtra (1997)5-SC-341**, it is observed that evidence of child witness and credibility thereof would depend upon the circumstances of each case. The Court should bear in mind that witness is reliable and demeanor must be like any other competent witness and there is no likelihood being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however, as a rule of prudence the Court always find it desirable to have the corroboration to such evidence from other dependable evidence on record. In **Ratansinh Nayak Vs. State of Gujarat (2004)1-SCC-64**, it was observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with Trial Court. However, said decision may be disturbed by the higher Court if found to be erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. In **Arbind Singh Vs. State of Bihar 1994-SCC (Cri)-1418**, it is observed that if the Court finds traces of tutoring, corroboration is a must before evidence of child witness can be acted upon.

20. In examination-in-chief, the victim was asked where did she go after the incident. She stated that she went to her mother. She told her mother to remove her chaddi and to wash it. Mummy asked her what happened. She told her mother that accused put the oil on her sonu and slept on her. Thus, the victim did not disclose to her mother when she met her that the accused had penetrated into her private part. She further stated that she was taken to police station. She disclosed the incident to police. They recorded it. She was sent to doctor. She do not recollect whether doctor asked her about incident. No where else enquiry was made with her. She was asked which person which places inquiries were made with her. She replied no. She denied that word 'sonu' was told to her by mother. She did not recollect how she came to know about this word. The victim was asked whether before coming to Court she was asked to memorize. She said yes. Her mother got her memorized. She was then asked when she had been to Trombey whatever stated by her mother was recorded. She said yes. She did not recollect what was written by police. As per narration of her mother, police were recording. In the midst of cross examination learned SPP sought permission to ask one question to the victim in the interest of justice. Court granted permission. The question put by SPP viz Q.No.61 reads as follows :

“Beta tu mala sangitla hota ki tu policana sangitlas, aata tu mhante mummy ne policina sangitale, tar hyatala konta khar aahe, polisani tula vicharle navtake ka ?

Answer :- Polisani mala thode vicharle hote, mi ghatana polisana sangitali.”

Thereafter the defense continued further cross-examination. The victim then deposed that she told police as her mother told her to tell. However, further she stated that her mother did not tell her anything and she knew everything. She did not know what police recorded. When police were inquiring, her mother was sitting next to her. When her statement was recorded only her mother and she was present. She identified the accused. She was asked whatever she is stating now is narrated to her by mother. She denied. She identified her clothes. Then she was asked, all this was memorized by her mother. She denied. She denied suggestion that whatever narrated in court was told by her mother to say. Victim was asked whatever was recorded was given to her to read it. She stated that her mother had given it to memorize. She was asked whether her mother had asked her to memorize and depose and that is what she deposed. She said yes.

21. PW-2 in the cross-examination has deposed that her husband and her daughter were not present when her statement was recorded. She was not present with the victim when her statement was recorded. Victim's statement was not given to her for reading. She did not know what statement was given by her. She did not read her statement. She had accompanied the victim at the time of medical examination. Victim's father was also with them. The statement of father of victim was not recorded in her presence.

22. PW-3 has deposed in her cross-examination that on the day of incident when she went to police station, her statement was not recorded.

23. In the cross-examination PW-4 stated that there were no stains on the clothes of victim. Police did not obtain her signatures on the clothes. She came in the Court along with PW-3. She was told by PW-2 to accompany her as panchanama was to be recorded. She knows PW-2 as she resides in her locality. The panchanama Exh.15 does not mention that there were stains on the clothes of victim.

24. PW-5 has deposed in the cross-examination that since last 12 years she is doing social work. Police has not recorded her statement. Since she is illiterate, she had no occasion to read the statement. While recording statement, victim, her mother and Patil madam and she herself were present. PW-6 has stated in his cross-examination that panchanama of arrest Exh.19 does not mention the place from which the accused was arrested. He do not know when statement of victim was recorded and do not remember when she was sent for medical examination. He registered offence under POCSO Act without waiting for medical examination. There is no specific mention that victim's mother took out victim's clothes and handed over it to him. He do not remember when he collected blood samples, nail clippings and swabs from the hospital and forwarded to chemical analysis. He did not record statement of in-charge of Muddemal Section of Police Station. He had not recorded statement of constable who carried blood samples to Kalina Lab. There is no mention of date on label Article-A. PW-8 has deposed that statement of Ghodke was not recorded by him. There is no documentary evidence to show that Jayshri Ghodke was present at the time of recording statement of victim. She did not know whether CD is filed along with charge sheet relating to audio video recording done at the

time of recording statement of victim. She has read the statement of the victim. The words used in the statement were told by victim herself. The victim told that the meaning of words 'sonu' and 'chunni' were told by her mother. She told that her mother had told her meaning of these words. PW-9 has stated that he did not notice during investigation that the Doctor had not give final opinion. On the basis of victim's statement and other statements, there was material to submit charge sheet and hence he submitted it.

25. PW-7 in his cross-examination has stated that history given in Discharge Summary was written by Resident Doctor. As per the history given in discharge card, there is history of accused touching private parts of victim after application of oil. C.A report does not mention of vaginal swabs. In case of attempt of penetration, there would be no redness, swelling over the external genital. Till now he did not give final opinion as chemical analysis report was not provided to him.

26. The C.A reports are exhibited in evidence vide Exhibit-9. The undergarment of the victim was having semen stain. The report further indicates that no blood was detected on the other clothes of the victim and the accused. No semen was detected on the other clothes of victim and the accused. The ABO grouping on the semen sent for examination was inconclusive. The C.A report relating to blood of accused sent for examination, is that it is unsuitable for blood grouping. The swab of the accused did not result in detection of semen. The nail clippings of the accused did not indicate existence of blood or any tissue. There is no evidence that semen was found on the person of victim.

27. On scrutiny of evidence on record it is apparent that victim was aged about 7 years. The incident had occurred on 23rd April 2015. The evidence of PW-1 (victim) proves that there was sexual assault by accused. In the light of evidence adduced before the Trial Court, the question which arises for consideration is whether it was aggravated sexual assault or aggravated penetrative sexual assault.

28. The FIR was lodged by mother of victim on 23rd April 2015 at about 2.30 p.m. The incident had occurred on the same day at about 11.15 am. According to mother of victim (PW-2), she was informed by victim about the incident. The victim (PW-1) in her deposition has narrated the incident. Her deposition is referred to hereinabove. According to her, she informed the incident to her mother. When her mother asked her what happened, she disclosed that Sunya Dada put the oil on her sonu and slept on her. Thereafter her mother went to house of Sunya Dada (accused). Thus, the information given to her mother was as above. This was provided by victim immediately when she met her mother after the incident. There is no reference of penetration. However, sexual assault is referred to by the victim. In the cross-examination she stated that whatever was recorded was given to her by mother for memorizing. Her mother had asked her to memorize and depose and that is what she has narrated. Before coming to Court she was asked to memorize by her mother. She further stated that when she had gone to Trombey, whatever told by her mother was written. She do not know what police had recorded. Police were recording as per narration of her mother. She was not telling. However, while Special PP put question no.61, she stated that police had asked her little and she narrated the incident to

police. Subsequently she stated that whatever her mother told her, she disclosed it to police. Thereafter she stated that her mother did not tell her anything, she knew everything. She did not know what police had written. She stated that except her mother and she herself, no one was present during inquiry by police. Thus, victim did not disclose presence of PW-5 while recording her statement. Victim has identified clothes which were on her person at the time of incident. Suggestion that whatever she stated before court was told by her mother was denied by her. She did not remember whether doctor asked her about incident. She also stated that nowhere else enquiry was made with her. She replied no to the question, which person, which places inquiries were made with her. The statement of victim recorded by police on 23rd April 2015 was produced during evidence of PW no.5. Thumb impression of PW-5 was marked as "X" for identification. The said thumb impression was marked as Exh.28 while recording evidence of PW-8 Samiksha Patil. Statement of victim was not exhibited in evidence. PW-1 has not referred to recording her statement in court under Section 164 of Cr.PC. PW-2 had stated that she was not present when the statement of victim was recorded. PW-5 stated that she has no document to show that she was present at police station. Police has not recorded her statement. PW-8 has stated that name of PW-5 as social worker is in the list of social workers kept at police station. PW-8 did not record statement of PW-5.

29. Apparently allegation of penetration is introduced by PW-2. She had instructed PW-1 to memorize the statement. The medical evidence do not support allegation of penetration. However, from the evidence on record charge of sexual assault cannot be ruled out.

30. The evidence of PW-7 is crucial to determine nature of act committed by accused. Medical Officer (PW-7) disclosed that victim was accompanied by her mother. History was provided by them that accused tried to penetrate inside vagina. He could not penetrate completely and ejaculated over perineal area. Since victim was crying, she was sent home. There is no evidence that semen was found on person of victim. Although blood group could not be detected, semen was found on nicker of victim as per C.A report Exh.9 collectively. According to PW-2, she had washed PW-1 after the incident. She noticed liquid on nicker of victim. The defence had argued that in the panchanama of seizure, it is not mentioned that there was semen on nicker of victim and panch PW-4 has stated that there was no semen on clothes. PW-7 also recorded history given by accused. As per said history accused tried to penetrate but could not succeed. Since victim was crying she was allowed to go. PW-7 further stated that after examination, opinion was "Evidence of sexual intercourse/assault cannot be ruled out Hence final opinion is kept pending till receipt of FSL reports." Thus, the medical officer was not sure about opinion which was dependent on FSL reports. It is pertinent to note that PW-7 has stated that till now he has not given his final opinion as chemical analysis report was not provided to him. PW-9 admitted that he had not noticed during investigation that doctor had not given final opinion. He had received C.A reports Exh.9 collectively in this case. He filed charge sheet on the basis of material.

31. PW-7 deposed that if there is attempt of sexual act without penetration, then there may be no injuries present over female

external genitals. He further stated that history given in discharge summary is written by resident doctor of Pediatric Department while that history given in examination report is written by him. As per the history given in discharge card, there is history of accused touching private part of victim after application of oil. He admitted that C.A reports do not mention about vaginal swabs. In cases of attempt of penetration, there would be no redness, swelling over external genitals.

32. I have perused medical examination report of victim (Exh.24). History provided by victim's mother and victim is recorded. It is recorded that no stains or foreign material evident on body. No external injuries on body. Local examination of genital indicate no stains, no swelling, no edema on labia majora and labia minora. No evidence of injury on vagina. Hymen injury absent. No bleeding, no oedema. No evidence of perineal tear. No external injury on urethra. No external injury on anus and oral cavity. High vaginal/cervical swab and urethral swab was not collected. Swab from discharge was collected. Samples/forensic evidence preserved for FSL is vaginal swab, perianal swab, perineal swab and buccal swab. Provisional opinion relating to injuries to external genitals is hymen intact. Evidence related to non-penetrative assault not present. The opinion of PW-7 reflected therein is "Evidence of sexual intercourse/assault cannot be ruled out. Hence final opinion is kept pending till receipt of FSL reports". It is noted through evidence of PW-7 and PW-9 that final opinion was not given. Discharge summary of victim issued by Department of Pediatrics is on record (Exh.25). Victim was admitted from 23rd April 2015 to 25th April 2015. Diagnosis : Alleged h/o sexual assault. Clinical summary referred as victim brought by

mother. Sexual assault by known person on 23rd April 2015. There is history of sexual assault in the form that he touched his private parts to her private parts after applying oil to her private part on 23rd April 2015. Medical case papers recorded on 23rd April 2015 at the time of admission mentions history of sexual assault by known person.

33. The document on record includes letter dated 24th April 2015 issued by hospital to chemical analyzer regarding nail clippings of accused for foreign material detection. Letter dated 24th April 2015 issued to C.A for prepucal swab and urethral swab for vaginal cells and seminal stain detection. Letter dated 24th April 2015 reporting blood of accused for blood grouping. C.A reports are referred to hereinabove. PW-7 while referring to C.A reports (Exh.9 collectively) has categorically stated that C.A report does not mention of vaginal swab. In the light of medical case papers/medical examination/medical opinion/C.A reports/evidence of PW-7, it cannot be said that there was penetrative sexual assault.

34. The prosecution has relied on medical examination of accused (Exh.26). History allegedly provided by accused is recorded in case papers. It is mentioned that accused have stated that victim came to his house. He was alone. He locked the door and removed clothes of victim, applied coconut oil on her genitals and tried to penetrate inside vagina but could not succeed. He ejaculated semen at perineum. Victim started crying and returned to her home. According to learned APP and learned counsel for appellant, history provided by accused can be considered as extra judicial confession which would support the case of prosecution and proves guilt of accused. The applicant was examined on 24th April 2015 after his

arrest. PW-7 has deposed that on 24th April 2015 he examined accused. He was brought by HC Gaikwad for examination of potency. Thus, the accused was in custody of police. Such extra judicial confession is not admissible in evidence. It would be hit by Section 26 of Evidence Act. Section 26 of Indian Evidence Act states that confession by accused while in custody of police not to be proved against him. In the case of **Kishore Chand Vs. State of Himachal Pradesh (1991)1-SCC-286**, it was observed that Section 26 provides that no confession made by any person while he is under custody of police, unless it be made in the immediate presence of Magistrate, shall be proved against such person. In the case of **Ramsingh Vs. Sonia and others (2007)3-SCC-1**, the accused was taken to lie detection test while he was in police custody and at that time he made extra judicial confession at which point police personnel went away from scene temporarily. It was observed that in the light of decision rendered in Kishor Chand (supra), the extra judicial confession made by accused is hit by Section 26 of Evidence Act. Section 26 of Evidence Act reads as follows :

“26. Confession by accused while in custody of police not to be proved against him. - No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate”, shall be proved against such person.
[Explanation – In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).”

In any case, assuming that it is not hit by Section 26 of Evidence Act, history provided by accused refers to attempt of penetration and not penetration.

35. However, sexual assault by accused is not ruled out. Victim had complained to her mother immediately after the incident. History of sexual assault is evident.

36. Both the sides have relied upon judicial pronouncements in support of their contentions. In the case of **Yogiraj s/o. Pralhad Ghule Vs. The State of Maharashtra (2016-ALL MR (Cri)-4715)**, relied upon advocate for appellant, it was observed that medical report produced by the prosecution do not show any external or internal injuries. No stain was found on any part of her body or private part. No definite opinion about rape can be given. No injury over private part or hymen or vagina was found. This evidence in turn shows absolute negation of the theory of rape of a girl aged six years by a person of 19 years. There is no other evidence produced by the prosecution affirmatively to show sexual intercourse/penetration or any of the ingredients of Section 375 of IPC. It was further observed that the evidence of child witness should be carefully scrutinized as there is likelihood of tutoring. The Courts are required to assess evidence of child witness in juxtaposition with other evidence, even if evidence of victim has not been challenged in the cross-examination properly. The accused therein, however, was convicted for the offence u/s 354 IPC and acquitted for the offence u/s 376 IPC.

In the case of **Sunil Soma Bhamble Vs. The State of Maharashtra (2016-ALL MR(Cri)-2950)** the accused was tried for attempting to commit sexual intercourse with the victim girl of four years. It was observed that the only link between the accused and the offence is that of finding of semen stain on the clothes of accused

and pant of victim. There is discrepancy in the evidence of panch witness and informant as to manner in which clothes of victim were seized and action of removal of stains by informant. The medical evidence did not show injuries on private parts of the victim. Mere finding of semen stains cannot be clinching material so as to establish guilt of appellant.

In the case of **Ganesh Gopal Phulwale Vs. State of Maharashtra decided in Criminal Appeal No.753 of 2018 decided on 11th November 2019** it was observed that there was no material to hold that it was a case of penetrative sexual assault. External or internal injuries were not found on the victim. The offence would at the most fall u/s 7 and 8 of POCSO Act. The medical evidence indicate that there was no external or internal injuries on the victim.

37. Learned advocate for respondent no.2 has relied upon several decisions to contend that testimony of the victim has to be considered. In **State of Punjab Vs. Gurdeep Singh (1997)7-SCC-714**, it was observed that extra judicial confession can be treated as a substantive evidence if there is some assuring material or circumstance. In the case of **Yogesh Singh Vs. Mahabeer Singh and others (2017)11-SCC-195** it was observed that the evidence of child witness must find adequate corroboration before it is relied upon. However, it is not the law that if a witness is a child, the evidence shall be rejected even if it is found reliable. In the case of **Vijay @ Chinee Vs. State of Madhya Pradesh (2010)8-SCC-191**, it was observed that the statement of prosecutrix if found to be worthy of credence and reliable, it requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix. In the

case of **State of Himachal Pradesh Vs. Manga Singh (2019)16-SCC-759** it is observed that no corroboration is required unless there are compelling reasons which necessitate Courts to insist for corroboration of statement of victim. Medical evidence may not be available. Solitary testimony of prosecutrix would be sufficient to base the conviction, if it inspires confidence.

38. The Trial Court has observed that when prosecution has established act of accused, presumption under Section 29 of POO Act comes into play. Section 30 of POCSO Act refers to presumption of culpable mental state. The Trial Court convicted the appellant under Section 376 IPC and Section 6 r/w 5(m) of POCSO Act. It was, however, held that prosecution failed to prove the guilt of accused under Section 10 r/w 9(m) of POCSO Act on the ground that there is no other distinct act than the attempt of inserting private part committed by accused.

39. The Trial Court has failed to appreciate that the sexual assault was related to one act. It is either penetration or sexual assault. Since the victim was below 12 years of age, it was either aggravated penetrative sexual assault or aggravated sexual assault. The Trial Court had framed the charge under Section 6 r/w 5(m) of POCSO Act, Section 376 of IPC and Section 10 r/w 9(m) of POCSO Act. Section 3 relates to penetrative sexual assault. Section 4 provides punishment for penetrative sexual assault. Section 5 provides for aggravated penetrative sexual assault. Section 6 provides punishment for aggravated penetrative sexual assault. Section 7 defines sexual assault. Section 8 provides punishment for sexual assault and Section 9 defines aggravated sexual assault, whereas Section 10 provides punishment for aggravated sexual assault.

40. There is non-application of mind by Trial Court. Since the charge was also framed under Section 10 r/w 9(m), it was observed that the said charge has not been proved. The prosecution case was based on one act of alleged aggravated penetrative sexual assault. It is not established that the accused had committed act of penetrative sexual assault. It is a case of sexual assault. The appellant could be convicted for the offence u/s 9 r/w Section 10 of POCSO Act. Although the first charge was framed u/s 6 r/w Section 5(m) of POCSO Act, the accused can be convicted for lesser offence in the light of evidence on record. The accused was also charged and convicted under Section 376 of IPC and in accordance with Section 42 of POCSO Act. No separate punishment was imposed. In view of Section 386 of Cr.P.C, the Appellate Court can alter the finding, maintaining the sentence, with or without altering the finding, alter the nature or the extent or the nature and extent of sentence.

41. The punishment provided under Section 10 of POCSO Act is imprisonment 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. The appellant is in custody for five years and six months approximately. The medical examination report shows his age around 20 years at the time of incident. Hence, the appellant can be sentenced to period of imprisonment undergone by him. The fine and order of payment of compensation is required to be maintained.

42. Hence, I pass following order :

ORDER

- (i) Criminal Appeal No.366 of 2017 is partly allowed;

- (ii) The conviction awarded by judgment and order dated 4th April 2017 passed by Special Judge under POCSO Act, Greater Mumbai in POCSO Special Case No.322 of 2015, for the offence under Section 6 r/w 5(m) of POCSO Act and Section 376 of Indian Penal Code, is set aside;
- (iii) The conviction is altered for the offence under Section 9 r/w Section 10 of POCSO Act and the appellant is sentenced to imprisonment already undergone by him with fine of Rs.1,000/-, in default of payment of fine amount, he shall undergo simple imprisonment for thirty days;
- (iv) The order directing payment of compensation of Rs.20,000/- to the victim girl is maintained. If the appellant fail to deposit compensation amount, he shall undergo imprisonment of one year.
- (v) The appellant shall be set at liberty after depositing fine and compensation amount unless required in any other case.

(PRAKASH D. NAIK, J.)

MST