

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

CRIMINAL APPEAL NO. 723 OF 2019

Laxman Govind Varma	 Appellant
v/s.	
The State of Maharashtra and anr.	 Respondents

Mr. S.P. Singh for the Appellant.
Mr. P.H. Gaikwad, APP for the State.
Ms. Ameeta Kuttikrishnan for Respondent No.2.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 26th OCTOBER, 2021.

ORAL JUDGMENT :-

. The Appellant herein has assailed the judgment dated 01/04/2019 in POCSO Special Case No.328/2017. By the impugned judgment, the learned Designated Judge under Protection of Children from Sexual Offences (POCSO) Act, 2012, Greater Bombay has held the Appellant guilty of offences punishable under Sections 354, 354-A r/w. 34 of the Indian Penal Code and Section 10 of POCSO Act, 2012. He has been sentenced to undergo rigorous imprisonment for five years with fine of Rs.10,000/- in default to undergo rigorous imprisonment for one month for offence punishable under section 10 of POCSO Act. No separate sentence has been imposed for offences under Section 354 and 354-A of the Indian Penal Code.

2. It is the case of the prosecution that the Appellant herein was engaged to paint a room of one Shaikh Mohd. Rafique (PW6). On 11/05/2017, at about 09:30 p.m., the victim (PW2) complained to her mother (PW1) that she was having pain in her private part. On the same night, when PW1 took the victim to the washroom for bath, the victim told her not to apply soap on her private part. Upon inquiry, the victim informed PW1 that when she had gone to the room of PW6 – Shaikh Mohd. Rafique, the painter made her sit on his lap and touched her vagina. She also complained that the other person present in the room had slapped her. Based on the said information given by the victim, PW1 lodged the FIR on 12/05/2017, pursuant to which PW4 – PSI Rahul Baban Kshirsagar registered the crime and referred the victim to KEM Hospital for medical examination. PW5 – PSI Nalini Shankar Shinde recorded the statement of the victim in presence of her mother. PW4 collected the birth certificate of the victim, conducted the scene of offence panchnama, arrested the Appellant and the co-accused under the arrest panchnama at Exhibit 17 and 18 and referred them for medical examination. He recorded statements of the witnesses and filed the charge sheet upon completion of investigation.

3. The charge was framed against the Appellant and the co-accused

for offences under Sections 354, 354-A, 323 r/w 34 of the Indian Penal Code and sections 6 and 10 of POCSO Act. They pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined six witnesses. The statement of the Appellant and the co-accused was recorded under Section 313 of Criminal Procedure Code. The defence of the Appellant and the co-accused was of total denial. The learned Special Judge after considering the evidence on record, acquitted the co-accused – Sajid Mirul Hasan Ali and convicted and sentenced the Appellant as stated above. Being aggrieved by the conviction and sentence, the Appellant has preferred this Appeal.

4. Heard Mr. S.P. Singh, learned counsel for the Appellant, Mr. P.H. Gaikwad, learned APP for the State and Ms. Ameeta Kuttikrishnan, learned counsel for Respondent No.2. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

5. The case of the prosecution is based mainly on the testimony of the victim girl who at the time of the incident, was barely 04 years of age. It is well settled that conviction can be based on the sole testimony of a child witness provided the witness is competent to depose to the facts and is a reliable witness. Section 118 of the Indian

Evidence Act, 1872, which deals with competency of a person to testify, provides that - “ *All persons shall be competent to testify unless Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.*”

Explanation .-A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.”

6. In the case of ***State of Karnataka v/s. Shantappa Madivalappa Galapuji and ors. (2009) 12 SCC 731***, the Hon’ble Apex Court has observed that :-

“6. The Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act, envisages that all persons shall be competent to testify unless the Courts considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease, whether of mind or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and to give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such

evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction based thereon.”

7. In ***P. Ramesh Vs. State represented by Inspector of Police, AIR 2019 SC 3559***, the Apex Court while considering the issue relating to the competency of a child witness vis-à-vis the relevant provisions under The Oaths Act, 1969 has reiterated that :-

“ 13.Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in Dattu Ramrao Sakhare v State of Maharashtra, (1997) 5 SCC 341, where this Court, in relation to child witnesses, held thus:

“5.A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in *Wheeler v. United States*, 159 U.S. 523 (1895) wherein it was held thus:

“... While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question

of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which- will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous...” (emphasis supplied)

In Ratansinh Dalsukhbhai Nayak v State of Gujarat, (2004) 1 SCC 64, this Court held thus:

“7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.” (emphasis supplied)

15. *In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down*

regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined. ”

8. It is thus well settled that a child is a competent witness provided he is capable of understanding the questions put to him and is able to give rational answers thereto. In the instant case, the birth certificate at Exhibit – 28 reveals that the victim was born on 27/09/2012. The alleged incident was committed on 11/05/2017. Hence, as on the date of the incident, the victim was 04 years of age. Since the witness was of tender age, it was obligatory upon the Judge to ascertain the intellectual and understanding capacity of the child and to record her satisfaction in respect of competency of the child witness to depose to the facts of the case. The records indicate that the learned Judge had not questioned the victim to ascertain whether she was able to

understand the questions put to her and give rational answers thereto. The learned Judge has thus failed to evaluate the competency of the victim (PW2) and record her satisfaction about her competency to depose. It is therefore necessary to scrutinize the evidence of PW2 and ascertain whether she was a competent and reliable witness.

9. The evidence of PW2 was recorded in question-answer form.

The relevant questions and answers read thus :-

Q.10 Where you were playing on that day ?

Ans. I was playing at the house of Kaki.

Q.11 Whether the Kaki was in the said house ?

Ans. Kaki was not there but colourwala (painter) was there.

Q.12 How many colourwala were there ?

Ans. Two.

Q.16 Did you go into the said room, as they called you ?

Ans. Yes, I went inside the room.

Q.18 What happened when you went inside ?

Ans. I have forgotten what happened inside.

Q.19. Did something happened with you when you went inside ?

Ans. Yes.

Q.20. What happened with you ?

Ans. I don't recollect.

Q.21. Why did you come to the Court ?

Ans. I have come to say something.

Q.22. What do you want to say ?

Ans. Nothing.

Q.23. Where you went with your parents ?

Ans. Police station and then hospital.

Q.24. Whether police inquired with you ?

Ans. Yes.

Q.25. What you have stated to the police ?

Ans. I have stated to the police about those men.

Q.26. What you have stated to the police about those men ?

Ans. Nothing.

Q.27. What Doctor did with you ?

Ans. In the police station said man was present.

Q.28. What Doctor did with you?

Ans. Doctor gave me medicine.

Q.29. Who was the said man present in the police station?

Ans. He was healthy man.

Q.30. Where were you referred later on ?

Ans. Nowhere.

10. The learned Judge has recorded the demeanor of the witness that she was not recollecting the facts and hence, on request, permitted learned Special PP to ask leading questions and to cross-examine the witness. It appears that the counsel for the Appellant did not object to asking of leading questions or cross examination of the victim by the prosecutor. The learned Special PP thereafter put leading questions to the witness, which the witness has answered in the affirmative. The relevant questions and answers read thus:-

Q.34. Is it correct that there were two men where colouring was going on?

Ans. Yes.

Q.35. Is it correct that these two men had called you?

Ans. Yes.

Q.36. Is it correct that you didn't go immediately on their call?

Ans. Yes.

Q.37. Is it correct that then they took you inside?

Ans. Yes. Healthy man took me inside.

Q.38. Is it correct that out of these two men, one took you close to him?

Ans. Yes.

Q.39. Did he give you chocolate?

Ans. No.

Q.40. Did one of them hit you?

Ans. Yes. He hit on my back. (witness has shown the waist by her hand).

Q.41. Is it correct that one of them made you sit on his lap?

Ans. Yes. The other man made me sit on his lap.

Q.42. Did you shout at him?

Ans. Yes.

Q.43. Did the said man touch your vagina?

Ans. Yes. He also touched his mouth to my vagina.

Q.48. Is it correct that in night when your mother was bathing you, you told your mother about the pains in your vagina?

Ans. Yes.

Q.49. Is it correct that then you narrated your mother about those men, who did such things with you?

Ans. Yes.

Q.85. Can you identify those colourwala, if shown to you?

Ans. Yes. One was having moustache.

(now both accused are called before the witness chamber, who are behind the wooden partitions)

Q.86. What accused no.1 did with you?

Ans. The said man touched my vagina with his hand and mouth.

11. PW2 was thereafter cross examined by the Advocate for the Appellant. In reply to question Nos.63 and 80 she has stated that she does not recollect what had happened on that day. Furthermore, in answer to question No.79, she has admitted that she was deposing as

told to her by her mother. In reply to question No.83, the witness has denied that her mother had inquired with her about the incident.

12. A plain reading and overall scrutiny of the evidence of this witness indicates that PW2, a child of four years has not exhibited hostile animus and was not trying to conceal the truth. The tenor of the answers given by the victim (PW2) in the examination -in-chief as well as in cross examination indicate that she did not have either cognitive skills to remember, recollect and narrate the incident or intellectual capacity and maturity to understand the nature of questions and to give rational answers thereto. Consequently, PW2 cannot be considered to be a competent witness.

13. It is further to be noted that in examination-in-chief, PW2 had stated that she did not remember the incident. In the cross examination by the learned Special PP, she has admitted the suggestion that the Appellant had touched her vagina and further stated that the Appellant had also touched her vagina with his mouth. The victim had not stated in the previous statement that the Appellant had touched her vagina with his mouth. Taking note of this improvement, the learned Judge has disbelieved the statement that the Appellant had touched the

vagina of the victim with his mouth. The learned Judge has culled out a stray statement in the form of admission from the deposition of the victim that the Appellant had touched her vagina and based on this stray statement, the learned Judge has held the Appellant guilty of the offence punishable under section 354, 354-A of IPC and Section 10 of POCSO Act.

14. It is well settled principle of law in criminal jurisprudence that no finding can be rendered either on mere surmise or conjecture and every finding should be based on satisfactory and acceptable evidence. Reliance is placed on in the case of ***State of U.P v/s. Pherusingh, AIR 1989 SC 1204***. In the instant case, the learned Judge has not analyzed and appreciated the evidence in its entirety but has given undue importance to a stray statement or admission made by PW2. The learned Judge has totally overlooked the fact that in the cross examination by the counsel for the Appellant, the victim (PW2) had once again reiterated that she does not recollect anything about the incident and that she was deposing as told by her mother. The tenor of her deposition indicates that she was under the influence of her mother. The evidence of PW2, who has been vacillating throughout her deposition does not inspire confidence. The learned Judge has

therefore grossly erred in recording conviction solely on the basis of a stray statement of PW2, who being a child of tender age was neither a competent nor a reliable witness.

15. It is also pertinent to note that PW2 did not know the Appellant and that she had identified him only as a painter. No test identification was conducted to establish the identity of the Appellant. She had identified him in the court for the first time about two years from the date of the incident. In ***Kanan and Ors. Vs. State of Kerala, AIR 1979 SC 1127***, the Apex Court has observed that :-

“ 3... It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The Idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.... ”

16. It is also to be noted that the testimony of PW1 indicates that prior to the incident, she did not know the Appellant either by name or face. She claims that her daughter (PW2) had informed her that the

painter who was engaged to paint the room of PW6 had sexually abused her on 11/05/2017. PW1 has deposed that the name of the Appellant was disclosed by PW6, the owner of the said room. It is to be noted that PW6 – Shaikh Mohd. Rafique has deposed that he had given a contract of painting on 12/05/2017 and that the Appellant had started painting work on 12/05/2017 at 09:00 a.m. and completed the work on the same day by 06:00 p.m. The evidence of PW6 does not indicate that the Appellant was engaged to do the work of painting on 11/05/2017 on which date, the alleged incident had occurred. There is thus no cogent evidence to establish the identity of the Appellant.

17. For the reasons stated above, in my considered view, the learned Judge has grossly erred in holding the Appellant guilty of the offence. Hence, the Appeal is allowed and the impugned judgment dated 01/04/2019 in POCSO Special Case No.328/2017 is quashed and set-aside. The Appellant stands acquitted of the offences punishable under Sections 354, 354-A of the Indian Penal Code and under Section 10 of POCSO Act, 2012. Bail bonds stand discharged.

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(SMT. ANUJA PRABHUDESSAI, J.)