

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

CRIMINAL APPEAL NO.1228 OF 2019

Udaykumar Aadam Jandrapallya
Aged about 32 years, Occ: Service,
Res. At Tukaram Katkar House,
Ambapada Village, Mahul Road,
Chembur (East), Mumbai 74
at present undergoing sentence
at Mumbai Central Prison. ..Appellant

v/s.

The State of Maharashtra
(At the instance of RCF
Police Station)

2) Smt. Nanda Narayan Talekar. ..Respondent/s

Mr. Prashant Jadhav i/b. Shabana Syed for the Appellant.
Mr. S.V.Gaavand, APP for the Respondent-State.
Mr. Sushan Mhatre for the Respondent No.2.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 8th DECEMBER, 2021.**

ORAL JUDGMENT.

1. The Appellant (Accused No.2) has challenged the judgment
dated 29.08.2019 in POCSO Case No. 74 of 2017, Gr. Bombay.

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2. By the impugned judgment the learned Special Judge has held the Appellant guilty of offence under Section 6 and 10 of Protection of children from Sexual Offences Act and sentenced him to undergo rigorous imprisonment for 10 years with fine of Rs.1000/- i.d. 7 days simple imprisonment for Offence under Section 6 and rigorous imprisonment for 7 years with fine of Rs.1000/- i.d. to suffer simple imprisonment for 7 days for Offence under Section 10 of the POCSO Act.

3. PW1 is the mother of the prosecutrix. She had lodged the first information report (Exhibit 26) alleging that on 15.12.2016 her daughter who was 4 years of age had complained of pain in her private part. She had later told her that one “Balu Uncle” had sexually abused her. She had therefore lodged the FIR against the accused no.1- the driver of the school van for sexually abusing her minor girl.

4. Pursuant to the FIR at Exhibit 26, PW11 Shubhangi Jagtap, PSI attached to RCF Police Station recorded the FIR and PW9 Sachin Gawde registered crime No. 303 of 2016 for offences under

Section 376, 354 of IPC and Section 6, 8 and 10 of POCSO Act. She arrested the Accused No.1 under arrest panchanama (Exh.47). On the same day she referred the victim and Accused No.1 for medical examination and seized their clothes. The victim was medically examined by PW5 Dr. Nishita Virendranath.

5. On 20.12.2016 PW1 informed that another person was involved in sexually abusing her minor daughter. PW12 Ashwini Kamble recorded the supplementary statement of PW1 and the victim and handed over further investigation to PW14 Sarjerao Netka. He recorded the statements of the witnesses. In view of identification of the Accused No.2 by the victim, he placed the Accused No.2 under arrest and sent him for medical examination. He forwarded the incriminating material for chemical analysis through PW16 PSI Vilas Dodge. Upon completion of investigation, he filed chargesheet against both the accused for offence under Section 354, 376 (ii) IPC and Section 6 and 10 of the POCSO Act.

6. The accused pleaded not guilty to the charge and claimed to

be tried. Prosecution, in support of its case examined 16 witnesses. Statement of the Accused was recorded under Section 313 Cr.P.C. The defence of the Accused was that of total denial. Upon appreciating and analysing the evidence on record, the learned Judge held that the victim was a 'child' within the meaning of Section 2(d) of the POCSO Act. The learned Judge further held that the victim had identified the Accused No.1 who was the driver of the school van and had specifically stated that he was involved in sexually abusing her. The learned Judge further held that the evidence of the victim indicates that another person was also involved in subjecting her to sexual assault and that she had identified the Accused No.2 before the Court as the person who had subjected her to sexual assault. The learned Judge therefore held both the accused guilty of offence under Section 6 and 10 of POCSO Act and convicted and sentenced them as stated above. Being aggrieved by this conviction, the Accused has filed this appeal under Section 374 of Cr.P.C.

7. The Accused No.1 who had challenged the conviction and sentence in Criminal Appeal No.1312 of 2019 expired during

pendency of the appeal and by order dated 14.10.2021 the appeal was disposed of as abated.

8. Heard Mr. Jadhav, learned Counsel for the Appellant (Accused No.2), Mr. Gavand, learned APP for the State and Mr. Mhatre, learned Counsel for the Respondent No.1. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

9. The parents of the victim are doctors by profession. Their daughter (PW2) was studying in Junior KG in Loretto Convent School. Her school timings were from 8.30 a.m. to 11.45 a./m. The victim and another boy from the same locality used to go to school by the school van bearing No. MH 03 BW 3968. The Accused No.1 was the owner and driver of the said van. She has deposed that Accused No.1 used to pick up her daughter and drop her home by 12.00 noon.

10. On 15.12.2016, the maid servant informed the husband of PW1 that the victim was complaining of burning sensation and

pain in her private part. He gave some cream to the maid with instructions to apply the same on the private part of the victim and later, when PW1 returned home, he informed her that the victim was complaining of pain in her private part. When PW1 tried to examine the private part, the victim did not allow her to touch. She was continuously complaining of pain and appeared to be scared. The victim later informed her that while she was returning home "Van Uncle" had kissed her on her cheeks and chest and had fondled her entire body and touched and inserted his finger in her vagina. The victim also told her that the said Van Uncle had urinated in her mouth. She therefore went to the police station and lodged the FIR at Exhibit 26.

11. The victim was referred to Rajawadi Hospital for medical examination. PW5 Dr. Nishita Virendranath, a Gynaecologist at Rajawadi Hospital has deposed that she had examined the victim on 16.10.2016. On local examination, she found inflammation to labia minora and labia majora. She has deposed that the said injuries indicated sexual assault on the victim. She has produced the medical examination report at Exhibit 37. In the cross

examination she has stated that such inflammation can be caused due to itching. She has however clarified that it is not possible for a child of 4 years to get such itching by fungal inflammation.

12. The medical evidence indicates that the victim girl of about 4 years of age was sexually assaulted and that she had disclosed to her mother that “Van Uncle” had sexually abused her. The victim had initially disclosed that she was sexually abused by the deceased accused No.1. The evidence of PW1 indicates that they had repeatedly questioned the victim about the incident and about 2 to 3 days later the victim disclosed that another person was also involved in sexually abusing her. She had disclosed his name as Ganesh. PW1 reported this fact to the police in her supplementary statement.

13. PW1 and PW7 Rajeshree Ambare, a Counsellor in Sneha NGO have deposed that the police had brought three persons at the police station and that the victim had identified the accused amongst the said three persons as the perpetrator of the crime. On the basis of this identification the accused No.2 came to be

arrayed as an accused and was arrested in the said crime.

14. It is to be noted that the report of the so called Identification Parade is not on record. The lady police Khambe who had allegedly conducted such identification parade has not been examined. It is thus not known as to on what basis the accused No.2 was brought to the police station as a suspect and further arrayed as an accused.

15. It is also to be noted that PW1 has admitted in her cross examination that she had not stated before the police that her daughter had told her that one more person was involved and that his name was Ganesh. She has further stated that when she asked her daughter whether she knew the name of the other person she had stated "Mujhe pata nahi" and when she repeatedly asked her, her daughter stated that van uncle used to call him "Ganesh idhar Aa". The Investigating Officer had not made any attempts to verify whether the Accused No.2 is the same person referred to as Ganesh.

16. The evidence of PW2, indicates that the Van Uncle (Accused No.1) had sexually abused her. She claims that another person, whom she has referred to as Ganesh Uncle, had also sexually abused her. In her statement under Section 164, PW2 had not stated that she was sexually abused by another person referred to as Ganesh Uncle. PW2 has stated that she had not disclosed the name of Ganesh Uncle to any one. She had also not given description of the other person “Ganesh”, to her mother or to the police.

17. It is pertinent to note that the name of Accused No.2 is not Ganesh. There is nothing on record to indicate that Accused No.2 is also known as Ganesh. The Special Judge has recorded that two other persons with similar features were placed along with both the accused and that the victim had identified the accused Nos.1 and 2 amongst the other two persons. It appears that the learned Judge had conducted a sort of identification parade in the course of trial, in which the victim had allegedly identified the accused. In this regard it is pertinent to note that in her cross examination PW2 has admitted that her father had shown her the photograph

of the accused which was in his mobile and had asked her to identify him in the Court. The identification in the Court by PW2 after considerable period of time and as tutored by her father is of no value.

18. The prosecution has relied upon CCTV footage from the school premises. However the same does not show the presence of the Accused No.2. None of the witnesses examined by the prosecution state that they had seen the Accused No.2 either with the victim or with the Accused No.1. The evidence of the Investigating Officer indicates that one Ganesh was the cleaner of the van. The Investigating Officer has not verified whether the person referred to by the victim as Ganesh was the cleaner of the bus. The prosecution has miserably failed to establish the identity of the Accused No.2 and or to prove that he is the other person involved in sexually abusing PW2.

19. Under the circumstances, and in view of discussion supra, the conviction of Accused No.2 cannot be sustained. Hence the order.

- (i) Appeal is allowed.
- (ii) The impugned judgment dated 29.08.2019 in POCSO Case No. 74 of 2017, Gr. Bombay is quashed and set aside.
- (iii) Accused No.2 be released forthwith, if not required in any other case.

(ANUJA PRABHUDESSAI, J.)