

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.559 OF 2019

Shaikh Anees s/o Shaikh Hussain (Habib)
Age : 27 years, Occu.:- Labour,
R/o. Rengtipura, Near Aziz Dal, Aurangabad
Tq. and Dist. Aurangabad ... Appellant

Versus

1. The State of Maharashtra
For the Jinsi Police Station, Aurangabad
2. XYZ ... Respondents

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Mr. A. S. Gandhi, Advocate for appellant.
Mr. S. P. Sonpawale, Advocate for respondent No.1 – State.
Mr. A. A. Mundhe, Advocate for respondent No.2 (Appointed through
legal aid) (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 28.06.2022

Pronounced on : 05.08.2022

JUDGMENT :-

. Present appeal has been filed by the original accused challenging the conviction under Sections 4, 5(m) and (n) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO Act”) in Special POCSO Case No.56 of 2018 by the learned Special Judge (under POCSO Act), Aurangabad on 16.05.2019.

2. The prosecution story is that the informant is the mother of the victim. Victim was aged 3 years on 04.03.2018. The mother of the victim lodged the report on 04.03.2018 stating that she was residing with her husband and four children. On 02.03.2018 when the husband of the informant was to proceed for Namaz at about 5.15 p.m., the victim girl was insisting that she would go along with him, but then to pacify her, her father gave her one rupee and told that she should take some eatable from the shop. He then went for Namaz. Informant then asked the victim to bring chowmein from the shop. Victim went running. She returned after about half an hour along with the amount itself and started saying as to what the accused has done to her by taking her to his house. The victim told the informant that the accused had taken out her pant and has done something with her private part, as a result of which she was getting burning sensation. The informant thereafter checked the private part of the victim and she could found that it had redness and wet and the victim was crying. Informant then went to the house of accused. Accused is the near relative of the victim and informant. Mother of the accused was in the house at that time and when informant asked as to what has been done with the victim, the mother of the accused told that her son has not done anything. Informant came back to her house and waited for the arrival of her

husband. She was not having mobile. He returned around 11.00 p.m. and then informant told him about the incident. Taking into consideration the pain to the victim she was taken to Ghati Hospital at about 2.00 a.m., but it was told that the doctor is not there and, therefore, they came back to home and again gone to the hospital at about 10.00 a.m. on the next day. The victim was admitted and then treatment was started. Thereafter, when police arrived, the FIR was lodged.

3. After lodging of the FIR, offence vide Crime No.45 of 2018 came to be registered with Jinsi Police Station, Aurangabad and further investigation was taken up.

4. P.W.5, P.S.I. - Varsha Kale has carried out the investigation. She has collected the MLC papers, medical examination papers of the victim girl as well as samples. Statement of the victim was got recorded in the presence of lady members of Mahila Suraksha Samiti. Accused came to be arrested. Panchanama of the spot was executed with the help of two panchas. The clothes of the victim as well as accused came to be seized through panchanama. All the seized articles were sent for chemical analysis. Statement of the victim - girl as well as the informant was got recorded under Section 164 of the Code of Criminal Procedure. The

birth certificate of the victim was collected. Statement of other witnesses were recorded and after the completion of the investigation, charge-sheet came to be filed before the learned Special Judge (under POCSO Act). After the accused appeared before the learned Special Judge (under POCSO Act), Aurangabad, charge came to be framed at Exhibit-8 under Section 376(2)(f) and (i) of Indian Penal Code and under Section 4, 5(m) and (n) punishable under Section 6 of the POCSO Act. The contents of the charge were read over and explained to the accused – appellant in vernacular. He pleaded not guilty and the trial has been conducted. Prosecution has examined in all six witnesses to bring home the guilt of the accused. After considering the evidence adduced by the prosecution, the learned Special Judge held the accused guilty of committing offence punishable under Section 376(2)(f) and (i) of Indian Penal Code as well as Section 4, 5(m) and (n) punishable under Section 6 of the POCSO Act, however, no separate sentence has been awarded for the offence under the Indian Penal Code. The accused has been sentenced thus :-

1. The accused/appellant has been convicted for the offence punishable under Section 4 of the POCSO Act and thereby sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.3,000/- in default to suffer rigorous imprisonment for three months.

2. The accused/appellant has been convicted for the offence punishable under Section 5(m) and (n) read with Section 6 of the POCSO Act and thereby sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5,000/- in default to suffer rigorous imprisonment for five months.

An amount of Rs.7,000/- has been directed to be given to the victim through the guardian towards compensation from the amount of fine in view of Section 357(1) of the Code of Criminal Procedure. This sentence is under challenge in this appeal.

5. Heard learned Advocate Mr. Amol S. Gandhi for the appellant, learned APP Mr. S. P. Sonpawale for respondent No.1 – State. Learned Advocate Mr. A. A. Mundhe, who is appointed to represent the cause of respondent No.2, is absent.

6. It has been vehemently submitted on behalf of the appellant – accused that the victim, who is admittedly aged 3 at the time of incident, was the cousin of the accused. It can be seen from the evidence that has been adduced by the prosecution that the informant PW.1 has turned hostile. PW.2 is the victim aged 3 years. She also turned hostile, however, in view of some admissions extracted in her cross-examination by learned APP, she was cross-examined on behalf of

the accused and in her said cross-examination by the accused, she has clearly stated that the accused has not done anything to her. He had not removed her pant. In fact, she has stated that the accused was not at all present at the said place at the time of incident. In spite of such evidence, the learned Special Judge has convicted the accused. PW.3 Supriya Chavan is the social worker in whose presence the spot panchanama was executed and the clothes of the victim as well as accused came to be seized. PW.4 - Dr. Pratima Gaikwad is the medical officer, who had examined the victim girl. Her testimony would show that there were no injuries on the body of the victim and, in fact, she has not stated that there was any injury to the private part of the girl. No doubt, she had found there was redness to the labia majora, but that cannot be taken as the only circumstance to prove penetrative sexual intercourse. In fact, PW.4 Dr. Pratima has not given any firm opinion whether sexual intercourse had taken place or not. The medical certificate cannot be taken as a piece of evidence, which is supporting the prosecution case. PW.5 P.S.I. - Kale is the Investigating Officer, who had collected MLC No.44 of 2018. If the said MLC is perused, then it has recital that the victim girl was admitted due to burn injuries sustained on 02.03.2018 at about 6.30 p.m. at her house. If those injuries are attributable to the alleged burn injuries, then it rules out the

possibility of sexual intercourse. Further, in the cross-examination of PW.5 P.S.I. - Kale, it can be seen that she had informed the District Women and Child Development Officer, Aurangabad by letter dated 05.03.2018, which was after the registration of the crime. Then how PW.3 Supriya could have remained present for execution of the panchanama on 04.03.2018 in police station. The said panchanama appears to have been executed afterwards by putting a previous date. PW.6 - Dr. Dnyaneshwar Dandegaonkar is the medical officer, who had examined the accused and had taken the samples.

7. The learned Advocate for the appellant has further submitted that the prosecution has not explained the delay caused in lodging the report. The incident is stated to have taken place around 5.15 p.m. of 02.03.2018, but the FIR has been registered at about 17.25 hours on 04.03.2018. The husband of the informant has not been examined for the reasons best known to the prosecution. Therefore, the learned Special Judge ought to have acquitted the accused by holding that the offence has not been proved beyond reasonable doubt. In the alternative, submission has been made that if at all the medical evidence was sufficient to show that there was some sexual assault, then at the most, the case would file under Section 4 punishable under Section 8 of the POCSO Act and the sentence can be reduced to the sentence which

has been already undergone up till now. The appellant is in jail since 04.03.2018. In order to support his contentions, the learned Advocate appearing for the appellant has relied on the decision in ***Mukesh @ Vicky s/o Suresh Dendule Vs. State of Maharashtra, [2018 DGLS (Bom.) 5]***, wherein it has been held that even if the evidence is accepted at face value, the only offence which is made out is under Section 354 of Indian Penal Code and Section 9 read with section 10 of the POCSO Act and, therefore, sentence was reduced. Further, in ***Mohan Ambadas Meshram Vs. State of Maharashtra, [2018 DGLS Bombay 641]***, it has been held that the allegations in respect of sexual intercourse was not supposed to be taken by the Court only in the backdrop of seriousness of allegations in the mind. The evidence needs to be convincing and if not proved beyond reasonable doubt, benefit of doubt to go to accused. When no injury was found on body and genitals of victim despite the fact that the accused was full grown man and victim child of merely six years, it was held that the prosecution failed to prove the case beyond reasonable doubt and the accused was acquitted in that case.

8. Learned APP strongly opposed the appeal and submitted that though the informant and the victim have turned hostile, however, their act of filing of FIR and their statements under Section 164 of the Code of Criminal Procedure have been proved by the prosecution. Mere

hostility of witnesses will not absolve the accused. Further, whatever has been admitted by these two witnesses by way of questions those were put in the nature of cross to them in their examination-in-chief will have to be considered. The informant accepts that when the daughter told her about the incident, she had then removed the pant of the victim and saw that her private part has become reddish in colour and wet. She has admitted that her statement was recorded under Section 164 of the Code of Criminal Procedure by learned Judicial Magistrate First Class. As regards the girl, who is 3 years, definitely later on when it appears that the matter was compromised since the accused is the cousin of the victim, the victim was tutored to say that nothing had happened to her. When the learned APP had cross-examined the victim, while answering question No.8, she has answered that she went crying to her mother and told that the accused has removed her pant and inserted something in her private part. No doubt, in the cross examination on behalf of the accused she was bound to say all the things as told as per the accused in view of the fact that the case was compromised. When heinous crime has been committed, the hostility of the informant and the victim will not affect the the prosecution story. P.W.3 - Supriya was the person in whose presence P.W.1 - informant had given the FIR. The FIR Exhibit-18 bears the signature of P.W.3 also. So also, she was the person in whose

presence the clothes of the victim as well as the accused came to be seized. Even though it had come that P.W.5 P.S.I. - Kale had given intimation to District Women and Child Development Officer on 05.03.2018, it was not the intimation for P.W.3 - Supriya Chavan to report the police station. P.W.3 Chavan could be asked to remain present on telephone call also. Further, in her cross-examination, she had stated that the distance between her house and Jinsi Police Station is only 10 to 15 minutes. Therefore, her presence at the time of recording FIR cannot be doubted. P.W.4 - Dr. Pratima has denied that the injury that was noted by her on the victim was possible by fall. She has given clear opinion that the injury noted by her on the private part of the victim was the sign suggestive of forceful recent penetration of vagina and sexual intercourse cannot be ruled out. Therefore, the conviction of the accused for the offence punishable under Sections 4, 5(m) and (n) read with Section 6 of the POCSO Act by the learned Special Judge was perfectly correct and legal and it requires no interference at all.

9. At the outset, it is to be noted that P.W.1 – informant and P.W.2 - victim have turned hostile. In fact, P.W.2 is aged only 3, however, for both of them, the prosecution had sought permission to put question in the nature of cross and then what was extracted from them under that procedure is also required to be considered. In other words, merely

because a witness turns hostile, his entire testimony cannot be discarded. It has to be scrutinized and then it is required to be assessed as to whether it is supporting the prosecution story or it is supporting accused or there is any reason for the hostility of such a witnesses. P.W.2 – the victim is the person with whom the crime is stated to have been committed. The concerned Special Judge had asked certain questions to the child witness to ascertain whether she knows the importance of the oath, however, when it was found that she does not understand importance of the oath, her deposition has been recorded without administering oath. In ***P Ramesh Vs. State Represented By Inspector of Police, [(2019) 20 SCC 593]***, the Hon’ble Supreme Court has held that :-

“Section 118 of the Indian Evidence Act 1872 deals with the competence of a person to testify before the Court. Section 4 of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of 12 years. Therefore, if the Court is satisfied that the child witness below the age of 12 years is a competent witness, such a witness can be examined without oath or affirmation”.

Further, after relying on the earlier decisions of the Hon’ble Apex Court, it has been held that,

“16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at 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”.

10. Thus, it is seen that, in this case, after putting certain questions, when the learned Special Judge found that the child witness does not understand the importance/sanctity of oath, but it appears that it was found that still her testimony can be recorded; the testimony has been recorded without administering oath. Initially, the victim has stated that the accused had not done anything to her, but when permission was granted to learned APP to put questions in the nature of cross as contemplated under Section 145 of the Indian Evidence Act, she has

given certain favourable answers to the prosecution. She has admitted that when her father was to go for *Namaz*, she was crying to go along with him and, therefore, the father had given one rupee for purchasing some sweet to her. Then further she admits that she went to her mother while crying and told that the accused had removed her pant and inserted something in her private part. She then identified her clothes which were then seized. Thereafter, the cross has been conducted on behalf of the accused. Major part of the same appears to be in the form of defence that she along with another boy were playing near the staircase and she slipped on the rounded pipe of the staircase causing injury to her private part. Then she admits that the accused had not done anything to her. Now, it is required to be considered as to whether those admissions thereafter taken in the cross have wiped the evidence given by her earlier or not. In order to assess the same, we cannot rely only on the said testimony before the Court. But, it would depend on the assessment of the testimony of her mother, the history that was given by the mother to the medical officer when P.W.2 - victim was medically examined, her statement recorded under Section 161 of the Code of Criminal Procedure as well as Section 164 of the Code of Criminal Procedure. It is to be noted from the record that her statement under Section 164 of the Code of Criminal Procedure was not exhibited

in the trial. It was not extracted from PW.1 – the mother/informant as to whether she was present when the victim's statement under Section 164 of the Code of Criminal Procedure was recorded by the learned Magistrate. Therefore, we may not lay our hand to the said statement of the victim under Section 164 of the Code of Criminal Procedure. However, the other pieces of evidence are required to be considered.

11. PW.1 – the mother/informant has deposed that the incident had taken place on the second day, but she was unable to give the year and month of the day. She has stated that on that day, the victim was insisting to go to Namaz with father, but then father gave one rupee to her and he left for Namaz. The victim had gone for taking sweet, but returned after about half an hour while crying. She had asked the victim as to what had happened, thereupon the victim told that she had gone to the house of accused and then slipped. According to her in the midnight, the victim woke up while crying and, therefore, they had taken her to Ghati Hospital. Doctor gave medicine and they had gone to their house. But again, in the morning, the victim started crying and then she was again taken to hospital. According to her, except these things nothing had happened to the victim. Thereafter, the prosecution had sought permission to put questions in the nature of cross to the informant and then she has admitted that the informant had removed

the pant of the girl and could see that the private part of the victim had become reddish and wet. She has admitted that she has signed the consent form, but then denies that she had given history to the medical officer stating that the accused has done heinous act with the victim. She then admitted that her statement was recorded in the Court and in her said statement (she was referring to her statement under Section 164 of the Code of Criminal Procedure), she has stated that heinous act was committed by the accused with the victim and then she has signed the said statement. She admitted the contents of her statement under Exhibit-19. In her cross conducted on behalf of the prosecution, she has clearly submitted that her relatives started insisting her to compromise the matter with the accused by saying that the custody period of the accused is sufficient for his punishment and this appears to be the reason as to why P.W.1 was not supporting the prosecution story. Thereafter, she went on to give admissions as desired by the accused in the cross conducted on behalf of the accused. Therefore, with the background that the victim has also turned hostile, the possibility of victim being tutored by the mother as well as other relatives cannot be ruled out. The admissions those have been given and the other facts independently supporting the prosecution story will have to be taken note of by the Courts in such situation.

12. PW.1 – informant has admitted her signature on FIR Exhibit-18. The FIR Exhibit-18 also bears the signature of PW.3 - Supriya. Merely because a letter was sent to the District Woman and Child Development Officer on 05.03.2018, we cannot doubt the presence of PW.3 at the time of reducing fir Exhibit-18. PW.3 - Supriya has clearly stated that she was present when the FIR reduced into writing and it was reduced as per the narration of PW.1 and then the informant had signed on Exhibit-18. It has rather been extracted in the cross of PW.3 - Supriya by the accused that her house is situated at a distance of about 10-15 minutes and as a member Mahila Suraksha Committee, she used to visit Jinsi Police Station frequently. She has specifically stated that the police had called her at about 5.00 to 5.15 p.m. Therefore, her presence at the time of narration of the FIR by PW.1 has been rather supported from the story extracted in the cross itself. All those facts, which have been then extracted, have been tried to be denied by the accused in her further cross-examination, which cannot be allowed. The testimony of PW.4 - Dr. Pratima, the medical officer, who had examined the victim, would show that she had taken the history of the victim as narrated by the mother. That history is then appearing in medical certificate Exhibit-34 which is corroborating to the FIR Exhibit-18. Thus, the prosecution story and the contents of the FIR Exhibit-18 have been got proved

through P.W.3 - Supriya as well as P.W.4 - Dr. Pratima. Under such circumstance, the hostility of the informant is not at all fatal to the prosecution. At the cost of repetition, it can be said that in view of compromise and may be the pressure from the relatives of the husband, the informant has resiled from her FIR. The other independent evidence which is on record will have to be taken into consideration.

13. P.W.4 – Dr. Pratima has clearly stated that on examination of the victim, she found no signs of injury on her body. But on examination of genital region, she found that there was evidence of linear injury of approximately 0.5 x 0.5 cm on right labia majora surrounded by redness. She has opined that there were signs suggestive of forceful recent penetration of vagina and, therefore, she has opined that the sexual intercourse cannot be ruled out and then she issued the certificate under Exhibit-34. In her cross-examination, she has denied the suggestion that evidence on the linear of labia and majora of the victim can be possible if the victim slipped from the rounded iron pipe. She also denied that the injury found on the private part was not confirmed and she has not given any confirm opinion about the sexual intercourse. Again she has reiterated by denying that there was no such incidents of forcible recent penetration on the person of the victim. Thus, it can be seen from her testimony that she was very much confirm

in saying that the injuries noted by her were sufficient to form the opinion that it was penetrative sexual intercourse. We cannot under the circumstance that P.W.2 - victim was tutored; try to tag her admissions about slip on rounded pipe to her injury to the private part in view of clear denial of the said suggestion by an expert and also in view of the proof of contents of Exhibit-18 as well as the history that was got narrated by P.W.4 - Pratima. This is the exact difference in the evidence in *Mukesh @ Vicky Suresh Dendule (Supra)* and *Mohan Ambadas Meshram (Supra)*, where on the basis of the evidence before the said Court, it was held that there was no penetrative sexual intercourse. Those decisions are not helpful to the present appellant.

14. P.W.6 - Dr. Dandegaonkar, who had examined the accused, had opined that the accused was found to be medically poor to perform sexual intercourse. Though this witness had taken the samples and those samples were sent for chemical analysis and the report of the chemical analysis says that it was inconclusive and no semen was detected on the clothes of the victim, we cannot give much importance to those reports. The basic nature of the reports of a chemical analyzer are corroborated in nature and not conclusive. The other evidence on record is then sufficient to come to the conclusion that the victim was subjected to penetrative sexual intercourse by the accused. With ulterior motive, the

accused has tried to win over the informant and victim, but taking into consideration the other evidence on record, still it can be said that the prosecution had proved the offence beyond reasonable doubt. With this kind of evidence, when there is evidence to prove the offence under Section 5(m) and (n) of the POCSO Act, it was for the accused to rebut the presumption which got conducted under Section 29 of the POCSO Act. The defence that has been taken by the accused that the injury to the victim was the result of slipping on the rounded iron rod of the staircase cannot be considered as a piece of rebuttal. The accused has not examined any other child, who was playing along with the victim at the relevant time. Non examination of the husband of the informant was not at all fatal. So also, when the contents of the FIR Exhibit-18 were proved, it can be said that the delay that was caused in lodging the FIR was properly explained. Further, it can also be said that when the delay could have been explained by the informant herself and she has been won over by the accused, accused cannot blame the prosecution by saying that the delay has not been explained. Much has been said about the MLC that was initially given that the victim has sustained burn injuries to the private part, but it is to be noted that no such suggestion has been given in the cross either to P.W.1 – informant, P.W.2 – Victim and P.W.4 – Dr. Pratima. If some Police Constable had taken a wrong

entry that does not mean that the said MLC was correct and the further acts by the informant are with some intention. The statement of the accused under Section 313 of the Code of Criminal Procedure is totally silent about the reason as to why a false case was filed against him. It was absolutely not suggested to P.W.1 – informant that there was any dispute between the informant and/or her husband with the parents of the accused. The statement of the accused under Section 313 of the Code of Criminal Procedure is also silent on the point that why police should actively involve him. In other words, reason for his false implication has not been given by the accused. Under such circumstance, it can be certainly said that the learned Special Judge was right in holding that the offences have been proved against the accused beyond reasonable doubt.

15. For the offence under Section 4 of the POCSO Act, the accused has been sentenced to suffer seven years of rigorous imprisonment and for Section 5(m) and (n) punishable under Section 6 of the POCSO Act, he has been sentenced to suffer rigorous imprisonment for ten years. In fact, if we consider Section 6 of the Protection of Children from Sexual Offences (Amendment) Act, 2019, it prescribes that whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but

which may extend to imprisonment for life. Here, in this case, the offence was committed on 02.03.2018 and, therefore, we are required to consider the punishment that was prescribed prior to the substitution of the punishment under Section 6 of the POCSO Act w.e.f. 16.08.2019. Therefore, the minimum sentences have been imposed in this case, which require no alteration at all in view of the fact that the age of the victim at that time was only 3 years. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm