

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

CRIMINAL APPEAL NO.123 OF 2020

Kiran Chandrakant Ovhal ..Appellant

Vs.

The State of Maharashtra & Anr. ..Respondents

Dr.Uday Warunjikar a/w Mr.Pankaj D. Purway for the Appellant.

Mr.Y.Y. Dabke, APP, for the Respondent-State.

Mr.Tejesh Dande a/w Mr.Bharat Gadhavi, Mr.Vishal Navale,
Mr.Aniket Aghade, Mr.Trushna Shah and Mr.Chinmay Deshpande i/
b Tejesh Dande & Associates for Respondent No.2.

CORAM : C.V. BHADANG, J.

**RESERVED ON : 7 DECEMBER 2021
PRONOUNCED ON : 29 APRIL 2022**

:JUDGMENT:

. By this Appeal, the Appellant-Accused is challenging the judgment and order dated 23 December 2019, passed by the learned Special Judge at Pune in Special POCSO Case No.17 of 2017. By the impugned judgment the learned Special Court has convicted the Appellant for the offence punishable under Section 5(m) read with Section 6 of the Protection of Children from Sexual Offences Act,

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2012 ('POCSO Act') read with Section 376(2)(i) of the Indian Penal Code (IPC for short).

2. The Appellant has been sentenced to suffer rigorous imprisonment for 10 years with fine. The learned Special Judge however has acquitted the Appellant from the offence punishable under Section 323 of Indian Penal Code.

3. The prosecution case may be briefly stated thus :-

The first informant, who is the mother of the victim girl was working in Central Park Hotel at Pune. Her husband is doing the work of collecting garbage. On 7 November 2016, when the informant came back from her work at 7.00 p.m., she found that the victim, who is her minor daughter aged about 6 years, was having fever. Her elder daughter brought medicines from a medical shop, which was administered to the victim. According to the informant, on account of the fact that the victim was suffering from fever, she chose not to bathe her. However, on 10 November 2016 at 8.00 a.m. when she was trying to bathe the victim, she noticed that there was redness and blood on her private parts with dry blood stains on the thighs. On inquiry, victim started crying. The victim informed that on the previous Monday when she was playing outside her house, the neighbourer (who she calls Dada), who according to the prosecution, is the Appellant/Accused, took her in his house at about 9.00 hrs to 10.30 hrs. and closed the door. It is the material case that

the Appellant lifted her gown and inserted his hand in her knicker and inserted his finger in her vagina. Victim experienced pain and she shouted. The Appellant hit her on her back. She started crying, when he opened the door and let her go. He threatened her not to disclose the incident to anyone.

4. The informant narrated the incident to her husband, after which the FIR (Exhibit-17) came to be registered on 10.11.2016.

5. During the course of the investigation, the statements of the witnesses and the victim (PW-3) were recorded. The victim was sent for medical examination and after completion of the investigation, a charge-sheet is filed.

6. The learned Special Judge framed charge against the Appellant for the aforesaid offences, to which the appellant pleaded not guilty and claimed to be tried. The defence of the Appellant is of total denial and false implication.

7. At the trial, the prosecution examined in all five witnesses, namely the mother and the father of the victim as PW-1 and PW-2. The victim is examined as PW-3. Medical Officer Dr. Nisha Watti as PW-4 and the Investigating Officer Mr. Krishna Indalkar as PW-5.

8. The Appellant did not lead any evidence in defence.

9. According to the Appellant, there was a quarrel between his mother and family members of the victim, which is the reason for his false implication.

10. The learned Special Judge has found the Appellant guilty. Hence this Appeal.

11. I have heard the learned counsel for the Appellant and the learned APP. With the assistance of the learned counsel for the parties, I have gone through the record.

12. It is submitted by the learned Counsel for the Appellant that the Special Court has framed charge under Section 3 and 4 of the POCSO Act read with Section 376 (2)(i) of IPC. However, the Appellant has been convicted under Section 5(m) read with Section 6 of the POCSO Act which is a graver offence than the offence under section 3 read with section 4 of the POCSO Act. It is submitted that thus the conviction of the Appellant for the offence under Section 5(m) read with Section 6 is not sustainable, particularly, when section 376(2) (i) was omitted in the year 2018. Reliance is placed on the decision of this court in *Abdul Rajak Chapparban v/s. State of Goa*¹ and in *State of Maharashtra v/s. Viran*

¹ (2020) SCC Online Bom 932

*Gyanlaln Rajput*¹ wherein it is held that if there is no charge under a particular section then the conviction is not sustainable. It is pointed out that the Appellant has already completed more than five years of jail sentence.

13. The learned Counsel for the Appellant has taken strong exception to the aspect of identification of the Appellant by the victim. It is submitted that the victim and the complainant who is her mother have been referring to one *Dada* residing in their neighbourhood who was involved in the incident. It is submitted that subsequently PW-1 and PW-2 claimed that it was 'Kiran Dada'. It is submitted that notwithstanding Section 36 of the POCSO Act, the identification of the accused has to be properly established as it goes to the root of the matter. It is submitted that the victim was not made to identify the Appellant before the court. It is submitted that the identification by the parents of the victim is of no consequence. The learned counsel has referred to three different versions which have come in the FIR about the identity of the accused. In the initial stage, no name was mentioned, later it was mentioned by the victim girl "*shejariche Dada*" (brother residing in the neighbourhood) and subsequently, the parents introduced the name of the Appellant. In the submission of the learned counsel section 36 of the POCSO Act does not relieve the prosecution of the basic requirement of the

1 (2015) SCC Online Bom 380

identification of the accused, albeit without exposing the child/victim to unnecessary trauma/stress.

14. It is submitted that the medical evidence is contrary to the oral evidence as PW-4 had not found any external injuries on the body of the victim nor had found any swelling or redness on her private parts which would falsify the evidence of PW-1. It is submitted that PW-4 has specifically opined that there is no evidence of any penetrative vaginal intercourse and further opined that “attempt” of vaginal fingering cannot be ruled out. It is submitted that in the absence of a conclusive medical opinion, the Appellant is entitled to benefit of doubt. It is submitted that admittedly there is an enmity between the parties which is the reason for false implication.

15. It is submitted by the learned APP assisted by the learned Counsel for the second respondent that sufficient particulars of the incident are setout in the charge and in the absence of any prejudice, the non framing of the charge under section 5(m) read with section 6 may not be decisive. Reliance in this regard is placed on the decision of the Supreme Court in *State of West Bengal and Laisail Haque and others*¹.

16. Insofar as the identification is concerned, it is submitted that the appellant was residing in the neighbourhood of the victim and

¹ (1989) 3 SCC 166

they are known to each other and therefore, the alleged absence of identification is of no consequence. Reliance is placed on the decision of the *Abdul Sayyed v/s. State of Madhya Pradesh*¹, *Willie (William) Slaney v/s. State of Madhya Pradesh*², *Dana Yadav alias Dahu and Ors. v/s. State of Bihar*³ and *Musheer Khan alias Badshah Khan and Ors v/s. State of Madhya Pradesh*⁴ and *Prakash v/s. State of Karnataka*⁵. It is submitted that section 36 of the Act require the Special Court to ensure that the child is not exposed in any way to the accused at the time of recording of the evidence. It is submitted that the evidence of the victim girl, who is of tender age is consistent and cogent and is sufficient to base the conviction. It is submitted that the victim was examined by PW-4 about 3 to 4 days of incident and therefore, the absence of Medical Officer noticing any redness or swelling on the private parts of the victim is not material. It is submitted that PW-4 has stated that there is possibility of vaginal fingering which cannot be ruled out.

17. I have carefully considered the rival circumstances and the submissions made. It is true that offence u/s 5(m) read with section 6 is graver than the offence u/s 3 and 4 of the POCSO Act. It can also be seen that conviction for a graver offence cannot be sustained if the charge is for a lessor offence. However, what is material is the

1 (2010) 10 SCC 259

2 (1955) 2 SCR 1140

3 (2002) 7 SCC 295

4 (2010) 2 SCC 748

5 (2014) 12 SCC 133

contents of the charge and not the actual section mentioned. It is necessary to note that the label of the section mentioned may not be decisive. The Appellate court faced with a contention based on inadequacy or insufficiency of the charge has to go to the charge as a whole and then to find out whether the necessary ingredients of the offence were put to the accused so as to avoid any prejudice. The object and purpose of framing of charge is to ensure that the accused is made aware of the prosecution case with sufficient amount of precision so as to ensure that he can properly defend and meet the charge so framed. In my considered view the matter would depend upon facts and circumstances of each case.

18. Coming to the present case, clause (3) of the charge reads thus:

“3) That, you accused, during the aforesaid period, time and place and during the course of same transactions, committed penetrative sexual assault on the minor victim girl aged about 6 years i.e. under the age of 16 years, by inserting your finger into the vagina of the aforesaid victim and you are thereby committed an offence punishable under section 3 read with section 4 of the Protection of Children from Sexual Offences Act, 2012 and within my cognizance.”

19. It can thus be seen that there are essential particulars in the charge about the Appellant accused inserting his fingers into the vagina of the victim. The appellant had also not demonstrative any prejudice on account of any irregularity or defect in the matter of framing of the charge. Thus, on the basis of the facts as obtaining in

this case and the contents of the charge the contention on behalf of the appellant cannot be accepted.

20. The contention based on the fact that Section 376(2)(i) has been omitted also may not be material inasmuch as the said Section was omitted w.e.f. 21.04.2018 while the incident in this case is prior thereto.

21. This takes me to the material evidence about the incident. It has come on record that the birth date of the victim is 18.10.2010. The incident is alleged to have happened on 07.11.2016. Thus, the victim was a little over 6 years of age on the date of the incident. It has come in the prosecution evidence that the victim narrated the incident to her mother for the first time on 10.11.2016, on which date the FIR came to be registered. It has come in the evidence of PW-1 that the victim has 3 elder sisters aged about 16 years, 14 years and 11 years and one brother. The prosecution evidence does not show that the incident was narrated by the victim to any of her elder sisters who used to be at home when their parents used to be out. The elder sisters who were aged about 11 to 16 years were certainly of the age to understand the nature and the gravity of the incident. However, their evidence is not forthcoming.

22. Coming to the issue of identification, it is true that the Appellant is the neighbourer of the victim. PW-1 states that prior to

the incident, her family and the family members of the appellant were not on talking terms. In the FIR, PW-1 claims that the victim informed her that “*shejarchya Dadane*” (the brother residing in the neighbourhood) had called her in the house and lifted her gown and inserted his hand in her knicker and inserted his finger in her vagina. In the subsequent part of the FIR, PW-1 claims that the victim pointed towards the house of Sunita Ovhal who is the mother of the Appellant. On the basis of such disclosure, PW-1 claims that it was the Appellant who did the act. PW-2 has straightway named the Appellant claiming that Kiran Ovhal did this as informed by his wife PW-1. However, PW-1 herself has not stated about the name of Kiran Ovhal.

23. Coming to the evidence of PW-4, Dr. Nisha Watti, she claims that when the victim’s mother asked the victim about the redness noticed around the perineal region of the victim, while she was giving bath, the victim told that the accused “did something with her but did not tell exactly what he did”. This history given is again contrary to the claim earlier made. The evidence of PW-4 clearly shows that she did not observe any external injury on the body of the victim or perineal region or swelling on the private parts of the victim. PW-4 also states that the hymen was intact. As per the opinion of PW-4, there is no evidence of penetrative vaginal intercourse, however she states that the attempt of vaginal fingering cannot be ruled out.

24. The learned Counsel for the Appellant as noticed earlier has taken strong exception to the absence of identification of the Appellant during the course of the trial by the victim. It is well settled that the identification before the court is alone the substantive evidence. The test identification parade may not be necessary where the parties are known to each other. However, at the same time when there is a certain amount of discrepancy as to the description or the name of the accused who was involved in the incident where the parties are known to each other, the identification before the court would assume significance. I am conscious of the fact that under section 36 of the POCSO Act, a duty is cast on the court to ensure that the child is not exposed in any way to the accused at the time of recording of the evidence. However, that may not in a given case obviate the need for proper identification before the court. It is necessary to note that there may be cases where the accused may be a total stranger to the victim, in which case the proper identification of the accused, as the perpetrator of the crime, would be of pivotal importance.

25. In the facts of the case, I do not find it necessary to make a detailed reference to the cases cited but for the risk of prolixity. None of these cases involved a trial under the POCSO Act or involving a child.

26. Considering the overall circumstances, I find that the appellant would be entitled to benefit of doubt broadly for three reasons, (i) for want of proper identification both in the FIR as well as before the court, (ii) Second on account of the medical opinion which cannot to be said to be conclusive inasmuch as while negating the penetrative sexual assault PW-4 only expresses possibility of the fingering not being ruled out and (iii) there is an enmity between the family of the appellant and that of the victim as admitted by PW-1.

27. In the result, the following order is passed:

ORDER

- (i) The appeal is allowed.
- (ii) The impugned judgment of conviction and sentence is hereby set aside.
- (iii) The appellant is acquitted of the offences punishable under Section 6 of the Protection of Children from Sexual Offences Act read with Section 376 (2)(i) of Indian Penal Code.
- (iv) The appellant is set at liberty forthwith if not required in connection with any other case.

C.V. BHADANG, J.