

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

CRIMINAL APPEAL NO.108 OF 2018

Shivnath Ramprasad Sharma	Appellant
Versus	
State of Maharashtra	...Respondent

Mr. Lokesh Digambarrao Zade, Advocate (appointed) for the Appellant.

Smt. J.S. Lohokare, APP, for Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 13th SEPTEMBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 30.11.2017 passed by the Special Judge under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) at Greater Mumbai in POCSO Sessions Case No.47/2014. The appellant was charged with commission of offence punishable under Section 377 of IPC and under Section 4 of the POCSO Act. At the end of the trial, he was convicted for commission of the offence punishable under Section 377 of IPC and was sentenced to suffer RI

for seven years and to pay fine of Rs.2,000/- and in default to suffer SI for three months. He was also convicted for commission of the offence punishable under Section 4 of POCSO Act and was sentenced to suffer RI for seven years and to pay fine of Rs.3,000/- and in default to suffer SI for three months. The sentences were directed to run concurrently. He was given set off under Section 428 of Cr.PC.

2. Heard Shri Lokesh Zade, learned counsel appointed for the appellant and Smt. J.S. Lohokare, learned APP for the State.

3. The prosecution case is that the appellant was residing in the neighborhood of the victim (PW-2) who was seven years of age. The appellant was around 24 years of age at the time of incident. The incident took place on 10.9.2013. The appellant lured PW-2 to his house by giving him some money and then committed penetrative sexual assault which would attract provisions of Section 377 of IPC. The mother of the victim came to know about some injury while she was washing the victim. Then the victim told her about the incident. She then went to the police station and lodged FIR. The appellant was arrested on 12.9.2013

at 3.55 a.m.. The FIR was lodged vide C.R. No.257/2013 at Mankhurd police station, Mumbai. Investigation was carried out. Spot panchnama was conducted. Clothes of the victim and the appellant were seized. They were sent for Chemical Analysis. The victim and appellant were sent for medical examination. Statement of witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed and the case was committed to the Special Court.

4. During trial, the prosecution examined six witnesses including the victim, the mother of the victim, the medical officer, a pancha and the investigating officer. The defence of the appellant was of total denial. He examined his uncle as a defence witness to show that there was previous quarrel between the victim's mother and the appellant and for that reason false FIR was lodged against him. Learned Judge considered the evidence and the defence of the appellant, heard the parties and recorded his judgment and order, as above.

5. The prosecution case is based on the evidence of the victim and his mother. The victim was examined as PW-2. Learned

Judge satisfied himself that the victim was able to understand the court proceedings and the questions put to him. Thereafter his evidence was recorded. PW-2 deposed that he was born in the year 2006. He was studying in school at the relevant time in the year 2013. The school timing was in the morning. On the date of incident he had not gone to school because of the festival holidays. He deposed that a person in the neighborhood gave him Rs.10/-. He also gave Rs.10/- to PW-2's friend and asked that friend to go home. When PW-2 was alone he was taken by that person to his own house. He closed the door. He removed the clothes. He put oil on his penis and committed the act which would fall within the meaning of Section 377 of IPC as well as under Section 3 of POCSO Act, i.e. penetrative sexual assault, attracting both these provisions. The victim shouted. He was given Rs.10/-. The offender left him. He told the victim not to disclose that incident to anyone. He did not tell that incident to anybody. However, on the next day he told his mother and also showed the house of that person. Then they went to the police station. The police enquired with him and sent him for examination.

In the cross-examination, PW-2 accepted that the boys in the area used to play mischief and used to knock on the windows of others. He denied the suggestion that one day prior to the incident he had harassed the appellant. He also denied the suggestion that before coming to the Court his mother had told him what to narrate in the Court. He identified the appellant in the Court as the same person who had committed that act.

6. PW-1 was the victim's mother. She had lodged the FIR. She had deposed that at the relevant time, the victim was studying in 3rd standard. On that day there was a holiday. He had gone out of house at 12.00 p.m. and had returned at about 1.30 p.m.. He was having some money in his hand. He told her that one uncle had given that amount to him. PW-1 made enquiries. Then PW-2 took her to the house of the appellant. PW-1 then questioned the appellant as to why he had given that money. He did not give any satisfactory answer. She came to know about name of the appellant subsequently. She identified the appellant in the Court. On the same day in the evening when she was cleaning PW-2, she noticed that PW-2 was having pain. She made further enquiries. Then

PW-2 described the incident to her. She disclosed that incident to her neighbour. Then they went to police station and lodged the FIR. The FIR is produced on record at Exhibit-17. PW-2 showed the spot to the police. The police arrested the appellant. PW-2 was sent for medical examination.

In the cross-examination, she deposed that her husband accompanied her to the police station. She denied the suggestion that her children were troubling others and, therefore, there was quarrel between herself and the appellant.

The FIR was lodged on 11.9.2013 at 11.00 p.m. regarding the incident dated 10.9.2013 which was taken at around 2.00 p.m.. The FIR substantially corroborates PW-1's evidence.

7. PW-4 was another child witness, but, he could not give proper answers and, therefore, learned Judge did not record his evidence.

8. PW-5 Mahajan Kewat was a pancha witness in whose presence clothes of the appellant were seized. The panchnama is produced on record at Exhibit-24. He did not fully support the

prosecution and, therefore, he was declared hostile but during the cross-examination conducted by learned APP he accepted that he was a pancha for spot panchnama from where *chaddar* was seized.

In the cross-examination, conducted on behalf of the appellant, he admitted that his signatures were taken on the papers in the police station and those papers were not read over to him.

9. PW-6 Police Constable Uddhav Pol had conducted major part of the investigation. He registered the FIR. He had gone to the spot, had prepared spot panchnama and had seized *chaddar* from there. He had seized the clothes of the victim and the appellant under panchnama. PI Nalawade had obtained birth certificate of the victim. Articles were sent to Forensic Laboratory. PI Nalawade had filed the charge-sheet. He identified the appellant before the Court. The appellant was arrested on 12.9.2013 at 3.55 a.m.. From 13.9.2013 onwards, PI Nalawade carried out the investigation.

10. PW-3 Dr. Ravindra Chavan is an important witness. He has deposed that on 12.9.2013, the victim was brought to him for medical examination. Even the appellant was brought for medical

examination. On local examination of the victim he found that there were abrasions on his anus. Abrasions were at 6 O'clock and 12 O'clock position. They were fresh. PW-3 has given his clear opinion that, according to him, penetrative sexual intercourse must have taken place. Accordingly he issued a certificate, which is produced on record at Exhibit-20. The opinion on the said document mentions that the findings on examination were suggestive of penetrative anal intercourse. Age of the victim was noted as between 8 to 9 years. This witness had also examined the appellant. He did not find injuries on his private parts. Clinically his age was found to be 24 years. There were injuries on his back, face, forearm, hand and neck due to assault by the people as per the history given by the police constable.

This, in short, was the prosecution evidence.

11. Learned counsel for the appellant submitted that there was delay in lodging the FIR, which was fatal to the prosecution. The CA reports on record are innocuous and they are not incriminating at all. The victim's father is not examined. No other independent witness from the locality is examined. The defence

witness's evidence supports the defence taken by the appellant. The victim's statement under Section 164 of Cr.P.C. is not recorded. The oil bottle was not seized.

12. Learned APP opposed this appeal. She relied on the deposition of the victim as well as the evidence of the medical officer that supported the victim's deposition.

13. I have considered these submissions in the light of the evidence led by the prosecution. There is hardly any dispute that the victim was aged between 8 to 9 years. There is no serious objection to the victim's age. Even when he was examined by the prosecution in the trial Court, at that time he was hardly eleven years of age. Learned Judge has noted that some preliminary questions were put to him and only after ascertaining his understanding his evidence is recorded. As far as his evidence is concerned, he has given clear answers. He has described the incident in detail. Considering the age the charge should have been under Section 6 of POCSO Act, but that charge was not framed and it is now too late to consider that aspect. The prosecution has not taken any steps in that behalf. The incident is

quite old which has taken place in the year 2013. The appeal is pending almost for four years. Therefore, I am considering the evidence in the background of the charges framed against the appellant.

14. I find that the evidence of PW-2, the victim, is quite trustworthy. When he returned home, he had some money with him as noticed by his mother (PW-1). He was having pain. He was initially reluctant to tell the facts to his mother but on her insistence he narrated the incident. Therefore, there was a delay of about one day. However, that delay will not affect the prosecution case in this case.

15. More importantly the victim's case is supported fully by the evidence of PW-3 Dr. Chavan, who had noticed the injury at the exact place where the victim had suffered because of the appellant. PW-3 has given his clear opinion that the victim was subjected to sexual intercourse. The findings were suggestive of penetrative anal intercourse. After coming to know about the incident, the victim's mother had gone to the police station without any delay. Medical examination was conducted as early as possible. These are very

strong circumstances against the appellant.

16. The evidence of the defence witness will not help the appellant because DW-1 has admitted that he had not seen the quarrel between the victim's mother and the appellant, therefore, his evidence being hearsay is not admissible.

17. Learned Judge has considered all these aspects correctly. The ingredients of Section 377 of IPC and Section 4 of the POCSO Act are made out. Therefore, I do not find any merit in this Appeal. The appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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