

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

CRIMINAL APPEAL NO. 165 OF 2019

Vijay Laxman Kamble

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Vishal Kanade (Appointed Advocate) for Appellant.

Mr. P. H. Gaikwad, APP for State/Respondent No.1.

Mr. Sushan Mhatre (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 23rd SEPTEMBER 2022

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 18/12/2018 passed by Special Judge, Thane under Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'), passed in Special Case No.291 of 2016. By the impugned Judgment and order the Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s.376(2)(i) of I.P.C. and was sentenced to suffer R.I. for 10 years and to pay a

fine of Rs.10000/- and in default of payment of fine to suffer S.I. for six months.

- ii) The Appellant was convicted for commission of offence punishable U/s.4 of POCSO and was sentenced to suffer R.I. for 7 years and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer S.I. for three months.
- iii) The Appellant was convicted for commission of offence punishable U/s.8 of POCSO and was sentenced to suffer R.I. for 3 years and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer S.I. for 3 months.
- iv) The Appellant was convicted for commission of offence punishable U/s.452 of I.P.C. and was sentenced to suffer R.I. for 1 years and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer S.I. for 3 months.

All the substantive sentences were directed to run

concurrently. The Appellant was granted set off U/s.428 of Cr.p.c. The fine amount, if recovered, was directed to be paid to the victim as compensation.

2. Heard Shri. Vishal Kanade, learned counsel for the Appellant, Shri. Gaikwad, learned APP for State/Respondent No.1 and Shri. Sushan Mhatre, learned Advocate appointed for the Respondent No.2.

3. The prosecution case, in brief, is that the victim was about 6 to 7 years of age. On the date of incident i.e. on 22/08/2016 her date of birth was 01/03/2009. The Appellant was her distant relative. He used to visit her house. On the date of incident, when no one was in the house, except her younger brother, the Appellant committed rape on her. The victim was shouting and crying. Her Aunt residing in the adjoining house was informed. She rushed back home. She inquired with the victim and she came to know about the incident. She called the victim's parents and then went to the police station and lodged her F.I.R. The offence was registered vide C.R.No. I 335 of 2018 at Nerul

police station. The Appellant was arrested on 22/08/2016 itself. The victim's statement was recorded on 23/08/2016 by the police. Her statement was also recorded U/s.164 of Cr.p.c. The investigation was carried out. Different panchanamas i.e. spot panchanama, seizure of clothes panchanama and arrest panchanama were prepared during investigation. The articles were sent for chemical analysis. The statements of other witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed. The case was committed to the Special Court.

4. During trial, the prosecution examined five witnesses including the victim, her Aunt, Medical Officers and the Investigating Officer. At the conclusion of trial, the Appellant was convicted and sentenced as mentioned earlier. It was a specific defence of the Appellant in his statement recorded U/s.313 of Cr.p.c. that PW-2's husband had taken financial help by way of hand loan from him and when the Appellant demanded repayment of that loan amount, there was a quarrel. At that time, PW-2's husband was under influence of liquor. After two days, this false case was lodged against him. Learned trial Judge did not accept

this defence. He relied on the evidence of the prosecution witnesses and convicted the Appellant.

5. PW-1 was the victim. She has deposed that, her school timing was between 7.00a.m. to 12.30p.m. In the morning itself her parents used to go to attend their jobs. She had a very small younger brother. She knew the Appellant. She identified the Appellant before the Court. She deposed that, she remember the incident in which the Appellant had committed this offence with her, however, she could not give the exact date. On that day, she and her younger brother were at home. There was nobody else. Her parents had gone to attend their work. It was a holiday for her school. At about 12.00p.m. the Appellant came to her house. She thereafter described the incident. The Appellant attempted to insert his private part in her private part. She felt pain. She shouted loudly. She pleaded with the Appellant to leave her. But he had not listened. He continued with his act. He kept inserting his private part. She was crying. She started shouting loudly; then he ran away. Immediately her Aunt-PW-2 came there. She made inquiries with the victim. She examined her private parts. There

was lot of pain and there was tenderness. PW-1 narrated the incident to PW-2. After some time, her parents came home. They took her to the hospital. Then they went to the police station. The police sent her to hospital. Doctor examined her. She narrated the incident to the Medical Officer. She narrated the incident to the police. She deposed that, she had also narrated the incident in the Court at Vashi before a Judge.

In the cross-examination, she denied the suggestion that, on the date of incident her father was at home. The Appellant was maternal cousin of her mother. She denied the suggestion that, since about one year prior to the incident the Appellant used to stay at their house for taking education. She denied that, he got a job and then he started residing elsewhere. Apart from that, there is nothing much in her cross-examination. She denied the suggestion that, she was tutored by her mother and Aunt for deposing in that manner.

6. PW-2 was the Aunt of the victim. She was residing in the neighbourhood of the victim's house. At the time of the incident,

according to PW-2, the victim was around 6 to 7 years of age. The incident took place on 22/08/2016. On that day, she along with her elder sister had gone to the Municipal Hospital at Karave. Her husband was in the house. At about 11.30a.m. to 12.00p.m. she received a phone call from her husband stating her that the victim and her brother were crying and PW-2's house was latched from outside. He asked PW-2 to return home at the earliest. She rushed back home. She opened the door of her house. Then she went to the victim's house. The victim was crying. She was frightened. PW-2 made inquiries with her. The victim disclosed the incident in detail to her. She examined the victim. There was swelling on her private part. Then she called the victim's mother telephonically. She returned home with her husband. Then they took the victim to the Municipal Hospital at Vashi. The doctor advised them to lodge a report in the police station first. Then they went to the police station. The F.I.R. was lodged. It is produced on record at Exhibit 13. Thereafter again the victim was taken to the Municipal Hospital, Vashi. On the next day, spot panchanama was prepared, victim's clothes were handed over to the police. PW-2 identified

the Appellant before the Court.

In the cross-examination, she admitted that the Appellant's family had an agricultural land at their native place and they were financially better than PW-2's family. The Appellant was residing in the same vicinity of PW-2 since about five years. He used to frequently visit the house of the victim and used to spend about 2 to 3 hours. He used to have meals there some times. There was a little passage between her house and the victim's house. A specific suggestion was put to her that she had demanded Rs.15000/- from the Appellant as financial help and the appellant refused to help her and, therefore, a false case was lodged against him. She also denied that, she and the victim's mother had tutored the victim to depose against the Appellant. The F.I.R. which is produced at Exhibit 13 substantially corroborates her deposition. The F.I.R. was registered at 6.52p.m. on 22/08/2016. The information was received at the police station at about 6.00p.m. on that day. It was given by PW-2. The prosecution had produced spot panchanama, arrest panchanama of the appellant and seizure of clothes of the victim panchanama. All these panchanamas were

admitted by the defence.

7. PW-3 Dr. Meenakshi Sawant had examined the victim on 22/08/2016 after the registration of F.I.R. She has deposed that the victim aged about 6 years was brought by the WPC Kandalkar of Nerul police station. The PW-3 then obtained consent of the victim's mother for carrying out medical examination. The history was given by the victim's mother that, when the victim was alone at home, the Appellant committed this act. PW-3 has further deposed that, hymeneal injury was absent. There was evidence of abrasion on left labia minora, which was fresh. On examination, it was her opinion that there was forceful insertion in the private part of the victim girl. She also opined that the evidence of sexual intercourse/assault could not be ruled out. She further explained that the injury i.e. abrasion on the left labia minora might be possible due to forceful insertion of penis in the private part of the victim. PW-3 issued the medical certificate which is produced on record at Exhibit 20.

In the cross-examination, she answered that abrasion

to labia minora was possible if the victim had fallen on private part against a rough surface. It was also possible because of vigorous itching and scratching. PW-3 accepted that any opinion expressed in Clause (f) of medical certificate was not a final opinion.

8. PW-4 Dr. Prerana Thakur had examined the Appellant and on the medical examination it was found that the Appellant was not impotent.

9. PW-5 Sushilkumar Gaikwad, P. I. was attached to Nerul police station. At that time, he was A.P.I. The investigation was handed over to him after registration of F.I.R. During investigation he sent the Appellant, who was already arrested, for medical examination. PW-5 then visited the spot of incident and prepared spot panchanama. On 23/08/2016 a woman police constable recorded victim's statement in presence of her mother. On 24/08/2016 PW-5 seized the clothes of the victim and the articles were sent for chemical analysis. He obtained birth certificate of the victim. He got recorded statement of the victim U/s.164 of Cr.p.c. On completion of the investigation the charge-sheet was filed.

10. The C.A. reports are produced on record. They are completely innocuous. They are not incriminating. The prosecution case rests on the ocular evidence and medical evidence.

11. Learned counsel for the Appellant submitted that, there is an important omission from the police statement of PW-2 because she had not stated before the police about oral penetration which was deposed by her in her deposition. Even the victim has not spoken about any such oral penetration. He submitted that the most important witness in this case was the husband of PW-2 because he was the first person who had heard the shouts of the victim. But he is not examined and therefore, an adverse inference should be drawn against the prosecution. There is discrepancy in the clothes of the victim which were seized and which were produced in the court. Learned Judge erred in discarding the defence of the Appellant. More importantly, the victim's parents were not examined. The victim has deposed that, when this act was committed and when she shouted, PW-2 immediately rushed. This is directly contrary to PW-2's own version that her husband had called her telephonically. She was

already in the hospital with her elder sister and then she rushed back home. That must have taken considerable time and, therefore, victim's deposition to that effect is not correct. Learned counsel further submitted that the age of the victim is not properly proved. The birth certificate is not produced on record through any witness.

12. Learned APP, as well as, learned counsel for the Respondent No.2 opposed these submissions. They submitted that, in this case the evidence of PW-1 was sufficient to convict the Appellant. She was merely 7 years of age at the time of incident. Therefore, there was no reason for her to implicate the Appellant falsely. The defence of the Appellant was unacceptable and there was hardly any reason for anybody to tutor a child of such tender age to depose falsely in such a serious manner. They submitted that, there was hardly any dispute about the date of birth of the victim. The birth certificate is not seriously challenged. They also relied on the medical evidence, which according to them, sufficiently corroborated the victim's deposition.

13. I have considered these submissions. So far as, articles and C.A. reports are concerned, they are completely innocuous and they do not help either the prosecution or the defense; therefore, they are left out of consideration.

14. The prosecution case mainly depends on the evidence of PW-1, 2 and 3. Amongst them, PW-1 being the victim is the most important witness. She has narrated the incident in detail. She was alone in the house. She had described the incident which would fall within the meaning of 'penetrative sexual assault'. There was pain in her private part and there were injuries to her private part, therefore, ingredients of Section 3 of POCSO and the definition provided under section 375 of I.P.C. are covered by her deposition. She was immediately examined by her Aunt and she had found swelling on her private part. She was taken to a Doctor. Even after registration of F.I.R., PW-3 Dr. Sawant had found that particular injury on labia minora, which also corroborates deposition of PW-1. It is not possible to hold that it was a self inflicted injury or was caused by any other person and not by the Appellant. Therefore, the reasonable conclusion which can be drawn is that this injury

was caused because of the acts of the Appellant. The Medical Officer-PW-3 has categorically deposed that, in her opinion there was forceful insertion of penis in the private part of the victim. There is no reason to doubt this particular opinion. Hence, PW-1's evidence is corroborated by PW-3's evidence

15. The PW-2 had rushed home and she had inquired with the victim. She had also seen the injuries of the victim and she had taken steps by calling the parents of the victim and then lodged the F.I.R. Though, the victim states that PW-2 had come immediately, but considering the tender age of the victim this minor statement will not go to the root of the matter. The fact remains that PW-2 had rushed home and had taken steps to take her for medical examination and, then had gone to the police station to lodge F.I.R. The Appellant had mentioned in his statement recorded U/s.313 of Cr.p.c. that he wanted to examine parents of the victim as defence witness, but subsequently had not pressed his application without citing any reason. He has not rebutted the presumption U/s.29 of POCSO. The prosecution has led all the necessary evidence to prove it's case against the Appellant. On the other hand, the

Appellant has not led any evidence to disprove that case. In fact, the defence taken by him is also not consistent. In the cross-examination of PW-2, a suggestion was put that, PW-2 wanted financial help of Rs.15000/-, the appellant had denied that and, therefore, this false case was lodged. However, in the statement recorded U/s.313 of Cr.p.c. the defence of the appellant was that PW-2's husband had taken hand loan from the appellant and when the appellant demanded it back he raised a quarrel with the appellant under influence of liquor and after two days this false case was lodged. Absolutely no evidence is led in support of this defence and both these defences are not exactly corroborating each other. Thus, over all impact of this discussion is that, the conclusion arrived at by the learned Judge, so far as, occurrence of the incident is concerned cannot be faulted with. So far as age of the victim is concerned, there is hardly any dispute about her age. The trial Court had seen the victim in the Court as PW-1. At that time, her age was mentioned as 9 years. The birth certificate and the extract of Navi Mumbai Municipal Corporation were produced on record at Exhibits 33 and 31 respectively. These are the copies

of public documents and the defence had not raised any objection when they were exhibited. Therefore, it cannot be argued that the age of the victim was not proved by the prosecution. Both these documents show that, date of birth of the victim was 01/03/2009. The incident had taken place on 22/08/2016 that means on the date of incident she was merely 7 years 5 months of age. Therefore, all the ingredients of Section for which the appellant is convicted are sufficiently established and proved by the prosecution beyond reasonable doubt. Hence, there is no merit in the appeal. There is no scope to reduce the sentence.

16. The Appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)