

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

CRIMINAL APPEAL NO.332 OF 2018

Nasir Hussain Shamsheer-Ali Hashmi	Appellant
Versus	
The State of Maharashtra & others	 Respondents

Mr. A.Z. Mookhtiar, Advocate (appointed) a/w. Adnan A. Mookhtiar, for the Appellant.

Mr. R.M. Pethe, APP for the Respondent No.1-State.

Mr. Amit Mane, Advocate (appointed) for Respondent Nos.2 & 3.

CORAM :SARANG V. KOTWAL, J.

DATE : 11th AUGUST, 2022

ORAL JUDGMENT :

1. Leave to amend to conceal the identities of the respondent Nos.2 & 3 from the appeal memo. Amendment to be carried out forthwith.

2. The office notings show that the respondent Nos.2 & 3 are already served. Nobody is representing them. Therefore, Shri Amit Mane, Advocate who is present in the Court, is appointed to represent these two respondents.

3. The appellant was convicted and sentenced by the learned Special Judge under POCSO Act for Greater Bombay in POCSO Case No.569/2015. The appellant was convicted and sentenced as follows :

- (i) He was convicted for commission of offences punishable under Sections 377, 354, 354-A and 342 of the Indian Penal Code and under Sections 6, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). It was observed that the punishment for the offences under Section 377 of IPC and under Section 6 of POCSO Act was greater in degree than the other offences, hence the punishment was imposed only in respect of Section 377 of IPC and under Section 6 of the POCSO Act. He was sentenced to suffer RI for 20 years and to pay fine of Rs.50,000/- and in default of payment of fine to suffer RI for six months. This conviction and sentence was in respect of the offence committed against victim No.1.
- (ii) For the offence committed against victim No.2, the appellant was convicted for the offences punishable under Sections 354, 354-A, 342 and 509 of IPC read with Sections 10 and 12 of POCSO Act. It was observed that the punishment for the offences punishable under Section 354 of IPC and under Section 10 of the POCSO Act was greater in degree than the other offences and, therefore, the sentence

was imposed under Section 354 of IPC and under Section 10 of POCSO Act. He was sentenced to suffer RI for 05 years and to pay fine of Rs.25,000/- and in default to suffer RI for two months.

The substantive sentences were directed to run concurrently. Out of the fine amount, Rs.40,000/- was directed to be paid to victim No.1 and Rs.15,000/- was directed to be paid to victim No.2. The appellant was granted set off under Section 428 of Cr.P.C.

4. The prosecution case, in brief, is as follows :

The appellant was a teacher in a Madarasa at Wadala, Mumbai. Between 2015 and 12.9.2015, he committed this offence in respect of two victims. The first victim was elder brother of the second victim. The first victim was 13 years of age and his sister, the victim No.2, was 11 years of age. There are allegations that he had committed penetrative sexual assault and unnatural sex with the first victim. On different occasions, he had touched the victim No.2 inappropriately on her private parts and thus had committed various offences for which he was convicted.

5. The FIR was lodged on 12.9.2015 vide C.R. No.196/2015 at Wadala police station, Mumbai under Section 342, 354-A, 377 of IPC and under Sections 4, 8 and 12 of the POCSO Act by the mother of the victims. The appellant was arrested on the same day i.e. on 12.9.2015. During investigation, a laptop was recovered at his instance. There are allegations that the appellant had used this laptop to show pornographic videos to both these victims. The hard-disk of the laptop was sent to Forensic Science Laboratory (FSL), which revealed that it contained various pornographic photographs and video clips. The clothes of the victims as well as of the appellant were seized and sent for examination. Medical examination of both the victims and the appellant was conducted. After completion of the investigation, the appellant faced the trial.

6. During trial, the prosecution examined twelve witnesses. PW-1 and PW-2 were the victims. PW-3 was their mother. PW-4 Mohd Ali Noor Islam Shaikh was a pancha in whose presence laptop was seized at the instance of the appellant. PW-5 Rajkumar Kharat had removed the hard-disk at the request of the

police. PW-6 Mushtaq Baksh was the owner of the premises. PW-7 Dr. Sachin Patil had conducted medical examination of the victims and the appellant. PW-8 Shivaji Surawade was a pancha in whose presence, hard-disk was removed but he did not support the prosecution case. PW-7 Sikandar Pyarali was a pancha in whose presence clothes of the victims as well as of the appellant were seized. PW-10 Priyanka Pawar was an expert from Forensic Science Laboratory, who had recovered the contents of the hard-disk from the laptop of the appellant. PW-11 WPSI Tapade had conducted the initial part of the investigation and PW-12 PI Bhoje was the investigating officer.

7. The defence of the appellant was that there was quarrel between the parents of the victims. He went to resolve their dispute. The victim's mother used to call him telephonically. He had told her not to call him. As he had not given response to her, she had threatened him to implicate him falsely and for the same reasons he is implicated falsely.

8. Learned Judge considered the evidence on record and in particular he relied on the evidence of the victims, their mother,

computer expert and the medical evidence; and convicted and sentenced the appellant as mentioned earlier.

9. The evidence of the victims in this case is important. PW-1 was the first victim who was the elder brother of the other victim. He has stated that at the time of incident he was in 8th standard. His school time was 12.00 pm to 6.00 pm. Since PW-1 was six years of age he was going to Madarasa to learn Musbi Talim, Arbi and Urdu. Since two years prior to the incident he started going to Madarasa at Wadala. The timing of the Madarasa was between 9.00 am to 11.00 am. He used to go there with his friends. His date of birth was 28.5.2002. There were three teachers in the Madarasa. The appellant was one of them. The appellant used to give his laptop for playing games. After all the other children had left the Madarasa, on the first occasion the appellant caught him from behind. He showed obscene video on his laptop. He told PW-1 that they would perform the same act as was shown in that video. PW-1 refused but the appellant continued with his act. PW-1, the first victim, then described the act of unnatural sex committed by the appellant. He has narrated

that the appellant had committed that act on a number of occasions and on one occasion he had had penetrative sexual assault. PW-1 was scared and he did not tell this incident to anybody including his mother. Once his sister, the other victim, told the acts committed by the appellant with her and thereafter his parents asked him about his own experience and then he narrated this incident to them. Thereafter they went to the police station and lodged the FIR. He identified the laptop of the appellant on which he was shown the obscene video contents. He identified the images and the video recording from the laptop on a C.D. The C.D. was prepared by a computer expert from F.S.L.. He deposed about his medical examination and recording of his statement under Section 164 of Cr.P.C.

In the cross-examination, he has stated that he used to play on a ground near their house. He used to play with some boys but those boys never used to go to Madarasa. In answer to a specific question, he has stated that his school timing was between 7.00 a.m. to 12.00 p.m. and that he used to go to Madarasa between 2.00 p.m. to 4.00 p.m. In all, 20 to 30 children used to

come to Madarasa from his area. He admitted that even other teachers used the same laptop. The other children who used to come to Madarasa also used the same laptop. He admitted that he did not disclose this incident to his friends, parents and other teachers. Madarasa was situated on the ground floor. There were shops opposite the Madarasa. He stated that at the time of the first incident he had shouted loudly but nobody came there. He further stated that from the Madarasa the voice could not reach out. His house was adjacent to Madarasa. After the first incident he sat at the Madarasa for approximately half an hour upto 5.00 p.m.. He has admitted that he used to play with his friends at the time of incident. On the date of incident also he had gone to play cricket. Till 7.00 p.m. on that date he had played cricket with his friends, but, he did not tell about the incident to anybody. On the next day, he went to his school full day and at usual time he went to Madarasa. All the teachers were present in the Madarasa. Only after a few days, he told the incident to his parents. When he went to the police station to lodge report; his father's friends, his maternal uncle and a cousin were accompanying them. He denied

the suggestion that because of the dispute between the appellant and his parents, he had implicated the appellant falsely.

10. PW-2 is the other victim. She was sister of PW-1, who was her elder brother. At the time of incident, she was studying in 6th standard. She was about two years younger than her brother. Her date of birth was 19.6.2004. She also used to go to the same Madarasa between 1.00 p.m. to 4.00 p.m.. Her mother used to go to the same Madarasa for sweeping and for giving tea to teachers and also to wash their clothes. Whenever her mother was sick, PW-2 used to substitute for her. On one such occasion, the appellant caught her from behind. She shouted, pushed the appellant and went home. At another time, the appellant whispered in her ear that he loved her. She informed this to her mother. Her mother confronted the appellant. At that time, the appellant had explained that PW-2 was like his daughter. She has further deposed that the appellant showed obscene films on his laptop. He touched her breasts. She told this fact to her mother. Her mother also asked PW-1 about his experience. Then he told about his experience. She has further deposed that on one

occasion, the appellant touched her private parts. The mother then informed these incidents to the victims' father. They then went to the police station and they lodged FIR against the appellant. She identified the laptop of the appellant. She also identified the images and obscene material from the C.D. produced in the Court.

In the cross-examination, she deposed that she did not inform about this incident to anybody as she was scared. Her father had never quarreled with the appellant. She admitted that she had not informed the police that the appellant had touched her private parts. That contradiction was brought on record. She has admitted that whenever there used to be quarrel between her parents, the appellant used to call her father to Madarasa and used to pacify him. She also admitted that there were cordial relations between her mother and the appellant. Sometimes the appellant used to leave his laptop in the victims' house.

11. PW-3 was the mother of the victims. She has deposed that the date of birth of the first victim was 28.5.2002 and that of the second victim was 19.6.2004. She has deposed that on 10.9.2015, her daughter came to her in a frightened condition and

narrated the incident. Thereafter even the first victim told the appellant his experience and the acts committed by the appellant. PW-3 then went to police station and lodged her FIR. The FIR is produced on record at Exhibit-25. In the cross-examination, she deposed that she used to serve food at Madarasa free of charge. She denied the suggestion that since the appellant had not given money to her on demand, she had lodged this false complaint against him.

12. PW-4 Mohd. Ali Noor Islam Shaikh is the pancha in whose presence the laptop was recovered at the instance of the present appellant from his room from below a bed. He admitted that he himself i.e. PW-4 was the maternal uncle of the victims.

In the cross-examination, he also stated that three constables were searching the room. The appellant had removed the laptop and had handed it over to the police. The appellant opened the laptop by putting a password. The memorandum statement and the panchnama are produced on record at Exhibits- 29 & 29A.

13. PW-5 Rajkumar Kharat was holding diploma in Hardware and Networking. He had his own firm at Wadala. In November, 2015 at the request of the police he removed the hard-disk from the laptop in the presence of two panchas. The panchnama to that effect was prepared. The hard-disk was seized and sealed.

In the cross-examination, he stated that the black coloured laptop was kept on the table of the police. Beyond that there is nothing much in his evidence which is of significance.

14. PW-6 Mushtaq Baksh was the owner of the premises where the incident had taken place. PW-8 Shivaji Surawade was pancha in whose presence hard-disk was removed but he was declared hostile. PW-9 Sikandar Pyarali was another pancha in whose presence clothes of the victim as well as the accused were seized. In the context of the case, the seizure of the clothes is not of any significance. It does not show the connection of the offence in any manner with the appellant. Therefore, evidence of PWs-6, 8 and 9 is not of much importance.

15. PW-7 Dr. Sachin Patil is the Medical Officer who had conducted the medical examination of the victims as well as the appellant. He has deposed that he had recorded the history given by the victims. On examination of genital and anal area of PW-1, anal verge was showing red in colour 6 O'clock with erosion. There was no other injury. This witness had given opinion that there was evidence of mechanical insult to anal region consistent with alleged history given by the survivor. There were no evidence of any physical injury over body.

As far as the second victim was concerned, he did not find any injury and there was no evidence of recent vaginal and anal penetration. However, his final opinion was consistent with the history given by the victim about sexual assault. These medical reports are produced on record at Exhibits-35 and 36.

He had also examined the appellant and there was no injury on his body. The DNA report in this case did not reveal any incriminating circumstance against the appellant.

In the cross-examination though he admitted that it

was possible that if the person eats spicy food, it can cause reddish erosional mark on anal region. However, he volunteered that there was an injury on the first victim. He had opined that there was nothing to suggest that the appellant was unable to perform sexual intercourse.

16. PW-10 Priyanka Pawar is another important witness. She was working as a Scientific Officer, Cyber Crime Department, Forensic Lab, Kalina. She had examined the hard-disk of the appellant's laptop. On examination, she found two pornographic videos and twenty-eight pornographic images. From the internet evidence finder, she had noticed that the person who had access to this hard-disk had visited many pornographic sites. She had prepared a C.D.. She had noted path of user file in the hard-disk which mentioned the name of the appellant. She kept her analysis on a C.D.. The C.D. was produced with her certification. Her cross-examination did not create any doubt about the value of her evidence.

17. PW-11 and PW-12 had carried out the investigation at different stages. PW-11 WPSI Tapade had arrested the appellant in

the midnight after registration of FIR. She had also seized the laptop at the instance of the appellant.

PW-12 PI. Bhoje had carried out the major part of investigation. He had collected the samples and sent those for testing and at the conclusion of investigation had filed the charge-sheet. He deposed about various panchnamas and in particular about the panchnama of separating the hard-disk from the laptop. There is nothing much in the cross-examination which could help the defence in any manner.

18. Learned counsel for the appellant submitted that the Madarasa is situated in a crowded locality. There were shops and huts all around and, therefore, it was not possible that this incident could have taken place there. According to PW-1, at the first instance, he had shouted but since the incident was not true, there was no question of anyone else hearing the shouts.

19. Learned counsel further submitted that the evidence shows that the incident had allegedly taken place when the first victim was supposed to be in school. The timing of the school

overlap with his allegations of the incident.

20. Learned counsel further submitted that the conduct of the first victim in particular was unnatural. It was improbable that after the incident he would normally go to a playground and play with his friend. He had not narrated about this incident to anybody for considerable period and after the second victim had made some complaint to her mother he narrated the offence committed by the appellant. According to learned counsel this is unnatural and the delay in disclosing this incident, creates doubt about the veracity of his version.

21. He further submitted that the medical evidence does not fully support the prosecution as there were other possibilities. In any case, the medical evidence does not support the allegations of the second victim.

22. By way of alternate argument, learned counsel submitted that the sentence of twenty years is on a higher side. The appellant's mother is suffering from serious back and knee problems. There is no one to look after her. His other brother is

teaching in a Madarasa and is not earning much to meet her medical expenses. The appellant is already in custody since 12.9.2015 and, therefore, some leniency be shown to him.

23. On the other hand, learned APP as well as learned counsel for respondents Nos.2 & 3 submitted that the prosecution has proved its case beyond reasonable doubt. There is absolutely no reason to doubt the depositions of both the victims. They also submitted that considering the nature of offence, leniency should not be shown to him.

24. I have considered these submissions in the background of the evidence discussed hereinabove. The depositions of both the victims are sufficiently reliable. There is no reason to doubt the truthfulness of their narrations. Both of them have described the incidents in detail. There does not appear to be any exaggeration. PW-2 has not exaggerated the incident and told about the incident as it had occurred. It would have been much easier to have made even more serious allegations but she has stuck to her story and she appears to be a truthful witness. Even the first victim i.e. PW-1 has given sufficient details about the

incident. His non-disclosure to his friends and parents on an earlier occasion cannot be held against him because in such cases it is not expected that the children will rush to others for narrating such incidents for various reasons; the most common reason being that they are scared. These incidents do leave a mark on their mind. In this particular case where the victims' mother questioned him particularly about his experience after the second victim had complained to her about her own experience, PW-1 had told about the acts committed by the appellant. The entire course of evidence and disclosure is natural. No fault can be found with PW-1 for not disclosing this incident to anybody else before September, 2015.

25. PW-1's evidence is sufficiently corroborated by the medical evidence which showed the injury near anal region which was consistent with his case. The Medical Officer had in categorical terms opined that his medical examination revealed findings which were consistent with the medical history given by the victims. As far as the second victim is concerned, there are no allegations of penetrative sexual assault. There are allegations of indecent touch. For that purpose, the medical examination is not

expected to reveal anything. In that context, her deposition is more important.

26. Apart from these circumstances, the other circumstance of seizure of laptop and analysis of the hard-disk on the same laptop is important. The laptop was recovered at the instance of the present appellant from his room. It was kept under his bed. It was analyzed by an expert and pornographic material was recovered from the hard-disk. This supports the versions of the victims that the appellant used to show them pornographic material. The analysis also revealed that the appellant used to visit pornographic sites. All this is consistent with the prosecution case. There is no reason to raise any suspicion about the procedure in respect of seizure of the laptop and the analysis by an expert of the hard-disk of the laptop. The laptop is identified by the witnesses in the court. Even other material is also identified. Thus, the prosecution has sufficiently proved its case beyond reasonable doubt. Therefore, the conviction recorded by the trial Judge can safely be maintained.

27. As far as the sentencing part is concerned, learned

counsel for the appellant has made submissions as to why the sentence should be reduced. These submissions are recorded hereinabove.

28. Section 6 of the POCSO Act is as existed on the date of offence i.e. in the year 2015 was as under :

“6. Punishment for aggravated penetrative sexual assault.”-Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”.

This Section was amended in the year 2019, but, at the time of incident, the minimum punishment was ten years which could extend to imprisonment for life. Under Section 377 of IPC, the punishment is for imprisonment for life or imprisonment of either description for a term which may extend to ten years. Thus, the sentence can be awarded which has to be minimum ten years, as provided under Section 6 of POCSO Act.

29. The appellant is in continuous custody since 12.9.2015. He was not granted parole or furlough. Even during

COVID period, he was in custody. He has an old mother, who is suffering from back problem and knee problem as submitted by learned counsel for him. The appellant's financial condition is poor. He even could not afford to engage an Advocate. His case was argued by a counsel appointed through Legal Aid Panel. His brother is a teacher at a Madarasa and is not earning much. The appellant does not have any other criminal antecedents. Considering all these aspects, some leniency can be shown to the appellant, but, since the offence is serious, some balance can be struck by reducing the substantive sentence and by enhancing the fine amount imposed on the appellant so that the victims can get more compensation. To that extent, the sentences can be modified.

30. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction of the appellant under all heads is maintained.
- iii. The sentence imposed on the appellant for commission of offence punishable under Section 377 of IPC and under

Section 6 of the POCSO Act is altered from rigorous imprisonment for twenty years to rigorous imprisonment for fifteen years. He was directed to pay fine of Rs.50,000/- and in default of payment of fine to undergo RI for six months. This fine is enhanced to Rs.75,000/- and in default of payment of fine he is directed to undergo RI for nine months. Thus, for commission of offence punishable under Section 377 of IPC and Section 6 of the POCSO Act, he is sentenced to suffer RI for fifteen years and to pay fine of Rs.75,000/- (Rupees Seventy Five Thousand Only) and in default of payment of fine to undergo RI for nine months.

- iv. The sentence imposed under Section 354 of IPC and under Section 10 of the POCSO Act whereby he was sentenced to suffer RI for five years and to pay fine of Rs.25,000/- and in default of payment of fine to undergo RI for three months is maintained.
- v. Both the substantive sentences shall run concurrently. As per Section 357 of Cr.PC., a sum of Rs.60,000/- from the fine amount, if paid, shall be paid to the victim No.1 i.e.

respondent No.2. As per Section 357 of Cr.P.C., a sum of Rs.20,000/- from the fine amount if paid shall be given to the second victim i.e. respondent No.3 by way of compensation.

- vi. The other clauses of the operative part of the trial Court judgment from clause Nos.6 to 13 are retained as they are.
- vii. Criminal Appeal is disposed of in aforesaid terms.

(SARANG V. KOTWAL, J.)

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