

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

CRIMINAL APPEAL NO. 776 OF 2017

Mohd. Raja Mohd. Islam Dhuniya	..Appellant
Versus	
The State of Maharashtra & Ors.	..Respondents

Mr. Sandeep R. Karnik (appointed Advocate) for Appellant.
Smt. M. R. Tidke, APP for State/Respondent No.1.
Smt. Megha S. Bajoria, (appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 28th SEPTEMBER 2022

JUDGMENT :

1. The appellant has challenged the Judgment and order dated 2.8.2017 passed by learned Special Judge under the Protection of Children from Sexual Offences Act, Greater Bombay in POCSO Special Case No.144 of 2015. The appellant was convicted and sentenced as under :

- i) He was convicted for commission of offence punishable under Section 6 read with Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and he was

sentenced to suffer RI for ten years and to pay a fine of Rs.2,000/- and in default of payment of fine to suffer SI for six months.

ii) He was convicted for commission of offence punishable under Section 506 of IPC and was sentenced to suffer RI for six months. Since he was convicted and sentenced for offence under Section 6 read with Section 5(n) of the POCSO Act, no separate sentence was imposed on him for commission of offence punishable under Section 376 of I.P.C. in view of Section 42 of the POCSO Act.

iii) The appellant was acquitted from the charges of commission of offence punishable under Section 10 read with 9(m) of the POCSO Act.

2. Heard Shri. Sandeep Karnik, learned Advocate appointed for the Appellant, Smt. Tidke, learned APP for State/Respondent No.1, and Smt. Megha Bajoria, learned Advocate appointed for Respondent No.2.

3. The prosecution case is about two separate incidents which had taken place on 14.12.2014 and 15.12.2014. There were two victims involved. They were about four years of age at the time of incident. The FIR in this case was lodged on 21.12.2014 vide C.R. No.681/2014 at Sakinaka Police Station. It was alleged that the offences were committed by the present appellant. He was arrested on 22.12.2014. The investigation was carried out. Statements of victims were recorded. They were sent for medical examination. Various panchnamas were recorded and after conclusion of the investigation, the charge-sheet was filed and the case was committed to the Special Court.

4. During trial, the prosecution examined eleven witnesses including both the victims, their mothers, sister of one of the victims, two Medical Officers, a shop-keeper, the investigating officers and the panchas for spot panchnama.

5. PW-1 was 6 years of age at the time of recording of her evidence. Her birth certificate is produced on record at Exhibit 31 showing her date of birth as 12/05/2010. The birth certificate of PW-3 is produced on record at Exhibit 32 and her date of birth is

mentioned as 26/12/2010. There is no dispute about their age.

6. PW-1 has deposed that, when she was playing with her sister, “Raja Uncle” was sitting on his vehicle. He told her that, she should come with him to buy wafers. He made her sit in a car. He put his mouth to her private parts. He then told her that she should not tell her mother about it, otherwise, he would beat her and even her mother would beat her. Then he left her. PW-1 then went to her mother and told her about the incident. She did not remember the date of incident. After some days, she was taken to the hospital by her mother. PW-1 narrated the incident to the police. According to her, she was not taken to a doctor. She was asked whether she would be able to identify that ‘Raja Uncle’, she answered in the affirmative. According to her, he resided in the same locality. When the Appellant was produced in the Court, learned S.P.P. asked her as to who he was. PW-1 deposed that, she did not know who he was. Then she was asked the specific question, whether he was ‘Raja Uncle’ connected with that car. Again she specifically answered in the negative. When she was asked what was the name of the accused; again she deposed that,

she did not know his name. She also deposed that, she had seen 'Raja Uncle' inside the car, but she did not remember his face. Then she was asked another specific question whether that 'Raja Uncle' was present in the Court. Even to that question, she answered in the negative. Apart from this, she deposed that, when this incident took place, there were few people standing near the car. It was night time. There was no quarrel between herself and 'Raja Uncle'. She stated that, she had not forgotten the incident and that she remembered everything.

7. PW-2 is mother of PW-1. She has deposed that, at the time of incident, PW-1 was 4 and half years of age. She also knew PW-4 whose daughter was 4 years old. PW-2 knew the appellant because he was residing in their building on the 4th floor. She identified the Appellant in the Court. Her children used to go to play there. The incident had occurred on 15/12/2014. PW-1 and her sister had gone to play at around 7.00p.m. The Appellant brought PW-1 back home at around 8.30p.m. PW-1 then ate her food and went to sleep. On 16/12/2014, when PW-1 saw the Appellant, she got scared and then she narrated the incident to

PW-2. In the night, PW-2 narrated that incident to her husband when he returned from work. She herself, her husband, her husband's parents and the victim went to the Appellant's house. The appellant begged for pardon. PW-2's in-laws advised her not to report the offence to the police.

8. On 20/12/2014, PW-4, residing on the 4th floor of the same building, came to her house and informed PW-2 that even her daughter was subjected to sexual assault by the Appellant on 14/12/2014 and he had apologized to PW-4. After this discussion, PW-2 decided to lodge F.I.R. She went to the police station and lodged the F.I.R. on 21/12/2014. A copy of the F.I.R. is produced on record at Exhibit 10. After that, both the victims were sent for medical examination. PW-1's statement was recorded at Sakinaka police station and then in Bandra Court.

In the cross-examination, she deposed that, PW-1 was not crying when the Appellant brought her back home. She deposed that, since the Appellant had repeated his act, they decided to lodge the F.I.R. It was not mentioned in her police

statement that, her children used to go to play on the 4th floor. According to her, she had stated that fact before the police, but she could not explain as to why this fact was not recorded in her police statement. She admitted that, she would not have lodged the F.I.R. if PW-4 had not come to her house. In her F.I.R. she has mentioned that the Appellant was 21 years of age and he was residing in the next room of PW-4. The F.I.R. thereafter refers to the incident dated 15/12/2014. The F.I.R. is registered at 7.15p.m. on 21/12/2014.

9. PW-3 is the other victim. She was asked a direct question that, whether Sonia's uncle had taken her to the first floor and had put his hand in her undergarments and then whether he had tried to insert cap of soft drink bottle in her private part. She nodded her head in the affirmative. She could not tell what happened after that. She was asked whether she would be able to identify Mohd. Raja. She deposed that, she would not be able to identify. The Appellant was shown to her. She deposed that, she did not know him. This was her short evidence and she was not cross-examined.

10. PW-4 was PW-3's mother. She deposed that, on 14/12/2014 one Mohd. Raja took her daughter to the terrace. PW-4 heard her voice; she was crying. PW-4 went to the terrace. Mohd. Raja was sitting there. There was one bottle. PW-3 told her that, he was inserting his hand in her nicker and he was inserting cap of the bottle in her private part. PW-4 told this fact to her husband. That person Raja sought apology and told them that, he would not do it again. PW-2 told PW-4 about the incident involving PW-1 and, therefore, they decided to lodge F.I.R. PW-4 told the Court that she would be able to identify the accused Raja, if he was shown to her. The Appellant was not produced from the jail on that day i.e. on 14/10/2016 when this examination in chief was recorded. It continued on 22/10/2016. On that day, she deposed that Mohd. Raja was not present in the Court. She did not identify the Appellant in the Court.

11. Learned SPP even gave a specific suggestion that the Appellant was the same accused, however, PW-4 denied that the Appellant was the same accused Mohd. Raja. Thus, PW-4 did not support the prosecution and she did not identify the Appellant.

Therefore, learned S.P.P. was granted permission to put questions in the form of cross-examination of PW-4. She denied the suggestion that, she was deliberately not identifying the Appellant. She admitted that the Appellant resided in the next room of her house. She denied the suggestion that, to help him she was deposing falsely.

In the cross-examination conducted on behalf of the Appellant, she could not explain as to why her police statement did not mention that, she had gone to the terrace, though she had stated it before the police. She deposed that, she had not stated before the police that, her daughter told her that the Appellant was inserting his hand in her nicker. She also admitted that, she had not stated before the police that the appellant was inserting bottle cap in the private part of her daughter.

12. PW-5 Vansingh Chaddhana was having a shop. According to the prosecution case, PW-1 was taken to his shop by the appellant. He has deposed that, he knew Mohd. Raja as he used to come to his shop. He did not remember whether on 15/12/2014

Mohd. Raja came to his shop along with PW-1 and bought wafers. He deposed that, accused Mohd. Raja was present in the Court. After these answers he was declared hostile and he was cross-examined by learned SPP.

In the cross-examination, portion mark 'A' from his statement was put to him wherein he had stated before the police that accused had come to his shop with PW-1 and had purchased a wafers packet. In the cross-examination he deposed that, he knew the accused by face.

13. PW-6 was the sister of PW-1. She was 10 years of age. She has deposed that, she knew Mohd. Raja as he was residing in their building. She used to call him 'Raja uncle'. Raja took PW-1 to milk dairy and gave her wafers and chocolates. After some days PW-1 told about the incident to PW-6 and PW-2. She did not inform about the incident on the very day when it had occurred. She identified the Appellant as Mohd. Raja.

In her cross-examination she denied the suggestion that, she was deposing at the instance of her mother and she

identified the Appellant on the say of her family members and that the Appellant was shown to her and, therefore, she had identified him.

14. PW-7 Dr. Kalyani Kale had examined both the victims on 22/12/2014. The history was given to her by victims and their mothers. On physical examination, she did not find any fresh injuries, stains, scars or abnormality. Her provisional medical opinion was that the PW-1 reported of non penetrative sexual assault. On examination there were no signs of use of force and injuries. So far as, PW-3 was concerned, she admitted that, PW-3 and PW-4 did not give history suggestive of penetrative sexual assault or unnatural sexual assault. There was no abnormality detected. There was no evidence of fresh injuries.

15. PW-8 Dr. Ravindra Chavan had examined the Appellant. In his opinion, there was nothing to suggest that he was impotent.

16. PW-10 Aslam Shaikh was a pancha for the spot panchanama in respect of the incident involving PW-1. It was exhibited at Exhibit 25. The spot panchanamas in respect of two

spots are produced on record at Exhibit 25 and 26.

17. PW-9 WPSI Ashwini Jadhav and PW-11 PI. Chandrashekhar Nalawade, were two investigating officers. They have deposed about the investigation carried out by them.

18. Learned counsel for the Appellant submitted that, both the victims and PW-4 have not identified the Appellant before the Court. This is a very important circumstance in favour of the Appellant. Though, PW-2 has identified him, she is not an eye witness and her evidence at the highest can be used to corroborate victim's evidence which in this case is not incriminating against the Appellant, because she has not identified the Appellant in the Court. PW-5 Vansingh, shopkeeper has not supported the prosecution case. The medical evidence is also silent and it is not incriminating against the appellant. The medical evidence, in fact, shows that, there was no penetrative sexual assault and, therefore, conviction U/s.6 of POCSO, as well as, U/s.376 of I.P.C. is not tenable. He submitted that, PW-4's evidence was important as she claimed to be an eye witness and yet she had not identified the

Appellant. This has major impact on the prosecution case, practically destroying it. Learned counsel submitted that the F.I.R. was not lodged immediately after the incident allegedly had taken place on 14/12/2014 and 15/12/2014. The F.I.R. was lodged only on 21/12/2014. There was no reason for the PW-4 to suddenly tell the PW-2 about the incident which had taken place on 14/12/2014. According to Shri. Karnik, therefore, the Appellant deserves to be acquitted.

19. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that, considering tender age of both the victims, some discrepancies in their evidence will have to be ignored. They have referred the culprit as 'Raja Uncle'. The Appellant was residing in the same building and, therefore, it would not be unusual for the victims to refer to him as 'Raja Uncle'. Their failure to identify him in the Court is of little significance. They submitted that, PW-4 is trying to help the appellant as he was her next door neighbour. Both of them relied on the evidence of PW-6 sister of PW-1 and according to them she had no reason to implicate the Appellant falsely.

20. I have considered these submissions. As rightly submitted by Shri. Karnik, the most important aspect in this case is about identity of the culprit. Both the victims specifically deposed that the Appellant was not the offender. This is a positive statement in favour of the Appellant. Learned SPP had put leading questions inviting the witnesses to identify the appellant, but both the victims not only failed to identify the appellant, but, according to them, the Appellant was not the person who had committed this offence. Therefore, this evidence destroys the prosecution case. More importantly, PW-4 mother of PW-3 has also deposed that the Appellant is not the same person who had committed the offence. Her evidence is important because she is an eye witness to the incident involving PW-3. She had gone to the place where the offender was in the process of committing the offence. She had seen the incident and there was no reason for her to protect the actual offender. Therefore, in my opinion, her deposition is a very important piece of circumstance in favour of the Appellant. Though it was contended that PW-4 would have wanted to help the Appellant being her next door neighbour, in this particular

case, the F.I.R. itself was lodged at her behest. It was only after she had convinced the PW-2 to lodge the F.I.R., this offence was registered. Therefore, her evidence and her non identification of the appellant assumes greater importance. As mentioned earlier, she has deposed that the Appellant was not the person who had committed the offence, therefore, in view of this positive evidence in favour of the appellant, it is unsafe to base conviction against him on this evidence.

21. Though, PW-2 has stuck to her story and has identified the Appellant in the Court, she is not an eye witness to the incident. She has relied on the narration given by PW-1. PW-2 on her own was not keen on lodging the F.I.R. because her husband and her in-laws were against lodging of the F.I.R. She had lodged this F.I.R. as an afterthought. But in any case, her deposition cannot override deposition of PW-1 herself. In this particular case, since PW-1's evidence is not in favour of the prosecution, benefit of doubt must go to the appellant in that behalf. Same is the case with the evidence of PW-6. From her deposition, it appears that the incident had taken place few days earlier before the victim told

them about the incident. This story also does not match with the prosecution case because, according to the prosecution case the victim had narrated the incident immediately on her return to her house on that very day.

22. Besides these major aspects there are other other important circumstances which make the story of the prosecution doubtful. According to PW-1 the incident had taken place inside the car. However, the F.I.R. and PW-1's statement recorded U/s.164 of Cr.p.c. mentions that the incident had taken place outside the car and not inside the car. PW-1 has also deposed that, there were few people around that car at that time. This makes her story little doubtful, however, it would not be proper to observe that the entire narration of PW-1 or PW-3 is false. However, sufficient doubt is created in favour of the Appellant about his involvement. To that extent, benefit of doubt must go to the appellant.

23. So far as, incident involving PW-3 is concerned, in her deposition she has stated that the incident had taken place on first floor, whereas, according to PW-4 who was an eye witness and also

as mentioned in the spot panchanama, the incident involving PW-3 had taken place on the terrace of the building. This is also a discrepancy which must be taken in favour of the appellant. But here again, considering the tender age of the victim it cannot be observed that her story is entirely false. The prosecution has failed to prove its case beyond reasonable doubt against the Appellant and, therefore, the Appellant deserves to be acquitted in this case.

24. Hence, the following order:

O R D E R

- i) The Appeal is allowed.
- ii) The Judgment and order dated 2.8.2017 passed by the Special Judge under POCSO Act, Greater Bombay in POCSO Special Case No.144/2015 is set aside. The Applicant is acquitted from all the Charges.
- iii) The amount deposited by the Appellant in this court shall be refunded to him.

iv) The State Government shall ensure that all the benefits under their various schemes are extended in favour of PW-1 and PW-3 in accordance with rules in that behalf.

v) With these directions the Appeal is disposed of.

(SARANG V. KOTWAL, J.)