

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 1474 OF 2019**

Arif Mohd. Rahilla]
Age – 23 years, Occ: - Packer,]
R/o. Peras Building, 2nd Floor, Room No.4,]
St. George Hospital Compound, Near Ganesh]
Mandir, Fort, Mumbai 400 001.]
At present lodged at Nashik Road Central Prison,]
District Nashik.]Appellant

Vs.

The State of Maharashtra]
At the instance of MRA Marg Police Station,]
Mumbai.]Respondent

Ms. Anjali Patil, Advocate for Appellant.
Ms. S. S. Kaushik, APP for Respondent-State.

CORAM : A. S. GADKARI, J.

DATE : 10th JUNE, 2022.

JUDGMENT:-

By the present Appeal under Section 374(2) of the Criminal Procedure Code (for short “the CrPC”), the Appellant has questioned correctness of Judgment and Order dated 19th September 2019 passed by the learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (for short “the POCSO Act”), Greater Mumbai in POCSO Special Case No.60 of 2017, arising out of CR. No. 302 of 2016 registered with MRA Marg Police Station, Mumbai, convicting the Appellant for the

offences punishable under Section 6 of the POCSO Act and under Section 376 of the Indian Penal Code (for short “the IPC”) and is sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.6,000/-, in default of payment of fine amount to further undergo specified term of sentence.

2. Heard Ms. Patil, learned Advocate for Appellant and Ms. Kaushik, learned APP for State. Perused entire record.

3. Victim was four and half years of age on the date of lodgment of the crime and with a view to protect her identity and in consonance with the provisions of Section 228(A) of the IPC and Section 33(7) of the POSCO Act, the detailed narration of facts and other details disclosing identity of victim and/or her mother are hereinafter avoided.

4. It is the prosecution case that, in the year 2016 the mother (PW.1) of victim (PW.2) was residing near Gorai Creeck, Borivali, Mumbai with her husband and three daughters. Her mother was residing within the campus of Saint George Hospital, Mumbai. The victim (PW.2) was sick and therefore her mother (PW.1) had brought her to the house of her mother. The birth date of victim (PW.2) is 23rd December 2011. There was a confectionery shop opposite to the house of the grandmother of victim. It was owned by Mr. Suvarna. On 2nd December 2016 at about 4.30 p.m. victim (PW.2) took Rs.2/- from her mother (PW.1) for purchasing chocolate and returned to house between 5.00 to 5.30 p.m.. Victim thereafter went

for urination. Victim (PW.2) came to her mother (PW.1) and disclosed that, there was bleeding from her private part. PW.1 therefore inspected her nicker and found that, there was bleeding. She therefore alongwith her brother and husband took victim to Saint George Hospital. The Medical Officer on duty namely Dr. Sushil Kamble (PW.4) examined victim and disclosed that, there were scratches by nails on her private part. Since there was no pediatric in the said hospital, Dr. Sushil Kamble (PW.4) advised PW.1 to take victim (PW.2) to J. J. Hospital, Mumbai. The Medical Officer at J. J. Hospital, Mumbai examined victim and informed Dr. Sushil Kamble (PW.4) that, the injuries were sustained by victim due to fingering. Medical papers (Exh-38) were accordingly prepared by him.

Mother (PW.1) of victim inquired with her to which she disclosed that, in the confectionery shop a person having beard, removed her nicker and put his finger in her private part and had threatened her that, if she discloses it to anybody he would assault her. Mother (PW.1) of victim thereafter approached MRA Marg Police Station and lodged her First Information Report (for short "the FIR") (Exh-28) which was recorded by WAPI Smt. Priya Bagul (PW.7), who seized cloths of victim (PW.2) in presence of her mother (PW.1) and witness namely Smt. Nisha J. Chauhan (PW.3). Shri. Gulabrao More (PW.6), Police Inspector attached to MRA Marg Police Station, Mumbai conducted investigation of the crime. Ashok M. Sanap (PW.5) conducted test identification parade of Appellant and as

per the prosecution the victim identified Appellant as the perpetrator of crime. After completion of investigation, Shri. Gulabrao More (PW.6) submitted charge-sheet before the Trial Court.

5. The Trial Court framed charge below Exh-7 for the offence punishable under Section 376 (1) of the IPC and under Section 6 and 8 of the POCSO Act. The contents of the said charge were read over and explained to Appellant in vernacular language to which he pleaded not guilty and claimed to be tried. The defence as can be gathered from the cross-examination of prosecution witnesses and the statement of Appellant recorded under Section 313 of the CrPC is that, victim's parents wanted defence witness Shivajiganesh R. Suvarna (D.W.1), who have been allotted Government quarter, be allotted to their relatives and therefore they concocted the present false case against him.

6. The prosecution in support of its case examined in all seven witnesses namely, mother of victim (PW.1); the victim (PW.2); Smt. Nisha J. Chauhan (PW.3), panch witness to seizure of cloths of victim panchanama (Exh-29); Dr. Sushil D. Kamble (PW.4), examined the victim and issued medical certificate alongwith other reports (Exh-38 colly); Shri. Ashok M. Sanap (PW.5), Naib Tahsildar, conducted test identification parade of Appellant; Shri. Gulabrao A. More (PW.6), investigating officer; and Smt. Priya M. Bagul (PW.7) recorded FIR (Exh-28). Appellant examined Shri. Shivajiganesh R. Suvarna (D.W.1) as defence witness. The Trial Court after

recording evidence and hearing the learned Advocates for the respective parties, has convicted and sentenced Appellant by its impugned Judgment and Order 19th September 2019.

7. Ms. Patil, learned Advocate for Appellant submitted that, herein the identity of the Appellant is in dispute. That, Appellant was shown to PW.1 and PW.2 on 2nd December 2016 itself at J. J. Hospital, Mumbai late in the intervening night of 2nd December 2016 between 12.30 a.m. to 1.00 a.m.. That, the victim (PW.2) has admitted showing of the Appellant to her at hospital in her cross-examination. That, the identity of the of the Appellant is not proved by the prosecution beyond reasonable doubt. That, though Appellant was unknown person, his name is mentioned in the FIR, however, explanation about mentioning of his name was not offered by any of the prosecution witnesses. She submitted that, PW.1 while narrating history of the offence to Dr. Sushil D. Kamble (PW.4) has stated that, act was committed by an 'unknown person'. That, in her statement recorded under Section 164 of CrPC, the victim (PW.2) has stated that, the accused had 'touched' to her private part. Therefore it is the case of only 'touch' within the pervuew of Section 7 of the POCSO Act and not a case of 'insertion' as contemplated under Section 3(b) attracting punishing Section 4 of the POCSO Act. She submitted that, assuming for the sake of argument, even if an offence is proved against Appellant, Section 7 will have application and certainly not Section 4 of the POCSO Act. She

therefore prayed that, impugned Order may be set aside by allowing present Appeal.

8. Per contra, learned APP vehemently opposed the Appeal and submitted that, P.W.1 has not admitted that, the Appellant was shown to her and victim (P.W.2) prior to test identification parade. She submitted that, the child was not knowing the name of Appellant and therefore she was unable to give his name to the Police. That, the victim (P.W.2) has stated that, a 'beard' person committed the said act with her. She submitted that, there is no confusion or ambiguity in the identity of "Sujju uncle" and Appellant a person with "beard" and it is the Appellant only who has committed present crime. After perusing medical reports, in particular page No.139 of paper book, which is a diagram of the injury suffered by the victim, the learned APP fairly conceded that, taking into consideration the diagram given by P.W.4 Section 7 read with Section 9(m) which is punishable under Section 10 will have application and the conviction of Appellant under Section 6 of the POCSO Act appears to be an error. She therefore prayed that, the present Appeal may be dismissed.

9. I will first deal with the contention of the learned Advocate for the Appellant about the application of Section 6 of the POCSO Act to the present case. Victim (P.W.2) in her statement recorded under Section 164 of the CrPC by the learned Additional Chief Metropolitan Magistrate, Mumbai has stated that, a 'beard uncle' removed her pant and touched her private

part. In her substantive evidence before the Trial Court, the victim (PW.2) has stated that, the uncle had touched (lagaya/mara) her private part. That, the said person had touched his finger to her private part. The mother (PW.1) of victim in her evidence has stated that, after noticing bleeding from the private part of victim, she took her to Saint George Hospital, Mumbai. That, the Medical Officer examined her and disclosed that, there were scratches made by nails to her private part. Dr. Sushil D. Kamble (PW.4) had examined victim on 3rd December 2016 at about 1.00 a.m. He has deposed that, on medical examination he found 1 x 1 c.m. abrasion over left labia majora on anterior medial aspect, having red colour with swelling. He therefore had opined that, sexual assault can not be ruled out. He has issued medical certificate (Exh-38). The said witness also produced on record medical papers of the victim (PW.2) which includes a sketch/diagram of the injury suffered by the victim to her private part which is annexed at page No.139 to the paper book. Perusal of the said sketch/diagram indicates that, the injury which was suffered by prosecutrix was on the outer periphery of her private part. At the side margin of the said sketch/diagram, the Doctor has noted injuries observed by him as "1 x 1 c.m. abrasion/scratch mark present on left labia majora medial aspect, Hymen appears intact".

It is thus clear from the testimony of the prosecutrix and the Medical Officer that, the accused had touched (lagaya/mara) her private

part and therefore no case for application of Section 3(b) punishable under Section 4 and 5(m) punishable under Section 6 of the POCSO Act is made out by the prosecution. It is in fact a case of 'touch' as contemplated under Section 7 of the POCSO Act. As the victim was below the age of 12 years, the Section 9(m) is attracted, which is punishable under Section 10 of the POCSO Act. In view thereof, the conviction and sentence of the accused under Section 6 of the POCSO Act awarded by the trial Court is erroneous and the accused ought to have been convicted and sentenced under Section 10 of the POCSO Act. The contention of the learned Advocate for Appellant is accordingly answered.

10. Now, I will deal with the most important and crucial aspect of the present case i.e. whether the prosecution has proved beyond reasonable doubt, the identity of Appellant as the perpetrator of present crime. Victim (PW.2) in her statement recorded under Section 164(5) of the CrPC has stated that, the alleged act was committed by 'beard uncle' (Dadhiwale Uncle). In her substantive evidence before the Court, she has named 'Suju uncle'. She has assertively stated that, alleged act was done with her by 'Suju uncle'. She has also admitted that, Appellant was shown to her by police. That, due to the tutoring by her mother and father she told name of Appellant. Mother (PW.1) of victim has stated that, the victim told her that, in the confectionery shop owned by Mr. Suvarna, a person having beard, committed the said alleged act with her. Mother (PW.1) of victim has not

given any explanation in her substantive evidence as to how she came to know that, the alleged act was done by Appellant. She has admitted that, Appellant was brought to J. J. Hospital, Mumbai for medical examination on 2nd December 2016 at about 11.00 to 12.00 in mid night and at that time, the victim was with her. Thereafter identification parade was conducted. It is thus clear that, Appellant was shown to P.W.1 and 2 prior to conducting his test identification parade. As the Appellant was shown to the victim and her mother prior to conducting identification parade, his identity in the said parade loses its sanctity in the eyes of law. Even otherwise, there are material contradictions, in the evidence of said two important witnesses as far as establishing identity of the Appellant beyond reasonable doubt.

11. The defence witness examined by Appellant namely Shivajiganesh R. Suvarna (D.W.1) has deposed that, his pet name is 'Sijju'. He has further deposed that, there is no confectionery shop in his house, in the compound of Saint George Hospital, Mumbai. That, police had tortured and pressurized him to accept the allegations having confectionery shop in his house. That, due to the torture of police he left the said place and started to reside in a rented house at Badlapur.

12. Apart from the above, there is no evidence at all available on record even to remotely infer that, Appellant was in fact present in the said shop on the date and time of alleged commission of offence. Perusal of

entire evidence on record reveals that, there is a serious doubt about the identity of the Appellant by victim as the sole perpetrator of the present crime. There is no conclusive proof that, the Appellant alone is the perpetrator of present crime. Appellant therefore is entitled for benefit of doubt and is accordingly given to him.

13. In view of the above discussion, Appeal is allowed.

Impugned Judgment and Order dated 19th September 2019 passed in POCSO Special Case No.60 of 2017 is quashed and set aside by giving benefit of doubt to the Appellant.

14. Appellant be released from Jail forthwith, if not required in any other case, on production of the present Order.

15. All the concerned to act on the basis of an authenticated copy of this Order.

[A.S. GADKARI, J.]