

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

CRIMINAL APPEAL NO. 23 OF 2020

Raju @ Abdul Haq Shaikh Mohammed Hanif ..Appellant.

Versus

The State of Maharashtra & Anr. ..Respondents

Mr. Aditya Bapat (Appointed Advocate) for Appellant.

Smt. M. R. Tidke, APP for State/Respondent No.1.

Ms. Jai V. Kanade (Appointed Advocate) a/w. Rahul Shirgavkar for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 8th DECEMBER 2022**

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 02/05/2019, passed by learned Special Judge under POCSO Act, Greater Bombay in POCSO Special Case No.191 of 2018. The Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s.6 of the Protection of

Children from Sexual Offences Act (for short 'POCSO Act') and was sentenced to suffer R.I. for 10 years and to pay a fine of Rs.15000/- and in default of payment of fine to suffer R.I. for 6 months.

ii) The Appellant was convicted for commission of offence punishable U/s.8 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') and was sentenced to suffer R.I. for 3 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for 3 months.

iii) The Appellant was convicted for commission of offence punishable U/s.12 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for 2

months.

iv) The Appellant was convicted for commission of offence punishable U/s.376 of the I.P.C., but since the sentence was imposed U/s.6 of the POCSO Act, no separate sentence was imposed.

v) All the substantive sentences were directed to run concurrently.

vi) Out of the fine amount, Rs.20000/- were directed to be paid to the victim as compensation. The Appellant was granted set off for the period which he had undergone as under trial prisoner during investigation and trial.

2. The prosecution case, in brief, is that the victim was 4 years of age at the time of incident. Her date of birth was 16/01/2014. The incident had taken place on 09/02/2018. The Appellant's daughter was a friend of the victim. On that day, in the evening, the victim had gone to the house of the appellant. At that time, the Appellant sent his daughter outside the house and when

the victim was alone in the house he committed the offence, for which he was convicted. The victim came out of the house. When she met her parents on the way she narrated the story to them. Mother of the victim went to the police station and lodged F.I.R. vide C.R.No.51 of 2018 at Nirmal Nagar police station. The investigation started. The appellant was arrested immediately and since then he is in custody. The Appellant, as well as, the victim were sent for medical examination. The statements of the witnesses were corded. Various panchanamas were recorded. The clothes of the victim and the Appellant were seized and sent for chemical analysis. At the conclusion of the investigation, the Charge-sheet was filed and the case was committed before the Special Court.

3. During trial, the prosecution examined six witnesses including the victim, her mother, Medical Officer and the police officers. The defence of the Appellant was of total denial. It was his case that, because of some dispute with the victim's father he was falsely implicated at the behest of the victim's father. His contention was that, on that day, at the time of incident, he was

not in his house, but was attending his work. In his defence he examined himself, his wife and his step daughter.

4. Learned Judge believed evidence of the prosecution witnesses and disbelieved the defence witnesses and ultimately convicted and sentenced the Appellant, as mentioned earlier.

5. The most important witness in this case is the victim herself. She was examined as PW-1. According to her, she was 6 years old at the time of her deposition. Learned Judge has recorded that, she was a small girl but she had sufficient understanding to give rational answers. She understood the sanctity of oath and, therefore, oath was administered to her. She has deposed that, she resided with her parents, brother and sister. The Appellant was her friend's father. PW-1 used to go to his house for playing with her friend. On the day of incident, she had gone to their house. The Appellant asked his daughter to go out of the house for bringing something from the market. Thereafter, he removed his clothes and inserted his finger in the victim's private part. He touched her private parts inappropriately and asked her to

hold his private part in her hand. He forced her to do that act. She was having pain. She started shouting. Then the Appellant sent her home before his daughter could return. When PW-1 was returning, she met her father. She narrated the incident to him. After that, police made inquiries with her and recorded her statement. She was sent for medical examination. Her statement was recorded U/s.164 of the Cr.p.c. She identified the Appellant present before the Court.

Her statement recorded U/s.164 of the Cr.p.c. was not shown to her and, therefore, it's contents are not properly proved.

In the cross-examination, she stated that, she used to go to the Appellant's house on many occasions. She was studying in the same school as that of Appellant's daughter. Their house was about 5 months walking distance from her own house. In the cross-examination, she was asked whether the Appellant had committed these acts earlier. To this question, she answered in the affirmative and deposed that, he had performed such acts. She was further cross-examined as to whether she had told about these

earlier incidents to anybody. At that time, she answered in the negative. However, she added that, when the first incident had taken place, at that time, the Appellant's daughter was in the house, but she had not questioned the Appellant. She was deposing about the earlier incidents for the first time in the Court. She further added that the Appellant's daughter was coming back to her house with the victim's father, at that time, the victim met them. After that, she told about the incident to her parents. She has also deposed that, she had not narrated the history to Doctor and police had told the history.

6. PW-2 was mother of PW-1. She has deposed that the victim's date of birth was 16/01/2014. On the day of incident, the victim had gone to the house of the Appellant for studying. After some time, the Appellant's daughter came to the house of PW-2 and told PW-2 and her husband that the Appellant had sent her (Appellant's daughter) to buy *bhajiya* and had closed the door of his house and that the victim was inside the house. PW-2's husband went with the Appellant's daughter. On the way, they met the victim; she was crying. The victim told them about the act

committed by the Appellant. Then they went to the police station. PW-2 lodged her report. The F.I.R. is produced on record at Exhibit 16. The victim was sent for medical examination. Her statement was recorded by the Metropolitan Magistrate. That statement was shown to this witness and it is produced on record at Exhibit 2. Thus, the statement of the victim recorded U/s.164 of the Cr.p.c. was brought on record through evidence of this witness and was marked as Exhibit 2.

In the cross-examination, she stated that her husband was knowing the Appellant since childhood, but they were not in the same profession. Her husband did not accompany them to the hospital. The victim had given history to the police. The F.I.R. is produced on record at Exhibit 16 and it corroborates the narration of PW-2.

7. PW-3 Dr. Raksha Shetty had examined the victim at 1.30a.m. on 10/02/2018. She has stated that the history was given by the victim narrating the acts committed by the Appellant. On examination, PW-3 had opined that there were no signs of use of

force, however, possibility of sexual assault could not be ruled out. On 22/04/2018, again the victim was brought to her for examination. Same history was given to her. On that day of examination, she did not find any injuries on the person of the victim. Two specific questions were put to her which are relevant in the context of this case. They are as follows:

“Question: If an adult person inserts a finger in private part of a girl aged 4-6 years, without use of force, then there will be no injury, what is your opinion?

Answer: Injury may be possible.

Question: If an adult person inserts a finger in folding of the private part not touching the inner part of vagina of a girl aged 4-6 years, without use of force, then there will be no injury, what is your opinion?

Answer: There will be no injury.”

In the cross-examination, she deposed that, pain is possible due to over exertion of cycling or playing. She could not say whether the incident had not taken place. She produced medical papers at Exhibit 22. As per opinion recorded in that report, there were no signs of use of force, however, sexual offence

could not be ruled out.

8. PW-4 Somnath Kale, P.S.I. had recorded the statements of the witnesses. He had arrested the Appellant and had sent the victim for medical examination. He had also prepared the spot panchanama. Those two panchanamas are produced on record at Exhibit 25 and 26. He had seized the clothes of the Appellant, as well.

9. PW-5 Nisha Chavan, P.S.I. had recorded statement of the victim. She has deposed that, the victim had given her statement for the first time on 16/02/2018.

10. PW-6 Pramod Kamble, P.S.I. had completed the investigation. According to him, her certificate from the school shows age of the victim. Her date of birth was 16/01/2012. He had recorded statements of the witnesses. The victim's statement was also recorded by the Metropolitan Magistrate. After completion of the investigation, he had filed the charge-sheet.

In the cross-examination, he deposed that, victim's birth certificate was not collected. The C.A. reports produced on

record are completely innocuous.

This is the evidence led by the prosecution. Thereafter the Appellant's statement was recorded U/s.313 of the Cr.p.c. His case was that, he used to go for work from 9.30a.m. to 9.30p.m. He has stated that, he was having two small daughters. There was a dispute between him and the victim's father regarding cloth business. He had threatened the Appellant to implicate him falsely. He had beaten him. The Appellant had surrendered on his own. He denied having committed any act. The Appellant also examined three defence witnesses including himself.

11. DW-1 was the Appellant himself. In his deposition, he stated that the victim's father was his childhood friend. The victim's friend was the Appellant's wife's daughter from her first marriage. The victim's father was addicted to *charas and ganja*. On that day, when the Appellant returned home from work, the victim's father came from behind and started beating him. He wanted the Appellant to leave the shop where the Appellant was working. The Appellant further deposed that, on his own he had

gone to the police station and at that time, he came to know about allegations regarding the incident in the police station. He did not know the victim. He came to know about the F.I.R. at 9.30p.m. He could not say why report was lodged against him.

In the cross-examination conducted on behalf of the State, he admitted that he did not have any evidence to show that he was not present in his house on the date of the incident. He admitted that, his wife and step daughter had come to the court to save him.

12. DW-2 is Appellant's wife. She has deposed that, on the day of incident she was present in the house. In the night both of them i.e. the Appellant and she herself were going to the house of her mother in law. At that time, victim's father met them. They came to know that the victim's family had gone to the police station. Therefore, the Appellant and DW-2 also went there. At that time, they came to know that a false report is lodged against the Appellant.

13. DW-3 was the Appellant's step daughter. According to

the prosecution, she was a friend of the victim and because of her friendship the victim had gone to the appellant's house. She has deposed that the victim used to come to their house for studying. They used to study in the gallery. The Appellant used to return home at 9.30p.m. and before that the victim used to leave their house. She has deposed that the Appellant had not committed any act with the victim.

14. As mentioned earlier, learned trial Judge believed evidence of the prosecution and disbelieved the defence witnesses and the defence taken by the Appellant.

15. Learned counsel for the Appellant submitted that, except for deposition of PW-1 there are no corroborating circumstances against the Appellant at all. PW-1-victim herself was of tender age and, therefore, her evidence needs to be scrutinized with caution. The Appellant's daughter was a key witness in this case because the victim's deposition makes reference to her at crucial time during the incident. According to the victim, the Appellant had sent his step daughter – DW-3 to buy something and when she was

not in the house, the Appellant committed the act. Similarly, when the victim was returning home, she met DW-3 and victim's own father. Therefore, evidence of DW-3 is important. She has not supported the prosecution case and, therefore, sufficient doubt is created about the truthfulness of the prosecution case. The victim's father was another important witness who should have been examined by the prosecution. His non examination should be to the benefit of the Appellant, as adverse inference is required to be drawn against the prosecution case. The medical evidence is not supporting at all. There were no injuries. PW-1 has stated that, she had not given history of the incident to the Doctor. She had only given history to the police. Therefore, history given to the Doctor cannot be taken into consideration to support the case of the prosecution.

16. Learned counsel for the Respondent No.2, as well as, learned APP submitted that, a child witness is a competent witness and there is no reason to disbelieve PW-1 because she had suffered the trauma which she was not likely to forget and, therefore, her evidence cannot be ignored. They submitted that, presumption

U/s.29 of the POCSO Act operates against the Appellant which he has not rebutted, though, he has examined three defence witnesses. There is no corroborative piece of evidence to support his defence that he was not at home, though, he could have easily examined somebody from his work place. Therefore, adverse inference should be drawn against the Appellant.

17. I have considered these submissions. At the outset, it must be noted that, medical evidence does not really support the prosecution case, but that may not help the defence. The Doctor has deposed that, there were no injuries either on the private parts or anywhere else on the person of the victim. But as mentioned earlier, to the answers to the specific questions, she has raised possibility that such incident is possible when there being no signs or injuries. Moreover, requirement of law as far as Section 375 of the I.P.C. and Section 3 of the POCSO Act is concerned, Clauses (a) and (b) of each of these sections make it sufficiently clear that penetration to any extent is enough to constitute the offence. Therefore, it is not necessary that there has to be penetration to such extent to cause injuries to the victim. Therefore, the medical

evidence neither helps the prosecution nor the defence in this case. Therefore, everything depends purely on the appreciation of evidence based mainly on the deposition of the victim herself.

18. As rightly submitted by learned counsel for the Respondent No.2, a child witness is a competent witness; but her evidence needs to be scrutinized with caution. In this case, I have carefully considered the deposition of PW-1. I do not find any infirmity in her deposition. She was around 4 to 5 years of age at the time of commission of offence and within a year her deposition was recorded in the Court. She has given clear answers. Learned trial Judge has recorded that, she was able to understand the questions and gave clear answers and, therefore, oath was administered to her. Therefore, she knew what she was depositing before the Court. More importantly, no inconsistency is brought on record regarding her deposition in the Court and in her first statement she had given to the police on 16/02/2018. Therefore, even by ignoring her statement U/s.164 of the Cr.p.c., since it is not properly proved, the fact remains that her statement was recorded by police and there was no contradictory statement or

portion in that statement compared to her deposition. The victim had given details of the incident. The description clearly makes out a case of penetrative sexual assault and the offence of rape as defined in both the sections. Age of the victim is not really in dispute. Learned trial Judge had seen her in the Court. She was of tender age, therefore, though no documentary evidence is put on record, her age is not in dispute. Learned counsel for the Appellant very fairly submitted that the defence has not really disputed the age of the victim.

19. The victim has described under what circumstances she used to go to the house of the Appellant and under what circumstances on that particular day she had gone to the house of the Appellant. It is very difficult to believe that she was tutored to this extent. Her evidence is clear and free from doubt. She has described as to how the Appellant had sent his daughter out of the house under some pretext and then had committed this act. She had immediately informed about this to her parents after coming out of the Appellant's house and thereafter the F.I.R. is lodged immediately. There is absolutely no scope of concocting, tutoring

or deliberation in lodging of F.I.R. There was no plausible reason to the appellant to have gone to the police station. This defence taken by the Appellant is not acceptable.

20. As rightly submitted by learned counsel for the Respondent No.2, as well as, learned APP, the Appellant could have easily given names of the persons who were working with him throughout the day. The Appellant's wife has not made any efforts to approach any authority before recording of her deposition to assert that she was in the house throughout the day and that the offence could not have been committed by the Appellant. The story that she was in the house throughout the day on the date of incident has surfaced for the first time at the time of recording of her deposition after one year from the date of incident and after arrest of the Appellant. In any case, that evidence is quite weak compared to the evidence led by the prosecution in the form of evidence of PW-1 victim herself. The reason given by the appellant for his false implication is hardly acceptable. I find that the evidence of the victim is clear and consistent. Learned trial Judge has adopted the same approach and has recorded the conviction

and sentence of the Appellant. Therefore, I do not find any merit in the Appeal.

21. Consequently, this Appeal is dismissed.

(SARANG V. KOTWAL, J.)