

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

CRIMINAL APPEAL NO. 1694 OF 2019

Sunil Durgaprasad Sharma @ Dubey ..Appellant
Versus
The State of Maharashtra & Anr. ..Respondents

Mr. Prakash Vare, for Appellant.
Smt. J. S. Lohokare, APP for State/Respondent No.1.
Ms. Devyani Kulkarni, (appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 6th SEPTEMBER 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 10/10/2019 passed by learned Special Judge (POCSO), Greater Mumbai, in POCSO Special Case No.549 of 2015. The Appellant was convicted and sentenced as under:

- i) The Appellant was convicted for commission of offence punishable U/s.10 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO') and he was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.10,000/-

and in default of payment of fine to suffer R.I. for two months.

ii) He was convicted for commission of offence punishable U/s.12 of POCSO 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 1 month.

Learned trial Judge had also observed that, though, the offence U/s.354-A of IPC was proved simultaneously with the offence under POCSO, in view of Section 42 of POCSO the punishment was imposed only for offence under POCSO.

The sentences were directed to run concurrently and the Appellant was granted set off U/s.428 of Cr.p.c.

2. Heard Shri. Prakash Vare, learned counsel for the appellant, Smt. Lohokare, learned APP for the State/Respondent No.1 and Ms. Devyani Kulkarni, learned appointed advocate for the Respondent No.2.

3. The prosecution case is that, the victim was residing in an adjacent chawl of the victim. The victim used to visit her maternal aunt, who was residing at the adjacent chawl, for helping her. On two occasions, the Appellant pressed her breast. On the third occasion, he removed his pant and made obscene gesture. On the first occasion the victim had told this fact to her uncle and aunt. They had questioned the Appellant. The Appellant had apologized and no further steps were taken. But after the third incident, the F.I.R. was lodged on 03/05/2014 at Bandra police station vide C.R.No.249 of 2014. The Appellant was arrested on 04/05/2014 at about 12.30a.m. The investigation was carried out. The victim's statement was recorded U/s.164 of Cr.p.c. The spot panchanama was conducted and the statements of the witnesses were recorded. The victim was sent for medical examination. After completion of the investigation, charge-sheet was filed and the case was committed to the Court of Sessions and the Appellant was tried before the Sessions Court.

4. During trial, the prosecution examined 7 witnesses including the victim, her father, her aunt, her uncle, police officers

and pancha for spot panchanama. The defence of the Appellant was of total denial. It was also his case that because of quarrel with the victim's aunt, he was falsely implicated. In support of his case, the Appellant examined his landlady as a defence witness No.1 and a neighbour as DW-2. After considering their evidence on record and after hearing the parties, learned trial Judge convicted and sentenced the Appellant, as mentioned earlier. Learned trial Judge believed the prosecution evidence and disbelieved the defence witness, as well as, the defence taken by the Appellant.

5. The prosecution case relies heavily on the evidence of the victim who was examined as PW-1. She has deposed that, her date of birth was 26/12/2001. She was studying in 7th standard at the time of incident. Her maternal aunt was residing in an adjacent chawl along with her family. The victim used to go to her house for helping her, whenever her maternal aunt was not keeping well. The victim's maternal aunt was advised not to lift heavy weights and, therefore, the victim used to help her in filling water. The Appellant was residing exactly opposite the public water tap. PW-1 has further deposed that, on one day when she was proceeding

from that lane, the Appellant pressed her breast. On another occasion, when she went to get water, the Appellant came there and touched her at different parts including her breast and hips. The victim went to the house of her maternal aunt and disclosed that incident to her. Her uncle and Aunt went to the house of the Appellant. They told this incident to the Appellant's wife. After that also when the victim had gone to fill the water, the Appellant stood in front of his door; he removed his pant and made obscene gesture. The victim told this incident to her aunt. Then her aunt, uncle and the victim went to the Appellant's house; he was not present. He was not found for 2-3 days. The victim's father saw the Appellant at Bandra railway station. He took him to the police station. The victim was called to the police station. There her statement was recorded. PW-1 was then referred to medical examination. Subsequently, her statement U/s.164 of Cr.p.c. was recorded.

In the cross-examination, she has deposed that timing of availability of water was from 4.30p.m. to 11.30p.m. There were about 350 huts in that area. She deposed that, when a person

gets the water from the tap, others are not present there. When the first incident took place, she did not shout. She had not told the police specifically that the first incident had taken place when she was filling water. She did not disclose this incident to anybody else but to her aunt. After the first incident, her parents did not file any complaint. Even after the second incident, they did not go to the police station. She had not stated in her police statement that her father had seen the Appellant at Bandra railway station and had brought him to the police station.

6. PW-2 was the Aunt of PW-1. She has deposed that, she used to call PW-1 to help her. She was residing nearby. On one day, PW-1 came to her house at 7.30p.m. At that time she was scared. She disclosed that the Appellant had touched her breast inappropriately and had kissed her on the cheek. At that time, the Appellant apologized and, therefore, they did not file any complaint. On the next occasion, the Appellant pressed her hips when the PW-1 was filling water. PW-1 had told this incident to PW-2. Again they went to the Appellant; again he apologized and explained that he had pushed the victim by mistake. Because of his

apology they did not lodge any complaint. On the third occasion, when the victim had gone to fill the water, the Appellant removed his pant and made obscene gesture. PW-1 told this incident to PW-1. PW-2 and others went to the Appellant's house, but he was not found. When they found the Appellant on the third day, they lodged the F.I.R. The F.I.R. is produced on record at Exhibit 11. They handed over the Appellant to the police.

In the cross-examination, she deposed that, the water tap was a public tap and people from the chawal were using the same tap. The timing for availability of water was from 4.00p.m. to 12.00a.m. She denied the suggestion that, because of quarrel with the Appellant's wife this false complaint was lodged. The F.I.R. produced on record at Exhibit 11 more or less supports and corroborates PW-2's deposition.

7. PW-3 Mangesh Thorat was a pancha for spot panchanama. The spot panchanama is produced on record at Exhibit 13. In the cross-examination he admitted that the spot of incident was having traffic and there were number of houses

around the public water tap.

8. PW-4 was father of PW-1. PW-5 was uncle of the PW-1 and husband of PW-2. They have deposed in a similar manner supporting the version of the PW-1. Both of them have admitted that they were not the eye witnesses to the incident.

9. PW-6 Pradeep Zalte, P.S.I. had conducted the investigation. He had arrested the Appellant. He produced the original birth certificate on record at Exhibit 19. He had referred the victim for medical examination on 08/05/2014, as the victim could not go for medical examination before that. He denied the suggestion that the birth certificate produced on record was not of the victim. The birth certificate is at Exhibit 19 which mentions the victim's name and her date of birth as 26/12/2001. It was registered on 31/12/2001.

10. PW-7 Reshma Momin, P.S.I. had recorded the statement of the first informant-PW-2. She had also recorded the statement of PW-1. The medical papers were produced on record at Exhibit 21.

11. DW-1 Kavita Kamble was the landlady of the Appellant.

She has deposed that, she had a quarrel with the PW-2 on account of filling water, but she had not reported the matter to the police due to intervention of people. According to her, the victim's family had, therefore, filed this false complaint against the Appellant as an afterthought.

12. DW-2 Ankita Dhond was another neighbour. She has not deposed about any specific incident.

13. Learned counsel for the Appellant submitted that the PW-1 has not given details in respect of the date, month, time etc. regarding the instances which she has alleged against the Appellant. None of the witnesses has spoken about the date of birth of PW-1 in the ocular evidence. It was a crowded locality and no independent witness was examined by the prosecution. It was also not possible that nobody could have seen the incident as it has occurred near a public water tap. There is over-writing in the medical history produced on record.

14. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that, PW-1 herself had mentioned her

date of birth in her examination in chief, which is supported by birth certificate. It was a public document and, therefore, there could not be a dispute about her age. At the time of incident the victim was twelve and half years of age. She had no reason to falsely implicate the Appellant. She had no quarrel with the appellant as such. Even her own family did not have any quarrel with the Appellant. Her evidence is natural. She was the victim. The trial Court had imposed minimum sentence and, therefore, there was no scope for interference with the observations of the trial Court.

15. I have considered these submissions. So far as prosecution witnesses are concerned, the most important witness is the victim herself. The other witnesses had not seen the incident and it is not even the prosecution case that anybody else had witnessed the incident. There were three incidents. Though, their details regarding dates etc. are not given by the victim, but it must be noted that, her age at the time of lodging of F.I.R. was hardly of 12 and half years. The incidents had taken place on three occasions. Naturally she was scared, but every time she had

reported the incident to her uncle, aunt and her father. To that extent, these three witnesses have supported the victim's version. On the last occasion, the victim and her family lodged the F.I.R. against the Appellant. He was arrested immediately after registration of F.I.R. The F.I.R. was lodged at about 7.50p.m. on 03/05/2014 and the Appellant was arrested in the same midnight at about 12.30a.m. on 04/05/2014. The prosecution evidence shows that the victim's father had taken him to the police station. The investigating officer was not cross-examined on this particular aspect. On the first two occasions, the victim's family chose not to file F.I.R. The explanation offered by the witnesses is that on those two occasions the appellant had apologized, but on the third occasion when he continued with his harassment to the victim, the family finally lodged the F.I.R. The course of events appear to be natural. More importantly, the evidence of the victim is cogent and clear. She had consistently deposed about the three incidences. The evidence of defence witnesses does not help the Appellant at all. DW-2 is not saying anything. DW-1 is the Appellant's landlady, but she has deposed that there was a quarrel between herself and

PW-2. There is no reference to any quarrel between the Appellant and his family with the PW-1 or her family. Therefore, there was absolutely no reason for PW-1 to implicate the appellant falsely. Learned trial Judge had considered all these aspects properly. The minimum sentence U/s.12 of POCSO was imposed, therefore, even in that aspect, no interference is called for. In this view of the matter, I do not find any merit in the Appeal.

16. The Appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)