

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

CRIMINAL APPEAL NO. 1431 OF 2018

Kasim Mohd. Amin Shaikh

..Appellant.

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Ramesh Tripathi a/w. A. N. Upadhyay, Ms. Kshitija Chalke,
Sagar Nikambe, Shubham Mishra i/b. Ramesh Tripathi &
Associates for Appellant.

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

CORAM : SARANG V. KOTWAL, J.

DATE : 5th DECEMBER 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 9th and 11th October 2018, passed by learned Special Judge under POCSO Act, Greater Mumbai in POCSO Case No.505 of 2016. The Appellant was convicted and sentence as under:

- i) The Appellant was convicted for commission of offence punishable U/s.376(2) of the I.P.C. and was sentenced to suffer R.I. for 20 years and to pay a fine of Rs.1000/- and in default of payment

of fine to suffer S.I. for 15 days.

- ii) The Appellant was convicted for commission of offence punishable U/s.354 r/w. Section 354-A of the I.P.C. and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.1000/- and in default of payment of fine to suffer S.I. for 15 days.
- iii) The Appellant was convicted for commission of offence punishable U/s.6 of the POCSO Act and was sentenced to suffer R.I. for 10 years and to pay a fine of Rs.500/- and in default of payment of fine to suffer S.I. for 8 days.
- iv) The Appellant was convicted for commission of offence punishable U/s.10 of the POCSO Act and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.500/- and in default of payment of fine to suffer S.I. for 8 days.
- v) All the substantive sentences were directed to run

concurrently. He was given set off for the period which he has undergone as under trial prisoner during investigation and trial.

2. The prosecution case is that the victim was 4 year old child. The incident had occurred on 25/08/2016. The appellant was residing on the upper floor of the room of the victim and her family. On that day, in the afternoon, when the victim's mother had gone to the house of the appellant to bring back her daughter who had gone to his house, she saw that the appellant had removed victim's clothes. He was touching her inappropriately. He was touching her private parts. The mother of the victim questioned him. She told others and came to the police station. The F.I.R. was lodged at Dharavi police station vide C.R.No.439 of 2016 under various sections. The investigation was carried out. The appellant was arrested on 26/08/2016. The appellant, as well as, the victim were sent for medical examination. Their clothes were seized and sent for chemical analysis. The statements of the witnesses were recorded. At the conclusion of the trial, charge-sheet was filed. The case was committed to the Special Court.

3. During trial, the prosecution examined eight witnesses including the victim, her mother, panchas for spot panchanama and seizure of clothes panchanama, two Medical Officers who had examined the Appellant and the victim and finally two Investigating Officers. The defence of the Appellant was of total denial. At the conclusion of the trial, learned Judge believed the evidence of PW-1 and PW-2. He also relied on the medical examination and convicted and sentenced the appellant as mentioned earlier.

4. Heard Shri. Ramesh Tripathi, learned counsel for the Appellant and Smt. Tidke, learned APP for the State. The Respondent No.2 is duly served.

5. The victim herself was examined as PW-1. At the time of incident she was about 4 years of age. Her age and that she was below 12 years of age is not disputed. She has deposed that, she knew the Appellant's daughter. PW-1 used to play with her. She has deposed that, she did not go to the appellant's house. She was asked an important question as to what had he done with her. Her

answer was 'Nothing'. Another leading question was asked to her as follows: 'Whether he had removed your nicker and inserted something in your urinal space?' Again the answer given was same "Nothing". She admitted that she had gone to the police station and she had told that what the appellant had done with her. But she denied that, she told anything to the Doctor. She also admitted that, she had gone to the Court and her statement was recorded there. She did not identify the Appellant at the time of her deposition in the Court. She further added that, nobody had instructed her not to identify him in the Court.

In the cross-examination conducted on behalf of the Appellant, she admitted that the Appellant had never put his finger inside her nicker and that the Appellant never beaten her. She also admitted that, she had not told anything to the Doctor.

6. PW-2 is the victim's mother. She has deposed that the victim was 4 years of age. The Appellant was having a daughter. She was victim's friend. On 25/08/2016, PW-2 was in her house. The Appellant's son had left his house after taking lunch. There

was no one else in the house of the Appellant. PW-2 went to his house to see her daughter. She saw that, her daughter was lying on the floor. Her nicker was removed halfway. The Appellant was sitting near her and he was touching her private parts. PW-2 got scared. She called out her daughter. She took her back home. Then she asked her daughter what had happened. At that time, PW-1 told her that the Appellant used to beat her on her hand and legs and used to touch her body after removing her nicker. She also told PW-2 that the Appellant used to show his private parts. PW-2 then went to the police station and lodged the F.I.R. The F.I.R. produced on record is at Exhibit 19. According to PW-2, the victim-PW-1 was born in the year 2012.

In the cross-examination, she deposed that whenever the victim used to go to the house of the Appellant, his wife and daughter used to be in the house. On that day, PW-1 had gone to the appellant's house between 1.00p.m. to 2.00p.m. for studying. She further deposed that, when she saw the Appellant with her daughter, at that time the door was open, but she had not stated so in her statement before the police. The photographs of the door

were produced on record. A suggestion was given to her that, unless the door was opened nothing could be seen as to what was going on inside the house. She denied that suggestion. She did not call neighbours after the incident. She did not call the police. She admitted that, there was minor quarrel between herself and the Appellant's wife on the ground of filling water. Importantly, she admitted that her daughter had fallen down from a swing and had sustained injury to her private part. This admission is important because the Medical Officer – PW-6 Dr. Mahesh Sabale has also admitted that, because of such fall the injury to her hymen was possible.

Thus, it can be seen that PW-2 has not deposed about penetrative sexual assault, even by using fingers. Even her F.I.R. does not mention any penetration. Even the story told by PW-1 to her, did not mention penetrative sexual assault. The evidence of PW-1 and PW-2 shows that it was a sexual assault as defined U/s.7 of the POCSO Act and it was aggravated sexual assault U/s.9 of POCSO because the victim was below 12 years of age as provided U/s.9(m) of POCSO. Hence, it was punishable U/s.10 of POCSO

Act with imprisonment not less than 5 years but which can be extended to 7 years; besides imposition of fine.

7. PW-3 Noorjaha Shaikh was a pancha for spot panchanama. The spot panchanama is produced on record at Exhibit 22. Nothing much appears in the spot panchanama. Similarly, evidence of PW-5 Nasir Shah who was a pancha for seizure of clothes of the Appellant, as well as, those of the victim, is also innocuous because C.A. reports do not show any incriminating material against the Appellant in respect of these clothes.

8. PW-4 Dr. Hemant Kukde had examined the Appellant. According to him, the Appellant was potent and was capable of performing sexual act. However, this opinion is immaterial because it was not the prosecution case that the appellant had performed sexual intercourse with the victim. Even in the history given by the appellant, he had not admitted to causing any offence against the victim.

9. PW-6 Dr. Mahesh Sabale is an important witness. He has

deposed that, he had examined the victim on 26/08/2016. There was no alleged history of photography or intoxication or of physical assault. The history was about removing of clothes and touching her all over the body and the appellant showing his private parts to the victim. There was no history of physical assault. But the victim had given history of the appellant having hit the victim on her arms and legs with a wooden stick. In the physical examination he saw abrasion of size 2.5cm x 2.1cm on her left cheek. Her hymen was not intact. There were two tears. There was no bleeding present. There was no injury to anal region. His provisional opinion was that, overall findings were consistent with the recent sexual intercourse. However, final opinion was kept pending till receipt of FSL reports. After receiving of C.A. report his final opinion was that there was evidence of recent sexual assault and the injury on the left cheek was 12 to 24 hours old before his examination.

In the cross-examination, he admitted that, if the girl fell down from height there can be tear of her hymen as shown in the report.

10. PW-7 A.P.I. Vijay Gole has deposed about recording of F.I.R. and registration of C.R.No.439 of 2016 with Dharavi police station. He had arrested the appellant. He had sent the victim for medical examination. He has deposed on the basis of medical examination. He received the opinion that the appellant had used fingers on the victim's private parts and, therefore, offence U/s.376 of I.P.C. and Section 4 of POCSO Act were added. Initially, the F.I.R. was registered only U/s.354 and 323 of the I.P.C. and U/s.8 and 12 of the POCSO Act.

11. Mr. Madhukar Sanap, P.I. was examined as PW-8. He was the investigating officer. He has carried out next part of the investigation. He had sent the articles for chemical analysis and had ultimately filed the charge-sheet.

12. Learned trial Judge, after appreciating the evidence, reached the conclusion that the appellant had used his fingers and, therefore, the offence of penetrative sexual assault was proved against the appellant. He has ultimately convicted and sentenced the appellant, as mentioned earlier.

13. Learned counsel for the appellant submitted that, there is absolutely no evidence of penetration either by using fingers or by using appellant's private parts. He submitted that, PW-1's evidence in fact is completely innocuous and the appellant should be acquitted based on the evidence of the victim herself. She has not identified the Appellant in the Court. Even, PW-2's evidence is hardly incriminating. It certainly is not incriminating as far as allegations of penetrative sexual assault are concerned. Even otherwise, her deposition is doubtful. It was not possible for her to see the incident considering the position of the door which opened into the room of the appellant from the flooring. He further submitted that the C.A. reports are completely innocuous and they are not incriminating. He further submitted that, at the highest, even if deposition of PW-2 is accepted, it can be a case of sexual assault and not of penetrative sexual assault and the benefit of doubt to that extent must go to the appellant.

14. Learned APP opposed these submissions. She submitted that the medical opinion completely supported the prosecution. Since there are tears to the hymen, that indicates that she was

sexually assaulted which could be termed as penetrative sexual assault. She submitted that it was not expected that a girl who had suffered this offence at the tender age of 4 years, would describe the incident in detail. She further submitted that the evidence of mother of the victim is sufficiently corroborated by the other circumstances and, therefore, the conviction is properly recorded.

15. I have considered these submissions. As far as evidence of the victim herself is concerned, in the Court she has not deposed anything against the Appellant. She has not even deposed about the Appellant touching her inappropriately. She has not deposed that there was any penetrative sexual assault as defined U/s.3 of the POCSO Act. However, as rightly submitted by learned APP, considering her tender age it is not expected that she would describe the incident in detail. In that context, evidence of PW-2 is more important. Therefore, evidence of PW-2 is required to be considered with greater scrutiny. To some extent the appellant gets benefit from the evidence of PW-1 as she has not even identified him.

16. PW-2 has described the incident which she had seen when she had gone to the appellant's house to take back her daughter-PW-1. But even in her evidence, there are no allegations of penetrative sexual assault. Her deposition is only about the appellant touching the victim. She has deposed that the appellant was touching the victim's private parts. There are no allegations that the Appellant was showing his own private parts to the victim. This is all that she had seen. But on inquiries with her daughter, the victim had added that the appellant used to show his private parts. But even in that context there are no allegations that there was any penetration as required U/s.3 of the POCSO Act or under section 375 of the I.P.C. Therefore, to that extent the appellant deserves benefit of doubt.

17. No doubt, there is evidence of PW-6 Dr. Sabale which shows that there were two tears on the hymen of the victim, but he has also deposed that there was no bleeding present. PW-2 has admitted that the victim had fallen down from a swing and she had sustained injuries to her private parts. PW-6 Dr. Sabale has admitted that, in such situation there was possibility of tear of

hymen in the position as shown in the report. Thus, even in that behalf, reasonable doubt is created against the prosecution case. There are no allegations that the appellant had committed penetrative sexual act using his private part or using his fingers. Therefore, prosecution falls short of proving commission of offence as defined U/s.3 of the POCSO Act, which is made punishable U/s.4 r/w. 5(m) of POCSO Act punishable U/s.6 of the POCSO Act. The prosecution, however, has proved its case based on the evidence of PW-2 that the offence of sexual assault as defined U/s.7 of the POCSO which takes aggravated form as defined U/s.9(m) of the POCSO Act and made punishable U/s.10 of the POCSO Act, is committed.

18. Learned trial Judge has convicted the Appellant for commission of offence punishable U/s.10 of the POCSO Act and has sentenced him to suffer R.I. for 5 years and to pay a fine of Rs.500/- and in default of payment of fine to suffer S.I. for 8 days. This conviction and sentence will have to be maintained.

Similarly, the Appellant was convicted for commission

of offence punishable U/s.354 r/w.354-A of the I.P.C. and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.1000/- and in default of payment of fine to suffer S.I. for 15 days. This conviction and sentence will also have to be maintained.

19. However, other offences are not proved and the impugned Judgment and order to that extent will have to be set aside.

20. With the result, following order is passed:

O R D E R

i) The Appeal is partly allowed.

ii) The conviction and sentence recorded against the Appellant U/s.376(2)(i) of the I.P.C. and under section 6 of the POCSO Act are set aside.

iii) The conviction and sentence recorded against the Appellant U/s.354 r/w. Section 354-A of the I.P.C. and under section 10 of the POCSO Act are maintained.

- iv) The substantive sentences shall run concurrently.
- v) The Appellant is granted set off U/s.428 of the Cr.p.c.
- vi) The Appellant has already undergone more sentence than that is imposed on him and, therefore, he shall be released forthwith if not required in any other case.

(SARANG V. KOTWAL, J.)