

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

CRIMINAL APPEAL NO. 1070 OF 2017

Vishnu Prakash Patole

..Appellant

Versus

The State of Maharashtra

..Respondent

Mr. Mithilesh Mishra (Appointed Advocate) for Appellant.

Mr. R. M. Pethe, APP for State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 25th AUGUST 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 03/11/2017 passed in POCSO Special Sessions Case No.114 of 2015 by the learned Special Judge, Pune under the Protection of Children from Sexual Offences Act.. The Appellant was convicted for commission of offence punishable U/s.354-A(1)(i) of IPC and was sentenced to suffer R.I. for six months and to pay a fine of Rs.1000/- and in default to suffer R.I. for 15 days. The Appellant was also convicted for commission of offence punishable U/s.12 of the Protection of Children from Sexual Offences Act (for short 'POCSO') and was sentenced to suffer R.I. for 6 months and to pay

a fine of Rs.1000/- and in default to suffer further R.I. for 15 days. Substantive sentences were directed to run concurrently.

2. Heard Shri. Mithilesh Mishra, learned counsel appointed for the Appellant and Shri. Pethe, learned APP for the State.

3. The prosecution case is that, the victim in this case was 15 years of age at the time of incident dated 08/01/2015. On that day, at around 4.15p.m. the appellant came in front of the house of the victim/first informant, pulled down his pant and was doing obscene act which amounted to aforesaid offences. The F.I.R. was lodged at Khadak police station, Pune. The Appellant was arrested, the investigation was carried out in connection with the said offence registered vide C.R.No.04 of 2015 at that police station. After conclusion of the investigation, charge-sheet was filed and the Appellant faced the trial, as mentioned earlier.

4. During investigation the Appellant was in custody from 09/01/2015 to 20/01/2015. That period was given as set off to him. After his conviction the Appeal was admitted and he was granted bail. However, he did not furnish bail as directed and,

therefore, he had to be arrested under a warrant. As of today he is in custody since 01/08/2022, pursuant to the execution of N.B.W. There was no one representing him since November 2021 before the Court and, therefore, Advocate Shri. Mithilesh Mishra was appointed to represent him in this case.

5. During trial, the prosecution examined seven witnesses including the victim, her friend, her sister, her Aunt, her neighbour, pancha for spot panchanama and the Investigating Officer. The defence of the Appellant was of total denial. At the conclusion of the trial, the Appellant was convicted and sentenced as mentioned earlier.

6. The prosecution case depends on the evidence of all these witnesses, but the most important witness is the victim herself.

7. The victim was examined as PW-1. She was about 16 years of age at the time of incident. She has deposed that, her date of birth is 23/02/1999. There is absolutely no challenge to this deposition and, therefore, it has to be accepted that her date of

birth is 23/02/1999. She has further deposed that, on the date of incident she was studying in 11th standard. She was residing with her parents, her grand-mother, her maternal uncle, her elder sister and cousin. On 08/01/2015, at about 4.00p.m. to 4.15p.m. she was in the house with her grand-mother, her elder sister and cousin. She had returned from the college. She knew the appellant. She used to see him on the way while going to college. At the time of incident, she was sitting in front of gate of her house. Her grand-mother was sleeping inside and her sister and cousin were sitting in the room nearby. PW-1 was playing a game on the mobile phone. Suddenly, she saw that the Appellant was standing near the door of her house. She saw that, he had pulled down his pant and was doing obscene act. She was shocked and she shouted calling her sister. In the meantime, the Appellant ran away. Her elder sister immediately rushed outside the house and saw that the Appellant was running away. PW-1 told this incident to her grand-mother and her cousin. Her mother returned home at around 6.15p.m. She was also told about the incident. Her maternal uncle came at 10.45p.m. He was also told about the

incident. He advised that the report should have been lodged immediately. Therefore, they rushed to Mithganj police chowky and lodged the report. The F.I.R. is produced on record at Exhibit 6. PW-1 identified the Appellant before the Court. Her statement was also recorded U/s.164 of Cr.p.c. It was also produced on record at Exhibit 7.

In the cross-examination, she was asked about the distance between her house and college. She used to go by bus to her college. Her family was dependent on the income of her mother and her maternal uncle. Her sister was married. It was a love marriage and was performed on 26/02/2015. Her brother in law used to visit their house before their marriage in December 2014 and January. She admitted that, there were houses surrounding her house. There was a video parlour and a public toilet in front of her house. She denied the suggestion that her brother in law told her the name of the Appellant. She could not explain as to why it was not mentioned in the F.I.R. that, she was playing a game on the mobile phone. She did not know whether the relations between her brother in law and the appellant were

cordial or not. Even at the time of recording of her statement U/s.164 of Cr.p.c. her brother in law was present. However, she denied that, her brother in law was present when her F.I.R. was lodged. But, she admitted that, before that, her brother in law was present and there was some discussion with him. She however denied that, she lodged her F.I.R. at the instance of her brother in law.

8. In the F.I.R. the name of the Appellant is specifically mentioned. Rest of the narration in the F.I.R. corroborates her deposition. Even her statement U/s.164 of Cr.p.c. corroborates her deposition.

9. PW-2 is her cousin. She and PW-1's sister were sitting in the T. V. room. PW-1 was sitting at the door of the house. Suddenly, PW-1 shouted and told her sister to see what a man in front of the door was doing. PW-2 and PW-1's sister went to the door and they saw one person running away on the road. PW-1 told them about the incident. However, PW-2 has not been able to identify that person. She had not seen him.

In the cross-examination, she denied that, she had not gone to the police station on the date of incident.

10. PW-3 was the victim's elder sister. She was residing with her family including the victim. She was present in the house when the incident took place. She has deposed that the victim was sitting in front of the gate of their house and playing game on the mobile phone. PW-2 and PW-3 were sitting in the same room at some distance and the front door was not visible to them. All of a sudden, PW-1 shouted and asked PW-3 to come near her to see what the offender was doing. PW-3 rushed there. She saw the Appellant was running; while running he was lifting his pant. They chased him, but he could not be caught. PW-1 started crying. She narrated the incident. She told PW-3 that the Appellant was showing his private parts. On the same day, when her maternal uncle came home, they went to the police station and lodged the complaint. At the time of lodging of complaint, they made inquiries. They came to know the name of the accused. His name was mentioned in the F.I.R. PW-3 has identified the appellant who was present in the Court. Her statement was also recorded U/s.164

of Cr.p.c.

In the cross-examination, she was asked about omission from her police statement that they had made inquiry about the name of the boy. She could not explain that omission. Apart from that, there is hardly anything of consequence in her cross-examination.

11. PW-4 was Aunt of the victim. At around 11.00p.m. in the night she returned to her house from her job. At that time, she saw that the victim was crying. The victim told her about the incident. The victim had told her the name of the accused and she had described the incident. This witness insisted that, PW-1 and her mother should go to the police station and lodge F.I.R.

12. PW-5 Malan Kuchekar was residing in the area, but she did not support the prosecution case and was declared hostile.

13. PW-6 Leela Bhise was a pancha who was present during panchanama of the house where the incident had taken place. Her evidence is not important.

14. PW-7 Shivaji Deokar, A.P.I. was the investigating officer. He investigated the offence registered vide C.R.No.4 of 2015 at Khadak police station. The Appellant was arrested on 09/01/2015. The arrest panchanama was prepared, the spot panchanama was prepared and the statements of witnesses were recorded by him.

In the cross-examination, he denied the suggestion that he recorded the statements falsely.

This, in short was the prosecution evidence.

15. The defence of the appellant was of total denied. He has however answered to the question No.18 in his examination U/s.313 of Cr.p.c. that, this complaint was lodged at the instance of brother in law of the victim.

16. Learned trial Judge considered the evidence, heard the parties and then reached the conclusion that the Appellant had committed this offence. He observed in paragraph 21 of his Judgment that the defence of the appellant was unacceptable and there was no reason for PW-1 to fall prey to the designs of her brother in law to implicate the appellant falsely. Learned Judge

convicted the appellant for both the offences and sentenced him as mentioned earlier.

17. Learned counsel for the Appellant submitted that, the prosecution has not proved age of the victim and has not proved that, she was minor. He submitted that, there was no other independent witness, though the offence had taken place in a crowded locality. He further submitted that the allegations do not show that the victim was targeted. The appellant had not done any particular act targeting the victim – PW-1. He further submitted that, at the highest, it can be the offence U/s.294 of IPC, for which no Charge was framed. There was no independent witness examined. The only independent witness examined in the case had turned hostile, therefore, there was no independent corroboration to the version of the victim. There are indications that the F.I.R. was lodged at the behest of victim's brother in law. The F.I.R. is not lodged immediately. Apart from that, he submitted that, ingredients of Section 354-A(1)(i) of IPC are not made out. The main ingredients of the said clause required physical contact and there was no allegation of physical contact and, therefore, offence

U/s.354-A(1)(i) of IPC is not made out. Therefore, conviction to that extent needs to be set aside. He further submitted that, since the age of the victim is not proved, even offence under POCSO is not proved and the Appellant deserves to be acquitted from all the Charges.

18. On the other hand, learned APP submitted that, age of the victim was not challenged and, therefore, offence U/s.12 of POCSO is clearly established. Apart from that, he submitted that the Appellant's act falls within the four corners of Section 354-A(1) (i) of IPC. The word 'and' appearing in sub clause should be read as 'or' and, therefore, conviction and sentence was properly recorded.

19. I have considered these submissions. As far as, age of the victim is concerned, it is neither challenged in the cross-examination nor in the answers given by the appellant in his statement recorded U/s.313 of Cr.p.c. The age of the victim, therefore, is not challenged by the defence and, therefore, PW-1's evidence will have to be accepted that she was below 18 years of

age.

20. As far as quality of evidence of PW-1 is concerned, she has given clear answers and she has described the incident in detail. The name of the Appellant was mentioned in her F.I.R. She has identified the Appellant before the Court. She has explained that, she was knowing the Appellant as she used to see him on the way while going to her college. Her deposition is sufficiently corroborated by her F.I.R. and her statement recorded U/s.164 of Cr.p.c. on 13/04/2015. The victim had got scared and only after her mother and maternal uncle returned home from their job in the late evening, after 9'O clock the family went to the police station and lodged F.I.R. Therefore, there was hardly any delay in lodging of F.I.R. As rightly observed by the learned Judge, the defence of the Appellant that, it was lodged at the behest of brother in law of the victim is not acceptable. There is nothing brought on record except some suggestion that, it was lodged at the behest of brother in law of the victim. No further suggestion of dispute between the Appellant and her brother in law is either suggested or stated in the statement of the Appellant recorded

U/s.313 of Cr.p.c. Therefore, there was no reason for the victim to name the Appellant falsely. The incident is supported by other witnesses, though, they have not actually seen what the Appellant had done. The victim – PW-1 had immediately shouted and sought help from her sister. At that time her sister and her cousin, examined as PW-3 and PW-2 respectively, were present in the house. They rushed for her help and they also saw a boy was running away. Though they did not see his face, the fact remains that, after PW-1 had shouted, that boy was running away from the spot. Therefore, to that extent their evidence corroborates deposition of PW-1. Their evidence for fixing identity of the Appellant is not of much use, but for that purpose, evidence of PW-1 is sufficient. She has named the Appellant in her F.I.R. She has explained how she knew the Appellant. She identified him in the Court. In this view of the matter, learned Judge did not commit any error in relying on her evidence. Even in my opinion, the prosecution has sufficiently proved the case against the Appellant beyond reasonable doubt.

21. Section 12 of POCSO is the penal section for ‘sexual

harassment'. 'Sexual harassment' is defined U/s.11 of POCSO. Sub Clause (i) of Section 11 of POCSO reads thus:

11. Sexual harassment – A person is said to commit sexual harassment upon a child when such person with sexual intent -

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

22. Thus, there is no doubt that the act of the Appellant falls within four corners of the said section. Therefore, offence U/s.12 of POCSO is made out.

23. As far as submission of learned counsel for the Appellant regarding Section 354-A(1)(i) of IPC is concerned, it is necessary to reproduce said section in its entirety.

24. Section 354-A of IPC reads thus:-

“354-A. Sexual harassment and punishment for sexual harassment – (1) A man committing any of

the following acts -

- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii) a demand or request for sexual favours; or
- (iii) showing pornography against the will of a woman; or
- (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”

25. For the purpose of submission of learned counsel for Appellant, clause (i) is important. According to learned counsel for the Appellant, the words ‘physical contact’ and ‘advances’ are

separated by the word 'and'. Hence, they are distinct. The word 'and' is used for conjunctive purpose. According to him, the first part 'physical contact' is the precondition for bringing the offence under clause (i).

26. Learned counsel for the Appellant relied on the Judgment of the Hon'ble Supreme Court in the case of *Union of India and others Versus Ind-Swift Laboratories Limited*¹.

27. On the other hand, learned APP relied on another Judgment of the Hon'ble Supreme Court in the case of *Cable Corporation of India Limited Versus Additional Commissioner of Labour and others*² to contend that the word 'or' is normally disjunctive and word 'and' is normally conjunctive. But at times they are read as vice versa to give effect to the manifest intention of the legislature as disclosed from the context.

28. The amendment by way of introducing Section 354-A of I.P.C. was made in the year 2013. The title of the section mentions thus - "Sexual harassment and punishment for sexual harassment".

1 (2011) 4 Supreme Court Cases 635

2 (2008) 7 Supreme Court Cases 680

The intention of the legislature is to provide punishment for 'sexual harassment' and for that purpose it is mentioned as to what constitutes 'sexual harassment'. The list of various acts is given which would fall within the meaning of 'sexual harassment'. In that context, various acts are covered. Thus, that section specifically gives list of different acts which would fall within the meaning of 'sexual harassment'. Clause (i) of Section 354-A of IPC also lists the acts of accused which would be covered within the meaning of 'sexual harassment'. Therefore, it cannot be said that 'physical contact' is a pre-requisite for 'advances involving unwelcome and explicit sexual overtures' to bring it within the meaning of 'sexual harassment' making it punishable. The phrase 'involving unwelcome and explicit sexual overtures' is common for both the words 'physical contact' and 'advances'. Physical contact involving unwelcome and explicit sexual overtures would be 'sexual harassment' and even 'advances involving unwelcome and explicit sexual overtures' would also fall within the meaning of 'sexual harassment'. Therefore, 'physical contact' and 'advances' are two separate categories which complete the list mentioned

U/s.354-A of IPC. There is nothing to suggest that for the act of advances involving unwelcome and explicit sexual overtures to be termed as 'sexual harassment; physical contact is necessary. In this view of the matter, the conviction U/s.354-A(1)(i) of IPC is properly recorded and there is no reason to interfere with the reasoning given by the learned trial Judge. The act of the Appellant would fall under both sections which are Section 12 of POCSO, as well as, Section 354-A(1)(i) of IPC.

29. The next question would be about imposition of sentence. The Appellant was sentenced to suffer R.I. for 6 months and to pay a fine of Rs.1000/- and in default to suffer further R.I. for 15 days for the offence punishable U/s.354-A(1)(i) of IPC. He was also sentenced to suffer R.I. for 6 months and to pay a fine of Rs.1000/- and in default to suffer R.I. for 15 days for the offence punishable U/s.12 of POCSO. Substantive sentences were directed to run concurrently. The Appellant was in custody from 09/01/2015 till 20/01/2015. He was given set off for that period. After that, during pendency of Appeal he was granted bail, but he did not furnish bail and, therefore, he was arrested under non

bailable warrant. He was arrested on 01/08/2022 and since then he is in custody. Thus, he has suffered his sentence for about 36 days. The offence is old. It had taken place on 08/01/2015. In between, there are no allegations that the Appellant has caused any harassment to the victim or has committed any other similar offence. It also appears that the Appellant is in bad financial state as he is represented by advocate appointed through legal aid panel. Therefore, some leniency can be shown to the Appellant, as far as, sentencing part is concerned. Therefore, in my opinion, substantive sentence for three months for each of these offences would serve the ends of justice.

30. Hence, the order:

ORDER

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant U/s.354-A(1)(i) of IPC and U/s.12 of POCSO is maintained, however, sentence is altered as follows:

- iii) For commission of offence punishable U/s.354-A(1)(i) of IPC the Appellant is sentenced to suffer R.I. for three months and to pay a fine of Rs.1000/- and in default of payment of fine to suffer further R.I. for 15 days.
- iv) For commission of offence punishable U/s.12 of POCSO the Appellant is sentenced to suffer R.I. for three months and to pay a fine of Rs.1000/- and in default of payment of fine to suffer further R.I. for 15 days.
- v) Substantive sentences shall run concurrently.
- vi) The Appellant is granted set off U/s.428 of Cr.p.c. for the period which he has undergone in the jail as an undertrial prisoner.
- vii) The period spent by the Appellant in custody after his arrest on 01/08/2022 pursuant to execution of non bailable warrant shall be counted as part of his substantive sentence. The

trial Court shall ensure that, there is no communication gap and the Appellant is detained only for the period of sentence imposed on him in accordance with law, so far as, this case is concerned.

viii) The Appeal is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)