

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

**CRIMINAL APPEAL NO. 301 OF 2020**

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|---------------------------------|---------------|
| Anwarali Qurbanali Mandal       | ..Appellant.  |
| Versus                          |               |
| The State of Maharashtra & Anr. | ..Respondents |

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Ms. Anjali Patil for Appellant.  
Mr. S. R. Agarkar, APP for State/Respondent No.1  
Mr. Drupad S. Patil (Appointed Advocate) for Respondent No.2.

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**CORAM : SARANG V. KOTWAL, J.  
DATE : 27 JANUARY 2023**

**JUDGMENT :**

1. The Appellant has challenged the Judgment and order dated 25/09/2019, passed by learned Special Judge under POCSO, Greater Bombay, in POCSO Special Case No.79 of 2015. By the impugned Judgment and order, the Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s. 4 of the Protection of Children from Sexual Offences Act (hereinafter

referred to as 'POCSO Act') and was sentenced to suffer R.I. for 20 years and to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for 1 month.

- ii) The Appellant was convicted for commission of offence punishable U/s.506(2) of the Indian Penal Code (hereinafter referred to as '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 ten days.
- iii) The Appellant was convicted for commission of offence punishable U/s.323 of the I.P.C. and was sentenced to suffer R.I. for 6 months and to pay a fine of Rs.500/- and in default of payment of fine to suffer S.I. for five days.
- iv) The Appellant was also convicted for commission of offence punishable 376 of the I.P.C., but, in view of sentence imposed U/s.4 of the POCSO

Act, considering the provision of Section 42 of the POCSO Act, no separate sentence was imposed on him for the offence punishable U/s.376 of the I.P.C.

- v) The Appellant was also convicted for commission of offence punishable under sections 8 and 12 of the POCSO Act, but in view of sentence imposed U/s.4 of the POCSO Act, no separate sentence was imposed under those sections.

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

There was another accused in this case i.e. Abdul Hasan Alias Kunj Manzil Haq Mandal, however, during pendency of the trial he died and the case against him stood abated.

2. Heard Ms. Anjali Patil, learned counsel for the Appellant, Shri. Agarkar, learned APP for the State/Respondent No.1 and Shri. Drupad Patil, learned appointed advocate for the Respondent No.2.

3. The prosecution case is that, the victim in this case was about 9 years of age. The Appellant and the co-accused came to one Nazir Mulla, who had a shop opposite to the house of the victim. In the night time, when the victim and her sister were alone in the house, the appellant entered the house and committed rape on the victim. Her father came in the midnight. She narrated the incident to him. He took the victim to the police station and then the F.I.R. was lodged. Nazir gave the name and address of the appellant. The police went to his house in the night itself and arrested him. The victim was sent for medical examination. Even the Appellant was sent for medical examination. The statements of the witnesses were recorded. Various panchanamas were recorded. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the special court.

4. During trial, the prosecution examined eight witnesses including the victim, her father, their neighbour, the panchas, the Medical Officer and the Investigating officer. The defence of the appellant was of total denial. Besides that, he also took up a

defence of *alibi* and for that purpose he examined the defence witness to contend that he was not in Mumbai on that day. Learned Judge considered the evidence and arguments. He disbelieved the defence. He believed the prosecution case and convicted and sentenced the Appellant, as mentioned earlier.

5. The prosecution case has unfolded through the evidence of PW-1-the victim. She has deposed that, in the year 2014, she was studying in the 5<sup>th</sup> standard. On 18/12/2014, her father told PW-1 and her sister to take dinner and go to sleep. He went out by bolting the door from outside. In the night, one unknown person entered the house. He gagged her mouth. He then tied her mouth with a cloth. Her hands were also tied. He removed her clothes. He removed his own clothes and then committed rape on her. He slapped her twice and showed her a knife. He put his finger in the vagina and there was bleeding from that part. The other person knocked on the door. He also entered the house. The first person put on his clothes and then ran away. PW-1 identified the appellant in the court when her deposition was recorded. PW-1 deposed that she was not knowing the appellant prior to the incident. Her

statement was recorded by the police in the same night. She identified the clothes of the appellant produced in the court. She also identified her own clothes. She further deposed that, she was sent to Sion hospital for medical examination. Her date of birth was 07/11/2005. She further deposed that, she was taken to a Court in Sewree for recording her statement. Her statement recorded U/s.164 of the Cr.p.c. is produced on record at Exhibit 14.

In the cross-examination, she stated that her father was working in a hotel. It was at a short distance from their house. Their house was in a slum area. There was a grocery shop near her house. Whenever her father went out for his job, she used to stay alone in the house with her sister. When their father used to leave, he used to tell somebody to look after PW-1 and her sister. Normally, he used to tell one Jetu who was a labourer and was doing a small job of melting gold. Jetu never used to come to their house. Jetu used to help PW-1 whenever needed. After the incident, at about 11.00p.m. the offender left the house. During the incident, she did not shout loudly and did not call anybody for

help. The shop near their house was open till midnight. She was admitted in the hospital for four days. She did not remember whether she had narrated the history to the Doctor. Her statement was recorded by a lady police officer. Those two persons went away after Jetu knocked on the door. Jetu did not catch those persons. She explained that, since, at the time of incident her mouth was tied, she did not shout. She denied the suggestion that, she was tutored to depose falsely in the Court.

6. PW-2 was the father of the victim. He produced the original birth certificate and its photocopy. After comparison, the photocopy was taken on record and was marked Exhibit 20. It showed date of birth of the victim as 07/11/2005. PW-2 used to provide tiffins in Zaveri Bazar by cooking food in his house. He used to leave at 11.30a.m. and used to return at 4.00p.m. Again he used to leave at 10.00p.m. and used to return after midnight. At the time of incident, his wife had gone to their native place. On 18/12/2014, he had asked his neighbour Nazir Mulla to keep watch on his daughter as he had to go out to give tiffins. At that time, two unknown persons were sitting with Nazir. PW-2 had

gone to Zaveri Bazar with tiffins. He returned at about 1.00a.m. in the midnight. He saw that the victim was crying. He enquired with her. She narrated the incident. She told that, two unknown persons who were sitting with Nazir had come to their house at around 11.00p.m. and then the incident had taken place. He then described the incident as was told to him by the victim. He further deposed that, Nazir came to their house after the incident. The victim used to call him Jetu. Then those persons ran away. PW-2 then went to Nazir and asked him about the incident. One neighbour named Lobo called the police. Many people had gathered near his house. Then he went to the police chowky and lodged this F.I.R. It is produced on record at Exhibit 21. The police arrested the appellant in the night itself. PW-2 also identified the appellant. The victim was sent to Sion hospital for medical examination. He identified the victim's clothes.

In the cross-examination, he deposed that, his younger daughter had not witnessed the incident. The grocery shop was not adjacent to their house. Nazir was residing alone in his hut. He was doing labour work. Many workers used to visit Nazir's house.

PW-2 himself had not seen whether there was bleeding from the private part of the victim.

The F.I.R. produced at Exhibit 21 substantially corroborates his evidence. The F.I.R. also mentions that Nazir had given the name of the appellant and hence, it was mentioned in the F.I.R. The F.I.R. was registered at 3.00a.m. on 19/12/2014. The information was received by the police station from PW-2 at 2.00a.m.

7. PW-3 is Joram Lobo. He has deposed that, he was the neighbour of the victim. He also knew Nazir. The appellant used to visit Nazir's house. In the night on 18/12/2014, he heard shouts from the house of the victim. He went there. The victim told about the incident. PW-3 then called his son, who in turn, made a phone call to the police. The police van came there. PW-1, PW-2 and PW-3 then went to the police station.

In the cross-examination, he deposed that he came to know about the incident when people gathered near the house of PW-1 and PW-2. There were around 1750 huts in their area. The

grocery shop was in front of his house. It was open till midnight. The appellant was shown to him on the next day. He was shown two persons.

8. PW-4 Sadashiv Shetty was a pancha for spot panchanama which is produced on record at Exhibit 28. It was conducted at around 6.00a.m. One knife and one towel was seized from that room.

9. PW-5 Arogya Pol was a pancha in whose presence the clothes of the victim and the clothes of the appellant were seized under different panchanamas. Those panchanamas are produced on record at Exhibit 30 and 31. Since the C.A. report regarding those clothes are not really incriminating, his evidence is not of any significant value.

10. PW-6 Dr. Narendra Kumar was the Medical Officer who had conducted the medical examination of the victim on 19/12/2014. According to him, the medical history was given by the victim herself. On her examination, he found that hymen was not intact. The samples were collected for analysis. He recorded

his opinion that the finding was consistent with old sexual intercourse/assault. The final opinion was reserved for receipt of F.S.L. report. According to him, the findings were consistent with the history of the incident. He produced the medical papers at Exhibit 32.

In the cross-examination, he deposed that the victim was examined within 24 hours of the incident. He was specifically asked as to what he would call a fresh injury in relation to the time factor. He answered that it depended on the nature of injury. If it was less serious, then it would be between 3 - 4 hours or 6 to 7 hours. In case of serious injury, it could be within 24 hours. In the certificate it was mentioned that the hymen injury was old. It was caused because of sexual intercourse, insertion of foreign object and finger. The medical certificate shows that the victim was examined at 7.45a.m. on 19/12/2014. Thus, she was examined after 7 hours from the time of incident and, therefore, according to him, he did not describe it as a fresh injury.

11. PW-7 P.S.I. Amol Mali was attached to Wadala T.T. police

station on that day. He was on the night duty. PW-1 and 2 came to the police station. He called W.P.C. Pramila Patil and recorded the victim's statement in her presence. The offence was registered vide C.R.No.871 of 2014 at Wadala T. T. police station. He identified the F.I.R. at Exhibit 21. He recorded the victim's statement in presence of W.P.C. Patil. He conducted the spot panchanama. He seized the towel and the knife from the spot. He sent the victim for medical examination. He sent the victim for recording her statement U/s.164 of the Cr.p.c. He collected the birth certificate of the victim. He identified the birth certificate at Exhibit 20.

In the cross-examination, he deposed that, he completed the recording of F.I.R. at about 2.45a.m. and registered the offence at around 3.00a.m. He could not remember whether Nazir Mulla had come along with PW-1 and 2 to the police station. He conducted the spot panchanama between 6.15a.m. to 7.15a.m. on 19/12/2014. Nazir Mulla was in the business of refining gold from trash material collected from Zaveri Bazar. He had not recorded the statement of Nazir Mulla. He accepted that the slum area was densely populated. He admitted that, name of the

appellant was told to the complainant by Nazir.

12. PW-8 was P. I. Bhausahab Kotkar. He had conducted the investigation after PW-7. He deposed that, Nazir Mulla told name of one of the accused. PW-8 and others took Nazir Mulla to Zaveri Bazar. He showed the building. The police entered that building. The appellant jumped from the second floor and started running away. The people gathered there caught him. PW-8 and others took the appellant in their custody in the early hours on 19/12/2014. He was brought to the police station and was put under formal arrest. The arrest panchanama is produced on record at Exhibit 41. It shows time as 6.00a.m. on 19/12/2014. He identified the appellant as the person who was arrested by him. On the information given by the appellant, the second accused was also arrested. He sent the articles to F.S.L. Kalina. He recorded the statements of some witnesses and finally filed the charge-sheet against both the accused.

13. Apart from this ocular evidence, the prosecution produced the C.A. certificates, but they are not really significant in

this particular case.

14. The appellant's statement was recorded U/s.313 of the Cr.p.c. In that statement, he stated that, he and Nazir Mulla were having enmity. Nazir had cheated the appellant in gold trading business. Nazir was close friend of PW-2. They were neighbours and both belonged to the same village. At the instance of Nazir, PW-2 has falsely implicated him. On the day of incident he was not in Mumbai. He had given some gold to Nazir for his jewellery melting business, but Nazir did not return back the gold and cheated him. Therefore, Nazir framed him in this case. According to him, he was not in Mumbai from 17/12/2014 till 19/12/2014; but he was in Pune along with his old client Mr. Joaquim John D'Souza; who was having a wedding in his family. Joaquim wanted to purchase jewellery from Pune and had taken the appellant's help in purchasing the same.

15. The Appellant examined the said Joaquim D'Souza as his defence witness. He has deposed that, he knew the appellant since 2012. The appellant used to make good jewellery. He was working

in Zaveri Bazar, Mumbai. He and the appellant were on good terms. On 27/12/2014, there was a wedding in his family. He had taken the appellant with him to Pune in the evening of 16/12/2014. The appellant had made the designs of the jewellery. The appellant had stayed with DW-1's family for 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup>. DW-1 did not remember whether they started from Pune in the night of 19<sup>th</sup> or in the morning of 20/12/2014. He went to the police station to tell these facts, but the police did not entertain him.

In the cross-examination, he deposed that, he was working in a restaurant as the Manager, in Thane. The appellant was working in Zaveri Bazar. They did not meet daily. He did not know name of the owner of the shop where the appellant was working. He deposed that, he had not received any summons from the Court to attend the Court, but he had received a phone call of the advocate for the appellant. That advocate told DW-1 that he had to come to the Court to give his evidence. DW-1 did not know what was the case against the appellant or what had happened with the victim. They had gone to Pune by a train, but he had not

taken tickets. He did not bring any wedding card regarding the wedding ceremony that took place on 27/12/2014.

16. Learned counsel for the Appellant submitted that the prosecution has failed to prove its case beyond reasonable doubt. The most important witness in this case would have been Nazir Mulla; but he is not examined. Therefore, adverse inference is required to be drawn against the prosecution case. The victim's sister is not examined. There is no evidence to show as to what happened to the sister, though, allegedly she was very much present in the house when their father had left the house. There was no bleeding from the victim's private part. That falsified her case. The knife was not identified by the victim. In any case, it is an ordinary kitchen knife found in any household. The medical evidence does not support the prosecution case, as the Doctor has opined that there were signs of old sexual assault/intercourse. The C.A. report does not support the prosecution case. Since the offender was not known to the victim, the test identification parade was necessary; but it was not held. There were two persons involved, but role of the second person is not clearly made out.

There is major difference between the victim's deposition in the Court and from the narration in her statement recorded U/s.164 of the Cr.p.c.

17. Learned APP, as well as, learned counsel for the Respondent No.2 opposed these submissions. They submitted that, there is no reason to doubt the deposition of the victim herself. Her evidence is reliable. Even the medical evidence supports her case. The Doctor has explained as to what he meant by old sexual assault or old sexual intercourse. There was injury to the hymen. They further submitted that the evidence of PW-3 also supports the prosecution case. The appellant has taken a false defence of *alibi*. He was arrested in that very night; when according to him and the defence witness he was in Pune at that time. This false defence evidence is also an incriminating piece of circumstance against the appellant.

18. I have considered these submissions. I find that PW-1 - the victim's evidence is reliable. There is no infirmity in her deposition or her narration. There is no reason as to why her

evidence should not be believed. Though, the prosecution has not clarified about presence of her sister; the victim's sister was even younger than the victim and, therefore, her evidence could not have made any difference to the case. The victim had given narration of the incident right from the time when she had seen both the accused in the house of Nazir. The victim's father had left his house for his work after 10.00p.m. and the accused took advantage of the situation and committed this act. There is no substance in the defence theory that it was a concocted story because, even PW-3 has deposed that there was loud conversation and noise coming from the house of the victim and people had gathered there. PW-3 himself went there. The victim had told about the incident. PW-3's son immediately informed the police. They came at the spot. PW-1, PW-2 and PW-3 went to the police station and the F.I.R. was immediately lodged. There is no time gap in this sequence and there is no scope to concoct a false story. Even PW-2 was not in the house when the incident took place. He came back at around 1.30a.m. The medical evidence does support the prosecution story. Though, learned counsel for the appellant

tried to make capital of the doctor's opinion that, it was a case of old sexual intercourse or assault. However, the Medical Officer – PW-6 has explained what he meant by 'old injury'. According to him, any injury in such a cases which was caused before 7 hours of medical examination was termed as 'old injury'. In this case, the victim was examined at 7.45a.m. on the next day morning and hence, there was a gap of 8 hours between the incident and the medical examination. Therefore, according to the Medical officer, he had opined that it was a case of old sexual assault. The defence, therefore, cannot take advantage of this opinion. The medical evidence does show that the hymen was torn.

19. Another incriminating circumstance against the appellant is that, said Nazir Mulla had immediately given the name of the appellant which is recorded in the F.I.R. itself. He had shown the house of the appellant. Police had gone to arrest the appellant immediately and in fact he was arrested from his house. He had tried to run away and he was caught by the people. He was immediately brought to the police station and he was put under formal arrest at 6.00a.m. on 19/12/2014. PW-2 has deposed that

the victim had immediately told the police that the arrested person was the same person who had committed rape on her. PW-1 has also identified the appellant in the Court. Considering the trauma which she had undergone, she was not likely to forget the offender. Therefore, in this case, the evidence of identification of the offender is sufficiently strong.

20. The appellant has taken a specific plea of *alibi* and he has examined DW-1 for that period. According to the defence witness, the appellant was with him from 16/12/2014 to 19/12/2014. The incident had taken place in the night of 18/12/2014 and in that night itself the appellant was arrested. There is a formal arrest panchanama conducted at about 6.00a.m. on 19/12/2014. Thus, it is proved beyond doubt that the appellant was arrested from his house in the night between 18/12/2014 and 19/12/2014. Therefore, his evidence of *alibi* is falsified. This is one more incriminating circumstance against him.

21. Considering all these aspects, I am of the opinion that the prosecution has proved its case beyond reasonable doubt.

Even, learned trial Judge has analysed the evidence in the same manner.

22. The next question would be about the sentence imposed on the appellant. The Appellant is sentenced to suffer R.I. for 20 years for commission of offence punishable U/s.4 of the POCSO Act. In view of Section 42 of the POCSO Act, no separate sentence was imposed for commission of offence punishable U/s.376 of I.P.C. In this connection, learned trial Judge has overlooked the fact that it was a case of ‘aggravated penetrative sexual assault’ as defined U/s.5(m) of the POCSO Act; which refers to penetrative sexual assault on a child below 12 years. In this case the victim was 9 year old and hence, she was below 12 years of age. In that case, proper penal section would be Section 6 of the POCSO Act, which on the date of offence provided the minimum punishment of R.I. which was not less than 10 years, but which could extend to imprisonment for life; besides imposition of fine. Instead of these two correct sections, learned trial Judge had convicted the appellant U/s.4 of the POCSO Act for penetrative sexual assault, which provided the punishment at that point when the offence was

committed with imprisonment of either description which could not be less than 7 years but which could extend to imprisonment for life; besides imposition of fine. Significantly, the Charge was also framed U/s.4, 8 and 12 of the POCSO Act, but not U/s.6 of the POCSO Act. However, the ingredients of Section 5(m) r/w. 6 of the POCSO Act were mentioned in the first clause of the Charge which was framed U/s.376(2)(i) of the I.P.C. as it stood then on the date of offence. Section 376(2)(i) of the I.P.C. as it stood then prescribed the punishment in respect of commission of rape on a woman when she was under 16 years of age. The punishment prescribed was R.I. for a term which could not be less than 10 years, but which could extend to imprisonment for life, besides imposition of fine. Fortunately, for the prosecution, this particular charge and also the conviction U/s.376 of the I.P.C. was recorded by the Trial Judge. Section 42 of the POCSO Act takes care of the lapse in framing of formal charge U/s.6 r/w. 5(m) of the POCSO Act. Since the Appellant is convicted U/s.376 of the I.P.C. pursuant to the charge U/s.376(2)(i) of the I.P.C. the sentence prescribed under that section is applicable in this case even for offences under

the POCSO Act.

23. Learned counsel for the appellant submitted that, on the date of offence i.e. on 18/12/2014 the minimum sentence provided U/s.376(2)(i) of the I.P.C. was for 10 years and even U/s.6 of the POCSO Act the minimum sentence provided was 10 years, though, the sentence could extend to imprisonment for life; therefore some leniency be shown to the appellant and the sentence be reduced to the minimum sentence which could be imposed on him.

24. Learned Trial Judge has recorded in his order that the appellant was having two small daughters besides wife and old parents. All of them were dependent on him. Learned counsel for the appellant submitted that he is continuously in custody since December 2014. He was never released on furlough or parole. He has no other criminal antecedents.

25. Learned APP and learned counsel for the Respondent No.2 left the sentencing part to the discretion of the Court.

26. I have considered these submissions. There is no doubt

that the offence is quite serious. On the date of offence i.e. on 18/12/2014 the minimum sentence prescribed under the aforementioned sections was for 10 years of R.I. However, considering that the victim was 9 year old and had to face the trauma, the sentence more than minimum sentence is required to be imposed on the appellant. At the same time, since at that point of time the minimum sentence was not 20 years, the sentence can be reduced taking into account the family background of the appellant, as was discussed by learned trial Judge. Taking over all view of these submissions, the evidence on record and the fact that the appellant is in custody since 2014, in my opinion, substantive sentence of 12 years of R.I. would meet the ends of justice.

27. Hence, the following order:

O R D E R

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant recorded by the Trial Court for commission of the offence punishable under section 4 of the POCSO Act and

under section 376 of the I.P.C. are maintained. However, instead of R.I. for 20 years, the Appellant is sentenced to suffer R.I. for 12 years and to pay a fine of Rs.10000/- and in default of payment of fine to suffer S.I. for one month.

- iii) The conviction and sentence recorded U/s.506(2) and 323 of the I.P.C. and U/s.8 and 12 of the POCSO Act are maintained.
- iv) All the substantive sentences are directed to run concurrently.
- v) The Appellant is given set off U/s.428 of the Code of Criminal Procedure.
- vi) All the other clauses of the impugned Judgment and order which are not contrary to this operative part are maintained.
- vii) The Appeal is disposed of accordingly.

**(SARANG V. KOTWAL, J.)**