

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

**CRIMINAL APPEAL NO.153 OF 2021**

Mohammed Mumtaz Ahamed  
Age 50 years, Indian inhabitant,  
Occ.: Servant, residing at  
Flat No.11, Fardeen Court,  
5<sup>th</sup> Floor, S.B.S. Road, Colaba,  
Mumbai.  
Presently lodged at Aruther Road  
Prison, Mumbai.

.... Appellant

versus

1. State of Maharashtra  
Through Colaba Police Station

2. XYZ

.... Respondents

.....

- Mr. Jehangir M. Khajotia, Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent No.1.
- Ms. Savita Yadav, (Appointed) Advocate for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.**

**DATE : 14<sup>th</sup> FEBRUARY, 2023**

**JUDGMENT :**

1. The Appellant has challenged the Judgment and Order dated 05/02/2021 passed by the Designated Judge under Protection of Children from Sexual Offences Act, 2012, for

Greater Bombay, in POCSO Special Case No.283 of 2018. By the impugned Judgment and Order, the Appellant was convicted and sentenced as follows ;

- (a) He was convicted for commission of offence punishable u/s 354 and 354-A of the Indian Penal Code. But no separate sentence was imposed on him under these sections, in view of section 42 of the Protection of Children from Sexual Offences Act (POCSO), 2012.
- (b) He was separately convicted for commission of offence punishable u/s 10 of POCSO and was sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer rigorous imprisonment for one month.
- (c) The Appellant was given set off u/s 428 of Cr.P.C.

2. Heard Mr. Jehangir M. Khajotia, learned counsel for the Appellant, Ms. Savita Yadav, learned counsel for the Respondent No.2 and Mr. S. R. Agarkar, learned APP for the State.

3. The prosecution case is that the victim's date of birth is 26/02/2008. The incident had occurred on 25/03/2018. The victim along with her mother and aunt was travelling in a taxi from CSMT to Colaba. On the way, the Appellant requested that he be taken to Colaba along with them. He sat on the front seat of the taxi. He suggested to the mother of the victim that the victim could sit on his lap. It is the prosecution case that while travelling in the taxi, the Appellant touched her private parts and breast. When everybody got down at Colaba, the victim immediately complained to her mother about this Act. The Appellant was nearby. The victim's mother confronted him. The mob gathered and caught the Appellant. Somebody from the crowd took him to the police station. The victim and her mother also reached the police station. The FIR was lodged and the Appellant was arrested. The investigation was carried out. The statements of the witnesses were recorded. At the conclusion of the investigation, the charge-sheet was filed. The case was committed to the Special Court.

4. During trial, the prosecution examined the victim, her mother, the victim's aunt, the person who had taken the Appellant to the police station and the police officers. The learned Judge believed the prosecution case and convicted and sentenced the Appellant.
5. The defence of the Appellant was of total denial.
6. The victim was examined as P.W.2. She has deposed that she was residing at Colaba with her parents and younger sister. Her date of birth was 26/02/2008. She was studying in 6<sup>th</sup> standard. On 25/03/2018 it was a Sunday. Her family had decided to go to Panvel to see her grandfather. However, since the train was too late, they did not go to Panvel, but instead returned back to CSMT. They hired a taxi to go to Colaba. She was sitting on the front seat. All the others were sitting at the back seat with her mother. Her aunt Rajani and her sister were sitting on the back seat. At that time, the Appellant came there. He also sat on the front seat. P.W.2 was about to go to the back

seat. The Appellant told her mother that P.W.2 could sit on his lap. During their travel he touched her breast and her private parts. When she was about to tell that fact to her mother, he pressed her mouth. They got down at Colaba Sweet market. P.W.2 started crying. She narrated the incident to her mother. They saw that the Appellant was present there. P.W.2 shouted. Crowd gathered there. The Appellant started running. The crowd caught him. He was brought to the police station. P.W.2 then narrated the incident to the police. She was referred for medical examination. Her statement was recorded u/s 164 of Cr.P.C. She identified the Appellant in the Court.

During cross-examination, she explained that her aunt Rajani was residing in a separate room in the adjacent lane from their house. She could not give details about the timing when they started from CSMT station. Her house was at 5 minutes walking distance from Colaba Sweet Market. There was a gap between the driver's seat and the passenger's seat in the front side of the taxi. She could not tell as to how many people had

gathered in the crowd when the Appellant was apprehended. Two persons from the crowd had accompanied them to the police station. She was not asked to identify the Appellant in any Test Identification Parade. She had not told the police in her police statement that her date of birth was 26/02/2008. Then there were some minor omissions put to her from her police statement.

7. P.W.1 was the mother of the victim. She has narrated the incident in the same manner as was narrated by P.W.2. Their version about the incident was consistent. After going to the police station, FIR was lodged. It is produced on record at Ex.11. P.W.1 produced the birth certificate of the victim at Ex.12. It was issued by the Village Development Officer, Usroli. It mentioned that the victim's date of birth was 26/02/2008. Her name was mentioned in the birth certificate and the registration was made on 07/03/2008. The birth certificate also mentioned the address of the victim as the same address which is mentioned in her deposition.

8. P.W.1 has deposed that in the taxi she herself, the victim, P.W.1's sister-in-law Rajani and her other daughter were travelling. One more lady, to whom P.W.1 referred to as the maternal aunt, had also boarded the taxi. These three elderly ladies and the younger daughter were sitting on the rear seat of the taxi.

The cross-examination was mainly directed towards the identity of the third lady, who was travelling with them. P.W.1 could not recall her name immediately. But she stated that the said lady was her friend and also her maternal aunt. P.W.1 further deposed in the cross-examination that there was a rear view mirror and two side mirrors in the taxi. After reaching Colaba, she paid the fare first. They got down and then the unknown passenger got down. P.W.1 had identified the Appellant in the Court at the time of recording of her examination-in-chief. She was further cross-examined on some minor omissions from her statement which was recorded as her FIR. However, her FIR substantially corroborated her case.

9. P.W.3 Rajani Chordekar was travelling with P.W.1 and P.W.2 in the same taxi as mentioned earlier. She has deposed about the incident in exactly same manner as was deposed by P.W.1 and P.W.2. She has also identified the Appellant before the Court.

She was cross-examined about the locality of their residence and about the third lady travelling with them. There was hardly any cross-examination in respect of the actual incident. She admitted that she had not noted down the number of the taxi. She was also not called by anybody for identifying the Appellant.

10. P.W.7 Mayur Merchande was the person who had taken the Appellant to the police station after the crowd had apprehended him. He has deposed that on 25/03/2018 at about 09.45 p.m. he was going to a medical shop from Colaba market. He was standing opposite Colaba Sweet Market. One taxi was

standing there. There were some women and one man near the taxi. The women were shouting and the crowd gathered there. He rushed there. One girl, who was about 9-10 years of age, was telling her mother that the uncle had touched her on her private parts and breast, when she was in the taxi. The crowd started manhandling that man. He then apprehended that man and made him sit on his motorcycle. He also took help of his friend Sachin. The Appellant was made to sit in between himself and Sachin on his motorcycle and then he was brought to Colaba police station. He also identified the Appellant before the Court.

In the cross-examination, he stated that when he had reached the spot, the women were getting down from the taxi. There was no other taxi in that vicinity. He did not note down the taxi number. His police statement shows that it was recorded on 26/03/2018. Though he has deposed that it was recorded on 25/03/2018.

In his further cross-examination he has deposed that 30

to 50 people had gathered at the spot at that time. The police did not visit the spot afterwards. Though there was a police booth in Colaba, at that time no police officer was present in that booth. There was no traffic constable present. He was confronted with a slightly contradictory statement from his police statement, where he had stated that he came to know about the name of the pillion rider at the police station. Whereas according to him he was knowing the said person Sachin since before, as they were friends.

11. P.W.4 PSI Babaso Salunkhe was present at Colaba police station when the informant, the victim and others came to the police station. P.W.1 then lodged her FIR. He recorded statements of P.W.7 Mayur Merchande, Sachin Kamble and P.W.3 Rajani Chordekar. The accused was brought to the police station and was arrested by him. The Arrest Panchanama was produced on record at Ex.18. Then he referred the victim and the Appellant for medical examination. Some minor omissions from P.W.1's FIR were proved by him in his deposition.

12. P.W.5, WPSI Kamal Karche, had recorded the victim's statement on 26/03/2018. She proved some minor contradictions from the victim's police statement.

13. P.W.6 API Gawade had conducted the further investigation and had submitted the charge-sheet.

In the cross-examination he deposed that he did not record the statement of anyone from Colaba Sweet Mart or the occupants of that building. He explained that the statement of one Ishwarsingh Purohit from Colaba Sweet Mart was recorded by PI Sadanand Mane. He did not conduct any ossification test of the victim. He had not visited any office or hospital to verify the date of birth of the victim. He had not recorded the statement of the Gram Vikas Adhikari to verify genuineness of Ex.12. He denied the suggestion that the Appellant himself had gone to the police station to lodge a report because he was beaten by the mob and instead of taking his complaint, a false case was lodged against him.

This, in short, was the prosecution case.

14. Learned counsel for the Appellant submitted that the victim's age is not proved beyond reasonable doubt. The identity of the third lady travelling with the victim and her mother, is not established. She was a fictitious person. The number of the taxi was not noted. There is no investigation about that taxi at all. It was the only taxi parked at the spot. Therefore, the taxi driver's identity and evidence was necessary. He submitted that even otherwise it is impossible to believe that the incident could not have taken place when the victim's mother and aunt were sitting right behind, on the rear seat of the taxi. The victim did not raise any shouts at all. He submitted that it can be a case of mistaken identity because no Test Identification Parade was held. He submitted that the Appellant's defence is probable. He was beaten by the mob because of some misunderstanding and when he had gone to lodge his FIR, instead of taking his FIR, he was made an accused in the FIR lodged by the P.W.1. He

submitted that there were too many omissions and contradictions in the evidence of the witness P.W.1, P.W.2 and P.W.3 compared to their police statements.

15. Learned counsel for the Respondent No.2 as well as learned APP opposed these submissions. They submitted that the conduct of the victim was absolutely natural. There was no reason for the victim or her mother to implicate the Appellant falsely. There was nothing to show that the victim or her mother held some grudge against the Appellant. The Appellant was caught immediately. Therefore, there was no scope for arguing that it was a case of mistaken identity. Holding of Test Identification Parade was not necessary because the Appellant was caught at the spot.

16. I have considered these submissions. The most important feature in this case is the deposition of the victim P.W.2. At the time of incident, she was about 10 years of age. Therefore, she had sufficient understanding of the incident and of the intention of the Appellant. Her conduct was absolutely

natural. The victim along with her mother and aunt started from CSMT in a taxi. The Appellant joined them and on his assurance, the victim's mother allowed the victim to sit on his lap. The Appellant took advantage of the situation and touched her on her private parts and on her breast. Though there was rear view mirror and side mirrors to the taxi, it was not necessary that the victim's mother would keep on watching the front seat. When the victim had tried to utter something, the Appellant had pressed her mouth. In any case, it was an awkward situation for the victim. Therefore, as soon as she got down from the taxi, she immediately told her mother about the incident. There was absolutely no time gap between getting down from the taxi and telling her mother about the incident. She had immediately narrated the incident and the acts of the Appellant to her mother. Both of them raised shouts and therefore crowd gathered there and the Appellant was caught at the spot. P.W.7 with the help of his friend took him to the police station. This sequence of events shows that there was no scope for concocting a false story. The victim, who was of sufficient understanding,

had narrated the incident immediately to her mother and the Appellant was immediately caught at the spot. There is no gap in these events, as also, there is no lacuna in the prosecution case. The identity of the third lady will not make much difference to the prosecution case. In any case, there is no reason to disbelieve the P.W.1 that the third lady was also travelling with them. Non-examination of that third lady will not make any difference in this case because P.W.1, P.W.2 and P.W.3 have consistently deposed about the incident as mentioned earlier. The most important evidence is that of the P.W.2, the victim herself and I do not find any infirmity in her deposition. There is presumption u/s 30 of the POCSO, which the Appellant has not discharged. The defence has not shown any possible reason as to why the Appellant would be implicated falsely by the victim or her mother.

17. The birth certificate of the victim was produced by P.W.1. It was a public document. The birth was registered immediately on 07/03/2008 after the birth of the victim on

26/02/2008. Therefore, there is no reason to doubt this birth certificate, which in any case was a public document and was admissible.

18. The omissions referred to by the defence counsel were rightly ignored by the learned Trial Judge by labelling them as insignificant omissions. I agree with the Trial Judge on that count. Those omissions are absolutely insignificant and they do not affect the prosecution case in any manner.

19. With the result, I do not find any merit in the Appeal. The Appeal is accordingly dismissed.

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