

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

CRIMINAL APPEAL NO.447 OF 2018

Miraj Mohsin Khan	Appellant
Versus	
The State of Maharashtra & Anr.	 Respondents

Ms. Shahin Kadar Sayed, Advocate i/b. Suryakant Pise, for the Appellant.

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

Mr. Sushil A. Inamdar, Advocate (appointed) for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 27th FEBRUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 31.1.2018 passed by the Designated Court under the Protection of Children From Sexual Offences Act, 2012 (for short, 'POCSO Act') for Greater Bombay in POCSO Case No.562/2015. The appellant was convicted for commission of

offences punishable under Sections 376(2)(i), (n), 354, 506 of the Indian Penal Code and under Sections 6 and 10 of the POCSO Act. He was sentenced to suffer RI for 20 years and to pay fine of Rs.25,000/- and in default of payment of fine to suffer RI for six months. Out of the fine amount which was recovered, Rs.15,000/- were directed to be paid to the victim by way of compensation. The appellant was granted set off under Section 428 of Cr.PC.

2. Heard Ms. Shahin Kadar Sayed, learned counsel for the appellant, Smt. M.R. Tidke, learned APP for the respondent No.1-State and Mr. Sushil Inamdar, learned appointed counsel for the respondent No.2.

3. The prosecution case is that the victim in this case was about nine year old at the time of the offence, which had taken place on a few occasions between 27.8.2015 to 11.9.2015. The victim used to go to her grandmother's place. The appellant's workshop was at a short distance. He used to

ask the victim to get tea for him and when she used to return with tea, he used to commit rape on her. The victim was affected because of this. She started passing urine without control and, therefore, her mother made enquiries with her. After that, the victim told her mother about the incident. The mother of the victim confronted the appellant. The people in the locality apprehended him. The victim's mother then went to the police station and lodged her FIR vide C.R. No.289/2015 at Shahunagar police station on 11.9.2015. It was registered at about 3.00 p.m.. The investigation was carried out. The appellant was arrested. The appellant and the victim were sent for medical examination. Their clothes were seized and were sent for chemical analysis. The statements of the witnesses were recorded. The victim's statement was recorded under Section 164 of Cr.P.C. At the conclusion of the investigation, the charge-sheet was filed in the Court of Special Judge for POCSO.

4. During trial, the prosecution examined six witnesses

including the victim, her mother, the medical officer, a pancha and two investigating officers. The defence of the appellant was of total denial. He examined his brother Yaatin Khan as a defence witness to show that his workshop was located in a crowded locality and there were four workers working with him. His case was that either the incident has not taken place or there was a possibility that somebody else had committed the offence and the appellant was implicated falsely.

5. At the conclusion of the trial, after hearing both sides and considering the evidence, learned Judge believed the prosecution evidence and in particular believed the evidence of the victim and the medical evidence. The learned Judge was not impressed with the defence evidence. He finally convicted and sentenced the appellant as mentioned earlier.

6. The victim was examined as PW-1. She has deposed that she was born in the year 2004. She has produced her birth certificate at Exhibit-16, which showed her date of

birth as '1.5.2004'. At the time of incident, she was studying in the 5th standard. Her school timing was between 7.30 a.m. to 12.30 p.m.. After returning from the school and after having lunch, she used to go to learn Arabi near her grand-mother's house. She used to return from her Arabi class at 3.00 p.m. After that she used to play at her grandmother's house. One Lakdiwala Uncle was having his workshop near her grandmother's house. He used to make wooden heels of sandals. The victim had named the appellant as the same person. She has deposed that the people in the vicinity used to call him by his name. She has further deposed that sometimes the appellant used to give her some money to bring tea from a nearby hotel. She used to bring tea for him. It is her case that at such times, he used to commit rape on her. She has described the act in detail in her deposition. According to her, he had committed those acts many times. Because of that she was having pain. He used to threaten her not to disclose this incident to anybody otherwise he threatened to beat her. This

happened 3 to 4 times, but, she was scared and did not disclose it to anyone. Because of this, she started losing control over urine. Her mother told her that she would be taken to a hospital and she would have to undergo a surgery. She got scared and informed her mother about the incident. Her mother informed her father and they took her to Shahunagar police station. She lodged her complaint there. The victim narrated the incident to the police. The spot was shown to the police. Her clothes were seized. She was sent for medical examination. She narrated the history to the doctor. Her statement was recorded by the police. She was taken to a Magistrate's Court. Her statement was recorded under Section 164 of Cr.P.C. It is produced on record at Exhibit-17 which substantially corroborates her version. In the re-examination, she identified the appellant who was produced through Video Conferencing.

In the cross-examination, she stated that her

grandmother was residing on the 3rd floor of the building. The appellant's workshop was at about five minutes walking distance from her grandmother's house. He was residing in that workshop. On one side of the appellant's workshop there was one office and on the other side there was another workshop. The police showed the appellant at the police station and she had identified the appellant at the police station.

7. PW-2 was the victim's mother. She deposed that the victim had lost control over passing of the urine. Therefore, she enquired with her. At that time, the victim told her about the incident. PW-2 got annoyed and went to the appellant's workshop with 2-3 other people. The appellant tried to run away but he was apprehended. Then PW-2 and others went to the police station. She lodged her complaint. She showed the place of incident to the police. The victim's clothes were seized. She was sent for medical examination. The victim's statement

was recorded by the Magistrate.

In the cross-examination, she stated that when she examined the victim's private parts, there was redness and injury. Besides that there were no injuries on her person. According to her, the victim was having difficulty with her urine for the past fifteen days before lodging the FIR. At the victim's grandmother's place, PW-2's two brothers and their families used to reside. While describing the spot of incident, she stated that, in the compound of the appellant's workshop, there were two buildings, one of which was vacant and the other was occupied by the residents.

8. PW-4 Sarfaraj Shaikh was the pancha for spot panchnama. It is produced on record at Exhibit-25. It was conducted at about 5.00 p.m. on 11.9.2015. He has also described the spot in a similar manner as is described by PW-2.

9. PW-3 Dr. Narendra Kumar had examined the victim as well as the appellant. He has deposed that on 11.9.2015,

the victim was brought to him. He along with Dr. Thakare examined her. The history was given by the victim and by her father. In the history given by the victim, it was mentioned that the incident took place on 8.9.2015 and 10.9.2015. On her examination, he found eight injuries in the nature of scratches, abrasions and contusions over the victim's hand, knuckles, elbows, face etc.. On her private parts, there was diffused erythema. There was injury to the hymen. The edges were ruptured. Erythema was seen over lower hymenal wall. Edema was present. In the urethra also there was tear at 11 O'clock position of the size 0.5 cm., edges smooth, no active bleeding. As per his provisional opinion, the hymen ruptured and the injuries in the private part of the victim were fresh.. The age of the injury was 3 to 4 days and his overall final opinion was consistent with the recent sexual intercourse. However, the final opinion was kept pending till receipt of the FSL report. The genital injuries were serious and, therefore, the victim was admitted to their hospital. According to him,

the victim was brought after 3 to 4 days after the incident and after the victim had taken bath; therefore, nothing was detected on her clothes and in her samples.

PW-3 had also examined the appellant. Those injuries were reflected in Exhibit-22. There were several injuries on his person. Those injuries were caused because of the beating by the public. He had suffered almost seven injuries on his face and arms in the nature of contusions and abrasions.

His cross-examination was not very significant.

The CA reports are innocuous. They do not indicate anything.

10. PW-5 PI Shinde was the first investigating officer. He had recorded the FIR. He had registered the offence. He had arrested the appellant. He had conducted the spot panchnama. He had seized the clothes of the victim and of the appellant. He had referred both of them for medical

examination.

In the cross-examination, he stated that PW-2's husband reached after lodging of the FIR and he had come with the appellant. PW-5 has not made any inquiries with the watchman. He had recorded the statements of the persons who had caught the appellant, but, those persons were not examined during trial.

11. PW-6 PI Ingale was the other investigating officer. He had sent the samples for chemical analysis. He had collected the birth certificate. He had referred the victim to the Magistrate's Court for recording her statement under Section 164 of Cr.P.C. He had filed the charge-sheet after the investigation was over.

In the cross-examination, he deposed that the workshop premises were owned by one Ram Sharik. He had given it on rental basis to one Ijaz and then Ijaz had introduced the appellant to Ram Sharik. The appellant was given that

block by Ram Sharik on rental basis.

12. The appellant's brother Yaatin Khan was examined as the defence witness. He has deposed that he was residing with the appellant in the appellant's workshop. There were four workers working with the appellant. They used to come at 9.00 a.m.. He used to help the appellant in his work. He used to sell handkerchiefs on the foot path. At about 11 a.m. to 12 O'clock he used to return to the shop of the appellant. The workers used to go to deliver the goods to different shops. Even the appellant used to go out for the delivery of the goods. He used to return between 2.30 p.m. to 3.00 p.m. and again used to go out for delivery of the goods and used to return at about 9.00 p.m.. On 11.9.2015, this witness was in that shop. The appellant was not there. At about 10.00 a.m., one lady came to the shop asking for the appellant. She was agitated. She threatened to take action. All the workers left the workshop. The appellant returned. The people started beating

him. This witness was scared and, therefore, he stood at a distance. After that, the police came and took the appellant to the police station.

He was cross-examined by the learned SPP. He answered that there register was not maintained in the workshop regarding the workers. He denied the suggestion that he was trying to help the appellant by deposing as was tutored by his advocate.

. This, in short, was the evidence led by both parties.

13. Learned counsel for the appellant submitted that the medical evidence does not support the prosecution case. It was not possible that the victim's mother would have missed those injuries on the victim's person which were observed by the medical officer – PW-3. There is serious inconsistency between the evidence of PW-2 and PW-3 in that regard and, therefore, the benefit of such discrepancy must be given to the appellant.

14. She submitted that the appellant's workshop was located in a crowded locality. There was a watchman in the building but the prosecution has not examined that watchman. Even his statement was not recorded by the police. She submitted that there were at least four other workers working in the workshop. Therefore, there was no possibility that the incident could have occurred as narrated by the victim. Even otherwise, none of the workers is examined by the prosecution and there is a possibility that one of those workers could be the real culprit and not the appellant.

15. She submitted that there is a strong possibility that the appellant was implicated falsely on mere suspicion. She further submitted that the victim has not given the details regarding the date and time of the incident. Though there is reference to two dates in the history narrated by her to the doctor, no such dates were given in her police statement or in the statement recorded under Section 164 of Cr.PC. Nobody

from her school or none of her friends was examined to show that the victim was under fear and had developed difficulty in controlling passing of urine. It was only after that the victim's mother had suggested that the victim would have to undergo surgery; getting scared, the victim has falsely implicated the appellant. She submitted that the evidence of the defence witness deserves equal consideration with that of the prosecution witnesses which shows that the incident could not have taken place as there used to be workers present in the premises. The CA reports do not support the prosecution case as nothing was found on the clothes of the victim or even in the swabs taken during the medical examination.

16. Learned APP as well as learned counsel for the respondent No.2 opposed these submissions. According to them, the age of the victim was not in dispute. The birth certificate was produced on record and it was duly proved. The victim was barely eleven year old. There was no reason for the

victim to implicate the appellant falsely. The medical evidence supports the prosecution case. There were injuries on the person of the victim. She knew the appellant as she had named him. She had also identified the appellant in the Court. The sole testimony of the victim was sufficiently reliable and, therefore, conviction can be safely based on her evidence.

17. I have considered these submissions. I have carefully considered the evidence of the victim and I find that her evidence does not suffer from any infirmity. She has described the incident in detail. Though she had not given details regarding the date or the time but she has deposed that the incident used to take place after her class was over when she used to play in the house of her grandmother. She has deposed that the appellant used to give her money to bring tea and after that he used to commit this offence. This was repeated on 3 to 4 occasions. She could not narrate this incident to her parents out of fear. But, because of her medical

condition her mother came to know about the incident and, therefore, on the victim's narration the appellant was confronted and was apprehended by the people in the locality.

18. The victim was then sent for medical examination which showed that there were injuries on her person. More importantly there were fresh injuries on her private parts and there was a fresh tear as mentioned earlier. This sufficiently corroborates her ocular evidence. She has specifically named the appellant as the offender. There was no scope to even suggest that the offence perhaps could have been committed by one of the workers. The evidence of the defence witness itself shows that sometimes even the workers used to go out for delivering the goods and therefore the appellant had sufficient opportunity to commit this offence. The age of the victim is not in dispute. The birth certificate is duly proved. Though the CA reports do not indicate anything; it hardly matters in this case because the clothes were seized after some time gap and even

the swabs were collected after a few days from the incident. Therefore, that circumstance neither helps the prosecution nor the defence.

19. The submission that the watchman and other people from the locality were not examined does not carry much force because the prosecution has proved its case through the evidence of the victim herself. She had absolutely no reason to implicate the appellant falsely.

20. As mentioned earlier, the injuries on her body and to her private parts sufficiently corroborates her story. In this view of the matter, I am of the opinion that the learned Judge has correctly recorded the conviction under all these offences against the appellant.

21. The next question will be about the sentencing part. Learned counsel for the appellant submitted that after his arrest on 11.9.2015, the appellant is continuously in custody. He was never released either on parole or on furlough. At the time of

incident, the minimum sentence provided under Section 376(2) of IPC and under Section 6 of the POCSO Act was ten years though it could extend to imprisonment for life. In this case, the learned Judge has awarded twice the minimum sentence and has imposed the sentence of twenty years on the appellant. She submitted that in this background some leniency be shown to the appellant as far as the period of sentence is concerned.

22. She invited my attention to the discussion regarding the sentence from paragraphs-64 to 66 of the impugned judgment and order. The submission of the appellant was recorded that his family was depending on him, which consisted of his old parents, wife and small children. His daughter had passed away. In this background, it was prayed that some leniency be shown to him. The learned SPJ, on the other hand, had emphasized on the nature of the offence and had sought maximum punishment.

23. The learned Judge had considered all these aspects

and had observed that to deter others who would entertain similar thoughts of committing the offence, leniency could not be shown to the appellant and then had passed this order. No fault can be found with the reasoning of the learned Judge. The offence indeed is serious. However, the impugned judgment and order is passed on 31.1.2018. Thus, the trial took considerable period to reach its conclusion. After that the appeal was pending before this Court for more than four years. The appellant is continuously in custody. His family background shows that he had lost his daughter. His other family members depended on him. There is no doubt that the offence is quite serious. But, considering this background some leniency can be shown to the appellant. Learned APP Smt. Tidke as well as learned counsel for the respondent No.2 submitted that this is not a case where minimum sentence should be awarded. But, some reasonable sentence more than the minimum sentence is necessary.

24. Considering both these submissions, I am of the

opinion that more than the minimum sentence which was applicable on the date of offence is required to be imposed. At that point of time, the minimum sentence was for ten years. However, considering the gravity of the offence, some more sentence than the minimum sentence will be required to be imposed. Considering all the facets of the case, in my opinion, RI for fifteen years instead of RI for twenty years will meet the ends of justice. At the same time, the fine amount can be enhanced so that the victim gets some reasonable amount more than what was awarded. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The impugned judgment and order dated 31.1.2018 passed by the Designated Court under the POCSO Act for Greater Bombay in POCSO Case No.562/2015 is modified to the following extent.

- iii. The conviction of the appellant under Sections 376(2)(i), (n), 354, 506 of IPC and under Sections 6 & 10 of POCSO Act is maintained. However, instead of RI for twenty years and payment of fine of Rs.25,000/-, the appellant is sentenced to suffer RI for fifteen years and to pay fine of Rs.50,000/- (Rupees Fifty Thousand Only) and in default of payment of fine to suffer RI for one year.
- iv. If the fine amount is recovered, the entire fine amount be paid to the victim by way of compensation under Section 357 of Cr.PC..
- v. The appellant is granted set-off under Section 428 of Cr.PC.
- vi. The rest of the clauses of the operative part of the impugned order, which are not inconsistent with this operative part, are maintained as they are.
- vii. With these observations, the appeal is disposed of.

(SARANG V. KOTWAL, J.)

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