

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

CRIMINAL APPEAL NO.659 OF 2022

Safraj @ Iqbal Faridulla KhanAppellant
Versus
The State of Maharashtra & Anr. Respondents

Mr. Ganesh Bhujbal, Advocate (appointed) for the Appellant.
Mr. S.R. Agarkar, APP, for the Respondent No.1-State.
Mr. Veerdhaval P. Kakade, Advocate (appointed) for the
Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 09th JANUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 20.2.2019 passed by the Additional Sessions Judge for Greater Bombay in POCSO Special Case No.151/2016. The appellant was convicted and sentenced as follows :

- i. He was convicted for commission of the offence punishable under Section 377 of the Indian Penal Code read with Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer RI for ten years and to pay a fine of

Rs.25,000/- and in default of payment of fine to suffer RI for six months.

The appellant was granted set off under Section 428 of Cr.P.C. Learned Trial Judge directed that the fine amount, if recovered from the appellant, shall be paid to the victim towards compensation in view of Section 357 of Cr.P.C.. The District Legal Services Authority was recommended for providing adequate compensation to the victim as per the provisions of Section 357-A of Cr.P.C.

2. Heard Shri Ganesh Bhujbal, learned appointed counsel for the appellant, Shri S.R. Agarkar, learned APP for the respondent No.1-State and Shri Veerdhaval Kakade, learned appointed counsel for the respondent No.2.

3. The prosecution case, in brief, is that the appellant was a relative of the victim's father. The victim was five years of age at the time of incident dated 15.2.2016. The date of birth of the victim was 10.11.2011. On that date, in the evening the victim was taken by his father to his factory. He was left in the

custody of the appellant and other co-workers. After some time the appellant dropped the victim to the victim's house. The victim told his mother about the offence committed by the appellant. The description of the offence fulfills all the ingredients of Section 377 of IPC and other sections of POCSO Act. The victim's mother informed the victim's father. Then the police were informed. The FIR was lodged vide C.R. No.80/2016 at Wadala T.T. Police Station. The appellant was arrested. Statements of the witnesses were recorded. The appellant and the victim were sent for medical examination. Medical swabs from the mouth of the victim were collected. The clothes were collected. The articles were sent for chemical analysis. At the conclusion of the investigation, charge-sheet was filed and the case was committed to the Special Court.

4. During trial, the prosecution examined six witnesses including the victim, his mother, the medical officer and the police officers. The defence of the appellant was of total denial. He did not lead any evidence. According to him, he was falsely implicated on account of misunderstanding.

5. Learned Judge considered the evidence and the submissions. He then convicted and sentenced the appellant as mentioned earlier.

6. PW-1 is the mother of the victim. She had lodged the FIR. She has deposed that she had four children including the victim. The date of birth of the victim was 10.11.2011. In the year 2016, PW-1's husband was in the business of garments. Ahmad Bhaskar, Arbaz Zakhir Khan and the present appellant Sarfaraj were PW-1's husband's nephews. The appellant had started working with her husband in the factory since about four to five days before the incident. The appellant was residing in PW-1's husband's factory. On 15.2.2016 at about 4.30 p.m., her husband had taken the victim to the factory. The victim played there for quite some time. At about 7.30 p.m. her husband had gone away for purchasing the raw material and at that time had asked Arbaz to look after the victim. At about 8.30 p.m., Arbaz went out for bringing something and the victim was left with the appellant. At about 9.00 p.m., the appellant dropped the victim and his brother

back to their house. The victim started crying. The victim told PW-1 that the appellant had committed wrong with him. He told her that the appellant had put his private parts in the mouth of the victim. The victim told her that the appellant should be punished. PW-1 then called her husband. He returned home and then they went to the police station and lodged the FIR. The FIR lodged by PW-1 is produced on record at Exhibit-19. She has deposed that the appellant's other name was Iqbal. She identified the appellant before the Court. After recording of the FIR, the victim was sent for medical examination. The police seized the clothes of the victim. The victim's statement was recorded under Section 164 of Cr.P.C. That statement is produced on record at Exhibit-20.

During investigation the police had gone to the spot of incident. The birth certificate of the victim was produced by her. Copy produced on the record was a photo copy. It was compared with the original copy. It was produced on record at Exhibit-22.

In the cross-examination, she was asked about the relationship with her husband and her children. She admitted

that the appellant was working with her husband since two and half years prior to the incident. After that, the appellant had not worked in their factory for one and half years. She denied the suggestion that during that period he had started his own printing business. But she volunteered that her husband had told the appellant that he would support the appellant.

Then she was cross-examined about the location of the factory. She admitted that the workers in the factory were mostly their family members. She did not know from where her husband purchased the raw-material. She deposed that, after she had informed her husband about the incident, they went to the police station. They had not gone to the factory. The appellant had run away. He was caught in another factory. In the meantime, PW-1 had sent one Naved in search of the appellant. It is her case that the appellant was brought to the police station by her husband. Besides this cross-examination, some minor omissions from her police statement were brought to her notice but those omissions are not relevant for this case. The FIR itself was registered at

about 2.00 a.m. on 16.2.2016. The information was given to the police station at 1.30 a.m. on 16.2.2016. The FIR substantially corroborates PW-1's evidence.

7. PW-2 was the victim himself. He has deposed that he knew Iqbal. He was residing in his father's factory. He then described the incident in which the appellant had put his private parts in PW-2's mouth. This happened in the factory. The appellant was alone with the victim. At that time PW-2's father had gone out of the factory. Naved, Rehan and other workers had also gone out of the factory. The appellant had forced the victim by catching his hair and pushing him down. After that, PW-2's parents took him to the police station. The police recorded his statement. PW-2 was referred for medical examination. His statement was recorded by the Magistrate subsequently. The victim identified the appellant, who was produced through V.C.

In the cross-examination, he deposed that, throughout the day his father was with him. PW-2's brother was dropped home by his father. In the cross-examination he further stated that

he had attended the Court on a few occasions previously. He had seen the appellant when he had come to the Court. The appellant was sitting outside the Court. At that time PW-2's father had told him that the appellant was bad. PW-2 further deposed that before coming to the Court, his father had not disclosed anything to him regarding the case. PW-2 asked his father why he was taken to Court. At that time his father told him that they had lodged the complaint against the uncle. PW-2's father told him that said uncle was having beard and further told him to identify that uncle with beard. He denied the suggestion that the appellant had not done any bad act with him.

8. The spot panchnama is produced on record at Exhibit-28. At the time of conducting the spot panchnama, the victim was present at the spot. The spot was shown by PW-1. The spot of incident was on the mezzanine floor of the gala where PW-2's husband was having his business for printing. The victim's clothes were produced by PW-1 under panchnama at Exhibit-29. Both these panchnamas were conducted in the morning of 16.2.2016.

9. PW-6 Dr.Dere had medically examined the victim on 16.2.2016. The victim narrated the incident and history of the incident to him. It is consistent with his deposition. PW-6 preserved buccal swab and perioral swab for examination. He gave opinion that the evidence of sexual intercourse/assault could not be ruled out. The final opinion was kept pending till receipt of the CA report. The CA report did not disclose evidence of any semen detected in any of the swabs. He further deposed that if the activity is prolonged and if the victim is examined after a few hours; during this period, the victim may drink water or any liquid or brush his teeth and, therefore, they may not find any semen or sperm in the oral cavity. He maintained that there was no mention of sexual assault in the CA report, still oral sexual act could not be ruled out. This witness had also examined the appellant and in his opinion there was nothing to suggest that the appellant was incapable of performing sexual assault.

He had also conducted ossification test on the victim and had found that the victim was around four years of age

10. PW-3 WPSI Anita Metkar had recorded the victim's statement on 17.2.2016 in presence of his parents.

11. PW-4 API Sandeep Mane was present in the police station in the midnight at around 1.30 a.m. on 16.2.2016 at Wadala T.T. police station. PW-1, PW-2 and PW-1's husband came to the police station. PW-1 informed the incident to him. He recorded her statement and registered the offence vide C.R. No.80/2016. He identified the FIR. He then referred the victim for medical examination at Sion Hospital. He seized clothes of the victim. He has deposed that the detection squad of their police station brought the appellant to the police station. He arrested the appellant on 16.2.2016 in presence of two panchas. He seized clothes of the appellant. He then visited the spot of incident. It was in the garment factory at Wadala. He obtained the birth certificate of the victim for age proof.

In the cross-examination, he deposed that he has not investigated regarding one Ahmed Master. He admitted that he had not found anything at the spot. There were other factories

around the spot of incident. The appellant was brought before him by the detection squad on 16.2.2016 in the evening.

12. PW-5 PI Mohan Yedurkar was the next investigating officer. He conducted the investigation after 17.2.2016. He caused recording of the victim's statement. The victim was referred for medical examination. The samples were sent to FSL. He recorded statements of the witnesses including the carrier of the samples. The birth certificate of the victim was collected. The victim was sent for recording statement under Section 164 of Cr.PC..

In the cross-examination, he stated that he had recorded the statements of Riyaz Khan, Naved Khan, Arbaz Khan and Mohd. Ahmed Malik who was also known as Ahmed Master. He denied the suggestion that at the time of incident Naved and Ahmed Master were present at the spot.

. This, in short, was the prosecution evidence.

13. The CA reports do not really indicate any important material.

14. Learned counsel for the appellant submitted that the evidence of PW-2 shows that he was tutored by his father. He has identified the appellant at the instance of his father and, therefore, evidence of PW-2 is wholly unreliable.

15. According to Shri Bhujbal the other important witnesses i.e. statements of co-workers were recorded by the investigating officer but none of them was examined by the prosecution during trial and, therefore, adverse inference is required to be drawn.

16. There are no corroborative pieces of circumstances including the CA report.

17. The circumstances regarding the arrest of the appellant are doubtful. PW-1 has deposed that the appellant was caught by PW-1's husband whereas the investigating officer has deposed that the detection squad had produced the appellant before him in the evening of 16.2.2016. He submitted that the appellant is implicated falsely because of misunderstanding and because of business rivalry.

18. Learned APP as well as learned counsel for the respondent No.2 submitted that the evidence of PW-1 and PW-2 corroborated each other. There are hardly any material contradictions and omissions in their depositions compared to their earlier statements. The victim had immediately narrated the incident to his mother i.e. to PW-1. The matter was reported immediately to the police. There was no scope for concoction or creating false story. The husband of PW-1 catching the appellant was also natural. Therefore, the manner of arrest will not matter. He submitted that though PW-2 has deposed that his father had shown the appellant, the evidence if read as a whole shows that there could not be any discrepancy in the identity or identification of the appellant.

19. I have considered all these submissions. I have closely scrutinized the evidence of PWs-1 & 2. PW-2 was about 6 years & 7 months of age at the time of recording of his evidence in the Court. He has given clear answers. He has described the incident with sufficient clarity and with sufficient details. He was emphatic

in his stand that the appellant had committed this particular act. He has described the act. His evidence is sufficiently corroborated by PW-1. The sequence of events shows that the appellant himself had left the victim to his house and immediately the victim had complained to his mother i.e. PW-1 about the act committed by the appellant. This immediate disclosure has importance. The victim was knowing the appellant. According to PW-1, the appellant himself had dropped the victim to his house and immediately PW-2 had narrated the incident. There is, therefore, no reason to doubt the prosecution case which unfolded through the evidence of PW-2 and PW-1. The FIR is also immediate. In the FIR, the appellant's name is disclosed. There is, therefore, no dispute about the identity of the appellant. In this context, the cross-examination of PW-2 wherein he has stated that his father had told to identify the appellant will not make any difference in this particular case.

20. The circumstances in which the appellant was apprehended are also not unnatural. After coming to know about

the incident it was natural for the victim's parents to search for the appellant. The victim's mother i.e. PW-1 had sent the co-workers in search of the appellant. The victim's father had also gone to search for him. They were knowing the appellant and his whereabouts and, therefore, he could be caught. Therefore, in this situation if the detection squad of the police produced him before the investigating officer in the evening for effecting formal arrest; that does not affect the prosecution case. There are no other corroborative pieces of evidence in the form of CA reports etc. The medical officer has explained that in such cases it was unlikely that any corroboration from the CA report would have been possible. At the same time, she has opined that the possibility of commission of offence was not totally ruled out.

21. Considering all this discussion, in my opinion, the prosecution has proved its case beyond reasonable doubt. The impugned judgment and order cannot be interfered with. Hence, the appeal is dismissed.

(SARANG V. KOTWAL, J.)