

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

CRIMINAL APPEAL NO.1109 OF 2022

WITH

**INTERIM APPLICATION NO.1643 OF 2022
IN
CRIMINAL APPEAL NO.1109 OF 2022**

Gautam Dhondu Dhone
Age : 55 years, Occ.: Labour,
R/at : beside M.R.A. Marg Police Station,
Behind BMC Chawl No.A/B Zopadpatti,
Mumbai.
Presently lodged at
Amravati Central Prison

.... Appellant

versus

1. State of Maharashtra
(L. T. Marg Police Station
in C.R. No.226/14)
 2. XXX
- Respondents

.....

- Mr. Prasad B. Kulkarni (Appointed), Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent No.1.
- Mr. Pawan Mali, (Appointed) Advocate for Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.
DATE : 02nd FEBRUARY, 2023

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 21/08/2019 passed by the Special Judge under POCSO Act, Greater Mumbai, in Special POCSO Case No.421/2014. By the impugned Judgment and Order, the Appellant was convicted as follows ;

- (a) The Appellant was convicted for commission of offence punishable u/s 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and was sentenced to suffer rigorous imprisonment of 15 years and to pay a fine of Rs.20,000/- and in default of payment of fine to suffer further rigorous imprisonment for two months.
- (b) He was also convicted for commission of offence punishable u/s 10 of the POCSO Act and was sentenced to suffer rigorous imprisonment of 7 years and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer further rigorous imprisonment for one month.
- (c) Both the sentences were directed to run concurrently.
- (d) The Appellant was given set off u/s 428 of Cr.P.C.

2. Heard Mr. Prasad B. Kulkarni, learned counsel for the Appellant, Mr. Pawan Mali, 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 in this case was about 7 years of age. Her date of birth was 21/07/2007. The Appellant used to be in the same area where the victim was residing with her parents. The incident had occurred on 05/08/2014. It is the prosecution case that the Appellant took her in front of a shop and inserted his finger in her private part. The victim went to her mother and narrated the incident to her. In the meantime, the father of the victim had caught the Appellant. He was taken to the police station. The mother of the victim lodged the FIR which is registered vide C.R.No.226/2014 at L. T. Marg police station. The Appellant was arrested. His clothes were seized. The clothes of the victim were seized. Both of them were sent for medical examination. The statement of the witnesses were recorded. Spot Panchanama was 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 10 witnesses including the victim, her parents, Medical Officers, the Panchas, a teacher from the victim's school and the Investigating Officers. The defence of the Appellant was of total denial.
5. The learned Trial Judge considered the evidence on record and the defence of the Applicant. After hearing the parties, he convicted and sentenced the Appellant as mentioned earlier.
6. The victim is examined as PW.5. She has deposed that she was residing with her parents and elder sister. She was going to a school in Chandanwadi. Her school timing was from 12 p.m. to 6 p.m. On the date of incident, when she was returning home, one uncle called her. He made her sit next to him. He touched her on her legs. After that he touched her private part.

She started crying. She then disclosed that incident to her mother. Her mother came to the spot. P.W.5 then pointed out the Appellant to her mother. After that, her parents brought the accused to the police station. She has further deposed that she was acquainted with the Appellant as he was a sweeper and used to do his job in their vicinity. She identified the Appellant before the Court. She identified her clothes. The police had recorded her statement. Her statement was also recorded u/s 164 of Cr.P.C. It is produced on record at Ex.27.

In the cross-examination, she deposed that her statement was recorded by a male police officer. She could not explain why her police statement did not mention that the accused had touched her legs or that the accused had touched her private part. She further admitted that there were shops around the place of incident and many people used to visit that area. She had not called anybody for help after the incident. After she started crying, people had gathered there.

7. P.W.1 is the mother of the victim. She had lodged the FIR. She has deposed that the incident had occurred in August 2014. The victim came towards her and was crying. P.W.1 enquired with her. P.W.1 deposed that the victim told her that one person removed her frock, touched her body and then removed her knicker and he put his finger in her private part. The victim took her to the place where the incident had taken place. P.W.1 saw that her husband had already caught the Appellant. P.W.1 identified the Appellant in the Court at the time of her deposition. She further deposed that she had seen the Appellant prior to the incident as he used to roam around in that locality. The Appellant was taken to the police chowky. The victim had also come to the police station. P.W.1 lodged her FIR, which is produced on record at Ex.14. The victim was then taken to the hospital for medical examination.

In the cross-examination, she stated that her husband was working in one shop which was at about 5 minutes walking distance from their house. She admitted that the locality where

she was staying, was a crowded area and it was difficult to walk on the footpath because of the crowd. She denied the suggestion that since the Appellant started working at the same place where P.W.1 was working, it had impact on her income and therefore the appellant was implicated falsely. The FIR was produced on record at Ex.14. It was recorded at 12.30 p.m. on 05/08/2014. It substantially corroborates the evidence of P.W.1.

8. P.W.2 is the father of the victim. He has deposed that on the day of incident, one person told him that a girl was crying in their area. P.W.2 then went to see what had happened. He saw that his daughter was crying. He then called the victim's mother. The victim told her mother about the incident. He then gave the narration as was deposed by P.W.1 in respect of what the victim told him describing the incident. P.W.2 then went to enquire with the Appellant. He took the Appellant to the police station. They were accompanied by the victim and P.W.1. The victim's mother P.W.1 lodged the FIR. P.W.2's statement was recorded by the police. Then, he took the police to the spot of incident. The Spot

Panchanama was drawn. He produced birth certificate of the victim at Article-C.

In the cross-examination, he also admitted that there were shops all around. The people and customers used to visit the shop near the spot of incident. The occupants of the premises also used to come and go in the said building.

9. P.W.3 Rajendra Sitap was the Pancha, in whose presence the clothes of the Appellant were seized. The Panchanama is produced on record at Ex.21. It was conducted between 02.30 to 03.20 p.m.

10. P.W.4 Asha Mangaonkar, was a Pancha for seizure of the victim's clothes. The Panchanama is at Ex.25. It is conducted at 01.10 p.m.

11. P.W.6 Sayali Breed, was a teacher of the school where the victim was studying. She produced the register where there

was entry regarding the victim showing her date of birth as 21/07/2007. She had issued a certificate to that effect which is produced on record at Ex.31.

12. P.W.7 Dr. Suchita Phad had examined the Appellant. In her opinion, there was nothing to suggest that he was impotent.

13. P.W.9 Dr. Dhruv Gohil, had examined the victim on 05/08/2014. He has deposed that he had recorded the history given by the victim's mother. On examination he did not find any fresh external injury except multiple HYPO to Hyper pigmented Maculopapular lesions which were present over the body. Itching was absent at the time of examination. On local examination, the findings were normal. He opined that as per the history given by the mother of the victim, the possibility of the sexual assault could not be ruled out.

14. P.W.8 API Rekha Sakpal was on duty when P.W.1 lodged her FIR. This witness has recorded the FIR. She had arrested the Appellant. Then she recorded the statement of two children

playing with the victim. She seized the clothes of the victim. The further investigation was handed over to API Gaware who is examined as PW.10. PW.8 has deposed in her cross-examination that CCTV cameras were installed in that area, but she had not collected any CCTV footage.

15. PW.10 API Gaware was the second Investigating Officer. He had conducted the Spot Panchanama. He seized the clothes of the Appellant. He had forwarded the clothes for chemical analysis. He collected the certificate from victim's school regarding her date of birth. He arranged for recording of victim's statement u/s 164 of Cr.P.C. He produced the Spot Panchanama at Ex.39. The spot was on the platform of the ground floor opposite a shop.

16. The C.A. reports were produced on record at Ex.4. They show that there were blood stains of 'B' group on the frock of the victim. There were semen stains on the underwear of the Appellant.

This, in short, is the evidence led by the prosecution.

17. The defence of the Appellant as mentioned was of total denial. Learned Judge believed the prosecution evidence. She believed the evidence of the victim and her parents. She relied on the evidence and in particular the C.A. reports showing presence of blood on the victim's frock and presence of semen on the underwear of the Appellant. Based on these aspects, she recorded the findings against the Appellant.

18. Learned counsel for the Appellant submitted that the prosecution has not proved its case beyond reasonable doubt. There are various contradictions in the evidence of the important witnesses PW.5, the victim and the parents i.e. PW.1 and PW.2. The victim has told that she had approached her mother and had narrated the incident and both of them went to the spot where the father had already caught the accused. Her mother also has deposed in the same manner. Learned counsel

therefore submitted that there was no occasion for the father to know that the Appellant had committed this act and therefore he could not have caught the Appellant. The evidence shows that the Appellant was caught either on suspicion or deliberately to implicate him falsely. He further submitted that the victim's deposition nowhere shows that the Applicant had put his finger in her private part and therefore there was no penetration at all. Even otherwise, there are important omissions in the victim's statement as are brought out in her cross-examination. She has admitted that her police statement does not include her case that the Appellant had touched her legs or her private part. She could not assign any reason as to why these important facts are not mentioned in her police statement. He submitted that though learned Judge has relied on the C.A. report showing presence of blood on the frock and presence of semen on the underwear of the Appellant, these circumstances were not put to the Appellant in the examination u/s 313 of Cr.P.C. and therefore this factors could not have been taken into consideration while recording the finding.

19. Learned APP and learned counsel for the Respondent No.2 opposed these submissions. They submitted that the omissions referred to by learned counsel Mr. Kulkarni regarding the important statements of the victim, were not put to the Investigating Officer. Therefore the omissions are not proved by the defence. The Appellant cannot take advantage of these omissions. They submitted that how the Appellant was caught, is hardly an important issue. This is a minor discrepancy in the evidence. The prosecution case is consistent with the father's evidence that the victim told about the incident to her mother. The father was in that area itself. He also was present when the victim told about the incident to her mother and then he went to the spot where the Appellant was present. The Appellant was taken to the police station immediately and therefore there was no scope to argue that it was a false case or it was a concocted case.

20. I have considered these submissions. As far as the sequence of events is concerned, after the victim had narrated

the incident, the Appellant was immediately caught by P.W.2 and he was taken to police station. The FIR was lodged immediately. Therefore some incident had definitely taken place and pursuant to the FIR, the Appellant was immediately arrested. To that extent, the evidence of P.W.1, P.W.2 and P.W.5 is consistent.

21. The important question would be whether there was penetrative sexual assault. In that context, the evidence of P.W.5- the victim is more important than any other evidence. She has narrated in her deposition that the Appellant had touched her legs. Then she has deposed that the Appellant had touched her private part. She had nowhere deposed that the Appellant had inserted his finger in her private part. There is absolutely no allegation or statement that there was any penetration. Even her statement u/s 164 of Cr.P.C. does not specifically mention that there was penetration. There was no re-examination of the victim to clarify this position. Therefore, at the highest, it can be said that there was sexual assault as defined u/s 7 of POCSO Act. Though, the FIR as well as the evidence of both the parents

mentions that the victim had told about the penetration, the substantive evidence would be that of the victim. At the time of her deposition, she was 12 year old. She had sufficient understanding of the questions put to her. She was also administered oath and she was very clear in her deposition. Therefore prosecution case does not cover the ingredients of the offence of penetrative sexual assault.

22. As far as the blood stains on the frock of the victim are concerned, the medical evidence does not show that there was injury, much less, the bleeding injury caused to her private part. Therefore, those blood stains cannot be directly attributed to the alleged act of the Appellant. The medical evidence also shows that there was Maculopapular lesions over the body. But at the time of examination, the itching was absent. Therefore, there is a possibility of bleeding was because of this medical condition. This cannot be attributed to any sexual assault. Therefore, even that circumstance does not point to the theory of penetrative sexual assault.

23. With the result, I am of the opinion that the prosecution has proved its case beyond reasonable doubt only in respect of the sexual assault as defined u/s 7 of the POCSO. The prosecution has failed to prove its case beyond reasonable doubt in respect of offence u/s 6 of POCSO which is the aggravated penetrative sexual assault, which is defined u/s 3 r/w 5 of the POCSO Act. The victim was below 12 years of age. There is hardly any dispute about her age. Therefore, section 9(m) and 10 of POCSO are attracted in this case which means that the act falls within the definition of aggravated sexual assault. Under that section, the punishment is prescribed which cannot be less than 5 years, but which can extend 7 years besides liability of paying fine. In this case, the Applicant is in custody since 05/08/2014. Thus more than 8 years and 6 months have passed. The maximum punishment which can be imposed on him is 7 years. Therefore, the sentence imposed on him has to be 7 years or less. The Appellant has already crossed that period and hence he deserves to be released forthwith.

24. Hence, the following order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) The conviction and sentence of the Appellant u/s 6 of the Protection of Children from Sexual Offences Act, 2012, by the Special Judge under POCSO Act, Greater Mumbai, in Special POCSO Case No.421/2014 is set aside.
- (iii) The conviction and sentence u/s 10 of the Protection of Children from Sexual Offences Act, 2012, are maintained.
- (iv) Hence the sentence imposed on him is now rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer further rigorous imprisonment for one month.
- (v) Since the Appellant has already suffered the sentence for more than 8 years 6 months, he shall be released forthwith, if not required in any other case.

- (vi) The Appeal is disposed of.
- (vii) With disposal of the Appeal, the connected Interim Application is also disposed of.

(SARANG V. KOTWAL, J.)