

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

CRIMINAL APPEAL NO. 296 OF 2021

Khandu Prabhakar Unkule

..Appellant.

Versus

The State of Maharashtra & Anr.

..Respondents

Ms. Savita A. Prabhune for Appellant.

Mr. S. R. Agarkar, APP for State/Respondent No.1.

Ms. Megha Bajoria (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 3rd JANUARY 2023

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 30/11/2018, passed by learned Special Judge under POCSO Act, Khed – Rajgurunagar, District Pune, in Special Case (POCSO) No.22 of 2015. The Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s. 376(2)(f) and 376(2)(i)

of the I.P.C. and was sentenced to suffer R.I. for 15 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for one year.

- ii) The Appellant was convicted for commission of offence punishable U/s. 506 of the I.P.C. and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for one year.
- iii) The Appellant was convicted for commission of offence punishable U/s.4 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act') and was sentenced to suffer R.I. for 7 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for 4 months.
- iv) The Appellant was convicted for commission of offence punishable U/s.6 of the POCSO Act and

was sentenced to suffer R.I. for 15 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for 1 year.

- v) The Appellant was convicted for commission of offence punishable U/s.8 of the POCSO Act and was sentenced to suffer R.I. for 4 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for 4 months.
- vi) The Appellant was convicted for commission of offence punishable U/s.10 of the POCSO Act and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for 1 year.
- vii) The Appellant was convicted for commission of offence punishable U/s.12 of the POCSO Act and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for 2 months.

viii) All the substantive sentences were directed to run concurrently.

ix) Out of the recovered fine amount, Rs.15000/- were directed to be paid to the victim. The Appellant was granted set off for the period which he had undergone as under trial prisoner during investigation and trial.

2. Heard Ms. Savita Prabhune, learned counsel for the Appellant, Shri. Agarkar, learned APP for the State/Respondent No.1 and Ms. Megha Bajoria, learned Appointed Advocate for the Respondent No.2.

3. The prosecution case is that the Appellant was the paternal uncle of the victim. He was residing with the victim's family. His wife was not residing with him. The victim's parents, the victim and the Appellant's mother were staying together in the same house with the Appellant. The victim was around 6 year old on 01/03/2015. Her date of birth was 16/04/2009. It is the prosecution case that the Appellant used to take her to a temple on

his two wheeler every Sunday. On the way, he used to insert his fingers in her private part. He used to show her pornographic films and pictures on his mobile phone. The victim suffered from infection. She was taken to a Doctor. He opined that there was a possibility of penetrative sexual assault on her. The victim's mother went to her parent's house with the victim. From there she contacted a social organization and with their help gave a complaint to Sinhgad police station on 24/04/2015, which was registered as C.R.No.00 of 2015. It was transferred to Junnar police station who had jurisdiction to conduct the investigation in that behalf. The C.R.No.54 of 2015 was registered at Junnar police station. The investigation was carried out. The Appellant was arrested immediately after registration of the F.I.R. The victim was sent for medical examination. The statements of various witnesses were recorded and at the conclusion of the investigation, the Charge-sheet was filed. The case was committed before the Special Court.

4. During trial, the prosecution examined eight witnesses including the victim, her mother, the social worker, panchas, the

Medical Officer and the Investigating Officers. The defence of the Appellant was of total denial. In his support, the appellant examined his mother as the Defence Witness No.1. Learned Judge, after considering all the aspects, believed the prosecution case. He convicted and sentenced the Appellant as mentioned earlier.

5. The victim was examined as PW-3. She has deposed that her date of birth was 16/04/2009. The Appellant was her uncle. At the time of the incident, she herself, her parents, her sister and the Appellant were residing together. Learned Judge has recorded that while deposing PW-3 was disturbed. After a little break her examination continued. But still she did not continue with her deposition and, therefore, the matter was adjourned further. On the next occasion, she described the incidents. She deposed that the Appellant used to take her to a temple at Vadaj on his two wheeler. The Appellant used to insert his hand in her pant. She was taken to hospital. She had narrated the incident to her mother and the Doctor. Because of the appellant's act she was suffering from pain in her private parts. She further deposed that, her statement was recorded in the Court at Junnar. She identified that

statement recorded U/s.164 of the Cr.p.c. It is produced on record at Exhibit 31. She admitted that the contents of that statements were true and correct.

After the examination was over, learned counsel representing the Appellant had filed an application at Exhibit 32 stating that he had no instructions from the Appellant and prayed for adjournment. That application was rejected. The Appellant was produced on video conferencing. He was given an opportunity to cross-examine the victim, but he had refused and, therefore, the victim's deposition was closed.

6. From the record, it can be seen that one application was made on behalf of the Appellant at Exhibit 42 for recalling the victim for her cross-examination. Learned trial Judge passed a detailed order. He had observed that the victim was present on 18/08/2016 for recording her evidence. Thereafter, her evidence was partially recorded on 8/8/2018, but she appeared to be under pressure, therefore, her evidence was recorded on the next date. On 10/10/2018 her examination in chief was completed, but

learned advocate for the appellant filed an application for adjournment vide Exhibit 32. Before that, he had filed a pursis at Exhibit 30 stating that he was ready to conduct the matter in absence of the accused, there was no question of identification of the accused and that the accused would not claim any prejudice. On that basis, the evidence of the victim was recorded; but after that, an application for adjournment was made. According to learned trial Judge, his conduct clearly showed that the appellant was trying to prolong the matter and was adopting such tactics to pressurise the victim. Learned Judge also observed that, Section 33(5) of the POCSO Act provided that the child should not be called repeatedly to testify in the court. According to learned Judge, sufficient opportunity was given to the learned advocate for the appellant, as well as, to the appellant himself to cross-examine the victim, but they had refused to avail of the same. Accordingly, his application was rejected on 14/11/2018. Thereafter this order was never challenged by the appellant and that order had attained finality.

7. The statement of the victim recorded U/s.164 of the

Cr.p.c. which was produced on record at Exhibit 31 describes the incidents. She had specifically stated in her statement that the appellant had inserted his finger in her private parts. He used to commit this act on every Sunday. He used to threaten her. He also used to show pornographic material on his mobile phone.

8. PW-5 was the mother of the victim. She has deposed that the victim's date of birth was 16/06/2009. At that time, all of them including the Appellant and his mother were staying together. The Appellant had obtained divorce from his wife. In March 2015, the victim told her that, she was suffering from pain at the time of urination. PW-5 then examined her and found reddish colour on the victim's private part. PW-5 took her to a doctor at Junnar. The doctor examined the victim and told PW-5 that victim's hymen was torn and opined that someone must have inserted finger in the victim's private part. PW-5 then inquired with the victim. At that time, the victim told her that the Appellant used to insert his finger in her private part and he used to show obscene pictures in his mobile phone to her. She also told PW-5 that the Appellant used to threaten her that if she told this fact to anybody he would beat her.

After that, PW-5 took her to her parent's house at Sinhgad road, Pune. She narrated that incident to her mother. Then she made a phone call to Nari Samata Manch. She had talked with PW-4 Smt. Ashumati Deshpande who was working there as a Counselor. She met PW-4 in her office and narrated the incident. Then they went to Sinhgad police station for lodging her complaint. The police officer recorded her statement and registered the F.I.R. The F.I.R. is produced on record at Exhibit 37. After that the victim's statement was also recorded. The victim was sent for medical examination at Sassoon Hospital. The victim told the history to the Medical Officer. PW-5 then produced the clothes of the victim.

In the cross-examination, she stated that the Appellant used to look after all the transactions in their house. PW-5's husband was doing labour work. She denied the suggestion that she had demanded partition from the Appellant and his mother i.e. from her mother in law and on their refusal this false complaint was lodged. The victim was suffering from pain since two months. Since 05/03/2015, PW-5 knew about that. She explained that the

delay caused in lodging F.I.R. was because her family members had overlooked the incident, though they were told about it. Then she went to her parent's house on 13th to 14th March, 2015 and then had lodged this F.I.R.

9. PW-4 Ashumati Deshpande was working with Nari Samata Manch. She has deposed that, on 23/04/2015 she received a phone call from PW-5 regarding her grievance involving the victim. PW-5 met her and narrated the incident. Then she helped PW-5 in lodging the F.I.R. In her examination in chief, she had made certain allegations against the Appellant as told to her by PW-5, but most of those allegations were in the form of omissions from her police statement and, therefore, her deposition beyond that point will not be very material.

10. PW-1 Mohan Gaikwad was a pancha in whose presence mobile phone and motorcycle of the appellant were recovered at his instance on 02/05/2015. The panchanama is produced on record at Exhibit 15.

11. PW-2 Navnath Chavan was a pancha for spot

panchanama. It is produced on record at Exhibit 22. The spot was shown by the Appellant himself.

12. PW-8 P.S.I. Kalyani Padole was attached to Sinhgad police station. She had recorded the F.I.R. as per the information given by PW-5. She also recorded the statements of the victim, PW-4 Ashumati Deshpande and one Mayuri Joshi. The offence had taken place within the jurisdiction of Junnar police station, therefore, PW-8 gave her report to her superior. C.R.No.00 of 2015 was registered at Sinhgad police station. Then it was transferred along with the documents to Junnar police station.

13. PW-6 A.P.I. Raosaheb Khedekar was attached to Junnar police station. C.R.No.54 of 2015 was registered at that police station. A lady police Naik Ghode recorded the statement of the victim in presence of this witness PW-6. After that, PW-6 sent the victim to Sassoon hospital for medical examination. He arrested the appellant. He conducted the spot panchanama. He caused recording statement of the victim U/s.164 of the Cr.p.c. He recovered the mobile phone and motor bike at the instance of the

Appellant. The spot panchanama was conducted. He had sent the seized articles to F.S.L. He had asked for conducting ossification test of the victim. The ossification test report is produced on record at Exhibit 57. It mentions that the victim's age on 27/04/2015 was above 5 years and below 7 years.

14. PW-7 Dr. Ruchi Thakur was attached to Sassoon Hospital, Pune. The victim was examined by Dr. Namara Shaikh who was working under PW-7. However, Dr. Shaikh was pregnant at the time of recording of the evidence during trial, therefore, she was unable to attend the Court. In stead of her PW-7 Dr. Ruchi Thakur appeared before the Court. She was knowing the hand writing of Dr. Shaikh and, therefore, she could produce and identify the medical papers in respect of the medical examination of the victim. PW-7 deposed that the victim was examined on 26/04/2015. As per the history given by the victim, the Appellant used to insert his finger in her private part and used to show obscene pictures on his mobile phone. On medical examination, it was found that the victim's hymen was torn at 9, 6, 3 and 1 O'clock position. There was old healed tears, perihymeneal

minimal inflammation was present. The opinion was that, those injuries were probable if a grown up person commits fingering in private part of the victim. Dr. Shaikh opined that there was evidence of vaginal penetration and from clinical examination it could be opined that there was evidence of perihymeneal inflammation. The medical papers were produced on record at Exhibit 66. This witness was cross-examined mainly in respect of the infection and white discharge. She particularly denied the suggestion that due to infection and scratching, the victim had suffered old healed hymeneal tears at those positions. She added that, at the time of her examination the victim was not suffering from white discharge.

15. This was the evidence led by the prosecution. As mentioned earlier, the defence of the Appellant was of total denial. However, he examined his mother Manorama Unkule as Defence Witness No.1. She has deposed that all the transactions in the family were looked after by the Appellant as he was the elder son. The Appellant's wife was residing separately as there was divorce between the Appellant and his wife. The victim was suffering from

white discharge and for that, she was taken for medical treatment. She was recovering. In March 2015, on one Sunday, PW-5 along with the victim and her another daughter went to her parent's house and since then there was no communication between PW-5 and this witness. PW-5's husband tried to bring her back, but she had refused. After that the Appellant was arrested and this witness came to know that PW-5 had lodged the F.I.R. This was her evidence. There was no cross-examination on behalf of the State. This evidence of the defence witness No.1 does not really throw light on the facts of the case.

16. Learned counsel for the Appellant submitted that the victim was not cross-examined and thus, prejudice was caused to the Appellant. There was a delay of about one month and 23 days in lodging the F.I.R. The delay was not explained. The cell phone recovered at the instance of the Appellant was not showing any obscene picture and there is no report from the F.S.L. to confirm that said cell phone did contain any pornographic material. She further submitted that the appellant was falsely implicated because of property dispute. The deposition shows that the victim was

reluctant to give evidence and there are indications that she deposed only at the instance of PW-5 i.e. her mother.

17. Learned counsel for the Respondent No.2, as well as, learned APP opposed these submissions. They submitted that the victim was only 6 year of age at the time of incident and it was not expected that she would freely answer all the questions. They submitted that, sufficient opportunity was given to the Appellant to cross-examine the victim as is recorded below Exhibit 42 by the learned Trial Judge. According to both learned counsel, the medical evidence sufficiently corroborated the evidence of the victim. The mother-PW-5 has explained in what manner and under what circumstance the offence was registered and thus, delay, if any, stood explained.

18. I have considered these submissions. As far as submission that the victim was not cross-examined causing prejudice to the appellant is concerned; the learned Trial Judge has given sufficient reasons as to how the Advocate and the Appellant conducted the trial. Learned Judge has rightly relied on

Section 33 of the POCSO Act. The record shows that the victim was traumatized even at the time of giving evidence and recalling her time and again would have caused further trauma to her. In spite of that, sufficient opportunity was given to the Appellant and his advocate. The order passed on Exhibit 42 was not challenged. It was passed on 14/11/2018 and since then there is no challenge to that order. After that the trial proceeded and was concluded. Therefore, it cannot be said that the Appellant was wrongly deprived of conducting cross-examination of the victim.

19. Apart from the evidence of the victim, there are other strong circumstances against the Appellant in the nature of conduct of PW-5 and PW-4. Both of them have explained the circumstance in which the F.I.R. came to be lodged. The F.I.R., the medical history and the statement of the victim recorded U/s.164 of the Cr.p.c. are quite consistent. In all these statements which were recorded at around the same time, there is consistent version that the Appellant had committed penetrative sexual assault on the victim. There is no inconsistency in all these statements. The statement of the victim recorded U/s.164 of the Cr.p.c. is duly

proved through the evidence of the victim. Even in that statement, clear description of the incident is given by the victim. All these statements and versions are consistent. Therefore, it can safely be held that the Appellant had committed those acts as are mentioned in those statements.

20. The mother of the victim PW-5 had explained that on coming to know about the incident, she had told about it to all the family members of her husband, but nobody paid any attention. Therefore, she took her daughters and went to her parent's house. There, she contacted a social organization and then lodged this F.I.R. Therefore, this explanation for registering the F.I.R. after more than a month is explained by PW-5. This explanation is quite reasonable and hence it is acceptable.

21. Apart from the ocular version of these witnesses, the prosecution case is amply supported by the medical evidence. PW-7 Dr. Ruchi Thakur has produced the medical papers regarding medical examination of the victim. The medical evidence proves that there was penetrative sexual assault on the victim, as

discussed earlier. This is quite consistent with the prosecution case. The ossification test conducted on the victim showed that her age was between 5 to 7 years. Thus, the prosecution has proved all basic ingredients of Section 6 of the POCSO Act, as well as, Section 376(2)(f) and 376(2)(i) of the I.P.C. Learned Judge has considered these aspects properly and hence, conviction recorded for these sections is proper.

22. As far as the offence U/s.12 of the POCSO Act is concerned, the prosecution case is that the Appellant used to show obscene videos and photographs on his mobile phone to the victim. The prosecution had seized the Appellant's mobile handset. However, there is no further evidence to show that the mobile phone had any such pornographic or obscene material. To that extent, there is some doubt created about the prosecution case; because it was possible for the investigating agency to lead evidence in that behalf. Therefore, to that extent benefit of doubt in respect of these allegations can be extended to the Appellant. Therefore, conviction and sentence recorded U/s.12 of the POCSO Act is required to be set aside.

23. Based on the above discussion, I am of the opinion that conviction under other offences except Section 12 of the POCSO Act has to be maintained.

24. The next question which I consider is about the quantum of sentence. Learned Judge has imposed sentence of 15 years R.I. for commission of the offence punishable U/s.6 of the POCSO Act and for the offences punishable under sections 376(2)(f) and 376(2)(i) of the I.P.C. Learned counsel for the Appellant submitted that the offence allegedly had taken place in 2015. The Appellant was arrested on 26/04/2015 and since then he is continuously in custody. The trial took almost three and half years from his arrest for completion. Even thereafter the Appellant remained in custody and now for more than eight years the Appellant is continuously in custody. The Appellant was never granted any furlough leave or parole leave. The Appellant does not have any criminal antecedents. The Appellant's mother is old and the evidence shows that there is no other family member to look after her. Her other son is hardly earning anything, therefore, it is the responsibility of the Appellant to look after her. She, therefore, submitted that,

minimum sentence be imposed on the Appellant. In this case, considering the date of offence in the year 2015, at that time, the minimum sentence U/s.6 of the POCSO Act was for 10 years, therefore, sentence be reduced to 10 years.

25. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that, considering the seriousness of the offence, the sentence imposed on him is proper and it may not be reduced.

26. I have considered these submissions for the sentencing part. In my opinion, there can be some reduction in the sentence based on the submissions made by learned counsel for the Appellant. However, considering the seriousness of the offence, a sentence more than minimum sentence is required to be imposed on the appellant. Therefore, though I am inclined to reduce the sentence from 15 years, I am not inclined to reduce it to 10 years. In my opinion, balance can be struck if the sentence is reduced to 12 years of Rigorous Imprisonment.

27. Hence, the following order:

O R D E R

- i) The Appeal is partly allowed.
- ii) The conviction and sentence recorded by the Trial Court under section 12 of the POCSO Act against the Appellant are set aside.
- iii) The conviction and sentences recorded U/s.506 of the I.P.C. and under sections 4, 8 and 10 of the POCSO Act against the Appellant are maintained.
- iv) The conviction of the Appellant U/s.376(2)(f) and 376(2)(i) of the I.P.C. is maintained. However, in stead of 15 years of R.I. the Appellant is sentenced to suffer R.I. for 12 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for one year.
- v) The conviction of the Appellant U/s.6 of the POCSO Act is maintained. However, in stead of 15 years of R.I. the Appellant is sentenced to

suffer R.I. for 12 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for one year.

- vi) All the substantive sentences are directed to run concurrently.
- vii) The Appellant is granted set off U/s.428 of the Cr. P. C.
- viii) Out of the fine amount, if it is recovered, Rs.15000/- be paid to the victim-PW-3 as compensation U/s.357 of the Cr.p.c. as is already granted by the Trial Court.
- ix) Rest of the clauses in the operative part of the impugned Judgment and order, if they are not inconsistent with this order, are retained as they are.
- x) The Appeal is disposed of.

(SARANG V. KOTWAL, J.)