

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

CRIMINAL APPEAL NO.917 OF 2022

Mohd. Khatir Shaikh alias	
Murgiwala Chacha	Appellant
Versus	
State of Maharashtra and another	Respondents

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**WITH
INTERIM APPLICATION NO.2805 OF 2022
WITH
CRIMINAL APPEAL NO.917 OF 2022**

Mr. Veerdhawal Kakade, Advocate (appointed) for the Appellant.
Smt. M.R. Tidke, APP, for the Respondent No.1-State.
Mr. R.S. Alange, Advocate for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 7th FEBRUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 29.1.2021 passed by the Designated Judge under Protection

of Children From Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act') for Greater Bombay in POCSO Special Case No.329/2018. The appellant was convicted and sentenced as follows :

- (i) The appellant was convicted for commission of the offence punishable under Section 6 of the POCSO Act and was sentenced to suffer RI for ten years and to pay fine of Rs.3,000/-; and in default of payment of fine to suffer RI for one and half months.
- (ii) He was further convicted for commission of the offence punishable under Section 10 of the POCSO Act and was sentenced to suffer RI for six years and to pay fine of Rs.1,000/-; and in default of payment of fine to suffer RI for fifteen days.

The substantive sentences were directed to run concurrently. He was granted set-off under Section 428 of Cr.P.C. The appellant was acquitted from the charges of commission of the offences punishable under Section 377 of IPC and under Sections 4 & 12 of the POCSO Act.

2. Heard Shri Veerdhawal Kakade, learned appointed counsel for the appellant, Smt M.R. Tidke, learned APP for the respondent No.1-State and Shri R.S. Alange, learned counsel for the respondent No.2.

3. The prosecution case is that the victim was five years old. His date of birth was 12.4.2012. The incident took place on 4.4.2018 at about 11.30 a.m.. The appellant took him to an isolated place and committed the offences which were defined under Section 377 of IPC and under Section 3 of the POCSO Act. Since the victim was below 12 years of age, the allegations were in respect of the offences of aggravated penetrative sexual assault. The victim boy came home and started crying. On enquiries made by his mother, he told her about the incident. His mother and one neighbour confronted the appellant who begged for forgiveness. After that, the victim's mother and the neighbour went to the police chowki. The FIR was lodged vide C.R. No.115/2018 at Wadala T.T. Police Station, Mumbai. The appellant was arrested. The statement of the victim was recorded. Both the appellant and the victim were sent for medical examination. Their clothes were

seized and sent for chemical analysis. The statements of witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed.

4. During trial, the prosecution examined eight witnesses including the victim, his mother, a neighbour, the medical officers, the carrier who carried the articles to the Laboratory and the investigating officers. The appellant's defence was that three women, including the victim's mother, were claiming the land which was in the appellant's possession. He had kept his articles in that portion of land. They were pressuring him to remove his articles from that place. They even set his articles on fire. His hand-cart and the articles were burnt; and this false case was filed against him because of this enmity.

5. The victim boy is examined as PW-1. He has deposed as follows :

His date of birth was 12.4.2012. He was residing with his parents, a brother and a sister at Wadala. He used to go to a school. The appellant resided near the creek where lot of articles

were kept. PW-1 was playing with his friends in the evening. The appellant made him sleep on a plank in his house. He did something on his anus. He removed his underwear and performed some act on that part. When PW-1 came home, he removed his underwear and started crying. His mother asked him the reason. He told her that the *Murgiwala Chacha* had done something on that part. He showed the house of *Murgiwala Chacha* to his mother. He had gone to the police station. His statement was recorded. His medical examination was conducted. His statement under Section 164 of Cr.PC. was recorded. He identified the appellant from the photograph affixed in the arrest form.

In the cross-examination, he deposed that his school began at 7.00 a.m.. He used to return alone from the school. On the date of incident, he had returned home at the lunch time. The appellant's house was at some distance from his house. His father did not purchase chicken from the appellant's shop. After the incident, there was a quarrel between his parents and the appellant. His mother had beaten the appellant on that day. He

denied the suggestion that his mother had explained to him about what to depose before the Court.

6. PW-2 is the mother of the victim. She produced his birth-certificate which is taken on record at Exhibit-23. It shows his date of birth as '12.4.2012'. She has deposed that on 4.4.2018, the victim was playing on the road. The appellant called him. At that time, she was filling water. After some time, the victim came home crying. He removed his underwear and kept on crying. She enquired with him. At that time, the victim told her that the appellant did something at his anus and that he was having pain. The victim took her to the appellant's house. She confronted the appellant. He tendered his apology and said that he had committed a mistake. Then, PW-2 went to the police station and lodged the FIR. The FIR is produced on record at Exhibit-24. The police recorded statement of the victim. He was sent for medical examination. His statement was recorded under Section 164 of Cr.P.C.. PW-2 had shown the spot of incident to the police. She handed over clothes of the victim to the police.

In the cross-examination, she stated that she could not read the contents of her report. She did not understand Marathi. The FIR was in Marathi. At the time of filling water, all the doors were open and there was rush at the water tap. PW-5 Radheshyam Yadav was the owner of their room. The victim's school timing was between 7.00 a.m. to 12.00 p.m. The school was fifteen minutes walking distance from their house. The water was supplied in their area at about 11.50 a.m.. She had gone to the police station at 12.00 noon with the victim and Radheshyam. They were in the police station till 5.00 p.m.. She volunteered that she first went to the police chowki, then came to the spot and after that went to the police station. Her husband was not present in the police station. She deposed that she did not see the incident but had observed that the victim's half-pant was wet and there were stains. She had given the victim's clothes to the police. She denied the suggestion that her husband owed dues to the appellant.

7. PW-5 Radheshyam Yadav was a neighbour and the landlord of PW-2's family. He has deposed that on 4.4.2018, PW-2

approached him with PW-1. The victim-PW1 told him about the incident. PW-5 along with PWs-1 & 2 went to the appellant's house and confronted him. He apologized and said that he had committed a mistake. PW-5 then accompanied the victim and his mother to the police station. In his presence, PW-2 handed over the victim's clothes to the police. The seizure panchnama was prepared in his presence. It is produced on record at Exhibit-33. He identified the clothes in the Court.

8. PW-6 Sadashiv Shetty was a pancha in whose presence the clothes of the appellant were seized after his arrest. The seizure panchnama is produced on record at Exhibit-36. It mentions that the appellant was given other clothes to wear and the clothes worn by him were seized.

9. PW-4 WHC Khandekar had carried the clothes and other articles to the FSL.

10. PW-3 Dr. Narendra Kumar was the Medical Officer. He had examined the victim and the appellant. He has deposed that on 4.4.2018, the victim was brought to Sion Hospital. The history

was given by the victim's mother that on 4.4.2018 at 1.30 p.m., the appellant took the victim to a lonely place. He removed the underwear of the victim and masturbated on the external genitals of the victim. The victim came home and told about the incident to his mother. The report was lodged. PW-3 specifically deposed that there was no history of anal intercourse. The appellant had tried to shut mouth of the victim to prevent him from shouting. On general physical examination, he observed that bright seminal stains were present on groin and mons pubis. There was one abrasion on inner side of left lower lip of the size 0.2 cm x 0.2 cm., which was red in colour. The genitals were normal. There was no injury on the genitals. The swabs and samples were collected and handed over to the police. He had given opinion that evidence of sexual assault could not be ruled out. The medical report is produced on record at Exhibit-26.

On 5.4.2018, he examined the appellant; and on his examination he found that there was nothing to suggest that the appellant was incapable of performing sexual intercourse. His swabs and samples were collected and handed over to the police.

In the cross-examination, he admitted that age of the injury in column No.5 was not mentioned. According to PW-3, since the colour of the injury was mentioned as red, it meant that it was a fresh injury.

11. PW-7 PSI Amol Salunkhe was the first investigating officer. He was attached to Wadala T.T. police station as PSI. The informant came to his police station. Her statement was recorded by WPSI Vidya Pawar in the presence of this witness. He identified the FIR at Exhibit-24. He then went to the spot of incident and prepared the spot panchnama which is produced on record at Exhibit-34. He seized the clothes of the victim. He arrested the appellant. The arrest panchnama is produced on record at Exhibit-38. He seized clothes of the accused. He then referred the victim and the appellant for medical examination.

12. PW-8 PI Anil Surve was the second investigating officer. He had referred the victim for recording his statement under Section 164 of Cr.P.C. He had sent the articles to FSL. He had filed the charge-sheet after completion of the investigation.

13. Apart from this oral evidence, the prosecution produced the CA reports on record at Exhibits-8, 15 and 16. The CA reports show that there was blood on the clothes of the appellant. There was no blood on the clothes of the victim. Semen was not detected on the clothes of the victim and the appellant. No semen was detected on the swabs taken from the victim.

14. Learned counsel for the appellant submitted that the appellant is falsely implicated. The victim has deposed that the incident had taken place in the evening, whereas the evidence of PW-2 and the prosecution case is that the incident has taken place in the morning at around 11.30 a.m. to 2.00 p.m.. He submitted that the appellant has given explanation as to why he was implicated falsely. The victim's mother wanted to take possession of the small place of the appellant where he had kept his articles.

15. He submitted that the medical evidence does not support the prosecution case. The medical history is different. There is no independent evidence showing that the victim was

taken to a secluded place. The spot of incident is not clearly described.

16. Lastly, he submitted that, at the highest, the case would not fall under the defining section of 'aggravated penetrative sexual assault'. He further submitted that the appellant was acquitted from the charges of commission of offence under Section 377 of IPC and therefore, it is clear that there was no penetration.

17. Learned APP as well as learned counsel for the respondent No.2 submitted that there is no reason to disbelieve the victim. Though there is some discrepancy about the time of incident, the learned Trial Judge has properly appreciated the evidence and has observed that since the FIR was lodged in the afternoon itself, the incident could not have been taken place in the evening. They submitted that the act of the appellant falls within the definition of 'penetrative sexual assault' because he has manipulated the private parts of the victim causing penetration.

18. I have considered these submissions. As far as the

evidence of the prosecution witnesses is concerned, it does appear that some incident had taken place. To that extent, the evidence of PWs-1, 2 and 5 is consistent. The victim had immediately narrated the incident to PW-2 who along with PW-5 had gone to the house of the appellant and had confronted him. Thereafter, all of them had gone to the police station and had lodged the FIR. Therefore, there was no scope to concoct a false story.

19. Though there is discrepancy about the time of incident, considering the young age of the victim and the time gap from the date of incident and the date of deposition, some concession can be given to the victim, who was five years of age at the time of the incident and seven years of age at the time of recording of his evidence. In any case, as rightly observed by the learned Trial Judge, the FIR was lodged at 1.30 p.m. and the time of incident mentioned in that FIR was 11.30 a.m. to 11.45 a.m. on 4.4.2018. Therefore, the prosecution has proved that some incident had taken place at that time on 4.4.2018.

20. The most important question in this case is exactly to

what extent the appellant had committed this offence and whether it would amount to penetrative sexual assault as defined under Section 3 of the POCSO Act. The victim has stated that the appellant did something on his anus. He performed some acts on his anus. PW-2 has also deposed that the victim told her that the appellant had done something on his anus. Though this statement is vague, the statement of the victim does indicate that the appellant had committed some act. The history given to the Medical Officer was that the appellant had masturbated on the external genitals of the victim and that there was no history of anal intercourse. Therefore, the evidence regarding penetrative sexual assault is lacking.

Section 3 of the POCSO Act reads thus :

- 3. Penetrative sexual assault.** – A person is said to commit "penetrative sexual assault" if –
- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

21. The description of the act mentioned by the victim read together with the medical history does not show that the ingredients of Section 3 of the POCSO Act are satisfied. However, the evidence does show that the offence of sexual assault as defined under Section 7 of the POCSO Act is made out. Section 7 of the POCSO Act reads thus :

“7. Sexual assault. – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

22. Since the victim was below 12 years and since his age was not in dispute, the provisions of Section 9(m) of the POCSO Act gets attracted. It is defined as ‘aggravated sexual assault’

because the victim was below 12 years. It is made punishable under Section 10 of the POCSO Act.

23. The CA report also does not support the theory of penetrative sexual assault. There was neither any blood nor any semen stains on the clothes, including half pant of the victim. The blood on the clothes of the appellant was not connected with the victim. The medical examination of the victim does not show that he had suffered any bleeding injury. The evidence of PW-3 also shows that the genitals were normal and no injury was present on genitals. PW-3 had observed minor abrasion on the inner side of the lower lip; and he had concluded that it could be because the victim's mouth was pressed. The opinion was also that the evidence of sexual assault could not be ruled out. However, there was no opinion expressed about the penetrative sexual assault. The observation of the medical officer about semen stains on groin of the victim is not supported by the CA reports.

24. The learned Trial Judge in paragraph-23 of her judgment has observed that touching the anus by the appellant

show that he intended to cause penetration and, therefore, his act would fall under Section 3(c) of the POCSO Act. However, touching the private parts would fall within the definition provided under Section 7 and not under Section 3 of the POCSO Act. To that extent, the learned Trial Judge was not right.

She has further observed that the offence under Section 377 of IPC was not proved but since the appellant had manipulated the private parts of the victim, the offence under Section 6 of the POCSO Act was committed. This reasoning also does not show as to how the ingredients of Section 3 of the POCSO Act were fulfilled.

In paragraph-28, the learned Judge has further observed that the appellant had manipulated the private parts of the victim so as to cause penetration but actually there was no penetration. Based on this observations, the minimum sentence of ten years was awarded. This observation again is contradictory and, therefore, cannot be sustained. With the result, I am of the opinion that the prosecution has not proved that the appellant had

committed an offence of aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act but he has committed the offence of sexual assault which was aggravated under Section 9 because the victim was below 12 years of age. It was punishable under Section 10 of the POCSO Act. Therefore, the conviction and sentence recorded under Section 6 of the POCSO Act will have to be set aside.

25. I have heard the parties for the quantum of sentence for the offence punishable under Section 10 of the POCSO Act. Learned APP and learned counsel for the respondent No.2 submitted that the maximum sentence under Section 10 of the POCSO Act be imposed. Learned counsel for the appellant invited my attention to the discussion in the Trial Court's judgment regarding the mitigating circumstances in this case. Learned Judge has observed that the appellant had a family consisting of his wife and five daughters. Three daughters were married and he had the responsibility of two daughters and wife. He also was looking after his brother who was blind. He was from a poor financial background. These circumstances are already mentioned

in the Trial Court's judgment. They are mitigating circumstances in favour of the appellant. The minimum sentence under Section 10 of the POCSO Act is five years and it could extend to seven years. The learned Trial Judge has sentenced the appellant to RI for six years. Considering the mitigating circumstances, the minimum sentence provided under Section 10 of the POCSO Act will meet the ends of justice. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction and sentence under Section 6 of the Protection of Children From Sexual Offences Act, 2012 recorded by the Designated Judge under the POCSO Act for Greater Bombay vide judgment and order dated 29.1.2021 passed in POCSO Special Case No.329/2018 are set aside.
- iii. The conviction of the appellant under Section 10 of the POCSO Act is maintained. However, instead of sentence of six years, the appellant is sentenced to

suffer RI for five years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for fifteen days.

- iv. The appellant is granted set off under Section 428 of Cr.P.C.
- v. The rest of the clauses in the operative part of the impugned order which are not inconsistent with this order are maintained.
- vi. Criminal Appeal is accordingly disposed of. With the disposal of the appeal, nothing survives in the interim application. It is also disposed of.

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(SARANG V. KOTWAL, J.)