

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

CRIMINAL APPEAL NO.1401 OF 2018

Rizwan @ Arif Noorl Huq Shaikh	Appellant
Versus	
The State of Maharashtra & others	 Respondentss

Mr. S.A. Shaikh, Advocate i/b. Shaikh Shafi Ahmed, for the Appellant.

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

Mr. Mujahid S. Ansari, Advocate (appointed) for the Respondent Nos.2 & 3.

CORAM : SARANG V. KOTWAL, J.

DATE : 28th FEBRUARY, 2023

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 3.11.2018 passed by the Designated Judge for POCSO, Greater Bombay in POCSO Special Case No.204/2017. The appellant is convicted and sentenced as under :

- (i) He was convicted for commission of the offence punishable under Section 377 of IPC and was sentenced to suffer RI for ten years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer RI for two months;
- (ii) He was convicted for commission of the offence punishable under Section 506(II) of IPC and was sentenced to suffer RI for two years and to pay fine of Rs.2,000/- and in default of payment of fine to suffer RI for one month;
- (iii) He 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.10,000/- and in default of payment of fine to suffer RI for two months;
- (iv) He was also convicted for commission of the offence punishable under Section 12 of the POCSO Act and was sentenced to suffer RI for one year and to pay fine of Rs.5,000/- and in default of payment of fine to

suffer RI for one month;

The substantive sentences were directed to run concurrently. He was given set off under Section 428 of Cr.P.C. The fine amount, if recovered, was directed to be paid to the victims.

2. Heard Mr. S.A. Shaikh, learned counsel for the appellant, Mr. S.R. Agarkar, learned APP for the respondent No.1-State and Mr. Mujahid Ansari, learned appointed counsel for the respondent Nos.2 & 3.

3. The prosecution case is that the first victim (hereinafter referred to as 'V1') was residing in the same building as the appellant. Between the period of September 2016 to 5.2.2017, the appellant used to take V1 to a passage between the staircase and the terrace. He used to commit forcible anal intercourse with V1. The second victim (hereinafter referred to as 'V2') was asked to keep watch to see whether anybody was approaching and to give a signal in that case. Both the victims were about eight years of age at the time of incident. Those incidents mainly took place

during the rainy season. Both the victims were studying in a tuition class. On one occasion, one of the victims abused the other. There was a quarrel. The tuition teacher made enquiries with them. V2 told her about the incident. V1 initially did not talk about the incident, but, then he also told her what had happened. The tuition teacher contacted V1's mother and after due consideration, V1's mother lodged her FIR at Wadala T.T. police station vide C.R. No.58/2017. The appellant was arrested. V1 and the appellant were sent for medical examination. The FIR was lodged on 9.2.2017 at about 12.10 a.m. in the midnight. The spot panchnama was conducted on the next day morning. The clothes of the appellant and V1 were seized and were sent for chemical analysis. After conclusion of the investigation, the charge-sheet was filed and the trial was conducted before the Special Court. During trial, the prosecution examined eleven witnesses including both the victims, V1's mother, their tuition teacher, the panchas, the medical officer and the police officers. The defence of the appellant was that there

was a quarrel between the victim's family and the appellant in which the appellant's sister was injured. They had gone to make a complaint before the police and as a counter-blast the appellant was implicated falsely in this case.

4. The main evidence in this case is that of V1 who is examined as PW-2. He has deposed that at the time of the incident he was nine year old. V2 was his friend. He knew the appellant. He was residing in the same building. PW-2 has described the incident in detail. He has deposed that the appellant used to take him on the terrace of the building on every Sunday in the night. There, he used to remove their clothes and then used to commit sexual intercourse as defined under Section 377 of IPC. He clarified that the appellant used to commit this act in the passage between the terrace and the staircase. The appellant used to ask V2 to remain in the vicinity and to give a signal by clapping if anybody was to approach that area. PW-2 used to suffer pain because of the act but the appellant used to gag his mouth and used to hit him on his head with the ring in his

finger. According to PW-2, he did not narrate this incident to anybody because the appellant had threatened to kill him with a sharp weapon. V2 told about this incident to their tuition teacher, who in turn, informed V1's mother. Then PW-2 himself informed about the incident to his mother. They went to the police station and lodged the FIR. The police referred PW-2 for medical examination to Sion Hospital. PW-2's statement was recorded under Section 164 of Cr.P.C.. It is produced on record at Exhibit-12. He identified the appellant before the Court through V.C.

In the cross-examination, while giving answer to a question, he stated that it was correct to say that he gave the statements before the police and the Magistrate on the say of his parents and that it was correct to say that his parents and teacher had put him under fear for giving those statements. At this point, the learned Judge intervened and explained to the witness the exact meaning of the question. Then, he answered that his parents and the teacher did not threaten him to give statements before the police and the

Magistrate. He denied the suggestion that because of the threats given by the teacher he had given false statements before the police and the Magistrate. He denied the suggestion that he was deposing falsely against the appellant at the instance of his parents. His statement recorded under Section 164 of Cr.P.C. was produced on record at Exhibit-12 and it substantially corroborates his deposition before the Court.

5. PW-7 was the second victim (V2). He has deposed that he knew what had happened with V1. The appellant was doing dirty things with V1. The appellant used to commit intercourse with V1. PW-7 himself had seen the appellant committing such intercourse sometime near the staircase and the door of the terrace. The appellant used to ask this witness to stand near the staircase and to clap if somebody was approaching. He has further deposed that V1 and he himself used to attend the same tuition class. One day, there was a quarrel between V1 and V2 (PW-2 and PW-7). The teacher intervened and made enquiries. PW-7 then

informed about the incident to their teacher, who in turn, informed V1's mother. PW-7 has further deposed that he did not reveal this incident to anybody as the appellant was beating him and was threatening to beat him further if he revealed the incident to anybody. His statement was recorded under Section 164 of Cr.P.C. It is produced on record at Exhibit-22. This statement substantially corroborates his deposition before the Court. He identified the appellant before the Court through V.C.

In the cross-examination, he stated that it was correct to say that his parents had told him what he had to depose before the Court. When this question was clarified by the Court, he added that his parents had told him to depose the truth before the Court otherwise they would beat him. He was then asked in the cross-examination on behalf of the defence as to whether it was correct that his parents had told him to depose before the Court that the appellant was doing dirty things. PW-7 answered in the affirmative, but, again when this question was clarified to him. Then he

stated that it was not correct. He also denied the suggestion that there was a dispute between his parents and the appellant's family or that there was dispute between the V1's family and the appellant's family. His statement recorded under Section 164 of Cr.P.C. was produced on record at Exhibit-22. It substantially corroborates his deposition before the Court.

6. PW-1 was the mother of V1. She has deposed that she was residing with her family in that building. Her husband was having a grocery shop. She produced the birth certificate of V1. A copy of the birth certificate was taken on record at Exhibit-10. It showed the date of birth of V1 as '8.12.2009'. She further deposed that on 6.2.2017, there was a quarrel between V1 and V2 in their tuition class. The tuition teacher made enquiries and came to know about the incident. The tuition teacher told this witness about the incident. PW-1 then made enquiries with V1 and V2. They confirmed the incident. PW-1 called the police by dialing number '100' on 8.2.2017 at about 11.00 p.m.. The police

came to their building and took the appellant with them. PW-1 went to the police station and lodged her FIR. It is produced on record at Exhibit-11. It was recorded in the midnight between 8.2.2017 and 9.2.2017. Her FIR substantially corroborates her deposition. V1 was then sent for medical examination. In the morning, the police prepared the spot panchanama. She produced V1's clothes before the police. They were seized. V1's statement was recorded under Section 164 of Cr.P.C. by the Metropolitan Magistrate, Dadar at Bhoiwada. She identified the appellant through V.C.

In the cross-examination, she stated that she did not notice any behavioural change in V1 during that period. According to her, since the incident used to take place in the rainy season, it meant that they took place in the month of June or July. The door of the terrace used to remain closed. The appellant's family was residing on the 7th floor.

7. PW-5 was the aforementioned tuition teacher.

She has deposed that on 6.2.2017, both the victims had attended her tuition class. There was a quarrel between both the victims. V2 told V1 that he would inform about V1's bad acts. PW-5 then took them in confidence and she came to know about the incident. She called V1's mother to her house and told her about the incident. She did not know the appellant. The police had recorded her statement on 10.2.2017.

8. PW-3 Sadashiv Shetty was a pancha in whose presence the clothes of the accused were seized. That panchnama is produced on record at Exhibit-15. It was conducted on 9.2.2017.

9. PW-4 Dattaram Gotad was another pancha, who was present when the spot panchnama was conducted. It is produced on record at Exhibit-17.

In the cross-examination, he admitted that he worked as a lift-man in the same building. The keys of the terrace used to be with him and the door of the terrace

always remained closed. He deposed in his deposition that V1's mother pointed out the spot which was adjacent to the staircase and the terrace, and was of the size 4 X 4 sq. ft.

10. PW-6 PC Narwade was a carrier who had carried the articles to FSL.

11. PW-10 was the V2's mother but she was examined as a pancha for seizure of V1's clothes.

12. It must be mentioned that the CA reports in this case which are produced on record at Exhibits-36 and 37 are innocuous. There was blood on one underwear but that blood-group was inconclusive and it did not connect the appellant with the crime. Therefore, the evidence of seizure of clothes and CA report does not make any difference to the decision of this case.

13. PW-8 Dr. Narendra Kumar was the medical officer attached to Sion Hospital. He had examined V1 as well as the appellant. He has deposed that the V1 was brought to their hospital at about 3.45 a.m. on 9.2.2017. On

examination of his genitals, he did not find any evidence of injury, redness or scars. No samples were collected and preserved. But, he opined that the evidence of sexual intercourse / assault could not be ruled out. The history of the incident was given by the V1's mother naming the appellant. PW-8 further deposed that the case was brought to him after two months from the last episode of the intercourse. Therefore, the injuries could have healed in a span of two months. If it was superficial penetration the chances of causing injuries were less. Even in case of deep penetration though the chances of injuries were more, the same were more likely to heal within two months.

He examined the appellant on 10.2.2017 at about 5.15 p.m.. His date of birth was given as '10.6.1998'. On medical examination, it was the opinion of this witness that there was nothing to suggest that the appellant was not capable of performing sexual intercourse.

In the cross-examination he denied the

knowledge that the appellant's IQ was found to be between 60 to 65 points in his psychiatric evaluation. According to this witness, for a normal man, the IQ is at least '120'.

14. PW-9 PSI Kamble was the first investigating officer. She has deposed about the lodging of the FIR. This witness had recorded PW-1's statement. She had also recorded V1's statement; and on 16.2.2017 she had recorded V2's statement.

15. PW-11 PI Gajanan Taple had taken over the investigation. He has deposed that he arrested the appellant. He seized his clothes. He referred V1 for medical examination. He conducted the spot panchnama. He seized V1's clothes. He collected V1's birth certificate. He produced the CA reports on record. He sent V1 and V2 for recording to their statements under Section 164 of Cr.PC.

. This, in short, is the evidence in this case.

16. Learned Judge held that the evidence of PW-1 and PW-5 corroborated the victims' evidence. She accepted

the explanation given by the medical officer. She discussed about the spot panchnama and the explanation offered by the victims regarding some questions in the cross-examination regarding their tutoring.

17. Learned counsel for the appellant submitted that the prosecution has not proved its case beyond reasonable doubt. The victims have not mentioned the date and time of the incidents. The evidence is quite vague. The spot of incident is also in doubt. Initially, the prosecution case was that the incidents had taken place on the terrace but the evidence was led that the incidents had taken place outside the terrace, near the staircase. There was no reason for this discrepancy to occur. The evidence of the liftman showed that the door of the terrace used to remain closed and the keys used to be with the liftman and, therefore, the incident could not have taken place on the terrace. PW-1 i.e. the mother of V1 used to keep close watch on the activities of V1 and, therefore, it was not possible that she would have missed any behavioural change in him. She (PW-1) has

admitted that there was no behavioural change in V1.

18. He submitted that the medical evidence shows that there were no injuries anywhere on the person of V1 and, therefore, it indicates that no such incident had taken place. He further submitted that the medical papers show that the appellant was of low IQ. Therefore, either he is entitled for acquittal or at least some leniency can be shown to him as far as the sentencing is concerned.

19. Learned counsel for the respondent Nos.2 & 3 as well as learned APP opposed these submissions. According to them, the evidence of both the victims was sufficient on which the finding of guilt can be based. They submitted that both the victims were of tender age. They were barely eight year old children and, therefore, it was not possible that they would have implicated the appellant falsely. They further submitted that absence of injury in this case is not material because the explanation is offered by PW-8 Dr. Narendra Kumar himself.

20. They further submitted that the question regarding the low IQ of the appellant was not raised during the trial when the evidence was led. There is nothing to show conclusively that the appellant was having low IQ. No defence evidence was led and, therefore, the appellant cannot take advantage of these submissions in that behalf.

21. I have considered these submissions. The most important piece of evidence in this case is the deposition of the V1. He has described the incident in detail which attracts all the ingredients of Section 377 of IPC and Section 6 as defined under Section 3 read with Section 5 of the POCSO Act. According to their depositions, it was a clear case of penetrative sexual assault as defined under Section 3 of the POCSO Act and also under Section 377 of IPC. The offence was aggravated as per Section 5(l) and 5(m) of the POCSO Act because V1 was below 12 years of age and the act was repeated more than once. Therefore, the evidence of V1 who is examined as PW-2 is important. He has narrated the incident in detail. I do not find any ambiguity or lacuna

in his deposition. In the natural course of the events, he had described as to how the offence came to light when there was a quarrel between him and PW-7 i.e. the second victim (V2). When the tuition teacher enquired with the victim; she was informed about the incident. She thereafter informed V1's mother. The evidence of all the witnesses is consistent in that behalf.

22. PW-7 i.e. V2 is an important witness. He was an eye witness to all the incidents. The appellant had used him to keep watch for giving a signal if anybody approached that place when he was committing that act. He had actually seen these incidents. He has fully corroborated the evidence of PW-2 (V1). Their evidence, in turn, is supported by the evidence of PW-5, who was the first person to whom the incident was disclosed by the victim. PW-5, in turn, had informed PW-1. Thus, all of them corroborate each other's evidence.

23. As clarified through the explanatory questions

put by the Court, both the victims had denied that they were tutored by their parents and the teacher to depose against the appellant.

24. As far as the medical evidence is concerned, though there were no injuries on the person of V1, PW-8 has explained as to why there was a possibility of absence of injuries and there is no reason to disagree with his opinion. In any case, the medical evidence pales in comparison with the clear and consistent ocular evidence particularly given by PW-2 the first victim himself. Though, both the victims have not given any particular dates and timings of the incidents, but, this has to be seen in the light of the fact that neither of them had disclosed this incident to anybody for a long time. By chance, the tuition teacher came to know about the incidents. Otherwise, the incident would not have come to light at all. Therefore, it cannot be said that there was delay in disclosing about the incident or that the particulars about the date and time was vague. In the facts of this particular case, in this background, this aspect will not help the

defence.

25. There is no ambiguity about the spot either. The prosecution evidence led through the evidence of PW-2 and PW-7 clearly mentions that the incidents took place near the staircase and the door of the terrace. Thus, I find that the evidence led by the prosecution is quite consistent in all respects.

26. The learned Judge has given proper reasoning for believing the prosecution witnesses. She has imposed the minimum sentence under Section 6 of the POCSO Act. There is no scope to reduce it further. Therefore, I do not find any necessity to interfere with the impugned judgment and order. With the result, I do not find any merit in the appeal.

27. The appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

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