

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 360 OF 2023

Ahamad Razak Shaikh } Appellant
(orig. accused)

V/s.

The State of Maharashtra and Anr. } Respondents

Mr. Bhavesh Parmar with Rahul Gaikwad, Mr. Aman Jhawar, Ms. Reshma Nair, Ms. Nikita Abhyankar, Ms. Vaishnavi Mudras and Mr. Vivekanand Akshali I.by Gravitas Legal, for the appellant.

Mrs. M.R. Tidke, APP, for the State.

CORAM : KISHORE C. SANT, J.

RESERVED ON : 28TH MARCH 2024.

PRONOUNCED ON : 7TH MAY 2024

JUDGMENT: (PER KISHORE C. SANT, J)

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1. The appellant-original accused has filed this appeal challenging the judgment and order dated 18th October 2022 passed by learned Special Judge under POCSO Act, Greater Bombay in POCSO Special Case No. 51 of 2017. By way of impugned judgment and order the accused is held guilty of the offences punishable under Sections 363, 354 (b) and 376 (2)(i)(j) of Indian Penal Code and under

This judgment is corrected as per speaking to the minutes of the order dated 10.05.2024
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Sections 4, 8, 10 and 12 of the Protection Of Children from Sexual Offences Act (POCSO), 2012. The awarded sentences are as stated below:

Sr. No.	Sections	Punishment	Fine Amount
1.	363 of IPC	R.I. 6 years	Rs. 10,000/- and in default, to undergo SI. for 3 months.
2.	354 (b) of IPC	R.I. 6 years	Rs.10,000 and in default, to undergo SI for 3 months.
3.	376 (2)(i) (j) of IPC and 4 of POCSO Act	R.I 10 years	Rs.1,00,000/- and in default, to undergo SI for 2 years.
4.	8 of POCSO	R.I 5 years	Rs. 10,000 and in default, to undergo for 3 months.
5.	10 of POCSO	R.I 6 years	Rs. 10,000 and in default, to undergo SI for 3 months.
6.	12 of POCSO	R.I 3 years	Rs. 1,000 and in default, to undergo for 6 months.

2. The prosecution was set in motion on lodging of F.I.R by grandmother of the victim with Bhandup Police Station dated 26th November 2016. In the FIR, she stated that on 25th November 2016 at 10.00 p.m. she had sent her grand daughter/ victim for bringing pain relief Balm (Zandu Balm) from the medical store as her husband had

headache. At around 10.30 p.m. she heard the noise, she therefore, went to see on the street as to what has happened and saw mob gathered. From someone in the mob she was told that the victim was taken by two unknown persons by gagging her mouth in a small lane. The victim tried to shout. On listening that the mob had gathered and caught the two persons. Police reached to the spot. Took both the persons to the police station. At police station the victim and informant were also taken in police vehicle to the police station. At police station the victim informed that one of the person caught hold her and took her in rickshaw and there he removed her clothes and touched his private part to her private part. Victim therefore raised shouts. On listening her shouts some people gathered there. Another accused therefore, started running from the spot into the other lane and there both accused arrested. Police asked those persons there names. One was Ahamad Razak Shaikh and other was Abdul Rashid Majid Shaikh. On the basis of this information, the police registered FIR and started investigation. Another accused was only 14 years of age, therefore, he was referred to Juvenile Justice Board to be dealt with according to Juvenile Justice Act. After trial the learned Special Judge, held the present appellant guilty and awarded sentence as stated above.

3. The prosecution has examined as many as 9 witnesses to bring home the guilt of the accused. The prosecution has also produced on record the medical evidence. During trial also the appellant was in Jail. The appellant thus has approached this Court.

4. Learned Advocate for the appellant vehemently argued the appeal. He submits that the prosecution has utterly failed to prove the offence under Section 376 (2)(i)(j) and Section 4 of POCSO Act. There is no allegation of penetrative sexual assault. The assault at the most is sexual assault. No ingredients are present even as per the allegations to prosecute the offence under section 376 of IPC. He submits that Doctor who was examined as PW-8 has not seen any injury to the victim. He submits that even Forensic Lab report does not prove the case of the prosecution. No semen was detected on any of the exhibit. The blood clothes of victim was sent to chemical Analyses for examination. However, the result is inconclusive. Learned Judge however still held the accused guilty without sufficient evidence and at any stage there was no evidence to prove offence under section 376. He relied upon the judgments in the cases of **“Koppula Venkat Rao v/s. State of AP”¹**, **“Aman Kumar and Anr v/s. State of Haryana”²**, **“Aftab**

1 (004) 3 SCC 602

2 (2004) 4 SCC 379

*Mustaq Khan vs The State of Maharashtra*³, *“Guddu @ Santosh vs. State of Madhya Pradesh”*⁴ and in the case of “***** s/o***** Jumbde and Anr. vs State of Maharashtra and Anr.”⁵

5. Learned APP and learned Advocate for the respondent no. 2 vehemently oppose the appeal. It is their submissions that the prosecution in this case has clearly established the fact of sexual assault. Evidence of victim is consistent with the statement under section 164 of Cr.P.C. At the time of incident she was hardly 9 years of age. There is injury found on her nose. The evidence of the victim is corroborated by PW-8 and informant /PW.1. In the medical evidence it has clearly count on the person of victim. Redness and swelling was found. PW-7 is the eye witness. Both the advocates thus pray for rejection of the appeal.

6. Learned APP relied upon the judgments in the cases of *“Phool Singh vs State of Madhya Pradesh”*⁶, *“State of Himachal Pradesh Vs. Manga Singh”*⁷, *“Hakkim Vs State of Tamil Nadu”*⁸, and in the case of *“State of Uttar Pradesh vs Babul Nath”*⁹

3 Cri. Appeal No. 870/2014 with IA/1775/2022 with IA/1646/2019

4 Cri. Appeal 1491 of 05

5 (Cri) Appeal No. 642 of 2020

6 (2022) 2 SCC 74

7 AIR Online 2018 SC 1019

8 2017 all Mr. (Cri) Journal 329

9 (1994) 0 SCC (Cri) 1585

7. On looking to this case, this Court needs to consider the deposition of PW-1 who is the informant, she stated about the incident. She stated that at the time of incident as victim told her this accused removed her salwar. He also removed her inner wear and then touched his private part to her private part. The persons from the family of the victim went to the police station. She lodged the FIR. In the cross-examination it has come that the route was busy route. The shops remained open till late night. She resides on the 2nd floor of the building. The incident can be seen from the balcony of her house. However, on hearing the shouts, she did not go to the balcony as to see what was happened. Nothing much has come in her cross. Accused was trying to run away from the spot. Cross-examination was taken of PW-1. However nothing much would be taken in the cross-examination.

8. PW-2 is the victim. In her deposition she stated about the incident when she had gone for buying Zandu balm. She stated that one person took her in rickshaw and went to one lane. He kissed her and also removed her kurta and thereafter he touched his private part to her private part. On that she raised shouts and people gathered. In cross-examination nothing much has come. In the cross-examination the questions are in respect of situation of the medical shops and that

there was crowd on the road except that nothing has taken. The question was asked about height differences between the accused and the victim. This Court however finds it to be immaterial. Evidence of the witness is consistent with her 164 statement.

9. PW-3 is a panch, who was called to draw panchnama near the medical shop where the victim girl had gone for buying Zandu Balm.

10. PW-4 is also a panch for seizure of clothes of the victim.

11. PW-5 is the uncle of the victim. He stated that while he was seating in his shop he saw a mob near Chandan Medical Store. He saw her niece there, he asked her how she was there at that time she cried. Mob had caught hold one person and was assaulting him. Victim told him about the incident. He gave registration number of auto rickshaw. Then he called his mother on the spot, mother came to the spot. Police also came there. They were then taken to the police station. In the cross-examination, it is stated that certain omissions are taken about people were assaulting two persons etc.,

12. PW-6 is also panch for seizure of the clothes of the accused.

13. PW-7 who resides near Chandan Medical Stores. He stated that in the night at around 10.00p.m. to 10.15p.m. he was taking

meal. While taking meal he heard some noise and therefore, he went to see as to why there is noise and why mob was gathered. He found one young boy sitting on the staircase of his building with one girl at around 10 years of age. She was seated on his lap. On asking as to who was he, he left girl there and started running. PW-7 ran behind that boy and raised shouts as to catch that person. On that people caught the accused. However, he could not identify the accused sitting in the Court. In the cross of this witness, nothing much is taken about it. It is taken that accused was not called hand his person. He could not tell the clothes worn by the victim girl.

14. PW-8, is a Doctor who examined the victim. He found a contusion 5cm x 5cm over right upper back region and abrasion of size 3cm x 0.2cm over lower one third aspect of bridge of nose, reddish in colour. On local examination of genitals, he found hymen was intact, oedematous, erythema was present i.e. swollen and redness. He recorded findings consistent with sexual assault, subject to receipt of Forensic Lab Report.

On examination of the accused he found there were two tear of size 10 c.m. and 5cm present over right upper back region of shirt. Dried blood stains present at multiple places over shirt. The said

injuries were one to two days old.

Doctor has mentioned some external injuries, i) three partially healed abrasions over right lower back region brown scab present. ii) Partially healed abrasion of size 0.5cm x 0.5 cm over dorsal aspect of left elbow, reddish brown scab present iii) partially healed abrasion of size 3cm x 3cm over left knee dark reddish brown scab present iv) Three partially healed abrasion of size varying from 2.5cm x 0.2cm to 1cm x 1.5cm over forehead dark reddish brown scab present.

In the cross-examination of the witness, he accepted that as per the guidelines the victim girl needs to be examined by female doctor. He examined the victim in presence of female resident doctor of department of gynecologist who has signed the report. He was asked specific question as to when hymen was intact and there was no bleeding, however, still gave findings of sexual intercourse to which he opined that there were two injuries on local genital, hymen was oedematous and erythema was present and therefore, he opined and deposed that there was recent sexual intercourse. He accepted that he had not written as to whether the injuries were fresh or old.

15. PW-9, is API attached to Bhandup Police Station. She had

sent the victim for medical examination. Section 376 of IPC was added after enquiry with the victim. She deposed about the seizure panchanama of the clothes of the victim and also of the accused. Clothes were sent for chemical analysis. She had also recorded the statement of the witnesses. She had sent the victim for statement under section 164 of Cr.P.C. On completion of investigation, she had filed the charge-sheet. In the cross-examination nothing much has taken. It has taken that 161 statement of the victim was taken afterwards and not mentioned in the police station for the first time. In the cross-examination further she stated that section 376 of IPC was added on the basis of the statement of the victim under section 164 of Cr.P.C.

16. The accused examined five witnesses in defence. In 313 statement he stated that because of quarrel with the people of that area and because of that quarrel the witnesses have deposed against him. He examined himself as DW-1. He deposed that on 25/11/2016 at around 8.30p.m. to 8.45 p.m. he was sitting in the rickshaw of his friend Rashid. The same was parked near the Hotel in the market area having rush. After sometime he came out of rickshaw and started looking for his friend and at that time the victim girl came right in his

front, he therefore, moved the victim aside. On that some one came and asked him why he pushed the girl and immediately on that 2 to 3 boys came there and started arguing with him and quarrel took place. Mob gathered there. After pacifying mob, two more persons came and they started beating him and within few minutes police came and they took him to the police station. He could not state as to why he has not lodged the complaint against any persons.

17. DW-2 is practising advocate. She deposed upon the map at Exhibit-59 and Exhibit-52 with list Exhibit-44 which she had prepared. However, she is the witness of the map and not of the incident. Her evidence is not of much importance.

18. DW-3 is the advocate who only identified the photographs of location where the incident took place. She is even not cross-examined.

19. DW-4 is cousin of the accused who identified the photographs those taken by him from with cellphone. His evidence is also not material of the incident.

20. DW-5 is the uncle of the accused. He also spoke about the maps of the place where the incident took place. There the house of the victim is seen. Thus evidence of defence witnesses is not much

helpful to the case of the accused.

21. On looking to the evidence wherein it is clearly seen that the evidence of the victim is corroborated by her grandmother. It is further corroborated by the medical evidence. Doctor has found swollen and redness on the genital part of the victim clearly shows that she was sexually assaulted. The question is as to whether the assault can be said to be penetrative assault and can be said to be as sexual assault so as to attract the ingredients of section 3 of POCSO and section 376 of IPC. From the evidence of PW-1, it is seen that the accused touched her private part. From the medical evidence, it is proved that it was swollen and redness on genital of the victim. Oedematous, erythema injuries were found. Looking to the actual evidence she has only stated that there was touch to her private part and not penetration. The question is whether now opinion of the Doctor can be accepted when the ocular evidence of the victim herself does not show anything of the penetrative assault. This will be discussed after discussing judgments cited by the parties.

22. The accused has not disputed the fact of gathering of mob near the spot. He has examined himself and from his evidence it is also clear that there was mob gathered around the rickshaw where he was

found guilty. There is also evidence of the uncle of the victim who was seating near the medical store who also immediately rushed to the spot and found that his niece was there on the road. There is further evidence of another witness who saw the victim and accused from the stair of his building and he also asked the accused as to why he was seating there. In spite of lengthy cross-examination nothing much could be taken. In the cross he had stated that he had shouted while going inside lane. In the cross-examination only it has come that he kissed once. From the cross it is seen that in fact she has accepted many other things. It is thus clear that there is evidence to clearly show that some incident took place and mob had gathered near the spot.

23. Coming to the judgment in the case of ***“Aman Kumar and Another”*** (supra), it was a case under section 376, the Apex Court has considered the proof in that case of medical evidence. It is further held to proof the offence under Section 376 penetration is the sine qua non for an offence of rape and there has to be clear evidence cogent to prove the penetration. In that case in absence of such witnesses the conviction of the appellant under section 376 (2) (g) was set aside and the accused was convicted only under section 354 read with section 34 of IPC.

24. In the case of ***“Guddu @ Santosh”*** (supra) the Hon’ble Apex Court has recorded that incident has taken place. In the case of ***“Koppula Venkat Rao”*** (supra), the Hon’ble Apex Court again considered offence in that case, the Doctor’s evidence clearly ruled out possibility of penetrative sexual assault. Accepting the case of the prosecution as it is, it was held that no case of rape was made out and the case at the most made out was of attempt of rape. In the last judgment Criminal Appeal No. 642 of 2020 decided by this Court at Aurangabad Bench, it is held that to prove offence under section 3 of POCSO Act there has to be a penetration. It was held in that case there was no allegations even by the victim and by the prosecution that there was penetrative sexual assault and aggravated penetrative sexual assault. The Court considered the judgment’s in the case of ***“Aman Kumar and Anr”*** (supra) and ***“S.P. Kohli (Dr) vs High Court of Punjab and Haryana”***¹⁰. In the said case the allegations of the victim herself was that the accused touched her private part.

25. This Court thus holds that the offence made out was not under Section 3 or 5 was under section 7 punishable under section 8 of POCSO, Act. The Doctor has opined that it is consistent with sexual assault. However looking to the report it is seen any foreign particles

¹⁰ (1979) 1 SCC 212

on clothes and no evidence of tear or loss of parts. All these things show that there was no penetrative sexual assault. One thing needs to be kept in mind that the victim was taken to police station immediately after the incident. In spite of that prosecution could not get any evidence to show penetrative injury.

26. Coming to the judgment relied upon by learned APP in the case of “*State of Uttar Pradesh vs Babul Nath*” (supra), it was considered that explanation to section 375 that penetration is sufficient to constitute the sexual intercourse necessary to prove the offence of rape. In the case of “*Phool Singh vs State of Madhya Pradesh*” the Hon’ble Apex court had held that when evidence of the prosecution is relied upon and the same is sufficient to prove the guilt of the accused. The evidence of the prosecutrix need not be corroborated if it inspires confidence. In the case of “*State of Himachal Pradesh Vs. Manga Singh*” (supra), the Hon’ble Apex Court has again held that the sole testimony of the prosecutrix, if it inspires confidence, no corroboration is required.

27. Thus what is held is that prosecution has to prove the penetration. This Court has therefore carefully gone through the evidence of the victim in the present case. In her evidence and the

statement she herself has stated that the accused touched his male part to her private part and he tried to kiss her. The evidence to show penetration is clearly lacking. The doctor though has opined that sexual assault cannot be ruled out he has not observed any penetrative injury. He has clearly mentioned that the hymen was in tact. Looking to the age of the victim however, it is certainly the case falling under section 7 of the POCSO Act.

28. On overall consideration, this Court finds that the findings & conviction for offences punishable under section 4 of POCSO, Act and under section 376 (2)(i)(j) deserves to be set aside. So far as other offences are concerned conviction and sentence need to be maintained. Hence, the following order:

ORDER

- i) Appeal is partly allowed.
- ii) The conviction recorded for the offence punishable under section 376 (2)(i)(j) and for the offence punishable under section 4 of POCSO Act, is hereby quashed and set aside.
- iii) Conviction recorded for the offence punishable under Sections 8 and 10 of POCSO is maintained.

iv) Order in respect of compensation to the victim, is also maintained.

29. Appeal thus stands disposed of.

(KISHORE C. SANT, J)