

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.116 OF 2021

Noor Jamal Akbar Shaikh : Appellant/Accused
Vs.
The State of Maharashtra & Anr. : Respondents

Adv. Aniket Vagal a/w Adv. Savvy Kolhekar, for the Appellant.
Mrs. M. R. Tidke, APP for the State .
Ms. Janhavi S. Karnik, Appointed by Legal Aid for the Respondent
No.2.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 4TH MARCH, 2024
PRONOUNCED ON : 12TH APRIL, 2024

PC. :

1. This Appeal is by Original Accused convicted by the Special Judge under Protection of Children from Sexual Offences (in short “POCSO”) Act, 2012, by way of Judgment dated 23rd July, 2019 in Special Case POCSO No.513 of 2017, for the offences punishable under Sections 6 & 10 of the POCSO, Act and Section 376(2) (j) (n) and 354 of the Indian Penal Code. He is sentenced to suffer 10 years imprisonment and to pay fine of Rs.25,000/- in default to undergo R.I. for 3 months for punishable under Section 6. He is sentenced to

suffer R.I. for 5 years and to pay fine of Rs.10,000/- in default to undergo R.I. for 3 months for offence under Section 10. No separate sentence is awarded for the offences punishable under Section 376(2) (j) (n) and 354 of the Indian Penal Code, in view of Section 42 of the POCSO, Act. The amount of fine is directed to be paid to the victim as compensation.

2. The prosecution story in short is that the Appellant who happens to be the father of friend of victim girl committed penetrative sexual assault falling under Section 5(m) of the POCSO Act. The victim girl child was of 6 years of age used to go to house of the Accused with his daughter. Her Date of Birth is stated to be 19/09/2011. On the day of incident, victim had gone to the house of Accused. He took her in the room he inserted his finger in the vagina of the victim. After coming back to the home at 9.00 p.m. the mother found the victim was very quiet, when victim came out from the toilet the knicker was found to be wet with blood stains. On inquiry the victim told her mother about the incident that the Accused inserted his finger in her vagina and also kissed her. On that the mother of the

victim took her with the teacher when again she narrated the incident. The mother therefore took the victim to the doctor. The doctor told her that it is a police case and referred the victim to Bhabha Hospital. The mother of the victim took her to the Bhabha hospital and thereafter complaint came to be lodged. On the basis of the information, offence was registered on 8th September, 2017. A Statement of the victim also came to be recorded under Section 164 of the Cr.P.C. during the investigation. After investigation chage sheet came to be filed.

3. In support of the prosecution case the prosecution examined 6 witnesses. PW-1 is victim, PW-2 is mother of the victim, PW-3 & PW-4 are doctors, PW-5 is the panch of spot panchnama and the seizure panchnama, PW-6 is the PSI who recorded the FIR and PW-7 is the Investigating Officer.

4. The victim child in her deposition stated about the incident. She also told her date of birth 19th September, 2011.

Her cross-examination is very short and nothing is taken to disbelieve her version in the deposition.

5. PW-2 is the mother of the victim, who stated that on the date of incident, she left the victim at the house of the friend of the victim i.e. at the house of the friend i.e. daughter of the Accused. After some time she went to pick up the victim at 9.00 p.m. After coming home, she found that the victim was very quiet. She saw that the victim when came out the toilet her Knicker was wet and there were blood stains on the knicker. On inquiry with the victim, she told about the incident. Informant therefore took the child to teacher and from there she took the victim to the doctor. Doctor told to refer victim to Bhabha Hospital. The mother PW-2 proved birth certificate of the victim & so also the statement of the victim recorded under Section 164 Cr.P.C.

Her Cross-examination too is short and nothing is taken to disbelieve the version of the witness. In 164 statement the victim stated that the Accused repeatedly committed the said Act.

6. PW-3 is the Doctor to whom the victim was first taken. The victim mother took the victim to this doctor and asked him to check his child. Mother insisted even to check the private part of the

victim on that the doctor told her to approach the police station and referred her to Bhabha Hospital as it was the police case.

7. PW-4 is a lady doctor who examined the victim at Bhabha Hospital. She clearly stated that she gave opinion that there was no sign of external force seen and sexual violence cannot be ruled out. She also stated that if male adult inserts a finger without force in private part of the girl aged 6 years, the hymen get sorn.

In the cross-examination she stated that it is necessary to apply force for tearing of the hymen of 6 years old girl. She denied the suggestion that the report was prepared on the say of the mother of the victim. She proved the Medical Certificate.

8. PW-5 is police who recorded F.I.R. & carried some investigation prepared panchnama of Seizure. He arrested the Accused and sent the articles to Forensic Science Lab.

Nothing much is taken in her cross-examination.

9. PW-6 is the PSI, she took down the phone call at 11.00 a.m. who had recorded the FIR.

10. PW-7 is Police Inspector, who also carried some

investigation. He forwarded swabs and blood samples to CA with forwarded letter Forensic Science Lab. He also referred the victim doctor for Medical Examination the referring the letter to the Chemical Analyser. The Trial Court find that the prosecution has proved its case and held accused guilty.

11. Learned Advocate for the Appellant vehemently argued that there is no sufficient evidence on record to prove the offence except testimony of prosecution. Prosecution has not produced any satisfactory evidence. The Medical Evidence is not sufficient to prove the guilty of the Accused. The Chemical Analyser's Report is also of no help to the prosecution. It is unsafe to rely upon the sole testimony of the child witness who is likely to be tutored. He relied on the judgment of the Apex Court in Criminal Appeal No.144 of 2022 dated 8th February, 2022 in the case of ***Nawabuddin Vs. State of Uttarakhand.***

12. Learned Advocate thus submits that even taking evidence as it is the case could not fall under Section 5(m) but at the most would be under Section 7 as there is no Penetrative Sexual Assault.

13. He alternatively submits that from the evidence and cross-examination it appears that the defence was not properly prepared and no proper questions were put in the cross-examination. The case is badly conducted case and therefore the matter need to be remanded for a fresh trial.

14. Learned APP submits that in the present case the evidence is consistent. The victim has clearly deposed before the Court. The evidence of the victim is corroborated by her mother. There is Medical Evidence of PW-4 his Certificate clearly shows that finger was inserted in the vagina of the girl child. It is a clear case of Penetrative Sexual Assault. The Learned Trial Court has rightly convicted the Accused. She relied upon the judgment reported in 2022 (2) Supreme Court Cases 74 in the case of *Phool Singh Vs. State of Madhya Pradesh*. In support of her submission that in the rape cases conviction can be based upon sole testimony of prosecutrix without any further corroboration.

15. Learned Advocate for the Respondent No.2 submits that in the present case the Accused was a person known to victim. He

happened to be father of her friend. They are residing in the same locality. Immediately after the incident the mother noticed abnormal behavior of the victim. Victim also clearly stated about the incident. She relied upon judgment of the Apex Court in Criminal Appeal No.144 of 2022 in the case of ***Nawabuddin Vs. State of Uttarakhand***. Criminal Appeal No.1051-1054 of 2021 ***Nasib Singh Vs. The State of Punjab and Anr.*** Judgment of the Delhi High Court in CRL.M.C.No.5032/2023 in the case of ***Rakesh Vs. State of NCT of Delhi & Anr.***

16. In the case of ***Phool Singh*** (supra) the Hon'ble Apex Court has held that in rape cases the conviction can be based on sole testimony of the prosecutrix and no further corroboration is required. This Court finds that the said judgment is squarely applicable in the present case. In the case of ***Nawabuddin*** (supra) is also applicable on facts. In that case also accused happened to be neighbor of the victim girl. He misused his position and tried to penetrate his finger and then tried to commit rape on the minor girl. Before he could succeed in committing rape, he was caught red handed by the local persons

and thereafter was crying. The Supreme Court negated argument on behalf of the Accused that the case is not of Penetrative Sexual Assault or Aggravated Penetrative Sexual Assault and held Accused guilty of the Aggravated Penetrative Sexual Assault. The Court also discussed the objects of the POCSO, Act. It is further held that no leniency should be shown to Accused while awarding a sentence.

17. In the case of ***Nasib Sing*** (supra) the Court considered the aspect of retrial and held that retrial would not be ordered unless the Appellate Court is satisfied that a case is made out. Para 22 of the said Judgment reads as under:-

“22. The above extract emphasizes that a retrial would not be ordered unless the Appellate Court is satisfied that:

- (i) The court trying the proceeding had no jurisdiction;***
- (ii) The trial was vitiated by serious illegalities and irregularities or on account of a misconception of the nature of the proceedings as a result of which no real trial was conducted; or***
- (iii) The prosecutor or an accused was for reasons beyond their control prevented from leading or tendering evidence material to the charge and that in the interest of justice, the Appellate Court considers it appropriate to order a retrial.***

Another feature which emerges from the above decision in that an order of retrial wipes out from the record the earlier proceeding and exposes the present accused to another trial. It is for that reason that the court has affirmed the principle that a retrial cannot be ordered merely on the ground that the prosecution did not produce proper evidence and did not know how prove their case.”

18. The Court also considered Judgment in the case of *Nar Singh Vs. State of Haryana* reported in (2015) 1 SCC 496 in respect of fresh trial.

19. This Court has thus considered a non-compliance. It is also considered the object of the Act that victim should not be repeatedly called to Court for recording evidence.

20. On considering all the aspects this Court finds that no case is made out to set aside conviction of the Accused. Even no case is made out for sending the matter for retrial.

21. This Court finds that the Trial Court has rightly appreciated the evidence. No interference is therefore called for.

22. Appeal stands dismissed.

(KISHORE C. SANT, J.)