

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

CRIMINAL APPEAL NO. 470 OF 2022

Navnath Dnyanu Jadhav .. Appellant
Aged 51 years, Occ. Barber, [original
Residing at New Shivaji Nagar, accused]
Room No. 1135, Acharya Donde Marg,
Sewree, Mumbai.
[Presently lodged at Arthur Road Prison]

Versus

1. The State of Maharashtra .. Respondents
2. Mr. XYZ
Age. 15 years, Occ. N.A.
R/at Sainagar, Ramtekdi,
Opp. Baradevi Bridge, Room No.2,
Acharya Donde Marg, Sewree,
Mumbai.

Ms. Misbah Solkar a/w. Ms. Lavanya Salve, Advocate for the appellant.
Mr. A.R. Patil, APP for the respondent/State.
Ms. Saima Ansari, Advocate (appointed) for respondent No.2.

CORAM	: KISHORE C. SANT, J.
RESERVED ON	: 23.02.2024
PRONOUNCED ON	: 13.03.2024

J U D G M E N T :-

01. This appeal is preferred against the judgment and order dated 11.04.2022 passed by the learned Special Judge under POCSO Act, Gr.

Mumbai, in POCSO Special Case No. 501 of 2018. The appellant is held guilty of the offences punishable under sections 4,6 and 12 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act in short] and under sections 506 and 377 of the Indian Penal Code. The punishment given is as per the chart below :-

Sections	Punishment	Fine Amount
6 of the POCSO Act	10 years rigorous imprisonment [RI]	Rs.15,000/-, in default, to suffer RI for six months.
12 of the POCSO Act	1 year RI	Rs.5000/-, in default, to suffer RI for two months.
506 of the IPC.	1 year RI	--

. For Section 4 of the POCSO Act, no separate sentence is awarded as the sentence is already awarded under section 6. All the sentences are directed to run concurrently.

02. The prosecution is launched on the basis of an FIR lodged by one Varsha Bhosale on 08.08.2018, registered with RAK Road Police Station, Mumbai for the offences punishable under sections 377, 506 of the IPC and sections 4,6,8 and 12 of the POCSO Act. The victim child, nephew of the informant, staying with her as he lost his parents in the childhood. The victim

was taking education in 10th standard. On 07.08.2018 at around 6.45 p.m. a friend of the husband of the informant, namely, Rakesh Bedkar came to her house and informed that the victim is seen with the accused roaming around one dilapidated house near Ram Tekdi. At 7.30 p.m. the victim returned to room. She asked as to where he was roaming with the accused. On that the victim started crying and told that the accused had taken him to a dilapidated building. The accused shown some pornographic videos on his mobile to the victim. Thereafter, the accused asked him to remove his clothes. Though the victim refused to do so, he threatened the victim and on that the victim removed his clothes. The victim was made to lie on kitchen platform and the accused slept on him and inserted penis in the anal part. The victim started shouting on this. The accused, however, again threatened him not to disclose the incident to anyone. He further told that even on earlier 2-3 occasions, he had done same thing with him. The informant waited till her husband came to home. After he came home, she discussed with him. It is, thereafter, an FIR came to be lodged.

03. The police arrested the accused and started investigation. A statement of the victim child came to be recorded under section 164 of the

Cr.P.C. After completing the investigation, a charge-sheet came to be filed. On recording the evidence and after holding the Trial, the learned Trial Judge held the accused guilty of the offences punishable under sections 4,6 and 12 of the POCSO Act and under section 506 of the Indian Penal Code.

04. The prosecution examined seven witnesses. PW-1 is the informant – aunt of the victim. PW-2 is victim boy, PW-3 is Rakesh Betkar, PW-4 is the punch witness, PW-5 is the Doctor who examined the accused, PW-6 is the Doctor who examined the victim and PW-7 is the Investigating Officer.

05. The learned Advocate for the appellant vehemently argued the appeal by submitting that the prosecution has failed to prove the offences with sufficient evidence. The story of the prosecution itself is doubtful. The evidence of PW-1 is hearsay evidence. Version of PW-3 who is alleged to be an eye-witness is unnatural. The evidence of the victim does not inspire confidence. PW-4 is only a punch. There is delay in lodging the FIR. She submits that the accused is falsely implicated because of the rivalry. There is variance in the evidence of the victim and his statement recorded under section 164 of the Cr.P.C. The Doctor who examined the victim has stated in

the evidence that there was no recent injury and there was no bleeding. The anus was intact. He thus submits that even medical evidence is not sufficient to prove the offence.

06. The learned Public Prosecutor and the learned Advocate appointed for respondent No.2 submit that the prosecution has sufficiently proved the offence. There is evidence to connect the accused with the offence. The story of rivalry between the parties is not sufficient to infer false implication. If the evidence of the witnesses inspire confidence, it is not required to prove the same by medical evidence for the offence under the POCSO Act. They prayed for rejection of the appeal.

07. After arguments of learned APP and learned Advocate for respondent No.2, the learned Advocate for the appellant further submitted that if such incident has taken place in the past, then certainly the victim would have resisted the accused and would not have gone with the accused again. PW-3 has also stated that he did not find that the victim resisting the accused while going towards the spot of incident.

08. Keeping in mind the above submissions, this Court has to consider the evidence.

09. PW-1, informant happens to be wife of maternal uncle of the victim. She stated in her evidence that since the victim lost his parents in the childhood, he was staying with her. His date of birth is 04.02.2003. She proved the bonafide certificate issued by the school. On the date of the incident, the victim was playing outside the house. At around 6.45 p.m. Rakesh Bedkar (PW-3) had been to the house and told her that he saw the victim and the accused roaming near Ramtekdi in a dilapidated house. At 7.30 p.m. the victim returned to home. On asking where he had gone, he started crying and stated the incident. Since the husband was not at home, she did not immediately lodge the complaint. Her husband returned to home at 11.00 p.m. and it is thereafter they decided to lodge the complaint. She proved the FIR. She also deposed about showing of the spot by the victim to the police in her presence and that the victim was referred for medical examination to the KEM hospital. She was present in the hospital. She proved the medical report. She also stated about giving clothes of the victim to the police. She identified Articles 3 and 4.

. In the cross-examination, suggestions were put about the rivalry and about the delay in lodging the FIR. Some omissions are taken about the victim going to the school and that the victim was playing outside the house. However, nothing much is taken out from the cross-examination of PW-1.

10. PW-2 is the victim. He stated in his evidence that the accused had taken him to the dilapidated house. He used to take him on that site. On the date of the incident the accused again took the victim to the spot. The accused removed pant of the victim and inserted his penis in the anus of the victim for half an hour. He came crying to the house. In the house he was asked by his grand mother as to why he was crying. Due to fear he told his grand mother that because of falling on the ground he received injuries. He, however, further stated that because of the fear he did not narrate the incident to grand mother. After some days, the maternal uncle came to know about the acts done by the accused. His maternal uncle thereafter asked him about the incident. The victim thereafter narrated the facts to the police. When the police had been to make enquiry, he also shown spot to the police. In the Court PW-2 deposed about the incident. On returning to home, the victim

narrated the incident to the informant. He stated that even on earlier occasion, the accused has done such thing to him. He proved statement recorded under section 164 of the Cr.PC.

. In the cross-examination of PW-2, some discrepancies are taken. Further questions were asked to show that the place was not secluded place where the incident took place. The incident took place in an open place and there was rush of the people on the road. He could not tell name of the owner of the house where the incident took place and how many windows and doors were to the said house. He denied the suggestion that there was quarrel between his uncle and the accused. Certain questions were asked about timing of returning at the home after the incident. He could not give exact date of the incident in the cross-examination or in the examination-in-chief.

11. PW-3 is Rakesh Betkar, who informed the informant that he saw the accused and the victim near Ramtekdi.

. In the cross-examination, it is taken that this witness did not see

the accused and the victim ascending the hill. To show unnatural conduct, it was asked whether he had suspicion on seeing the victim and the accused talking to each other and inspite of that he did not confront the victim as to why he was with the accused. It is also taken in the cross-examination that at the time of the incident, some children were playing and some ladies were sitting in the open space. The victim was not playing with the children. It is taken that the house where the alleged incident took place is only at the distance of 25 to 35 feet from the temple where there were people. It is also taken that the said house was by the side of the road. It is taken that he did not try to stop the accused by raising shouts or by calling him. It is taken that he did not immediately go to the house of the victim to inform that he saw the victim with the accused. Before going to the house of the victim, he had been to his own house. It is taken that a decision to lodge the report was taken only after the uncle came to home and after some discussion.

12. From the evidence what has come on record is that, it can be said that this witness saw the victim and the accused coming to the house where the incident took place.

13. PW-4 Sameer Sitaram Chavan is the panch. Except proving the panchanama, his evidence is not of much help. He proved spot panchanama and seizure panchanama of mobile of the accused.

14. PW-5 is Dr. Sachin Sudarshan Patil, Assistant Professor who examined the accused in KEM hospital. He stated in his evidence that on 10.08.2018 he received requisition from RAK Marg Police Station for examination of the accused. He along with Dr. Girish Mule examined the accused. His evidence is only on the point that the accused was capable of performing sexual intercourse.

15. PW-6 Dr. Mahendra Namdeo Wankhede, examined the victim. In his evidence he stated that on examination of the victim, he found no recent injuries. On anal examination, he found that there was fissure of 6° clock position. There was no acute per rectum bleeding. Anal tone was normal. He took one anal swab for sample. The team of the Doctors formed opinion that there was no evidence of any recent anal penetration. However, he opined that fissure may be possible due to anal intercourse. He proved the medical report of the victim.

. In the cross-examination it is taken that the fissure may not be possible due to anal intercourse and it can be caused by various reasons.

16. PW-7 Rohit Chandrakant Khot is the Investigating Officer, who deposed about arrest of the accused. He proved arrest panchanama, seizure of mobile, referring the accused and the victim for medical examination and referring the victim for recording statement under section 164 of the Cr.PC.

. In the cross-examination of this witness it is taken that the victim's statement was recorded first in time. However, same was not treated as the FIR. He did not make any enquiry with the persons sitting in the open space when the incident took place and the friends of the victim who were near the temple. No CDR was collected of the mobile of the accused. He denied suggestion that the accused had been to police before the complaint was lodged against the informant. He proved the seizure panchanama, arrest panchanama.

17. Thus, on the basis of this cross-examination, the learned Advocate

for the appellant tried to create doubt about the story of the prosecution. It is submitted that there is no forensic science lab report about semen sample of the accused and the victim.

18. On all these evidence, what is seen is that there is no clear evidence in the form of medical certificate, except having fissure in the anal of the victim. The Doctor has categorically accepted in the cross-examination that there are various reasons for fissure.

19. The learned Advocate for the appellant relies on the judgment of this Court in Criminal Appeal No. 212 of 2017 by the Nagpur Bench in the case of Sagar Dinanath Jadhav Vs. State of Maharashtra. This Court has held that to raise the presumption under section 29 of the POCSO Act, the prosecution has to prove the facts and circumstances. The presumption can be rebutted on preponderance of probabilities. In that case, there were no traces of semen on the clothes of the victim and the underwear of the victim. The Trial Court had accepted the contention of the prosecution that there was strong likelihood of the underwear having been washed and therefore no traces of the semen could be found. It was found that the victim had not

changed the clothes or taken bath from the time of incident till the medical examination and seizure of the clothes. The Court on oral appreciation set aside the conviction and sentence under section 4 of the POCSO Act and under section 452 and 377 of the IPC by allowing the appeal.

20. In the present case, taking the case of the prosecution as it is, it is seen that except oral evidence, there is no other evidence on record. The alleged incident took place at around 06.30 to 07.00 p.m. in the evening. The FIR was lodged within few hours on 08.08.2018 on the same day at 11.00 p.m. The prosecution has also in-fact seized clothes of the victim. The clothes were sent for forensic science lab report. However, no actual report is produced on record. There is no CA report or Forensic Science Lab report in respect of clothes of the accused. There is no clear opinion of the Doctor showing presence of the injuries on the anus and that there were fresh injuries. Though it is observed that there was fissure, in the cross-examination the Doctor has clearly observed that the fissure is not because of insertion of the penis but it is possible because of various other reasons. It is surprising to note that though the victim's statement was recorded first in time, the Investigating Officer did not record the FIR on the basis of the statement of

the victim. Further things need to be seen that in statement under section 164 of the Cr.P.C. the victim has stated the things which are not mentioned in the FIR and also in the deposition before the Court. Looking at the statement under section 164 of the Cr.P.C., it is seen that the victim had first disclosed the incident to the grand-mother that he fell near the temple and therefore he was crying. He stated that because of fear in the mind, he did not disclose the incident immediately. However, same is not stated in the deposition before the Court. The story in the statement under section 164 of the Cr.P.C., differs from the version in the Court. Though, this Court is not impressed by the submission that because of the rivalry the accused is falsely implicated, however, at the same time there is no sufficient material on record to prove the offence beyond reasonable doubt. Considering the things as it is, this Court finds that there is no sufficient evidence to prove the guilt of the accused. In the statement under section 313 of the Cr.P.C. also the accused stated that he has been falsely implicated.

21. This Court is not impressed by the arguments of learned Advocate for respondent No.2 that there is sufficient evidence of PW-2 and PW-3 corroborating each other. The submission of the learned APP that the cross-

examination of the witnesses was in the nature of general statement. His further submission is that PW-3 is eye-witness and the conduct of the PW-3 is natural. This Court finds that the submission of the learned APP is not acceptable. At the first place this witness has not seen the incident what he stated is only that he saw accused and victim roaming near dilapidated house at Ramtekdi. Secondly, he has not tried to accost the accused if he has any suspicion.

22. Taking into consideration all the above facts and circumstances, this Court finds that the prosecution has failed to prove the charges levelled against the accused. In absence of sufficient evidence on record, it is not safe to uphold the conviction. Hence, the following order :-

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The judgment and order dated 11.04.2022 passed in POCSO Special Case No.501 of 2018, by the learned Special Judge under POCSO Act,. Gr. Mumbai, is quashed and set aside.

- (iii) The appellant/accused is acquitted of the offences punishable under sections 4,6 and 12 of the Protection of Children from Sexual Offences Act, 2012 and under sections 506 and 377 of the Indian Penal Code.
- (iv) The appellant/accused shall be set at liberty, if not required in any other offence.
- (v) Fine amount, if paid by the appellant/accused, be refunded to him.
- (vi) Interim application, if any, shall stand disposed off.

[KISHORE C. SANT,J.]