

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1394 OF 2019
WITH
INTERIM APPLICATION NO.505 OF 2024
IN
CRIMINAL APPEAL NO.1394 OF 2019**

Ashok Lekhu Rajat : Appellant/Orig. Accused
Vs.
State of Maharashtra & Anr. : Respondents

Adv. Akhilesh Singh a/w Adv. Ruchi Singh & Adv. Smita Ausarkar, for the Appellant.

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

Adv. Manisha Arjun Devkar, (appointed) for the Respondent No.2.

**CORAM : KISHORE C. SANT, J.
RESERVED ON : 20TH MARCH, 2024
PRONOUNCED ON : 25TH APRIL, 2024**

PC. :

1. This Appeal arises out of the Judgment and Order passed by the Learned Special Judge under Protection of Children from Sexual Offences (POCSO) Act, 2012, dated 17th December, 2018 in POCSO Special Case No.522 of 2014. By way of Impugned Judgment & Order the present Appellant is held guilty for the offence punishable under Section 376 of Indian Penal Code and under Sections 4 & 6 of POCSO Act. He is sentenced as below:-

Sr. No.	Sections	Punishment	Fine Amount
1.	376 of IPC	15 years	Rs. 2000/-, in default, to undergo R.I. for two months.
2.	4 of POCSO Act	7 years	Rs.2000/-, in default, to undergo R.I. for two months.
3.	6 of POCSO Act	15 years	Rs.2000/-, in default, to undergo R.I. for two months.

All the sentences are directed to run concurrently.

2. The brief facts in short leading to the prosecution case are that on 9th September, 2014 the Complainant went to the public toilet along with her daughter aged 4 years and the sister-in-law to attend nature's call. The Victim went to one toilet. The sister-in-law occupied the another toilet. The Victim girl since was only 4 years of aged, the door of the toilet was kept open. The Complainant went to take water from the public tap. As she went to the tap 10-15 feet away she heard screaming of the Victim on that immediately rushed back to the toilet and saw that the Accused was inserting finger in the vagina of the Victim girl. On seeing that she hit Accused with bucket in hand. Aunt also immediately came out from her toilet. She also beat the Accused. At that time some other people also gathered there but the Accused ran away from the spot. Immediately Complainant did not report the incident to anyone. The Victim however, was suffering form pain in her private part. The Complainant therefore

brought the incident to the notice of her husband i.e. father of the Victim. It is thereafter the complaint came to be filed on 11th September, 2014. The Police after investigation filed a charge sheet and prosecuted the Accused. The Learned Judge on the basis of evidence led before the Court held the Accused guilty and awarded sentence. The Appellant/Original Accused is thus before this Court.

3. Learned Advocate for the Accused vehemently argued the Appeal, in his argument he submitted that there is no sufficient evidence on record, to prove guilt of the Accused. He pointed out contradictions in the evidence of PW-1, PW-2, PW-3 & PW-6. There is no independent witness though the story of the prosecution is that immediately after the incident people had gathered there. Father of the victim is not examined. He also submitted that the Accused is falsely implicated as the mother of the Complainant did not want that bachelor like the Accused is staying in the society. There is no identification parade held. He relied upon judgment in the case of ***Laxman Govind Varma Vs. State of Maharashtra And Another¹*** in support of his submission that child witness are prone to tutoring and there evidence should be accepted carefully. He relied upon another judgment in the case of ***Pradeep Vs. State of Haryana²*** in support

1 2021 SCC OnLine Bom 4137

2 2023 SCC OnLine SC 777

of his submission that under the Oaths Act it is duty of the Court to ascertain whether the person deposing of oath is capable of understanding of sanctity of the oath. He further relied upon the judgment in the case of *Navin Dhaniram Baraiye Vs. State of Maharashtra, through P.S.O., P.S. Ajni, District Nagpur*³ in respect of his submission as regards deficient medical evidence.

4. Opposing appeal, learned Advocate for the Respondent No.2 submits that the prosecution has led sufficient evidence of six witnesses. PW-2 is the eye witness i.e. the mother of the Victim. PW-3 is Victim. The contradictions are not material. So far as the main incident is concerned all the witnesses are consistent. There is also a statement recorded under Section 164 of the Criminal Procedure Code. There was no need to hold identification parade as the Accused was known to the witnesses, since Accused was staying in the same locality. The contradictions are not material. It is for the Accused to make out a case that he is falsely implicated in the offence. Since there are presumptions attached to an act under POCSO. She submits that the medical evidence supports the case of prosecution. She submits that the judgments relied upon by the Accused are not applicable in the present case.

³ 2018 SCC OnLine Bom 1281

5. Learned APP submits that the Victim was hardly of 4 years of age. There is a Birth Certificate on record. The evidence of all the witnesses is corroborative. Delay in lodging the F.I.R. is rightly explained. He prays for rejection of the Appeal.

6. This Court has to the assistant of the Victim this Court has gone through the evidence.

7. PW-1 is the mother of the Victim/Complainant. She categorically stated that on 9th September, 2014 at about 10.30 p.m. she had gone to attend nature's call at public toilet with victim & sister-in-law. The public toilet there were lights. She took the Victim to public toilet whereas her sister-in-law went to another toilet. She had kept the door of the toilet open as a Victim was a small girl. The tap water is 10 feet away from the toilet. When she went to the tap water, she heard screaming of victim girl and she immediately rushed to the toilet. She found that the Accused was inserting his finger in her vagina. She hit the Accused with the plastic bucket on his nose. The blood starting oozing from the nose of the Accused. She started shouting, listening to her shouts some people gathered there. She further deposed that because of the sudden incident she was afraid and therefore she did not disclose the incident immediately. The Victim however was suffering because of the pain and she was crying.

It is for that reason she told the incident to father of the Victim. It is thereafter report was lodged with the police station. She also deposed that her statement came to be recorded before the Metropolitan Magistrate. It is stated that she was not knowing name for the Accused. It is further stated that the Accused was standing in the passage of the public toilet. She asked him as to why he is standing in the passage. On that he said that he is leaving the place. It is further taken out that she only saw that the Accused was standing outside the washroom. It was tried to suggest the daughter was having problem of speaking. It is stated that the incident was not immediately reported to the husband.

In the cross-examination she stated that she has seen the incident. She could not give exact date of birth of the Victim. In her evidence she proved 164 statements.

8. PW-2 is the sister-in-law of the Complainant and aunt of the Victim. She also stated about the incident. She was sitting in the another toilet. On hearing the screaming she immediately came out from the toilet. She also slapped the Accused on coming to know as to what has happened. She stated that blood was oozing from the nose of the Accused.

In the Cross-examination it has come that she did not see the actual incident of accused putting finger in vagina of the victim.

9. PW-3 is the Medical Officer who examined the Victim on 11th September, 2014. She stated that the victim gave history of fingering. She did not find any external injury on the body. There was no evidence of fresh injury the hymen was intact. She however stated that by passage of time of two days the injury may be healed. Even in the case of fingering is not done with force hymen may not be ruptured. She stated that the pain at the time of passing urine is possible by fingering. After examination she opined that there was fingering. She proved Medical Certificate.

10. PW-4 is the Investigating Officer. He stated that the Accused gave confessional statement.

In the Cross-examination noting much is taken.

11. PW-5 is the PSI, who at the relevant time was working as Police Station Sakinaka. He stated about seizure of the clothes of the Victim. It is stated that the spot was shown by one David Anthony and it was not shown by the Victim or her parents.

12. PW-6 is the Victim, she stated about the incident. She also stated that her mother on noticing the incident beat the Accused. She identified the Accused.

In the Cross-examination, she could not give the exact date and time of the incident. She could not tell the address of the Accused. She

stated that the Accused was shown to her in the Court. Thus still she stated that she recollect face of the Accused as the same person. It is also taken out that she was reminded of the incident by mother and police before coming to the Court. It is try to suggest that there was already a quarrel between the Accused and the Mother which she denied. It is material to note that this suggestion was not given to any of the witnesses i.e. the mother and the aunt of the Victim.

13. In a statement under Section 313 it is stated by the Accused that the mother of the victim did not like bachelor boys staying in the society and therefore false compliant is lodged.

14. On going through the evidence this Court finds that there is evidence of mother and the aunt of the Victim which corroborate each other. The contradiction is a minor. Merely because of some contradictions it cannot be inferred that the case of the prosecution is doubtful. The learned Advocate failed to show as to how the contradiction affects in the prosecution case. The argument that the Victim has stated in the Cross-examination that the Accused was shown to her by the police before coming to the Court is not of much help to the Accused considering the age of the Victim. It is not the case of the Accused that she had not seen the Accused at the time of incident. From the evidence of the Victim also it is

seen that she has clearly stated that it is the same person who did the act with her. The further submission that the Victim was told about the incident what to say in the Court is also of no much avail. As the Victim at the time of incident was hardly 4 years of age. Assuming that she was told by the mother still there is evidence of mother and the aunt of the victim which corroborates each other. Their evidence is also sufficient to prove the case of the prosecution.

15. So far as the judgments relied upon by the Accused some discussion is needed. The first judgment is in the case of ***Laxman*** (supra). In the said case it was considered that the age of the Victim was 4 years. It was held that the learned judge ought to have ascertained the intellectual capacity and the level of understanding of this child before treating the Victim as a competent witness to depose the facts of the case. From the evidence in the present case this Court finds that no case is made out to show that the Victim was not able to answer the questions. In the case of ***Laxman*** (supra) the Special P. P. was allowed to ask many questions and cross examine the witness. In that case it had come on record that the Victim had stated that she does not remember the incident. It was also observed that in the case of ***Laxman*** (supra) that in the Court, it was observed that the Victim was under the influence of her mother while

deposing before the Court. In the present case the Court finds that the judgment is not applicable as the evidence of the Victim inspires confidence.

16. In the case of ***Pradip*** (supra) the Apex Court had considered the evidence of the minor girl in the light of Section 4 of the Oaths Act, 1969 which requires the Court to satisfy itself about competency of the child witness under the 12 years of age. However, in the said judgment the Court has held that the corroborative testimony of the child witness is not a rule but a measure of caution. Since the child witness is easily susceptible to tutoring. The Court further held that the witness is a child witness that itself is no ground to reject the evidence of such witness. What is required is to take caution.

17. In the case of ***Navin*** (supra) this Court considered the Medical Evidence. In that case also Medical Evidence was given of the unnatural sexual assault and in view of that the case Accused was acquitted in Appeal. In this case there is clear evidence to show that the Accused/Appellant had inserted his fingers into vagina of the Victim.

18. In the case of ***Suresh Raju Mukane Vs. The State of Maharashtra & Anr., in Criminal Appeal No.522 of 2021*** the victim was three & half years old. She had deposed in the Court after two years of the

incident. The Victim girl clearly identified the Accused in the Court. The Court held that it is highly impossible for a minor girl aged three & half years to identify person as the memory of child is short. It was specifically admitted by the Victim in her evidence that she had no opportunity to see the face of the person as there was dark. In that view of the matter it was held that the prosecution failed to establish that it was the Accused who committed sexual assault. In the present case there are two witnesses i.e. mother and the aunt. At the time of incident the mother has clearly seen the incident.

19. On considering all the evidence and also these judgments relied upon by the Appellants, this Court finds that the prosecution has clearly established its case. The Trial Court has also rightly appreciated the evidence. No case is made out calling for the interference at the hands of this Court.

20. The Appeal thus deserves to be dismissed and the same is dismissed.

21. In view of the dismissal of the Appeal, pending Interim Application stands disposed of.

(KISHORE C. SANT, J.)