

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

CRIMINAL APPEAL NO.226 OF 2024

Jummasha Kashim Khalifa

....Appellant

Versus

The State of Maharashtra
and another

....Respondents

Mr. Nitin Gaware Patil, Advocate (appointed) for the Appellant.

Smt. Manisha R. Tidke, APP for the Respondent No.1-State.

Mr. Veerdhawal Deshmukh, Advocate (appointed) for the
Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 07th AUGUST, 2024

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 15.2.2023 passed by the Special Judge (POCSO), Gadhinglaj, District-Kolhapur in Special (POCSO) Case No.8/2020. The Appellant was convicted and sentenced as under :

[i] The Appellant was convicted for the offence punishable under Sections 354 of IPC and he was sentenced to suffer RI for three years and to pay fine of Rs.5,000/- and in default of payment of fine to undergo RI for one month;

[ii] The Appellant was convicted for the offence punishable

under Section 10 of the Protection of Children From Sexual Offences Act, 2012 (for short, 'POCSO Act') and he was sentenced to suffer RI for five years and to pay fine of Rs.10,000/- and, in default of payment of fine, to undergo RI for two months;

2. The substantive sentences were directed to run concurrently. The Appellant was given set off under Section 428 of Cr.P.C. for the period undergone as under-trial prisoner. As the Appellant was punished under Section 10 of POCSO Act, no separate sentence was passed under Sections 8 and 12 of POCSO Act. Also as the Appellant was punished under Section 354 of IPC, no separate sentence was passed under Section 354-A of IPC. The Appellant was acquitted from the offence punishable under Section 506 of IPC.

3. Heard Mr. Nitin Gaware Patil, learned appointed counsel for the Appellant, Smt. Manisha Tidke, learned APP for the Respondent No.1-State and Mr. Veerdhawal Deshmukh, learned appointed counsel for the Respondent No.2.

4. The prosecution case is that the date of birth of the victim was 30.1.2010. The incident occurred on 19.3.2020. The

victim and her friend had gone to a bakery. The Appellant was present there. He threatened the victim's friend, who ran away. The Appellant held her neck and dragged the victim to a place near a lake. It is alleged that he tied her hands with a string and started kissing her. The victim, somehow rescued herself and ran towards her house. She met her mother. The victim narrated the incident to her mother. Thereafter they went to the police station and lodged her FIR. The Appellant was arrested. The spot panchnama was conducted. The string, mentioned by the victim, was found at the spot. The Appellant was arrested. The investigation was carried out and the charge-sheet was filed. The case was committed before the Special Court for POCSO.

5. During the trial, the prosecution examined seven witnesses, including the victim, her mother, the spot pancha, the person who produced the birth register, the person who produced the memory card regarding the videography of the spot panchnama and recording of the statements, and the investigating officer. The defence of the Appellant was of total denial. No specific defence was taken by him. He did not

examine any defence witness. The learned Judge heard the parties and convicted and sentenced the Appellant, as mentioned earlier.

6. The prosecution case is narrated by the victim herself, who is examined as PW-4. She has deposed that she was born on 30.1.2010. At the time of incident, she was studying in the 4th standard. On the date of incident, she herself and her friend 'S' went to a bakery for bringing snacks. At that time, the Appellant called her. He caught her neck. He threatened her friend 'S'. Then the Appellant dragged her towards the lake. He made her sit on the platform of the lake. He removed one string from his pocket and tied her hands. He kissed her. PW-4 kicked the Appellant and ran away. She narrated the incident to her mother, who telephonically called PW-4's father. Her father came home. All of them went to the police station. PW-4 narrated the incident to the police. They recorded her statement. She identified the string produced in the Court. She identified the Appellant.

In the cross-examination she deposed that the

Appellant was not a permanent resident of their village. His two sisters were residing near PW-4's house. She admitted that there was rush of people near the bakery. Her mother and aunt were washing clothes outside their house. She stated that since she was acquainted with the Appellant, she went near him as he called her. She stated that she did not raise shouts when the Appellant caught her neck. She further stated that there were people residing in that area near that spot. The Appellant dragged her towards the lake by holding her neck. It took only half a minute to reach the lake from the place from where she was dragged. She explained that though her friend 'S' could run away, she herself could not run away as the Appellant had caught her neck. She removed the string while running towards her house. When they reached the police station, the Appellant was also present in the police station. He was at his house before he was brought to the police station. She denied the suggestion that prior to the incident there was quarrel between the PW-4's mother and the Appellant's sister on account of money. She also denied that there was quarrel between the Appellant and PW-4's father on account of money.

7. PW-1 was the mother of PW-4 and she had lodged the FIR. She has deposed that she was residing with her husband and three children. She deposed that PW-4's date of birth was 30.1.2010. The incident took place on 19.3.2020. At that time, she was washing the clothes. The Appellant came and asked for water. After that he went away. PW-4 wanted money for purchasing snacks and went to bring it. She was accompanied by her friend 'S'. After some time, PW-4 returned home crying. She told PW-1 that the Appellant had pulled her and by holding her had kissed her. She was dragged towards the lake. PW-1, then told this fact to her husband. Then her husband beat the Appellant and took him to the police station. They lodged the report. The FIR is produced on record at Exhibit-8. She identified the Appellant in the Court.

In the cross-examination she stated that the house of 'S' and the Appellant's sister's house are close to each other. The distance between her house and the spot of the first incident, where the Appellant had caught the victim, was 2 to 3 houses away from PW-1's house and that spot was visible from her

house. But, she denied that she had seen the Appellant taking away PW-4. 'S' did not come to her house. When PW-4 reached home, her hands were not tied. The FIR was lodged at 4.39 p.m. The FIR narrates the incident in the same manner as is deposed by PW-1 and PW-4.

8. PW-2 Gajanan Dharmadikari was the pancha for spot panchnama. He has deposed that he had received a letter from the Tahsildar Office and he was asked to attend the police station to act as a pancha. He went to the spot from the police station. The informant was present there. The victim was present. They showed the spot. They found one rope of the length 5 to 6 ft. The police seized it and sealed it. The spot panchnama was carried out. It is produced on record at Exhibit-10. He identified the rope produced in the Court.

In the cross-examination, he deposed that they reached the spot at 6.15 to 6.30 p.m.. He deposed that there was a market near the spot. The lake was on the southern side of the spot. The distance between the two spots described by the victim was 20 ft. He stated that the rope, which was found, was easily

available. The spot panchnama is produced at Exhibit-10. It describes that the rope was found at the second spot as described by the victim PW-4. The spot panchnama was conducted from 6.30 p.m. to 7.05 p.m.. A rope of eight feet length was seized from the spot.

9. PW-3 Pranam Shide was working in the Birth and Death Registrar office at the concerned Municipal Council. He produced the birth register showing the entry regarding date of birth of PW-4. In any case the date of birth of the victim is not in dispute. Said entry in the register and the certificate are produced on record at Exhibits-14 and 15.

10. PW-5 Aayub Mulla was a pancha in whose presence, the memory card was produced. In the cross-examination he stated that he did not know the contents of the memory card. The panchnama was produced on record and marked as Exhibit-20. The panchnama shows that the memory card contained the video recording in respect of recording of the statements of the victim and her friend 'S'.

11. PW-6 Police Constable Ganesh More had taken the

photographs of the spot on his mobile phone. He identified the photographs which are produced on record at Exhibits-23 to 26. He produced the screenshot of hash value of video clip containing recording of statement of the victim and her friend 'S'.

12. PW-7 Dinesh Kashid was the investigating officer. The FIR was registered at Gadhinglaj Police station vide C.R. No.138/2020. He deposed that the Station House Officer had sent the victim for medical examination. This witness conducted the spot panchnama. He recovered the rope from the spot. He recorded the statements of the victim girl, the lady police officer and that of her friend 'S'. The process of recording their statements was video-graphed. He collected the birth certificate of the victim to show her date of birth. He got the statement of the victim recorded under Section 164 of Cr.PC.

In the cross-examination he deposed that the first spot from where the victim was taken away was at a distance of 15 to 20 ft. from her house and the lake was situated at a distance of 50 feet from her house. He deposed that there used to be rush of people and vehicles near the first spot.

13. Learned counsel for the Appellant submitted that the evidence of PW-4 does not appear to be true. It was not possible for the accused to drag her from the first spot to the other spot without anybody noticing it, particularly when the victim had raised shouts. Her friend 'S' was not examined. There is discrepancy regarding the narration of the actual incident given by PW-1 and PW-4. There is discrepancy in the length of the rope described by the pancha in his deposition and the string or rope seized from the spot. There is no independent corroboration.

14. Learned counsel for the Respondent No.2 as well as learned APP submitted that the evidence of PW-4 is sufficient to base the conviction. There was no reason for her to implicate the Appellant falsely. He had not taken any specific defence. Finding of rope at the spot is an incriminating corroborative piece of evidence.

15. I have considered these submissions. In this case PW-4 is the only witness who could have described the actual incident. The incident took place at the two spots. From the first spot, she was dragged to the other spot where the next incident

took place. As far as the first spot of the incident is concerned, undoubtedly there was victim's friend 'S' present at that time, but, she is not examined. However, the evidence shows that the Appellant had threatened her friend 'S' and therefore she had not even rushed to the house of the victim to tell the victim's mother about the incident. She was also of tender age. Non-examination of 'S' will not help the Appellant in this Case.

16. Learned counsel for the Appellant submitted that the evidence shows that the first spot was near a market place and, therefore, at least somebody could have noticed the incident if it was actually true. However, even the Appellant has not rebutted the presumption under Section 29 of the POCSO Act in that behalf. There is hardly any distance from the first spot and the second spot. According to the spot panchnama, it was 20 ft.

17. The victim was over-powered as the Appellant had caught her by her neck. The Appellant pulled her towards the lake which was the second spot. It was only 20 ft away and, therefore, it was not very difficult for him to drag her away from the first spot without anybody else noticing it. The victim has

described the incident in some detail which attracted the defining Section under the POCSO Act. The relevant section under POCSO Act is Section 7 defining sexual assault, which reads thus :

“7. Sexual assault. -- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

. The act described by the victim clearly falls within the meaning of Section 7 of the POCSO Act. The offence becomes aggravated sexual assault because the victim was below 12 years of age and her age is not disputed.

18. It is not as if the victim's evidence is uncorroborated. The finding of rope at the spot is a strong corroborative piece of evidence. The FIR is lodged at around 4.39 p.m. and the spot panchnama was immediately conducted within a short time at around 6.30 p.m.. When the police and the pancha went to the spot which was shown by the victim and her mother, a rope was found at the spot. It corroborates the deposition of PW-4. She

has deposed in her cross-examination that she removed the string while running towards her house and the string was found at the spot. Therefore, this is a corroborative piece of evidence. I am not impressed by the submission that there was discrepancy in the length of the string mentioned by PW-2 and that mentioned in the spot panchnama. There was hardly any discrepancy in the length and in any case it does not go to the root of the matter at all.

19. From her evidence, it is clear that PW-4's evidence does not suffer from any infirmity. She has given clear and consistent evidence. There is no reason to discard her evidence. The Appellant, on his part, has not led any evidence, or has not offered any plausible explanation for his false implication.

20. Considering this discussion, I do not find any merit in the Appeal. The Appeal is dismissed.

(SARANG V. KOTWAL, J.)

Deshmane(PS)

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