

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

CRIMINAL APPEAL NO.120 OF 2022

Sadanand Dattarao Hapse

....Appellant

Versus

The State of Maharashtra
and another

....Respondents

.....

WITH

INTERIM APPLICATION NO.2545 OF 2024

IN

CRIMINAL APPEAL NO.120 OF 2022

Mr. Shailesh S. Kharat, Advocate for the Appellant.

Mr. Prashant P. Jadhav, APP for the Respondent No.1-State.

Mr. Aditya Bapat, Advocate (appointed) for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 04th SEPTEMBER, 2024

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 20.2.2020 passed by the learned Special Judge under POCSO Act, Greater Mumbai in POCSO Special Case No.47/2017. The Appellant was convicted and sentenced as under :

- [i] The Appellant was convicted for the offence punishable under Section 376(2)(i),(l) of IPC and he was sentenced to suffer RI for twelve years and to pay a fine of Rs.20,000/- and in default of payment of fine to undergo RI for three months;
- [ii] The Appellant was convicted for the offence punishable under Section 10 of the Protection of Children From Sexual Offences Act, 2012 (for short, the 'POCSO Act') and he was sentenced to suffer RI for six years and to pay fine of Rs.10,000/- and in default of payment of fine to undergo RI for two months.
- [iii] The Appellant was convicted for the offence punishable under Section 12 of the POCSO Act 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.

2. The Applicant was also convicted under Sections 4 and 6 of the POCSO Act, however, in view of Section 42 of the

POCSO Act, no separate sentence was imposed on the Appellant under Sections 4 and 6 of the POCSO Act. All the substantive sentences were directed to run concurrently. The Appellant was given set off under Section 428 of Cr.P.C. He was acquitted from the charge of commission of the offence punishable under Section 506 of IPC. The amount of fine, if recovered, was directed to be paid to the victim as compensation under Section 357(1) of Cr.P.C. after the Appeal period was over. The case was recommended to the District Legal Services Authority, Mumbai for awarding compensation to the victim (PW-3) as per Section 357-A of Cr.P.C.

3. Heard Mr. Shailesh Kharat, learned counsel for the Appellant, Mr. Prashant Jadhav, learned APP for the Respondent No.1-State and Mr. Aditya Bapat, learned appointed counsel for the Respondent No.2.

4. The prosecution case is that the victim, in this case, was twelve years and ten months old at the time of the incident. The date of birth of the victim was 12.1.2004 and the incident occurred on two occasions in the month of November, 2016. The

victim was suffering from learning disability and, therefore, the offence was aggravated. The Appellant was a Sweeper in the society where the victim was residing with her parents. Her father was not keeping well and her mother used to go for her job. On the date of the first incident, the victim had gone to play with her friends. She parked her cycle near a room. That room was close to the room used by the Sweeper. The Appellant took her inside the room and touched her indecently. He gave his mobile phone to her and told her not to disclose it to anybody. He also threatened her. On the next occasion, within 2-3 days, again the Appellant took her to a room. This time, he committed penetrative sexual assault and again threatened her. Initially, the victim did not tell this incident to anybody, including her mother. But, her mother discovered the mobile phone in the victim's school bag. The victim then told her about the incident. The mother of the victim consulted other family members and ultimately lodged the FIR on 23.11.2016 at about 10.00 p.m.. The Appellant was arrested on 24.11.2016 and since then he is continuously in custody. The investigation was carried out. The

charge-sheet was filed and the case was committed to the Special Court.

5. During the trial, the prosecution examined eleven witnesses including the victim, the Medical Officers, a panch, the Supervisor in the building and the Police Officers. The defence of the Appellant was of false implication. It is also the Appellant's case that he had gone to lodge a complaint about theft of his mobile phone. He was told by the police that the victim's mother and the victim had stolen the mobile phone and, therefore, to save themselves, they lodged this complaint against him.

6. After considering the evidence and the defence, the learned Judge convicted and sentenced the Appellant, as mentioned earlier.

7. The victim was examined as PW-3. She has deposed that she was residing with her parents and grand-mother. She, along with her friend used to go to the clubhouse of the society for playing. They used to go for cycling near the clubhouse. Her mother used to go for her job and her father used to remain in

the house. Her mother used to leave home at around 8.30 a.m. and used to return at 9.00 p.m. PW-3's date of birth was 12.1.2004. She has deposed that the incident took place during the Diwali festival in the year 2016. At about 11.00 a.m., she and her three friends had gone for cycling towards the clubhouse. At about 12.00 noon, she returned home and her friends had gone back to their houses. She had gone to the parking area. The Appellant was working as a Sweeper in the society. The Appellant suddenly came towards her from behind and took her forcibly towards the washroom used by the watchmen and he touched her private parts repeatedly. She has deposed that she was frightened and she went back to her house. On the next day also, she went with her friends for cycling. Again, she went to the same place to park her cycle. Again, the Appellant came towards her and took her forcibly towards the bathroom used by the watchmen. He gave his mobile handset to her. She further deposed that he removed their clothes and touched her private parts. She added that he inserted his private part in her private parts. The Appellant asked her to take photographs and told her

not to disclose that fact to anybody. He handed over that mobile handset to her and told her not to tell about it to anybody else. After that, she went home. She did not disclose this incident to anybody as she was frightened. She started attending her school. Her mother came to know that she had a mobile handset. Her mother inquired with her about that fact. PW-3 lied to her that it belonged to her friend "H". PW-3's mother made inquiries with H's mother and came to know that PW-3 was not telling the truth. Her mother, then, again inquired with her. Again the victim did not give proper answer; but her mother kept on questioning her; and ultimately PW-3 disclosed the entire incident to her mother. PW-3's mother lodged her FIR at Navghar police station. The police made inquiries with PW-3. Her statement was also recorded by the Magistrate at Kurla under Section 164 of Cr.PC., which is produced on record at Exhibit-26. She identified the mobile phone given by the Appellant to her, which is produced in the Court. She identified her clothes produced in the Court.

In the cross-examination, she stated that after 2-3

days, when her mother came to know about the mobile handset, they had gone to the police station. During that period, the mobile handset remained with PW-3's mother. Before that, PW-3 herself was having the mobile handset for 2-3 days. During that entire period, neither the Appellant made any phone call to her nor PW-3 made any phone call to him. The handset was switched off. Her mother also did not use the phone to call the Appellant by using that mobile handset. Her mother did not question the Appellant about the mobile handset. The Appellant used to come to the building for sweeping daily. The washroom was situated adjacent to the cabin of the watchman. The watchman was deputed in the premises of the building for 24 hours. Sometimes the washroom used to be locked and sometimes it used to be unlocked but in the evening time, it used to be locked. On 23.11.2016, when they had gone to the police station, the Appellant was present in the police station. She denied the suggestion that the Appellant had alleged that PW-3 had stolen his mobile phone from the garden. Importantly, she admitted that the said mobile handset did not have any photographs or

videos. She used to carry that mobile handset with her in her school bag. She carried it to her school for 2-3 days.

In her cross-examination, she deposed that at the time of recording of her police statement, she had not stated before the police that the Appellant had come towards her from behind and that he had given his mobile handset to her and that the Appellant had inserted his private part in her private parts and that he had asked her to take photographs. This appears to be the omission from her police statement. The defence had asked the investigating officer WPSI Kulkarni, who was examined as PW-6 about this omission; at that time PW-6 had also admitted that PW-3 had not stated so in her police statement but PW-6 further added that the victim had stated that after removing the clothes the Appellant had committed the “bad act” with her. PW-3 admitted that at the time of her medical examination, her mother had given the history to the medical officer and the medical officer had not asked her about it.

8. PW-1 was the first informant. She was the mother of the victim. She has deposed that PW-3 was a Special Child. PW-

1 herself was working in a private company as a Manager. On 18.11.2016, when she was checking the school bag of PW-3, she found a mobile phone. When she questioned her daughter, initially she told PW-1 that it belonged to one of her friends, "H" but later on confessed that it belonged to the Appellant and then she narrated the incident as described by PW-3. PW-1 then took PW-3 to a Gynecologist, Dr. Shetty who confirmed the incident but opined that there was "no harm". After that PW-1 went to the police station with her husband, sister and the victim. She lodged her FIR. It is produced on record at Exhibit-20. The police recorded statement of PW-3. On 24.11.2016, she handed over the victim's clothes to the police. From the evidence, nothing incriminating is brought out in the evidence in respect of those clothes. The C.A. Report did not reveal anything incriminating against the Appellant. PW-1 has further deposed that her statement was recorded under Section 164 of Cr.P.C.

In the cross-examination, she deposed that she came to know about the incident for the first time on 18.11.2016 and she lodged the FIR on 23.11.2016. She explained that she

wanted to consult the matter with her family members. After she came to know about the mobile phone belonging to the Appellant, she did not question the Appellant about it. She deposed that there was a watchman in their building. There were fourteen buildings in all. The watchmen's cabin was by the side of the parking area and the service washroom was adjacent to that cabin. There were watchmen for 24 hours; one during the day and the other in the night. She did not make any inquiry with the watchman. She did not make inquiries with the victim's friends. Nobody from the society told her that the victim was playing in the parking area. She denied the suggestion that PW-3 had stolen the Appellant's mobile phone and to avoid those accusations, this false case is lodged against the Appellant.

9. PW-2 Hiralal Jadhav was a Manager in the society. He deposed that the Appellant was working as a Gardner in the clubhouse. This witness used to mark the Appellant's presence in the muster-roll. There were fourteen buildings in the campus. There were around 28 flats in each building. There were in all 450 flats. The society campus was crowded in the morning and

in the evening.

10. PW-5 Pawaskar was a Guard Supervisor working in that society. He has deposed that he had seen the Appellant talking with PW-3 between 11.11.2016 to 18.11.2016.

11. PW-11 Vijay Gosavi was a pancha witness. He has deposed about the seizure of the victim's clothes produced by PW-1, seizure of the mobile phone produced by PW-1 and the spot panchnama. The spot panchnama is produced on record at Exhibit-50. It is mentioned in the spot panchnama that there was flat No.106 of building No.7 above the washroom, which was the spot of incident.

12. The prosecution examined three medical officers in this case. Their evidence is quite important. PW-8 Dr. Shetty was the first doctor who had examined the victim. She was a Gynecologist. She was a private practitioner. On 23.11.2016, the victim's parents brought her to PW-8. The victim gave her the history that the Appellant had touched his private part to her private part. He had pressed her private parts. She had suffered

pain. PW-8 examined her. She has specifically stated that she could not find any damage to the victim's private parts. In her cross-examination, she added that she had not found any marks or injuries of sexual assault on the victim.

13. PW-7 Dr. Patil had examined the victim after the FIR was lodged. He has referred to the history given by the victim's mother. He had given his final opinion that there were signs of use of force and that the sexual assault could not be ruled out. He was asked in the examination-in-chief itself as to what he meant by 'NAD' in the medical report. He answered that, it meant 'No Abnormality Detected'. It meant that there were no fresh injuries or tears. According to him, the fresh injury would be caused within 2-3 days of the examination. He added that he referred to the protocols of the medico legal examination and, therefore, had not mentioned the status of hymen because, according to those protocols, it was irrelevant and it could be torn due to various causes. He was asked whether history of penovaginal sexual intercourse was possible. He had answered affirmatively. The provisional medical certificate was produced

on record at Exhibit-37.

He was cross-examined . He deposed that the victim had learning disability. He admitted that since the victim was suffering from mental disability, she was not able to give proper history. The medical papers produced on record at Exhibit-37A clearly mentions that there was no abnormality detected in urethral meatus and vesibule, labia majora, labia minora, fourchette and introitus, hymen, perineum and external urethral mealus. Thus, the clinical examination did not show any indication of any injury or force inflicted on the victim. Inspite of this clinical examination, the witness gave his opinion as mentioned above. His opinion is based only on the history told to him and not based on his own clinical examination.

14. PW-4 Dr. Gupte was a Psychologist. She has deposed that she was treating the victim since 2015 as she was having learning disability and attention deficit hyper activity disorder. On 23.11.2016, the victim was brought to her hospital by the victim's parents. They narrated the incident. This witness had referred the victim for further treatment to a Gynecologist and

had advised to lodge a report.

15. The defence admitted the medical examination of the Appellant, which is produced on record at Exhibit-28. It was issued by the Sion Hospital, Mumbai. In that document, the history was mentioned as given by the Appellant. He had stated that he knew the victim as she used to play in the garden. Once she had fallen while cycling. He had gone to help her. On 14.11.2015, she had asked him to give his mobile phone for an hour. He had given his mobile phone but thereafter she had not returned it. He had denied any kind of sexual assault committed with the victim.

16. PW-6 WPSI Kulkarni had recorded the victim's statement and as mentioned earlier had referred to the omission from the victim's police statement, as deposed by the victim in her deposition.

17. PW-9 PI Dilip Patil was the investigating officer who had filed the charge-sheet. He had recorded the statements of some of the witnesses and some of the doctors.

18. PW-10 PSI Jagade was the first investigating officer. He had registered the FIR, seized the mobile phone and clothes produced by PW-1 and had caused recording of the statements under Section 164 of Cr.P.C. He deposed that he had seized the mobile phones from the Appellant as well as from PW-1. He did not find any obscene video or photographs in both these mobile phones. He did not find any incoming and outgoing calls between the Appellant and the victim. He added that the log details of the mobile phone produced by PW-1 were in deleted condition. He did not collect the CDR of both the mobile phones.

. This, in short, is the evidence led by the prosecution.

19. Learned counsel for the Appellant submitted the entire evidence shows that the incident is highly improbable. The conduct of the victim was unnatural. She had not raised any shouts. It was not possible for the Appellant to have dragged her to the watchmen's washroom from an open parking space of a crowded society. The mobile phones do not show any obscene photograph or videos. There is no explanation as to why the victim had kept the mobile phone of the Appellant. There were

no calls exchanged between them. He heavily relied on the medical evidence. He submitted that the clinical examination by two medical officers PW-7 and PW-8 did not show any injury and hence there were no signs of penetration. He submitted that the evidence shows that there was always a watchman next to the washroom as the watchmen's cabin was adjacent to the washroom. He submitted that there is serious doubt raised about the entire incident and in any case there is a strong doubt about the theory of penetration. He, therefore, submitted that the Appellant deserves to be acquitted. The Appellant is in custody since 24.11.2016.

20. Learned APP as well as learned counsel for the Respondent No.2 submitted that in this case, the evidence of the victim – PW-3 is cogent and reliable and, therefore, even in the absence of the corroborative medical evidence, the conviction can be based on her sole testimony. There is no reason for the PW-3 to implicate the Appellant falsely. They submitted that even penetration to a small extent can constitute an offence and there need not be any injury caused to the victim.

21. I have considered these submissions. I find force in the submissions of learned counsel for the Appellant that the medical evidence in this case assumes importance. The clinical examination conducted by the two doctors i.e. Dr. Shetty and Dr. Patil show that there were no signs of injury at all. This fact will have to be taken into consideration while deciding this appeal.

22. Learned counsel for the Appellant referred to the omission brought out by the defence in PW-3's evidence from her police statement. As mentioned earlier, the victim PW-3 as well as the police officers have admitted that PW-3 had not specifically mentioned the penetrative sexual assault, though, there was a reference to the 'bad act' committed by the Appellant in her police statement. However, considering her tender age, this aspect cannot be the sole decisive factor in the present case. This will have to be considered together with the other evidence.

23. However, in the history given to Dr. Shetty, there was mention of only touching the private parts of the victim. Thus, at the first instance, the allegations made by PW-3 were only regarding touching of her private parts and not the penetration.

In this case, PW-3 is the most important witness for the prosecution. Her first disclosure to an independent Gynecologist and to the police in her statement, together will have to be given due importance. In this particular case, the case of the prosecution in respect of penetrative sexual assault will have to be scrutinized carefully. In this connection, the medical evidence given by these two doctors, the clinical findings noted in the medical papers, the history given to Dr. Shetty (PW-8) and her case in the police statement together indicate that there is a reasonable possibility that it was a case of sexual assault and not penetrative sexual assault. Reasonable doubt is created about the allegations of penetrative sexual assault. Therefore, to that extent, benefit of doubt will have to be given to the Appellant.

24. However, the entire prosecution case cannot be discarded in totality. The victim was suffering from learning disability. She has consistently deposed about the inappropriate touch attributed to the Appellant on two occasions which would fall within the definition of sexual assault as defined under Section 7 of the POCSO Act. This becomes 'aggravated sexual

assault' because the victim was suffering from learning disability and it was done on more than one occasion. Therefore, the offence would fall within the meaning of Section 9(k),(l) of the POCSO Act, which is an aggravated form of sexual assault. To that extent, the prosecution has proved its case in respect of the commission of the offence under these Sections.

25. The learned counsel for the Appellant had submitted that the mobile handset of the Appellant was found with PW-3 and, therefore, to save herself from the allegations of theft, she has falsely implicated the Appellant. I am unable to agree with these submissions. The Appellant had not made any grievance to anybody in the society or even before the police that his mobile phone was not returned by PW-3 to him. In the history narrated by the Appellant himself during his medical examination, he has accepted that the victim had asked for that mobile phone from him and he himself had given that mobile phone to her. Besides that, he himself had another mobile handset which was also seized by the police and, therefore, there is no force in the submission that the victim had stolen that mobile phone from the

Appellant. Consequently, the submission that the Appellant was falsely implicated because of the possible allegations of theft of the mobile phone also cannot be accepted. However, it must be noted that there were no objectionable or incriminating photos or videos in either of the two mobile phone handsets seized in this case.

26. In such cases, even delay in lodging the FIR will not make any difference considering the tender age of the victim and the apprehension in the mind of the victim's mother. Thus, the prosecution case cannot be termed as completely false. But, as discussed earlier, there is a reasonable possibility of exaggeration and making allegations to give it a serious colour, as discussed earlier.

27. In this view of the matter, I am of the opinion that the conviction under Section 376 of IPC and under Sections 4 & 6 of the POCSO Act is not sustainable, but, the conviction and sentence under Sections 10 and 12 of the POCSO Act are required to be upheld. Considering the disability and tender age of the victim, I am not inclined to reduce the sentence imposed

by the trial Court on the Appellant for commission of the offence punishable under Sections 10 and 12 of the POCSO Act.

28. Hence, the following order :

:: O R D E R ::

- i. The Appeal is partly allowed.
- ii. The conviction and sentence of the Appellant under Section 376(2)(i)(l) of IPC and under Sections 4 & 6 of the Protection of Children From Sexual Offences Act, 2012, recorded by the learned Special Judge under POCSO Act, Greater Mumbai in POCSO Special Case No.47/2017 against the Appellant is set aside.
- iii. The conviction and sentence of the Appellant under Sections 10 and 12 of the POCSO Act are maintained. Consequently, the Appellant's conviction under Section 10 of the POCSO Act and the sentence of RI for six years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer further RI for two months is maintained. Similarly the Appellant's conviction under Section 12 of the POCSO

Act and sentence of RI of three years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer RI for one month, is maintained.

- iv. The substantive sentences are directed to run concurrently. The Appellant is given set off under Section 428 of Cr.P.C. for the period already undergone as an under-trial prisoner.
- v. The amount of fine, if recovered, shall be paid to the victim as a compensation under Section 357(1) of Cr.P.C.
- vi. The direction that the case was recommended to the District Legal Services Authority, Mumbai for awarding compensation to the victim (PW-3) as per Section 357-A of Cr.P.C., is maintained.
- vii. The Appeal is disposed of accordingly. Pending Interim Applications are also disposed of.

(SARANG V. KOTWAL, J.)

Deshmane(PS)

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