

Rekha Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1264 OF 2023

WITH

INTERIM APPLICATION NO. 109 OF 2025

IN

CRIMINAL APPEAL NO. 1264 OF 2023

Dayanand Malakari Shivsharan, Age – 35 years,
(Applicant is presently in Yerawada Jail)

R/o. 806, Kamgar Putala, Shivaji Nagar, Pune,
District-Pune.

...Appellant

Versus

1. The State of Maharashtra.

Through Shivaji Nagar Police Station,
Police Station in C.R.No. 241/2019.

2. XYZ

(at the instance of Shivaji Nagar Police Station)

...Respondents

Dr. Pradeepkumar Pardeshi with Ms. Anushka Martis & Akshay
Gawde, for the Appellant.

Mr. Chandrakant D. Mali, APP, for the Respondent No.1-State.

Mr. Aishwarya Sharma, Appointed Advocate, for the Respondent
No.2.

CORAM: R. M. JOSHI, J.

DATED: 13th JANUARY 2026

ORAL JUDGMENT:

1. This appeal takes exception to the Judgment and Order dated 25th February, 2022, passed in Special Case (POCSO) No. 371 of 2019, whereby the Appellant, i.e., accused No.1 came to be convicted for the offences punishable under Sections 376 (2)(f),

376(2)(j) of the Indian Penal Code 1860 (for short "IPC") and under Sections 4, 5(1), 5(n) of the Protection of Children Against Sexual Offences Act, 2012 (for short "the POCSO Act") and sentenced him to suffer 15 years of imprisonment with fine of Rs.15,000/- with default sentence. The Appellant/accused No.1 is also convicted for the offence punishable under Section 354A of the IPC and under Section 8 of the POCSO Act and sentenced him to suffer rigorous imprisonment for four years with fine of Rs.5000/- with default sentence.

2. The facts which led to the filing of this Appeal can be narrated in brief as under :

On 3rd May, 2019, the victim, niece of accused No.1 lodged report to the concerned Police Station stating that her father was addicted to liquor and mother was working as a maid servant. Since they were unable to maintain victim as well as her sister, they were kept in a hostel. It is further stated that accused No.1 told grandmother of the victim that he would maintain victim and her sister. From March 2017, both started residing with accused No.1 and his family consisting of wife and son. It is further case of the victim that after some days accused No.1/appellant in the night came near her and touched her breast and inserted his finger into her vagina. Similar acts were done by the appellant/accused No.1 on numerous occasions and attempts were also made to commit penetrative sexual intercourse with the victim. She claims that the said incidents were disclosed to accused No.2, i.e. wife of accused No.1, who, however, neglected

the same. The sister of the victim informed her about she being abused sexually by son of accused Nos. 1 and 2, who is Juvenile in Conflict with Law. It is claimed that no complaint would be lodged by the victim owing to the fact that she was residing with her real uncle, however, she disclosed the same to a Social Worker and thereafter, report came to be lodged with Shivaji Nagar Police Station and crime was registered vide C.R. No. 241 of 2019.

3. After registration of crime, victims were sent for medical examination. Their statements were recorded under Sections 161 as well as 164 of the Criminal Procedure Code ('Cr.P.C.' for short). Spot panchanama was done. Clothes of victims as well as accused were seized. On conclusion of the investigation, charge-sheet came to be filed before the competent Court.

4. Charge was framed against the accused persons vide Exh. 22. The accused adjured the charge and hence, they were tried. The prosecution has examined in all following 7 witnesses :

PW-1	Victim-A at Exh. 32.
PW-2	Victim-B at Exh. 37
PW-3	Social Worker-Surekha Sarode at Exh. 40
PW-4	Social Worker cum Councilor-Dipali Dandwate at Exh. 41
PW-5	Panch Witness (spot panchanama)-Rajesh Kachi at Exh. 43
PW-6	Dr. Samradnyi Sarode at Exh. 49

PW-7 PI-Diksha Zadate at Exh. 52

5. Apart from the oral evidence, the prosecution led documentary evidence, such as, birth certificates of victims, spot panchanama of seizure of clothes, medical report and CA reports. Learned Trial Court found evidence led by the prosecution to be sufficient beyond reasonable doubt and hence, convicted them. Accused No.2 was sentenced to suffer imprisonment till rising of the Court with fine. The said accused has not challenged the judgment of conviction.

6. Learned Counsel for the appellant/accused submits that the trial Court has failed to take into consideration the fact that there is unexplained delay in lodging of the First Information Report ('FIR' for short). It is his contention that the report came to be lodged on 3rd May, 2019, whereas the first incident claimed to have occurred creates doubt about genuineness thereof. It is his further submission that the prosecution has not examined Digambar, who was material witness, so also, neighbours in order to support the version of the victim in respect of occurrence of the incident. It is further argued that the testimony of the victim is not consistent and owing to the material inconsistencies therein, the Trial Court ought not to have relied upon such evidence to convict the accused. Reference is also made to the medical examination report of the victim, which according to him, does not bear signature of the victim. It is his submission that the prosecution is required to prove that victims were minor at the relevant time, however, the birth certificates, though placed on record are not

proved through a competent witness. It is his further submission that the appellant/accused was suffering from HIV and in case any sexual intercourse done by him with the victim, the disease would have transmitted to her. It is his submission that there is no evidence to support that the victim also suffered with HIV disease. It is his submission that facts indicate the guilt of accused is not proved beyond doubt and therefore, he deserves acquittal.

7. Learned APP and learned Counsel for the Respondent No.2 supported the impugned Judgment and Order. It is their contention that the evidence of the victim of the sexual assault needs to be considered in different perspective and where the evidence is found free from doubt, same can become sole ground for conviction of the accused without seeking any further corroboration thereto. It is submitted that in the instant case, apart from the consistent testimony of the victim, her version is fully supported by the medical evidence on record. Insofar as the delay caused in lodging of the report is concerned, it is their contention that the facts and circumstances of the case are self explanatory and it was not expected from the victim to lodge report against the real uncle since her food and shelter was dependent upon him. It is submitted that there is no cross-examination of victim, medical officer or any other witness examined by the prosecution in order to create doubt with regard to the correctness of their testimony.

8. On the point of appreciation of evidence of victim in sexual assault, it is fair to say that if the evidence of the victim inspires confidence then same can become sole basis for conviction of the accused even without seeking any further corroboration thereto. As far as present case is concerned, the victims were minor. The burden on the prosecution to prove the age of the victims duly discharged. The birth certificates (Exhs. 36 and 38) filed on record indicate that both the victims were minor and therefore, child within the meaning of Section 2(d) of the POCSO Act. Though it is sought to be argued now on behalf of the Counsel for the appellant/accused that the birth certificates were not proved through competent witness, it is pertinent to note that firstly, no objection was raised with regard to exhibiting of the said birth certificates by the Trial Court and secondly, there is no suggestion in the cross-examination of these witnesses that the date of birth reflected in the said birth certificates is incorrect. Practically, during the course of the trial, the defence has not challenged the fact that the victims were minor at the relevant time.

9. It is relevant to note that at the first instance that the evidence of victim No.2 i.e. PW-2, is hearsay evidence insofar as the present appellant/accused is concerned and therefore, said evidence is kept out of consideration. Victim No. 1 i.e. PW-1, however, in her substantive evidence before the Trial Court specifically states as to the acts done by the appellant/accused with her. She states about attempts made by the appellant/accused to commit penetrative sexual intercourse with

her in absence of any other family members in the house. She gave details with regard to the act done by the appellant/accused. Her statement before the trial Court on oath is consistent with first information report at Exh. 33 so also history given to the Medical Officer at the time of her examination. As rightly pointed out by the learned APP and learned Counsel for the Respondent No.2, in the cross-examination of this victim practically no challenge has been made to her version with regard to the occurrence of the incident as narrated by her. On the contrary, in the cross-examination it is confirmed that the incident as claimed by her did occur.

10. No doubt, there is considerable delay in lodging the FIR, however, the delay is explained by the circumstances of the case itself. It has come on record that the victims parents were unable to maintain them and therefore, they were sent to the hostel and thereafter, at the instance of appellant/accused they started residing with him. The appellant/accused is a real uncle of the victims and the victims were dependent upon him for food, clothing and shelter. Since, they were dependent upon the appellant/accused for their basic necessities, needless to say that it would have been impossible for them to make any complaint to any third person with regard to the incidents occurred with them. The victim, however, categorically states about she disclosing the act done by the appellant/accused Nos. 1, who is his wife, however, she neglected the same. It is necessary to take note of the fact that the wife of the appellant/accused is convicted by the

Trial Court and the said conviction has not been challenged by her. In such circumstances, the act committed by the appellant/accused was disclosed to the Social Worker and thereafter, the victims were given courage to lodge First Information Report against the accused persons. It is also necessary to take note of the fact that it is not the case of the appellant/accused during the trial that he has been falsely implicated in the crime and there are no suggestions made to the witnesses including the victims and Social Workers to the effect that with malafide intention first information report came to be lodged or that the victim was tutored by the Social Workers. In such circumstances, this Court finds that the delay caused in lodging the FIR is not fatal to the case of the prosecution.

11. Apart from the fact that the evidence of the victim is consistent when she claimed that the appellant/accused used to touch her inappropriately so also, used to insert finger into her vagina, get support from the medical evidence. Dr. Sarode, PW-6, in her testimony has candidly deposed about history given by the victim at the time of medical examination. On clinical examination, it was found that there were multiple healed hymenal tears. The report Exh. 50 is duly proved by the Medical Officer. In the cross-examination, the defence was not able to elicit anything in order to show that the torn hymen is not on account of the acts done by the appellant/accused.

12. It is sought to be argued on behalf of the appellant/accused that the appellant/accused is suffering from HIV and in case, there was a sexual intercourse committed by him, the disease ought to have transmitted to the victim. This contention of the appellant/accused does not hold any water in view of the fact that the allegations against the appellant/accused is used to insert the finger into the vagina of the victim and by doing so there was no question of transmission of HIV diseased to the victim.

13. It is pertinent to note that though initially charge was framed excluding offence punishable under Section 5(1)(n) of POCSO Act, however, the learned Trial Court by order dated 28th September, 2021 framed the said charge against the appellant/accused. There is evidence on record to show that the appellant/accused is a real uncle of the victims. The victims were residing with him. The act committed by the appellant/accused with the victim amounts to sexual assault as defined under Section 3 of the POCSO Act, so also, it amounts to rape as defined under Section 375 of the IPC. The said act having been committed by a person, who is in blood relation with the victim and since the victim was dependent upon him for shelter, the offences against the appellant/accused under Sections 376(2)(f), 376(2)(j) of the IPC and Section 4 and 5(1)(n) of the POCSO Act, are rightly held to be proved.

14. At this stage, learned Counsel for the appellant/accused submits that the appellant/accused is suffering from HIV, so also,

the wife of the appellant/accused is not only suffering from HIV but is also suffering from cancer. To support his submission, he placed reliance on the medical papers sent by the appellant/accused from jail. It is his submission that having regard to these facts, the appellant/accused be sentenced to suffer minimum sentence as prescribed by the Act. It is his submission that at the relevant time minimum sentence was 10 years and as such, modification to the impugned Judgment and Order is required to that effect. The learned APP and learned Counsel for the Respondent No.2 opposed the said contention by pointing out that it is their case the real uncle of the victim has committed assault on her and as such, it is not a fit case for reduction of sentence imposed by the trial Court.

15. While imposing the sentence, the Court is required to consider the overall facts and circumstances of the case. Herein in this case, it is not in dispute that the appellant/accused is suffering from HIV disease and there is also evidence to indicate that his wife is suffering from HIV so also, is a cancer patient. The appellant/accused, apart from the fact that is in jail, he has also undergone the rigors of the judicial process. The appellant/accused has no criminal history behind him.

16. In the circumstances, this Court finds it appropriate to sentence the appellant/accused to suffer rigorous imprisonment for a period of 10 years, which is minimum prescribed under the

relevant provisions. Rest of the Judgment and Order of the Trial Court is maintained unchanged.

17. The Appeal stands disposed of accordingly.

18. In view of disposal of Appeal, pending Applications, if any, stand disposed of.

(R. M. JOSHI, J.)