

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

**CRIMINAL APPEAL NO. 1162 OF 2019
WITH
INTERIM APPLICATION NO. 3563 OF 2025
IN
CRIMINAL APPEAL NO. 1162 OF 2019**

Pyaru Noormohammed Shaikh
age 68 years, Occ. Driver,
residing at : H/201, Navbharat Nagar,
Juhu lane Hutment, Wireless Road,
Andheri (W), Mumbai – 400 058.
(at present in custody and lodged
at Kolhapur Central Prison)

...Appellant
(Original Accused)

Versus

1) The State of Maharashtra
(at the instance of Mahim Police Station
in their C.R.No.07/2013)

2) X Y Z

... Respondents

Mr. Altaf Khan (through VC) appointed Advocate a/w. Mr. Akash Mangalgi for the Appellant in APEAL/1162/2019 and for the Applicant in IA/3563/2025.

Mrs. Sangeeta Shinde, APP for the Respondent No.1 – State.

Mr. Veerdhawal Deshmukh appointed Advocate for Respondent No.2.

Mr. Mahendra Bagwe, PSI, Mahim Police Station, present.

CORAM: SHYAM C. CHANDAK, J.

RESERVED ON : 19th DECEMBER, 2025
PRONOUNCED ON : 20th JANUARY, 2026

JUDGMENT :-

1. This Appeal challenges the Judgment and Order dated 19/06/2019, in POCSO Special Case No.910/2013, passed by the learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (“the

Act”), Greater Bombay. Thereby, the Appellant (“**accused**”) was convicted for offences punishable under Sections 342 and 354 of the Indian Penal Code, 1860 under Section 4 of the Act and sentenced as under :

Sec. 342 IPC	To suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for 8 days.
Sec. 4 POCSO Act	To suffer rigorous imprisonment for 10 years and to pay a fine of Rs.3,000/- in default to suffer simple imprisonment for 15 days.
Sec. 354 IPC	No sentence imposed as the offence of Section 4 POCSO Act being the major offence.

2. Heard Mr. Altaf Khan, the learned counsel for the accused, Ms. Shinde, learned APP for Respondent No.1-State and Mr. Deshmukh, the learned appointed counsel for Respondent No.2-informant.

3. The prosecution story was that, Mrs AJS (PW-3) and her family were residing at N-Nagar. The victim Miss “M”, aged 6 years (PW-1) is daughter of PW-3. On 01/01/2013, at about 12:00 noon, PW-3 and her husband went to their work and returned home at about 00:10 hours in the night. PW-1 had slept without eating. Therefore, PW-3 went to wake her up, but she had fever. However, it being a night time, she did not take PW-1 to a hospital. On 02/01/2013, at about 06:00 a.m., PW-3 and her husband again went to their work as PW-1’s fever was gone. At about 16:00 hours, they returned home. At that time, PW-1 was lying on a bed. PW-3 inquired with PW-1 and she told her that on 01/01/2013, at about 17:45 hours, she along with her friend Miss “K” were playing in the lane, in front of their house. The accused, who was residing in their neighbourhood, called PW-1 in his room on the pretext of giving her a chocolate. The accused then closed the door of the house, removed her clothes and inserted his finger in her private part, therefore, she was suffering pain there. Thereafter, PW-3 and her husband took PW-1 to Bhaba hospital at Bandra, where PW-5 Dr.

Radhika Seth, Assistant Professor, recorded the history behind the medical complaint, examined PW-1, and admitted her in the hospital for further management.

4. The hospital authority reported the matter to the police at about 23.30 hours. At 23.45 hours, API Satish Ravindra Borate (PW-4) went to the hospital and recorded the Report (Exh.18) of PW-3, at around 00.55 hours of 03/01/2013. Said Report came to be registered with Mahim Police Station, at C.R.No. 7/2013, under Sections 354 and 342 IPC (*vide* printed FIR Exh.18-A). Later on, Section 4 of Act was added to the crime. During investigation, PW-4 arrested the accused, recorded the statements of witnesses and the Spot Panchanama. Investigation culminated into filing of charge-sheet.

5. The trial Court framed the charge of the offence of Sections 354 and 342 of IPC and Section 4 of the Act instead of Section 6 of the Act although the victim was then below 12 years of age. The accused pleaded not guilty to the charge and claimed to be tried. The defence of the accused was of denial and false implication.

To prove the charge, the prosecution has examined five witnesses. On closure of the evidence, the trial Court recorded the statement of the accused under Section 313 Cr.P.C As appears from the tenor of the cross-examination, it was a specific defence of the accused that there was quarrel in-between his son and the daughter-in-law, therefore, PW-3 has falsely implicated the accused in this case at the instance of the daughter and depose false against him.

6. On appreciation of the evidence in the light of the rival arguments, the learned Judge of the trial Court held that the alleged offences of Sections 354 and 342 IPC were proved against the accused. The victim was

a child below 12 years of age. Therefore, the charge should have been framed under Section 6 of the Act. The charge came to be proved under Section 6 of the Act. However, the learned Judge observed that the case was very old. The maximum punishment of imprisonment then provided for offence of Section 4 of the Act was similar to the maximum punishment of the imprisonment then provided for offence of Section 6 of the Act. Therefore, after hearing the parties on the point of the sentence, the learned Judge came to the view that the minimum substantive sentence provided under section 6 of the Act should be awarded with some fine. Hence, the learned Judge convicted and sentenced the accused as noted in paragraph 1 above. It is this judgment that is assailed in this Appeal.

7. The testimony of PW-1 was commenced on 05/02/2019 when she has deposed that, at the time of the incident, she was studying in 1st Std. PW-2 'K' was her friend. They used to play together every Sunday at 04:00 pm. However, she deposed that she does not remember what had happened and why she had fallen sick. She had been to the doctor. The doctor had examined her. But, she does not remember as to what the doctor had said to her and what she had said to the doctor in reply.

At this juncture, the learned Judge of the trial Court noted the demeanor to PW-1 and recorded that, "every time the victim was saying that she does not remember. The ld. APP asked the victim as to whether she does not want to tell, what incident had occurred with her, to which she nodded her head in affirmative. It was seen that the victim was not in mood to tell the incident and just repeating that she does not remember. Hence, on the request of APP examination-in-chief was deferred."

The examination-in-chief was then resumed on 21/02/2019, when PW-1 deposed that she does not remember the date of the incident. At the time of incident, she and her brother were playing. Her friend PW-2 'K'

joined them. They played for about 5 minutes in their lane. On being specifically asked by the learned APP as “who did the wrong with you”. PW-1 has answered as “I do not know that man”. She has deposed that she cannot identify the accused on seeing him. However, PW-1 has deposed that the accused was residing at some distance from her lane. The accused had called her at his house by giving a chocolate. The Id. APP then questioned the PW-1 as “What the accused did then?” But, PW-1 did not answer and, as noted by the learned trial Judge, she was shivering. The Id. APP then asked her as to “Whatever he did good or bad? Proper or wrong?”. The PW-1 has answered as “*ganda*”. She has deposed that the accused had closed the door from inside. The accused then inserted his finger in her private part. Therefore, she shouted and ran away. PW-1 has deposed that when she had fever, her mother PW-3 had asked her about the fever. At that time, she had disclosed the incident to her. She and her mother then went to the hospital. However, PW-1 has deposed that she did not tell the incident to the police in the hospital or the police station. She does not know who had informed the police about the incident. She does not remember whether she had gone to the police station.

At this juncture, as noted in the deposition, the accused was called and made to stand with the male stenographer. The Id. APP then asked the PW-1 as “Is he the same person”. In reply, as noted in the deposition, the *“Victim stared for few seconds then nodded the head in affirmative. Id. Advocate for accused has submitted that the witness must be asked clearly about identification of accused. The answer only in gesture shall not be taken.”* Therefore, the Id. APP asked the PW-1 as to whether the aged person (accused) whom she had just seen (before the Court), was the same person who did the fingering. The PW-1 has answered as, “I do not remember.” At this juncture, the learned trial Judge noted that “The victim started shivering, fan put off”. Again the PW-1 was asked by the APP as to whether the accused, to whom she had seen in the Court was the same

person who used to reside near the lane of her house. She has answered as “I do not remember.” PW-1 then deposed that she had told her mother about the offender whom had done wrong with her.

7.1 In the cross-examination, PW-1 has deposed that she does not know “K” (PW-2). Long back she used to reside at “M.... D.... link road”. One Sara Didi had accompanied her to the Court (on 21/02/2019). Sara Didi had instructed her to tell where she had been touched (by the accused). PW-1 has deposed that the person shown to her in the Court, *i.e.*, the accused, had not done anything wrong or bad act with her. The accused does not reside near her house. She has admitted that when she was seated in the Court, the accused was coming from the door, and at that time, Sara Didi had told her that the accused was the same person who had done wrong with her. PW-1 has admitted that Sara Didi had told her that the accused will be shown to her and she has to say that he was the same person. She has admitted that she had not told her friend ‘K’ (PW-2) that any bad act was done with her. She had gone to the hospital as she had fever and not on account of any bad act done to her. She has admitted that the accused had not given her a chocolate and had not done anything wrong with her.

8. PW-2 has testified that PW-1 was her friend. At the time of the incident, they both were playing. One Dada had called and said them to accompany with him, and that, he will give them a chocolate. At that time, PW-1 was seated there and she went home. PW-2 has deposed that when she returned from home, PW-1 was crying. She had asked PW-1 as to what had happened. PW-1 had told her that the said person Dada had touched her private part. She, therefore, suggested PW-1 to complain to her mother. PW-2 has identified the accused as the same person “Dada”, and that, the accused used to reside in her neighbour.

8.1 In the cross-examination, PW-2 has deposed that Saira is her mother. Since 10 to 12 years she has been residing at her given address. She knew the people residing nearby. She has admitted that “Babu” is the son of the accused. Azgari is the wife of Babu and she knew her very well. She has admitted that the incident had occurred in-between 4 pm to 5 pm. She has admitted that her mother, PW-3 and Azgari had accompanied her in the Court. She has denied that, the accused was not residing at the said place; that, the accused had not done the sexual assault with PW-1; that, nothing wrong had happened with PW-1; and that, she has deposed false on the say of the Azgari w/o Babu and the police.

9. PW-3, the informant has deposed that at the time of the incident, she was at her work. PW-1 was playing with her friends in the lane. Pointing at the accused, PW-3 has deposed that “Dada” had called the PW-1 on the pretext of giving her a chocolate. PW-2 had left PW-1 with the accused and, she had gone away. PW-3 has deposed that the accused then removed PW-1’s nicker, did something with his nail at her place of urinating and consequently she had suffered the nail injury. The accused had inserted his finger in PW-1’s private part. PW-1 had told about that incident to PW-2. PW-3 has deposed that she had returned home at about 12:00 midnight. PW-1 narrated to her about the incident. At that time, she had told PW-1 to urinate. However, she did not go and pass urine. She, therefore, suggested her to urinate in a bucket. Yet, she did not. PW-1’s stomach was swollen as she did not urinate. PW-3 has deposed that on the next day, she had gone for her work.

PW-3 has deposed that, on the next date, she went to Azgari, the daughter-in-law of the accused. Azgari told her that she was not concerned with the incident and suggested her to speak with the accused and his son. She, therefore, went to the son of the accused, but, his son contended that his father did nothing wrong. Azgari suggested her to take the PW-1 to the

hospital as she was suffering a lot. She, therefore, took her to Bhabha Hospital. She had given the history to the doctor. Since it was a police case, therefore, the doctor had called the police. The police arrived there and recorded her statement-cum-report (Exh.18) as per her narration. She has identified the accused and deposed that he had done the sexual assault on PW-1. The doctor came to know that PW-1 had not passed urine. Therefore, the doctor made her to urinate with the help of a tube. She has deposed that, at the time of the incident, the accused used to reside near her house. She has deposed that her husband had showed the spot of the incident to the police as she was with PW-1 in the hospital.

9.1 In the cross-examination, PW-3 has admitted that PW-1 had told her about the incident after she had returned from the work at around 12.00 midnight. She has deposed that she had given the history to the doctor. A few omissions have been brought on record that, PW-3 had not stated in the Report (Exh.18) that PW-1 she was not passing urine; and that, on the next date, she went to Azgari, the daughter-in-law of the accused; that, Azgari told her she was not concerned with the incident and suggested her to speak with the accused and his son; that, she, therefore, went to the son of the accused, but, his son contended that his father did nothing wrong; and that, Azgari suggested her to take the PW-1 to the hospital as she was suffering a lot. PW-3 has admitted that there used to be quarrel in-between Azgari and her husband, *i.e.*, son of the accused and the relations between the couple were not cordial. She has admitted that the son (Babu) of the accused was residing separate from his wife Azgari. She has denied that the accused was not residing with his son; that, the accused used to reside with his another son; that, nothing wrong was done with PW-1; that, Azgari wanted to get rid of the accused, therefore, she has implicated the accused on the say of Azgari; and that, she has deposed false on the say Azgari.

10. Now, turning to the medical evidence of PW-5 Dr. Radhika Seth. The relevant testimony of PW-5 is that, on 02/01/20213, at 10:35 pm, PW-1 was brought to the hospital by PW-3. They gave the history that one Shaikh Pyaru had inserted his finger near PW-1's urinary area for a short while. She and her Registrar Priyanka recorded the history. The PW-3 had told that PW-1 was crying for the whole night and passing the urine with pain. They medically examined PW-1. They did not find any injury on her private part. PW-1 was admitted in the hospital and discharged on 04/01/2013. In this regard, PW-5 has referred the medical papers (Exh.24 collectively). She has deposed that PW-1 was aged 6 to 9 years. She had given her opinion that, *"there was no signs of use of force/forceful penetration of vagina/anus. On examination, however, there is history of attempted penetration of vagina by finger, therefore, sexual assault cannot be ruled out."* She has deposed that there may not be an injury in case of slight penetration. Sexual assault is possible without an injury.

In the cross-examination, PW-5 has admitted that the general mental condition of PW-1 was good. As stated in the medical papers, PW-1 had passed the urine and she had no fever. She has denied that, she had not recorded the said history; and that, she had not examined the PW-1.

11. PW-4 Satish Borate, API has testified about the steps he had taken in relation to this crime. He has deposed that pursuant to the intimation received from the hospital, he had visited there on 02/01/2013, at around 23.45 hours. He then recorded the statement-cum-report (Exh.18) of PW-3 as per her narration and registered this crime under Sections 354 and 342 of the IPC (*vide* Printed Fir Exh.18-A). Later on, he had added Section 4 of the Act. At about 01:50 hours, he had arrested the accused in presence of two panchas under Arrest Panchanama (Exh.20). On the same day he recorded the statements of PW-1 and her friend PW-2. He recorded Spot

Panchanama (Exh.21) at the house of the accused in presence of the panchas. API- Prakash Sawant completed investigation filed charge-sheet.

In the cross-examination, PW-4 has admitted that he has not collected the documents of the alleged room of the accused to show that the accused used to reside there. PW-3 did not state before him that PW-1 was not passing urine and her stomach was swollen. PW-3 did not state before him that on the next day, she had gone to the house of Azgari, the daughter-in-law of Dada; that, Azgari told her that she was not concerned with the incident; that, Azgari had suggested to talk with Dada and his son; she had gone to Dada's son; that, he contended that his father did nothing wrong; that, Azgari suggested her to take PW-1 to the hospital as she was suffering a lot. He has denied that without making any inquiry he has registered the false FIR on the say of Azgari and PW-3. He has denied that no incident had occurred, as alleged.

12. Mr Altaf Khan, the learned counsel appearing for the accused submitted that there are material inconsistencies in the testimonies of the witnesses. As stated in the Report (Exh.18) and deposed by PW-1 as well as PW-3, the accused had inserted his finger in the private part of PW-1. According to PW-3, consequently, PW-1 had the nail injury. But the fact of having suffered by the injury has not been deposed to by PW-1. Moreover, PW-1 was taken to the hospital for the complaint of pain in the private part, not on account of an injury to the private part and she was not passing the urine. Thus, PW-3 has improved the case by deposing that PW-1 had not passed the urine and her stomach was swollen. That apart, the said evidence is not supported by PW-5 because according to this witness and the medical papers, PW-1 had passed urine and she had no injury. In the cross-examination, PW-1 has admitted that the accused had not committed anything wrong with (sexual assault) her. PW-2 has deposed that, when PW-1 had come out of the house of the accused, she had only told that the

accused had touched her private part. Thus, this evidence has negated the evidence of PW-1 and PW-3. There is significant delay in filing the Report (Exh.18) and said delay was not properly explained. The evidence of PW-1, PW-2 and PW-3 indicates that the accused's daughter-in-law Azgari and PW-2's mother were close to each other. The relations in-between Azgari and Babu s/o accused were not cordial and there used to be quarrels in-between the two. Therefore, considering the delay in the Report and the insufficient medical evidence, it is probable that the accused has been falsely implicated in this case at the instance of Azgari.

In the alternative, Mr Altaf Khan submitted that considering the evidence of PW-1 and PW-2, maximum the alleged offence would be under Section 10 and certainly not under Sections 4 or 6 of the Act. Because, as noted in the medical papers, PW-1 had denied the history of removing her clothes by the accused and there is no medical evidence of an injury to the private part of PW-1 or that PW-1 was not able to pass urine due to the alleged sexual assault.

Mr Altaf Khan emphatically submitted that PW-1 has not identified the accused as the same person who had committed the alleged sexual assault on her. The evidence of PW-2 and PW-3 on the point of the identity of the accused is hearsay in nature. Therefore, the identity of the accused was not established by the prosecution. As such, the accused could not have been held guilty of the alleged offences.

Lastly, Mr Altaf Khan urged that the minimum punishment then provided for Section 4 of the Act was 7 years and the maximum punishment was for life. The minimum punishment then provided for Section 6 of the Act was 10 years and the maximum punishment was for life. As such, the offence of Section 6 has been a major offence. Therefore, without framing the charge of Section 6, the accused could not have been

sentenced to suffer 10 years. Therefore, the impugned conviction and sentence is unlawful.

13. Mrs Shinde, the learned APP, on the other hand, submitted that both PW-1 and PW-2 have categorically deposed that at the relevant time, the accused had called the PW-1 inside his house. Immediately thereafter, the accused inserted his finger in the urinary area of PW-1. The testimony of PW-3 clearly indicate that PW-1 was not able to pass urine or she was passing it with pain because of an internal injury caused to her private part due to said sexual assault. This evidence is supported by the medical evidence of PW-5 and the medical papers referred by her. Mrs Shinde submitted that the identity of the accused has been properly established by the witnesses. Therefore, considering the PW-1 was the child below 12 years, the trial Court has rightly held the accused guilty of the offence of Section 6 and sentenced him to undergo only the minimum punishment of imprisonment provided for the said offence.

13.1 Mr Deshmukh, the learned appointed counsel made similar submissions. Additionally, he has submitted that even though it is accepted for the sake of argument that PW-1 has not identified the accused as the person who had subjected her to the sexual assault, there is sufficient circumstantial evidence which has established the identity of the accused as the perpetrator of the crime. To support this submission he has cited the decision in *Visveswaran v. State* REP. BY S.D.M.¹

Mr Deshmukh emphatically submitted that the accused has not shown that he could not properly defend himself on account of framing of the charge of Section 4 instead of the correct Section 6 because the victim girl was aged below 12 years. He has submitted that, conjointly, the charge “Firstly” under Section 354 and the charge “Thirdly” under Section 4 of the

1. (2003) 6 SCC 73.

Act clearly stated that, at the time of the incident, PW-1 was the child aged 6 years and, as alleged, the accused had inserted his finger in her private part. Mr Deshmukh urged that, therefore, this was only a case of mistake in the charge “Thirdly”, *i.e.*, omitting the word “aggravated” and stating the non-applicable Section 4 instead of the applicable Section 6 of the Act. If the accused was not misguided due to the said mistake and it has not resulted in “failure of justice”, such a mistake is then pardonable in law view of the provisions of Section 464 Cr.PC. To substantiate these submissions Mr Deshmukh highlighted that it is trite that the criminal Court, particularly the superior Court should make a close examination to ascertain whether there was really a ‘failure of justice’ or whether it is only a camouflage. As such, the claim made by Mr Altaf Khan that this is a case of ‘failure of justice’ on account of the said mistake in the charge, is absolutely hollow. Thus, according to Mr Deshmukh the impugned conviction and sentence is completely lawful and there is no merit in the Appeal as well as in the submission made by Mr Altaf Khan.

14. I have considered these submissions and scrutinised the evidence accordingly. The defence has not disputed that, at the time of the incident, PW-1 was a child below 12 years of age. Said fact even otherwise proved by PW-1, PW-3 and PW5 coupled with medical papers (Exh.24). Section 3 (b) of the Act provides that a person is said to commit “penetrative sexual assault” if he insert any part of the body, not being the penis, into the vagina of the child. Section 5 (*m*) of the Act provides that, whoever commits penetrative sexual assault on a child below 12 years of age is said to commit the offence of “aggravated penetrative sexual assault”, punishable under Section 6 of the Act. Considering the rival submissions, the first question that arises for determination is, ‘Whether the prosecution has proved that the accused had committed the offence under Section 6. According to Mrs Shinde and Mr Deshmukh, with the help of the evidence

of PW-1, PW-3 and PW-5 coupled with Report (Exh.18) and the medical papers (Exh.24), the charge of Section 6 of the Act has been clearly proved.

15. In this regard the testimony of PW-1 is very important because there was no eye witness to the incident. From the testimony of PW-1 and PW-2 it has been proved that when they were playing, the accused had called the PW-1 on the pretext of giving her a chocolate and he then took her inside his house.

15.1 On the point of the sexual assault, the evidence of PW-3 is that, PW-1 had told her that when the accused took her inside his house, he had removed her nicker. Said fact has been stated in the Report (Exh.18) and also in the 'history part' of the medical papers (Exh.24). However, PW-1 and PW-5 have not deposed the said fact. That apart, the medical papers recorded that when the child (PW-1) was again asked, she had denied the history of removing of the clothes by the accused.

15.2 Further, PW-1 has deposed that after taking her inside the house, the accused inserted his finger in her private part. Therefore, she shouted and immediately came out of the house and went home. However, PW-1 has not deposed that she had disclosed the same incident to PW-2. As against this, PW-2 has deposed that when she came out of the house, she saw that PW-1 was crying, therefore, she had asked the PW-1 as what had happened. PW-1 told her that the accused had touched her private part. Meaning, PW-1 did not tell PW-2 that the accused had inserted his finger in her private part. Said disclosure by PW-1 before PW-2 immediately after the incident was the first version of the prosecution story and therefore, it is relevant under Section 6 of the Evidence Act.

15.3 In her Report (Exh.18), PW-3 has not stated that when she had returned home at about 12:00 midnight, she had told PW-1 to urinate,

however, she did not go and pass urine; that, she, therefore, suggested her to urinate in a bucket; that, yet, she did not pass urine; and that, PW-1's stomach was swollen as she did not urinate. Secondly, PW-1 has not stated that she was not able to urinate due to the fingering.

15.4 As stated in the Report (Exh.18), PW-3 had taken the PW-1 to the hospital for the complaint of pain in her private part due to the fingering. But, PW-3 has deposed that since PW-1 was not passing urine, therefore, she had taken her to the hospital. However, PW-5 has admitted that PW-1 had passed the urine. Nowhere, on the basis of the medical papers (Exh.24), PW-5 has deposed that PW-1 was not able to pass urine and therefore, certain medical treatment was given to her to treat that medical condition. PW-3 has deposed that PW-1 was made to urinate with the help of a tube, but, neither this fact was stated in the Report (Exh.18) nor PW-5 has so deposed. That apart, as deposed by PW-5, there was no signs of use of force/forceful penetration of vagina. PW-5 has admitted that there was not even slightest injury to the private part. From the evidence of PW-5 it is apparent that, her finding of sexual assault on PW-1 and such opinion recorded in the medical papers, both were based on the alleged history of attempted penetration of vagina by finger. However, the same is not adequately supported with the other evidence of record. The learned Judge of the trial held that on 3rd January when PW-1 was medically examined, the doctor had diagnosed that she had difficulty in micturition. However, on a careful reading of the medical papers, it appears that, said mentioning was the medical complaint to the doctors, not their final diagnoses. That apart, said fact was not specifically deposed by PW-5, who herself had medically examined the PW-1. Therefore, I find it difficult to accept that the accused had inserted or attempted to insert his finger in the private part of PW-1 and consequently, she had pain in her private part; or she was not able to pass urine; or she was passing the urine with difficulty.

15.5 Nevertheless, on the basis of the testimonies of the prosecution witnesses coupled with the text of the Report (Exh.22) and the medical papers (Exh.24), I hold that, it has been proved beyond a reasonable doubt that the accused had wrongfully confined the PW-1 in his house and touched her vagina without penetration but certainly with the sexual intent. A conjoint reading of Sections 7 and 9 (m) of the Act provides that, whoever, with sexual intent touches the vagina of the child below 12 years of age is said to commit the offence of 'aggravated sexual assault'. As such, I hold that the accused is guilty of the offence of Section 10 but certainly not of the offence of Section 6 of the Act. Additional, as held by the trial Court, the accused has been guilty of the offences of Section 354 and 342 IPC.

16. Now question is whether the accused was proved to be the offender of the crime. As noted above, when the learned APP had pointedly asked the PW-1 as to whether the accused before the Court was the same, who had committed the sexual assault on her. The PW-1 had stared for few seconds and she then nodded her head in the affirmative. However, the ld. defence Advocate suggested that the witness must clearly be asked about the identification of the accused. Therefore, again PW-1 was asked as to whether the aged person she had seen was the same who did the fingering? She had answered as "I do not remember." However, the learned Judge of the trial Court held that the identity of the accused was proved.

16.1 In this regard the, in paragraph 15 of the impugned Judgment, the learned Judge observed that from the above question and answers and the demeanor of PW-1, it seems the victim was under pressure, scared and therefore adopted the policy to answer, "I do not remember". In the circumstances her further answers during the course of her cross-examination denying identity of the accused seems due to the fear and pressure. The pressure on her and her policy to tackle the question with answer, "I do not remember" was noted in her first sitting of recording

evidence also. The victim had adopted the policy to answer all the questions, "I do not remember". She was not even in mood to tell, 'when she had been to doctor'? 'what doctor said to her and what she said to doctor'? PW-1 had started shivering when she was asked as to what the accused did then". It seems the shivering was symptom of her fear to tell the incident. On recalling the incident also she might be feeling scared. Thus, the victim's behavior of shivering by looking at the accused indicates that the wrong was done by the accused with her. So far as denial to identity the accused during the course of cross-examination, it may be due to pressure.

16.2 In support of his statement under section 313 of Cr.P.C., the accused produced a CD and a transcription of a telephonic conversation between Babu s/o the accused and PW-3. From the said conversation, it appears that, they had talked about what PW-3 shall depose before the Court as they wanted to settle this matter. However, PW-3 fully supported the case and identified the accused. PW-2 has also identified the accused to whom she had seen just before the incident and who had called them. The accused the witnesses were residing in the same vicinity. PW-2 has stated that the accused was residing in her neighbour. Only the accused was named in the Report (Exh.18), in the medical papers and blamed for committing the sexual assault on PW-1. In view of these circumstances and looking at the fact that PW-1 had identified the accused by nodding her head in the affirmative, the learned Judge of the trial Court has held that the identity of the accused was proved. In my opinion, this finding and conclusion by the learned Judge is justifiable and supported by the evidence on record.

To fortify this conclusion it is apposite to refer the decision in *Visveswaran* (Supra). Therein, the Appellant before the Hon'ble Supreme Court had abducted the victim (PW1) and her husband (PW2) in the night

time. He then took the victim in a hotel and committed rape on her. The Appellant had no mustache and beard at the time of committing the crime. However, when the victim and her husband were examined in the Court, said Appellant had mustache and beard and was wearing a *Dhoti*. Therefore, the couple could not identify him and deposed that said person is not in the Court. The other relevant witnesses also did not identify him. In the backdrop, in paragraph 11, the Hon'ble Supreme Court observed that, "It does not mean that the acquittal is to follow as a natural corroboratory from the statements of PW1 and PW2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. It was observed that the clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt." Hence, in paragraph 13 it is observed as under:

"13. ..., it is no doubt true that if the evidence of witnesses is examined in isolation, without having regard to the aforesaid principles, there may be considerable force in the submission that the identity of the appellant has not been established and likewise as a result of defective investigation of not holding test identification parade, the benefit should go to the appellant. However, when the case is examined having regard to the aforesaid legal principles, the result would be otherwise. Circumstances which have been taken into consideration against the appellant by the trial court as well as the High Court are that the appellant, a Police official, was caught from a room in a hotel. The proprietor of the hotel was examined as PW3. The hotel record (Exhibits P-4 and P-5) showed booking of the room in that hotel by the appellant and also payment of advance of Rs.100/-. PW3 had also been examined by PW14. The appellant could not explain his

whereabouts during the time the offence was committed. He was not cooperative during investigation. He declined to give sample of his semen. He was having different appearance at the time of examination of PW1 and PW2 in Court. At the time of commission of offence, he did not have beard and the moustaches. However, when PW1 and PW2 were examined in Court, he had beard and the moustaches and was wearing Dhoti. The testimony of PW1 and PW2 was straightforward. The witnesses, immediately after the commission of offence, had named the appellant. The non-holding of the test identification parade, having regard to the facts of the case, is not fatal and does not create any reasonable doubt in the case of the prosecution. We are unable to accept the contention that the identity of the appellant had not been proved. From the proved circumstances, it has been fully established that PW1 was picked up and raped in a hotel room as per the case set up by the prosecution by a police constable who was none other than the appellant. There is no infirmity in the impugned judgment of the High Court. ”

17. The conspectus of the above discussion is that, the trial Court failed to consider that there was no sufficient evidence to hold the accused guilty of the offence of Section 6 of the Act. However, the trial Court held that the offence of Section 6 was proved against the accused. Further, the trial Court convicted the accused under Section 4 of the Act but sentenced him to suffer the minimum punishment of 10 years imprisonment provided for said offence of Section 6. On the contrary, the offence proved against the accused is ‘aggravated sexual assault’ which is punishable under Section 10 of the Act.

18. In view of the aforementioned infirmities, the impugned Judgment and Order needs to be interfered with to quash and set aside the impugned conviction and sentence of the accused under Section 4 of the Act and instead, to convict and sentence him under Section 10 of the Act which is

punishable under Section 10 of the Act with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. The nomination role produced by the learned APP on 18/12/2025 states that, as on 30/11/2025, the accused has already undergone the substantive sentence of 6 years, 5 months and 14 days. Mr Altaf Khan, the learned Appointed counsel submitted that now the said period is 6 years and 7 months plus. At present, the accused is aged 71 years. Therefore, it would be appropriate to sentence the accused for the period already undergone till date and to pay fine. The impugned conviction under Section 354 and conviction and sentence 342 IPC is lawful.

19. As a result, Appeal succeeds in part, accordingly. Hence, following Order is passed :-

(i) Appeal is partly allowed.

(ii) The impugned Judgment and Order dated 19/06/2019, in POCSO Special Case No.910/2013, passed by the learned Special Judge under the POCSO Act, 2012, Greater Bombay whereby the Appellant/Accused was convicted and sentenced under Section 4 of the POCSO Act, is quashed and set-aside.

(iii) Instead, the Appellant is convicted under Section 10 of the POCSO Act and sentenced to suffer rigorous imprisonment for the period already undergone till date and to pay fine of Rs.3,000/- in default to suffer simple imprisonment for 15 days.

(iv) The impugned conviction under Section 354 IPC and the conviction and sentence under Section 342 IPC of the Appellant is upheld.

(v) All the sentence shall run concurrently. The Appellant shall be entitled for set off under Section 428 Cr.PC.

(vi) The Appellant has already undergone the substantive sentence imposed on him. Hence, the Appellant shall be released forthwith, if not required to be detained in any other crime/case.

(vii) In the wake of disposal of Appeal, Interim Application stands disposed of.

20. Before parting with the Judgment, I would like to place on record appreciation for efforts put in by Mr. Altaf Khan and Mr. Veerdhawal Deshmukh, both learned Advocates appointed by High Court Legal Services Committee, Mumbai for espousing the cause of Appellant and Respondent No.2 respectively, they were thoroughly prepared in the matter and rendered proper and able assistance to the Court.

PREETI
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JAYANI

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(SHYAM C. CHANDAK, J.)