IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 315 OF 2014

Khalil Mehboob Shaikh
Aged about 25 years,
residing at Room No. 16,
Nalwali Gulli, Near Houda Masjid,
Beheramnagar, Bandra (East),
Mumbai - 400 051.
Presently in Nashik Jail. .... Appellant.
(Original Accused)

Vs.

The State of Maharashtra
at the instance of Nirmal
Nagar Police Station. .... Respondent.

Mr. A.H.H. Ponda I/by Mr. Shailesh Kharat, Advocate for the Appellant.

Mr. S.S. Pednekar, APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 30th JANUARY, 2019.

JUDGMENT :

1 The appellant herein is convicted for offence punishable under Section 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1000/- in default to suffer rigorous imprisonment for one month. The appellant is also convicted for the offence punishable under Section 377 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 5000/- in default to suffer rigorous imprisonment for one year. The appellant is also convicted for an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 5000/- in default to suffer rigorous imprisonment for one year. The appellant is also directed to pay Rs. 10,000/- as compensation to the victim of the offence vide judgment and order dated 27th February 2014 passed by the Designated Court under Protection of Children from Sexual Offences Act, 2012, for Greater Bombay in Sessions Case No. 464 of 2013. Hence, this appeal.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) On 14th February 2013 P.W.-1 Sujit Manohar Mone was on night patrolling duty and he received a phone call from Nirmal Nagar Police Station and the patrolling staff was informed that some suspicious persons have entered on the terrace of building No. 210 of Railway Colony.

(ii) P.W. 1 Sujit Manohar Mone alongwith PI Sonawane reached the building. They went to the terrace. They were also accompanied by the personnel of Crime Detection Branch. On the terrace, they saw that the victim (child) was denuded of all his clothes and the accused appellant was doing an unnatural act with the victim and sexually abusing him. The child was crying and shouting when the police appeared. They consoled the child and the accused was taken into custody.

(iii) The child has disclosed his name and that he is 16 years old. On further enquiry, the child master “X” has disclosed that his father had expired before his birth and his mother had expired at

the time of delivering of child. He was brought up by his grand-parents. He was on trip to Mumbai alongwith his grand-parents. On 13th February, 2013 when he had alighted from the train at Borivali station at 10.30 pm. for food, he had missed the train. Thereafter, he had reached Bandra station on the next day and on 14th February 2013, the accused-appellant had lured him with some money and had taken him to the nearby building and had forcibly performed carnal unnatural intercourse with him.

(iv) The accused was taken in custody by the Crime Detection branch. The victim was taken to the police station and his oral report was reduced into writing on 15th February 2013. On the basis of the said report, Crime No.56 of 2013 was registered at Nirmal Nagar Police Station against the accused for offence punishable under Sections 377 and 323 of the Indian Penal Code and under Section 5(l)/6 of the protection of Children from Sexual Offences Act, 2012.

(v) After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions and registered

as Sessions Case No.464 of 2013. The prosecution examined as many as seven witnesses to bring home the guilt of the accused.

3 P.W.1, Sujit Manohar Mone happens to be the Constable who had received information on the wireless and has reached the spot and rescued the child. The accused was given in custody of Crime Detection branch.

4 P.W. 2- Master "X" is the victim. He has deposed before the Court that he has studied up to 7th standard in St. Mary School, Bangalore. He has studied as residential student. He passed 7th standard in 2009. The child could not state his date of birth. He has deposed that they had come to Mumbai by train and he missed his grand-parents. He has narrated the trauma which he has gone through. He has deposed that he had slept on the railway station and on 14th February 2013 he had gone to Golden hotel for eating food. He slept at Bandra station. At about 2 to 3 a.m. i.e. in the middle of the night, he woke up for answering nature's call. He was approached by two boys, who enquired with him as to why he was at

Bandra station. Thereafter, the said 2 persons had offered him Rs. 20/-. One of them had left the company of the other who is the accused-appellant. The accused-appellant had lured him by offering Rs. 20/- and asked him to accompany him. He was forcibly taken to the terrace of the building. Upon his resistance, he was beaten by the accused. On the terrace, the accused had tied his hands and denuded him of his clothes and thereafter, he had committed the heinous act, sexually abused him in all respects. In the midst of the act, the police had reached the terrace and had rescued him. The victim has proved the contents of the FIR, which is marked at Exhibit '10'.

5 The victim has been cross-examined at length. The defence has failed to create any dent in his evidence as stated in the examination-in-chief. Unwarranted suggestions were given to the victim such as that he was earning his living by indulging into such acts which the victim has denied. He was taken to the hospital on the next day of the incident. The suggestions given by the defendants were that on the date of the incident the victim had voluntarily

approached the accused in Shibu Bar. It was suggested that the victim had shown a knife to the accused and had attempted to extort money. That the accused was trying to chase him and that when they reached near the building, the accused in order to punish him had denuded the victim. Needless to say that the suggestions are far from probabilities in the facts of the case.

6 P.W.3, Dr. Amarsingh Anandrao Rathod had examined the victim. According to him, the victim was 15 years old. The history was given by the victim. The observation of P.W.3, doctor are as follows :

> "Anal tear - at 6 o'clock position, 1.5 cm x 0.5 cm x skin deep, bleeds on touch, tenderness present, reddish brownish in colour.
>
> Age of injury- within 48 hours.
>
> Anal swab collected. Victim was not accustomed to anal intercourse.
>
> Opinion- Finding suggestive of anal intercourse.
> Age of victim – 15 to 16 years. I am giving this opinion about age on the basis of x-ray and ossification test. X-ray number is 617 dt. 15/2/2013.

7 It is pertinent to note that the doctor had brought alongwith him the report of the ossification test alongwith X-ray of the child and they were collectively marked as Exhibit '13'. This is a peculiar case where although the documents were submitted by the doctor at the time of giving deposition, the report of ossification test is missing from the record. However, the X-ray report is available. It is marked by the Court as Exhibit '13' collectively, which are papers of ossification test and X-ray of the victim. The doctor has specifically opined that the age of the victim is between 15 to 16 years and that he has given the said opinion about the age on the basis of X-ray and ossification test.

8 Rowing enquiry is made with P.W.3-doctor only to test his knowledge about he medical jurisprudence as putforth by Dr. Modi. These are general questions. The Court has observed that the questions put to the doctor were formed in such a manner that the doctor could not follow the suggestions and therefore, defence was allowed to ask direct questions. Suggestion put to the Court was that child must be suffering from constipation and therefore, he must

have used some object to relieve him. It was also suggested that the victim child was habitual to sodomy. A specific question was asked about the age i.e. Can a medical practitioner exactly give the age of the person?. The answer is : “On the basis of the ossification test, a medical practitioner can tell the range of age limit of the victim though exact age cannot be stated”. The doctor has further answered that the margin for determination of age could be 6 months on either side.

9 A specific question was asked to the Doctor, PW-3 as to whether in this case, the presence of blood is there and the answer was “Yes. I have recorded that there is bleeding on touch”. Rest of the questions are general in nature. Another relevant question was that “Can a Medical Practitioner exactly give the age of the person?” and the answer was 'on the basis of ossification test, the Medical Practitioner can tell the range of age limit of the victim though exact age cannot be stated'.

10 At this stage, learned counsel for the appellant has submitted that upon inspection of the records and proceedings, it is

seen that X-ray report is a part of records and proceedings. However, the report of the ossification test does not form part of the records and proceedings and therefore according to the learned counsel for the appellant in the absence of any documents or the report of ossification test, the prosecution has failed to prove that the victim was below the age of 18 years. It is pertinent to note that the endorsement on Exhibit 13 is "papers of ossification test and X-ray of victim". The certificate annexed to X-ray No.617 bears an endorsement as follows :

"X-ray with elbow, shoulder, knee, heap joint"

Suffice it to say that this would be sufficient indication that the Doctor had arrived at a conclusion on the basis of ossification test and the X-ray that the age of the victim is less than 18 years. Section 45 of the Indian Evidence Act, 1872 reads:

> *"45. Opinions of experts.-- When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts".*

It is true that in the case of **Maniram Vs. the State, reported in A.I.R., 1993, Supreme Court page 2453**, the Hon'ble Apex Court was of the opinion that the medical evidence is only the evidence of an expert and that it is not a substantive piece of evidence".

11 In the present case, it was incumbent upon the investigating agency to obtain the School leaving certificate of the victim especially when he had given all the details of the institutions where he had studied, to determine the date of birth of the victim. It is true that the investigating agency has failed to carry out the investigation in a proper manner. The investigating agency was insensitive about the whole issue in question and the only evidence available would be the ossification test report.

12 The learned Judge has considered the said ossification test report and therefore exhibited it as Exhibit "13" collectively. It is, in these circumstances that this Court is of the opinion that it would not be appropriate to substitute the opinion of the Doctor.

13 In the case of Radhakrishna Nagesh Vs. State of Andhra Pradesh, reported in (2013) 11 Supreme Court Cases, page 688, the Hon'ble Apex Court has observed :

> *"It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.*

In the present case, it is undisputed that when PW-1, the patrolling staff went to the terrace, they had in fact seen the accused sexually abusing the minor boy and they had rescued the victim. It appears that the pleadings as far as the dispute in determination of age is concerned, is only to escape the sentence under the provisions of Protection of Children from Sexual Offences Act, 2012, as Section 5 of the said Act contemplates minimum punishment of ten years, whereas Section 377 of the Indian Penal Code contemplates the sentence with (imprisonment for life), or with imprisonment of

either description for a term which may extend to ten years, and shall also be liable to fine. In any case, the incident in question is undisputed. There are specific laws and criminal jurisprudence contemplates that the accused has a right to maintain silence and the onus is upon the prosecution to prove his guilt beyond reasonable doubt. The exception to this principle is Section 106 of the Indian Evidence Act, which could be applicable in the present case in as much as the accused was found in the company of the victim at the time when the witness had specifically seen the accused in action. The defence appears to be lame. In as much as the defence of the accused is that the victim had threatened him with the knife and therefore he had assaulted him. The question still remained as to why they were found in a secluded place that too on the terrace of the building. It is an essence of criminal jurisprudence that an accused is presumed to be innocent until he is convicted. In several cases, benefit of doubt is extended to the accused, however, time has come to protect the interest of the victims as well. When the state agencies failed in their duties to establish the case against the

accused, beyond reasonable doubt, that too by keeping certain lacunae either in the investigation or at the time of trial, the onus would be upon the courts to see that the justice is done to the victim as well.

14 The investigating officer i.e. PW-7 has admitted in the cross-examination that the information about the incident was given by one Ramzan Shaikh. That was the source of information to the police and yet the investigating officer has candidly deposed before the Court that she has not recorded the statement of Ramzan Shaikh in the course of investigation. The investigating officer has further candidly submitted that he has not filed any documents except medical certificate to show that the victim was below 18 years of age. In these circumstances, implicit reliance has to be placed on the opinion of the Doctor, who on the basis of the ossification test has concluded that the victim was below 18 years of age.

15 It is further pertinent to note that the investigating officer has not prepared the spot panchanama. This could be for the

reasons best known to the investigating officer. It would be difficult for the courts to ascertain as to whether it was a residential building, an office premise or otherwise or whether inhabitants of the said building had reported to the police or as to whether Ramzan Shaikh was the resident of that building. The investigating officer has further admitted that the building in which the incident took place is occupied by the residents, but she did not record the statements of any occupier as the incident occurred in early morning at 3.00 am. and occupants were not aware of it. This would further show that there are several serious lapses in the investigation in the present case.

16 Learned counsel for the appellant has placed reliance on the judgment of the Apex Court in the case of Jagtar Singh Vs. State of Punjab, reported in A.I.R. 1993 Supreme Court, page 2448 contending therein that the opinion of the doctor cannot be relied upon as far as age of the accused is concerned in the absence of corroborative evidence. In the case of Jagtar Singh, it was the

specific defence of the accused that at the time of incident, he was 15 years of age. The learned Sessions Judge had negated the said contention and going by the opinion of the Doctor held that the accused was 18 to 20 years of age. At that stage, the School Leaving Certificate or Birth Certificate was not on record and the matter rested entirely on the statement of the accused under Section 313 of Cr.PC. and that the expert evidence of the Doctor, who was not even cross-examined on the said point. However, before the High Court, school leaving certificate was produced, which showed that the accused was a minor and on that basis the High Court had released the accused on bail. The order of releasing the accused on bail was challenged before the Apex Court and at that stage, the complainant had produced birth certificate of the accused indicating that the date of birth of the accused was 9th October 1957. Thereafter the High Court had held that the appellant was certainly not below the age of 16 years as contended. In the Supreme Court, the certificate that was produced did not indicate the name of school, from which the transfer certificate was obtained. The Hon'ble Apex Court had held

that the birth certificate of the accused had been scrupulously kept away from the Court by the appellant and ultimately the opinion of the Doctor prevailed, which was thereafter substantiated by the birth certificate. In these circumstances, it would be of no avail to consider the defence of the accused for reducing substantive sentences and holding the appellant guilty under Section 377 of Indian Penal Code.

17 In the present case, the learned Sessions Court has convicted the accused under Section 377 of Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and fine of Rs.5,000/-, in default rigorous imprisonment for 1 year. The accused is also convicted for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 10 years.

18 The learned counsel for the appellant therefore prays that the conviction and sentence under the POCSO Act be set aside and the appellant be convicted under the offences punishable under

Section 377 of Indian Penal Code and sentence be reduced to the period already undergone. The basis for the argument is that the victim has not produced the birth certificate. The whole case rests upon the evidence of the Medical Officer, who has opined that the victim was a minor.

Section 42 of the POCSO Act 2012 reads as follows :

> "42. Where an act or omission constitutes an offence punishable under this Act and also under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

does not include Section 377 of Indian Penal Code. Hence, in the facts of the case, the appellant deserves to be convicted under Section 5(1)(k) of POCSO. However, Section 42(A) of the said Act reads as follows :

> "42A. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of

any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency".

19 In the case of Shyam Narain Vs. State of NCT of Delhi, reported in A.I.R., 2013 Supreme Court, page 2209, wherein, the Hon'ble Apex has held that:

> **"(B) Criminal P.C. (2 of 1974), S.354 – Sentencing –-- Has social goal – Awarding just sentence is complex exercise – Court has to strike balance between reformative theory and principle of proportionality.**
>
> Sentencing for any offence has a social goal. Sentence is to be imposed, regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crime. It serves as a deterrent. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim. **(para 11)**

20 The report received from Nashik Road Central Prison shows that the accused/appellant has undergone 5 years 10 months and 12 days of actual imprisonment. The appellant shall serve rest of the substantive substance.

21 Hence, the sentence awarded to the appellant for the offence punishable under Section 6 of the POCSO Act is maintained and the sentence for the offence punishable under Section 377 of Indian Penal Code is set aside.

22 The prosecution has proved the offence punishable punishable under Sections 5(i) and (k) of the POCSO Act and hence the conviction and sentence of the appellant is upheld for the offence punishable under Section 6 of POCSO Act and he is sentenced to suffer rigorous imprisonment for ten years.

23 The appeal stands disposed of.

(Smt. Sadhana S. Jadhav, J.)

Note: Judgment is corrected as per Speaking to Minutes of the order dated 8th April 2019.