

POCSO SPL.356/16

: 1 :

Judgment

MHCC050041672016



Received on 18/11/2016

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Decided on 18/04/2022

Duration 5 Y. : 5 M. : - D.

Exh.43

**IN THE COURT OF SPECIAL JUDGE UNDER THE PROTECTION OF
CHILDREN FROM SEXUAL OFFENCES ACT, 2012 AT BORIVALI
DIVISION, DINDOSHI, MUMBAI
POCSO SPECIAL CASE NO.356 OF 2016
CNR NO. : MHCC05-004167-2016
(C.R.No.439/16)**

THE STATE OF MAHARASHTRA,
At the instance of Malad Police Station
vide C.R. No.439/16

...Complainant
(Prosecution)

Versus

Sunil Balwilsingh @ Balbirsingh Rana

...Accused

Mrs. Geeta Malankar, Spl.A.P.P. for the State.
Advocate Mr. Rupesh Maurya for the Accused.

**CORAM : H.H.THE SPECIAL JUDGE
SMT. H.C.SHENDE (C.R.NO.11)**

DATE : 18th April, 2022

: JUDGMENT :

(Delivered and pronounced in open Court on 18/04/2022)

Mumbai being a metro city still has the biggest slums and in these slums there are so many small houses and less space to walk through it. These houses are not bigger than the size of match box as we usually observe and hence, the people here use public toilet made by the government. The problem is that these toilets are less in numbers and not close to everyone's house so when small kids go to use these toilets, some trustworthy person shall accompany to them. At least a lady watchman needs to appoint at the said public toilet used by women and particularly minor children. There is a need to have lady watchman in a toilet or kids should accompany by their near ones just to avoid the kids being getting harassed by any assailant in the said place in such tender age as it would leave a deep scar on their lives which they would carry forever throughout their lives. It is very traumatic and also causing mental harassment to the kids and such incidents are increasing rapidly so the parents must take care of it while sending their kids to the public toilet to avoid further harm.

The accused **Sunil Balwilsingh @ Balbirsingh Rana** is facing trial for the charge **U/Sec.354, 506 of Indian Penal Code, 1860 (Hereinafter referred to as "IPC" for the sake of brevity) and U/sec.9(m) punishable u/s.10 of the Protection of Children from Sexual Offences Act, 2012 (Hereinafter referred to as "POCSO Act" for the sake of brevity).**

2. The facts in nutshell are that :

(The names of the victim girl and her family members are not mentioned in the Judgment to maintain the confidentiality about their identity as per the rule 33(7) of POCSO Act).

The informant is maternal sister of the victim girl. The victim girl was aged about 7 years at the time of the incident. She is residing with the informant at Malad (W). The residents of their chawl use public toilets situated in their area. On 05/09/16 at about 13.00 hours the victim girl went to attend the nature's call in the public toilet. Within 15 minutes she came back crying. She was scared. The informant asked her the reason. The victim told that after attending the toilet, she came out of the toilet. The sweeper lifted her and kissed her on her lips. She asked him to leave her to which he threatened her that he will throw her out of the toilet. After that the informant made an inquiry about the sweepers in her neighbourhood. She got to know that there are two sweepers who knew the assailant. During that time the informant went in search of the assailant to his house with these two sweepers. There she asked two men and a woman about his address. They told her that he is brother-in-law of man residing in said chawl.

The informant told the incident that had happened to her father and called him to the address of the accused. She also told the incident to the people and then they called him out and beat him.

Thereafter they took him to the police station. In the police station the police asked his name and address. The accused told his name 'Sunil Balbirsingh Rana', age 21 years, a sweeper.

The report of above incident was lodged by the informant in Samata Nagar Police Station. On the basis of the information given by the informant, the FIR was taken by WPSI Manjushri Ghule.

First Information Report :

3. The Crime No.439/16 is registered u/s.354, 506 of IPC and u/s.8 of POCSO Act.

Investigation :

4. During investigation, the accused was arrested on 05/09/15 under arrest cum surrender form Exh.37 by Smt. Manjushri Ghule. The victim was sent for medical examination. Then she by visiting to the spot i.e. toilets, prepared the spot panchnama Exh.35. The statement of the victim was recorded u/s.164 of Cr.P.C.

Chargesheet :

5. On conclusion of investigation, the Chargesheet is filed against the accused in the Court.

Charge :

6. The accused appeared before the Court. On appearance of accused, Learned Predecessor of this Court Shri. S. S. Oza framed the Charge u/s.354, 506 of IPC and u/s.8 of POCSO Act against him on 21/11/2019 as per **Exh.6**. The contents of the Charge were read over and explained to him in vernacular. He understood the same. He disowned the Charge and claimed to be tried.

His defence is of total denial and false implication out of mistake. He is innocent.

The Charge is altered by this Court as per Exh.6-A as the victim was aged 7 years of age at the relevant time so by deleting the Charge u/s.8 of POCSO Act, charge u/s.9(m) r/w.10 of POCSO Act was framed. It was again read over and explained to the accused in vernacular. He understood the same. He denied it and claimed to be tried. His defence is like as above.

7. Evidence adduced by the prosecution :-

The prosecution has examined six witnesses as under :-

Witness No.	Name of witness	Exh. No.	Document if any proved its Exhibit number
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1.	First informant/aunt of minor victim girl.	Exh.12	Exh.13-Report. Exh.15-Statement u/s.164 of Cr.P.C. of victim girl (exhibited in cross-examination of PW 1).
2.	Victim girl.	Exh.22	
3.	Mr. Sanket Laxman Jadhav (neighbourer of victim girl).	Exh.29	
4.	Mr. Chetan Madhukar Niwalkar (he resides in the area of victim girl).	Exh.31	
5.	Smt. Mansi Kalpesh Pawar (panch witness of spot panchnama).	Exh.34	Exh.35-Spot panchnama dated 05/09/16.
6.	API Smt.Manjushri Shankar Ghule (investigating officer).	Exh.36	Exh.37-Arrest-cum-surrender form. Exh.40-Letter dated 05/09/16 addressed to Medical officer Dr. Babasaheb Ambedkar Hospital.

8. The prosecution has filed documents vide lists of documents at Exh.8, Exh.21 and Exh.39 viz. :-

Sr.No.	Name of document	Exh.No.
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1.	Report.	Exh.13
2.	Statement u/s.164 of Cr.P.C. of victim girl (exhibited in cross-examination of PW 1).	Exh.15
3.	Original birth certificate.	Exh.23
4.	Spot panchnama dated 05/09/16.	Exh.35
5.	Arrest-cum-surrender form.	Exh.37
6.	Letter dated 05/09/16 addressed to Medical officer Dr. Babasaheb Ambedkar Hospital.	Exh.40

9. The prosecution has filed list of articles at **Exh.10** as nil.

10. The prosecution closed its evidence by filing evidence closure pursis at **Exh.41**.

Statement of accused under section 313 of Cr.P.C. :-

11. The statement u/s.313 of Cr.P.C. of accused was recorded at **Exh.42** in which he reiterated that he is a sweeper by profession. He did nothing to the victim except lifting her out and why he would do it to lose his job.

12. Heard the Learned APP Mrs. Geeta Malankar for State and Learned Advocate Mr. Dinesh Maurya for the accused at length.

Arguments of Learned APP Mrs. Geeta Malankar for State :

13. The Learned APP Mrs. Malankar for State submitted that the accused is a sweeper of the area. He is quite old person. The victim was 7 years old

girl at the relevant time. The birth certificate (Exh.23) is showing her date of birth 23/04/10. The POCSO provisions are attracted. The Act came in force to save, protect the children from being abused by such persons who are destroying their personality. The victim is a woman. The accused molested her by using criminal force against her and threatened her. He admitted that he is a sweeper and was present at the spot with the victim at the relevant time. He lifted the victim. He assaulted her. She started crying which states that she felt bad, being harassed by the accused. The accused was identified by the victim very well.

14. The sole testimony of the child victim needs to be accepted as it is confidence inspiring and more particularly on the backdrop of above mentioned admission of the accused. He be punished with maximum punishment of imprisonment and fine. The victim also needs to be compensated.

Arguments of Learned Advocate Mr. Maurya for accused :

15. The FIR is registered by the maternal sister of the victim with the allegations that on 15/09/16 the minor victim girl went to attend the public toilet at about 1.30 p.m. where she was sexually assaulted by the present accused as reported in the FIR but the entire chargesheet is not whispering that the accused has assaulted the victim. Her statement or evidence is not stating that who was a toilet cleaner and who allegedly assaulted the victim. There is mistaken identity of the accused. No supplementary statement of the victim was recorded. As per the FIR, the

accused was taken from his house but PW 1 is saying that they saw the accused on their way. The evidence of the informant is full of contradictions and omissions, cannot be relied upon. Her testimony is shaken during her cross-examination. If three sweepers are coming to clean the toilet and witnesses are not knowing whether on that day it was turn of the accused, then how it could be acceptable that the accused was an assailant and he assaulted the victim. The victim is saying that the informant was knowing to him and the informant is saying that she has not seen him. Then it cannot be said that he is the accused who assaulted the victim. There are no lights in the area near the public toilet. The panchnama does not speak that it was prepared near the toilet. The spot was not clearly identified. The victim is a minor child. She can be easily tutored and accordingly was taught by PW 1 and the victim speaks accordingly against the accused. Her evidence is not reliable. She exaggerated the material aspect and so the evidence is not reliable. No explanation as to why her statement was recorded after two days of the incident. The evidence of PW 3 is of no use to the prosecution. Though PW 4 is saying that he had seen the victim while coming back from the toilet by crying but neither the informant nor the victim is saying so. PW 5 is a regular panch. His evidence cannot be accepted as a Gospel Truth. The story of the prosecution is unreliable. The prosecution failed to prove the guilt of the accused beyond doubt. Unless the true foundation laid by the prosecution, the presumption u/s.29 of POCSO Act is not made available to the prosecution. The medical report is not supporting to the victim's evidence. Her age is not proved.

16. No offence is made out against the accused. The accused needs to be acquitted.

Points for determination :

17. In the light of the charge framed against the accused, evidence on record, the statement U/Sec.313 of the Cr.P.C. and the submission made across the bar by the Learned Counsel of both sides, following points arise for my determination to which I have recorded my findings against each of them for the reasons to follow :

SR.NO.	POINTS	FINDINGS
1.	Does the prosecution prove that the victim girl was minor at time of the incident as per the provision of POCSO Act ?	In the affirmative.
2.	Does the prosecution prove that on 05/09/16 at about 13.00 hours at public toilet Ganesh Chawl, Nadiyadwala Colony No.1, S. V. Road, Malad (W), Mumbai, the accused forcibly lifted and took the kiss of the victim intending to outrage or knowing it to be likely that he will outrage the modesty of the said victim and thereby committed an offence punishable u/s.354 of IPC ?	In the affirmative.
3.	Does the prosecution prove that on above mentioned date, time and place, the accused committed criminal intimidation by threatening the victim with threat to cause death or grievous hurt by throwing her outside the window and thereby committed an offence punishable u/s.506 of IPC ?	In the affirmative.

4.	Does the prosecution prove that on 05/09/16 at about 13.00 p.m. at public toilet situated in Ganesh Chawl area, Nadiadwala Colony No.1, S. V. Road, Malad (W), Mumbai, the accused with his sexual intent by lifting the minor victim girl aged 7 years (daughter of the informant of this matter) forcibly kissed her and while she was requesting to leave her, he gave threat her to throw her out of the window and he thereby committed aggravated sexual assault punishable u/s.9(m) punishable u/s.10 of POCSO Act ?	In the affirmative.
5.	What order ?	Accused is convicted as per final order.

:: REASONS ::

As to Point Nos.1 to 4 :

18. As the facts are interlinked to each other, it would be appropriate to determine the Point Nos.1 to 4 with common reasoning with distinct observation wherever necessary.

The victim is child as contemplated u/s.2(d) of POCSO Act :

The provisions under POCSO Act are stringent in nature.

The prosecution if wants the Court to rely on their claim that the victim is 'child', at the time when she was assaulted sexually by the accused, then it is incumbent for the prosecution to prove beyond doubt

that the victim was child i.e. below 18 years of age on the date of the incident.

The prosecution in present case came with their theory that the victim girl was minor on the date of assault. She was of 7 years only. Her date of birth is 23/04/10 as per her birth registration certificate Exh.23 brought on record through her evidence by the prosecution.

19. At the time of filing FIR Exh.13, the informant **PW 1 (Exh.12)** gave information to the police that the victim girl was aged about 7 years only. The prosecution by examining PW 2 the victim girl (**Exh.22**), brought on record the birth certificate Exh.23. The name of parents of the victim, date and place of birth and registration of birth with authority reflects from said birth certificate **Exh.23**. The testimony of victim that her date of birth is 23/04/10 is corroborated by impeachable document viz. Birth certificate of the victim (Exh.23). Actually the date of birth of the victim and said birth certificate (Exh.23) is not positively challenged by the defence and the accused even in his statement recorded u/s.313 Cr.P.C., admitted that the victim is a small girl. The birth registration certificate is primary evidence. When the child is admitted in a school, parents of the child usually submit the admission form of a child. On the basis of cogent evidence on record which will be either the certificate from the hospital where the child is born or the birth registration certificate. When the original evidence has been produced on record by the victim, then there is no reason to discard it. The Learned Defence counsel raised objection that it was not given to the police. Whether for the fault on the part investigation officer, we can

discard or throw the cogent proof. We cannot punish the victims who are innocent, common people not knowing minute details of rules of law. The testimonies of PW 1 and PW 2 sufficiently speak that on the date of incident, the victim was aged about 7 years only. The birth certificate (Exh.23) is stating her date of birth 23/04/10. In these circumstances, this Court has no hesitation to accept that the birth date of the victim is 23/04/10 and on the date of the incident i.e. on 05/09/16 the victim girl was aged about 7 years i.e. below 12 years of age and a child as defined u/s.2 (d) of POCSO Act.

20. The Hon'ble Bombay High Court in the case of **Shivara @ Balu Khandu Jagtap vs. State of Maharashtra reported in Cri. Appeal No.1558/2018 decided on 03.09.2019** held that the certificate issued under Section 12/17 of the Registration of Births and Deaths Act is issued by public officer and it is a public document forming the record of the public officer and therefore, the same is a public document under Section 74 of the Indian Evidence Act. The same is admissible in evidence by mere production thereby in view of the provisions of Section 77 of the Indian Evidence Act. It is also held that the birth certificate issued by the statutorily appointed competent authority is relevant and admissible. The same is the public document and it constitutes primary evidence, proof of contents of public document can be had by production thereby as per Section 77 of the Indian Evidence Act, therefore, no former proof of birth certificate issued of competent authority under the provisions of Registration of Births and Deaths Acts, 1979 of rules framed thereunder is required.

The Court accordingly records its finding to Point No.1 in the affirmative.

Prompt FIR :

21. The FIR Exh.13 dated 05/09/16 was lodged by the informant on the same day of the incident. As per the testimony of PW 1 and PW 2, on 05/09/16 at about 13.00 hours the victim went in the public toilet where she was allegedly assaulted/molested by the present accused by lifting her, by kissing her and then he gave threats to the victim. The said incident was reported to Malad Police Station at about 14.45 hours on 05/09/16 and the station diary entry No.35/16 was taken at about 15.30 hours. The FIR was lodged against the present accused. It rules out the theory of false implication.

22. Here it is pertinent to note that otherwise also there is no theory of enmity or false implication of the accused out of any dispute put up by the defence. The Learned Advocate for the accused during course of arguments, vehemently submitted that there is mistaken identity of the accused. Nobody was knowing the accused. Even the rest independent witnesses are also not saying that they saw the accused in said area on the date of the incident. I would like to answer this issue at the relevant point. At this juncture, we must note that the FIR is promptly lodged by disclosing the act of molestation caused and of giving threats to the victim by the accused. The name of the accused reflects in the FIR as an assailant.

23. Before moving ahead, we have to take a glance on the legal provisions from IPC. The accused is charged for the offence punishable u/s.354 and 506 of IPC and as the victim girl was below 12 years of age on the date of assault so the provision u/s.9 (m) r/w.10 of POCSO Act are also attracting in this matter.

The essential ingredients of the offence u/s.354 of IPC are

- 1) That the assault must be on a woman.
- 2) That the accused must have used criminal force on her.
- 3) That criminal force must have been used on the woman intending thereby to outrage her modesty.

24. Needless to say that what constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of a woman is very relevant though its absence is not always decisive. Modesty in Section 354 of IPC is an attribute associated with female human being a class though she was of any age.

25. In case of **Raju Pandurang Mahale V. State of Maharashtra [AIR 2004 SC 1677]**, the Hon'ble Apex Court made it clear that the word 'modesty' is not defined in IPC. The ultimate test for ascertaining whether modesty has been outraged as whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman.

26. Prior to it the Hon'ble Supreme Court in case of **State of Punjab V. Major Singh [AIR 1967 SC 63]**, in simplest but meaningful language explained what constitutes offence u/s.354 of IPC. As per the Hon'ble Supreme Court, intention is not the sole criteria of the offence punishable u/s.354 of IPC and it can be committed by a person assaulting or using criminal force to any woman. If he knows that by such act the modesty of a woman is likely to be affected, knowledge and intention are essentially things of mind and cannot be demonstrated like physical object. The existence of intention or knowledge has to be called out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in same position as an injured witness and her evidence should receive same weight.

27. In nutshell the assault or criminal force is to be used to a woman with an intention to outrage her modesty or knowing it likely that her modesty or knowing it likely that her modesty would be outraged by the accused.

28. Here we have to look into the provisions of POCSO Act.

Section 7 of POCSO Act :

“7. Sexual assault. - Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast such person or any other person, or does any other

Act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

29. Section 9 (m) of POCSO Act specifies that if the child assaulted is below the age of 12 years of age, then it is aggravated form of sexual assault and it made punishable u/s.10 of said Act.

30. On this backdrop, if we go through the testimony of the victim (PW 2) and PW 1 informant. They deposed that on 05/09/16 the victim girl went in the public toilet of their area at about 13.00 hours. The accused who was working as a sweeper was cleaning the toilet. The victim after attending her nature's call came out of the toilet. The accused lifted her, kissed her on her lips. She started screaming, requested him to leave her. Then the accused gave her threat that he will throw her out of the window of the toilet. She started crying, then he left her. She came back by crying. It was her natural reaction of feeling bad as being a woman. It needs to be considered while we consider all aspects as the allegations are of commission of sexual assault and outraging the modesty of the victim. When the victim was on her way back to home, she was crying. She met PW 4 Mr. Chetan Niwalkar (**Exh.31**), a resident of same area. PW 4 in his evidence before the Court corroborated the testimony of the victim. As per the evidence of PW 4, on 05/09/16 at about 12.30 to 1.00 p.m. when he was standing outside his house, he saw the victim. She was crying. He asked the reason of it and the victim told to him that the toilet sweeper picked her up, kissed her. When she asked her to leave, then he gave

threats that he will put her out of the window of the toilet. The victim was carried to her house by PW 4.

31. The evidence of PW 1, PW 2 that when the victim gave information of the alleged assault to PW 1 and PW 4 as above they all with PW 3 who is an independent witness went in search of the present accused. As per the evidence of PW 3, he along with same boys of their area who were knowing that the sweeper i.e the accused is residing at Malad (E), went in search of the accused.

32. The Learned Advocate for the accused gave more emphasis on the point that the two boys have not seen the accused. The PW 1 admitted that the two boys of which one is PW 3 has not told to her that they saw the accused in the public toilet. The accused was not showed to the victim. No identification parade was carried out by the police. The Learned Advocate for the accused, therefore, tried to put up that it is a case of mistaken identity. The accused is innocent.

33. Here I would like to mention that during the course of cross-examination of PW 3 taken by the Learned defence Counsel, it clearly came on record that prior filing the FIR and when they all went in search of the accused, the PW 1 informant asked to the victim in presence of this witness PW 3 that whether this accused is the same person i.e. a sweeper who did the said act with the victim.

34. The above fact of showing the accused to the victim by PW 1 for confirming as to whether the accused is the same sweeper who assaulted to the victim came on record through the cross-examination of this witness PW 3 taken by the defence. It is brought on record by the defence themselves so there cannot be a place for doubt or mistaken identity of the accused.

35. Next to it the accused in his statement recorded by this Court, accepted that he is working as a sweeper of said toilets. The fact that the public toilet is there in said area has been confirmed by the spot panch PW 5 Smt. Mansi Pawar (**Exh.34**). According to this panch witness, her parents are residing in said area and the spot i.e. toilets are beside to her parents' house. The spot panchnama Exh.35 is prepared in ladies toilet.

36. It is worth to mention that all the above facts about confirming the situation of spot brought on record by the defence through the cross-examination of this witness PW 5 taken by defence. There is no reason to discard her testimony only because she is knowing the complainant. The PW 5 is a married girl, residing far away from her parents. Her testimony is helpful to extent that there were public toilets near to the house of the complainant.

37. The evidence of PW 5 is a corroborating evidence of rest material witness.

38. Lastly the question may come as to why this Court should rely on the sole testimony of the victim girl who is aged of 7 years only ?

39. Now it is settled position of law that conviction to accused can be founded on sole testimony of the victim. It needs no corroboration unless it is unreliable, having material discrepancies in it.

40. The Hon'ble Supreme Court in case of **State of Maharashtra V. Chandraprakash Kewalchand Jain, AIR 1990 Supreme Court 658**, summarised the legal position with regard to corroboration of the statement of the prosecutrix. Ahmadi J. speaking for the Court, observed as under :

“15. It is necessary at the outset to state what the approach of the Court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex-offences. It is essential that the evidence of the prosecutrix should be corroborated in material particulars before the Court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare the Court should look for corroboration before acting on the evidence of the prosecutrix.”

16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime.....

17. We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Our is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those violate the social norms. The standard of proof to be expected by the Court in such cases, must take into account the fact that such crimes

are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity”.

41. The defence on the other hand, brought on record through the testimony of PW 3 that before lodging the FIR by PW 1, she got it confirmed from the victim girl that the accused is the same sweeper who assaulted the victim. Here it is worth to mention that the accused in his statement recorded u/s.313 of Cr.P.C. in his reply to the question put to him said that, “he did nothing to the small girl. He only lifted her and kept aside and then started doing his work of cleaning.” This reply of the accused establishes his presence at the spot i.e. in the toilet with the victim girl at the relevant time.

42. The victim in her statement recorded by the Learned Metropolitan Magistrate Court reiterated the facts of assault by the accused so this Court does not find any force in the theory of case of mistaken identity as put up by the defence.

43. On the other hand, the evidence mentioned and discussed above, concretises the evidence of the victim. Her evidence is strengthened because of explanation given by the accused.

Whatever little lacuna was there in the prosecution story, has been cured by the defence as mentioned above.

44. Cumulative reading of the aforesaid would prove beyond shadow of doubt that it was the accused who had committed sexual assault on the minor victim aged 7 years at the relevant time. He outraged the modesty of the victim girl and when she screamed, he gave threats to throw her out of the window. It reflects the intention of the accused to cause harm to the victim.

45. The prosecution with the help of truthful, and confidence inspiring testimony of the victim and the evidence analyzed above, is succeeded in laying foundation that the accused has assaulted the victim girl. Now the provision u/s.29 of POCSO Act comes in play.

Section 29 of POCSO Act :

“Section 29 of POCSO Act Presumption as to certain offences -
Where a person is prosecuted for committing or abetting or attempting to commit any offence under section 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

46. This clause provides for presumption as to certain offences. It provides that where a person is prosecuted for violating the provision under clauses 3, 5, 7 and 9 of the said act, and where the victim is a child below the age of sixteen years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved.

47. The presumption available in section 29 of the POCSO Act needs to be kept in mind while appreciating the evidence in cases under the POCSO Act. This provision is contrary to the basic principle of criminal jurisprudence that the accused is presumed to be innocent unless his guilt is proved beyond all reasonable doubts. In cases under POCSO Act as per section 29 of the POCSO Act, it is for the accused to prove that he has not committed any offence as alleged and that too beyond doubt not only on the basis of preponderance of probabilities. Otherwise the Court shall presume that he has committed assault on the victim. The provision u/s.29 of the POCSO Act would add strength to the prosecution evidence.

48. Section 29 needs to give consideration as it gives presumption in favour of the victim. It is not absolute presumption. It can be rebut by the accused with defence evidence.

49. The accused failed to put up his case of mistaken identity. No theory of enmity in between the family of the informant and the accused was brought on record by the defence. No case of false implication was put up by the defence. No evidence in defence to rebut the presumption available to the victim u/s.29 of POCSO Act put up by the defence.

50. In short the accused in absence of evidence in defence failed to rebut the presumption available in favour of the victim.

51. This leads me to conclude that the prosecution with the help of truthful, unimpeachable testimony of the victim proved it beyond doubt that the accused sexually assaulted/outraged the modesty of the minor victim girl and gave threats to her so the offences u/s.354 and 506 of IPC and u/s.9(m) r/w.10 of POCSO Act are proved against the accused beyond all reasonable doubts. Hence, the Court records its findings to Point Nos.2, 3 and 4 in affirmative and stops to hear the accused on the quantum of punishment.

Date : 16.04.2022

(H. C. SHENDE)
Special Judge under P.O.C.S.O. Act,
Sessions Court, Borivali Division,
Dindoshi, Goregaon, Mumbai

52. The Learned APP Smt. Malankar for State made submission that the accused is elder person. The victim is a small girl of 7 years old having full faith even in the assailant attended the public toilet in his presence. But the accused by taking disadvantage of the circumstances and her tender age, assaulted her to fulfill his lust. The accused, therefore, needs to be punished with maximum punishment. He not only harassed the victim but when she screamed and tried to rescue herself, he gave threats to throw her out of the window which shows his intention clearly so he be punished with maximum punishment with maximum fine and the compensation be given to the victim.

53. The Learned Advocate for the accused and accused in person, however, made submission that he is innocent one. He is not a habitual person. He lost his father way back. There is nobody in his house to look after his family in his absence. He needs medication, needs special care so leniency be shown to him while awarding the punishment. The Learned Advocate for the accused also put up that he be released on bond of good behaviour/probation. He is not in a position to pay the fine so fine should not be imposed and a chance be given to him by releasing him on the bond of good behaviour.

54. Heard both sides.

55. The accused and his Learned Advocate though asked for releasing the accused on admonition or bond of good behaviour, probation but I am not inclined even to think about it. The victim girl is small aged about 7

years assaulted with sexual intent by the accused. The person who is brought in the Court with such allegation of sexually assaulting to the minor if leniently dealt with by the Court, then it would be an injustice to the victim, it is traversery of justice. It will give wrong message to the society at large and may boost the fear prevailing in the mind of the victim of sexual assault that the courts are also not recognizing their pain so the submission made by the defence to show leniency to the accused is out of consideration according to this Court.

56. This leads me to consider the quantum of sentence to be imposed on the accused. The victim aged 7 years was sexually assaulted by the present accused. Her testimony made it clear that she felt very bad because of it and started crying. The accused accepted that he lifted the victim girl. It shows that she was a weak, helpless small child. His innocence and circumstances are misused by the present accused and he sexually assaulted her.

57. Though special enactments are made the crime against child victim are increased in the society. We must listen the deafening cry of the society against the said crime and needs to deal with such crime judiciously particularly while inflicting the punishment.

58. The submission leads me to decide the quantum of sentence. The Learned Advocate for the accused submitted to show leniency for the accused as he is a poor and working person. In my view, these reasons are neither special nor adequate. The measure of punishment in cases of child

abuse cannot be depended upon the special status of the accused or the victim. It must depend on the conduct of the accused, age of the victim and gravity of criminal act. Protection of society and deterring criminal is the avowed object of criminal law system. This required to be achieved by imposing an appropriate sentence.

59. The Hon'ble Supreme Court in case of **State of Rajasthan V. Om Prakash** [AIR 2002 SC 2235] has observed that it is necessary for the Courts while dealing with the child rape cases. The effect of such a crime on the mind of the child is likely to be life long. A special safeguard has been provided for the children in the constitution of India in which Article 39 which interalia stipulates that state shall, in particular, direct its policy towards securing that the tender age of the children is not abused and the children are given opportunity and facility to develop in a healthy manner and condition of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment.

60. In present case, I do not find extenuating or mitigating circumstances on record to justify imposition of lesser punishment than prescribed by law. The plea of mercy/or showing leniency is misplaced, it would be travesty of justice.

61. Section 42 of POCSO Act made it specific that if the offence under IPC and under POCSO Act are proved against the accused having same nature of allegation, the accused needs to be punished for the offences having punishment at greater in degree but the bare reading of the

provision u/s.42 of POCSO Act makes it clear that it does not speak about alternate punishment for the offence u/s.354 of IPC.

Section 42 of POCSO Act :

“42. Alternate punishment - Where an act or omission constitutes an offence punishable under this Act and also under sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376-C, 376-D, 376-E 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.”

So the punishment u/s.354 of IPC and u/s.9(m) r/w.10 of POCSO Act needs separate consideration.

62. After considering the entire circumstances, the offences are proved against the accused and the punishment provided to it, this Court arrived at the conclusion that the following sentence would meet the ends of justice.

63. Hence, the Court by recording its findings to Point Nos.1 to 4 in the affirmative, proceeds to pass the following order :

ORDER

1. The accused **Sunil Balwilsingh @ Balbirsingh Rana, age-21 Years, residing at Chachiya Chawl, Dhobi Ghat, Chincholi Phatak, Malad (E), Mumbai** is convicted for the offences punishable **under**

sections 354 and 506 of Indian Penal Code, 1860 and under section 9(m) read with section 10 of Protection of Children from Sexual Offences Act, 2012 vide Section 235(2) of Code of Criminal Procedure.

The accused **Sunil Balwilsingh @ Balbirsingh Rana** is punished u/s.354 of Indian Penal Code, 1860 and is sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.7,000/- (Rupees Seven Thousand Only), in default of payment of fine, he shall suffer Rigorous Imprisonment for six months.

The accused **Sunil Balwilsingh @ Balbirsingh Rana** is punished u/s.506 of Indian Penal Code, 1860 and is sentenced to suffer Rigorous Imprisonment for two years.

The accused **Sunil Balwilsingh @ Balbirsingh Rana** is punished u/s.9(m) r/w.10 of Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.7,000/- (Rupees Seven Thousand Only), in default of payment of fine, he shall suffer Rigorous Imprisonment for six months.

2. All the sentences shall run concurrently.
3. Accused is on bail. He be taken in custody forthwith. His Bail Bond, if any, stands cancelled. Cash bail, if any, be forfeited.

4. Set of as per section 428 of Criminal Procedure Code be given to the accused for the period, if any, has undergone by the accused in custody in the present crime.
5. Out of amount of fine, (if paid by the accused/realized), the amount of Rs.10,000/- (Rupees Fifteen Ten Only) be given to the victim girl on due verification, towards compensation as per section 357 of Code of Criminal Procedure, after appeal period is over.
6. As there is no muddemal filed in this case as per list of articles Exh.10, no order to that effect.
7. The concerned Police Station is directed to hand over the copy of Judgment to the Hon'ble District Magistrate (Collector) to be given to the victim/prosecutrix and her legal heirs and report the compliance of the same to the Court.
8. Copy of Judgment be given to the accused free of cost.
9. The Judgment is pronounced in the open Court in presence of the Learned APP, Learned Advocate for the accused and the accused.

Date : 18.04.2022

(H. C. SHENDE)
Special Judge under P.O.C.S.O. Act,
Sessions Court, Borivali Division,
Dindoshi, Goregaon, Mumbai

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Judgment

Handwritten order given on : 16 & 18/04/2022
Typed on : 16 & 18/04/2022
Corrected on : 18/04/2022
Signed on : 18/04/2022
Sent to Dept. on :

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

UPLOAD DATE AND TIME : 18/04/22 at 4.58 p.m. Mrs. Vidya Pendharkar
NAME OF STENOGRAPHER

Name of the Judge (with Court Room No.)	HHJ Smt. H. C. Shende (Court Room No.11)
Date of Pronouncement of Judgment/Order	18/04/2022
Judgment/Order signed by P.O. on	18/04/2022
Judgment/Order uploaded on	18/04/2022

POCSO SPL.356/16

: 33 :

Judgment