

POCSO SPL.91/19

: 1 :

Judgment

MHCC050012372019



Received on 05/03/2019

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Decided on 12/04/2022

Duration 3 Y. : 1 M. : 7 D.

Exh.49

**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.91 OF 2019
CNR NO. : MHCC05-00-1237-2019
(C.R.No.94/19)**

THE STATE OF MAHARASHTRA,
At the instance of Malwani Police Station
vide C.R. No.94/19

...Complainant
(Prosecution)

Versus

Paul Micheal Vaz
Age : 40 Years, Occ.: Service.
R/o. : Room No.17, Bldg. No.5,
D I.T Block, Dr. Ambedkar Road,
Parel, Mumbai-400 012.

...Accused

Mrs. Geeta Malankar, Spl.A.P.P. for the State.
Advocate Mr. P. B. Patil for the Accused.

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

DATE : 12th April, 2022

: JUDGMENT :

(Delivered and pronounced in open Court on 12/04/2022)

The accused **Paul Micheal Vaz** is facing trial for the charge **U/Sec.354 of Indian Penal Code, 1860 (Hereinafter referred to as “IPC” for the sake of brevity) and U/sec.9(n) 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 the mother of the victim girl who is aged five years at the relevant time. The informant approached to Malad Police Station. She gave them information that on 16/01/19 she was called in the afternoon by the teacher of her daughter’s school. She could not go on that day due to her job restrictions but on 18/01/19 she went to her daughter’s school and talked to the concerned teacher in the school. The teacher told to the informant that her daughter would rub her private part on the corner of bench and the teacher wanted to know as to why was she doing this. The teacher asked the victim in front of the informant regarding this but the victim was scared and did not say anything out of fear. Later the informant came back home with the victim and took her into confidence and again tried to ask her as to why was she doing this ? The victim told her, “Dada touches me here” and she started crying. The

informant did not believe that her husband was touching their daughter's private part. The informant went to the baby sitting institution where she had enrolled the victim for baby sitting. The informant told this act of the victim and her confession to aunty there and asked that lady to try and ask the victim about it again. The aunty from the baby sitting took the victim in confidence again and asked the victim about this act. The victim again replied "Dada touches me here".

After hearing this again, the informant had got sure that her husband and harassed the victim girl. Thereafter the informant discussed this with her parents and on 22/01/19 she filed the complaint in Malad Police Station.

First Information Report :

3. On the basis of the statement given by the informant, PSI Smt. Yewale, Malwani Police Station has taken the FIR and Crime No.94/19 u/s.354 of IPC and 9 (n) r/w. 10 of POCSO Act was registered against the accused.

Investigation :

4. The investigation was conducted by PSI Sable. On 22/01/19 her by visiting to the spot of incident i.e. Room No.8 which is a house of the informant and of the accused, prepared spot panchnama Exh.39. The accused got arrested under arrest-cum-surrender panchnama Exh.40. On

23/01/19 the victim girl was sent for her medical examination, statement of witnesses and victim was recorded by the investigating agency and the victim was sent to the Learned Metropolitan Magistrate Court No.63, Andheri, Mumbai for recording her statement u/s.164 of Cr.P.C.

Chargesheet :

5. Then the Chargesheet came to be filed against the present accused in the Court.

Charge :

6. The accused appeared before the Court. On appearance of accused, Learned Predecessor of this Court Smt. A. D. Deo framed the Charge u/s.354 of IPC and u/s.9(n) r/w.10 of POCSO Act against him on 10/10/2019 as per **Exh.9**. The contents of the Charge were read over and explained to him in vernacular. He understood the same. He abjured the Charge and claimed to be tried.

His defence is of total denial and false implication in the matter by the informant who is his wife because she is having friendship with two persons. She was talking with them in the late night. She did not take care of the child so the dispute was raised between them. Fights were taken place between them in which she gave threats to him that she wanted to leave him and she will teach lesson to him. He never assaulted to his own daughter. He loves his daughters. This is a false case.

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
1.	Victim girl (child witness).	Exh.16	
2.	First informant/mother of the victim girl and wife of accused.	Exh.21	Exh.22-Format of FIR with statement. Exh.25-Birth certificate of victim girl. Exh.26-Statement u/s.164 of Cr.P.C. of victim girl.
3.	Perpetho Pitar D'cousta (Teacher in school of the victim girl).	Exh.28	
4.	Dr. Archana Shaumil Waghela (medical officer who examined victim girl).	Exh.32	Exh.33(colly.)-Page Nos. 3 to 36.
5.	PSI Smt. Priyanka Ramesh Yeole (police officer who recorded FIR and registered crime).	Exh.35	

6.	PSI Mr. Prashant Hanumant Sable (investigating officer).	Exh.38	Exh.39-Spot panchnama. Exh.40-arrest panchnama cum form. Article A – Letter dated 23/01/19 to Stabadi Hospital. Exh.41-acknowledged copy of letter dated 30/01/19 sent to Ld. M. M. Court.
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8. The prosecution has filed list of documents at Exh.15, Exh.24 and Exh.31 viz. :-

Sr.No.	Name of document	Exh.No.
1.	Format of FIR with statement.	Exh.22
2.	Birth certificate of victim girl.	Exh.25
3.	Statement u/s.164 of Cr.P.C. of victim girl.	Exh.26
4.	Page Nos. 3 to 36.	Exh.33(colly.)
5.	Spot panchnama.	Exh.39
6.	Arrest panchnama cum form.	Exh.40
7.	Acknowledged copy of letter dated 30/01/19 sent to Ld. M. M. Court.	Exh.41

9. The prosecution has filed list of articles at Exh.16 as nil.

10. The prosecution closed its evidence by filing evidence closure pursis at Exh.42.

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.44** in which he reiterated that he is falsely implicated in the matter by the informant who is his wife because she is having friendship with two persons. She was talking with them in the late night, did not take care of the child it resulted in raising dispute between them. Fights were taken place between them in which she gave threats to him of teaching lesson to him. He never assaulted to his own daughter. This is a false case lodged by his wife to take the revenge.

12. The accused examined himself on Oath as DW 1 **Exh.45** in which he denied all allegations levelled against him and put up the same theory that the informant falsely accused him because he stopped her to talk with those persons.

13. Heard the Learned APP Mrs. Geeta Malankar for State and Learned Advocate Mr. P. B. Patil for the accused at length.

Arguments of Learned APP Mrs. Geeta Malankar for State :

14. The Learned APP Mrs. Malankar for State submitted that The accused is charged with the offence u/s.354 of IPC and u/s.9 (n) r/w.10 of POCSO Act. The accused is the father of twin daughter. The victim is his own daughter amongst them both. At the relevant time she was below 12 years of age. Her birth date and age is admitted by the defence. The victim in her evidence throughout gave clear statement of causing assault to her

and threat as to not to tell it to anybody given to her by her own father i.e. the accused. The mother of the victim was called by the school teacher of the school of the victim. She gave information about acts of rubbing private part on the benches by the victim and when she was taken in confidence, she has narrated the acts of assault to her by the accused by pointing her private part and by saying that, "Dada touches here". She gave information to her babysitting aunty. The evidence of the victim, informant about her act corroborated by the school teacher, who is independent witness. She will not put false story. Even the informant PW 2 after confirming the facts, went to lodge the report. The sole testimony of the child victim is reliable, sufficient to hold the accused guilty of committing said crime. Her evidence needs to be relied upon. The defence failed to rebut the presumption available in favour of the victim u/s.29 of the said Act.

15. The accused by examining himself as DW 1 contradicted their own defence taken earlier during the course of cross-examination of material witnesses. If as per accused, the informant is of loose character is not carrying her responsibilities towards the children, then why he has not filed divorce petition.

16. The Learned APP further pointed out that the cross-examination of the victim girl PW 1 taken by the Learned Defence Counsel falsifies their story of irresponsible behaviour of the informant in the house. The family of the informant and the accused was normal happy family. They were

enjoying drinks. The defence put up the story of some function to informant but failed to establish it with cogent proof as to which was the function and what is its relevance. The evidence in defence led by the accused is not probable, acceptable as it is contrary to their own defence taken by them. So it cannot be relied on. It is not a case of rape or actual penetrative sexual assault so no need of corroboration from the medical officer or the medical evidence. The small girl who is the real daughter was inappropriately touched by her own father i.e. the accused. The victim in her evidence gave details of same except some minor contradictions or omission which needs no consideration. Those are not affecting the core of the evidence. It was not easy for a mother to lodge the complaint against her husband with the allegation of sexual assault on their daughter so after confirming it, she approached to the police station. The said facts, circumstances are properly explained. The evidence inspires confidence.

17. The Learned APP in support of her arguments that no prudent woman would lodge a false complaint of sexual assault to their own daughter, relied on the Judgment in case of **State of H.P. V. Asha Ram** of Hon'ble Supreme Court in **(2005) 13 Supreme Court Cases 766** wherein it is observed by the Hon'ble Supreme Court that,

“Father charged for raping his own daughter-High Court reversing the order of conviction passed by the trial court and acquitting the accused-Propriety-Testimony of prosecutrix PW 1, in spite of being subjected to lengthy cross-examination remaining unpeached-Suggestion that false case had been

hoisted against the accused at the instance of her mother (who had strained relations with the father and was residing separately), and that she was having menstruation at that time, denied by her-Testimony of prosecutrix well corroborated by testimony of PW 2 (sister) and PW 3 (mother) and also the medical evidence on record-Held, High Court erred in law as well as on facts, and thereby committed grave miscarriage of justice in acquitting the accused-Despite strained relations between the parents, PW 1 and 2 were happily staying with the accused and there was no rhyme or reason as to why the daughter should depose falsely so as to expose her honour and dignity and also expose the whole family, risking the outcasting or ostracisation and condemnation by the family circle as well as by society-Hence, impugned order of High Court set aside and that of trial court restored-Supreme Court expressing displeasure and dismay at the way High Court had dealt with such a grave offence”.

18. As per the Learned APP, in the same Judgment the Hon'ble Supreme Court reiterated the principle of law that conviction can be founded on sole testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. She, therefore, vehemently submitted that the sole evidence of the victim and of the rest witnesses is self-sufficient. The offence u/s.354 of IPC and u/s.9 (n) r/w.10 of POCSO

Act is proved against the accused beyond all reasonable doubts. He be punished with severe punishment.

Arguments of Learned Advocate Mr. Patil for accused :

19. The defence has filed written notes of arguments **Exh.48** and the Learned defence Advocate Mr. Patil made oral submission also in addition to the written arguments.

20. Now so far as the relation between the parties and the date of birth of the victim is not disputed by them. I would like to mention in brief the points raised by the Learned defence Counsel in their arguments. The Learned Counsel submitted that the victim must have been shocked when the question put to her about her about alleged act of rubbing private part on the benches and then with thought that she has to give some answer to satisfy her mother. She must have imagined that she was jumping on the stomach on her father and that is the reason that she has some irritation on the private part. In this background, it is clear that probably mother has forced her to answer the questions and, therefore, she must have said, "Dada touches her". In normal course of conduct, the informant would have told about school call to the accused but she alone went to the school. She would have first examined whether there is any injury to the private parts of the victim. She would certainly got annoyed, would have raised big fight with the assailant who is her husband for acts but she kept quiet. Her unnatural conduct is doubtful and makes it clear that the allegations are completely false. The informant admitted her friendship

with two persons and so the quarrels in their house and so this is a false case. No independent witness to corroborate the evidence of the victim or the informant Mrs.Sarveen had attended the Court but was not examined. The father and sister of the informant are also not examined so the evidence of assault in absence of corroborative evidence cannot be accepted and relied upon. The child witness is susceptible to tutoring and, therefore, the evidence of child witness is the most unsafe. The child is in custody of the informant since arrest of the accused so there is every possibility that she was tutored by her mother/informant and so the testimony of the victim cannot be relied upon. The victim never had mentioned touching by hand by the accused. The mother was always with the victim before every authority so it added doubt. The medical officer also accepted that the child may be used to rub it or she may be in the habit of doing so. The small incident of rubbing her private part by the victim in the school is exaggerated by the informant and implicated the accused falsely in present matter.

21. In addition to it, the Learned Advocate for the accused submitted that the accused has examined himself on Oath as the defence witness and his evidence is natural, truthful. The prosecution failed to put doubt on his evidence. At last the Learned Advocate for the accused put up that the prosecution failed to make any offence against the present accused. He needs to be acquitted of the offences.

22. The Learned defence relied on the bunch of Judgments given below in support of their arguments.

1) **Navin Dhaniram Baralye V. State of Maharashtra (2018 Cri.L.J. 3393)**

2) **Sagar Dinanath Jadhav V. State of Maharashtra (2018 CRI. L. J. 4271).**

23. The defence through the cross-examination of the material witness by the submission of the Judgments, relied on by them tried to give more emphasis on the point that the victim is child. She is with mother and very well tutored by her mother informant (PW 2). Section 29 of POCSO Act though gives presumption but it is not absolute presumption. It is rebuttable presumption and it would come into operation only when prosecution is able to establish facts that would form foundation for presumption u/s.29 of POCSO Act to operate.

24. Further as per the Learned defence Counsel, the evidence given by DW 1 accused needs to be taken into consideration and has to be given appropriate importance in examining as to whether the appellant was able to rebut the presumption u/s.29 of POCSO Act on preponderance of probabilities. In support of his contention, the Learned Counsel for the accused relied on the Judgments of **Navin and Sagar (cited supra)**. In short as per the defence, the prosecution failed to make out prima facie case so the presumption is not available to them u/s.29 of POCSO Act and secondly, even if the presumption is there to help the victim, the accused

with his acceptable and reliable evidence, rebutted it and so the theory of the prosecution needs to be thrown out of consideration and the accused needs to be acquitted as no case is made out against him.

Points for determination :

25. 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 the accused named above prior to 18/01/19 at Malwani used criminal force to a minor girl/victim aged five years, touched to her private part i.e. vagina intending to outrage her modesty and thereby committed an offence punishable u/s.354 of IPC ?	In the affirmative.
3.	Does the prosecution prove that on the above mentioned period and place, the accused being a father used criminal force to a minor girl/victim aged five years, touched to her private part i.e. vagina intending to outrage her modesty and he thereby committed an offence punishable u/s.9(n) punishable u/s.10 of POCSO Act ?	In the affirmative.

4.	What order ?	Accused is convicted as per final order.
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:: REASONS ::

As to Point Nos.1 to 3 :

26. As the facts are interlinked to each other, it would be appropriate to determine the Point Nos.1 to 3 with common reasoning with distinct observation wherever necessary.

27. The prosecution came with the theory of causing sexual assault by the accused who is the father of the minor victim girl who was aged five years at the time of the incident.

28. The fact that the victim girl born on 23/06/13 and her birth certificate **Exh.22** stating same date of her birth admitted by the defence. The age of the victim had not been contested and therefore, it is not necessary to enter into a verbose discussion on this aspect suffice it to say that Exh.22 the birth certificate of present victim girl reveals her date of birth to be 23/06/13. She was thus a child of about five years when she allegedly became an object of lascivious acts of the present accused.

29. Taking into consideration the above circumstances, this Court concludes that the prosecution is succeeded in proving that at the time of the incident, the victim was child i.e. below 18 years of age as

contemplated for provision under POCSO Act and as defined u/s.2(d) of POCSO Act. Hence, the Court records its finding to Point No. 1 in affirmative.

30. Before entering into the analyzation of evidence of material witnesses, it would be proper to have glimpse on the legal provision. The accused is charged for the offence punishable u/s.354 of IPC and u/s.9 (n r/w.10 of POCSO Act.

Section 354 of IPC :

354. Assault or criminal force to woman with intent to outrage her modesty. - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing to be likely that he will thereby outrage her modesty, 'shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.]”

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.”

Section 9 (n) of POCSO Act speaks about the circumstances in which the sexual assault is defined u/s.7 of POCSO Act turned to aggravated form of sexual assault and the provision for the punishment for aggravated sexual assault given in section 10 of POCSO Act.

31. Here in this matter as the accused is the real father of the victim against whom the allegations are made by the victim, he touches to her private part and then gave threat to the victim that if she would tell it to anybody, he would punish her with 20 times sit up. The provision u/s.9 of POCSO Act, therefore, is attracted.

32. The cumulative effect of the testimony of PW 1, PW 2 and PW 3 speaks that the accused and the informant (PW 2) are working parents. They used to keep their twin daughters with baby sitter aunty. As per the evidence of the accused, his first daughter is shy but this victim girl is naughty. They both were going in the school.

33. As per the evidence of PW 2, she received a call from the school of the victim on 16/01/19 but because of work constraint, she went in the victim's school on 18/01/19, met the teacher who informed that the victim was rubbing her private part on the benches. On inquiry before the teacher, the victim kept mum but later the informant with the victim when came back to home, then she by taking the victim in confidence, when asked as to why she was doing so then the victim told that, "Dada touches me here". She pointed her vagina and also disclosed that as her father

threatened her that, “he will punish her if she would disclose it to anybody” so she kept mum. The teacher of the victim was also examined as PW 3 (Exh.50). She corroborated that she observed at the relevant time that the victim was rubbing her private part at the corner of the school benches. She asked about it to her but she did not disclose anything. She reported it to the school Principal and the school principal called her parents. The mother of the victim came in the school. They told to the mother that the victim is rubbing her private part i.e. vagina on the bench. The police made inquiry with her and she gave statement to the police.

34. During course of cross-examination of this independent witness PW 3, it was asked to her as to whether the medical facility is available in their school or not and she said that it is not available.

35. Her further evidence came through her cross-examination taken by the defence that she gave information to school Principal orally. She admitted that the mother of victim came and she met with Principal. As a parent, she knows the mother of the victim even prior to the incident and nothing.

So the sequence of incidents is that on 18/01/19 mother of the victim went to the school of the victim as she was called where she came to know about the alleged acts of the victim, she then made inquiry with the victim and came to know about the acts of the assault on the victim by the accused.

36. The Learned defence Counsel during course of arguments submitted that the victim being a child not expecting about any inquiry told the reason as per her wish to her mother. I am not inclined to accept it as the evidence of PW 3 teacher makes it clear that even prior to mother of the victim, she asked the victim about her alleged acts but she kept mum, then in front of PW 2 informant also the victim was inquired but she disclosed nothing. The evidence of PW 3 teacher thus makes it clear that the victim was not for first time came across with said inquiry about her acts in the school. She even in presence of the informant, did not tell anything to the teacher so in my opinion, the theory of defence that the victim gave some reason by preparing theory has no place and not acceptable.

37. Secondly, no such question was put up to the victim PW 1 that out of fear that her mother came to know about her bad acts and so she gave this reason or that her mother asked her to tell said reason for her act and so she is telling also does not appear to be probable, acceptable. The teacher observed it first. The said fact goes upto the school principal of the victim and then was informed to the parents. So it would be out of the box of imagination that the victim cooked up the story or PW 1 compel her to say so.

38. On this backdrop, we need to consider the theory of defence that the informant out of anger as the accused restrained her from keeping contacts with her two friends as came in her evidence, prepared a false story also does not find any place. It is also not acceptable because the teacher

observed the act of the victim and then informed to other after asking its reason to the victim.

39. The Learned Advocate for the defence and accused in his evidence as DW 1 tried to put up that the informant kept on attending the mobile phone in the late night with her friends, was not taking care of the children and house work so there were quarrels in between them and was a big fight prior to eight days of the FIR and so this false FIR.

40. All the above theories of defence put up by them to PW 1. She accepted of having her friends' named in the evidence and the accused objecting to her and asking not to contact to them. The accused even if was suspecting the character, had not taken any legal steps against the informant. On other hand, when the questions put up to the victim who is the first witness of the present matter by the Learned defence Counsel that her mother was always on the phone, not cooking food, bringing food from outside was categorically denied by the victim by adding that her mother prepares good food. The victim is not having knowledge about any big quarrel in between her parents seen or intervened by the neighbourers. The theory in defence which was put up by the defence that there were usual quarrels in between the informant and the accused is not accepted by the victim. One suggestion was put to her by the Learned defence Counsel that her parents were talking loudly. She accepted it but denied that her mother was shouting loudly by opening the windows. The said admission by the victim of having knowledge of loud voice of the parents

does not mean that there were usual quarrels in between the parents of the victim. This question is ambiguous question. We cannot presume that talking loudly means a quarrel so the victim was used as a weapon against the accused by the informant.

41. The Learned Advocate for the accused gave more stress on the fact that the informant came to know about it on 18/01/19 still the FIR was lodged on 22/01/19. No proper reason for the delay was given by her. In my opinion, for arriving at any conclusion, we have to verify the facts, circumstances prevailing at the point of time so also the relation between the parties interse but the delay in lodging the FIR with the allegation of sexual assault is not always fatal unless the delay malafide intention smells out of it.

The Hon'ble Supreme Court in the matter of **Punjab V/s. Gurmit Singh reported in AIR 1996 S.C. 1393** held that,

“(B) Criminal P. C. (1974), S. 154, - Sexual offences - Delay in lodging FIR - Not material when properly explained.

Penal Code (1860) S. 376.

In sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family.

It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter.”

Similarly in case of **Bharwada Bhoginbhai Hirjibhai V. State of Gujrat (AIR 1983 SC 763)** while reiterating their earlier observation that,

“Conviction can be founded on the sole testimony of the victim of rape/sexual assault shows their displeasure by mentioning that in Indian setting refusal to act on the testimony of a victim of sexual assault in absence of corroboration as rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? It was further pointed out that on principle of the evidence of a victim of sexual assault stands on a par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. The

aforesaid observation was made by this Court because of the following factors : (SCC pp. 225-26, para 10)

“(1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband’s family of a married woman, would also more often

than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.”

Similarly in case of **Madan Gopal Kakkad V. Naval Dubey (1992)**

3 SCC 204,

“it was pointed out at SCC p. 218 that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the “probabilities factor” does not render it unworthy of credence, and that as a general rule, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.”

42. The above discussion leads me to conclusion that the informant mother of the victim is wife of the accused. Though she came to know about the acts of the accused, she refrained herself to come on any conclusion and tried to get it confirmed from the victim and requested to baby sitting aunty to ask about it to the victim and when the baby sitting

aunty confirmed it, then she went to lodge the FIR so in my opinion, the informant might have been in dilemma even after coming to know about said assault. The delay if any cannot be explained by specific evidence. We have to take the note of it and circumstances prevailing at the relevant time in which the FIR is lodged. In my view, therefore, the plausible explanation came on the record. The delay if any is not fatal to the prosecution case in any way.

43. An emphasis was given by the Learned Advocate for the accused on the aspect that the victim must have been tutored by her mother. He argued that the victim also accepted it that she is listening to her mother and her mother told her about deposition in the Court but I am of the view that the further question Nos.76 and 77 put up to the victim by the Learned defence Counsel and the answer given by the victim washed out the theory of defence of tutoring to the victim by the mother to depose false against her own father. The victim girl PW 1 denied of deposing in the Court as only asked to depose accordingly in the Court by her mother/informant.

44. It is worth to note that the victim is first witness of the prosecution. The defence put up their theory in defence to her first and till that their theory in defence was not disclosed by them. The victim denied of telling false and stuck to her version that the accused touched to her private part. I do not find any reason to disbelieve her natural, coherent, reliable evidence. The victim is not only saying that the accused touched her but

also she added that thereafter the accused gave threat to her that if she would disclose it to other, he will punish him. This reflects guilty mind of the accused behind the act. Otherwise there was no reason for the victim to tell it and there was no reason for him to give threats to the victim. The accused through his contradictory evidence failed to rebut the presumption available in section 29 of the POCSO Act. The acts of the victim first were noticed by her teacher and then the mother came to know about it so there is no possibility of false implication of the accused out of grudge by the informant. The Learned Advocate also tried to put up that she did not say that he touches with finger. I am astonished with such arguments because even provision/definition of sexual assault given under section 7 of POCSO Act also does not specify how the assailant should touch to the private part of the victim and which touch amounts to an offence if the victim is assaulted by the assailant as defined u/s.7 of POCSO Act.

45. At the cost of repetition, I would like to reproduce it here.

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.”

46. The victim if saying that, “Dada touches here” and then she started reacting in weird manner, then needless to say that the accused did it with

sexual intent which affects on the mind of small victim. When explanation was asked to her by the teacher, she kept mum, she did not disclose to mother in the school and got scared. The victim gave reason of not disclosing it was a threat given to her by the accused. These all circumstances clearly suggest that the accused has committed sexual assault on the victim with sexual intent and she being a girl (woman), he outraged her modestly.

47. The prosecution with the help of evidence on record proved that the assault caused to the victim by the accused. As it is not case of prosecution that any direct/actual physical assault was caused to the victim by the accused so though the medical officer PW 4 who has examined the victim on 23/01/19 in Shatabdi Hospital deposed that there were no injuries to the victim still it makes no difference. Here it is worth to mention in sequence that Learned Advocate put up possibility of causing itching sensation to the victim because of increase of bilirubin and, therefore, she is rubbing her private part or she may be in the habit of doing so accepted by the medical officer but the doctor explained that if there was increasing in bilirubin, then the itching sensation must have been to the whole body and not to vagina only. She accepted that it may be the habit of the victim but this question was not put up to any other witness who were close to the victim i.e. her mother, teacher or even to the victim that she is in the habit of doing so. How could a doctor, a third person able to say about the habits of minor girl unless observed it so I do not find any force in the arguments and possibilities of rubbing private part by the victim other than sexual act committed by the accused with her and its impact on her mind.

48. With this, the Court is concluding here that the prosecution with the help of material, cogent, confidence inspiring testimony on record, proved it beyond doubt that the accused sexually assaulted the victim girl with sexual intent and molested her and committed an offence punishable u/s.354 of IPC and u/s.9 (n) r/w.10 of POCSO Act. Hence, by recording my findings to Point Nos.1 to 3 in affirmative, I stop to hear the accused on the point of quantum of punishment.

Date : 11.04.2022

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

49. The Learned APP made submission that the accused is father of the victim girl. She was hardly of five years old on the date of the incident. Her life came in danger. The accused needs to be punished with severe punishment i.e. maximum punishment given u/s.10 of POCSO Act. The victim needs to be compensated so heavy fine needs to be imposed. No need to show leniency considering the relation between the parties.

50. The Learned Advocate for the accused and the accused in person, however, requested to show the leniency in imposing the punishment. The Learned Advocate for the accused Mr. Patil submitted that if we consider the act alleged the minimum punishment to the offence u/s.9 r/w.10 of POCSO Act is also at higher side so there is a need to show the leniency to that effect. He wants to take care of his daughter after coming back to the society. He is working for his family, wishes to take care of his daughter. He is not a hardened criminal so minimum punishment be imposed.

51. The submission leads me to decide the quantum of sentence. The accused is father of the victim aged five years hardly at the relevant time. The Learned Advocate for the accused submitted to show leniency for the accused as he is a reputed person, working person and the victim is his own daughter. 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.

52. 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.

53. As we know, the accused is father against whom the allegations made by the victim daughter that 'he touches her vagina (over her clothes)'. It is proved beyond doubt against the accused. A father is fortress, trustee of his daughter. This crime, therefore, becomes more grievous. 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 is of showing leniency is misplaced, it would be travesty of justice.

54. 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 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.”

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

55. 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.

56. Hence, the Court by recording its findings to Point Nos.1 to 3 in the affirmative, proceeds to pass the following order :

O R D E R

1. The accused **Paul Micheal Vaz**, age-40 Years, residing at Room No.17, Bldg. No.5, D I.T Block, Dr. Ambedkar Road, Parel, Mumbai-400 012 is convicted for the offences punishable under section 354 of Indian Penal Code, 1860 and under section 9(n) punishable under section 10 of Protection of Children from Sexual Offences Act, 2012 vide Section 235(2) of Code of Criminal Procedure.

The accused **Paul Micheal Vaz** is punished u/s.354 of Indian Penal Code, 1860 and is sentenced to suffer Rigorous Imprisonment for three years and to pay fine of Rs.5,000/- (Rupees Five Thousand Only), in default of payment of fine, he shall suffer Rigorous Imprisonment for three months.

The accused **Paul Micheal Vaz** is punished u/s.9(n) 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.20,000/- (Rupees Twenty Thousand Only), in default of payment of fine, he shall suffer Rigorous Imprisonment for one year.

2. Both 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. Out of amount of fine, (if paid by the accused/realized), the amount of Rs.20,000/- (Rupees Twenty Thousand 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.
5. As there is no muddemal filed in this case as per list of articles Exh.16, no order to that effect.
6. 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.
7. Copy of Judgment be given to the accused free of cost.
8. The Judgment is pronounced in the open Court in presence of the Learned APP, Learned Advocate for the accused and the accused.

Date : 12.04.2022

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

Handwritten order given on : 09 & 11/04/2022
Typed on : 09 & 11/04/2022
Corrected on : 12/04/2022
Signed on : 12/04/2022
Sent to Dept. on : 12/04/2022

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

UPLOAD DATE

AND TIME : 12/04/22 at 5.49 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	12/04/2022
Judgment/Order signed by P.O. on	12/04/2022
Judgment/Order uploaded on	13/04/2022

POCSO SPL.91/19

: 35 :

Judgment