

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.689 OF 2018

Balu s/o Chabu Barde,
Age 26 years, Occu. Labour
R/o. Pimparkhed (BK)
Tq. Ghansawangi, Dist. Jalna

... Appellant

Versus

The State of Maharashtra

... Respondent

...
Mrs. K. R. Jamdhade, Advocate a/w Mrs. Maya R. Jamdhade,
Advocate for Appellant
Mr. V. S. Badakh, APP for Respondent – State
Mrs. Zainab Surti, Advocate for Informant (Appointed)
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 13th JANUARY, 2023

JUDGMENT :

1. By this appeal the appellant impugns judgment and order dated 29/08/2018, passed by the learned Judge, Special Court and Additional Sessions Judge, Jalna, in Special Case (Child) No.24/2017, thereby convicting and sentencing appellant as under:-

I) For offence punishable under Section 377 of the Indian Penal Code to undergo rigorous imprisonment for seven years and to pay fine of Rs.5,000/-;

II) For offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") to undergo rigorous imprisonment for 10 years and to pay fine of Rs.5,000/-;

2. The prosecution case, in short, is that victim is six years old son of informant (PW1). On 23/02/2017 there was procession at the village to celebrate electoral victory of informant's nephew in Panchayat Samiti election. In the evening, PW1 was standing near the village entrance gate (वेस). At that time, victim (PW2) came towards him crying and informed him that accused Balu committed unnatural sex with him by inserting penis in his anus. PW1 took victim to their house, where the victim narrated the incident to his mother (PW8). PW8 removed pant of the victim and found that there was slight bleeding and swelling to victim's anus. PW1 and other family members searched for the accused. He was found in the crowd of procession. He was brought to the house of informant and victim identified him as accused. PW1 then lodged report (Exhibit-33) with police on 23/02/2017, which was registered at Crime No.24/2017, for offence punishable under Section 377 of IPC and Sections 3 and 4 of the POCSO Act. After completion of investigation charge-sheet was filed. Appellant was charged under Section 377 of IPC and Section 6 of the POCSO Act. The appellant pleaded not guilty.

3. Prosecution in support of it's case examined 11 witnesses. The defence of the appellant was of false implication due to rivalry over political factionalism, following the Panchayat Samiti

election. After appreciation of evidence, Special Court convicted appellant as aforestated. Hence the appeal.

4. Heard learned advocate for appellant, learned Additional Public Prosecutor for respondent – State and learned advocate appointed for informant. Perused the record.

5. Learned advocate for appellant assailed the conviction contending that evidence brought on record by the prosecution is not sufficient to convict the appellant. According to her, there is material variance in the prosecution evidence, benefit of which needs to be given to the appellant. She submits that prosecution has failed to prove the charge beyond reasonable doubt.

6. Learned Additional Public Prosecutor and learned advocate for the informant, on the other hand, by relying on the prosecution evidence submit that trial Court has properly appreciated the evidence and has rightly convicted the accused. Further submission is that in view of evidence of prosecution witnesses, medical evidence and presumption under Section 29 of the POCSO Act, conviction of accused/appellant is proper and no case is made out to interfere in the same.

7. PW1 father of the victim has deposed that victim was six years old and the incident happened prior to one year, at about

06:00 p.m. He was near the gate (वेस) of their village. On that day, his nephew had succeeded in Panchayat Samiti election and there was procession. Victim came towards him crying and told him that accused Balu removed his pant and committed unnatural sex with him. Therefore, he took victim to the house. Victim narrated the incident to his mother. Victim's mother checked by removing his pant. Slight bleeding and swelling was noticed at the anus of the victim. Then he went to the house of accused, but he was not found there. Accused was found in the village procession and he was caught and brought to their house, where the victim identified accused as the same person who did unnatural sex with him. On the same day they lodged report (Exhibit-33).

In cross-examination PW1 admitted that accused belongs to 'Bhilla' community and he belongs to 'Maratha' caste. He, however, denied the suggestion that accused was supporter of rival political party and there was dispute between him and the accused.

8. Victim is examined as PW2 and he has stated in his evidence that on the date of incident, while he was in temple, Balya picked him up and took him in the field of wheat crop and below tamarind tree he inserted penis in his anus. Then there was bleeding to his anus and then he came towards the temple. He met

his father near the gate (वेस). Then, his father took him to home where he narrated the incident to his mother. He also narrated the incident to police.

In his cross-examination, he admitted that *"My father told me to narrate that Balu had committed so."*

"Question : Whether your father told you to narrate so to the police?"

Answer : Yes, my father told me."

9. PW3 is resident of the same village. He has stated that he knows informant PW1 and victim PW2. On the date of incident his son and victim were playing near to gate (वेस) of their village. On that day, he had been near the Gram Panchayat shop. At that time, at about 06:30 p.m. victim came there crying. He narrated to his father in his presence that behind Gram Panchayat in the field of wheat crop accused inserted penis in his anus. He heard it.

In cross-examination he admitted that nephew of the informant was elected in Panchayat Samiti election from Nationalist Congress Party on the date of incident. As results of the election had been declared, there was procession in the village. He has further stated that he does not know whether accused is worker of another political party and has acted against said nephew in the election.

10. PW4 is panch to the spot panchanama (Exhibit-39). He

deposed that on the spot of incident, wheat crop was moulded and the land was trampled. He denied the suggestion that as the accused did not give vote to their political party, he is deposing falsehood at the instance of informant.

11. PW5 is the medical officer who examined victim as well as the accused. He deposed that on examination victim was found disturbed and irritable. There was swelling, redness to his anal canal. There was pain on touch. He collected the samples of his anal canal, his nails and blood, and handed it over to the police. He issued medical certificate of examination of the victim (Exhibit-44). According to him, the signs he found in the anal canal examination of the victim are possible if penis has been inserted in his anal canal.

He also examined accused on the same date and found him capable of committing sexual intercourse.

In cross examination he has stated that injury found on the anus of victim was not possible by nail. The injury was not due to any infection. Such type of signs are possible in cases of piles or fisher. He, further, deposed that children rarely get such type of disease. He admitted that he has not issued any letter to the police about mental soundness of victim to give any statement, as the police did not demand such letter. He denied the suggestion that victim's report was prepared at the instance of his father.

12. PW6 is disbelieved by the trial Court as he is interested witness.

13. PW7 is panch to the panchanama of recovery of clothes of accused person (Exhibit-50) and to the panchanama of seizure of clothes of victim (Exhibit-51).

14. PW8 is mother of the victim. She deposed that victim is her son. He is aged 7 years and his age at the time of incident was six years. Incident had occurred on 23/02/2017. On that day, at about 06:00 to 06:30 p.m. victim and his father came home. Victim was crying. She asked him as to what had happened. Victim told her that accused Balu took him to farm near the rivulet of their village and has put his penis in his anus. Then, she removed his pant and found that there was bleeding and swelling on his anus. Then she told this thing to her in-laws. She identified accused in the Court.

In cross-examination she has denied that her nephew was elected to Panchayat Samiti. She, however, admitted that from her clan of Raktate, one person was elected to Panchayat Samiti. She denied the suggestion that as the accused did not vote in favour of her nephew, they had grudge against him. She has admitted that, in their village there are four to five Balu. She, however, volunteered that her son/victim had identified the accused

in the Court as the person who had committed unnatural sex with him.

15. PW9 is the police inspector who had registered FIR (Exhibit-33) at Crime No.24/2017.

16. PW10 is the carrier of clothes and blood samples to the Forensic Laboratory (Chemical Analyser).

17. PW11 is the investigating officer who has investigated the crime and on completion of the same, filed charge-sheet.

In his cross examination he has admitted that if the offences are punishable above seven years, they call Government servants to act as Panchas. The panch witnesses in the present case are not Government Servants. He has also admitted that he did not conduct test identification parade of the accused. He had recorded statement of victim in presence of his father. He denied the suggestion that accused was implicated at the instance of victim's uncle, who is member of Panchayat Samiti. He has proved CA reports (Exhibits – 65, 66 and 67).

18. On appreciation of victim's evidence and particularly his admission that his father told him to narrate that Balu had committed the offence, possibility of victim implicating the accused at the instance of his father, cannot be overruled.

19. Considering the admission of victim's mother (PW8) that there are 4 to 5 Balu in their village, it is not clear as to how and on what basis PW1 went to the house of accused alone and caught hold of him from procession and brought him to his house, where the victim identified him as the same person who had committed unnatural sex with him. Admittedly, no test identification parade is held in the present matter. Considering these aspects, it becomes doubtful that accused is author of the crime. Defence that the accused had not committed the offence and he was at the procession appears to be probable.

20. Medical evidence also does not support the prosecution case. By letter Exhibit-43, investigating officer referred victim for medical examination and his opinion was sought on following aspects:-

- "१. पिडित बालकावर अनैसर्गिक संभोग झाला आहे अगर कसे.
२. अनैसर्गिक संभोग झालेला असल्यास त्याची तपासणी होवून त्याचे गुप्तभागास दुखापत झालेली आहे काय याबाबत अभिप्राय देण्यात यावा
३. औसर्गिक संभोग झाल्या बाबत आरोपीच्या शिस्न मधील विर्याचे थेंब त्याचे गुद्द्वारामध्ये आढळून आले असल्यास ते नमुने CA तपासणी करिता घेण्यात येवून सिलबंद करून मिळणेस विनंती आहे.
४. पिडित बालकाच्या रक्ताचे नमुने घेवून CA तपासणी करिता सिलबंद करून देण्यात यावेत."

PW5 upon conducting medical examination of victim has issued certificate at Exhibit-44 thereby giving following answers:

"1) It's not clear that unnatural sex happened.

- 2) *There is swelling, redness present at the anal canal.*
 3) *Yes, I have taken semen for CA, blood for grouping, public hairs and nails for CA."*

21. On the same day accused was forwarded for medical examination by the investigating officer along with letter Exhibit-45, wherein opinion of the medical officer on following points was asked:-

१. आरोपी हा संभोग करण्यास सक्षम आहे काय?
 २. व त्याने संभोग केला आहे काय?
 ३. आरोपीचे CA तपासणी कामी वीर्य सॅम्पल घेण्यात यावे
 ४. आरोपीचा रक्त नमुना राखुन ठेवण्यात यावा.
 ५. त्याचे गुप्तांगावरील केस CA तपासणी कामी राखुन ठेवावित."

PW5 on examination of accused has issued medical certificate Exhibit-46, giving following opinion:-

- "1) *The victim is capable of doing sexual intercourse.*
 2) *It's not clear to he had done intercourse.*
 3) *Yes, I have taken semen for CA, blood for grouping, public hairs and nails for CA."*

22. Chemical Analyser's report Exhibit-65 reveals that blood stain of blood group 'A' which is of the victim, was found on the half pant worn by victim, at the time of incident. Blood group of accused is "B". No semen was found on the anal swab of the victim. Blood group at Exhibit-3 (anal swab) could not be determined as the results are inconclusive. Semen stains were found on the underwear of the accused.

23. Taking into consideration the medical evidence and CA reports, in my opinion, the prosecution has failed to conclusively

prove that accused has committed the alleged offence. Accused was immediately arrested and he was medically examined. No injuries are found on private part of the accused. PW5 medical officer has given opinion that it is not clear that the accused had done intercourse. From the medical certificate of victim Exhibit-44, it is not clear that unnatural sex happened. These aspects raise grave suspicion about the prosecution case. Fact remains that no history of unnatural sex is narrated at the time of medical examination of victim and therefore, it is not reflected in the medical certificate Exhibit-44. The CA reports also do not support the prosecution case.

PW5 medical officer has deposed that at the time of examination victim was disturbed and irritable and signs he found in anal canal of victim are possible if penis is inserted in the anal canal. In the cross examination he has admitted that swelling and redness are possible in case of piles or fisher. He has further stated that children rarely get such type of disease. But he has not stated that victim was not having such type of disease.

24. There is no merit in the argument of learned Additional Public Prosecutor and learned advocate for informant that the presumption under Section 29 of the POCSO Act is required to be drawn in the present case. To raise the presumption, prosecution has to first prove foundational facts in the context of allegations

made against accused under POCSO Act. In ***Navin Dhaniram Baraiye Vs. The State Of Maharashtra***, reported in **2018 ALL MR(Cri) 4919**, it is held:-

"...It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.

Although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability."

In the present case, prosecution has failed to establish facts that would form foundation for presumption under Section 29 of the POCSO Act to operate. Hence, presumption under Section 29 would not operate against accused.

25. In my view the prosecution has utterly failed to prove it's case beyond reasonable doubt and the appellant, therefore, is entitled for benefit of doubt. In the result, following order:-

ORDER

- (I) The appeal is allowed.
- (II) Impugned judgment and order of conviction passed by the Judge, Special Court and Additional Sessions Judge, Jalna, in Special Case (Child) No.24/2017, is hereby quashed and set aside. Appellant is acquitted.
- (III) Appellant be released forthwith, if not required in any other case.
- (IV) Appellant to execute bond in terms of Section 437(A) of Cr.P.C.
- (V) Fees of the learned advocate appointed to represent respondent No.3 is quantified at Rs.5,000/-. High Court Legal Services, Sub-Committee, Aurangabad, to pay the same within a period of four weeks from today.

(NITIN B. SURYAWANSHI, J.)