

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO.261 OF 2014**

Damodhar s/o. Himtaji Dongre,  
Age 71 years, Occ. Labour,  
R/o. Hingni (Bk.), Tq. Dharur,  
Dist. Beed ..Appellant

Versus

The State of Maharashtra,  
Through Police Station Officer,  
Police Station, Dindrud,  
Tq. Dharur, Dist. Beed ..Respondent

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Mr.S.B.Solanke, advocate for appellant

Mr.S.R.Palnitkar, APP for respondent - State

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**CORAM : M.T. JOSHI, J.**  
**DATE : AUGUST 12, 2015**

**ORAL JUDGMENT :**

Heard both sides.

2] The appellant, who is convicted by learned  
Addl. Sessions Judge/Special Judge, Majalgaon in  
Sessions Case No.47 of 2013, vide judgment and

order dated 10<sup>th</sup> April, 2014, for the offences punishable under Section 376 read with 511 of Indian Penal Code and Sections 4 and 8 of the Protection of Children from Sexual Offences Act (for short, "POCSO Act") and sentenced to suffer rigorous imprisonment for seven years on account of offence punishable under Section 376 read with 511 of Indian Penal Code and Section 4 of POCSO Act; and for three years on account of offence punishable under Section 8 of POCSO Act, with a direction to pay fine, has preferred present appeal.

3] The prosecution case would reveal that the present appellant as well as the family of the victim girl, who was seven years old at the time of the incident, were residing in the fields in the neighborhood.

. According to the complaint of PW 2 - grandmother of the victim, on 5<sup>th</sup> May, 2013, while

she was returning back to her house after taking milk from the appellant, her pot slipped from her hands and the milk was lost. Present appellant came to know of the same. Therefore, he went to the house of PW 2 - grandmother and advised that if the victim girl is sent to his place, he would give some milk with her. Accordingly, the grandmother sent the victim girl with the appellant to his field where, she-goats were tied by him. However, for a considerable period, the victim girl did not return to the house and therefore, grandmother of the victim girl sent her another son i.e. PW 3 to find out as to what has happened. Thereafter, PW 3 saw that under a tree, present appellant has made the victim girl to lie on the ground and he was lying over her. At that time, the victim girl was weeping. Therefore, PW 3 dragged the appellant from the person of the victim girl. By that time, it was found that the nicker of the victim girl was

removed and present appellant had also removed his Dhoti. In the circumstances, PW 3 brought the victim girl to the house.

. When the grandmother inquired with the victim girl, she told that present appellant removed her nicker, made her to lie on the ground and thereafter, he also slept over her. In the circumstances, FIR came to be filed on the same day i.e. 5<sup>th</sup> May, 2013.

. Thereafter, regular investigation was carried by PW 6 – Ramakant Panchal, A.P.I. He sent the victim for medical examination. Her statement was recorded. The appellant was arrested and sent for medical examination. Necessary panchnamas were recorded. Statements of witnesses including PW 3 were recorded. The property was sent for chemical analysis and ultimately, the charge sheet was filed.

4] Before learned Special Judge, besides other witnesses, PW 1 - victim girl, PW 2 - grandmother of the victim girl, who had filed the FIR (Exhibit-14) and PW 3 - uncle of the victim girl were examined. There is no need to advert to the medical evidence or the Chemical Analyst's report as the prosecution case is of attempt to commit rape. All the three witnesses, detailed supra, deposed on the prosecution line.

5] The defence of the appellant, as can be seen on the line of his statement under Section 313 of the Code of Criminal Procedure, is that on the day of the incident, there was marriage of Namdeo, son of Nanabhau (brother of appellant) at village Babhalgaon. There was dispute between the family of victim girl and the family of appellant over taking water from public hand pump. Due to that dispute, the family members of the victim girl were not invited to the marriage and therefore, in

order to take revenge, present appellant is involved in a false case, though, in fact, on the day of alleged incident, the appellant and his relatives had already gone for marriage of Namdev.

6] Learned Special Judge, however, found that the prosecution evidence is reliable and therefore, conviction and sentence, as detailed supra, came to be recorded against the appellant.

7] Mr.Solanke, learned counsel for the appellant, submits that though the provisions under Section 24 of the POCSO Act provide that the statement of the victim child shall be recorded usually at her place of residence, as far as practicable by a woman police officer not below the rank of sub-inspector; and the police officer, while recording the statement, shall not be in uniform, the statement of the victim girl would show that it was recorded by a male police constable who was in

uniform. He further took me through the testimonies of the witnesses and pointed out certain contradictions. He invited my attention to the statement of the victim girl recorded before the court wherein, she has deposed that her mother had sent her to bring the milk from the house of the appellant while, the FIR and evidence of the grandmother, would show that present appellant had advised the grandmother of the victim, to send the victim to his house. He further submits that due to previous enmity, present appellant, who was seventy years of age at the time of the alleged incident, has been involved in a false case.

8] Mr.Solanke, learned counsel for the appellant, alternatively submits that the offence punishable under Section 376 of Indian Penal Code provides for a minimum sentence of seven years rigorous imprisonment or imprisonment for life and attempt to commit an offence punishable under Section 511

of Indian Penal Code, provides for half of the substantive sentence. He further submits that the ingredients of Section 4 of the POCSO Act i.e. penetrative sexual assault, are not made out by the prosecution. In the circumstances, he submits that as the appellant is presently 75 years old, leniency in awarding the sentence ought to have been given by learned Special Judge.

9] Learned APP, however, opposed all the pleas. According to him the provisions of Section 24 of POCSO Act, are not mandatory. It provides that the conditions prescribed thereunder are to be followed "as far as practicable". At any rate, breach thereof would not vitiate the trial. He further submits that the defence of the appellant is not, at all, probable. The suggestions regarding the defence of the appellant, are clearly denied by relevant prosecution witnesses. He submits that the honour of the family and more

particularly, of a seven years old girl, would not be put to stake by her family members to involve the seventy years old man in a false case. He further submitted that the fact that a seventy years old man had attempted to commit rape, would show his depravity and therefore, he submits that the appeal may be dismissed.

10] On the basis of this material, following points arise for my determination :-

I] Whether the prosecution has proved that on 5<sup>th</sup> May, 2013 at about 9:30 a.m. at village Hingni (Bk), present appellant attempted to commit rape on the minor victim girl ?

II] Whether the prosecution has further proved that on the given date, time and place, the appellant committed offence of

penetrative sexual assault on the victim girl ?

III] Whether the prosecution has further proved that on the given date, time and place, the appellant, with a sexual intention, removed undergarment of the victim girl and also removed his Dhoti with a view to commit sexual assault ?

IV] Whether interference in the sentence is required ?

. My findings as to point I, is in the affirmative; as to point II, in the negative; and as to points III and IV, in the affirmative. The appeal is, therefore, partly allowed on the lines of the final order, for the reasons to follow.

**R E A S O N S**

11] The statements of PW 1, PW 2 and PW 3 are not shattered in the cross-examination. The defence of the appellant was denied by them. The FIR was filed on the day of the incident itself. In the circumstances, the statement of the victim girl not only inspire confidence, but is corroborated by her grandmother by immediately filing the FIR. Therefore, so far as the facts of the case are concerned, I concur with the reasons given by learned Special Judge.

12] Section 24 of the POCSO Act runs as under :

**"24. Recording of statement of a child.-**

*(1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.*

*(2) The police officer while recording the statement of the child shall not be in uniform".*

*(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.*

*(4) No child shall be detained in the police station in the night for any reason.*

*(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child."*

. It is to be noted that said provisions are made for benefit of the victim and not for benefit of the accused. It would not lie in the mouth of the accused that the breach of the provisions, ultimately, would vitiate the trial. It is provided under the said provisions that the statement of the victim child shall be recorded usually at her place of residence, as far as practicable by a woman police officer not below the rank of sub-inspector; and the police officer, while recording the statement, shall not be in uniform.

13] In fact, the investigating agency requires to be sensitive in such matters. The object and purpose of the said provisions is to see that the child, who has already been victimized by the perpetrator of the crime, should not be subjected to recording of statement at the police station by a male officer in uniform thereby again making her uncomfortable and causing mental trauma. In that view of the matter, though the procedure prescribed under Section 24 of POCSO Act, is not followed, it can not be used to benefit the accused.

14] It is, however, clear that the prosecution case is not of penetrative assault, which is punishable under Section 4 of the POCSO Act, which runs as under :-

**"4. Punishment for penetrative sexual assault.-** Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a

term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

15] It is, therefore, clear that the offence punishable under Section 4 of the POCSO Act, is not applicable in the present case.

16] In the circumstances, considering the age of the appellant, who is now seventy five years old, and the fact that he is behind the bars since 5<sup>th</sup> May, 2013, in my view, following order would meet the ends of justice.

**ORDER**

A] The appeal is partly allowed.

B] The impugned judgment and order dated 10<sup>th</sup> April, 2014 passed by learned Addl. Sessions Judge/Special Judge, Majalgaon in Sessions Case

No.47 of 2013, convicting the present appellant for the offence punishable under Section 4 of the POCSO Act, is hereby set aside. Instead, he is acquitted from the said offence.

C] However, conviction of the appellant recorded vide the impugned judgment for the offences punishable under Section 376 read with 511 of Indian Penal Code and Section 8 of POCSO Act, is hereby confirmed.

D] The sentence of rigorous imprisonment for seven years and direction to pay fine of Rs.1,000/-, in default to suffer rigorous imprisonment for six months for the offences punishable under Section 376 read with 511 of Indian Penal Code; and sentence of rigorous imprisonment for three years and to pay fine of Rs.500/-, in default to suffer rigorous imprisonment for three months for the offence

punishable under Section 8 of POCSO Act, are hereby set aside.

. Instead, it is hereby directed that the appellant shall suffer rigorous imprisonment for three years and shall pay a fine of Rs.1,000/-, in default, shall suffer rigorous imprisonment for two months for the offences punishable under Section 376 read with 511 of Indian Penal Code.

. For the offence punishable under Section 8 of the POCSO Act, the appellant shall suffer rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default, to suffer rigorous imprisonment for one months.

E] Both the substantive sentences shall run concurrently.

F] As the appellant is in custody since 5<sup>th</sup> May, 2013, set off be given as per the rules.

G] Muddemal property be disposed of as per the directions issued by learned Addl. Sessions Judge/Special Judge, Majalgaon.

**[M.T. JOSHI, J.]**

kbp