

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

CRIMINAL APPEAL NO. 157 OF 2017

Vikas Diwansingh Patil

Age: 35 years, Occu.: Labour,
R/o Varkhed Khurd, Tq. Bodwad,
Dist. Jalgaon.

..APPELLANT

VERSUS

1. State of Maharashtra
Through Investigating Officer,
Bodwad Police Station,
Tq. Bodwad, Dist. Jalgaon.

2. Shrushti Jaywant Patil
Age: 17 years, Occu.: Student,
R/o Varkhed Khurd, Tq. Bodwad,
Dist. Jalgaon.
Minor – Through Her Guardian
Jaiwant @ Dinkar s/o Prabhakar Patil
Age: 45 years, Occu.: Agri.,
R/o Varkhed Khurd, Tq. Bodwad,
Dist. Jalgaon.

..RESPONDENTS

Mr. R.V. Gore, Advocate for appellant
Mr. B.A. Shinde, A.P.P. for respondent no.1
Mr. G.S. Shembole, Advocate for respondent no.2

**CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : AUGUST 28, 2017
PRONOUNCED ON : SEPTEMBER 11, 2017**

JUDGMENT :-

The appellant has assailed the judgment dated
10th April, 2017 passed in Special (POCSO) Case No. 32

of 2014 by the learned Additional Special Judge / Additional Sessions Judge, Bhusawal, whereby he has been convicted for the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO" for short) and under Section 448 of the Indian Penal Code ("IPC" for short).

2. The victim girl was aged about 13 years in the year 2014. She was studying in 7th standard. On 31st January, 2014, the mother of the victim had gone to the hospital at Bodwad, while her father had gone to village Tembhi, Tq. Motala. The house, where the victim was residing with her parents and grandfather, was comprising of two rooms. In one of the rooms, her aged grandfather was sleeping. He had lost sight due to old age. The victim girl connected a pipe to the water tap at about 5.00 p.m. and entered into the house. At that time the appellant followed her and entered into the house. The victim girl told him that her parents were not present in the house and

they would be coming in the evening. The appellant, without uttering any word, caught hold of the right hand of the victim girl and pushed her on a cot that was inside one of the rooms of the house other than the room in which her grandfather was sleeping. The appellant pressed mouth of the victim girl and started removing her nicker. At that time, her friend viz. Pallavi (P.W.2) came to call her for the purpose of playing. After hearing the call of Pallavi (P.W.2), the appellant got frightened and fled away. During the above mentioned incident, the victim girl sustained scratches on her right hand and waist. After the parents of the victim girl came back home at about 5.30 p.m., the victim girl narrated them about the incident and thereafter they went to Police Station Bodwad. The victim girl lodged a report against the appellant. On the basis of that report, Crime No. 13 of 2014 came to be registered against the appellant. The investigation followed. The statements of the witnesses were

recorded. The victim girl was medically examined. After completion of the investigation, the appellant came to be charge-sheeted for the offences punishable under Sections 354-A and 448 of the I.P.C. and also under Sections 8 and 12 of the POCSO Act.

3. The learned Trial Judge framed charges against the appellant for the above mentioned offences vide Exhibit - 7 to which the appellant pleaded not guilty and claimed to be tried. His defence was of total denial and false implication on the ground that he was a mediator in the proposed sale transaction of the land of the grandfather of the victim girl with one Anant Galwade (D.W.1) and when the said Anant Galwade (D.W.1) and the appellant visited the house of the victim girl and demanded back from the grandfather of the victim girl the amount of earnest money, he refused to pay that amount back and threatened to lodge a false case against the appellant.

4. The State/Prosecution examined six witnesses to establish the guilt of the appellant. The appellant examined Anant Galwade (D.W.1) in his defence.

5. After evaluating the evidence on record, the learned Trial Judge found the appellant guilty of the offence under Section 7 punishable under Section 8 of the POCSO Act and sentenced him to suffer rigorous imprisonment for four years and to pay a fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for two years. The learned Trial Judge further held the appellant guilty of the offence punishable under Section 448 of the I.P.C. and sentenced him to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/-, in default, to suffer rigorous imprisonment for 15 days. The substantive sentences were directed to run concurrently. Out of the fine amount, the amount of Rs.10,000/- was ordered to be given to the victim girl as compensation.

6. The learned Counsel for the appellant submits that the evidence of the victim girl is not at all natural and probable. Though the house of the victim girl is situate adjacent to the village road and in thickly populated area, no independent witness has been examined by the prosecution. Pallavi (P.W.2), the friend of the victim girl, did not support her version. The grandfather of the victim girl was inside the house. Even then, the victim girl did not raise any shouts, which does not appear to be probable. The evidence of Anant Galwade (D.W.1) shows that on 29th January, 2014, he had gone alongwith the appellant for demanding back the earnest money from the grandfather of the victim girl and at that time, the grandfather of the victim girl not only refused to pay back the amount of the earnest money, but also threatened to lodge a false complaint against the appellant. He submits that the presumption under Section 29 of the POCSO Act has been duly rebutted by the appellant by showing that

there was a reason for the victim girl to lodge a false report against him. He submits that the scratches were not possible when there were clothes on the person of the victim girl. He submits that the victim girl was a child witness. Therefore, independent corroboration to her version was essential. According to him, the learned Trial Judge did not appreciate the evidence of the prosecution properly and wrongly convicted the appellant for the above mentioned offences.

7. As against this, the learned A.P.P. submits that there was absolutely no reason for the victim girl to lodge a false report or speak lie against the appellant. The transaction in respect of the proposed sale of the land of the deceased grandfather of the victim girl with Anant Galwade (D.W.1) has nothing to do with the incident in question. The grandfather of the victim girl was visually challenged due to his old age. He was sleeping in

another room. The parents of the victim girl were not present in the house. The appellant took disadvantage of this situation. The victim girl specifically states that when the appellant tried to remove her nicker, she sustained scratches on her waist and hand. This evidence has been corroborated by the medical evidence. Pallavi (P.W.2) belongs to the community of the appellant. Therefore, in order to save the appellant, she turned hostile. According to him, the evidence of the victim girl is quite natural. It creates great confidence. He submits that the presumption laid down in Section 29 of the POCSO Act has not been rebutted by the appellant. He has been rightly convicted and sentenced by the Trial Court. He, therefore, submits that the appeal may be dismissed.

8. The victim girl deposes at Exh.13 that her date of birth is 06th October, 2000. This evidence has not been challenged on behalf of the appellant.

She was aged about 13 years, 3 months and 26 days on the date of the incident that took place on 31st January, 2014. Thus, she was a "child" on the day of the incident as defined under Section 2(d) of the POCSO Act being below 18 years of age.

9. The victim girl states that she was studying in 7th standard when the incident took place. She was aged about 16 years when she deposed before the Court. She had attained the age of understanding. She deposes that on the day of the incident, at about 5 p.m., she connected a pipe to the water tap and went back inside her house. The appellant followed her. She informed the appellant that her parents were not at home. At that time, the appellant caught hold of her right hand and pushed her on a cot. When she tried to shout, the appellant pressed her mouth and tried to remove her nicker. At that time, her friend Pallavi (P.W.2) gave a call to her for playing. Therefore, the appellant ran away from the

house. She sustained scratches on her waist and hand when the appellant tried to remove her nicker. This version is corroborated by the contents of the report (Exh.14) which was lodged by her in Police Station Bodwad in the night of the incident itself after her parents came back home. The only omission that has been brought on record is that the fact that she tried to shout is not specifically mentioned therein. However, her version that the appellant pressed her mouth at the time of the incident, has been corroborated by the contents of the F.I.R. (Exh.14). Pressing of the mouth of the victim itself indicates that the appellant, in order to make it difficult for the victim girl to raise shouts, pressed her mouth. In the circumstances, this minor omission would have no adverse effect on the case of the prosecution.

10. Pallavi (P.W.2) (Exh.17) does not support the prosecution. She admits in her cross-examination

that the appellant belongs to her community. She further admits that she is not in talking terms with the victim girl. These two admissions are sufficiently clear to show as to why Pallavi did not support the prosecution. It is obvious that in order to save the appellant, she resiled from her previous statement, which will not create any doubt about the case of the victim girl.

11. The grandfather of the victim girl was inside the house. He was an aged person having lost vision due to old age. His statement seems to have been recorded by the investigating officer. However, he could be examined since he expired prior to the stage of recording the evidence in this case. Therefore, it cannot be said that the prosecution suppressed his evidence.

12. It has come in the cross-examination of the victim girl that there were houses of Ganpat Daulat

Patil, Dnyandeo Govinda Chaudhary and Shankar Mangalsing Patil near the house where the incident took place. She admits that the said persons had come to her house after the said incident. The learned Counsel for the appellant submits that these persons have not been examined by the prosecution and therefore, a doubt is created about the case of the prosecution. This contention cannot be accepted. It is a common knowledge that the incidents like the incident-in-question generally occur at the places which are not be visible to the outsiders. Such offences are generally committed surreptitiously. The appellant would not have dared to commit such acts in the presence of neighbors of the victim girl. Consequently, non-examination of these persons would not throw doubt on the case of the prosecution. On the contrary, the unchallenged evidence of the victim girl that the said persons had come to her house after the incident strengthens her version about occurrence of the incident. Had the incident as

stated by the victim girl had not taken place, those persons would not have visited her house.

13. Dr. Pawar, (P.W.5) (Exh.21) deposes that he examined the victim on 31st January, 2014 in Rural Hospital at Bodwad and found the following injuries:-

"(i) Crescentric nail scratches, red and brown in colour, on right hand palm, dorsal aspect – simple in nature, caused by finger nail.

(ii) Multiple crescentric nail scratches, of size 2 x 0.1 cm and 3 x 0.1 cm, vertical in shape and red and brown in colour, on lower abdomen, pelvic region and right side 2 cm lateral to pubic symphysis, simple in nature and caused by finger nail."

14. Dr. Pawar (P.W.5) issued injury certificate (Exh.22) and further opined by issuing the letter (Exh.24) that the injuries found on the body of the victim girl were caused by the finger nails. This evidence fully corroborates the evidence of the

victim girl about the cause of the scratches found on her right hand and waist.

15. As per the agreement (Exh.39), the grandfather of the victim girl had agreed to sell his land to Anant Galwade (D.W.1) for Rs.3,25,000/- on receiving Rs.75,000/- from him. The sale deed was to be executed on or before 31st January, 2013. In case the sale deed was not executed prior to 31st January, 2013, the grandfather of the victim girl had agreed to refund the earnest amount of Rs.75,000/-. The appellant seems to be an attesting witness to the said agreement. Anant Galwade (D.W.1) states that the grandfather of the victim girl did not execute the sale deed and therefore, he was demanding back the earnest money from time to time. He states that since the appellant was a mediator for the said transaction, he visited the house of the victim girl on 29th January, 2014 alongwith the appellant and asked her grandfather to refund that amount. At that

time, the grandfather of the victim girl refused to pay that amount back and threatened to file a report against them. According to the appellant that was the reason for lodging of a false report against him.

16. Anant Galwade (D.W.1) admits that he alone was able to complete the said transaction. He further admits that he did not issue any notice to the grandfather of the victim girl or initiate any legal action against him for not completing the sale transaction. Even if the evidence of Anant Galwade (D.W.1) in respect of the proposed sale transaction of the agricultural land is accepted for a while, it will be clear that it was purely a civil dispute between them. If the grandfather of the victim girl wanted to lodge a false report, it would have been lodged against Anant Galwade (D.W.1) and not the appellant. By filing false report against the appellant, the grandfather of the victim girl would not have been in a position to evade refund of the

earnest money to Anant Galwade (D.W.1). Thus, there was absolutely no reason for the grandfather of the victim girl to prompt the victim girl to lodge a false report against the appellant. Moreover, at the cost of the dignity of the victim girl and her family members, no report would have been lodged against the appellant.

17. As per Section 29 of the Act, where a person is prosecuted for committing an offence under Section 7 of this Act, the Special Court shall presume that such person has committed the said offence, unless the contrary is proved. The appellant has totally failed to prove anything contrary and as such, failed to rebut the presumption under Section 29 of the POCSO Act. His defence is not natural, probable and acceptable.

18. The evidence of the victim girl, which is corroborated by the medical evidence, inspires a great confidence. The appellant has failed to rebut

the presumption under Section 29 of the POCSO Act. The learned Trial Judge has rightly convicted the appellant for the offence under Section 7, punishable under Section 8 of the POCSO Act. The appellant entered into the house of the victim girl for committing the said offence. Therefore, the learned Trial Judge rightly convicted him for the offence punishable under Section 448 of the I.P.C.

19. The learned Counsel for the appellant relied on an unreported judgment in the case of **Namdeo Mahadu Bhalerao Vs. State of Maharashtra** in **Criminal Revision Application No. 101 of 2004**, decided by this Court on 02nd December, 2016, wherein, on the basis of the facts and evidence of that individual case, the accused was acquitted of the offences punishable under Sections 452 and 376 of the I.P.C. No legal principle which would be made applicable to the present case is laid down in that case. Therefore, the said judgment is of no help to the appellant.

20. The learned Counsel for the appellant further cited a judgment in the case of **John @ Vivek. Ramesh Jadhav Vs. State of Maharashtra 2015 ALL.M.R. (Cri) 4053**, wherein the accused/appellant was convicted for the offence punishable under Section 10 of the POCSO Act. This Court, in the above case, has observed that when the offence is of serious nature and attracting minimum punishment for five years and maximum it can be upto seven years, great care and caution is required to be taken while appreciating the evidence of the child witness. In that case, the age of the victim girl was eight years. In the present case, the victim girl was aged about 13 years and 3 months at the time of the incident. When she deposed before the Court, she was about 16 years. As such, she was quite a matured person having attained the age of understanding. As stated above, on appreciating of her evidence, it is found to be quite trustworthy. In view of these facts, the said

judgment would be of no help to the appellant to discard the evidence of the victim girl.

21. The learned Counsel for the appellant placed reliance on the judgment in the case of **Vitthal Kachru Tupe Vs. State of Maharashtra 2016 (3) B.Cr.C. 863**, in which the benefit of probation was given to the accused, who was convicted for the offences punishable under Sections 325 and 506 of the I.P.C., on finding that there was no criminal antecedents or history against the accused and the liberty granted to him by releasing him on bail, was not misused by him. On the basis of this judgment, it is submitted that if it is held that the appellant is guilty of the above mentioned offences, he may be extended the benefit of probation.

22. The appellant was aged about 30 years at the time of the incident. He was quite a matured person. He sexually assaulted the victim girl. Considering the serious nature of the offences established

against the appellant, I am of the view that the appellant does not deserve the benefit of probation.

23. The learned Counsel for the appellant, in the alternative, submits that the appellant has already suffered imprisonment for more than three years, which was the minimum punishment of imprisonment for the offence under Section 8 of the Act. Therefore, considering the fact that the appellant is not a previous convict, he may be sentenced to suffer imprisonment for the period which he has already undergone.

24. The maximum substantive sentence passed against the appellant is for a period of four years. The appellant was in jail in connection with this case from 01st February, 2014 to 04th February, 2014 and then from 10th April, 2014 (i.e. the date of delivery of the impugned judgment) onwards till date. Thus, he has undergone the sentence of imprisonment for a period of about three years and five months.

In my view, considering the nature of the offences established against the appellant and the fact that the appellant is not a previous convict, I am of the view that it would meet the ends of justice if the appellant is sentenced for the period which he has been already undergone. This much sentence would remind him to refrain from indulging in any criminal activity in future. So far as the sentence of payment of fine is concerned, I do not find any reason to interfere in it. In case the appellant does not pay the fine amount, he would undergo the sentence in default of payment of fine as has been ordered by the Trial Court. The appeal is liable to be allowed partly. In the result, I pass the following order:-

O R D E R

- i) Criminal Appeal is partly allowed.
- ii) The impugned order of conviction of the appellant for the offence under Section 7, punishable

under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and under Section 448 of the Indian Penal Code is maintained as it is.

iii) The impugned order of sentence is modified and the appellant is sentenced to suffer imprisonment for the period which he has already undergone.

iv) The impugned order of sentence of fine passed against the appellant in respect of the above mentioned offences is maintained as it is. In case the appellant does not pay the amount of fine, he will have to suffer the sentence of rigorous imprisonment, in default of payment of fine, as ordered by the Trial Court.

v) The order passed by the Trial Court directing payment of compensation of Rs.10,000/- to the victim girl is maintained as it is.

vi) On payment of fine amount by the appellant, as ordered by the Trial Court or after undergoing the sentence of imprisonment in default of payment of fine, the appellant be released forthwith, if not required in any other case.

vii) Criminal Appeal is accordingly disposed off.

[SANGITRAO S. PATIL]
JUDGE

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