

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

CRIMINAL APPEAL NO. 259 OF 2016

Chandrakant Dnyaneshwar Barne,
Age : 42 years, Occu: Service,
R/o: Pansare Mala Kakan,
Tq. Khed, Dist. Pune.

Appellant

VERSUS

The State of Maharashtra,
through the Police Inspector, Newasa
Police Station, District. Ahmednagar.

(Copy to be served on Public
Prosecutor, High Court of Judicature of
Bombay, Bench at Aurangabad).

Respondent

Mr. H. P. Kshirsagar (Appointed) for the Appellant.

Mr. K. D. Munde, APP for the Respondent – State.

CORAM : K. L. WADANE, J.

Reserved on : 27th November, 2018

Pronounced on : 30th November, 2018

JUDGMENT:

1. This appeal is presented by the accused who is convicted by the learned Additional Sessions Judge, Newasa for the offence under Section 3 punishable under Section 4 of the Protection of Children

from Sexual Offences, Act and thereby sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.30,000/-, in default to suffer simple imprisonment for period of six months. He is further convicted for the offence punishable under Section 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.500/-, in default to suffer simple imprisonment for seven days. Out of the fine amount, the learned Sessions Judge, directed that an amount of Rs.25,000/- be paid to the victim boy. The accused appellant is further convicted for the offence punishable under Section 377 of the Indian Penal Code and under Section 12 of the Protection of Children from Sexual Offences Act, however, no separate sentence is imposed in view of the punishment awarded to him under Section 4 of the POCSO Act.

2. Brief facts of the case may be stated as follows:

- i. On 28.08.2013 complainant - Vikas Vijay Patil, lodged a complaint to the Police Station, Newasa stating that he was residing in the hostel and was taking education in the 6th standard at Trimurti Pawan Pratishtan, Trimurtinagar, Newasa Phata Tal. Newasa.
- ii. On 11.08.2013 when the complainant was in his room at

that time accused came there at about 11:30 a.m. to meet his son Rohit Barne. However, Rohit went for lunch in a mess, therefore, the accused was waiting in the passage of the hostel. At that time, a teacher Mr. Khandagale called the complainant and instructed him to accompany with the accused to point out the office to secure the gate pass. Accordingly complainant went along with accused. Accused obtained the gate pass and thereafter, accused asked the complainant to show the bathroom.

iii. At about 12:30 noon the accused pulled the complainant in the bathroom, bolted the door of the bathroom from inside asked the complainant to remove his pant. When complainant resisted, the accused slapped him. Then the accused removed the pant of the complainant and asked him to sit on the person of the accused. Thereafter, the accused pressed the mouth of the complainant, make him to bent and inserted his penis in the anus of the complainant, due to which there was bleeding from anus. Thereafter, accused went aside for washing his hands. Immediately, the complainant removed latch of the door and ran away.

iv. The complainant went inside the mess, where he disclosed

the incident to the teachers namely Mr. Kahndagale, Mr. Magar and Mr. Kale. When the incident was disclosed to Mr. Khandagale, at that time, the accused apologized and said 'sorry'. The complainant informed the incident to other students namely Gaurva Kanchan and Depak Sulsule. On 15th August complainant suffered from the illness of mumps (Galfugi), therefore, the complainant was admitted in the hospital of the institution till 24.08.2013.

- v. On 24.08.2013 the complainant went along with Waghchaure sir to the house of complainant at Aurangabad. On 25.08.2013 the complainant disclosed this fact to his mother Sunita. Again the complainant was taken to the educational institution, however, due to fear he contacted his family members and asked them to take him.
- vi. On 27.08.2013, cousin of the complainant namely Navnath had been to the institution to meet the complainant, at that time, the complainant disclosed the incident to Navnath who in turn informed the same to the father of the complainant namely Vijay Patil and thereafter, complainant went to the police station along with his father Vijay and lodged the

complaint. After receipt of the complaint the offence came to be registered at crime No.207/2013. After the registration of the crime, Investigating Officer, visited the spot, prepared the Spot Panchanama, recorded the statement of the witnesses including the statement of father of complainant namely Vijay Patil, Vikas Shelke - Clerk, Gaurav Kanchan - Student and friend of the complainant, and Vikram Magar - Teacher. The complainant was referred for the medical examination. PW-8 Dr. Surekha Nivruttirao Gaulkar prepared the case paper and referred the patient to Dr. Pargaonkar and on the opinion and notes of Dr. Pargaonkar, she recorded her opinion on the M.L.C. register.

vii. After carrying out the as usual investigation, the investigating officer PW-9 - Mr. Mukund Bankatrao Aghav, submitted the charge-sheet against the accused. The case was committed to the Court of Sessions for its trial. Accordingly, the charge was framed against the accused for the offence punishable under Section 377, 323 and 506 of the Indian Penal Code and Section 4 and 12 of the POSCO Act.

3. In order to prove the offences leveled against the accused prosecution has examined in all 9 witnesses i.e.

- PW-1 - Vijay Mohiniraj Patil - father of the victim.
- PW-2 - Mohan Rangnath Ghule - Panch witness, spot panchanama.
- PW-3 - Vikas Vijay Patil - Victim.
- PW-4 - Afroj Maqusad Ali Siddiquee - Watchman
(to prove the entry and presence of the accused at the relevant time).
- PW-5 - Vikas Navnath Shelke - Clerk who issue gate pass to the accused.
- PW-6 - Gavrao Shashikant Kanchan-Student and friend of PW-3.
- PW-7 - Vikram Vilas Magar - Teacher to whom the victim disclosed the incident.
- PW-8 - Dr. Surekha Nivruttirao Gaulkar.
- PW-9 - Mukund Bankatrao Aghav - Investigating Officer.

4. Besides the oral evidence of the aforesaid witnesses, prosecution had relied upon the contents of the spot panchnama, M.L.C. report, Copy of the case papers and opinion of the Doctor.

5. Considering the evidence on record and upon hearing both the sides the learned Additional Sessions Judge convicted the accused as referred earlier.

6. I have heard the arguments of Mr. H. P. Kshirsagar, the learned counsel for the appellant and Mr. K. D. Munde the learned APP for the respondent - State.

7. Mr. Kshirsagar, the learned counsel argued that there is inordinate delay in filing the complaint so also there is no medical evidence on record to show that there was a carnal intercourse by the

accused with the victim. He further argued that the material witnesses namely Mr. Khandagale and other students before whom the claimant claimed to be disclosed the entire incident, have not been examined by the prosecution. According to Mr. Kshirsagar, the oral evidence of the complainant and the other witnesses is not sufficient to establish the carnal intercourse as it is not supported with the medical evidence. He further argued that the accused was not referred for the medical examination which is lacuna on the part of prosecution.

8. Mr. Munde, the learned APP submitted that the complainant is student taking education and son of the accused is also taking education in the same institution. On the day of incident the accused had been to meet his son and at the relevant time the accused requested the complainant to show the bathroom, at that time, he pulled the complainant inside the bathroom, bolted it and committed the carnal intercourse. Mr. Munde, the learned APP further submits that immediately after the incident the complainant has disclosed this thing to PW-6 Gaurav Kanchan, PW-7 Vikram Magar and other witnesses. This is a quite natural conduct of the complainant, therefore, the oral testimony of the complainant cannot be disbelieved, particularly, when it is supported with the oral evidence of the PW-6 Gaurav Kanchan and PW-7 Vikarm Magar. He further submits that

there was no reason for the complainant to implicate the accused falsely. The defence taken by the accused appears to be that there was quarrel between complainant and the son of the accused. Looking to the submissions of both the sides, it is material to mention that amongst other charges, the accused is charged for the offence under section 3, punishable under Section 4 of the POCSO Act i.e. Penetrative Sexual Assault. The relevant provision of Section 3 read as follows :

3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

9. So to establish the offence under Section 3 punishable under Section 4, it is for the prosecution to establish that the accused had committed a penetrative sexual assault by penetrating his penis into anus of the complainant as contemplated under Section 3

subsection (a) of the POCSO Act. This clause defines the offence of penetrative sexual assault. It provides that a person penetrate his penis to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person or inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person or manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child. So it is for the prosecution to establish that the accused has inserted his penis irrespective of its extent. To examine this material aspect, it is material to refer here the oral evidence of the complainant, particularly, in para No.2 of the deposition. On perusal of the same, the sum and substance of the deposition is that on 11.08.2013, Mr. Khandagale, called the complainant and asked him to accompany with accused, thereafter, the accused told the complainant that he wanted to go for urinal and for that purpose he asked complainant to show bathroom, where, he caught hold the hand of the complainant and pulled him into the bathroom. The accused bolted the bathroom from inside and asked him to remove his half pant. When complainant declined, accused slapped the complainant and removed his half pant. Then accused removed his pant, thereafter, he held his hands, put his hand on the

mouth of the complainant and then the did illicit act. The accused inserted his penis into the anus of the complainant and that way he did the illicit act. He further deposed that due the illicit act there was bleeding from his anus and then complainant went to the mess and disclosed the incident to Mr. Khandagale, Mr. Magar, and Mr. Kale.

10. According to the prosecution, immediately after the incident, the complainant disclosed this things to the teachers and also the students out of them PW-6 Gaurav Kanchan is examined who stated on oath before the trial court. On the relevant date, at the relevant time, Vikas Patil i.e. victim was crying in the passage of the hostel. This witness inquired with him as to what happened, therefore, the complainant informed that the accused taken him to bathroom. The accused asked him to remove the pant, when he refused, the accused slapped him. The accused shut the mouth of the complainant and did the illicit act. During the cross-examination this witness has admitted in following words:

"It is correct that before entering witness box I have gone through my statement. It is not correct to say that today I met father of Vikas. I read my statement twice. It is correct that I remember what I read."

11. So looking to the aforesaid admission, it reveals that the statement of this witness recorded by the police was made available to

this witness before deposition he read twice and then deposed which is not permissible in law. The witness can be permitted to refresh his memory but it is before the Court. In such circumstances, the evidence of this witness is not free from infirmity.

12. Next witness is PW-7 Vikram Vilas Magar, who deposed that on 11.08.2013 when he was taking lunch, complainant Vikas Patil came to him. He further disclosed that the accused removed his clothes and asked complainant to remove his pant. When complainant refused to do so on which Mr. Barne i.e. accused slapped him and then Vikas frightened and came back. Vikas told him that Mr. Barne, insisted him to sit on his person. During the cross-examination this witness has admitted as follows:

"It is correct that he did not disclosed me about any unnatural act by the accused."

So looking to the evidence of this witness, it supports and corroborate the oral evidence of the complainant to the extent that the accused asked the complainant to remove his pants and he also insisted the complainant to sit on his person."

13. Another aspect is to be considered is that according to the complainant, after the carnal intercourse, there was bleeding from the anus, however, on second day he washed his pant. The clothes,

particularly, the half pant of the complainant was not recovered, nor the accused was referred for the medical examination.

14. Further on perusal of the evidence of PW-8 - Dr. Surekha Nivruttirao Gaulkar, it appears that the complainant was referred for medical examination on 28.08.2013. Dr. Surekha prepared the M.L.C. report, recorded the history of the patient. The patient gave history of the sexual assault on 11.08.2013. The patient was then referred to surgeon Dr. Pargaonkar. On his examination and on the basis of his notes and opinion by Dr. Pargaonkar, Dr. Surekha Gaulkar recorded the notes and opinion on the M.L.C. register (Exh.27). He further deposed that normally injuries due to sexual assault gets healed within 7 days including bleeding injuries. There may not be any sign available for medical examination after a period of 15 days. During the cross-examination this doctor admitted that she has not personally examine the patient. Therefore, what can be gathered from the evidence of Dr. Surekha Gaulkar is that simply she referred the patient to Dr. Pargaonkar and in fact Dr. Pargaonkar has examined and on the basis of the notes and opinion given by Dr. Pargaonkar, she noted it in the M.L.C. register. It is unfortunate thing that Dr. Pargaonkar has not been examined on behalf of the prosecution. Even accepting the opinion of Dr. Pargaonkar noted in the M.L.C. register, it reveals that

there was no external or bleeding injuries at the anus of the complainant or even scar is not noted by the doctor who examined the patient. So looking to the over all aspects and reassessment of the evidence, it appears that the evidence adduced on behalf of the prosecution for a penetrative sexual assault is insufficient. There is oral evidence of the complainant about the penetrative sexual intercourse, however, it is not supported with the other evidence like medical evidence. However, there is sufficient evidence of the complainant supported by the evidence of Mr. Vikram Vilas Magar - teacher, that there was a sexual assault as defined under Section 7 punishable under Section 8 which reads as follows :

Section 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 of 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.*

15. Considering the evidence of the complainant, it appears that the act done by the accused i.e. removal of the half pant and removal of his pant amounts to any other act with sexual intent which involves physical contact without penetration is said to be committed sexual assault. So the oral evidence adduced on behalf of the prosecution is sufficient to established the offence defined under

Section 7 punishable under Section 8 of the POCSO Act.

16. The trial court had not gone into the depth of the evidence relating to the offence of the sexual assault in detail. Certain casual observation made which is not supported by the medical evidence. Next aspect argued by the learned counsel for the appellant is about the delay.

17. The delay in setting the law into motion by lodging the complaint is normally viewed by the courts in suspicion because there is possibility of concoction of evidence against the accused. In such cases, it becomes necessary for the prosecution to satisfactorily explain the delay on registration of FIR. But there may be cases where the delay in registration of FIR is inevitable and the same has to be considered. Even a long delay can be condoned if the witness has no motive for falsely implicating the accused. Looking to the facts and circumstances of the case, it reveals that the complainant or his father Vijay has no reason to file a false complaint against the accused. The accused is the father of one of the student studying with the complainant and the incident took place when the accused visited the premises to meet his son Rohit. In such circumstances, there is absolutely no reason for the complainant or his father to lodge a false complaint for heinous offence of a sexual assault on a child. The

defence taken by the accused is that due to the quarrel between the complainant and the son of the accused a false complaint is lodged. The reason or the ground of the defence taken by the accused is not at all acceptable.

18. Since the evidence on record is insufficient to establish the offence under Section 3 punishable under Section 4, however, same is sufficient to establish the offence of sexual assault under Section 7 punishable under Section 8. Therefore, the order to that effect needs to be modified. Hence following order:

O R D E R

- i. The Criminal Appeal is partly allowed.
- ii. The order of conviction of the appellant for the offence under Section 3, punishable under Section 4 of the Protection of Children from Sexual Offences, Act is hereby set aside and modified as under.

"The conviction of the accused is altered from the offence punishable under Section 4 to the offence punishable under Section 8 of the Protection of Children from Sexual Offences, Act and accused is sentenced to suffer rigorous imprisonment for four years."

- iii. Remaining sentence stands confirm. With this modification,
the Appeal is partly allowed and disposed of accordingly.
- iv. The fees of the learned counsel appointed for the appellant
is quantified as Rs.5000/- to be paid through High Court,
Legal Services Authority.

(K. L. WADANE, J.)