

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

CRIMINAL APPEAL NO. 504 OF 2017

Hanumant s/o Buwasaheb Deshmukh ... **Appellant**
Age 76 years, Occu: Nil
r/o Chincholi-Mali Tq. Kaij,
Dist. Beed

VERSUS

State of Maharashtra

Mr. A. A. Nimbalkar, Advocate for the appellant
Mr. Y. G. Gujrathi, APP for the State.

CORAM	: K. L. WADANE, J.
RESERVED ON	: 27th September, 2018
PRONOUNCED ON	: 29th September, 2018

JUDGMENT:

1. This Appeal is preferred by the Appellants- original accused who has been convicted by the learned Special Judge, Ambajogai in Special Case No. 06 of 2016, for the offence punishable under section 450 of the Indian Penal Code (IPC) and sentenced to suffer rigorous imprisonment for four years and to pay fine of Rs.1000/- and for the offence punishable under section 354-A IPC and sentenced to suffer R.I. for two years and to pay fine of Rs.2000/-. The appellant/accused is

further convicted under sections 8 of the Protection of Children from Sexual Offences Act (POCSO Act) and sentenced to suffer R. I. for three years and to pay fine of Rs.2000/- . All the sentences are to run concurrently.

2. PW-2 namely Balu Gade, father of the victim (minor girl) lodged complaint to the police station on 06.03.2016 alleging that on 13.02.2016, when the victim was alone in the house of his brother- Aba Gade, at about 1.00 p.m, accused Hanumant gave a chocolate to the victim and inserted his finger into her vagina. Victim disclosed this fact to her father-PW-2. However, so as to avoid defamation in the society, PW-2 contacted other witnesses/villagers, went to the accused and enquired about the incident. At that time, accused apologized. Therefore, PW-2 avoided to lodge criminal complaint.

On 05.03.2016 again, when victim was alone in the house, at about 2.00 p.m., the accused entered into the house and repeated the same thing i.e. inserted his finger into vagina of the victim, due to which, the victim shouted. Grandmother of the victim came there, so the accused ran away from the spot. On the basis of information given by the PW-2, offence came to be registered against the appellant for the

offence punishable under sections 376(2)(i)(j), 354, 354(A), 452 of the Indian Penal Code and under section 4, 8, 12 and 18 of the POCSO Act.

3. After registration of the crime, PW-4 Investigating Officer visited the spot and prepared spot panchanama in presence of PW-3 Vijay Gaikwad and after doing as usual investigation, he has submitted charge sheet before the learned Judicial Magistrate, First Class Ambajogai, who thereafter committed the case to the Special Court, Ambajogai. The learned Special Judge framed the charges against the appellant for the offence punishable under sections 450, 354-A, 376(2) IPC and under sections 4, 6, 8 and 12 of the POCSO Act.

4. After recording evidence of the witnesses, statement of the accused under section 313 of the Cr. P.C. was recorded and after hearing the arguments, the trial court convicted and sentenced the accused as aforesaid. Hence this appeal is preferred by the accused-appellant challenging his conviction and sentence.

5. I have heard Mr. Nimbalkar, learned counsel appearing for the appellant and Mr. Gujrathi, learned APP for the respondent State at length. With their able assistance, I have carefully perused the entire notes of evidence.

6. In order to establish the charges leveled against the appellant accused, the prosecution has examined four witnesses viz. PW-1 Victim at Exh.24, PW-2 Balu Gade at Exh.25 father of the victim, PW-3 Vijay Sheshrao Gaikwad as panchwitness to spot panchanama at Exh.29 and PW-4 Investigating Officer Raosaheb Gangaram Gadekar at Exh. 32. Besides oral evidence of above witnesses, prosecution has also relied on FIR Exh.26 and Spot panchanama Exh.30.

7. On perusal of the evidence on record, it appears that in order to establish the alleged offence, evidence of the victim is very important and material. Evidence of other witnesses like PW-3 and PW-4 are of formal in nature. It is an undisputed fact that the victim was aged about six years at the time of incident and her evidence is recorded by the learned Special Judge in the form of question and answer, after verifying that witness is able to understand the questions and answer. From the evidence of victim it appears that she is a school going girl and at that time she was taking education in 2nd standard. At the relevant time, she had been to the house of her real uncle Aba Gade. In order to assess oral evidence of victim, question Nos. 5, 6, 9, 10 and 11 and their answers are very material, which are reproduced

as follows:

Q. No.5 : What is residence place of Hunumant Kaka ?

Ans. : Hanumant Kaka is of village Chincholi Mali.

Q. No.6 : What did he do with you?

Ans. : Hanumant Kaka told me that he will give chocolate to me and put his his hand in my nicker.

Q. No.9 : What trouble you caused ?

Answer : Due to that, I sustained trouble.

Q.No.10 : Who came there ?

Answer : At that time my grandmother Abhai came there.

Q. No.11 : After your grandmother came what had happened ?

Ans. : I told to my grandmother that that old man gave chocolate to me and put his hand in my nicker ?

8. Looking to the evidence of the PW-1 victim which is in question and answer form, it reveals that at the relevant time, the accused who is referred by the victim as Hanumant Kaka gave chocolate to her and then put his hand into her nicker. So the act of the accused seems to be physical contact with the victim and advances, involving unwelcome and explicit sexual overtures, which is squarely covered under the definition of section 354-A(i) IPC. Same is the case in reference to the offence under section 8 and the definition of sexual

assault given in Section 7 of the POCSO Act, which reads as follows:

"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."

Looking to the definition of sexual assault and the act committed by the accused, it appears that the accused, with sexual intent, put his hand into the nicker of the victim, which amounts to touching to the private part of the victim, or at the most, it can be said that act of the accused was with sexual intention involving physical contact without penetration which can be said to be sexual assault. Oral evidence of the victim PW-1 is restricted only to the extent that the accused has put his hand in her nicker, which amounts to touching to a private part of the victim with sexual intent.

9. On perusal of evidence of PW-2, it appears that earlier on 13.02.2016, the accused has committed the same thing, however, so as to avoid defamation in the society, the matter was settled as the accused apologized and hence no complaint was lodged at that time. In the

cross examination of PW-2, certain suggestions were given regarding groupism and two groups of persons. The victim has nothing to do with such group and there is no evidence on record to show that PW-2 is belonging to any group or involved in the groupism in the village.

10. Mr. Nimbalkar, learned counsel for the appellant argued that since there was rivalry between two groups, the complaint was lodged by PW-2. Argument of Mr. Nimbalkar is not acceptable because, nobody will dare to file such a complaint concerning chastity of PW-1 at the stake of defamation. No prudent man can advice to a daughter who is about six years to depose falsely about sexual assault against the person who was aged about 76 years at the time of incident. I do not find any reason to disbelieve the version of PW-1 victim.

11. Looking to the nature of allegations and the fact, nothing is brought on record in the cross examination to disbelieve the evidence of prosecution. Oral evidence of sole eye witness which is victim can be relied without there being any further corroboration. Corroboration is rule of produce and in the present case, there is absolutely no reason for PW-1 to depose falsely against the appellant and there is absolutely no reason for PW-2 to file false first information report against the

accused-appellant.

12. In view of the above, the conviction recorded against the appellant is proper to the extent of offence punishable under section 354-A IPC and offence under section 8 of the POCSO Act. Finding of the learned Special Judge holding the accused guilty for the offence punishable under section 354 IPC and section 8 of the POSCO are correct and requires no interference.

13. The next aspect involved in the present matter is that charges were framed against the accused and one of the charges framed against the accused is for the offence punishable under section 450 of the IPC. Punishment provided for the offence under Section 354-A is up to three years imprisonment. Punishment for the offence under section 8 of the POSCO is to the extent of five years with fine. No punishment of life imprisonment is provided for the offences punishable under sections 354-A IPC and Section 8 of POCSO Act. Learned Special Judge has convicted the accused for the offence punishable under section 450 IPC. Provisions of 450 IPC reads as follows:

"House-tresspass in order to commit offence punishable with imprisonment for life: Whosoever commits house-tresspass in

order to the committing of any offence punishable with imprisonment of life, shall be punished with imprisonment of either description for a term not exceeding 10 years and shall also be liable to fine. "

Looking to the aforesaid provisions of Section 450 IPC, it appears that since the accused has not committed an offence punishable with imprisonment for life, the provisions of section 450 IPC cannot be attracted. An accused can be convicted for the offence punishable under section 450 IPC, provided the other offence punishable with imprisonment for life is proved against the accused, otherwise, the conviction under section 450 is bad in the eyes of law. Resultantly, the accused is acquitted from the offence punishable under section 450 IPC.

14. In view of the above, the appeal is partly allowed.

15. Punishment imposed upon the appellant accused for the offence punishable under section 354-A IPC and Section 8 of the POCSO Act are maintained.

16. Punishment awarded for the offence punishable under section 450 IPC is hereby quashed and set aside. Amount of fine imposed

upon the accused for the offence punishable under section 450 shall be refunded to the accused.

Criminal appeal is accordingly disposed of.

(K. L. WADANE, J.)