

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL 386 OF 2017

Jitesh s/o. Bhagwandas Pagadwar,
 Aged about 21 years, Occ. Labourer,
 r/o. Chikhali, Tah. Kurkheda,
 district Gadchiroli

...APPELLANT

...V E R S U S...

The State of Maharashtra,
 Through Police Station Officer,
 Police Station Kurkheda, Tah Kurkheda
 District Gadchiroli.

...RESPONDENT

 Shri. L.B. Khergade, counsel for appellant.
 Smt. S.V. Kolhe, Addl. Public Prosecutor for respondent.

CORAM: **ROHIT B. DEO, J.**
DATE: **12th March, 2018.**

ORAL JUDGMENT

The appellant – accused is aggrieved by the judgment and order dated 4.5.2016 rendered by the Additional Sessions Judge, Gadchiroli in Special POCSO Case 10 of 2015, by and under which the accused is convicted for offence punishable under section 376(2)(i) read with section 511 of the Indian Penal Code

(“IPC” for short) and section 3 read with section 4 of the Prevention of Children from Sexual Offences Act (“POCSO” for short) and is sentenced to suffer rigorous imprisonment for seven years and to payment of fine of Rs.1,000/- for offence punishable under section 4 of the POCSO Act and is further sentenced to suffer imprisonment for three years and to payment of fine of Rs. 1,000/- for offence punishable under section 506 part II of the IPC.

2 Heard Shri L.B. Khergade, the learned counsel for the appellant and Smt. S.V. Kolhe, Addl. Public Prosecutor for the respondent / State.

3 The learned counsel Shri L.B. Khergade, would submit that the findings recorded by the learned Sessions Judge are incongruent. The learned Sessions Judge has convicted the accused of attempt to commit rape under section 376(2)(i) read with section 511 of the IPC. Perusal of paragraph 9 of the judgment and order impugned would reveal that the opinion of PW 5 Dr. Kilnake that attempt to penetration could not be ruled out is relied upon by the learned Sessions Judge. The learned counsel would submit that the fact that the learned Sessions Judge

has recorded a finding that the accused attempted to commit rape axiomatically rules out even the slightest penetration in the vagina or in the external genitalia like vulva. The learned counsel would submit that in view of the said findings recorded by the learned Sessions judge, the conviction for offence punishable under section 4 of the POCSO Act is unsustainable.

4 The learned counsel Shri Khergade invites my attention to section 3 and 4 of the POCSO Act which read thus:-

“Section 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 other or 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 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”.

“Section 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”.

The learned counsel submits that in view of the finding recorded that the accused is guilty only of attempt to rape, neither sub section (a) nor (b) nor (c) nor (d) of section 3 is attracted. The learned Sessions Judge has observed in paragraph 16 thus:-

“16. The accused since could not point out any material discrepancy in the prosecution case has failed to rebut the presumption and thus the offence of penetrative sexual assault is brought home against him, since his act clearly shows his manipulation of the private part of the victim to cause penetration”.

The learned counsel would submit that the conviction under section 4 of the POCSO Act is presumably predicated on the assumption that sub section (c) of section 3 of POCSO Act is attracted. The assumption is erroneous, is the submission. It is not even the case of the prosecution that the accused manipulated any part of the body of the child so as to cause penetration into the vagina, anus or any other part of body of the child or made the child to do so with the accused or any other person.

5 The submission of the learned counsel that the finding recorded are incongruent, is not without substance. It is trite law that even the slightest penetration in the vulva would amount to

rape. The learned Sessions Judge have recorded a finding that only an attempt to commit rape is proved, could not have convicted the accused under section 4 of the POCSO Act, in the circumstances of the case. The conviction for attempt to rape presupposes the absence of even the slightest penetration. In this view of the matter, the offence which will be made out, if it is held that even the slightest penetration in the vagina or vulva is not proved, will be offence punishable under section 18 of the POCSO Act.

6 The child victim, who is examined as PW 1 has deposed that the accused gave Rs. 10/- to her friend R and asked her to purchase biscuit. R and another friend of the child victim A went to the shop. The accused took the child victim to a field to remove pipes, R & A met them on the way and offered the biscuits to the accused whose response was that R and A should take the biscuits and stand on the other side of the road. Child victim was taken to the field, the accused made her lie down, removed her slacks and underwear. At this stage of recording of evidence, since the child victim was reluctant to depose further, she was asked to pen down her version, which version (Exh. 8-A) is treated as part of the testimony. Exh. 8-A would reveal that the child victim has

narrated the prelude to the incident and then has stated that the accused made her lie down on the ground, removed her knicker and slack, kissed her and since she was shouting loudly, the accused threatened her that death should she reveal the incident to anybody. The child victim went home and narrated the incident to her parent. After having so deposed the child victim has added a sentence which if translated would read thus:-

“He removed his pant and put the same on my private part”

7 It is difficult to record a finding with any degree of certainty that the child victim was referring to even the slightest penetration. More so as PW 3, the friend of the child victim to whom the child victim narrated the incident immediately only states that the child victim disclosed that the accused removed her knicker, pressed her mouth and kissed her. The medical evidence is that the hymen was intact and no injuries were noticed on the person of the child victim or on her private parts except slight redness on vaginal mucosa suggesting congestion. In the teeth of the ocular evidence, it would be extremely unsafe to record a finding of even slightest penetration on the basis of the evidence of PW 5 Dr. Kilnake who admits in the cross examination that it can not be said whether there was actual attempt of rape or not.

8 On a holistic appreciation of evidence on record,
while I am inclined to confirm the conviction under section 376(2)
(i) read with section 511 of the IPC and under section 506 part II
of the IPC, the conviction under section 3 read with section 4 of
the POCSO Act is unsustainable and is set aside.

9 Instead the accused is convicted under section 4 read with
section 18 of the POCSO Act and is sentenced to suffer rigorous
imprisonment for four years.

10 The sentence of fine is maintained.

11 The appeal is partly allowed in the above terms.

JUDGE

RS Belkhede, PA