

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

CRIMINAL APPEAL NO.692 OF 2018

Ahemad Pasha Shaikh
Age-27 years, Occu-Agri,
R/o.Karla, Tq. Ausa,
Dist.Latur

...APPELLANT

VERSUS

The State of Maharashtra
Through the Police Inspector
Killari Police Station,
Tal.Ausa, Dist. Latur

...RESPONDENTS

Mr.S.P.Salgar, Advocate for the appellant (appointed)
Mr.P.N.Kutti, APP for the respondent/State

**CORAM : S.M.GAVHANE, J.
RESERVED ON : 09.04.2019
PRONOUNCED ON : 21.06.2019**

J U D G M E N T

. The appellant (hereinafter referred to as 'the accused'), who has been convicted for the offence punishable under Section 377 of the Indian Penal Code (hereinafter referred to as 'the IPC') and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act') and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1000/- (Rupees One Thousand), in

default, to undergo further rigorous imprisonment for two months for the offence punishable under Section 6 of the POCSO Act as per the judgment and order dated 09.12.2015 passed by the Special Judge, Latur in Special Case (POCSO) No.08/2013, has preferred this appeal being aggrieved by the said conviction and sentence. The accused was given set off under Section 428 of the Code of Criminal Procedure as per the impugned judgment.

2. In brief, facts of the prosecution case, are as under.

A. The accused and the victim boy (PW-10) aged five years are the residents of village Karla, Tq. Ausa, Dist. Latur. It was alleged that on 27.08.20013, at about 01.30 pm the accused took the victim boy to dilapidated Wada of one Patil. There accused removed the pant of the victim boy and committed anal intercourse with him. Thereafter, he left the victim boy near his house. The victim boy sustained injury to his anus and the same was bleeding. Grand-mother (PW-4) of the victim boy noticed the same and informed the father (PW-2) of the victim boy on phone. Father and mother of the victim boy came to the house. They had taken the victim boy to the Government Hospital, Latur. Dr. Deepak Lande (PW-7) examined the

victim boy and issued necessary certificate stating that there was forceful penetration of anus. He also noticed swelling and redness on the anus of the victim boy. The father of the victim boy went to the Killari Police Station and his statement (Exh.49) was recorded. Treating the said statement as FIR crime No.60/2013 was registered against the accused in the Killari Police Station under Section 377 of the IPC and under Section 6 of the POCSO Act and the investigation was commenced.

B. During investigation the Investigating Officer (SDPO) Mrs. Thakar (PW-8) recorded the statements of father, grand-mother of the victim boy, victim boy and other persons who were in known of the facts and prepared the panchanama of spot of incident. She collected the Medico Legal Certificate (Exh.60) regarding examination of the victim boy. The accused was arrested on 27.08.2013 and he is in custody since then. He was also medically examined by Dr.Lande (PW-7). After completion of the investigation charge-sheet was submitted against the accused in the Sessions Court at Latur.

C. Charge was framed against the accused for the offence punishable under Section 377 of the IPC and Section 6 of the POCSO Act. Accused pleaded not guilty to

the charge and claimed to be tried.

D. To prove charge against the accused the prosecution has examined following 10 witnesses.

i]	PW-1	Dinkar Kale
ii]	PW-2	Veerbhadra Yelnure
iii]	PW-3	Appasaheb Yelnure
iv]	PW-4	Kalawati Karagir
v]	PW-5	Vijaykumar Harpad
vi]	PW-6	Angad Kashinath Yelnure
vii]	PW-7	Dr.Deepak Lande
viii]	PW-8	Niyati Thakar
ix]	PW-9	Vishwajeet Godke
x]	PW-10	Sanket Yelnure

E. In defence the accused has examined Rubina Ayub Shaikh [DW-1] at Exh.78. His defence as it appears from the trend of cross-examination of relatives of the victim boy is that he has been falsely implicated as his relations with the family of the victim boy are strained and that the victim boy sustained injury by sharp edged stone.

F. Considering the evidence adduced by the prosecution and the defence evidence learned Special Judge held that the prosecution has proved both the offences under Section 377 of the IPC and Section 6 of the POCSO Act and convicted the accused for both the

offences and sentenced the accused for the offence punishable under Section 6 of the PCOSO Act as mentioned in the opening para of this judgment by the impugned judgment and order. Therefore, this appeal against the conviction by the accused.

3. I have heard Mr.Salgar, learned Advocate appointed through Legal Aid and Mr.Kutti, learned APP for the respondent/State and with their assistance I have perused the evidence adduced by the prosecution and the defence evidence. I have gone through the impugned judgment and order.

4. Mr.Salgar, learned Advocate for the appellant/accused submitted that there is no consistency in the evidence of Veerbhadra Yelnure (PW-2) father of victim and Kalawati Karagir (PW-4) who informed on phone to PW-2 about the incident. PWs.2,4,6 and 10 are interested witnesses as they are relatives of the victim boy. None of these witnesses approached the accused and asked him about the incident. In fact, they should have approached the accused and should have asked him about the incident. Therefore, conduct of these witnesses is doubtful and hence their evidence is not believable. To support his said submission learned advocate for the

accused has relied upon the decision in the case of Shankarlal Gyarsilal Dixit Vs State of Maharashtra 1981 (2) SCC 35.

5. Mr.Salgar, learned Advocate for the accused submitted that the evidence of PW-4 and PW-7 shows that at the material time of the incident the victim boy was wearing half pant, while PW-2 father of the victim says that the victim boy was wearing full pant. Muddemal was sent to the Chemical Analyzer for analysis and as per the said Muddemal full pant was sent to the Chemical Analyzer for analysis. Panch Appasaheb Yelnure Panch (PW-3) says that on 27.08.2013 blue jeans was produced by PW-2 father of the victim boy and he does not say that the pant was either full pant or half pant. As such according to the learned counsel there is no consistency in the evidence of prosecution witnesses as to whether full pant or half pant of the victim boy was seized and therefore, prosecution evidence regarding seizure of pant of the victim boy cannot be believed.

6. Mr.Salgar, learned advocate further submitted that as per the report of the Chemical Analyzer (Exh.72) no semen was detected on anal swab of the victim boy. Therefore, said circumstantial evidence produced by the

prosecution is of no help to the prosecution. Relying upon the decision in the case of Padala Veerareddy Vs State of A.P. 1990 AIR (SC) 79, learned advocate for the accused submitted that chain of circumstances must be established and the prosecution has not established the chain of circumstances and therefore, according to the learned advocate prosecution has failed to prove the offences against the accused with which he was charged and therefore punishment and sentence recorded against accused is not proper and the same be set aside by allowing the appeal.

7. Mr.Kutti, learned APP on the other hand submitted that there is no substance in defence of the accused. There is evidence of the victim boy (PW-10) regarding the act done by the accused and the said evidence is corroborated by the Doctor (PW-7) and Medico Legal Certificate (Exh.60) and Angad Yelnure (PW-6) who is uncle of the victim boy. According to the learned APP the prosecution has proved the offences against the accused beyond reasonable doubt. It is submitted that the inconsistencies pointed out by the learned Advocate for the accused are in significant and they are not sufficient to reject the direct evidence of the victim boy, his uncle and the medical evidence regarding the

incident. It is submitted that decisions relied upon by the accused are not applicable to the present case. Learned APP further submitted that conviction and sentence recorded against the accused is proper. There is no merit in the appeal and thus, he claimed to dismiss the same.

8. I have carefully considered the submissions made by the learned counsel for the accused and the learned APP.

9. Considering the offences under Section 377 of the IPC and Section 6 of the POCSO Act alleged against the accused, in the first place it is necessary to consider the age of the victim boy on the date of incident. Alleged incident took place on 27.08.2013. The evidence of victim boy (PW-10) shows that his evidence was recorded on 19.08.2015 and he has stated that he does not know his age. He stated that he is studying in 2nd std.. His evidence that he is studying in 2nd Std. was not challenged in the course of his cross-examination. The evidence of Niyati Thakar (PW-8) the Investigating Officer shows that she collected birth certificate (Exh.64) of the victim boy. As per the said certificate birth date of the victim boy is 26.06.2008. Considering

said birth date and the date of incident i.e. 27.08.2013 it can be said that the age of the victim boy was five years and two months. Similarly, the evidence of complainant (PW-2) father of the victim boy shows that the age of the victim boy, when his evidence was recorded on 17.12.2014 was five years. Accused has not seriously disputed the fact that the age of the victim boy was five years at the time of incident. Thus, on the basis of above evidence I hold that the prosecution has proved that the age of the victim boy was five years on the date of incident on 27.08.2013 and as such as the victim boy was below eighteen years of age, he was child within the meaning of Section 2(d) of the POCSO Act.

10. As regards the act alleged against the accused of unnatural offence under Section 377 of the IPC and aggravated penetrative sexual assault under Section 6 of the POCSO Act, to prove the same, the prosecution has mainly relied upon the evidence of PWs.10,4,6 and 2. As regards the evidence of the victim boy (PW-10) is concerned, it has come in his evidence that on the day of incident he was playing near his house. The accused took him to dilapidated Wada by pressing his mouth. There he pressed his mouth. He removed his jeans pant. Thereafter, he inserted his su-su in his anus. He threatened to throw

him in well if he raises shouts. Thereafter, accused dropped him in front of his house, his anus had started bleeding. After dropping him in front of his house, the accused went on the patra on the house of Brahmin. Thereafter, his grand-mother (PW-4) informed his father by phone of one aunty. Thereafter, his father and mother came and took him in the hospital. From there they went to the police station. He stated that he can identify the accused and accordingly he identified the accused. In the cross-examination he has denied that he is deposing false about the incident as tutored by his father and further denied that the accused did nothing to him and that he is deposing false on the say of his father. Thus, nothing is found in favour of the accused in the cross-examination of the victim boy. Therefore, there is no reason to disbelieve the evidence of the victim boy.

11. The evidence of grand-mother (PW-4) of the victim boy to whom the victim boy disclosed the incident immediately, is that at the time of incident she was in Karala in the house of Bhagyashree. She knows the accused. The victim boy is the son of Bhagyashree her daughter. Her daughter Bhagyashree and her husband had gone to the field. The victim boy and other children of Bhagyashree were in the house. They were playing near

her. The victim boy went out of the house. She had heard crying of the victim boy. She came out of the house. She saw that anus of the victim boy was bleeding. Thereafter, she asked her neighbour Rubina to make phone call to Veerbhadra (father of the victim). Accordingly, said Rubina made a phone call to father of the victim boy and told that anus of the victim boy was bleeding. Thereafter, father and mother of the victim boy came to the house. They asked the victim boy what had happened. The victim boy told that the accused had taken him to Wada giving him Rs.2/- and saying that he would purchase candy for him and there the accused had inserted his penis in his anus. Thereafter father of the victim boy had taken the victim boy in the hospital. In the cross-examination she has denied that she is deposing false. Thus, nothing is found in favour of the accused in the cross-examination of PW-4. Thus, there is no reason to disbelieve the evidence of PW-4 to whom immediately after the incident the victim boy had disclosed the incident of inserting the penis by the accused in the anus of the victim boy.

12. The evidence of Angad Yelnure (PW-6), who knows the complainant as well as the accused and who appears to have heard cry of the victim boy and to whom victim boy

disclosed the incident, is that on 27.08.2013 at about 01.30 pm he was in his house and he heard crying of a boy from the dilapidated Wada of Kisan Patil. He came out of the house. He saw that the accused had dropped the son of the complainant/Veerbhadra on the road. He went to that boy. Mother-in-law of the complainant also came there. He saw that anus of the boy was bleeding. He asked him as to what had happened and he told him that the accused had taken him away giving him Rs.2/- saying that he would purchase chocklet for him. Said boy told that accused had taken him to dilapidated Wada and inserted his penis in his anus. Said boy also told him that his anus was bleeding and as he was crying the accused dropped him there. In the cross-examination he denied that he is deposing false on the say of the complainant. His evidence that the victim boy disclosed him the incident that the accused inserted his penis in the anus of the victim boy has not been shattered in the course of his cross-examination on behalf of the accused. Thus, there is no reason to disbelieve the evidence of PW-6 and his evidence is quite natural.

13. The evidence of complainant (PW-2) who is father of the victim boy is that on the day of incident he and his wife had gone to their field in morning. His mother-

in-law (PW-4) and sons were in the house. His mother-in-law had made a phone call to him from the mobile of Rubina and informed that anus of the victim boy was bleeding. She also told that accused had taken the victim boy to dilapidated wada of one Brahmin and anus of victim boy was bleeding since accused reached him back. He deposed that he came to his house. The victim boy told him that accused had given Rs.2/- and told that he would purchase candies for him and took him to Wada of Brahmin by lifting him. He also told that accused had removed his full pant and inserted his penis in his anus. Victim boy told him that his anus had started bleeding and thereafter accused reached him back near their house. He stated that he took the victim boy to Government hospital, Latur and Doctor asked him to go to police station. Then he went to Killari Police Station and lodged the complaint (Exh.49). In the cross-examination he has denied that their relations with the accused and his family were strained and hence he filed false case. He also denied that victim boy had not told him that accused had taken him away and committed alleged act of sexual assault. He also denied that he is deposing false. Thus, nothing is found in favour of the accused in the cross-examination of the complainant.

14. From the evidence of the victim boy (PW-10) it is clear that on the date of incident the accused had taken him to the dilapidated wada of Kiran Patil in the village and there the accused after removing his pant inserted his penis in the anus of the victim boy and therefore there was bleeding and thereafter accused left the victim boy near his house. The, evidence of the victim boy is very well corroborated by grand-mother (PW-4) of the victim boy to whom the victim boy immediately disclosed the incident after the incident took place. So also, the evidence of the victim boy is corroborated by Angad Yelnure (PW-6) who had seen the victim boy crying in the dilapidated Wada of Kisan Patil and further saw the accused dropping the victim boy on the road and to whom the victim boy narrated the incident happened. PW-6 has also corroborated the evidence of the victim boy regarding the act committed by the accused. Similarly, the complainant (PW-2) has corroborated the evidence of the victim boy regarding the act done by the accused. It was quite natural for the victim boy to disclose the incident to his father.

15. Now coming to the medical evidence, the evidence of Dr. Lande (PW-7), who had examined the victim boy as well as the accused on the same day i.e. on 27.08.2013 at

05.00 pm, is that the victim boy was brought by Killari Police Station for medical examination. Father of the victim boy had told history as unnatural intercourse by one boy of his village. Doctor has stated that he examined the victim boy and found swelling and redness on his anus and there was also a tear on upper portion of the anus. It was in 12 O' Clock position. It was of the size 0.3cm (depth)x0.3cm x 1cm. The injury was bleeding. According to Doctor there was forceful penetration of anus. He had taken samples of anal swab and sample of blood of victim boy and referred the victim boy to the Civil Hospital, Latur for further treatment and accordingly he issued injury certificate (Exh.60).

16. In the cross-examination on behalf of the accused Dr. Lande has denied that the injury like one which was on the anus of the victim boy is possible if a boy falls on pointed stone. He stated that if, forceful penetration of anus is attempted on a person lying on rough surface, then injury to his body touching the surface is possible. He stated that injury may not cause to the person attempting penetration. He stated that in case of forcible penetration of penis in anus, it is not necessary that injury to penis would also be caused. He denied that victim boy had no injury on his anus and that

he issued false certificate (Exh.60). He denied that he is deposing false. Thus, nothing is found in favour of the accused in the cross-examination of Dr. Lande. The victim boy (PW-10) had denied that there were stones in the Wada of Brahmin. So also, his father (PW-2) has denied that at the time of incident work of house of Premnath was going on and the victim boy got hurt by sharp edged stone piece and by taking disadvantage of that fact, he prepared false case against the accused. Moreover, grand-mother (PW-4) of the victim boy has denied that the victim boy was playing at the place where construction of Premnath was going on and crushed stones were kept there and the victim boy got injured after falling on the crushed stones. Thus, considering the fact that the PWs-2,4 and 10 have denied suggestions as above and the fact that Dr. Lande (PW-7) has also denied that injury which was noticed on the anus of the victim boy is possible if a boy falls on the pointed stone possibility of sustaining injury to anus of the victim boy accidentally due to fall on the stone is totally ruled out and therefore defence of the accused that the victim boy accidentally sustained injury to his anus is not at all believable and acceptable.

17. Injury certificate (Exh.60) issued by Dr. Lande

(PW-7) also shows injury on the anus of the victim boy and it also shows that there were signs of use of forceful penetration of anus as deposed by Dr. Lande (PW-7). Thus, the evidence of Dr. Lande and certificate (Exh.60) have corroborated the evidence of the victim boy (PW-10) regarding forceful penetration of anus of the victim boy.

18. Admittedly the complainant (PW-2) and Kalawati Karagir (PW-4) are respectively father and grand-mother of the victim boy, but when their evidence as regards the incident is quite natural, their evidence cannot be disbelieved simply because they are relatives of the victim boy. Therefore, submission of the learned advocate for the accused that their evidence cannot be believed as they are relatives of the victim boy cannot be accepted.

19. As referred earlier, it has come in the evidence of the victim boy (PW-10) that his grand-mother (PW-4) had informed his father (PW-2) by phone of one aunty and that Grand-mother (PW-4) asked her neighbour Rubina to make phone call to Veerbhadra (PW-2) father of the victim boy and said Rubina made phone call to the complainant and told him that anus of the victim boy was bleeding etc. The complainant has also stated that his

mother-in-law (PW-4) had made a phone call to him from the mobile of Rubina and informed that anus of the victim boy was bleeding etc. Referring the above evidence learned advocate for the accused submitted that there is inconsistency in the evidence of these witnesses as to actually who phoned the complainant and informed the incident and therefore, case of the prosecution is doubtful and cannot be accepted. It appears that the complainant, his mother-in-law and victim boy are from the village and when their evidence is appeared to be recorded after one and half years, there is possibility of committing some mistake by them while deposing before the Court and therefore, there is inconsistency as to actually who informed the complainant about the incident. Said inconsistency being not material is not sufficient to discard the evidence of these three witnesses. Therefore, argument advanced by the learned advocate for the accused in this respect is not accepted.

20. It has come in the evidence of the victim boy that on the date of incident there was jeans pant on his person. So also, it has come in the evidence of the complainant that the victim boy was wearing blue colour pant (Article-A) and it has come in the evidence of grand-mother of the victim boy that the victim boy was

wearing half pant on the date of incident. It has come in the evidence of PW-3 Panch that the complainant had handed over one blue jeans pant having blood stains and the same was seized under the panchanama (Exh.50.). According to him Article-A is the same pant. The panchanama (Exh.50) shows that blue colour full pant of the victim boy was seized. Referring above evidence learned advocate for the accused submitted that there is inconsistency in the evidence of above witnesses as to whether the victim boy was wearing full pant or half pant on the date of incident and therefore, case of the prosecution that the accused removed pant on the person of the victim boy and then committed the alleged act is not believable. There appears inconsistency in the evidence adduced by the prosecution regarding the type of pant on the person of the victim boy on the date of incident that is whether it was full pant or half pant, but that inconsistency alone is not sufficient to discard the evidence of PWs-2,4,6, and 10 which is quite natural. Therefore, submissions made by the learned advocate for the accused as above, is not acceptable.

21. As regards the defence of the accused is concerned, at the cost of repetition his defence is that the victim boy sustained injury to anus accidentally and

that he has been falsely implicated in the case. As observed earlier the prosecution has ruled out the possibility of sustaining the injury to anus of the victim boy, accidentally. Therefore, defence of the accused that the victim boy sustained injury to anus accidentally is not at all acceptable. Moreover, the complainant father of the victim boy has as referred earlier denied that their relations with the accused and his family were strained and hence filed false case. Similarly, grand-mother (PW-4) of the victim boy has denied that there is a dispute over the wall between the complainant and the accused and hence complainant has filed false case against the accused. So also, it has come in the evidence of PW-6 that there were no quarrels between the accused and the complainant. Therefore, it cannot be said that there was dispute or quarrel between the complainant and the accused and therefore, false case is filed against the accused.

22. Defence witness Rubina has stated that no incident had taken place between the accused and the victim boy on 27.08.2013. Nobody had come crying in her presence. She had not seen anus of anybody bleeding in her presence. Nobody had told that accused had taken the victim boy to dilapidated Wada and had committed

unnatural intercourse with him. She denied the suggestions given to her in the cross-examination on behalf of the prosecution in the light of case of the prosecution. She admitted that father of the accused had brought her for giving evidence. Considering the fact that she was brought to the court by the father of the accused for giving evidence and when PWs-2,4 and 10 have denied the suggestions on behalf of the accused that he has been falsely implicated there is no reason to reject their evidence regarding the incident. Thus, the evidence of defence witness is not sufficient to say that no incident has taken place and that the accused has been falsely implicated. Thus, there is no substance in the defence of the accused.

23. I have gone through the decisions in the case of *Shankarlal Dixit* (supra) and *Padala Veerareddy* (supra) cited by learned counsel for the appellant. Since the facts in the cited decisions and the facts of the present case are different, the said decisions cannot be suitably made applicable to the present case.

24. For all the reasons discussed above, on the basis of evidence of PWs-2,4,6 and 10 and medical evidence of Dr. Lande (PW-7) and certificate (Exh.60)

issued by him, I hold that the prosecution has proved the offences under Section 377 of the IPC and under Section 6 of the POCSO Act beyond reasonable doubt. Considering the punishment provided for both these offences and provision under Section 42 of the POCSO Act and the fact that the minimum punishment provided for the offence under Section 6 of the POCSO Act is 10 years the trial Court has rightly imposed the sentence of 10 years imprisonment on the accused for the offence under Section 6 of the POCSO Act and rightly not imposed separate sentence for the offence under Section 377 of the IPC by the impugned judgment and order. Therefore, there is no reason to interfere with the impugned judgment convicting the accused for both the aforesaid offences and sentencing him for the offence under Section 6 of the POCSO Act. Thus, the appeal sans merits and same is liable to be dismissed. Accordingly, the appeal is dismissed.

25. Mr.S.P.Salgar, Advocate was appointed to represent the appellant-accused through Legal Aid. I appreciate his sincere efforts in conducting the matter to arrive at the proper conclusion. I quantify his fees at Rs.7,500/-.

[S.M. GAVHANE, J.]