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

CRIMINAL APPEAL NO.30 OF 2018

Chander Namdeo Thorat
Age: 68 Yrs., occu. Labour,
R/o Ieet, Tq. Bhoom,
District Osmanabad. **= APPELLANT**

VERSUS

The State of Maharashtra
Through Police Inspector,
Police Station Washi,
Tq.Washi, Dist. Osmanabad. **= RESPONDENT**

Mr. SV Deshmukh, Advocate for Appellant;
Mr. AA Jagatkar, APP for Respondent-State

CORAM : P.R.BORA, J.
DATED : 21st September, 2019.

ORAL JUDGMENT

1. The appellant has preferred the present appeal against the judgment and order dated 12th October, 2017 passed by the learned Special Judge, (POCSO Act) at Bhoom in Special Case No.12 of 2016.

2. The appellant was prosecuted in the aforesaid Special Case for the offences punishable under Sections 376(1), 376(2)(i),(j) (n) and 506 of Indian Penal Code as well as under Sections, 4, 8

(2)

and 12 of The Protection of Children from Sexual Offences Act, 2012 (for short, POCSO Act).

3. The learned Special Judge has convicted the appellant-accused for all the aforesaid offences. The maximum sentence imposed upon the appellant is rigorous imprisonment for ten years with fine of Rs.10,000/- for the offence punishable under Section 376(1), 376(2)(i) and (n) of IPC.

4. It was the case of the prosecution that the appellant, who is hereinafter refereed to as accused, was carrying on small business of selling chocolates and biscuits outside of one Zilla Parishad school of which the prosecutrix was a student. The alleged incident is said to have happened in Summer vacation of May 2016. According to the prosecution, the prosecutrix along with her younger sister, used to go to her school since Khichadi used to be distributed to the students under one Government scheme. The prosecutrix in the period between 27th May to 31st May 2016 had been going to the said school with her younger sister to eat Khichadi.

(3)

5. It is the further case of the prosecution that in the said period, accused had sexual intercourse with the prosecutrix consecutively on 5-6 days near the water storage tank in the school premises. The prosecutrix informed about the alleged mis-deeds of the accused to her aunt on or about 7th May, 2016. After such disclosure by the prosecutrix, her aunt (PW 1) took the prosecutrix with her to the police station, Washi and lodged a report of the alleged incident, whereupon investigation was set in motion. The accused was arrested. Spot of the incident was shown by the prosecutrix to the police in presence of the panch witnesses and accordingly spot panchanama was prepared. Statements of the necessary witnesses were recorded by the Investigating Officer. The prosecutrix was sent to the hospital for her medical examination and accordingly her medical examination was conducted. Blood samples of the prosecutrix as well as the clothes on person of the prosecutrix were forwarded to the forensic lab seeking report from the said laboratory. Medical examination of the accused was also conducted and the clothes on his person were also sent for

(4)

chemical analysis. After completing the investigation, charge sheet was filed against the accused.

6. In order to prove the charges against the accused, six witnesses were examined by the prosecution. Aunt of the prosecutrix, who had lodged the report of the alleged incident, was examined as PW 1; whereas victim girl deposed as PW 2. Witness on the spot panchanama was the third witness examined by the prosecution. Medical Officer, who examined the prosecutrix and submitted his report was 4th witness examined by the prosecution. The prosecution also examined Headmaster of the zilla parishad school, wherein the alleged incident was said to have occurred, as 5th witness by the prosecution and the prosecution evidence was concluded after examination of the Investigating Officer.

7. The accused had taken defence of total denial and false implication. Plea of alibi was also raised by him and to prove the said plea, one witness was examined by the accused known as

Haridas Maharaj Pathrudkar as DW 1.

8. The learned Special Court, after having assessed the evidence on record, held the accused guilty for the offences punishable under Sections 376(1), 376(2)(i),(j) (n) and 506 of Indian Penal Code as well as under Sections 4, 8 and 12 of The POCSO Act and sentenced the accused to undergo rigorous imprisonment for ten years. Aggrieved by, the present appeal has been filed by the appellant convict.

9. Shri SV Deshmukh, learned counsel appearing for the appellant, assailed the impugned judgment on various grounds. The learned counsel submitted that the learned Special Court has given undue weightage to the evidence of the prosecutrix, ignoring the fact that she was a child witness and was fully tutored by her parents. The learned counsel, taking me through the cross-examination of the prosecutrix (PW 3), submitted that the prosecutrix has unambiguously admitted in her cross-examination that her aunt and the parents had stated her as to the facts to be deposed before the

(6)

court. The learned counsel further submitted that the prosecutrix has clearly admitted in her cross-examination that what was to be stated by her before the police, was stated to her by her aunt. The learned counsel further submitted that having regard to the age of the prosecutrix, she was not having any understanding of the acts allegedly committed by the accused, as are disclosed by her in her testimony before the court.

10. The learned counsel further submitted that without due corroboration, the evidence of the child witness cannot be accepted and it is always very unsafe to rely the sole testimony of the child witness. The learned counsel further submitted that the trial court has failed in appreciating that the spot, where the accused was alleged to have sexually abused the prosecutrix, is *verandah* of the school and was visible even from the road and the gate of the said school.

11. The learned counsel further submitted that the trial court has also failed in appreciating that it is not probable that the

(7)

accused would have indulged in commission of the acts alleged against him when several students, staff of the school, teachers of the school as well as the staff employed for preparation and distribution of *Khichadi* were present in the school. The learned counsel further submitted that in the accused was not likely to indulge in commission of any such acts alleged against him when the prosecutrix was all the while accompanied by her younger sister. However, the trial court has not appropriately considered the said aspect

12. The learned counsel further submitted that the medical evidence brought on record by the prosecution, has completely negated the case of the prosecution. Taking me through the evidence of PW 4 – Dr.Sachin Charandas Telap and more particularly the cross-examination of the said witness, the learned counsel submitted that possibility of the accused committing sexual intercourse with the prosecutrix, that too penetrative sexual intercourse, is completely ruled out. The learned counsel further submitted that if the prosecution case is to be accepted that not only once, but on

(8)

consecutive 4-5 days, she was being abused by the accused, there must have been noticed at least some injuries to the private part of the prosecutrix. The learned counsel submitted that as per the medical evidence, even a simple abrasion was also not noticed on any part of the body of the prosecutrix on more particularly on her genital organs.

13. The learned counsel submitted that, as has been deposed by PW 1 as well as PW 2, i.e. the prosecutrix, the accused used to ask the prosecutrix to lie down on his body and thereafter used to insert his private part into private part of the prosecutrix. The learned counsel further submitted that having regard to the tender age of the prosecutrix, even a slight penetration would have also caused serious injury to the genitals of the prosecutrix. The learned counsel submitted that absence of any such injury leads to the only inference that there was no substance in the allegation made against the accused as above.

14. The learned counsel further submitted

(9)

that the prosecutrix in her cross-examination has also admitted that if anything against her wish happens, she immediately retracts. The learned counsel submitted that if this may be the nature of the prosecutrix, it cannot be accepted that even though the accused repeated the alleged acts on consecutive 4-5 days, the prosecutrix did not resist the said attempt or make it known to her parents or to her aunt with whom she was residing.

15. The learned counsel further submitted that the trial court has also failed in appreciating the defence raised by the accused and the facts deposed by the defence witness No.1 viz. Haridas Maharaj Pathrudkar. The learned counsel submitted that nothing has come on record in the cross-examination of DW 1 so as to disbelieve his testimony. The learned counsel further submitted that for wrong reasons the trial court has discarded the evidence of DW No.1 -Haridas.

16. The learned counsel further submitted that the trial court has completely ignored the defence raised by the accused that there was every

(10)

reason for aunt of the prosecutrix to falsely implicate the appellant in commission of the alleged crime by making her niece, i.e. the prosecutrix, to make such false complaint against him for the reason that the accused had noticed the aunt of the prosecutrix in affairs with one person. The learned counsel further submitted that as about age of the prosecutrix also, the prosecution has failed in bringing on record any dependable evidence. For all above reasons, it was the contention of the learned counsel that the order of conviction passed by the trial court was unsustainable and liable to be set aside, consequently, leading to the acquittal of the accused of all the charges levelled against him.

17. Learned APP Shri Jagatkar supported the order passed by the learned Special Judge. Learned APP submitted that the evidence of the prosecutrix alone is in fact sufficient to hold the accused guilty for the offences charged against him. The learned APP further submitted that the testimony of the prosecutrix inspires full confidence and as such, her sole testimony was enough to convict the

(11)

accused. The learned APP further submitted that the trial court has rightly relied upon the testimony of the prosecutrix. The learned APP further submitted that since the FIR was lodged after the period of about one week, no injuries were noticed to the genitals of the prosecutrix. The learned APP submitted that the statement of the prosecutrix was also recorded under Section 164 of Cr.P.C. and in the said statement also, she had specifically impleaded the accused and has also narrated about the mis-deeds committed by the accused. The learned APP submitted that the accused had raised absolutely false defence which has been rightly rejected by the learned Special Judge. The learned APP further submitted that, taking up a false defence would also indicate a guilty mind of the accused and that can also be considered a circumstance against the accused. The learned APP submitted that the learned Special Judge has appropriately considered the evidence on record and has rightly convicted the accused for the offences under Section 376 of IPC and under Section 8 of the POCSO Act. The learned APP, in the circumstances, prayed for dismissal of the

appeal.

18. I have given due consideration to the submissions made by learned counsel for the appellant and learned APP for Respondent-State. I have also perused the impugned judgment and the entire evidence on record. On perusal of the impugned judgment, it is revealed that the learned Special Judge has fully relied upon the testimony of the prosecutrix in holding the accused guilty for the offences charged against him. Though it was sought to be contended by the learned counsel appearing for the appellant that the prosecution has failed in bringing on record any cogent evidence as about the age of the prosecutrix so as to hold that she was minor, and in the circumstances, cannot be held to be a minor, the said submission is not at all acceptable. The prosecutrix was admittedly in 3rd std. When the alleged incident is said to have occurred. The prosecution has brought on record dependable evidence as about the age of the prosecutrix. As has come on record, the prosecutrix got her primary education in zilla parishad school. The record

(13)

from zilla parishad school is placed on record and has been duly proved. There appears no reason to doubt the said evidence. Even otherwise, it is not the case that there is marginal difference in the age, as has been prescribed in the charge sheet and the age according to the accused, so as to have any doubt about the said evidence. It is not disputed by the accused that at the relevant time, the prosecutrix was taking her education in 3rd std. when the alleged incident is said to have occurred. In no case, it can be said that the prosecutrix, who was in the 3rd std. May be of the age more than 18 years. Thus, there is absolutely no substance in the objections raised as about the age of the prosecutrix. I have no hesitation in holding that on the day of occurrence of the alleged incident, the prosecutrix was definitely minor.

19. The trial court has held the accused guilty for the offence punishable under Section 376(2)(i),(j) (n) and 506 of Indian Penal Code as well as under Sections 4, 8 and 12 of POCSO Act, meaning thereby that the Special Court has held that the accused has committed penetrative sexual

(14)

intercourse with the prosecutrix. The finding so recorded by the learned Special Judge has to be scrutinized in light of the evidence on record.

20. As I noted herein above, the evidence which has come on record, is sufficient to hold that, at the relevant time, the prosecutrix was in the age group of 8-9 years. Considering the age of the prosecutrix, if the case of the prosecution is to be accepted that the accused did commit repeated sexual intercourse with the prosecutrix that too penetrative sexual intercourse, there must have been certain injuries to the genitals of the prosecutrix and if the case of the prosecution of complete penetration is to be accepted, then her hymen must have been noticed to have been completely ruptured. The medical evidence, as I noted herein above, however, is otherwise and completely negates the case of the prosecution. P? W 4 – Dr. Sachin Telap, in his cross-examination has admitted that if the accused would have completely inserted his penis in the vagina of the minor girl, there would have been rupture of the hymen and injuries to her private part. The said

(15)

witness has further admitted that no injuries were found on the private part of the victim girl. The said witness has also admitted that the injuries like abrasions, contusions, lacerated would remain on the body for 7 to 8 days. In view of the admission given by PW 4, even if it is accepted that because of delay in approaching the police and consequently in the medical examination of the prosecutrix some injuries were likely to be vanished, it cannot be accepted that even the sign of any such injuries would also have not been noticed on the genitals of the prosecutrix. Considering the medical evidence on record, unhesitatingly, it can be said that there is no evidence against the accused so as to hold that he had penetrative sexual intercourse with the prosecutrix.

21. The next question falls for my consideration is whether the entire case of the prosecution is false and the testimony of the prosecutrix is liable to be outrightly rejected or otherwise.

22. I have carefully perused the evidence of the prosecutrix before the court as well as the statement given by the prosecutrix before the Magistrate under Section 164 of the Code of Criminal Procedure. It is difficult to accept the contention of the accused that an attempt was made to falsely implicate him in the alleged crime and that he is completely innocent and further that he was not present at the spot of occurrence. Though the defence witness was examined by the accused so as to bring on record that in the relevant period, he was attending the *Bhagwat Saptah* at some different place, the defence so raised, cannot be wholly accepted. It has to be stated that the discussion made by the trial court while rejecting the evidence of DW 1, the reasons, which are assigned, cannot be said to be sustainable and the evidence of the said witness cannot be rejected on the said ground. However, it further appears to me that even accepting the version of DW 1, no such conclusion can be drawn that for the entire said period, the accused was totally absent from the place of occurrence. It is significant to note that the span of the alleged acts is for the whole

(17)

of the week and the incident is said to have occurred at the school, where the accused was selling some sweets and biscuits outside the said school. The prosecutrix being the child, her evidence requires to be closely scrutinized with more care and caution. Considering the admissions given by the prosecutrix in her cross-examination, it is obvious that to some extent, she was tutored by her aunt and by her parents also, which has resulted in stating certain facts to which there is no supportive medical evidence. However, the entire evidence of the prosecutrix does not appear to be false and it is difficult to accept that no such incident was ever occurred.

23. As I noted herein above, the statement given by the prosecutrix before the Magistrate appears to be more truthful, which has been corroborated by the circumstances on record. In her statement recorded by learned JMFC, Paranda under Section 164 of Code of Criminal Procedure, the prosecutrix had stated the following facts, -

“After the school vacations started, I used to go to the school for eating

(18)

khichadi. One old man used to come there at that time. His name was Chander. Chander used to sit outside the school selling some articles. He resides near the school. He gave me money for purchasing toffees and biscuits. So I went near him, as was called by him. At that time, Chander lifted his Dhoti upwards. My younger sister Dipti was at that that with me. Chander then asked me to remove my nicker and sit on his person. At that time my private part become sticky. I washed out the said sticky substance by taking water from the bottle. Chander had done the aforesaid act with me on 4-5 occasions. Yesterday, I disclosed all these facts to my aunt. My aunt in turn informed to my uncle. My uncle informed about it to his police friend. After the said police person came to our house, I and my aunt narrated the incident to the said police."

24. In her statement recorded under Section

161 of Cr.P.C. also same facts were stated by the prosecutrix.

25. In light of the facts, which were stated by the prosecutrix before the Magistrate and in her statement recorded under Section 161 of Cr.P.C., if her testimony before the court is perused, it apparently appears that some facts which the prosecutrix had not disclosed in her statement under Section 164 of Cr.P.C. or under Section 161 of Cr.P.C., were deposed by her before the court. The said facts are that, “ the accused used to insert his private part in my private part; give strokes (टोचा मारायचा) and he also used to say that he would kill me in case I disclose about it to my family members. After my private part used to get sticky, I used to go to the water tank and wash myself.”

26. The facts, as above, which are deposed by the prosecutrix in her testimony before the court appear to be improbable in view of the medical evidence on record. Having regard to the tender age of the prosecutrix, had the accused really

inserted his penis in vagina of the prosecutrix and had given strokes, there must have been caused serious injuries to the genital of the prosecutrix and her hymen could not have remained in tact in such circumstances. As has come on record, in the medical examination of the prosecutrix, no injury not even a slight abrasion has been noticed on the genitals of the prosecutrix and her hymen is noticed to be in tact. Considering the evidence, as aforesaid, there remains no doubt that the fact deposed by the prosecutrix that the accused used to insert his private part in her vagina, cannot be believed. It has further to be noted that according to the version of the prosecutrix, such acts were repeated by the accused on 4-5 consecutive days. Had it been so, perhaps much more serious injuries would have been caused to the genitals of the prosecutrix. The medical evidence thus does not corroborate the facts, as aforesaid, deposed by the prosecutrix. The question arises whether the entire testimony of the prosecutrix is to be then disbelieved ? As I have noted herein above, the facts stated by the prosecutrix in her statement under Section 164 of Cr.P.C. contain

(21)

honest narration of the incident as it had occurred. Whereas the facts which were additionally stated by the prosecutrix in her testimony before the court was an outcome of the tutoring to her by her aunt. The said facts will have to be excluded while analysing the evidence of the prosecutrix. From the evidence on record, it has been, however, undoubtedly established that the accused outraged the modesty of the prosecutrix, who is admittedly tender aged girl. It can be reasonably inferred that the alleged acts of the accused were with the intention of getting stimulation and to have seminal discharge thereafter. Thus, though there is no evidence showing that the accused had penetrative sexual intercourse with the prosecutrix, from the evidence on record, it has been fully established that by asking the prosecutrix to lie down on his person, with intention to get satisfied his sexual urge, the accused did commit the offence of sexual assault, as defined under Section 7 of the POCSO Act.

27. For the aforesaid reasons, the conviction

(22)

of the accused for the offence under Section 376(1) and 376(2)(i) and (n) of IPC as well as the offence under Section 4 of the POCSO Act, cannot be sustained and deserves to be set aside. From the evidence which has come on record, the prosecution, however, has undoubtedly proved that the accused has committed the offence under Section 354-A of IPC and under Sections 7, read with 8 and 12 of the POCSO Act.

28. Though learned counsel appearing for the appellant has prayed for showing leniency in imposing sentence on the appellant for the aforesaid offences, the request so made does not deserve consideration. Taking into account that the accused sexually assaulted the prosecutrix, who is tender aged girl of 8-9 years to satisfy his sexual urge and thus caused sexual harassment to her, he deserves to be imposed with maximum sentence prescribed under Section 8 of the POCSO Act, i.e. of five years' rigorous imprisonment. In view of the higher punishment prescribed for the offences punishable under Section 8 of the POCSO Act, no separate sentence for other offences needs to be

imposed.

29. In the result, following order is passed,

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ORDER

i. The conviction of the appellant-accused under Sections 376(1), 376(2) (i),(n) of Indian Penal Code, and under Section 4 of the POCSO Act, is quashed and set aside;

ii. The appellant-accused is held guilty for the offence punishable under Sections 354-A of IPC and under Sections 7 read with section 8 and section 12 of the POCSO Act.

iii. The appellant is sentenced to suffer rigorous imprisonment for five years with fine of Rs.15,000/-, in default, to suffer simple imprisonment for six months for the offences punishable under Sections 7 read with section 8 of the POCSO Act;

(24)

iv. No separate sentence is prescribed for the offence punishable under Section 354-A of IPC as well as Section 12 of the POCSO Act.

v. The appellant-accused be given benefit of set-off as provided under Section 428 of Cr.P.C.

iv. If the fine amount is paid by the accused, an amount of Rs.10,000/- out of it, be paid to the victim girl.

v. The appeal stands allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

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