

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.751 OF 2015

Bansidhar @ Annasaheb Haridas Ghumare,

Age : 24 Yrs., Occu. Agriculturist,

R/at Gopalpura Sidhbet Kelgaon,

Ta. Khed, Dist. Pune.

(At Present in Yerwada Central Jail)

... **Appellant**

V/s.

The State of Maharashtra

Through Public Prosecutor,

High Court, Bombay

Through Alandi Police Station.

... **Respondent**

.....

Mr.Mahesh H. Chandanshiv, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 14th JANUARY 2019.

ORAL JUDGMENT :

1 The appellant/accused, by this appeal, is challenging the Judgment and Order dated 16/06/2015 passed by the learned Additional Sessions Judge, Khed-Rajgurunagar in Special Case No.30 of 2014 thereby convicting the appellant/accused of offences punishable under Sections 377 and 506 read with Section 34 of the Indian Penal Code as well as under Sections 4 and 6 of the Protection of Children from Sexual Offences Act (hereinafter

referred to as 'POCSO Act' for the sake of brevity). For the offence punishable under Section 377 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.5,000/- and in default to undergo further rigorous imprisonment for one year. For the offence punishable under Section 506 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for one year apart from imposition of fine of Rs.1,000/- and in default to undergo rigorous imprisonment for two months. For the offence punishable under Section 4 of the POCSO Act, the appellant/accused is sentenced to suffer rigorous imprisonment for seven years apart from direction to pay fine of Rs.2,000/- and in default to undergo further rigorous imprisonment for six months. For the offence punishable under Section 6 of the POCSO Act, the appellant/accused is directed to undergo rigorous imprisonment for ten years apart from imposition of fine of Rs.5,000/- and default sentence of rigorous imprisonment for one year. The learned trial Court has directed that all substantive sentences shall run concurrently.

2 Facts in brief leading to prosecution and resultant conviction of the appellant/accused can be summarized thus :

(a) Appellant/accused Bansidhar @ Annasaheb Haridas Ghumare was in-charge of the Boarding House run by Sant Nivrutti Maharaj Ashram situated at Gopalpura Sidhbet at village

Alandi Devachi in Khed Taluka of Pune District. Several children taking education in the middle and high-school in different educational institutes located at Alandi Devachi used to stay in that Boarding House run by Sant Nivrutti Maharaj Ashram at village Alandi Devachi. Apart from taking school education in different Schools, inmates of that Boarding House of Sant Nivrutti Maharaj Ashram used to take religious teachings by practising tabur (*mrudang*) and chanting *bhajan* in the morning hours. The appellant/accused was at the helms of affairs of that Boarding House.

- (b) According to the prosecution case, from October 2013, the appellant/accused used to call the P.W.No.2/male victim child, who was inmate of the Boarding School to his room in the said Boarding House. There, the appellant/accused used to put his penis in the mouth of the P.W.No.2/male victim child and also used to commit carnal intercourse with the P.W.No.2/male victim child against the order of nature.
- (c) The P.W.No.3 is the another male victim child, who happened to be inmate of the Boarding House run by Sant Nivrutti Maharaj Ashram. On 18/01/2014 as well as 19/01/2014, the appellant/accused called the P.W.No.3/male victim child to his room and committed carnal intercourse with him against the order of nature.

- (d) On 26/01/2014, the appellant/accused called the P.W.No.3/male victim child as well as the P.W.No.1/another male victim child, who also happened to be inmate of the Board School to his room on the pretext of watching the television. Within a short span of time, the appellant/accused asked the P.W.No.3/male victim child to return to his place. The P.W.No.1/male victim child was asked to stay. Then the appellant/accused started fondling body of the P.W.No.1/male victim child by his hands. He then threatened to kill the P.W.No.1/male victim child. Thereafter, the appellant/accused put his penis in the mouth of the P.W.No.1/male victim child. Subsequently, the appellant/accused committed carnal intercourse against the order of nature with the P.W.No.1/male victim child.
- (e) On 21/01/2014, all inmates of the Boarding House gathered for practising *tabur* and chanting *bhajan*. At that time, the P.W.No.1/male victim child narrated the incident happened with him to other male victim children i.e. P.W.Nos.2 and 3. He then came to know that similar incidents took place in the past with the P.W.Nos.2 and 3. The P.W.No.1/male victim child then decided to inform the incident to his father and accordingly, he telephoned his father and informed the act of the appellant/accused.
- (f) Upon getting information about the incident from the

P.W.No.1/male victim child, his father Ramhari rushed to the Sant Nivrutti Maharaj Ashram, Alandi Devachi from Aurangabad and reached there in the evening hours. The incident was again narrated by the P.W.No.1/male victim child to his father P.W.No.5 Ramhari. Sufferings of the other children were also told to him. Therefore, P.W.No.5 Ramhari telephonically informed about the incident happened with their children to fathers of P.W.Nos. 2 and 3.

- (g) On 30/01/2014, accompanied by his father-P.W.No.5 Ramhari, the P.W.No.1/male victim child went to Police Station, Alandi Devachi and lodged report (Exhibit 14) against the appellant/accused. Accordingly, Crime No.4 of 2014 for the offences punishable under Sections 377 and 506 of the Indian Penal Code as well as under Section 4 of the POCSO Act came to be registered against the appellant/accused.
- (h) Routine investigation followed. Statements of witnesses came to be recorded. Certificates regarding date of birth of the victim children came to be collected. They were sent for medical examination. P.W.No.4 Dr.Sunil Darode from the Sassoon Hospital, Pune examined the victim on 30/01/2014. On completion of routine investigation, the appellant/accused came to be charge-sheeted.

- (i) Charge for the offences punishable under Sections 377 and 506 of the Indian Penal Code as well as under Sections 4 and 6 of the POCSO Act came to be framed and explained to the appellant/accused by the learned trial Court. He abjured his guilt and claimed trial.
- (j) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all six witnesses. The victim male children are examined as P.W.Nos.1 to 3. Ramhari – father of the P.W.No.1/male victim child came to be examined as P.W.No.5. Investigating Officer Somnath Jadhav, API working with Alandi Police Station is examined as P.W.No.6.
- (k) Defence of the appellant/accused was that of total denial. According to him, his disciplined behaviour was not liked by inmates of the Boarding House and, therefore, he is falsely implicated in the crime in question. The appellant/accused is entered in the defence and examined Rahul Sawant, one of the inmate of the Boarding House run by Sant Nivrutti Maharaj Ashram as D.W.No.1. After hearing the parties, the learned trial Court came to the conclusion that the appellant/accused had committed carnal intercourse against the order of nature with the victim male children i.e. P.W.Nos.1 to 3 and he had criminally intimidated them. It is further held by the learned trial Court that the appellant/accused has committed penetrative sexual assault

on the victim male children i.e. P.W.Nos.1 to 3 and the offence became aggravated penetrative sexual assault in view of the provisions of Section 5(f) of the POCSO Act as the appellant/accused was in-charge of the religious institution run by Sant Nivrutti Maharaj Ashram where the victims were staying. Accordingly, the appellant/accused came to be convicted of the offences punishable under Sections 377 and 506 of the Indian Penal Code as well as under Sections 4 and 6 of the POCSO Act. He was sentenced on all counts as indicated in the opening paragraph of this judgment.

3 I heard the learned Counsel appearing for the appellant/accused. By drawing my attention to the material elicited from the cross-examination of the victim children, the learned Counsel argued that because of disciplined manner in which the Boarding House was being run by the appellant/accused, he is falsely implicated in the crime in question. It is argued that cross-examination of the victim children shows that there was no television set in the Ashram and, therefore, reason for calling them to his room by the appellant/accused, as stated by the P.W.No.1/male victim child, is patently false. As such, no reliance can be placed on evidence of victim male children viz. P.W.Nos.1 and 3. The learned Counsel further argued that cross-examination of the victim children shows that inmates of the Boarding House used to study up to the midnight. There was ample opportunity with the victim children

to make a hue and cry. Similarly, the Boarding House was situated in a populous locality and it was surrounded by several institutions. The victims could have narrated their sufferings soon after the incident to others. However, this was not done by them. Even after disclosing the incident to P.W.No.5 Ramhari, the FIR was lodged after four days. Forensic evidence is not supporting the case of prosecution nor the medical evidence. There is no eye witness to the incident. The learned Counsel appearing for the appellant/accused placed reliance on Judgment of the Honourable Apex Court in the matter of ***Gowrishankara Swamigalu v. State of Karnataka & Anr.***¹ so also on the Judgment of the Division Bench of this Court in the matter of ***Pandurang Tukaram Ithape & Ors. v. The State of Maharashtra***² to demonstrate that delay in lodging the FIR makes the prosecution case suspect. He further placed reliance on Judgment of learned Single Judge of Delhi High Court in the matter of ***Abdul Salam v. State***³ to substantiate his contention that in absence of medical evidence on record, the appellant/accused needs to be acquitted.

4 As against this, the learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence by contending that the medical evidence is supporting the prosecution case and there is no reason to disbelieve version of the victims of the crime in question.

1 AIR 2008 Supreme Court 2349.

2 1996(3) ALL MR 688.

3 120 (2005) DLT 336.

5 I have carefully considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence.

6 Victims of the crime in question are P.W.Nos.1 to 3. While in the witness box, on 22/04/2015, these victim male children have stated their age as 15, 13 and 14 years respectively. The incident in question took place from October 2013 to 26/01/2014. Oral evidence in respect of age of the victim children adduced by them is not at all challenged in the cross-examined by the defence. Moreover, in order to prove age of the victim children, the prosecution has placed on record School Leaving Certificates as well as Bonafide Certificates in respect of the victim children. School Leaving Certificate dated 31/01/2014 issued by Shri.Dnyaneshwar Vidyalaya, Alandi at Exhibit 31 is in respect of the P.W.No.1/male victim child. This School Leaving Certificate (Exhibit 31) shows that date of birth of the P.W.No.1/male victim child is 17/05/2000. Bonafide Certificate issued at Exhibit 35 is issued by the Nagar Parishad School No.1 of Alandi. This Certificate at Exhibit 35 is in respect of the P.W.No.2/male victim child. This Certificate shows date of birth of the P.W.No.2/male victim child as 24/05/2001. School Leaving Certificate dated 31/01/2014 at Exhibit 32 is in respect of the P.W.No.3/male victim child. This School Leaving Certificate dated 31/01/2014 is issued by Dnyaneshwar Vidyalaya of Alandi. It shows that date of birth of the P.W.No.3/male victim child is

20/11/2000. This evidence adduced by the prosecution is not at all disputed by the defence. Evidence on record shows that the victim children apart from taking religious education while staying at Sant Nivrutti Maharaj Ashram were taking the regular school education in the Dnyaneshwar Vidyalaya as well as the Nagar Parishad School of Alandi Town in Pune District. They were student of the middle school. This evidence adduced by the prosecution unerringly points out that at the time of the alleged offence, the victims were below eighteen years of age and as such, there were children as defined by Section 2(d) of the POCSO Act.

7 Now, let us examine whether the prosecution has bring home the guilt to the appellant/accused in respect of offences alleged against him and held to be proved by the learned trial Court. As held in the foregoing paragraph, the victims are child witnesses. It is well settled that the evidence of child witness must find adequate corroboration before it is relied upon. This is rule of practical wisdom because a child is susceptible to the tutoring. Evidence of a child witness is required to be evaluated more carefully and with a greater circumspection. Let us, therefore, examine whether the victims of the crime in question are witnesses of the truth and their evidence can be relied upon for basing conviction.

8 The P.W.No.1/male victim child is the victim child, who has set the criminal law in motion by reporting the incident to

the Police Station, Alandi on 30/01/2014. This witness has narrated his sufferings to the fellow residents of the Boarding House run by Sant Nivrutti Maharaj Ashram on 27/01/2014 and then he came to know that the fellow residents viz. P.W.Nos.2 and 3 were also suffered the same fate at the instance of the appellant/accused. The fact that these three witnesses were residing in the Boarding House of the Sant Nivrutti Maharaj Ashram at Alandi is not disputed at all by the defence. Similarly, it is not disputed that the appellant/accused was running the Boarding House of the Sant Nivrutti Maharaj Ashram. On this backdrop, it is in evidence of the P.W.No.1/male victim child that at about 11.00 p.m. of 26/01/2014, he along with the P.W.No.3/male victim child was summoned by the appellant/accused in his room for the purpose of watching programme on the television. Accordingly, both of them went to the room of the appellant/accused situated in the said Ashram. The P.W.No.1/male victim child testified that then the appellant/accused sent back the P.W.No.3/male victim child, but asked him to stay. Then, as deposed by the P.W.No.1/male victim child, the appellant/accused asked him to sleep on the bed and started rubbing his body. By threatening to kill him, thereafter, the appellant/accused put his penis in the mouth of the P.W.No.1/male victim child. As stated by the the P.W.No.1/male victim child, thereafter, the appellant/accused has committed carnal intercourse against the order of nature with him with a threat not to tell the incident to anybody else. As seen from

evidence of the P.W.No.1/male victim child, in the morning of 27/01/2014, when all of the inmates of the Boarding House gathered for practising *tabor (mrudung)* and for chanting *bhajan*, he told the incident to his friend i.e. the P.W.Nos.2 and 3. The P.W.No.1/male victim child stated that he learnt from the P.W.No.2/male victim child that he too is victim of such acts of the appellant/accused since October 2013. In a similar fashion, as stated by the P.W.No.1/male victim child, the P.W.No.3/male victim child has also stated that the appellant/accused had subjected him to the carnal intercourse against the order of nature on 18/01/2014 and 19/01/2014.

9 As seen from version of the P.W.No.1/male victim child, he mustered the courage to call his father P.W.No.5 Ramhari telephonically and informed the incident to him. His father P.W.No.5 Ramhari rushed to the Boarding House at about 6.00 p.m. on the very same day. As stated by the P.W.No.1/male victim child, his father thereafter, informed the incident to fathers of the P.W.No.2/male victim child and the P.W.No.3/male victim child. When they reached the Boarding House, the matter was reported to police. This witness has proved the FIR (Exhibit 14), which is perfectly in tune with his version before the Court.

10 The defence has tried to cast a shadow of doubt on version of the P.W.No.1/male victim child by eliciting from his cross-examination that there is no television set in the Ashram.

However, the P.W.No.1/male victim child clarified the fact that though there is no television set in the Ashram, the appellant/accused was having a laptop.

11 The next victim i.e. the P.W.No.2/male victim child, in a similar fashion, has stated that since October 2013, from time to time, the appellant/accused used to call him at his room and then the appellant/accused used to put his penis in the mouth. The P.W.No.2/male victim child further deposed that the appellant/accused used to commit carnal intercourse against the order of nature with him. This witness has also spoken about threat of killing extended by the appellant/accused if the incident is disclosed to anybody else.

12 The third victim i.e. the P.W.No.3/male victim child has narrated the incident which took place with him on 18/01/2014 as well as on 19/01/2014. As per version of this witness, on both these dates, the appellant/accused subjected him to carnal intercourse against the order of nature. This witness has also spoken about the threatening by the appellant/accused for preventing disclosure of the incident to anybody else.

13 All the three victims of the crime in question were subjected to the searching cross-examination by the defence. The defence could brought on record the fact that the Boarding House run by Sant Nivrutti Maharaj Ashram is located in the central place

of the town. The same is surrounded by the residential houses and institutions. The victims did not disclose the incident to anybody else though they were taking education in different Schools and also in contact with the students as well as teachers in those Schools. Apart from this, the victims have candidly admitted that the appellant/accused is a disciplined man. It was mandatory for the inmates of the Boarding House to wake up at the dawn to practise on the *tabor (mrudung)* and to chant *bhajan* daily. As seen from cross-examination of the victims that if they failed to do these practice, the appellant/accused used to beat them. The children were disliking the appellant/accused because of his disciplined behaviour.

14 The question which falls for consideration is whether feeling aggrieved by the disciplined behaviours, the children taking education in the middle School would attribute such a heinous offence to the appellant/accused. The allegations made by the victims are regarding the penetrative sexual assault as well as carnal intercourse against the order of nature on them by the appellant/accused. It is seen that the victims of the crime in question are residents of villages like Nimgaon Ketaki as well as Khangaon from Pune and Solapur Districts. The P.W.No.1/male victim child seems to be residents of Aurangabad. Considering the fact that the victims were admitted by their parents to the middle Schools at Alandi Devachi by making arrangement of their

residence at the Sant Nivrutti Maharaj Ashram for having additional benefits of religious studies, it needs to be held that the victims of the crime in question are from tradition-bound society where such type of sex is still a taboo. Such incident instill the sense of shame and casts a stigma on the victim also. In such situation, it is hard *nay* impossible to believe that just because the victims were fed up with staying in the Boarding House, they would make such a serious allegations against the appellant/accused, who was in-charge of the Boarding house. Therefore, it is not possible to hold that evidence of the victims is suffering from doubts merely because the appellant/accused is a disciplined person, who was insisting the inmates of the Boarding House to wake up early in the morning and then to practise on the *tabor*.

15 The victims of the crime in question were subjected to the medical examination. P.W.No.4 Dr.Sunil Darode examined them medically at the Sassoon Hospital on 30/01/2014. Though no injuries were found on the private parts of P.W.Nos.1 and 2, the Medical Officer noted injury on the anal region of the P.W.No.3. As per version of the P.W.No.3/male victim child, he was subjected to the carnal intercourse against the order of nature by the appellant/accused on 18/01/2014 and 19/01/2014. As deposed by P.W.No.4, Dr.Sunil Darode, on 30/01/2014, the P.W.No.3/male victim child was having a scar of 6 O'clock position of size 8 mm. on the anal region. This evidence corroborates the

version of the victims of the crime in question to the effect that they were subjected to the penetrative sexual assault by the appellant/accused. Judgment in the matter of ***Abdul Salam (supra)*** proceeded on the facts and the evidence in that matter. It is held therein that there is no evidence of the anal intercourse. Such is not the case in hand. All the victims in the case in hand have deposed about their sodomisation by the appellant/accused.

16 The impugned Judgment and Order of conviction and resultant sentence is also assailed on the ground of the delay in lodging the FIR and for this purpose reliance is placed on the judgments in the matter of ***Gowrishankara Swamigalu (supra)*** and ***Pandurang Tukaram Ithape (supra)***. The delay in lodging the FIR alone cannot be used as a formula in doubting the prosecution case. It can at the most put the Court on its guard to search if any explanation has been offered for the delay. If prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on the count of such delay, then only delay would be fatal to the prosecution case. If there is proper explanation to the delay, then such delay by itself cannot be a ground for disbelieving and discarding the entire prosecution case. In the case in hand, the victims, who were from the age group of 12 to 14 years were at the mercy of the appellant/accused, who was running the Boarding House, where they were staying. The victims were far

away from their family. It was the P.W.No.1/male victim child, who mustered the courage to inform the incident to his father P.W.No.5 Ramhari. As seen from evidence of P.W.No.5 Ramhari, upon being informed by his son, he reached the Boarding House at Alandi at 6.00 p.m. of 27/01/2014. P.W.No.5 Ramhari has deposed about narration of his son i.e. the P.W.No.1/male victim child about sodomisation by the appellant/accused, so also his act of putting his penis in the mouth of the P.W.No.1/male victim child. Upon getting knowledge that similar incidents took place in respect of other inmates of the Boarding House i.e. P.W.Nos.2 and 3, P.W.No.5 Ramhari has chosen to contact their fathers telephonically. Material elicited from the cross-examination of P.W.No.5 Ramhari gives cogent and satisfactory explanation about the delay in lodging the FIR. The defence has elicited from the cross-examination of this witness that on 27/01/2014, he had altercations with the appellant/accused as the appellant/accused gave evasive answers. From cross-examination of P.W.No.5 Ramhari, it is further brought on record that on 28/01/2014, father of the P.W.No.2/male victim child came to the Boarding House and father of the P.W.No.3/male victim child came there on 30/01/2014. Thereafter, on 30/01/2014, the report came to be lodged against the appellant/accused by the P.W.No.1/male victim child. Thus, as seen from the evidence on record, the victims of lust of the appellant/accused being children residing far away from their family were not having courage and daring to inform

their sufferings. Ultimately, the P.W.No.1/male victim child had informed the incident to his father P.W.No.5 Ramhari on 27/01/2014. Thereafter, fathers of other victims were summoned. Father of the P.W.No.3/male victim child reached the Boarding House on 30/01/2014 and then the report came to be lodged. Thus, it cannot be said that there is inordinate delay in lodging the FIR, which is fatal in nature. It is a common knowledge and also a judicially noted fact that incidents like sodomy on children more so when the perpetrator of the crime happens to be the in-charge of the Boarding House involves honour of the families of the victims as well as the victims themselves and, therefore, there is reluctance on the part of the victims to report the matter or to disclose the incident of their sexual exploitation. Consequences of evidence soon following the narration of the P.W.No.1/male victim child and as described by the prosecution witnesses provides satisfactory explanation for the delay in lodging the FIR. Hence, no infirmity can be found in the prosecution case on the ground of alleged delay in lodging the FIR.

17 The version of the P.W.No.1/male victim child in respect of the incident in question is gaining corroboration from evidence of P.W.No.5 Ramhari, who had proved former statement made to him by his son i.e. the P.W.No.1/male victim child. This former statement was made by the P.W.No.1/male victim child to his father soon after the incident and as such, is relevant under Section 157 of the Evidence Act.

18 So far as defence version coming from the mouth of D.W.No.1 Rahul is concerned, the same is not inspiring the confidence. This witness, though inmate of the Boarding House, was not knowing about allegations made by the victim children against the appellant/accused. He has not spoken about any narration to him by the victim children about their unwillingness to stay in the Boarding House run by the Ashram. His evidence is not based on the facts, but whatever stated by him is by way of surmises and conjectures. Therefore, evidence of the defence witness is of no avail to the appellant/accused.

19 In the light of foregoing discussion, I find no infirmity in the findings of the learned trial Court that the appellant/accused had criminally intimidated the victims and had committed carnal intercourse against the order of nature on them. Similarly, the findings of the learned trial Court that the appellant/accused has committed aggravated penetrative sexual assault on the victims viz. P.W.Nos. 1 to 3. is also based on the evidence on record. The appellant/accused was holding a position of trust and authority over the victims, who were staying in the Boarding House run by him. He was managing the affairs of the Boarding House of the religious institution namely Sant Nivrutti Maharaj Ashram, where the victims were residing. However, the learned trial Court upon holding that the prosecution has proved the offence of aggravated penetrative sexual assault committed by the appellant/accused had proceeded on imposing sentences on

the appellant/accused for the offence punishable under Section 4 so also for the offence punishable under Section 6 of the POCSO Act. Both offences are regarding penetrative sexual assault. Offence defined by Section 5 of the POCSO Act is aggravated form of the offence punishable under Section 4 of the POCSO Act. Therefore, when the penetrative sexual assault committed by the appellant/accused was found to be the aggravated one, the learned trial Court ought not to have separately punished the appellant/accused for the offence punishable under Section 4 of the POCSO Act. Moreover, such course of action is also not permissible under Section 71 of the Indian Penal Code. The appeal deserves to be allowed to that extent partly. Hence, the Order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) Sentence of rigorous imprisonment for seven years so also direction to pay fine of Rs.2,000/- and in default to undergo rigorous imprisonment for six months for the offence punishable under Section 4 of the POCSO Act awarded to the appellant/accused is quashed and set aside.
- (iii) Rest of the impugned Judgment and Order of conviction and the resultant sentence is maintained.
- (iv) The Appeal is accordingly disposed of.

(A.M.BADAR J.)