

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

CRIMINAL APPEAL NO.722 OF 2016

Mahesh Sambhaji Chafle
Age: 21 years, Occu.: Agriculturist,
R/o. Pimpri, Tq. Kalamnuri,
Dist. Hingoli

... APPELLANT

VERSUS

The State of Maharashtra
Through Police Station Officer, Akheda
Balapur, Tq. Kalamnuri, Dist. Hingoli

... RESPONDENT

.....
Mr. Amay Sabnis (Appointed through Legal Aid), Advocate for appellant.
Mr. B. V. Virdhe, APP for respondent-State.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 05-03-2020

PRONOUNCED ON : 12-06-2020

JUDGMENT :

. Present appeal has been filed by the original accused challenging his conviction in Special (Child) Case No.6 of 2015 by learned Additional Sessions Judge/Special Judge, Hingoli dated 14-11-2016 under Protection of Children from Sexual Offences Act. The appellant-accused has been convicted for the offence punishable under Section 4 of Protection of Child

from Sexual Offences Act (hereinafter referred to as the “POCSO” Act) and has been sentenced to suffer rigorous imprisonment for seven years and shall pay a fine of Rs.35,000/- in default to suffer rigorous imprisonment for six months. Amount of Rs.25,000/-, out of the fine amount recovered, has been directed to be given to the child as compensation.

2. The prosecution had come with the case that the victim child was aged 9 years on 18-02-2015 and was residing with his parents, two sisters and one brother. He was taking education in 5th standard. The parents of the victim are agriculturist and labour. The victim had gone to school on 18-02-2015 and had returned around 4.00 p.m. Thereafter, he had gone to fetch water from the tube well near his house. He met neighbour Mahesh Sambhaji Chafle i.e. present appellant while returning back to house. Accused gave him currency note of Rs.10/- and asked the victim to bring tobacco packet (Tota) of Rs.5/- and change of Rs.5/-. Accused also told that the victim should keep Rs.2/- out of the said change and return Rs.3/- to himself. Accordingly, victim went to the grocery shop of one Sudam Dhande, purchased the tobacco packet and brought the change. He went to the house of the accused and gave it to accused and then accused asked him to keep Rs.2/- and accepted Rs.3/- from the victim. Thereafter, accused picked the victim and took him to the middle room of his house where there was a

wooden cot and mattress on the same. Thereafter, after removing clothes of himself as well as victim, he has committed unnatural intercourse with the victim. Victim went to his house, answered nature's call and after his mother arrived, he told the entire story to the mother. In the meantime, his father also arrived and then he had told the incident to his father. It is stated that though the Sarpanch was called, he had advised the father of the victim to wait and thereafter, when nothing happened, on the next day morning the victim and his father went to the police station and lodged report. The first information report has been lodged by the victim himself.

3. It is the further prosecution story that the victim was referred for his medical examination. After medical examination was conducted, his samples were taken. His clothes were seized by executing panchanama. Panchanama of the spot was carried out. Statements of the witnesses were recorded. Accused came to be arrested. Search of his house has been taken and panchanama has been drawn. After collecting the necessary documents, especially, the medical report of victim as well as that of the accused, the charge sheet was filed.

4. After the accused appeared before the learned Special Judge, charge has been framed at Exhibit-11 for the offence punishable under Section 377 of Indian Penal Code and Section 4 of the POCSO Act. The

contents of the charge were read over and explained to the accused in vernacular. He pleaded not guilty. Trial has been conducted. Prosecution has examined in all eleven witnesses.

5. After taking into consideration the evidence of the prosecution and hearing both sides, the learned Special Judge held the accused guilty of committing offence punishable under Section 4 of the POCSO Act. No separate sentence has been awarded for the offence punishable under Section 377 of Indian Penal Code and as aforesaid the sentence has been awarded. Hence, the present appeal.

6. Heard learned Advocate Mr. Amay Sabnis (Appointed through Legal Aid) for the appellant and learned APP Mr. B. V. Virdhe for respondent-State.

7. It has been vehemently submitted on behalf of the appellant that as per the prosecution story, especially, the FIR which has been lodged by the victim-boy, the incident had taken place around 4.00 p.m. on 18-02-2015. However, the FIR has been lodged on 19-02-2015. There is absolutely no explanation by the prosecution about the delay. When the informant said that he had immediately informed the incident to his parents, there was no hurdle for the parents to lodge report immediately on the same day itself.

P.W.1, who is the father of victim, has developed a reason by saying that he had called Sarpanch, but Sarpanch had advised him to wait. Sarpanch has been examined as P.W.5 - Dadarao Shinde, however, he has denied the said fact. Further, perusal of evidence of P.W.2 - child would show that on the same day police had arrived in his house and had seized shawl/bed-sheet from the house of the accused. Question, therefore, arises as to who had informed the fact or told the story to police. The victim, in his cross examination has stated that somebody had given phone call to police and police had come. The learned Special Judge has brushed aside this fact only by saying that since the victim is a child, he might have got some confusion and mistakenly he might have stated that the police had arrived on the same day. The prosecution papers would show that the said bed sheet was seized on 02-03-2015. Further, it can be seen that the prosecution, especially the investigating officer, has not acted swiftly and seriously while investigating the case. Though since beginning the victim was saying that he has been subjected to unnatural intercourse, yet, at the time of medical examination on 19-02-2015, his samples have not been taken. The samples have been taken on 22-03-2015 and thereafter, they were sent for checking. P.W.3 – carries has been examined to prove the transmission of the sample to the laboratory. Thereafter, P.W.4 – Sudam Dhande, the shopkeeper from whom the boy is stated to have purchased tobacco packet, P.W.5 - Dadarao Shinde

and P.W.6 - Govind Dhande panch to the spot panchanama have turned hostile and their cross examination taken on behalf of the prosecution has not yielded any positive result. Same is the case with P.W.7 Ganpat Gore, who is the panch to the discovery panchanama under Section 27 of the Indian Evidence Act. As per the prosecution story, the accused ha discovered his clothes in presence of this witness. P.W.8 - Gangasing Thakur is the panch to the seizure of the clothes of the accused. He has also turned hostile. In fact, the FIR was lodged on 19-02-2015 and the accused came to be arrested on 02-03-2015. There is absolutely no explanation in the evidence of the investigating officer as to why he had not arrested the accused immediately. Thus, it can be seen that the only witnesses who were in favour of the prosecution were the victim, P.W.1 - father of the victim, P.W.2 – victim and P.W.9 - the maternal uncle of the victim. The maternal uncle is stated to be present in the police station at the time when the victim had lodged the report. Major part of his evidence is hearsay and to whatever extent the prosecution intended to get corroboration to that cause also there are many contradictions and omissions in the testimony of these three witnesses. The evidence of P.W.10 - the medical officer Dr. Sambhaji Kadam is in favour of prosecution. However, if we consider his own observations that there was no sign of recent tears, no abrasion, contusion or any injury to the private part, would clarify that his ultimate conclusion is wrong. His ultimate conclusion

was “findings are consistent with entry of penis into anus”. When there were absolutely no signs how he had arrived at the said conclusion, is a question. He has deposed that when he examined the anal region, he found the tone of the sphincter was found to be hypotonic. After that there was discomfort or pain during examination or tenderness. He has also stated that thereafter he had examined the anus by speculum. He found no abrasion, no contusion, no laceration, no piles. Merely because the child was saying something that during examination he was having pain or discomfort, he could not have concluded that there was entry of penis into anus. Therefore, in fact, the medical evidence is not in favour of prosecution though the ultimate conclusion has been so drawn by the medical officer. The testimony of investigating officer P.W.11 would show that he has not done the investigation in proper manner. The neighbours of the accused have not been examined. Investigating officer voluntarily says that those persons were having no idea. The learned Special Judge had not considered the admissions given by P.W.1 - father of the victim regarding previous enmity. On the basis of those admissions inference could have been definitely drawn that there is a possibility of false implication of the accused. The child was tutored. The conduct of the child is also then required to be considered. For his age, he could not have been so calm even before the medical officer. The learned Advocate for the appellant therefore, prayed for acquittal of the

accused by submitting that the learned Special Judge has not appreciated the evidence properly. In the alternative, it was also stated that the appellant is in jail since 02-03-2015 and therefore, by this time he has already undergone imprisonment for five years. Therefore, he prayed for reduction of sentence to already undergone.

8. Per contra, learned APP supported the reasons given by the learned Special Judge while convicting the accused and further submitted that the previous enmity between the victim's family and the family of the accused would reveal that it was already settled before Tanta Mukti Samiti. Though PW.5 and PW.6 were related to that Samiti, they have not stated anything about the same. That civil dispute even if we accept because no documentary evidence has been produced by the accused, yet, was not of such a gravity that accused would be implicated in such a crime. The hostility of witnesses cannot give the advantage to the accused. He has won over those witnesses. PW.4 in clear terms says that he knows both i.e. victim and his father as well as the accused and therefore, he has intentionally not supported the prosecution and even refused to identify the child who resides in the neighbourhood. The medical examination was consistent with the ocular evidence. When there was no such circumstance which would allow us to draw an inference that the accused has been falsely implicated, then the

defence will have to be discarded. The prosecution had proved the offence of the accused beyond reasonable doubt and therefore, for such crime, no leniency need to be shown.

9. At the outset, the first and the foremost observation that is required to be made is that such offences are usually committed in isolation and therefore, there cannot be an eye witness. Therefore, even though the father of the victim as well as the maternal uncle are supporting the prosecution, the basic nature of their testimony is hear say. They were telling the same thing which they had heard from the victim. Their testimony is important from the point of view that when the victim had narrated the incident to them. Out of those witnesses, only the father of the victim came in picture immediately after the incident and just before the FIR could be lodged the maternal uncle got the knowledge about the incident. Therefore, it is required to be seen that even if we brush aside the testimony of maternal uncle, yet, whether the other evidence on record which is in favour of prosecution would prove the guilt of the accused beyond reasonable doubt.

10. The testimony of PW.2 - victim shows that though he is minor, yet, had sufficient understanding as he was 9 years of age and after verification of his understanding capacity, oath was administered to him. He has given all the details as per his FIR, however, he has stated that on the

same day of the incident, police had come and he had shown the house of the accused to police. Thereafter, police had seized shawl and bed sheet. Thereupon, even the Court has put question as to why police had come. He has answered that they had contacted with the police on phone. He has further stated that after the police had seized the shawl, thereafter, they went to sleep. There could not have been a mistake by police by not taking any report in writing from the victim or from his father at that moment itself before seizure of the shawl. Accused cannot take advantage of the said situation that has been told by the victim in his examination-in-chief for the simple reason that, in the cross examination it appears that the victim realised that he has committed some mistake and then he has answered that he had no knowledge as to who had called the police on phone and then to the specific question 'whether police enquired with you in the night when they came to your house', he has answered that police had not come to his house in the night time. He has further specifically stated that his statement was recorded by police in police station. Therefore, there appears to be some mistaken facts told by him in the examination-in-chief. But as aforesaid, taking into consideration his answers in the cross examination, the accused cannot be allowed to take advantage of the said mistaken facts.

11. As regards the alleged delay in lodging report is concerned,

unless it is shown by the accused that the said delay is fatal, it may not affect the merits of the case. In order to consider the enmity, it is to be noted that the father of the victim has admitted that there was some dispute between his family and the family of the accused on account of wall of their houses. However, if we consider the situation of the house of the accused from the house of the victim which has especially been brought on record in the cross examination of the victim itself that there is a lane between the house of the victim and the house of the accused, thus, there could not have been a common wall between those houses and therefore, it was necessary for the accused to bring on record as to what was exactly the nature of the dispute. Obtaining some vague admissions will not serve the purpose of the accused. Further, the victim's father had admitted that whenever such quarrel took place between their families, they have settled the dispute through Tanta Mukti Samiti of the village. Important point to be noted is that no question was asked as to when that dispute had arisen, when that meeting of the Tanta Mukti Samiti was held. Unless there would have been nexus between these two, accused cannot take advantage of alleged enmity. Further, when the dispute was already settled before the Samiti, there was no question of further enmity between them. It does not appear that, that incident of dispute regarding wall had taken place just earlier to lodging of the report. Even in his statement under Section 313 of Code of Criminal Procedure, the

accused has tried to say that there are civil disputes going on in respect of wall, passage and also agricultural land. No supporting document is produced by him. Therefore, mere mention of such statement will not allow us to infer that there is dispute between the two families and as a result of it, the accused might have been possibly implicated. Even if for the sake of arguments it is accepted that there is such civil dispute; yet, the gravity does not appear to be so that with the help of a small child, the father would level such kind of allegations against the accused. Under such circumstance, the said defence deserve to be discarded in entirety. If there is no such background of false implication, then, though there appears to be some delay, it cannot be said to be fatal to the prosecution.

12. Further fact that is required to be considered from the cross examination of the victim that his main story about asking him to bring Tobacco by the accused, taking him inside the house and thereafter, committing unnatural intercourse has not been shaken in the cross examination. Non examination of the neighbours from the vicinity of the house of accused is also not fatal for the simple reason that even as per the testimony of the victim, accused had gagged his mouth and there is nothing extracted in the cross examination by the accused that he had ever shouted for help. If such opportunity would not have been given, how the neighbours

were supposed to come to know as to what is going on in the house of the accused. One more aspect is required to be considered that, as per the victim-boy, accused had met him on road near the water-tap. Accused had then asked him to bring tobacco packet. Accused could have bought it himself, if he had gone half way towards shop. Further accused had returned to his house and then waited for victim-boy to come, would show that it was his pre-planned act. This fact has not been shaken in the cross of the victim-boy.

13. The testimony of the victim stood supported by medical examination. PW.10 - Dr. Sambhaji Kadam, though has stated that he had not found any recent tears, stains due to semen, blood, faecal matters around the anus or there was no injury or no mark of violence, yet, he has stated that when he had digitally examined the anus, he had found the tone of the sphincter to be hypotonic. Further, in the cross he has explained that there was no injury but other findings were there to come to the conclusion that the intercourse had happened. After he had digitally examined the patient, it was found that there was tenderness and that patient was feeling the pain at that time. Further, he has denied the suggestion that the hypotonic may be caused due to defecation. The cross examination of the medical officer would show that the conclusion drawn by him is not shattered, which says that "findings are consistent with entry of penis into anus". Thus, when the

medical evidence is supporting the victim and there is nothing in the cross examination of the victim to discard his evidence or brand it as unbelievable or untrustworthy, then these facts only were sufficient to come to the conclusion that the accused has committed the offence.

14. The hostility of the witnesses has not affected the prosecution story. It is to be noted that those hostile witnesses were from the same village and, therefore, due to pressure or to be on the safer side, they might have not supported the prosecution and avoided to talk against accused. Interestingly, PW.4 - Sudam Dhande, the shopkeeper, has even refused to identify the victim-child from his own village. The reason is obvious.

15. As aforesaid, there is corroboration between the oral evidence and the medical evidence. The testimony of the victim is trustworthy. Therefore, learned Special Court was justified in holding that the prosecution had proved the guilt of the accused beyond reasonable doubt and proceeded to convict him. Merely because a second view is possible, the Appellate Court cannot take such second view. Further, as regards the reduction of sentence is concerned, no reason has been shown why the sentence should be reduced. The offence has been committed, that too on a boy of 9 years old is a heinous crime and therefore, question of showing leniency does not arise.

16. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

SCM