

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL No. 111/2020.

Tukaram Ashruji Khandare,
Aged 67 years, Occupation -
Agriculturist, resident of Loni Gawali,
Taluq Mehkar,
District Buldhana. ... **APPELLANT.**

VERSUS

State of Maharashtra
through Police Station Officer,
Dongaon, District Buldhana,
Maharashtra. ... **RESPONDENT.**

Mr. R.V. Gahilot, Advocate for the Appellant.
Shri H.R. Dhumale, A.P.P. for the Respondent.

CORAM : VINAY JOSHI, J.

DATE OF RESERVING THE JUDGMENT : 14.10.2020
DATE OF PRONOUNCEMENT : 22.10.2020

JUDGMENT :

Heard learned Counsel appearing for the parties.

2. The appellant/accused aged 67 years, was convicted in

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Special (Child) Case No.98/2019 by judgment and order dated 19.12.2019, for the offence punishable under Sections 376 and 450 of the Indian Penal Code, Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “**the POCSO Act**” for short). The maximum punishment awarded is to suffer rigorous imprisonment for 10 years and total fine of Rs.25,000/-, with stipulation of default. The accused was acquitted from the charge of committing offence punishable under Section 377 of the Indian Penal Code. The State has not challenged acquittal of appellant on said count. The accused has challenged the aforesaid conviction in this appeal.

3. The prosecution case in brief is that the informant Dhondu was residing along with his family members, including his daughter / victim girl aged 8 years at village Loni Gawali, Taluq Mehkar, District Buldhana. As usual on 07.12.2015, the informant went on his duty, whilst his wife had gone for labour work. Two sons of the informant had been to their school, and the minor victim was alone at the house, as she was ill. Around 1 o'clock in the afternoon the informant returned to his house for lunch. He found

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that the house was locked from within, therefore, he peeped from the window and saw that appellant/accused Tukaram by lifting frock of the victim was moving his hand on her neck, cheek and chest. The informant shouted to open the door, on which the accused opened the door and hurriedly left the place. On asking, the victim disclosed that the accused moved his hand on her body, kissed her as well as put his finger in his anal part. On the following day, the informant went to the Dongaon Police Station and lodged report [Exh.19], regarding the occurrence.

4. Police registered crime vide C.R.No. 95/2015, and carried investigation. Panchnama of scene of offence was drawn, victim as well as accused were medically examined and on completion of investigation, final report came to be filed. The Special Judge framed charge under relevant provisions of the Indian Penal Code and of the POCSO Act. Since accused denied the guilt, the prosecution has examined in all 6 witnesses to prove the guilt. The Special Judge on appreciation of evidence held that the prosecution succeeded in proving the offence punishable under Sections 376 and 450 of the Indian Penal Code, Sections 4 and 6 of the POCSO Act,

and imposed the sentence as aforestated.

5. The learned Counsel appearing for the appellant/accused vehemently argued that the Special Judge erred in convicting the accused on the basis of inconsistent evidence. He would submit that the incident as narrated by the witnesses is improbable. There was every possibility of false implication on account of inimical terms. Particularly, he would submit that the trial Court has convicted the accused for the act of insertion of finger into vagina, which was not the prosecution case at all. He has also criticized the delay in lodgment of first information report and ultimately urged for acquittal.

6. Per contra, learned A.P.P. supported the judgment of Trial Court. It is argued that the evidence of minor victim is well corroborated by the evidence of informant, who is also eye witness to the incident. Medical evidence supports the prosecution case. The delay in lodgment of first information report has been properly explained and, therefore, he requested for confirmation of the sentence.

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7. The prosecution case in short is about rape and aggravated penetrative sexual assault by the accused on a minor victim aged 8 years. Though the prosecution has examined in all 6 witnesses, the evidence of P.W.1 minor victim and P.W.2 Dhondu Kamble [informant], who is also father of the victim, carries importance. The prosecution has also examined P.W.5 Dr. Sushma Helage, who has examined the victim on the point of rape and sexual assault.

8. Since the accused is convicted under the provisions of the POCSO Act, primarily one has to see whether the victim is a 'child' within the meaning of Section 2[d] of the POCSO Act. It is the prosecution case that the victim was barely 8 years of age at the time of occurrence. The victim girl has stated her date of birth as 21.07.2008, meaning thereby she was 8 years of age at the relevant time. Moreover, the prosecution has examined P.W.3 Dr. Sanjay Chavan, who has examined the victim on the point of her age. On clinical and radio-logical examination, he opined that the victim was 8 to 10 years of age. Neither there is cross examination on this point, nor the age of victim is disputed during the course of

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examination. Precisely, the prosecution evidence on the point of age of victim has gone unchallenged. Therefore, it is abundant clear that the victim girl was 8 years of age at the time of occurrence, meaning thereby she was a 'child', at the relevant time, within the meaning of Section 2[d] of the POCSO Act.

9. Always in case of rape or sexual assault, the evidence of victim assumes significance. The trial Court has recorded evidence of victim by following the procedure as laid down in Chapter VIII of the POCSO Act. It is her evidence that on 07.12.2015, her parents had gone out for work, whilst her brothers went to school. Due to illness, she was alone at the house. She has asked accused Tukaram, who was near by resident, to open the door. After opening the door, no sooner she entered into the house, accused followed her, pressed her neck, chest and inserted his finger in her anus. She deposed that her father gave a call and was looking from the window. The accused opened the door and left the place. She was cross examined at length, but, her evidence remained intact on the core issue. During cross examination, she has explained the occurrence that the accused rolled his hand on her chest, and inserted finger from front

side. True she admits that there was a dispute in between her father and accused, however, this sole admission without corroboration is of no consequence.

10. The prosecution has examined P.W.2 Dhondu, who is informant as well as father of the victim. His evidence fully corroborates the evidence of minor victim. He stated that on the date of occurrence, he returned to the house at 1 p.m. and as door was locked from within, he saw from the window. He noticed that the accused Tukaram was moving his hands on chest of the victim. On enquiry, the victim disclosed that the accused also inserted his finger in her private part. On the following day, he went to the police station and lodged a report. He has denied all the suggestions pointing that he had inimical terms with the accused. His evidence is direct to the extent of presence of the accused, and partially corroborates version of the victim to the extent that the accused has moved his hand on her chest.

11. Though effort was made to suggest that it is a case of false implication, however, there is no material to that effect. Both the witnesses have denied that two days prior to the occurrence

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there was quarrel between victim's mother and daughter of the accused. Some other usual suggestions were given to impress that due to Gram Panchayat elections there was dispute, however, they were denied. In absence of any cogent material, the defence of false implication cannot be accepted. It is a case of sexual assault where the chastity of victim, rather of entire house was at stake and therefore, case of false implication cannot be believed unless there is credible material.

12. The prosecution has examined P.W.5 – Dr. Sushma Helage, who has examined the victim girl on 09.12.2015. During medical examination she found abrasion over the chest, however, the injury was 4 to 5 days old and therefore, cannot be taken into aid. On genital examination, besides redness over labia majora on right side, there were no external injuries. Particularly she deposed that there were no injuries or redness over anal region of the victim. The learned counsel for the appellant/accused would submit that the medical evidence nowhere supports the case of insertion of finger into anal region. The said submission carries substance, since as per evidence of medical officer, there were no injuries at anal region.

During examination, the medical officer found redness at labia majora on right side, however, it was not the case of victim about insertion of finger in her vagina. Particularly it was prosecution case of insertion of finger in the anal region, and therefore, some injuries found on the other parts of the body would not support the prosecution case.

13. The victim in her evidence has specifically stated that the accused had inserted finger into her anal region. Admittedly as per evidence of P.W. 2 Dhondu, he had not seen the accused either putting finger in the anal region or vagina of the victim. It is his own contention that as per narration of victim, he is saying that the finger was inserted into private part. Pertinent to note that in FIR [Exh.19], the informant obviously after learning the things from the victim stated that the accused moved his hand at her chest, neck, cheek and inserted finger into her anal region. Therefore, it is necessary to see whether the evidence is sufficient to establish the prosecution case about insertion of finger in anal region. For said purpose injury at private part of the victim cannot be considered. Notably, the victim was barely 8 years of age. In the circumstances,

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had it been the fact that there was insertion or penetration of finger into anal region, then the medical examination would have shown traces on said part. However, the medical evidence nowhere supports in that regard. In the wake of such position, it is doubtful whether the accused had penetrated his finger into anal region of the victim. It is a settled law that if two views emerge from the situation, the view favourable to the accused would take precedence. On mere assumption or possibility, the accused cannot be convicted.

14. Apart from that there is convincing evidence to the extent that the accused has moved his hand from cheek, neck and chest of the minor victim. The evidence in this regard remained unshattered and intact. Apparently the evidence of victim and informant is sufficient to establish that the accused has touched to the breast of the child which amounts to 'sexual assault', as defined under Section 7 of the POCSO Act, which reads as below :-

“7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which

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involves physical contact without penetration is said to commit sexual assault.”

15. In so far as the intention of the accused behind touching the chest is concerned, in absence of any rebuttal material, the presumption under Section 30 of the POCSO Act would come into play. The statutory presumption of culpable mental status of the accused would apply in the case. Moreover, there is no explanation, nor can be any explanation for the accused about his act of touching breast of a minor vulnerable girl. Since the victim was aged 8 years, the act of accused of sexual assault amounts to ‘aggravated sexual assault’, within the meaning of Section 9[m] of the POCSO Act. All the sexual assaults on children below 12 years amount to aggravated form of sexual assault, which is the case herein.

16. In conclusion, since the prosecution failed to prove penetrative assault amounting to rape or penetrative sexual assault, the conviction under Section 376 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act would not sustain in the eyes of law. The act of accused of touching the breast of the victim with sexual intent amounts to aggravated form of sexual assault, which is

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punishable under Section 10 of the POCSO Act. It provides punishment of imprisonment for 7 years with a rider of minimum 5 years of imprisonment. Having regard to the age of the accused, which is near about 70 years, the imprisonment of 5 years would meet the ends of justice. From above discussion it is evident that the house tress pass was merely in order to commit an offence punishable with imprisonment, which is made punishable under Section 451 of the Indian Penal Code. The impugned judgment calls for interference to that extent only.

17. In this view of the matter, Criminal Appeal is partly allowed. The impugned judgment dated 19.12.2019, passed by the Special Judge, Mehkar, District Buldhana in Special (Child) Case No.98/2019, is modified to the extent that the conviction of accused for the offence punishable under Section 376 of the Indian Penal Code and Sections 4 and 6 of the POCSO Act, is hereby quashed and set aside. Instead, the accused is convicted for the offence punishable under Section 10 of the POCSO Act and is sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs.20,000/-, in default to suffer further rigorous imprisonment for

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one year.

18. Further instead of conviction under Section 450 of the Indian Penal Code, the appellant/accused is convicted for the offence punishable under Section 451 of the Indian Penal Code, and sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs.5000/-, in default to suffer further rigorous imprisonment for three months. Both the substantive sentence shall run concurrently. The appellant will be entitled to set off under Section 428 of the Code of Criminal Procedure.

19. The entire fine amount, if deposited by the appellant/accused, be paid to the victim towards compensation in terms of Section 357[1] of the Code of Criminal Procedure.

20. Muddemal property be dealt with in accordance with law.

JUDGE

Rgd.