

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 778/2019

Banti @ Sachin S/o Prataprao Gopal,
Aged about 28 years, Occ. Labour,
R/o. Juna Dhamangaon Railway,
Tq. Dhamangao Railway & Dist.
Amravati

.... APPLICANT

// VERSUS //

The State of Maharashtra,
through the Police Station Officer,
Dattapur, Dist. Amravati.

.... RESPONDENT

Shri P. R. Agrawal, Advocate for appellant.
Ms. M. H. Deshmukh, A.P.P for State/Respondent.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT ON : 14.10.2020
JUDGMENT PRONOUNCED ON : 19.10.2020

JUDGMENT

2. Heard.

3. The appellant/accused was tried in Special Case (POCSO) No. 227/2017 and convicted by the Special Judge for the offence punishable under Section 376(i) of the Indian Penal Code, Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and was sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 5000/-, in default of payment of fine, to suffer further rigorous imprisonment for 1 year. The said judgment of conviction and sentence has been challenged by accused in this appeal in terms of Section 374 of the Code of Criminal Procedure.

4. The prosecution case in short is that the victim girl aged 7 years was residing along with her parents and two sisters. accused was residing in the nearby cattle shed. The victim's mother was providing tiffin to her father-in-law who was also residing in the same cattle shed. The accused used to return empty tiffin at victim's house. On 02.10.2017 around 02.00 p.m., victim's mother had gone to the School to fetch her elder daughter. The victim was alone at her house.

5. At that time, accused came to victim's house and asked for a glass of water. The accused embraced victim, kissed her and inserted his finger into her private part. The victim baffled and hurriedly returned to kitchen under pretext of having water. The victim started shouting, hence accused hurriedly left the place. Victim girl came out of the house and waited for her mother who returned within five minutes. After seeing the mother, victim started weeping, on which her mother inquired. The victim disclosed the entire episode as happened. Then victim and her mother went to the cattle shed where accused was sleeping. On seeing accused, victim girl again started to weep. Thereafter victim went along with her parents to the Police Station where her mother lodged report (Exh. 12).

6. The Police carried usual investigation. Panchanama of the scene of offence was drawn. Victim was medically examined. Necessary statements were recorded. On completion of investigation, final report was filed. The accused denied charge and put the prosecution to the task of establishing levelled charges with requisite standard of proof. In order to establish the charged offences, the prosecution has examined in all eight witnesses. Prosecution witnesses consists of victim, her mother, neighbours, medical officer and the

Police persons. Birth Certificate of the victim was tendered on record. The explanation of accused on incriminating material was sought by the Trial Court. The defence of accused is of total denial and false implication. On appreciation of oral and documentary evidence, the Trial Court held that the prosecution succeeded in proving the offence of rape and penetrative sexual assault. However, the accused was acquitted from the charge of house tress-pass. The Trial Court convinced the accused and passed aforesaid mentioned punishment.

7. Heard Shri P. R. Agrawal, learned counsel for appellant/accused. He has criticized the impugned judgment from every possible angle. He made two fold submissions. Firstly that the evidence adduced by the prosecution is not worthy of credit. Secondly, there is no iota of evidence to establish penetrative sexual assault, but at the most it can be case of sexual assault.

8. Learned counsel Shri Agrawal submitted that the victim's mother was having rift with her father-in-law and therefore, he was staying separately in the cattle shed. The accused who was also staying in the cattle shed, was taking care of informant's father-in-law who shown inclination to transfer his immovable property to accused. It is

submitted that due to such inclination of old aged fellow, the informant was having grudge against the accused and therefore, he has been falsely implicated in the case. It is argued that the evidence of minor victim is unreliable because her house was adjacent to the house where the landlady was very much present in her adjacent room who could have heard the shout of victim, if any. It is argued that the medical evidence does not support to the evidence of victim. There are no marks of force or violence on the body of victim. He has specifically pointed out the history narrated by victim to medical officer wherein the history of fingering on private part has been stated. He would submit that though soon after alleged occurrence, accused was assaulted, the said fact was suppressed by prosecution. Besides that, the delay in lodgment of First Information Report has been criticized.

9. As against this, Ms. M. H. Deshmukh, learned Additional Public Prosecutor strongly supported the judgment of the Trial Court. She would submit that the evidence of minor victim is natural, real and creditworthy. The victim as well as her mother had denied all the adverse suggestions. The defence was not able to bring on record the inimical terms as alleged. It is also submitted that medical evidence is not must to establish the offence of rape or sexual assault. She would

submit that the First Information Report was lodged within couple of hours and ultimately, urged to uphold the judgment and order of conviction.

10. With the assistance of both learned counsel, the entire record was perused. Though the prosecution has examined in all eight witnesses, the evidence of minor victim assumes significance. Always in cases of rape evidence of eye witness is hardly available, nor it is expected, therefore the evidence of victim requires deeper scrutiny. It is settled position of law that victim's evidence alone, if inspires confidence, conviction can be based. The victim being minor, the Special Judge made assessment by putting certain preliminary questions. On satisfaction, he administered oath to the victim. On material aspect, it is her evidence that on the day of incident, it was birth anniversary of Mahatma Gandhi, hence being school holiday she was at home. Her father was gone for work whilst her elder sister had gone to the school to attend cultural programme. Her mother had gone to bring her elder sister from the school. At that time, accused entered into her house, asked for water and then by pulling her closer, kissed her repeatedly and inserted his finger into her private part. Somehow, she got released herself and started shouting, on which

accused ran away. Then she waited for her mother near gate who arrived within five minutes. Victim narrated the entire incident to her Mother. Both went to cattle shed to see accused where he was staying. After seeing accused, again she started weeping and thereafter in the evening, they went to the Police Station and lodged the report. The minor victim was subjected to a grilling cross-examination but she fared in said ordeal. She specifically denied all the suggestions suggesting inference that she was a tutored witness. She denied rest of the suggestions about non-happening of the occurrence. In short, her evidence was not cracked by way of cross-examination.

11. Then the prosecution has examined PW-2 – mother of victim. It is her evidence that on the day of occurrence in the afternoon, she went to the School to take her elder daughter. When she returned to the house, she saw that victim was weeping and was waiting for her near gate. On inquiry, the victim narrated the incident. Both of them went to cattle shed and saw accused on which victim again started weeping. The nearby people caught the accused and then all of them went to Police Station where she lodged the report. Several suggestion were given to the witness to establish that since her father-in-law was inclining to transfer his property to the accused, she had

grudge against him. However she has denied all such suggestions. Besides that rest of the cross-examination was of no importance. Precisely she denied the defence of the denial of incident and false implication.

12. The prosecution has examined PW-3 Jyoti who is nearby resident and PW-4 Pranali who was running grocery shop in the vicinity. Evidence of these two witnesses is to suggest that at the relevant time, they have seen vehicle of accused parked near the house of victim. It is not denied that the accused was residing in nearby cattle shed, meaning thereby he was acquainted fellow. In the situation, it was quite natural for victim to provide drinking water on asking. Though the landlady was staying just adjacent to the place of occurrence, that does not mean that she was expected to keep vigil on all the happenings beyond the wall. It requires to note that victim was minor girl barely 7 years of age, therefore there may not be possibility of raising a loud shout which could be heard in the neighbourhood. The reaction of victim of again started weeping after seeing the accused in cattle shed, suggest her mental status after experiencing horrifying event.

13. The defence pointed towards the admission of victim, that her elder sister used to attend School on bicycle and therefore informant's contention of going to school is untrue. However merely on that basis, the evidence of PW-2 - informant cannot be rejected. On the day of occurrence being holiday, victim's sister might have attended school on foot or by bicycle still her mother may go to fetch her. Though it is argued that the victim's father-in-law was desiring to transfer his property to accused, however there is no material to support said theory. There is no reason for the victim's parents to falsely implicate a person residing in the neighborhood.

14. On the point of age of the victim girl, the prosecution has proved her birth certificate (Exh. 11) issued by the Local Body in terms of the Registration of Birth and Death Act, 1969. The said birth certificate issued by the competent authority carries probative value. As per certificate, the birth date of victim is 06.08.2010, meaning thereby on the date of incident, she was barely 7 years of age. The accused nowhere suggested that victim was either above 18 years age or at least above 12 years of age. It is not the case that there was age difference of barely one or two years to suspect her date of birth. Having regard to the birth certificate issued by the Municipal Council,

it is abundant clear that victim was a “child” within the meaning of Section 2(d) of the POCSO Act.

15. Coming to the medical evidence, the prosecution has examined PW-7 – Dr. Ashish Salandra who has examined the victim. On 02.10.2017 itself the minor victim was brought for examination along with her mother. He has noted the history as narrated by victim girl. On local examination of genital, he found that there was no sign of any sexual transmitted inspection. On examination of labia majora and labia minora, streaks of majora and minora are in closed condition showing no marks of injury or assault. Clitoris were in normal condition. Fourchette was patent. Hymen was intact. Perineal tear not present. Precisely, he did not found any sort of injury or traces of whatsoever nature.

16. In this background, the defence submission requires consideration. Learned counsel Shri Agrawal made alternate submission that at the most, it is the case of sexual assault i.e mere case of fingering by accused on the private part of victim. True for establishing penetration, as a rule there is no requirement to any injury. However, always it depends upon the facts and circumstances of each case. Particularly, the victim was minor girl aged 7 years and therefore,

if there happened to be forceable insertion of finger, then on immediate examination, there would have been traces to that effect in the form of injury or redness. However absolutely there is no evidence to that effect. Pertinent to note that on 02.10.2017 in the afternoon, the incident occurred whilst on the very day in the late evening, victim was medically examined. The immediate medical examination bears nexus since if victim was medically examined after considerable gap then there may not be traces of the occurrence. However, in this case, though within couple of hours, minor victim was medically examined, there were no traces. Having regard to the very tender age of victim, in absence of any sort of marks of injury or redness, it is difficult to hold that there was insertion of finger into vagina of minor victim.

17. One more aspect needs consideration on this point. As per evidence of medical officer, he himself has taken down history as narrated by the minor victim. History of fingering i.e. finger touch was mentioned in Column No. 10 of the medical certificate (Exh. 33). Moreover, Doctor has specifically deposed that the victim narrated the history of fingering i.e. finger touch on vaginal and breast region. The said history narrated by victim is consistent to infer that there was no penetration of figure at all. In the wake of such position, the act of

mere fingering was probable rather than the case of penetration by finger. It is settled law that if two views emerge from the situation, the view favourable to the accused would take precedence. On mere assumption or a possibility, the accused cannot be convicted. Thus, the strong possibility emerges of mere fingering by accused to the private part and chest of the victim girl. In view of said probable inference, the charge of rape as well as penetrative assault would fail. However, the act of fingering by accused would certainly fall within the term of “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 involves physical contact without penetration is said to commit sexual assault.”

18. So far as the intention of accused behind touching to the vagina is concerned, in absence of any rebutting material, presumption under Section 30 of the POCSO Act, would come into play. The statutory presumption of culpable mental state of accused would apply in the case. Moreover, there is no explanation nor can be any explanation for accused about his act of touching vagina of minor girl

with finger. Since the victim was aged 7 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 child below 12 years amounts to the aggravated form of sexual assault which is the case herein.

19. In conclusion, since the prosecution failed to prove penetrative sexual assault. The conviction of accused under Section 376(i) of the Indian Penal Code is not sustainable in the eyes of law, The Trial Court erred in convicting the accused for the offence punishable under Section 6 of the POCSO Act. The act of accused amounts to aggravated form of sexual assault punishable under Section 10 of the POCSO Act. Section 10 of the POCSO Act provides punishment of imprisonment upto 7 years with rider of minimum 5 years imprisonment. Having regard to the poor financial condition and young age of accused, 5 years imprisonment would meet the ends of justice. The impugned judgment calls for interference to that extent only.

20. In view of the matter the impugned judgment dated 19.11.2019 passed in Special Case (POCSO) No. 227/2017 is set aside and modified. Instead of offence punishable under Section 6 of the

POCSO Act, the accused is convicted for the offence punishable under Section 10 of the POCSO Act, and sentence to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 5000/- in default to suffer further rigorous imprisonment for 1 year. The conviction under Section 376(i) of the Indian Penal Code is hereby set aside. The accused is entitled for set off under Section 428 of the Indian Penal Code.

21. Appeal stands partly allowed in above terms and disposed of accordingly.

JUDGE

Gohane.