

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 992 OF 2021**

Sachin Rampriti Chaudhary
Aged about 30 years,
Prior Occupation : Labourer
presently incarcerated at
Nashik Central Jail
previously residing at
Under Construction Building
of Mittal Constructions, 5th floor
in front of Mittal College,
Malad (West), Mumbai 400 064.

..Appellant

v/s.

1. The State of Maharashtra
at the instance of
Malad Police Station

2. Ashok Ratan Shirsat,
Aged 52 years,
res. Of Balaji Ashirwad Bldg.
5th floor, Opposite Mittal College
Malad (West), Mumbai.

..Respondent/s

Mr. Aditya Mehta for the Appellant.
Mr. P.H.Gaikwad, APP for the Respondent-State.
Ms. Megha Bajoria, Advocate appointed for the Respondent No.2.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 8th DECEMBER, 2021.**

ORAL JUDGMENT.

1. With consent, the Appeal is heard finally at the stage of admission.

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2. This Appeal is directed against the judgment and order dated 27.9.2019 in Special Case No.188 of 2015, Borivali Division, Dindoshi, Mumbai.

3. By the impugned judgment the learned Special Judge (POCSO) has held the Appellant (hereinafter referred to as the Accused.) guilty of the offence under Section 18 r/w. 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and has sentenced him to undergo rigorous imprisonment for a term of One and half of the imprisonment for the life and fine of Rs.5000/- i.d. to undergo simple imprisonment for one month.

4. PW1, the father of the victim was working at a construction site at Balaji Ashirwad Building, Motapada, Malad (West). He was living with his family in a room on the 5th floor of the building under construction. The accused was working as a Supervisor at the said construction site.

5. On 26.8.2014 at about 10.00 a.m. he had sent his minor

daughter (PW2) to bring drinking water from his house. Since she did not return, the Complainant went to the 5th floor. He pushed the door open and saw his daughter lying on the floor. Her salwar was below her knees. The accused had pressed the mouth of the victim with his hands and he was sitting in between her legs with his pant below his knees. The accused fled away from the spot on seeing PW1. PW1 therefore went to Malad Police Station and lodged the FIR (Exh.16).

6. PW8- PSI Rahul Kumbhar, Investigating Officer, Malad Police Station registered Crime No. 413 of 2015 for offences under Section 376(2)(i) of IPC and Section 4, 8, 12 of POCSO and referred the victim for medical examination. He seized the clothes of the victim, conducted scene of offence panchanama, arrested the accused and sent him for medical examination. PW10 Raghunath Dalvi, took over further investigation. He forwarded the clothes and the exhibits collected in the course of the investigation to CSFL. He requested the Metropolitan Magistrate to record the statement of victim under Section 164 of Cr.P.C. and handed over further investigation to PW 11 PSI Vanmali, who

filed the chargesheet against the accused for offences under Section 376(2)(i) of IPC and Section 4, 8, and 12 of POCSO Act.

7. Charge was framed and explained to the accused. He pleaded not guilty and claimed to be tried. The prosecution, in support of its case examined 12 witnesses. Statement of the accused was recorded under Section 313 of Cr.P.C. The defence of the accused was of total denial.

8. Upon considering the evidence on record, the learned Judge held that the victim was below 18 years of age and a 'child' within the meaning of Section 2(d) of POCSO Act. The learned Judge has further observed that the prosecution has failed to establish that the accused had subjected the victim to penetrative sexual assault. The learned Judge observed that the evidence on record proves that the accused had attempted to commit rape/ sexual penetrative assault and hence held the accused guilty of offence under Section 4 r/w. Section 18 of the POCSO Act and sentenced him as above. Being aggrieved by the judgment, the accused has filed this Appeal under Section 374 of Cr.P.C.

9. The short point falling for consideration is whether the prosecution has established beyond reasonable doubt that the accused had attempted to commit rape or penetrative sexual assault on the victim, a child within the meaning of Section 2(d) of the POCSO Act.

10. The case of the prosecution the victim (PW2) was a child below 18 years of age. PW1, the father of the victim has stated her date of birth as 14.02.2000. PW7-, Principal of Savitribai Phule Vidyalaya, has deposed that as per the school records the date of birth of the victim is 14.02.2000. He has produced School Register at Exhibit 38 and School Leaving Certificate at Exhibit 39, wherein the date of birth of the victim is recorded as 14.02.2020. There is no serious challenge to these documents. Hence, relying upon these documents it can be safely held that the victim was below 18 years of age and a child within the meaning of Section 2(d) of the POCSO Act.

11. PW1, Complainant has deposed that he was working at a

construction site and living in a room on the 5th floor of the building under construction. On 26.8.2014 he had sent the victim to get water. Since she did not return, he went to the room. He pushed the door and found that the victim was lying on the floor with her salwar below her knees. The accused was sitting between her legs with his pants and under garments were below his knees. The accused had pressed her mouth with his hands. PW1 has deposed that the accused fled away from the scene on seeing him. He therefore lodged the FIR at Exhibit 16.

12. PW2- Victim has deposed that on the relevant date when she had gone to the room on the 5th floor of the building to get water for her father, the accused entered the room. He removed his pants as well as her salwar and when he was about to insert his penis in her vagina, her father entered the room and that the accused ran away on seeing him.

13. PW2 has stated that she had gone to the police station with her father on 26.8.2015. One lady constable had enquired with her about the incident for almost an hour. She has stated that

the said lady police constable did not record her statement, and that the same was recorded by a male constable. She has stated in her cross examination that she had visited the police station along with her father again on 27th, 28th and 29th August, 2015. She has deposed that though the police had called them at the police station on these three dates, the police did not inquire with her or with her father anything about the incident.

14. Though the victim (PW2) claims that her statement was recorded under Section 161 of Cr.P.C., the same does not form part of the charge sheet. It is true that Section 161 does not mandate the police to record the statements made by all the witnesses during the investigation and failure to record the statement in writing does not preclude the prosecution from examining any such witness. However, if the police officer exercises discretion to reduce the statement into writing and the prosecution proposes to examine the witness, in terms of Section 173(5) and 207 of Cr.P.C., the accused is entitled to the copy of the statement, unless the police officer exercises the discretion to withhold any part of the statement in exercise of powers under Section 173(6) of Cr.P.C.

15. It need not be emphasized that non-compliance of the mandatory provisions under Section 173(5) and 207 can affect the right of the accused to discredit the witness by bringing on record the contradictions and omissions, if any, between the evidence before the Court and the statement under Section 161 Cr.PC. In other words, withholding or suppressing the statements can affect the right of the accused to impeach the credibility of the witness and thus impairs the right of the accused to fair trial.

16. PW8 Rahul Tanaji Kumbhar PSI, attached to Kurar Police Station has admitted that he had instructed one lady police constable to record her statement. He has not verified whether the statement of the victim was in fact recorded by the lady police. He has not assigned any reasons for not annexing the said statement to the chargesheet. It is also to be noted that the request to record the statement of the victim under Section 164 of Cr.PC. was made only on 19.9.2015. The evidence of the victim indicates that she was very much available in Mumbai for over two months after the incident. The prosecution has not assigned any

reasons for the delay in recording the statement of the victim immediately after the incident. The investigation in a serious case has been conducted in a most casual manner.

17. Be that as it may, though the accused was charged for committing rape/ penetrative sexual assault, the evidence of the victim and her father does not indicate that the accused had committed any such act as contemplated under Section 375 IPC or Section 3 of the POCSO Act. Taking note of this, the learned Judge has acquitted the accused of offences punishable under Section 376 of IPC and Section 4 of the POCSO Act. The accused has been held guilty of attempting to commit rape. In this regard it will be relevant to refer to the decision of the Apex Court in ***Aman Kumar and Another vs. State of Haryana (2004) 4 SCC 379*** wherein the Apex Court has held that in order to find an accused guilty of an attempt to commit rape, has held that:-

“ 8. The plea relating to applicability of Section 376 r/w. Section 511 of IPC needs careful consideration. In every crime, there is first intention to commit, secondly preparation to commit it,

thirdly attempt to commit it. If the third stage, that is attempt is successful, than the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person, attempting the act. ...

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11. In order to find an accused guilty of an attempt with intent to commit the rape, Court has to be satisfied that the accused when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion, that the conduct of the accused was indicative of a determination to gratify his passion at all events, and inspite of all resistance, material must exist. Surrounding circumstances many times throw beacon light on that aspect. ”

18. In a recent decision, in ***State of Madhya Pradesh vs.***

Mahendra @ Golu 2021 SCC OnLine SC 965, the Apex Court has held that :

“ 12. There is visible distinction between ‘preparation’ and ‘attempt’ to commit an offence, and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage of ‘preparation’ consists of deliberation, devising or arranging the means of measures which would be necessary for commission of the offence. Whereas an ‘attempt’ to commit an offence starts immediately after the completion of preparation. ‘Attempt’ is the execution of mens rea after preparation. ‘Attempt’ starts where preparation comes to an end, though it falls short of actual commission of the crime.”

19. In the instant case, the evidence PW1 indicates that he had seen the victim lying on the floor with her salwar below her knees and that the accused was sitting in between her legs with his pant and underwear below his knees. Similarly, PW2 has deposed that

the accused had removed her salwar as well his pant and had attempted to insert his penis in her vagina. These witnesses have stated that the accused had fled away on seeing PW1.

20. It is pertinent to note that the evidence of these witnesses that the accused was unclothed and was attempting to commit rape, is not consistent with the statement made in the FIR / statement under Section 164 of Cr.P.C. It is to be noted that in the FIR at Exhibit 16, PW1 had not stated that the under pants of the accused were below his knees and that the accused had fled away from the scene on seeing him. Similarly, PW2 had not stated in her statement under Section 164 that the accused had removed his pants and was trying to insert his penis in her vagina, and that the accused had run away on seeing her father. The material omissions and obvious improvement in their evidence creates a dent on the prosecution version of 'attempt to rape.'

21. As stated earlier, in order to prove an offence of attempt to commit rape, the prosecution has to establish that the accused had gone beyond the stage of preparation. The conduct of the accused in making the victim lie on the floor, removing her salwar and

sitting in between her legs without removing his pant or underwear and /or doing any further act, would not constitute an offence of attempt to commit rape to attract culpability under Section 4 r/w. 18 of the POCSO Act. Hence, conviction of the accused under Section 4 r/w. 18 of the POCSO Act cannot be sustained. The act of the accused of pulling down the salwar of the victim and sitting in between her legs would at the most constitute an offence of sexual assault within the meaning of Section 7 of the POCSO Act, which is punishable with maximum punishment of five years. The Appellant is already in custody since last over 6 years and hence even if he is held guilty of the offence under Section 7 of the POCSO Act, he cannot be detained any further.

22. Hence the conviction of the accused under Section 4 r/w. 18 of the POCSO Act is set aside. Since the accused has already undergone imprisonment of more than six years, which is more than the maximum sentence prescribed for offence under Section 7 of the POCSO Act, the accused is ordered to be released forthwith, if not required in any other case.

23. The appeal is allowed to the extent indicated above.

20 The High Court Legal Aid Committee to pay the fees as per Rules to Ms. Megha Bajoria, learned appointed Advocate, who has espoused the cause of the Respondent No.2.

(ANUJA PRABHUDESSAI, J.)