

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1503 OF 2018

Laxman Macchindra Gidde	]	
R/at Gidde Vasti, Tadvale,	]	
Taluka-Atpadi, District-Sangli	]	
At presently lodged at	]	
Sangli District Prison, Sangli	]	..Appellant
Vs.		
The State of Maharashtra	]	
Through PI Atpadi Police Station	]	
Taluka-Atpadi, District-Sangli.	]	..Respondent

Mr.Amit A. Mane a/w Mr.Kirankumar Phakade for the Appellant.
Mr.S.H. Yadav, APP, for the Respondent-State.

CORAM : C.V. BHADANG, J.

DATE : 24 NOVEMBER 2021

JUDGMENT :

. By this Appeal, the Appellant is challenging the judgment and order dated 4 December 2017 passed by the learned Special Judge at Sangli in Special Case (POCSO) No.46 of 2016. By the impugned judgment the Appellant-Accused has been convicted for the offence punishable under Section 377 of Indian Penal Code ('IPC' for short) and Section 6 of the Protection of Children from Sexual Offence Act, 2012 ('POCSO' for short). The Appellant has been sentenced to suffer rigorous imprisonment for 10 years with

fine, under Section 6 of the POCSO Act. No separate sentence has been awarded under Section 377 of IPC. The Appellant however, has been acquitted from the offence punishable under Section 342 of IPC.

2. The prosecution case may be briefly stated thus :-

That the complainant Balasaheb Shivaji Gidde (PW-1) has two sons. In the year 2016 the younger son who is the victim in this case was six years of age and was studying in a Kinder Garten. The victim is examined as PW-2. It is the prosecution case that on 1 August 2016 as both the sons of the complainant were unwell they were taken to Dr.Santosh Patil at Atpadi at about 10 a.m. The complainant returned along with his two sons at 2.00 p.m. and left the two children with their grandmother. The complainant and his wife went to their agricultural land for bringing fodder. The specific prosecution case is that the victim PW-2 followed the complainant. However, the complainant was not aware of the same. It is claimed that the Appellant who is residing near by, called the victim in his house locked the door from inside. The Appellant is alleged to have carnal intercourse with the victim, against the order of nature. Thereafter the Appellant sent the victim to his house.

3. The complainant and his wife returned to their house when the victim informed them about the incident where upon a

complaint came to be lodged with Atpadi Police Station. During the course of the investigation the Appellant/Accused came to be arrested and he was referred for medical examination. The victim was also got medically examined. The investigating officer seized articles namely the clothes of the victim as well as the Appellant and one coconut oil cans which were sent for chemical analysis. The statement of the witnesses came to be recorded and after completion of the investigation charge-sheet is filed.

4. The learned Special Court framed charge for the offence under Section 377 and 342 of IPC and Section 4, 5(m) and 6 of the POCSO Act. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant is one of total denial and false implication on account of a right of way, and drawal of well water, between the Appellant and the Complainant

5. The prosecution examined in all seven witnesses and produced the record of the investigation. The Appellant did not lead any evidence in defence.

6. The learned Special Court has found the Appellant guilty for the offence punishable under Section 377 of the IPC and Section 6 of the POCSO Act. Hence this Appeal.

7. I have heard the learned counsel for the Appellant and the learned Additional Public Prosecutor. With the assistance of the learned counsel for the parties, I have gone through the record.

8. It is submitted by the learned counsel for the Appellant that the prosecution has failed to establish the age of the victim. It is submitted that the prosecution having failed to establish that the victim was a 'child', within the meaning of the said Act, the conviction under Section 6 of the POCSO Act cannot be sustained. He submitted that in the circumstances, presumption under Section 29 of POCSO Act, can not be drawn.

9. The learned counsel has taken me through the evidence of the (PW-1) complainant and the victim (PW-2) in order to submit that no where the date of birth of the Appellant has been referred to. It is submitted that the birth certificate of Gram Panchayat Talvade, which is produced at Exhibit-20 is also not formally proved by examining any witness. It is pointed out that none of the prosecution witness has referred to the said certificate Exhibit-20. The learned counsel has pointed out that although the birth is shown to be registered on 30 December 2010, the certificate is shown to be issued prior there to on 31 January 2010 which is even prior to the date of the birth which is 28 December 2010. It is submitted that the prosecution case about the specific date of birth

of PW-2 has also not been put to the Appellant in his statement under Section 313 of Cr.P.C. and therefore the same cannot be used against him.

10. It is submitted that according to the complainant the victim and his elder brother were left in the company of the grand mother when the complainant and his wife went to their agricultural land. It is submitted that however, grand mother has not been examined as witness. It is submitted that, it is improbable that the victim would follow the complainant and his wife and still the complainant would be unaware of the same. It is submitted that the house of the complainant and that of the Appellant is shown to be situated in the heart of the village, in thick locality and it is improbable that the Appellant would call the victim in his house in broad day light and would sexually exploit him. It is submitted that the oil which is said to be found on the clothes of the victim and the under garments of the Appellant, is an article of common use, found in every household and there is nothing incriminating about the recovery of the said oil from the house of the Appellant.

11. It is submitted that even this aspect about finding of the oil on the clothes has not been put to the Appellant in his statement under Section 313 of Cr.P.C. It is submitted that there is no evidence to show that there were semen stains found on the

undergarments of the Appellant. It is submitted that thus the Special Court entirely misread the evidence which would be apparent from the statement under Section 313 of Cr.P.C. in which a question is put about the finding of semen vide question No.48.

12. It is pointed out that the bed sheet on the bed where the alleged incident had taken place has not been recovered. He therefore, submitted that the prosecution has failed to establish the incident beyond reasonable doubt and the Appellant has probablized the defence of false implication on account of a dispute as to the right of way and the well water between the Appellant and the Complainant (P.W.-1).

13. The learned counsel for the Appellant has made an alternate submission, for modification of the conviction to the offence punishable under Section 8 of the said Act. It is submitted that there is no evidence to show that there was any penetration and therefore in the submission of the learned counsel for the applicant there was no penetrative sexual assault or an aggravated penetrative sexual assault which is punishable under Section 6 of the said Act. For this purpose the learned counsel has referred to the evidence of the complainant and the Medical Officer PW-6 Uttam Namdeo Padalkar At Exhibit-42.

14. It is submitted that the Appellant is in custody since 1 August 2016 and has completed more than 5 years of the imprisonment which is the maximum punishment provided under Section 8. He submitted that thus the Appellant be released on the period already undergone. On behalf of the Appellant reliance is placed on the decision of Supreme Court in *Asraf Ali V/s. State of Assam*¹ on the point of effect of the incriminating evidence, not being put to the Appellant, in statement under Section 313 of Cr.P.C.

15. Further reliance is placed on the decision of this Court in *Ravi Ananadrao Gorpude V/s. State of Maharashtra*², in order to submit that the provisions of the Act are stringent in nature, and the degree of proof required is also higher and in the absence of the prosecution succeeding to establish that the victim was a 'child', the conviction under the POCSO Act cannot sustained.

16. The learned Additional Public Prosecutor has supported the impugned judgment. It is submitted that the evidence of PW-1 and PW-2 is consistent to show that the PW-2 was sexually abused by the Appellant. It is submitted that the medical evidence also supports a case of a sexual assault which is further corroborated by the finding of the oil on the clothes of PW-2 and the undergarments

1 (2008)-16-SCC-328

2 2017 ALL MR (Cri.) 1509

of the Appellant. It is submitted that PW-1 has stated that the victim was six years of age on the date of the incident and was studying in Kinder Garten. The learned Additional Public Prosecutor has then referred to the question No.3 of the statement under Section 313 of Cr.P.C. in which the fact that the victim was studying in Kinder Garten was put to the Appellant which he was admitted. He therefore, submitted that the prosecution evidence in the form of the birth certificate Exhibit-20 and the statement of the Appellant is sufficient to establish that the victim was a 'child'. It is submitted that the victim was way under the statutory age of 18 years provided under Section 2(d) of the POCSO Act. It is submitted that the defence of false implication on account of a certain dispute between the Appellant and the Complainant is far fetched and remote and cannot be accepted. It is submitted that the no plausible reason has been shown, for false implication of the Appellant. It is submitted that the medical evidence would show that there was a contusion, noticed by PW-6, on examination of PW-2 which corroborates the nature of the act attributed to the Appellant. He therefore, submitted that the appeal be dismissed.

17. I have given my anxious consideration to the rival circumstances and the submissions made. There is no manner of doubt that the provisions of the said Act are stringent in nature and invite strict punishment. It is well settled that in such circumstances,

the standard of proof would also be higher and stricter as held by this Court in case of *Ravi Ananarao Gulpude (Supra)*.

18. The first question is whether the victim PW-2 is shown to be a child. Section 2(d) of the Act defines a “child” to mean a person who is below 18 years of age. According to PW-1 the victim was aged 6 years and was studying in the Kinder Garten. In support of the same the prosecution, has produced the certificate issued by the village panchayat-Talvade at Exhibit-20 which shows that the date of birth of victim as 28 December 2010 and thus on the date of incident i.e. on 1 August 2016 the victim would be a little less than 6 years of age. Although a discrepancies is sought to be pointed out in the birth certificate, in all probability the date of issue appears to be an error arising out of accidental slip or omission. In any event none of the prosecution witnesses have been cross-examined on any such discrepancy. This is not a case where the victim is on the verge of attaining 18 years of the age. There is a significant difference between requirement of a person being 18 years of the age to be a child and the age of the victim in this case which is stated to be six years. Thus, there is no possibility of any marginal error in ascertaining the age. It is true that the Special Judge would have done well to frame a specific question on the age/date of birth of PW-2 which can then be put to the Appellant under Section 313 of Cr.P.C. which is not done in this case. However, by virtue of

question No.3 the Appellant was asked that the victim in the year 2014 was studying in a Kinder Garten which he has admitted to be correct. It is well settled that the answer given by the Accused on a particular aspect can be taken into consideration with positive prosecution evidence on a particular point. Considering the overall evidence and the submission of the learned counsel for the Appellant, in my considered view, no exception can be taken to the fact that the victim was a 'child' within the meaning of the said Act.

19. It is necessary to note that under Sub Section 2 of Section 34 it is for the Special Court to decide whether a person is a child. Sub Section 3 of Section 34 provides that no order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub Section (2) was not the correct age of that person. Thus it is not possible to accept the contention of the Appellant on the issue of the age of the victim (PW-2).

20. This takes me to the material evidence as to the incident, PW-2 was acquainted with the Appellant and has referred to him as "Laxman Kaka". PW-2 has described the incident in material particulars which is evident from his evidence.

21. PW-2 was cross-examined on the point of his school hours. He stated that his school time was 8.30 a.m. to 12.00 noon. However, on the date of the incident PW-2 has not attended the school. He denied that the Appellant was away in his agricultural land. PW-2 stated that the Appellant was very much present in the house. The said incident as informed to PW-1 has been deposed by PW-1 also. In my considered view, the learned APP is right that the defence about false implication on account of the dispute as to right of way or as to well water is too remote and farfetched in this case to be accepted. In this case, except bare suggestion, there is nothing on record to show that there was any such dispute between the Appellant and the Complainant. It was not disputed during the course of the argument that there is no exchange of any notices or any litigation between the Appellant and the Complainant on the point of any such dispute. Thus in my considered view the incident as such stated by PW-2 stands established. The question is whether the Act of the Appellant would constitute a 'penetrative sexual assault' and for the matter of that an 'aggravated penetrative sexual assault' or a mere 'sexual assault' as defined under Section 7 of the Act which is punishable under Section 8 of the said Act. A perusal of Section 3 of Act would make it clear that a penetrative sexual assault would require penetration, insertion, manipulation of the part of the body of the child as referred to in Section 3(a)(b) and (c). Even the manipulation referred to in clause (c) presupposes that

such manipulation is to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person. Section 3(d) requires application of mouth to the parts of the body of the child as referred to in the said section. It is not the prosecution case that the Appellant had applied his mouth.

22. Section 7 defines 'sexual assault' as under:-

“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.”

The prosecution evidence has to be considered and appreciated in the context of the specific provisions of the Section 3 and Section 7 of the said Act. A careful perusal of the evidence of PW-1 and PW-2 shows that there is no evidence of penetration as such.

23. The Investigating officer had made a requisition (Exhibit-43) to the Medical Officer for examination of PW-2 raising specific queries. The Query No.2 was specifically whether there was penetration. The evidence of PW-6 would indicate that the medical

history given was about Appellant having taken the victim on the bed and having 'tried to insert penis into anus'.

24. He has further stated that he had found a contusion of 1 cm x 1 cm at 12 o'clock position on the perennial region which was red in colour. The injury was simple in nature. PW-6 has stated that his clinical finding were suggestive of sexual assault in the form of contusion. He has reserved his final opinion till the receipt of the FSL report. He has accordingly issued a report Exhibit-44, after the receipt of the C.A. reports PW-6 gave his final opinion about their being a sexual assault in the form of the contusion. Thus the same opinion of clinical examination was maintained even after the receipt of the CA report.

25. It is necessary to note that in the face of a specific query by the Investigating Officer, vide requisition Exhibit-43, the Medical Officer has only opined about their being a 'sexual assault' and not a 'penetrative sexual assault'.

26. The learned counsel for the Appellant also rightly pointed out that even in the statement under section 313 of Cr.P.C., the Special Court vide question No.46 has framed a question about an 'attempt' to establish sexual relation with the victim and not about any 'penetrative sexual assault'.

27. It is also necessary to note that although the Special Court has framed a question about finding of the semen, the CA report is silent about the same and quite to the contrary has only found presence of oil on Exhibit-2 (underwear of the Appellant) and Exhibit-3 (half pant of the victim). Thus looked from any angle, in my considered view, the prosecution has failed to establish that the Act would constitute a 'penetrative sexual assault', under Section 3 consequently the act cannot fall under Section 5 which is an 'aggravated penetrative sexual assault' and therefore punishment under Section 6 of the said act cannot be sustained. In my considered view, the Appellant can be found guilty only of sexual assault under Section 7 of the Act which is punishable under Section 8 with a minimum sentence of 3 years, which may extend to maximum of 5 years with fine. The Appellant is stated to be in custody from August 2016 and has completed more than 5 years of imprisonment which is the maximum sentence provided. Thus while modifying the conviction to Section 7 I find that the fine amount can be enhanced with compensation to the complainant/victim. Hence the following order is passed.

ORDER

- (i) The Appeal is partly allowed.
- (ii) The conviction of the Appellant for the offence punishable under Section 6 of the POCSO Act is

modified to the offence punishable under Section 8 of the said Act.

(iii) The Appellant is sentenced to the period already undergone and to pay a fine of Rs.25,000/- and in default of payment of fine to suffer simple imprisonment for three months. Out of the fine, if realised, an amount of Rs.20,000/- be paid to the complainant/victim as compensation.

(iv) The Appellant be set at liberty forthwith, upon payment of fine and if the Appellant is not required in any other case.

(v) The Criminal Appeal is disposed of in the aforesaid terms.

**NILAM
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C.V. BHADANG, J.