

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

CRIMINAL APPEAL NO. 693 OF 2019.

Sunil @ Pavnya Shamraoo Meshram,
Aged about 38 years, Occupation
Labour, resident of Bhagdi, Tahsil
Lakhandur, District Bhandara.
Prisoner No.C-10207 detained
in Central Prison, Nagpur. ... **APPELLANT.**

VERSUS

The State of Maharashtra,
through Police Station Officer,
Lakhandur, Tahsil Lakhandur,
District Bhandara. ... **RESPONDENT.**

Shri N.L. Jaiswal, Advocate (Appointed) for the Appellant.
Shri M.J. Khan, A.P.P. for the Respondent.

CORAM : **VINAY JOSHI, J.**
DATE : **AUGUST 20, 2021.**

ORAL JUDGMENT :

Heard learned Counsel for the parties.

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2. Challenge in this appeal is to the judgment and order of conviction dated 31.08.2018 passed by the Special Judge, Bhandara (under POCSO Act) in Special Criminal (POCSO) Case No.18/2016, under which the appellant/accused was conviction for the offence punishable under Section 377 of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act. The trial Court has imposed separate sentence for each of the proved offence, however, the maximum sentence is to undergo rigorous imprisonment for a period of 10 years along with total fine of Rs.6000/-, with stipulation of default. All the sentences were directed to run concurrently.

3. It is the prosecution case that on 25.03.2016, around 11 a.m. the victim boy aged 10 years was returning to his house from the farm. In the way, he saw mango tree, hence, he lingered for felling of the mangoes. At that time the accused, a villager, came and called the victim to near by river for fishing. Both of them went to the river bank, undressed themselves and then accused spread the net for catching fishes. During that time, the accused took the victim to the bushes

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under pretext of showing nest. The accused asked the victim to bend as there was leech (jalu) at his hip. No sooner the victim turned, the accused took off his underwear and inserted his penis at victims anus. The victim pained, hence, he started crying by asking him to stop. The accused removed his penis and ran away. The victim boy returned to the house and narrated the things to his parents. On the very day, mother of the victim lodged the report with the concerned police.

4. In order to establish the guilt of the accused the prosecution has examined in all 6 witnesses and relied on several documents. The evidence of P.W.4 minor victim and P.W.1 Medical Officer carries importance. Besides that, the prosecution has relied on the victims medical examination report [Exh.29], spot panchnama [Exh.34] and date of birth certificate which is at Exh.62.

5. In order to establish that the victim is a 'child' within the meaning of Section 2[d] of the POCSO Act, the prosecution has relied on the date of birth certificate [Exh.62] of the victim boy. The said certificate is issued by health department under Birth and Death Registration Act. The certificate shows that birth entry was taken long back on 30.05.2005. The defence has not challenged the date of birth

of victim during the course of evidence. Birth date certificate being a public document, it carries presumptive value. In absence of any rebuttal evidence it can be safely hold that the date of birth of the victim was 16.05.2005, meaning thereby on the date of incident he was 10 years 11 months of age i.e. a 'child' within the meaning of the provisions of the POCSO Act.

6. The entire thrust of the prosecution is on the evidence of P.W.4 – minor victim. He has stated the entire story regarding the sexual assault. On material aspect he deposed that at the relevant time when both were in the river bed, the accused took him to the near by bushes under the pretext of showing birds nest. The accused told that there was litch [jalu] at his hip and immediately by removing his underwear inserted penis into his anus. It pained to the victim, hence, he started crying. On victims' resistance the accused removed his penis, the victim worn his clothes and returned to his house. Since it was paining, the victim slept at his house and was crying. Victims' mother asked the reason, on which he disclosed the things. The victim is cross-examined at length. Several suggestions were given to discredit the evidence of child witness, however, they did not yield. Particularly,

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it was suggested that the victim has scratched his anus by nail, due to which there were pains. Pertinent to note that by admitting the presence of accused, it was suggested that at the relevant time the accused took out the litch [jalu] from the victims' anus, and therefore it was paining. Besides that some other suggestions were given on the point of enemical terms, however, they were denied. The victims' statement withstand to the prosecution case on all fronts. Nothing has been brought on record to raise a doubt about the credibility of his evidence.

7. The prosecution has examined P.W.1 – Dr. Rangari, who has examined the victim within 12 hours from the occurrence. It is his evidence that on examination he found that at the entry of anus there was injury. There was abrasion type of cut injury to the anus due to forceful intercourse. However, the Medical Officer opined that it is a case of attempt of sexual intercourse, as well as case of sodomy. The Medical Officer has issued a medico legal certificate [Exh.29], to that effect.

8. The learned Counsel appearing for the appellant / accused stressed on the evidence of the Medical Officer to impress that it is a

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case of mere attempt. Particularly it is emphasized that the Medical Officer himself has opined that it is a case of attempt of sexual intercourse, as well as the same is also reflected in the medico legal certificate. It is not possible to accept this submission, because it was a mere opinion or guesswork of the Medical Officer. On the basis of entire material, inference has to be drawn. There is a clear and cogent evidence of P.W.4 victim stating that the accused has inserted his penis at his anus. The Medical Officer also noted the injuries and abrasion on the anus of victim boy. Not only that, the Medical Officer also says that the injuries at anus are due to forceful intercourse. Therefore, the medical evidence strongly supports oral testimony of the victim about sexual assault. In such a background, mere opinion of by the Medical Officer about attempt, has no bearing at all.

9. The learned defence counsel also took me through the Chemical Analysis report [Exhs.68, 69 and 70] to impress that neither blood or semen was detected on the clothes or rectal swab collected from the victim. True, there were no semen or blood stains noted on Chemical Analyzation. However, it is not a legal requirement. The accused is charged for committing an offence of penetrative sexual

assault within the meaning of Section 3 of the POCSO Act. The requirement to constitute the offence is of penetration of penis to any extent into anus or other parts, as defined. Thus, mere slight penetration of penis into anus without emission of semen, is sufficient to constitute an offence. There is ample material to establish that the accused has penetrated his penis into the anus of the victim. The injuries noted at the anus of the victim loudly speaks that the action of accused has traveled beyond attempt. There is clear evidence of penetration, therefore the submission of defence about mere attempt is unacceptable.

10. Besides that, it is argued that there was no independent witness to the occurrence. However, there is no legal requirement to have evidence of independent witness to establish a particular offence. Always, it depends upon the facts and circumstances of each case. The incident had occurred at an isolated place where no one except victim and accused were present. In the circumstances, there is no possibility of viewing the occurrence by any stranger, hence, the prosecution case cannot be faulted from that angle.

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11. The prosecution has examined P.W.3 – informant, who is mother of the victim. She has stated that on the date of occurrence in the afternoon she found that the victim boy was crying, hence, on enquiry she learnt about the sexual assault committed by the accused. This witness was also grilled to show the enemical terms however, the attempt remained abortive. Pertinent to note that the alleged occurrence took place on 25.03.2016 in between 11 a.m. to 12 noon, whilst the matter was reported to the police on the same day at late night. As per the prosecution case, the minor victim has informed the things to his mother in the afternoon around 3 p.m., who in turn around 5 p.m. disclosed the things to her husband and then they went to the police station. Thus, it is apparent that the first information report was assiduously lodged which eliminates the chances of concoction and false implication.

12. On meticulous reassessment of entire oral and documentary evidence, it is revealed that the prosecution has duly established that the accused has committed the charged offences. The act of the accused as established during the course of evidence amounts to an offence of carnal intercourse and aggravated form of penetrative sexual

assault, since the victim was below 12 years of age. The judgment and order of conviction under challenge is well reasoned. Hence, no interference is called in this appeal. In the result the appeal fails and is accordingly dismissed.

13. Fees of the learned Advocate appointed for the appellant be paid as per rules.

JUDGE

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