

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

CRIMINAL APPEAL NO. 731 OF 2019.

Suresh Shalikrao Pawar,
Aged about 21 years,
Occupation – Education,
resident of Bhoygaon, Tahsil
Korpana, District Chandrapur.

... **APPELLANT.**

VERSUS

The State of Maharashtra,
through Police Station Officer,
Police Station Gadchandur,
Tahsil Korpana, District Chandrapur.

... **RESPONDENT.**

Shri Y.P. Mandpe, Advocate for the Appellant.
Shri S.D. Sirpurkar, A.P.P. for the Respondent.

CORAM : VINAY JOSHI, J.

<u>CLOSED FOR JUDGMENT ON</u>	:	06.01.2021
<u>JUDGMENT PRONOUNCED ON</u>	:	09.01.2021

JUDGMENT :

Every convict has legal right to test the legality and correctness of the order of conviction by resorting the statutory

remedy of filing an appeal. The appeal being continuation of the proceedings, inherent presumption of innocence will remain until the matter is finally concluded. The accused was convicted by Special Court, Chandrapur in POCSO Case No. 47/2017 for the offence punishable under Sections 376[2][i] of the Indian Penal Code, along with Sections 4 and 6 of the Protection of Children from Sexual Offences Act. He was sentenced to suffer rigorous imprisonment for a term of 10 years, along with fine of Rs.2000/- with default clause. The said order of conviction is the subject matter of challenge in this appeal.

2. I have heard the learned Counsel for the parties.

3. Lodgment of report dated 25.04.2017 [Exh.29] led concerned police of Gadchandur Police Station, to register Crime No.203/2017 for the aforesaid offences. The victim of the crime was a minor girl barely 5 years of age. Mother of victim lodged report that on the date of incident the victim returned from her school around 9 a.m. and was playing in the courtyard. The neighboring lady PW.2- Neha called the informant mother and said that the accused a nearby resident was prone in showing indecent pictures to the minor, took the victim at his house, and hence, asked the informant mother to look into the matter. Immediately, the

informant mother went to the house of the accused by crossing backside compound, and saw that the accused in naked condition. Accused made to stand the minor victim on a cot and her undergarments were removed. The accused was inserting his penis into the vagina and anus of the minor. After seeing the things, informant screamed and got rescued her daughter from the clutches of the accused. She had informed the things to the nearby residents. After return to her house, she called her husband and then went to the police and lodged report.

4. PW. 8 – P.I. Rokde, undertook investigation. He visited the place of occurrence and drew panchnama [Exh.47]. He has sent the victim as well as the accused for medical examination. Clothes of victim were seized. Necessary samples for chemical analyzation were collected. On completion of investigation final report came to be submitted in the Special Court. The accused denied the guilt. The prosecution has examined in all 9 witnesses to establish the leveled charges. The trial Court considered the evidence, heard submissions and found that the offence was established beyond reasonable doubt, and accordingly passed the judgment and order of conviction.

5. In order to convince the un-sustainability of the impugned judgment, learned counsel for the appellant took me through the evidence and certain documents. He has pointed out certain inconsistencies and stated about improbabilities. He has criticized the evidence of informant, and victim by every possible angle. According to him, the medical evidence does not support the prosecution case. He is particular in pointing out that the chemical analyzers report does not corroborate the prosecution case. Reminding the rigor of burden of proof on prosecution, he urged for reversal of the judgment.

6. Per contra, learned A.P.P. has strongly supported the judgment and order of conviction. He has made a point that the victim's unshattered testimony itself is sufficient to fasten the guilt. Besides that the victims' evidence is corroborated by her mother, who was eye witness to the occurrence. He took me through the evidence of medical officer to state that there were injuries at the genitals of the victim which strongly supports the prosecution case. He would submit that the defence of false implication is untenable. It is his submission that on the date of occurrence itself the FIR has been lodged, which eliminates the chances of concoction. In short he would submit that the impugned judgment is flawless, hence,

calls no interference.

7. To recapitulate the things, on 25.04.2017 in the morning, the informant – mother was cautioned by her neighboring lady that her daughter was taken away by the accused at his residence. Moreover, it was stated that the accused was prone in child abuse, hence, informant should take care. Immediately, informant went to the house of accused and saw that the accused has undressed himself, and was inserting his penis into the vagina of the minor victim.

8. In order to discharge the burden of proving the offence beyond shadow of doubt, the prosecution has led evidence of in all 9 witnesses. The prosecution evidence mainly consists of the evidence of victim, her mother [informant and eye witness], neighboring lady, medical officers, panch and investigating officer. Having regard to the nature of accusation, always the evidence of victim assumes significance. In that view of the matter, the evidence of minor victim [P.W.3] was gone into. The victim being a child witness of tender age, the Special Court has put preliminary questions to understand the intellectual capacity of the victim. The record indicates that the victim gave rational answers to all preliminary questions demonstrating her understanding capacity.

The Special Court on its own satisfaction has recorded the victims evidence in question-answer form. While answering question no.5, the victim girl narrated the occurrence that, at relevant time, the accused made her to stand on the cot. The accused removed her slacks and put his penis at her urinal place i.e. vagina. The Special Court has recorded the demeanor of the witness in the form that most of the time, after putting question, the minor remained silent. Certainly, that was a natural conduct on the part of the minor who was barely 7-8 years of age at the time of recording evidence. The victim was subjected to lengthy cross examination, which infact ought to have avoided. The defence tried to bring on record certain omissions from her evidence. The endeavor was to show that the victim was tutored witness, however, the victim faired in all questions by denying the suggestion which negates tutoring or about inimical terms.

9. The learned defence counsel took me to question no.42 where the victim answered in affirmative to the question that her mother told her to depose against the accused. However, while answering question no.41, the victim specifically denied that she is deposing the things as stated by her mother. Moreover, while answering question no.43, she answered in the negative that she is

deposing as per instructions of her mother. Entire reading of her evidence discloses that, the evidence about occurrence is categorical and has not been shattered during cross examination.

10. True, the child witness is always prone to the tutoring, however, there is no rule of law that conviction cannot be based on the testimony of a child witness. As a rule of prudence, Court always seeks corroboration to the evidence of child witness. In that regard one can go through the evidence of P.W.1 informant [mother of victim]. It is her evidence that on the date of occurrence the neighbouring lady namely P.W.2 Sneha, cautioned her that the minor victim was taken by accused at his house. She has also stated about the antecedents of accused that in past the accused had shown obscene pictures on mobile to her daughter. It is her evidence that immediately she went to the house of the accused by jumping from rare side wall, and saw that the accused made her daughter to stand on a cot. Victims' nicker was removed, whilst the accused was clothless. She saw that the accused put his penis at the victims' urinal place.

11. Several suggestions were given during cross-examination to impeach the worth of this witness. Endeavor was also made to show that the informants' contention about jumping

from rare side wall was improbable. In this regard, it is submitted that the informant lady had worn a saree on the date of occurrence, therefore, it was impossible to cross the wall by jumping. Infact the height of wall has not come on record. Though the defence gave suggestion to number of witnesses that height of wall was around 4 ½ to 5 feet, but, everyone denied the same. It is to be understood that in rural area the surrounding compound always exist for namesake. At some place it may have certain height, whilst at other place there happened to be a gap or cover by bushes, therefore, merely because the informant had worn saree, it cannot be said that her entire testimony was unbelievable on that count. Besides that minor improvements are brought on record, but, they do not relate to the core issue about sexual abuses. In short, the evidence of informant fully corroborates the minors testimony regarding sexual abuse. Generally in such type of cases it is hard to get the evidence of direct witness on the occurrence, however, herein, the mother of the victim has witnessed the things and had stated the same in categorical terms.

12. Besides that the prosecution has examined P.W. 2 Sneha, a neighboring lady. It is her evidence that on 25.04.2017, in the morning she saw accused taking victim to his house. She deposed

that after recounting her past experience of accused with her children, she immediately called the informant and cautioned her. Though there are certain improvements, however, in substance her evidence corroborates the version of informant to the extent that she had asked her to go to the house of the accused to see the things. Moreover, neighboring person P.W.7 Shantaram has corroborated the incident to the extent that at the relevant time he saw the informant mother shouting that the accused had behaved badly with her daughter. In short, each witness has to say a little bit, however, it helps to strengthen the evidence of star witnesses of the prosecution case.

13. The next batch of witness is of medical officers. After registration of FIR victim was initially referred to Rural Hospital, Gadchandur for medical examination. P.W.5 Dr. Raziya Parekh has examined her on the same day. On examination she found abrasion on the labia majora having size of 1.25 cm on right side. She noted bleeding and spotting present at private part. Since the victim was non-cooperative, she was referred to Government Medical College, Chandrapur for further examination. P.W.9 Dr. Priti Priyadarshani has examined the victim on the same day. On examination, she found that there were superficial injuries on the genital area of the

victim. Small superficial laceration skin deep and multiple punctate haemorrhages under the skin were seen. She also noted petechial small haemorrhages, however, they were bleeding. She found small superficial lacerations on right side labia majora, along with petechial haemorrhages. The evidence of Medical Officer was supported by respective medical examination reports.

14. The defence has cross examined both the medical officers at length. Certain procedural lapses were brought on record, but, they were insignificant. It was suggested that if the minor remains un-hygenic or plays in dirt, then she would suffer itching and there may be abrasion at her private part by scratching. Moreover, it is brought on record that if a well grown male of 20 years had a sexual intercourse on minor of 5 years of age, then there would be significant trauma, tear injuries at her genitals. However, the medical officer was quick enough to add that hygiene condition of minor was sound. It was also explained that in case of scratching, there must be old injuries, but, they were absent. Pertinent to not that at the time occurrence due to intervention by mother, the accused could not succeed in his object. In order to constitute an offence of rape or penetrative sexual assault, partial or slightest penetration of the male organ is sufficient. The possibility

of causing significant trauma and genital injury may not be present when there was slight penetration. Therefore, the suggestion given to discredit minors evidence would not assist. On the other hand, the medical evidence strongly corroborates the victims evidence that on the date of occurrence, the accused has inserted his penis, may be to some extent, in her private part.

15. It is prosecution case that the accused used to show obscene material on his mobile to small children. The defence has straneously argued that the prosecution has not proved that there was obscene material in the mobile of the accused, though it was seized. True there is no such evidence, but, that by itself would not falsify the entire prosecution case. The act of showing obscene pictures to minor was a separate affair, then the actual act of sexual assault. In absence of evidence about showing obscene pictures, the rest of the evidence about actual occurrence can be well accepted.

16. The learned counsel for the defence has pointed out that the chemical analyzer report [Exh.68] discloses that neither blood nor semen was found on the clothes of the victim. However, that cannot be a decisive factor in each case, nor it is a requirement of law. The direct evidence of minor victim and her mother, coupled with medical report can be safely acted upon without corroboration

from the chemical analyzers' report. In some cases there may not be evidence from forensic expert, however, it depends on the facts and circumstances of each case.

17. Herein it is to be remembered that the act was not complete, but, the accused was inserting his penis into the vagina of minor, however, due to intervention, act remained incomplete. In such a peculiar facts, since there was no complete penetration, there may not be blood or semen stains on the clothes of the victim, therefore, the defence cannot muster any strength on the same.

18. It has come in the evidence that the incident took place on 25.04.2017 around 10 a.m. After incident, the mother called her husband from his work and then they approached to police and lodged report at 5 p.m. One has to visualize the actual scenario, that no sooner there was occurrence, no one would rush to police station within few minutes. It is a matter of sexual abuse on a child. Certainly the mother has waited for her husband and on giving thoughtful consideration went to police station. In view of the nature of allegations few hours delay cannot be termed as an inordinate delay, rather it is a case where the FIR has been lodged assiduously. The quick lodgment of FIR also shows genuineness of the prosecution case.

19. On re-appreciation of the entire material it is evident that the prosecution evidence is cogent, reliable and it fairly establishes that the accused has inserted his penis into the vagina of minor. There is no manner of doubt that it is a case of penetrative sexual assault and the victim being below 12 years of age, the act amounts to aggrieved form of penetrative sexual assault. The Special Court in its elaborate discussion has considered the core issue as well as properly dealt with all submissions.

20. The last alternative submission of the defence is that having regard to the young age of the accused, leniency be shown. The prosecution has proved that the accused has committed an offence of aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. The offence was committed on 25.04.2017, at the relevant time the prescribed punishment for the offence was of rigorous imprisonment for a term which would not be less than 10 years, but, which may extent the imprisonment for life along with fine. The Special Court has imposed the minimum sentence for rigorous imprisonment for 10 years which was permissible in law. The statute has left judicial discretion to the Court only to the extent to impose punishment in between the term

of imprisonment of at least 10 years, which may extend to life imprisonment. Though the accused is a young fellow, however, the punishment less than 10 years cannot be imposed due to statutory mandate. Hence, the submission in this regard though appears to be convincing, however, cannot be accepted due to statutory rigor.

21. In the result, the judgment and order of conviction is well maintainable in the eyes of law, hence, the appeal being devoid of merit, stands dismissed.

JUDGE

Rgd.