

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.41 OF 2020

Sagar s/o. Ashok Asture,
Age : 26 years, Occ. Nil,
r/o. Ajinath, Tq. Sillod,
Dist. Aurangabad

..Appellant

Vs.

The State of Maharashtra

..Respondent

Mr.Sudarshan Salunke, Advocate i/b. Mr.A.P.Raka, Advocate for
appellant

Mrs.G.L.Deshpande, APP for respondent

Mr.Shaikh Tarek Mobin, Advocate for respondent no.2

**CORAM : R.G. AVACHAT, J.
RESERVED ON : APRIL 12, 2022
PRONOUNCED ON : JUNE 14, 2022**

ORDER :-

The challenge in this appeal is to the judgment of conviction and resultant order of sentence dated 12.11.2019 passed by learned Addl. Sessions Judge-10, Aurangabad, in Special Case (POCSO) No.134 of 2016, whereby the appellant has been convicted for the offences punishable under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and therefore, sentenced to suffer rigorous imprisonment for ten years and

five years and to pay fine of Rs.3,000/- and Rs.1,500/-, respectively. In default of payment of fine, he has been directed to undergo simple imprisonment for three months and two months, respectively.

2. The facts, giving rise to the present appeal, are as under:-

"A" (name changed) was a minor daughter of PW 1 - "S" (name changed). She was mentally challenged. PW 3 - Irfan, friend of PW 1 - "S", came to his residence and told to have seen "A" in the house of the appellant. PW 1 - "S", therefore, accompanied him to the appellant's house. He pushed open the door to find both "A" and the appellant naked. The appellant had laid himself on the person of "A". On having seen PW 1 - "S" and his friend Irfan, the appellant ran away. "A" informed PW 1 - "S" that the appellant took her to his residence. He undressed himself and her as well. He committed sexual intercourse with her. PW 1 - "S", therefore, accompanied by his wife took "A" to police station. He lodged FIR (Exh.17).

3. Crime, vide C.R. No. 93 of 2016 came to be registered for the offences punishable under Section 376(2)(i), (j), and (l) and

Sections 4, 8 and 12 of the POCSO Act. The appellant was arrested same day. Clothes on the person of the appellant and "A" as well, at the time of commission of the offence in question, were taken charge of under panchnamas (Exh.43 and 44). The statements of the persons acquainted with the facts and circumstances of the case were recorded. Both "A" and the appellant were medically screened. The clothes on their person, vaginal swab, etc., were sent to C.F.S.L. for examination and report. On completion of the investigation, the appellant was proceeded against by filing charge sheet.

4. The trial Court framed Charge (Exh.5). The appellant pleaded not guilty. His defence is of false implication. The prosecution examined nine witnesses and produced in evidence certain documents. On appreciation of the evidence in the case, the trial Court convicted and sentenced the appellant, as stated above.

5. Heard Mr.S.J.Salunke, learned counsel appearing for the appellant; Mrs.G.L.Deshpande, APP for respondent no.1; and Mr.Shaikh Tarek Mobin, learned counsel for respondent no.2.

6. Learned counsel for the appellant would submit that if we take evidence of the prosecution as it is, it would, at the most,

be an offence of outraging modesty of a female. Learned counsel, therefore, took me through the evidence on record, to ultimately urge for releasing the appellant with conviction, at the most, for the offence punishable under Section 354 of Indian Penal Code. According to him, the appellant, at the relevant time, was in the age group of 19-20 years. The conviction of ten years would spoil career of the appellant. He has already been behind the bars for little over six years.

7. Learned APP would, on the other hand, submit that the victim gave her evidence attributing the appellant with the offence of aggravated penetrative sexual assault. According to her, the appellant was caught on the spot. He would, therefore, have no escape from the criminal liability. Learned APP, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the evidence in the case. The incident took place on 22.05.2016 by 12.00 noon. PW 1 - "S", father of the victim "A", testified that his friend – Irfan (PW 3) and one Bhaskar (PW 4) came to his residence and told him to have seen the appellant to have been sexually

assaulting "A". PW 1 - "S", therefore, accompanied both of them to the residence of the appellant. He pushed opened the door to find both the appellant and his daughter ("A") naked. He saw the appellant to have laid himself on the person of "A". It is further in his evidence that on having seen them, the appellant took to his heels from the back door. It is further in his evidence that on inquiry with "A", she informed that she had been sexually exploited by the appellant. PW 1 - "S", therefore, took the victim ("A") to the police station and lodged the FIR (Exh.17). In his cross-examination, it has come on record that he did not understand Marathi. The FIR has been recorded in Marathi. He has put his thumb impression on the FIR (Exh.17).

9. The statement of PW 1 - "S" under Section 164 of the Code of Criminal Procedure (Exh.57) was also recorded. In the said statement (Exh.57), PW 1 - "S" did not attribute the appellant to have had sexual intercourse with his daughter "A". This is a material omission amounting contradiction. PW 2 – Majidbin is witness to the scene of offence panchnama (Exh.28). PW 3 – Irfan and PW 4 – Bhaskar were friends of PW 1 - "S". PW 4 – Bhaskar claimed to have had seen the appellant took "A" to his residence. PW 4 – Bhaskar

informed the same to PW 3 - Irfan. It is in his evidence that both of them went to the house of PW 1 - "S" and related what they had seen. It is further in his evidence that he (PW 1 - "S") accompanied both of them to the house of the appellant. The entrance door was pushed open to see both the victim ("A") and the appellant naked/lying on a cot. Close reading of the evidence of this witness would suggest that none of them claimed to have had seen the appellant doing sexual intercourse with "A". Admittedly, it took not less than ten minutes for both PW 3 - Irfan and PW 4 - Bhaskar to approach the house of PW 1 - "S" and go back to the house of the appellant. PW 1 - "S" also did not claim to have had seen both the appellant and the victim ("A") in compromising position. What he had seen was that both of them were naked and the appellant was on her person.

10. Admittedly, the victim was mentally challenged. It has been specifically recorded by the Investigating Officer and learned Judicial Magistrate, First Class, as well, that on interaction with the victim, she was found to have been unable to give coherent replies. Her statement was, therefore, not recorded. It is only after three years of the incident, the victim was examined as witness before the

trial Court. True, she testified the appellant to have had sexual intercourse with her. It is just difficult to imagine and to rely the victim's evidence, as, soon after the alleged incident, she was found to have been unable to give rational answers to the questions put to her by learned Judicial Magistrate, First Class and therefore, her statement under Section 164 of Cr.P.C. could not be recorded.

11. There is one more reason for this Court not to rely on the case of the victim ("A") that she was subjected to sexual intercourse. It is the report of her medical screening. PW 6 – Dr. Ashwini had examined the victim. It is also in her evidence that the history was given by the mother of the victim since she (victim) was unable to state anything due to her mental retardness. Dr.Ashwini's evidence is to the effect that on examination, she noticed no injuries on the person or genital of the victim. No abrasion, contusion or laceration over labia majora. Hymen was found to have old healed tears. The blood sample, vaginal swab, etc., of the victim was obtained for chemical examination report. True, according to PW 6 – Dr.Ashwini, the victim was subjected to sexual assault. It is, however, not known on the basis of what material, she gave such opinion particularly when she was categoric

to admit that it took six months' period to heal the hymenal tears. There are other reasons as well, whereby hymen could be torn. When the Doctor noticed old healed hymenal tears, those necessarily dates back to, at least, six weeks before the medical examination of "A". Admittedly, the C.A. report as regards vaginal swab, blood examination report, rules out sexual intercourse.

12. In view of this Court, based on above evidence, learned trial Judge ought not to have convicted the appellant for the offences under Sections 6 and 10 of the POCSO Act. The evidence on record makes out an offence of sexual assault punishable under Section 8 of the POCSO Act. The punishment provided for the sexual assault is imprisonment for a term which shall not be less than three years but which may extend to five years and shall also be liable to fine. It is reiterated that the evidence on record, undoubtedly, indicates the appellant to have committed offence of sexual assault punishable under Section 8 of the POCSO Act. He has already been behind the bars for little over six years. It is reiterated that at the time of commission of the offence, the appellant was not more than 19-20 years of age.

13. For the reasons given herein above, the appeal partly succeeds in terms of the following order:-

- (i) The appeal is partly allowed.
- (ii) The judgment and order dated 12.11.2019 passed by learned Addl. Sessions Judge-10, Aurangabad, in Special Case (POCSO) No.134 of 2016, convicting and sentencing the appellant for offences punishable under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012, is set aside. The appellant is acquitted of the offences punishable under Sections 6 and 10 of the Protection of Children from Sexual Offences Act, 2012.
- (iii) Instead, the appellant is convicted for the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 Act and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.1,000/-.
- (iv) The appellant has already paid a fine of Rs.4,500/- before the trial Court. Said amount of fine be adjusted accordingly and remaining amount of fine be paid back to the appellant.
- (v) Since the appellant has been behind the bars for the period more than the quantum of sentence imposed by this order, he be released forthwith, if not required in any other case.

- (vi) Rest of the terms of the impugned order to stand unaltered.

[R.G. AVACHAT, J.]

KBP