

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

CRIMINAL APPEAL NO. 197 OF 2019

Pandurang Soma Wadle
Age: 25 years,
R/o. Varad, Tq. Dharangaon,
District Jalgaon

... **Appellant**
(Orig. Accused)

Versus

The State of Maharashtra
Through – PSO Dharangaon
Police Station, Tq. Dharangaon
District Jalgaon

... **Respondent**

....
Mr. U. S. Malte, Advocate for the appellants
Mr. S. P. Sonpawale, APP for respondent - State
....

CORAM : R. G. AVACHAT, J.

DATED : 21st MARCH, 2022

J U D G M E N T :-

. The challenge in this appeal is to an order of sentence dated 13.11.2018 passed by the Special Judge (POCSO Act), Jalgaon in Special Case (POCSO) No.28 of 2015. Vide impugned judgment and order, the appellant herein has been convicted for the offence punishable under Section 376(2)(i) and under Section 448 of the Indian Penal Code. He has, therefore, been sentenced to suffer rigorous imprisonment for ten (10) years and fine of Rs.20,000/- and rigorous imprisonment for one year and fine of Rs.10,000/-,

respectively, in default of payment of fine, he is directed to undergo simple imprisonment for one year and six months, respectively. The appellant has also been convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, but has not been awarded separate sentence therefor. He has however been acquitted of the offence punishable under Section 342 and 506 of the Indian Penal Code. Out of the amount of fine if recovered, a sum of Rs.20,000/- has been directed to be paid to the victim, as compensation.

2. Facts giving rise to the present appeal are as follows:

PW1 -A (prosecutrix) was 11 years of age at the relevant time. She would reside at the house of her maternal uncle and grand-parents. The parents of the prosecutrix would reside at Sinner (Nashik). On 07.04.2015, by 2.00 p.m., the prosecutrix was at home. Her maternal uncle had gone for labour work. The grandfather had been to the field for grazing cattle. Grandmother was away in Surat. The appellant, residing in the neighbourhood, came home of the prosecutrix. He asked her to give him kiss. She refused. He, therefore, lifted her and laid on the cot. The prosecutrix told him that she would call grandmother, who would reside in the

neighbourhood. The appellant asked her not to call anyone. He further asked her to drop the curtain. He, then, undressed her. Licked her private part. Touched his penis to her private part. The prosecutrix could not resist as the appellant was stout. She, therefore, gave calls as “Pramila Ajji – Pramila Ajji”. In response thereto Pramila Ajji and Ujwala Ajji came there. Having seen them, the appellant took to his heels. The prosecutrix was weeping. She narrated Pramila and Ujwala, what had happened with her. On return of her maternal uncle and grandfather by 6.00 in the evening, they went to the Police Station. The prosecutrix lodged the report of the incident (FIR Exh.29).

3. A crime vide C.R. No.59 of 2015 came to be registered. The offence was investigated. The prosecutrix was medically screened. Scene of offence panchanama was drawn. The appellant came to be arrested. Clothes on the person of both of them at the time of incident were taken charge of. Statements of persons acquainted with the facts and circumstances of the case were recorded. Documents in proof of age of the prosecutrix were obtained. Chemical Analyzer (C.A.) reports too were received. The appellant then came to be proceeded against by filing charge-sheet.

4. Charge (Exh.14) was framed. The appellant pleaded not guilty. His defense was of false implication.

5. To sustain the charge, prosecution examined total nine (9) witnesses and let in evidence number of documents. The witnesses examined on behalf of the prosecution were as under:

“PW1 – victim at Exh.28; PW2 – Gajanan Tulshiram Patil – panch witness at Exh.36; PW3 – Suresh Jobap Patwade – punch witness at Exh.38; PW4 – Chudaman Baliram Patil – panch witness at Exh.40; PW5 – PSI Kavita Babasaheb Bhujbal at Exh.44; PW6 – Ujwala Sanjay Pawar at Exh.46; PW7 – Dr. Hira Anand Damle – Medical Officer at Exh.49; PW8 – Kalpalata Madansing Rajput – Head-mistress of school at Exh.52; PW9 – PI Devidas Kisan Dhumne – Investigating Officer at Exh.57.”

6. For deciding this appeal, relevant evidence would be that of the prosecutrix, the Medical Officer who examined her and the Investigating Officer. Let us appreciate the evidence.

PW1 - prosecutrix gave her evidence consistent with the FIR (Exh.29). It was in her evidence that on 07.04.2015, by 12.00 noon, she had returned home from school. She was alone home. Her maternal uncle was away for labour work. Grandfather had been to

the field for grazing cattle. Grandmother was away in Surat. Her parents were at Sinner (Nashik). It is further in her evidence that she was engaged in cleaning home. The appellant came her home. It was 2.00 p.m. He asked her to give him kiss. She refused. He, therefore, lifted her and laid on the cot. The prosecutrix told him that she would call grandmother, who would reside in the neighbourhood. The appellant asked her not to call anyone. He further asked her to drop the curtain. He, then, undressed her. Licked her private part. Touched his penis to her private part. The prosecutrix could not resist as the appellant was stout. She, therefore, loudly called, "Pramila Ajji – Pramila Ajji". It is further in her evidence that, in response thereto Pramila Ajji and Ujwala Ajji rushed to her home. Having seen them the appellant took to his heels. The prosecutrix was weeping. She narrated Pramila and Ujwala, what had happened with her. On return of her maternal uncle and grandfather by 6.00 in the evening, they went to the Police Station. The prosecutrix lodged the report of the incident.

7. The prosecutrix was subjected to a search in cross examination. She has, however, not been confronted with the FIR or her statement recorded under Section 164 of the Code of Criminal

Procedure, so as to bring on record contradictions/omissions, if any, therein. All the questions in the nature of suggesting the appellant's case of having been falsely implicated and denying the version of the prosecutrix, have been denied. The prosecutrix gave her date of birth as 19.04.2004. She placed on record her birth certificate (Exh.32). The same has not been specifically taken exception to.

8. PW2 and PW3 are the panch witnesses to the scene of offence and seizure of cloths of the prosecutrix, respectively. Their evidence is not of much importance. PW4 was another panch witness to the seizure of knicker. His evidence too is of not much assistance for the prosecution. PW5 - Kavita was a Police Sub-Inspector, who has recorded the FIR (Exh.29). PW6 – Ujwala was residing in the neighbourhood of the prosecutrix. According to the prosecution case, in response in response to the shouts raised by the prosecutrix, Ujwala had rushed to her house. This witness has however not supported the prosecution. It is in her evidence that the prosecutrix had given loud calls to Pramila Ajji. In response to the said calls, Pramila and herself had been to the house of the prosecutrix. The prosecutrix was weeping. She, however, did not relate them anything.

9. Then there is evidence of PW7 – Dr. Hira. It is in her evidence that a lady Constable had brought the prosecutrix for medical examination on 08.04.2015. She examined the prosecutrix. Her medical examination report states – on general examination, everything was normal. No injuries on her body and private part. No bleeding. Public hairs absent. Hymen was intact and no injuries thereon. There was mild congestion of introitus. Vaginal swab, samples of hairs, nails and blood were obtained. She had reserved her opinion pending C.A. report. After having gone through the C.A. report before the Court, she gave her opinion that victim was attempted for intercourse, unsuccessfully.

It is also in evidence of Dr. Hira that the prosecutrix and her mother had given the history as, the appellant came home. Hid himself. When prosecutrix arrived in the room, he tried to undress her. He undressed himself and kissed her breast. She started shouting. The appellant therefore ran away. The medical examination report along with the history given by the prosecutrix and her mother is at Exh.50. PW8 – Kalpalata, the Headmistress of the school wherein the prosecutrix took education, was examined in proof of her age. PW9 was the Investigating Officer.

10. If we appreciate the aforesaid evidence with close scrutiny, it is thus clear that the prosecutrix did not have reason to falsely implicate the appellant. The prosecutrix was 11 years of age at the relevant time, has been proved. It is reiterated that the prosecutrix was not confronted with the FIR Exh.29 and her statement under Section 164 Cr.P.C. More or less, her evidence in relation to these two documents is consistent one. It is also not the case of the prosecutrix and the prosecution as well, that it was a case of penetrative sexual assault. According to the prosecutrix herself, the appellant had touched his penis to her private part. The medical evidence rules out penetration. According to the Medical Officer, it was the case of an attempt of sexual assault. In this factual backdrop, the trial Court ought not to have convicted the appellant for the offence of rape punishable under the Indian Penal Code and/or the offence of penetrative sexual assault under Section 4 of the POCSO Act. Although the prosecutrix testified that the appellant had licked her private part, in her previous statement given to the Medical Officer in the nature of history states that the appellant had kissed her breast. As such, there is gross inconsistency. The prosecutrix had been medically examined within ten (10) hours of the registration

of the FIR. The FIR was lodged some hours after the alleged incident that too only after adult male members came home. This Court do not propose to observe anything more.

11. Suffice it to state that there is gross inconsistency in the case of the prosecutrix as regards the appellant to have allegedly licked her private part. It is in doubt as to whether the appellant had licked the prosecutrix's private part or breast. Evidence of the prosecutrix in this regard is therefore not believed. She has, however, been consistent to state the appellant to have touched his penis to her private part. As per the prosecution case itself, it was a case of attempt of sexual assault. Since the appellant had entered the house of the prosecutrix and committed the offence, he has rightly been convicted for offence punishable under Section 448 of the Indian penal Code.

12. For the reasons given herein above, the appeal partly succeeds, holding the prosecution to have failed to prove an offence of rape. But it is proved it to be a case of an attempt to commit rape punishable under Section 511 of Indian Penal Code read with Section 376(2)(i) and/or offence under Section 4 read with Section

18 of the POCSO Act. The punishment provided for both these offences namely attempt under Indian Penal Code and under POCSO Act is one and the same i.e. imprisonment for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

13. At the relevant time, the appellant was 25 years of age. He has been behind the bars since the date of conviction i.e. for about three years and four months. He was also behind the bars for little over four months pending investigation. In view of this Court, ends of justice would meet with sentencing the appellant to suffer rigorous imprisonment for a period of four years in the totality and pay fine of Rs.5,000/-, in default of payment of fine, he shall undergo rigorous imprisonment for one month. With this, the appeal partly succeeds. Hence, following order:

ORDER

- (i) The appeal is partly allowed.
- (ii) The conviction of the appellant for the offence punishable under Section 448 of the Indian Penal Code is maintained.

(iii) The appellant is acquitted of the offence punishable under Section 376(2)(i) of the Indian Penal Code and Section 4 of the POCSO Act. He is, however, convicted for the offence punishable under Section 376(2)(i) read with 511 of the Indian Penal Code and Section 4 read with 18 of the POCSO Act. He is, therefore, sentenced to suffer rigorous imprisonment for four (4) years instead of ten (10) years and to pay fine of Rs.5,000/-. In default of payment of fine, the appellant shall undergo rigorous imprisonment for one month.

(iv) Set off under section 428 of Cr. P. C. be given to the appellant.

14. In view of above order, Criminal application No.1144 of 2020 stands disposed of.

[R. G. AVACHAT, J.]

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