

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

CRIMINAL APPEAL NO. 730 OF 2019

Ashok alias Ganesh Bhausahab Bagul

..APPELLANT

VERSUS

State of Maharashtra and Another

..RESPONDENTS

....
Mr. S.G. Bobde, Advocate for appellant

Mrs. G.L. Deshpande, A.P.P. for respondent no.1 – State

Mrs. S.T. Kazi, Advocate for respondent no.2 (appointed)

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CORAM : R.G. AVACHAT, J.

DATED : 09th MARCH, 2022

PER COURT :

1. The challenge in this appeal is to the judgment of conviction and order of sentence dated 28th May, 2019 passed by the learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad in Special (POCSO) Case No. 11 of 2016. The appellant has been convicted for the offence punishable under Sections 8 and 10 of Protection of Children from Sexual Offences Act, 2012, and therefore, sentenced to suffer rigorous imprisonment for five years each and fine of Rs.1,000/- and Rs.2,000/- respectively. In default of payment of fine, he has been sentenced to suffer rigorous imprisonment for one month and two months respectively. Both the sentences were directed to run concurrently.

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

The appellant would reside with his maternal uncle at Khandoba Nagar, Vaijapur. He was nineteen years of age at the relevant time. The house of the prosecutrix is just opposite the house of the maternal uncle of the appellant. A road separates both the houses. The prosecutrix (P.W.1) has two daughters. The elder one (survivor) was five years of age. On 06th February, 2016 the survivor had gone out the house to play. It was about 02.00 p.m. The prosecutrix gave her calls. The survivor came out of the house of the appellant's maternal uncle in response to third call. The survivor was crying. The prosecutrix took her into confidence to learn from her that the appellant had sneaked his hand in the underpant of the survivor and touched her vagina. The prosecutrix, therefore, went to the appellant to question him. Persons residing in the neighborhood gathered. The appellant was overpowered. The prosecutrix approached the concerned police station and lodged the First Information Report ('F.I.R.') (Exh.39).

3. A crime vide C.R. No. 31 of 2016 for the offences punishable under Section 376 of the Indian Penal Code read with Sections 4 and 12 of the POCSO came to be registered. Statement of the survivor was recorded. She was medically screened. Scene of offence panchanama was drawn. The appellant was arrested. Statements of the persons acquainted with the facts and circumstances of the case were recorded. On completion of

investigation, the appellant was proceeded against by filing charge-sheet. Learned Judge framed charge (Exh.3). The appellant pleaded not guilty. Prosecution examined seven witnesses to establish the charge. On appreciation of the evidence before it, the trial Court convicted and consequently sentenced the appellant as stated above.

4. Heard. Considered the submissions advanced. Perused the evidence relied on. Gone through the impugned judgment.

5. Learned counsel would submit that the trial Court did not give the appellant an opportunity to cross-examine the survivor. The age of the survivor has not been proved to be below either ten or twelve years. Learned counsel, therefore, urged for remanding the case back to the trial Court with an opportunity to the appellant to cross-examine the survivor.

6. Learned A.P.P. and learned counsel for Respondent No.2 - informant would, on the other hand, submit that the survivor was five years of age at the relevant time. The appellant was overpowered within minutes of the incident. The F.I.R. was lodged within hours thereof. The statement of survivor was also recorded immediately. Although, learned counsel for the appellant was not present to cross-examine the survivor, the trial Court had given the appellant an opportunity to personally cross-examine the survivor.

He declined. As such, the evidence in the case undoubtedly establish the charge. He, therefore, urged for dismissal of the appeal.

7. The appellant would reside with his maternal uncle at Vaijapur. The house of the prosecutrix is just opposite the house of the appellant's maternal uncle. A village road separates both the houses. The prosecutrix gave her oral evidence stating therein that it was about 02.00 p.m. of 06th February, 2016. The survivor was out of the house for playing. She gave the survivor 2-3 calls. In response to the third call the survivor came out of the house of the appellant's maternal uncle. She was crying. The prosecutrix, therefore, took her into confidence to learn from her that the appellant touched her vagina. The prosecutrix, therefore, went to the appellant and questioned him. The neighbors gathered. The appellant was overpowered. It is further in her evidence that she approached the concerned police station and lodged the F.I.R. The prosecutrix was subjected to cross-examination. She was suggested to have no good relations between her family and that of the appellant's maternal uncle. She denied. Nothing further could be brought on record during her cross-examination so as to disbelieve her evidence.

8. P.W.2 – Pramod Nikale is the witness to the scene of offence panchanama. P.W.3 – Manisha Jagtap is a Police Naik, in her presence the statement of the survivor was recorded. The said statement is at Exhibit 50.

P.W.5 – survivor gave her evidence testifying that the appellant had called her to his house. He gave her cashew nuts. He removed her underwear and touched her vagina. Her mother was searching for her. In response to the mother's call, she came out of the house.

9. It is true that learned counsel representing the appellant before the trial Court was absent to cross-examine the survivor. The trial Court, therefore, asked the appellant to personally cross-examine her. He did not avail the said opportunity. It is informed that his subsequent application to permit his advocate to cross-examine the survivor was allowed subject to cost. On account of failure to pay the cost, the survivor could not be subjected to cross-examination.

10. The birth certificate of the survivor is on record. Same indicates her date of birth 09th October, 2011. She was five years of age at the relevant time. Within minutes of the incident the survivor had narrated her ordeal to her mother – P.W.1. Accordingly, the F.I.R. was lodged. The mother of the survivor gave her evidence consistent with what had been reported to her by the survivor. The survivor too gave her evidence. It is true that the appellant had no opportunity to subject the survivor to cross-examine. Therefore, even we ignore the evidence of the survivor, the evidence of her mother establishes the fact that the appellant had touched the private part of the survivor.

11. In the case of *Syed Pasha Vs. State of Karnataka, 2005, Cri.L.J. 4123*, the Hon'ble Apex Court has observed that in the case of rape alleged to have been committed on a child of 4-5 years, the duty is cast on the Court to have utmost sensitivity and it is necessary to appreciate the evidence in its totality, keeping in view the background of the entire case, and not in isolation. In the said case, the victim was not examined. Based on the circumstantial evidence, the offence was held to have been proved.

12. This Court, therefore, finds no reason to interfere with the order of conviction passed against the appellant. The conduct of the appellant amounted an offence punishable under Section 10 of the POCSO. The punishment provided therefor is of imprisonment of either description for a term which shall not be less than five years. The record indicates the appellant has been in jail for little over four years. At the time of commission of offence he was nineteen years of age, while on the date of conviction he was little over twenty one years of age. The provisions of POCSO do not rule out application of Probation of Offenders Act, 1958 ('the Act'). Considering the age of the appellant and the fact that he has been behind the bars for little over four years, this Court proposes to deal with him in terms of Section 4 of the Act.

13. In view of above, criminal appeal stands disposed of as under :-

ORDER

(i) The impugned judgment of conviction is hereby maintained.

(ii) The appellant be released on his entering into a bond of Rs. 15,000/- to appear and to serve the remaining of the sentence of five years, when called upon during the period of next two years. In the meantime, he shall be of good behavior.

(iii) The appellant be released from jail forthwith, if not required in any other case.

(iv) The bond shall be executed before the trial Court.

(v) Fees of Mrs. S.T. Kazi, learned counsel appointed for Respondent No.2, is quantified at Rs.5,000/-.

(R.G. AVACHAT, J.)

SSD