

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.244 OF 2018

Ashok Babalya Sangale

Age : 43 years, Occ : Agriculturist

R/o – Zyre Kadamwadi,

Taluka – Rajapur,

Dist. Ratnagiri

.... Appellant

versus

State of Maharashtra

through Rajapur police station

Taluka Rajapur, Dist. Ratnagiri

.... Respondent

.....

- Mr. Kushal Mor, (Appointed Advocate) for Appellant.
- Mr. P. H. Gaikwad, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 10th NOVEMBER, 2022

JUDGMENT :

1. Leave to amend to delete name of the victim from the Appeal memo, wherever it appears.

2. The Appellant has challenged the Judgment and Order dated 20/03/2017 passed by Special Court, Ratnagiri, in Special Case No.6 of 2016. By the impugned Judgment and Order, the

Appellant was convicted for commission of offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'). He was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer simple imprisonment for three months.

He was also convicted for commission of offence punishable u/s 8 of POCSO and was sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs.2,000/- and in default of payment of fine to suffer simple imprisonment for one month.

He was further convicted for the offence punishable u/s 506 of the Indian Penal Code (for short 'IPC') and was sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- and in default of payment of fine to suffer simple imprisonment for 15 days.

He was acquitted from the charges of offence punishable u/s 377 of the IPC.

Apart from the Appellant, there was one more accused i.e. accused No.2 Sachin Kadam, who was acquitted of all the charges.

All the sentences were directed to run concurrently. The Appellant was given set off u/s 428 of Cr.PC.

3. Heard Mr. Kushal Mor, learned counsel for the Appellant and Mr. P. H. Gaikwad, learned APP for the State.
4. The prosecution case is that, the victim PW.1 was 14 years old boy. He was knowing both the accused as they were residing in the same village. He has described the two incidents dated 17/10/2015 and 21/10/2015. The first incident took place at a secluded plot near a river where the Appellant took the victim's private part in his hand. On the next occasion, the victim was taken inside a flour mill and at that time the Appellant took his private part in his mouth and also tried to insert his own private part in the anus of the victim. On

26/10/2015 both the accused threatened the victim. His grandmother and other relatives came there and thereafter the incident was made known to others. The FIR thereafter was lodged on 27/10/2015 at Rajapur police station vide C.R.No.61 of 2015. The investigation commenced. The Appellant was arrested on 29/10/2015 and since then he is in custody. After conclusion of the investigation, the charge-sheet was filed and the case was tried before the Special Court.

5. During trial, the prosecution examined five witnesses. P.W.1 was the victim, P.W.2 was the Pancha for Spot Panchanama, P.W.3 was a distant relative of the victim. P.W.4 Dr. Ramchandra Mestri had examined the victim and the Appellant medically. P.W.5 PSI Sachin Kale was the Investigating Officer.
6. The defence of the Appellant was of total denial.
7. Learned Judge considered the evidence of the defence and concluded that the accused No.2 deserved to be acquitted. However, he relied the prosecution evidence as far as the

Appellant was concerned and convicted and sentenced the Appellant as mentioned earlier.

8. P.W. 1 was the victim and hence the main witness for the prosecution. He has deposed that his date of birth was 05/01/2002. His birth certificate is produced on record at Ex.53 and it is admitted by the defence and therefore there is no dispute about his age. Thus, at the time of incident he was about 13 years of age.

9. He was studying in 3rd standard. He was residing with his father, stepmother and stepbrother. He knew both the accused as they were from the same village and he knew them from his childhood. He identified the Appellant before the Court at the time of deposition. On 17/10/2015, at about 06.00 p.m., he had gone near Naveri river to answer nature's call. At that time, the Appellant came there. He took the victim's private part in his hand. He then threatened him and went away. The victim also returned to his house. On 21/10/2015 at about 07.00 p.m.

he was returning from his house. When he reached the flour mill situated near his house, the Appellant called him inside the flour mill. There, the Appellant took the victim's private part in his mouth. He also tried to insert his own private part in his anus. The victim started shouting loudly and then he ran away to his house. He did not tell this to anybody because he was frightened. On the next day, the Appellant threatened him that he would beat him if he told this incident to anybody. On 26/10/2015 at about 07.00 p.m. when the victim was in his house, the Appellant and the co-accused Sachin Kadam came there. Both of them threatened him. At that time, the victim's grandmother came there. She questioned the Appellant and the co-accused. She then called others. The accused went away. The victim's relatives then discussed the incident and on 27/10/2015 P.W.1 lodged his FIR. It is produced on record at Ex.46. According to him, at that time his father was admitted in hospital at Mumbai and therefore there was delay in lodging the FIR. He also explained that since he was frightened, he did not immediately lodge his FIR.

In the cross-examination hardly any relevant material in favour of the defence was brought out. He has deposed that he did not remember whether he attended the school on 18/10/2015, 19/10/2015 and 20/10/2015. He did not remember as to whether on 17/10/2015 and 21/10/2015 he had gone to his school or not. One Tukaram Panchal was the owner of the flour mill where the incident had taken place. He has deposed that there was no house adjacent to the flour mill. He admitted that his uncle P.W.3 Sandeep had accompanied him to the police station. It was not mentioned in his FIR that his father was admitted in hospital. It required one hour time to reach to Rajapur from his village by a S.T. Bus. He denied the suggestion that because of a complaint given by a girl in his school, he had implicated the accused No.2 falsely.

The FIR produced on record at Ex.46 substantially corroborates his deposition. His evidence was recorded in the Court on 07/10/2016 i.e. almost a year from the date of incident.

10. P.W.2 Namdeo Nade was a Pancha in whose presence Spot Panchanama of the flour mill as well as the bank of the river was carried out. The Spot Panchanama was produced on record at Ex.49. The spot near the river was a secluded place and surrounded by bushes.

11. P.W.3 Sandeep was a distant relative of the victim. He has deposed that on 26/10/2015 the victim's grandmother called him to his house. He went there at about 08.00 p.m. She told him that the Appellant and the co-accused had assaulted the victim and had threatened him. He then made enquiries with the victim, who narrated the incident to him. P.W.3 then went to Police Patil. Because of night time they did not go to police station. On the next day they went to Rajapur police station and P.W.1 lodged his FIR.

In the cross-examination, he denied that there was toilet in his house in his village. He accepted that after the victim told the incident, they had meeting with the Police Patil.

He also admitted that there was Raipatan police chowky near their village and they could have gone there to lodge the FIR. His police statement omitted to mention that they did not go to Raipatan police chowky as it was night time. He could not explain that omission.

12. P.W.4 Dr. Ramchandra Mestry had examined the victim as well as the Appellant. He did not find injuries on the person of either of them. He explained that since the patients were examined after 6 days from the date of incident, there were no signs of injuries. He produced the medical papers on record at Ex.60.

13. P.W.5 PSI Sachin Kale had conducted the investigation. He has deposed that on 27/10/2015 the P.W.1 and his grandmother came to the police station and lodged their FIR. P.W.5 then started the investigation. He prepared Spot Panchanama and then arrested the accused. The Arrest Panchanama shows that the Appellant was arrested on 29/10/2015.

14. Learned counsel for Appellant submitted that the case rests on the evidence of sole eyewitness PW.1. But his evidence is not reliable. It is not believable that he was not remembering as to whether he had gone to school on the dates of incidents. He submitted that this shows concoction on his part. According to Mr. Mor there was delay of about 10 days in filing the FIR. It was also not explained as to why the FIR was not lodged at nearby chowky and why it was lodged at the police station far away from their village going by a bus. The evidence shows that a false case is concocted. There were no injuries on the person of the Appellant as well as the victim. This is also a circumstance in the Appellant's favour. He lastly submitted that the sentence imposed on the Appellant is harsh and it can be reduced, considering the fact that the Appellant is in custody for 7 years and that he has no criminal antecedents.

15. Learned APP opposed these submissions. According to learned APP, the prosecution has sufficiently proved this case

beyond reasonable doubt. There was no reason to disbelieve the evidence of P.W.1. The medical evidence was not against the prosecution as the doctor has explained that after 6 days of incident there was not likelihood of presence of injuries on the person of the Appellant as well as the victim.

16. I have considered these submissions. Examining closely the evidence of P.W.1, I do not find any serious infirmity in his evidence. No reason whatsoever is brought on record by the defence as to why P.W.1 would implicate the Appellant falsely. The allegations show chain of circumstances which had taken place on 17/10/2015, 21/10/2015 and 26/10/2015. Both the spots were secluded and it was possible for the Appellant to commit the offence without others knowing it. It is also expected that the victim would be frightened being a 13 years boy and therefore he could not have immediately lodged his complaint or would have told anybody about this incident. In the facts of this case, there was hardly any possibility of any injury being present on the person of either of the victim or the Appellant. Therefore

everything depends on the version of victim himself which I found to be reliable and cogent. His deposition was recorded after more than one year and therefore it was not unusual that he could not answer whether he attended the school on that day. In any case, both these incidents had taken place in the evening and not during the school time.

17. There is also no force in the submission that there was delay in lodging the FIR. The victim has explained about the threats given to him. The FIR was lodged only after he was threatened in the presence of his grandmother and when the incident was known to grandmother and other people. There was nothing wrong in lodging complaint at Rajapur police station, because it was accessible by bus and the victim was accompanied by his grandmother and P.W.3 to the police station.

18. Considering all these aspects I am of the opinion that the findings are rightly recorded by the learned Judge on the evidence of P.W.1.

19. The next question is about sentence. The minimum punishment provided u/s 4 of POCSO was 7 years on the date of incident i.e. in October 2015. The Appellant is continuously in custody since 29/10/2015. There are no antecedents against him. He has not caused any other physical injury to the Appellant. His co-accused is acquitted of threatening the victim on 26/10/2015.

20. Considering all these aspects, some leniency can be shown to the Appellant and minimum sentence can be imposed on him, instead of the sentence of 10 years rigorous imprisonment u/s 4 of POCSO, as it existed on the dates of incidents.

21. Learned APP does not have serious objection for reducing the sentence in these circumstances.

22. Hence, the following order :

ORDER

(i) The Appeal is partly allowed.

- (ii) The conviction and sentence of the Appellant u/s 8 of POCSO as well as u/s 506 of the Indian Penal Code are maintained.
- (iii) The conviction of the Appellant u/s 4 of POCSO is maintained. However, instead of rigorous imprisonment for 10 years, he is sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer simple imprisonment for three months.
- (iv) All substantive sentences are directed to run concurrently.
- (v) He is given set off u/s 428 of Cr.P.C.
- (vi) With these observations, the Appeal stands disposed of.

(SARANG V. KOTWAL, J.)