

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

CRIMINAL APPEAL NO.709 OF 2018

Sudam Ganpat Nimhan	 Appellant
Versus	
The State of Maharashtra	 Respondent

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Mr. Aditya S. Bapat, Advocate (appointed) for the Appellant.
Mr. S.R. Agarkar, APP, for the Respondent-State.
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CORAM : SARANG V. KOTWAL, J.

DATE : 20th OCTOBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 2.5.2018 passed by the Special Judge (POCSO), Pune in Special POCSO Case No.245/2016. By the impugned judgment and order, the appellant was convicted for commission of offences punishable under Sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and under Sections 376, 506 Part II of the Indian Penal Code. The appellant was sentenced to suffer RI for ten years and to pay fine of Rs.5,000/- and in default to suffer RI for three months for commission of offence punishable under Sections 4 & 8 of the POCSO Act.

Because of this sentence, no separate sentence was awarded under Section 376 of IPC. For commission of offence punishable under Section 506(II) of IPC, he was sentenced to suffer RI for six months and to pay fine of Rs.500/- and in default to suffer RI for one month. The sentences were directed to run concurrently. He was granted set off for the period which he had undergone as an under-trial prisoner under Section 428 of Cr.P.C.

2. Heard Shri Aditya Bapat, learned appointed counsel for the appellant and Shri S.R. Agarkar, learned APP for the respondent-State.

3. The prosecution case is that the victim's date of birth was 29.11.2004. She was studying in a school at Pune. She was travelling by a school bus between August, 2015 to 21st March, 2016. The appellant was the driver of the same bus. There are allegations that the appellant used to touch her inappropriately and on one occasion had inserted his finger in her private parts. The victim informed this fact to her class-teacher on 17.3.2016. The victim's parents were informed by the class-teacher and the Principal. The victim's mother lodged her FIR on 26.3.2016. The

appellant was arrested on the same day. The investigation was carried out. The victim and the appellant were sent for medical examination. Statements of witnesses were recorded. The victim's statement was recorded under Section 164 of Cr.PC. At the conclusion of investigation, the charge-sheet was filed and the case was committed to the Special Court.

4. During trial, the prosecution examined eight witnesses including the victim, her mother, the class-teacher, her friend, Medical officers, a pancha and the investigating officer. The defence of the appellant was of total denial.

5. Learned Judge believed the prosecution case and the evidence led by the prosecution and convicted and sentenced the appellant as mentioned earlier.

6. PW-1 was the mother of the victim. She has deposed that the date of birth of her daughter, who is the victim in this case, was 29.11.2004. PW-1 produced the birth certificate which is taken on record at Exhibit-11. Her daughter was studying in a school in Pune. In 2016 she was in the 6th standard. She used to go to school by a private school bus and used to return in the

same bus. The appellant used to take her in that bus and used to return in the same bus. On 17.3.2016, PW-1 had received a phone-call of the victim's class-teacher. She called PW-1 to meet her. On 18.3.2016, PW-1's husband went to the school. The class-teacher informed PW-1's husband that the victim had told her that the appellant used to touch the private parts and thigh of the victim. PW-1's husband then informed this to her. PW-1 took her daughter in confidence and asked her about it. Her daughter told her that the appellant used to make her sit in the cabin of the bus. In the month of August or September when she was alone in the bus the appellant touched her breast, thigh and stomach. He gave money to her. She also told PW-1 that on one occasion, when the informant was alone in the bus, the appellant inserted his finger in her private parts. The appellant used to forcibly make her sit in the cabin and used to commit these acts. Whenever the other children used to come in the cabin he used to remove his fingers from the victim's private parts. The appellant used to tell the victim to keep quiet and used to threaten her that he would beat her. Because of this fear, the victim had not informed the incident to anyone. After this, PW-1 lodged her report against the

appellant on 25.3.2016. The FIR is taken on record and marked as Exhibit-12. The victim was sent for medical examination after registration of FIR.

In the cross-examination, she deposed that since 1st standard the victim used to go to school in the same school bus and even the driver was the same. The victim used to play various sports. She used to play badminton, and used to go for cycling on every Saturday and Sunday. She admitted that on 18.3.2016, she had not lodged the report against the appellant. She denied the suggestion that in the year 2016 on the occasion of Dhulivandan the victim had thrown colour on the other children in the bus and also had thrown colour outside the bus. She denied that the appellant had told her to report this in the school. On 25.3.2016, she went to the police station. The FIR was lodged in the midnight. There is some minor contradictions from her FIR, which were put to her in the cross-examination.

7. PW-2's evidence is important in this case. She is the victim. She has deposed that she used to go to school at around 7.30 a.m. and used to return at 4.00 p.m. The appellant was the

driver of that school-bus. There was a lady care-taker for the school-bus. She used to be present in the school bus only in the morning but while returning the care-taker used to remain absent. She stated that the children from other area started travelling in the same school-bus, therefore, the appellant asked her to sit in the cabin. The appellant told her that he knew her grand-father. He had asked her to sit in the cabin but she did not like to sit in the cabin. She further deposed that whenever she used to sit in the cabin, the appellant used to touch her chest, back, thigh and other parts and used to pay her money. She has further deposed that on one occasion, the appellant put a finger in her private parts. She opposed that. He told her to keep quiet. He paid her some money for sweets. She further deposed that the appellant used to press her stomach and chest and that he used to commit such acts from time to time. He used to tell her that if she informed this to anybody he would beat her and, therefore, she did not tell this to anybody. But after some days, she informed it to her class-teacher. She further deposed that after she told her class-teacher, her father was called in the school. The class-teacher told him about the incident. Her father told her mother

about the incident. Significantly PW-2 has further deposed that on 21.3.2016 again the appellant harassed her in the same manner. This particular deposition is important in the context of the case. After that again PW-2 informed this incident to her mother. After that her parents went to the police station and lodged the report. The victim was then sent for medical examination. Her statement was also recorded under Section 164 of Cr.P.C.

In the cross-examination, she has admitted that the school-bus used to pick up children from various parts while going to the school. The area was crowded. The school bus was crowded and the students had to stand in the bus. She has further admitted that at the time of incident she had not informed about these acts to her mother., though she was not afraid of her mother.

8. PW-3 is another important witness. She was class-teacher of PW-2. She has deposed that she was class-teacher for the 6th standard. On 17.3.2016, the victim came crying to her. When PW-3 asked the victim why she was crying, the victim told her that the appellant used to touch her back, chest, thigh when she was sitting in the driver's cabin. PW-3 then informed the

incident to the Principal, who asked PW-3 to call the victim's parents. On the next day, the victim's father met her in the school. PW-3 informed him about the incident. Then the victim's father lodged report against the appellant.

In the cross-examination, she deposed that she was not aware in which vehicle the victim was coming to school and who was the driver. She was also not aware about other students travelling in the same vehicle. She stated that the victim used to take part in the sports. She admitted that except on 17.3.2016, the victim had never informed her about any such incident.

9. PW-4 Dr. Deepali Jadhav had medically examined the victim. She has deposed that the victim was examined on 26.3.2016. The victim herself gave the history that some where in August and September 2015 the appellant physically molested her and put his finger in her private parts. She was bleeding at that time and her mother thought it was her first menstruation period. After that the appellant used to do that act repeatedly and had threatened the victim. According to this witness, the victim had not attained the age of menarche. She further found that her

hymen was torn completely and there were multiple old healed tears. She further deposed that tearing of hymen is possible if anybody frequently inserts finger in the private parts. However, in the cross-examination she admitted that by vigorous activities like jumping, cycling, climbing staircase etc. there could be hymen tear. She could not tell the age of old multiple old healed tears and there was no opinion as to age of injuries and nature of injuries mentioned by her. There was no evidence of injuries suggestive of application of force.

10. PW-5 API Bobade had recorded the FIR. She had sent the victim for medical examination. She had arrested the appellant. She had recorded the statement of the class-teacher. She had sent the appellant for medical examination. She had seized the bus and had taken photographs of the bus. She had arranged to record the statement of the victim under Section 164 of Cr.PC.

In the cross-examination, she deposed that she had recorded the statement of the class-teacher on 18.3.2016.

11. PW-6 was a friend of the victim. She has deposed that

she used to travel in the same school bus with the victim. The appellant used to tease her. She further deposed that the appellant made the victim sit in the cabin near the window. She has further deposed that she had noticed that the appellant was touching the thigh of the victim. The victim had told this witness that the appellant used to harass her.

Her cross-examination is not of any help in favour of the defence.

12. PW-7 Narayan Patil was a pancha for seizure of the bus and PW-8 Dr. Bhalerao had examined the appellant medically. These two witnesses are not very material.

13. Learned counsel for the appellant submitted that the evidence of the prosecution falls short of proving its case beyond reasonable doubt. It was not possible for the appellant to commit such acts in a crowded bus. It has come on record through the evidence of the victim and her friend that the school bus was otherwise crowded and full of students; and therefore the allegations cannot be true. He submitted that there is no explanation as to why the FIR was lodged late in the night

between 25th and 26th March, 2016 though the incident came to the knowledge of the class-teacher on 17.3.2016 and it was immediately informed to the victim's parents.

14. He further emphasized the fact that if the parents knew about the incident it was simply impossible that they would allow the victim to travel in the same bus with the appellant after 17.3.2016.

15. He further submitted that in any case the story of the prosecution is highly improbable and the prosecution has definitely failed to prove its case beyond reasonable doubt as far as penetrative sexual assault is concerned. The date of assault, even approximately, is not mentioned and though in the medical history there is some reference to bleeding; neither the victim nor the informant has made mention about such bleeding indicating such injury. He further submitted that the victim did not utter a word about the penetrative sexual assault to her class-teacher. Even her friend has only spoken about the inappropriate touch and there was no reference to penetrative sexual assault.

16. He further submitted that though the medical

examination showed tearing of hymen; but PW-4 Dr. Jadhav has explained that it could be caused because of various other reasons and it was not a conclusive proof of the acts alleged against the present appellant.

17. He, therefore, submitted that firstly the appellant deserves to be acquitted from all the charges; and in the alternative at least he should be acquitted from the charge of commission of the offence of penetrative sexual assault and of rape.

18. Learned APP Shri Agarkar opposed these submissions. He submitted that there is no reason to doubt the deposition of the victim herself. She has not only spoken about the sexual assault as defined under Section 7 of the POCSO Act but she has also deposed about the penetrative sexual assault because the appellant had inserted finger in her private parts. He submitted that even her mother has deposed likewise. Apart from that the medical history given by the victim is also on the same lines and, therefore, the conviction is properly recorded.

19. I have considered these submissions. As far as the

submission of learned counsel for the appellant that the appellant deserves to be acquitted from all the charges is concerned; I am unable to accept that submission. It is not possible to hold that the victim was telling the entire story falsely. There is an eye witness in the form of PW-6 – her friend who had seen the appellant touching the victim's thigh. To that extent the victim's evidence is corroborated. Therefore, the offence as defined under Section 7 of the POCSO Act is proved through the evidence of PW-2. Section 7 of POCSO Act reads thus :

“7. Sexual Assault.-- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

According to PW-2 the victim, the appellant had touched her breast and, therefore, his act would fall within the meaning of ‘sexual assault’. Since in the year 2016 she was below 16 years of age and since that act of sexual assault was repeated the offence would fall within the meaning of ‘aggravated sexual assault’ inviting punishment under Section 10 of the POCSO Act.

Though that particular charge was not framed, it is a lesser charge than the one under Section 4 of the POCSO Act. The conviction can be altered to that under Section 10 of POCSO Act if it is proved that the offence of penetrative sexual assault punishable under Section 4 of the POCSO Act is not proved by the prosecution.

20. The ingredients of offence of sexual assault as defined under Section 7 and aggravated sexual assault under Section 9(l)&(m) are clearly spelt out in the charge. Therefore, there is not impediment in convicting and sentencing the appellant under Section 10 of the POCSO Act.

21. The more important question in this case is whether the prosecution has been able to prove its case beyond reasonable doubt as far as the allegations of penetrative sexual assault is concerned. From that angle the evidence has to be examined carefully. Undoubtedly, the victim has deposed that on one occasion the appellant had inserted his finger in her private parts. She has not deposed that this particular act was repeated by him. Her answer to question No.15 speaks about the repetition of

touching her inappropriately, but, there is no specific clear deposition that the act of inserting finger was repeated by him. Even for that one occasion there is doubt created through her evidence for the following reasons :

- i. Even the approximate date of such incident is not mentioned.
- ii. Though the medical officer has spoken about the victim having suffered bleeding, neither the victim nor her mother – PW-1 has spoken a word of any bleeding. That is very significant.
- iii. More importantly, PW-1 has nowhere deposed about the bleeding or her suspicion regarding the cause for her bleeding at all. There is no approximate month or year about such incident.
- iv. The victim's class-teacher has deposed about the information given by the victim herself and there is absolutely no reference to penetration. She has only spoken about touching the victim inappropriately on her back, chest and thigh. There is absolutely no reference to penetrative sexual assault using his fingers. This is very significant.
- v. The victim's friend PW-6 has also not spoken about penetrative sexual assault and she has not deposed that the victim had told her about any such penetrative assault though the victim had only told her that the appellant was harassing her.
- vi. PW-4 has accepted that there could be other causes for the tear which she had noticed.

22. There is another important aspect of this matter. PW-2 the victim in answer to question No.18 has deposed that her teacher had called her father to her school and had informed her father about the incident. Her father in turn had informed the incident to her mother. Thereafter the victim narrated the same incident to her mother. Surprisingly she further deposed that after that, on 21.3.2016 again the appellant harassed her in the same nature. Again, she informed the same to her mother. This is very difficult to understand. If the parents knew about the nature of incident on 17th or 18th March, 2016, it was simply impossible that they would permit the victim to travel with the appellant on 21.3.2016. Therefore, this particular answer creates serious doubt about the prosecution case. It was the victim's case that the appellant had committed those acts. The parents simply would not have allowed the incident to be repeated or the victim to go anywhere near the appellant. This does indicate that till lodging of the FIR there were no serious allegations except touching the victim inappropriately. Therefore, based on this discussion, a very serious doubt is created about the allegations of penetrative sexual assault and, therefore, the appellant will have to be given benefit

of doubt to that extent. Moreover, as rightly submitted by learned counsel for the appellant, the bus was always crowded and, therefore, it was improbable that the appellant could have inserted his finger in her private parts in such crowded bus. The prosecution has not brought out on record through any independent evidence that the victim would be alone in the bus. The prosecution has not proved that the victim was the last person to get down from the bus.

23. Moreover there is also no explanation as to why the FIR was not lodged either on 17.3.2016 or on 18.3.2016 and why it was lodged between the night of 25th and 26th March, 2016. This also raises some doubt about the prosecution's case. However, all these aspects will not entitle the appellant from clean acquittal. But, cumulative effect of these infirmities is that the benefit regarding allegations of penetrative sexual assault will have to be given to him.

24. Learned APP submitted that if the conviction is to be altered to the one under Section 10 of the POCSO Act, then the maximum sentence be imposed against the appellant looking at

the nature of incident and the manner in which the appellant had taken advantage of the situation.

25. Learned counsel for the appellant submitted that some leniency be shown while imposing sentence considering that he is already in custody for more than four years. The period of offence was in March, 2016 and before that. Considering these submissions, in my opinion the following order would meet the ends of justice. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction of the appellant under Section 376 of IPC and under Sections 4 & 8 of the POCSO Act is set aside. Instead, the appellant is convicted for commission of offence punishable under Section 10 read with 9(l) and 9(m) of the POCSO Act and is sentenced to suffer RI for seven years and to pay fine of Rs.5,000/- (Rupees Five Thousand Only) and in default to suffer RI for three months.

- iii. The appellant's conviction and sentence under Section 506 Part II of IPC is maintained. That means, he is convicted for commission of offence under Section 506(II) of IPC and is sentenced to suffer RI for six months and to pay fine of Rs.500/- (Rupees Five Hundred Only) and in default to suffer RI for one month. That part of the impugned judgment and order is maintained.
- iv. All the substantive sentences are directed to run concurrently.
- v. The appellant is granted set off under Section 428 of Cr.P.C. for the period that he has undergone in detention during trial.
- vi. Criminal Appeal is disposed of accordingly.

(SARANG V. KOTWAL, J.)

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