

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

CRIMINAL APPEAL NO.441 OF 2022

Anil Atmaram Gurubakshani,
Age 41 years, Occu. Labour
R/o Old Sindhi Colony,
Nandurbar, Dist. Nandurbar

... **APPELLANT**

VERSUS

1. The State of Maharashtra
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad)

2. X
(Name withheld)

... **RESPONDENT**

.....
Mr. S.J. Salunke, Advocate for appellant
Mr. N.T. Bhagat, A.P.P. for respondent
Smt. Anuradha Mantri, Advocate for respondent No.2
(appointed)

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CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 21st March, 2023

Date of pronouncing judgment : 14th July, 2023

J U D G M E N T :

The challenge in this appeal is to the judgment
and order of conviction and consequential sentence passed
by the Court of Special Judge, Nandurbar in Special Case,

No.22/2021. Vide impugned judgment and order, the appellant was convicted for offence punishable under Section 10 of the Protection of Children from Sexual Offences Act (POCSO Act for short) and, therefore, sentenced to suffer rigorous imprisonment (R.I) for seven years and to pay a fine of Rs.50,000/- with default stipulation. The appellant is, however, acquitted of the offences punishable under Sections 376-AB of the Indian Penal Code and under Sections 4 and 6 of the POCSO Act. The State has not preferred appeal against acquittal.

2. The prosecution case is as follows :-

The appellant and the victim, a girl child of about 5 years of age at the relevant time, were residing in the neighbourhood of each other. The appellant would run a petty grocery shop. The victim wanted chocolates. Her mother (P.W.2), therefore, gave her Rs.10/-. The victim went to the appellant's shop. The appellant took her in. He removed the victim's knicker (pant). He also removed his own pant. He then committed peno-vaginal intercourse with her. He even inserted his finger in the victim's private part. One of the friend of the victim gave her call. The appellant

let the victim go. The victim came home crying. She shared the incident with her mother. The parents of the victim, therefore, took her to the police station. The victim was medically screened. Her statement then came to be recorded. The victim's mother lodged First Information Report (F.I.R. - Exh.29/30).

3. Crime vide C.R. No.238/2021 came to be registered and investigated as well. The victim was medically screened. The appellant was arrested. He too was medically screened. Scene of offence panchanama was drawn. Clothes on the person of both, the victim and the appellant at the relevant time were seized. Blood sample and the clothes were sent to C.F.S.L. for analysis and D.N.A. profiling. On completion of the investigation, the appellant was proceeded against.

4. Charge (Exh.16) was framed against the appellant. He pleaded not guilty. His defence was of false implication. The prosecution examined 6 witnesses and produced in evidence certain documents to establish the charge. The trial Court, on appreciation of the evidence, convicted the appellant.

5. Learned counsel for the appellant would submit that, the victim at the relevant time was close to 5 years of age. She was prone to tutoring. There are material omissions and contradictions in the evidence of the prosecution witnesses. The medical evidence does not support the prosecution. The appellant is in jail since the day of his arrest i.e. 18/5/2021. The trial Court ought not to have relied on uncorroborated testimony of a child witness. According to learned counsel, the prosecution evidence falls short to bring home the charge beyond reasonable doubt. He, therefore, urged for allowing the appeal.

6. The learned A.P.P. and the learned counsel representing the respondent No.2 would, on the other hand, submit that, before recording evidence of the victim, the trial Court had put her certain questions. She gave rational answers thereto. The trial Court found the victim to be a competent witness. She had narrated the incident to her mother. As such, the evidence of the mother of the victim corroborates the prosecution case. They would further submit that, D.N.A. report undoubtedly implicate the appellant. Both the learned counsel took this Court through

the evidence and ultimately urged for dismissal of the appeal.

7. Considered the submissions advanced. Perused the evidence on record. Let us reappreciate the prosecution evidence to find whether the impugned order of conviction and consequential sentence is just and proper. True, the trial Court put the victim certain questions and found her to be a competent witness. The victim, while giving her evidence, was just 5 years of age. It is in her evidence that, her mother gave her Rs.10/- for purchase of chocolates. She, therefore, went to uncle's shop in the nearby. The uncle removed her pant. He also removed his own. The uncle then penetrated his private part into her's. The uncle then inserted his finger in her private part. Her friend Rashi gave her call. Her another friend Sujal pushed the door (of the shop). She then went home crying. She related her mother what happened with her. She was then taken to a police station and then to hospital. She was medically screened. The victim identified the appellant before the Court as the very uncle who behaved with her such a way.

8. During her cross-examination, the victim testified that the appellant's mother – Nandi Aunty was sitting in the shop. She further testified that all the family members of the appellant and one another person were present in the shop. The appellant was cutting chilly on the cot. While she came out of the shop, her parents were on the stairs of her home.

9. P.W.2 (mother of the victim) stated in her evidence that, it was 5.15 p.m. of 18/5/2021. The victim was insisting for chocolates. She, therefore, gave her Rs.10/-. The victim went to the shop of the appellant. She did not return within 10-15 minutes. She along with her husband came out of their home to look for the victim. Rashi and Sujal, friends of the victim were playing around. She asked them to call the victim. Both of them, therefore, went to the shop of the appellant to call her. The victim then came home with Sujal. The victim was crying. She related her the incident. She examined the victim's private part to find redness to have been developed there. The victim's knicker had become wet. She along with her husband, therefore, took the victim first to the police station and then to the hospital. The victim was medically

screened. Then they returned their home. Police arrived. A lady constable recorded the victim's statement. She (P.W.2) lodged the F.I.R. (Exh.29/30).

10. It is further in her evidence that, the victim was clad in a T Shirt and a full pant. She identified those clothes before the Court.

11. P.W.2 was subjected to a searching cross-examination. She was confronted with the F.I.R. and her statement recorded under Section 164 of the Cr.P.C. Certain material omissions amounting to contradictions have been brought on record. She, however, denied to have lodged a false report against the appellant on account of a dispute between him and her husband.

12. P.W.3 Dr. Dr.Germansing was a Medical Officer on duty at Civil Hospital. He medically screened the victim. His evidence will be referred to a little later. P.W.4 Dr. Rohan medically examined the appellant to find him potent. P.W.5 Raben is a panch witness to the scene of offence and seizure of clothes of the victim and that of the appellant. While P.W.6 Sachin was the investigating officer. The C.A. reports and D.N.A. report find place at Exhibits 52 to 57.

13. The victim was medically screened soon after the incident. Her medical examination report reads thus ;

14. The Medical Officer Dr. Rohan (P.W.4) was categorical to state to have not noticed any sign of sexual assault on the victim. His evidence further suggests that, if there is a peno-vaginal intercourse by a man of 40, with a girl child of about 5 years old, possibility of rupture of labia minora would be there. Admittedly, he did not notice the same. Admittedly, the investigating officer had referred the victim for her re-medical examination. There was, however, no change in the examination report.

15. Although the investigating officer testified in his evidence to have obtained blood samples of both, the appellant and the victim, none of the Medical Officers examined by the prosecution did state to have had obtained blood samples of both, the appellant and the victim for D.N.A. profiling. There is also no witness to state a semen sample was obtained of the appellant. The clothes of both, the appellant and the victim were seized on the following day. The victim's clothes were delivered by her mother. There is no evidence to indicate the seized articles and the

alleged samples to have been preserved. There is also no evidence as to who carried those articles to C.F.S.L. The trial Court has, therefore, rightly negated the prosecution case, the appellant to have committed rape of the victim. It is reiterated that the State has not preferred any appeal against the acquittal.

16. The trial Court has convicted the appellant holding him to have touched his penis and finger to the victim's private part. The informant (P.W.2), mother of the victim did not state in her statement recorded under Section 164 of the Cr.P.C. that the petitioner had inserted his finger in the private part of the victim. Said statement is conspicuously silent to state the appellant to have touched his private part with that of the victim's. The victim also in her similar statement did not state the appellant to have inserted or even touched the finger at her private part. It was all along the case of the victim that the appellant had committed rape of her. The medical examination report of the victim ruled out rape. We cannot reconstruct the prosecution case, scaling it down from the offence of rape or aggravated penetrative sexual assault to an offence of sexual assault.

17. The victim at the relevant time was close to 5 years of age. It is in her evidence that, while she went to the appellant's shop, his mother, all of his family members and one unknown uncle were also present at his residence. The grocery shop is in one of the rooms (road side). It would, therefore, be difficult for this Court to believe the case of the victim that the alleged acts were committed by the appellant in the presence of his family members. The scene of offence panchanama indicates the shop has a shutter (steel), while the mother of the victim in her statement to the police testified that one of the friends of the victim pushed the door and entered the appellant's residence.

18. In short, it was not the case of the victim that the appellant applied his finger to her private part. It was also not her case that the appellant touched his private part with her's. The Court on its own, without there being any evidence, cannot reconstruct the prosecution case, as stated above. The evidence of the victim alone that the appellant did the alleged acts with her cannot be accepted since according to her, all the family members of the

appellant were present at his residence. In this factual backdrop, the trial Court ought not to have convicted the appellant for the offence of aggravated penetrative sexual assault punishable under Section 10 of the POCSO Act. Interference with the impugned judgment and order is, therefore, warranted.

19. In the result, the appeal succeeds. Hence the order :

ORDER

(i) The Criminal Appeal is allowed.

(ii) Conviction of the appellant and consequential sentence recorded by learned Special Judge, Nandurbar vide judgment and order dated 5/5/2022 passed in Special Case No.22/2021 is hereby set aside.

(iii) The appellant is acquitted of the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012. The appellant be released forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

20. Fees of Smt. Anuradha S. Mantri, learned counsel appointed for respondent No.2 is quantified at Rs.8000/- (Rupees eight thousand).

(R.G. AVACHAT, J.)

fmp/-