

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.373 OF 2021
A/W
INTERIM APPLICATION NO.2620 OF 2022
IN
CRIMINAL APPEAL NO.373 OF 2021**

Irfan Husain Shaikh	]	
Aged 28 years, Occu: Labour,	]	
R/o. Ghongade Vasti,	]	
Solapur.	]	
(at present lodged in Yerwada	]	
Central Prison, Pune).	]	Appellant
		(Orig. Accused)

Vs.

1. The State of Maharashtra	]	
At the instance of Jodbhavi Peth	]	
Police Station, Solapur.	]	
District: Solapur.	]	
 C.R. No.433 of 2017.	]	
(Notice to be served on the A.P.P	]	
High Court, Mumbai.)	]	
 2. XYZ	]	
Age: 40 years, Occupation: Labour	]	
Gongade Wasti Bhawani Peth,	]	
Solapur.	]	Respondents

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Mr. Ujwal R. Agandsurve, for Appellant.

Mr. A.R. Kapadnis, A.P.P, for Respondent No.1-State.

Mr. Ganesh Bhujbal, Appointed through High Court Legal Services Authority, for Respondent No.2.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

DATE : 22nd JUNE, 2023.

JUDGMENT:

1. Challenge in this appeal is to a judgment and order dated 21st January, 2020 rendered by the Additional Session Judge, Solapur in Sessions Case No.335 of 2017, thereby convicting the appellant of the offence punishable under section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO”). The appellant has been sentenced to undergo rigorous imprisonment for ten (10) years and fine of Rs.2,000/-, in default, simple imprisonment for three months. No separate sentence was awarded in view of section 42 of the POCSO Act of the offence punishable under Section 377 of the Indian Penal Code (for short “I.P.C”).

2. Prosecution case is as follows.

3. P.W1 is the complainant and father of the victim. The victim was aged about nine years who was born on 11th February, 2008. There is no dispute about the age of the victim at the time of the incident which had occurred on 18th September, 2017 at about 11.00 a.m. On that day, the victim alongwith his friends P.W. 3,

P.W. 4, P.W.5 and P.W.6 had been flying kites on a ground when the appellant came to the victim boy and under the pretext of giving him a new kite and string, took him in a room. He forcibly removed half pant of the victim as well as his pant and underwear. Thereafter, he inserted his penis into the anus of the victim boy. However, the victim boy screamed and rushed back to the ground. The appellant, however, again attempted to repeat the same act by taking the victim boy to the said room. This time, friends of the victim viz: P.W.3, P.W.4, P.W.5 and P.W.6 rescued the victim from the clutches of the appellant.

4. The victim boy was reluctant to return to home as he had an apprehension that his mother would scold him. When his father returned home and brought the victim, the victim boy narrated the incident to his father.

5. P.W.1 approached Jodbhavi Peth Police Station and lodged a complaint. On the basis of which, an First Information Report came to be registered vide C.R. No.434 of 2017. P.W.7-Investigating Officer – Bhimaji Hindurao Patil conducted investigation into the crime. The victim boy was sent for medical examination to Civil

Hospital Solapur along with reference letter. Investigating Officer visited the spot. He drew a spot *panchanama*. Clothes on the person of the victim boy at the time of the incident came to be seized in the presence of *panch* witnesses. The accused was also arrested by the Investigating Officer. *Muddemal* was sent to Forensic Science Library, Pune for conducting D.N.A test of the appellant. After recording statements and on completion of investigation, a charge-sheet was filed in the Court.

6. Additional Sessions Judge, Solapur framed a charge under section 377 I.P.C and under section 3(A) and 4 of the POCSO Act. The accused pleaded not guilty and claimed a trial. His defence was total denial and false implication.

7. Seven witnesses were examined by the prosecution.

8. The learned Additional Sessions Judge after going through the evidence of the victim boy as well as other witnesses and after hearing the prosecution and defence, by the impugned judgment convicted the appellant as above.

9. Learned Counsel for the appellant, Mr. Agandsurve is fair enough to admit that the victim boy was minor at the time when the incident took place. He emphasized that medical evidence does not support the prosecution case as regards carnal intercourse alleged to have been meted out to the victim boy. If there was insertion of penis into the anus of the victim boy, there ought to have been some injury in view of the fact that the victim boy screamed due to pains. So far as other witnesses are concerned, the learned Counsel submits that their evidence does not inspire confidence as almost all the witnesses i.e P.W.3 to P.W.6 have admitted that it was A-their friend, who had informed them about the incident.

10. On the other hand, learned Counsel for respondent No.2 and the learned A.P.P supported the impugned judgment by contending that the evidence of the victim boy remained un-rebutted and there is no reason to disbelieve him as well as rest of the witnesses who were friends of the victim boy and were very much present at the time of the incident on the ground.

11. P.W.1 is the father of the victim who has reiterated, what has been stated by him in the First Information Report. His evidence is

of hearsay nature still it cannot be ignored in view of the fact that no father would falsely implicate an innocent person by making such serious allegations in respect of his minor son. There is no effective cross-examination of P.W.1 by defence.

12. The important evidence would be that of the victim whose evidence came to be recorded by the learned Additional Session Judge by following due process of law. He being a minor, initially a few questions were asked to him as to whether he understood and realized sanctity of an oath. Relevant questions are question Nos. 42 to 61, which are extracted below;

“Que 42 – What was your age at the time of incident?

Ans – 9 years.

Que 43 – Which class you were in at the time of incident?

Ans - third std.

Que 44 – What was your age at that time?

Ans – 9 years

Que 45 – When did the incident happened?

Ans – I do not remember date, but there was morcha of lingayat community therefore, my school had holiday.

Que 46 - Then what happened?

Ans – I went to fly kite at 11.00 am.

Que 47 – Then what happened?

Ans – Irfan had come there and he was drunk.

Que 48 – Then what happened?

Ans – He cut my kite and told me that I will give you kite and kite string. He showed me 10/- Rs. note and took me in one room.

Que 49 – Then what happened in the room?

Ans – He asked me to remove my under pant and underwear. As I did not remove clothes, he forcible removed my pant and underwear, he removed his underwear and forcibly inserted his private part in my anus.

Q. 50 – Then what happened?

Ans – I stated screaming loudly as it was painning in my anus.

Q. 51 – What did he do when you were screaming?

Ans – As I was screaming he left me, then I came out of room. He wore his pant and came near staircase.

Q. 52 – Then what happened?

Ans – I told my friends what had happened.

Q. 53 – What did your friends tell you?

Ans – My friends told me to go and tell my father.

Q. 54 – Then did you tell your father?

Ans – My pappa was not at home. I did not tell my mother as I thought she will scold me.

Q. 55 – You did not go home?

Ans – I waited in the ground and later on started to play with the friends.

Q. 56 – Then what happened?

Ans – Again Irfan called me, to give kite strings which was rolled on bottle.

Q. 57 – Did you go to bring bottle?

Ans – I went to bring kite string bottle. He assaulted me with the glass bottle.

Q. 58 – What happened when he assaulted?

Ans – There was inflammation on my forehead.

Q. 59. Then what happened?

Ans – Irfan picked me took me in the room.

Q. 60 – Then what happened?

Ans – He again asked me to remove the underwear.

Que. 61 – Did you remove your underwear?

Ans – No. He was removing my underwear but I was holding it tight. Meanwhile my friends A and B and other friends came there, they all escaped me from him by pelting stone. Then Irfan left me. Then I sat with my friends in the Pandal. My father came searching for me at night”.

These questions and answers are quite sufficient to believe and accept the truthfulness of his version in light of the fact that even in cross-examination, defence has substantiated certain facts that the appellant had taken him from the ground at the relevant time. The defence has not disputed presence of the appellant on the spot at the time of the incident as well as the fact that he has taken the victim boy along with him. It is even suggested by the defence that friends of the victim did not make any hue and cry, meaning thereby, even friends of the victim were present at the relevant time.

13. The defence has gone to the extent in suggesting that the victim did not make hue and cry when he was taken in the room by the appellant. The answers given by the victim boy to the questions put to him by the learned Additional Sessions Judge coupled with the cross-examination referred hereinabove is in itself sufficient to hold that the appellant had committed the offence as alleged.

14. So far as the testimonies of P.W.3, P.W.4, P.W.5 and P.W. 6 are concerned, they spoke in one tune, however, each of them admitted that whatever stated by them was about actual incident narrated by

their friend A who has not been examined by the prosecution. That itself would not falsify the testimony of these minor boys whose presence near the spot at the time of the incident is not disputed. Evidence of P.W3 to P.W.6 is relevant in view of section 6 of the Evidence Act.

15. Medical certificate of the victim, especially, surgery opinion is extracted below;

Surgery Opinion:-

PR :- No evidence of external perianal injury

No evidence of any active bleeding

DRE (Digital Rectal Exam) – No evidence of tissue, spasm, tear or ulcerations

Sphincter tone is normal

Rectal swab taken and sent for analysis”.

Section 3 clause (a) of the POCSO Act defines what is the penetrative sexual assault. Clause (a) and (b) of section 3 of the POCSO Act are extracted below;

“3. Penetrative sexual assault.- A person is said to commit “penetrative sexual assault” if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person”.

It manifests that a person is stated to have committed penetrative sexual assault if he penetrates his penis, **to any extent**, into the vagina, mouth, urethra or anus of the child. It necessarily means that even slightest insertion of the penis constitutes penetrative assault which is made punishable under section 4 of the POCSO Act. In an unnatural offence even slightest degree of penetration is enough and it is not necessary to prove the completion of the intercourse by the emission of seed.

16. As such, I do not see any reason to interfere with the impugned judgment and order of conviction awarded to the appellant by the trial Court. The only thing is that the learned trial Court has misinterpreted section 42 of the POCSO Act. Section 42 of the POCSO Act contemplates life imprisonment. It reads as under;

“42. Alternate punishment.- Where an act or omission constitutes an offence punishable under this Act and also under sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375,

376, [376-A, 376AB, 376-B, 376-C, 376-D, 376-DA, 376-DB], [376-E, section 509 of the Indian Penal Code (45 of 1860) or section 67-B of the Information of Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree”.

17. It is apparent from a bare reading of the said section that greater degree of punishment needs to be awarded to the accused if he is found guilty for the aforesaid offence as well as under the said Act. The maximum sentence provided under section 4 of the POCSO Act is for life. Be that as it may.

18. Upshot of the aforesaid discussion is that the impugned judgment and order does not warrant interference in appeal and hence, it stands dismissed.

19. In view of dismissal of the appeal, Interim Application, shall stand disposed of.

[PRITHVIRAJ K. CHAVAN, J.]