

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.326/2021

Gautam s/o Monaji Bhaisare,
Convict No. C/10567, aged 35 years,
Occ. Farmer, r/o Sakhara, Gadchiroli,
Tq. Sakhara, Dist. Gadchiorli,
(Appellant is presently in Central
Prison, Nagpur)

.....APPELLANT

...V E R S U S...

State of Maharashtra, through
Police Station officer, Police Station,
Gadchiroli, Dist. Gadchiroli.

...RESPONDENT

Mr. S. D. Sahoo, Advocate for appellant.
Mr. M. J. Khan, A.P.P. for respondent.

CORAM:- ANIL L. PANSARE, JJ.

DATED :- 21.03.2023

ORAL JUDGMENT

The appellant has taken exception to the judgment and order dated 05.12.2019 passed by learned Special Court, Gadchiroli, in Special POCSO Case No.5/2019, thereby convicting the appellant for the offences punishable under Sections 354, 448 of the Indian Penal Code, 1870 (for short the 'IPC') and Section 8 of the Protection of Children From Sexual Offences Act, 2012 (for short the 'POCSO Act'). For the offence punishable under Section 448 of the IPC, the appellant is sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs1,000/- in

default to suffer simple imprisonment for one month. For the offence punishable under Section 8 of the POCSO Act, the appellant is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.25,000/- in default to suffer simple imprisonment for four months. No separate sentence is awarded for the offence punishable under Section 354 of the IPC. Both the sentences are directed to run concurrently.

2. Briefly stated, the case of the prosecution is that on 18.08.2018 at about 04:00 P.M. mother of the victim had gone out for some work and her sister had gone out for playing. The mother of the victim was running daily needs shop in her house. Amongst others, she used to sell chocolates, kharra, etc. The mother left the house for some work. The victim alone was present in the house. The accused came later to her house and demanded 'kharra'. Initially, the victim refused but the accused insisted. Therefore, she gave him 'kharra'. The accused paid the amount of kharra. The minor victim went inside for keeping the money. The accused followed her. He pushed her on bed and made her sleep. The appellant then slept on her person and pressed her breasts by both the hands. The victim pushed him and ran out of the house. The appellant also left the house. The mother of the victim returned back at about 05:00 P.M. The victim was weeping. The victim

narrated the plight. Thereafter, the report has been lodged with the police station.

3. The FIR was accordingly registered vide Crime No.344/2018 for the offences punishable under Sections 354, 448 of the IPC and Section 8 of the POCSO Act. The investigation was carried out. The investigating officer has collected birth certificate of the victim. The spot panchanama was drawn. The appellant was arrested on 19.08.2018. Statement of victim and her mother came to be recorded under Section 164 of the Criminal Procedure Code, 1973 (for short the 'Cr.P.C.'). The investigation culminated into filing of the charge-sheet.

4. The charge was framed and read over to the appellant, to which he pleaded not guilty and claimed to be tried. The prosecution has examined six witnesses. The appellant did not examine any witness in defence. The defence of the appellant was of total denial so also of dispute between uncle, brother and mother of the victim with the appellant. Thus, defence of the appellant is of false implication because of previous enmity.

5. I will refer to the argument, evidence, documents, impugned judgment, etc. to the extent necessary to decide the

following points that arise for my consideration.

Sr. No.	Points	Findings
1	Has the prosecution proved that on 18.08.2018 at mouza Sakhara, District Gadchiroli, the appellant committed house trespass by entering into the house of the victim with an intention to commit the offence?	In affirmative.
2	Has the prosecution proved that on 18.08.2018, the appellant used criminal force upon victim and outraged her modesty and committed sexual assault?	In affirmative.
3.	Whether interference is called for in the impugned judgment?	In negative.
4.	What order?	As per final order.

REASONS

As to point nos.1 to 3:

6. These points being interlinked, they are decided by common reasons. The prosecution has examined following six witnesses.

- (i) PW1–Mother of victim.
- (ii) PW2 – The victim.
- (iii) PW3 – Bandu Taksande, pancha witness.
- (iv) PW4 – Bhaktdas Bhanarkar, maternal uncle of victim.
- (v) PW5 – Purushottam Dinaji Sorte, neighbour of the victim.
- (vi) PW6 – Tejasvi Patil, Police Sub Inspector, the investigating officer.

7. The evidence of PW2 is most crucial because she is the only witness to the incident. She has deposed that on 18.08.2018, she was alone in the house. The appellant entered her house and sought 'kharra'. The victim said that her mother is not in the house and therefore she will not give him 'kharra'. The appellant insisted for 'kharra'. Therefore, she went inside and brought 'kharra' and gave it to the appellant. The appellant paid the amount of 'kharra'. She went inside to keep the amount. The appellant followed her and pushed her on bed. Thereafter, he slept over her person and pressed her breasts by both hands. She pushed him and ran out of the house. The appellant also ran away. Her mother returned back. She (the victim) was weeping. Her mother inquired as to what had happened, to which the victim narrated the incident. She and her mother approached the police station and lodged FIR. She has also deposed that her date of birth is 18.05.2008. She had brought certified copy of birth certificate (Exh.25).

8. In the cross-examination, omission to the effect that, 'she said to the appellant that her mother is not in the house and therefore she will not give him kharra' has been proved. However, she withstood the cross-examination on the point of incident. Further, there is no challenge to the date of birth of the victim.

9. Thus, through testimony of the victim, her date of birth has been proved to be 18.05.2008. The incident has occurred on 18.08.2018. The victim was, 10 years and 3 months old at that time. The age of the appellant was about 33 years. There is nothing in the cross-examination to discard the testimony of the victim. She has narrated her sufferings in clear words.

10. Her testimony is corroborated by PW1 – her mother, at least on the point, when she came back, the victim was weeping. She inquired and the victim narrated the incident to her. The victim and her mother went to the police station and FIR came to be lodged. The FIR is at Exh.-16. Spot panchanama Exh.-15 is also proved through this witness. In the cross-examination, it is brought on record that she made a phone call to her brother and thereafter lodged report. As such she also narrated about the incident, the same being hearsay, is inadmissible. Therefore, the cross-examination on the point of incident will also be not relevant. So far as the post incident comments are concerned, there is absolutely nothing in the cross-examination to disbelieve this witness. The cross-examination is mainly on the point that there is delay in registration of the FIR. The delay is said to be of seven hours.

11. According to the learned counsel for the appellant, the delay is vital. However, I do not find any substance in this submission for, in such matters prime focus of the mother will be to make her daughter comfortable and to consult other members of the family. PW1 is a widow and one cannot expect a lady to immediately rush to the police station to lodge report. In the present case, PW1 appears to have consulted her brother and thereafter approached the police station. In that sense, the FIR has been promptly lodged.

12. PW3 - Bandu Taksande, is a pancha witness. The spot panchanama, Exh.-36 is proved in his evidence. In the cross-examination, it is brought on record that the bed-sheet was in order and that no suspicious articles were found on the bed.

13. This admission cannot be stretched to draw an inference that the testimony of the victim on the point of incident is not believable. It is so because, the pancha witness is not expected, unless otherwise shown, to minutely observe, the niceties at the scene of the crime. The witness is a panch witness to the spot, which is not a bed but the house/room. He has deposed in the chief examination that he went to the victim's house, which had a country tiles (*kavelu*) roof and that the spot

panchanama was drawn at her house. Thus, the focus of the witness was towards house/room where the offence has been committed. One cannot expect such a witness to minutely observe the bed-sheet and other articles. His admission, therefore, cannot be given more weightage than the victim's version.

14. PW4 – Bhaktdas Bhanarkar is brother of PW1. He has stated that PW1 had called him. The witness went to her house. The victim was weeping and thereafter he narrated the story as disclosed to him by the victim. The said part of the evidence being hearsay is not admissible. In the cross-examination, there is nothing to disbelieve his version on post incident events viz. the victim was weeping.

15. PW5 – Purushottam Sorte is neighbour of the victim. He has stated that the victim had been to his house in frightened condition. He has noticed that the appellant was present at a distance of 50-60 feet from that place. Thereafter the witness did not support the prosecution version on the point that the victim had narrated him the entire incident.

16. Learned counsel for the appellant intends to take advantage of the testimony of this witness on the count that he did

not support the prosecution version. However, he did not support prosecution in respect of the story narrated by the victim to him. That being the hearsay evidence, even otherwise is not admissible. What is admissible is that the victim had been to his place and that she was in frightened condition. There is no cross-examination on this point. Thus, his testimony will, in a way, be helpful to the prosecution on the count that at the relevant time, the victim was in frightened condition.

17. PW6 – Tejasvi Patil is the investigating officer. He deposed in tune with the investigation carried out by him viz. recording the FIR, visiting spot, drawing spot panchanama, recording statement of witness under Section 164 of the Cr.P.C., obtaining birth certificate of the victim, arresting the appellant, filing charge-sheet, etc. The appellant could not get any admission in his favour in the cross-examination.

18. The evidence led by the prosecution would clearly prove that on 18.08.2018, the appellant had entered the house of the victim with an intention to commit crime and that therefore has committed criminal trespass. The evidence further indicates that the victim was 10 years 3 months old at the time of incident and thus was a “Child” as defined under Section 2 (d) of the

POCSO Act. It is further proved that the appellant, after entering the house has committed sexual assault on the victim by pushing her on bed and sleeping over her person and then by pressing her breasts by both hands.

19. Sections 7, 8 and 29 which are relevant to decide the present appeal read thus:

“Section 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.

Section 8: Punishment for sexual assault:

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

Section 29: Presumption as to certain offences:

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

20. If the evidence is read in the light of Sections 7 and 29 of the POCSO Act, the learned Special Judge has rightly held the appellant guilty for the offence of sexual assault and therefore has rightly punished him under Section 8 of the POCSO Act.

21. The evidence will also indicate that the ingredients of Section 354 of the IPC have been satisfied. The learned Special Judge has correctly relied upon Section 26 of the General Clauses Act, 1897, to infer that when a particular act is an offence under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. Section 8 of the POCSO provides for imprisonment which shall not be less than three years and which may extend to five years. As against, Section 354 of the IPC, stipulates punishment which shall not be less than one year which may extend to five years. Learned Special Judge observed that punishment under Section 8 is of a greater degree and that therefore the appellant has been convicted under section 8 of the POCSO Act and not under section 354 of the IPC. This finding being in tune with the settled position of law, does not require any interference.

22. Thus, the learned Special Judge has correctly convicted the appellant under the provisions of Section 8 of the POCSO Act and Section 448 of the IPC. Therefore, no interference is called for in the impugned judgment. Accordingly, I answer point nos.1 and 2 in the affirmative and point no. 3 in the negative.

23. Having answered the first three points in the manner hereinabove, the appeal is liable to be dismissed. However, learned counsel for the appellant made a strenuous argument that the sentence imposed is excessive and not in tune with the nature of crime. He further, submits that the appellant is entitled for lenient view, for the reason that his mother has low vision and finds it difficult to perform her daily activities. She is residing at Gadchiroli. The brother of the appellant is working as painter and unable to attend the mother. Thus, it is argued that except for the appellant there is no one to take care of mother aged 70 years old. He further submits that for her livelihood, his mother is depending on the Government schemes and gets Rs.700/- per month. When inquired, he fairly submits that this ground was not put forth before the learned Special Judge. Learned A.P.P. however submits that no leniency should be shown to the persons like the appellant.

24. When inquired of antecedents, learned counsel for the appellant submits that there are no criminal antecedents. Thus, this appears to be the first crime against the appellant. As such, offence against child ought to be viewed seriously. Nonetheless, the appellant was in jail from 19.08.2018 to 14.09.2018, 13.06.2019 to 18.06.2019 and is in jail from 05.12.2019 till date and thus has undergone almost 3 1/2 years imprisonment. His

mother appears to be in difficulty. Considering the same, I am of the considered view that the interest of justice will meet if the appellant is made to suffer sentence which he has already undergone.

25. Learned A.P.P. then submits that the appellant has not paid fine of Rs.26,000/-, part of which i.e. Rs.20,000/-, was to be given to the victim by way of compensation. Since the fine amount is not deposited, the appellant will have to undergo sentence in default. For Section 8 of the POCSO Act, the default sentence is four months and for Section 448 of the IPC, it is one month.

26. A profitable reference could be had, on this point, to the judgment in the case of *Sharad Hiru Kolambe Vs. State of Maharashtra*.¹ The Apex Court, while dealing with the substantive sentence and sentence in default of payment of fine has considered various provisions of the Code has held that the provisions under Sections 31 and 429 (2) of the Cr.P.C. indicate that the default sentence shall be in addition to the substantive sentence and that the default sentence shall not begin to run till the substantive sentences are over and further that the default sentence shall not run concurrently but will run consecutively. The appellant,

¹ 2018 (18) SCC 718

therefore, will have to undergo five months imprisonment over and above the substantive sentence. Hence, following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The judgment and order dated 05.12.2019 passed by learned Special Court, Gadchiroli, in Special POCSO Case No.5/2019, thereby convicting the appellant for the offences punishable under Section 448 of the Indian Penal Code, 1870 and Section 8 of the Protection of Children From Sexual Offences Act, 2012 is confirmed. However, the sentence imposed is modified.
- (iii) The appellant is sentenced to undergo imprisonment for the period, which he has already undergone till today. However, as the appellant has not deposited the fine amount of Rs.26,000/-, the appellant shall undergo further five months simple imprisonment.
- (iv) On completion of five months of simple imprisonment, the appellant shall be set at liberty, if not required in any other crime.
- (v) A copy of the judgment shall be given to the appellant free of cost.

(Anil L. Pansare, J.)

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