



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

CRIMINAL APPEAL NO. 233 OF 2022

. Ramdas s/o Deurao Pawar
Age: 50 years, Occ. : Labour,
R/o. Tq. Telwadi, Paithan,
District Aurangabad.Appellant

Versus

1. The State of Maharashtra
2. XYZRespondents

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Advocate for Appellant : Mr. Nilesh S.Ghanekar
APP for Respondent no.1 : Mr.N.B.Patil
Advocate for Respondent no.2 : Ms.Nayana D. Patil (appointed)
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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 28 NOVEMBER, 2024

PRONOUNCED ON : 04 DECEMBER, 2024

JUDGMENT :-

1. In this appeal, there is challenge to the judgment and order of conviction dated 07-03-2022 rendered by the learned Special Judge (POCSO), Aurangabad in Special Case (POCSO) No.181 of 2016 holding present appellant guilty for offence under Sections 376(2)(f) of the Indian Penal Code (IPC) and under Sections 6 read with 5(m) of the Protection of Children from Sexual Offences Act (POCSO).

PROSECUTION CASE IN BRIEF

2. In nutshell, case of prosecution is that victim lived with her PW1 mother and PW2 grandmother. PW1 mother of victim, who is illiterate, used to leave the house in the morning for labour work and return in the evening and as such during her absence, victim child aged 4 years was in the custody and care of grandmother. The incident in question took place on 28-08-2016. At around 06:00 p.m., appellant, who happens to be a distant relative of informant mother, visited her house. He sought permission of grandmother PW2 to sit in the house and while she was busy in the kitchen, the child was taken to one of the rooms of the house and after pulling down his own pant, he removed the undergarments of the victim. PW2 grandmother, who fortunately went to see for the appellant, who had gone to other room, saw him inserting finger in the urinal organ of the victim and therefore, she questioned him after which he allegedly fled.

PW2 grandmother reported the incident to her daughter PW1, who returned in the evening. PW1 mother examined private parts of victim and claims to have noticed swelling. Next day, PW1 approached Police Station and lodged report exh.21, on the strength of which, crime bearing no.I-293 of 2016 came to be registered and

finally investigated by PW6 Kedar (PSI) and accused came to chargesheeted for offence under Sections 376(2)(f) of the IPC and under Sections 3, 4, 7 and 8 of the Protection of the Children from Sexual Offences Act (POCSO).

Charge was framed on 19-09-2018 for the offence punishable under Sections 376(2)(f) of the IPC and under Sections 5(m)(n) punishable under Section 6 of the POCSO Act.

At trial, learned Special Judge (POCSO), Aurangabad vide Special Case (POCSO) No.181 of 2016 appreciated oral and documentary evidence and vide judgment and order dated 07-03-2022, held charges for offence under Section 376(2)(f) of the IPC and under Sections 6 read with 5(m) of the POCSO Act, proved and sentenced accused to suffer rigorous imprisonment for ten years and twenty years respectively and to pay fine.

Aggrieved by the above judgment and order of conviction, instant appeal has been preferred.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant submitted that infact offence for which appellant was chargesheeted was not made out. It

is his submission that though he does not dispute age of victim, he questions the judgment as according to him, offence under Sections 5(m) and 6 of the POCSO Act does not get attracted, rather at the most, offence under Sections 9 and 10 of the POCSO Act gets attracted. In support of such contentions, he took this Court through the evidence of PW1 mother and PW2 grandmother of victim as well as evidence of PW4 Dr.Nagawade and notings of medical expert i.e. more particularly, paragraph 4 of cross-examination. He tried to argue that PW1 mother reported insertion of finger in anus but prosecution's own witness PW2 grandmother speaks about vaginal penetration and as such according to him, prosecution evidence is inconsistent. Lastly, it is his submission that there is improvisation as well as exaggeration and as such according to him, the FIR, which is lodged after delay of one day and that too by PW1 mother of the victim, who has mere hearsay information, ought not to have been straightway accepted by the learned trial Judge and hence, he seeks indulgence at the hands of this Court in overturning the findings of the trial Court.

On behalf of State :

4. In answer to above submissions, learned APP pointed out that

there is no dispute about the age and there is no challenge to age of victim. He pointed out that victim was barely 4 years of age. That incident has taken place in the house and it has been eye witnessed by PW2 grandmother of victim. That her evidence is also on record. That the same is remained intact and undisturbed. That medical expert also supports prosecution case and as such according to him, the impugned judgment is infallible.

On behalf of Victim :

5. Learned Counsel appointed to represent the victim also strongly objected to the above submissions. According to her, victim was proved to be 4 years of age and as such, she was below 12 years of age. Even according to her, there is eye witness account supported by medical evidence. According to her, in cases of such nature, delay if any, is insignificant. That grave offence has been committed on child, who had no male relative in the house and precisely disadvantage of the same has been taken by the appellant, who is none other than a relative. According to her, here though learned trial Court convicted appellant for offence under Sections 6 read with 5(m) of the POCSO Act, according to her, in view of fact that accused being relative of victim's mother, even clause (n) of Section 5 of the

POCSO Act gets attracted. At the end, she supports findings and reasons assigned by learned trial Court in convicting appellant.

EVIDENCE IN TRIAL COURT

6. In support of its case, prosecution has adduced evidence of in all six witnesses.

Evidence of **PW1** mother of victim, **PW2** grandmother of victim, **PW3** Dr.Titare and **PW4** Dr.Nagawade, who examined victim, is of importance and sum and substance of their evidence is as under :

7. **PW1** Informant and mother of victim deposed as under :

“2] This incident took place in the year 2016. I am an illiterate. So I cannot tell date and month of the incident. I do not remember it. I go to my work in the morning at about 09.00 a.m. and return at about 07.00 p.m. Accordingly, on the day of incident I returned from my work in the evening at about 07.00 pm. When I returned to home at that time my mother was at home and told me that Ramdas Pawar had been to the house at about 06.00 p.m. Ramdas Pawar is my distant maternal uncle. He is present before the court, I identify him. [witness pointed finger towards the accused and identified him]. After arrivals of Ramdas Pawar he sat in the house. After some time, my mother told him that she is going to kitchen and asked him to go. He told my mother that he was going. My mother went inside the kitchen. Then instead of going out Ramdas Pawar went to our backside room. My mother suspected. So she came in front room from kitchen. Then she went to back side as no one was seen in the

front room. In backside room Ramdas Pawar was with my daughter. My mother saw Ramdas Pawar took victim on his thighs, his pant chain was found open and he had given his penis in the hand of victim and put his finger in her anus. After seeing it, my mother inquired Ramdas by saying “आरे रे रामदास हे काय करतोस” Then hearing it Ramdas ran away. It was told to me by my mother. Then my daughter came to me. I took her on my thighs. She told me that there are pains to her urinal organ. Then I inquired her how it is. Then she told Ramdas Mama had been there, threatened her and did this acts and she stated, as stated by my mother. On the next day I had been to police station to lodge complaint. Complaint now shown to me. It is the same. Its contents were read over to me. Thereafter, it being true and correct, I put my thumb mark on it. I identify it. It is at Exh.21.

3] It was late for me and there were pains to my daughter, so on that day I had not been to police station to lodge complaint. Then I was sent to Ghati Hospital alongwith my daughter. In Ghati Hospital lady medical officer inquired with me. I had given consent for medical examination of my daughter. Survivor consent from now referred to the witness. It bears mark my thumb impression. It also bears the signature of medical officer. I identify it. It is at Exh.22. While reporting complaint, I had stated that he inserted finger in the anus of my daughter, but after medical examination, it was revealed that he inserted finger in the urinal organ of my daughter, so I stated about it in my supplementary statement. Police had been to our house. Place of incident was shown to them. My statement was recorded in the court. Statement now shown to me is the same. It bears my thumb impression. Its contents are true and correct. It is at Exh.23.”

8. **PW2** grandmother of victim and mother of informant deposed

as under :

“1] Complainant is my daughter. She was married with XYZ. She was given in Deoulgaon Raja, Dist.Buldana in marriage. She begot a daughter. Her husband was addicted to liquor so there were quarrels in between my daughter and her husband, so I brought her to me. I brought her to me in the year 2016. Since then she is staying with me. She is also doing labour work.

2] She goes for work in the morning at 09.00 a.m. and returns at 07.00 p.m. This incident took place in the year 2016. I cannot recollect the exact date of incident. As usual in the morning at 09.00 a.m. mother of victim went to her work. I and her victim daughter were at home. In the evening at about 06.00 p.m. Ramdas Pawar came. Ramdas Pawar is our distant relative. He is present before the Court. I identify him. [Witness pointed fingers towards accused and identified him]. He stated me let him sit for some time there. I told him I have no time and I have to cook food. So I told him that I do not have time. Then I asked him to go. Then he went and I went inside kitchen. But I do not know when he again entered in the house. I was in kitchen. victim told me that she wanted to sleep. At that time victim was aged about 4 years. Victim came to me and I told her to sleep on the cot. That cot was in the another room. I suspected whether accused went out or not. I went in the hall. He was not there. Then I went to another room adjoining to hall. He was there. I saw that nicker of victim was removed. I had seen that he opened his pant chain and had given his penis in the hand of victim. Middle finger of his right hand was inserted in the urinal organ of victim. I was frightened. On seeing it I reacted “आरे रे हे काय करतोस”. Then he left the child and ran away. Then my daughter complainant came at about 07.00 p.m. Then I narrated entire incident to my daughter. There was no male member in our family. During whole night we were crying. On the next day we had been to police station

and my daughter lodged the complaint. Police recorded my complaint.

9. **PW3** Dr.Prashant Uddhavrao Titare is the Medical Officer. He deposed as under :

“On 2nd Nov.2016 three X-rays of victim were taken. I opined that age of child is between 3 to 5 years. Accordingly, I assessed her age on the basis of radiological bone assessment process. Accordingly, I issued age certificate. It now shown to me is the same. It bears signature. Its contents are true and correct. My opinion therein is based on scientific test. It is at Exh.30.”

10. **PW4** Dr.Ashwini Keshrao Nagawade is another Medical Officer, who examined victim and recorded history of victim. She deposed as under :

“I was Assistant Professor in Govt. Medical College Hospital Aurangabad on 30.08.2016. On that day victim girl was brought to me by police personnel and her relative alongwith requisition letter of police. Then I recorded history of sexual assault narrated by the relative of the victim girl. She stated that accused did sexual assault by fingering on dated 28th August 2016. Then I examined her. On local examination of perineal region, I found abrasions and redness over fourchette and valva. Hymen was intact. My opinion is forceful vaginal penetration and vaginal and vulval mutilation cannot be ruled out. Final opinion is reserved till report of FSL are made available. Accordingly, I issued Annexure-III. It now shown to me is the same. It bears my signature. Its contents are true and correct. It is at Exh.34.

PW5 Mahesh Ramrao Maid is pancha to spot panchanama Exh.38.

PW6 Sitaram Bhagwanta Kedar (PSI) is the Investigating Officer, who carried out investigation and on gathering sufficient evidence, chargesheeted accused.

ANALYSIS

11. Before adverting to the analysis of the evidence, it would be fruitful to reproduce certain phrases i.e. Sections 3, 5(m), (n) and 7, which are crucial and are highlighted and incorporated in the Special Statute i.e. POCSO Act. Sections 3, 5(m), (n) and 7 read as under :

“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; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

“ 5. Aggravated penetrative sexual assault.-

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or

marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child;”

*“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.”*

12. Here admittedly, during hearing or even in the trial Court, no issues are raised about victim to be below 12 years of age. Here though PW1 informant mother has set law into motion, there is no denial that while she was out for work, incident had taken place in the house. However, in the house, the child was in the care and custody of grandmother PW2 and as such, it would be appropriate to first deal with evidence of PW2.

PW2 grandmother of victim is examined at exh.24. Her substantive evidence of is already reproduced above. On scrutiny of the same, it is emerging that on the day of incident PW1 mother of victim, left for work as usual at 09:00 a.m. and only this witness and victim, daughter of PW1, were at home. At around 06:00 p.m. appellant, who is said to be a distant relative, allegedly came and sought permission to sit in the house for some time. PW2 specifically

stated that she had no time and she had to cook meals. Thereafter, she asked him to go, he went away and she proceeded towards the kitchen. She further deposed that she does not know when appellant came again and entered in the room while she was in kitchen. Witness claims that she suspected whether accused went out or not and therefore, she first went to the hall, but accused was not there. Then she deposed that she went in another room adjoining to hall. That accused was there. She deposed that *“I saw that nicker of victim was removed. I had seen that he opened his pant chain and had given his penis in the hand of victim. Middle finger of his right hand was inserted in the urinal organ of victim.”* Therefore, out of fright, she questioned him and then he left the house and went away. She claims that when her daughter PW1 came in the evening, she narrated the incident to her. She further stated that there was no male member in their family. During entire night, they were crying and on the next day, they went to Police Station, where her daughter PW1 lodged complaint.

Above witness is subjected to **cross-examination** initially about marriage of daughter PW1 and that it was second marriage and victim was begotten from the same.

Omissions are brought to the extent that husband of her daughter was quarreling with her, about accused to be distant

relative, about asking her granddaughter to sleep on the cot, seeing accused inserting middle finger of his right hand in private part of victim.

But learned trial Court has noted that only omission is to the extent of right hand and middle finger.

The manner of cross-examination in paragraph 5 shows that there is no serious challenge to the occurrence, rather it is apparently admitted.

13. Now, let us visit evidence of informant **PW1** i.e. mother of victim, whose evidence is at exh.20. She has deposed that she is illiterate. That she is unable to give date, month of the incident. That she used to go for work in the morning at 09:00 a.m. and return by 07:00 p.m. According to her, on that day, she returned from the work in the evening at 07:00 p.m. When she returned, that time her mother PW2 was at home and she told her that appellant had come to house at around 06:00 p.m. Witness stated that appellant is her distant maternal uncle and she identified him in the Court. She further stated that after arrival, appellant sat in the house and after some time, when her mother PW2 told him that she is going in the kitchen and asked him to leave, he told her mother PW2 that he was

going. She further deposed that when her mother PW2 went inside the kitchen, instead of going out, appellant went towards backside room. That her mother suspected, so she came in front room from kitchen and from there, she went to backside room as no one was in the front room. Witness stated that her mother told that in the backside room, appellant was with her victim daughter and her mother PW2 saw appellant took victim on his thighs, his pant chain was found to be opened and he had given his penis in the hands of victim and put his finger in her anus and therefore, she questioned him and after which he ran away. Witness further stated that her victim daughter came to her. That she took her on her own thighs. That her daughter told that there was pain to her urinal organ. Then this witness claims to have enquired how it is, after which, victim allegedly told her that appellant had been there, threatened her and did this act and victim stated it to mother of this witness. That on next day, she had been to Police Station and lodged report.

She further deposed about visiting hospital, giving consent. In paragraph 3 of examination-in-chief itself, she stated that while reporting complaint, she had stated that appellant inserted finger in anus of her daughter, but after medical examination, it was revealed that appellant inserted finger in the urinal organ of her daughter and

so she stated about it to that extent in her supplementary statement.

In **cross-examination**, she admitted that she personally did not see the incident. She admitted that while giving complaint, she did not state that appellant threatened her daughter. She also answered that her mother did not tell her that daughter told her that she wanted to sleep and therefore, contents in her statement exh.23 are incorrect. She denied accused to be close relative or they to be in cross terms on account of cohabitation with her husband. She also denied any dispute. She admitted that accused has son, daughter and grandchildren. She further answered that her daughter was 4 years of age at the time of incident and as such was not in condition to talk properly. She admitted that on that day when she returned and saw her daughter, she did not take her daughter to hospital.

14. Another crucial witness in instant case is **PW4** Dr.Nagawade, who had occasion to examine victim. She has stated that on local examination of perineal region, she found abrasions and redness over fourchette and valva. She stated that hymen was intact. She opined that forceful vaginal penetration and vaginal and vulval mutilation cannot be ruled out.

In **cross-examination** though she admitted that on account of

urinal infection there could be redness to vagina and on account of fingering in vagina, there may be bleeding or may not be, but she admitted that in this case there was no bleeding but there was abrasion and swelling.

CONCLUSION

15. Therefore, on meticulous and careful analysis of evidence of PW2 grandmother followed by PW1 mother, here it is clearly coming on record that on the date of incident, victim, aged 4 years, was in the house with her grandmother PW2. PW1 mother of victim was out for work. Accused, who is in relation, came to the house and did the above acts. The impact of the above sexual assault by mode of fingering, has left marks of abrasions and swelling. PW1 mother of victim, is illiterate and may not have examined urinal part of victim and may have merely examined anal part. PW4 Dr.Nagawade, medical expert, who is the right person to opine, has on examination, issued above opinion and has also noted the manner and nature of injuries, which have remained intact.

16. Before this Court, learned Counsel for the appellant tried to submit that offence under Sections 5 and 6 of the POCSO Act would not be attracted, but at the most offence under Sections 9 and 10 of

the POCSO Act would be attracted.

This Court does not find any force in the above submission. There is overwhelming evidence that accused indulged in penetrative sexual assault. The act falls within the teeth of above reproduced provisions of the POCSO Act. Considering the age of the victim, learned trial Court has rightly applied clause (m) of Section 5 of the POCSO Act and as such there does not seem to be any error or infirmity in the findings of the trial Court so as to interfere in the impugned judgment and order in any manner. No case being made out, appeal deserves to be dismissed. Accordingly, I proceed to pass following order :

ORDER

(I) Criminal Appeal No.233 of 2022 stands dismissed.

(II) Fees of the learned Advocate appointed to represent respondent no.2 is to be paid through the High Court Legal Services Sub-Committee, Aurangabad, as per Rules.

(**ABHAY S. WAGHWASE**)
JUDGE