



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

CRIMINAL APPEAL NO. 719 OF 2023

Balaji s/o. Girmaji Warkare
Age. 45 years, Occ. Labour,
R/o. Baliramapur,
Tq. & Dist. Nanded.

.. Appellant

VERSUS

1. The State of Maharashtra

.. Respondents

2. XYZ

Ms. Ashwini A. Lomte, Advocate (appointed) for the appellant.
Ms. Chaitali Choudhari-Kutti, APP for respondent-State.
Mr. V.B. Dhage, Advocate for respondent No.2.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 22.08.2024
PRONOUNCED ON : 26.11.2024

J U D G M E N T :-

01. This appeal arises out of judgment and order passed by the learned Special Judge (POCSO), Nanded in Special Case No.89 of 2021 dated 05.07.2023. By way of the impugned judgment and order the Trial Judge held the appellant-accused guilty of the offence punishable under

sections 9(m) and 9(n) of the Protection of Children from Sexual Offences Act [for short "POCSO Act"] and sentenced him to suffer rigorous imprisonment for five years and to pay fine of Rs.3000/-, in default, to suffer simple imprisonment for three months for each of the offences. The accused came to be acquitted for the offence punishable under section 376(3), 376-AB , 376(2)(f), 376 (2)(i)(j), 323 and 506 of the Indian Penal Code [for short "IPC"] and section 3 punishable under section 4 and under sections 5(m) and 5(n) punishable under section 6 of the POCSO Act.

STORY OF THE PROSECUTION

02. On 16.06.2021 the mother of the prosecutrix lodged the complaint against the accused for the offences under the POCSO and IPC. Allegations are that in the night between 14.06.2021 and 15.06.2021 the accused committed sexual assault on the prosecutrix aged 9 years who happens to be his daughter. It is stated that at around 3.00 a.m. the accused woke up the informant and started beating her for no reason saying that he does not need her company and drove her out of the room. The complainant therefore went out of the home. Being night hours, she sat in the courtyard and her husband and the

prosecutrix were sleeping in the room. At 3.30 a.m. the prosecutrix shouted and came running out of the house. When asked, the prosecutrix told that the accused pressed her chest, removed her panty and inserted his fingers in her private part. He threatened her not to disclose the incident to anyone. He also told her that she is not her biological daughter. The complainant telephoned her maternal cousin sister and went to her. Thereafter the incident was reported to the brother of the complainant. He advised them to go to the hospital. The complainant, therefore, took the prosecutrix to the hospital with her. From the hospital, they were advised to go to police station. Thus, they went to police station, Vajirabad. The police asked them to go to Police Station, Nanded. It is upon that both the prosecutrix and the informant went to the police station at Nanded. The police took the complaint in writing and again referred the victim to medical examination. The offence came to be registered bearing No. 387 of 2021. After recording of the complaint, the investigation started. The clothes of the accused and the prosecutrix came to be seized. The statement of the prosecutrix and the informant came to be recorded under section 164 of the Cr.P.C. The charges came to be framed against the accused. The accused claimed innocence and wanted to face a trial.

GIST OF EVIDENCE BY THE PROSECUTION.

03. The prosecution in its support, examined seven witnesses to prove the guilt of the accused; whereas the accused did not put-forth any evidence in his defence. His defence is of total denial.

04. PW-1 – the complainant and mother of victim narrated the incident as alleged and as reported by her to the police. PW-2 is the victim. PW-3 – Sukhdeo Prabhakar Jondhale is the punch of spot and seizure panchanama. PW-4 – Dr. R.D. Awasare is the doctor who proved medical report of the victim. PW-5 – Govind Balaji Kendre is the Headmaster of the school, where the victim was taking education. This witness proved application preferred by the complainant for admission of the victim in the school. He also further proved the copy of leaving certificate. PW-6 is Ganesh Holkar, who recorded the FIR. He proved the letter written by police station to the Municipal Council Hospital. PW-7 Asad Chandpasha Shaikh is the Investigating Officer.

05. After closing of the evidence, trial Court examined the accused under section 313 of the Cr.P.C. The accused took a defence that the complainant – his wife wanted a divorce from him and since he

was not ready to give divorce, he is falsely implicated at the hands of mother of the prosecutrix. He thus says, because of her other witnesses have deposed falsely against him.

06. PW-1 - Sujata narrated the whole incident in her deposition. In her cross-examination, it was suggested that because she wanted divorce from the accused, she has falsely implicated the accused in this crime. It is also tried to be brought on record that there is no proof of age of the victim. It is taken that this witness is illiterate and does not know the reading and writing. It is also taken that while admitting the prosecutrix to the school she had not submitted any documents showing the date of birth of the prosecutrix. Further, it is tried to suggest that when the accused was sleeping in the room, even the brother of the prosecutrix was also sleeping in the room, but he did not see anything or noted anything of the incident.

07. PW-2 is the prosecutrix. She deposed that she goes to school and is studying in 6th standard. She told about beating the complainant by the accused and therefore the complainant went out of the house. She stated that after the mother went out of the house within few minutes, the accused inserted his three fingers in to her vagina. She

immediately removed those fingers. He threatened her not to disclose incident to anyone. He also said that the victim is not his daughter. She immediately came out of the house and told the incident to her mother. She deposed that PW-1 contacted her sister and thereafter they went to the hospital. From there, as per doctor's advice they went to police station and again thereafter from police station they went to hospital again for medical examination. She identified her frock and the towel worn by the accused. In the cross-examination it is taken that she was admitted by her mother to the school. On the day of incident, there was no quarrel between the husband and wife. She accepted that she did not raise any shout when her legging was removed by the accused. Only after removing the legging she went out and shouted. The incident was not told by her to any neighbour or any other person.

08. Next witness PW-3 – Sukhdeo Jondhale, the punch, working in the Municipal Corporation, Nanded, told about drawing of panchanama and how he was called by police to police station. It is taken in his cross-examination that he had acted as punch also on earlier occasion also for the police. He proved the panchanama of the spot.

09. PW-4 is Dr. R.D. Awasare, who was working as a Medical

Officer since 2007. On 16.06.2021 he was working as Residential Medical Officer and was present in the Government Hospital, Vishnupuri, Nanded. He deposed that the victim was brought to the Hospital by a lady police constable from Gramin Police Station. He examined the victim. His colleague was there, namely, Dr Prachi Koli. The consent was obtained by him from the victim and mother of the victim for examination of the victim. He deposed that on physical examination, he found no surface injuries on the person of the victim. On genital examination, he found multiple old healed hymenal tears. He collected sample of the blood. He gave the finding that possibility of sexual assault cannot be ruled out. The samples were collected and sent for forensic science laboratory examination. He, thereafter, submitted the report. He proved the said report. In the cross-examination he accepted that there were no external injuries found to the victim. He denied the suggestion that there were no signs of penetrative sexual assault on the victim. He also denied that there was also no evidence of non-penetrative sexual assault. The injuries on the genital part were not fresh injuries. The genital organs of the victim were in normal condition except old healed hymenal tears. The opinion was not a confirmed opinion.

10. PW-5 Govind Kendre, Head Master working in Zilla Parishad School, village Ijali, deposed that the victim was student of his school and she was admitted in the first standard. The application was filled by the complainant for admission of the student. He had brought original admission register with him. From the record he deposed that the date of birth of the victim was 07.10.2010. All these original documents were proved by him. In the cross-examination, he accepted that the admission form is not in the hand-writing of mother of the victim as she was not much educated, however, it only bears her signature. He could not tell as to who filled in the admission form. At the time of admission, no birth certificate of the victim was given. The only document that was given was Nirgam Utara (Leaving Certificate) from the earlier school. The entry about the birth date was taken on the basis of list of anganwadi and on the basis of Adhar card as it was mentioned by the mother of the victim.

11. PW-6 Ganesh Holkar was attached to the police station as PSI. After registration of crime, the investigation was handed over to this witness. He arrested the accused. He identified the accused. He requested for two panchas from the office of ZP by giving a letter. Thereafter, he went to the place of incident along with punchas and the

informant. The panchanama was drawn. He proved the spot panchanama and seizure panchnama. He deposed that the clothes were seized and were sent to the Forensic Laboratory. Thereafter, he referred the victim for medical examination. In the cross-examination, he accepted that the date of birth is not mentioned in the first information report. He did not record the statement of the person from the school from where he collected the Nirgam Utara. He did not investigate the place of birth of the victim, from the hospital where she was born. In the section 164 statement also there is no date of birth mentioned. He accepted that he did not record statement of the victim except the daughter of the complainant and the accused, as they were not residing with the informant. The incident took place in the room consisting of 8 x 8 ft in size. It was the only room that was used for all the purposes. He did not record the statement of brother of the victim. He accepted that there was no dispute between husband and wife i.e. the complainant and the accused.

12. The last witness is PW-7 Asad Chandpasha Shaikh, PSI, who was attached to Nanded Gramin Police Station. He was Duty Officer on 16.06.2021. On receiving the complaint he registered the crime. Nothing much is taken from his cross-examination.

SUBMISSIONS BY THE ACCUSED.

13. The learned Advocate for the appellant submits that the prosecution has not established the guilt of the accused beyond reasonable doubt. The age of the victim is not proved by the prosecution. The statement of the natural witness i.e. brother Soham who was in the room at the time of alleged incident is not recorded. No injuries were found on the person of the victim to show that there was penetration. The evidence of the victim and the mother thus requires to be discarded. The medical evidence clearly shows that no surface injuries were found on the body of the victim. The incident alleged is of 15.06.2021. The FIR is lodged on 17.06.2021. There is no satisfactory explanation for the said delay. PSI Munde, who recorded the FIR is not examined. The accused in his 313 statement has taken defence that since the informant wanted divorce from the accused, she has falsely implicated the accused. Sufficient case is shown for false implication. Though the trial Court has rightly acquitted the accused from the offence punishable under section 376 of the IPC and section 3 punishable under section 4 and sections 5(m) and 5 (n) punishable under section 6 of the POCSO Act, however, it has failed to appreciate that even for other

sections there is no sufficient evidence on record. The CA report does not support case of the prosecution. To bring the offence under section 9(m) of the POCSO Act, it was necessary for the prosecution to specifically prove the age of the victim. Even ingredients of section 9(n) of the POCSO Act are not attracted. She relied upon judgment in the case of **Mangesh Wadekar Vs. State reported in AIR ONLINE 2023 Bom. 312.**

SUBMISSIONS BY THE PROSECUTION.

14. The learned APP vehemently opposed the appeal. She submits that the accused is father of the victim. He has committed such heinous act with his own daughter by driving his wife out of the house. The evidence of PW-1 and PW-2 is consistent and corroborative. In the medical evidence it has come that there were old healed injuries to the hymen. It has come on record that the victim was in 6th standard at the time of the incident. The mother has categorically told the date of birth of the victim as 07.10.2010. There is immediate disclosure of the incident by the victim to her mother. There is Nirgam Utara (leaving certificate) wherein the date of birth is mentioned. She further submits that in the cases like this, the sole testimony of the victim if found

reliable can be taken as sufficient evidence to convict the accused. In her support, she relied upon judgment of this Court at Principal Seat in the case of **Mohd. Khatir Shaikh alias Murgiwala Chacha Vs. State of Maharashtra and Anr. - Criminal Appeal No.917 of 2022** She thus prays for dismissal of the appeal.

15. The learned Advocate Mr. Dhage for respondent No.2 adopted arguments of learned APP. He submits that in this case inspite of there being clear evidence on record, the learned Trial Court has committed illegality in acquitting the accused from the offence punishable under section 376 off the IPC and section 3, 5(m) and 5(n) of the POCSO Act. He prays for dismissal of the appeal filed by the accused.

16. The learned Advocate for the appellant in rebuttal argued that though the School Leaving Certificate shows date of birth as 07.10.2010, it has come on record in the evidence of the Headmaster that the date was taken on information by someone else than the mother or father of the victim. In the case of **Shaikh Khatir (supra)**, she submits that there was CA report that was proved by the prosecution and in that view the judgment was passed. She again emphasized that the cousin Soham and his mother were not examined by the prosecution.

Soham would have been the best witness for the prosecution and still he is not examined. She submits that the judgment relied upon by the learned APP are not applicable to the facts of the present case.

DISCUSSION - CONSIDERATION

17. After having gone through the record and the evidence, it has clearly come on record from the evidence of PW-1 and PW-2 that in the night of 15.06.2021, some incident took place. The victim immediately came out of the house and reported the incident to her mother PW-2. It was 03.30 a.m. in the morning. It is but natural that PW-2 did not immediately go to police station. It has come on record that that she is educated woman. It is obvious that she waited for some time till morning. As she could not have courage to go to police station alone, she went to her sister's house first. It is after meeting her sister, she went to police station. This Court finds that this conduct cannot be said to be unnatural. The delay in lodging an FIR in this case cannot be said to be fatal to the case of the prosecution. So far as age is concerned, it is stated to be 9 years at the time of the incident. From the school record, it is brought on record that the date of birth recorded is 07.10.2010. The victim was studying in 6th standard. There is no

serious challenge by the accused as regards the age of the victim. This Court finds that it can be safely taken that the age of the victim was below 12 years at the time of the incident. The learned Trial Court, therefore, has rightly taken the age of the victim as 9 years at the time of the incident. The trial Court has also rightly accepted the case of the prosecution that some incident took place in the night. No fault can be found with this finding. As regards the offence is concerned, this Court finds that evidence of the prosecution is short to prove the offence under section 376 of the IPC and section 5(m) and (n) of the POCSO Act. Though it is tried to be argued by respondent No.2 that acquittal in both the sections is not correct, this Court finds that the learned Trial Court has rightly appreciated evidence in that regard and rightly acquitted the accused under those sections.

18. In the case of **Mangesh Wadekar (supra)**, it was recorded that there was no opinion given by the Doctor as to the recent sexual intercourse. The opinion shown in that case that in view of fleshy hymen, vaginal penetration cannot be ruled out. In that case it was not brought on record from the evidence of Doctor that there was any injury or tear or any laceration or abrasion on the private part of the victim. There was no bleeding from the private part. The evidence of the victim

and her sister in that case about bleeding from private part was considered to be improvisation and exaggeration.

19. So far as judgment cited by learned APP is concerned, in the case of **Shaikh Atiq Shaikh Khadar Vs. The State of Maharashtra and Anr., Criminal Appeal No. 195 of 2024**, there was no proper description given by the victim of the offence. It was held that the victim was of six years of age, it is not expected of her to give proper description as expected from any adult person. The clothes of the victim were not seized in that case. There the accused could not give proper explanation as to how his semen was found on the clothes of the victim. In that case the Court acquitted the accused of the offences under the POCSO Act.

20. In the case of **Ganesan Vs. State represented through its Inspector of Police, reported in AIR 2020 SUPREME COURT 5019**, the Hon'ble Apex Court has held that when sole testimony of the victim is reliable and supports the prosecution, the same is sufficient to convict the accused.

21. In the case of **Attorney General for India Vs. Satish and**

Anr. reported in (2022) 5 SCC 545, the Hon'ble Apex Court has considered the provisions of sections 7 to 12 and 29 and 30 of the POCSO Act and held that any act done with sexual intent involving physical contact without penetration would fall in the definition of physical contact under sections 7 and 9 of the POCSO. Section 13 is presumption under the POCSO Act. In the present case the accused has not rebutted the presumption under section 13 of the POCSO Act.

22. Considering all the above, this Court finds that the prosecution has clearly established that the incident has taken place in the night. The victim was minor below 12 years of age. There was sexual assault at the hands of the accused. The Trial Court has rightly taken all these points against the accused. In absence of sufficient evidence, the Trial Court rightly acquitted the accused from the offence punishable under section 376 of the IPC and sections 3, 5(m) and (n) of the POCSO Act.

23. Before parting with the judgment, this Court appreciates efforts taken by the learned Advocate appointed for the appellant by this Court.

24. This Court finds that no case is made out calling for interference in the appeal. The appeal, therefore, deserves to be dismissed. In view of the discussions above, following order :-

ORDER

- (I) The appeal stands dismissed.
- (II) The judgment and order passed by the learned Special Judge (POCSO), Nanded in Special Case No.89 of 2021 dated 05.07.2023 is hereby confirmed.
- (III) Consequences to follow.
- (IV) The professional fees of learned Advocate Ms. Ashwini A. Lomte appointed for the appellant is quantified at Rs. 15,000/- (Rupees Fifteen Thousand) to be paid by the High Court Legal Services Sub-Committee, High Court of Bombay, Bench at Aurangabad.

[KISHORE C. SANT, J.]