



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

CRIMINAL APPEAL NO.196 OF 2024

Santosh Uttam Lokhande (In Jail)
Aged about 36 years,
Occupation: Cultivator,
R/o Khopadi, Tq. Barshitakli,
District: Akola. **APPELLANT**

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

State of Maharashtra,
through Police Station Officer,
Police Station Pinjar,
District Akola. **RESPONDENT**

Mr. A. S. Londhe, Advocate for Appellant.
Mr. S. S. Hulke, APP for Respondent/State.

CORAM: **G. A. SANAP, J.**
DATE: **27th AUGUST, 2024.**

ORAL JUDGMENT:

1. Heard.
2. **Admit.**
3. On going through the record, I am of the opinion that
considering the evidence led by the prosecution, this appeal can
be decided finally. Heard finally with the consent of the learned
Advocate for appellant and the learned APP.

4. In this appeal, challenge is to the judgment and order dated 28.12.2020, passed by the learned Extra Joint District Judge and Additional Sessions Judge, Akola, whereby the learned Judge held the appellant/accused guilty of the offences punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and Section 506(II) of the Indian Penal Code. The appellant is sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.10,000/- (Rupees Ten Thousand only) and in default to further simple imprisonment for six months for the offence punishable under Section 506(II) of IPC and to undergo rigorous imprisonment for five years and to pay a fine of Rs.10,000/- (Rupees Ten Thousand only) and in default of payment of fine to further simple imprisonment for six months for the offence punishable under Section 8 of the POCSO Act.

5. The victim, as per the case of the prosecution, on date of the incident was 12 years old. The appellant is the father of the victim. The crime was registered against the appellant on the report of victim. The case of prosecution, which can be gathered from the report and the charge-sheet, is that on 07.06.2019 the victim along with her mother and brother went to attend her

maternal uncle's place to attend the marriage. On 08.06.2019, the appellant went there and quarreled with her mother. The appellant brought the prosecutrix and her brother back to his house. In the evening the victim cooked the food and after dinner went to the house of Ranjana Sharma to sleep. On 09.06.2019, again after dinner, she was proceeding to the house of Ranjana Sharma, but the appellant did not allow her to go there. The appellant insisted the victim to sleep in their house itself. It is stated that in the night, at about 10:00 p.m., the appellant directed the victim to bring a liquor tin and he closed the door from inside. It is stated that the appellant extended threat of dire consequences, in case she raised the shouts. The appellant forcibly removed her undergarments and committed sexual intercourse with her. In the meanwhile, one Akshay gave a call from outside and demanded the liquor. The appellant pressed the mouth of the victim and replied to Akshay that he had no liquor. After some time, the victim went out of the house. She had pain in her abdomen. On the next day the victim narrated the entire incident to her parental side Sheetal Kailas Thakare and other neighbouring women. The victim, thereafter, along with her aunt, went to Police Station Pinjar, District Akola and lodged report (Exh-47).

6. On the basis of the report, a crime bearing No.105/2019 was registered against the appellant. The investigation was carried out by (PW-5). (PW-5) sent the victim to the hospital for medical examination. The I.O. recorded the statements of witnesses. He collected the samples. After completion of the investigation, he filed the charge-sheet against the appellant.

7. The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of false implication on account of the dispute with his wife. The prosecution, in order to bring home the guilt of the appellant, examined eight witnesses. The learned Judge, on consideration of the evidence, held the appellant guilty and sentenced him as above. The appellant being aggrieved by this judgment and order, has come before this Court in appeal.

8. I have heard Mr. Ajay Londhe, learned Advocate for the appellant and Mr. S. S. Hulke, learned Additional Public Prosecutor for the respondent/State. Perused the record and proceedings.

9. The learned Advocate for the appellant submitted that there is no iota of evidence to prove the charge against the

appellant. The learned Advocate took me through to the evidence of the victim (PW-1) and her mother (PW-2) and pointed out that neither the mother nor the victim supported the case of the prosecution. The learned Advocate submitted that the learned Judge, relying upon the medical evidence and the evidence of (PW-6) Ranjana, who is maternal sister of the appellant, has convicted and sentences appellant. The learned Advocate for the appellant submitted, that on the basis of evidence of (PW-6) Ranjana, the appellant cannot be convicted. The evidence is not sufficient to prove the charge against the appellant on any count. The learned Advocate submitted that the learned Judge without considering the evidence on record and without recording the cogent reasons in support of his findings, handed down the conviction and sentence. The learned Advocate submitted that the evidence of the Head-Master (PW-7) ought to have been discarded. The learned Judge recorded a finding that on the date of the incident the victim was below 18 years of age.

10. The learned APP submitted that the victim and other material witnesses have not supported the case of the prosecution. However, the learned APP submitted that on the basis of the evidence of (PW-6) and the evidence of Medical Officer (PW-4),

the learned Judge has held the appellant guilty. The learned APP submitted that the learned Judge has recorded the sound reasons in support of his findings. The learned APP further submitted that the evidence of the Head-Master (PW-7) is sufficient to prove the birth date of the victim as 01.07.2007.

11. I have gone through the record and proceedings. I have perused the judgment and order passed by the learned Judge. It is evident on perusal of the record that the victim girl has not supported the case of the prosecution. The appellant is the father. (PW-2) is the mother of the victim and wife of the appellant. (PW-3) is the sister of the appellant. These witnesses (PW-2) and (PW-3) have not supported the case of the prosecution. Perusal of the impugned judgment and order would show that the conviction and sentence is not based on the evidence of these three witnesses. On going through the evidence of these witnesses, I am satisfied that it is not of any help to prove the charge against him.

12. The learned Judge has placed implicit reliance on the evidence of (PW-6), who is the maternal sister of the appellant and the evidence of the Medical Officer (PW-4), who had examined the victim. It is necessary to consider the evidence of

(PW-6) minutely to find out whether it is sufficient to prove the charge on any count framed against the appellant. She has stated that on the next date of the incident, the victim came to her and started weeping. The victim narrated the incident to her. Her evidence would show that victim narrated the entire incident to her. She has deposed about the entire incident which was narrated to her. It is seen that the evidence of (PW-6) is not a direct evidence about the incident. The victim has not supported the case of the prosecution. Since the victim has not supported the case of the prosecution, the evidence of (PW-6) could not be said to be direct evidence. Her evidence, in my view, would be hearsay evidence. The evidence of (PW-6), even if the victim had supported the case of prosecution, could have been used as corroborative piece of evidence. The learned Judge, as can be seen from the judgment, has placed implicit reliance on the evidence of (PW-6), as if her evidence is a direct evidence of the incident. The learned Judge, in my view, was not right in placing implicit reliance on the evidence of (PW-6). The evidence of (PW-6) in the above stated facts was hearsay evidence. In my view, even if her evidence is accepted as it is, it would not be sufficient to prove the incident and as such the charge against the appellant.

13. The evidence of the Medical Officer in such a case can be used as a corroborative piece of evidence. The Medical Officer (PW-4) in his evidence has stated that on 10.06.2019, he had examined the victim. The victim had narrated the history of the assault. The medical reports at Exh.30 and 31 have been admitted by the appellant. (PW-4) has stated that on examination of the victim, he observed redness on her private part. He has stated that her hymen was intact. He has categorically opined that there was no possibility of penetrative intercourse with the victim. The learned Judge has relied upon this evidence as corroborative piece of evidence. The learned Judge has observed that this evidence is sufficient to corroborate the testimony of (PW-6). In my view, the learned Judge has committed patent illegality in placing implicit reliance on the evidence of (PW-6) as well as the evidence of (PW-4) to convict and sentence the appellant. In my view, even if this evidence is accepted as it is, it would not be sufficient to prove the charge against the appellant on any count. In my view, the learned Judge has failed to properly appreciate the evidence and the provisions of law. The learned Judge appears to be a senior judicial officer. It appears that he was re-appointed after his superannuation as an Extra Joint District Judge and Additional Sessions Judge, Akola. In my view, the learned Judge,

having such a vast experience, was not expected to commit such a blunder. The learned Judge on the basis of such broken piece of evidence has handed down the conviction and sentence. The appellant has been in jail for last more than five years. It is to be noted that the learned Judge, while deciding a case, was required to decide it on the basis of the evidence available on record and within the strict parameters of law. The victim did not support the case of the prosecution. It needs to be stated that witness is a master of his version. Nobody, including the Court, can compel the witness to depose a particular fact in a particular manner. The Court has to respect the wisdom of the witness. The Court has to decide the case on the basis of the evidence. In my opinion such a case, which is filed under the POCSO Act, cannot be decided on moral considerations and moral satisfaction of the learned Judge about the sexual assault on the victim. The Court is bound by the law. The Court is required to record a finding on proper scrutiny and appreciation of the evidence. If the evidence on record is not sufficient to prove the charge, the learned Judge cannot base the conviction on his moral satisfaction with regard to the commission of the offence. In my view, such an approach is not consistent with the basic principles of the criminal jurisprudence. The prosecution is duty bound to prove the guilt of

the appellant beyond reasonable doubt. It needs to be stated that even if the charge is under the POCSO Act, the rudimentary principle of the criminal jurisprudence that the guilt has to be proved beyond reasonable doubt, cannot be relaxed in any manner.

14. It is to be noted that the learned Judge has placed implicit reliance on the provisions of Section 29 of the POCSO Act and drawn the presumption of a guilt against the appellant. In my view, on this count also the learned Judge was not right. He has committed the patent illegality. It is not out of place to mention that the presumption under Section 29 of the POCSO Act is not an absolute presumption. If the presumption under Section 29 of the POCSO Act is held to be an absolute presumption, the prosecution would simply be required to file the charge-sheet against the appellant and frame the charge against the appellant and ask the appellant to discharge the negative burden. The presumption is rebuttable presumption. In my view, in order to trigger the presumption provided under Section 29 of the POCSO Act against the appellant, the prosecution is duty bound to prove the foundational facts vis-a-viz charge framed against the appellant. If the prosecution is not able to prove the foundational facts by

leading cogent and concrete evidence, the presumption under Section 29 of the POCSO Act would not get attracted/triggered. It appears on perusal of the judgment and order that the learned Judge while appreciating this aspect was reeling under complete misconception. The learned Judge was required to bear in mind that the approach of the Court must be neutral. The learned Judge has forgotten this fact completely.

15. It is further apparent on the face of the record that the evidence with regard to the birth date of the victim was also not credible and reliable. The learned Judge, on the date of the evidence of (PW-7) Head-Master of the School, allowed him to produce the admission register and the true copy of the Transfer Certificate (for short 'T.C.'). The prosecution is not allowed to produce fresh evidence in the form of documents at the stage of the evidence of the prosecution. It is to be noted that even if this issue has become purely an academic, in view of the fact that the victim and other material witnesses have not supported the case of the prosecution, it is necessary to bear this position in mind. The learned Judge was required to follow the procedure. Even if it is held that the procedure is a handmaid and not the mistress of the justice, in my view, it can not be bent to a point to unsettle the

prescribed procedure under the law. Section 173 sub-section 8 of the Cr.PC. empowers the Investigating Officer to conduct the investigation and collect further evidence. The further evidence collected after filing of the charge-sheet can be produced by way of supplementary charge-sheet and not in this manner. In my view, the learned Judge, has completely glossed over this position.

16. The appellant, who is father of the victim, has been in jail for more than five years. The evidence was not *ex-facie* sufficient to prove the charge against him. The conviction and sentence is based on moral consideration. The learned Judge was carried away by the fact that the appellant was none other than the father of the victim girl. There is no cogent and concrete evidence to prove the charge. It is seen that on the basis of such judgment, the accused/appellant has been required to spend the valuable years of his life in prison. In view of this, I am satisfied that the conviction and sentence is without any evidence. The prosecution has miserably failed to prove the charge against the appellant. In view of this, I conclude that the appeal deserves to be allowed.

17. Accordingly, the appeal is allowed.

18. The judgment and order of conviction and sentence

passed against the appellant by learned Extra Joint District Judge and Additional Sessions Judge, Akola dated 28.12.2020 in Special (POCSO) Case No.88/2019 is quashed and set aside.

19. Appellant – Santosh Uttam Lokhande is acquitted of the offences punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and Section 506 (II) of the Indian Penal Code.

20. Appellant – Santosh Uttam Lokhande is in jail. He be released forthwith if not required in any other crime/case.

21. The appeal stands disposed of in the aforesaid terms.

(G. A. SANAP, J.)