



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

CRIMINAL APPEAL NO. 639 OF 2022

APPELLANT : Panjab S/o. Tanuji Rathod, Aged
about 55 Years, R/o. Wadali
(Deshmukh), Tq. Akot, Distt. Akola.

//VERSUS//

RESPONDENTS : 1. State of Maharashtra, through P.S.O.
Murtizapur City, Distt. Akola.
2. XYZ through its complainant, R/o.
Navin Basti, Tq. Murtizapur, Dist.
Akola, Crime No.0197/2019, P.S.O.
Murtizapur City, Distt. Akola.

Mr. A.S. Londhe, Advocate for the Appellant.
Ms. S.V. Kolhe, APP for Respondent No.1/State.
Ms. Shalini Godbole, Advocate (appointed) for Respondent
No.2 is absent.

CORAM : G. A. SANAP, J.
DATED : 24th SEPTEMBER, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order dated 03.01.2022, passed by the learned Extra Joint District Judge and Additional Sessions Judge, Akola, whereby the learned Judge convicted the accused of the offences punishable under Section

377 of the Indian Penal Code, 1860 (for short, “IPC”) and under Section 3(a) punishable under Section 4; under Section 5(m) punishable under Section 6 and under Section 11(vi) punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in default to suffer simple imprisonment for six months for the offence punishable under Section 377 of the IPC; rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in default to suffer simple imprisonment for six months for the offence under Section 3(a) punishable under Section 4 of the POCSO Act; rigorous imprisonment for ten years and to pay a fine of Rs.50,000/- and in default to suffer simple imprisonment for six months for the offence under Section 5(m) punishable under Section 6 of the POCSO Act and rigorous imprisonment for three years and to pay a fine of Rs.10,000/- and in default to suffer simple imprisonment for three months for the offence under Section 11(vi) punishable under Section 12 of the POCSO Act.

02] BACKGROUND FACTS:

The informant (PW-1) is the mother of the victim-boy.

The victim-boy, on the date of the incident, according to the prosecution, was below 12 years of age. The case of the prosecution, which can be gathered from the report and other materials, is that the victim, at the relevant time, was studying in VI Std. Sawan @ Dadu is the friend of the victim. The accused used to visit the house of Sawan and, as such, was acquainted with him. 14th July, 2014 was a holiday. At about 10:00 a.m., the victim went out to play with his friends. At about 4:00 p.m., the victim returned back home. He was weeping. The informant made an inquiry with him. At that time, the victim told that at about 3:00 pm., the accused, on the pretext of showing peacock, took him and Dadu on his motor-cycle to the field of one Tidake. In the said field, there was a hut. He took them inside the hut and closed the door from inside. The accused asked Dadu to hold the hands of the victim. The accused removed the knickers of the victim and pushed him on the ground. The accused inserted his penis into his anus and moved up and down. The accused in the midst of this act received a phone call on his mobile. He attended the phone call. In this process, his grip over the victim was loosened. The victim and Dadu took advantage of this situation and ran away from the hut. On being informed about the incident, the mother of the victim went to the Police Station, Murtizapur City and lodged the report.

On the basis of this report, a crime bearing No.0197/2019 was registered against the accused.

03] PW-6 conducted the investigation. The Investigating Officer referred the victim-boy for medical examination. The Investigating Officer seized the cloths of the accused as well as the cloths of the victim. He drew the spot panchanama. The statements of the victim, his mother, and PW-7 were recorded as per the requisition of the Investigating Officer by the learned Magistrate. The Investigating Officer collected the record with regard to the birth date of the victim. On completion of the investigation, she filed the charge-sheet against the accused.

04] The learned Judge framed the charge against the accused. The accused pleaded not guilty. It is the defence of the accused that, on account of the money dispute, he has been falsely implicated in this case. The prosecution, in order to bring home the guilt of the accused, examined seven witnesses. The learned Judge, on consideration of the evidence, held the accused guilty of the charge and convicted and sentenced him as above. The appellant has challenged this judgment and order by way of this appeal.

05] I have heard Mr. A.S. Londhe, learned advocate for the appellant and Ms. S.V. Kolhe, learned APP for respondent No.1/State.

06] Learned advocate for the appellant submitted that there is no independent corroborative evidence. The evidence of the victim and his mother is doubtful and untrustworthy. There are major inconsistencies and discrepancies in their evidence. There are material omissions and improvements in the evidence. The evidence is not sufficient even to prove the attempt to commit the carnal intercourse with the victim-boy by the accused. The medical evidence does not support the case of the prosecution. The history of assault narrated by the victim to the doctor at the time of his examination clearly suggests that there was no carnal intercourse with the victim by the accused. At the most, the history of the assault narrated before the doctor by the victim would show that the accused tried to commit the carnal intercourse with the victim. Learned advocate submitted that PW-7, who has been examined as an independent witness, has not supported the case of the prosecution. In the submission of the learned advocate for the appellant, the case of the prosecution is resting on a weak foundation, and therefore, the learned Judge was required to take

great care while appreciating the evidence of the informant and the victim. The credibility of the informant and the victim has been shaken in their cross-examinations.

07] Learned APP, in short, supported the judgment and order passed by the learned Judge. It is submitted that there is no reason to discard and disbelieve the evidence of the victim. The victim-boy had no reason to falsely implicate the appellant. The defence of enmity has even not been substantiated. The history of assault narrated before the Medical Officer may not be sufficient to prove the offence of carnal intercourse, but it would be sufficient to prove that the appellant attempted to commit carnal intercourse. The spot of the incident, as narrated in the report by the informant, was shown to the police by the victim-boy. Learned APP submitted that the statements of the victim and the informant were recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.PC"). In their statements, recorded by the Magistrate, they have consistently narrated the incident.

08] The learned Judge, on the basis of the available evidence on record, has recorded a finding that the offence of attempt to

commit carnal intercourse with the victim by the appellant has been proved. The case of the appellant is that the evidence on record is not sufficient to prove even the offence of attempt to commit carnal intercourse. As far as the age of the victim boy on the date of the incident is concerned, the prosecution has adduced sufficient evidence and proved that, on the date of the incident, the victim was below 12 years of age. It is undisputed that the birth certificate of the victim has not been produced on record. The victim, in his evidence, has stated that his birth date is 9th November, 2008. The informant has also stated that the birth date of the victim is 9th November, 2008. The victim, on the date of the incident, was studying in VI Std. at Zilla Parishad Primary School, Borgaon.

09] The Investigating Officer, during the course of the investigation, obtained the *bona fide* certificate from the Headmaster of the school. The said certificate is at Exh.35. The Headmaster of the school was summoned and examined as PW-5. The Headmaster had brought the original admission register for the year 2008 onward and the affidavit register of the parents from the year 2010 onward. It is undisputed that neither the original admission register nor the original affidavit register was produced.

It is evident that PW-5 has deposed on the basis of the available record maintained by the school. He has stated that the admission register entry of the victim in the school is at Serial No.1775. The birth date of the victim recorded in the said register entry is 9th November, 2008. He has stated that the school register shows that the victim was admitted in the school on 26th June, 2014 in I Std. The witness has produced on record the true copy of the relevant page of the entry from the register. It is marked as Exh.33. He has also produced on record the affidavit of the mother of the victim submitted at the time of the admission of the victim in the school. He has also produced on record the certified copy of the said affidavit. He has stated that the contents of these documents are correct as per the original. The certified copy of the affidavit is at Exh.34. He has stated that, on 30th August, 2019, he had received a letter from the Investigating Officer for issuing a certificate. He had issued the certificate. It is at Exh.36. It is to be noted that the school admission register produced before the Court by the witness was the primary evidence. It is undisputed that the learned judge did not exhibit the relevant entry from the admission register as well as the affidavit from the affidavit register. There appears to be a procedural error on the part of the learned Judge. However, on account of this procedural error on the part of the learned Judge, it

cannot be said that the primary evidence was not brought to the notice of the Court. The certified extracts of the admission register entry and the affidavit of the mother of the victim are secondary evidence.

10] It is not the case of the accused that this school record was prepared after registration of the crime to support the case of the prosecution. There is no dispute that the victim was admitted in I Std. of the said school. There is also no dispute that, on the date of the incident, he was studying in VI Std. It is further seen that there is no serious dispute with regard to the birth date of the victim. The Headmaster is an independent witness. The Headmaster or the School Administration had no reason to prepare a false document. Even such a case is not put to any witness by the accused. The oral and documentary evidence adduced on record, in my view, is therefore sufficient to prove that the birth date of the victim is 9th November, 2008. The victim, on the date of the incident, was below 12 years of age. The victim was a child as defined under Section 2(1)(d) of the POCSO Act.

11] In this backdrop, it is necessary to appreciate the evidence of the victim and the mother of the victim. The accused

has not examined any independent witness to substantiate his defence. Perusal of the cross-examination of the victim and the informant would show that this defence of enmity is also not consistently put to these two witnesses. The victim, an adolescent boy below 12 years old, was ravished by the accused. The victim had no enmity with the accused. The victim otherwise had no reason to single out the appellant and falsely implicate him in such a crime. The report of the incident was lodged immediately. The immediate lodging of the report by the mother, after coming to know of the unfortunate incident through the victim, is the most vital circumstance in favour of the prosecution. This circumstance, in my view, would reflect upon the credibility of the evidence of the victim and the informant. The informant, in the ordinary circumstances, had no reason to lodge such a serious report against the appellant. The appellant, as can be seen from the record on the date of the incident, was about 55 years old.

12] As far as the identification of the accused is concerned, he was known to the victim and the mother of the victim. PW-7, who is the child witness, has not supported the case of the prosecution. PW-2 victim has stated that the accused took them to the hut in the field of Tidake, and in the said hut, after closing the

door, he committed carnal intercourse with him. He has stated that the appellant had directed PW-7 to hold his hands, and then he committed carnal intercourse with him. The victim, in his deposition, has stated that they were playing marbles (Kancha). They also played batball. They went to see Anand Mela. Thereafter, they went to Hanuman Temple. He has stated that at that time the accused came there and took him and PW-7 on his motor-cycle, on the pretext of showing peacock, to the field. He has stated that in the field they saw the wild lizard. The accused gave Rs.10 to him and PW-7 to buy Kurkure. They brought the Kurkure and, after eating, went inside the hut to drink water. In his further evidence, he has narrated the first-hand account of the entire incident. His statement was recorded by the Magistrate. In his statement recorded before the Magistrate, he has consistently narrated the incident before the Magistrate.

13] Perusal of his statement recorded by the Magistrate would show that the account of the incident narrated by him before the Magistrate was not at all embellished. He has stated that, when the accused was committing carnal intercourse with him, the accused received a call on his mobile phone. The accused attended the said call. He has stated that he and his friend took advantage of

this situation and ran out of the hut. He has stated that thereafter he came to the house and narrated the incident to his mother. PW-2 victim has been thoroughly cross-examined. Perusal of his cross-examination would show that, despite searching cross-examination, nothing has been brought on record to discard and disbelieve his evidence as to the occurrence of the incident. His evidence with regard to the occurrence of the incident is credible and trustworthy. I do not see any reason to doubt his evidence with regard to the occurrence of the incident. As far as the nature of the actual incident is concerned, I may come to the same little latter.

14] As far as the informant is concerned, her conduct is consistent with the conduct of a man of ordinary prudence placed in a similar situation. She has stated that, on account of the holiday to the school, the victim was at home. She has stated that the victim went out to play. The informant has reiterated the entire incident narrated to her by the victim in her examination-in-chief. It was suggested to the victim that there was a dispute on account of recovery of the money with Manik Ingle. She has denied this suggestion. There is no material to show that the informant had borrowed the money from Manik Ingle. It has also not been clarified how Manik Ingle was concerned and connected with the

accused.

15] Perusal of her cross-examination shows that no material has been elicited to doubt her credibility. On the contrary, it shows that the informant, without waiting for her husband, went to the police station and lodged the report. She has stated that, on the date of the incident, her husband had gone to Nagpur. It was suggested to her that, after having discussion with the relatives, she lodged the report with an exaggerated account of the incident. It is to be noted that the mother of the victim had no reason to lodge a false report against the appellant. The appellant has not brought on record an iota of material to suggest that for some reason or the other, there was enmity between him and the informant, and the report lodged was the outcome of the enmity. The informant, the mother of the victim, would not have unnecessarily involved her son in such a matter. The offence of this nature invites stigmatic consequences not only for the victim but also for the family. The victim of such a crime is bound to be traumatized. Reporting of such a crime further adds to the pain, agony, and trauma of the victim. Such an incident not only defames but defiles the victim. The victim-boy was studying in VI Std. The mother of the victim would not have lodged a false report by involving her son. Lodging

of such a report in the absence of the incident would have reflected on the psyche of the victim-boy. Such an incident would have become the subject-matter of discussion amongst his friends. In my view, this is a very vital aspect. The informant, the mother of the victim, would not have unnecessarily dragged her son in such a dirty incident, in the absence of the occurrence of such an incident.

16] It is necessary to re-appreciate the evidence and find out as to the actual charge made out against the accused. The victim was sent to the Medical Officer for examination. He was examined by PW-4. The learned Judge, relying upon the evidence of the Medical Officer and the medical certificate, has come to a conclusion that the charge of carnal intercourse has not been proved. The learned Judge has recorded a finding that the charge proved is an attempt to commit carnal intercourse. While narrating the history of assault to the doctor, the victim had stated that the appellant tried to penetrate his penis into his anus. The doctor has recorded in the report that there is no sign of full penetration and ejaculation. There was no injury on the body as well as to the anus of the victim. The doctor has not given any candid opinion. He has opined that the intercourse could not be ruled out. The Medical Officer reserved his final opinion, subject to receipt of the F.S.L.

report. The reports of the analysis of the samples by the F.S.L. are negative. The findings in the F.S.L. reports are not consistent with the case of penetrative carnal intercourse with the victim. The evidence on record, however, is sufficient to prove the attempt to commit carnal intercourse by the appellant with the victim.

17] The learned Judge with the aid of Section 511 of the IPC, has convicted and sentenced the accused. The learned Judge has also convicted and sentenced the accused under multiple sections of the POCSO Act. The learned Judge has convicted and sentenced the accused under Sections 4, 6, and 12 of the POCSO Act. In my view, with above finding, the learned Judge was not right in convicting the appellant under these three sections. Admittedly, there was no penetrative sexual assault. At the most, it was an attempt to commit penetrative sexual assault. Section 7 of the POCSO Act defines sexual assault. Section 9 of the POCSO Act defines aggravated sexual assault. In order to constitute an offence under Section 7 of the POCSO, it must be proved that the accused 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 does any other act with sexual intent which involves physical contact without penetration. In this case, at

the most, the offence of sexual assault would be made out.

18] The victim, on the date of the incident, was below 12 years of age. In view of this, the proved offence would be an aggravated sexual assault punishable under Section 10 of the POCSO Act. Therefore, in this case, the charge proved against the accused under the POCSO Act was under Section 9 punishable under Section 10 of the POCSO. The evidence is not sufficient to prove the charge under Sections 3, 4, and 12 of the POCSO Act. The minimum punishment provided under Section 10 of the POCSO is five years, but which may extend to seven years. The punishment provided under Section 377 of the IPC is imprisonment for life or the imprisonment of either description for a term which may extend to 10 years and shall also be the fine.

19] Learned advocate for the appellant submitted that the appellant has been in jail for 5 years, 2 months, and 10 days. It is submitted that the appellant is a family man. In his absence, his family members are facing great difficulties. Learned advocate submitted that the imprisonment already undergone by him would be a sufficient sentence in this case.

20] Learned APP submitted that, considering the nature of the crime, the appellant does not deserve leniency.

21] On going through the record and proceedings, I am satisfied that the offence proved against the appellant is under Section 377 read with Section 511 of the IPC, and under Section 9 punishable under Section 10 of the POCSO Act. The minimum punishment provided under Section 10 is five years imprisonment. The punishment provided under Section 377 of the IPC may extend to 10 years or imprisonment for life. In the facts and circumstances, in my view, the imprisonment already undergone by the appellant would be a sufficient sentence. In view of this, I proceed to pass the following order:

ORDER

- i] The Criminal Appeal is **partly allowed**.
- ii] The judgment and order of conviction and sentence passed against the appellant by the learned Extra Joint District Judge & Additional Sessions Judge, Akola, dated 03.01.2022, in Sessions Trial No.94/2019, is modified.
- iii] The conviction and sentence for the offences under

Section 3(a) punishable under Section 4; under Section 5(m) punishable under Section 6, and under Section 11(vi) punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012, is set aside.

iv] The appellant/accused – **Punjab S/o. Tanuji Rathod** is convicted for the offence under Section 9 punishable under Section 10 of the POCSO Act.

v] The conviction for the offence punishable under Section 377 read with Section 511 of the IPC, is maintained.

vi] The appellant/accused - **Punjab S/o. Tanuji Rathod** is sentenced to undergo the imprisonment already suffered by him, on both the counts.

vii] The appellant/accused - **Punjab S/o. Tanuji Rathod** shall pay a fine of Rs.10,000/- (Rs. Ten Thousand Only) on both the counts, and in default of payment of fine, he shall undergo simple imprisonment for two months.

viii] The Criminal Appeal stands disposed of, accordingly.

(G. A. SANAP, J.)