



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

CRIMINAL APPEAL NO. 672 OF 2022

APPELLANT : Dhanraj Gajanan Wakodikar,
Aged about 39 years, Occu. Labour,
R/o Bangladesh, Nike Talao,
Nagpur.

VERSUS

RESPONDENTS : 1] State of Maharashtra,
through Police Station Officer,
Police Station, Panchpaoli, Nagpur.

2] X Y Z, in Crime No. 0438/2019,
Police Station, Panchpaoli, Nagpur.

Mr. Amit M. Kukday, Advocate appointed for the appellant.
Mr. Saurabh C. Joshi, A. P. P. for respondent no.1/State.
Ms. Aarti Singh, Advocate appointed for respondent no.2/victim.

CORAM : G. A. SANAP, J.
DATED : SEPTEMBER 25, 2024.

ORAL JUDGMENT

1. In this appeal, challenge is to the judgment and order dated 30.10.2021, passed by learned District and Sessions Judge-11, Nagpur, whereby the learned Judge convicted the appellant for the offences punishable under Sections 376(2)(f), 376(3) and 506 of the Indian

Penal Code and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act” for short). He is sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay fine of Rs.25,000/- (Rupees Twenty five thousand only) and in default to suffer further SI for 3 (three) months, for the offence punishable under Section 376(3) of the IPC; to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/- (Rupees One thousand only), in default to suffer SI for one month, for the offence punishable under Section 8 of the POCSO Act ; to suffer imprisonment for one year and to pay fine of Rs.1,000/- (Rupees one thousand only), in default to suffer SI for one month for the offence punishable under Section 12 of the POCSO Act; and to suffer imprisonment for one month and to pay fine of Rs.1,000/- (Rupees one thousand only), in default to suffer SI for one month for the offence punishable under Section 506 of the IPC. No separate punishment is awarded for the offences punishable under Sections 376(2)(f) of the IPC and under Section 4 of the POCSO Act.

2. BACKGROUND FACTS

The crime in this case was registered on the report of PW1, who is the mother of the victim girl. The case of the prosecution, which

emerges from the report and the other materials, is that the appellant is the father of the victim. In the report, it is stated that the incident occurred on 14.05.2019 and 15.05.2019. The victim girl, on the date of the incidents, was 13 years old. She was studying in 7th standard. It is stated that six months prior to these incidents, the teacher of the victim by name Smt. Wadode had called the informant in the school and told her that the victim was sexually assaulted by her father. The victim had told her teacher about the bad behaviour of her father. The mother made an inquiry with the victim. The victim narrated that her father was touching her with bad intention. It is stated that on 14.05.2019, the victim and her father (i.e. appellant) were at the house. The appellant called the victim to sleep with him. He dragged her near him. He forced the victim to touch his penis. He inserted his penis in her mouth. He kissed her. He pressed her breasts. He threatened to kill the victim in case the incident is disclosed to her mother. The neighbour of the victim by name Sita went to the house of the victim on 15.05.2019 and told her mother that yesterday her husband had beaten the victim.

3. It is further stated that on 15.05.2019, the informant went to attend her duty. The victim came to her workplace. The victim told

her that the accused misbehaved with her like yesterday. The accused forced her to touch his penis. He put his penis in her mouth. The informant went to the house of her elder sister and informed her about it. On 15.05.2019, the informant along with her elder sister and the victim went to the police station and lodged the report against the appellant.

4. On the basis of the report (Exh.7), a crime bearing No. 438/2019 was registered against the appellant at Pachpaoli police station, Nagpur. PW11 API Sarika Raut carried out the investigation. She referred the victim to the hospital for medical examination. She arrested the appellant. The Investigating Officer drew the spot panchanama. She seized the clothes of the appellant and the clothes of the victim. The appellant was also sent for medical examination. The statements of the victim and her mother were recorded on the requisition of the Medical Officer by the learned Judicial Magistrate, First Class, under Section 164 of the Code of Criminal Procedure. On completion of the investigation, PW11 filed charge-sheet against the appellant in the Court of law.

5. Learned Judge framed the charge (Exh.2) against the

appellant. The appellant pleaded not guilty. His defence is of false implication because of the quarrel between him and his wife (informant). The appellant had a doubt about her extra-marital affair with one Mahesh and on this count, there was quarrel between them. The prosecution, in order to bring home the guilt of the appellant, examined 11 witnesses. The learned Judge, on consideration of the evidence, convicted and sentenced the appellant as above. The appellant, being aggrieved by this judgment and order, has come before this Court in appeal.

6. I have heard Mr. Amit M. Kukday, learned advocate appointed to represent the appellant, Mr. Saurabh C. Joshi, learned Additional Public Prosecutor for the respondent no.1/State and Ms. Aarti Singh, learned advocate appointed to represent respondent no.2/victim. Perused the record and proceedings.

7. Mr. Kukday, learned advocate submitted that the evidence adduced by the prosecution is not sufficient to prove the charge against the appellant. There was inordinate delay in lodging the report. The defence of the appellant is probable. The incident narrated before the Court by the informant and the victim is totally unbelievable.

According to the prosecution, the appellant had started troubling the victim since January-2019. No report was lodged with the police at that time. Similarly, the informant did not question her husband about the same at any time prior to lodging the report. Learned advocate submitted that the substantive evidence of PW1 informant and PW2 Victim, even if accepted at its face value, would not be sufficient to prove the offences, for which the appellant has been convicted and sentenced. Learned advocate submitted that even if the evidence is accepted as gospel truth, then at the most, the offence defined under Section 7 punishable under Section 8 of the POCSO Act, would be made out. Learned advocate further submitted that the mother of the victim girl had refused to conduct her medical examination. The medical evidence is hardly of any help to lend an assurance to the case of the prosecution. As far as the age of the victim is concerned, the learned advocate for the appellant has hardly any dispute about it . Learned advocate submitted that without proof of the foundational facts, the learned Judge has invoked the provisions of Section 29 of the POCSO Act. Learned advocate submitted that the learned Judge has failed to properly appreciate the evidence adduced by the prosecution and the provisions of law.

8. Learned Additional Public Prosecutor submitted that the evidence is cogent, concrete and reliable. The charge has been proved on the basis of this evidence. There is no reason to discard and disbelieve the evidence. The defence of the appellant is not probable. There is no material on record to accept his defence. Learned APP further submitted that the appellant is the father of the victim and therefore, without the occurrence of such a serious incident, the mother would not have lodged the report with the police. Learned APP submitted that the evidence of the victim and her mother has been corroborated by the evidence of other independent witnesses. In short, the learned APP has supported the judgment and order passed by the learned Sessions Judge.

9. Learned Advocate appointed to represent respondent no.2 has adopted the submissions advanced by the learned APP.

10. It is stated that the victim, on the date of the incident, was 13 years old. Exhibit-6 is the birth certificate of the victim. It is stated that the birth date of the victim is dated 02.11.2005. The victim as well as her mother have stated that the birth date of the victim is 02.11.2005.

The prosecution has examined PW12 to prove the birth certificate. PW12 was working with the Municipal Corporation, Nagpur as Medical Officer. She was also having additional charge of Sub-Registrar of Births and Deaths. On the basis of the office record, she has stated that the birth date of the victim is 02.11.2005. She has produced before the Court the Live Birth Report Register in Form no.1. She has produced on record the certified copy of the Live Birth Report Register. It is at Exh.43. It is seen that the original entry from the register was not given exhibit number. In my view, this, at the most, could be said to be a procedural error. The evidence adduced by the prosecution is, therefore, sufficient to prove that the victim was 13½ years of age on the date of the incident.

11. It would now be necessary to consider the evidence of the informant (PW1), the victim girl (PW2) and other witnesses. The informant (PW1) and the victim (PW2) are the main witnesses for the prosecution. The evidence of the other witnesses is not the direct evidence about the occurrence. These witnesses have been examined to corroborate the occurrence of the incident brought to their notice through different sources. While appreciating the evidence of the

victim and her mother, it is necessary to see as to whether this evidence is sufficient to prove the incident as narrated by them and the offences against the appellant. As far as the medical evidence is concerned, it is hardly of any use to take forward the case of the prosecution, with regard to the penetrative sexual assault.

12. In this case, the main evidence is of the informant and the victim. The report lodged by the informant is at Exh.7. It is true that in the month of January-2019, the victim had complained about her father to her teacher. The teacher has been examined by the prosecution. She is PW3. The mother did not lodge report in the month of January-2019. She lodged the report after the incidents occurred on 14.05.2019 and 15.05.2019. As far as these incidents are concerned, I am satisfied that there was no delay as such. The informant being the mother of the victim and the appellant being the father of the victim, the mother was supposed to take time and give a second thought to the issue of lodging the report to the police. It is apparent that after verifying the correct factual position, she made up her mind to report the matter to the police. Therefore, in this case, even if there is some delay in lodging the report, it would not be fatal to the case of the prosecution. The delay, in any manner, would not affect the

credibility and trustworthiness of the evidence of the informant and the victim. PW1, the informant/mother of the victim, has stated that the victim was studying in the 7th standard at Mahatma Jyotiba Fule Primary School. She has stated that her daughter disclosed the incident to her teacher by name Mrs. Wadode (PW3). She has stated that she was called by the teacher of her daughter in the school and she was informed by the teacher that the appellant was inappropriately touching the private part of the victim. She has stated that the teacher told her to take care of her daughter. PW1 has stated that the teacher informed her that the appellant had threatened her daughter of dire consequences, in case the information was disclosed to anybody. She has stated that on account of this threat, they did not disclose the incident to anybody.

13. In her further evidence, PW1 has deposed about the incident occurred on 14.05.2019 at about 2.00 to 3.00 pm. She has stated that the appellant touched the chest of her daughter. The appellant told her to press his penis. The appellant also asked her daughter to sleep with him. On that date, the daughter did not disclose this incident to her on account of the threat. She has stated that on 15.05.2019, one Sita came to her and informed that the appellant had

beaten her daughter at about 2.00 pm on 14.05.2019. She has stated that thereafter she made an inquiry with her daughter and at that time, her daughter narrated the incident to her, which occurred on 14.05.2019. She has further stated that on 15.05.2019 at about 2.00 pm, her daughter came to her and informed her that the appellant was doing similar act with her. She has stated that thereafter she went to the police station and reported the incident to the police. The substantive evidence of PW1, in her examination-in-chief, is silent about the penetrative sexual assault. Similarly, it is silent about the insertion of penis into her mouth. Her evidence is also silent about the ejaculation in this process. The evidence of PW1 in her examination-in-chief, at the most, would prove the ingredients of sexual assault as defined under Section 7 of the POCSO Act. It is not sufficient to establish the penetrative sexual assault. It is true that in her report, PW1 stated that the appellant had inserted his penis in her mouth. It is to be noted that this statement in her report cannot be used as substantive piece of evidence. The statement made by her before the Court is the substantive evidence. The statement on oath by the witness is not consistent with her statement made in the report on this material point. In her deposition, she is silent about penetration of the penis in the

mouth of the victim.

14. The next important witness is PW2, the victim. The victim has stated that on 14.05.2019 at about 2.00 pm, her father was at home. She has stated that at that time, the appellant asked her to sleep with him. She has further stated that the appellant asked her to hold his penis. The appellant touched her chest. The appellant kissed her. She has also stated that the appellant dropped the liquid, coming out of his penis, in her mouth. She has further stated that the appellant beat her. She has stated that at that time, one Sita came to her house and questioned her father as to why he was beating her. The victim has further stated that again on 15.05.2019 at about 1.30 pm, her father came to the house to take meals and at that time also the appellant repeated the same act with her. She has stated that thereafter, she started crying. One neighbouring aunt came there and asked her as to why she was crying. She has stated that at that time, she told the aunty that the appellant was doing bad acts with her. She has stated that one uncle by name Ram took her to the workplace of her mother and there she narrated the incident to her mother. It is seen on perusal of the substantive evidence of the victim (PW2) that she is silent about the

insertion of the penis in her mouth by the appellant. She has only stated that the appellant dropped the liquid coming out of his penis in her mouth. At this stage, it would be necessary to refer to the statement of the victim recorded under Section 164 of the Cr.P.C. The victim has stated that prior to six months, the appellant made her to sleep with him. The appellant forced her to touch his penis, until there was ejaculation. The appellant pressed her chest and kissed her. It is to be noted that in her 164 statement, recorded before the Magistrate, she has nowhere stated about the penetrative sexual assault or insertion of penis in her mouth by the appellant.

15. The evidence of the informant (PW1) and the victim (PW2), in my view, is not sufficient to prove the charge of penetrative sexual assault on the victim by the appellant. However, the said evidence cannot be discarded in toto. The said evidence, in my view, is sufficient to prove the offence of sexual assault on the victim, as defined under Section 7 of the POCSO Act. Section 7 is extracted below :

“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.”

16. Perusal of Section 7 of the POCSO Act would show that the intention of the accused is required to be seen. If any of the acts, stated in Section 7 is committed with sexual intent, then it constitutes 'sexual assault' on the child. Section 8 of the POCSO Act, provides the punishment for sexual assault. The evidence of the informant (PW1) and the victim (PW2) is sufficient to prove the sexual assault on the victim by the appellant. It is to be noted that the appellant is none other than the father of the victim. The victim and the informant have not stated the incident of penetrative sexual assault in their evidence before the Court. However, their evidence with regard to the sexual assault by the appellant on the victim cannot be discarded and disbelieved. The victim, on the date of the incident, was studying in 7th standard. The mother is working with the V.C. Corporation, Nagpur. The mother would not have unnecessarily involved her daughter, even if she wanted to teach a lesson to her husband on account of his quarrelsome nature. The victim girl has admitted in her cross-examination that the appellant was abusing her and her mother under the influence of liquor. The informant (PW1) has admitted in her cross-examination that one Mahesh was working with her. She has categorically admitted that her husband was suspecting that she had

illicit relations with said Mahesh. Even if it is assumed that the husband of the informant would quarrel with her on this count, this by itself would not be sufficient to accept the defence of the appellant of false implication for the said reason. If the informant wanted to take revenge, then she could have invented some other ground to falsely implicate the appellant. The evidence of the victim and the informant on this count cannot be discarded. The other evidence adduced by the prosecution is sufficient to lend an assurance to the credibility and trustworthiness of the evidence of the victim and the informant.

17. PW3 Karuna Wadode is the Teacher of the victim. She has stated that the victim was studying in 7th standard and she was her class Teacher. She has categorically stated that on 17.01.2019, the victim along with some girls came to her and started crying. She has stated that on inquiry with the victim, she told her that her father was behaving improperly with her. She has stated that she made further inquiry, but she did not elaborate anything. She asked the teacher to call her mother. PW3 has stated that therefore, she called the informant to the School on 19.01.2019 and apprised her about the complaint made by the victim. She asked the informant to take care of the victim.

Perusal of her evidence would show that first time in the month of January-2019, the victim, being fed up with the conduct of the appellant, complained about him to her teacher. The victim, as can be seen from her conduct, had faith in her teacher. She did not disclose anything to her mother. The teacher warned the mother to take care of the victim.

18. The parents of PW4 are the neighbours of the informant. She has stated that in the month of May-2019, there was marriage of her sister and therefore, she had come to her parents' house. She has stated that she went to the house of the victim as her father was beating her. On being questioned about the reason for beating, the appellant did not tell anything. She informed the incident to the mother of the victim. She has stated that on the next day, she saw the victim crying at her house. She has further stated that she, her brother Ram and other 2-3 persons made an inquiry with the victim. She has stated that at that time, the victim informed them that her father was behaving badly with her and doing bad acts. On her request, her brother Ram took the victim to her mother (PW1).

19. PW4 Sita is an independent witness. She had no reason to depose falsely against the appellant. Similarly, in her cross-examination, no material has been brought on record to suggest that she had any motive to depose falsely against the appellant.

20. PW6 Roshni is the another neighbour of the informant (PW1). She has stated that the informant told her to take care of the victim in her absence. She has stated that on 15.5.2019, in the noon hours, she saw that the victim was weeping. She made inquiry with her. She has stated that the victim told her that her father was beating her and she wanted to talk with her mother on telephone. The evidence of this witness is not the direct evidence. However, her evidence suggests that some incident had occurred on 15.05.2019.

21. PW7 is the aunt of the victim. She has stated that the informant had made a phone call to her and informed her that the victim was crying. She has stated that thereafter, the informant and the victim came to her house and then she made inquiry with the victim. She has stated that the victim was crying. She has stated that the victim further told her that the appellant made her to hold his penis. In short,

she has reiterated the incident narrated by the victim in her deposition. This evidence, in my view, is sufficient to corroborate the evidence of the victim and her mother on material aspects. I do not see any reason to discard and disbelieve the evidence of the victim and her mother on this part of the incident. Their evidence has been sufficiently corroborated by the evidence of the other witnesses. I do not see any reason to discard and disbelieve the evidence of those independent witnesses.

22. The evidence of the independent witnesses is not sufficient to prove the incident of penetrative sexual assault on the victim. All the independent witnesses are silent about the occurrence of any such incident. Their evidence, at the most, would be sufficient to prove the offence of sexual assault, as defined under Section 7 of the POCSO Act. The learned Judge has failed to consider this factual position. The learned Judge, on the basis of the evidence of the informant and the victim, has recorded a finding that their evidence is sufficient to prove the offence of penetrative sexual assault. On re-appreciation of the entire material and the evidence, I am satisfied that the evidence is not sufficient to prove the charge under Section 376 of the IPC as well as

under Section 3 of the POCSO Act. The evidence on record is sufficient to prove the charge under Section 7 punishable under Section 8 of the POCSO Act. Section 7 defines the sexual assault. Section 8 provides punishment for the same. It is further seen that on the basis of this evidence, the offence under Section 354-A would also get attracted. In view of this, the conviction and sentence for the offence punishable under Section 376(3) of the IPC as well as offence under Section 3 of the POCSO Act cannot be sustained. The appellant is liable to be convicted for commission of the offence under Section 7 punishable under Section 8 of the POCSO Act and under Section 354-A of the IPC.

23. Learned advocate for the appellant submitted that the maximum punishment provided under Section 8 of the POCSO Act may extend to 5 years and the fine. Learned advocate submitted that even the punishment provided under Section 354-A of the IPC may extend to one year with fine or with both. Learned advocate submitted that the appellant has already undergone the imprisonment for five years, four months and five days. Learned advocate submitted that the sentence suffered by the appellant would be the appropriate

punishment. Learned APP and the learned advocate for respondent no.2 victim submitted that considering the nature of the crime and the relationship between the appellant and the victim, a strict view be taken.

24. I have given thoughtful consideration to the submissions. The imprisonment already suffered by the appellant is more than the maximum sentence prescribed under Section 8 of the POCSO Act. In the facts and circumstances, the imprisonment already suffered by the appellant would be an appropriate punishment.

25. Before parting with the matter, it is necessary to place on record the appreciation of the Court for the valuable assistance rendered to the Court by learned advocate Mr. Amit Kukday, appointed to represent the appellant and learned advocate Ms. Aarti Singh, appointed to represent respondent no.2/victim. Hence, the following order :-

- i. The Criminal Appeal is partly allowed.
- ii. The judgment and order of conviction and sentence, passed against the appellant by learned District and Sessions Judge-11, Nagpur, dated 30.10.2021 in Special Case No. 173/2019, is modified.

iii. The impugned judgment and order, convicting and sentencing appellant - Dhanraj Gajanan Wakodikar for the offences under Section 4 and 12 of the Protection of Children from Sexual Offences Act, 2012 and under Sections 376(2)(f), 376(3) and 506 of the Indian Penal Code, is set aside. He is acquitted of the said offences.

iii. In stead, appellant – Dhanraj Gajanan Wakodikar is convicted of the offence under Sec. 7, punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and under Section 354-A of the Indian Penal Code. He is sentenced to undergo the imprisonment already suffered by him. No separate sentence is awarded for the offence punishable under Section 354-A of the IPC.

26. Mr. A.M.Kukday, learned advocate appointed to represent the appellant and Ms. Aarti Singh, learned advocate appointed to represent respondent no.2/victim, are entitled to get their fees. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fees of the learned appointed advocates, as per the Rules.

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

(G. A. SANAP,J.)