



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

CRIMINAL APPEAL NO.363/2024

Sharad S/o Kashinath Kumare,
aged about 25 Yrs., Occ. Labour,
R/o Chincholi, Tal. Katol, Distt. Nagpur.
(Presently at District Prison, Wardha) ... Appellant

- Versus -

State of Maharashtra,
through Police Station Sevagram,
Tah. & Distt. Wardha. ... Respondent

Mr. R.S. Nayak, Advocate (Appointed) for the Appellant.
Mr. Ujjawal R. Phasate, A.P.P. for the Respondent/State.

CORAM: NEERAJ P DHOTE, J.
DATE OF RESERVING THE JUDGMENT: 03.02.2026.
DATE OF PRONOUNCING THE JUDGMENT: 05.02.2026.

JUDGMENT

This is the Appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") against the judgment and order dated 22.01.2024, passed by the learned Additional Sessions Judge, Wardha in Sessions Case No.131/2022 convicting and sentencing the Appellant as follows:-

- "i] The accused is convicted for an offence punishable under Sections 452, 354 of the Indian Penal Code and section 8 of POCSO Act vide Section 235(2) of the Code of Criminal Procedure.*
ii] Accused is sentenced to undergo rigorous imprisonment for period of 4(four) years and pay fine of

Rs.1000/- (Rs. One Thousand only) for the offence punishable under section 452 of 1.P.C. In default of payment of fine, accused is further sentenced to undergo rigorous imprisonment for period of 6 (Six) months.

iii)] Accused is sentenced to undergo rigorous imprisonment for period of 4(four) years and pay fine of Rs.1,000/- (Rs.One Thousand only) for the offence under section 8 of POCSO Act. In default of payment of fine, accused is further sentenced to undergo rigorous imprisonment for period of 6(six) months.

iv) The punishment provided to section 8 of POCSO Act is severe than punishment under section 354 of IPC. In view of provision laid down in section 42 of POCSO Act, accused is not separately punished for offence under 354 of IPC.

v) Out of compensation amount Rs.1500/-(Rs. One Thousand Five Hundred only) be paid to victim as compensation as per section 357(1) of Cr.PC. In addition to that the District Legal Service Authority may decide the quantum of compensation to be awarded to victim, under the Victim Compensation Scheme, set out in section 357(A) of the Code of Criminal Procedure, 1973 and Rule 9 of Protection of Children from Sexual Offences Rules.

vi) All substantive sentences shall run concurrently.

vii) Accused is in jail from 30.08.2022 to 13.06.2023. Therefore, he is entitled to set off for period already undergone in jail as per section 428 of Cr.PC.

viii) Copy of judgment be given to accused free of cost as per Section 363 of the Code of Criminal Procedure.”

2. The prosecution’s case, as revealed from the police report, is as under:-

a) The Informant was residing at the given address with her daughters. The Victim was 15 years old in August 2022 when the incident took place. On 26.08.2022 after the Informant and Victim went to sleep, the Appellant entered their house at about 11.30 p.m.

and pressed the chest of the Victim. The Victim got up from the sleep and raised alarm. The Informant got up. The Appellant fled. The Informant tried to apprehend the Appellant, however, in vain. The incident was reported to the Sevagram Police Station and Crime No.0518/2022 came to be registered for the offence punishable under Sections 354 and 452 of the Indian Penal Code, 1860 (for short "I.P.C") and for the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"). The statement of the Victim came to be recorded. The spot-panchanama was drawn. The Appellant came to be arrested. The documents in respect of date of birth of the Victim came to be taken charge of from the school. The statement of witnesses were recorded. After completion of the investigation, the Appellant came to be chargesheeted.

b) The learned trial Court framed the Charge against the Appellant for the offence punishable under Sections 354 and 452 of the I.P.C. and for the offence punishable under Section 8 of the POCSO Act, below Exh.2. The Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the prosecution examined in all 6 witnesses and brought on record the relevant documents. After the prosecution filed evidence closure pursis, statement of the Appellant came to be recorded under Section 313(1)(b) of the Cr.P.C. The Appellant stated that, he was falsely implicated. Thereafter, the learned trial Court passed the impugned judgment and order convicting and sentencing the Appellant as above.

3. Heard the learned Advocate for the Appellant and the learned A.P.P for the State. Scrutinized the evidence available on record.

4. It is submitted by the learned Advocate for the Appellant that, the age of the Victim is not proved as required under the law. The school record was not of the primary school and there is no evidence to show as to on what basis the date of birth of the Victim was entered in the said school record. The prosecution failed to establish that, the Victim was the child at the relevant time. As regards the incident is concerned, it was dark and, therefore, the identity of the accused was not known. As the Appellant saw the Victim and her mother taking away the cow-dung cakes from the place where the Appellant was working, the false report was lodged against the Appellant to save themselves. The Appellant is behind bars for a period of about 3 years. The Appeal be allowed.

5. It is submitted by the learned A.P.P. that, the testimony of the Victim and her mother is consistent with each other. No contradictions are brought on record which go to show that, their testimony was consistent with their previous statements. There is no suggestion in the cross-examination that, the Victim was major by age. The Headmaster of the school has given explanation as to on what basis the date of birth of the Victim was recorded. The non-examination of the independent witness was not fatal. No interference was called for in the impugned judgment and order. The Appeal be dismissed.

6. When the Charge is for the offence punishable under the penal provisions of the POCSO Act, it becomes necessary for the prosecution to establish that, the Victim was the child as defined under Section 2(d) of the POCSO Act i.e. below 18 years of age. To

prove the date of birth and the age of the Victim, the prosecution examined the Headmaster of the Ashram School Mr. Anil V. Bute as PW.4. His evidence shows that, it was the subsequent school of the Victim wherein she was admitted on 05.05.2019. The Victim completed 10th standard and she applied for Transfer Certificate on 18.06.2022. The evidence of this witness shows that, the date of birth of the Victim recorded in the said Ashram School was 10.02.2007. However, the evidence of this witness shows that, without verifying the record he was unable to tell as to whether the copy of birth certificate of the Victim was taken at the time of admission. From the evidence of this witness it is clear that, the said date of birth was recorded in the secondary school of the Victim on the basis of the record of the previous school. Undisputedly, no witness from the first attended school of the Victim has been examined. The testimony of the Victim's mother, who is examined as PW.2, is silent in respect of date of birth of the Victim whereas her evidence shows that, her eldest daughter got married in 2019 at the age of 19 years and Victim was one year younger to her. If this evidence is considered, the Victim was above 18 years of age in the year 2022 when the incident took place. With this evidence on record it is clear that, the prosecution failed to prove the date of birth of the Victim and consequently that, the Victim was the child at the time of incident.

7. As regards the incident is concerned, according to the Victim, who is examined as PW.3, on 26.08.2022, she and her mother went to sleep after having meals. Around 11.30 p.m. the Appellant entered her house and pressed her chest. She got up from the sleep

and raised alarm, due to which her mother got up and ran behind the Appellant. The Appellant managed to flee. Her cross-examination shows that, on raising alarm after the incident, 5 to 6 women and 5 to 6 men gathered. However, none of the said women or men have been examined by the prosecution. Undisputedly, the report is lodged on 28.08.2022 for the incident which took place on 26.08.2022. It has clearly come in the evidence of the Investigating Officer Anuradha M. Fukat, who is examined as PW.6, that, when the investigation came to her she perused the papers and found that, the Victim was not having complete information in respect of the accused and, therefore, there was delay of 2 days in lodging the report. Undisputedly, the delay is not explained.

8. It is the defence of the Appellant, as can be seen from the cross-examination that, the Appellant was working at the Cattle-shed (*Gotha*) of one Gangadin Bhise which was adjacent to the residence of the Appellant and the Appellant saw the Victim and her mother committing theft of the cow-dung cakes from the said Cattle-shed and, therefore, to save themselves, the false report was lodged. This defence cannot be brushed aside in view of the clear admission by the Victim in the cross-examination that, before lodging the report, her mother telephoned her maternal uncle and her maternal uncle told her to lodge the report against the Appellant before the Appellant takes any action against them. It has come in the cross-examination of the Victim's mother that, the cow-dung cakes were kept in the Cattle-shed of said Gangadin where the Appellant was working.

9. From the above evidence it is clear that 2 day's delay in lodging the report coupled with the admission of the Victim in respect of the consultation by her mother with her maternal uncle and thereafter lodging the report against the Appellant and the defence of the Appellant, the possibility of the false implication of the Appellant cannot be ruled out. Under such circumstances, it was necessary for the prosecution to examine the witnesses, who according to the Victim and her mother, had gathered near their house in the night. More so, as seen above, the Victim was not having complete information about the accused and, therefore, the report was lodged after about a period of 2 days. This was sufficient time to concoct the story against the Appellant. With this major potholes in the prosecution evidence, there is no question of raising presumption against the Appellant under Section 29 of the POCSO Act. The evaluation of the evidence available on record, as discussed above, clearly shows that, the prosecution failed to prove the Charge against the Appellant with concrete and reliable evidence. The above discussion makes one to see the prosecution's case with doubt. Thus, the Appellant is entitled for benefit of doubt and resultantly for acquittal. Hence, the following order.

ORDER

- i) The Appeal is allowed.
- ii) The conviction of the Appellant recorded by the learned trial Court by the impugned judgment and order is quashed and set aside.
- iii) The Appellant is acquitted for the offence punishable under Sections 452 and 354 of the I.P.C. and Section 8 of the POCSO Act.
- iv) The Appellant is behind bars. He be set at liberty forthwith, if not required in any other crime.

- v) The fine amount paid by the Appellant, if any, be refunded to him.
- vi) The record and proceedings be sent back to the learned trial Court.
- vii) The fees of the learned Advocate appointed for the Appellant is quantified at Rs.12,000/-. Same be paid accordingly by the High Court Legal Services Authority.

(NEERAJ P. DHOTE, J.)