(2024) 10 BOM CK 0020

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 637 Of 2022

Chatur @ Chetan Maroti Meshram	APPELLANT
Vs	
State Of Maharashtra	RESPONDENT

Date of Decision: Oct. 4, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 164
- Indian Penal Code, 1860 - Section 375, 376AB
- Protection of Children From Sexual Offences Act, 2012 - Section 3(c), 4, 6, 7, 9(m), 10, 29

Hon'ble Judges: G. A. Sanap, J

Bench: Single Bench

Advocate: R. P. Joshi, Piyush Pendke, Mohini Sharma

Final Decision: Disposed Of

Judgement

G. A. Sanap, J.

1. In this appeal, challenge is to the Judgment and order, dated 24.08.2022, passed by the learned Additional Sessions Judge, Gadchiroli, whereby the learned Judge, convicted the appellant/accused for the offences punishable under Section 376-AB of the Indian Penal Code (for short, 'the IPC') and Sections 4 and 6 of the Protection of Children From Sexual Offences Act, 2012 (for short, 'the POCSO Act') and sentenced him to suffer rigorous imprisonment for twenty (20) years and to pay a fine of Rs.50,000/- (Rupees Fifty Thousand Only) and in default to suffer rigorous imprisonment for six months for the offence punishable under Sections 4 and 6 of the POCSO Act. No separate sentence has been awarded for the offence punishable under Section 376-AB of the IPC.

2. Background facts:

The informant (PW-1) is the mother of the victim girl. The crime was registered on her report on 15.07.2019. The case of the prosecution, which can be gathered from the report and other materials, is that on 14.07.2019 the informant had gone for work on the agricultural field. She returned back at 3.00 p.m. The informant has three daughters. When the informant came back from the field, the three daughters were present in the house. The victim at the relevant time told her that while returning from her grandmother's house, the appellant on the way met her. The appellant took her in his house and made her lie on the cot. The appellant took out his clothes and slept on her body. The appellant inserted his finger into her vagina through her knickers. After this incident the informant went to the house of the appellant to seek his explanation, but nobody was present in his house. It is stated that at about 5.00 p.m. she again went to the house of the appellant and informed his mother about the deplorable act committed by the appellant. The mother of the appellant called him and abused him in filthy language. The appellant denied the incident. It is stated that by this time it was late in the night and therefore, the informant and her husband, instead of going to the police station, went back to the house. On the next day, they went to Chamorshi Police Station and the informant lodged the report. On the basis of this report, crime bearing No.187/2019 was registered against the appellant.

3. Nisha Khobragade (PW-5) carried out the investigation in the crime. She went to the spot and drew the spot panchnama in the presence of the panchas. She arrested the appellant. She collected the birth certificate of the victim. The statement of the victim and her mother had been recorded by the learned Judicial Magistrate First Class, Chamorshi. Investigating Officer after registering the first information report referred the victim for medical examination. On completion of the investigation, she filed the chargesheet against the appellant in the Court of law.

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

5. I have heard the learned Advocate Mr. R.P. Joshi appointed to represent the appellant and the learned APP Mr. P.P. Pendke for the State. Perused the record and proceedings.

6. Learned Advocate took me through the oral and documentary evidence adduced by the prosecution. Learned Advocate submitted that the evidence adduced by the prosecution is not sufficient to prove the guilt of the appellant. The evidence of the

informant and evidence of the victim do not inspire confidence. Learned Advocate submitted that at the time of the recording of the evidence of the victim, she has placed on record the exaggerated account of the incident. It is submitted that the victim was tutored. In order to buttress this submission, learned Advocate took me through the history of assault narrated by the victim and recorded by the medical officer at the time of examination of the victim. Learned Advocate also drew my attention towards the statement of the victim at Exh.20 recorded under Section 164 of the Code of Criminal Procedure (for short, 'the Cr.P.C.) by the learned Judicial Magistrate First Class, Chamorshi. Learned Advocate on the basis of these two documents submitted that the victim did not state before the doctor as well as before the learned Magistrate that the appellant had inserted finger in her vagina. Learned Advocate took me through the evidence of Medical Officer PW-4 and submitted that the evidence of the Medical Officer instead of corroborating the case of the prosecution would make the defence of the appellant probable. Learned Advocate submitted that it is the case of the prosecution that when the finger was inserted in the vagina by the appellant, the victim was wearing the knickers. The knickers was not seized. The knickers was not produced before the Court. It is submitted that the prosecution has suppressed this material evidence from the Court. Learned Advocate submitted that the learned Sessions Judge, placing implicit reliance on the evidence of the informant and the victim, has held the appellant guilty and handed down him sentence of twenty years of rigorous imprisonment. Learned Advocate submitted that the evidence on record is not sufficient to prove the penetrative sexual assault on the victim by the appellant. Learned Advocate in the alternative submitted that even if the evidence of the informant and the victim is considered in juxtaposition with the history of the assault recorded by the Medical Officer and the statement of the victim recorded by the learned Magistrate at the most, the offence under Section 7 punishable under Section 10 of the POCSO Act would be made out. Learned Advocate pointed out other circumstances which in his submission, are sufficient to probabalise the defence of the appellant.

7. Learned APP submitted that the evidence of the informant and the evidence of the victim is cogent, concrete and reliable. The informant, considering the stigmatic consequences flowing from such a crime would not have involved her daughter in such a dirty incident even for the sake of taking revenge against the appellant. Learned APP submitted that the evidence of the informant and the evidence of the victim is credible and trustworthy. It is submitted that evidence of the medical officer does not rule out the possibility of penetrative sexual assault completely. The absence of the injuries to the genitals of the victim would not be a circumstance to give a benefit of a doubt to the appellant. The absence of injury to the genitals of the victim, by itself, in the teeth of the evidence of the victim and her mother, would not enure to the benefit of the appellant. Learned APP submitted that the victim might have committed a mistake

while narrating the history of the assault before the doctor as well as before the learned Magistrate. It is submitted that the Court has to give weightage to the substantive evidence of the victim and the informant. Learned APP, in short, submitted that the well reasoned judgment and order passed by the learned Judge does not warrant interference.

8. The relevant facts having bearing with the issue involved in this appeal need to be stated at the very outset. The appellant and the informant are the residents of the same village. The appellant was well acquainted with the informant and the victim. The prosecution, in this case, by leading oral and documentary evidence has proved that the victim on the date of the crime was four years and five months old. Exh.17 is the birth certificate of the victim. It needs to be stated at this stage that the appellant has neither challenged the oral evidence nor the documentary evidence adduced by the prosecution with regard to her birth date. The prosecution has proved that the victim on the date of the incident was four years and five months old.

9. The informant has deposed before the Court about the incident which was narrated to her by the victim when she came back from the field. She has stated that when she came from the field, the victim was sleeping. The victim woke up at about 2.30 p.m. The victim at that time narrated the incident to her. The informant in her examination-in-chief reiterated the incident which was reported by her to the police. In short, in her evidence, she has stated that the victim told her that the appellant took out his clothes and slept on her body. She has further stated that the victim told her that the appellant inserted his finger in her vagina and therefore, she had pain and she started crying. She has stated that thereafter the appellant released her and she came back to the house. Her subsequent conduct would show that immediately after getting to know of the incident through the victim, she went to the house of the appellant, but his house was closed. In the evening again, she went to the house of the appellant and narrated the incident to his mother and sister. She has stated that on being apprised of this incident to the mother of the appellant, mother of the appellant abused the appellant. She has stated that at that time the appellant denied the incident. She has stated that at that time her husband was not at home. The mother and sister of the appellant came to her house and requested not to report the matter to the police. She has stated that there was no facility of transport in the night to go to the police station and therefore, on the next day, they went to the police station and lodged the report.

10. Perusal of her evidence would show that it is consistent with the occurrence of the incident. In order to ascertain the actual incident occurred on that day, it would be necessary to appreciate the evidence of the victim and other relevant material. The report of the incident was lodged on 15.07.2019 at about 15.55 hours i.e. 3.55 p.m. The conduct of the informant in lodging the report of the incident is consistent with the possibility of the occurrence of some incident. The Court on consideration of the

evidence adduced by the prosecution has to record the finding as to the actual nature of the incident occurred on the given date. The victim, in her evidence, has stated that the appellant, on the assurance of giving chocolate, called her to his house. She has stated that after going to his house, he took out his clothes and inserted his fingers in her private part. She has stated that she told the appellant to remove himself from her body but the appellant did not respond positively. She has stated that thereafter she went to her house and when she woke up in the evening, she narrated the incident to her mother. The evidence of the victim with regard to the occurrence of the incident is very short. The victim was referred to the hospital for medical examination.

11. At this stage, before proceeding to appreciate other evidence, it is necessary to mention that, as per the evidence of the informant, the appellant on the promise of giving chocolate, took her into his house. It is not the case of the prosecution that except the appellant any other person was present in the house. It has come on record that the appellant had not removed the knickers of the victim. In my view, if the appellant had the intention to commit penetrative sexual assault, then there was no impediment for him to go ahead with his intended act. It is the case of the prosecution that without removing the knickers of the victim he inserted his finger in her private part. If the appellant had intention to commit penetrative sexual assault he would not have allowed the victim to go without satisfying his lust. In my view, this important circumstance is required to be borne in mind while appreciating the evidence of the informant and the victim. Similarly the history of the assault narrated by the victim before the Medical Officer and the candid statement made before the Magistrate with regard to the nature of the actual incident occurred at that time has to be considered in juxtaposition with the evidence of the informant and the evidence of the victim.

12. Dr. Roshni Raut (PW-4) is the Medical Officer who had examined the victim on 15.07.2019 at 9.30 p.m. Medical Officer did not notice any injury on the person of the victim as well as on her genitals. Her hymen was intact. There was no injury to labia majora and labia minora. The victim narrated the history of the assault to the doctor. Perusal of the history of the assault narrated by the victim to the doctor would show that she did not tell the doctor that the appellant had inserted his finger in her private part. Before the doctor, while narrating the history of assault, she stated that the appellant had touched her private part.

13. The statement of the victim was recorded by the learned Judicial Magistrate First Class, Chamorshi, on 19.07.2019. The statement is at Exh.20. The prosecution has relied upon this statement to seek corroboration to the evidence of the victim. The Court can look into this statement for the purpose of addressing the issue of credibility and trustworthiness of the evidence of the informant and the victim. The incident narrated before the Magistrate by the victim needs to be considered and compared with the one narrated by the victim before the Court. The perusal of statement of the victim at

Exh.20 would show that before recording the statement of the victim, the learned Magistrate put near about ten questions to her. The manner of putting questions to the victim, as recorded by the learned Magistrate, would show that the learned Magistrate ensured that the victim was made comfortable. Learned Magistrate ensured that fear of the incident, if any, in the mind of the victim is completely erased and she is made free to narrate the incident. The victim has stated before the learned Magistrate that after removing his clothes the appellant slept over her body. She has further stated that the appellant touched his hand to her urine place and her bumps. The victim did not state before the learned Magistrate that the appellant inserted his finger in her private part. In my view, this evidence cannot be completely glossed over. This evidence has been adduced by the prosecution. The Court on minute scrutiny and appreciation of the evidence has to decide whether the same is sufficient to prove the charge against the appellant?

14. At this stage, it is necessary to mention that the POCSO Act is a special enactment. This act has been enacted with an object to protect the children from the sexual assault. It needs to be stated that, consistent with the object and intention of the legislature, the stringent punishment has been provided for the commission of the offence against the child. It is not out of place to mention that when the statute provides stringent punishment, the Court must be very careful while deciding such cases. In case of stringent punishment under the law the Court has to ensure the strict compliance of the provisions of the law. It is to be noted that Section 29 is one of the provisions incorporated in this act consistent with the intention and object of the law makers. It is to be noted at this stage that despite incorporating Section 29 of the POCSO Act, the fundamental principle of criminal jurisprudence that the prosecution has to prove its case against the appellant beyond reasonable doubt has not been completely diluted. The presumption is provided under Section 29 of the POCSO Act. However, it is not an absolute presumption. In order to trigger the presumption, the prosecution is duty bound to prove the foundational facts viz-a-viz the charge, framed against the appellant. If the prosecution evidence is sufficient to prove the foundational facts viz-a-viz the charge then the presumption would trigger and apply with vigour and force. The appellant then would be required to rebut the said presumption. In other words, while considering such matters, the evidence adduced by the prosecution has to be considered in entity. The evidence on proper and careful scrutiny must be sufficient to prove the charge beyond reasonable doubt. If the evidence creates a doubt about the occurrence of the incident or particular act having been committed by the appellant, then the benefit of the same needs to be given to the appellant.

15. Coming back to the veracity and truthfulness of the evidence adduced by the prosecution, it is evident that there is scope to doubt the evidence of the prosecution with regard to the insertion of finger in the private part of the victim by the appellant.

The history of the assault narrated by the victim to the doctor and the statement made her by the victim, before the Magistrate has caused a serious dent to the principal charge against the appellant of insertion of finger in her private part. However, the evidence of the informant and the victim, coupled with the history of the assault narrated before the doctor and the incident narrated before the learned Magistrate, would show that some incident had occurred on the given date. The said incident has been categorically stated by the victim. I do not see any reason to doubt the version of the victim and her statement made before the Magistrate with regard to that part of incident. In her statement before the Magistrate as well as before the Medical Officer, she has categorically stated that the appellant had touched her private part. It is to be noted that touching a private part as stated by the victim could not be a manipulation as provided under Section 3(c) of the POCSO Act. Such an act committed by the appellant would be sexual assault as defined under Section 7 of the POCSO Act. Touching a private part in this manner would not constitute penetrative sexual assault. It would not be said to be a rape as defined under Section 375 of the I.P.C. In this case, on the basis of the evidence, the prosecution has failed to prove that the appellant had committed penetrative sexual assault. Similarly, the said evidence is not sufficient to prove the offence of a rape as defined under Section 375 of the I.P.C. It is pertinent to mention that the offence which the prosecution has proved against the appellant on the basis of this evidence would be as defined under Section 9 (m) punishable under Section 10 of the POCSO Act. It is to be noted here that the victim was below 12 years of age on the date of the incident. Therefore, Section 9 (m) would get attracted.

16. In view of this, the finding recorded by the learned Judge with regard to the rape and penetrative sexual assault on the victim is concerned, the same cannot be sustained. However, the evidence is sufficient to prove the aggravated sexual assault. The act committed by the appellant would speak volumes about his intention. The prosecution has proved that the appellant touched the private part of the victim with a sexual intention.

17. In the backdrop of the above findings it would be necessary to consider the appropriate quantum of sentence in this case. Learned Advocate Mr. R.P. Joshi submitted that minimum punishment provided for the proved offence under Section 10 of the POCSO Act is five years. The punishment may extend to 7 years with a fine. The appellant was arrested for this crime in 2019. He has been in jail since then. The record shows that till date the appellant has suffered the imprisonment for five years and two months. Learned Advocate submitted that considering the proved offence against the appellant the sentence already undergone by him would be commensurate with the gravity of the crime and it would meet the ends of justice.

18. Learned APP submitted that considering the fact that the victim was four years and five months old on the date of the offence, he does not deserve misplaced sympathy.

19. I have given thoughtful consideration to the submissions. In my view in case of the proved offence punishable under Section 10 of the POCSO Act the sentence already suffered by the appellant would be sufficient and it would meet the ends of justice.

20. Before parting with this matter, I must place on record my appreciation for the assistance rendered at the request of this Court by the learned Advocate, Mr. R.P. Joshi. The able assistance extended by Mr. R.P. Joshi has proved fruitful for this Court while deciding this appeal. Similarly I place on record my appreciation for assistance rendered by Mr. P.P. Pendke, learned APP.

21. Mr. R.P. Joshi, learned Advocate appointed to represent appellant, in this appeal is entitled to receive the fee. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fee of the learned appointed Advocate as per rules.

22. Accordingly, I proceed to pass the following

Order:-

i) The Criminal Appeal is partly allowed.

ii) The judgment and order of conviction and sentence dated 24.08.2022 passed against the appellant by the learned Additional Sessions Judge, Gadchiroli in Special POCSO Case No.51/2019 for the offence punishable under Section 376-AB of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012, is quashed and set aside.

iii) Appellant/accused – Chatur @ Chetan Maroti Meshram is convicted of the offences punishable under Section 10 of the POCSO Act and he is sentenced to undergo imprisonment suffered by him till date.

iv) The appellant/accused is in jail. He be released forthwith, if not required in any other case/crime.

23. The Criminal Appeal stands disposed of in the above terms.