



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

CRIMINAL APPEAL NO. 258 OF 2022

APPELLANT : Mahadeo @ Mahadya Uttam Gonde,
Aged 30 Years, Occu: Agriculturist,
R/o. At Nimani, Tah. Korpana, Dist.
Chandrapur.

//VERSUS//

RESPONDENTS : 1. The State of Maharashtra, through
Police Station Officer, Police Station
Gadchandur, Tah. Gadchandur, Dist.
Chandrapur.
2. XYZ (Victim) in Crime
No.0111/2020, P.S. Gadchandur,
Distt. Chandrapur. Hence, identity is
not disclosed. Details are submitted
in Closed Envelop.

Mr. Mahesh Rai, Advocate for the Appellant.
Ms. R. V. Sharma, APP for Respondent No.1/State.
Ms. Sunita Paul, Advocate (appointed) for Respondent No.2 is
absent.

CORAM : G. A. SANAP, J.
DATED : 4th SEPTEMBER, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order

dated 28.03.2022, passed by the learned Special Judge, Special Court (POCSO), Chandrapur, whereby the learned Judge held the accused guilty of the offences punishable under Sections 4 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") and under Section 377 of the Indian Penal Code, 1860 (for short, "IPC"). He has been sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.3,000/- and in default to suffer rigorous imprisonment for six months for the offence punishable under Section 4 of the POCSO Act, and rigorous imprisonment for 5 years and to pay a fine of Rs.2,000/- and in default to suffer rigorous imprisonment for six months for the offence punishable under Section 10 of the POCSO Act. No separate sentence has been awarded for the offence punishable under Section 377 of the IPC.

02] BACKGROUND FACTS:

PW-2 is the victim boy. On his report, a crime was registered against the accused at Gadchandur Police Station, Dist. Chandrapur. The case of prosecution, which can be gathered from the report and other materials, is that, on the date of the incident, the victim was 11 years old. The victim and the accused are the

residents of village Nimani, Tah. Korpana, Dist. Chandrapur. On the date of the incident, the victim was studying in 5th Standard. On the date of the incident, the victim and his friend had gone to the field for grazing their goats. They were grazing their goats in the field of one Natthu Mama. The field of the accused is near to the field of Natthu Mama. The accused came to the said field on his motorcycle. The accused told the victim and his friend Ayush that there is a crop of green grams in his field. The accused lured them to accompany him. On the promise of giving them green grams, the victim and his friend Ayush accompanied the accused on his motorcycle to his field. After reaching his field, they got down from the motorcycle. At that time, the accused tried to catch hold of them. They ran away towards the road; however, the accused managed to catch hold and overpower the victim.

03] It is stated that Ayush ran away from the spot towards the road. The accused overpowered the victim and carried him on his shoulder in his field by the side of the bullock-cart road. The accused removed the pant of the victim. The accused also removed his pant. The accused pressed the scrotum and penis of the victim. The accused tore his shirt and threw it away. The accused pressed his chest. The accused forcefully laid him on the ground. He

inserted his penis into his anus. At that time, they heard the horn of the vehicle. The accused released him and pushed him into the thorny bushes. The victim sustained injury to his hand. He put on his pant and shirt and went towards the road. His friend Ayush met him on the road. He narrated the incident to Ayush. They went home. The victim narrated the incident to his mother. The mother of the victim called one Praful Gourkar, an acquaintance of them. They went to the police station and lodged the report. On the basis of this report, a Crime bearing No.111/2020 was registered against the accused at Gadchandur Police Station.

04] PW-8 carried out the investigation. He forwarded the victim to the hospital for his medical examination. He drew the spot panchanama. He arrested the accused. He seized the cloths of the victim and the cloths of the accused. He forwarded the cloths and samples to F.S.L., Nagpur. He recorded the statements of the witnesses. On completion of the investigation, he filed the charge-sheet against the accused.

05] The learned Special Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of his enmity with Umesh Rajurkar, who, at

the time of the incident, was Up-Sarpach. Umesh Rajurkar is the friend of Praful Gourkar. Praful Gourkar demanded money from the mother of the victim. The mother of the victim had no money, and therefore, on the say of Praful Gourkar, the false report was lodged against him.

06] The prosecution, in order to bring home the guilt of the accused, examined eight witnesses. The learned Special Judge, on consideration of the evidence, convicted and sentenced the accused as above. The appellant has filed this appeal against the said judgment and order.

07] I have heard Mr. Mahesh Rai, learned advocate for the appellant/accused and Ms. R. V. Sharma, learned APP for respondent No.1/State. Perused the record and proceedings.

08] Learned advocate for the appellant/accused submitted that there is no independent corroboration to the evidence of the victim. The evidence of PW-5 Ayush and PW-6 Praful Gourkar is not cogent, consistent, and reliable. Learned advocate submitted that, even if the evidence of the victim is considered at its face

value, coupled with the medical evidence, it would not be sufficient to prove the offence of carnal intercourse as defined under Section 377 of the IPC and penetrative sexual assault as defined under Section 3 of the POCSO Act. Learned advocate first and foremost submitted that the evidence on record is not sufficient to prove the charge against the accused. It is pointed out that, at the most, the offence of attempt to commit sexual act would get attracted in this case. Learned advocate took me through the evidence of PW-3, the Medical Officer, and submitted that the doctor has not recorded a candid opinion with regard to the carnal intercourse with the victim. Learned advocate further submitted that the medical examination report of the accused at Exh.56 would show that not a single injury was found on the body as well as on the private part of the accused. Learned advocate submitted that the doctor, who had examined the accused, has not opined that his findings of examination of the accused suggested that in the recent past he had a carnal intercourse. Learned advocate submitted that there was no injury to the anus of the victim to suggest that there was even a slightest penetration. Learned advocate submitted that the learned Judge has failed to properly appreciate the evidence and, as such, came to a wrong conclusion.

09] Learned APP submitted that the victim, who was about 11 years old, has placed on record the first-hand account of the incident. There is no reason to discard and disbelieve the evidence of the victim boy. The defence of the appellant/accused is not at all probable. The victim and his mother had no motive to falsely implicate the appellant/accused. The victim, on the fateful day, was grazing his goats in the field of Natthu Mama, and the accused, in order to satisfy his lust, lured the victim and Ayush to his field. Learned APP submitted that there was no delay in lodging the report. The evidence of PW-5 Ayush and PW-6 Praful Gourkar, who are the independent witnesses, is consistent. The evidence of the victim has been corroborated by PW-5, who, at the relevant time, was with him and could manage to escape, when the accused tried to catch hold of him as well. Learned APP submitted that the medical evidence clearly suggests that there was a forceful attempt to penetrate, and therefore, the learned Judge was right in holding that the charge of the penetrative sexual assault was proved. Learned APP submitted that even if it is held that there was no penetration or partial penetration, the act of the accused would amount to manipulation of the body part of the victim for the purpose of penetration into his anus. Learned APP laid a stress, to substantiate this submission, on the provisions of Section 3(c) of

the POCSO Act.

10] In this appeal, the Court has to answer two primary questions. (i) Whether the incident as narrated by the victim occurred or not? (ii) Whether the accused committed the penetrative sexual assault on the victim as stated by the victim or not? As far as the incident is concerned, the evidence of the victim and his friend Ayush is sufficient. The victim (PW-2) has narrated the vivid account of the incident. He has stated that he and Ayush were grazing their goats in the field of Natthu Mama. The accused came there on his motorcycle. The accused promised to give them green grams from his field. He lured the victim and Ayush to accompany him. They sat on his motorcycle and went to his field. After going to the field, they saw that there were no green grams in his field. The accused, at that time, tried to catch hold of both of them. Ayush ran away from the spot. The accused overpowered him, lifted him on his shoulder, and carried him in his field. The accused removed the pant of the victim. The accused also removed his pant. The victim has stated that the accused pressed his scrotum and his penis. The accused pressed his chest. He has stated that he pushed him on the ground with force. He has stated that he inserted his penis into his anus. He cried for help. He has stated

that, at that time, they heard the horn of a motorcycle passing through the road, and therefore the accused released him. The accused pushed him into the thorny bushes, and therefore he sustained injury to his hand.

11] As far as the first part of the incident is concerned, Ayush has supported him. Ayush has stated that they were grazing their goats in the field of Natthu Mama. The version of Ayush is consistent with the version of the victim. Ayush has stated that the accused took them to his field on the pretext of giving them green grams. He has stated that when they went to his field, they found that there were no green grams. He has stated that, at that time, the accused tried to catch hold of them. He managed to flee from the spot, but the accused caught hold of the victim and carried him in the field on his shoulder. He has stated that he ran away towards the road. He has further stated that, after some time, the victim came towards him and narrated the unfortunate incident to him.

12] Perusal of the cross-examination would show that their evidence as to the occurrence of this incident is consistent. Their evidence has not at all been shaken. The occurrence of the incident has been proved on the basis of their evidence. The incident

occurred on Sunday. The victim and Ayush are from poor families. On Sunday, they would go to graze their goats. It is not the defence of the accused that they did not have goats. The victim and Ayush have categorically stated that they went home. The victim narrated the incident to his mother. The mother of the victim called PW-6 Praful Gourkar. The victim narrated the incident to him as well. The victim (PW-2) and PW-5 have stated that Praful Gourkar (PW-6) carried them and the mother of the victim to the Police Station, Gadchandur, and the victim lodged the report. It is necessary to mention at this stage that there was no delay in lodging the report. The incident occurred on 15th March, 2020, at 4:00 p.m. The report was lodged at 21:00 hours. The victim was sent for medical examination by the police in the night itself.

13] In this context, it would be necessary to see the evidence of PW-6 Praful Gourkar. He has stated that he has acquaintance with the family of the victim. He has stated that, on the date of the incident, at about 4:00 p.m., he was standing near the Pan Thela of Temburde. He has stated that he came to know from the discussion of the people about the incident, and therefore he went to the house of the victim. He has stated that he saw that the victim and his mother were weeping. The victim narrated the incident to his

mother. He has stated that Ayush was present on the spot. The incident, as stated by him, was narrated by the victim to her mother. He has reiterated the incident as narrated by the victim in his evidence. He has stated that the mother of the victim requested him to accompany them to the police station. He has stated that, therefore, he carried them on his motorcycle to the police station. In the police station, the victim lodged the report.

14] He was subjected to cross-examination. The main thrust of the cross-examination is on the point of his enmity with the accused. He has denied that in order to take revenge, he has prevailed upon the mother of the victim to lodge the false report against the accused. He has denied all the suggestions put to him. He has stated in his cross-examination that during the bad times of the mother of the victim, he had helped her. He has denied the suggestion that in order to help his friend Umesh Rajurkar, who had enmity with the accused, he prevailed upon the mother of the victim to lodge a false report. In my view, the defence of the accused put forth to the victim, Ayush, and this witness has not been admitted by them. The accused has not adduced any independent evidence to substantiate his defence. Similarly, the accused has not been able to probablise his defence. He has not

pointed out any material from the record to substantiate his defence. As far as the incident is concerned, the evidence is consistent. I have no reason to discard and disbelieve the evidence as to the occurrence of the incident. The evidence is sufficient to prove the incident.

15] The next important question is with regard to the actual nature of the incident. The Court has to consider whether there was a penetrative sexual assault or merely an attempt or sexual assault by touching the anus of the victim by the accused. At this stage, it would be appropriate to consider the submission advanced by the learned APP that the evidence on record would be sufficient to establish that there was manipulation of the part of the body of the victim so as to cause the penetration into his anus, and therefore it would be sufficient to prove the offence of penetrative sexual assault.

16] It is to be noted that if the evidence on record is not sufficient to prove the penetration or partial penetration, then by invoking clause (c) of Section (3) of the POCSO Act, it would not be possible to accept the case of prosecution viz-a-viz the charge under Section 3 of the POCSO Act. Even for the offence

punishable under Section 3 of the POCSO Act, there has to be penetration or partial penetration. The question is whether the simple act of touch can be considered to be manipulation under Section 3(c) of the POCSO Act. A plain reading of Section 3(c) of the POCSO Act would show that for an act to be a penetrative sexual assault, the accused has to manipulate any part of the body of the child so as to cause penetration. The act committed as per this section must constitute a penetrative sexual assault. Section 7 of the POCSO Act provides for an offence in case of touch. The act of simple touch with sexual intent cannot be considered to be manipulation under Section 3(c) of the POCSO Act. In view of the separate and distinct nature of the offences under Sections 3 and 7 of the POCSO Act, the Court has to consider the evidence on record. If the evidence on record is sufficient to prove that there was penetration or partial penetration, then the offence under Section 3 of the POCSO Act would get attracted. Similarly, the offence under Section 3(c) of the POCSO Act would get attracted only when there is manipulation of any part of the body of the child so as to cause penetrative sexual assault.

17] The question is whether the evidence on record is sufficient to establish penetration, partial penetration, or

manipulation of any part of the body of the victim so as to cause penetration. PW-3 is the Medical Officer, who had examined the victim. His evidence requires careful scrutiny and consideration. The fate of the case of prosecution hinges on his testimony and on his findings and opinion. It appears that the doctor has committed a mistake while mentioning the date of the examination of the victim. The doctor has mentioned in his report that the incident occurred on 14th March, 2020, at 4:00 p.m. to 5:00 p.m. Similarly, the doctor has mentioned in his report that the victim was examined by him on 15th March, 2020, at 2:40 a.m. The report further shows that it was finally prepared on 15th March, 2020, at 3:40 a.m. In my view, this is nothing short of a casual and careless act of the doctor. The report was lodged on 15th March, 2020, at 21:00 hours. The victim was referred to the doctor after lodging the report. Therefore, the date of examination mentioned by the doctor in his report being 15th March, 2020, at 2:40 a.m., appears to be a mistake. It is a result of the careless and negligent approach of the doctor. Exh.33 is the OPD paper. The OPD paper is the first document prepared when a patient is taken to the government hospital for examination. In this OPD paper, the correct date and time has been mentioned. It is mentioned that the OPD paper was issued on 16th March, 2020, at 2:40 a.m. It is to be noted that,

fortunately for the prosecution, this OPD paper is part of the record. The doctor had no reason and occasion to examine the victim prior to 16th March, 2020, at 2:40 a.m. The date and time mentioned in the report of the doctor appears to be a mistake.

18] PW-6 has stated that, on examination, he found that there was an abrasion on the left wrist joint of the victim. He also noticed a contusion over the internal region of anus. The digital examination of the anal sphincter was painful. The doctor has stated that the possibility of an unnatural sexual act could not be ruled out. The doctor was cross-examined in detail. He has admitted that for the purpose of injury of tissue, the amount of force is required. He has admitted that the rate of application of force to the tissue is also one of the factors to cause injury. He has stated that the target area is also important from where the injury is caused. He has stated that the anal region is a combination of flesh tissue. The doctor, in his evidence, has agreed with the view of Modi, a celebrated author of Medical Jurisprudence, that if the blunt object hits a particular portion with force, then the contusion is caused. He has stated in his report that he has not mentioned the age of the injury. The doctor had collected the anal swab of the victim. The report of the examination of the anal swab shows that

neither blood nor semen was detected. The doctor did not notice any bleeding injury to the anus. There was no tear suggesting the forcible penetration. The doctor, on the basis of his findings, has simply recorded that the possibility of unnatural sexual act is not ruled out. In my view, this opinion is not sufficient to establish that, indeed, there was a penetrative sexual assault. There was no internal injury to the anus. The doctor has stated that the victim was having pain. The evidence of the doctor, if read at its face value, would not be sufficient to conclude that there was a penetration or partial penetration in the anus. At the most, it could be said that there was an attempt to commit the carnal intercourse. It is to be noted that the offence of carnal intercourse would not be complete unless and until there is a penetration or partial penetration.

19] It is to be noted that the examination of the accused also can prove the involvement of the accused in the penetrative sexual assault. The accused was examined by the doctor. The doctor, who had examined the accused, has not been examined. However, the report of his examination is on record. The accused was arrested on 16th March, 2020. He was examined by the doctor on 16th March,

2020, at 1:00 p.m. The cloths of the accused had been seized. The doctor did not find any injury on his body. Similarly, the doctor did not find any injury to his penis. At the time of his examination, urethral swab and the swab from his discharge had been collected. The Medical Officer did not observe any deformity or injury to his genitals. The doctor did not notice injuries on the prepuce, glans penis, phrenum, and scrotum. The column about presence or absence of smegma is blank. If the accused had committed forceful sexual intercourse as stated by the victim, then there would have been some injury either on his body or on his penis. The doctor has not opined that the examination of his genitals suggested a penetrative sexual assault by him in the recent past. In my view, therefore, this report of the medical examination of the accused does not support the case of prosecution that there was a penetrative sexual assault.

20] The victim has stated that the accused forcibly pushed him down on the ground, removed his pant and inserted his penis into his anus. In my view, the other evidence is not sufficient to believe this statement. The evidence is sufficient to prove the occurrence of the incident; however, the Court has to find out whether it was a sexual assault, penetrative sexual assault, or simply

an attempt to commit the carnal intercourse. The learned Judge has mainly relied upon the evidence of the Medical Officer. In my view, the contusion over the external part of the anus by itself would not be sufficient to establish the penetrative sexual assault. At the most, it would show that the accused attempted to commit the penetrative sexual assault and in the process, he touched the anus of the victim. Touching of the anus in this manner as stated above could not be a manipulation of any part of the body of the victim so as to cause penetration in the anus. In the facts and circumstances, in my view, the offence, as defined under Section 3 of the POCSO Act, has not been made out.

21] In this background, at this stage, it would be necessary to see the oral evidence of the victim before the Court and the facts stated by him in his report at Exh.33. In his evidence, he has stated that the accused inserted his penis into his anus. In the report, he has stated that the accused touched his penis to his anus and tried to insert it. He has stated that, therefore, he made a hue and cry. He has stated that someone on a vehicle came there, and after hearing the horn of the vehicle, the accused released him. In the report, the victim has not stated that the accused inserted his penis into his anus. He has stated that the accused touched it and attempted to

insert it into his anus. Before Court, he has improved his version. In my view, this is another important factor to come to a conclusion that there was no penetration.

22] The victim, on the date of the incident, was about 11 years old. The prosecution has produced on record ample oral and documentary evidence to prove the birth date of the victim. The victim has stated that his birth date is 11th February, 2009. His birth certificate collected by the Investigating Officer at the time of the investigation is at Exh.25. The prosecution has examined PW-7, an independent witness, to prove this fact. He is Gram Sevak of Gram Panchayat, Nemani. He has produced before the court the birth entry register of Gram Panchayat Nemani. He has stated that, in the said register, there is an entry for the birth of the victim, and his birth date is 11th February, 2009. The information of the birth of the victim was given by the father of the victim on 21st February, 2009. The extract of the relevant entry from the register is at Exh.51. The register was duly verified by the learned Judge before giving exhibit to the certified extract. Exh.25 was shown to this witness. He has stated that it was prepared on the basis of the very same entry. On perusal of this evidence, it has been proved beyond doubt that, on the date of the incident, the victim was 11 years old.

It is necessary to mention, at this stage, that the prosecution has proved the occurrence of the incident. However, the evidence of prosecution is not sufficient to prove the penetrative sexual assault or the carnal intercourse. In view of the proof of the incident, it is necessary to see the offence made out against the accused.

23] As far as Section 377 of the IPC is concerned, the offence made out would be an attempt to commit carnal intercourse, read with Section 511 of the IPC. As far as the provisions of the POCSO Act are concerned, the offence made out would be an aggravated sexual assault as defined under Section 9 and punishable under Section 10 of the POCSO Act. The victim, on the date of the incident, was 11 years old. The appellant/accused is, therefore, liable to be convicted under Section 377 read with Section 511 of the IPC and under Section 10 of the POCSO Act. The learned Judge, on his conviction under Section 10 of the POCSO Act, has awarded the sentence of five years rigorous imprisonment. Under Section 4 of the POCSO Act, the learned Judge has sentenced him to suffer rigorous imprisonment for ten years. In my view, in this case, the conviction under Section 4 cannot be sustained. It is required to be set aside. The conviction under Section 10 has to be maintained. Similarly, the accused is

required to be convicted under Section 377 read with Section 511 of the IPC. As per Section 10 of the POCSO Act, in case of aggravated sexual assault, the minimum sentence is five years and the maximum sentence is up to seven years. Therefore, in this case, the sentence awarded under Section 10 of the POCSO Act is required to be maintained. Hence, the following order:

ORDER

- i] The Criminal Appeal is **partly allowed**.
- ii] The order with regard to the conviction and sentence of the appellant dated 28.03.2022, passed by the learned Special Judge, Special Court (POCSO), Chandrapur, for the offence punishable under Section 4 of the POCSO Act, is quashed and set aside.
- iii] The conviction and sentence for the offence punishable under Section 10 of the POCSO Act, is maintained.
- iv] The appellant/accused – Mahadeo @ Mahadya Uttam Gonde is also convicted for the offence punishable under Section 377 read with Section 511 of the IPC.

v] The sentence awarded for the offence punishable under Section 10 of the POCSO Act is five years. Therefore, there is no need to award separate sentence for the offence punishable under Section 377 read with Section 511 of the IPC.

vi] The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

Vijay