

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH

CRIMINAL APPEAL NO. 161 OF 2020

Satish s/o Bandu Ragde,
aged about 39 years,
occupation – Private Work,
r/o Gond Mohalla, Deepak
Nagar, Behind Surendragarh
Durga Mandir, Nagpur.

... APPELLANT

Versus

The State of Maharashtra
through Police Station Officer,
Gittikhadan, Nagpur.

... RESPONDENT

Shri Sk. Sabahat Ullah, Advocate for the appellant.
Shri M.J. Khan, APP for the respondent.

.....

CORAM : PUSHPA V. GANEDIWALA, J.
JANUARY 19, 2021.

ORAL JUDGMENT :

Heard Shri Sk. Sabahat Ullah, learned counsel for
the petitioner and Shri Khan, learned APP for the respondent.

2. This is an appeal against the judgment and order dated
05.02.2020 in Special Child Protection Case No. 28 of 2017 passed
by the Extra Joint Additional Sessions Judge, Nagpur, by which the

appellant is convicted for the offence punishable under Sections 354, 363 and 342 of the Indian Penal Code (hereinafter referred to as IPC) and Section 8 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as POCSO Act), in Crime No. 405 of 2016 registered at Police Station Gittikhadan, Nagpur, District – Nagpur.

3. For the offence punishable under Section 8 of the POCSO Act read with Section 354 of the IPC, the appellant is sentenced to suffer R.I. for three years and to pay fine of Rs. 500/-, in default of fine to suffer R.I. for one month.

For the offence punishable under Section 363 of the IPC, the appellant is sentenced to suffer R.I. for two years and to pay fine of Rs. 500/-, in default of fine to suffer R.I. for one month.

For the offence punishable under Section 342 of the IPC, the appellant is sentenced to suffer R.I. for six months and to pay fine of Rs. 500/-, in default of fine, to suffer R.I. for one month.

All the substantive jail sentences were directed to run concurrently. The appellant is given set off for the period of sentence, he has already undergone.

4. The prosecution story, in brief, is as under :

i) On 14.12.2016, the informant (mother of the prosecutrix) (PW-1) lodged a report at police station Gittikhadan, Nagpur, stating therein that the appellant took her daughter (prosecutrix) aged about 12 years, on the pretext of giving her guava, in his house and pressed her breast and attempted to remove her salwar. At that point of time, the informant reached the spot and rescued her daughter. Immediately, she lodged First Information Report. On the basis of the said FIR, crime came to be registered against the appellant / accused vide Crime No. 405 of 2016 (Exh. 1) for the offence punishable under Sections 354, 363 and 342 of the IPC and under Section 8 of the POCSO Act.

5. The police started investigation. After investigation, charge-sheet came to be filed in the Special Court, Nagpur, against the appellant.

6. The Special Court framed charge (Exh. 11) against the appellant / accused under Sections 361, 354, 342 and 309 of the IPC and under Section 8 of the POCSO Act. The said charge was read over and explained to the appellant / accused, to which he denied. His plea was recorded.

7. In order to establish the guilt against the appellant /

accused, the prosecution examined in all five witnesses and also brought on record the relevant documents.

PW-1 is the informant - mother of the prosecutrix.

PW-2 is the prosecutrix.

PW-3 is the prosecution witness (neighbour).

PW-4 is a WPSI – Kinake.

PW-5 is the PSI who registered crime against the appellant / accused on the report of the informant.

8. The Special Court recorded the statement of the appellant / accused under Section 313 of the Code of Criminal Procedure.

9. After hearing both the sides, the learned Court found the appellant / accused guilty of the crime registered against him and passed the judgment of conviction and sentenced him as above. The learned Special Court, however, acquitted the appellant / accused of the offence punishable under Section 309 of the IPC. This judgment of conviction is impugned in this appeal.

10. I have heard Shri Sabahat Ullah, learned counsel for the appellant and Shri Khan, learned Additional Public Prosecutor for the respondent - State. I have also perused the record with the

assistance of both the counsel.

11. At the outset, the informant – PW-1 and the prosecutrix – PW-2 are the star witnesses. The age of the prosecutrix at the relevant time was 12 years and this fact is not seriously disputed by the learned counsel for the appellant.

12. The informant - PW-1 - the mother of the prosecutrix deposed that the incident took place on 14.12.2016. On that day at about 11.30 AM, her daughter – the prosecutrix (name kept undisclosed) went to bring guava. As she did not come back for a long time, she started searching for her. Her neighbour told her that the appellant, who was staying in the vicinity of their house, took her daughter to his house and showed her the house of the appellant. PW1 went there calling “Laxmi, Laxmi”. She saw the appellant coming down from the first floor. She asked the appellant about the whereabouts of her daughter. He denied the presence of the prosecutrix in his house. PW-1 searched for her daughter on the ground floor and then she went up to first floor. The room was bolted from outside. She opened it and found her

daughter. Her daughter was crying. She took out her daughter from that room and her daughter narrated the incident that on the pretext of giving guava to her, the appellant brought her to his house and pressed her breast and when he tried to remove her knicker, she shouted. Thereafter he went out, after bolting the room from outside. Immediately, PW-1 along with her daughter proceeded for Police Station and lodged report.

13. PW-2 – Prosecutrix testified that on the day of incident, when she was going to bring guava, the appellant caught her hand and told her that he will provide guava to her and he took her to his house. He tried to remove her Salwar and pressed her breast. Then she shouted. The appellant pressed her mouth by his hand. The appellant went down by closing the door of the room from outside. Thereafter, her mother opened the door and entered the room and brought her outside. Then they went to Police Station for lodging report.

14. PW-3, the neighbour, is examined on the point that she had heard the shouts of a girl and she informed PW-1

about it.

15. A perusal of the testimony of PW-1 and PW-2 on the point of incident would reveal that both the witnesses are consistent on the point that the appellant pressed the breast of the prosecutrix. With regard to removing of knicker, though in her chief PW-1 stated that the appellant/ accused was trying to remove knicker of her daughter, however, in cross examination she has corrected her statement and deposed that she told the police that the appellant tried to remove Salwar of her daughter. The prosecutrix deposed about removing of her salwar. So there is no confusion with regard to whether the accused tried to remove salwar or knicker.

16. Now the question for consideration of this court is, whether the 'pressing of breast' and 'attempt to remove salwar' would fall within the definition of 'sexual assault' as defined under Section 7 and punishable under Section 8 of the POCSO Act. For better appreciation of evidence, it would be necessary to look into the definition of 'sexual assault', which is reproduced

below:

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.*

As per this definition, the offence involves the following necessary ingredients :

- (i) Act must have been committed with sexual intent.
- (ii) Act must involve touching the vagina, penis, anus, or breast of the child.

or

making the child touch the vagina, penis, anus or breast of such person or any other person.

or

doing any other act with sexual intent which involves physical contact without penetration.

17. The appellant/ accused is convicted for the offence of 'sexual assault'. As per the definition of 'sexual assault', a 'physical contact with sexual intent without penetration' is an essential ingredient of the offence. The definition starts with the words -

“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.....” The words ‘any other act’ encompasses within itself, the nature of the acts which are similar to the acts which have been specifically mentioned in the definition on the premise of the principle of ‘*ejusdem generis*.’ The act should be of the same nature or closure to that.

18. Evidently, it is not the case of the prosecution that the appellant removed her top and pressed her breast. The punishment provided for offence of ‘sexual assault’ is imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. Considering the stringent nature of punishment provided for the offence, in the opinion of this Court, stricter proof and serious allegations are required. The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of ‘sexual assault’. It would certainly fall within the

definition of the offence under Section 354 of the Indian Penal Code. For ready reference, Section 354 of the Indian Penal Code is reproduced below :

“354. Assault or criminal force to woman with intent to outrage her modesty. - Whoever assaults or uses criminal force to any woman, with the intention to outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.”

19. So, the act of pressing breast can be a criminal force to a woman/ girl with the intention to outrage her modesty. The minimum punishment provided for this offence is one year, which may extend to five years and shall also be liable to fine.

20. It is the basic principle of criminal jurisprudence that the punishment for an offence shall be proportionate to the seriousness of the crime.

21. Section 7 of the POCSO Act, defines sexual assault and the minimum sentence provided is three years and Section 354 of the Indian Penal Code, which is related to outraging the modesty of a woman, prescribes minimum sentence of one year. In the instant case, having regard to the nature of the alleged act by the appellant and having regard to the circumstances, in the opinion of this Court, the alleged act fit into the definition of the offence as defined in Section 354 of the Indian Penal Code.

22. The learned counsel for the appellant strongly argued with regard to testimony of PW-1, she being a hearsay witness. No doubt PW-1 does not claim to have seen the incident, however, her testimony would be relevant and admissible in evidence under Section 6 of the Evidence Act. The principle of *res gestea* would be applicable, being part of the same transaction. Evidently, she went to the house of the accused searching for her daughter, she saw the accused coming down from the first floor, she inquired with the appellant - accused about her daughter, he refused her

presence, she searched for her daughter on the ground floor, she went upwards, she found the door of the room bolted from the outside, she opened the door, she found her daughter crying, she brought her daughter out of room, her daughter narrated the incident to her. All these events form the parts of the same transaction.

23. The learned counsel for the appellant also argued with regard to the mental capacity of the girl, which was observed by the learned trial Court while recording her testimony. It is true that as per demeanor of the witness, she might not have that mental intelligence, however, the learned counsel could not point out from the record that she was not a competent witness and her answers to the questions were not rational. Secondly, immediately after the incident, she narrated the incident to her mother and on that basis the First Information Report came to be lodged and on material point of facts, the testimonies of both, mother and daughter are consistent.

24. PW-3 is the witness, who informed PW-1 about the fact that she heard the noise of her daughter from the house of the appellant. The learned counsel pointed out some omissions in her testimony with regard to shouting of the girl “Maa Maa”. These are not the material omissions to disbelieve the prosecution story. Fact remains that she informed PW-1 that she heard shouts from the house of the appellant and PW-1 went there and she found her daughter. Other witnesses are formal in nature.

25. The learned APP read out Section 7 of the POCSO Act, which defines sexual assault and submitted that the act which has been proved by the prosecution “pressing of breast” comes within the definition of sexual assault under Section 7 of the POCSO Act.

26. It is not possible to accept this submission for the aforesaid reasons. Admittedly, it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin

to skin with sexual intent without penetration.

27. In view of the above discussion, this Court holds that the appellant is acquitted under Section 8 of the POCSO Act and convicted under minor offence u/s 354 of IPC and sentenced him to undergo R.I. for one year and to pay fine of Rs.500/-, in default of fine to suffer R.I. for one month. The sentence for the offence punishable under Section 342 of the Indian Penal Code i.e. six months and fine of Rs.500/-, in default to suffer R.I. for one month, is maintained. The accused is on bail. His bail bond stands forfeited. Issue Non-bailable warrant against the appellant – accused. All the substantive jail sentences shall run concurrently and the appellant – accused is entitled for set off under Section 428 of the Code of Criminal Procedure.

28. Criminal Appeal stands disposed of accordingly.

JUDGE

*GS.