

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

CRIMINAL APPEAL NO. 445 OF 2020

Libnus s/o Fransis Kujur,
Age 50 years, Occ. Labour,
R/o. Swami Vivekanand Nagar,
Tq. & Dist. Gadchiroli

...APPELLANT

// VERSUS //

State of Maharashtra through
Police Station Officer,
Police Station Gadchiroli,
District Gadchiroli

...RESPONDENT

Shri A.C. Jaltare, Advocate for the appellant.
Shri M.J. Khan, A.P.P. for respondent – State.

CORAM : PUSHPA V. GANEDIWALA, J.
JANUARY 15, 2021.

ORAL JUDGMENT :

This appeal challenges the judgment and order passed by the Special Judge, Gadchiroli, District Gadchiroli in Special POCSO Case No. 07/2019 dated 05/10/2020 by which the appellant/accused is convicted for the offence punishable under Sections 354-A(1)(i) and 448 of the Indian Penal Code (for short "IPC") and Sections 8, 10 and 12 read with Section 9(m) and 11(i) of the Protection of Children from Sexual Offences Act, 2012 (for

short POCSO Act), in Crime No. 63/2018 registered at police station Gadchiroli, Dist. Gadchiroli.

2. For the offence punishable u/s 448 of IPC, the appellant/accused is sentenced to suffer S.I. for one year and fine of Rs.1000 in default S.I. for 15 days.

3. For the offence punishable u/s 10 of POCSO Act, the appellant/accused is sentenced to suffer R.I. for 5 years and fine of Rs. 25,000 in default S.I. for 6 months. No separate sentence is passed for the offence punishable u/s 8 and 12 of the POCSO Act and Section 354-A(1)(i) of the IPC.

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

i) On 12/02/2018, the informant (mother of the prosecutrix) lodged a report stating therein that on 11/02/2018, she had gone to her duty during the period between 8.00 a.m. to 4.00 p.m., and when she returned, she noticed the presence of appellant/accused in her house and molesting her minor daughter, aged about five years.

ii) It is stated that when the informant left for her duties, her two daughters, aged around 3 and 5 years were alone in the house. Her husband had been out of station. It is alleged that the moment she saw a person in her house holding hands of her elder daughter, she shouted, as a result of which her neighbours gathered there. Thereafter, the appellant/accused ran away.

iii) On the report of the informant, a crime bearing No. 63/2018 came to be registered against the appellant/accused for the offence punishable under Sections 354-A(1)(i) and 448 of the Indian Penal Code and Sections 8, 10 and 12 read with Section 9(m) and 11(i) of the Protection of Children from Sexual Offences Act, 2012. After investigation, police filed charge-sheet before the Special POCSO Court, Nagpur.

iv) The Special Court framed charge against the appellant/accused for the offences punishable under Sections 354-A(1)(i) and 448 of the IPC and Sections 8, 10 and 12 read with Section 9(m) and 11(i) of the POCSO Act. The charge was read over and explained to the appellant/accused in vernacular, to which he pleaded not guilty and claimed to be tried. His plea was recorded.

v) To establish charge against the appellant/accused, the prosecution examined in all six witnesses and also brought on record relevant documents. The trial Court examined the appellant/accused under Section 313 of the Code of Criminal Procedure and recorded his statement. His defence is of total denial.

vi) The trial Court found the prosecution evidence trustworthy and passed the judgment of conviction and sentenced the appellant/accused as above. This judgment is impugned in the present appeal.

5. I have considered the submissions put forth on behalf of both the sides. I have also perused the record with the assistance of learned both the counsel.

6. In order to facilitate appreciation of evidence, it would be apposite to reproduce the relevant portion of the testimony of the informant (PW1), who is the only material witness with regard to the incident, which reads thus :

1] XXXX "On that day, I returned from my work to my house at 4.00 p.m. I saw that one person was present in my house. He was not allowing my two daughters from the house from that place. That person had caught hold the hands of victim i.e. my elder daughter. That person was taking victim

inside the room of my house. I saw that victim was moving her pant in above direction. I shouted. I abused that person in the words, "Kon Hosre Bhadwa, Kai Karat Aahe". Despite it, that person did not set free my daughter from his clutches. Again I shouted. Thereafter, he set free my daughter. Initially I had not seen the face of that person. But when he turned, I saw his face.XXXX

7. Apart from the above, the informant (PW-1) further testified that her daughter informed her that appellant/accused removed his penis from the pant and asked her to come to the bed for sleeping. The informant also noticed that the zip of the pant of the appellant/accused was opened.

8. The appellant/accused is convicted for the commission of offence of 'aggravated sexual assault', which is punishable under Section 10 of the POCSO Act. The offence of 'sexual assault' is defined u/s 7 of the POCSO Act while 'aggravated sexual assault' is defined u/s 9 of the said Act. To examine whether the alleged act of the appellant/accused fits into the definition of 'aggravated sexual assault', 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 intention.

(ii) Act involves touching 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.

9. In the case in hand, undisputedly, the age of the prosecutrix is five years. If the offence of 'sexual assault' is proved against the appellant/accused, the prosecutrix, being of age below twelve years, the conviction has to be recorded for the offence of 'aggravated sexual assault'.

10. The punishment for aggravated sexual assault is imprisonment of either description for a term which shall not be less

than five years but which may extend to seven years, and shall also be liable to fine.

11. The appellant/accused is prosecuted for the charge of 'aggravated sexual assault'. As per the definition of 'sexual assault', a 'physical contact with sexual intent without penetration' is essential ingredient for 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. The acts of 'holding the hands of the prosecutrix', or 'opened zip of the pant' as has been allegedly witnessed by PW-1, in the opinion of this Court, does not fit in the definition of 'sexual assault'.

12. The minimum sentence for this offence is five years imprisonment. Considering the nature of the offence and the sentence prescribed, the aforesaid acts are not sufficient for fixing

the criminal liability on the appellant/accused for the alleged offence of 'aggravated sexual assault'. At the most the minor offence punishable under section 354-A(1)(i) of the IPC is proved against the appellant.

13. In this view of the matter, the prosecution could establish that appellant/accused entered into the house with an intention to commit offence and he held the hands of the prosecutrix with an intention to molest her. Therefore, the conviction of the appellant/accused for the offence punishable under Sections 448 and 354-A(1)(i) of the IPC is maintained. The punishment provided for the offence u/s 345-A(1)(i) is sentence for a term which may extend to 3 years of fine or with both. The punishment for the offence of house trespass is imprisonment for a term upto one year and fine upto Rs. 1000 or with both. It is informed that till date the appellant/accused has undergone total imprisonment of about 5 months.

14. Considering the nature of the act, which could be established by the prosecution and considering the punishment provided for the aforesaid crimes, in the opinion of this Court, the imprisonment which he has already undergone would serve the purpose.

15. For the reasons aforestated, Criminal Appeal is partly allowed. The conviction of the appellant/accused for the offence punishable under Sections 8, 10 and 12 of the POCSO Act, is quashed and set aside. The conviction of the appellant/accused for the offence punishable under Sections 448 and 354-A(1)(i) of the IPC is maintained. However, his sentence is modified to the extent he has already undergone.

16. As the appellant/accused is in custody, he shall be set free, if he is not required in any other criminal case. Criminal Appeal is accordingly partly allowed and disposed of.

JUDGE

D.S.Baldwa/C.L.Dhakate