



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.642 OF 2020

\*\*\*\*\* s/o. \*\*\*\*\*

\*\*\*\*\* s/o. \*\*\*\*\* Jumbde

..Appellants.

Versus

1. The State of Maharashtra  
Through Police Inspector,  
Police Station, Mukundwadi,  
Aurangabad.

2. XYZ  
Through next friend

..Respondents

...

Advocate for Appellants : Mr.Ramesh Dhakane h/f. Mr.M.S.Karad  
APP for respondent no.1 : Mr.N.D.Batule  
Advocate for respondent no.2 : Ms.Sabahat T. Kazi

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 24 JANUARY, 2024

PRONOUNCED ON : 31 JANUARY, 2024

JUDGMENT :-

1. Aggrieved by the judgment and order of conviction passed  
by the learned Special Judge (POCSO Act), Aurangabad dated

15-10-2020 in Special Case Child Prot.No.168 of 2017 recording guilt of the appellants for offence punishable under Sections 376(2)(f)(n) r/w 34, 506 r/w 34 of the Indian Penal Code (IPC) and under Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act (POCSO Act), original accused has preferred instant appeal.

### **BRIEF CASE OF PROSECUTION IN TRIAL COURT**

2. Victim, who was studying in 6<sup>th</sup> standard was noticed crying in the class on 07-09-2017. Her teacher PW1 Wankhede made enquiry as to why she is crying. Victim narrated that she was residing with her maternal uncle as she has no parents. She narrated that accused persons were forcing her to do all household work and when she failed to do so, they kept her starving. They used to make her sleep in washroom. She also narrated that when nobody was in the house, at that time, accused \*\*\*\*\* and accused \*\*\*\*\* used to strip her, move their hands on her body, private parts. They used to threaten her not to disclose such act to anyone. When she reported to her aunt accused no.3, she used to threat to driver her out of house. PW1 Wankhede, teacher on hearing the child, called Head Master of the School PW5 Tapkire and even he heard what victim narrated and

therefore, they had been to Police Station and complaint was lodged on the strength of which crime was registered and the same was investigated by PW9 Chavan and on completion of investigation, accused were chargesheeted and duly made to face trial before the Special Judge (POCSO Act), who after appreciating the oral and documentary evidence adduced by the prosecution, convicted appellants as stated above.

The above judgment is challenged by the appellant on following grounds :

#### **GROUND**

- (i) Firstly prosecution has failed to establish the charges cogently, firmly and beyond reasonable doubt.
- (ii) Secondly there is no independent corroboration except testimony of victim.
- (iii) Thirdly FIR is on the basis of hearsay information.
- (iv) Fourthly prosecution has failed to prove age of the victim.
- (v) Fifthly medical evidence does not suggest commission of offence under the POCSO Act.
- (vi) Lastly there is false implication and inspite of no evidence, conviction is recorded.

**Submissions on behalf of State and victim :**

3. In answer to above grounds, learned APP pointed out that prosecution has cogently established that victim, who has lost her parents, was taken care by the accused. However, inspite of victim being of tender age, she was tortured by making her forced to do all household work, she had been kept starved for not doing work. Moreover, accused nos.1 and 2 committed offence punishable under the provisions of the POCSO Act. That victim has named accused persons and narrated their deeds. That medical examination proved their guilt. That independent witnesses like School authorities have categorically deposed. Therefore, as all ingredients for attracting offence under the POCSO Act were available on record, it is his submission that learned trial Court has committed no error in recording guilt.

4. Learned Advocate for victim pointed out that accused no.1 is husband of maternal aunt, accused no.2 is maternal uncle and accused no.3 is maternal aunt of the victim and they are preparators of crime. That prosecution has examined nine witnesses and their evidence has remained unshaken. That charges are successfully proved. That statements of victim recorded under Sections 161 and

164 of the Cr.PC. are consistent. That there is evidence of independent witnesses like class teacher and school authorities. Therefore, on finding guilt, conviction has been recorded on due satisfaction and careful scrutiny of evidence. Thus, it is submitted that there is no merit in the appeal and prayers are made to dismiss the same.

#### **PROSECUTION WITNESSES**

5. To support its case, prosecution has examined in all nine witnesses and their status is as under :

**PW1** Harshali Wankhede, informant is Assistant Teacher in Municipal Corporation School. Her evidence is at exh.38.

**PW2** is victim. Her evidence is at exh.45.

**PW3** Rajendra Shamrao Suryawanshi pancha to spot panchanama. His evidence is at exh.57.

**PW4** Sunita Pundalik Borse is Teacher in Municipal Corporation School, Mukundwadi. Her evidence is at exh.61.

**PW5** \*\*\*\*\* Vasantrao Tapkire is Head Master in Municipal Corporation School, Mukundwadi. Her evidence is at exh.63.

**PW6** Kamlakar Shyamrao Jagtap is Corporator. His evidence is at exh.64.

**PW7** Sampat Nivrutti Idhate is Head Master in Municipal Corporation

School, Mukundwadi. His evidence is at exh.70.

**PW8** Dr.Shagufta Fatema Mohammad Fakruddin is Medical Officer at G.M.C.H. Aurangabad. Her evidence is at exh.81.

**PW9** Ganesh Chavan (API) is Investigating Officer. His evidence is at exh.92.

6. While exercising powers under Section 374 of the Code of Criminal Procedure, this Court is called upon to re-examine, re-appreciate, re-analysis the entire evidence adduced by prosecution in the trial Court.

### **ANALYSIS**

7. It is the case of prosecution that victim, a student studying in primary school, was found crying and upset and therefore, was enquired by her class teacher PW1 Wankhede, thereupon, acts of accused appellants came to light. PW1Wankhede further informed PW4 Borse as well as PW5 Tapikire, Head Master. Police was approached and PW1 Wankhede set law into motion resulting into registration of crime. Hence, sum and substance of above referred witnesses is required to be visited and dealt at threshold.

**PW1** Harshali Wankhede deposed that she knew victim who

had no parents and was put up with her maternal aunt. On being asked why she was crying, in presence of PW4 Sunita Borse, victim narrated that she wants to stay in the school and did not want to go home. On reason for same being asked, victim allegedly told that she is residing with her maternal aunt, her husband and their children. She was made to wash clothes, clean utensils and do entire household work and on failure to do so, she was assaulted and kept starved and forced to sleep in the toilet. She further stated that when nobody was in the house, at that time both accused removed her clothes, touched her private parts and when she attempted to cry and shout, they threatened to kill her. Witness deposed that victim informed that they raped her. When she informed her aunt accused no.3, she threatened to drive her out of the house.

**PW4** Sunita Borse, also a teacher serving in same school, reiterated about victim student, a pupil of PW1 Wankhede, was crying and she was not ready to go home and on further enquiry, she told about treatment meted out to her regarding forced to do all household work and that uncles i.e. accused nos.1 and 2 after removing her clothes, moved their hands over her private parts and on shout being raised, threats were issued and this all going since one year. She deposed that finding the matter serious, information

was passed to PW5 Tapkire Head Master and he was also called and victim again narrated the episodes happened with her at the hands of accused persons and therefore, they all visited Police Station and PW1 Wankhede set law into motion.

**PW5** Tapkire, Head Master also reiterated whatever was told by the victim and he is examined at exh.63.

8. After visiting the cross-examination faced by all above three witnesses, it is noticed that there is virtually no effective cross as regards to what is heard by them from the mouth of victim. Cross is found to be merely beating around the bush. Their testimony has not been touched or shaken on the points of disclosures made by victim to them.

9. Here star witness is victim herself and she is examined as **PW2**. On meticulous re-appreciation of her evidence, it is emerging that victim was studying in 8<sup>th</sup> standard and she gave her age as 13 years.

The sum and substance of her evidence is that, after demise of her parents, she came to reside with her maternal aunt (accused no.3). She deposed that at relevant time, she was in 5<sup>th</sup> standard. In para 2, she named accused \*\*\*\*\* and \*\*\*\*\* sleeping over her

person in the evening, pressing her breast and touching their male genitals on her private part after removing their own clothes and also removing her clothes. She deposed about informing about it to her maternal aunt accused no.3, but she used to ask her to let them do so and when she denied liking it, her aunt threatened to kill her. She stated that accused no.3 made her do all household work, did not provide her food, confined her in washroom. Witness deposed about informing regarding it to her class teacher PW1 Wankhede, PW4 Borse and PW5 Head Master and they all taking her to Police Station, she showing the spot and her statement being recorded. She also identified her clothes, which were seized.

10. On visiting cross faced by victim, it is emerging that she is unable to state when her father died. She admitted that after death of her parents, **she came to reside with her maternal aunt.** She flatly denied that even mother resided with her maternal aunt. On being questioned, she narrated how her mother died. The cross-examiner asked her whether she knew names of the body parts and she answered in affirmative. Then she is asked about the neighbourhood, names of her friends, timings of her uncles going for work, nature of job, name of the landlord, and she is found to be

duly answering the same. She admitted that toilet was outside the house. She is asked where she slept and who all slept where. In para 5 of the cross, she stated that she understands what is good and what is bad. Though she admitted that if she did not study, her maternal aunt beat her, she flatly denied that due to the same she was annoyed with her aunt. She is unable to give dates of such instances at the hands of accused nos.1 and 2. She admitted that when she had been to the hospital, she had not informed the Doctor about the acts of accused. She is also unable to give date of birth and name of the hospital. Rest is all denial.

11. Statement of the victim is also got recorded by producing her before learned JMFC on 20-09-2017. It is apparently recorded within two weeks of FIR. In Paragraphs 2 and 3, she has narrated the acts of accused and stated that they did it since she was in 5<sup>th</sup> Standard. She gave the timing at which they did the said acts.

12. On carefully analyzing the above discussed testimony of PW2 victim, it is apparent that she was victimized while she was in 5<sup>th</sup> std. Suggestion in the cross that she was put up with her maternal aunt, accused no.3 and two uncles accused nos.1 and 2, clearly shows that

there is no serious dispute about stay of victim, who had unfortunately lost her both parents. She has narrated the ordeal faced by her at the hands of her aunt, who made the child do entire household work, failed to provide meals to her and made her sleep in the washroom. She has named both the uncles for violating her body by disrobing her, sleeping over her, moving their hands over her private parts and when she raised shouts, they allegedly threatened her. She very categorically stated that when she reported it to her maternal aunt, she did not pay heed. Victim has narrated their acts to her PW1 class teacher, PW4 colleague of her class teacher as well as PW5 Head Master. They have already deposed whatever was heard by them and they had promptly taken her to the Police Station finding the matter serious. As stated above, victim has also reiterated the acts of accused before learned JMFC before whom she was produced for recording statement under Section 164 of the Cr.P.C.. Details are narrated in paragraphs 2 and 3.

On re-appreciation and reanalysis, testimony of victim and above three school authorities, who are teaching staff and Head Master respectively, there is nothing to doubt their versions.

13. Victim is subjected to medical examination and said Doctor

**PW8** Dr.Shagufta Fakruddin has also testified at exh.81 regarding victim being forwarded by Mukundwadi Police Station for medical examination. This independent witness also deposed about noting the history. This witness has also given the names of accused while in the witness box. She claims that she carried out physical examination, but there were no signs of use of force. She also spoke about possibility of physical intercourse cannot be ruled out.

This medical expert in cross has admitted that for penetration, force is required and that it is her opinion that there were no signs of use of force.

14. On critical analysis of evidence of victim and teachers of her school, there is no reason to doubt their testimonies. On carefully going through the cross faced by them, their versions in the witnesses box are not rendered doubtful. Infact there is no serious and effective cross of the victim on the point of she been ravished. All attempts by defence while she was under cross seems to have gone futile.

15. It is to be noted that after losing parents, the child was in the custody of accused no.3 her maternal aunt. She has narrated that

she was victimized since she was in 5<sup>th</sup> standard. There is no challenge for namesake by defence as regards to her age is concerned. Informant class teacher deposed about child crying and denying to go home and therefore, on being further questioned, victim has narrated the acts of accused. She is very categorical about both her uncles removing her clothes, sleeping over her person and pressing her breast. She is very categorical that they use to touch her male genital to her vagina. Admittedly, victim on being examined by PW8 on 07-09-2017, there are no any signs of injury.

16. Here vide exh.30 charge was framed for Sections 376(2)(f) r/w 34, 376(2)(n) r/w 34, 506 r/w 34 of the IPC and under Sections 4, 6 and 8 of the POCSO Act. The operative part shows that learned trial Judge has recorded guilt and conviction for commission of offence 376(2)(f)(n) r/w 34, 506 r/w 34 of the IPC, Section 4, 6, and 8 of the POCSO Act.

Therefore, it is desirable to reproduce the said provisions for proper comprehension to further find out whether as challenged before this Court, conviction for said offence is justified or not.

**Section 376(2)(f)(n) of the IPC :**

“**376. Punishment for rape:** (1) .....

(2) *whoever, -*

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) *being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, **commits rape** on such woman*

(g) .....

(h) .....

(i) .....

(j) .....

(k) .....

(l) .....

(m) .....

(n) **commits rape** repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life and shall also be liable to fine.”

**Section 506 of the IPC :**

“**506. Punishment for criminal intimidation** – *Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;*

*If threat be to cause death or grievous hurt, etc. - and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extent to seven years, or with fine, or with both.”*

**Section 4, 6 and 8 of the POCSO Act :**

***“4. Punishment for penetrative sexual assault – [(1)]*** *Whoever commits **penetrative** sexual assault shall be punished with imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.*

*[(2) Whoever commits **penetrative** sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.*

*(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”*

***“6. Punishment for aggravated penetrative sexual assault .-***

*(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.*

*(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”*

***“8. Punishment for sexual assault. -*** *Whoever, commits sexual assault, shall be punished with 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.”*

17. Keeping above legal requirements in mind, this Court has meticulously gone through the testimony of victim PW2. Obviously, medical evidence does not come to the aid of the prosecution, as apparently there is huge gap between alleged incidences and medical examination. Therefore, it is the testimony of victim alone that remains for consideration.

18. This Court reproduces the testimony of victim i.e. while she was in the witness box. Para 2 being relevant is reproduced as under:

“2. When I was residing in the house of my maternal aunt Indu, \*\*\*\*\* and \*\*\*\*\* used to sleep on my person in the evening, used to press my breast, they used to touch their male genital on my vagina, they used to remove their clothes, they use to remove my clothes.”

The translated version of statement of victim under Section 164 of the Cr.P.C., which has been recorded by producing her before the learned 14<sup>th</sup> JMFC Aurangabad, more particularly, paragraph 2 is as under.

“2. My maternal uncle and uncle made me sleep on cot. They use to remove my clothes as well as their clothes. After I shouted they pressed my mouth and use to say that do not inform any one. If informed, then they would kill. They touch her urinal place and

breast with their hands, they put their male organ in her urinal place. They did this repeatedly with her.”

19. Therefore, on comparing both versions i.e. given in substantive evidence before the Court and while giving statement under Section 164 of the Cr.P.C., there is variance to the extent of putting male organ in her urinal place, which is finding place in her statement under Section 164 of the Cr.P.C., but is apparently missing at the time of recording her testimony before trial Court.

20. Law is fairly settled that it is the substantive evidence that would prevail and not statement under Section 164 of the Cr.P.C.

Consequently, on considering her substantive evidence in the witness box, she is found to be deposing about accused nos.1 and 2 touching their male genital on her vagina and pressing her chest/breast. While in the witness box, she has not stated about any penetration or insertion.

21. On going through the operative part of the judgment, it is emerging that learned trial Judge has recorded conviction for offence under Section 376(2)(f)(n), which is reproduced above. In the considered opinion of this Court, for attracting said charge, first and

foremost it is expected of prosecution to establish rape. Though above provision, for which guilt is recorded, binds accused nos.1 and 2, being relatives / guardians, however, testimony of witness is not about penetration or insertion.

It is fairly settled position that penetration is *sine qua non* for constituting offence of rape. Though partial, it is essential that there has to be penetration or insertion. Law to this extent has been dealt and discussed in various judicial pronouncements. It would be fruitful to refer the ruling of the Hon'ble Apex Court in the case of ***Aman Kumar and Anr. v. State of Haryana, (2004) 4 SCC 379***, wherein paragraph 7 which is relevant, is reproduced as under:

*“Penetration is sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. Partial penetration also is sufficient to constitute offence of rape. The depth of penetration is immaterial in an offence punishable under Section 376.”*

Similar law is also reiterated in the case of ***S.P.Kohli (Dr.) v. High Court of Punjab and Haryana, (1979) 1 SCC 212***.

Therefore, in the considered opinion of this Court, conviction recorded by learned trial Judge for this offence is improper.

22. Likewise, operative part further goes to show that guilt is also recorded for commission of offence under Sections 4 and 6 of the POCSO Act, however, on going through the said provisions, it is incumbent upon the prosecution to prove that there was **penetrative sexual assault** and **aggravated penetrative sexual assault**.

As to what amounts to penetrative sexual assault and aggravated penetrative sexual assault is also dealt and defined in Sections 3 and 5 of the POCSO Act and hence, the same are reproduced as under :

***“3. Penetrative sexual assault.-***

*A person is said to commit "penetrative sexual assault" if-*

*(a) he **penetrates his penis**, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person;*

*or*

*(b) he **inserts**, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*

*(c) he **manipulates** any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*

*(d) he applies his **mouth** to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”*

***“5. Aggravated penetrative sexual assault.***

*(a) Whoever, being a police officer, commits penetrative sexual assault on a child --*

- (i) within the limits of the police station or premises at which he is appointed; or*
  - (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or*
  - (iii) in the course of his duties or otherwise; or*
  - (iv) where he is known as, or identified as, a police officer; or*
- (b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--*
- (i) within the limits of the area to which the person is deployed; or*
  - (ii) in any areas under the command of the forces or armed forces; or*
  - (iii) in the course of his duties or otherwise; or*
  - (iv) where the said person is known or identified as a member of the security or armed forces; or*
- (c) whoever being a public servant commits penetrative sexual assault on a child; or*
- (d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or*
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or*
- (f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or*
- (g) whoever commits gang penetrative sexual assault on a child.*

*Explanation.-- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for*

- that act in the same manner as if it were done by him alone; or*
- (h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or*
- (i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or*
- (j) whoever commits penetrative sexual assault on a child, which--*
- (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently;*
  - (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;*
  - (iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;*
  - [(iv) causes death of the child; or]*
- (k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or*
- (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or*
- (m) whoever commits penetrative sexual assault on a child below twelve years; or*
- (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or*
- (o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or*
- (p) whoever being in a position of trust or authority of a child commits*

*penetrative sexual assault on the child in an institution or home of the child or anywhere else; or*

*(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or*

*(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or*

*(s) whoever commits penetrative sexual assault on a child in the course of [communal or sectarian violence or during any natural calamity or in similar situations]; or*

*(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or*

*(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.”*

## CONCLUSION

23. On comparing substantive evidence of victim, which is reproduced above, with above legal requirements, in the considered opinion of this Court, even charge under Sections 4 and 6 of the POCSO Act would not be attracted for the simple reason that, in substantive evidence, victim has deposed about accused nos.1 and 2 touching her private parts and chest with their hands and they sleeping over her person. Resultantly, when such is her testimony, in the considered opinion of this Court, neither penetrative sexual assault nor aggravated penetrative sexual assault can be said to be

established. Resultantly, in the considered opinion of this Court neither the charge of Section 376(2)(f)(n) nor Section 4 and 6 of the POCSO Act can be said to be getting attracted.

24. However, definitely here evidence of victim clearly shows that there was sexual assault with sexual intent.

As to what amounts to sexual assault is defined in the Statute in Section 2(i) which is as under :

“sexual assault”- Has the same meaning as assigned to it in Section 7.

Section 7 reads as under :

*“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 (emphasis laid)** is said to commit sexual assault.”*

25. Taking above provision into consideration and applying it with the testimony of the victim, definitely offence of Section 7 r/w Section 8 of the POCSO Act is attracted and made out.

26. In view of above discussion, interference at the hands of this appellate court is necessary in modifying the judgment and order of trial Court. Accordingly, I proceed to pass following order :

**ORDER**

- (i) Criminal Appeal No.642 of 2020 is partly allowed.
- (ii) The conviction and sentence awarded by the Special Judge (POCSO Act), Aurangabad in Spl. Case Child Prot. No.168 of 2017 on 15-10-2020 to appellant nos.(1) \*\*\*\*\* s/o. \*\*\*\*\* and (2) \*\*\*\*\* s/o. \*\*\*\*\* for the offence punishable under Section 376(2) (f)(n) r/w 34 of the IPC and Sections 4, 6 and 8 the POCSO Act, stands set aside.
- (iii) Instead, appellant nos.(1) \*\*\*\*\* s/o. Govindrao Suradkar and (2) \*\*\*\*\* s/o. \*\*\*\*\* Jumbde are hereby convicted for commission of offence under Section 7 read with Section 8 of the POCSO Act and are hereby sentenced to suffer rigorous imprisonment for five years.
- (iv) Conviction of appellant nos.1 and 2 under Section 506 r/w 34 of the IPC vide clause (6) of the operative part of the impugned order is hereby **maintained**. However, no separate sentence is awarded.
- (v) Order of the trial Court as regards to payment of fine amount is **maintained**.
- (vi) It is clarified that there is no change in rest of the order of the trial Court.

( ABHAY S. WAGHWASE )  
JUDGE