

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 184 OF 2003

Rafiqbhai Gaffurbhai,
Age : 55 Years, Occu. : Business.
R/o Chaprasipora, Old By pass
Road, Infront of Shukrawar
Bazar, Camp, Amravati 444 602. .. Appellant

VERSUS

1. The State of Maharashtra
2. Baburao Vithalrao Vinkare,
Age : 43 Years, Occu. : Service,
3. Meera Baburao Vinkare,
Age : 12 Years, Occu.: Education,
minor,

Respondent Nos. 2 and 3 both
R/o Nath Nagar, Extension
Brahmasing Nagar, Nanded. .. Respondents

Shri A. M. Gaikwad, Advocate for the Appellant.
Mrs. M. A. Deshpande, Addl.P.P. for the Respondent No. 1.
Shri Y. L. Bidve, Advocate h/f Shri A. R. Rathod, Advocate for the
Respondent No. 2.
The Respondent No. 3 is served.
The respondent Nos. 4 and 5 are removed as per Courts order
dated 27.08.2009.

CORAM : ARUN M. DHAVALA, J.

DATE : 24TH JULY, 2017.

ORAL JUDGMENT :-

. Aggrieved by conviction U/Sec. 294, 354 and 509 of the

Indian Penal Code and sentences as described in following table, the accused from Sessions Case No. 85 of 2001 of Sessions Court, Nanded has preferred this appeal.

Sr. No.	Offence punishable U/Sec. of I. P. Code.	Substantive Sentence	Fine	In default of non payment of fine
1	294 I. P. Code	R. I. for three (03) months	Rs. 1000/-	R. I. for fifteen days
2	354 I. P. Code	R. I. for two (02) years	Rs. 1000/-	R. I. for one month
3	509 I. P. Code	S. I. for one (01) year	Rs. 1000/-	S. I. for one month.

Besides above conviction and sentence, the accused was also directed to pay compensation of Rs. 1,000/- each to the P.W. 1 (Baburao Vithalrao Vinkare), P.W. 3 (Meera Baburao Vinkare), P.W. 5 (Parvati Ashokrao Dahiphale), P.W. 6 Rajeshri Madhavrao Kadam and Bhagyashri Madhavrao Kadam in all Rs. 5,000/-. The impugned judgment is delivered on 16.01.2003 in Sessions Case No. 85 of 2001 by the Adhoc Additional Sessions Judge, Nanded.

2. On 30.04.2001 at 9.20 p.m. P.W. 1/Baburao Vitthalrao Vinkare lodged First Information Report (FIR) at Bhagya Nagar Police Station, Nanded. As per the FIR on that day at 2.00 p.m. one unknown person came on scooter bearing registration No. MH-26/7061 and called his ten year old daughter and showed her

obscene photos. Then she was forcibly made to sit on the scooter and an attempt was made to kidnap her, but as she raised shouts, the neighbourers gathered there and he was obstructed and the girl was rescued. The unknown person fled away. P.W. 1 reported the matter to police of Bhagya Nagar Police Station orally and the police made a search, but no such unknown person was found. About two hours thereafter, the said unknown person again came to the said area. His daughter Meera(P.W. 3) and neighbouring ladies identified him as the same person who had earlier come. As they started following him, he fled away. P.W. 1 had noted the scooter number and he chased him. The unknown person entered into one ice factory, near railway station Nanded. P.W. 1/Baburao followed him into the ice factory and made casual enquiry regarding rate of ice and confirmed the identity of the said person. Since he was accompanied by several other persons of criminal nature no action was immediately taken and thereafter at 9.20 p.m. FIR was lodged and crime No. 95/2001 for the offences punishable U/Sec. 363, 366(A) 294, 509 and 354 of the Indian Penal Code came to be registered with Bhagya Nagar Police Station Nanded.

3. The same was investigated into by P.W. 11/P. I. Mujawar. During the course of investigation spot panchanama was drawn, statements of material witnesses were recorded and the accused was arrested. He was owner of the ice factory. On a voluntary statement made by him, obscene book was discovered from a

canal. The investigation also revealed that the employee of the accused had lodged FIR at Vazirabad Police Station, Nanded at 8.45 p.m. against Shivsena M.L.A. Khedkar and others for committing mischief and causing damage to the tune of Rs. 50,000/- to ice factory and for assaulting his employees. After completion of investigation charge sheet was filed. In due course it was committed to the Court of Sessions.

4. The learned Trial Judge framed charge at Exhibit 24 for the offences punishable U/Sec. 363, 366-A, 294, 354 and 509 of the Indian Penal Code. The accused pleaded not guilty. The prosecution examined eleven witnesses. The learned Trial Judge believed the witnesses to the extent of charge U/Sec. 354, 509 and 294 of the Indian Penal Code and sentenced the accused as referred above. Hence this appeal.

5. Learned advocate Mr. A. M. Gaikwad, for the appellant made following material submissions.

- (i) The FIR was against unknown person. No test identification parade was held. There was no description of accused. The accused was identified for the first time in the Court.
- (ii) The accused is owner of one ice factory and his manager has lodged FIR on the same day at 8.45 p.m. against MLA Mr. Khedkar and other persons and thereafter present FIR

came to be lodged. There are admissions to show that the informant/P.W. 1 Baburao had a long discussion with MLA before lodging the FIR.

- (iii) The recovery of obscene book from the accused is not proved. The panch witnesses P.W. Nos. 8 and 9 have turned hostile. The recovery is from open place of canal. It is shown to be made at 5.20 p.m., when the accused was produced before the learned Magistrate for remand at 5.00 p.m.
- (iv) There is no material to show that scooter was belonging to the accused. It belongs to somebody else.
- (v) There are material discrepancies in the evidence of P.W. 3 Meera/victim, her parents P.W. No. 7/Saraswati and P.W. No. 1/Baburao and two independent witnesses P.W. No. 5/Parvati and P.W. No. 6/Rajashri. P.W. Nos. 5 and 6 contrary to the prosecution case deposed that the obscene booklet was shown by the accused to them as well. P.W. 5 and 6 were expected to be in their school or college at the time of incident.
- (vi) There are material discrepancies regarding time of the incident.
- (vii) The FIR was lodged after holding a meeting and having a

long discussion with the local MLA.

(viii) The evidence is not trustworthy and reliable.

Hence the appeal be allowed and conviction and sentence of the accused/appellant be set aside.

6. Learned Additional Public Prosecutor Mrs. Deshpande submitted that, there is consistent evidence showing that the accused had shown obscene booklet to P.W. No. 3/Meera. It was seen by her parents and one P.W. No. 5/Rajashri. Even P.W. No. 1/Baburao had chased the accused upto his ice factory and his identity was verified, and therefore, the conviction and sentence for the offences punishable U/Sec. 354 and 294 of the Indian Penal Code should be maintained. She fairly conceded that, offence punishable U/Sec. 509 of the Indian Penal Code is not made out.

7. Considering the above, the points for my consideration, my findings thereon are as follows :

<u>POINTS</u>	<u>FINDINGS</u>
A. Whether the accused had outraged the modesty of P.W. 3 Meera ?	In the negative.
B. Whether the accused had committed intrusion on the privacy of P.W. 3/Meera?	In the negative.

- C. Whether accused had shown obscene book to P.W. 3/Meera to her annoyance in a public place ? In the negative.
- D. What sentence and order ? The appeal is allowed as per final order.

-: R E A S O N S :-

8. The prosecution has examined eleven witnesses, which may be grouped conveniently as follows :

- (a) Group A P.W. 3/Meera the victim girl.
P.W. 1/Baburao the informant and father of Meera.
P.W. 7/Saraswati mother of Meera.
- (b) Group B Neighbouring witnesses
P.W. 5/Parwati Dahiphale
P.W. 6/Rajashri Kadam
- (c) Group C Other witnesses
P.W. 2/Pravin Biyani a panch to seizure of scooter panchanama at Exhibit 37.
P.W. 4/Devanand Mandalwad a panch to spot panchnama at Exhibit 40.
P.W. 8 and P.W. 9 both panch witnesses
(Memo and panchnama at Exhibit 45, 46) have

turned hostile.

P.W. 10/P.S.I. Dharmadhikari, who
recorded the FIR.

P.W. 11/P.I. Mujawar who is investigating
officer.

The FIR lodged by one Mubaraik Ismail Chauhan at Vazirabad Police Station is at Exhibit 54.

9. P.W. 3/Meera at the time of incident was aged about ten years and at the time of deposition was aged about 12 years. She deposed that on 30.04.2001, she was removing dried clothes. At that time one unknown person came there by a scooter and called her by uttering words shuk-shuk. (The learned Trial Judge held that it amounted to offence punishable U/Sec. 509 of the Indian Penal Code). He was the accused person before the Court. She did not pay any attention. When the accused again uttered shuk-shuk, she went near him. He enquired with her address of one Mr. Patil. She was not knowing the address. The accused told her to see the diary with him for the address and when she saw the diary, it was containing obscene nude photographs. Thereafter, accused forcibly made her to sit on his scooter. She cried and her mother came out followed by her father. The scooter dashed against a temple of idol of Mhasoba on the road and she jumped from the scooter and rushed to her house. The accused ran away by his scooter. Her father chased him to know his address. After two hours the accused again came in the area.

In the meanwhile police had visited the locality. The persons from her locality were shouting that accused had come accused had come. The accused then fled away. Her father P.W. 1 chased the accused. She has identified the obscene book Article A as the book shown to her by the accused.

10. P.W. 7/Saraswati Winkare is mother of P.W. 3/Meera. She narrated the incident. She stated that, she was with Meera when the accused called her by uttering words shuk shuk. She went inside and Meera went towards the accused. Then she heard cries of her daughter. She rushed out and saw that the scooter rider was forcibly taking away her daughter. She also raised shouts. The scooter dashed against the temple and her daughter rescued herself and rushed towards house. Thereafter, her husband came out of the house and saw the registration number of the scooter as MH-26/7061. Thereafter her husband had lodged report with Bhagya Nagar Police Station. The police had visited the locality and made enquiry about description of the accused. The accused could not be traced.

11. The evidence of P.W. 1/Baburao Vinkare, father of Meera is similar. He came out and saw that the accused was taking away Meera on his scooter bearing registration No. MH-26/7061. The accused left Meera and ran away, as he and his wife had proceeded towards him. He did not speak about dash of the scooter against the temple of Mhasoba. He stated that, he

reported the incident to Bhagya Nagar Police Station, Nanded. The police visited the area and search was made and after two hours, the accused again came to that area. His wife, daughter and other neighbourers identified him. Then he was chased him upto Amaratwala Ice Factory. The accused had parked his scooter outside and walked in the office of ice factory. P.W. 1 made casual enquiry about rate of the ice and verified the identity of accused, but could not take any action against him. He reported the matter to the police control room and Bhagya Nagar police station and thereafter lodged the FIR Exhibit 35.

12. P.W. 5/Parvati and P.W. 6/Rajashri were examined as independent witnesses. P.W. 5 stated that on that day at about 12.00 noon the accused had been to that area. When she was drying her clothes, the accused gave call as tai. When she went near him, the accused took out the booklet of obscene photos from the dicky of his scooter and showed obscene photos to her. She identified booklet Article A as the same booklet. Thereafter she saw the accused taking away Meera by his scooter. The spot is near Mhasoba temple. At about 3.00 to 4.00 p.m. the incident has taken place. Meera rescued herself and registration number of the scooter was MH-26/7061. P.W. 6/Rajashree is aged about 16 years. She was studying in a school. She stated that, she and her sister Bhagyashri had gone to a grocery shop for purchase sugar and tea and while returning back at 10.00 a.m. one unknown person came there on scooter and asked them to follow

him as he was having a class of clothes. They refused to accompany him. Thereupon, he took out booklet from the dicky and showed nude photographs to them and thereafter the accused left the spot. Later she learnt about the incident of Meera. The accused had again entered the said area at 4.00 p.m. and she and others identified him and P.W. 1 had chased him.

13. After carefully going through the evidence on record and giving thoughtful consideration to the arguments advanced, I find that, the evidence on record is totally untrustworthy and unreliable. Besides the material ingredients of Sec. 354 and 509 of the Indian Penal Code were not made out, even if, the evidence is taken at its face value. It is very material to note that, the accused has been acquitted by the learned Trial Judge for the offences punishable U/Sec. 363 and 366-A of the Indian Penal Code and thereby disbelieved the evidence of attempt to kidnap Meera. My reasons for arriving at this conclusion may be stated as follows :

(I) The FIR was lodged against unknown person. The description of the said person was not given to the police. No test identification parade was held.

(II) P.W. 3 has admitted that, her father had gone to the office of MLA Khedkar and had a long discussion with him and thereafter the FIR was lodged. In the meanwhile FIR Exhibit 54 was lodged half an hour earlier by Manager of the accused

against MLA Khedkar and other Shiv sainik. It shows that on that day at about 5.00 to 5.30 p.m., some persons had entered his ice factory and wanted to take ice without payment of money. When he objected to do the same, fifteen to twenty persons entered the factory and started work of demolition and assault. The Manager was assaulted with fist and kick blows and damage to the extent of Rs. 50,000/- was caused to the ice factory. MLA Khedkar was standing outside. This FIR was lodged at 8.45 p.m. at Vazirabad Police Station and subsequent FIR of P.W. 1 was lodged at Bhagyanagar police station at about 9.25 p.m. The learned Trial Judge observed that P.W. 1 is not an accused in the earlier FIR but overlooked the fact that, he had long discussion with MLA Khedkar before lodging the FIR.

(III) If the evidence of P.W. 1, 3 and 7 is considered at the face value, the incident took place at 2.00 p.m. and identity of the accused as owner of ice factory came to the knowledge of P.W. 1 at about 4.00 to 5.00 p.m. Then there is no explanation why FIR was lodged after four hours at 9.25 p.m.

(IV) The evidence on record shows that, the scooter bearing particular number was the main link to connect the offender with the crime. The police have not collected documents of registration of the scooter showing name of the owner. The accused has categorically denied that the scooter belongs to him. He has disclosed the name of some other person as owner of the

scooter.

(V) As far as recovery of obscene book is concerned, it is tainted with malafides. Both panchas on recovery panchanama i. e. P.W. 8 and P.W. 9 have turned hostile. Both memorandum at Exhibit 45 and recovery panchanama at Exhibit 46 are shown to have been made by P.W. 11 at 5.15 to 06.05 p.m. The learned Trial Judge has already held that, the evidence of Investigating Officer P. I. Mujawar is not trustworthy and reliable. He went to the extent of saying that, the I. O. had joined hands with the accused to save him. In this situation the the discovery cannot be held to be proved on the basis of untrustworthy evidence of I. O. It is made from open space of canal, which is accessible to the public at large. Therefore, discovery of obscene book Article A has not been proved.

(VI) The evidence of P.W. 1, 3, 5, 6 and 7 is full of discrepancies. If they are to be believed, according to P.W. 6/Rajashri, the accused came there on scooter at 10.00 a.m. and took out from his dicky obscene book and showed it to her, which is not the prosecution case at all. No such allegation is made in the charge sheet, nor any charge has been framed to that effect. P.W. 5/Parvati similarly stated that, at about 12.00 noon the accused came, while she was drying clothes and called her addressing her as tai. When she went near the accused, he took out from his dicky a obscene book and showed it to her. Again there is no

allegation of such nature in charge sheet, nor any charge has been framed. Besides above, as rightly argued by the learned advocate for the appellant, P.W. 5 and 6 are school and college going girls and at the relevant time, they were expected to be in their school or college. Thereafter, P.W. 1, 3 and 7 have deposed about the incident at 2.00 p.m. According to P.W. No. 7/Saraswati the scooter number was noticed at 2.00 p.m. only. According to P.W. 3 and 7 the accused again came at 4.00 p.m. At that time the scooter number was noticed and same person was identified. P.W. 3 stated that, when the accused came, the persons gathered in the lane raised shouts as the accused has come. "It is obvious that the public will never call the offender as the accused. Therefore, there was no possibility of shouts by them as accused had come". The accused is owner of ice factory. He cannot be so fool to visit the same area at 10.00 a.m., 12.00 noon, 2.00 p.m. and 4.00 p.m.

(VII) As far as the main incident is concerned, P.W. 3 has stated that, the accused called her by uttering words shuk shuk. P.W. 7/Saraswati has stated that, she was present along with her daughter. When she went inside the house, P.W. 3 went outside. This is improbable. Then the accused asked P.W. 3 address and P.W. 3 told him that, she was not knowing the address, still accused asked her to see the diary and then showed the obscene book. Thereafter the accused forcibly made her to sit on scooter. The English version shows that accused forcibly made her to take

on his scooter. The Marathi version shows that, she was made to sit. A child can be taken away on the scooter by keeping standing on the front side avoiding her escape by two hands holding the scooter. A child cannot be made to sit on the back seat. There is evidence of some witnesses that the scooter dashed against the temple of Mhasoba, while some witnesses have not stated so. It is not possible that the accused, would visit the same area at 10.00 am., 12.00 noon, 2.00 p.m. and 4.00 p.m. inspite of knowledge that people had become aware about his misdeeds. Surprisingly, when at 4.00 p.m. P.W. 1 chased the accused and had identified him as owner of the ice factory, no immediate FIR was lodged.

(VIII) The words 'shuk shuk' do not amount to intrusion on the privacy of a girl. There is no specific evidence as to what was the act of intentional outraging the modesty of P.W. 3/Meera. The only allegation worth consideration was attempt to kidnap and showing obscene book to the annoyance of P.W. 3. The evidence of P.W. 5 and 6 that the obscene book was shown to them also is clearly afterthought. The material on record shows that as the Manager of the accused lodged FIR against Mr. Khedkar and his party workers, after the incident of ransom in the factory at 5.00 p.m., there was long discussion between P.W. 1 and Mr. Khedkar and thereafter FIR was lodged. The evidence of witnesses and the entire prosecution story is untrustworthy and unreliable. It was shocking to note that, the learned Trial Judge

went to the extent of granting compensation to P.W. 1/Baburao, who was not victim and one Bhagyashri Kadam, who was not examined and to P.W. 5 and 6 when there were no charge on the accused against P.W. 5, P.W. 6 and Bhagyashri. The appreciation of evidence by the learned Trial Judge is not proper. The entire evidence led by prosecution deserves to be disbelieved and the accused deserves to be acquitted of all the charges. Hence the order.

ORDER

- A. The appeal is allowed.
- B. The conviction of the accused/appellant by way of judgment dated 16.01.2003 in Sessions Case No. 85 of 2001 delivered by the Adhoc Additional Sessions Judge, Nanded for the offences punishable U/Sec. 354, 509, 294 of the Indian Penal Code and sentence and order of compensation thereunder are set aside.
- C. The accused/appellant is acquitted of all the charges.
- D. His bail bonds stand cancelled.

Sd/-

[ARUN M. DHAVAL, J.]

bsb/July 17