

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.820 OF 2010

**DATTATRAYA RAMCHANDRA SUTAR)
(PAWAR))...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Manjiri Parasnic i/b. Mr.P.D.Pise, Advocate for the Appellant.

Ms.P.N.Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 23rd AUGUST 2017

ORAL JUDGMENT :

1 By this appeal, the appellant / convicted accused is
challenging the judgment and order dated 16th September 2010
passed by the learned Ad-hoc Additional Sessions Judge-1, Sangli,
in Special Case No.6 of 2010 thereby convicting him of offences
punishable under Section 377 of the Indian Penal Code (IPC) and
under Section 3(1)(iii) of the Scheduled Castes and Scheduled

Tribes (Prevention of Atrocities) Act, 1989 (for the sake of brevity S.C.S.T. Act). For the offence punishable under Section 377 of the IPC, the appellant / accused is sentenced to suffer rigorous imprisonment of 3 years apart from directing him to pay fine of Rs.2,000/- and in default to undergo further rigorous imprisonment for 6 months. For the offence punishable under Section 3(1)(iii) of the S.C.S.T.Act, the appellant / accused is sentenced to suffer rigorous imprisonment of 6 months, in addition to payment of fine of Rs.1,000/- and in default directing him to undergo further rigorous imprisonment for 3 months.

2 Brief facts leading to the prosecution of the appellant / accused projected from police report are thus :

(a) Informant PW2 Nandkumar Manik Pol is resident of village Malegaon in Miraj Taluka of Sangli District. He used to do work of centering in order to earn his livelihood, and therefore, he used to be away from his home for a period of about fifteen days at a stretch. His family was comprising of his wife PW3 Sunita Pol and three children - two daughters and a son aged about 3½ years.

(b) The appellant / accused is stated to be resident of the same village and his house was situated at a distance of about 30 to 40 feet from the house of informant PW2 Nandkumar Pol.

(c) According to the prosecution case, informant PW2 Nandkumar Pol belongs to Dhor caste which is recognized as schedule caste whereas the appellant / accused is belonging to Maratha caste. The prosecution alleged that at or about 26th January 2010, in the afternoon, the appellant / accused called the minor son aged about 3½ years of informant PW2 Nandkumar Pol and PW3 Sunita Pol to his house on the pretext of giving him jalebi. After giving him jalebi for eating, the appellant / accused made the minor son of PW2 Nandkumar Pol and PW3 Sunita Pol fellatio.

(d) According to the prosecution case, minor son of PW2 Nandkumar Pol and PW3 Sunita Pol disclosed this incident to his mother PW3 Sunita Pol on 1st February 2010. At that time, PW2 Nandkumar Pol was at Gadhinglaj town of Kolhapur District for

doing centering work. After getting this telephonic call, he immediately returned back to his house on the said night itself. In the morning hours, PW2 Nandkumar Pol verified this fact from his minor son, who is alleged victim of the crime in question. His minor son again reiterated the same fact and told him that the appellant / accused put his penis in the mouth and asked him to suck the same.

(e) The prosecution further alleged that PW3 Sunita Pol had even called her cousin brother PW4 Duryodhan Kadam and the victim minor child disclosed the incident which took place to PW4 Duryodhan Kadam.

(f) Accompanied by his minor son, PW2 Nandkumar Pol so also PW3 Sunita Pol and her cousin PW4 Duryodhan Kadam then went to the house of the appellant / accused on 2nd February 2010. The minor son of PW2 Nandkumar Pol pointed out the appellant / accused as perpetrator of the crime. Upon being questioned by his parents, the appellant / accused ran away from rear door of his house.

(g) Informant PW2 Nandkumar Pol then went to Police Station Miraj and lodged report Exhibit 16 on 2nd February 2010 itself which resulted in registration of Crime No.14 of 2010 against the appellant /accused for offences punishable under Section 377 of the IPC and under Section 3(1)(12) of the S.C.S.T.Act, 1989. The victim of the crime was then sent to the government hospital for medical examination. The appellant / accused came to be arrested on 3rd February 2010. Statement of witnesses came to be recorded during the course of investigation conducted by PW5 Somanath Gharge, Deputy Superintendent of Police. On completion of routine investigation, the appellant / accused came to be charge-sheeted.

(h) The charge for offences punishable under Section 377 of the IPC and under Section 3(1)(iii) of the S.C.S.T.Act, came to be framed and explained to the appellant / accused. He pleaded not guilty and claimed to be tried.

(i) In order to bring home the guilt to the appellant / accused, the prosecution has examined in all five witnesses. PW1 Parashram Shinde is a panch witness to the spot panchnama Exhibit 14 recorded on 3rd February 2010. Father of the victim minor boy namely, Nandkumar Pol is examined as PW2. PW3 Sunita Pol is mother of the minor boy where as PW4 Duryodhan Kadam is cousin of PW3 Sunita Pol. Somnath Gharge, Deputy Superintendent of Police, who investigated the crime in question is examined as PW5. PW6 Sambhaji Patil, P.S.I., Miraj Police Station, had recorded the FIR Exhibit 16 and registered the offence.

(j) Defence of the appellant / accused is to the effect that the prosecuting party has obtained electric supply to their house from the house of the appellant / accused and they were in arrears of the charges of electricity consumption. The appellant /accused was not on good terms with his daughter-in-law. Conniving with the daughter-in-law of the appellant / accused, PW3 Sunita Pol has falsely implicated him in the crime in question.

(k) After hearing the parties, by the impugned judgment and order, the learned Ad-hoc Additional Sessions Judge, was pleased to convict the appellant / accused and to sentence him as indicated in the opening paragraph of the judgment.

3 The appellant / accused was released on bail during pendency of the appeal. It is seen that by order dated 18th March 2016 (Coram : Smt.S..S.Jadhav, J.) directed issuance of non-bailable warrant and that is how the appellant / accused came to be arrested and is undergoing the jail sentence. The appeal is, therefore, taken up for hearing as the appellant / accused has undergone substantial part of the short sentence imposed upon him by the learned trial court.

4 I have heard the learned advocate appearing for the appellant / accused. She argued that the trial is vitiated as the investigation of the crime in question is not conducted by the Officer authorized to carry out the investigation as per Rule 7 of the S.C.S.T. (Prevention of Atrocities) Rules, 1995. She further

argued that the child witness is not examined by the prosecution and other evidence adduced by the prosecution is hearsay. In submission of the learned advocate appearing for the appellant / accused, other persons were present at the house of the appellant / accused at the time of the incident as seen from the evidence of PW3 Sunita Pol and therefore, it cannot be said that the prosecution has proved the guilt of the appellant / accused beyond all reasonable doubts. As against this, the learned APP supported the impugned judgment and order by contending that it is not at all necessary to examine the victim of the sexual offence and by evidence of his parents and a relative, the prosecution has proved guilt of the appellant / accused beyond all reasonable doubts. The learned APP relied on evidence of PW2 Nandkumar Pol, PW3 Sunita Pol and PW4 Duryodhan Kadam to submit that evidence of these witnesses is admissible in view of provisions of Sections 7 and 8 of the Evidence Act. According to the learned APP, conduct of the appellant /accused in fleeing away from the spot upon being questioned by the parents of the victim, corroborates the prosecution case against him.

5 I have considered the rival submissions and also perused the record and proceedings including depositions of witnesses.

6 According to the prosecution case, it was on 26th January 2010 at his house, that the appellant / accused had performed carnal intercourse against the order of nature with 3½ years old son of PW2 Nandkumar Pol and PW3 Sunita Pol. Though no documentary evidence is placed on record to infer age of the victim boy, it is in evidence of his father PW2 Nandkumar Pol, that his son at the time of the incident, was about 3½ years old. PW3 Sunita Pol has stated that her son, who is victim of the crime in question, was aged about 3 years, at the time of the incident. On behalf of the defence, age of the alleged victim of the crime in question is not disputed. With this, let us examine whether evidence of the prosecution witnesses is sufficient to conclude that the prosecution has proved beyond all reasonable doubts that the appellant / accused had committed the offence punishable under Section 377 of the IPC by putting his penis in

the mouth of the victim boy and asking him to suck the same on 26th January 2010, at his own house.

7 Evidence of the prosecution is based on narrations of the alleged victim of the crime in question, firstly made to his own mother PW3 Sunita Pol, thereafter to his cousin maternal uncle – PW4 Duryodhan Kadam and lastly to his father PW2 Nandkumar Pol. It is in the evidence of PW3 Sunita Pol that on 1st February 2010, while playing, her minor son, who is alleged victim of the crime in question, has told her that the appellant / accused opened his pant and asked him to suck penis of the appellant / accused on 26th January 2010, after calling him on the pretext of giving jalebi to him. PW3 Sunita Pol in her evidence stated that then she called her cousin PW4 Duryodhan Kadam and informed this fact to PW4 Duryodhan Kadam. Then she telephonically informed this fact to her husband and on the next date, she along with her husband PW2 Nandkumar Pol and PW4 Duryodhan Kadam taking her minor son went to the house of the appellant / accused. PW3 Sunita Pol testified that then her minor

son who is alleged victim of the crime in question, had shown the appellant / accused. Then the appellant / accused went inside his house and left the spot from back door of his house.

8 During cross-examination, PW3 Sunita Pol admitted the fact that her house has electric supply from the house of the appellant / accused and she used to pay charges for consumption of electricity to the appellant / accused. This witness denied that electric charges were due on her and the appellant / accused was demanding the same from her. She further denied that it was at the instance of the daughter-in-law of the appellant / accused, she has lodge false report against the appellant / accused. At this stage, it is worthwhile to notice that PW3 Sunita Pol has candidly accepted the fact that on 26th January 2010, sons of the appellant / accused, so also his daughter-in-law were present at his house. PW3 Sunita Pol has also admitted that the appellant / accused used to earn his livelihood by working in the factory situated at MIDC, Miraj.

9 In tune with his FIR Exhibit 16, PW2 Nandkumar Pol has disclosed that on 1st February 2010 when he was at Gadhinglaj, at about 9.00 p.m. his wife PW3 Sunita Pol had telephonically informed him about the incident and therefore, he returned back to his house at Malegaon at about 3.00 a.m. As per version of PW2 Nandkumar Pol, on 2nd February 2010, in the morning hours, he made enquiry from his minor son and upon that, his minor son told him that the neighbouring uncle gave jalebi to him and thereafter removed his pant and put his penis in the mouth. PW2 Nandkumar Pol further deposed that his minor son told him that the neighbouring uncle compelled him to suck the penis. As per version of PW2 Nandkumar Pol, then, his minor son took him to the house of the appellant / accused and by touching the appellant / accused told him that the appellant / accused is the same neighbouring uncle. PW2 Nandkumar Pol then claimed to have went to the Police Station on 2nd February 2010 itself to lodge the report Exhibit 16. Cross-examination of this witness reveals that house of the appellant / accused is also occupied by two sons, daughter-in-law and grandson of the

appellant / accused. PW2 Nandkumar Pol has also accepted the fact that electric supply to his house is from the house of the appellant / accused but denied that there were huge arrears of electricity bill payable by him and therefore, his wife colluded with the daughter-in-law of the appellant / accused to implicate the appellant / accused in a false case. It is worthwhile to note that PW2 Nandkumar Pol has categorically denied that his minor son who is victim of the crime in question, was unable to talk properly and clearly, at the relevant time.

10 Then comes the evidence of PW4 Duryodhan Kadam - cousin of the PW3 Sunita Pol and maternal uncle of the alleged victim of the crime in question. As per version of this witness, it was at about 8.30 p.m. of 1st February 2010, PW3 Sunita Pol called him and then the alleged victim of the crime in question told him that the appellant / accused called him on the pretext of giving jalebi. PW4 Duryodhan Kadam further narrated that minor victim of the crime in question, then disclosed to him that the appellant / accused removed his own pant and inserted his penis

in the mouth of the alleged victim of the crime and asked him to suck it. PW4 Duryodhan Kadam further deposed that on the next date, along with PW2 Nandkumar Pol and PW3 Sunita Pol, he went to the house of the appellant / accused and made enquiry. The appellant / accused then left through the back door. Contrary to the version of PW2 Nandkumar Pol, this witness PW4 Duryodhan Kadam in his cross-examination stated that the minor victim of the crime in question was not in a position to talk properly and he used to speak haltingly. PW4 Duryodhan Kadam further stated that minor victim was unable to understand time.

11 This is what the major chunk of the evidence against the appellant / accused. Now let us examine whether this evidence can be made use of to infer guilt of the appellant / accused for the offence punishable under Section 377 of the IPC. With the aid of evidence of parents and cousin maternal uncle of the alleged minor victim of the crime in question, one can safely conclude that the minor son of PW2 Nandkumar Pol and PW3 Sunita Pol was aged about 3 years at the time of the alleged incident. As seen from

evidence of PW2 Nandkumar Pol, minor victim of the crime in question was in a position to talk properly as well as clearly at the time of the incident. Not only that, the evidence of PW2 Nandkumar Pol indicates that his son had developed intellectual capacity to take his parents to the house of the appellant / accused and to indict the appellant / accused as a perpetrator of the crime by touching him and by telling his parents that it is the appellant / accused who is the same neighbouring uncle who had indulged in commission of crime against him. As against this, PW4 Duryodhan Kadam, cousin maternal uncle of the minor victim of the crime in question, has come up with the version that the minor victim of the crime in question was unable to talk properly and he was unable to talk coherently. Evidence of PW4 Duryodhan Kadam indicates that the minor son of PW2 Nandkumar Pol and PW3 Sunita Pol, who is alleged victim of the crime in question, at the relevant time, was not in a position to have sense of time. Thus, on one hand, PW2 Nandkumar Pol is stating that his child is intelligent enough to understand the events taking place and had attained sufficient maturity to disclose what had happened with him and to take his

father to show the perpetrator of the crime, while on the other hand, the cousin maternal uncle of the said child has come up with a stand that victim child, at the relevant time, had not attained the capacity to talk properly and coherently. He had not developed the sense of time at the relevant time. Evidence of the prosecution, as such, is inconsistent and this court is unable to determine whether PW2 Nandkumar Pol is a witness of truth or PW4 Duryodhan Kadam is trustworthy, so far as capacity of understanding and general intelligence of the alleged minor victim of the crime in question is concerned. At the same time, PW2 Nandkumar Pol, PW3 Sunita Pol and PW4 Duryodhan Kadam, who all are interested witnesses, are consistent in stating that the minor victim of the crime in question has consistently disclosed to all of them the incident of calling him by the appellant / accused on the pretext of giving jalebi to him to eat and then taking advantage of this fact, committed carnal intercourse with him against the order of nature by putting penis in the mouth of the minor victim boy and asking him to suck it.

12 As prescribed by Section 118 of the Evidence Act, all persons are competent to testify unless the court considers that by reason of tender years, extreme old age, disease or infirmity, whether of body or mind, or any other cause of the same kind, they are incapable of understanding the questions put to them and of giving rational answers. The only incompetency that the Evidence Act recognizes is incompetency from immature or defective intellect, which may arise from infancy as one of the causes. However, the relevant consideration is not age, but capacity to understand the questions put and ability to give rational answers to those questions. As such, a child witness having power to comprehend and understanding is a competent witness. Even a child of a tender age can be allowed to testify if he has intellectual capacity to understand the questions and to answer those rationally. It is for the trial Judge to decide whether the child witness has sufficient intelligence and capacity to understand questions so also to answer them rationally by noticing his manners and assessing his intelligence by putting some primary questions to him. The trial Judge can resort to any examination

which may disclose the capacity and general intelligence as well as understanding of the child witness. By putting proper questions to child witness the court can test his capacity to depose and if a person of tender years satisfy the requirement of intellectual capacity and ability to give a rational account of what had happened on a particular occasion, his competency as a witness is established. With this position in law in respect of competency of the child witness to depose, if one goes by evidence coming on record from chief-examination of parents and cousin maternal uncle of the alleged minor victim of the crime in question, then it is clear from the evidence of his parents that the minor victim of the crime in question had developed sufficient intelligence and capacity to understand the things and events taking place and also to answer questions put to him rationally. With this, one fails to understand as to why the Investigator of the rank of Deputy Superintendent of Police viz. PW5 Somanath Gharge, has failed to record statement of the alleged minor victim of the crime in question. In his evidence, neither PW5 Somanath Gharge, Dy.S.P., nor other prosecution witnesses have given any reason as to why

the alleged minor victim of the crime in question is not shown as a witness or as to why he is not examined as a witness during the trial. If the prosecution has not examined the minor victim of the crime in question because of his tender age, then naturally, a question will arise as to whether at the relevant time, he was in a position to disclose what happened to him to his parents and relatives, and whether he was in a position to identify the alleged offender correctly. Evidence on record, which is totally inconsistent in the wake of version of PW4 Duryodhan Kadam about the ability to talk and general understanding of the minor victim is wholly insufficient to conclude about intellectual capacity of the victim child to understand the events taking place. It is not possible to conclude that the minor victim was having enough sense of time, day and date. To crown this all, non-production of the alleged victim of the crime before the trial court in order to enable the learned Judge to test his capacity to depose poses a serious doubt on the case of prosecution particularly when neither the Investigator nor parents of the victim came up with a reason for not producing the alleged victim as a witness before the court.

13 On this backdrop, it is material to note that the alleged disclosure of the minor victim in respect of the incident in question to his mother was not immediate. Evidence of PW3 Sunita Pol shows that the disclosure about the incident was allegedly made to her, by her minor son, on 1st February 2010. Her evidence makes it further clear that the alleged incident took place on 26th January 2010. Evidence of PW3 Sunita Pol is totally insufficient or scanty to infer any special occasion for making such disclosure of the event to her, which allegedly took place on 26th January 2010, on 1st February 2010. This creates a shadow of doubt on case of the prosecution, leave apart the fact that capacity of the alleged victim to understand and to form rational opinion is in serious doubt.

14 Now let us examine whether what was heard by prosecution witnesses viz., PW2 Nandkumar Pol, PW3 Sunita Pol and PW4 Duryodhan Kadam allegedly from the victim minor child aged about 3½ years constitutes piece of admissible evidence.

Section 59 of the Evidence Act provides that all facts except contents of documents or electronic record could be proved by oral evidence. As per mandate of Section 60, oral evidence must, in all cases be direct. When such evidence refers to a fact which could be perceived by any sense other than hearing or witnessing, the evidence must be of a witness who says he perceives it. It is well settled that the best available evidence should be brought before the court. This provision aims at rejection of evidence which is not direct i.e. rejection of hearsay evidence. Whatever a person is heard to say disclosed by another person is not admissible. Something which a witness before the court says that he heard from a third party who is not called as a witness, then the statement of that witness is inadmissible to prove the truth of the fact stated. In other words, secondary evidence of any oral statement is not admissible. Thus, evidence not based on personal knowledge but what has been heard from others being hearsay evidence, is inadmissible. Rejection of hearsay evidence is for the reason that such statement cannot be made subjected to the test of cross examination. It may suffer from many possible deficiencies,

suppressions, error and trustworthiness which lie underneath the bare assertion. Therefore, evidence of a witness that he learnt the fact from another person cannot be admitted, particularly, when the another person does not step in the witness box and says that he had narrated that particular fact to the particular witness. In the light of this position in law, what PW2 Nandkumar Pol, PW3 Sunita Pol and PW4 Duryodhan Kadam are stating to be heard by them from the alleged minor victim of the crime in question, cannot constitute direct evidence which is admissible in law. On the contrary, evidence of all these three witnesses, in respect of the disclosure to them by the alleged minor victim of the crime in question, is totally hearsay, and as such, inadmissible. The same cannot form a basis for convicting the appellant / accused of offences alleged against him. On this backdrop, non-examination of the alleged minor victim of the crime in question and non-disclosure of any reason for his non-examination by the Investigating Officer PW5 Dy.S.P. Somanath Gharge, casts a serious shadow of doubt on the prosecution case.

15 Now let us examine evidence of the prosecution from the angle of probability. For this purpose, one will have to consider the evidence regarding the spot of the incident, location as well as size of the spot of the incident, which according to the prosecution was house of the appellant / accused, situated in the neighbourhood of the house of the alleged minor victim of the crime in question. As per version of PW2 Nandkumar Pol, the appellant / accused resides at a distance of about 30 to 40 feet from his house. As seen from the evidence coming on record from his cross-examination, the appellant / accused was sharing his house with his two sons, daughter-in-law and grandson. It is seen from the cross-examination of PW3 Sunita Pol that on the day of the alleged incident i.e. on 26th January 2010, sons as well as daughter-in-law of appellant / accused were present in the house. In this fact situation, size of house of the appellant / accused in which as per version of PW3 Sunita Pol, the incident in question occurred, assumes importance. PW1 Parashram Shinde is a panch witness to the spot panchnama Exhibit 14 which shows the size of

house of the appellant / accused. Evidence of this panch witness as well as recitals in spot panchnama Exhibit 14 shows that house of the appellant / accused is comprising of two room. The first room is admeasuring 13 feet x 10 feet whereas the next room is again admeasuring 13 feet x 10 feet, but having a partition for kitchen in it. Thus, house of the appellant / accused is comprising of two small rooms which he was sharing with his two sons, daughter-in-law and a grandson, as seen from the version of PW2 Nandkumar Pol. The incident allegedly took place when the incumbents of the said house viz., both sons and daughter-in-law of the appellant / accused were present. How the alleged incident of indulging in carnal intercourse against the order of nature is committed by the appellant / accused in his small two roomed house, wherein his two sons and his daughter-in-law were present, is a fact which is not getting any explanation from the evidence of the prosecution. This is an aspect which creates reasonable doubt in the case of the prosecution regarding the alleged incident.

16 Documents at Exhibit 18 are the documents of medical examination of the alleged minor victim of the crime in question. Evidence of the prosecution indicates that being a neighbour, the appellant / accused was known to the prosecuting party. Rather, it is stated in evidence that members of the prosecuting party had been to the house of the appellant / accused for questioning him in respect of the incident in question. Then, the FIR came to be lodged and the alleged minor victim of the crime in question was taken to the government hospital for medical examination. The document at Exhibit 18 is the OPD Card of the government hospital wherein history of the incident is scribed. This document reflects that the history stated to the attending Medical Officer was history of unnatural sexual assault by some known person. Name of the offender is not reflected in the history recorded by the Medical Officer in the OPD Card at Exhibit 18. The alleged victim of the crime in question, being a minor child of about 3½ years, must have attended the government hospital along with his parents. If really the victim of the crime in question had earlier disclosed to his parents that it was the appellant / accused who

had committed sexual assault on him, then naturally, parents of the alleged minor victim of the crime in question, would not have spared the appellant / accused but would have specifically stated his name to the attending Medical Officer while recording the history of the alleged incident. This is a factor which makes prosecution case suspect. The documents of medical examination of the alleged minor victim of the crime in question at Exhibit 18 are not disclosing any evidence of the sexual assault on the alleged minor victim of the crime in question. Thus, medical evidence sought to be adduced by the prosecution is also not supporting the case of the prosecution.

17 The net result of foregoing discussion requires me to hold that the prosecution has failed to establish guilt of the appellant / accused beyond all reasonable doubts. As the offence punishable under Section 377 of the IPC alleged against the appellant / accused is not made out by the prosecution, the charge for the offence punishable under Section 3(1)(iii) of S.C.S.T.Act fails. The appellant / accused, as such, deserves benefit of doubt, and therefore the order :

ORDER

- i) The appeal is allowed.
- ii) The impugned judgment and order passed by the learned Ad-hoc Additional Sessions Judge-1, Sangli, in Special Case No.6 of 2010, on 16th September 2010, is quashed and set aside.
- iii) The appellant / accused is acquitted of offences punishable under Section 377 of the IPC and Section 3(1)(iii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.
- iv) The appellant / accused be released from prison forthwith, if not required in any other case,
- v) Fine amount, if any, paid by him, be refunded to him.

(A. M. BADAR, J.)