

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

CRIMINAL APPEAL NO. 97/2020

Dinesh @ Nitin Ukandrao Khandate,
Aged about 24 years, Occ. Labourer,
R/o. Mamdapur, Tq. Ashti, Dist. Wardha,

.... APPELLANT

// VERSUS //

State of Maharashtra,
through Police Station Officer,
Police Station Talegaon (S.P.),
Tah. Ashti, Dist. Wardha.

.... RESPONDENT

Ms. M. Ghatode, Advocate for appellant.
Ms. H. N. Jaipurkar A.P.P. for State/Respondent.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT ON : 16.12.2020
JUDGMENT PRONOUNCED ON : 17.12.2020

JUDGMENT

Heard.

2. The challenge in this appeal is to the judgment and order of conviction in Special (POCSO) Case No. 85/2016 dated 03.01.2020

by which the appellant/accused was held guilty for the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (short 'POCSO Act'), Section 354 and 506 of the Indian Penal Code.

3. The Trial Court has imposed sentence to undergo rigorous imprisonment for three years along with fine of Rs. 500/- with default clause for the offence punishable under Section 8 of the POCSO Act. However, the Trial Court has not imposed separate sentence for the offence punishable under Section 354 of the Indian Penal Code by virtue of Section 42 of the POCSO Act. Besides that the accused has been sentenced to pay fine of Rs. 500/- for the offence punishable under Section 506 of the Indian Penal Code.

4. The prosecution case in nutshell is that the victim girl aged 15 years had lodged report on 16.04.2015 regarding the occurrence. She stated that on that day, around 08.00 p.m., there was religious procession in their village. Several young boys and girls including victim participated in the procession and were singing and dancing on the public road. Around 09.00 p.m. someone held victim from behind tightly and particularly held her breasts. The victim immediately gave jerk, turned around and saw that it was accused who caught hold her

from behind. Immediately, victim went to her house and informed the things to her parents. All of them went to the house of accused to question about his deeds, on which the latter abused and threatened to beat. Therefore, the victim girl along with her parents rushed to the Police Station and lodged report. The Police took cognizance of commission of cognizable offence by registering crime vide crime No. 26/2015 on the basis of victim's report. The Police visited the place of incident and drew spot panchanama. Since victim refused to offer herself for medical examination, she was not sent accordingly. The statement of relevant witnesses were recorded. Investigating Officer has collected documents related to date of birth of victim. On completion of investigation, final report has been filed in the Special Court.

5. The Trial Court framed charge vide Exhibit-3. Since the accused denied the guilt, the prosecution has examined in all five witnesses to bring home the guilt. The prosecution also banks upon certain documents to substantiate the guilt of the accused. The prosecution evidence mainly consists of the evidence of victim, eye-witness, school Headmaster, Panch and Investigating Officer. Having regard to the oral and documentary evidence, the Trial Court formed

opinion that the evidence adduced by the prosecution was sufficient to establish the leveled charges. In consequences, the Trial Court has recorded the finding of guilt and passed aforementioned sentence.

6. The learned counsel for accused strongly criticized the judgment of conviction. It is urged that Trial Court failed to appreciate the evidence in its proper perspective and resultantly erred in convicting the accused for the charges. It is argued that the prosecution utterly failed to establish that the victim was 'child' within the meaning of Section 2(d) of the POCSO Act and therefore, conviction under special Act is wholly unjustified. She would argue that the statement of victim recorded by the Magistrate under Section 164 of the Code of Criminal Procedure has been suppressed. Though there were several independent witnesses, they were not examined. Besides that, it is submitted that evidence of victim and eye-witness is inconsistent. She has expressed that since the incident occurred during night hours, there was possibility of mistaken identification. It is argued that the Investigating Agency has not conducted prior test identification parade which has weaken the prosecution case. Finally, she urged for reversal of the judgment of the conviction by allowing appeal.

7. Per-contra, learned Additional Public Prosecutor strongly supported the judgment of conviction. She would submit that there was clinching evidence against the accused. PW-1 victim as well as PW-3 Priyanka have specifically stated about the occurrence along with the name of accused. Their evidence is consistent, cogent and reliable. In short, she would submit that the judgment of the Trial Court is flawless, hence deserves to be confirmed by way of dismissal of appeal.

8. Having regard to the nature of crime, obviously, the evidence of victim girl carries importance. She deposed that on 16.04.2015, around 09.00 p.m., she had participated in the village procession arranged on the occasion of 'Bhagwat Saptaha'. Several boys and girls also participated and all were dancing. It is her evidence that at that time accused came from behind and pressed her breast. Suddenly, she turned around and saw that it was the accused who pressed her breast. The victim explained that since accused was her villager, she was knowing him. This was the precise narration about the actual occurrence. She was cross-examined by the defence. Though she admits that there were no lights in the way of procession, however, she was quick to deny that there was inadequate light to see

the faces. Besides that, she had bluntly denied all the suggestions regarding alleged enemical terms. In short, her testimony remains unshattered during cross-examination.

9. The prosecution has examined PW-3, Priyanka who was eye-witness to the incident. On similar line, she deposed that at the relevant time, she along with victim had participated in village procession. Around 09.00 p.m, she heard scream of victim on which she saw that accused was holding victim from behind and had put his hands on her breast. Her cross-examination was not potential to shake credibility of her evidence. The defence argued that PW-3 has specifically stated that incident occurred near the house of one Sahebrao Atakarane which has not been stated by the informant. In-fact, non-discloser of exact place of incident does not matters much. The victim has specifically stated that in village procession on public road the incident occurred, therefore, this submission does not have any bearing on the issue involved.

10. Though it is submitted that the prosecution has not examined any respectful person of the village, however the same is not requirement of law. Needless to say that the conviction can be based

on sole testimony of victim, provided it inspires full confidence of the Court. Moreover, the prosecution has already examined one of the eye-witness who has squarely corroborated the evidence of victim.

11. It is argued that the Investigating Officer has not conducted prior test identification parade and therefore, in failure thereof the prosecution case cannot be relied. To substantiate said contention, reliance has been placed on the decision of the Supreme Court in case of *Dana Yadav Alias Dahu and others Vs. State of Bihar, (2002) 7 SCC 295*. The submission in this regard is wholly untenable. It was not the case that accused was totally unknown to the victim so as to conduct prior test identification parade. If an accused is known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same. Suffice to say that First Information Report lodged within few hours, very much bears the specific name of accused. Besides that, the victim has explained that accused being their villager, he was known to her. In view of such facts, absolutely there was no necessity to conduct prior test identification parade and therefore, the submission in this regard is unjustified

12. It has been submitted by the learned counsel for defence that the prosecution has suppressed the statement of victim recorded under Section 164 of the Code of Criminal Procedure. No attempt was made by the prosecution to tender such statement during evidence. To substantiate said contention, reliance has been placed on the decisions of this Court in cases of *Amol S/o Dudhram Barsagade Vs. State of Maharashtra, 2019 ALL MR (Cri) 435* and *Murugasamy Vs. State of Tamil Nadu and others, 2017 ALL MR (Cri) Journal 559*. True in case at hand while carrying out investigation, the statement of victim was got recorded through Judicial Magistrate First Class. Perusal of record indicates that the copy of victim's statement recorded under Section 164(5) of the Code by the Judicial Magistrate First Class, Arvi has been produced in sealed envelop along with a separate copy for accused. However, those envelopes are still intact and lying in the record of the file. The defence neither obtained the said copy of statement from Court nor put the same to the victim to contradict her or used for other purpose. Therefore, submission about suppression of victim's statement is factually incorrect.

13. The defence counsel is unable to show any provision of law that such statement has to be referred to the victim during the

course of evidence. The defence can well make use of said statement as previous statement of witnesses, but apparently they had not availed the said advantage. In the circumstances, it cannot be said that prosecution has suppressed the previous statement of victim nor it has any impact on the case.

14. Reverting to the core issue, the evidence of victim is cogent, consistent and trustworthy. There is independent corroboration to the victim's evidence by PW-3, Priyanka. There is no question of mistaken identity since the name of accused was very much mentioned in the First Information Report itself. Pertinent to note that alleged offence took place on 16.04.2015 around 09.00 p.m. whilst First Information Report (Exh. 11) has been registered on the very date around 23.55 p.m. i.e. within three hours from the occurrence. Always quick lodgment of First Information Report assumes significance since it elements the chances of concoction. The defence is unable to establish that, out of rivalry, accused has been falsely implicated. The prosecution evidence unerringly point out that the accused caught hold the breast of victim from behind and as such, criminal force was used with an intention to outrage her modesty.

15. The accused has been charged for the offence of outraging modesty of a woman as well as for 'sexual assault' within the meaning of Section 7 of the POCSO Act. In order to stand the charge under the POCSO Act, it is pre-requisite for the prosecution to establish that the victim was a child within the meaning of Section 2(d) of the POCSO Act. In this regard, it is prosecution case that the victim's date of birth was 11.01.2000. To establish said fact, the prosecution has examined PW-5, Bebi Mokadam who was the Headmistress of Zilla Parishad Primary School, Mamdapur. Through her evidence, the prosecution has proved the relevant portion of admission registered (Exh. 42), affidavit register (Exh. 43) and transfer certificate register (Exh. 44) maintained by School. All these registers bear entry in the name of victim showing her date of birth as 11.01.2000.

16. The defence has seriously challenged the evidence on the date of birth by canvassing that the prosecution has not established birth date of victim by leading cogent and reliable evidence. It is submitted that the prosecution has not brought birth certificate of victim which was essential to establish the age of child. To substantiate said contention, reliance has been placed on the decisions of this Court in cases of *Rohidas s/o. Manik Chavhan and anr. Vs. State of*

Maharashtra, 2017 ALL MR (Cri) 4504 and ***Meenakshi Madan Rai & Bhaskar Raj Pradhan, 2018 ALL MR (Cri) Journal 21***, wherein this Court has disbelieved the evidence on the point of date of birth.

17. Undeniably, the prosecution has not produced date of birth certificate issued under the Registration of Births and Deaths Act, 1969. The only evidence pertaining to the school record of the victim has been tendered. The admissibility of such documents would be of not much evidentiary value to prove the age of victim in absence of material on the basis of which the age was recorded. The date of birth mentioned in the school record would have no evidentiary value unless the person who made the entry or who gave the date of birth has been examined. In this regard, useful reference can be made to the decision of the Supreme Court in case of ***Alamelu and anr. Vs. State represented by Inspection of Police, 2011 All MR (Cri) 1278 (S.C.)***. It is trite law that merely because the documents were proved and exhibited, does not mean that the contents of documents were also proved. Mere proof of the documents (Exh. 42 to 44) would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.

18. PW-5, Headmistress specifically admitted that she had no personal knowledge about the entries made in school register. She has not collected information given in the documents nor she was in the service of concerned school at the relevant time. It has not brought on record as to what was the source of information or who gave the relevant information to the school regarding the date of birth of victim. Precisely, there is no link evidence about the entries carried out in school register. The parents of victim were not examined to enlighten on the issue. Moreover, the victim girl in her evidence has stated her date of birth differently. Besides that, in initial report (Exh. 10) lodged by the victim, there is no reference about date of birth. For all these reasons, it can be safely held that the prosecution has failed to establish the age of victim and consequently, she was a 'child' within the meaning of Section 2(d) of the POCSO Act. Once the said finding is reached, the prosecution under the provisions of POCSO Act would not stand. However, there is no escape to the accused from the offence punishable under Section 354 of the Indian Penal Code, since the said offence can be committed against woman of any age.

19. In the light of above discussion, the impugned judgment calls interference to the extent of setting aside the conviction under

Section 8 of the POCSO Act by maintaining the conviction under Sections 354 and 506 of the Indian Penal Code. The Trial Court has not passed separate sentence for the offence punishable under Section 354 of the Indian Penal Code by virtue of Section 42 of the POCSO Act.

20. In the result, the prosecution has proved the offence punishable under Section 354 of the Indian Penal Code for which the prescribed punishment is 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. Always, the sentence should be in-proportion to the atrocities committed by the accused. The accused is young person who has total disregard to the women's dignity and chastity. During the procession on public road, he has touched to the sexual character of female by use of criminal force. Certainly, the act of accused is of such a nature which cannot be taken lightly. If lesser sentence has been awarded then it would pass signal that sisters and daughters of our society are not safe. In other words, the Court's of law which are meant for justice are not taking seriously such kind of offences. Therefore, to pass a strong message to the like minded persons and to teach a lesson to the accused, certain term of corporal punishment is necessary. Having regard to the young age of accused,

two years rigorous imprisonment would meet the ends of justice.

21. In view of above, the appeal stands partly allowed. Conviction and sentence passed by the Trial Court for the offence punishable under Section 8 of the POCSO Act is quashed and set aside. The accused is convicted for the offence punishable under Sections 354 and 506 of the Indian Penal Code. The accused shall undergo rigorous imprisonment for two years and to pay fine of Rs. 500/-, in default to undergo simple imprisonment for one month for the offence punishable under Section 354 of the Indian Penal Code. The accused shall pay fine of Rs. 500/- in default to suffer simpler imprisonment for 15 days for the offence punishable under Section 506 of the Indian Penal Code.

22. The accused is entitled for set off in terms of Section 428 of the Code of Criminal Procedure

23. Appeal stands disposed of in above terms.

JUDGE