

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

CRIMINAL REVISION APPLICATION NO. 101 OF 2018

Pundlik s/o Sitaram Raut,
Aged about 78 years,
Occupation – Pensioner,
R/o Ravindra Nagar, Gadgebaba
Chowk, Ballarpur, Tq. - Ballarpur,
District – Chandrapur.

.... **APPLICANT**

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station Ballarshah, Tq.-
Ballarpur, District – Chandrapur.

.... **NON-APPLICANT**

Ms. Gayatri Dive, Counsel h/f. Mr. P.R. Agrawal, Counsel for the
applicant,
Mr. N.S. Rao, Addl.P.P. for the non-applicant/State.

CORAM : ROHIT B. DEO, J.
DATED : 13th OCTOBER, 2021

ORAL JUDGMENT :

Applicant-Pundlik Sitaram Raut is convicted for offence punishable under Section 354 of the Indian Penal Code (IPC) and is sentenced to suffer simple imprisonment for one year and to payment of fine of Rs.10,000/- (Rupees Ten Thousand) and in default, to suffer further simple imprisonment for one year and is further convicted for

offence punishable under Section 506 of the IPC and is sentenced similarly.

2. The applicant, who shall be referred to as the accused, preferred Criminal Appeal 145/2011 which is partly allowed by the learned Sessions Judge, Chandrapur vide judgment dated 06-4-2018. The learned Sessions Judge set aside the conviction of the accused for offence punishable under Section 506 of the IPC and confirmed the conviction and sentence as regards offence punishable under Section 354 of the IPC.

3. I have heard the learned Counsel Ms. Gayatri Dive for the accused and the learned Additional Public Prosecutor Mr. N.S. Rao for the State.

4. Ms. Gayatri Dive would submit that restricted as the revisional jurisdiction is, interference in the conviction and sentence impugned is imperative since the findings recorded are grossly erroneous, as would occasion miscarriage of justice. Ms. Gayatri Dive attempts to substantiate the said submission by inviting my attention to the prosecution case and the evidence on record. The learned Additional Public Prosecutor Mr. N.S. Rao supports the conviction recorded and

emphasizes that in exercise of limited jurisdiction under Section 401 of the Criminal Procedure Code, 1973 (Code) no interference is necessary since the findings recorded is a possible view, and the view is concurrent.

5. The prosecution case, as is discernible from the report dated 06-2-2010 lodged by Smt. Kiran Khobragade is that:

- (i) She is a housewife residing at Buddha Nagar, Ballapur and the accused, who retired as Principal of School, is a neighbour residing adjoining to her house. The kitchen of the house of the accused is visible from the complainant's house. The branches of a guava tree standing within the premises of the complainant has branches which extend upto the house of the accused. The children of the locality play at the open land adjoining the complainant's house. The informant alleged that on 03-2-2010 when she was cooking food, she saw from the window that the accused called 'A', the daughter of Shalik Kulsange inside his house and pressed her chest. The accused further placed his penis in the hand of 'A' and manipulated her genitalia by inserting his hand in her panty. The complainant informed A's mother Sangita Kulsange who confronted the accused. It is alleged that 'A' disclosed that the accused used to call the girls, who used to

play near his house, by promising chocolates and then used to pressed their chest and manipulate private organ. It is further alleged that accused threatened the girls that disclosure of the incident will entail serious consequences. The complainant's daughter 'K' also allegedly had a similar version to narrate. The allegation is that the accused assaulted several girls including 'A', 'K' and 'L'.

- (ii) On the basis of the complaint lodged by Smt. Kiran Khobragade, offence punishable under Sections 354 and 506 of the IPC was registered at the Ballarshah Police Station vide Crime 23/2010. The Investigating Officer recorded the spot panchanama, statements of eleven witnesses including three children named supra and the culmination of investigation led to the submission of the charge-sheet in the jurisdictional Court.
- (iii) The learned Magistrate framed Charge (Exhibit 14). The accused pleaded not guilty. The prosecution examined eleven witnesses. The accused did not adduce any evidence in defence. However, the defence, as is discernible from the cross-examination and the statement recorded under Section 313 of the Code, is of false implication due to enmity with the Khobragade family.

6. Considering the limited scope of revisional jurisdiction, it would be impermissible to re-appreciate the evidence on record as if acting as an appellate Court. However, certain striking features of the prosecution case and the evidence on record must be noted. The complainant Smt. Kiran Khobragade claims that she saw, from her house, the accused sexually assaulting 'A' and that she narrated the said incident to her mother. The incident allegedly occurred on 03-2-2010. According to the complainant, it was only thereafter that 'A' and the other children, including her daughter 'K', disclosed similar sexual misconduct on the part of the accused. 'A' is examined as PW 9. She has outrightly denied that the accused misbehaved with her. 'A' states that as a fact, she has never visited the house of the accused. 'A' was cross-examined by the Prosecutor. She has, however, remained steadfast in her version that the accused did no wrong. The prosecution did not examine A's mother, to whom the complainant allegedly narrated the incident. These infirmities in the prosecution case ought to have been considered by the learned Magistrate. Unfortunately, the learned Magistrate does not appear to have addressed the said infirmities in the prosecution case. Since the very genesis of the complaint is that the complainant saw the accused sexually assaulting 'A', the fact that the said incident is totally denied by 'A' and the prosecution did not examine her mother, assumes

significance and creates a reasonable doubt about the veracity of the complaint. In this backdrop, the fact that the report was not immediately lodged on 03-2-2010, and was lodged only on 06-2-2010 does assumes some significance. The learned Sessions Judge, too did not apply judicial mind to the significance of 'A' not supporting the prosecution and her mother not having been examined. The reference to 'A' not supporting the prosecution is found in the judgment of the learned Sessions Judge in paragraph 13, in the limited context of the charge under Section 506 of the IPC.

7. According to the complainant, the other child who was sexually assaulted, is 'L'. She is examined as PW 4. She flatly denied having gone to the house of the accused. She did not support the prosecution and nothing is brought out in her cross-examination to be of any assistance to the prosecution.

8. Neither the learned Magistrate nor the learned Sessions Judge have considered the implication of 'L' not supporting the prosecution.

9. The learned Magistrate has heavily relied on the evidence of the complainant Smt. Kiran Khobragade (PW 1). She claims to have seen the accused sexually assaulting 'A'. She has vividly described the sexual

misconduct, which she claims to have seen from her house. It is brought out in the cross-examination that the brother-in-law of PW 1 parks his truck in front of the residence of the accused. She, however, denies the suggestion that due to such parking of truck, there are incidents of altercations since the truck obstructs the way of the accused. A suggestion was given that there was an altercation between the father-in-law and sister of the witness and that the accused deposed in the said trial. The response of the witness is that she is not aware. It is extracted in the cross-examination that the house of the complainant is double storied and that she resides on the first floor. The witness admits that the house of the accused is single storied and that there is a lane between the two houses. Certain omissions are brought out in the cross-examination. PW 2 is the brother-in-law of the complainant. His version as regards the alleged sexual misconduct appears to be hearsay. The witness is extensively cross-examined on the aspect of inimical relations between the Khobragade family and the accused. While PW 2 admits that his two trucks are parked in front of the house of the accused, he denies the suggestion that there were several altercations between the witness and the accused. In any event, the evidence of PW 2 is inadmissible in view of the admission that the instances were narrated to him by his wife, who in turn learnt from the complainant.

10. The daughter of the complainant has supported the prosecution. According to her, the accused was sexually misbehaving since at least one month prior to the incident. The witness states that the accused sexually assaulted whosoever accompanied her to the house of the accused, to pluck guavas. The child witness admits that her family and the family of the accused are not on talking terms. The witness further admits that her family and the family of the accused are not on visiting terms. The witness denies the suggestion that she has deposed as dictated by her parents.

11. PW 5 is Sindhu, the maid, who allegedly saw the accused sexually assaulting 'A'. The witness admits that she came to the Court alongwith the complainant and her family members. The witness further admits that the complainant and the family members told and advised her 'how to depose'. She, however, denies the suggestion that her testimony is false and is at the behest of the complainant and her family members.

12. PW 8 is Gita Uikey who states that on 03-2-2010 while she was helping the wife of the accused to wear saree and happened to go inside the kitchen to clean utensils, she saw the accused misconducting with 'A'. In the cross-examination, she admits that she came to the

Court alongwith the complainant and her family members and that before adducing evidence the police explained to her the statement under Section 161 of the Code. The evidence that the witness was helping the wife of the accused to wear saree, is an omission.

13. In so far as the evidence of PW 8-Gita Uikey, the probative value is virtually nullified by the admission that her police statement is explained to her by the police. While a witness would be entitled to refresh the memory while deposing in Court, the fact that the police explained to the witness her statement outside the Court, seriously undermines the credibility of the deposition. Such view is taken by a learned Single Judge in *Sharad s/o Namdeorao Shirbhate v. State of Maharashtra, 2006(2) Mh.L.J. (Cri) 1210*, which is approved by the Division Bench in *Suresh s/o Purushottam Ashtankar v. The State of Maharashtra and Another, 2015 All MR (Cri) 4243*.

14. In so far as the evidence of the child witness 'K', who is the daughter of the complainant, is concerned, it would be necessary to test the evidence with caution to exclude the possibility of the witness having been tutored. The child witness claims that the accused was indecently misbehaving with her since last one month. The witness has, however, not disclosed the incident to her mother or any other

person. The witness admits strained relationship between the families of the complainant and the accused. She admits that two families are not on talking muchless visiting terms. In this backdrop, her version that she used to go to the house of the accused to pluck guava alongwith the other children and that the accused used to press the breast of the children and sexually misconduct since one month prior to the lodging of the report, is extremely doubtful.

15. The version of PW 5-Sindhu, who claims to be working as maid, at the relevant time, that she went to the house of the accused to call Gita Uikey and she saw the accused seating on the couch and placing his penis in the hand of 'A', is not confidence inspiring at all. Witness Gita Uikey claims to be the maid who at the relevant time was helping the wife of the accused to wear saree. That the accused will indulge in such act, while seating on the couch, and with his wife nearby in the same house, is a version which will have to be tested with extreme caution. PW 5-Sindhu, though a maid, admits that she was not working at the house of the accused. Her version that she went to the house of the accused to call Gita Uikey (PW 8) is an omission. In this backdrop, her admission that the family members of the complainant explained to her how to depose, makes her testimony extremely fragile.

16. The house of the accused is single storied. The complainant resides on the first floor of her house. Her claim to have vividly seen the incident which allegedly occurred in the kitchen of the house of the accused, must be taken with pinch of salt, considering that the report is not lodged with promptitude and the alleged incident of 03-2-2010 is reported to the police only on 06-2-2010.

17. In my considered view, the fact that both the Courts below have not considered, muchless appreciated the serious infirmities in the evidence and the lacunae in the prosecution case, is reason enough for this Court to exercise revisional jurisdiction since the result is gross miscarriage of justice. I am satisfied, that it would be extremely hazardous to convict the accused on the basis of the evidence on record, and both the learned Courts below fell in serious error in reaching the finding of guilt.

18. The judgments impugned are set aside.

19. The accused is acquitted of offence punishable under Section 354 of the Indian Penal Code.

20. Fine paid, if any, shall be refunded to the accused.

21. The bail bond of the accused shall stand discharged.
22. The revision application is allowed accordingly.

JUDGE

adgokar