

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

CRIMINAL APPEAL NO.935 OF 2019

Sudhakar Maganrao Koli,
Age 40 years, Occu. Service,
R/o Pimpri, Tq. & District Jalgaon ... **APPELLANT**

VERSUS

- 1) The State of Maharashtra,
(Copy served on the Public
Prosecutor, High Court,
Bench at Aurangabad)
- 2) X ... **RESPONDENTS**

.....
Shri Joydeep Chatterji, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent No.1 – State
Mrs. Pratibha H. Suryawanshi, Advocate for respondent No.2.
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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 9th February, 2022

Date of pronouncing judgment : 22nd February, 2022

J U D G M E N T :

The challenge in this appeal is to the order of conviction and sentence passed by Special Judge (Under POCSO Act), Aurangabad, on 28/8/2019, in Special Child Prot. Case No.130/2017. The details of the appellant's conviction and resultant sentences are as under :

Sr. No.	Sections	Sentence	Fine	Default sentence
1	Section 7 punishable under Section 8 of the POCSO Act, 2012	R.I. for 5 years	2000/-	R.I. for 3 months
2	Section 9 punishable under Section 10 of the POCSO Act, 2012	R.I. for 7 years	5000/-	R.I. for 5 months
3	Section 11 punishable under Section 12 of the POCSO Act	R.I. for 3 years	2000/-	R.I. for 3 months

All the sentences have been directed to run concurrently.

The amount of fine, if deposited by the appellant, has been directed to be paid to the victim as compensation under Section 357-A of the Code of Criminal Procedure.

The learned Judge has acquitted the appellant of the offence punishable under Section 376(2)(a)(I) of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (the Act of 2012).

2. Facts giving rise to the present appeal are as follows:-

P.W.1 (informant) was resident of a village in

District Aurangabad. He has been serving as a Home Guard. The appellant had been serving as a Police Head Constable. Both, the informant and the appellant were residing in the neighbourhood of each other. The informant has a mother, wife and four children. The prosecutrix, a 14 year old girl at the relevant time, is one of the daughters of the informant. All the family members would reside together. Because of the nature of job of the informant and the appellant, they had close acquaintance with each other.

3. The incident took place on 17/5/2017. The appellant asked the informant to remain at a particular place awaiting arrival of a particular vehicle. The appellant had told the informant that the vehicle was carrying Ganja and, therefore, it should be intercepted. This was nothing but a ploy to keep the informant busy late in the evening. As such, the appellant kept the informant stationed at a particular place from 10.30 p.m. onwards. The appellant went to his house. He called the prosecutrix to his house and committed sexual intercourse with her. The informant had a suspicion over conduct of the appellant. He (informant), therefore, instead of remaining stationed at a particular place, came his home to find the prosecutrix absent. Wife and son of the

informant had gone to the place of his in-laws. The informant enquired with his mother about the prosecutrix. She told him that the prosecutrix was sleeping by her side and might have gone to answer nature's call. The informant took search for the prosecutrix in the nearby. He had also been to the police station to lodge a missing person's report. The Police Station Officer, however, asked him to take search for her daughter first. The prosecutrix came home by 4.00 a.m. She told the informant to have had gone to answer nature's call. On the way, she slipped. On the following morning, brothers of the informant came. On their sustained questioning, the prosecutrix told them that the appellant had called her his residence. He removed her clothes and had sexual intercourse with her. The informant and his brothers, therefore, went to the police station and lodged the First Information Report (F.I.R.) Exh.23.

4. A crime vide C.R. No.193/2017 came to be registered and investigated as well. Statements of the prosecutrix and persons acquainted with the facts and circumstances of the case were recorded. Scene of offence panchanama was drawn. The prosecutrix was medically screened. The appellant came to be arrested. He too was

medically examined. On completion of the investigation, the appellant came to be proceeded against by filing charge sheet.

5. The learned Judge framed the charge (Exh.15). The appellant pleaded not guilty. His defence is of false implication. The prosecution examined 8 witnesses to establish the charge. It also produced in evidence certain documents. The witnesses examined by the prosecution are— P.W.1 informant, P.W.2 prosecutrix, P.W.3 Manisha, aunt of the prosecutrix, a panch of clothes seizure panchanama (Exh.31), P.W.4 Santosh, handwriting expert in the office of C.I.D., Aurangabad, P.W.5 Dr. Vidula, in whose presence the prosecutrix was medically screened. The medical examination reports of the prosecutrix are at Exhs.51 and 52. P.W.6 Sunil is panch witness to the panchanama of seizure of SIM Card (Exh.54). P.W.7 Kausalya was a member of Mahila Dakshata Samiti. In her presence, the police had recorded statement of the prosecutrix. P.W.8 Kalpana did the investigation of the crime. On appreciation of the evidence, the learned Judge convicted the appellant and sentenced as stated hereinabove.

6. Learned counsel for the appellant would submit

that, the appellant had not been charged for the offence punishable under Sections 10 and 12 of the Act of 2012. Still he has been convicted thereunder. Turning to the merits of the case, he would submit that, there is no witness claiming to have had seen the prosecutrix entered the appellant's residence or exited therefrom. The evidence of the informant and the prosecutrix is replete with contradictions and omissions. The uncle of the prosecutrix had beaten her up. Whatever evidence was given by her was necessarily under duress. According to learned counsel, the medical examination report also runs counter to prosecution case. According to him, moral conviction has no sanction in law. The learned counsel took this Court through the entire evidence in the case to ultimately submit that the testimony of the prosecutrix ought not to have been relied on by the learned Judge for convicting the appellant. He, therefore urged for allowing the appeal.

7. Both the learned A.P.P. and the learned counsel representing the prosecutrix would submit that, the prosecutrix was 14 years of age at the relevant time. Her age was not in dispute. Principle- falsus in uno falsus in omnibus has no application. The Court is under obligation to sift the

truth from falsehood, if any. According to them, close reading of the evidence of the prosecutrix would entail the appellant's conviction. The trial Court has rightly convicted the appellant. There is, therefore, no reason for interfering with the impugned judgment and order.

8. Considered the submissions advanced. Perused the evidence in the case. Gone through the documents relied on. Let us appreciate the same.

9. Admittedly, both the informant and the appellant were serving as Home Guard and Police Head Constable respectively. Both of them were residing in the neighbourhood of each other. They have, therefore, close acquaintance between them. Although the informant has stated in his examination-in-chief that both of them were attached to a particular police station, in the cross-examination, he admitted that, both of them were serving with two different police stations.

It is in the evidence of the informant that, on the given date (17/5/2017), the appellant met him by 4.00/ 5.00 p.m. He told the informant to have received a tip off that one vehicle carrying Ganja was to arrive from Dhule by 12.00

midnight. He, therefore, asked the informant to stay at Kagzipura and to remain at a particular place awaiting arrival of a particular vehicle. The appellant then went to his police station. Both of them again met by 10.30 p.m. They took wine and dinner at Nisarg Dhaba. Then the appellant took the informant to Kagzipura, left him there and went to his residence. It is further in the evidence of the informant that he had suspected conduct of the appellant. He, therefore, instead of remaining at Kagzipura, came to his home by little past 11.00 p.m. He noticed the prosecutrix was not home. His wife and son had been to the house of his parents-in-law. He, therefore, enquired with his mother about the prosecutrix. He learnt from her that the prosecutrix was sleeping by her side and might have gone to answer nature's call. Since the prosecutrix did not return in a while, the informant took search for her. He had even been to the police station to lodge a missing person's report. The Police Station Officer asked him to take search for the prosecutrix first. He, therefore, came home. The prosecutrix returned by 4.00 a.m. She told the informant to have had gone to answer the nature's call. On the way she slipped and felt giddiness.

It is further in his evidence that, on the following

morning, his brothers Sanjay and Suresh came. All of them enquired with the prosecutrix as to where had she been the previous night. She informed them that the appellant had called her to his residence and he committed rape of her. The informant and his both brothers, therefore, lodged the F.I.R. Exh.23.

10. The learned A.P.P. would submit that, a chit bearing a particular vehicle number was seized from the house of the informant. Specimen handwriting of the appellant was obtained. Both, the chit and the specimen handwriting were examined by handwriting expert. The report of the handwriting expert concludes that the sample handwriting of the appellant matched with the handwriting in the chit. The learned A.P.P. meant to say that, the appellant, with a view to keep the informant engaged for 3 – 4 hours on the fateful night and have a smooth meeting with the prosecutrix, had given the said chit. The evidence of the informant is, however, conspicuously silent in this regard. He did not state anything about having any chit containing the vehicle number. For want of evidence in this regard, the handwriting expert's report, which has been duly proved by the evidence of the expert himself, would in no way bolster

the prosecution case.

11. Close examination of the F.I.R. does indicate that, both the brothers of the informant have also signed the F.I.R. to show their presence at the police station. Be that as it may. The informant was subjected to a searching cross-examination. It is in his evidence that the appellant would reside along with his wife and their 3 year old child. The family members of both of them were not on visiting terms with each other. From his cross-examination, it has come on record that the following matter had been stated by him for being recorded in the F.I.R., but the same does not find place therein.

“The appellant met by 5.00 p.m. and told him to have received a tip off that a truck carrying Ganja was to arrive from Dhule. The appellant had asked him to remain at Kagzipura until 12.00 midnight. He and the appellant had drinks before meal (dinner).”

There is also some material that indicates the informant to have had not narrated it for being recorded on the F.I.R.

12. The F.I.R. is not an Encyclopaedia. What has not been appearing in the F.I.R. appears to have not been on the

mind of the informant while he lodged the report. The omissions amounting to contradiction do not go to the root of the matter to disbelieve the informant's case that the appellant had asked him to remain at a particular place awaiting arrival of a particular vehicle carrying Ganja. From the evidence of the informant, what has come on record is that, he returned his home by little past 11.30 p.m. The prosecutrix was not home. He, therefore, took search for her. She came home by 4.00 a.m. in the following morning. She related him and his brothers what had happened with her. The informant's evidence is not directly on the offences in question.

13. It is in the evidence of the prosecutrix (P.W.2) that, there was an acquaintance developed between her and the appellant for little over a month next before the incident. The appellant had given her a cell phone. On the given day, he had asked the prosecutrix to come his home by 11.00 p.m. She refused, fearing her father. The appellant, therefore, told her that, he would ensure that her father would remain busy in duty for 2 – 3 hours so as to ensure their smooth meeting. It is further in her evidence that, little past 11.00 p.m., the appellant took her to his residence.

Closed the door from inside. Laid her on the cot. Asked her to remove clothes from her person. He slept by her side. Removed clothes from his person. Kissed her and moved his hand all over her body. She got frightened. She requested the appellant to let her go. She heard father giving her loud calls. She, therefore, asked the appellant to hide her somewhere. Accordingly, he hid her in bathroom of his residence. The appellant then latched the bath room and even the entrance door of his residence from outside and went away. By 3.00 a.m. he returned. Opened the latch of the bathroom. He asked her to tell her father that she had gone to bathroom and on way fell due to giddiness. It is further in her evidence that, thereafter she went home. She told her father accordingly. She then went to sleep. In the following morning, her uncles Devidas, Sanjay and Suresh came home. All of them questioned her about her whereabouts on the preceding night. She related them what the appellant did with her.

14. During her searching cross-examination, it has come in her evidence that she did not find her father in drunken state on the fateful night. Her father did not knock on the door of the residence of the appellant or that of the

appellant's landlord in search for her. She did not tell her grandmother that the appellant had called her to his residence. Her uncle Devidas beat her up. He, however, did not beat with a wood or a blowing pipe. She did not make any complaint about the appellant to anybody until Devidas beat her up. Devidas asked her to lodge report against the appellant. She had not accompanied her father to lodge the F.I.R. She later on went to the police station. P.W.8 Kalpana Rathod, investigating officer, had recorded her statement twice. She denied to have had stated in her statement that the appellant did nothing with her and he shall therefore not be punished. She also did not state of having afraid of her family members and she did not want to go back home. She did not sustain injury due to beating by Devidas. She denied to have had stated in her statement to have suffered injuries as a result of beating by Devidas.

15. The prosecutrix was duly confronted with her statement under Section 164 of the Criminal Procedure Code and two other statements recorded during investigation. Omissions and contradictions have been duly proved. Whatever she has stated in her statement under Section 164 and statements under Section 161 has been categorically

denied by her in her evidence before the Court and vice versa. I propose to marshal her evidence a little later. Although statement under Section 164 of the Code of Criminal Procedure has not been specifically marked Exhibit Number, the prosecutrix was duly confronted therewith. The investigating officer was also shown the said statement. He admitted the same as a statement of the prosecutrix recorded by Judicial Magistrate under Section 164 of the Code of Criminal Procedure. The learned A.P.P., therefore, could not be heard to contend that the prosecutrix had not been duly confronted with her statement under Section 164 of the Code of Criminal Procedure.

16. P.W.3 Manisha is aunt of the prosecutrix. She is panch witness to the panchanama of the seizure of the clothes of the prosecutrix. It is in her examination-in-chief itself that she had been to the house of the prosecutrix on the following morning. Devidas beat her up with stick. She took the prosecutrix aside and enquired with her. She learnt from the prosecutrix that the appellant had taken her to his house and committed rape of her. In the cross-examination, P.W.3 Manisha testified that the prosecutrix had suffered injuries as a result of the beating by Devidas. She had even asked

Devidas as to why he was beating her. He did not respond. He was very much annoyed with the prosecutrix.

17. The medical examination reports (Exhs.51 and 52), proved by the evidence of P.W.5 Dr. Vidula suggest that the prosecutrix had given history that the appellant had taken her to his residence. The appellant was alone home. He kissed her on lips and touched her breasts. She, however, did not remove her clothes. The medical examination report of the prosecutrix suggests the following :-

- (1) Crush injury on the middle finger nail of right hand.
- (2) Hymen ruptured.
- (3) No evidence of fresh injury.
- (4) No signs of use of force.
- (5) Sexual intercourse cannot be ruled out.
- (6) Final opinion reserved pending receipt of Forensic Science Laboratory report.
- (7) The injuries on the person of the prosecutrix were probably caused by hard and blunt weapon.

18. There is no witness claiming to have had seen the prosecutrix entered the residence of the appellant or exiting therefrom on the night of 17/5/2017. The averments in the

F.I.R. and the oral evidence of the informant is hear-say. What has been noted in the medical examination report as history has not been reiterated by the prosecutrix in her substantive evidence. The same would, therefore, not reinforce her case as her previous statement. It is not that the prosecutrix is branded a liar.

The fact is, however, that, she changed her version many a times. In her substantive evidence before the Court, she testified that the appellant had called her to his residence. She went there. He laid her on the cot. Kissed her. She, however, did not remove clothes from her person. On return home, she informed her father and other relations that she had been out to answer nature's call. On the way, she fell due to giddiness. Her uncle Devidas beat her up. Although she denied to have been beaten up with a wooden log or a blowing pipe, it is in her statement to the Magistrate (Exh.73) that Devidas beat her up with wooden log and blowing pipe as well. She has also stated in her very statement to have had informed her uncle that the appellant did nothing with her. He left his house bolting the entrance door from outside by 11.00 p.m. and came back by 3.00 a.m. She reiterated in the very statement that the appellant did

nothing with her. He be not punished. She had fear to her family members. She did not want to stay her home. She had a fear to her life at the instance of her family members. This was the statement recorded by the Judicial Magistrate, First Class. It was only on her hearing father's loud calls, she had asked the appellant to hide her. He, therefore, hid her in the bathroom.

The statement of the prosecutrix recorded under Section 164 of the Criminal procedure Code does not attribute anything incriminating to the appellant. The statement was recorded by none other than a Judicial Magistrate, First Class. While she gave evidence before the Court, she had come from her father's residence, meaning thereby, her father and other relations might have prevailed upon her to give evidence as they desired her to give. Admittedly, the prosecutrix was thrashed by her uncle only some time before she gave her statement to the police, attributing incriminating role to the appellant herein. What she has stated incriminating against the appellant before the Court did not find place in her statement under Section 164 of the Criminal Procedure Code. While police recorded her statement twice, she was under influence of her father and other relations. She had even

been beaten up immediately therebefore. There is nothing in the substantive evidence to suggest that the wife and the minor child of the appellant were not home during the relevant night. Gaps in the evidence could not be filled in with surmises and conjectures.

19. None had seen the prosecutrix in the house of the appellant at any time on the fateful night. According to the informant, the prosecutrix had told him to have been subjected to sexual intercourse by the appellant. The same is hear-say. Immediately before she told the informant and her uncles what had happened with her the previous night, she had been thrashed by her uncle with a wooden log and iron pipe as well to such an extent that injuries were visible on her person. Under such pressure of the uncle, the prosecutrix gave her statement to the police, attributing the appellant to have been physical with her though no sexual intercourse has been attributed. Again her statement was recorded in the presence of a member of Mahila Dakshata Samiti, wherein she stated that the appellant never had sexual intercourse with her. He only touched her body. While in her statement on oath recorded by the Judicial Magistrate, she has stated as under :

"माझी आणि पो. स्टे. खुलताबाद येथे काम करत असलेले पोलीस कोळी यांच्यासोबत माझी एक महिन्यापासून ओळख आहे. त्याने मला एकदा विचारले होते की, मी तुला आवडतो का, मी होय म्हणून सांगितले होते. आम्ही दोघे एकमेकांसोबत बोलत होतो. त्यानंतर मला कोळी यांनी दि. १७/७/२०१७ रोजी रात्री ११.०० वाजता त्याच्या घरी बोलविले होते. त्याचे घर आमच्या घरासमोरच आहे. त्यांची चांगली ओळख आहे म्हणून मी त्यांच्या घरी गेले. तेंव्हा रात्रीचे ११.०० वाजत होते. तेंव्हा कोळीने मला कपडे काढण्यासाठी सांगितले होते. परंतु मी कपडे काढण्यास नकार दिला. तेंव्हा त्याने मला सांगितले की ठीक आहे, तुझी मर्जी काढू नकोस. तेवढ्यात माझ्या पप्पांचा आवाज आला. त्यांचा आवाज ऐकून मी खूप घाबरले होते व मी कोळीला सांगितले की मला लपव, नाहीतर माझे पप्पा मला मारतील. असे म्हटल्यावर त्याने बाहेर जाऊन घराच्या दाराची बाहेरून कडी लावली व तो पो.स्टे. जातो म्हणून गेला. त्यानंतर तो रात्री ३ वाजता आला व त्याने कडी लावलेली उघडली. मी लगेच बाहेर माझ्या घरी गेले. तेंव्हा माझ्या पप्पांनी मला विचारले की, तू कुठे गेली होतीस, मी त्यांना त्यावेळेस खोटे सांगितले की मी बाहेर बाथरूमला गेले होते. त्यानंतर सकाळी ७ वाजता माझे काका देविदास रंगनाथ मरकड तेथे आले आणि त्यांनी मला काहीच न विचारता लगेच मारायला सुरुवात केली. त्यांनी मला लाकडांनी फुकणीने मारायला सुरुवात केली. तेंव्हा मी त्यांना सांगितले की मी कोळी यांच्या घरी गेले होते. तेंव्हा मला काकांनी विचारले की कशासाठी गेली होते. तेंव्हा मी त्यांना सांगितले की त्याने मला तिथे बोलविले होते. म्हणून मी असच गेले होते.

त्यानंतर काकांनी विचारले की त्याने काय केले तुझ्यासोबत. मी त्यांना सांगितले की त्याने काहीच केले नाही. तो रात्री ११ वाजता बाहेरून काडी लावून गेला होता. नंतर रात्री ३ वाजता येऊन त्याने कडी उघडली होती. असे सांगितल्यानंतर माझ्या काकांनी मला विचारले की तू तिथे ३ तास होतीस, त्याने काहींना काही केलच असेल तुझ्यासोबत, मी काकांना सांगितले की, काहीच नाही केले त्याने, तो बाहेर गेलेला होता. मग त्यानंतर माझे पप्पा, माझे दोन चुलत काका (१) संजय मरकड (२) सुरेश मरकड हे सर्व मिळून पो.स्टे. ला गेले तेथे त्यांनी काय केले माहीत नाही.

कोळीने काहीच केले नाही, त्याला शिक्षा करू नका. तसेच आता मला घरच्यांची भीती वाटत आहे. मला घरी राहायचे नाही, मला माझ्या घरच्या लोकांकडून जीवाला धोका वाटत आहे. माझे हे बयान त्यांना माहित झाल्यावर ते मला मारतील. मला इतरत्र योग्य ठिकाणी पाठवा. मला खूप शिकायचे आहे. एवढंच सांगायचे आहे.”

20. The aforesaid facts have all been duly proved. What has been stated to the doctor as a history before examination of the prosecutrix has not been reiterated by her in her examination-in-chief. The same is, therefore, not admissible in evidence. In the aforesaid premise, it is just difficult to disengage truth from falsehood. The appellant deserves grant of benefit of doubt since the sole evidence of prosecutrix fell short to inspire confidence. Based on such evidence, the learned Judge ought not to have convicted the appellant. Interference is, therefore, warranted with the impugned order.

21. In the result, the appeal succeeds. Hence the order :

ORDER

- (i) Criminal Appeal is allowed.
- (ii) The impugned order of conviction and sentence passed by Special Judge (Under POCSO Act),

Aurangabad, on 28/8/2019, in Special Child Prot. Case No.130/2017 is hereby quashed and set aside.

- (iii) The appellant is acquitted of the offences punishable under Sections 8, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012.
- (iv) The appellant be set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to him.

**(R. G. AVACHAT)
JUDGE**

fmp/-