

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

CRIMINAL APPEAL NO. 136 OF 2020

Shubham S/o Vilas Tayade,
Aged about 18 years,
R/o Amboda, Tq. Mahagaon,
District Yavatmal

.... **APPELLANT.**

// VERSUS //

The State of Maharashtra,
Through Police Station Officer,
Police Station Mahagaon,
District Yavatmal.

.... **RESPONDENT.**

Shri Anil Mardikar, Senior Advocate assisted by Shri Digvijaysingh,
Advocate for the appellant.

Shri S.V.Sirpurkar, Additional Public Prosecutor for the
Respondent/State.

CORAM : ANIL S. KILOR, J.

DATED : 28th APRIL, 2022.

ORAL JUDGMENT :

In this appeal the appellant has raised a challenge to the correctness and legality of the judgment and order dated 8th January, 2020 passed by the learned Additional Sessions Judge, Pusad in Special Case No. 29 of 2015, whereby the appellant has been convicted under Sections 4 and 10 of Protection of Children

from Sexual Offences Act, 2012.

2. The appellant was charged for the offence punishable under section 376(2)(i) of Indian Penal Code (in short referred as “IPC”) and under Sections 4 and 10 of the Protection of Children from Sexual Offences Act, 2012 (in short referred as “POCSO Act, 2012”).

3. It is the case of the prosecution that on 15th August, 2015, the victim who was five years old, on the date of incident, residing at village Amboda, after attending the flag hoisting ceremony at 9 am, came back home. Her parents, as per the routine work, went to labour work.

4. It is the further story of prosecution that victim’s mother came back at about 5 pm and after taking tea when she took her daughter for latrine, she noticed that blood was oozing from victim’s private part. When she inquired to victim, she told her mother that Shubham Dada has offered her chocolate on the pretext of teaching and took her in the school. Mother thereafter verified the injury and told about the incident to her husband and

other family members. The father of the victim called other persons of the village and thereafter, they called accused and asked as to what he did, but accused frightened and ran away. Thereupon, victim's mother took the victim to police station and filed a report (Exh.32).

5. Accordingly, First Information Report bearing No. 172 of 2015 (Exh.33) came to be registered at Police Station Mohagaon against the accused for the offence punishable under section 376(2) (i) of IPC and under Sections 4 and 10 of the POCSO Act, 2012.

6. After investigation, the chargesheet was filed before the Special Judge, Pusad for the above offence. The Special Judge has framed the charge against the accused under Section 376(2)(i) of IPC and Sections 4 and 10 of POCSO Act, 2012. The charge was read over and explained to the accused. Accused adjured his guilt and claimed to be tried. His defence was of total denial. During the trial the prosecution has examined in all six witnesses and also placed reliance on some documentary evidence.

7. The prosecution has examined Manisha Dattrao Pate,

informant/ mother of the victim girl as P.W.1 at Exh.31, Devidas Sambhaji Paode, P.W.2 at Exh.50, Sarpanch of village, Sunil Namdeorao Kanhekar, P.W.3 at Exh.52 as neighbour, Ku. Shrawani Dattrao Pate, P.W.4 at Exh.58 as victim, Dr. Gadge, P.W.5 at Exh.65, the Medical Officer and Santosh Gosavi, P.W.6 at Exh. 89 as Investigating Officer.

8. The defence has examined one witness i.e. D.W.1 at Exh.101 Narendra Devrav Khandara in order to show that accused/ appellant has been falsely implicated.

9. After the trial, the statement of the accused under Section 313 of Code of Criminal Procedure was recorded at Exh.95. Thereafter upon hearing the learned Additional Public Prosecutor and learned counsel for the defence and on scrutiny of the evidence the learned Sessions Court has held that the prosecution has proved the offence against the appellant/accused beyond reasonable doubt and accordingly the appellant has been convicted for the offence punishable under Section 4 of the POCSO Act, 2012 and sentenced to suffer imprisonment of seven years and to pay fine of

Rs.5000/- in default to undergo simple imprisonment for one month. He is further convicted for the offence punishable under Section 10 of the POCSO Act, 2012 and sentenced to suffer imprisonment of five years and to pay fine of Rs.5000/- in default to undergo simple imprisonment for one month vide judgment dated 8th January, 2020 passed by the learned Additional Sessions Judge, Pusad.

10. I have heard learned counsel for the respective parties.

11. Shri Mardikar, learned Senior Advocate submits that the Sessions Judge has given erroneous findings while convicting the appellant for the offence punishable under Sections 4 and 10 of POCSO Act. He submits that the findings recorded by the learned Sessions Judge that the offence has been proved by the prosecution against the appellant/accused, is without evidence.

12. He further submits that no test identification parade was conducted. It is submitted that it was significant in this case to hold identification parade in the backdrop of peculiar fact that in the village Amboda there are about five persons having name

‘Shubham’. It is submitted that the idea of holding Identification Parade is to test the veracity of the witness on the question of his/her capability to identify the person. He further submits that in absence of identification test parade it would not be safe to rely upon testimony regarding identification of accused for the first time in the Court. He further submits that in the case in hand after two and half years of the incident, the victim identified the appellant for the first time in the Court.

13. Shri Anil Mardikar, learned Senior Advocate further argues that in this case no statement under Section 161 of the Code of Criminal Procedure was recorded by the police. He further submits that in the cross-examination the victim has admitted that she was tutored by mother. Accordingly, he submits that it would not be safe to consider the testimony of the victim in this case. He would submit that in view of the fact that the prosecution failed to establish the identity of Shubham, the conviction awarded by the learned Sessions Judge for the offence punishable under Sections 4 and 10 of the POCSO Act, is not sustainable in the eyes of law.

14. Per contra, learned Additional Public Prosecutor supports the impugned judgment and order dated 8th January, 2020. It is submitted that in the examination-in-chief, the victim has deposed that she knows Shubham i.e. appellant and therefore it cannot be said that while referring to 'Shubham Dada' in the complaint, it was some other persons and not the appellant.

15. It is submitted that prosecution has succeeded in bringing sufficient evidence on record to bring home the guilty against the appellant, beyond doubt. Thus, he submits that learned Sessions Judge has rightly convicted the appellant for the offence punishable under Sections 4 and 10 of POCSO Act.

16. To consider the rival contentions, I have perused the record and proceedings and also the impugned judgment and order.

17. In this case nothing has been argued on the age of the victim and there is no challenge raised to the findings recorded by the learned Sessions Judge that on the date of incident the victim was below 18 years of age.

18. It is a settled law that presumption operates under

Section 29 of the POCSO Act is not absolute and it is triggered only when the prosecution is able to prove the foundational facts for which evidence placed on record by the prosecution is to be examined. The accused can rebut the presumption either by discrediting the prosecution witnesses by effective cross examination or leading defence evidence.

19. Accordingly, I am moving to examine whether prosecution has proved the foundational facts, in this case. It is argued that the appellant Shubham's identity has not been established in the background that the defence has brought on record though the evidence of P.W.1 and P.W.2 that, there are more than one person in the village Amboda, having name Shubham.

20. In this case, P.W.1 mother of the victim, who is informant, has deposed that on the date of incident i.e. on 15th August, 2015 the victim attended the flag hoisting in school and returned home about 9 am. At about 11 am when the victim was playing outside the house, the other members of the family including P.W.1 left for labour work. She further deposed that at

about 5 pm all family members returned home and they all took tea. The victim was to attend the call of nature. P.W.1, therefore took her to the call of nature. That time P.W.1 noticed that there was bleeding from her private part. P.W.1 questioned the victim as to what happened, she replied that, "*Shubham Dadani Tila Chocolate Dile Wa Shalet Shikaoto Ase Sangoon Shalet Nele*". She further deposed that she examined the private part of the victim and noticed injury and then, P.W.1 told all family members that Shubham raped the victim. She further states that her husband Dattrao and her neighbour, brought Shubham at home and questioned him as to what he did with the victim and upon hearing Shubham came under fear and ran away. Thereafter, she went to police station and lodged the report.

21. In cross-examination P.W.1 states that the name of son of Gyanba is Shubham. Digambar Pate is cousin of her husband and name of his son is Shubham. She states that she does not know that son of Gajanan Hede is also Shubham. She further states that she does not know that there is a boy by name Shubham in the

family of Raut. She further states that she does not know that there is a person by name Prakash Khartale in the locality and name of his son Shubham.

22. P.W.2 Devidas Shambhaji Paode who is a husband of former Sarpanch of village Amboda, in cross-examination has admitted that in his village, there might have been five to ten boys by name Shubham. He further states that he knows Gajanan Hede and name of his son is Shubham. He further states that name of son of Digambar Pate is also Shubham. He states that name of son of Gyanba Hede is Shubham. Son of Prakash Kartade is Shubham and name of son of Prataprao is Shubham.

23. The defence has thus brought on record that there are more than one person in village Amboda, having name Shubham.

24. Admittedly, in this case no test identification parade was conducted. The victim identified the accused/appellant in the Court first time after a period more than two years.

25. The Hon'ble Supreme Court of India in the case of **Kanan and others Vs. State of Kerala**¹ reported in 1979 3 SCC 319

1 1979(3) SCC (Cri) 621

while considering the importance of holding TI parade under Section 9 of the Evidence Act as held that

“.....It is not understandable as to how the witness gave the names of the appellants when he knew them only by face which indicates that names of the accused must have been supplied by someone else and this introduces an element of doubt in his testimony. Both the Trial Court and the High Court have found that the mere fact that no T. I. parade was held would not destroy the evidence of P.W. 25. With due respect, we feel that the High Court erred in law in taking this view. It is well settled that where a witness Identifies an accused who is not known to him in the Court for the first time, his evidence Is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The Idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. In these circumstances, therefore, we feel that it was incumbent on the prosecution in this case to have arranged T. I. Parade and get the identification made before the witness was called upon to identify the appellant in the court. On this ground alone, the testimony of P.W. 25 becomes unworthy of credence and must be excluded from consideration.....”

26. In the *Simon and others Vs. State of Karnataka*¹ the Hon'ble Supreme Court of India has observed that mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of

1 2004(2) SCC 694,

a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in Court so as to fix the identity of the accused, who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is further held that it has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

27. Thus, from the above referred observations of the Hon'ble Supreme Court of India, it is clear that the idea of holding T.I. parade is to test the veracity of the witness on the question of his capability to identify to an unknown person so as to strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in the Court so as to fix the identity of the accused. This rule however, is subject to exception, when, for example the Court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.

28. It is further clear that mere failure to hold test identification parade would not make inadmissible the evidence of identification in Court. What weight is to be attached to such identification is a matter for the Courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration.

29. In the teeth of above referred well settled principle of law on the point of T.I. parade, at this stage it is necessary to refer to

the oral evidence of the prosecution witnesses in relation with identification of the accused, in this case.

30. I therefore now moved to the oral evidence of the victim P.W.4 at Exh.48. In the examination in chief the victim has deposed that she knows the accused. She calls Shubham Dada, the boy who is sitting behind shown to her, was the same.

31. Though P.W.4 has deposed that she knows the accused and she calls Shubham Dada to him, nothing has been brought on record by the prosecution that to show that how the P.W.4 was acquainted with the accused or how the accused and his name was known to her. More particularly when from the cross-examination of P.W.4 it has come on record that P.W.4 was not in position to even state the names of sons of her close relatives.

32. P.W.4 in her cross-examination states that her grand father has one brother Natthu. She used to address 'Baba' to Natthu Ajoba. The house of Natthu Ajoba is behind the house of victim. She does not know the name of son of Natthu Ajoba. She states that Digambar Kaka used to reside at the house of Natthu

Ajoba. She address Kaka to Digambar Kaka. She does not know the name of Digambar Kaka is Shubham.

33. In the above referred backdrop to find out whether there was any acquaintance of the victim with the accused, the evidence of P.W.1, the mother of the victim is significant.

34. In cross-examination P.W.1 deposed that there is a long distance between her house and that of accused. She further deposed that she does not know the name of mother of Shubham. She also states that Shubham has two sisters but she does not know their names. She states that she is not on visiting terms at the house of Shubham. She also deposed that family members of the Shubham were not on visiting terms. No one from her house is friend of Shubham. She admits that Shubham never visited her house in her or her families absence or in their presence. She also states that she never talked with Shubham and she does not know the nature of work of Shubham.

35. P.W.1 nowhere in her evidence stated about any association or acquaintance for any reason, of the victim with

accused prior to alleged incident, giving the victim reason to know him and his name. It is therefore, not understandable as to how the victim was knowing the accused and his name. This introduces an element of doubt about the identification of the accused by the victim, in the Court for the first time.

36. In these circumstances, therefore, I feel that it was incumbent on the prosecution in this case to have arranged T.I. parade and get the identification made before the victim was called upon to identify the appellant in the Court.

37. In absence of such evidence, I will examine whether there is any other evidence available on record to corroborate the story of prosecution. In this regard the evidence of P.W.1, P.W.2 and P.W.4 is important.

38. As per the prosecution, the place of occurrence is a school namely Roopgiri English School, Ambora. The date of incident is of 15th August, 2015 i.e. independence day. According to the prosecution story, the incident took place after the flag hoisting ceremony was over and students including a victim went

back to their respective home.

39. It is the case of the prosecution that the school premises belongs to Vilas Nagorao Tayade, father of the accused and the accused being son of Vilas Tayade, he used to keep keys of school with him.

40. Whereas, the defence has examined a witness D.W.1 Narendra Devrav Khandare who has deposed that the school is in the premises of Vilas Tayade, the father of the accused and he had taken said premise on rent for Rs.500 per month. It is further stated in his deposition that his daughter Vidya who has completed her diploma in Education was serving as a teacher in the said school. He further deposed that on the date of incident he took lunch in the school at 2 pm and he was there in the school for whole day. He deposed that he locked the school between 5.30 pm to 5.45 pm and left the school and during that period nothing has happened in the school in his presence.

41. P.W.2 Devidas Sambhaji Paode in his cross-examination has admitted that Khandare was running Roopgiri School and his

daughter was teacher in that school. He also admits that the said school was taken on rent by Khandare Sir.

42. Thus, the prosecution has failed to show that the accused used to keep keys of the school with him and he had access at any time in the said school.

43. Moving further, P.W.4 in her cross examination has stated that the children of school at Amboda are her neighbours. She states that after school time is over, they were playing on the road in front of the house. She further states that there are house surrounding to the school. The house of children with whom she used to play are situated there. There is flour mill adjoining to school. The grocery shop situated near the victim house is always open from morning to evening. She further states that people were at home due to flag hoisting. People always used to sit on the platforms (otta) in front of house, grocery shop and flour mill.

44. From the above evidence, it can be seen that the school is surrounded by houses, a flour mill and also a grocery shop. It has come in the evidence that people sit on the platforms (otta) in front

of house, grocery shop and flour mill.

45. In this backdrop, if the story of prosecution is considered that the accused came and gave chocolate and took her to the school on the pretext of teaching, there would be witnesses to it who have seen the victim with the accused.

46. The P.W.2 deposed that school is at 60 to 70 feet distance from the house of Dattrao, the father of the victim. He states that one flour mill is at about 50 meter distance from the school. However, no witness has been examined from adjoining houses or grocery shop or flour mill, who has seen the accused is taking victim to the school.

47. Thus, there is no witness who has seen the victim with the accused taking her to the school.

48. In addition to this, there are discrepancies in the evidence of the prosecution as per P.W.1 that her family members return home at about 5 pm. Thereafter, they had tea. The victim was to attend call of nature and therefore P.W.1 took her for call of nature and therefore P.W.1 took her for call of nature and at that

time she noticed that there was bleeding on her private part.

49. On the other hand P.W 2 deposed that incident occurred on 15th August 2015. He further states that after returning from meeting at 3 pm, Dattrao Pate told him the blood was oozing from the private part of daughter Shrawani and Shubham Tayade by offering chocolate, has done something wrong and raped her. He states that time he came to know was 4.30 to 5 pm.

50. The P.W.2 in his cross examination states that he was called by Dattrao on phone and informed him at about 4 to 4.30 pm that blood was coming out from private part of his daughter.

51. There are further discrepancies in prosecution evidence. P.W.1 in her deposition states that her husband Dattrao and neighbours brought Shubham at home and questioned him as to what he did with victim and upon hearing he came under fear and ran away.

52. Whereas, P.W.2 state that before JMFC, Mahagaon he stated that when he with the other person went, Shubham was standing in front of his house, Dattrao called him near and

thereafter they asked him about incidents. He further admits that he stated to police in his statement that Dattrao brought Shubham at his house and there he was inquired, thereupon, he gave jerk to hand and ran away.

53. Moving to the medical examination of the victim. In the medical examination no injury was found on genital.

54. In a Chemical Analysis report in respect of clothes of the accused neither blood nor semen is detected. In medical examination of the accused no fresh injury mark over penis and around it was found.

55. Thus, nothing found in Chemical Analysis report or in the medical examination of accused to corroborate the case of the prosecution.

56. In these circumstances, therefore, I feel that it would not be safe to give much weightage to the identification of accused by the victim, in the Court first time. Thus, it can safely be held that the prosecution failed to establish identity of the appellant and thereby foundational facts.

57. The prosecution therefore, has failed to bring guilt home against the accused/appellant beyond reasonable doubt.

58. Having held so, in my considered opinion, the learned Additional Sessions Judge, Pusad has committed error in convicting the appellant under Sections 4 and 10 of POCSO Act vide judgment and order dated 8th January, 2020 and accordingly, the judgment and order dated 8th January, 2020 needs to be quashed and set aside.

59. At this stage, the learned Senior Advocate for the appellant states that as the victim is not party to the present proceeding, the appellant will not claim the amount of compensation paid to the victim. The statement is accepted. Hence, I pass the following order.

ORDER

- i. Criminal Appeal No. 136 of 2020 is allowed;
- ii. The impugned judgment and order dated 8th January, 2020 passed by Additional Sessions Judge, Pusad in Special (Child) No.29 of 2015, is hereby quashed and set aside;

iii. The appellant is acquitted for the offence punishable under Sections 4 and 10 of the Protection of Children from Sexual Offences Act, 2012;

iv. The appellant, who is in jail, shall be released forthwith, if his presence is not required in any other case.

JUDGE

S.K.Nair

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by
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Date: 2022.05.08
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