

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 124 OF 2021

Madhukar Rambhau Tekade,
Aged about 66 years, Occ.Labour,
R/o Riddhapur, Taluka Morshi,
District : Amravati (Accused in Jail)

.... **APPELLANT**

// **VERSUS** //

State of Maharashtra,
(Through Shirkhed Police Station),
Taluka Morshi, District : Amravati

.... **RESPONDENT**

Shri S.P. Deshpande, Advocate (Appointed) for appellant.
Shri A.M. Kadukar, A.P.P. for respondent-State.

CORAM : SMT. M.S. JAWALKAR, J.
DATE : 26/09/2022

ORAL JUDGMENT:

Heard learned Advocate for the appellant and the
learned Additional Public Prosecutor for the respondent-State.

2. The present appeal is filed by the appellant being
aggrieved by the judgment and order of conviction dated

20/03/2020 passed by the learned Additional Sessions Judge and Special Judge under POCSO Act, Amravati in Special Case No. 221/2015. By the said judgment the appellant came to be convicted for the offence punishable under Sections 354(1)(i), 354(B) of the Indian Penal Code and Sections 7, 8, 9(m) and under Section 10 of Prevention of Children from Sexual Offences Act, 2012. [Hereinafter referred as “the POCSO Act”]. The Special Court sentenced the appellant to suffer simple imprisonment for five years and directed to a pay fine of Rs.5000/- for the offence under Section 9[m] punishable under Section 10 of the POCSO Act. In default to suffer simple imprisonment of six months.

3. The prosecution story in brief is as under:

The informant is resident of the Sarvadnya Ashram at Riddhapur and she is working as a Mahanubhav Canvasser. Since four years father of victim girl who is residing at Surat, Gujrat State left his daughter in the said Ashram when she was of 5 years. As victim was mentally retarded, he has gifted his daughter to the said Ashram, since that day informant was looking towards her and used to maintain her. She claimed her status is of Guru-mother of the victim girl.

4. It is alleged that, on 09/08/2015 at about 3.30 pm the victim girl was proceeding towards the nearest Pranav Ashram, which was situated near Sarvadhnya Ashram. At about 4.00 pm she came in the Ashram and was crying. She removed her pant and shown her private part and said her “चावले चावले”. Therefore informant and one Ranjanabai Vinkar had seen private part of the victim girl and noticed one injury. On enquiry by informant along with Gopal Dharulkar she caught hold the finger of informant and took them at the house of accused, which is near to their Ashram. She had shown her finger towards the accused and told that accused called her in his house, removed her pant and bitten on her private part. Therefore, they took victim girl in the police station and lodged complaint against the accused.

5. Offence came to be registered vide Crime No. 202/2015 under Section 376[2][i][I] and 506 of the Indian Penal Code and under Section 6 of the POCSO Act. After investigation is completed, police filed charge-sheet. The charges under Section 354-A(1)(i) and 354-B of the Indian Penal Code and provisions under Section 7 punishable under Section 8 of the POCSO Act came to be framed. As victim girl is below 12 years, additional charge came to be framed

under Section 9(m) punishable under Section 10 of the POCSO Act.

6. The learned Counsel for the appellant vehemently argued that the impugned judgment and order is illegal and perverse and unjust as prosecution originally charged the appellant for offences punishable under Sections 376(2)(1)(l) and 506 of the Indian Penal Code and under Section 6 of the POCSO Act. There was no investigation in respect of age of the victim girl and learned Sessions Judge framed additional charge under Sections 7 and Section 8 and Section 9(m) and Section 10 of the POCSO Act and the said addition is allowed a month before the date of judgment. Medical report shows that there were no teeth marks found as alleged. It is further submitted that the prosecution has not established that there was criminal intention. Placing the burden on appellant to establish false implication/false complaint by the informant, by the Special Court is against the law of land. It is submitted that drawing adverse inference against the accused on his failure to prove false implication is contrary to the settled principle of law. There is no record showing that father of victim girl gifted her to the said Ashram nor any adoption deed is filed on record. Therefore, it is not established that the victim girl was residing in the

Ashram near the premises of the appellant. Prosecution failed to establish that appellant was residing in the said house or victim was residing in the said Ashram. The informant and the appellant were in enimical terms. He was falsely implicated. As a matter of record, the victim girl is mentally retarded and she was unable to understand anything, unable to speak. Her possibility of informing to PW.1, PW.2 and PW.4 is very less. It is not established by the prosecution that PW.1 PW.2 and PW.4 possess the knowledge and capacity of understanding dumb witness. The witnesses examined by the prosecution are interested witnesses.

7. The learned Counsel for appellant relied on judgment of ***State of Rajasthan Vs. Darshan Singh Alias Darshan Lal***, reported in ***(2012) 5 SCC 789***, wherein it is held as under :

“The object of enacting the provisions of [Section 119](#) of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of

intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.”

8. It is claimed that since the informant Nainabai Pusdekar, PW.1 being Guru mother and Gopal Dharulkar, PW.2 being living in said Ashram from childhood are interested witnesses. Their evidence needs to be discarded due to which there is nothing on record holding the appellant guilty of aforesaid charge. The learned Counsel for the appellant also pointed out that the witnesses examined are not credible to prove that appellant has committed rape on victim minor girl, however, medical evidence made it clear that no rape of victim girl has been occurred even the evidence of Dr. Leena Nerkar, PW.13 shows that the local guardian of victim girl i.e. PW.1 has given history that culprit tried forceful insertion of penis and pressed the breast of victim girl but same was not proved by medical evidence. It is submitted that the prosecution examined victim girl as witness No.3. The victim girl stated before the Court by pointing out her finger towards the accused and stated regarding

pressing her breasts by the accused and taken teeth bite on her private part. However, in cross she deposed that she resides at Surat and previously also she was residing at Surat. She was residing along with her mother and father. Nobody has beaten her nor her breast was pressed by anybody. When accused was shown to her, she has not stated anything against the accused nor made any gestures. The medical report as well as Chemical Analysis's report are not supporting the prosecution. The learned Special Court also not considered previous enmity which was the reason for false implication. In view of his evidence, the learned Special Court ought to have acquitted the appellant.

9. As against this, learned Additional Public Prosecutor submitted that charges are duly established by the prosecution. There is no need to interfere with the order passed by the learned Special Court. The learned Special Court taken into account the entire evidence on record and gave its just and sound reasoning for the conviction.

10. I have heard both the parties at length. Perused the record. PW.1 deposed as per her complaint. In cross she has

admitted that the house of the accused is situated in thickly populated area and in front of the house there is heavy traffic road. The other members of family are residing with the accused and one can see inner portion of the house. House consists of one room. The witness has not denied that there was quarrel between the accused and the persons from monastery on account of throwing leaves in the said well or on account of pipe of the well. She answered she does not remember. She also answered that she does not remember that on account of said dispute one of the ladies of our monastery has lodged report against the accused. She has admitted that the victim is mentally retarded. They have not called the psychiatrist nor she had any document to show that she is having custody of the victim. PW.2 Gopal Dharulkar is the resident of that Ashram. Though he deposed that victim came weeping and said “चावले चावले” this statement is not there in the statement recorded by the police. PW.3 is the victim, however, while recording her evidence, there is nothing to show that she was competent to depose. In cross, she deposed that she is residing along with her mother and father in Surat. Nobody had beaten her nor her chest was pressed by anybody. She had not stated anything about the accused. The learned Judge has not appointed any interpreter or

assistance of any person to record evidence of victim. Nor evidence reflects that learned Judge recorded its satisfaction about mental status of victim.

11. The fourth witness is the Religion Canvasser (Dharma Prasarak) Head of the Sarvadnya Ashram. He admitted that there is no document in their monastery to show that victim is given in custody by her parents. They have not having document to show that the victim was medically examined. Two-three omissions are brought on record by the defence. Witness No.6 is the Medical Officer, Dafrin Hospital, Amravati. She has conducted general examination by obtaining consent of her guardian. Victim was found to be normal. He found that no fresh injury was seen and only old scar aged about 20 to 24 hours on supra pubic region. During the examination, no teeth bite was seen on vagina of victim. No other injury was seen over private part and all over body of the victim. He advised for x-ray of victim for age determination and also advised for Sonography test and referred her to psychiatrist. He deposed in cross that the old scar found during examination can be possible due to fall. He admitted that in case of teeth injury, marks of teeth are found and he did not notice any such marks.

12. Witness No.7 is the doctor – psychiatrist who examined the victim as referred by District General Hospital. He admits that when she was brought to the hospital at that time the victim cannot tell her name and her address. He was unable to say who has brought her whether mother or father. He admitted that no machine test was applied to reached the conclusion at the stage. Also admitted that such opinion cannot be treated 100% correct. Her I.Q. appears to be shown as 55 and mild mentally retardation is observed. Another psychologist examined is Bhavna Harish Purohit. She carried out her I.Q. test and result was 51 i.e. mild mental retardation. She also admitted that in certificate it is not mentioned which test was carried out.

13. The evidence of father of victim is only important for the purpose that he himself gave in custody his daughter who was mentally retarded to the custody of Ashram. The evidence of Investigating Officer shows that he has not recorded the statement of victim girl nor victim girl had come before the Investigating Officer. He has not verified the house number from the Grampanchayat Office and was unable to state the house number of spot of incident.

14. On perusal of this evidence, it appears that statement of victim was not recorded by the Investigating Officer. The evidence recorded by the Special Court also appears not as per the guidelines issued in that regard. There is no certification that the said statement of the victim was recorded by keeping any interpreter present who is acquainted with the language of the appellant. In view of the medical opinion, there is no case of teeth bite. It appears that initially the offence came to be registered under section 376 which was later on converted into 354-A. The Chemical Analysis report also not supporting to the prosecution. There is no independent witness examined by the prosecution. Same charges under the POCSO Act came to be added just before judgment.

15. The reply to the question about the previous enmity on account of throwing leaves in the well or in respect of pipe line in the well, the witness PW.1 has not denied the same but also shown her unawareness and she replied that she is not remembering. As such possibility of false implication cannot be ruled out. If cross of the victim is seen, she has stated that she was not beaten by anybody nor her chest was pressed by anybody. Thus, from her evidence it cannot be ascertained whether she can reply rationally or whatever

she want to say is rightly interpreted by the Court. As such, the clinching evidence to prove the facts are not placed before the Court. Moreover medical evidence not supporting to the prosecution. Though earlier charge of Section 376 of the Indian Penal Code is applied, it was subsequently dropped. Thus, the judgment passed by the learned Special Court is liable to be quashed and set aside. When there are two possibilities benefit of doubt ought to have tilted in favour of accused. Accordingly, I proceed to pass the following order :

ORDER

- i) The appeal is allowed.
- ii) The judgment and order dated 20/03/2020 passed by the learned Additional Sessions Judge and Special Judge under the POCSO Act, Amravati in Special Case No. 221/2015, is hereby quashed and set aside.
- iii) The accused be released immediately, if not required in any other matter.
- iv) The muddemal property be destroyed.