

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

CRIMINAL APPEAL NO.81 OF 2021

Kamalakar s/o Laxman Dhasal

Age 40 years, Occu. Labour,

R/o Samata Nagar, Bhokardan,

Tq. Bhokardan, District Jalna

(Presently in Jail)

... APPELLANT

VERSUS

1. The State of Maharashtra
through A.G.P. office,
High Court, Bench at Aurangabad

2. Chandrakant s/o Vishnu Salve
Age 60 years, Occu. Labour,
R/o Samata Nagar, Bhokardan,
Tq. Bhokardan, District Jalna

3. X Y Z
Guardian of victim,
R/o Samata Nagar, Bhokardan,
Tq. Bhokardan, District Jalna

... RESPONDENTS

.....
Mr. G.R. Ingole, Advocate holding for
Mr. S.G. Bobde, Advocate for appellant
Mr. A.S. Shinde, A.P.P. for respondent No.1 – State
Mr. P.B. Kadam, Advocate for respondent No.3 (appointed)
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CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 2nd May, 2023

Date of pronouncing judgment : 6th June, 2023

J U D G M E N T :

The challenge in this appeal is to a judgment and order dated 17/2/2020, passed by Additional Sessions Judge-3, Jalna in Special Case (POCSO) No.19/2016. Vide impugned judgment and order, the appellant has been convicted for the offence punishable under Section 376(2)(j) of the Indian penal Code and Section 2(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 sentenced to suffer rigorous imprisonment for ten years on both counts and fine with default stipulation. The appellant has also been convicted for the offence punishable under Section 3(xi) (xii) of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act and sentenced to suffer rigorous imprisonment for 2 years and fine with default stipulation. The substantive sentences have been directed to run concurrently. Though the appellant was held guilty for the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, no separate sentence was awarded.

2. A gist of the prosecution case is as follows :

The appellant would reside at Samata Nagar, along with his mother and children. The victim, a girl child of close to three years age then, would reside along with her parents in the neighbourhood of the appellant. The victim was playing in-front of her house. It was 11.30 a.m. of 20/1/2016. The appellant took her to his residence. He gave her "Chiwda" and a purse. The appellant then removed her knicker. He licked her private part and rubbed the same with his beard. He then let the victim go. The victim was crying. Her mother (P.W.3) and grandfather Chandrakant (mother's father) (P.W.2) came out of their respective houses. Some other neighbours too gathered. Mother noticed redness at victim's private part. The victim related them what the appellant did with her.

3. The grandfather Chandrakant (P.W.2), the mother of the victim and some neighbours approached Bhokardan Police Station. P.W.1 lodged the First Information Report (F.I.R.) (Exh.37). Crime vide C.R. No.13/2016 came to be registered for offences punishable under Sections 376(2)(i)(j) of the Indian Penal Code, Sections 4, 8, 10 of the Protection of Children from Sexual Offences Act and Sections 3(1) (xi) (xii)

of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act. P.W.7 Ishwar, Dy. S.P., did investigation of the crime. Crime scene panchanama (Exh.28) was drawn. The victim was medically screened. Samples were obtained for chemical analysis and D.N.A. profile. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant came to be proceeded against. The trial Court framed the charge (Exh.24). The appellant pleaded not guilty. His defence is of false implication. It is his case that, there was a quarrel between wife of his brother and the mother of the victim. With a view to take revenge thereof, he has been framed.

4. The prosecution examined 7 witnesses and produced in evidence certain documents to establish the charge. The trial Court, on appreciation of the evidence, convicted and consequently sentenced the appellant as stated above.

5. Let us advert to the evidence. P.W.1 Namdeo is a panch witness to the panchanama of the crime scene, Exh.28.

Since nothing incriminating was found at the crime scene, the panchanama is of no relevance.

6. P.W.2 Chandrakant testified that, the victim was his grand-daughter (daughter's daughter). He would reside at Santa Nagar. His daughter (P.W.3) would reside separately along with her husband and children in a room taken on rent. On the given date, i.e. on 21/1/2016, by 11.30 a.m., he was at his residence. He came out on hearing the cries of the victim. His daughter too came out. The victim was crying. She was taken into confidence. It was learnt from the victim that the appellant took her to his residence. He gave her "Chiwda" and a purse. The appellant then removed her knicker. He leaked her private part and rubbed the same with his beard. He then let the victim go. It is further in his evidence that the appellant is Maratha by caste. The victim belongs to Scheduled Caste. Some neighbours had also gathered. He along with the mother of the victim, victim and a few neighbours approached Bhokardan Police Station. He lodged the F.I.R. (Exh.37).

7. In response to the questions put to P.W.2 Chandrakant in his cross-examination, it has come on record

that he did not witness the incident nor did he see the victim coming out of the house of the appellant. He reached Bhokardan Police Station immediately after the incident and lodged the report. He denied the suggestion of having lodged a false F.I.R. on account of quarrel between his daughter and the wife of brother of the appellant.

8. The evidence of P.W.3, mother of the victim and P.W.5 Bharti, a neighbour is on the lines of the evidence given by P.W.2 Chandrakant in his examination-in-chief. Their is not adverted to only with a view to avoid repetition.

9. The victim was also examined. The trial Court put her certain questions to find her to be a competent witness. Oath was, however, not administered to her considering her age and she was found to have no understanding of sanctity of oath. Her evidence was recorded in question-answer form. It is in the evidence of the victim that the appellant, father of Chhakuli, gave her purse and Chiwda. He took her to his residence. Removed her pant. Licked her place of urine and he then rubbed the said place with his beard. She came out of his house crying. She narrated the incident to her mother and

Baba (grandfather). She identified the appellant before the Court.

10. In response to the questions put to her during her cross-examination, she testified that she had two brothers and three sisters. She could not tell their names. She also could not state as to how many days before the incident took place. She also claimed ignorance as to how she knew the name “Chhakuli”. The victim flatly refused to have given evidence at the instance of her mother. She, however, admitted that, on her arrival in the Court premises, she was told how to speak before the Court. She could not give names of her friends, brothers and sisters as well.

11. Then there is evidence of P.W.6 Dr. Ramkrushna. He admittedly medically examined the victim by 11.30 p.m. on the day of the incident. His evidence suggests that no external or internal injury was there on the private part of the victim. He even did not notice saliva on the vulval region. No redness was found, although blood sample and other things were obtained for chemical analysis and D.N.A. profiling, their reports were not produced before the trial Court for the reason

to have not been received.

12. Learned counsel for the appellant would submit that, there was delay of over 8 hours in lodging of the F.I.R. The police station was at a distance of 20 minutes drive from the residence of the informant. According to him, the victim was just 2 years and 10 months old at the relevant time. It was incomprehensible that the victim would narrate the incident as has been deposed to by the informant and the mother of the victim. For the reasons best known to the investigating officer, victim's statement under Section 161 of the Criminal Procedure Code was not recorded. The medical evidence rules out the alleged incident. C.A. report and D.N.A. report have not been produced before the trial Court. An adverse inference in that regard, therefore, needs to be drawn.

13. Turning to the evidence of the victim, the learned counsel would submit that, a child of tender age was prone to tutoring. The victim gave vital admission suggesting that she was instructed how to depose before the Court. The so called independent witness, P.W.5 Bharti was admittedly a relation of the victim. The presence of the said witness was not borne out

either from the F.I.R. According to learned counsel, the offence warrant minimum punishment of 10 years. The quality of evidence, therefore, should have been sterling. Admittedly, there is no eye witness to the incident. The sole testimony of the victim, close to 3 years of age, ought not to have been relied on by the trial Court. The learned counsel, therefore, urged for allowing the appeal.

14. The learned A.P.P. and the learned counsel appointed to represent the victim would, on the other hand, submit that, the trial Court, on examination of the victim, found her to be a competent witness. In view of the previous statement of the victim made to her mother and grandfather, her testimony before the Court gets corroborated. The delay in lodging of the F.I.R. has been properly explained. An independent witness has been examined. The victim's statement under Section 164 of the Criminal Procedure Code reinforces the prosecution case. To support these submissions, the learned A.P.P. relied on the following authoritative pronouncements to ultimately urge for dismissal of the appeal.

- (1) State of Punjab Vs. Gurmit Singh
1996 AIR (SC) 1393

- (2) M. Nageswara Reddy Vs. State of Andhra Pradesh & ors. [2022 Cri.L.J. 2254]
- (3) Mahadev Gaur Bishwas Vs. The State of Maharashtra & anr. Criminal Appeal No.440/2019
- (4) Suryanarayana Vs. State of Karnataka 2001 AIR (SC) 482
- (5) Nivrutti Pandurang Kokate & ors. Vs. State of Maharashtra [2008 AIR (SC) 1460]
- (6) P. Ramesh Vs. State Represented by Inspector of Police 2019 AIR (SC) 3559
- (7) Rameshwar s/o Kalyan Singh Vs. State of Rajasthan 1952 AIR (SC) 54
- (8) Shaikh Anees s/o Shaikh Hussain (Habib) Vs. State of Maharashtra & ors. [2022 All M.R. (Cri) 3150]

15. Considered the submissions advanced. Perused the evidence on record and the authorities relied on.

The birth certificate of the victim (Exh.53) indicates she was just 2 years and little over 10 months of age at the material time. The alleged incident took place by 11.30 a.m. on 20/1/2016. Admittedly, the appellant was residing along with his mother and children. There is also evidence to indicate that his brother along with his wife were also residing there. The prosecution did not lead any evidence to indicate

that at the relevant time the appellant alone was at his residence. Admittedly, none of the prosecution witness claimed to have seen the victim coming out of the house of the appellant. It is only on hearing of her cries her grandfather (P.W.2 Chandrakant) and mother (P.W.3) came out of their respective residences. The victim is said to have shared her ordeal with them. Close reading of the F.I.R. and evidence of P.W.2 Chandrakant and P.W.3 indicate that they claimed to have rushed to the police station immediately. Whereas P.W.3's statement indicates that they reached the police station by little past 7.00 p.m. As such, there is delay of little over 8 hours in lodging of the F.I.R. True, in case of Gurmit Singh (supra), it has been observed :-

“In sexual offences, delay in the lodging of FIR can be due to variety of reasons particularly the reluctance of prosecutrix or her family members to go to the Police and complain about the incident which concerns the reputation of prosecutrix and the owner of her family – It is only after giving it a full thought that a complaint of sexual offence is generally lodged and even if there is delay which is natural in the circumstances of the case, will not be fatal to the prosecution case.

The Court cannot overlook the fact that in sexual offences, the delay may be due to several natural reasons. The criticism by the Court as to why he did not complain to the lady teachers or other girl

student, when she appeared for the examination at the centre and waited till she went home and narrated the incident to her mother. The conduct of the prosecutrix was not natural. Her not informing the teachers or her friends at the examination centre under the circumstances could not detract from her liability. Moreover the evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to that extent it was more reliable and of great weight.”

16. Each case has to be decided on its facts and circumstances. Judicial observations are made in settings of facts. Proof of commission of a crime is necessarily a question of fact. In the present case, the delay was sought to be explained on the ground that the father of the victim was away at his work place. He was informed on telephone. Lodging of the F.I.R. was delayed as his arrival was awaited. Admittedly, the father of the victim came back from his work place on the following day. Admittedly, P.W.2 Chandrakant, the grandfather (male person), was in the company of the mother of the victim. He could have lodged the report at the earliest. It is not that no incident did take place. However, it is only the victim and the appellant who are in the know of what had actually happened. It is reiterated that, victim was just 2 years and 10 months old at the relevant time. It is just difficult to comprehend that she

would be able to state that the appellant licked her private part with his tongue and rubbed the same with his beard. It is also difficult to find that a child of such age could specifically state the words “tongue” and “beard”. The victim herself has testified that while she came to give evidence in the Court, she was instructed how to depose. Some portion of her evidence needs to be specifically adverted to. Since she did not understand sanctity of oath, she was not administered oath. To the questions as to ascertain number of her brothers and sisters, she testified to have 2 brothers and 3 sisters, when in fact she has only 2 brothers. She could not state as to how many days before the incident took place. She could not further state as to how she was in the know of the name, “Chhakuli”. She could not state the names of her friends.

17. The record indicates that, the victim’s statement was not recorded by the police on the given day. The victim’s alleged statement under Section 164 of the Criminal Procedure Code was recorded 12 days after the alleged incident. The same was not referred either to the victim or her mother, nor the officer who recorded the same was examined. As such, the said statement could not be considered to be a piece of

evidence, in the nature of the victim's previous statement.

18. True, Section 118 of the Evidence Act speaks of competency of a witness. The trial Court, after having put certain questions to the victim, found her to be a competent witness as she appears to have given rational answers to some of his questions.

19. The medical examination report of the victim runs counter to the prosecution case. The medical officer did not notice external or internal injury or even redness at the private part of the victim. In the facts and circumstances of the case, C.A. report or D.N.A. report would not have furthered the prosecution case. The investigating agency still collected blood and other sample and sent for tests. Admittedly, C.A. report and D.N.A. report were not produced before the trial Court for the reason of having not been received.

20. True, in view of Section 157 of the Evidence Act a former statement of a witness may be proved to corroborate later testimony as to same facts. Here, the victim's statement to her grandfather, mother and so called independent witness

is sought to be relied on so as to corroborate the victim's evidence before the Court. It is true that the grandfather, mother and the so called independent witness testified in one voice that the victim had related them what the appellant did with her. The question is, as to reliability of the evidence of the prosecution witnesses. P.W.5 Bharti, a neighbour, was examined. The F.I.R. does not suggest this witness arrived on hearing the cries of the victim. As such, presence of this witness has not been made out. Moreover, this witness (P.W.5 Bharti) was admittedly a relation of the mother of the victim. She belongs to the same caste. The record indicates that, the evidence of the mother of the victim and this witness was recorded on two different dates. A gap between the two was of about three months. P.W.5 Bharti testified that, on the day her evidence was recorded in the Court, she had come along with the victim's mother. Admittedly, the evidence of victim's mother was recorded three months before the evidence of P.W.5 Bharti was recorded. The mother of the victim accompanying P.W.5 Bharti to the Court suggests P.W.5 Bharti to have been influenced to give evidence in favour to the prosecution, although a direct suggestion in that regard was denied by the said witness.

21. Reliance on the judgment in the case of Mahadev Bishwas (supra) is of no assistance to the prosecution although victim therein was just 3 years and 5 months old at the relevant time, for the reason that there was medical evidence suggesting blood to have oozed from the private part of the victim. There were nail marks at the private part. The medical officer who examined the victim had recorded the history. So is not the case here. No history was narrated to the Medical Officer Dr. Ramkrushna (P.W.6). The medical examination report (Exh.52) is silent to record history.

22. Judgment in case of Suryanarayan (supra) indicates that a child witness therein was of 4 years old. It was an offence of murder. Homicidal death was proved. The presence of a child witness was made out from the F.I.R., lodged with promptitude. The child was 4 years old. The victim, in the present case, was 14 months younger than the child witness in Suryanarayan's case.

23. The facts in Nivrutti Kokate's case (supra) indicate that the child witness was 12 years old, necessarily of the age

of understanding. There can be no two views over what has been observed in paragraph No.9 in Nivrutti Kokate's case, as under :-

“9. In Dattu Ramrao Sakhare Vs. State of Maharashtra [(1997) 5 SCC 341], it was held as follows : SCC p.343, para 5.

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/ her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of

make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

24. Similar are the observations of the Apex Court in case of P. Ramesh (supra) and Rameshwar Singh (supra). The facts in Rameshwar Singh's case indicate the victim was 8 years of age while the child witnesses in case of P. Ramesh were of the age of 6 and 8 years respectively.

25. It is reiterated that there is no eye witness to the incident. The victim was 2 years and 10 months old at the relevant time. Although she was found to be a competent witness, her evidence indicates that she was instructed how to depose before the Court. She gave incorrect number of her siblings. She could not state their names or the names of her friends. She was even unable to state how did she know the name of "Chhakuli". The medical examination report does not support the prosecution. There was about 8 hours delay in lodging of the F.I.R. Although the appellant could not make out

his defence, there is every reason to observe that the mother and grandfather of the victim might have exaggerated the alleged incident. The presence of independent witness is not borne out from F.I.R. The victim's mother had accompanied the said witness to the Court on the day her evidence was recorded. The F.I.R. is silent to state that the appellant belongs to Maratha community. It is only in a supplementary statement that was recorded the very day, the informant stated the victim to have belonged to Scheduled Caste and the appellant to be of Maratha community. It is not known as to why the informant gave caste of the appellant. The evidence of the prosecution is silent to indicate the appellant to have committed the alleged crime only with a view that the victim belongs to Scheduled Caste. It was submitted by the learned counsel for the appellant that the appellant's was only family belonging to Maratha community residing in the said vicinity. He meant to say that it was an attempt on the part of the victim's family to ensure the appellant leave his place of residence from Samata Nagar. The offence is serious one. It warrants minimum sentence of 10 years imprisonment. To sustain a conviction, the evidence has to be of sterling quality. The appellant is in jail for little over three years and three months, besides his

detention in prison during investigation, enquiry and trial as well. The possibility of the child/ victim to have been tutored cannot be ruled out. On the contrary, the fact that child was tutored just before she gave evidence in the Court is made out from the cross-examination. The crime was registered on the basis of the F.I.R. containing hearsay statement. For little over 12 days on registration of the crime, the victim's statement was not recorded nor did the victim give history of incident to the medical officer. All these facts lead this Court to observe the prosecution to have failed to establish the charge beyond reasonable doubt. The trial Court simply relied on the evidence of the victim and the victim's mother and grandfather to record conviction. This Court is, therefore, not in agreement with the findings recorded by the trial Court. Interference with the impugned judgment and order is therefore warranted.

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

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The order of conviction and sentence dated 17/2/2020,

passed by Additional Sessions Judge-3, Jalna in Special Case (POCSO) No.19/2016 is hereby set aside. The appellant is acquitted of the offences punishable under Section 376(2)(j) of the Indian Penal Code, Section 10 of the Protection of Children from Sexual Offences Act and Sections 2(v) and 3(xi)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

(iii) 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, J.)

fmp/-