

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

905 CRIMINAL APPEAL NO.476 OF 2023

‘X’
Minor, through her natural guardian
and mother, ‘Y’.

... Appellant

... Versus ...

- 1 The State of Maharashtra
- 2 Datta Laxman Adagale,
Age 28 yrs., Rickshaw Driver,
R/o Behind Jahangir city,
Pangar Bavadi, Beed,
Tq. & Dist. Beed.

... Respondents

...

Mr. S.J. Salunke, Advocate for appellants

Mr. S.J. Salgare, APP for respondent No.1

...

CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.

DATE : 06th JULY, 2023

ORDER : (SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original informant as guardian of minor victim to challenge the acquittal of respondent No.2 by

learned Special Judge, under the POCSO Act, Beed, from the offences punishable under Section 354, 354-A, 376, 376(2)(j) of the Indian Penal Code, 1860 and punishable under Section 4, 8 and Section 9(l), 9(m) read with Section 10 of the Protection of Children from Sexual Offences Act, 2012, in Special (POCSO) Case No.80/2022 on 28.03.2023.

2 Heard learned Advocate Mr. S.J. Salunke for the appellant and learned APP Mr. S.J. Salgare for respondent No.1, at the stage of admission.

3 In short, the prosecution story is that the informant – mother of the victim was married to the accused, but the victim is the daughter from the first husband of the informant. The victim girl was taking education in 6th standard. Accused used to ply auto rickshaw and, therefore, he used to go to leave the victim to her school and used to pick her up. Usually, the victim used to come home by 8.00 p.m., but since three months prior to the First Information Report dated 15.05.2022 the victim was coming late till 10.00 p.m. When informant used to ask the reason to the accused, he used to say that he is having some work, but thereafter the informant noticed that the victim was looking depressed and was not disclosing anything. The accused also used to come under the influence of liquor and also used to pick up quarrels and used to beat the children. On 08.05.2022 when the accused

was consuming liquor in the house around 7.30 p.m., he asked the victim to fill the glass with liquor, at that time, informant told accused that he should not ask the girl to do such work. Thereupon, the accused abused her and assaulted her. He compelled the victim to fill the glass with liquor and tried to outrage the modesty of the girl. Informant told that she would keep the daughter and the son at her maternal place. The accused picked up quarrel with the informant on the next day. On 14.05.2022 the girl got confidence and told the informant that since last three months the accused was taking the rickshaw under a bridge and he used to consume liquor and used to kiss the girl and press her breast. When informant asked about the same to accused, he quarreled, assaulted informant and children and gave threat that he would kill them into pieces. Thereafter the informant went to Police Station and lodged the report.

4 After the investigation was over, charge sheet was filed with the Special Court under POCSO Act. The trial was conducted. Prosecution examined in all four witnesses. Taking into consideration the evidence on record and hearing both sides the learned Trial Judge has acquitted the accused. Now the original informant wants to challenge the said acquittal.

5 The first and the foremost objection, that is, required to be taken is that the informant and the victim girl turned hostile before the learned

Special Judge. The present appellant – informant has not proved her First Information Report. The victim, who can be said to be the victim of the alleged act, has also turned hostile. The learned APP representing the prosecution before the learned Special Judge, put the questions in the nature of cross. The appellant has flatly denied that the contents of the First Information Report were told by her though she has admitted the signature and even the girl has denied that she had given statement before the police. Both of them have denied the contents of their statement under Section 164 of the Code of Criminal Procedure taken by learned Judicial Magistrate First Class, Beed. Under the said circumstance, it cannot be stated that they are the victims as defined under Section 2(wa) of the Code of Criminal Procedure. The appeal will have to be dismissed at the threshold on this point. When questioned, the learned Advocate for the appellant submits that at the time of deposition the accused has promised them that he would look after them properly. They believed in him and, therefore, they gave evidence in such manner. We are absolutely not convinced with the reason. Under the promise that they would be looked after properly, nobody can extract what he wants. But, at the same time, that does not allow the person to speak lie, knowing it fully well that whatever they are now deposing by taking oath is false. When such situation arises, we are of the opinion that the learned Trial Court should consider as to whether the facts of the case require action to be

taken for the offence of forgery against such witnesses. There cannot be a compromise to the truth. If anybody is giving promise for speaking lie, then the Courts should scrutinize the evidence properly and in proper cases should take action of forgery. When it comes to the serious offences which are exclusively triable by the Court of Sessions or the Special Court and such false cases are registered, then the very purpose behind the enactment gets lost. If the allegations in the First Information Report were true, then such promise ought not to have deviated the informant and the victim from speaking true facts. Therefore, the reason now stated does not appeal to us.

6 The learned Advocate for the appellant has tried to rely on the decision in **Imran Shamim Khan vs. State of Maharashtra [2019 DGLS (Bom.) 366]**, wherein the victim was 9 years old and was pressurizing to turn hostile at the time of trial and resile from her earlier statement. It was held that her previous statement made before Magistrate at earliest opportunity under Section 164 of the Code of Criminal Procedure must be given credence, if it is being corroborated on material points by other evidence. He submits that based on the said ratio in this case also the conviction ought to have been awarded on the basis of statement of the victim under Section 164 of the Code of Criminal Procedure. We do not agree with the said submission. The first and the foremost fact required to be noted is that the appellant therein

was convicted for the offences punishable under POCSO Act and in the appeal he had come with the case that when victim has turned hostile, then he ought to have been acquitted. In that connection the Court had considered the other material also including the earlier statement of the victim under Section 164 of the Code of Criminal Procedure. Here, in this case, the girl as well as the victim has denied that the contents of Exhs.43 and 46, which were their statement under Section 164 of the Code of Criminal Procedure, were taken as per their say. Even if for the sake of argument it is accepted that those statements can be considered under Section 80 of the Indian Evidence Act without even examining the concerned Magistrate, who recorded the statement; yet, it is to be noted that in that event except the said statement there is nothing. The accused stood prosecuted for committing rape on the girl also and the Medical Officer was not examined before the learned Special Judge. For proving offences with which the accused was charged substantive evidence was required and it cannot be merely on the basis of the statement of the girl under Section 164 of the Code of Criminal Procedure. Therefore, no case is made out to admit the appeal. Appeal stands dismissed at the threshold.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)