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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.526 OF 2020

Shankar s/o Yelappa Waghmare
Age – 34 years, Occ- Labour
R/o Wadepuri, Taluka – Loha
District – Nanded

APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Station AUSA
Taluka – AUSA, District – Latur

RESPONDENTS

2. XYZ

.....
Mr. Sudarshan J. Salunke, Advocate for the appellant
Mrs. R. P. Gour, APP for respondent - State
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 3rd MARCH, 2023
PRONOUNCED ON : 3rd APRIL, 2023

JUDGMENT :

1. This appeal takes exception to the judgment and order dated 3rd September, 2020 passed by Additional Sessions Judge, Latur in Special Case (POCSO) No. 35 of 2014, thereby convicting the appellant for offence punishable under section 376 (1) of the Indian Penal Code read with section 6 of the Protection of Children From Sexual Offences Act and sentencing him to suffer Rigorous Imprisonment for 7 years and to pay a fine of

Rs.500/-, in default of payment of fine to suffer simple imprisonment for two months.

2. Prosecution case, in short, is that the informant (PW-2) was residing with her family in the field of Munna Mandade at Mauje Shivani. On 3rd July, 2014, since she was not feeling well, she along with her daughter went to hospital at Pan Chincholi, at about 3.00 p.m. Her husband had gone to village Nandiyal. Her son had gone for work at Gondri. Her daughter – victim, aged 10 years was alone in the house. When she returned home at 5.30 p.m. the victim came to her crying and on being asked the victim told that worker in the field of Bukke had come and asked water for drinking and when she was giving water to him, he picked her up, took in cattle shed, gagged her mouth by cloth, pushed her on fodder and raped her by removing all her clothes. At that time, Ganesh (PW-6) came there and on seeing him, the accused ran away. The informant narrated the incident to her husband and thereafter lodged report (Exhibit-45) at AUSA Police Station, on the basis of which Crime No. 122 of 2014 was registered for offence punishable under section 376 (2) (i) of the Indian Penal Code and under sections 3, 5 and 6 of the Protection of Children From Sexual Offences Act. After completion of investigation charge sheet came to be filed.

3. Charge for offence punishable under section 376 (2) (i) of the Indian Penal Code read with section 6 of the POCSO Act was framed against the appellant – accused, which he denied and claimed to be tried.

4. Prosecution examined 10 witnesses before the Trial Court, to prove its case. Defence of the accused was of total denial. Defence of the accused, as is clear from the tenor of the cross-examination and written statement filed under section 313 of the Criminal Procedure Code, is that of false implication due to quarrel on account of taking away drum sticks and rose flowers from the field of employer of father of the victim and not allowing father of the victim to pluck mangoes from the mango trees situated in the field of his employer. He claimed that he had plucked drum sticks and rose flowers from the field, where the informant and her family stays. The victim had opposed him from taking away drum sticks and rose flowers and, therefore, father of the victim was annoyed and he has framed the accused in a false case.

5. The Trial Court, after considering the evidence on record, convicted the accused, as aforesaid.

6. Heard learned advocate for the accused and the learned

Additional Public Prosecutor for the State. Perused the record and proceedings.

7. Unfortunately, the victim and her father, both have expired as is evident from the report submitted to this Court. Therefore, in view of ratio in ***"Arjun Kishanrao Malge V/s State of Maharashtra and Others"*** 2021 ALL MR (Cri) 1601, this appeal is being heard on merits, in the interest of justice.

8. Learned advocate for the accused assailed the impugned judgment and order of conviction on various grounds including that the victim is a tutored witness, which is brought on record in cross-examination of the victim. The medical evidence does not support the prosecution case. There is material variance in the evidence of PW-3 and PW-5, hence their evidence is unreliable and hence liable to be discarded. According to him, PW-5 – Laxmibai Verma is a chance witness. Further submission is that cloth allegedly put in the mouth of the victim at the time of the incident, is not seized by the Investigating Officer. Further it is submitted that age of the victim is not proved by the prosecution and her date of birth is not given on record. PW-2 – mother of the victim has not given the date of birth of the victim. He submits that though in the radiological examination report, approximate age of the victim is stated to be 10 to 12

years, according to him, PW-10 (Dr. Prerna Raje) who has placed said report on record, is not a radiologist. Therefore, she cannot opine about age of the victim. Further submission is that report of the radiologist is not a gospel truth and there are no reasons reflected in the said report as to on what basis age of the victim was determined to be between 10 to 12 years. He, therefore, submits that the prosecution has failed to prove that the victim was child at the time of the incident. In support of his aforesaid submission, he relied on ***"Manoj @ Monu @ Vishal Chaudhary V/s State of Haryana and Another"* 2022 ALL SCR (Cri) 638**. By relying on ***"Pohalya Motya Valvi V/s State of Maharashtra"* (1980) 1 SCC 530**, he submits that merely because blood stains were found on the pant of the accused, who is a labourer, is not an incriminating circumstance to be used against the accused. Learned advocate for the accused also places reliance on ***"Mayur Panabhai Shah V/s State of Gujraht"* AIR 1983 SC 66**, in support of his submissions. He, therefore, submits that the impugned conviction is unsustainable and the accused is entitled for acquittal.

9. Per contra, learned Additional Public Prosecutor supports the impugned judgment and order of conviction. According to her, the victim was minor and her evidence is trustworthy and

inspires confidence. Though the victim has admitted that there was discussion in their family about quarrel, however, the present case cannot be said to be the outcome of the quarrel about taking away of drum sticks and rose flowers. There are no omissions in evidence of PW-2 – mother of the victim. PW-3 and PW-5 though have not seen the actual incident of rape, however, they have witnessed that the accused and victim were in naked position and, therefore, they are eyewitnesses, immediately after the incident and their evidence is reliable.

According to her, the incident had taken place in the year 2014 and the evidence was recorded in the year 2017, so minor contradictions are bound to be there in the evidence of the witnesses. Fact remains that PW-2 – mother of the victim is illiterate lady. Victim's evidence is to be believed because she had immediately disclosed the incident to her mother. The FIR corroborates the version of the victim and PW-2. Nothing is elicited in the cross-examination of the prosecution witnesses, to dislodge their testimony. Evidence of PW-5 (Laxmibai Verma) supports the evidence of victim, PW-2 and PW-6. Distance between the house of PW-5 and that of the victim is hardly 50 to 100 feet. According to her, PW-5 is not a chance witness, but is a natural witness. PW-5 has stated that she has seen the victim

and accused on the spot, in naked position and the victim narrated the incident to her mother, in her presence. According to her, even the investigating officer – PW-8 has confirmed that the victim had given her age to be 10 years before him. Further, by placing reliance on Modi's Jurisprudence 2020 edition, she submits that medical evidence on record confirms the fact that the victim was child, as her secondary sexual characteristics were absent. She, therefore, by relying on **"Ranjit Hazarika V/s State of Assam" (1998) 8 SCC 635**, submits that the victim was child below 12 years of age, at the time of the incident and, therefore, the Trial Court has rightly convicted the accused for aggravated sexual assault. According to her, defence is not probable and since tricky questions were asked to the victim, she has given few admissions, however, the Trial Court has rightly appreciated the evidence and the conviction of the accused is justified.

10. PW-2 - mother of the victim, who had lodged the FIR (Exhibit-45), has deposed that she is illiterate and resides in Shivani for labour work along with her husband, one daughter and son. The incident had taken place three years back, in the month of Ashadh at about 3.00 p.m. She, along with her other daughter, had gone to Hospital at Pan Chincholi. Her son had

gone to Gondri for labour work and her husband had gone to Nadiyal. At that time, her younger daughter – victim, was alone at home. She returned home at about 5.30 p.m. at that time the victim came to her weeping. On being asked, the victim told her that a worker from the field of Bukke had been to their house and asked water from her and when she went to bring water, he shut her mouth and dragged her towards cattle shed. Her mouth was gagged by cotton cloth and rape was committed on her. Thereafter, when her husband returned home at about 8.00 p.m., she narrated the incident to him. Then their neighbour, Pratap More informed the incident to police and the police had been to their house. Then the police brought them to AUSA Police Station and she lodged the report (Exhibit-45).

In the cross – examination, she has stated that she has three sons and two daughters and all the children were born after gap of one and half year. Her two children are married. She did not understand for what purpose date 04.07.2014 is written in the report Exhibit-45. She admits that her husband was doing work on "auth" in the field on that day, thereafter he went to other village. She was residing at village Nandiyal when she conceived and delivered the victim. She has admitted that while she was pregnant with the victim, Anganwadi Sevika used

to note down the details of pregnancy.

She has also admitted that there are drum stick trees on the east – north corner of their house in the field of their employer Mandade. There is east-west thorny fencing between fields of Mandade and Rajeshwar Buke. She did not inform the incident to Mandade after she came to know about the same. She did not lodge report of the incident to police during 5.00 p.m. to 8.00 p.m. They visited the police station in the night and returned back to home in the next morning at about 10.00 to 11.00 a.m. At about 8.00 a.m. on the second day of the incident, they went to Civil Hospital, Latur for medical examination of the victim.

She has further admitted that she did not know as to what exactly was written in the complaint (Exhibit-45) and she had put her thumb impression as was directed by the Police. She has also admitted that on the day of the incident the accused had taken drum sticks from the trees situated in the field of Mandade and the victim had asked him not to take the drum sticks. The accused had also taken away some rose flowers, when he took drum sticks. She has further admitted that on the day of the incident, agricultural works were going on in the fields.

She, however, denied the suggestion that no such incident had taken place and since they were annoyed with the accused, since he did not allow them to take mangoes from the field of Bukke and took away drum sticks from the field of their employer Mandade, therefore, they have lodged false case against him.

11. The victim is examined as PW-3. She has deposed that at the time of the incident her mother, father, brother and sister were residing in the field of Munna Mandade at Shivani Bk. Taluka – Ausa. On the day of the incident i.e. on 3rd July, 2014, her brother had gone in the field situated in Bondri Shivar. Her father had gone out of station and her mother and sister had gone to hospital at Chincholi as her mother was ill. She was alone at her home. She washed clothes, cleaned the house and was cleaning utensils at about 4.00 p.m. Accused was residing near the field of Munna Mandade. He came and removed drum sticks from trees and also plucked some rose flowers and went away. He again came and asked her to give him water. Then he lifted her and took her to shed and threw on the heap of fodder. Since she started shouting, he gagged her mouth by putting a bundle of cloth in her mouth. Then he removed her clothes, unzipped his pant and inserted his penis in her vagina. He told

her that he will kill her if she discloses the incident to anyone. Then PW-6 Ganesh came there and the accused ran away. Thereafter PW-5 Laxmibai came there and she gave her water for drinking and when her mother and sister returned home, she narrated the incident to them. She has stated said fact before the police and also in the Court. Her statement (Exhibit-52) was recorded before the Judicial Magistrate. She was taken to civil hospital, after recording her statement. She has stated that the incident took place four years before and her age was 10 years at that time. The victim has stated that the police had seized her clothes, which were yellow colour petticoat and blue colour nicker. She identified those cloths, Petticoat (Article-1) and Nicker (Article-2) so also she identified the accused.

12. She has admitted in her cross-examination that on the day of the incident, her father was working in the field towards east-south direction from their house. Her mother left the house at 3.00 p.m. to go to hospital and returned home at about 4.00 p.m. on the day of the incident and, thereafter they did not go anywhere. She has also admitted that on the day of the incident, the accused, along with his wife and children, was in their field. The house of the accused is 50 feet away towards north-south direction from their house. She has admitted that the accused

used to take away drum sticks and rose flowers, therefore, her father had scolded him on the day of the incident, at that time, she was there and the accused had pushed her. She also admitted that on that day serious dispute took place due to taking away of drum sticks and rose flowers by the accused. She also admitted that prior to four days of the incident, the accused had restrained her father from plucking mangoes from the mango trees situated in the field of employer of the accused, due to said reason, her father was annoyed with the accused. She admitted that in spite of serious quarrel, the accused took away drum sticks and rose flowers. She has stated that after taking away the drum sticks and rose flowers, the accused did not come towards their house. Further admission is given that on that ground they discussed in the house and thereafter went to police station to lodge report and the case lodged by them in the police station at that time, is the present case. She could not tell full name of PW-6 Ganesh. She also could not give full name of the accused. Minor omissions, which are insignificant, are brought out in her evidence.

The victim has admitted that she does not know what contents were stated by her mother in the complaint lodged in the police station. She further admitted that she has given

statement in the police station and in the Court at Ausa, as was told to her by her parents. She went to the hospital in the night and returned from the civil hospital after 30 minutes, thereafter, they did not visit Civil Hospital, Latur. Her clothes were seized when she visited police station to lodge report at 9.00 p.m. on the day of the incident. She admitted that no writing work was done after her clothes were seized. She denied the suggestion that no such incident, as alleged by her and her mother, has taken place. She also denied that at the time of the incident, she was 19 years old and she has falsely stated that her age was 10 years.

13. PW-5 Laxmibai Verma is neighbour of the victim and her house is situated near the field of Munna Mandade. On the day of the incident, she heard shouts of the victim from her house and when she went near the victim, that time, the victim was in cattle shed and when she reached there the victim hugged her and cried and there were no clothes on her body. Soybean fodder was in scattered condition and the accused was also present there and there was no pant on his person. PW-6 – Ganesh came there and on seeing him, the accused zipped his pant and ran away. There was cloth in the mouth of the victim. She gave water to her for drinking. After some time, victim's

mother, who had been out of station, came there. The victim told her mother that the accused came and demanded water and took her in the cattle shed and raped her. Her statement (Exhibit-68) was recorded under section 164 of the Criminal Procedure Code in AUSA Court.

In cross-examination, PW-5 admitted that the informant – PW-2 is from her village and she came to Gondri with the help of the informant and they have good relations. She has stated that there was a pan shop near their house. She has further stated that there was no other person present in their house at the time of the incident. Her mother in law used to reside with them there. At that time, she had just delivered a baby. Her mother in law was residing there to take her care and to see that she should not go anywhere. On the day of the incident, the accused, his wife and children were at their house. PW-6 Ganesh came to the place of the incident 5 to 10 minutes after she reached there. She does not know the name of employer of PW-6 Ganesh. She did not know that field of employer of PW-6 Ganesh is not adjacent to the field where the informant -PW-2 is residing. She returned to her house at about 5.00 p.m. She did not know when PW-6 Ganesh left the place of the incident. According to her, the informant – mother of the victim came to

the place of the incident at about 4.00 p.m. Certain omissions are brought on record in her cross examination. She has also admitted that police told her as to how and which statement is to be given in the Court. Accordingly, she went along with the police to AUSA Court and gave statement. She denied that since no one from the village was ready to support the case of the victim and, therefore, at the request of mother of the victim, she and her husband became witnesses in this case, as they were all from the nearby villages. To the question that no such incident has happened with the victim and still she has come to give evidence, she replied that she had not seen the incident. She denied the suggestion that no such incident had taken place.

14. PW-6 Ganesh Barde has deposed that the incident occurred before 5 years. At that time, he was going to land situated at Shivani by foot-path, which is near the cattle shed in the field of Mandade. He heard cries of a girl and, therefore, went to see as to what had happened. Accused and victim were there in the cattle shed and victim was naked. Then he gave call to nearby woman (PW-5 Verma) and on inquiry with the accused, he told that he had come there to drink water. The victim told him that the accused demanded water and when she went to bring water, accused lifted her and brought her in the cattle shed and she

was forced to lie down on soybean fodder. Her clothes were removed by holding her legs and she was raped. Accused was there and he ran away by jumping. PW-5 Verma came there and she saw the victim and she wore clothes to the victim and also gave some water to the victim for drinking. Then mother and sister of the victim came there and the victim narrated the incident to them. His statement (Exhibit-72) was recorded under section 164 of the Criminal Procedure Code at Ausa Court.

In cross-examination, he has stated that he left the spot of the incident at about 3.00 to 3.30 p.m. and went to his field. Prior to that he was at the spot of the incident for about an hour. He reached to the field situated at village Shivani at about 4.00 p.m after leaving the spot of the incident. He admitted that at the time of the incident, wife and children of the accused were in their house. After the accused ran away by jumping, neither he nor PW-5 Laxmibai initiated any action by visiting any place. Omission that the accused ran away and neighbour PW-5 Laxmibai came there, is brought on record in his cross-examination. He has further admitted that the the victim had not told the incident to him and he also did not know as to what the victim told to her mother and sister. Portion marked "A" from his statement given before the police was confronted to him and he

has admitted that he had not stated the same to police and he did not know the contents of Exhibit-72. Certain omissions are brought on record in his cross-examination. He was unable to state as to why said facts were not mentioned in his police statement. He denied the suggestion that no such incident, as alleged had taken place and as he has cordial relations with the parents of the victim, he was giving false evidence.

15. PW-10 Dr. Prerna Raje, who had examined the victim and issued medical certificate (Exhibit-94) has deposed that on the day of the incident, she had examined the victim at 7.30 p.m. and on being asked the history, the victim had told her that the accused had forcible sexual intercourse with her. She found that hymen of the victim was ruptured and her secondary sex characters were not developed. There was no injury mark on the body of the victim. Radiological age of the victim was between 10 and 12 years. She took her blood, vaginal swab, anal swab, Buccal swab and hand nails and sealed them and handed the same to the police. Then she prepared report (Exhibit-94). She had seen the CA reports and as per the same, no semen was detected, however, according to her, false or negative report is possible if the victim changes clothes, passes urine and takes bath.

In the cross-examination, she has admitted that in column No. 6 of her report, it is mentioned that there is no evidence of violence on the body. In column No.10 of the report, she has mentioned that stain of semen and blood were absent. She has admitted that normally if a girl rides a bicycle then her hymen may be ruptured. She has further admitted that hymen may be ruptured due to playing games and working in field. She volunteered that there would be other injuries in such cases. She admitted to have mentioned in column No.11 of the report that there is old healed rupture and she has not mentioned in the report that said rupture was fresh or only ruptured. She further admitted that in column 18 of the report, she has mentioned old scar over left forearm and she has given opinion that she could not state whether the victim was subjected to forcible intercourse or not. It is mentioned in the report that there was no external injury on the body and there is no evidence of injury, scratch marks on external genital organ. She further admitted that if the victim did not take bath, changes clothes and do not go for urine frequently, then CA report may come positive. She further admitted that in the medical report (Exhibit-94) history narrated by the victim that accused forcefully raped her, is not mentioned. She denied that she has falsely deposed that the

victim narrated the history that the accused forcefully raped her. She also denied that she has falsely stated that she has collected sample of blood, nails, vaginal swab and anal swab etc.

16. PW-9 – Dr. Deepak Ranveer has examined the accused and issued Certificate (Exhibit-90). He has stated in his report that there is nothing to suggest impotency of the accused. His blood samples, public hair sample and semen sample were collected and were handed over to the police.

17. PW-4 Rajkumar Verma, husband of PW-5 Laxmibai has proved the spot panchanama (Exhibit-66).

18. PW-1 Govind Yadav was also a Panch witness to the spot panchanama, however, he has turned hostile.

19. PW-8 API Rafiq Sayyed was the investigating officer, he has stated the steps taken during the course of the investigation.

20. On careful scrutiny of the evidence led by the prosecution, it is clear that the prosecution witnesses are not reliable and trustworthy and the case of the prosecution is not supported by medical evidence.

21. The victim though alleges commission of rape by the accused, who is a fully grown up married man of 28 years of

age, yet the medical evidence belies her allegations. Medical certificate (Exhibit-94) does not record history of alleged rape by the accused. Impressions of the Medical Officer – PW-10 Dr. Prerna Raje, recorded in the medical certificate are as follows:

- I. Whether forceful intercourse has occurred or not can not be commented, final opinion can be given only after chemical analysis report.
- II. There is old healed rupture of hymen.
- III. There is no evidence of external injuries on her body.
- IV. There is no evidence of injuries / scratch mark over external genital organs.
- V. According to radiologist age of patient is between 10 to 12 yeas.
- VI. Blood sample, hand nails, vaginal swab, anal swab and Buccal swabs collected, sealed and handed over to police for chemical analysis.

22. It is clear from the above opinion that there were absolutely no internal or external injuries on the body of the victim, though she claims forcible sexual intercourse by the

accused. The medical certificate mentions that there is old healed rupture of hymen. There is not an iota of any material indicating forcible sexual intercourse. Neither there is any injury on the private part nor even a slight redness. In this view of the matter, it is difficult to accept the allegation of forceful sexual intercourse / rape.

23. The CA report further creates doubt about the prosecution case. No blood or semen is detected on the skirt (Exhibit-B1) and jangya (Exhibit-B2) of the victim. Blood is detected on full pant (Exhibit-A2) of the accused, mostly on the front portion of left leg. Blood group and semen of the accused could not be determined, as the results were inconclusive. Vide CA report (Exhibit-82) no semen was detected on the vaginal swab, anal swab and buccal swab of the victim. Blood group of the victim is "O", so the CA reports also do not support the prosecution case.

24. Coming to the deposition of the victim, she has given admission that there was serious dispute between the accused and her family members, as the accused had prevented her father from plucking mangoes from the field of the employer of the accused and he had taken away drum sticks and rose flowers from the field of employer of her father, which probablize the defence case that being annoyed with said dispute, the accused

is implicated in the false case. Admission of the victim that on the day of the incident her father had scolded the accused and on that day serious dispute had taken place due to taking away of drum sticks and rose flowers by the accused and 4 days prior to the incident, the accused had restrained her father from plucking mangoes from the field of his employer and due to that her father was annoyed with the accused and further admission that after taking away drum sticks and rose flowers, the accused did not come towards her house, further probablize the defence of the accused. Her further admission that they discussed in the house and thereafter went to police station to lodge report and she did not know what contents were stated by her mother in the complaint lodged in the police station and that she gave statement in the police station and in the court at AUSA as told to her by her parents, further creates serious doubt about prosecution version.

25. Evidence of PW-2 – mother of the victim, is also not reliable and trustworthy. She has admitted that she was 20 years old at the time of her marriage and she has three sons and two daughters born to her after a gap of one and half year between them. Her further admission that she did not know what exactly was written in complaint (Exhibit-45) and she put thumb

impression as directed by the police, that the accused had taken drum sticks of the trees situated in the field of Mandade and the victim asked the accused not to take away drum sticks and accused also took some rose flowers are to be considered in favour of the defence.

26. Evidence of PW-5 – Laxmibai and PW-6 Ganesh is inconsistent and there is material variance in their testimonies. PW-5 claims to have come to the spot on hearing shouts of the victim from her house and when she reached the spot, the victim hugged her and cried and there were no clothes on her person, soybean fodder was in scattered condition and accused was there and there was no pant on his person. She has stated that PW-6 Ganesh came there and on seeing PW-6, the accused closed chain and ran away. She admits that she had just delivered a baby and her mother in law used to reside with them to take her care and to see that she should not go anywhere. Though she has stated that there was no other person present in their house at the time of the incident, it is difficult to believe that she had left her newly born baby alone at house and went to the spot of the incident and stayed there for about an hour between 4.00 p.m. and 5.00 p.m. Following omissions in her evidence, which are proved from PW-8 Investigating Officer,

further create doubt about her version:

- i) my husband was working in the field of Tukaram Yelgude in the year 2014 (Omission is "year 2014")
- ii) father of victim was working in the field of Mandge
- iii) My house was situated near the field of Mandge
- iv) I heard shout coming from house (omission "house")
- v) Accused was not having pant on his person
- vi) By seeing Ganesh, accused closed chain of his pant
- vii) there was cloth in the mouth of victim.

27. Admissions of PW-5 Laxmibai that police told her as to how and which statement is to be given in the Court; her answer to the question whether it is correct to say that no such incident had taken place with the victim and still you came to give evidence- that she had not seen the incident, creates further doubt about veracity of this witness.

28. PW-6 Ganesh has stated that on hearing cries of girl, he went to see as to what had happened and the accused and the victim were in the cattle shed and the victim was naked, then he

gave call to neighbouring woman (PW-5). The victim disclosed the incident to him that she was raped by the accused at that time her mouth was wrapped by cloth. Accused ran away by jumping when PW-5 came there and she made the victim wear her clothes and gave water for drinking then victim's mother and sister came there and victim disclosed the incident to them. In cross-examination, he has stated that about 3.00 to 3.30 p.m. he left the spot of incident and went to his field, prior to that he was at the spot of the incident for about an hour. Omission in his evidence that the accused ran away and neighbour Laxmibai Verma (PW-5) came there is proved in evidence of the Investigating Officer. His further admission that the girl did not disclose the incident to him and that he did not know what the girl told to her mother and sister creates doubt in his deposition.

Further contradiction i.e. नंतर मला पोलीसांकडून आरोपी चे नाव शंकर एल्लप्पा वाघमारे रा. वडेपुरी ता. लोहा, जि. नांदेड असे असल्याचे समजले is also proved on record. He has deposed that he did not state said portion before the police.

29. PW-6 was unable to explain following omissions from his evidence, which were proved in evidence of PW-8 Investigating Officer :

I. Victim told that accused demanded water and when

she went to bring water, accused lifted her and bought her in the cattle shed and victim was compelled to lie down on soybean fodder and her clothes were removed by holding her legs, her mouth was wrapped by cloth and she was raped.

ii) Accused ran away by jumping.

30. Thus, it is clear that evidence of PW-6 is inconsistent on material particulars with the evidence of PW-5 Laxmibai and hence their evidence is unreliable.

31. The investigating officer has failed to seize the cloth, which was allegedly put in the mouth of the victim, to gag her.

32. In "***State of U. P. V/s Krishna Gopal and Another***" AIR 1988 SC 2154, the Supreme Court has held :

"24. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial-process. Eye-witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical-evidence, as the sole touch-stone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses

held to be credit-worthy, consistency with the undisputed facts, the 'credit' of the witnesses, their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation”.

33. In **"Mahindra V/s Sajjan Galpha Rankhamb and Others"** **AIR 2017 SC 2397**, the Supreme Court has held :

“.....Such medical evidence is also very important in assessing the testimony of eye witnesses and in determining whether the testimony of eye-witnesses can be safely accepted. Moreover, it is settled – law of criminal jurisprudence as has been recognized by this Court in State of U.P. V. Krishna Gopal, (AIR 1988 SC 2154) (supra) that “A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt.”

34. The Trial Court has erred in recording a finding that accused has not given explanation about finding of blood on his pant and this is very strong evidence against the accused and there is consistency in prosecution evidence connecting him with the crime.

In spite of admissions given by the prosecution witnesses that serious dispute took place on the day of the incident due to taking away of drum sticks and rose flowers by the accused and victim's father was annoyed with the accused, the Trial Court has recorded a finding that the prosecution witnesses had no reason to falsely implicate the accused and they had no animosity with

him. The inconsistency in evidence of the prosecution witnesses is not appreciated by the Trial Court, in the proper perspective. The blood stains found on the left leg of pant of the accused, is of no help to the prosecution, in view of the ratio in "*Pohalya Motya Valvi*" (*supra*), wherein it is held that blood stains on dhoti of an agriculturist is not an incriminating circumstance.

35. In "*Ranjit Hazarika*" (*supra*), the Supreme Court has held that to constitute rape, penetration, however slight, is sufficient. In that case, no injuries were found on the private part of the prosecutrix, who was subjected to sexual intercourse in standing posture. The evidence of prosecutrix inspired confidence. Nothing was suggested by the defence as to why the prosecutrix should not be believed or why she would falsely implicate the appellant. Statement of the prosecutrix had remained virtually unchallenged in the cross-examination and her statement was amply corroborated by her mother and father.

This ruling is distinguishable on the facts of the present case. It cannot be said that the evidence of the victim has gone unchallenged. The defence, in the present case, appears to be probable, which is duly suggested to the victim, her mother and other prosecution witnesses. Therefore, in my view, this citation would not help the prosecution.

36. After careful scrutiny of the evidence in the present case, I am of the view that there is substantial doubt as to the guilt of the accused.

37. For the aforesaid reasons, the impugned judgment and order of conviction cannot be sustained. Hence, the following order

ORDER

- I. The appeal is allowed.
- II. Impugned judgment and order of conviction dated 3rd September, 2020 passed by Additional Sessions Judge, Latur in Special Case (POCSO) No.35 of 2014 is hereby quashed and set aside.
- III. The appellant – accused be released forthwith, if not required in any other case.
- IV. The appellant to execute personal bond of Rs.25,000/- in terms of section 437-A of the Criminal Procedure Code.

[NITIN B. SURYAWANSHI]
JUDGE