

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

CRIMINAL APPEAL NO.770 OF 2022

Vishal Sharad Shelke,
Age : 22 years, Occ.Agri.,
r/o. Belgaon,
Tq. and Dist.Beed

..Appellant

Vs.

1. The State of Maharashtra
2. "X"

..Respondents

Ms.Ashwini A. Lomte, Advocate h/f. Mr.S.J.Salunke, Advocate for
appellant

Mr.N.T.Bhagat, Advocate for respondent no.1

Mr.U.S.Mote, Advocate for respondent no.2

CORAM : R.G. AVACHAT, J.

DATE : MARCH 23, 2023

ORDER :-

By this appeal, the appellant challenges the order of conviction and sentence dated 29.09.2022 in Special (POCSO) Case No.03 of 2021 passed by the learned Special Judge and Sessions Judge, Beed, whereby the appellant has been convicted for the offence under Section 3 punishable under Section 4(1) of the Protection of Children from Sexual Offences Act, 2012 and under Section 376(2)(f) of the Indian Penal Code.

2. Heard learned counsel for the parties.
3. Learned counsel for the appellant would submit that none of the prosecution witnesses supported the prosecution. The trial Court still convicted the appellant. According to learned counsel, the moral conviction has no recognition in criminal jurisprudence. Learned counsel took me through the evidence of the prosecution witnesses to ultimately urge for allowing the appeal.
4. Learned APP would, on the other hand, support the impugned judgment of conviction and consequential order of sentence. Learned counsel representing respondent no.2 - victim supports the appellant herein.
5. At the relevant time, the appellant was 22 years of age. It is the case of prosecution that on 19.10.2022, by 09.00 in the morning, the appellant intercepted the victim (PW 1) while she was returning from the field after answering nature's call. The appellant allegedly fondled her breasts and placed his private part in the mouth of the victim. The appellant snapped the photographs of these acts by making use of the cell phone and threatened the victim to make it viral.

6. PW 1 – victim, therefore, shared the incident with her family members and ultimately, lodged the First Information Report (Exh.14) on 24.10.2020.

7. Based on the FIR (Exh.14), crime vide C.R.239 of 2020, came to be registered for the offences punishable under Sections 376(3), 323 and 506 of Indian Penal Code, Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 67-B of the Information and Technology Act. The statements of the persons acquainted with the facts and circumstances of the case were recorded. The appellant was arrested. The scene of offence panchnama (Exh.17) was drawn. Both appellant and victim were medically examined. The cellphone of the appellant came to be seized from him. It was sent to C.F.S.L. to retrieve the data therefrom. On completion of investigation, the appellant came to be proceeded against by filing the charge sheet.

8. Learned Special Judge framed the Charge (Exh.6). The appellant pleaded not guilty. The prosecution examined ten witnesses and produced in evidence certain documents.

9. The trial Court examined a witness in exercise of powers under Section 311 of the Code of Criminal Procedure and on appreciation of the evidence in the case, convicted the appellant and consequentially sentenced, as stated above.

10. Considered the submissions advanced. Perused the entire prosecution evidence, oral and documentary.

11. PW 1 was the victim. It is in her evidence that no incident, as has been narrated in the FIR (Exh.14), did take place on 19.10.2020 by 09.00 a.m. On close reading of the entire examination-in-chief and her cross-examination conducted by learned APP, nothing could be elicited to make out the offence as was alleged in the FIR. Admittedly, the incident had not been witnessed by anyone. In the circumstances, the evidence of PW 1 (victim) was material one. She herself did not stand by the prosecution. It appears that the appellant was a distant cousin of the victim.

12. PW 2 – Krishna, uncle of the victim, too did not stand by the prosecution. He was shown photographs Articles "A" to "C".

According to him, in the photograph Article "A", the appellant and the victim girl are seen.

PW 3 is the father of victim. He too did not stand by the prosecution. Same is the case of other prosecution witnesses, except the police official who played role in the investigation of the crime.

13. It is reiterated that close reading of the evidence of each and every prosecution witnesses leads this Court to observe that there is no shred of material to connect the appellant with the offence in question.

14. Learned Special Judge, in exercise of powers under Section 311 of Cr.P.C. examined Mr.Amol Zodape, Scientific Officer, Cyber Crime and TASI Forensic Laboratory, Aurangabad. This witness had examined and inspected the mobile, sim card and memory card seized from the appellant. He compared the data on the mobile and the memory card. He then compared the reference photographs with the said data. According to him, the data stored in the mobile and the memory card tallied with the reference photographs. He gave his report vide Exh.65.

15. Learned Judge has observed in paragraph 29 of his judgment as under :-

“29. PW 1 victim, PW 2 her uncle, PW 3 father of victim, PW 4 cousin grand-mother of victim and PW 6 cousin grand-father of victim are witnesses. Their evidence can be said to be direct in nature. However, all these prosecution witnesses showed their back to the prosecution case. Therefore, let's turn towards other evidence on record.”

16. Relying on the evidence of the Court witness, the trial Court observed that the prosecution has proved that on the given day, the appellant committed the alleged acts, which constituted the offences he was charged with. There are two photographs on record, wherein, a boy and a girl are seen. The photographs suggest the alleged acts took place. The photographs are alleged to have been obtained from the data of the cellphone of the appellant. There is no certificate under Section 65-B of the Evidence Act in proof of those photographs. Learned Judge observed that the persons appearing in the photographs were the appellant and the victim, since those photographs were shown to PW 2, uncle of the appellant, and he testified accordingly. On close reading of the examination of the appellant under Section 313 of Cr.P.C., it appears that this piece of evidence (what has been deposed to by PW 2

identifying the persons in the photographs) was not put to the appellant as one of the incriminating circumstances. The trial Court, therefore, could not have relied on that piece of evidence to record the finding of conviction.

17. It is reiterated that the victim and all other witnesses, except the police official who were involved in the investigation of the crime, did not stand by the prosecution. As such, the prosecution has failed to establish the Charge. The trial Court, based on such quality of evidence, erred in convicting the appellant herein. Interference with the impugned order, in the facts and circumstances of the case, is, therefore, warranted.

18. In the result, the appeal succeeds. Hence, the following order:-

(i) The appeal is allowed.

(ii) The impugned order of conviction and sentence dated 29.09.2022 in Special Case (POCSO) No. 03 of 2021 passed by the learned Special Judge and Sessions Judge, Beed, is set aside.

(iii) The appellant is acquitted of the offence under Section 3 punishable under Section 4(1) of the Protection of Children from Sexual Offences Act, 2012 and punishable under Section 376(2)(f) of the Indian Penal Code.

(iv) He be released forthwith, if not required in any other case.

(v) Fine amount, if any, deposited by the appellant be refunded to him.

[R.G. AVACHAT, J.]

KBP