



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.477 OF 2020

Bhagwan Alias Balu Appasaheb Dalve
Age 40 years, Occu.Aгри.,
R/o Jaigaon, Tq. Parli Vaijnath,
District Beed

... APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Station Officer,
Police Station, Sirsala,
Tq. Parli Vaijnath, Dist. Beed.
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad)
2. X Y Z d/o Asaram Shinde,
Under guardianship of real father,
Asaram Sahebrao Shinde,
Age major, Occu. Agri.
R/o Jaigaon, Tq. Parli Vaijnath,
District Beed

... RESPONDENTS

.....
Mr. S.J. Salunke, Advocate holding for
Mr. A.A. Khande, Advocate for appellant
Mr. S.R. Wakle, A.P.P. for respondent
Mr. S.G. Kawde, Advocate for respondent No.2
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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 14th March, 2024

Date of pronouncing judgment : 15th March, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

The appellant was prosecuted for committing rape of a
girl child in the age group of 12/13 years during the period from

Summer 2012 to Diwali of 2016 after having administered her a stupefying drug. The Trial Court i.e. the Special Court constituted for trial of offences under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short) convicted the appellant for the offences punishable under Sections 376(2)(i)(j)(n), 328, 506 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 and consequently sentenced to suffer imprisonment for life which shall mean imprisonment for the remainder of his natural life, rigorous imprisonment for 10 years and rigorous imprisonment for 7 years respectively and to pay fine of Rs.20,000/- (Rupees twenty thousand) on each count. No separate sentence was inflicted for the offence punishable under 6 of the POCSO Act. The substantive sentences have been directed to run concurrently.

FACTS :

2. The victim "A" was 12 years of age in the year 2012. She was resident of village Ambajogai. During Summer and Diwali Vacations, she visited village Jaigaon, Taluka Parli Vaijnath during the period of three years i.e. from 2012 to 2016. Nikhita, Tanuja, Radha and Pratiksha were her friends. The appellant, resident of village Jaigaon was 36 years of age at the relevant time. He administered the victim stupefying laced with water, eatables like *Pohe* etc. many a time to make her unconscious. During all such

occasions, the appellant committed sexual intercourse with her under Peepal and Wood-Apple tree in a field and even at his residence once.

3. It was on 26/12/2016 the victim experienced stomach pain. Her grandmother, therefore, took her to Swami Ramanand Teerth Rural Medical College & Hospital for examination. A lady doctor there enquired with her whether anybody had sexual intercourse with her. The victim thereupon gave a history of sexual assault committed by the appellant many a time. The victim was medically screened. Samples of her certain things were obtained. The victim then lodged First Information Report (F.I.R. - Exh.17) with Sirsala Police Station, District Beed.

4. A crime vide C.R. No.0170/2016 for offences punishable under Sections 376, 328, 506 of the Indian Penal Code and Sections 3, 4, 7 and 8 of the POCSO Act was registered. The appellant was arrested. Scene of offence panchanamas were drawn. Statements of persons acquainted with the facts and circumstances of the case were recorded. The appellant too was medically screened. Clothes on the person of the appellant and the victim were seized. Upon completion of the investigation, the appellant was proceeded against by filing a charge sheet before the Special Court (Trial Court).

5. The Trial Court framed the charge (Exh.7). The appellant pleaded not guilty. His defence was of false implication. According to him, a sum of Rs.4 Lakhs was lent to the family members of the victim. Only with a view to avoid repayment thereof, a false F.I.R. has been lodged.

6. To bring home the charge, the prosecution examined 9 witnesses and produced in evidence number of documents. The Trial Court, on appreciation of the evidence in the case, convicted the appellant and consequently sentenced as stated above.

7. Heard. Learned counsel for the appellant took us through the evidence on record to ultimately submit that the victim's evidence is replete with inherent improbabilities. Material witnesses have not been examined. Medical evidence does not support the prosecution. The appellant is behind the bars for little over seven years. He therefore, urged for allowing the appeal.

8. Learned A.P.P. would, on the other hand, submit that the victim has given graphic details of the incident. She was being a child and apprehensive of her reputation, did not share her ordeal with her family members immediately. To base a conviction in case of rape, the sole testimony of a victim is sufficient.

9. The learned counsel for the victim made the submissions on the lines of the submissions made by the learned A.P.P. Both the learned counsel supported the impugned judgment and order and ultimately urged for dismissal of the appeal.

10. Let us advert to the evidence in the case and appreciate the same. For better appreciation, the oral evidence of the victim "A" is reproduced below :-

"1. I am originally native of Jaigaon, Tq. Parli. On the above place I myself, my brother, sister and grandmother resides along with me. Incident occurred in the year 2012 at Jaigaon at about 1.00 p.m. On that day Tanuja, Radha, my cousin sister Nikhita came towards me and given me water glass. Then after I have drunk said water. Then after Tanuja and Radha caught hold me and proceeding by walk and Nikhita was following us. Then after they took me towards tamarind tree and wood apple tree and lie me down. Then after Balu Kaka came there. I felt giddiness, therefore, I can't understand what happened next. When I regained my conscious at that time I was in the house of Tanuja. After 2/3 days my cousin sister Nikhita told me that Balu Kaka adulterate something in the said water. Then after Nikhita further told me that Balu Kaka uplifted my dress and committed sexual intercourse with me. Then after Nikhi further told me that Balu Kaka then dropped me at Pimpal tree and then after all of them took me to Tanuja's house.

2. After 8 days when we were playing under the Pimple Tree at about 11.00 a.m. at that time we prepared raw beaten rice (Pohe) for eating but nobody ate same except me. Then after I went on hillery

(Dagari) while playing at that time Balu Kaka on the spot. At that time Balu Kaka lifted me and took towards river. At that time I was shouting. After shouting at that time, Tanuja, Radha, Nikhita told me that I shall go and they will come later on. I know what happened till I was taken towards river side what happened afterward I don't know. When I regained my conscious I was under the tree of Pimpal. At that time, Nikhita, Tanuja and Radha were near me. Then after we came to Ambajogai as Summer vacation over. When I regained my conscious at that time I felt giddiness and there was stomach ache. Then after in the next Summer vacation we went to Jaigaon. On that day at about 2.00 to 2.30 Tanuja, Radha and Nikhita went to nature's call. At that time Tanuja given me eclair chocolate. I have ate said chocolate. Thereafter Tanuja and Nikhita caught hold me. Thereafter Balu Kaka came there. He uplifted my dress and committed sexual intercourse. At that time, I was conscious. Then after I became unconscious and regained conscious and found myself on the terrace (Ota) of Shriram Bhaiyya. At that time Balu Kaka removed my pant, Nikhita and Tanuja caught hold my hands. Then after Balu Kaka slept over my body and committed Sambandh. I told them that I intend to tell in my home at that time they given understanding to me whether such kind incidence to be tell in home. Then after we returned to Ambajogai after Summer vacation as Summer Vacation over. So also they told me that even if I tell in my home all of them will make me false. Balu Kaka threatened me to beat me if I tell to home.

3. Thereafter we went to Jaigaon in the Deepawali vacation. On that day, I myself, Tanuja, Nikhita, Radha and cousin sister of Balu Kaka namely Pratiksha were playing on the first floor of house of Balu Kaka. At that time Balu Kaka came there. At that time Tanuja, Nikhita and Radha kiss Balu Kaka. Thenafter Balu kaka kiss me. Thereafter I have narrated what happened to Pratiksha. Then after Pratiksha asked to Balu Kaka whether he kiss me. At that time Balu Kaka told me it is not her business and whether anything is less to her. I have not told said incidence to my father due to fear.

Then after we returned to Ambajogai.

4. In the year 2016, before Deepawali festival Balu Kaka came to my school and called me out through Peon of school under pretext of my guardian. At that time Balu Kaka told me that I was called to home as my family members came to know something about me. At that time I frightened. At that time Balu Kaka told me that I was sweating and make me drink the water from his glass. At that time I am feeling unwell and therefore Balu Kaka asked Kshirsagar Sir whether he can take me to room as my father is in the room. Balu Kaka told to Kshirsagar Sir that he was my uncle therefore Kshirsagar Sir allowed to go with him. Thereafter Balu Kaka took me to the Goddess Jogai along with my bag. Then after Balu Kaka took me to Shivaji Chowk in rickshaw and asked rickshawala to take us to Mukundraj. At that time rickshawala told him why he intend to take Mukundraj instead of Hospital. Therefore, Balu Kaka slapped him. Then after Balu Kaka took me in another rickshaw towards Bastion of back gate of Jogai Temple. At that time, flouriest saw us and informed to police. Therefore police came and took us to Police Chowki. Police enquired us, taken our name and other details and ask to go. Thereafter Balu Kaka tell me to go to lodge and I don't know what happened then after. Then after when I regain my conscious at that time I was in front of Raj Medical Stores. At that time I was not feeling well and there was pains in my vagina. Then after I went to the home.

5. As I was suffering from stomach pain therefore I have visited SRTR Hospital along with my grandmother on 26/12/2016. In the hospital, Swati Madam examined me prior to examination she asked me whether there is sexual relation with anybody. At that time I told her affirmative and therefore she ask about said person including his details name, how many children he have etc. At that time I told to her that said person was Balu Dalve from our village and he having two kids. Doctor Madam further asked me the name of son of him. At that time I told her name of his son is

Aryan. At that time doctor asked me how I went at that time I told her that I not went but I was taken by girls. Thereafter I have narrated the incidence in short to Doctor then Doctor informed to the police. Then after Police informed to my parents. Then after my parents decided to file case against Balu Kaka therefore we went to Ambajogai city Police Station. Then after we went to Police Station Sirsala. Then after police recorded my complaint on laptop, in presence of Dr. Rashmi Nawandar, professor Usha Mane, lady Police Constable Chhaya Tagad, Borade Saheb and my grand mother Kauslya Shinde. Then after I have read over the printed complaint. Its contents were true and correct therefore I put my signature on it. I can identify said FIR statement if shown to me as it bears my signature. Now I saw my FIR statement dated 27/12/2016 from the record of the case. It bears my signature on each page in toto three signatures. The contents are true and correct. Complaint is marked and exhibited Exh.16.”

11. The victim referred to the F.I.R. (Exh.17) and a statement recorded under Section 164 of the Criminal Procedure Code (Cr.P.C.). Her evidence before the Court may find to have been reinforced by her previous statements in the nature of F.I.R. and the statement under Section 164 of the Cr.P.C.

12. Then we have evidence of P.W.2 “N”, a friend of the victim. Again for better appreciation, we reproduce her evidence.

“1. Aakansha Tanuja, and Radha are my friends. Aakansha is studying in school at Ambajogai. Aakansha used to come to village in Summer vacation. The incident took place in the year 2012. The incident took place at 1.00 p.m. under the tree

of tamarind. The incident took place at Jaigaon under the tree of tamarind. At that time Tanuja, Aakansha, Radha and myself were present on the spot. At that time, Balukaka came there. Tanuja and Radha have caught hold hands and legs of Aakansha. Balukaka committed wrongful act with Aakansha. In the place of urine of Aakansha he
.. The witness not completed the sentence in spite of sufficient time given. Hence, Court directed A.P.P. to proceed further on another point. Then after Aakansha went to home. Balukaka had given ice water with pill to Aakansha prior to commission of wrong act. Aakansha felt giddiness due to drinking of said water. Aakansha was under state of drowsiness when wrong acts were committed. Then after we took Aakansha to the house of Tanuja.

2. After 8 days from the above incidence myself, Aakansha, Radha and Tanuja were playing Bhatukli at about 1.00 p.m. under Pimpal tree. At that time we have prepared Pohe. Balukaka added medicine in Pohe. Balukaka given Pohe only Aakansha for eating. Then after Balu Kaka lifted Aakansha and taken towards river side at that time Aakansha was shouting. At that time myself, Tanuja and Radha told to Aakansha she shall go and we will reach within 10 to 12 minutes. Then after Balukaka drop Aakansha on the Oata of Shriram Bhaiya. That time Balukaka given Rs.500/- to me but I have told Aakansha that Rs.500/- given by my aunt. Then after on the next day I have told Aakansha that Balukaka given me Rs.500/- and both of us taken Rs.250/- each. Then after myself, Radha and Tanuja shifted Akansha to her house. Balukaka told Akansha such thing not to be tell in the family and he also given threats to Akansha not to tell otherwise he will kill. Then after myself, Tanuja and Radha went to the Court. The madam from Court ask to me what happened and I have narrated what was happened to madam. Madam written on laptop. Then after, I have put my signature on the written paper. A.P.P. requested permission to open the brown envelope on which the white chit with a

contents तिसरे न्याय दंडाधिकारी प्र. वर्ग. अंबेजोगाई पोलीस स्टेशन सिरसाला येथील गुन्हा रजिष्टर क्रमांक १७०/२०१६ कलम ३७६, ३२८, ५०६ भा. द. वि. सह कलम ३, ४ व ७, ८ बाल लैंगिक अत्याचार प्रतिबंधक कायदा, २०१२ मधील साक्षीदाराचा कलम १६४ फौजदारी प्रक्रिया संहिता कलम १९७२ प्रमाणे जबाब. On opening said envelope three sealed envelopes of statement of witnesses Tanuja Raghunath Dalvi, Radha @ Saroja Ramrao Shinde and Nikhita Navnath Shinde found. A.P.P. requested permission to open the sealed envelope of statement of witness Nikhita. Defence counsel Mr. Khandare having no objection of intactness of envelope. Hence, permission granted. On opening of sealed envelope the statement of witness Nikhita recorded under Section 164 of Cr.P.C. by the Court found. Said statement taken on record. Now, I saw the statement of Nikhita recorded by the Court under Section 164 of Cr.P.C. before the Court dated 6/1/2017 from the record of the case. it bears my signature. Contents are true and correct. Statement of Nikhita recorded by the Court under Section 164 of Cr.P.C. before the Court dated 6/1/2017 is hereby marked and exhibited **Exh.23**. Balu kaka touched the place of urine of Aakansha by hand and leg. Balukaka removed her dress. I don't know what Balukaka did. Balukaka, Tanuja and Aakansha present there. I can identify Balukaka if shown to me.

13. This witness too referred to her statement recorded by the learned Magistrate (Exh.23).

14. Appreciation of the evidence of the aforesaid two witnesses would indicate that the victim, P.W.2 "N" and their other friends namely Tanuja, Radha and Pratiksha were in the age group of 12 to 14 years. It is just illogical to imagine that all these 4 friends of the victim would assist the appellant to commit sexual

assault on the victim in a manner as alleged. Tanuja and Radha have not been examined.

15. The appellant is also alleged to have had been to the school of the victim, claiming to be her family member. He took the victim from the school. None of the school authorities namely the Head Master/ Teacher of the victim has been examined. The appellant allegedly took the victim first to Jogai Temple, a crowded place. It is in the evidence of the victim that, even the appellant had slapped the autorickshaw driver in whose rickshaw they had travelled. It is further in her evidence that, a florist sitting outside the temple had also reported the matter to the police. Both, the appellant and the victim were taken to the Police Station. What happened thereafter is not known.

16. The appellant is alleged to have administered the victim stupefying eatables/ liquid through water and *Pohe*. *Pohe* were said to have been cooked under the Peepal tree. All the time the victim had allegedly become unconscious to find somewhere else after having gained consciousness. It was only in December 2016 she experienced stomach pain. Her grandmother therefore took her to S.R.T.R. Medical College & Hospital, Ambajogai. Her urine was obtained for test. The test report is not before the Court. Her grandmother did not allow her to be admitted to the hospital.

Their such conduct was against medical advice.

17. Close reading of the cross-examination of both the witnesses indicates no specific day or date of the incident has been given. It is reiterated that, the friends of the victim have not been examined. It is just illogical to imagine that her girl friends who were in the age group of 12/13 years, would assist the appellant to commit penetrative sexual assault on the victim. It is also reiterated that, none of the school authorities have been examined in proof of the prosecution case that the appellant, under the pretext of being a family member of the victim, took her away from the school and then ravished her. True, the medical examination report of the victim (Exh.37) indicates her hymen was ruptured. Reasons for rupture of hymen are more than one, including sexual intercourse. While the victim was medically screened, she gave the Medical Officer Dr. Ashwini (P.W.4) the history as follows ;-

“Pt. came to OPD at 26/12/2016 1.30 p.m. for pain in abdomen, there Dr. Swati Agrawal, Asstt. Proff. OBGY noticed of serious assault and referred for MLC, MLC was done, Pt. gives the H/o of sexual assault, Pt. is 14 yrs., unmarried, non-co-operative, Pt. given H/o of multiple sexual assault, Pt. gives H/o of penil penetration 2nd & 3rd episode. No H/o anal & mouth penetration, No H/o internal inj., multiple sexual assault from 2012 till 2016. Last time of sexual contact 2015 Oct. & 2016 Oct. only lip kissing done. Pt. has changed clothes & washed genetilia. But Pt. was not willing for medical examination. Afterward this MLC was informed to

Ambajogai Police Station 02446-247100 at 1.50 p.m. & 2.15 p.m. & letter was sent. Pt. was brought by L.P.C. 1870, C.P. Tagad, Police Station, sirsale & P.N. 1400 Solanke, Police Station, Sirsala on 28/12/2016, 12.15 p.m. Pt. Came for medical examination. After 26/12/16 Pt. Left, later no H/O of any sexual contact, No H/O external injury till 28/12/16, 12.15 p.m.”

18. The reading of the aforesaid history would indicate that it was the claim of the victim that the appellant had only kissed her in the month of December 2016. The last sexual assault took place about 3 months before she was medically screened. It is not known as to why the grandmother or parents of the victim have not been examined.

19. The Medical Officer Dr. Ashwini (P.W.4) gave her provisional opinion as under :

“I am of the opinion that I cannot predict whether accused has performed sexual intercourse or not.”

The opinion was reserved pending receipt of the C.A. reports.

20. The C.A. reports (Exh.93) have been on record. No semen was detected on vaginal swab, vulval swab of the victim.

The C.A. report does not support the prosecution. Thus, the Medical Officer's report does not support the prosecution case.

21. The other witnesses namely P.W.3 Govind tendered in evidence school record (Exh.28) of the victim to indicate her date of birth was 1/1/2002. Although the victim was found below 16 years of age at the relevant time, we are of the view that the prosecution evidence referred hereinabove inspires no confidence to sustain a sentence of life imprisonment imposed against the appellant. Needless to mention, serious is the offence, stricter shall be the proof. We are not at one with the findings recorded by the Trial Court since, based on such quality of evidence, the Trial Court ought not to have convicted the appellant. Interference with the impugned order of conviction and consequential sentence is, therefore, warranted.

22. In the result, the appeal succeeds in terms of the following order :-

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The order of conviction and consequential sentence dated 10/02/2020, passed by learned Additional Sessions Judge,

Ambajogai in Special (POCSO) Case No.09/2017 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 376(2)(i)(j)(n), 328, 506 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to the appellant.

(iii) The Criminal Appeal stands disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-