



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

CRIMINAL APPEAL NO. 907 OF 2018

Madhav Rama Yelewad
Age: 36 years, Occu.: Labour,
R/o Bidrali, Tq. Basar,
Dist. Nirmal (Telangana State)

..APPELLANT

VERSUS

1. State of Maharashtra
2. XYZ
Through her Legal Guardian

..RESPONDENTS

....
Ms. R.S. Kulkarni, Advocate for appellant (appointed)
Mr. S.D. Ghayal, A.P.P. for respondent no.1 – State
Mr. S.S. Jadhav, Advocate for respondent no.2 (appointed)
Mr. C.P. Patil, Advocate for intervener
....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ**
RESERVED ON : 13th FEBRUARY, 2024
PRONOUNCED ON : 01st MARCH, 2024

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

1. The challenge in this appeal is to the judgment of conviction and order of consequential sentence passed by the Special Court constituted for trial for the offence under the Protection of Children from Sexual Offences Act, 2012 ('POCSO') on 23rd March, 2018 in Special (POCSO) Case No. 8 of 2017. The order of conviction and consequential sentence reads as under :-

Section	Act	Sentence	Fine
376(2)(f)(i)(n)(m)	I.P.C.	Life Imprisonment	Rs.5,000/- In Default S.I. for 06 months
377	I.P.C.	R.I. for 10 years	Rs.5,000/- In Default S.I. for 06 months
504	I.P.C.	R.I. for 01 year	Rs.2,000/- In Default S.I. for 02 months
506	I.P.C.	R.I. for 01 year	Rs.2,000/- In Default S.I. for 02 months
4	POCSO	R.I. for 10 years	Rs.5,000/- In Default S.I. for 03 months
6	POCSO	Life Imprisonment	Rs.5,000/- In Default S.I. for 03 months

The substantive sentences are directed to run concurrently.

2. The facts giving rise to the present appeal are as follows :

The appellant married P.W.3 – Ashatai (informant) in April 2007. The couple is blessed with three children, a son and two daughters. P.W.2 (victim) is one of the two daughters of the appellant and informant. Both, the appellant and informant would do labour work to earn their living. Parental house of the informant was at Bhokar. The appellant was resident of Bidrali (State of Telangana). Bidrali is the village neighbouring the village Bhokar. The victim would reside with her maternal grand parents, for education.

3. The F.I.R. (Exh.14) was lodged by the informant on 01st September, 2017 with Bhokar Police Station. The averments in the F.I.R. are to the effect that since four-five months before 01st September, 2017, the victim experienced pain at her anus. The informant suspected that the victim might have been suffering from piles. The informant, therefore, took her to a private hospital of one Dr. Vilas Bhokare for treatment. About eight days

before 01st September, 2017, the informant, the appellant and the victim were home alongwith two other children. It was night time. The appellant undressed himself. He undressed the informant. The appellant did sexual intercourse with her. He also did sexual intercourse with her against order of nature. The appellant woke up the victim and started removing clothes on her person. The appellant told the informant that he wanted to have sexual intercourse with the victim the same way. The informant requested him not to do anything with the victim. Do her (informant) the way he wanted. On the following morning, the victim related the informant that the appellant had sexual intercourse with her many a time earlier. She also related the informant that the appellant ejacuated in her mouth. He also did anal intercourse with her. The informant, therefore, left the victim at her paternal home at Bhokar and returned to her matrimonial home at Bidrali to live alongwith the appellant and the other children.

On 31st August, 2017, the appellant told the informant that he was going to visit Dharmabad. The informant suspected something amiss. She suspected that the appellant would go to her parental home and misbehave with the victim. She, therefore, informed her maternal uncle on phone. Her parents and sister, therefore, went to their field taking the victim along with them. The appellant went there. He picked up quarrel with his parents and sister-in-law. He assaulted the informant's mother and even threatened her of dire consequences. The informant, having learnt about the incident, went to her parent's home at Bhokar and lodged the F.I.R. (Exh.14). Crime vide C.R. No. 250 of 2017 was registered for the offences punishable under

Sections 376(2)(f)(i)(n)(m), 377, 504 and 506 of the Indian Penal Code and under Sections 4 and 6 of the POCSO. Both, the informant and the victim were medically screened. Scene of offence panchanama (Exh.34) was drawn. The appellant was arrested. Statements of both, the informant and the victim were recorded by Magistrate (statement under Section 164 of Cr.P.C.). Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, the appellant was proceeded against by filing the charge-sheet before the Special Court ('trial Court').

4. The trial Court framed the charge (Exh.4). The appellant pleaded not guilty. His defence is of false implication. According to him, his married sister-in-law was staying away from her husband. She was residing at her parental home at Bhokar. Her character was not good. She would talk to many persons on cell phone. He disliked the same. He would insist his parents-in-law to ensure that she gets married again. The victim was residing with his parents and sister-in-law. The victim was under their influence. The sister-in-law would show the victim obscene pictures on cell phone. According to him, the F.I.R. (Exh.14) was lodged to teach him a lesson as he quarreled with his parents-in-law over character of his sister-in-law.

5. The prosecution has examined six witnesses and produced in evidence certain documents, to establish the charge. The trial Court, on appreciation of the evidence in the case, convicted the appellant and sentenced as stated above.

6. Learned counsel appointed to represent the appellant would submit that the case is based on sole testimony of the victim. The victim was a child, prone to tutoring. The informant did not stand by the prosecution. Arrest panchanama of the appellant (Exh.42) indicates injury on his person. The appellant had been to the house of his parents-in-law on 31st August, 2017. There was a quarrel between him and his in-laws. On appellant's arrest, he has not been medically screened. It was the in-laws of the appellant, who assaulted him. She would further submit that P.W. 6 - Investigating Officer took extra interest in the investigation. She went out of her way to ensure successful prosecution. Our attention has been drawn to Exh.58. It was a note in the handwriting of the investigating officer. It was given by her for tutoring. According to learned counsel, a police officer had already accompanied the victim for recording her statement under Section 164 of Cr.P.C., still investigating officer's presence was secured by the Magistrate concerned while recording victim's statement. Learned counsel would further submit that under the POCSO, re-examination of the victim is not permissible. Cross-examination is to be conducted in question-answer form. When the document (Exh.58) came to light, evidence of the victim had already been recorded. The appellant has thus been prejudiced in his defence. Extra interest taken by the investigating officer could be brought on record through re-examination of the informant. Investigating officer did not offer any explanation as to why she prepared the said document (Exh.58). On the day F.I.R. was lodged and victim was medically screened, victim's statement was not recorded. Victim's statements under Section 164 of

Cr.P.C. was recorded after seventeen days of lodging of the F.I.R. If one goes by the prosecution case, last alleged sexual assault on the victim took place in March/April 2017. There is delay of over five months in approaching the police. The victim admitted in her evidence that her maternal aunt was not behaving properly. The appellant would insist his parents-in-law to get his sister-in-law married, therefore there used to be quarrel between them. Learned counsel relied on the following authorities to ultimately urge for allowing the appeal :-

1. Vishal Vs. State of Maharashtra and Ors., MANU/MH/1433/2023

2. State of Karnataka Vs. Shivanna, MANU/SC/0400/2014

7. Learned A.P.P. would, on the other hand, submit that a nine years old daughter of the appellant has no reason to falsely implicate her father, the appellant. The daughter speaking against her own father goes a long way to infer the appellant to have committed the crime in question. According to learned A.P.P., although the informant turned hostile, her entire evidence does not get washed off. He relied on the Apex Court judgment in case of **Neeraj Dutta Vs. State (Govt. of N.C.T. of Delhi), (2023) 2 SCR 997** to submit that evidence of a hostile witness is required to be considered with due care and caution and that part of the testimony which is credit worthy must be considered and acted upon. He adverted our attention to the evidence of the informant to suggest that she admitted to have had given consent for medical examination of the victim and herself. She gave the history. Learned A.P.P. further relied on the judgment of this Court in case of

Ashok Mahadev Kannake Vs. State of Maharashtra, 2021 DGLS (Bom.)

1922 to submit that the facts therein were similar to the one in question. This Court convicted the appellant therein for having committed rape of his own daughter.

8. The informant is party to this appeal. Since she did not stand by the prosecution before the trial Court itself, Mr. Patil, learned counsel, who has filed an application for intervention on behalf of the informant submitted that the victim too concedes to allow the appeal. In view of this fact, we have appointed Mr. Satej Jadhav, learned counsel, to represent the victim in this matter and assist the Court. He submits that the appellant's defence under Section 313 of Cr.P.C. is afterthought. The informant had given the history of sexual assault on the victim and herself as well. According to him, testimony of the victim was sufficient to bring home the charge.

9. Considered the submissions advanced. Perused the evidence on record. We highly appreciate the able assistance rendered by Ms.R.S. Kulkarni and Mr.S.S. Jadhav, learned counsel appointed to represent the parties.

10. Paragraph no.18 of the judgment in case of Vishal (supra) reads thus :-

"18. The Hon'ble Supreme Court of India in the case of State of Karnataka Vs. Shantappa Madivalappa Galapuji and others, (2009) 12 SCC 731, has held thus:

"14. The position in law relating to the evidence of child witness has been dealt with by this Court in Nivrutti Pandurang

Kokate v. State of Maharashtra and Golla Yelugu Govindu v. State of A.P. 15.... "6....The Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Suryanarayana v. State of Karnataka)

7. *In Dattu Ramrao Sakhare v. State of Maharashtra it was held as follows: (SCC p. 343, para 5) :*

"5. ... A child witness if found competent to depose to the facts and reliable on 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."

The above position was highlighted in Ratansingh Dalsukhbhai Nayak v. State of Gujrat at SCC pp. 67-68, paras 6-7."

11. A child witness is prone to tutoring. A careful scrutiny of evidence of the child witness is a must. In the case in hand, although the prosecution has examined six witnesses, the only evidence that is relevant to decide the present appeal is that of the victim, a child of eight years old at the relevant time, besides medical evidence to some extent. P.W.1 – Jay is a witness to the scene of offence panchanama (Exh.9), while P.W.5 – Vikas is a witness to the panchanama (Exh.33) whereunder clothes on the person of the victim

were seized. The clothes were delivered by the informant (mother of the victim) to the police on 02nd September, 2017. The evidence of both these witnesses is of little relevance, since nothing incriminating was found at the scene of offence and C.A. report (Exh.29) relating to the clothes of the victim. Although the blood stains were noticed on her legging, the C.A. report (Exh.29) concludes that blood grouping of the blood stains was inconclusive. Moreover, the clothes were delivered a few months after the alleged last sexual intercourse.

12. P.W.3 – informant (mother of the victim) did not support the prosecution. It is true that evidence of hostile witness cannot be ignored in its entirety. A part of testimony which is credit worthy must be considered and acted upon. Evidence of the informant is to the effect that the appellant was short tempered. He would consume liquor occasionally and under influence thereof, used to pick up quarrel with her and even beat her up. She was staying at her matrimonial home at Bidrali. She was insisting him to reside permanently at Bhokar at her parents place. It is further in her evidence that on 31st August, 2017 the appellant had been to Bhokar. He picked up quarrel with his sister-in-law. The informant, therefore, lodged the report (Exh.14) against the appellant.

13. Since the informant did not stand by the prosecution, she was subjected to the searching cross-examination by learned A.P.P. She was confronted with certain matters appearing in the F.I.R. (Exh.14). She

disowned to have stated the same. She has, however categorically stated that the victim was medically screened, after she gave consent therefor. Her consent to that effect is at Exhibit 16. In response to the questions put during cross-examination by the defence, she testified that the victim would reside at her parent's house at Bhokar. Her sister – Kiran was also residing with her parents. Character of her sister was not good. She used to show the victim obscene pictures on her cellphone. The appellant dislike the same.

14. Although in cross-examination, evidence of the informant may appear to be an embellishment, there is some truth therein, since the victim in her cross-examination reinforces the same. The victim gave evidence while she was in fifth standard. It is in her evidence that she did not like the appellant since he did dirty things with her. The appellant would give threats to her life if she did not allow him to have sexual intercourse with her. It is in her evidence that while she was in third standard, she had accompanied the appellant to their field. The appellant showed her obscene pictures in his cellphone. He gave his private part in her hand and then in her mouth. He even ejacuated in her mouth. Again after two-three days while the mother was not home, the appellant did penovaginal intercourse with her. The appellant did not allow her to shout. Again two-three days thereafter, the appellant behaved with her similar way. He applied oil at her anus and inserted finger. Evidence of the victim further indicates that after appearing for fourth standard examination when she returned home, the appellant committed oral and penovaginal intercourse with her. It is further in her

evidence that some days before the report was lodged with the police, her parents and siblings were home. It was night time. The appellant removed clothes on the person of her mother. He also attempted to remove her clothes. The mother (informant) rescued her from the appellant. It is further in her evidence that thereafter she related her mother the past incidents of sexual assaults committed by the appellant. Her evidence further indicates that once she was referred to the government hospital for treatment considering it to be the pain due to piles. Evidence of the victim brought on record through cross-examination would be referred to while appreciating the evidence, with a view to avoid repetition.

15. P.W.4 – Dr. Mohan medically screened the victim. His evidence indicates that the history was narrated by the informant (mother of the victim). He noticed hymen of the victim to have been ruptured (old hymen rupture). As per examination perineal tear and urethra were intact. There was no anal injury. Hymen rupture may be possible for more than one reason. Medical examination report of the victim is at Exhibit 25. He reserved his final opinion pending receipt of C.A. report. C.A. report (Exh.29) do not further the prosecution case. The blood stains found on the legging of the victim could not be concluded of a particular group of blood.

16. P.W.6 – Poonam Suryawanshi did the investigation of the crime. Her evidence indicates that the scene of offence panchanama (Exh.34) was drawn by her. She got the statement of the victim recorded. According to her, the F.I.R. was recorded as narrated by the informant.

APPRECIATION :-

17. The question is whether based on sole testimony of the victim, an eight years old child at the relevant time, conviction and consequential sentence stands sustained. It is stated that a child witness is prone to tutoring. A child witness's evidence is required to be closely scrutinised. Learned A.P.P. may be justified in contending that a girl child did not have reason to falsely implicate her father. True, the victim has given details of the incidents happened with her. We, however cannot lose sight of the fact that the F.I.R. has been lodged by the informant (mother of the victim/wife of the appellant) eight/nine days after the alleged incident, wherein the appellant tried to disrobe the victim and expressed his desire to have sexual intercourse with her (victim). As per the prosecution case itself the victim thereafter related the informant three/four incidents of penovaginal and unnatural intercourse committed by the appellant about five months before the F.I.R. was lodged. Since the victim was medically screened about six months after last such alleged incident, the medical evidence does not speak of sexual assault.

18. As per the prosecution case itself, on the day before the F.I.R. was registered, the appellant had been to the house of his parents-in-law. He picked up quarrel and even assaulted them. It is only having learnt the same, the informant went to the house of her parents and lodged the F.I.R. (Exh.14) against the appellant. The same suggests there was anger in the mind of the informant against the appellant. Although the F.I.R. was lodged

on 01st September, 2017, statement of the victim was recorded by P.W.6 - Investigating Officer after twelve days, while the victim's statement under Section 164 of Cr.P.C. was recorded after seventeen days. It is not known as to why the Investigating Officer did not record victim's statement the day on which the F.I.R. was lodged. Admittedly, the victim was residing alongwith her maternal grand parents, maternal uncle and aunt as well. The same suggests the victim was under their influence at the relevant time.

19. After recording of evidence of the informant was over, a document (Exh.58) was placed on record. P.W.6 – Investigation Officer admitted the same to have been in her handwriting. Close reading thereof would indicate that those were the bullet points as to the victim's grievance against her father (appellant). P.W.6 – Investigating Officer failed to offer any explanation as to why did she prepare the said document and handed it over to the informant. The same suggests that the victim's statement before the Magistrate was preceded by prompting/tutoring in terms of document (Exh.58). Although, the informant did not stand by the prosecution, her evidence indicates that she lodged the F.I.R. at the behest of her parents.

20. There is one more reason for not to act upon the prosecution case. Kiran is the sister-in-law of the appellant. Although married, she was residing at her parent's house. The victim too was residing with them. The victim in her cross-examination testified in no uncertain terms that the appellant had a quarrel with her grand parents over behaviour of Kiran. She further testified that Kiran would talk with many persons on cellphone. The

appellant disliked the same. The appellant would urge his parents-in-law to see that Kiran gets remarried. There, therefore, used to be quarrel between the appellant and his parents-in-law. It is reiterated that on the day before the F.I.R. was lodged, the appellant had been to the house of his parents-in-law and quarreled and even assaulted them. It is the case of the appellant that it was he, who was at the receiving end. He was assaulted by his in-laws. Our attention was drawn to his arrest panchanama (Exh.42) wherein marks of old injuries have been noted. Admittedly, on arrest of the appellant he was not subjected to medical examination. It is not known as to why the Investigating Officer did not comply with the statutory mandate to have the appellant medically screened soon after his arrest.

21. The fact remains that the criminal law was set in motion against the appellant by lodging the F.I.R. on the following day on which he allegedly assaulted his parents-in-law. Same suggests the informant to have had a reason to grind an axe against the appellant. The victim was under the influence of the informant, informant's parents and sister – Kiran. Possibility of the victim, therefore, deposing against the appellant at their behest could not be ruled out. As such, it is a case based on sole testimony of the victim, child witness. P.W.6 – Investigating Officer appeared to have indulged in tutoring the victim. The alleged acts of sexual assault took place five months before the F.I.R. was registered. All these circumstances lead us to observe the prosecution case to have not been inspiring confidence to sustain conviction and consequential sentence of life imprisonment.

22. In the result, we pass the following order:-

I) Criminal appeal is allowed.

II) Order dated 23rd March, 2018 passed by Additional Sessions Judge (Special Court), Bhokar in Special (POCSO) Case No. 8 of 2017 thereby convicting the appellant for the offence punishable under Sections 376(2)(f)(i)(n)(m), 377, 504 and 506 of the Indian Penal Code and under Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012 and sentencing therefor is hereby set aside.

(III) The appellant stands acquitted.

(IV) The appellant shall be set at liberty forthwith, if not required in any other case.

(V) Fine amount paid, if any, be repaid to him.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

SSD