



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 506 OF 2023

1. Milind s/o Ashruba Dhanve,
Age : 39 years, Occu. : Service.
2. Pravin @ Pappu s/o Ashruba Dhanve,
Age : 34 years, Occu. : Agri.
3. Ashruba s/o Hasu Dhanve,
Age : 73 years, Occu. : Agri.

Appellant Nos. 1 to 3 R/o Gomalwada
Tq. Shirur Kasar, Dist. Beed.

4. Nitin s/o Ashruba Dhanve,
Age : 46 years, Occu. : Service.
R/o. Ambika Nagar, Dist. Beed.

.. Appellants
(Original Accused Nos. 1 to 4)

Versus

State of Maharashtra
Through Police Station Officer,
Shirur Kasar, Tq. Shirur Kasar, Dist. Beed

.. Respondent

WITH
CRIMINAL APPEAL NO. 714 OF 2023

X. Y. Z.

.. Appellant

Versus

1. The State of Maharashtra
2. Milind s/o Ashruba Dhanve,
Age : 39 years, Occu. :
3. Pravin @ Pappu s/o Ashruba Dhanve,
Age : 34 years, Occu. :

4. Ashruba s/o Hasu Dhanve,
Age : 73 years, Occu. :
5. Nitin s/o Ashruba Dhanve,
Age : 46 years, Occu. :
6. Dayabai Ashruba Dhanve,
Age : 65 years, Occu. :

All R/o. Gomalwada,
Taluka Shirur Kasar, Dist. Beed.

.. Respondents

Mr. Uttam L. Telgaonkar, Advocate for the Appellants.

Mr. S. M. Ganachari, APP for Respondent/State.

Mr. Shriniwas A. Kulkarni, Advocate for Appellant in Criminal Appeal
No. 714/2023.

CORAM : ABHAY S. WAGHWASE, J.

Date on which reserved for judgment : 09th February, 2024.

Date on which judgment pronounced : 26th February, 2024.

JUDGMENT :

1. Appellants-convicts hereby take exception to the judgment and order dated 09.05.2023 passed by learned Special Judge (POCSO), Beed in Special POCSO Case No. 2/2020 recording guilt for offence under Sections 323 and 324 r/w Section 34 of the Indian Penal Code (for short "I.P.C."). Likewise, the original complainant has also questioned the said judgment to the extent of acquittal of accused Nos. 2 to 6 from offence under Sections 354-A, 143, 147, 148, 504, 506 r/w Section 149 of the I.P.C. and under Sections 8 and 12 of the Protection of Children from Sexual Offences (POCSO) Act.

2. In brief, prosecution was launched against present appellants by Shirur Kasar Police Station, alleging that informant victim aged 17 years was standing outside her house on 02.11.2019 at around 8.30 a.m. According to her, accused Milind, Pravin and Ashruba came there. Accused Milind with bad intentions caught hold of her hand, pulled her and said that her father is not performing her marriage with him and suggested maintaining relations with him and offered to marry her. She raised shout. Upon which her grandmother and sister came. Accused Pravin beat her sister whereas, accused Ashruba pushed grandmother and abused her. After this it is alleged that, informant and her sister went towards garage of her father to inform about the occurrence. She alleged that, around 09.30 a.m. accused reached there and abused her father. Accused Pravin assaulted her father on head with iron tambi whereas accused Milind hit rod on his legs and accused Ashruba gave blows with stick whereas, accused Nitin gave kicks and fist blows. Because of said assault her father suffered bleeding injury and they approached police and lodged report which was registered.

3. PW-7 who took over investigation, arrested accused and on conclusion of investigation charge-sheeted accused and where resultantly tried by learned Special Judge who on appreciation of evidence held accused only guilty for offences punishable under Sections 323, 324 r/w 34 of the I.P.C. and acquitted accused from charges under Sections 354-

A, 143, 147, 148, 504, 506 r/w Section 149 of the I.P.C. and Sections 8 and 12 of the Protection of Children from Sexual Offences (POCSO) Act.

. It is the above judgment which is now taken an exception by filing instant appeal.

4. Provisions under Section 374 (2) of the Code of Criminal Procedure being invoked, this Court undertakes reexamination, re-appreciation and reanalysis of the oral and documentary evidence adduced by prosecution in trial.

5. On going through the record it transpires that, case of prosecution is rested on testimonies of seven eye witnesses and documentary evidence like FIR, panchanama, injury certificate etc. is also taken recourse too.

6. For proper comprehension, it is desirable to give the status as well as sum and substance of the testimonies of the prosecution witnesses which is as under.

7. **PW-1** - She gave her date of birth as 16.11.2002, her age as 17 years and that she was studying K.S.K. College, Beed. Regarding the occurrence dated 2.11.2019 she deposed that around 8.30 a.m. while she was standing in front of her house, accused Milind, Pravin and Ashruba came. Accused Milind caught hold her hand, pulled her saying that her

father is not performing her marriage and further proposed to maintain relations with him and that he would marry her. On shouts being raised by her, her grandmother and sister came, but accused Pravin and Ashruba beat, pulled and pushed them respectively and when they went to report the occurrence to her father around 9.30 a.m., above three accused along with one Nitin came there and assaulted her father with iron tambi, iron rod, wooden stick and fist blows respectively. She deposed about approaching police and lodging FIR.

8. **PW-2** her sister in para 2 deposed about hear and shouts of her sister and therefore, she and her grandmother rushed out and saw accused Milind had caught hold of her sister's hand asking to keep relations. She also deposed about she intervening and being beaten by accused Pravin by fist blows and her grandmother being pulled and pushed by accused Ashruba. She also deposed about accused reaching garage of the father and assaulting him.

9. **PW-3** injured father of PW-1 and PW-2 testified that around 9.00 to 9.30 a.m on 02.11.2019 while he was at the garage his daughter informed about forceful act of accused Milind holding hand. According to him, while his daughter was narrating about the occurrence, accused came there in a Tata Sumo. Accused Pravin hit him with iron tambi on head, about accused Milind hitting him with iron rod, accused Ashruba

hitting him with wooden rod and accused Nitin gave him kicks and fist blows, that they approached Police who referred him to Hospital. He identified accused as well as article iron tambi, iron rod and stick.

10. **PW-4** Panch -2 memorandum of disclosure and seizure of iron tambi, iron rod, wooden rod wide Exh. 51 deposed about disclosure being given and accused taking them and seizure being effected.

11. **PW-5** another eye witness stated that, daughter of PW-3 came followed by arrival of 4-5 persons in Tata Sumo and they assaulting Ambadas i.e .PW-3 who suffered injuries.

12. **PW-6** - Doctor who examined PW-3 and issued injury certificate Exh. 61.

13. **PW-7** - I.O. who narrated all steps taken by him till filing of charge-sheet.

SUBMISSIONS

14. Criticizing the judgment under challenge learned counsel would submit that alleged occurrence has taken place in two parts. He pointed out that regarding first episode, PW-1 and PW-2 can be said to be witnesses whereas, for second occurrence testimony of PW-3 and 5 are recourse to and relied by prosecution. He next submitted that, witnesses are firstly not consistent regarding the occurrences. According to him,

while appreciating the evidence learned Trial Judge has acquitted accused persons from alleged first episode, but again reliance is placed on same testimonies for recording guilt. He emphasized that, in fact, there is no charge about assault to PW-3, nor there is charge under Section 34 of the I.P.C. and thus, he submits that when there was no charge for Sections 324 or 323, conviction ought not to have been recorded as has been done by learned Trial Judge. Alleging false implication he pointed out that, in fact, there is history of land dispute and defence cross examination is on such lies. Due to previous grudge it is apparently a false equitation.

15. Attacking the prosecution case learned counsel would submit that by invoking Section 27 of Indian Evidence Act prosecution has attributed recovery. He would submit that, in the memorandum exact place of hiding articles has not been stated and therefore, it is his submission that such evidence ought not to have been relied and acted upon by learned Trial Judge.

16. He further submits that only interested witnesses are examined and no independent witnesses are examined even when alleged incident has taken place in busy locality. Lastly, he sought reliance on following cases and submitted that, there is improper appreciation of evidence by learned Trial Judge and even as settlement has not taken into account. It

is submitted that, the impugned judgment is liable to be set aside.

- (i) Ramesan and Ors. Vs. State of Kerala reported in 2007 CRI. L. J. 1637.
- (ii) Bhupesh Deb Gupta (Dead) by L.Rs. Vs. State of Tripura reported in (1979) 1 SCC 87.
- (iii) Mahbub Shah Vs. Emperor reported in LAWS (BOM)-1945-1-11.
- (iv) Harjit Singh and others Vs. State of Punjab reported in (2002) 6 SCC 739.
- (v) Boby Vs. State of Kerala reported in 2023 SCC OnLine SC 50.

17. Learned APP, while opposing the above submissions pointed out that testimony of informant victim, her sister and grandmother is consistent and they are all corroborating each other about arrival of accused, holding hand of informant with evil intention, victim raising alarm and PW-2 and her grandmother rushing to the spot. He pointed out that, they all are further consistent about being manhandled and they went to inform their father. It is submitted that, accused persons came there getting with iron tambi, iron rod and stick. They have put the assault on the PW-3. Roles of each of them is distinctly spelt out by injured as well as eye witnesses PW-1 and PW-2. There is medical evidence which support ocular account. There is recovery under Section 27. Learned APP submits that, there be overwhelming and intervening evidence. Guilt recorded is perfectly legal and so he presses to dismissal

of the appeal for want of merits.

ANALYSIS

18. On carefully shifting evidence of PW-1 informant, she has deposed about she was standing out her own house in the early hours of the morning. She testified about arrival of accused Milind, Pravin and Ashruba. She has alleged role of catching her hand by the accused Milind and has narrated the utterances made by him regarding suggesting victim to maintain relation with him and he would marry her specifically stating that her father is not marrying her to him. Said utterance is after catching her hand. Shouts raised by her. Her sister and grandmother has came out. Her elder sister PW-2 has also narrated as like her as stated by PW-1. She and her grandmother were also manhandled and she has deposed to that extent.

19. Regarding the first occurrence which took place in front of the house, both sisters are categorically lending support each other. On going through the cross faced by them, it is pertinent to note that in paragraph Nos. 6, 7, 8 and 9, question are posed about locality, surroundings and geographical locations of the surroundings and relations. It is abundantly clear that, first episode which took place in front of the house is not at all challenged in any manner.

20. Second episode seems to have taken place at the garage of PW-3

and on visiting on testimony of PW-3 father it is emerging that he has narrated that his mother as well as both daughters came to the garage around 9.00 to 9.30 a.m. and when his daughter informant was narrating about occurrence of 8.30 a.m. in which accused Milind had forcibly held her hand, accused persons came there and he has narrated the role of accused Pravin for hitting him with iron tambi, accused Milind hitting him with iron rod on legs and Ashruba giving blows with wooden stick and accused Nitin shower him with fist blows. He further stated that they all went to police station and it is the police who referred them to hospital and his daughter lodged complaint.

21. Questions are posed about accused Ashruba to be close relative, he residing in Mahatma Phule Vasti, about relations between complainant family and accused family to be relatives and relations between them to be strained since two days. Questions are posed about legal notice being sent to his own for cohabitation and some conversation taking place on 30.10.2019 and 31.10.2019. Cross in the form of question answer form in paragraph No. 7 also shows that incident of arrival of accused near the garage is not disputed. Similarly, his cross in paragraph No. 9 further clearly shows that there is no challenge to the second episode of beating to him.

22. Above witness is a injured witnesses. His substantive evidence

discussed about regarding assault to him has remained unshaken. By examining PW-6 - a medical officer, injuries suffered by PW-3 on 02.11.2019 are established. Injury certificate is also confirming the examination and injuries. Therefore, the prosecution has apparently established both the occurrences around 8.30 a.m. as well as between 9.00 and 9.30 a.m. i.e. incident of holding hand of informant, manhandling of PW-2 and grandmother and after an hour also accused coming to the spot in a vehicle armed with articles like iron tambi, iron rod and stick and beating PW-3 and also causing him injuries with same.

23. Panch in whose presence accused give memorandum of disclosure is also examined as PW-4, who is an independent witness and has deposed about accused Milind giving memorandum, expressing his willingness to hand over iron tambi, iron rod and wooden rod and taking panch and police towards the house of accused and from the dicky of the Tata Sumo vehicle said articles are being taken out and seized. Panchanama is also proved through this witness.

24. It is tried to be submitted by the learned advocate for the appellants that exact place has not been stated in the memorandum and therefore, recovery evidence cannot be relied. There is no substance in such submission. Law does not require stating the exact place, but what is relevant is information leading to discovery. Here there is evidence

about accused coming in Tata Sumo vehicle and amounting assault with above articles on PW-3. Recovery is from same vehicle of which description is given by injured himself as well as informant daughter. Consequently there is no reason to doubt recovery evidence.

SUMMATION

25. Here PW-1, PW-2 are consistent about occurrence at 8.30 a.m. during which informant, her sister and grandmother were all manhandled by accused Pravin, Milind and Ashruba. Nothing has been solicited in their cross to question the truthfulness of their testimonies. Second occurrence of assault is coming from the mouth of very injured also a victim of assault. He has categorically defined role played by each of them and who was armed with what, and who were hit him. Medical witness confirms assault. Therefore, ingredients for attracting offence under Sections 324, 323 of the I.P.C. are very much available in the evidence of prosecution.

26. Learned counsel for the appellants would strenuously submit that, there was no charge under Sections 323, 324 r/w Section 34 of the I.P.C. and he specifically invited the attention of this Court to the charge framed by learned Trial Judge at Exh. 28. Therefore, it is his submission that above conviction is bad in law.

27. There is no merit in above submission. True it is that in Exh. 28 charges which are framed and explained are for commission of offence under Sections 143, 147, 148 and 354-A of the I.P.C., but there is specific charge for offence under Sections 324, 323, 504, 506 r/w Section 149 of the I.P.C. Further here there is specific charge under Section 149 of the I.P.C. which is a substantive offence. Going by the charge-sheet it is emerging that, five persons were tried by learned Trial Judge i.e. accused Milind, Pravin, Ashruba, Nitin and Dayabai. Thus, there are five persons who are charge-sheeted however, only accused Nos. 1 to 4 are convicted.

28. When evidence on careful scrutiny makes out a case only against four accused, deriving strength from the judgment of the Hon'ble Apex Court in the case of Rohtas and another Vs. State of Haryana reported in (2021) 19 SCC 465, alteration of charge from Section 149 to Section 34 of the I.P.C. being held to be permissible, here there is no hurdle to uphold the conviction by applying Section 34 of the I.P.C. when accused are shown to be carrying common intention. Paragraph No. 17 of the said judgment is as under :

“17. This does not, however, imply that Courts can not alter the charge and seek the aid of Section 34 IPC (if there is common intention), or that they cannot assess whether an accused independently satisfies the ingredients of a particular offence. Sections 211 to 224 of CrPC which deal with framing of charges in criminal trials, give significant flexibility to Courts to alter and rectify the charges. The only controlling objective while deciding on alteration is whether the new charge would cause prejudice to

the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy. The emphasis of Chapter XVII of the CrPC is thus to give a full and proper opportunity to the defence but at the same time to ensure that justice is not defeated by mere technicalities. Similarly, Section 386 of CrPC bestows even upon the appellate Court such wide powers to make amendments to the charges which may have been erroneously framed earlier. Furthermore, improper, or non framing of charge by itself is not a ground for acquittal under Section 464 of the CrPC. It must necessarily be shown that failure of justice has been caused, in which case a retrial may be ordered.”

29. Evidence discussed above clearly shows that in both the episodes, initially accused Pravin, Milind and Ashruba went to the house of informant and after above stated occurrence there they came armed with iron tambi, iron rod, stick by occupying vehicle. Such material clearly indicates that each of them were sharing common intention and therefore, there is no illegality in convicting them for offence under Sections 323, 324 r/w Section 34 of the I.P.C. as is done by learned Trial Court.

30. Victim also preferred an appeal bearing No. 714/2023 questioning the acquittal of respondent Nos. 2 to 6 from charges under Sections 354-A, 143, 147, 148, 323, 324, 504, 506 r/w Section 149 of the I.P.C. and Sections 8 and 12 of the POCSO Act.

31. Learned counsel pointed out that, there is improper appreciation. There is clinching evidence against respondents for commission of

offence under Section 354-A, provisions under Sections 8 and 12 of the POCSO Act. Victim herself has deposed thereby defining role of all the accused. Above offences were proved by invoking Section 149 of the I.P.C. and thereby even guilt of accused from above offences is proved, but the learned Trial Court unfortunately acquitted them and therefore, so much part of the acquittal is required to be set aside and respondents may be acquitted from Sections 354-A, 143, 147, 148, 323, 324, 504, 506 r/w Section 149 of the I.P.C. and Sections 8 and 12 of the POCSO Act.

32. Perused the charge and Exh. 28-C wherein, five people are explained charge under Sections 143, 147, 148, 323 r/w 149, 324 r/w 149, 504 r/w 149, 506 r/w 149 whereas, accused Milind is charged for commission of offence under Section 354-A whereas, it seems that all accused are charged for commission of offence under Sections 8 and 12 of the POCSO Act.

33. Victim has given her date of birth as 16.11.2002 and she deposed that at the time of incidence she was 17 years of age, however, one does not find her age being proved by prosecution by placing on record birth certificate. Father PW-3 while in witness box has not given date of birth of PW-1 daughter, but merely spoke about she is taking education in K.S.K. college. Though investigating officer deposed about collecting age proof of victim from Zilla Parishad school, the same is not placed on

record. Therefore, here there is no conclusive proof about victim to be below 18 years of age on the date of incidence, the provision under Section 8 as well as under Section 12 cannot be attracted. Investigating Officer though has stated in paragraph No. 5 about collecting age proof from Zilla Parishad school, while under cross in paragraph No. 9 he admitted that he has not collected information from the school regarding document of age proof tendered by parents in school.

34. Resultantly, there is no conclusive proof to hold that victim is below 18 years of age. Hence, provisions under Sections 4 and 8 cannot be applied. Their roles are not defined and there is little or no evidence about there direct involvement. Even otherwise, there is mere testimony of PW-1 about accused No. 1 Milind catching hold of hand of victim. Therefore, there is no merit in the appeal filed by complainant for setting aside the judgment and order dated 09.05.2023 of acquittal of accused passed by the learned Special Judge (POCSO), Beed in Special POCSO Case No. 2/2020 for offence under Sections 354-A, 143, 147, 148, 504, 506 r/w Section 149 of the I.P.C. and under Sections 8 and 12 of the POCSO Act.

35. Consequently, in the light of the above discussion, no fault whatsoever can be found in the appreciation at the hands of learned Trial Judge. Evidence as well as law has been rightly applied. Hence, no case being made out in appeals. I proceed to pass following order.

ORDER

- (i) Both the criminal appeals stand dismissed.
- (ii) The impugned judgment and order dated 09.05.2023 passed by learned Special Judge (POCSO), Beed in Special POCSO Case No. 2/2020 is maintained as it is.

(ABHAY S. WAGHWASE, J.)

P.S.B.