



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

CRIMINAL APPEAL NO.371 OF 2017

. The State of Maharashtra through,
Police Station, M.I.D.C., Latur,
District – Latur .. Appellant

Versus

. Mahasagar Bapurao Jadhav,
Age: 23 years, Occu.: Teacher,
Resident of – Taka, Taluka – Ausa,
District – Latur .. Respondent
(Orig. Accused)

...
APP for Appellant: Mrs. Chaitali Choudhari - Kutti
Advocate for Respondent:
Mr. Dhananjay Shide h/f. Mr. Shashikiran N. Patil
...

CORAM : ABHAY S. WAGHWASE, J.
Reserved On : 14.06.2024
Pronounced On : 20.06.2024

JUDGMENT:

1. Getting dissatisfied by the judgment and order of acquittal dated 18.06.2016, passed by the learned Additional Sessions Judge-2, Latur, in Special Case (POCSO) 17 OF 2015, by which present respondent, who was charged and tried for offence under Section 3(b) read with section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sections 323, 504, 506 of the Indian Penal Code (IPC) came to be acquitted, State has preferred instant appeal.

IN BRIEF FACTS LEADING TO TRIAL ARE AS UNDER

2. **PW-3** victim, a boy, studying in 6th standard, who was residing in a hostel namely Vishva Vidnyan Gurukul Hostel since he was in 3rd standard. His parents lived at Latur.

3. On 17.10.2014, while the victim-boy was preparing for his first term examination, around 11:30 p.m. present respondent, a caretaker of the hostel, entered the boy's room and asked him to fetch water. The boy informed that he was afraid to go out. Again after half an hour, the respondent entered his room, switched off the light, disrobed the boy and inserted finger in boy's anus. The boy resisted, but still respondent allegedly took him to the first floor and again repeated the above act and threatened the boy to keep silent as he has to continue to remain in the hostel.

For Diwali vacations the boy went back to his house. While the vacations were over and it was time to return back to the academics and the hostel, informant father discussed with him about his departure. That time victim boy declared that he does not want to go back to the hostel and started weeping. On enquiry, the boy narrated the incident with him at the hands of respondent. Therefore, father initially approached the hostel authority and questioned them and subsequently

approached police and lodged report Exhibit-27, on the basis of which crime was registered.

After investigation respondent was chargesheeted and tried before learned Additional Sessions Judge-2, Latur. At trial prosecution examined as many as 9 witnesses and relied on documentary evidence. Defence denied to lead evidence and pleaded innocence and false implication.

After appreciating the prosecution evidence, learned trial judge reached to a finding that the prosecution failed to prove the charges by leading cogent, reliable evidence and, thereby, acquitted the accused from all the charges, i.e. under sections 323, 504, 506 of IPC and Section 3(b) read with section 4 of the POCSO Act.

It is the above judgment that is questioned by the State on various grounds raised in the appeal memo.

SUBMISSIONS

On behalf of the learned APP:

4. Appraising this court about the nature of charge, learned APP would strenuously submits that respondent no.2 was both a teacher as well as a caretaker of the boys hostel. That, PW-3 victim was a resident of said hostel. Unfortunate incident had taken place with the boy on the night of 17.10.2014. Finding the boy alone in the night time, learned APP

pointed out that, his own teacher - respondent, misbehaved with the boy and indulged in act of inflicting sexual assault. That, it was a pervert act by respondent not once but twice. Learned APP would submit that, the respondent accused has victimised his own pupil whom he was expected to take care. Being a teacher and a caretaker, efforts by the minor boy to resist went futile. It is pointed out that accused threatened to discontinue his residential stay in the hostel and, therefore, the child did not inform others and the owner of the hostel or even the uncle, who had come to pick him up. Learned app pointed out that the child was under stress and fear and, therefore, he also did not promptly report his father on reaching home for diwali vacations. She pointed out that only when it was time to go back to the hostel, for continuation of academics of the second term arrived, and when preparations were made to send him back to the hostel, the child made disclosure to his father. According to learned APP, because of peculiar nature of crime inflicted on him, there was delay in reporting and according to learned APP in cases of such nature, delay is insignificant. However, according to her, such aspect unfortunately prevailed and weighed over the opinion drawn by the learned trial judge.

5. Learned APP further submitted that father approached and questioned the respondent as well as hostel owner. Respondent fled after visit of father. Therefore, his such conduct confirms his involvement. She

pointed out that maternal uncle also deposed. Moreover, according to her the child has also testified in the witness box. His testimony was inspiring confidence and, therefore, according to her, there was clinching and overwhelming evidence confirming and establishing the pervert act of the accused. Prosecution had established all the charges but unfortunately as there is improper appreciation of evidence and law, it is her submission that trial ended up in acquittal. In the light of above submissions, she states that such judgment should not be allowed to be sustained and rather should be set aside by allowing the appeal.

On behalf of respondent - accused:

6. Pleading innocence and alleging false implication learned counsel for respondent pointed out that there is no dispute that the boy was residing in the hostel and that there is no further dispute that respondent was appointed as a teacher in the hostel. However, according to him, there was no such episode of alleged sexual assault. He pointed out that false and fabricated story has been set up only because the boy was caught redhanded watching of obscene clips on mobile of other boy and was reprimanded and was directed to call father to the hostel after diwali vacations. Only because of such episode, false story has been concocted and he is tried to be involved. He pointed out that mere fleeing

out of fear of being beaten, as is tried to be put-forth, would not itself be sufficient to infer his guilt or involvement.

7. Learned counsel pointed out that at the outset prosecution failed to established the age of the boy as according to him it was *sine quo non* in view of charge under section POCSO Act. He pointed out that prosecution failed to adduce single peace of evidence about victim boy to be a minor. He seeks reliance on the judgment of this court in the case of **Dinesh @ Nitin Ukandrao Khandate Vs. State of Maharashtra, in Criminal Appeal No.97 of 2020, dated 17.12.2020, reported in 2021 ALL MR (Cri.) 313.**

8. Taking this court through testimony of victim PW-3, he pointed out that answers given by the victim clearly shows that he has not reported about the alleged occurrence with the police. That boy's statement has not been recorded, which was mandatory in view of provisions of POCSO Act and it is evident from the answers given by the boy in cross. Learned counsel further pointed out that prosecution did not get statement of victim got exhibited. Learned counsel pointed out that there is inordinate delay in reporting the alleged incident and there is no plausible explanation for the said delay. Therefore, it is his submission that entire case of prosecution had collapsed. According to him, in spite of alleged incident taking place on 17.10.2014 and in spite of boy to be

brought from hostel by uncle, there was no reporting by the boy of such serious incident. Learned counsel took this court through the FIR and would submit that when the boy came from diwali vacation the boy had reported the incident but even immediately at that time itself there was no complaint or reporting. Learned counsel pointed out that father - informant is contradicting himself, as in witness box he deposed about boy informing about the incident after diwali vacations were coming to an end and it was time to go back to the hostel. Therefore, according to the learned counsel there is immense unexplainable delay in lodging report. Consequently, it is submission of learned counsel for respondent that false afterthought and concocted version is reported only because victim boy was caught watching obscene clips and reprimanded and father was summoned to hostel.

9. Lastly, learned counsel submitted that the above evidence was correctly appreciated by the learned trial judge. As version of complainant and victim was not inspiring confidence and as charges were not proved beyond reasonable doubt, he submitted that learned trial court correctly acquitted the accused and, as such, he prays to dismiss the appeal for want of merits.

ANALYSIS

10. Here present respondent was chargesheeted for commission of offence under sections 3(b) read with section 4 of POCSO Act and sections 323, 504, 506 of IPC.

11. For proper comprehension and ready reference, the above provisions of the POCSO Act are reproduced as under:

“3. Penetrative sexual assault.- A person is said to commit “penetrative sexual assault” if-

(a) ...

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or”

“4. Punishment for penetrative sexual assault.-

(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

12. Before reappreciating and reanalysing evidence of prosecution in trial court, present proceedings being appeal arising out of acquittal, it would be desirable to deal and discuss the settled legal position and principles enunciated by the Hon'ble Apex Court, which are to be borne in mind while dealing with an appeal against acquittal.

LEGAL POSITION

13. Here is the appeal by the State against judgment and order of acquittal.

Before proceeding to re-appreciate the evidence, it would be appropriate to give brief account of settled legal position while dealing with appeal against acquittal.

Recently, the Hon'ble Apex Court in the case of ***Ravi Sharma v State (Government of N.C.T. Delhi and another)***, 2022 LiveLaw (SC) 615 has considered and discussed the law settled by the Hon'ble Apex Court in the case of ***Chandrappa v. State of Karnataka***, (2007) 4 SCC 415, which are as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the

evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

14. Likewise in the same judgment, the Hon’ble Apex Court has touched and dealt with as to what is meant by perverse findings by taking recourse to the earlier decisions in the cases of **Arulvelu and another v. State**, (2009) 10 SCC 206; **Babu v. State of Kerala** (2010) 9 SCC 189 and **Anwar Ali and another v. State of Himachal Pradesh**, (2020) 10 SCC 166.

Similarly, while dealing with the aspect as to what is meant by “possible view”, the Hon’ble Apex Court in **Ravi Sharma** (supra), by referring to the Judgments in the cases viz. **N.Vijay Kumar v. State of**

Tamil Nadu, (2021) 3 SCC 687; Murugesan v. State, (2012) 10 SCC 383, Hakeem Khan v. State of M.P., (2017) 5 SCC 719, observed that “if the “possible view” of the trial Court is not agreeable for the High Court, even then such “possible view” recorded by the trial Court cannot be interdicted. It is further held that as long as the view of the trial Court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial Court cannot be interdicted and the High Court cannot be supplant over the view of the trial Court”.

15. Keeping the above discussed legal position in mind, appeal filed by State against acquittal is taken up for consideration.

16. On complete reappreciation and analysis of the evidence in trial court, it is noticed that though prosecution has come with a case that the boy at the time of alleged incident was studying in 6th standard, entire evidence of prosecution at the outset is found to be silent about age or date of birth of the boy. Father did not give date of birth of his child. The Investigating Officer has not bothered or cared to collect and place on record documents pertaining to the age of the boy. In cases of such nature, it is incumbent upon the prosecution, at the threshold to established age of the victim or even accused if he is juvenile. This legal requirement has apparently not been adhered to by prosecution.

17. Here crucial evidence is that of victim followed by that of his father informant and his uncle. Unfortunately, even when it was mandatory, no steps seems to have been taken to get the victim boy medically examined. Be it so. There is no dispute that victim was put up in a hostel namely Vishva Vidnyan Gurukul Hostel owned and run by PW-7 Ramanand Khake-Patil. There is no serious challenge that boy was staying in the hostel. However, now it is to be seen as to whether there is substance in the accusation of accused victim boy being subjected to sexual assault with sexual intent by his so called rector or caretaker - respondent.

18. On carefully evaluating the evidence of victim PW-3 it is emerging that according to him around 11:30 p.m., on 17.10.2014, while he was studying, present respondent entered his room, asked him to bring water. He told him that he was feeling afraid. He deposed that accused went away but returned back after half an hour. He switched off the light removed the boys pant and inserted his finger in the boys anus. The boy started crying. Then according to him the accused took him to the upper floor and tore his clothes and again inserted his finger saying that he has to again come back to the hostel. Next day his uncle came and took him home. He did not reported the incident to his parents and fell ill. After diwali vacations were over, when his father was arranging to

take him back to the hostel he informed his father that he does not want go to the hostel and on being asked the reason, he reported the incident of which his father lodged report. He deposed that police had made inquiries with him. He also identified accused in the court.

19. While under cross victim boy answered that the hostel has two floors. There are 4 to 5 teachers and 1 attendant. He answered that all use to reside on ground floor. He answered that he was residing in the hostel since he was in 3rd standard. He answered that there is water facility on both the floors. He denied hostel staff to be strict and disciplined. He admitted that if student commits mischief teachers use to reprimand them and punish them. He denied that two three days prior to the diwali holidays accused had slapped him questioning him what he was doing in the dark and he was also scolded for coming late. He answered that there is no room number in which he stayed. He further answered that there are 7 to 8 rooms for the student. In hall 10 students stays and in each room there were 4 to 5 student. He is unable to give names of his inmates. He answered that he reported the incident to his father when he was asked to come to Latur. He further answered that he disclosed to his father about the incident 2 to 3 days after diwali holidays were over. He denied that his father took him to the police station. He answered that police came to his uncle's place at Latur and made inquiry

with him. That is, after 8 days of the diwali holidays. He answered that police noted his name. He further answered that he did not disclose police that he had disclosed the incident to his father, which allegedly was at the instance of accused. He volunteered that police merely asked his name and parents name. He categorically answered that he did not state anything about the incident at the instance of accused to the police. He answered that the torn pant was lying in the hostel itself. He denied that accused warned him to bring his father to the hostel. He also denied that he was apprehending about his removal from the hostel. He further answered that after reporting to his father his father alone went to Latur.

20. Now, let us appreciate the evidence of informant father PW-2, who is examined at Exhibit 26. He deposed that his son was studying in 7th standard and studying in Sudarshan Vidyalaya and staying in hostel. He deposed that during diwali holidays, last year his son came home but was silent. After holidays his son refused to go back to the hostel and started crying and on inquiry told that on 17.10.2014, respondent came to his room switched the lights put finger in his anus, took him to the upper floor, tore his pant and again put finger in the anus. That, when his son crying accused threatened him that he has to come back to the hostel. Father deposed that hence he visited the hostel

on 13.11.2014, and, thereafter, he approached MIDC Police and lodged report - Exhibit 27.

21. Father has been cross examined and the relevant cross is as under:

He is unable to state number of rooms and number of students in the hostel at that time. He answered that hostel was available for student from 5th standard to 10th standard. He admitted that he use to met his son once in a fortnight or once in a month. He is unable to give names of roommate of his son. In para 5, he stated that his son came for diwali vacations on 18.10.2014 but told about the incident after 26 to 27 days. He admitted that his son is not accompanying him during visit. He answered that as he was frightened, he is unable to state what was reported and what was written in the complaint. He answered that as he was frightened he did not mentioned in the complaint that on further inquiry by him his son told that on 17.10.2014 accused came and asked him to bring water and when his son said that he was afraid accused went away.

22. He answered that he had lodged the FIR at between 12:00 noon to 01:00 p.m. He answered that, 4 to 5 days after the FIR, again he was called to police station to give statement but even according to him at the time he was frightened and he could not state facts which were

missed in the FIR. He answered that his son has brought the torn pant back to home.

23. In further cross father denied knowing whether 2 to 3 days prior to 17.10.2014 respondent accused had slapped his son questioning him what he was doing in dark and he also denied knowing whether his son was asked to bring him after diwali and had further warned that if he fails to bring he would take action. Rest is all denied.

24. Uncle who brought the boy home before diwali vacations is also examined as PW-4 and according to him, he found victim nervous and in spite of being asked the reason the boy did not informed. He claims that he received phone call from PW-2 informing about boy being sexually abused and so he accompanying PW-2 to the hostel. He claims that after returning from there he questioned the boy and the boy reported the incident which had occurred with him.

Almost all questions put to him in cross are denied by this witness.

25. PW-7 Hostel Owner, stated that accused was working in their hostel where 32 students were admitted. According to him accused was the caretaker of the hostel. He deposed that, on 11.11.2014, father of the

victim reported misbehavior with his son and even beat accused who ran away.

26. Rest of the witnesses are spot punch who did not support, P.S.O. and I.O. respectively.

27. What can be culled out from above substantive evidence of victim is that according to him, on 17.10.2014, around 11:30 p.m., while he was studying accused came to his room, inserted finger in his anus and again took him on the first floor and repeated the act. But while under cross victim has admitted that there are 4 to 5 boys in each room. However, none of the other boys are shown to be present there. It is not getting clear where other roommates went. Surprisingly, child was unable to state the names of his roommates, in spite of claiming that he was residing in the said hostel from 3rd standard. In cross he had stated that he even did not report the incident with him to police when they came to make inquiry with him. Though his statement was shown to be recorded, surprisingly prosecution in the trial court failed to get it exhibited by confronting to the victim. On the contrary, the child in cross has very categorically stated that except asking his name and his parents name nothing was asked by police. Therefore, apparently, there is breach of mandatory provisions of POCSO Act of not noting the statement of the victim. The boy was a student and was capable of giving statement but

still though statement is shown to be recorded, it is not got exhibited so as to consider it in appreciation of the evidence.

28. Specific defence of accused is that the boy was caught while watching obscene clips and was reprimanded and was asked to bring father to the hostel and on failure there would be action taken against him. Hence, defence came with a case that out of fear of being caught for the above episode and apprehending action, concocted story has been set up. It is noticed that the entire tenor of the cross to the boy is in such backdrop, though he has denied the same.

29. Even on appreciation of father's evidence, it is evident that he has been allegedly reported by his son just after diwali vacations were over and it was time to go back to the hostel. The child was brought from the hostel by uncle on 18.10.2014 itself. But in F.I.R., PW-2 informant father stated that immediately after coming home for diwali vacations his boy reported about the incident but father claims to have visited hostel on 13.11.2014 to question the accused and the hostel authorities. However, the hostel owner PW-7 deposed about visit of father on 11.11.2014. Therefore, exactly on which day informant went to question is not clear. Even otherwise, incident of 17.10.2014 is finally reported on 13.11.2014. Apparently, when in FIR occurrence was reported immediately after coming home on 18/19.10.2014, why it took so long

that is almost a month, for father to report the occurrence to the police is not satisfactorily explained by the father. Father has shown ignorance about alleged incidences of his son being reprimanded for watching obscene clips and he himself is being called by accused caretaker after vacation. Father has not denied that said episode was false one, rather he merely expressed his ignorance. PW-7, in para 2 of the cross, admitted that 2-3 weeks prior to the incident accused had made complaint to him that the victim used to view obscene films on the mobile of the other students and that time he himself has instructed accused to call victim's parents after diwali vacations.

Testimony of uncle is of no avail as he has merely brought the boy home and apparently he was not informed by the boy at any point of time earlier.

30. Consequently, here age of victim is not proved. Secondly, there is no medical evidence and no independent corroboration. Here, there is child witness account. Law mandates in cases of grave nature to seek corroboration, as there is possibility and children being prone and susceptible to tutoring, as a caution, in peculiar cases, it is desirable that the court should look for corroboration. Here peculiar circumstances of the case coupled with the fact of inordinate delay in reporting, calls for seeking corroboration. Apparently here there is none. In the considered

opinion of this court in light of specific defence of false implication raised by accused in the backdrop of boy being caught and reprimanded for watching obscene material and father being summoned to hostel, possibility of false implication cannot be completely ruled out. For above reasons, respondent deserves benefit of doubt.

31. That apart, there is apparent carelessness on the part of investigating machinery and prosecution in not adhering to the procedure laid down in the POCSO Act, even when the case was of minor being victimised. Therefore, above lapses and lacunas contribute to the unreliable and uncorroborated testimony of victim, thereby rendering the case of prosecution weak, fragile and unworthy of complete reliance. Even in the considered opinion of this court, case has not been proved by prosecution beyond reasonable doubt. It is cardinal principle of criminal jurisprudence that graver the offence, stricter is the requirement of proof. Here it is not so.

32. Perused the judgment under challenge. In the considered opinion of this court the findings recorded by the learned trial judge are in consonance with the quality of evidence on record. How and in what manner there is improper appreciation or failure to apply law as is tried to be put forth in appeal has not been demonstrated. With such quality of evidence, the view taken by the learned trial judge can be said to be the possible view. Keeping the settled principles to be applied in mind, while

dealing with the appeal against acquittal, there is no reason to take different view or disturb the findings reached at by the learned trial judge. No case being made out on merits. I proceed to pass following order:

ORDER

The criminal appeal stands dismissed.

[ABHAY S. WAGHWASE, J.]

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