



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.707 OF 2022

APPLICANT : Rahul @ Golu S/o Suresh Gadekar
(Original Accused No.2) Aged about 25 years, Occupation – Nil
 R/o Waghadi Yavatmal Dist. Yavatmal,
 Yavatmal **(In Jail)**

..VERSUS..

RESPONDENTS : 1 The State of Maharashtra Through Police
 Station Officer Wadgaon Yavatmal
 District Yavatmal
 2 X-1 the Complainant/Informant/Victim
 in crime no.1077/2017 registered with
 Police Station Avadhutwadi, District
 Yavatmal. **(Victim)**

WITH

CRIMINAL APPEAL NO.583 OF 2023

APPELLANTS : 1 Shantaram Tukaram Jichkar
(Original Accused No.1) Age : 29 years, Occupation : Nil,
(Convicted Offender C-5590)

(Original Accused No.4) 2 Vikkey @ Dhakkan @ Nikhil
 Dnyaneshwar Pawar
 Age : 23 years, Occupation : Nil
(Convicted Offender C-5591)

Both R/o: Waghadi, Yavatmal, Tahsil and
 District : Yavatmal

**(At present both accused are in Central
 Prison, Amravati)**

RESPONDENTS 1 The State of Maharashtra,
 Through Police Station Officer, Police

Station : Wadgaon Road District :
Yavatmal.

2 **X-1**, (In Crime/FIR no. bearing
No.1077/2017) (**VICTIM**)

Through Police Station Officer, Police
Station : Wadgaon Road, District :
Yavatmal.

3 **Y-1**, (In Crime/FIR no. bearing
No.1077/2017) (**VICTIM**)

Through Police Station Officer, Police
Station : Wadgaon Road, District :
Yavatmal.

Mr P. D. Lawankar, Advocate h/f Mr C. D. Rohankar, Advocate for Appellant in Criminal
Appeal No.707 of 2022.

Mr R. D. Hajare, Advocate (Appointed) for Appellants in Criminal Appeal No.583 of
2023.

Mr S. Hulke, APP for Respondent/State.

CORAM : **M. W. CHANDWANI, J.**

RESERVED ON : **3rd APRIL, 2024.**

PRONOUNCED ON **25th APRIL, 2024.**

JUDGMENT

. These two appeals are arising out of the same judgment and order of conviction dated 12.07.2019, passed by the learned Additional Sessions Judge-2, Yavatmal, in Special (POCSO) Case No.76 of 2017. Therefore, they were heard analogously and are being disposed of by this common judgment.

2. The appellants, in both the appeals, were prosecuted for the offences punishable under Sections 394, 354 and 354(B) read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”) and under Sections 8 and 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”). By the impugned judgment and order, the appellants alongwith other co-accused namely Nandu Ashok Shelke were held guilty for the offences punishable under Sections 394, 354 and 354(B) read with Section 34 of the IPC as well as under Sections 8 and 10 of the POCSO Act and were sentenced under each count. A maximum sentence was awarded for the offence punishable under Section 394 read with Section 34 of the IPC to suffer rigorous imprisonment for a term of seven years besides imposing the fine amount with default clause.

3. Prosecution case can be culled out as under :

On 02.10.2017 at around 07:00 p.m., the informant and her female friend alongwith their respective boyfriends went for a stroll to a secluded place at the outskirts of Yavatmal City by

two wheelers. Both the girls alongwith their respective boyfriends sat separately. Within a short period time, 6 to 7 unknown boys came there and started beating them. They snatched mobiles from all of them and robbed cash amount of Rs.350/- from the informant. The miscreants also took personal search of both the victim girls by touching them inappropriately. They also snatched a bentex chain from the victim girl who is the friend of the informant. Somehow, they rescued themselves from the miscreants and came to the main road. Fortunately, Police Patrolling Van met them and they were taken to the hospital for medical help. On the very next day, the report came to be lodged against unknown robbers for the aforesaid offences. During investigation, the appellants alongwith other co-accused namely Nandu Ashok Shelke came to be arrested. One mobile phone came to be seized from appellant Rahul @ Golu Suresh Gadekar and stolen cash of Rs.350/- came to be seized from the appellant Vikkey @ Dhakkan @ Nikhil Dnyaneshwar Pawar. Another mobile phone came to be recovered from juvenile in conflict with law. After completion of investigation, charge-sheet came to be filed before the learned Special Court. During trial, the learned

Trial Court examined nine witnesses. On conclusion of the trial, the learned Trial Court convicted the appellants and other co-accused Nandu Ashok Shelke, by the impugned judgment and order dated 12.07.2019.

4. It is to be mentioned here that the co-accused Nandu Ashok Shelke filed an appeal before this Court *vide* Criminal Appeal No.785 of 2019. This Court, by its judgment dated 29.10.2021, allowed the criminal appeal of co-accused Nandu Ashok Shelke and acquitted him from the aforesaid offences. Usually, the benefit of the decision in Criminal Appeal No.785 of 2019 can be extended to the non appealing co-accused. However, while parting with the judgment, this Court, in the said appeal, has specifically mentioned that the benefit of this judgment cannot be extended to the non-appealing co-accused, mainly on the ground that, nothing was seized from Nandu Ashok Shelke. Therefore, the case of Nandu Ashok Shelke was distinguished from the other co-accused. Since then, until now no appeal was filed either by Shantaram Tukaram Jichkar, Rahul @ Golu Suresh Gadekar or by Vikkey @ Dhakkan @ Nikhil Dnyaneshwar

Pawar. After the judgment of this Court in Criminal Appeal No.785 of 2019, the appellants Shantaram Tukaram Jichkar, Rahul @ Golu Suresh Gadekar and Vikkey @ Dhakkan @ Nikhil Dnyaneshwar Pawar have filed the present appeals. Since the non-appealing convicts have filed these appeals, I proceed to decide the same on merits of the case.

5. It is a matter of record that the appellants and other co-accused Nandu Ashok Shelke were not known to the victim girls and their respective boyfriends. The learned Trial Court relied on the Test Identification Parade (T. I. Parade) of these appellants and other co-accused in the Court, apart from the seizure of the mobile handsets and cash amount of Rs.350/- from Rahul and Vikkey respectively.

6. Notably the Co-ordinate Bench of this Court in Criminal Appeal No.785 of 2019, filed by Nandu Shelke, held that there are various lacunae in the T.I. Parade. Apart from delay in holding the T.I. Parade, this Court observed that it is not safe to place implicit faith on the evidence of identification in the Court. Relevant paras of Criminal Appeal No.785 of 2019 are

reproduced as under :

“18. Perusal of panchanama-II containing description of 16 round indicates that in mechanical manner in same sequence and words, each round has been described by preprator. The mode and manner of conducting Panchanama itself is not free from doubt. There is no description as to whether the accused have opted to choose their position in the row after parade of one witness. Panchanama is silent whether the accused have opted to change their clothes for next round of parade and so on. Moreover, there is no evidence to state about the suitability of the selection of dummies for identification. Neither the holder of test identification parade asked the Jail Superintendent to bring dummies having similar physic, like the accused nor he made selection of dummies. It appears that whatever dummies were provided by the Jailer, were mechanically used by the holder of test identification parade without assessing their suitability. The said manner of holding parade itself frustrates the very purpose and importance of the test identification parade and ultimately about its evidentiary value.

19. One another aspect also needs consideration that the two pancha witnesses used for test identification parade were subordinate of PW-5 Naib Tehsildar Rajabhau Vette. The said fact is evident from memorandum panchanama (Exh 64) itself since the panchas are working as Clerk in Tehsil Office. Pertinent to note that final memorandum panchanama does not bear signature of panchas at all. It obviously adds the suspicion to the great extent. Besides that in order to vouch credibility of the entire test identification parade, examination of independent pancha witness was necessary but they have not been examined. The memorandum panchama neither Part-I nor part-II discloses the time of each of the round of actual identification.

20. The process of holding T. I. Parade was such that all four witnesses were made to sit at one place. For identification of one accused, one by one witnesses were called and there was gap of 5 to 10 minutes in between the next round. Therefore, there was opportunity for witnesses to brief the next witness about the description of accused to be identified, like his clothes etc. PW-5 Naib Tehsildar admitted that all four witnesses were kept in one cabin and next witness was called one after another. Moreover, Naib Tehsildar admits that barrack in which he conducted T. I.

Parade, was open and visible. Therefore, it creates serious doubt about the chances of seeing the accused by witnesses prior to the holding of parade. In short, entire process of prior T. I. Parade is tainted and not free from suspicion.

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25. *In the light of above position, undeniably it is a factual aspect to be decided by the Court whether the delay caused in holding T. I. Parade vitiates the process. Admittedly, the incident occurred on 02.10.2017 whilst on the following day i.e. on 03.10.2017 itself, all four accused were arrested. However, after 28 days, i.e. on 31.10.2017 test identification parade was conducted. Absolutely, no explanation has been offered by the prosecution for holding belated test identification parade. The record indicates that on 10.10.2017 itself, Investigating Officer vide letter Exh. 106 informed the Executive Magistrate to hold T. I. Parade on or before 13.10.2017. However, despite said caution, the test identification parade was delayed. There is purpose for which Court expects the quick holding of test identification parade as the witnesses may not forget the features of the accused which they have seen at the time of occurrence. Thus, unexplained delay in holding T. I. Parade is a matter which adds suspicion.*

26. *Reverting to the facts, as per prosecution evidence on the day of incident around 07.00 p.m. all four witnesses i.e. two boys and two girls, initially met at Shivaji Garden, Yavatmal. All of them went by riding two wheelers to Arni-Dharwha bye-pass which was 7 to 8 k.m. away from the city and reached around 07.30 p.m. It is the evidence that after 20 to 25 minutes, the assailants arrived on the spot meaning thereby, the incident occurred in between 07.45 p.m. to 08.00 p.m. Admittedly, it was a winter season being a month of October and therefore, judicial note can be taken that days would be shorter than night. The learned defence counsel has submitted that almanac shows that on that day, sunrise was at 06.30 a.m. whilst sunset was at 06.27 p.m. Reasonably, it can be inferred that it was a dark when the incident occurred at isolated bye-pass road. Notably the witnesses were not at Arni-Darwha bye-pass road but again they went to inside rough road at some distance from the bye-passe road. There is no evidence that there was street light nor it can be presumed in absence of any material. PW-2 victim girl No. 2*

though denied that there was no visibility, however she admits that there was no clear visibility. Therefore, it is evident that incident took place in dark.

27. The witnesses have admitted that they got frightened due to sudden occurrence. It is a matter of appreciation that the incident took place on isolated place during night hours. Both couples sat separately near bushes. The incident happened as of sudden which no one expected. All four witnesses were in their tins therefore, naturally they got frightened and scared about their safety. In the situation, their priority would be to escape from the clutches of goons and nothing else. It is not a case of single assailant so as to concentrate on his activities. However, as per evidence, 6 to 7 unknown assailants came in dark and started to beat the witnesses and looted them. It is not the case that there was conversation in between them so that the witnesses could get time to observe the assailants. The occurrence would have hardly taken time of few minutes. It is difficult for the frightened teenagers to see, observe and to memories images of miscreants. On such background, notably the test identification parade was conducted after one month and the victim's evidence was recorded after one year from the occurrence therefore, the so-called identification conducted in the Court is not free from doubt.

28. In the above scenario, it is not safe to place implicit faith on the evidence of identification in Court. Particularly, it was not supported by the credible evidence of prior test identification parade. Moreover, besides victim girl No. 1, other witnesses have not identified appellant even in the Court. Therefore, it is too risky to rely on such shaky evidence to base conviction. I may reiterate that though there was recovery of cash amount, mobile handsets, however it was from non-appelling co-accused, therefore, the said material cannot be used against the appellant Nandu Shelke.

29. To summarize, the Trial Court has based its conviction solely on the evidence of identification of appellant in Court as well as in prior T. I. Parade. For the reasons stated in forgoing discussion, the prosecution evidence is not reliable to establish the identity of the appellant in the occurrence. Neither the evidence about Court identification nor about prior T. I. Parade inspires confidence. The Trial Court erred in appreciating the

evidence of identification in proper perspective. In the result, judgment and order of conviction would not sustain in law, hence appeal calls interference.”

7. It is to be noted that the evidence, against the present appellants over T. I. Parade and identity in the Court is the same as against Nandu Shelke, whose appeal came to be allowed and he has been acquitted from the charges except the evidence of seizure of the articles from appellant Rahul as well as appellant Vikkey. Rather nothing was seized from the appellant Shantaram. Therefore, there is no reason for me to take a different view on the credibility of the T. I. Parade or identity in the Court than what has been observed by the Co-ordinate Bench of this Court in Criminal Appeal No.785 of 2019. The prosecution claimed that one black coloured mobile handset of Itel Company came to be seized from the appellant Rahul. The evidence of PW-2 victim shows that she identified the said black coloured mobile handset, but fact remains that the said mobile has been identified only on the basis of colour and company and nothing has been brought on record to show what was the International Mobile Equipment Identity number (IMEI) of the mobile, which was robbed.

8. Turning to the recovery of Rs.350/- from the appellant Vikkey, which has been made as one of the basis of conviction. Record reveals that three notes of denomination of Rs.100/- and one note of denomination of Rs.50/- came to be seized from appellant Vikkey. Whereas, the case of the prosecution is that the miscreants robbed three notes of denomination of Rs.100/- and five notes of denomination of Rs.10/- from PW-1 victim.

9. Ironically on one hand, the learned Trial Court observed that without any identification marks on seized currency notes, nobody can exactly identify the currency notes and cannot claim that those are the same as the ones which were stolen from his/her possession. In the same breath, the learned Trial Court went to observe that though one note of denomination of Rs.50/- is not consistent with the deposition of PW-1 victim, but there are three notes of denomination of Rs.100/-, which were found from the possession of appellant Vikkey that match with the evidence of victim over the denomination of notes of Rs.100/-. The learned Trial Court made this recovery as one of the basis of conviction. There is nothing

on record to show that these three notes of denomination of Rs.100/-, which were recovered from the appellant Vikkey, are the same notes, which were robbed by the unknown miscreants from PW-1. Anybody, rather most of the people possessed notes of denomination of Rs.100/-. Thus, it cannot be said that the three notes of denomination of Rs.100/- recovered from the appellant Vikkey are the same as the ones which were robbed from the victim girl and therefore, it cannot be the basis for recording the conviction particularly, when the miscreants were not known to the victim at the time of incidence. So far as the appellant Shantaram is concerned, nothing was recovered from him.

10. In absence of material on record to show that the mobile seized from the appellant Rahul and the three notes of denomination of Rs.100/- seized from the appellant Vikkey are the same articles, which were robbed from PW Nos.1 and 2, the cases of all appellants will be in the same boat as of acquitted accused Nandu Shelke.

11. Put all together, the Co-ordinate Bench of this Court has already observed that there are various lacunae in the T.I.

Parade apart from delay in holding the T.I. Parade, therefore, it will not be safe to place implicit faith on the identification in Court. The articles seized from the appellants Rahul and Vikkey, are not proved to be the same articles, which were robbed from the PW Nos.1 and 2.

12. The Trial Court erred in appreciating the evidence of identification in Court as well as recovery of robbed articles in proper perspective. As a result, the judgment and order of conviction would not sustain in law, hence it requires interference of this Court. Consequently, I proceed to pass the following orders :

ORDER

- i) The criminal appeals are **allowed**.
- ii) The impugned judgment and order passed by the learned Additional Sessions Judge-2, Yavatmal, in Special (POCSO) Case No.76 of 2017 dated 12.07.2019 is hereby set aside.
- iii) The appellants/accused namely Rahul @ Golu Suresh Gadekar, Shantaram Tukaram Jichkar and Vikkey @

Dhakkan @ Nikhil Dnyaneshwar Pawar are acquitted of the charged offences and they be released forthwith, if they are in custody and their custody is not required in any other offence.

iv) Fine amount, if any, deposited be refunded.

Muddemal property be dealt with in accordance with law.

13. Fees of the appointed counsel be given as per the Rules.

14. The criminal appeals are disposed of and the criminal application(s), if any, also stand(s) disposed of.

(M. W. CHANDWANI, J.)