



Judgment

37 appeal 757.23

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.
CRIMINAL APPEAL NO. 757/2023

Vijay @ Fakkar S/o. Punjaji Khobare,
(Presently in Jail),
Age about 55 yrs., Occ. Labour,
R/o. Mahatma Fule Nagar, near
Balmukhi Hanuman Mandir, Kailash
Tekdi Khadan, Akola, Tq. & Dist. Akola.

... **APPELLANT**

VERSUS

1. State of Maharashtra through
PSO, Khadan, Tah. & Dist. Akola.
2. XYZ, Crime No.822/2020,
PSO, Khadan, Tah. & Dist. Akola.
(Deleted as per Court's order
dated 28.11.2023.)

... **RESPONDENTS**

Mr. Mahendra L. Vairagade, Advocate (appointed) for appellant.
Mr. P. Pendke, APP for respondent/State.

CORAM : **G.A. SANAP, J.**
DATE : **10.12.2024.**

ORAL JUDGMENT

Heard.

2. In this appeal, challenge is to the judgment and order dated 04.06.2022 passed by the learned Extra Joint District Judge and Additional Sessions Judge, Akola, whereby the learned Judge convicted the appellant/accused for the offence punishable under Sections 354-A(ii) of the Indian Penal Code and Section 11(ii)/12 of the Protection of Children from Sexual Offences Act, 2012 (in short “POCSO Act”) and sentenced him to suffer rigorous imprisonment for three years and to pay a fine amount of Rs. 3,000/-, in default, to suffer simple imprisonment for six months for the offence punishable under Sections 354-A(ii) of the Indian Penal Code and Section 11(ii)/12 of the POCSO Act.

3. Background facts:-

4. The victim girl, on the date of the incident, was four years old. The informant is the mother of the victim. The case of the

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prosecution can be gathered from the report and the other materials. The appellant/accused is a resident of Mahatma Phule area, Kailash Tekadi, Khadan, Akola. He is addicted to liquor. The informant resides in the same locality. The informant and the appellant are acquainted with each other. Prior to this incident, they were engaged together in the business of catering. The informant is having two daughters. The victim is begotten to the informant from Manoj Meena. On the date of the occurrence, she had married with Rohit Rathi. It is stated that on 13.10.2020, at about 03.00 p.m., the informant went to the house of neighbour Seema Vasuya. She was talking with her, along with other neighbourladies, including Mangala Jugdand, Sheela Babhulkar, Vimal Wankhede, and Fatima. They were gathered at the house of Seema Vasuya. They were chit-chatting. The victim girl was with the informant. The appellant came to them in a drunken condition. There was hot talk between the appellant and the informant. The appellant took the victim girl with him despite resistance by the informant. He took the victim girl behind the Balmukhi Hanuman Temple (in short, "Hanuman Temple"). It is

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stated that behind Hanuman Temple, he removed his underwear and showed his private part to the victim girl. This act of the appellant was noticed by Seema Vasuya. She raised shouts as the appellant removed his underwear. The shouting of Seema Vasuya drew the attention of the informant and other women, who were present there, towards the appellant. The appellant ran away from the spot. The informant brought back the victim and then went to Khadan Police Station and lodged the report.

5. On the basis of the report, a crime bearing No. 822/2020 was registered against the appellant. The investigation was carried out by API Pranita Karale. She arrested the appellant on the next day. The Investigating Officer visited the spot of the incident and drew the spot panchanama. The victim girl was referred for the medical examination but her mother did not allow her medical examination. The Investigating Officer produced the victim girl along with the informant and neighbouring lady Seema Vasuya before the Child Welfare Committee for recording their statements. The statements were recorded. Similarly, their statements were recorded by the

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learned Magistrate under Section 164 of the Code of Criminal Procedure (in short, "Code"). After completion of the investigation, the charge-sheet was filed against the appellant.

6. The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. It is the defence of the appellant that the husband of the informant had borrowed Rs. 1,000/- from the fiancée of Krushikesh, son of the appellant. On account of return of the money, there was a quarrel between her husband and the son of the appellant, and therefore, a false report was lodged. In order to bring home the guilt of the appellant, the prosecution examined four witnesses. The learned Judge, on consideration of the evidence, held the appellant guilty of the charge and sentenced him as above. This appeal has been filed by learned Advocate appointed from the panel of the Legal Aid on behalf of the appellant.

7. I heard Mr. Mahendra L. Vairagade, Advocate (appointed) to represent the appellant and learned APP Mr. P. Pendke for the respondent/State. Perused the record and proceedings. Learned

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Advocate for the appellant submitted that the evidence of the victim girl cannot be believed. The victim girl was tutored. The victim girl has also not stated that the appellant had shown any object with sexual intent. Learned Advocate submitted that Seema Vasuya who was the important witness to the incident, was not examined. PW-2, informant, mother of the victim girl is an interested witness. It is pointed out that PW-3, Naresh Wankhede had not seen the incident. It is submitted that the conviction is based on the evidence of PW-1, Victim Girl and PW-2, informant, mother of the victim girl. The learned Judge has failed to properly appreciate the evidence. The defence of the appellant was admitted in the cross-examination by PW-2, informant. Learned Advocate for appellant pointed out that PW-2, informant has further admitted that she and appellant were doing catering business together. It is submitted that, therefore, the occurrence of the incident is itself highly doubtful and unbelievable.

8. Learned APP submitted that on minute scrutiny the evidence of the victim girl, the learned Judge has recorded a finding that the evidence of the victim girl is credible and trustworthy.

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Learned APP for submitted that PW-2, informant has not, in any manner, exaggerated the incident. In the submission of the learned APP, the failure of the prosecution to examine Seema Vasuya could not be fatal to the case of the prosecution. It is submitted that the Court has to see the quality of the evidence and not the quantity. It is submitted that the evidence adduced by the prosecution is trustworthy and, as such, rightly believed by the learned Judge.

9. I have gone through the oral and documentary evidence. The statement of the victim girl was recorded by the learned Judicial Magistrate First Class under Section 164 of the Code. The report of the incident was lodged by PW-2, informant, the mother of the victim girl. PW-2, informant had not consented for the medical examination of the victim girl. In my view, this will not, in any way, affect the merits of the case, inasmuch as this is not the case of penetrative sexual assault or sexual assault. It is a simple case of sexual harassment. Perusal of the statement under Section 164 of the Code of the victim girl, which is at Exh.30, would show that the victim girl has not exaggerated the incident while recording her statement. In her

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evidence before the learned Court, she has stated that she knew the appellant. She has stated that the appellant took her behind the Hanuman Temple and removed his underwear in her presence. She has stated that thereafter, the mother came there and the appellant ran away. She was subjected to cross-examination. She has admitted that there was quarrel between her mother and the appellant on one or two occasions. She has stated that behind the Hanuman Temple, the people come to urinate. She has stated that children play on the ground near the Hanuman Temple. The victim girl has consistently stated that the appellant took her behind the Hanuman Temple and removed his underwear in her presence. It has come on record that the appellant had consumed liquor at the time of the incident. Evidence of the victim girl before the Court is consistent with the statement recorded by the learned Magistrate. Perusal of her evidence clearly indicates that she was not tutored. She has not exaggerated the incident. Similarly, it is not possible for child witness like PW-1, victim girl to narrate the occurrence of the incident due to tutoring of due to sheer imagination. In my view, this is the most vital

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circumstance. In this case, it reflects upon the credibility and truthfulness of the PW-1, victim girl.

10. The PW-2 is the informant. She has stated that on 13.12.2020, she went to the house of Seema Vasuya. Her daughter was with her. She has stated that in the courtyard of Seema Vasuya, Vimalbai, and Shilabai were chit-chatting. She has stated that at that time, the appellant came there wearing underwear only. The appellant took the victim girl toward behind the Hanuman Temple, where the appellant removed his underwear in her presence. She has stated that the incident was witnessed by Seema Vasuya, and she raised shouts. She has stated that thereafter, they chased the appellant. The appellant ran away. In her cross-examination, she has admitted that she and the appellant were doing catering business together. She has denied the suggestion put to her consistent with a defence of the appellant. However, she has admitted that her husband had borrowed Rs. 1000/- from the fiance of Krushikesh, son of the appellant. She has stated that the said amount was returned. She has admitted that the act committed by the appellant was noticed by Seema Vasuya, and the

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shouts raised by Seema Vasuya attracted her attention towards appellant. It is to be noted that PW-2, informant has not exaggerated the occurrence of the incident. The act committed by the appellant was noticed by Seema Vasuya and shouts raised by Seema Vasuya attracted their attention. It has come on record that thereafter, the women present there chased the appellant. The appellant ran away. The statement of PW-2, informant recorded by the learned Magistrate First Class, Akola under Section 164 of the Code is at Exh. 29. In her statement before the learned Magistrate, she has narrated the incident consistent with the one stated in her report lodged with the Police.

11. It is true that the prosecution has not examined Seema Vasuya, who was the independent witness. It has come on record that the statement of Seema Vasuya was recorded under Section 164 of the Code by the learned Magistrate. However, this statement was not exhibited. Even if the said statement had been exhibited, it would not have made any difference inasmuch as, such statement could be used for the purpose of contradictions and omissions and not as a substantive piece of evidence.

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12. The evidence of the victim girl, in my view, is sufficient to prove the case of the prosecution. The victim girl has stated that the appellant had removed his underwear. PW-2, informant has also stated in her evidence that the appellant took the victim girl with him toward the Hanuman Temple. She has stated that this act committed by the appellant was noticed by Seema Vasuya, and when she raised hue and cry, they saw that the appellant had removed his underwear. The appellant ran away from the spot.

13. The incident occurred in the afternoon at 03.00 p.m. The PW-2, informant went to the Police and lodged the report at 05.03 p.m.. There was no delay. It is to be noted that the defence of the appellant in the context of the incident reported to the Police does not appear to be probable. If the informant wanted to falsely implicate the appellant, then she would have invented any other story. The informant would not have involved her four year daughter. In the facts and circumstances, I do not see any reason to discard and disbelieve the evidence of the child witness. The possibility of tutoring has been completely ruled out. The victim girl is consistent

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throughout. Evidence of the victim girl on the material part of the incident has been corroborated by PW-2 informant. The perusal of the judgment and order passed by the learned Judge would show that the learned Judge has recorded cogent and concrete reasons in support of the findings. In my view, the findings of fact recorded by the learned Judge are therefore, unassailable. The prosecution, on the basis of the evidence, has proved the charge against the appellant.

14. Learned Advocate for the appellant on the point of sentence submitted that the learned Judge has awarded the maximum sentence for the offence under Section 11(ii) punishable under Section 12 of the POCSO Act. Learned Advocate submitted that the learned Judge has not properly appreciated the prayer made by the appellant for leniency. It is submitted that this was the first offence registered against the appellant. He is a senior citizen. He was under the influence of liquor at the time of the incident. He was acquainted with the informant and victim girl. He did not take undue advantage of the situation. It is submitted that his family members are dependent on him. Learned Advocate for the appellant pointed out that the

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appellant has undergone the sentence of two years and five months. The learned Advocate for the appellant submitted that the sentence undergone by the appellant would be sufficient to improve the appellant. The learned Advocate pointed out that the appellant has deposited the fine amount. As far as this sentence is concerned, the learned APP submitted that considering the proved offence against the appellant, he does not deserve leniency.

15. I have given thoughtful consideration to the submission. I have gone through the record and nature of the offence committed by him. I am of the opinion that the sentence already suffered by the appellant would be the punishment proportionate to the gravity of the offence proved against the appellant. The appellant has already undergone the sentence of two years and five months. The learned Judge has awarded rigorous imprisonment for three years. In the facts and circumstances, the order of the conviction does not warrant interference, however, the order with regard to the sentence, deserves modification. Hence, the following order:

“1. The criminal appeal is dismissed.

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2. The conviction of the appellant for the offence punishable under Sections 354-A(ii) of the Indian Penal Code and Sections 11(ii)/12 of the Protection of Children from Sexual Offences Act, 2012 is maintained. However, the substantive sentence is modified.

3. The appellant is ordered to undergo the imprisonment already suffered by him. The appellant has paid fine of Rs. 3000/-.

4. In view of above, the appellant **Vijay @ Fakkar s/o Punjaji Khobare** who is in jail, shall be released forthwith, if not required in any other case.

16. The criminal appeal stands disposed of, accordingly.

17. Fees of learned Advocate appointed to represent the appellant be paid as per Rule.

(G.A. SANAP, J)