



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

CRIMINAL APPEAL NO. 295 OF 2020

Shivaji S/o. Mahadu Gunjal,
Age : 42 years, Occu. Agri.,
R/o. Padali Darya, Tq. Parner,
Dist. Ahmednagar.

...Appellant

Versus

The State of Maharashtra

...Respondent

.....
Mr. M. S. Kokate h/f Mr. V. V. Tarde – Advocate for the Appellant
Mrs. M. L. Sangit – APP for the State
.....

AND
CRIMINAL APPLICATION NO. 962 OF 2020
IN
CRIMINAL APPEAL NO. 295 OF 2020
.....

CORAM : NEERAJ P. DHOTE, J.

RESERVED ON : 25TH NOVEMBER, 2025
PRONOUNCED ON : 2ND DECEMBER, 2025

JUDGMENT : -

1. This is the Appeal under Section 374(2) of the Code of Criminal Procedure [for short 'Cr.P.C.'] against the Judgment and Order dated 6th March, 2020, passed by the learned Additional Sessions Judge, Ahmednagar, in Special Case No. 417 of 2018, convicting the Appellant for the offence punishable under Section 376(1) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten (10) years and fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for one (1) month, AND, for offence punishable under Section 4 of the

Protection of Children from Sexual Offences Act, 2012 [for short 'POCSO Act'] for which no separate sentence is awarded.

2. The Prosecution's case as revealed from the Police Report is that, on 10.10.2018, the sister of the Victim informed her mother that the Appellant gave Rs. 5/- to the Victim and asked for Rs.5/- from her. The mother of the Victim opened the compass box of the Victim and found the coin of Rs. 5/-. The Victim's mother inquired with the Victim as to from where she got the said coin, upon which, the Victim informed her that, on the day of Mahatma Gandhi Jayanti, when she was playing with her sister below the coconut tree in front of their house in the afternoon, the Appellant called them to his house. When they reached the Appellant's house, her sister and friends were asked to go and the Victim was taken inside his house. The Appellant made her to sit on his lap, touched her private part and pressed his private part to her private part. The Victim shouted and so the Appellant helped her to come down from the cot and gave coin of Rs. 5/- and threatened her not to inform anybody about the incident. The Victim's mother approached the Parner Police Station and lodged the report that, the Appellant sexually assaulted her daughter and Crime bearing No. I-330/2018 came to be registered against the Appellant for the offence punishable under Sections 376(f)(i)(n), 506 of the Indian Penal Code and Sections 4 and 42 of the POCSO Act.

3. The Investigating Officer sent the Victim for medical examination. The statement of the Victim, Victim's sister and other witnesses came to be recorded. The clothes of the Victim came to be seized. The Appellant came to be arrested. The spot *panchanama* was prepared. The clothes of the Appellant came to be seized. The Appellant was sent for medical examination. The articles seized during the course of the investigation were sent for chemical analysis. The relevant documents were collected and on completion of investigation, the Appellant came to be charge-sheeted. On committal, the learned Trial Court framed the Charge against the Appellant for the offence punishable under Sections 376(f)(i)(n), 506 of the IPC and Section 4 of the POCSO Act, below Exh. 11. The Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined the following witnesses:

1. PW1 – Victim's mother, who lodged the Report at Exh. 17.
2. PW2 – The panch for spot panchnama and for seizure of clothes of the Appellant, below Exh. 20.
3. PW3 – Victim, below Exh. 25.
4. PW4 – Victim's sister, below Exh. 26.
5. PW5 - The panch witness for seizure of Victim's clothes, below Exh. 27.
6. PW6 – The panch witness for the seizure of Rs. 5/- coin, below Exh. 31.
7. PW7 - The Investigating Officer, below Exh. 34.
8. PW8 – Medical Officer, below Exh. 41.

3.1. In the evidence of the above referred witnesses, the Prosecution brought on record the relevant documents, such as,

FIR/Report, the *Panchanamas*, the Medical Papers and the Chemical Analysis Reports, etc.

4. After the Prosecution filed 'Evidence Closure *Pursis*', the statement of the Appellant came to be recorded under Section 313(1)(b) of the Cr.P.C. The Appellant stated that, due to the dispute with the Victim's family on account of common boundary of the agriculture field and water from the safety tank of the latrine, false case was registered against him. The learned Trial court passed the impugned Judgment and Order convicting and sentencing the Appellant as above.

5. It is submitted by the learned Advocate for the Appellant that, there is no evidence in respect of the date of birth and the age of the Victim and, therefore, the Prosecution failed to establish that the Victim was a child below the age of eighteen (18) years. The Medical evidence do not prove the sexual assault on the Victim. The evidence of Medical Officer do not find support from the medical papers. There was delay in lodging the FIR. The Victim's statement was the result of tutoring by her mother. The Victim's sister was also tutored by her mother. The evidence on record show that, there was dispute between the Appellant and the family members of the Victim. The spot where the incident is alleged to have taken place is surrounded by other houses in the village and the Prosecution's case was not probable. As the Charge is not proved, the Appellant was entitled for acquittal.

6. It is submitted by the learned APP that, the date of birth and the age of the Victim is not challenged by the Appellant in the cross-examination. The evidence of the Victim is corroborated by the medical evidence. The learned Trial Court considered the presumption under Section 29 of the POCSO Act. The Appellant failed to prove his defence of false implication. The evidence of the Victim and her Sister was consistent. The delay in lodging the FIR is explained. No interference is called for in the impugned Judgment and Order and the Appeal be dismissed.

7. Heard both the sides. Scrutinised the evidence available on record.

8. As regards the case of Prosecution that, the Victim was the Child, there is no serious challenge on that aspect by the Appellant. No other document is brought on record to establish the date of birth and the age of the Victim. PW1, the Victim's mother, deposed the date of birth of the Victim as 16.03.2009, which is nowhere challenged by the Appellant. The evidence of the biological mother of the Victim went unchallenged in respect of the date of birth and the age of the Victim. Admittedly, the report is lodged in October – 2018. Therefore, there is no difficulty in observing that the Prosecution proved that at the relevant time the Victim was a child.

9. The Prosecution came up with the story of sexual assault by the Appellant on the child. The Appellant came with the defence that there was dispute between him and the family of the Victim on account of agricultural boundary and the water of the safety tank of the latrine and, therefore, he was falsely implicated. The testimony of PW1, who is the mother of the Victim and who lodged the report, in her cross-examination admitted that, the land of the Appellant was adjacent to their land and they had common boundary. The evidence of PW2 – panch witness, who was residing adjacent to the house of the Appellant, admitted in his cross-examination that, there was dispute between the appellant and the Victim's father on account of safety tank and the toilet. Further, PW3 – Victim's evidence show that, there was dispute between the Appellant and her parents on account of agricultural land and the waste water of the safety tank of their toilet which was let in the field of the Appellant. The Victim's testimony further show that, the quarrel took place between her parents and the Appellant on that count and they used to see each other like enemy. This evidence on record clearly show that, the relations between the Appellant and the family of the Victim were strained and not cordial.

10. As regards the incident of sexual assault is concerned, the evidence of PW1 – Victim's mother, show that, on 10.10.2018, when she returned home by completing her agricultural work, her second

daughter told her that the Appellant gave coin of Rs. 5/- to the Victim, which was kept in her compass and she also asked for Rs. 5/- from her. She inquired with the Victim in that regard. At that time, the Victim told her that on 02.10.2018, after she returned home from the school, the Appellant called her and her two sisters at his house. The Appellant sent the sisters back and took the Victim inside the room and by lifting her skirt removed her slack, opened the zip of his trouser and pressed his penis over the vagina of the Victim and slept on the Victim. The Victim felt irritation and she raised alarm. The Appellant gave Rs. 5/- coin to her and asked the Victim not to disclose the incident to anybody and told the Victim that her parents were doing such things in the night. The Victim came back home. PW1 in her further evidence deposed that, with her husband, she went to the house of the Appellant to inquire the incident. At that time, the Appellant's wife asked her to do whatever she want to. Thereafter, she went to Parner Police Station and lodged the report against the Appellant below Exh. 18. She further deposed that, the Victim was referred for medical examination to the Rural Hospital. She deposed of recording her statement under Section 164 of the Cr.P.C., below Exh. 19.

11. The cross-examination of PW1 show that, the Victim did not disclose anything to her about the incident till 10.10.2018. The Victim did not state anything to her about any incident prior to 02.10.2018.

Her younger daughter also had not stated anything about the incident dated 02.10.2018. Her cross-examination show that, her evidence that she along with her husband went to the house of the Appellant to ask about the incident and at that time the Appellant's wife asked her to do whatever she want to, was an improvement/omission.

12. The evidence of the Victim show that, she was studying in 5th std., in Zilla Parishad School. The Appellant was residing behind her house. In 2018, on the day of Gandhi Jayanti, after she returned home and went to play under the coconut tree with her two sisters, the Appellant called them and asked her sisters to go and he took her inside the room and caused her to sit on the cot and thereafter on his lap. The Appellant removed half of her slack and raised skirt upwards and by removing the zip of his trouser, placed his private part on her private part and slept on her. She felt itching on the private part and so she shouted. The Appellant got up and rubbed her vagina by his finger, due to which she felt itching. Thereafter, she was made to come down from the cot. The Appellant gave Rs. 5/- coin to her and told her not to disclose the incident to anyone. She further deposed that, her younger sister saw Rs. 5/- coin in her compass and informed the same to her mother and after her mother saw the coin of Rs. 5/- in her compass, she inquired with her about the same and so she narrated the incident to her mother.

13. The cross-examination of the Victim show that, her mother accompanied her to the Police Station when her statement was recorded by the Police. In clear terms, it has come in her cross-examination that she gave the statement as per the say of her mother and while recording the statement, she and her mother stated the contents to the Police. If we see the evidence of the Investigating Officer-PW7, it show that at the time of lodging the report the informant was accompanied by her husband and the relatives and he further admitted that the statement of the Victim and her sister were not recorded immediately after lodging the Report. This show that there was delay in recording the statement of the Victim and that of her sister. It has further come in the cross-examination of the Victim that, she did not remember whether she stated all the contents of her Police Statement before the learned Magistrate while recording her statement under Section 164 of the Cr.P.C. This Cross-examination of the Victim indicate tutoring of the Victim.

14. The evidence of PW4, who is the Victim's sister deposed that, on the day of Gandhi Jayanti, after she and the Victim returned home and went for playing under the Coconut tree, the Appellant called them in his house and accordingly they went there. The Appellant took the Victim inside his house and sent her younger sister back for playing

under coconut tree. When she saw Rs. 5/- coin in the compass box of the Victim, she came to know that it was given by the Appellant and so she told about the same to her mother and also asked her for Rs. 5/-. Her evidence goes to show that, when her statement was recorded by the Police, she was accompanied by her mother PW1. Her cross-examination in clear terms show that, she do not remember whether she stated before the Police as per the say of her Mother. In clear terms, it has come in cross-examination that, her mother told her what to depose before the Court. This indicate that the testimony of this witness was the result of tutoring by her mother.

15. The evidence of PW2 show that, on 14.10.2018, he was called by the Police at the house of the Appellant for spot *panchanama*, and Exh. 21 spot *panchanama* was prepared. As per the above evidence of the Victim, the spot of the incident was the house of the Appellant. It is nobody's case that the Appellant was residing alone in his house. What the evidence in the cross-examination of the Victim's mother go to show is that, the accused was residing with his wife, one daughter and one son. There were houses of their relatives adjacent to their house and that of the accused. The evidence of PW6 – panch witness, who was from the same village, show that, his house was adjacent to the house of the Victim and the house of the Appellant was at a distance of 50 feet from his house and one can listen if called from their house and the

voice could reach from their house to the house of the Appellant. The evidence further show that, the houses of other persons were situated near to their house and house of the Appellant was visible from their house. This further show that, the spot of incident was in the thickly populated area. If this is the admitted position, it is highly improbable that the incident as narrated by the Victim took place at the house of the Appellant. There is medical evidence on record in the nature of testimony of PW8, who was the Medical Officer at Rural Hospital at Parner. On 14.10.2018, the Victim was brought for medical examination. After recording the history, she examined the Victim. On examination, she found redness in her Labia Majora and Labia Minora. There was no swelling and congestion oedema. There was no evidence of any injury. She gave the opinion that, there may be attempt of sexual assault. Accordingly, she issued the Medical Examination Form at Exh. 44. Her cross-examination show that, the history of alleged incident is not mentioned in the Medical Examination Form at Exh. 44. It has further come in her cross-examination that, redness and the tenderness in the vagina may be due to itching / scratching on the vagina by female herself. In clear terms, it has come in her cross-examination that, there was no mention in the Medical Examination Form at Exh. 44 that, there was redness in the Labia Majora and Labia Minora. Though, in the further examination-in-chief the Medical Officer deposed that, the history was mentioned in the MLC register, it has come in the further

cross-examination that the Victim was accompanied by her mother. The MLC number, date, time and place were not mentioned in the extract of MLC Register (Exh.49). This Medical Officer volunteered that the Victim's mother helped her while giving the history. It has further come in the cross-examination that, Column No. 13 in respect of history in the Forensic Medical Examination Report was blank. The medical evidence is not concrete in respect of the sexual assault, as it also show that the redness on the Labia Majora and Labia Minora may be possible due to scratch out of itching.

16. The other evidence is in respect of seizure of clothes of the Victim and the Appellant. As there is nothing incriminating in the CA reports, the seizure becomes irrelevant. It has come in the cross-examination of Investigating Officer that, no complaints were received against the Appellant in respect of such offence prior to the present incident. It is needless to state that, the testimony of the Child is to be evaluated with great care and caution as they are susceptible to tutoring. The above discussed evidence on record clearly show that, the statement of the Victim and her sister were influenced by their mother. The Victim's statement was the result of tutoring. In the backdrop of the clear evidence that the relations between the Appellant and the Victim's family were not cordial, the possibility of false implication cannot be ruled out. The medical evidence do not corroborate the prosecution's

case and the Victim's evidence in respect of the sexual assault. The over all evidence on record is not concrete and not free from doubt. Evaluation of the evidence on record leads to the conclusion that, the prosecution case is under the shadow of doubt and the defence of the Appellant appears probable. When the Prosecution's evidence do not conclusively establish the Charge, there is no question of drawing presumption as provided under Sections 29 of the POCSO Act.

17. Perusal of the Judgments cited by the learned APP, in *Wahid Khan Versus State of Madhya Pradesh, (2010) 2 SCC 9*, *Mangesh s/o. Damodhar Chandankhede Versus State of Maharashtra, 2018 All.M.R. (Cri) 403* and *Nawabuddin Versus State of Uttarakhand, (2022) 5 SCC 419*, show that, the facts therein were different. They are on the point of proving the age of the Child, no necessity of corroboration to the testimony of the Victim, and that the testimony of the Victim of rape stands on par with that of an injured witness. There can be no doubt in respect of the principles laid down in the said judgments. However, in the backdrop of the evidence in the case at hand, it is not possible to maintain the Conviction and sentence awarded by the learned Trial Court. Resultantly, the Appeal succeeds. Hence, I pass the following order:-

ORDER

[i] Criminal Appeal is allowed.

- [ii]** The conviction and the sentence awarded by the learned Additional Sessions Judge, Ahmednagar, vide the Judgment and Order dated 6th March, 2020, in Special Case No. 417 of 2018, is hereby quashed and set aside.
- [iii]** The Appellant is acquitted of the offences for which he has been convicted and sentenced by the learned Trial Court by the impugned Judgment and Order.
- [iv]** The Appellant is in Jail and he be released forthwith, if not required in any other offence.
- [v]** The muddemal articles be dealt with as directed by the learned Trial Court.
- [vi]** The fine amount if paid by the Appellant be refunded to him.
- [viii]** The record and proceedings be sent back to the learned Trial Court.
- [ix]** Pending Criminal Application/s, if any, stand/s disposed off.

[NEERAJ P. DHOTE]
JUDGE

SG Punde