



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

CRIMINAL APPEAL NO. 387 OF 2023

Babulal Barku Bhil

Age : 28 years, Occu: - Nil,

R/o. Adgaon, Tal. Chopada, Dist. Jalgaon.

...Appellant

Versus

State of Maharashtra,

Through Chopda City Police Station,

Jalgaon (C.R. No. 09/2022).

...Respondent

.....

Mr. Chetan T. Jadhav – Advocate [appointed] for the Appellant

Mr. G. A. Kulkarni – APP for State

Mr. Rahul A. Tambe – Advocate [appointed] for Respondent No. 2

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CORAM : NEERAJ P. DHOTE, J.

RESERVED ON : 08.10.2025

PRONOUNCED ON : 14.10.2025

JUDGMENT : -

1. This is an Appeal under Section 374(2) of the Code of Criminal Procedure, 1973 [for short 'Cr.P.C.] against Conviction awarded by the learned Additional Sessions Judge, Amalner, in Special Case (POCSO) No. 01 of 2022, on 08.12.2022, convicting and sentencing the Appellant as follows: -

"ORDER

1] *The Accused Babulal Barku Bhil, Age- 28 years, Occu- Nil, R/o. Adgaon, Tal. Chopada, Dist- Jalgaon is hereby convicted u/s 235(1) of Cr.P.C. for committing offence punishable u/s. 354A, 354B of IPC and under section 8 of The Protection of Children from Sexual Offences Act, 2012.*

- 2] *The accused is hereby directed to undergone sentence of rigorous imprisonment of 7 years for committing offence punishable u/s 354B of IPC.*
- 3] *The accused is not sentence for committing offence punishable u/s 354A of IPC separately. As he is awarded punishment u/s 354B of IPC.*
- 4] *The accused is awarded rigorous imprisonment of five years for committing offence u/s. 8 of The Protection of Children from Sexual Offences Act, 2012.*
- 5] *No fine is awarded to the accused though all these offences in which accused have convicted provides fine as accused is poor person and legal aid was given to him.”*

2. The Prosecution case, in brief as revealed from the Police Report, is as under : -

[a] The Informant was the Labourer and resident of Adgaon, Taluka Chopada, District Jalgaon. She was residing with her husband and three daughters. The elder one is married. The second one was taking education in 10th Std., and the younger daughter (Victim) was studying in the first Std. In the morning of 10.01.2022, when she and her husband left for work, they dropped the Victim to her mother's house, which was nearby. In the afternoon, when she returned home, Bhavrao Vana Koli, the resident of their village, brought the Victim to her house and informed that, the Appellant took the Victim with him on the pretext of offering Jujube (बोरे) and took her to Nallah, removed her clothes and was trying to commit sexual assault on her. As the Victim was crying, his attention was drawn. The Appellant fled and he took the Victim with him. The Informant approached the Police, lodged the report and

the criminal law was set in motion. The Police conducted the spot *panchanama*, recorded the statement of the Victim and the witnesses, and arrested the Appellant. On completion of investigation, the Appellant came to be Charge-sheeted.

3. On committal, the learned Trial Court framed the Charge against the Appellant for the offence punishable under Sections 354 A, 354 B of the Indian Penal Code, 1860 [for short 'IPC'] and Section 8 of the Protection of Children from Sexual Offences Act, 2012, below Exh.8. The Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined the following witnesses:

- [i] PW1 – Victim's mother and Informant.
- [ii] PW2 – Victim.
- [iii] PW3 – Bhavrao Vana Koli, the eye-witness.
- [iv] PW4 – Pratibha Vijay Patil, the Headmistress of the School where the Victim was studying.
- [v] PW5 – Gopal Abhiman Mahirale, the Spot Panch.
- [vi] PW6 – Pramila Kashinath Pawar, the Station Diary Officer of the Police Station, who recorded the Victim's statement and that of the Informant and registered the Crime.
- [vii] PW7 – Ghanshyam Chandrakant Tambe, the Investigating Officer.

3.1. The Prosecution brought on record the following documents:

- [a] The report on which the FIR came to be registered [Exh.16].
- [b] Statement u/s 164 of Cr.P.C. of the eye-witness [Exh.22].
- [c] The School Leaving Certificate of the Victim [Exh.25].
- [d] The *Bonafide* Certificate of the Victim [Exh. 26].

- [e] The Spot *Panchanama* [Exh.28].
- [f] The Statement of the Victim [Exh. 30].
- [g] The Injury Certificate of the Victim [Exh. 40], and duly filled in Form before the Child Welfare Committee [Exh. 41].

4. After the Prosecution filed Evidence Closure Pursis, the learned Trial Court recorded the statement of the Appellant under Section 313(1)(b) of the Cr.P.C. The Appellant denied the case and the evidence of the Prosecution. On appreciation of the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

5. It is submitted by the learned Advocate for the Appellant that, the Victim was a child. The evidence on record goes to show that, there was a dispute between the Appellant and the Victim's grant-mother, and therefore, the Appellant was falsely implicated. The eye-witness was an old person and, therefore, his presence on the spot was doubtful. According to the Victim, her hands were tied by the handkerchief, whereas, according to the witness, the Victim's hands were tied by rope. The medical evidence do not support the case of the Prosecution. The evidence on record show that, the possibility of false implication cannot be ruled out. The Appellant is behind the bars for a period of three (3) years and some months and has undergone the minimum sentence provided for the offences for which he has been convicted, and submits that the Appeal be allowed.

6. It is submitted by the learned APP that, the Victim was a Child. The eye-witness to the incident was examined and the statement of the eye-witness was recorded before the learned Magistrate which goes to show that he was able to walk. The Victim's evidence was consistent with her previous statement. The suggestions were denied and the defence got falsified. There was sufficient evidence to invoke the presumption under Section 29 of the POCSO Act. There is no explanation by the Appellant in the statement under Section 313 of the Cr.P.C. The learned Trial Court has properly appreciated the evidence on record and convicted the Appellant and the Appeal be dismissed.

7. It is submitted by the learned Advocate for the Victim that, the Prosecution proved the Charge by examining the necessary witnesses. The defence is not probable. Though the Victim was a School going girl, on the day of incident, she was at home. He further submitted that, he adopts the arguments made by learned APP and prays for dismissal of the Appeal.

8. Since the Conviction is for the offence punishable under Section 8 of the POCSO Act, it is necessary to prove that, the Victim was a Child as defined under Section 2(d) of the POCSO Act. To prove the date of birth of the Victim, the Prosecution examined PW4 - Pratibha

Vijay Patil, who was the Headmistress of the Zilla Parishad Kendriya Prathamik School, Adgaon. Her evidence shows that, she issued the Leaving Certificate of the Victim. She brought the school record in which the date of birth of the Victim was recorded as 01.06.2015. Though this witness was cross-examined at length, nothing has come to create any dent in her testimony. In view of evidence of this witness, the Prosecution proved that the Victim was a Child.

9. The Informant is the mother of Victim. Undisputedly, she is not an eye-witness to the incident. Her evidence show that, on the day of incident, she dropped the Victim at the house of her mother, Kalabai, which was at the back side of her house. She knew the Appellant, who was residing at the back side of her house. After she returned home in the afternoon, PW3 – Bhavrao brought the Victim with him and informed about the incident and therefore, she lodged the report at Exh. 16. The cross-examination shows that, her said evidence that the Appellant was residing behind her house, the Victim was brought by PW3 – Bhavrao to her house and the Victim informed her about the incident, were improvements/omissions. Her evidence shows that, the Appellant was addicted to liquor and her mother used to sell liquor. Her husband was also addicted to liquor. Suggestions were given that her husband and the Appellant were good friends due to liquor habit and the Appellant was in arrears towards bill of liquor to be paid to her

mother. What can be seen from the evidence of this witness is that, she set the criminal law in motion and nothing more.

10. The Victim was examined as PW2. The note before her evidence show that, the evidence of Victim was recorded in the chamber by taking necessary precautions. The said note show that, the Victim had come along with her mother and she was allowed to sit on the lap of her mother and was also allowed to see the mobile while recording the evidence. The evidence of Victim show that she was in the first standard at the relevant time. She knew the Appellant. The Appellant asked her to accompany him for having jujubes. The Appellant took her to Nallah where he tied her hands with handkerchief and removed her clothes. She started crying. PW3 – Bhavrao came there and the Appellant ran away. PW3 – Bhavrao brought her home. She informed about the incident to her grandmother and the mother. It has come in the cross-examination that PW3 – Bhavrao was an old person. Suggestion was given that, PW3 – Bhavrao was not able to move due to his old age. It has come in the Victim's evidence that, on the day of incident, she was in the School for the entire day, and she did not sustain any injury to her hand. Further, it has come in her evidence that, the Appellant did not take her towards Nallah. The other suggestions were denied. She identified the Appellant and started crying.

11. It is needless to state that, under the settled position in law, the testimony of the child Victim needs to be appreciated with due care and caution as there is always possibility of tutoring. Some variances are bound to be there in the testimony of a child witness. As per the note recorded before her evidence show that the Victim was aged 5-6 years. It was mandatory for the learned Trial Court to ask some preliminary questions to the Victim so as to ascertain if the Victim was capable of understanding the sanctity of giving the evidence. Even if the above aspect is ignored, the evidence of the Victim is shaken in the cross-examination. Therefore, complete reliance cannot be placed on her testimony. It becomes necessary to seek corroboration to the testimony of the Victim.

12. Evidence of PW3 – Bhavrao shows that, on 10.01.2022, while he was coming back from the temple to take fodder for Cow around 01:30 to 02:00 pm, and reached near Ramkrishna Mali's field, he heard cry of a girl child nearby Nallah and he saw the Victim whose hands and feet were tied. There were no clothes on the Victim's person. The Appellant was present there. The nicker of the Victim was in the hands of the Appellant. The Appellant ran away and he brought the Victim to her grand-mother by putting her clothes on her person. He further deposed that, the hands of the Victim were tied. His evidence indicates that, his said evidence in respect of the incident was an

improvement. However, the same is not proved by the defence through the Investigating Officer. His cross-examination shows that, the Appellant used to steal his food box from the farm. The suggestion is given that the relation between his family and the Appellant were not cordial due to quarrels and the Appellant was being harassed by the villagers. Exh. 22 shows that, the statement of PW3 – Bhavrao, under Section 164 of Cr.P.C. was recorded after ten (10) days of the incident. The age of this witness is shown as 75 years. As the incident, according to him, is of January-2022 and his testimony was recorded in October-2022, it is clear that he was 75 years of age at the relevant time. His cross-examination shows that, due to his age, he does not go anywhere. Undisputedly, the evidence of PW3 – Bhavrao was recorded by the Court Commissioner. In the light of this, his presence on the spot of incident appears doubtful.

13. According to the Victim, her hands were tied and according to this witness, the hands and legs of the Victim were tied. From the evidence of PW5 – the Panch witness, it is seen that one rope of two to two and half ft., was seized from the spot which was a Nallah. The Injury Certificate of the Victim is brought on record in the cross-examination of PW7 – Investigating Officer. It has come in the cross-examination of the Investigating Officer that, the Injury Certificate do not show injuries on the person of the Victim. According to the

Investigating Officer, if the hands of any person are tied with force, the person can sustain injury. According to this eye-witness, he gave the custody of the Victim to her grand-mother whereas; according to the Informant, PW3 – Bahvrao brought the Victim to her house. Undisputedly, the grandmother of the Victim is not examined. In the cross-examination of PW 7 – Investigating Officer, the defence confronted him with Form No. 17 at Exh. 41, which was filled in before the Child Welfare Committee, and brought on record that it was mentioned in the said form that the Victim was found in absconded condition; the Victim was a minor and was not ready to go home. These are material aspects, which cannot be ignored. Further, the evidence of this PW7 – I.O. shows that, there was no reference of Nallah in the sketch shown in the spot panchanama.

14. The above discussion of the evidence on record show that, the Prosecution's evidence is not concrete. The evidence on record do not give the required assurance that, the incident had taken place. The evidence of the Victim is shaken in the cross-examination. The presence of the eye-witness is doubtful. The evidence of the Informant in respect of the incident is hearsay. There was no injury on the person of the Victim, though according to Prosecution witnesses, her hands were tied by rope. Though, according to the Prosecution the incident took place on 10.01.2022 in the afternoon, the report was lodged by the

Informant on 11.01.2022 in the afternoon. As the Prosecution evidence is not concrete and fall short of proving the foundational facts to give the required assurance in respect of commission of offence by the appellant, the presumption under Section 29 of the POCSO Act will not come into play. In view of the above discussion, the Prosecution's case is required to be seen with doubt and it is not possible to maintain the conviction and sentence awarded by the learned Trial Court and the Appellant is entitled for acquittal. Hence, I pass the following order : -

ORDER

- [i] The Appeal is allowed.
- [ii] The Judgment and Order dated 08.12.2022 passed by learned District Judge-2 and Additional Sessions Judge, Amalner, in Special Case (POCSO) No. 01 of 2022, convicting and sentencing the Appellant, is hereby quashed and set aside.
- [iii] The Appellant is acquitted of the offences punishable under Sections 354A, 354B of the Indian Penal Code and Section 8 of the Protection of Children from Sexual Offences Act, 2012.
- [iv] The Appellant be released forthwith, if not required in any other Crime.

- [v] Muddemal articles be dealt with as per the operative order of the learned Trial Court.
- [vi] Fees of learned Advocate, Mr. Chetan T. Jadhav, appointed to represent the Appellant, is quantified at Rs. 10,000/- [Rupees Ten Thousand], which shall be paid by the High Court Legal Services Sub-Committee, Aurangabad Bench.
- [vii] Fees of learned Advocate, Mr. Rahul A. Tambe, appointed to represent Respondent No. 2, is quantified at Rs. 10,000/- [Rupees Ten Thousand], which shall be paid by the High Court Legal Services Sub-Committee, Aurangabad Bench.

[NEERAJ P. DHOTE]
JUDGE

SG Punde