Subhash Vs. The State of Maharashtra

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Court : Mumbai Nagpur

Decided On : Nov-21-2015

Judge : A.B. Chaudhari

Appeal No. : Criminal Appeal No. 134 of 2015

Appellant : Subhash

Respondent : The State of Maharashtra

Judgement :

Oral Judgment :

1.Being aggrieved by the Judgment and Order dated 09th March, 2015 passed by learned Additional Sessions Judge, Chandrapur, in Sessions Case No. 2 of 2013 convicting the appellant Subhash Balkrushna Buradkar of the offences under Sections 9 and 10 of the Protection of Children from Sexual Offences Act, 2012, and sentencing him to undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 2,000/-, in default, further Rigorous Imprisonment for one month, and also for the offence under Section 354-A of Indian Penal Code, the present appeal has been filed by the appellant, who is in jail from 5th July, 2013.

2.In support of the appeal, learned counsel for the appellant submitted that the prosecution case is based on the solitary testimony of the girl child witness aged about nine years, and the Trial Court recorded conviction on the basis of the said evidence. He submitted that though the conviction can be based on the sole

testimony of a witness, but then, in that case, the evidence of such a witness should be trustworthy and without any infirmity. He then submitted that in the instant case, the child witness 'V' [PW 1] admitted in the cross-examination that her police statement was recorded during investigation, as told by her grand-mother to the police. He also submitted that she was taught by her grand-mother how to give evidence in the Court and that the statement by police was recorded in Hindi on the questions put to her in Hindi. He then submitted that there are inherent contradictions in the evidence of the child witness. That apart, there is a serious doubt about the identity of the appellant-accused, since the child witness did not say a word about she knowing the accused previously or she identifying the accused in the Test Identification Parade. In fact, not a single question was asked by the prosecution as to identification of the accused by her in the Test Identification Parade. He then submitted that in para 6 of the cross-examination, she changed the entire story of the prosecution; but surprisingly enough, the Trial Judge has not chosen to refer to or look into the cross-examination at all and decided to convict the appellant, stating therein that the accused did not deny the material portion in her Examination-in-Chief. According to Mr. Joshi, the initial burden of proof being on the prosecution, the entire story is wrongly gathered, marshaled and assessed by the Court, and even assuming that the suggestions or denials are not given, the entire cross-examination shows that the accused never admitted the offence to have been committed by him, and, on the contrary, the story is about his false implication, which necessarily means that he has denied the story of prosecution. He then submitted that the Trial Judge went by the principle that no family member or the guardians of the girl would put her to the risk of dis-reputation by making any false allegations. To substantiate his argument, learned Adv. Mr. Joshi relied on the following decisions:-

[a] **State of Rajasthan Vs. Babu Meena** [(2013) 4 SCC 206],

[b] **K. Venkateshwarlu Vs. State of Andhra Pradesh** [AIR 2012 SC 2955],

[c] **John @ Vivek Ramesh Jadhav Vs. State of Mah**. [2015 ALL MR (Cri) 4053], and

[d] **Gura Singh Vs. State of Rajasthan** [1984 Cri. L.J. 1423].

3.Per contra, learned Addl. Public Prosecutor for the respondent-State supported the impugned Judgment and Order and vehemently submitted that to the material portion of the evidence of the child witness, there is not even a semblance of suggestion anywhere that the incident did not happen as narrated by her in material particulars and, therefore, the Trial Judge cannot be blamed, since the appellant did not deny the incident proper by making the cross-examination to that effect. She then submitted that the evidence of the child witness [PW 1] was trustworthy and believable and that is why conviction has been rightly recorded by the court below. She, therefore, prayed for dismissal of the appeal.

4.I have perused the entire evidence with the assistance of the learned counsel for the rival parties carefully. I have seen the reasons recorded by the Trial Judge in the judgment impugned.

5.The evidence of 'V' [PW 1] was recorded 'in camera'. She was aged about nine years on the date of recording of evidence. In her Examination-in-Chief, she stated that one person had come to her while her grand-mother was talking to one more person and then he took her in the hut where he had outraged her modesty by touching her chest, private part etc., and kissing her. Careful reading of the Examination-in-Chief does not show anywhere that the person, who came to her and took her to the hut, was the same person, namely the appellant-accused. It is casually pointed out by her that she can identify the accused person and said person is present today before the Court. But then, there might be several persons present in the Court and care ought to have been taken by the court as well as by Public Prosecutor to point out the appellant as the same person doing the indecent act, or that it was the the appellant who was the same person taking her to the hut. Surprisingly enough, that is absent in the Examination-in-Chief. Further, in the Examination-in-Chief, it is nowhere claimed by her that she had known the appellant-accused earlier at any point of time. It appears that, that is why the Test Identification Parade was held. But then it was for her to depose that she was taken for parade and that she had identified the accused as the same person, namely the appellant. Nothing of that sort was done by the prosecution. Thus, to my mind, it is the prosecution who is completely guilty of adducing the evidence before the Court in a halfhearted and casual manner and, thus, spoiling the

prosecution case.

6.Now, coming to the cross-examination of this witness, I quote paras 3 and 6 as follows:-

3. Police have recorded my statement. He put questions to me in hindi and I also replied in hindi language. It was recorded on next day of the quarrel between my grand mother and the accused. It was recorded at about 8.00 to 8.30 p.m. My evidence is taught by my grand mother. My statement was narrated by my grand mother to police and they have reduced into wring accordingly.?

6. My brother Vedant is younger by 2 years to me.

On that day, I along with my brother had been to see train. We have viewed train. My grand mother came towards us with searching. Thereafter, she has taken us to her tea stall. Thereafter, we all went to house. Then my grand mother returned back to home in the night and told to my father that there was quarrel between she and accused, therefore, she has to lodge the report. Thereafter, my father and grand mother went to Police Station. At that time I did not accompany them. On the next day police called me and asked whether or not report lodged by my grand mother is true. On that I replied in the affirmative.?

The above evidence shows that she was asked the questions in Hindi and she replied in Hindi, but her statement is in Marathi. It is then stated that there was a quarrel between her grand-mother and the accused. It is then stated that her evidence was taught by her grand-mother. Her statement was narrated by her grand-mother to the police who recorded the same accordingly, which means that she had never given a statement which was recorded by the police, but her grand-mother had stated on her behalf. That apart, in para 6, she stated that on that day, i.e., the date of incident, she had gone to see the train with her brother, and her grand-mother came searching for them. She then took them to her tea stall. Thereafter, they all went to house. She also stated that her grand-mother told her father that there was a quarrel between her and the accused and she wanted to lodge a report with the Police Station. She did not go to Police Station, but her grand-mother accompanied by her father lodged the report with the Police Station.

It is, thus, clear that in para 6 of the cross-examination, the witness has narrated the incident in a totally different manner, stating nothing about the complicity of the appellant in respect of the incident narrated by her in para 6 of her cross-examination. As earlier stated, there is a serious flaw about the identification of the appellant as the same person. The Trial Court has stated that in the cross-examination, the incident was not disputed. In my opinion, her cross-examination will have to be read in entirety and one cannot jump to the conclusion that merely because the material portion about outraging the modesty is not suggested to be false, such a conclusion cannot be drawn. That apart, as earlier stated by me, in examination-chief, she described about one person outraging the modesty and not the appellant-accused person. In the wake of such type of quality of evidence, I do not think that it would make any difference when the suggestions or denials are not given to the witness.

7.That apart, except the above evidence of PW 1, there is no evidence and naturally because the case of the prosecution is that PW 1 was taken to hut and nobody has seen that nor anybody claimed to have seen the incident of outraging the modesty in the hut. It was PW 1 'V' who alone was the privy to the incident, but then the quality of evidence which I have stated is such that no conviction could have been recorded in the instant case. It clearly appears that the Trial Court has recorded a moral conviction, which has no place in law. The Court has to find out whether there is legal evidence or not, irrespective of the fact whether the victim is a girl child, or as the case may be. Ultimately, the Courts are bound to stick to the letters of law and not to one's own whims and fancies. The Court has further stated that no person would put the girl child by raising such a stigma. The answer was given by the Apex Court in para 16 of its judgment in the case of **Pandurang Sitaram Bhagwat vs State of Maharashtra, 2005** [All M.R. (Cri) 776 (SC)] would be apt, which I quote hereunder:-

16. The approach of the learned Trial Judge as noticed supra that ordinarily a lady would not put her character at stake? may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix thereof. The law reports are replete with decisions where charges under Sections 376 and 354 of IPC have been found to have been falsely advanced.?

8.As to the law about assessment of evidence of a child witness, it would be apt to quote para 9 from the Judgment of Apex Court in the case of **K. Venkateshwarlu Vs. State of Andhra Pradesh** [cited supra], which reads thus:-

9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.?

Following the above view of the Apex Court and in the light of the evidence discussed above, I think the Judgment of the Trial Judge is faulty for want of legal evidence. Thus, the appellant will have to be acquitted. In that view of the matter, I make the following order:-

ORDER

[a] Criminal Appeal No. 134 of 2015 is **allowed**.

[b] The Judgment and Order dated 9th March, 2015 passed by learned Additional Sessions Judge, Chandrapur, in Sessions Case No. 2 of 2013 is set aside.

[c] The appellant is acquitted of the offences for which he was charged and convicted.

[d] He be released forthwith, if not required in any other crime.