

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.242 OF 2016

Kishor s/o. Bhanudas Walhekar,
Age: 23 years, Occu.:Labourer,
R/o. Ukhalwadi, Post. Jatnandur,
Tq. Shirur Dist. Beed = **APPELLANT**
(Accused)

VERSUS

The State of Maharashtra
Through police Inspector
Police Station, Pathardi,
Taluka Pathardi,
Dist. Ahmednagar = **RESPONDENT**

Mr.NL Jadhav, Advocate for Appellant;
Mr.SW Mundhe, APP for Respondent

CORAM : P.R.BORA, J.

RESERVED ON:- 10th August, 2017

PRONOUNCED ON:3rd November,2017

JUDGMENT:

1) The appellant has filed the present appeal against the judgment and order passed by the Judge of Special Court at Ahmednagar in Sessions Case No.206 of 2014 decided on 20th November, 2015, whereby the appellant has been convicted for the offences punishable under Sections 3 and 4 as well as 5(1) and (6) of the

Protection of Children from Sexual Offences Act, 2012 (for short, POCSO Act) and under Section 376, 366-A and 363 of Indian Penal Code. The maximum sentence awarded to the appellant is of ten years.

2) The appellant is in jail since the date of his arrest in the crime registered against him i.e. from 22nd May, 2014.

3) In short, it is the case of the prosecution that the accused kidnapped the prosecutrix, who is stated to be a minor girl, from the lawful guardianship of her parents with an intent to seduce her for illicit intercourse and time to time committed rape on her in the period between 7.5.2014 to 13.5.2014. According to the case of the prosecution, on 7.5.2014, the accused gave a phone call to the prosecutrix and asked her to come at State Transport bus stand at Amrapur so as to go along with him at his house at Ukhal-wadi. Accordingly, the prosecutrix reached to ST bus stand at Amrapur and then went

along with the accused, first to Ahmednagar and from there to Pune. It was the further case of the prosecution that the accused took the prosecutrix at Pimpri and stayed in a lodge at Pimpri and during their stay in the said lodge, had sexual intercourse with the prosecutrix against her will. It was the further case of the prosecution that on 10th May, 2014, the accused took the prosecutrix to Aalandi and without her consent, performed marriage with her and at that time compelled the prosecutrix to state the year of her birth as 1996. It was also the case of the prosecution that thereafter the accused several times had sexual intercourse with the prosecutrix without her consent.

4) In the meanwhile period, father of the prosecutrix was searching for her and when he came to know that the prosecutrix is with the accused at his house at Ukahlwadi, brought the prosecutrix from there and then lodged the report against the accused whereupon investigation was

set in motion. The investigating officer recorded statements of the necessary witnesses, prepared panchanama of the spot, collected details of the joint stay of the accused and the prosecutrix at Pimrpi, Pune as well as Aalandi, collected the documentary evidence pertaining to age of the prosecutrix from the school, where the prosecutrix had taken her education; got done the medical examination of the prosecutrix as well as the accused and after completing the investigation, filed charge sheet against the accused for the offences punishable under Sections 376, 363 and 366-A of Indian Penal Code and under Sections 3, 4 and 5(1) of the POCSO Act.

5) In order to prove the guilt of the accused, the prosecution had examined as many as 12 witnesses before the Sessions court. According to the accused, the charges levelled against him are false. It is his contention that the prosecutrix, at her own, accompanied him at

Pimpri, Aalandi etc and that he did never kidnap her and it was not his intention to seduce her for illicit intercourse. It is also the contention of the accused that he did not have sexual intercourse with the prosecutrix without her consent. The accused, however, did not enter into the witness box nor examine any witness in his defence. The learned Sessions court, after considering the oral as well as documentary evidence brought before it, held the charges levelled against the accused to have been proved and convicted him for the aforesaid offences and awarded the punishment as noted herein above. Aggrieved by, the appellant has filed the present appeal.

6) Shri N.L.Jadhav, learned Counsel appearing for the appellant, assailed the impugned judgment on various grounds. The learned Counsel submitted that the learned Sessions Judge has utterly failed in appreciating that at the relevant time, the prosecutrix was

not a minor girl and has accompanied the accused at her own will. The learned Counsel further submitted that though the prosecution has failed in bringing on record any cogent evidence as about the age of the prosecutrix, the learned Sessions Judge, merely relying on the school record, has held the prosecutrix to be a minor girl.

7) The learned counsel further submitted that the prosecution has also failed in bringing on record any cogent evidence to prove that the accused had sexual intercourse with the prosecutrix against her wish. The learned Counsel further submitted that at the relevant time the prosecutrix was above the age of 18 years and had accompanied the accused voluntarily. The learned counsel submitted that in her cross-examination the prosecutrix has candidly admitted that she voluntarily went with the accused from bus-stand Amrapur. The learned counsel further submitted that father of the

prosecutrix has also admitted in his cross-examination that the accused has not taken the prosecutrix by force.

8) In view of the above, according to learned Counsel, the accused could not have been held guilty by the learned Sessions Court for the offences charged against him. In support of the submissions made by him, the learned counsel relied upon the following judgments, -

i) Madan Mohan Singh and Ors. Vs. Rajni Kant and anr – AIR 2010 SC 2933;

ii) Ramesh chandra Agrawal Vs. Regency Hospital Ltd and ors. – AIR 2010 SC 906;

iii) Birad Mal Singhvi Vs. Anand Purohit – AIR 1988 SC 1796;

iv) Gangadhar s./ Gonduram Tadme Vs. Trimbak s. Govindrao Akingire and ors. – 2005(1)Mh.L.J. 94;

v) Gurudas Bandu Pendor Vs. State of Maharashtra – 2015 ALL M.R.(Cri.) 4494.

Eventually, the learned Counsel prayed for setting aside the impugned judgment and order and consequently to acquit the accused of the offences charged against him.

9) Shri S.W.Mundhe, learned APP appearing for the State, resisted the submissions made on behalf of the appellant. The learned APP submitted that the prosecution has brought on record clinching evidence, proving the guilt of the accused. The learned APP submitted that the prosecution has, beyond any doubt, proved that the prosecutrix was a minor girl at the relevant time by examining the Headmaster of the school where the prosecutrix had taken her primary education and by bringing on record the documentary evidence as about the age of the prosecutrix. The learned APP further submitted that in view of the fact that the prosecutrix was below the age of 16 years, the theory of consent was liable to be discarded and has been rightly discarded by the learned Sessions Judge. The

learned APP further submitted that the prosecution has sufficiently proved that the accused resided with the prosecutrix in a lodge at Pimpri and had forcible sexual intercourse with her. The learned APP submitted that the medical evidence also supports the case of the prosecution. In the circumstances, according to the learned APP, no case was made out by the appellant for causing interference in the impugned judgment and order. In order to substantiate his contentions, the learned APP relied upon the judgment of the Hon'ble Apex court in the case of State of Madhya Pradesh Vs. Anoop Singh – 2015 3 Bom.C.R.(Cri.) 640. The learned APP, prayed for dismissal of the appeal stating the same to be devoid of any merit.

10) I have carefully perused the evidence on record. The prosecution though has examined as many as 12 witnesses so as to prove the guilt of the accused, the evidence of the prosecutrix, of her father Rajendra Dake (PW 2) and of Balkrishna

Vinayak Kanthale (PW 7) the Head Master of the ZP primary school at Susare, bear material importance. After having considered the entire evidence on record and more particularly the testimony of the prosecutrix and her father, it is apparently revealed that on 7th May 2014, the prosecutrix had voluntarily, at her own, left the parental house to accompany the accused. As has been deposed by the prosecutrix, the accused had asked her to reach at Amrapur ST Stand by giving her a phone call on mobile phone. Accordingly, the prosecutrix left her house when her parents were not at home and reached to Amrapur ST stand by an auto rickshaw by paying a fare of Rs.10/- for the said auto rickshaw to travel from her house to Amrapur ST stand. As has been further deposed by the prosecutrix, after reaching to Amrapur ST stand, she and the accused first went to Ahmednagar by ST bus and thereafter went to Pune. From Pune, they both went to Pimprichinchwad and resided at one lodge. As per the version of the prosecutrix, they resided in the

said lodge for two days and on both days, the accused had taken her in the city in the day time and in the night the accused had sexual intercourse with her.

11) It has also come on record through the evidence of the prosecutrix that the accused, then took her at Aalandi and performed the marriage with her. It is further deposed by her that at that time, the accused compelled her to tell her year of the birth as 1996. As has been further deposed by her, she and the accused returned to Pimpri-Chinchwad and further resided for two days in the same lodge and then the accused took her to his parental home at Ukhalwadi. As has come on record, on 13th May, father of the prosecutrix came to Ukhalwadi and took back the prosecutrix with him and lodged the report on 14th May, 2014. In the report lodged by her, of course, the prosecutrix has alleged that the accused had forcible sexual intercourse with her. However, in so far as her act of leaving

the paternal house on 7th May, 2014, the prosecutrix has admitted that she went voluntarily with the accused from Susare to Amrapur. Even father of the prosecutrix has admitted in his cross-examination that the accused did not take the prosecutrix with him by force.

12) In her testimony before the court, the prosecutrix though has deposed that the accused on pretext that his son is missing the prosecutrix and, therefore, she shall come to his village for taking care of the said child, in the FIR lodged by her, nowhere the said fact is stated by her. On the contrary, the version in the FIR demonstrates that the prosecutrix had stated that she and the accused had fallen in love with each other. The prosecutrix in her cross-examination was confronted with the said portion in the report lodged by her. Though the prosecutrix denied that any such fact was stated by her while lodging the report to the police,

Dy.SP — Umesh Hajare (PW 12) in his cross-examination stated that the said portion in the FIR marked at portion 'A' was stated by the prosecutrix and was recorded strictly as per the version of the prosecutrix. In her further cross-examination, the prosecutrix herself has admitted that the police has recorded her statement, which was treated as FIR as per her own version.

13) It is further significant to note that though after eloping from parental house on 7th May, 2014, till her father took her back with him on 13th May, 2014, the prosecutrix was along with the accused and as stated by her travelled with him through public transport, i.e. State Transport bus from Amrapur to Ahmednagar, thereafter to Pune and then to Chinchwad and Aalandi etc., the prosecutrix did not complaint to anybody that she was compelled by the accused to accompany him against her will. The prosecutrix has also admitted that at Amrapur ST

Bus stand, she saw some persons from village Susare, but she did not make any grievance to them that she was being forcibly taken by the accused with him. As has come on record, the accused used to take her for ride in the city in day time. It was, therefore, possible for the prosecutrix to make a complaint against the accused. It was also possible for her to make a complaint to the persons in the lodge or while travelling by ST bus to the fellow-travellers. Admittedly, no such complaint was made by the prosecutrix. It is more significant to note that the accused ultimately took her at her parental house at village Ukhalwadi, where also the prosecutrix did not make any complaint. The entire behaviour of the prosecutrix undoubtedly shows that she was not being taken by any force by the accused, but was accompanying the accused voluntarily at her own wish. If this was the case of the prosecutrix that the accused had sexual intercourse with her without her wish and by force, then also it was possible for her to

immediately make complaint to the persons in the lodge or when she travelled from Pimpri-Chinchwad to Aalandi by bus to the fellow-travellers in the ST bus or even to the priest, who according to her, performed her marriage with the accused. The prosecutrix, admittedly did not make any such complaint to anybody. The allegation so made thus also does not appear to be believable.

14) Further, if it was the case of the prosecutrix that she became ready to go along with the accused, as because it was stated to her by the accused that his son is missing her, when the accused, instead of taking her to his village, took her to Ahmednagar and from there to Pune, the prosecutrix at the very first instance must have refused to go with the accused and must have made complaint to the police or to the persons around her. Admittedly, no such complaint was made by the prosecutrix. On the contrary, the evidence on record shows that she remained in the company of the accused thereafter

for about 5 to 6 days and then along with the accused went to the parental house of the accused at village Ukhalwadi.

15) From the evidence on record, it is difficult to believe the allegation made by the prosecutrix in her testimony before the court that she was being taken by the accused by falsely stating that the son of the accused was missing her and she was required at the village where the accused was residing for taking care of the child of the accused. It further cannot be accepted for one more reason that it has come in the evidence of the prosecutrix herself that the accused was residing at Ukhalwadi along with his wife and son. The question arises when mother of the child was very much there, why for the prosecutrix was required to take care of the child. Considering all these circumstances, the version of the prosecutrix in the FIR that she and the accused had fallen in love with each other and that was the reason that she went with

the accused, appears more probable and believable. As I noted earlier, even father of the prosecutrix has also admitted in his cross-examination that the accused did not take the prosecutrix with him by using force.

16) After having considering the evidence of the prosecutrix and father of the prosecutrix, I find it difficult to accept the case of the prosecution that the accused had forcibly taken the prosecutrix with him to say in legal parlance, kidnapped her, from the lawful guardianship of her parents with an intent to seduce her for illicit intercourse. It also appears difficult to accept that the accused had sexual intercourse with the prosecutrix without her consent. The fact apart that the medical evidence does not conclusively support the version of the prosecutrix that the accused had forcible sexual intercourse with her.

17) From the evidence on record, which I

have elaborately discussed herein above, though it is revealed that the prosecutrix had at her wish eloped with the accused and voluntarily remained in his company for the period of about six days and during the said period also had sexual intercourse with the accused,

18) The learned Sessions Judge has kept the aforesaid evidence out of consideration on the ground that the prosecutrix was minor at the relevant time and as such, was not competent to accord her consent. As it was submitted by the learned APP, the prosecutrix being minor, consent on her part, as alleged by the accused, was immaterial.

19) The next question, therefore, which falls for my consideration is, - whether the prosecution has proved that the prosecutrix was minor at the relevant time ?

20) As per the case of the prosecution, date

of birth of the prosecutrix is 8th October, 1999 and as such, at the relevant time, the age of the prosecutrix was 15 years and she was thus a minor child, not competent to accord her consent. To support the said contention the prosecution has relied upon the testimony of the prosecutrix, testimony of her father, testimony of the Headmaster of the school (PW 7), where the prosecutrix took her primary education and the documents produced on record by PW 7, more particularly the extract of the admission register, bonafide certificate issued by the Headmaster of the said school, and the copy of the school leaving certificate wherein the date of birth of the prosecutrix is noted as 8th October, 1999.

21) As was argued by learned APP, the prosecution has undoubtedly proved the date of birth of the prosecutrix to be 8th October, 1999. according to which, the age of the prosecutrix, at the relevant time was certainly below 16 years

and as such, she has been rightly held to be minor by learned Sessions Court.

22) According to the accused, the prosecutrix was major at the relevant time and 8th October, 1999 is not the correct date of her birth, as has been canvassed by the prosecution. It is the contention of the accused, that the evidence, which has been brought on record by the prosecution as about the age of the prosecutrix is not free from doubt and hence cannot be relied upon.

23) In the light of the submissions so made, the evidence on record has to be closely scrutinized.

24) PW 7 – Balkrishna Kanthale, the then Headmaster of the Zilla Parishad Primary school, Susare, was examined by the prosecution to prove that the prosecutrix was minor at the relevant time. PW 7 in his testimony before the court has

deposed that the prosecutrix had studied in zilla parishad primary school at village Susare. PW 7 had brought with him necessary record as about age of the prosecutrix and filed the same on record. As per the said record, the date of birth of the prosecutrix is 8th October, 1999. As deposed by PW 7, the entry as about the date of birth of the prosecutrix was taken in the school register from the original Birth Certificate issued by Gramsevak, Susare. Referring to the testimony of PW 7 and the documents which were exhibited in the evidence of the said witness, i.e. Exh. 38, 39 and 40, it was vehemently argued by learned APP that by bringing on record such evidence the prosecution has, beyond reasonable doubt, proved that the prosecutrix was a minor girl at the relevant time.

25) The learned APP relied upon the judgment of the Hon'ble Apex court in the case of State of Madhya Pradesh Vs. Anoop Singh – (2015) 7 SCC 773 to urge that the date of birth certificate from

the school (other than the play-school) first attended can be held to be a valid and dependable proof in so far as date of birth is concerned. The learned APP submitted that the Hon'ble Apex court in the case of Mahadeo Kerba Vs. State of Maharashtra and Anr. – (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable for determining the age of the victim of rape. Sub-clause (ii) of the said Rule 12(3) provides that the date of birth certificate from the school first attended can be accepted as a cogent proof as regards to the date of birth of the victim of rape.

26) Per contra, it was vehemently argued by Shri N.L.Jadhav, learned Counsel appearing for the accused that in view of the law laid down by the Hon'ble Apex court in the case of Madan Mohan Singh and Ors Vs Rajani Kant and Anr. – AIR 2010 SC 2933, the entry in the school register has to be proved in the same manner as required in Civil

and Criminal cases. My attention was invited by the learned Counsel to the discussion made by the Hon'ble Apex court in Paras 14 to 18 of the said judgment, which are reproduced herein below, -

"14. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar- AIR 1970 SC 326; Ram Murti Vs. State of Haryana, AIR 1970 SC 1029; Dayaram and Ors. Vs. Dawalatshah and Anr. AIR 1971 SC 681; Harpal Singh and Anr. Vs. State of Himachal Pradesh, AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand and Anr. - (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj; AIR 2008 SC

632; and Ram Suresh Singh Vs. Prabhat Singh @ Chhotu Singh and Anr. - (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

15. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain Vs. the State of U.P. And Ors., AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC 1587.

16. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

17. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable

evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: Brij Mohan Singh Vs. Priya Brat Narain Sinha and Ors., AIR 1965 SC 282; Birad Mal Singhvi Vs. Anand Purohit, AIR 1988 SC 1796; Vishnu Vs. State of Maharashtra (2006) 1 SCC 283; (AIR 2006 SC 508; 2005 AIR SCW 6149); and Satpal Singh Vs. State of Haryana JT [2010 \(7\) SC 500](#); [\(2010\) AIR SCW 495](#)).

18. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide; Updesh Kumar and ors. Vs. Prithvi Singh and Ors. (2001) 2 SCC 524:(AIR

2001 SC 703: 2001 AIR SCW 347);
and State of Punjab Vs. Mohinder
Singh, AIR 2005 SC 1868)."

27) Referring to the observations made and the law laid down by the Hon'ble Apex court in the aforesaid judgment, the learned Counsel submitted that the age of the prosecutrix cannot be determined on the basis of the date of birth mentioned in the document at Exhibits 38, 39 and 40 since they have not been legally proved in terms of Section 32(5) of the Evidence Act. The learned Counsel submitted that as has come on record through the evidence of PW 7, the date of birth was entered in the school record on the basis of the birth certificate issued by the Gramsevak, Susare, however, the said birth certificate has not been produced on record of the present case. The learned Counsel further submitted that a specific question was put to the Investigating Officer in his cross-examination as to whether he has collected birth certificate from Gramsevak Susare and he has answered that he

did not collect any such certificate from Gramsevak Susare. The learned Counsel submitted that since the very source, on the basis of which, the entry in regard to the date of birth of the prosecutrix was taken in the school record is not existing on record and as such, the school record cannot be accepted to be a dependable evidence as about the age of the prosecutrix.

28) There are certain other circumstances on record because of which also reasonable doubts are created as about the correctness of the date of birth of the prosecutrix, as has been entered in the school record, which has been relied upon by the trial Court. The document at Exh.38, which is the extract from the school register, shows that elder sister of the prosecutrix had also studied in the same school in which the prosecutrix had studied. In the document at Exh.38, name of elder sister of the prosecutrix appears at Serial 993; whereas name of the prosecutrix is at serial No.992. As per the said

document, date of birth of the prosecutrix is 8th October, 1999. As has been deposed by father of the prosecutrix, i.e. PW 2 – Rajendra, the prosecutrix was his second child. As has been further deposed by him, the second child was born after about 3 ½ years of the birth of the first child. According to the fact so deposed, there must be a difference of 3½ years in the date of birth of the prosecutrix and her elder sister. However, in the document at Exh.38, the date of birth of the elder sister of the prosecutrix is mentioned as 25th May, 1998. According to the said document, the age difference between the prosecutrix and her elder sister is less than 1½ years. It was stated by the prosecutrix in her testimony before the court that she has two sisters and one brother. As stated by her, Sheetal is her elder sister; she was the second child, Chhaya is her younger sister and brother Rahul is the youngest child. As has come on record in the evidence of the prosecutrix, age difference between her and her elder sister is

about 2 to 2 ½ years. Even if the said version is accepted to be true, the information containing in the document at Exh.38 does not commensurate with the same.

29) There is one more reason that the date of birth of the prosecutrix, as mentioned in the school record, cannot be said to be free from doubts and therefore cannot be explicitly relied upon. The prosecutrix in her evidence has deposed that she studied up to 7th Std. I have carefully perused the testimony of the prosecutrix. It was not the case that it was suggested to the prosecutrix that she studied up to 7th Std. and the said suggestion was accepted by her. From the deposition of the prosecutrix as has been recorded by the Court, it is quite evident that the information so given by the prosecutrix that she studied up to 7th Std. was by way of an answer to the question which was put to her. Contents of para 8 of her testimony further reveals that the prosecutrix has reiterated the said fact by

stating that she left her education from 7th Std. In this context, if the another fact, deposed by father of the prosecutrix in his testimony before the Court, to the effect that the prosecutrix left her school about 6 to 7 years back is considered, in no case, it can be accepted that the date of birth, as mentioned of the prosecutrix in Exh.38, i.e. 8th October, 1999, would be the correct date of birth of the prosecutrix. If the fact stated by the prosecutrix that she studied up to 7th Std. and the fact stated by her father that she left the school prior to 6 to 7 years are conjointly read, would lead to an inference that at the relevant time, the prosecutrix was more than the age of 18 years. The fact stated by the prosecutrix that she studied up to 7th Std. and the facts stated by her father that the prosecutrix left the school prior to about 6 to 7 years, are not controverted by the prosecution.

30) Considering the evidence, as aforesaid,

it is difficult to rely on the school record, which demonstrates the date of birth of the prosecutrix as 8th October, 1999. I reiterate that the prosecution has not filed on record the birth date certificate issued by Gramsevak of Grampanchayat, Susare on the basis of which the entries were stated to be taken in the school record. The Head Master of the school, though, filed on record the extract from the Admission Register, a copy of the bonafide certificate; copy of the school leaving certificate, did not file on record the date of birth certificate when it was existing in the school record according to his own version. As noted earlier, the Investigating Officer has testified that he did not collect the birth certificate of the prosecutrix during the course of the investigation.

31) Perusal of the impugned judgment and more particularly the discussion made in para 26 of the said judgment reveals that, relying on the

school record produced at Exhibits 38, 39 and 40, the learned Sessions Judge recorded the conclusion that age of the prosecutrix at the time of the incident was below 16 years and she was thus minor at the relevant time. In view of the evidence which has come on record, which has been analysed by me herein above, it is difficult to agree with the discussion made and the finding recorded by the learned Sessions Judge in para 26 of the impugned judgment. From the discussion made by the learned Sessions Judge, it is discernible that the learned Sessions Judge has presumed that the entries in the school record were taken on the basis of original birth certificate issued by Gramsevak Susare. The learned Sessions Judge, has, however, failed in appreciating that though PW 7 brought with him the other school record, i.e. copy of the bonafide certificate; school leaving certificate and the General Admission register, did not bring the copy of the birth certificate issued by Gramsevak, Susare. The copy of the

said birth certificate is admittedly not there on record.

32) As has been held by the Hon'ble Apex court in the case of Madan Mohan Singh (cited supra), the authenticity of the entries in the school record would depend on whose information such entries stood recorded and what was his source of information. PW 7, in his cross-examination has candidly admitted that he does not have personal knowledge as to who has given the information regarding the date of birth of the prosecutrix at the time of her admission in their school. Further, the admission form is also not on record to show as to who had filled in the said admission form while admitting the prosecutrix in the Zilla Parishad primary school at Susare. It is nowhere stated by PW 7 that the information as about the date of birth of the prosecutrix was given by father of the prosecutrix or mother of the prosecutrix. What has been stated by PW 7 is the fact that the

entry of date of birth was taken from original birth certificate issued by Gramsevak Susare. As noted earlier, the said birth certificate is not brought on record by the prosecution. As is revealing from the testimony of PW 7, the birth certificate issued by Gramsevak Susare was the only source of information for him to record the date of birth of the prosecutrix in the school register. The said birth certificate is admittedly not brought on record by the prosecution.

33) In the circumstances, the entry, as has been taken in the school record as regard to the birth date of the prosecutrix cannot be said to be proved in accordance with law. The Hon'ble Apex court in the case of Madan Mohan Singh (cited supra) has ruled that, - entry in the school register/school leaving certificate required to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or

criminal case. In the circumstances, even if the documents at Exh. 38 to 40 are held to be admissible under Section 35 of the Evidence Act, the entry as regards to the date of birth of the prosecutrix contained therein whether has any probative value requires to be examined in the facts and circumstances of the case. The Hon'ble Apex court in the case of Madan Mohan Singh (cited supra) has held that entry in any public document, i.e. school register, voters list etc, may be admissible under Section 35 of the Evidence Act, but the Court has a right to examine their probative value. The authenticity of such entries has to be proved. In the instant matter, I have no hesitation in holding that the prosecution has failed in proving the authenticity of the date of birth of the prosecutrix, as mentioned in the school record.

34) As has been elaborately discussed by me herein above, if the other evidence and/or circumstances which have come on record, more

particularly the fact stated by the prosecutrix that she studied up to 7th Std. And the another fact deposed by her father that the prosecutrix left the school prior to about 6-7 years, it is difficult to accept the date of birth as mentioned in the school record to be a correct date of birth of the prosecutrix. As deposed by the prosecutrix, she studied up to 7th Std. Even if it is assumed that she was admitted in the school at the age of 6, her age at the time of leaving the school from 7th Std. Must not be less than 13. As has been deposed by the father of the prosecutrix, she left the school prior to 6-7 years. Even if it is assumed that the prosecutrix left the school prior to six years, her age may not be less than 18 years at the time of the alleged incident. Considering all these circumstances, the evidence, which has been relied upon by the learned Sessions Judge, for determining the age of the prosecutrix, cannot be said to be free from doubt and, therefore, cannot be relied upon. The prosecution has failed in

bringing on record any impeccable evidence as about the age of the prosecutrix.

35) The judgment of the Hon'ble Apex court relied by the learned APP in the case of State of Madhya Pradesh Vs. Anoop Singh (cited supra) may not apply to the facts of the present case. In the said case, the prosecution in support of its case had brought on record two certificates, one was the birth certificate and the other was the middle-school examination certificate. The date of birth of the prosecutrix was shown as 29th August, 1987 in the birth certificate while in the middle-school examination certificate, the date of birth was shown as 27th August, 1987. There was thus difference of just two days in the dates mentioned in the above mentioned documents. It had also come on record in the said case that the entry as regards to the birth of the prosecutrix was made in the record of the Grampanchayat within two months of the birth of the prosecutrix. In the circumstances, it was

held by the Hon'ble Apex court that it could not be guessed that the prosecutrix was shown under aged in view of the possibility of the incident in question. In the instant matter, the very basic document, i.e. birth certificate is not brought on record, on the basis of which the entries are stated to have been taken in the school record, which has been relied upon by the prosecution. As such, the aforesaid judgment of the Hon'ble Apex court may not be of any help for the prosecution to urge that the evidence brought on record by the prosecution was sufficient to prove the age of the prosecutrix.

36) As has been held by me in the earlier part of the judgment, the evidence on record leaves no doubt that the prosecutrix left her parental house and joined the accused and then remained with him for next 5-6 days voluntarily at her own. The evidence on record also does not show that any force was applied by the accused against the prosecutrix. This fact has been

admitted by the prosecutrix as well as her father in their respective testimonies before the court. Though it was also alleged that the accused forced the prosecutrix to marry with him and accordingly performed marriage with her at Aalandi and that at that time compelled the prosecutrix to tell the year of her birth as 1996, the prosecution has not brought on record any evidence to prove the said allegation. Further, from the evidence on record, it is difficult to hold that the accused had sexual intercourse with the prosecutrix against her wish or without her consent. It is quite evident that the said consent is held immaterial by the learned Sessions Judge on an assumption that the prosecutrix was minor at the relevant time and was, therefore, not competent to give her consent.

37) After having considered the entire material on record, I have no hesitation in holding that the prosecution has failed in

proving that the prosecutrix was minor at the relevant time and was, therefore, incompetent to consent for any of the acts allegedly committed by the accused. On evaluation of the evidence of the prosecutrix and the other circumstances on record, it becomes clear that the prosecutrix voluntarily left her parental house and joined the company of the appellant-accused and remained with him till she was brought back by her father from the house of the accused at village Ukhalwadi. As has been elaborately discussed by me, from the evidence on record, it is evident that the prosecutrix was having ample chances to return to her home if she was not the consenting party for eloping with the accused. Since no such attempt was ever made by the prosecutrix, it has to be held that the prosecutrix remained in the company of the accused at her own wish. In the circumstances, it would be very unsafe to hold the accused guilty of the offences under Sections 363 and 366 of IPC. Further, in absence of any positive evidence that sexual intercourse

was committed by the accused with the prosecutrix against her wish or will, the conviction for the offence under Section 376 of IPC also cannot be sustained. In view of the fact that the prosecution has failed in proving that the prosecutrix was below the age of 18 years at the relevant time, the conviction of the appellant-accused for the offence under the POCSO Act also is liable to be set aside.

38) In the result, following order is passed, -

ORDER

i) The judgment and order dated 20th November, 2015 passed by the Judge, Special Court Ahmednagar in Sessions Case No.206 of 2014, is quashed and set aside;

ii) The appellant - Kishor s/o Bhanudas Walhekar is acquitted of all the charges with which he was charged;

iii) The appellant be released forthwith, if not required in any other case or crime. The fine amount, if any, paid by the appellant, be refunded to him;

iv) The Criminal Appeal thus stands allowed.

(P.R.BORA)
JUDGE

bdv/
FLDR 12.10.17