

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

CRIMINAL APPEAL NO. 485 OF 2015

Bhopu s/o. Maroti Rathod	.. Appellant
Age. 26 years, Occ. Labour	[original
R/o. Dhawalkewadi, Tq. Gangakhed,	accused]
Dist. Parbhani.	

Versus

The State of Maharashtra	.. Respondent
Through Police Station Gangakhed,	
Tq. Gangakhed, Dist. Parbhani.	

Mr.J.M. Murkute, Advocate for the appellant.
Mr.K.B. Jadhavar, APP for the respondent/State.

CORAM	:	S.M.GAVHANE, J.
RESERVED ON	:	17.10.2018
PRONOUNCED ON	:	29.10.2018

J U D G M E N T :-

1. By this appeal, the appellant/accused challenges the judgment and order dated 08.06.2015 passed by the Additional Sessions Judge, Gangakhed in Special Case

(POCSO) No.13 of 2014 thereby convicting him for the offences punishable under sections 363, 366, 376 (2) (i) of the Indian Penal Code [for short "the IPC"]. The appellant/accused is sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- [Rupees Five Thousand], in default of payment of fine to undergo rigorous imprisonment for six months for the offence punishable under section 376 (2) (i) of the IPC. He is sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.2,000/- [Rupees Two Thousand], in default of payment of fine to undergo rigorous imprisonment for one months for the offence punishable under section 363 of the IPC. He is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,000/- [Rupees Three Thousand], in default of payment of fine to undergo rigorous imprisonment for three months for the offence punishable under section 366 of the IPC. No separate sentence is recorded against the appellant/accused for the offence punishable under section 4 of the Protection of Children

from Sexual Offences Act, 2012 [for short "the POCSO Act"] as the sentence prescribed for the offence punishable under section 376(2)(i) of the IPC is greater. All the substantive sentences were ordered to run concurrently. The accused is given set off under section 428 of the Code of Criminal Procedure [for short "CrPC"] of the period undergone by him as under-trial prisoner. Out of fine amount, if recovered, an amount of Rs.5,000/- is ordered to be paid to complainant - Kamalbai w/o. Sitaram Rathod, by way of compensation under section 357(1) of CrPC, after the appeal period is over. It appears that the accused has deposited the fine amount.

2. The facts leading to the institution of the present appeal, in short, are as under :-

a] Complainant-Kamalbai w/o. Sitaram Rathod [PW-1] is resident of Dhawalkewadi, Tq. Gangakhed, Dist. Parbhani. At the relevant time of the incident, she was residing with her daughter - the victim girl - Priyanka d/o.

Sitaram Rathod [PW-5] and her son Moreshwar. The victim girl was aged 15 years. On 23.04.2014 at about 05=00 pm while the complainant was at her house, her daughter – the victim girl had gone to the neighbour's house. Thereafter, she did not come back. Therefore, on the same day the complainant lodged a missing report of the victim girl [Exh.32] in the Police Station, Gangakhed. Thereupon, the police started to search the victim girl.

b] Thereupon, on 28.05.2014 the police informed the complainant that the victim girl is found. Then, the complainant went to the police station. On her asking, her daughter – the victim girl told her that the accused enticed her and had taken her to Pune by bus and at Alandi married with her by garlanding her. At that time, there were only the victim girl and the accused. Thereafter, the victim girl was

taken to Bodhan, Dist. Nijamabad in the State of Telangana. There the accused had taken a room on rent. He had a sexual relation with her. The complainant alleges that thus the accused kidnapped the victim girl from her lawful custody and had sexual relation with her, on marrying with her, during 23.04.2014 to 28.05.2014. The accused is also from the same village. After recording the complaint as above [Exh.31] of the complainant, the police registered Crime No.145 of 2014 in Police Station, Gangakhed against the accused for the offences under sections 363, 366, 376 of the IPC and under section 4 of the POCSO Act. PSI Gite [PW-9] started investigation.

c] During investigation, PSI Gite [PW-9] arrested the accused on 28.05.2014. He was released on bail on 24.12.2014 as per order dated 18.12.2014 of this Court in Criminal

Application No.6417 of 2014. PSI Gite recorded statement of the victim girl on 28.05.2014. On the same day, he seized clothes on the person of the victim girl and the accused under separate panchanamas and they were sent for analysis to the Chemical Analyzer. He visited the spot of incident at Bodhan, Dist. Nijamabad on 30.05.2014 and prepared panchanama of spot of incident. Meanwhile, both the victim girl and the accused were referred to the Doctor for medical examination and after they were examined, the Doctor issued medical certificates including the certificate regarding the age of the victim girl. After completion of the investigation, the Investigating Officer submitted the charge-sheet in the Court of the Additional Sessions Judge, Gangakhed for trial.

d] The learned Additional Sessions Judge framed the charge against the accused for the

offences punishable under sections 363, 366, 376 of the IPC and under section 4 of the POCSO Act, to which the accused pleaded not guilty and claimed trial. His defence is that he has been falsely implicated due to enmity. The victim girl herself accompanied him as she was not willing to marry with son of one Parasram, resident of Shivaji Nagar Tanda, Tq. Gangakhed. In defence, the accused has examined three witnesses.

3. To prove the charge against the accused, the prosecution has examined in all 11 witnesses and relied upon medical certificates referred to above. On considering the evidence adduced by the prosecution and the defence evidence, the Trial Court held that the prosecution has proved all the offences against the accused with which he was charged and accordingly convicted and sentenced him for the said offences, as detailed in the opening paragraph of this judgment, by

the impugned judgment and order. Aggrieved thereby the present appeal by the accused on several grounds mentioned in the appeal. The hearing of the appeal was expedited as per order dated 10.08.2015 in Criminal Application No.3408 of 2015 and the appellant is in jail since impugned judgment and order dated 08.06.2015.

4. Mr. Murkute, learned Counsel for the accused submitted that the prosecution has failed to prove that the age of the victim girl was below 16 years on the date of incident on 23.04.2014. The evidence of PW-3 Headmaster that the birth date of the victim girl is 05.07.1998 and Exh.36 – extract of school leaving register are not properly considered by the Trial Court. The Trial Court has not considered the evidence of Dr. Siddiqui [PW-11], who had examined the victim girl and issued radiological report regarding the age of the victim between 15-16 years and 5 months, as per Exh.67. According to the learned Counsel the age of the victim on the basis of evidence of Dr.Siddiqui was more than 18

years. It is submitted that the victim girl herself accompanied the accused as she was not willing to marry with the son of Parasram as per the defence version. It is submitted that the victim girl and the accused have married, as such the victim girl is wife of the accused. Thus, according to the learned Counsel, no offence is proved against the accused. It is submitted that even if it is said that the victim girl is less than 16 years, as she is wife of the accused, sexual intercourse by her with the accused cannot be said to be a rape, in view of Exception – 2 to section 375 of the IPC, which provides that sexual intercourse or sexual act by a man with his own wife not being under 15 years of age, is not rape. Learned Counsel has further submitted that Exception 2 – to section 375 of the IPC is held unconstitutional by the Hon'ble Supreme Court. Thus, it is submitted by the learned Counsel that the impugned judgment and order may be set aside and the accused be acquitted of the offences for which he has been convicted and sentenced. Alternatively, the learned Counsel submitted that the

accused is in jail for more than four years and the said period be considered as sentence on the accused by reducing the sentence imposed by the Trial Court by modifying the impugned judgment and order.

5. Learned Counsel for the accused to support his submissions that the exact age of the victim girl is not proved by the prosecution as the evidence adduced by the prosecution is not clear and unambiguous and therefore the accused is entitled to be acquitted, has relied upon the decision in the case of Domnic Misquita and etc. Vs. The State, 1996 Cri.L.J.2799 (Bombay High Court). So also, to support his submission that the prosecution has not properly proved Exh.36 extract of register of admission in school of the victim, the learned Counsel has relied upon the decision in the case of Gangadhar Gonduram Tadme Vs. Trimbak s/o. Govindrao Akingire & Ors., 2005(1) Mh.L.J.94.

6. Learned APP for the respondent/State supported

the impugned judgment and order. He submits that on the basis of evidence of PWs 1,2,3,5 and 11 and Exh.36 – extract of register of admission in school of the victim girl, which is proved by PW-3 Headmaster, it can be said that the age of the victim girl was below 16 years on the date of incident. Therefore, even if it is said that she had consented for sexual intercourse with the accused, her consent is immaterial. Moreover, as the age of the victim on the date of incident was below 18 years, she is a child within the meaning of section 2(d) of the POCSO Act. Thus, according to learned APP, the Trial Court has rightly believed the evidence of the victim girl, her mother, Headmaster and medical officers PWs 8 and 10 and held that the prosecution has proved the offences alleged against the accused beyond reasonable doubt and rightly recorded the conviction against the accused by the impugned judgment and order. Thus, the learned APP has claimed to dismiss the appeal.

7. I have carefully considered the submissions of

the learned Counsel for the appellant/accused and the learned APP for respondent/State and with their assistance I have perused the evidence on record. I have also gone through the impugned judgment and order.

8. Considering the ingredients of the offences under section 376(2)(i), 363, 366 of the IPC and offence under section 4 of the POCSO Act, it is necessary to consider the age of the victim girl on the date of incident. Case of the prosecution is that the age of the victim girl was 15 years i.e. below 16 years on the date of incident. To prove the same, the prosecution has mainly relied upon the evidence of PWs 1,2,3,5 and 11. PW-1, who is the complainant and mother of victim girl, has stated that the victim girl is aged about 15 years. Said evidence has gone unchallenged in the course of her cross-examination on behalf of the accused. The evidence of PW-2 Ramesh Chavan, who is maternal uncle of the victim girl is that the victim girl is aged about 15 years. He has denied that the age of the victim was more

than 16 years and the victim girl was not 15 years age at the time of the incident. Both PWs 1 and 2 have not specifically stated about the date of birth of the victim girl and therefore their evidence is not sufficient to state that on the date of incident the exact age of the victim girl was 15 years or below 16 years.

9. The evidence of victim girl [PW-5] is that she was born in the year 1998. She attended the school at Dhawalkewadi and she was in the school only for one year. Said evidence of the victim girl has gone unchallenged in the course of her cross-examination. Thus, there is no reason to disbelieve the evidence of the victim girl that she was born in the year 1998 and she attended the school at Dhawalkewadi.

10. Now coming to the evidence of PW-3 Headmaster of Zilla Parishad Primary School, Dhawalkewadi, he deposed that he is Headmaster of the said school since August, 2010. The victim girl was a student in the said school

from 22.06.2004 to 15.06.2007. As per admission and school leaving register, the date of birth of the victim girl is 05.07.1998. He has brought the original register of admission and school leaving. He has proved the extract Exh.36 of the said register, which was issued by him on 29.04.2014. He has of-course stated that he had not brought admission form of the victim student and that he does not know on what basis the date of birth of the victim was recorded in the admission register. He denied that entries in the register are false and that the contents of Exh.36 are not as per record. Thus, nothing is found in favour of the accused in the cross-examination of this witness. Exh.36 – extract of admission and school leaving register shows that the victim girl was admitted in the said school on 22.06.2004 in 1st standard and she left the school on 29.01.2005 and reason given for leaving the school is due to migration. This extract shows the date of birth of the victim girl as 05.07.1998. It appears from the evidence of PW-3 that above said birth date is recorded in the admission and

school leaving register on the basis of admission form. The birth date i.e. 05.07.1998 corroborates the evidence of victim girl that she was born in 1998 and she was admitted in the school at Dhawalkewadi. Therefore, on the basis of evidence of PW-3 Headmaster and extract Exh.36, it can be said that birth date of victim is 05.07.1998 and on the date of incident i.e. on 23.04.2014 her age was 15 years and 10 months i.e. below 16 years.

11. There is evidence of Dr.Siddiqui [PW-11] who conducted radiological examination to determine the age of the victim girl. According to him, the victim girl was referred to him in Civil Hospital, Parbhani on 29.05.2014 for radiological examination for Sonography and X-ray. He examined the victim girl and on the basis of her clinical examination and radiological report, he opined that the age of the victim was between 15 to 16 years and 6 months and accordingly he issued letter of his opinion to the police station-Exh.67. In the cross-examination, he stated that the fusion of radius bone

appears on attaining the age of 18 years. As per the radiological report, head of ulna appeared and fused. The head of ulna appears and fused at the age of 15 and it appears and fused at the age of 16 to 19 years. Further, he stated that on attaining the age of maturity, pubic hairs of female becomes dark and curly. The patient had curly pubic hairs. In a woman child the growth of pubic hairs begins approximately at the age of 13 years and attains maturity at the age of 15 years. Exh.67 – opinion issued by PW-11 shows that the head of ulna appeared and fused and the age of the victim is between 15 to 16.5 years. Referring to the contents of this opinion i.e. head of ulna appeared and fused and evidence of PW-11 that the fusion and radius bone appears on attaining the age of 18 years, learned Counsel appearing for the accused submitted that the age of the victim girl on the date of incident was not below 16 years and she was 18 years old. The evidence of PW-11 Doctor is opinion evidence and as his evidence shows that head of ulna appears and fused between 15 to 17 and as it

is mentioned in the opinion that the age of the victim was between 15 to 16.5 years it cannot be said that exact age of the victim girl was more than 18 years. Therefore, the argument advanced by the learned Counsel for the accused is not accepted.

12. For the foregoing reasons I hold that the prosecution has proved that the age of the victim girl was below 16 years on the date of incident. There is clear and unambiguous evidence of PWs 3 and 5 and extract Exh.36 issued by PW-3 Headmaster regarding birth date of the victim girl. Therefore, the decision in the case of Domnic Misquita (Supra) relied upon by the learned Counsel for the appellant/accused, facts of which are different from the facts of the present case, cannot be suitably made applicable to this case, to state that the prosecution has failed to establish that the age of the victim girl was below 16 years or that the prosecution has not proved the exact age of the victim on the date of incident. Similarly, the decision in the case of

Gangadhar Tadme (Supra) relied upon by the learned Counsel for the appellant/accused cannot be made applicable to this case, as as per the facts of the said decision the birth certificate was not issued in compliance of mandatory requirement under section 22(1) of the Birth, Death and Marriage Registration Act and hence it was held that the said certificate does not carry presumptive value under section 114 of the Evidence Act and further it was held that said certificate cannot be said to be a certificate issued under the Act and in the present case there is evidence of PWs 3,5 and extract Exh.36 of admission and school leaving register of the victim.

13. As regards offence punishable under section 363 of the IPC is concerned, the prosecution has to establish that the accused took or enticed the victim girl under 18 years of age out of the keeping of her lawful guardian without consent of such guardian and as regards offence punishable under section 366 of the IPC is concerned, the

prosecution has to establish that the accused kidnapped the victim girl with intend that she may be compelled to marry any person against her will. It is held that the victim girl was below 16 years at the time of incident. Naturally, therefore, she was under 18 years. It has come in the evidence of the victim girl [PW-5] that the accused asked her to accompany him. He offered to perform marriage with her. He had taken her to Bodhan from Dhawalkewadi. He had taken her in a temple of goddess. There was no one in the temple. They exchanged garlands at the temple. The accused told her that now she is his wife. He threatened her not to disclose to anybody. In the cross-examination, she stated that the accused had threatened her that he would kill her brother and therefore she accompanied him. Thus, it is clear from the evidence of the victim girl that the accused took away the minor victim girl from her lawful guardian - her mother [PW-1], without consent of PW-1, with intend to marry her. Since the victim was minor victim below 18 years of age, it cannot be said that at her own, she

accompanied the accused because her consent is immaterial. Therefore, the argument advanced by the learned Counsel for the appellant in this respect is not accepted. As such, I hold that the prosecution has proved both the offences punishable under sections 363 and 366 of the IPC beyond reasonable doubt. The Trial Court has rightly held so.

14. The incident in the present case has taken place between 23.04.2014 to 28.05.2014. It is held that the victim girl was below 16 years on the date of incident. Sections 375 and 376 of the IPC respectively regarding rape and punishment for rape are amended with effect from 03.02.2013. Considering facts of case, it is relevant to refer clause Sixthly of section 375 of the IPC, which has made consent of the victim for sexual intercourse as immaterial and inconsequential. It reads as under :-

“375. Rape – A man is said to commit “rape” if he –

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or

makes her to do so with him or any other person;
or

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xxxxxxxxxx

Sixtyly – With or without her consent, when she
is under eighteen years of age.

xxxxxxxxxx"

. So also section 376 sub-section (1)(2)(i) reads
as follows :-

"376. Punishment for rape – (1) Whoever, except
in the cases provided for in sub-section (2),
commits rape, shall be punished with rigorous
imprisonment of either description for a term
which shall not be less than seven years, but
which may extend to imprisonment for life, and
shall also be liable to fine.

(2) Whoever, -

xxxxxxx

(i) commits rape on a woman when she
is under sixteen years of age; or

xxxxxxx"

15. As regards the offences under section 376(2)(i)
of the IPC and under section 4 of the POCSO Act are
concerned, the evidence of victim girl [PW-5] is that at
Bodhan after they exchanged garlands at the temple, the
accused told her that she is his wife. He had a room at
Bodhan. It was a house of a Muslim family. They resided

in the said room. The accused had physical relationship with her. In her cross-examination, said evidence has gone unchallenged. The evidence of victim girl is corroborated by the medical officer PW-8 - Dr.Shobha Chandak, as she has stated that on 29.05.2014 she examined the victim girl in the Sub-District Hospital, Gangakhed, physically as well as clinically. The victim had given history that she had accompanied the accused since one month and she had sexual relation with him. Her evidence further shows that on clinical examination, she found that hymen of the victim was torn and it was old tear, which suggests that she was habitual to sexual intercourse. Said evidence has gone unchallenged in her cross-examination. Thus, on the basis of evidence of the victim girl and Dr. Chandak, it can be said that the accused had sexual intercourse with the victim girl, below 16 years of age at the time of the incident. Another aspect to be noted is that as per clause Sixthly to section 375 of the IPC referred earlier, as the victim girl was under 18 years of age, even if it is said that

she had consented for sexual intercourse, said consent is immaterial and inconsequential and the act of the accused of having sexual intercourse with the victim girl amounts to rape punishable under section 376(2)(i) of the IPC as the victim girl was below 16 years of age at the time of the incident. As regards offence under section 4 of the POCSO Act is concerned, as the victim girl was below 18 years of age, she was child within the meaning of section 2(d) of the POCSO Act and the accused had sexual intercourse with her which amounts to penetrative sexual assault as per section 3, which act is punishable under section 4 of the POCSO Act. There is also presumption under section 29 of the POCSO Act as to certain offences. In the present case, the accused is prosecuted for committing offence under section 3 punishable under section 4 of the POCSO Act and he had sexual intercourse with the victim and therefore presumption under section 29 of the POCSO Act that he has committed offence punishable under section 4 of the POCSO Act is attracted and nothing contrary is proved by the accused.

16. For the reasons discussed above, I hold that the prosecution has proved offence under section 376(2)(i) of the IPC and under section 4 of the POCSO Act beyond reasonable doubt.

17. As referred earlier, learned Counsel for the appellant/accused has submitted that as accused has married the victim girl and she is his wife even if she is below 16 years of age i.e. 15 years and 10 months at the time of the incident, he cannot be said to have committed offence of rape in view of Exception-2 to section 375 of the IPC, which says that sexual intercourse or sexual act by a man with his own wife, the wife not being under 15 years of age, is not rape. It appears that this provision is held unconstitutional by the Hon'ble Supreme Court as per decision in the case of **Independent Thought Vs. Union of India & Anr, 2017(10) SCC 800**. It is held that Exception-2 to section 375 of the IPC is read down as follows:-

"Exception-2 – Sexual intercourse or sexual act by a man with his own wife, the wife not being 18 years, is not rape"

. Further it is held that the said judgment will have prospective effect.

. Except the evidence of the victim, there is no evidence to show that the victim and the accused have married by garlanding each other in the temple of goddess. In reply to the question in the statement under section 313 of the CrPC in respect of marriage, the accused has replied said question in the negative.

18. On behalf of the prosecution in the cross-examination of Ratan Chavan [DW-1], it was asked as to whether the accused has already performed marriage and he had children and that maintenance proceeding between the accused and his wife are pending. To said question, said witness has replied that he does not know the same. Similarly, it was asked to Madhukar Chavan [DW-3] in the cross-examination on behalf of the prosecution, whether the accused is married to one Sonali and he has a

daughter by name Sandhya and that his said wife has prosecuted him for the offence under section 498-A of the IPC in the Court of Nanded and to the said question, said witness has replied that he does not know the same. It was also suggested to the said witness that the accused had married at Nanded on 06.05.2011 in his presence and witness had denied the said suggestion. From the above evidence, it appears that the accused is already married. Therefore, it cannot be said that the victim girl is wife of the accused. Naturally, therefore, argument advanced on his behalf that his act of having sexual intercourse with the victim girl does not amount to rape is not accepted.

19. For all the reasons discussed above, I hold that the Trial Court has properly appreciated the evidence adduced by the prosecution and rightly held that the prosecution has proved the offences punishable under sections 376(2)(i), 363, 366 of the IPC and under section 4 of POCSO Act and rightly convicted and sentenced the

accused. So also, the Trial Court has rightly sentenced the accused for the offence under section 376(2)(i) of the IPC as per the impugned judgment and order and rightly not awarded separate sentence for the offence under section 4 of the POCSO Act, in view of the provisions under section 42 of the POCSO Act. The sentences awarded by the Trial Court for the offences under punishable sections 376(2)(i), 363, 366 of the IPC, as mentioned in the opening paragraph of this judgment, are in accordance with the punishments provided for the said offences and considering the gravity of the offences. The Trial Court has already showed leniency while imposing the sentences and therefore there is no ground to reduce the sentences awarded by the Trial Court to the period of imprisonment undergone by the accused as per alternate submission made by the learned Counsel for the appellant/accused.

20. In view of above discussion, there is no ground to interfere in the findings recorded and conclusion

reached by the Trial Court, so as to alter or amend the impugned judgment and order. As such the impugned judgment and order convicting and sentencing the accused is confirmed. Thus, the appeal being devoid of merits, the same is liable to be dismissed. Accordingly, the appeal is dismissed.

21. The appellant is in jail. The record and proceedings in Special Case (POCSO) No.13 of 2014 be sent to the Trial Court forthwith for further necessary compliance.

[S.M.GAVHANE, J.]