

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 516 OF 2016

Devanand Rajabhau More,

Age : 21 years, R/o - Chanai,

Ambajogai, Dist. Beed.

...Appellant

Versus

State of Maharashtra

...Respondent

.....

Mr. D. B. Thoke, Advocate for Appellant.

Mr. S. P. Sonpawale, A. P. P. for Respondent / State.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 17-07-2018.

PRONOUNCED ON : 23-10-2018.

JUDGMENT : (Per Smt. Vibha Kankanwadi, J)

01. Present appeal has been filed by the accused challenging his conviction in Special POCSO Case No. 4/2014 by Special Court, Ambajogai, Dist. Beed on 1.8.2016 for the offence punishable under Sections 363, 366A and 376(2) and Section 6 of the Protection of Children from Sexual Offences Act, 2012.

02. Prosecution had come with a case that the informant, who is the mother of the victim girl was

residing alongwith her husband, victim girl, son and mother-in-law. The victim girl was taking education with Shri Sandeshwari Vidyalaya, Chanai, Tq. Ambajogai in 10th standard in the year 2013. The victim girl went to school as usual in the morning at 9 AM on 10.10.2013. She had taken her tiffin. The school used to be over by 4 PM. On that day the nephew of the informant had given a telephone call at 2 PM to the informant and asked the informant as to whether the victim has returned. He told that the victim is not in school. Thereafter, the informant and her husband, who were in their field were informed about the same and therefore, they went to the school to make enquiry. Victim's friends were present in the school. Enquiry was made with them about the victim. It was told that in view of the birth day of the victim when she was standing near a water tank in order to bring cake, she was taken by Devanand Rajabhau More i.e. present accused with Krishna Rajabhau More. The said fact was also told by the Teacher of the victim. When Krishna More and Dhamma More were found near the water tank, the parents of the victim made enquiry about the victim with them. At that time, it was informed that the accused and the victim got alighted at the Stand and they are not aware where they have gone. When the victim did not return till 11.10.2013 her mother

lodged report against the accused. The said F. I. R. vide C. R. No. 140/2013 was registered under Section 363, 366 read with Section 34 of I. P. C. and investigation was undertaken. It appears that the victim and the accused were found on 14.10.2013. The statement of the victim was recorded on that day and thereafter, she was sent for medical examination. Accused came to be arrested. He was also medically examined. It was told by the victim that during whole night on 10.10.2013 they had halted in the agricultural land of the victim and thereafter, they had gone to Pokhri, Latur Kale Borgaon. She also told that accused had sexual intercourse with her and therefore, Section 376 of Indian Penal Code came to be added. At the time of medical examination the samples were taken. Clothes of the victim as well as accused were seized. All the seized articles and samples were sent for chemical analysis. Statement of the witnesses were recorded. Panchnama of the spot i.e. the field was executed. After the investigation was over, charge-sheet came to be filed before the Special Court.

03. Accused was on bail. When he appeared before the Special Judge, Charge was framed for the offence punishable under Section 376(2), 363, 366 of I. P. C. and Section 6 of POCSO Act against the accused No. 1 and

against the accused No. 2, the charge is framed for Section 34 of the I. P. C. Both the accused persons pleaded not guilty and therefore, trial was conducted. Prosecution had examined in all 9 witnesses in order to bring home the guilt of the accused. It is the defence of the accused that he had love affair with the victim since 4 years prior to the date of offence. He was called by the victim on that day to celebrate her birth day. After he gave best wishes to her, the sister of the victim had seen them. Victim had asked him to accompany with her. But, then he had refused. But, then the victim had given threat to him that she would commit suicide if he does not give company to her. Thereafter, they went to Latur and then at his paternal aunt's place at Goregaon, Mumbai. His aunt had handed them to Police.

04. Taking into consideration the evidence on record and hearing both the sides, the learned Trial Court has convicted the accused No. 1 for the offence punishable under Section 363 of I. P. C. and sentenced to suffer rigorous imprisonment for 5 years and pay fine of Rs. 500/-, in default to suffer simple imprisonment for 7 days. He has been further convicted for the offence punishable under Section 366 of I. P. C. and sentenced to suffer rigorous imprisonment for 5 years and to pay fine

of Rs. 1,000/-, in default to suffer simple imprisonment for 10 days. Accused No. 1 has been further convicted for the offence punishable under Section 376(2) of I. P. C. and has been sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 1,000/-, in default to suffer simple imprisonment for 10 days. He has also been convicted for the offence punishable under Section 6 of the POCSO Act, 2012 and has been sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/-, in default to suffer simple imprisonment for 15 days. All the substantive sentences have been directed to run concurrently. Set off has been granted. Out of the fine amount, the amount of Rs. 4,000/- has been directed to be given to the victim as compensation. Accused No. 2 has been acquitted from all charges. Accused No. 1 has filed this appeal challenging his conviction.

05. Heard Mr. D. B. Thoke, Advocate for Appellant. Mr. S. P. Sonpawale, A. P. P. for Respondent / State. Perused the record and proceedings.

06. It has been submitted on behalf of the appellant that the evidence of the victim would show that there was love affair between the victim and accused No. 1. In fact, PW-3 the victim in her statement before Police

itself has admitted that she was having love affair with accused, since 4 years prior to the date of incident. Though she has then denied, the said contradiction has been brought on record in her cross-examination. Another fact that is required to be considered from her testimony that even her Teachers as well as friends had seen the victim going alongwith accused No. 1. She had not raised any hue and cry. Therefore, it was voluntary act on the part of the victim to go alongwith accused No. 1. The evidence of Medical Officer PW-6 Dr. Meera would show that there were no external injuries on the private part of the victim. That means she had given consent. He relied on the decision in **Ravindra Laxman Pendor V/s The State of Maharashtra, [2015 All MR (Cri.) 4490]**. In this case there was evidence and proof regarding victim having love affair with appellant and she had accompanied him. It was alleged that accused had committed sexual assault on victim against her will. However, no injuries were found on the external body of the victim at the time of her medical examination. Victim did not claim that she was under threat by the appellant when she accompanied him. Under such circumstance, when there was no concrete proof to prove the offence, so also age of the victim was based on ossification test, conviction was set aside. Here in

this case also ossification test was not carried out. Almost similar view has been taken in **Sunil Baban Gadhve V/s State of Maharashtra, [2016(2) ABR (Cri.) 498]**. In the present case, victim had given love letters to the accused which are at Exh. 48. They have been produced in order to show that she was in love with accused No. 1. As per the testimony of PW-4 Dilip Kakde, the Teacher on the basis of school record the birth date of the victim is 10.5.1998. However, we can not consider the admission register Exh. 53 and school leaving certificate Exh. 54 because the proper person who had taken the entry in the said register has not been examined. Therefore, when there was no proper proof of age, the learned Trial Court ought to have acquitted the accused.

07. The learned A. P. P. has submitted that there is not much dispute raised by the accused on the point that the victim was with him on 10.10.2013 till 14.10.2013. The medical evidence show that hymen was ruptured and therefore, it supports the fact of sexual intercourse. It is to be noted that the medical examination was conducted on 14.10.2013 and history of sexual assault was given at 2.30 PM on 11.10.2013. Therefore, taking into consideration the gap between the time of sexual assault and her medical examination there might not have been any

external marks of the injury. However, the medical examination definitely suggest the sexual assault. At the time of incident, the victim was 15 years and 15 months old. Therefore, even if for the sake of arguments, it is accepted that she had love affair with accused that does not mean that accused would have presumed her consent. She being minor her consent is no consent at all. Therefore, conviction of the appellant is definitely proper.

08. PW-2 is the mother of victim. She has stated that the victim was aged 15 years at the of incident and she was taking education in 9th standard in Sandeshwari Vidyalaya, Chanai. Incident had taken place on 10.10.2013. Victim went to school as usual alongwith tiffin. Mother had gone to land of one Taty More for working, where her husband was also working. During lunch break the accused had taken away the victim in a rickshaw. According to her, other 2 persons had also sat by the sides of her daughter. She came to know about the same from the class-met of her daughter. She had then lodged report Exh. 44. Thus, it can be seen that PW-2 has not witnessed anything. But, on the basis of information supplied to her, she has lodged the report. Her testimony is also required to be considered in order to ascertain

age of the victim which has been disputed by the accused. In her examination-in-chief the mother has not given birth date of her daughter. She has only stated that her daughter was aged 15. It is to be noted in FIR, examination-in-chief as well as cross-examination she has stated that birthday of her daughter was to be celebrated in the evening. That means on 10.10.2013. In her examination-in-chief she has stated that the accused had taken the victim alongwith him by saying that he would bring cake. Thus, the picture is painted that on that day there was birthday of the victim. PW-3 is the victim herself. She has also stated in her examination-in-chief itself that accused had given her complements on her birthday, which she accepted. Now, it will not be out of place to mention here that the prosecution has examined PW-4 the Teacher from the school, where victim was taking education, in order to prove the admission register as well as school leaving certificate. Though PW-4 Kakde through whom those 2 extracts have been proved at Exh. 53 and 54, was not the person who had taken the entry in the said register, yet, he was deposing on the basis of record with the school. In Exh. 53 as well as Exh. 54 the date of birth of the victim is 10.5.1998. At the cost of repetition as per the prosecution story as well as the

testimony of PW-2 and 3 the incident had taken place on 10.10.2013. The simple question, therefore, is, when it was not the birthday as per the school record, how, there could have been a celebration for the birthday of victim on 10.10.2013. It could not have been 5 months earlier. On this count itself it can not be stated that the prosecution has proved the age of the victim on the day of incident. Further in Exh. 53 and 54 it has been stated that the victim had taken admission in Shri Sandeshwari Vidyalaya, Chanai from the school which was held by Zilla Parishad from the same village. In other words, till 7th standard the victim had taken education in Zilla Parishad Primary School, Chanai and then she got admission for 8th standarad in Sandeshwari Vidyalaya, Chanai. The school record of Zilla Parishad School has not been produced by the prosecution. Thus, the document on the basis of which the entry was taken in Ex. 53 and 54 was taken was not tried to be produced on record.

09. As per PW-2 the victim was aged 15. This statement is denied in her cross-examination. Under such circumstance, it was incumbent on the prosecution to prove that victim was aged 15 by leading cogent material. Whatever material has been produced on record is absolutely not sufficient.

10. PW-3 victim has deposed that in the lunch break she was with her 3 friends and they were taking meals under a tree. Accused came in his auto rickshaw and gave her signal to come near darga. She says that passengers were in auto rickshaw. But, then they went to the house of one of friend of the victim who was with her for taking meals. Important point to be noted is that it was the lunch break, then, how the victim and her friends would have left the school in between, is a question. She does not say that all of them had informed the school Teacher about their plan not to attend the second session in the school. She has further deposed that they were standing in the courtyard of the house of her friend. At about 3 PM the accused came with rickshaw and stopped by the side of darga. One Sameer Shaikh was also in the rickshaw. Accused asked them to sit in the rickshaw. Accordingly, the victim and her 2 friends sat in the rickshaw. Her 2 friends alighted from the rickshaw and asked her that they will come after the talk is over. This gives an indication that the friends of the victim were having knowledge that the accused and victim used to talk with each other and therefore, they had given room to them. Victim has further stated that accused gave her complements on her birthday and also told that he loves

her a lot, they will elope and marry. Accused took his rickshaw from the road of school. The students and Teachers saw them. Accused took the rickshaw from the house of one of the friend of the victim by a rough road towards Sangaon. She was then taken in hybrid crop of the land of the accused. They sat in the crop near well till midnight. When rain started they took shelter in tin shed. Early in the morning at about 5 AM they went to Adas Road and Pick up rickshaw and went to Latur "T" Point. They changed rickshaw and went to Pokhri. She says that one Pappu and Pyare who are the friends of the accused were present and thereafter taking Pyare's rickshaw they went to Latur. Accused had introduced the victim to his friend as his beloved and they are eloping for marriage. Then, they went to Kale Borgaon. Accused, victim and one Pappu sat in the land of friend of accused. At about 3 PM in the crop of Tur accused was trying to have sexual intercourse with the victim. But, by giving assurance of marriage accused had sexual intercourse with victim against her will. Thereafter, accused had again taken her to bus stop of Kale Borgaon and they went to Murud and thereafter, they went to Mumbai in the house of the aunt of the accused. But, Police took them in custody on 14.10.2013. Thus, from the entire incident narrated by

her, it can be clearly seen that she was a consenting party. She did not resist the accused in any manner. Accused had given clear indication to her that he is taking her for the purpose of marriage, but, she did not say that she had no intention to marry the accused. There are many doubts about the story. For example, if the accused had intention to kidnap her why he would have taken the rickshaw from the road of the school to be seen by the students and Teachers. Unless she would have been consenting party, the accused would not have acted in such a manner. Further, at every point of time she had the opportunity to run away because she does not say that at any point of time the accused had confined her in any manner. In her further cross-examination, many admissions have been taken which would prove that she was a consenting party. Now, the prosecution is only raising a point that since she is a minor her consent is no consent at all. However, as aforesaid the prosecution has not produced conclusive evidence to prove that the victim was minor. At the cost of repetition I would like to say that on the date of incident I.e. 10.10.2013 , there was no birthday of the victim as per her school record.

11. PW-6 Dr. Meera is the Medical Officer who had examined victim. After examination, she has stated that

as per the gynaecological opinion hymen was ruptured posteriorly and laterally. There was no external injury. That means there was a sexual intercourse by accused. He is not denying it in a clear terms. Rather, his defence is about consent. He has also taken a defence that there was a love affair between him and the victim. He had tried to produce on record the letters issued by the victim at Exh. 48. However, the victim has denied that she has written it. Important point to be noted is that in her cross-examination PW-6 Dr. Meera has clearly stated that she has not issued any age determination certificate of the victim till date of her deposition. The discrepancy in the date of incident and the date in the school register regarding the birth of the victim ought to have been noticed by the investigation officer and he ought to have insisted upon age determination in the medical examination of the victim. Thus, another mode from which the age of the victim could have been brought on record, has not been utilized by the prosecution. Therefore, whatever age has been stated in the medical papers can not be considered because it has been recorded as per the say of the victim or her mother.

12. Other evidence on record is in the form of proof of panchnama regarding clothes of the accused and victim,

spot panchnama and count of the investigation carried out by the Investigation Officers. There is no necessity to discuss this evidence for the simple reason that basic ingredient of the offence can not be stated to have been established by the substantial evidence of the victim, her mother and the medical examination. It will not be out of place to mention here that prosecution has examined PW-8 Dr. Nandkishore More, who was the Gynaechologist. He had examined the victim and only PW-6 Dr. Meera has issued the certificate on the basis of opinion of PW-8 Dr. More. In his cross-examination, he has also stated that the opinion of Pathology Department, Age determination ossification test, radiology department was called, but, he does not say that he had received any kind of report from the concerned departments so as to form an opinion that victim was minor on the date of incident.

13. Thus, taking into consideration the reason stated above conclusion can be arrived that prosecution has miserably failed in proving that the victim was minor on the date of the incident. The ratio laid down in **[2016(2) ABR (Cri.) 498]** and **[2015 All MR (Cri.) 4490]** is helping to the accused. In similar set of facts this Court had come to the conclusion that when there is no concrete evidence to prove age of the victim and no

ossification test was done, no witness was examined so as to prove the date of birth of victim; the conviction under such circumstance can not be awarded.

14. The learned Trial Court appears to have been swayed away with the fact that the mother had given the age of the victim and testimony of victim found to be truthful. The fact which has been missed by the learned Trial Court is that the victim had attained the age of maturity, with full knowledge that accused would be taking her to marry for which she did not resist. If she was not knowing accused earlier and then all of a sudden accused expressed his love to her and tells her that we would elope and marry then her reaction would have been different. Her friends were with her. She has not raised hue and cry. On the contrary she has stated that her friends made a room for the talk between accused and herself and stayed away from them. It is nothing but the indication that there was a love affair between the accused and the victim and with full understanding the victim had eloped with the accused. The learned Trial Court did not consider the discrepancy in the date of birth i.e. in the evidence and the school leaving certificate and wrongly concluded that the prosecution has proved that she is minor. Under such circumstance, the

conviction awarded to the appellant is wrong and erroneous and it deserves to be set aside by allowing the appeal.

Hence, following order;

ORDER

(i) The appeal is hereby allowed.

(ii) The conviction awarded to the appellant – original accused No. 1 Devanand Rajabhau More in Special POCSO Case No. 4/2014 by Special Judge and Additional Sessions Judge, Ambajogai dated 1.8.2016 for the offences punishable under Sections 363, 366, 376(2) of I. P. C. and Section 6 of POCSO Act, 2012 is hereby set aside.

(iii) The appellant is hereby acquitted of the offences punishable under Sections 363, 366, 376(2) of I. P. C. and Section 6 of POCSO Act, 2012.

(iv) The fine amount paid / deposited, if any by the appellant be refunded to him.

(v) Appellant to execute PR bond of Rs. 15,000/- with one surety of like amount for compliance of Section 437A of Cr. P. C. and

the duration of the said bond would be 6 months.

(vi) He be set at liberty if not required in any other case.

(vii) Order of compensation to the victim under Section 357 of Cr. P. C. is also hereby set aside.

(viii) It is clarified that the order of disposal of Muddemal passed by the learned Additional Sessions Judge is hereby maintained.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-.