

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

CRIMINAL APPEAL NO.79 OF 2017

Yuvraj s/o Kamlakar Londhe
Age : 28 years, Occu : Labour,
R/o. Chincholi Mali, Tal. Kaij,
Dist. Beed

... Appellant

Versus

The State of Maharashtra

... Respondent

.....

Advocate for Appellant : Shri S.B. Solanke
APP for Respondent – State : Shri S.J. Salgare

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CORAM : PR. BORA, J.

Dated: September 16, 2019

ORAL JUDGMENT :-

1. The appellant has preferred the present appeal against the Judgment and order dated 21.10.2016 passed by the Special Judge and Additional Sessions Judge at Ambajogai in Spl. (POCSO) Case No.25 of 2015. The appellant has been convicted in the aforesaid Special Case for the offences punishable under Sections 363 and 376 (2) of Indian Penal Code and under Section 6 of Protection of Children from Sexual Offences Act, 2012. The maximum sentence imposed upon the appellant is 10 years Rigorous Imprisonment with certain fine amount.

2. It was the case of the prosecution that, the appellant-accused kidnapped the prosecutrix, who is stated to be minor having

age of 13 years from the lawful custody of her parents with an intention to have sexual relations with her and while she was with him, did commit sexual intercourse with her. The offence was registered against the appellant on the statement given by the prosecutrix to the police on 27.04.2015. In order to prove the guilt of the accused, though the prosecution seems to have adduced the evidence of as many as 10 witnesses, the evidence of the prosecutrix herself and the evidence of the Medical Officer who examined her is more material to decide the controversy raised in the matter.

3. At the relevant time, the prosecutrix was aged about 13 and was studying in 6th Std. To prove the age of the prosecutrix, the school record was brought on record and the same was proved by examining the Head Master of the concerned school.

4. Dr Snehal Chaure (PW-9), Medical Officer has deposed before the Court that, in the medical examination of the prosecutrix conducted by her, it was clearly revealed that, the prosecutrix was subjected for sexual intercourse in the recent past. Her hymen was found to be torn and certain other injuries were also noticed on the private part of the prosecutrix.

5. The defence of the accused was that, the prosecutrix at her own had joined his company and during the period between which they were with each other, he did not have sexual intercourse with the prosecutrix. The Trial Court has rejected the defence so raised on behalf of the accused and on the basis of the evidence brought on record by the prosecution has held the accused guilty for the offences charged against him.

6. Shri Solanke, learned counsel appearing for the appellant assailed the impugned judgment on several grounds. The learned counsel submitted that, no clinching evidence has come on record as about the age of the prosecutrix. The learned counsel submitted that, the School Leaving Certificate which was brought on record and on the basis of which the Court has recorded a conclusion that the prosecutrix was aged about 13 years and was therefore minor, cannot be held to be a conclusive proof and the prosecution must have brought on record the original record in respect of the date of birth of the prosecutrix or must have called for the record on the date on which the prosecutrix was admitted in the primary school. The learned counsel further submitted that, in absence of any such evidence on record, merely on the basis of the School Leaving Certificate age of the prosecutrix could not have been determined.

The learned counsel further submitted that, considering the evidence on record, there is reason to believe that the prosecutrix has already attained the age of understanding and has consciously joined the company of the accused.

7. The learned counsel further submitted that, the Trial Court has failed in appreciating that the prosecutrix in her cross-examination has clearly admitted that her marriage was settled by her parents with one Ghubade and she was against settling of the marriage with the said person and that was the reason that, she in fact made the accused to leave his home and join her company. The learned counsel submitted that, the mother of the prosecutrix has also admitted the said fact of settling of the marriage of the prosecutrix with said Shri Ghubade. The learned counsel submitted that, the fact that the marriage of the prosecutrix was settled by her parents leads to a reasonable inference that, the prosecutrix had attained the age of marriage. The learned counsel submitted that, in the present days, the age of marriage even from the point of view of the villagers or the persons belonging to undeveloped or backward area, cannot be less than 16 years. The learned counsel submitted that, the evidence has also come on record showing that during pendency of the Sessions Case in fact the marriage of the prosecutrix

has taken place. The learned counsel submitted that, it cannot be accepted that the marriage of the prosecutrix was performed at the age of 13 or 14. The learned counsel submitted that, from the circumstances as above, reasonable doubts are created as about the age of the prosecutrix and in absence of any clinching evidence as about the date of birth of the prosecutrix or ossification test the age of the prosecutrix is liable to be decided on the basis of the circumstances which have come on record. The learned counsel submitted that, the circumstances as have come on record lead to the reasonable inference that, the prosecutrix has attained the age of marriage i.e. more than 16 years. The learned counsel submitted that, considering the fact as aforesaid, which has not been properly appreciated by the trial Court, the accused could not have been held guilty for the offence punishable under Section 376 (2) of I.P.C. The learned counsel submitted that, believing that the prosecutrix was minor the Court has ignored the aspect of consent and believing that the consent part was immaterial held the accused guilty for the offence under Section 376 of I.P.C. The learned counsel submitted that, this is the glaring mistake committed by the Trial Court.

8. The learned counsel for the appellant submitted that, insofar as the conviction under the POCSO Act is concerned, the

charge under Section 6 of the POCSO Act was framed against the appellant-accused at the end of the trial and no appropriate opportunity was given to the accused to defend the said charge. The learned counsel submitted that, in the circumstances, even the conviction recorded under the POCSO Act is also liable to be set aside. The learned counsel submitted that, ample evidence has come on record suggesting that the element of force was totally absent and the prosecutrix at her own had accompanied the accused throughout her travel. The learned counsel, in the circumstances, prayed for setting aside the conviction of the appellant and to acquit him of all the offences charged against him.

9. Shri Salgare, learned APP supported the impugned judgment. The learned APP submitted that, the prosecution has sufficiently proved the age of the victim girl by bringing on record the evidence in the form of school record of the prosecutrix. The learned counsel submitted that, no such circumstance has been brought on record through the cross-examination of PW-8 Vilas Motiram Giri so as to disbelieve his evidence. The learned APP submitted that, in view of the said evidence which has remained unchartered, now it is not open for the accused to say that the age of the prosecutrix was not 13 years but was more than 16 years. The learned APP submitted that,

once it is accepted that the prosecutrix was below the age of 16 years, the argument advanced on behalf of the accused that she was the consenting party becomes totally irrelevant.

10. The learned APP submitted that, the accused also seems to be fully aware of the fact that the prosecutrix was minor and in spite of that indulged in taking her away from the lawful guardianship of her father and roamed along with the prosecutrix and was ultimately arrested by the police. The learned APP submitted that, clinching medical evidence has come on record establishing that the prosecutrix was subjected for sexual intercourse. The learned APP further submitted that, in absence of any contrary evidence the only inference which emerges is that, while prosecutrix was in the company of the accused, he had sexual intercourse with her. The learned APP submitted that, even the prosecutrix in her testimony before the Court has in clear terms stated about the said sexual intercourse and also alleged that, the accused had sexual intercourse with her against her wish.

11. The learned APP submitted that, nothing has been brought on record so as to disbelieve the testimony of the prosecutrix. The learned APP, in the circumstances, submitted that no

fault can be found in the order of conviction recorded by the Trial Court for the offences under Section 376 (2) of I.P.C. as well as under Section 6 of the POCSO Act. The learned APP submitted that, the Trial Court has chosen not to impose any heavy punishment than the minimum sentence prescribed for the aforesaid offence. Insofar as the argument advanced on behalf of the accused that the prosecutrix was in the age of understanding and that was the reason that her marriage was settled by her parents, the learned APP submitted that, that cannot be a ground to draw an inference as about the age of the prosecutrix. The learned APP submitted that, still in the poor strata of the society and the undeveloped areas the child marriages are performed. The learned APP submitted that, unless there is some contrary evidence so as to discard or negate the documentary evidence placed on record, the argument made on behalf of the accused is liable to be rejected. The learned APP, in the circumstances, prayed for dismissal of the appeal.

12. I have duly considered the submissions advanced by the learned counsel appearing for the appellant as well as the learned APP appearing for the respondent - State. I have perused the impugned Judgment and the entire evidence on record. The appellant was charged for the offences punishable under Sections

363, 366-A and 376 (2) of I.P.C. as well as under Section 6 of the POCSO Act. For all these offences, the material factor will be the age of the prosecutrix. According to the prosecution, the age of the prosecutrix was 13 years at the time of the alleged occurrence. In order to prove the age of the prosecutrix, the prosecution has examined PW.8 - Vilas Motiram Giri, the Head Master of Karmveer Vidyalaya Chincholi Mali, Tal. Kaij. In the evidence of the said witness before the Court, the School Leaving Certificate pertaining to the prosecutrix came to be proved and was marked at **Exh.82**. As per the contents of the said document, the date of birth of the prosecutrix is 15.01.2002. According to the date of birth mentioned in the said certificate the age of the prosecutrix at the relevant time was 13 years and 3 months. As about the age of the prosecutrix that is the only evidence which has come on record in the form of document. The prosecutrix has stated her age on the date her deposition in the Court as 14 years and 13 years at the time of alleged occurrence. The mother of the prosecutrix also has stated the age of the prosecutrix at the time of occurrence to be 13 years.

13. It was sought to be contended by Advocate Shri Solanke that, the School Leaving Certificate issued by the Secondary School cannot be accepted to be a conclusive proof as about the age of the

prosecutrix. The learned counsel submitted that, the entries in the record of the Secondary School as about the date of birth of the prosecutrix were made on the basis of her School Leaving Certificate issued by the Primary School. The learned counsel submitted that, unless the said certificate issued by the Primary School is duly proved and it is also proved that, the entry made as regards to the date of birth in the record of the Primary School was on the basis of some authenticate document, the date recorded in the school record cannot be held to be a conclusive proof as about the date of birth of a person. The learned counsel submitted that, in the instant matter, since the said evidence is lacking, the prosecution cannot be said to have proved the material fact that the prosecutrix was of the age less than 16 years at the time of the alleged occurrence.

14. The contention raised by Shri Solanke is liable to be turned down. The record of the case shows that, the prosecution has very well brought on record the School Leaving Certificate issued by the Primary School, where the prosecutrix had taken her primary education. The learned A.P.P. brought to my notice that, inadvertently, School Leaving Certificate issued by the Secondary School and the School Leaving Certificate issued by the Primary School both are marked at **Exh.82**. On careful perusal of the record, there remains no

doubt that, the prosecution has duly proved the School Leaving Certificate issued by the Primary School. The date of birth as has been recorded in the School Leaving Certificate issued by the Primary School and the date of birth recorded in the registers of the Secondary School are one and the same. Moreover, in their testimonies before the Court, the parents of the prosecutrix have specifically deposed about the age of the prosecutrix to be 13 years on the date of occurrence of the alleged incident. They have also deposed that, while admitting the prosecutrix in Primary School, the date of birth of the prosecutrix was correctly stated. In view of the evidence on record as above, the objection raised on behalf of the accused that the prosecution has not concretely proved the age of the prosecutrix so as to hold her to be a minor, is liable to be rejected. On the contrary, ample evidence has come on record evidencing that the prosecutrix was born on 15.01.2002 and as such, below the age of 16 years on the date when the alleged incident happened. In the circumstances, the theory of consent sought to be pleaded by the accused loses its significance.

15. An another objection has been strongly pressed on behalf of the appellant that, the prosecution has not brought on record any clinching medical evidence so as to prove the allegation of rape against the appellant. The Medical Certificate issued by PW-9
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Dr. Snehal Chaure was brought to my notice to show that, in the local examination of genital organs of the prosecutrix, PW-9 Dr Chaure had not noticed any internal injury and the hymen of the prosecutrix was found torn. The learned counsel submitted that, non-existence of any injury to the genital organs of the prosecutrix leads to an inference that, either there was no sexual intercourse by the appellant with the prosecutrix or if such an intercourse had taken place, the element of force was absent. The learned counsel further submitted that, PW-9 Dr Chaure in her cross-examination had clearly admitted that, while committing sexual intercourse if violence is used, there is often laceration of fourchette and perineum. According to the learned counsel, since no such signs were noticed, the prosecution cannot be said to have proved that the prosecutrix was subjected to sexual intercourse by the appellant. I am not impressed with the arguments so advanced.

16. In her testimony before the Court, the prosecutrix had in clear words stated about the sexual intercourse by the appellant with her without her consent, not once, but on repeated occasions. Further the evidence of PW-9 Dr Chaure if read in its entirety, Dr Chaure has expressed the possibility of sexual assault on the prosecutrix. The evidence of the prosecutrix conjointly read with the

evidence of Dr Chaure leaves no doubt that the appellant had sexual intercourse with the prosecutrix against her will. I reiterate that, the testimony of the prosecutrix appears trustworthy and is supported with the medical evidence. She was admittedly below the age of 16 years when the alleged incident had occurred.

17. After having considered the entire material on record, it does not appear to me that, the Trial Court has committed any error in holding the accused guilty for the offences charged against him. I, therefore, see no reason for causing any interference in the judgment and order impugned in the present Criminal Appeal. In the result, the following order is passed.

ORDER

- (i) The Criminal Appeal is dismissed.

(**PR. BORA, J.**)