

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

CRIMINAL APPEAL NO. 144 OF 2017

1. Sonabai Sanjay Pandit

Age: 42 years, Occu.: Household,

2. Anil Sanjay Pandit

Age: 25 years, Occu.: Agri.,

Both R/o Manwat, Tq. Manwat,

Dist. Parbhani

..APPELLANTS

VERSUS

State of Maharashtra

..RESPONDENT

....

Mr. S.S. Rathi, Advocate for appellants

Mr. S.P. Sonpawle, A.P.P. for respondent – State

....

CORAM : R.G. AVACHAT, J.
RESERVED ON : 02nd MARCH, 2020
PRONOUNCED ON : 20th MARCH, 2020

JUDGMENT :

This appeal is directed against judgment and order dated 22nd March, 2017 passed by the learned Additional Sessions Judge, Parbhani in Special Case (POCSO) No. 24 of 2015. By the impugned judgment and order, the appellants herein have been convicted for the offences punishable under Indian Penal Code (“I.P.C.” for short), Immoral Traffic (Prevention) Act, 1956 (“PITA” for short) and Protection of Children from Sexual Offences Act, 2012 (“POCSO” for short) and sentenced to suffer imprisonment and to pay fine. For the sake of convenience, details of the offences for which the appellants

have been convicted and sentenced to imprisonment are given in a tabular form below :-

Appellant Name	Section		Sentence	Fine	In Default
	I.P.C.	PITA			
Appellant No.1 – Sonabai and Appellant No.2 - Anil	372 and 373 r/w 34	-	R.I. 7 yrs.	500/-	S.I. 1 month
	-	3 and 4	R.I. 2 yrs.	500/-	S.I. 1 month
	-	5(a), (b) and 6	R.I. 10 yrs.	500/-	S.I. 1 month
Appellant No.1 - Sonabai	POCSO				
	4 r/w 17		R.I. 10 yrs.	500/-	S.I. 1 month
	8 r/w 17		R.I. 5 yrs.	500/-	S.I. 1 month

The appellants alongwith six others were prosecuted for the offences stated hereinabove and with some other offences of which they have been acquitted. The State has not preferred appeal against acquittal.

2. The facts giving rise to the present appeal are as follows :-

P.W. 1 – Vivek (informant) was Inspector of Police attached with Local Crime Branch, Parbhani. He received tip off that Appellant No.1 – Sonabai (“A-1” for short) runs a brothel at Manwat. Minor girls were brought from Rajasthan and forced into prostitution at the brothel run by A-1. P.W. 1 – Vivek, therefore, made all the arrangements for effecting a raid at the brothel. P.W. 18 – Vikas agreed to act as dummy customer. Services of other two persons were availed to act as panch witnesses. First a pre-trap panchanama (Exh. 35) was prepared. Currency note of Rs.500/- bearing a

particular number was given to P.W. 18 – Vikas so as to offer it to A-1 in consideration for providing by her a prostitute. As planned, P.W. 18 – Vikas went to the premises of A-1. He offered her sum of Rs.500/- and asked for a minor girl. A-1, in turn, showed him three girls. He selected one of them. He then paid A-1 the earmarked currency note of Rs.500/-. P.W.18 – Vikas then took the selected girl – Anita (name changed) to one of the rooms in the said premises/wada. As planned, he gave a missed-call to P.W. 1 – Vivek. Thereupon, P.W. 1 – Vivek accompanied by a few police officials and two panchas entered the premises/wada. He seized the earmarked currency note of Rs.500/- and Rs.13,000/- from A-1 and prepared panchanama of seizure of the currency notes (Exh. 41). It was found that there were fourteen girls made to work as prostitutes. Twelve of them seemed to be minors. P.W. 1 - Vivek took all of them to Manwat Police Station. He then lodged F.I.R. bearing C.R. No. 33 of 2015 for the offences punishable under Sections 366-A, 370, 370-A, 372 and 373 read with Section 34 of the I.P.C., under Sections 3, 4, 5, 5(a), 5(b), 6 and 7(1)(a)(2) of PITA. P.W. 19 – Dadahari, Inspector of Police, Manwat Police Station did the investigation of crime. He visited the brothel, prepared scene of offence panchanama, recorded statements of the girls rescued from the brothel and got all of them medically examined. On completion of investigation, the appellants and six others were proceeded against by filing charge-sheet before the learned Judicial Magistrate First Class, Manwat. Learned J.M.F.C., Manwat, in turn, committed the case to the

Court of Session. The case was assigned to the Court of Additional Sessions Judge (“trial Court”) for trial in accordance with law. Charge (Exh. 24) was framed. Then it was realised that offences punishable under POCSO Act were attracted, additional charge, therefore, came to be framed. The appellant and six others (acquitted) abjured the guilt. Their defence was of false implication. According to the appellants, with a view to earn reward P.W. 1 – Vivek lodged false F.I.R. on intervention of one Non-Governmental Organisation viz. Socio-Economic Development Trust, Swapnabhumi (“N.G.O.”). The N.G.O. was interested in earning government grants/funds.

3. To substantiate the charge, prosecution examined nineteen witnesses. Documents in the nature of panchanamas and medical certificates came to be tendered in evidence. On appreciation of the evidence in the case, trial Court was pleased to convict the appellants for the offences stated hereinabove. The appellants are, therefore, in appeal before this Court.

4. Heard Mr. Rathi, learned Counsel appearing for the appellants, learned A.P.P. representing State and also heard Mr. Najam E. Deshmukh, learned Advocate appearing for N.G.O. He placed on record written notes of arguments. I have carefully perused the same to find it to be reiteration of evidence of some witnesses and findings recorded by the trial Court.

5. Learned Counsel representing the appellants would submit that four out of fourteen allegedly rescued girls have been examined as witnesses. No documentary evidence in proof of their age was produced before the trial Court. The trial Court relied on medical examination reports of those four girls to observe them to be below eighteen years of age. According to learned Counsel, report of ossification test is not conclusive evidence of age. There is margin of error of two years on either side. According to learned Counsel, the learned trial judge ought to have acquitted the appellants of all the offences they were charged with.

6. Learned A.P.P. would, on the other hand, supported the impugned judgment. He took me through the evidence of the victim girls and the medical officers to submit that no interference with the impugned judgment is called for.

7. There is evidence to indicate that a raid was effected on the premises/wada in control of A-1 at about twelve midnight on 26th March, 2015. P.W. 1 – Vivek testified that he had received a tip off that A-1 runs a brothel in her premises at Manwat. He, therefore, arranged for effecting the raid. He secured presence of 3-4 persons to act as panch witnesses and a dummy customer. A pre-trap panchanama (Exh. 35) was drawn. A currency note of Rs.500/- denomination, bearing a particular number was given to P.W.

- 18 – Vikas to offer it to A-1 as consideration for providing a girl. P.W. 18 – Vikas was instructed to give P.W. 1 – Vivek a miss-call on his cell phone, if A-1 accepted/ received the earmarked currency note.

8. P.W. 18 – Vikas testified that he acted as dummy customer. A pre-trap panchanama was drawn. He received currency note of Rs.500/- denomination for being offered to P.W. 1 – Vivek. It is further in his evidence that he entered the premises/wada in control of A-1. He met a lady by name Sonabai i.e. A-1. He asked her to provide him a minor girl for physical relationship. A-1, in turn, asked him to pay Rs.500/- therefor. It is further in his evidence that on his asking, A-1 showed him three girls. He selected one of them. She was appearing minor. On A-1's demand, he paid her the currency note of Rs.500/- denomination. A-1 then allowed him to take the selected girl to one of the rooms. Then he gave P.W. 1 – Vivek a miss-call. In response thereto, a police team headed by P.W. 1 – Vivek entered the premises and rest followed.

9. P.W. 1 – Vivek, P.W. 2 – Sandeep and P.W. 18 – Vikas gave evidence consistent with each other. P.W. 2 – Sandeep is a panch witness to the pre-trap panchanama and even to the raid effected on the brothel run by A-1. It is in evidence of these three witnesses that there were fourteen girls, twelve of them appeared to be minor. P.W. 1 – Vivek took all of them to Manwat Police Station and lodged F.I.R. P.W. 19 – Dadahari did the

investigation. He visited the brothel and drew scene of offence panchanamas (Exh. 47, 48 and 133). From the vicinity of scene of offence, he seized article viz. one white coloured Tata Sumo vehicle, bearing registration no. MH-44-B-3377.

I have closely scrutinized evidence of above three witnesses to find their evidence to be reliable and worthy to act upon. Learned Counsel for the appellants did not point me anything to render the evidence of these witnesses to be unworthy of credit.

10. Out of fourteen girls rescued from the brothel, four have been examined as witnesses, those are P.W. 6 to 9 viz. Savita, Sujata, Geeta and Lata (names changed) respectively. P.W. 6 to 9 gave their evidence in one voice. It is in their evidence that they hailed from Rajasthan. They alongwith six other girls came to Manwat on their own. It is in their evidence that they informed their family members to have been leaving for Shirdi. It is further in their evidence that they were staying in the house of A-1 at Manwat. With slight variation interse the evidence, these four witnesses testified that in the premises/wada under the control of A-1, boys used to visit. They would pay Rs.200/- or Rs.100/- to them or to A-1. Half of the amount received was required to be shared with A-1. In consideration for receipt of money, they were doing wrong work (ganda kam) with the boys. These witnesses stated that they did the wrong work on their own.

11. Section 2(a) of PITA defines “brothel” to mean :-

“brothel” includes any house, room conveyance or place or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes;

While Section 2(f) defines “prostitution” to mean :-

“prostitution” means the sexual exploitation or abuse of persons for commercial purpose, and the expression “prostitute” shall be construed accordingly;

For the purpose of provisions of PITA “child” means a person who has not completed the age of 16 years, whereas “minor” means a person who has completed the age of 16 years but has not completed the age of 18 years.

12. From the evidence of P.W. 6 to 9 it has been proved beyond doubt that A-1 was keeping a brothel. Section 3 of PITA provides for punishment for keeping the brothel or allowing the premises to be used as brothel, while Section 4 of same Act speaks of punishment for living on the earnings of prostitutes. It is reiterated that the evidence of P.W. 6 to 9 undoubtedly proved that A-1 was living on earnings of the prostitutes. Trial Court has, therefore, rightly convicted A-1 for the offences punishable under Sections 3 and 4 of PITA.

13. I have carefully scrutinised the entire evidence in the case to find that there was no material to sustain conviction of Appellant No.2 (“A-2” for

short). Role of A-2 appears to be that he, being a son of A-1, was residing with her in the premises used for running the brothel. The evidence of P.W. 8 and 9 is to the effect that A-2 was residing in the said premises. Nothing more has been attributed to him. Trial Court was, therefore, not justified in convicting A-2. According to trial Court, the said premises/wada belonged to the husband of A-1 (Accused No.8 before trial Court). He passed away pending trial. In view of trial Court, since on the demise of Accused No.8, the wada belongs to A-1 and A-2 and as such both of them run a brothel therein. Admittedly, when the raid was effected, Accused No.8 was very much alive. By that time A-2 did not have any right, title and interest in the premises/wada owned by Accused No.8. The Trial Court held that since A-2 was residing in the brothel, it could safely be said that both A-1 and A-2 used to live on the earnings of the prostitution. This inference appears to be far fetched and without base of any evidence so far as against A-2 is concerned.

14. So far as regards other offences for which the appellants have been convicted, it is to be stated that for proof of all or any of those offences, the prosecution was required to prove that at least one of the victim girls was below the age of eighteen years. With a view to avoid the judgment to run into number of pages, I do not propose to reproduce the ingredients of those offences. Only four out of fourteen rescued girls have been examined. The evidence as regards age of victims, who were not examined, need not be adverted to. Even for the sake of assumption the said evidence is appreciated,

it is on the lines of the evidence produced in respect of P.W. 6 to 9.

15. P.W. 6 and 9 claimed to be seventeen years of age, while P.W. 7 and 8 stated to be eighteen years of age. P.W. 6 to 9 did not know their birth dates. Even they would have given a particular date of their birth, same would have been hit by hearsay. Admittedly, none of the parents of P.W. 6 to 9 have been examined in proof of their age. No documentary evidence in the nature of their birth certificate, school admission or school leaving certificate has been produced on record. Their minority was sought to be established on the basis of their medical examination reports. It is, therefore, necessary to advert to the evidence of medical officers who examined them and certified to be within a particular age group. First such witness is P.W. 10 - Narmada. She was a medical officer attached to Civil Hospital, Parbhani. It is in her evidence that she examined six of the girls referred for medical examination. P.W. 6 – Savita is one of them. On their examination, she certified them to be within the age group of 15-18 years.

16. Medical certificate (Exh.50) pertains to P.W. 6. In title caption of the certificate, full name of P.W. 6 has been recorded with her age as twenty years. It is not known who gave her age as twenty. In the certificate, it has been specifically stated that P.W. 6 might be of 14-15 years of age. P.W. 10 has specifically mentioned in the certificate to co-relate her opinion with x-ray

finding. In her cross-examination, P.W. 10 testified that she was a B.D.S. (Bachelor of Dental Surgeon). She admitted that on the basis of examination of teeth, perfect finding as to the age of the person could not be given. She had not taken x-ray of teeth of P.W.6. She simply conducted local examination. She went on to admit that in the book Jurisprudence and Toxicology (Modi's) it has been mentioned that "method is subjective and not entirely satisfactory to another investigator. Pathological condition can be altered each changes. The average error claim for this method is + or - 3.6 years."

17. P.W. 12 – Jayshree, Medical Officer, had examined P.W. 7. It is in her evidence that she collected x-ray reports from radiologist. On the basis of x-ray reports, she found P.W. 7 to be in the age group of 15-17 years. She issued a certificate (Exh. 91). Her evidence also indicate to have examined 3-4 other girls (not examined as witnesses) to find them to be in the age group of 18-19 years. In her cross-examination, she testified that ossification test was not conclusive proof in respect of determination of age of a patient. Radiologist is an expert in conducting ossification test. She was not radiologist. The margin of error is plus or minus two years. In her opinion, P.W. 7 was in the age group of 14-19 years.

18. So far as regards age of P.W. 8 is concerned, the evidence is of P.W. 14 – Varsha, Medical Officer, Civil Hospital, Parbhani. It is in her evidence

that she collected x-ray reports to find her to be in the age group of 15-17 years. She issued certificate in that regard (Exh.106). During her cross-examination, she testified that the radiologist is an expert in conducting ossification test. She was not a radiologist. Ossification is not conclusive proof of age. The margin of error is plus or minus two years. According to her, P.W. 8 might be of the age of above fourteen years but below nineteen years.

19. So far as regards P.W. 9 is concerned, I do not come across any evidence of her radiological examination. As such, there is no evidence in proof of her age of being below eighteen years of age at the relevant time.

20. It is reiterated that there is no documentary evidence like birth certificate or school record indicating date/s of birth/s of P.W. 6 to 9 so as to find them below eighteen years of age at the relevant time. Medical officers, who examined them with a view to ascertain their age, have been candid enough to state their findings were not conclusive in nature and margin of error was two years on either side. As such, the prosecution could not establish that P.W. 6 to 9 were below eighteen years of age at relevant time.

21. Trial Court, on the issue of determination of age, had relied on Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Rule 12 speaks of procedure to be followed in determination of age. Rule 12 reads thus :-

12. *Procedure to be followed in determination of Age.*

(1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) *The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.*

(3) *In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -*

(a) (i) *the matriculation or equivalent certificates, if available; and in the absence whereof;*

(ii) *the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*

(iii) *the birth certificate given by a corporation or a municipal authority or a panchayat;*

(b) *and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower*

side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

22. In my view, reliance on Rule 12 is misplaced. Said rule pertains to determination of age of a child or a juvenile in conflict with law, so far as regards enforcement of provisions of Juvenile Justice Act. It needs no mention that the Juvenile Justice (Care and Protection of Children) Act and Rules thereunder are meant for welfare of juveniles. The provisions of the said Act were beneficial in nature so far as regards juveniles are concerned. Rule 12 cannot be invoked for ascertaining the age of a victim, in trial of offences under other Acts like I.P.C., PITA or POCSO.

23. In case of *Alamelu & Anr. Vs. State represented by Inspector of Police, 2011 ALL MR (Cri) 1278*, Apex Court observed that on the basis of medical evidence, generally the age of an individual could be fixed approximately. Margin of error in age has been judicially recognised in case of *Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors. (1982) 2 SCC 538* as follows :-

“.... However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”

24. It is reiterated that in the evidence of medical officers as regards age of P.W. 6 to 9 is concerned, they themselves have admitted that there is margin of error of two years on either side. The evidence thus indicate that P.W. 6 to 9 even might have been of the age of eighteen years or above at the relevant time. It can be stated in other words that prosecution has not proved beyond doubt that P.W. 6 to 9 were below eighteen years of age when the raid was effected i.e. on 26th March, 2015.

25. Evidence of P.W. 6 to 9 that they had left their houses in Rajasthan under the pretext of visiting Shirdi and on their own came to Manwat, undoubtedly indicates that provisions of Section 5(1)(a)(b) of PITA do not get attracted. For the offence punishable under Section 6 of PITA, there is also nothing in the evidence of P.W. 6 to 9 to indicate the appellants to have had detained them in the brothel.

26. So far as regards conviction of the appellants under Sections 4, 8 and 17 of POCSO is concerned, it is to be stated that none of them is proved to be a child on the date the offence was committed. Moreover, so far as regards proof of penetrative sex assault is concerned, the medical officers examined in this case have categorically stated to have not given any opinion as to whether P.W. 6 to 9 had been subjected to penetrative sexual intercourse in the recent past of the raid.

For the reasons given hereinabove, interference with the impugned judgment is called for to the extent of setting it aside in toto as against A-2 is concerned and partially as against A-1.

27. In the result, appeal partly succeeds in terms of the following order :-

- (i) The criminal appeal is partly allowed.
- (ii) The judgment and order dated 22nd March, 2017 passed by the learned Additional Sessions Judge, Parbhani in Special (POCSO) Case No. 24 of 2015, is hereby partially set aside.
- (iii) Appellant No.1 is acquitted of the offences punishable under Sections 372 and 373 read with Section 34 of the I.P.C., under Sections 5(a), (b) and 6 of PITA and under Sections 4 and 8 read with Section 17 of POCSO.

(iv) Conviction of Appellant No.1 for the offences punishable under Sections 3 and 4 of PITA is maintained.

(v) Appellant No.2 is acquitted of all the offences .

(vi) Bail bonds of Appellant No.2 shall stand cancelled.

(vii) Fine amount under the offences of which the appellants are acquitted, if paid, be refunded to them.

(viii) The Appellant No.1 has been behind bars since 27th March, 2015. As such, she has served out the sentence of imprisonment imposed in respect of the offences punishable under Sections 3 and 4 of PITA. She be, therefore, released from jail, if not required in any other case.

(R.G. AVACHAT, J.)

SSD