

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.582 OF 2016

Momin Mazhar alias Babbu s/o Momin Majjit,
Age 24 yrs., Occ. Meson,
R/o Barshi Naka, Beed,
Tq. & Dist. Beed.

... Appellant.

... **Versus** ...

The State of Maharashtra,
Through the Police Station Officer,
Police Station, Peth, Beed,
Tq. & Dist. Beed.

... Respondent.

...

Mr. R.S. Deshmukh, Senior Advocate i/b Mr. G.A. Kulkarni, Advocate for
appellant

Mr. P.K. Lakhotiya, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th FEBRUARY, 2020

JUDGMENT :

1 Present appeal has been filed by the original accused,
challenging his conviction by learned Special Judge of Special Court under
The Protection of Children from Sexual Offences Act, 2012, District Beed for

the offence under Section 7 punishable under Section 8 of the POCSO Act in Special (Children Protection) Case No. 14 of 2014 dated 31.08.2016.

2 It is the prosecution story that when the dead body of the new born was found, police had registered FIR for committing murder of the child against unknown person. Thereafter the mother of the child i.e. present prosecutrix was found out. Upon the inquiry with the said mother of the child, who is a girl, the First Information Report came to be lodged by her on 21.01.2014. She is aged 17 years stating that she was studied up to 7th standard in Urdu medium. She used to reside with mother, one sister and two brothers. They had house consisting of various rooms (Wada) and accused used to reside in one of the rooms on rent about a year prior to FIR. Prosecutrix used to be alone at home after her mother and brothers used to go out for work. Accused used to take the prosecutrix from her house to his room by holding her hand, after he used to found her alone. He used to have forcible sexual intercourse with her. She became pregnant from him. When the size of her stomach increased, she told the said fact to her mother. Accused was called by her mother to their house and told him that he should marry prosecutrix. However, accused refused. He left the room of prosecutrix's mother and went to stay at other place. Prosecutrix was admitted to Dr. Golve's Hospital about two months prior to FIR, when she

was in labour pain. Her name was told differently as wife of accused. She delivered a female child on 12.11.2013. The new born had six fingers to each hand. Prosecutrix was discharged after two days hospitalization. After she was taken to home, mother of the prosecutrix had called accused and told about birth of the child. Accused started disowning the paternity of the child and to maintain her. He then strangled the child. Prosecutrix and mother was frightened. The dead body of the child was then disposed of on Vadawani – Upali road on 14.11.2013. Then the FIR was lodged. It will not be out of place to mention here that since this FIR is lodged by the victim, it has been registered for the offence punishable under Section 376 (A) of Indian Penal Code and Section 3 punishable under Section 4 of the Protection of Children from (Sexual Offence) Act, 2012. Separate FIR was already registered for the offence punishable under Section 302 of Indian Penal Code for murder of the child.

3 The victim/prosecutrix was got medically examined, after the FIR was registered. Statements of witnesses were recorded. Accused came to be arrested. Samples of the prosecutrix, accused and child were taken for the purpose of Deoxyribo Nucleic Acid (DNA) test. Reports regarding same have been collected. Various panchnamas have been prepared and articles have been seized. The seized muddemal was sent for chemical analysis. After the

completion of investigation, charge-sheet was filed before the Special Court under POCSO Act.

4 After the accused appeared, learned Special Judge has framed charge at Exh.7 for the offence punishable under Section 376 (A) of Indian Penal Code and Section 3 punishable under Section 4 of POCSO Act. The contents of charge were read over and explained in vernacular. He pleaded not guilty. Trial has been conducted.

5 After going through the evidence, and hearing both sides, learned Special Judge has held that the offence under Section 7 and 9 of POCSO Act has been proved against the accused beyond reasonable doubt. Accused has been acquitted of the offence under Section 3 punishable under Section 4 of the said Act. He has been sentenced to suffer rigorous imprisonment for 5 years and pay fine of Rs.500/-, in default to suffer rigorous imprisonment for 15 days for committing offence under Section 7 punishable under Section 8 of the said Act. Accused has been further convicted for the offence under Section 9 punishable under Section 10 of POCSO Act and has been sentenced to suffer rigorous imprisonment for 7 years and pay fine of Rs.1000/-, in default to suffer rigorous imprisonment for 30 days. This judgment and order is under challenge in this appeal.

6 Heard learned Senior Counsel Mr. R.S. Deshmukh instructed by Mr. G.A. Kulkarni for the appellant and learned APP Mr. P.K. Lakhotiya for the respondent-State.

7 It has been vehemently submitted on behalf of the appellant, that the prosecution story itself would make it clear, that after the fetus was found murdered, the mother was identified i.e. prosecutrix, and thereafter, she has given the disclosure. This clearly establishes that the First Information Report has been lodged by the girl when she was in police custody. She has stated, that the accused was tenant in the Wada belonging to her family. Accused was residing with his wife, and therefore, the girl had every knowledge, that the accused is already married. It is the defence of the accused that the girl had intention to marry with the accused, and therefore, her mother had asked accused to marry the prosecutrix. When he refused as well as denied the paternity of the child, they have implicated the accused. The learned Special Judge failed to consider that the age of the prosecutrix is not proved by the prosecution. Though she has stated that she had done schooling up to 7th standard, school record in respect of her birth date has been collected. The documents, which are on record, are that the girl had delivered child at Gholve Hospital and at the time of her admission she has given her age as '19 years' and status as 'married'. This ought to have been

considered by the learned Trial Judge. Further, the delay, that has been, caused has not been explained at all. Though the alleged sexual intercourse is stated to have taken place much prior to 21.01.2014, yet, the First Information Report is filed after the birth of the child. Another fact to be noted is, that the child was born on 12.11.2013 and the First Information Report has been lodged on 21.01.2014. Even as per the contents of the First Information Report the murder of the child has taken place on 14.11.2013. Therefore, this inordinate delay has not been explained by the prosecution, in any manner. The surprising fact is, that the prosecutrix as well as her relatives i.e. sister, husband of the sister deposed, that she had never disclosed about the forcible sexual intercourse by the accused and becoming pregnant from him, at any earlier point of time. Another fact also that is required to be considered is, that after the mother of the prosecutrix found that the prosecutrix is pregnant from the accused, she had called accused and asked him to marry the prosecutrix. However, when he refused and changed the residence, yet the mother did not take any action, which raises doubt regarding the story put forth by the prosecutrix. Taking into consideration the evidence of the prosecutrix, especially the admission that as the accused had not applied force against her for sexual intercourse, she had not revealed the said fact to Doctor. This admission shows, that she was a consenting party and as her age has not been proved, it will have to be held in favour of

the accused that the prosecutrix was major. Taking into consideration these aspects, in fact, the accused ought to have been acquitted of the offences. Further, since the age has not been properly proved, she cannot be termed as “child” within the definition of POCSO Act. Therefore, conviction under POCSO Act is illegal. He, therefore, prayed for allowing the appeal and setting aside the conviction awarded against the appellant.

8 Per contra, the learned APP submitted that the circumstances, under which the FIR came to be lodged, are required to be considered. The prosecutrix says that she had studied up to 7th standard in Urdu medium and thereafter left the schooling about 8 years prior to her deposition. She was studying at home and the accused, who was the tenant in the Wada of her family, has taken disadvantage of the said fact. Accused was already married, and therefore, he cannot take a defence that prosecutrix is a consenting party, unless it is brought on record that she was major. Though the documents on record as well as the testimony of PW 4 Dr. Vijay Gholve, in whose hospital the prosecutrix had delivered the child, has stated that she had given her age as ‘19 years’, yet, it is to be noted that the possibility of not disclosing the said fact about her minority and the status as ‘unmarried’ will bring defame to the family, that would not have been disclosed. The prosecutrix in her cross-examination has denied that she had given her age as ‘19 years’ to Dr.

Gholve. However, at the same time a suggestion has been put on behalf of the accused, that at the first time of her physical relations with accused commenced with she was 18 years of age. This suggestion has been denied by the prosecutrix. However, by giving such suggestion the accused is admitting that he had sexual intercourse with the prosecutrix. Though the school record has not been collected, yet, in this case, there is ossification test. PW 5 Dr. Priyanka, who had medically examined the prosecutrix, has stated, that at the bottom of her opinion it is mentioned that the age of the patient is 12-14 years. The said opinion was based on the X-ray and other tests conducted for ossification test and in order to prove ossification test and its result prosecution has examined PW 6 Dr. Jalindar. He has given the tests conducted and result of the test leading to his opinion, that the prosecutrix was between 12-14 years of age, when she was examined by him on 19.01.2014. There is nothing in his cross which would display his opinion. Therefore, the age of the prosecutrix has been brought on record and as per that opinion the prosecutrix is “child” within the definition of Section 2(d) of POCSO Act. Though there is delay in lodging the FIR, it is not fatal. Further, Exh.77 is the examination report of the DNA test and it has been clearly opined that the accused and the prosecutrix are concluded to be the biological parents of the child. All the different genetic systems analyzed matched. Under such circumstance, when it is concluded that they are the

parents, definitely, there was sexual intercourse between them and admittedly, when the prosecutrix was aged 12-14, her consent is not consent at all, therefore, the accused has been rightly convicted by the learned Trial Judge.

9 At the outset, it is to be noted that the FIR came to be lodged by the prosecutrix after it was revealed that the child born to her was found murdered. When the inquiry regarding the fetus, which was found murdered, was done it located the prosecutrix as the mother of the child. Thereafter, it was disclosed that the prosecutrix had delivered the said child at Gholve's Hospital. When it was further inquired, as to who is the father of the child, the prosecutrix had given the story. Definitely there is delay in lodging the report, and therefore, now it is required to be seen, whether delay is fatal to the prosecution story or not. The testimony of the prosecutrix would show, that she is totally supporting her FIR and has clearly stated, that when she became pregnant from the accused he was asked by her to marry him, and therefore, when he refused and left the rented room, she had narrated the said act of the accused to her mother. Definitely, she is not giving any reason, as to why she had not disclosed the sexual act done by the accused prior to her pregnancy and it is also not clear as to when she had asked the accused to marry her. The entire story is tried to be covered within

about 8 lines in the deposition and further, she has not stated, that in any way the accused had given her threat, which prompted her not to disclose the fact to her mother and other relatives. Merely on these points, whether she can be taken as consenting party is also required to be considered. In her cross-examination she has stated, that she was having understanding capacity to know, what is false and what is true, what is right and what is wrong. She has admitted that accused was residing along with his wife in the said rented room. It is stated that there are about 400-500 residential houses around her house and that area is populated by Muslims. In clear terms she has admitted that for about 5-6 months period she has not disclosed the act of the accused to anybody. It was rather, till her mother had taken her to Gholve's Hospital she has not disclosed the said fact. As aforesaid, though she is admitting that she had not disclosed the said fact to anybody else prior to almost delivery of the child, again the question arises, whether she is a consenting party. In order to ascertain, as to whether she was a consenting party or not, we are required to consider what is her age.

10 Though the prosecutrix in her FIR itself has stated, that she is educated up to 7th standard it appears, that the Investigating Officer has not taken pains to collect the school record. There was no attempt by the prosecution to produce her birth date on record by any of the modes

available. However, when the prosecutrix was referred for medical examination, it appears that ossification test was done in order to determine her age. Prior to that when she had gone to Dr. Gholve's Hospital for delivery, it appears that her age was told as '19 years' and it was also told that she is 'married'. There is no suggestion to the prosecutrix that before the delivery of the child she had married to somebody else. That means, to that effect, that even on the date of the delivery of the child the prosecutrix was unmarried, is admitted to the accused. In other words, the accused is accepting the fact that the status of the prosecutrix shown as 'married' in the record of Gholve Hospital, is not correct. However, the accused intent to rely upon the said incorrect information to the extent of age, that has been told to the Hospital authorities. Cross-examination to Dr. Gholve is also on the same line. He is accepting the fact that hospital record shows, that prosecutrix was aged 19 and she was married about a year prior to the date, on which she was assaulted. However, it is to be noted that he has not relied on any documentary evidence and in fact, would have acted on the basis of whatever was told to him, either by the relatives or by the patient herself. Even if for the sake of argument we accept that the prosecutrix had given her age as '19' and her status as 'married', yet, the purpose behind that, is required to be considered. The prosecutrix and her family members would have been aware about the fact, that it would bring defame to their family, if it is disclosed that

the prosecutrix is unmarried and yet giving the birth to a child. Therefore, for the fear of society the said information might have been given to the Hospital authorities, that she is 19 years of age and was married a year prior to the delivery. Accused cannot take advantage of the said fact. In other words, it can only be said that if she would have been disclosed about the fact, that she was raped and then had become pregnant, it would have been a Medico Legal Case, which it appears that the prosecutrix and her family members tried to avoid. It is also to be noted that even after birth of the child, when prosecutrix was taken home, her mother had called accused and informed him about the birth of the child from him to the prosecutrix and asked him to marry, but accused refused again, at that time. That means, the mother of the prosecutrix was in favour of, that anyhow now the accused should accept the prosecutrix as well as the child and then wanted to avoid police case. The fact appears to have been got disclosed when as per the FIR as well as the testimony of the prosecutrix, that when the accused was so called to accept the child as well as prosecutrix, he not only refused but denied the paternity of the child and he had pressed the nose of the child, as a result of which, the child died, and thereafter the dead body has been disposed of. This Court would refrain itself from observing anything in respect of the alleged murder of the child and disposal of the dead body as it is subject-matter in another case punishable under Section 302, 201 of the

Indian Penal Code. It will further be not out of place to mention here, that the present accused has been convicted for committing that offence also and his appeal is pending before this Court. The reference of the fact is taken to connect the disclosure of the sexual act by the accused with the FIR.

11 Coming back to the point as regards determination of age is concerned, it is to be noted that PW 5 Dr. Priyanka is the Medical Officer, who had examined the prosecutrix. She has specifically stated that the prosecutrix was referred for determination of age also. X-rays were taken by the Radiologist and the opinion has been given by the Radiologist Dr. Jalindar Limbgaonkar regarding the age. As regards the medical examination regarding rape/sexual assault is concerned, she has recorded that the hymen was torn with old tears and there was no evidence of other injuries. It is obvious that the sexual act had taken place much earlier i.e. about more than one year and thereafter the prosecutrix had delivered the child. Therefore, possibility of any evidence about other injuries was not there at all. Except suggestions, there is nothing in her cross. The prosecution has examined PW 6 Dr. Jalindar Limbgaonkar also, who had given the opinion regarding age of the prosecutrix. He had stated that X-ray plates were referred to her for examination and age determination. The radiological examination of the X-ray plates disclosed that the medical epicondyle on fuse, it was fused at the

age of 14 years in case of female. The head of the radius was fused at 14 years in female, lateral epicondyle was fused and it was fused at the age of 12 years in case of female. Pili crest was appeared and it appears at the age of 14 years in case of female, and therefore, these findings prompted him to take opinion that the age of the patient i.e. prosecutrix was between 12-14 years. In his cross-examination he has stated that he had not brought the X-ray plates. He was unable to tell who was X-ray technician on 21.09.2014. Further, he has stated that as per Modi's Jurisprudence the distal end of radius appearance and fusion is given as 16 ½ to 18 years. He also says that crest of ilium appearance and fusion in case of female is given as 17 to 19 years. Head of radius fused means age may be 18 years. But then he has denied the suggestion that the opinion given by him in respect of the age of the prosecutrix is wrong. Even after considering those statements from cross-examination of the expert it can be said, that nothing contradictory has been transpired, which was proved, that on the date of the act of sexual intercourse by the accused prosecutrix was more than 18 years of age. The age determination on the basis of ossification test is conclusive in this case, and therefore, the prosecutrix was "child" as defined in POCSO Act.

12 The suggestion given in the cross of the prosecutrix on behalf of the accused, that at the first time of her physical relation with accused

commenced with she was 18 years of age though denied by her presupposes that the accused is accepting there was physical relations between him and the prosecutrix. He cannot come with the case of consenting theory, under such circumstance. Though the accused has tried to take defence of total denial, it appears that it has been shaken somewhere, when such suggestions have been given. Definitely it appears to be on the background that in the DNA test the accused and the prosecutrix have been concluded to be the parents of the child. Now, when it is concluded that the prosecutrix was “child”, as defined in POCSO Act, even if for the sake of argument we accept, that she had not resisted the accused or would have fallen in the trap of the accused, she cannot become a consenting party, as the consent of a minor girl is not consent at all. In fact, this much evidence is sufficient to conclude that accused has committed offence under Section 7 and 9 punishable under Section 8 and 10 respectively of the POCSO Act.

13 Prosecution has also examined PW 2, who is the sister of the prosecutrix, PW 3, who is the husband of PW 2. However, the testimony of both these witnesses would show, that they had no idea about the incident, that had taken place with the prosecutrix and they got the knowledge about the same only after the prosecutrix was about to deliver the child.

14 The accused has admitted the spot panchnama, which is

admittedly executed after the FIR was lodged. Other police witnesses examined, are either carrier or the Investigating Officer. Nothing contradictory has been transpired from their cross-examination.

15 Every delay in lodging the report, either inordinate or not, may not be fatal to the prosecution story. The facts and circumstances are then required to be assessed in order to come to the conclusion, as to whether the said delay is fatal to the prosecution or not. Here, in this case, there is admittedly inordinate delay, but accused has not adduced any such evidence or nothing has been brought by him in the cross-examination of the prosecution witnesses to show, that the said delay has caused prejudice to him. Advantage of the silence, on the part of the prosecutrix in not approaching the police prior in time, will not give advantage to accused to claim immunity or to conclude that no such act was done by him, when the DNA report is conclusive enough to point out him to be the father of the child coupled with the suggestion, that has been given to the accused, referred in the above paras, would lead this Court to conclude that even though there is inordinate delay in lodging the FIR, it is not fatal and benefit of the point cannot be given to the accused.

16 Taking into consideration all these facts and the findings would lead to the conclusion that the prosecution has proved the offence against the

accused beyond reasonable doubt and the learned Trial Judge has rightly convicted him. There is absolutely no necessity to interfere with the sentence imposed. Such kind of acts do not deserve any kind of sympathy, when the sexual assaults on minor girls are reported in large number, nowadays. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it is dismissed.

(Smt. Vibha Kankanwadi, J.)

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