

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.906 OF 2018

Maula s/o Babu Kotwal,
Age 31 years, Occupation Nil,
R/o Shirol Tq. Akkalkot
Dist. Solapur.

...Appellant.
(Original accused)

VERSUS

The State of Maharashtra.

...Respondent.

.....
Advocate for Appellant : Mr. S. S. Kazi.
APP for Respondent-State : Mr. S. B. Pulkundwar.

.....

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 09-09-2020.

JUDGMENT :

1. Present appeal has been filed by the accused challenging his conviction by learned Special Judge, Osmanabad in Special (POCSO) Case No.21 of 2015, dated 25-07-2017, thereby holding him guilty of committing offence punishable under Section 363, 366 (A), 376 (2) (i) of Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (Hereinafter referred to as 'POCSO Act').
2. The prosecution has come with a case that, informant was

residing with his family and accused was also residing in his family at the relevant period. There is absolutely no relationship between the accused and the informant. Victim is the daughter of informant who was then i.e. on 28-05-2015 was aged 15 years 03 months. The victim left the house at about 7.30 p.m. on 27-05-2015 without informing anything to the family members. The family members made inquiry with her friends but could not get any clue. Thereafter inquiry was made with the employer of the accused where he was working, and at that time it was found that he is also missing and, therefore, the informant lodged report stating that the minor girl has been kidnapped from his custody by accused.

3. On the basis of the said First Information Report, offence under Section 363 and 366 (A) of the Indian Penal Code came to be registered vide Crime No.134 of 2015 with Tuljapur Police Station and investigation was started.

4. Search for the accused and the victim was made for about 15 days and, thereafter, Tuljapur Police informed that the victim has been found at Solapur Railway Station with accused. After the police brought the victim to police station, her statement was recorded, and when it was revealed that the accused had sexual intercourse

with her, the offence under Section 376 (2) (i) of the Indian Penal Code and under Section 6 of POCSO Act came to be added. Victim and accused were referred to medical examination. Panchanama of the spot was carried out. Statements of other witnesses were recorded. The clothes of the victim as well as accused were seized. Evidence in respect of age of the victim was collected, and accused came to be arrested. After the conclusion of the investigation, charge-sheet was filed before the learned Special Judge.

5. The accused has been produced before the learned Special Judge. He was on bail from 02-06-2016. Charge has been framed at Exhibit 03 against him and, thereafter, the same was altered on 27-04-2017. He pleaded not guilty and trial has been conducted. Prosecution has examined in all 14 witnesses in order to bring home the guilt of the accused. The defence of the accused is of total denial and the fact that he had extended some amount to the informant as loan, and when he demanded the said amount back, he has been falsely implicated in order to avoid the payment. After considering the evidence on record, the learned Special Judge has held the accused guilty. Accused has been sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.500/-, in

default, to suffer rigorous imprisonment for three months for the offence punishable under Section 363 of Indian Penal Code. He has been further sentenced to undergo imprisonment for five years and pay fine of Rs.500/-, in default, to undergo rigorous imprisonment for three months for the offence punishable under Section 366 (A) of the Indian Penal Code. He has been further convicted and directed to undergo sentence of rigorous imprisonment for ten years and to pay fine of Rs.1000/-, in default, to suffer rigorous imprisonment for six months for the offence punishable under Section 6 of the POCSO Act. No separate sentence has been awarded for the offence punishable under Section 376 (2) (i) of the Indian Penal Code. All the substantive sentences are directed to be run concurrently. This conviction is under challenge in this appeal.

6. Heard learned Advocate Mr. S. S. Kazi for the appellant and learned Additional Public Prosecutor Mr. S. B. Pulkundwar for respondent-State.

7. It has been vehemently submitted on behalf of the appellant that, the learned Special Judge has not appreciated the evidence properly. He failed to consider that, the victim had specifically stated in her testimony that, she ran away with the accused as her

family members were harassing her. Even in cross-examination a fact has come on record that, the informant is not her father, but her father is presently staying at Patan, District Satara. The informant has his legally married wife, children, daughter-in-law etc., and they all are residing at Patan, District Satara. She has clearly stated that, her mother had illicit relations with the informant, which she had not approved. When the girl found that the treatment given to her by her mother and other family members including the informant who was not the legally married husband of her mother was not proper; she has voluntarily left the custody of the mother and joined accused. Therefore, he cannot be said to be held guilty for committing offence under Section 363 or 366 (A) of the Indian Penal Code. Further it can be seen that, the victim was of sufficient understanding capacity. When the accused and the victim went from Tuljapur, they had gone to Mumbai, stayed there for about 15 days and, thereafter, when they had come to Solapur, they were caught by Tuljapur Police. They both had wandered in Mumbai as well as in Solapur, so she had every opportunity to get herself rescued from the clutches of the accused. She has not done so; which reflects that, with her own consent she had left the custody of her so called guardian. Further she has admitted that the accused

had sexual intercourse with her with her consent. Offences have not been transpired or proved beyond reasonable doubt. Though the informant has also been examined, yet he has clearly stated that his original native place is Kalgaon Tq. Patan Dist. Satara where he has two children from first wife. But then he has corrected himself by saying that, those two children are of his second wife and there is no issue to his first wife. Thereafter he has again stated that, in fact victim's mother is his second wife. In the cross-examination of P.W.4 -mother of the victim, it has come on record that, the FIR has been lodged by one another person who is not her legally wedded husband but the said report is in the name of the legally wedded husband. As the police had asked Aadhar card, she had asked another person with whom she is presently residing, to lodge the report in the name of her husband. The person with whom she is residing had not adopted her son and daughter and, therefore, there is substance in what the victim is saying that she was harassed at the house and it prompted her to leave the custody of the guardian. The medical evidence is not supporting the prosecution. So also the age of the victim is not proved. Even if we accept that the girl was minor, yet when she had left the custody of her guardian voluntarily, when she was of a understandable age, then offence cannot be said

to have been proved beyond reasonable doubt. As aforesaid, the First Information Report has been lodged with impersonation, it was inadmissible. Therefore, taking into consideration all these aspects, the learned Special Judge ought to have acquitted the accused. In the alternative, the learned Advocate for the appellant submitted that, since the accused has undergone almost six years of imprisonment, then by showing the leniency for his age i.e. 31 years, it be reduced to already undergone.

8. The learned Advocate for the appellant/ accused has relied on the decision in, *Rajudan Gemardan Charan v. The State of Maharashtra, Criminal Appeal No.90 of 2016, decided by this Court on 19-07-2019*, wherein this Court after taking into consideration the evidence on record, the sentence has been reduced and which comes almost to the already undergone. Further reliance has been placed on the decision in, *Navin Dhaniram Baraiye v. State of Maharashtra*, reported in *2018 (2) AIR Bom R (Cri) 897*, wherein it was held that, the presumption under Section 29 of the POCSO Act cannot be raised when the medical evidence is not supporting the ocular evidence. Further, in *Mohan Ambadas Meshram v. State of Maharashtra*, reported in *(2018) 2 AIR Bom R (Cri) 947*, it was held that, when it was found that the evidence of two witnesses

is totally unreliable then the Court has refused to invoke presumption under Section 29 of the POCSO Act. In *Devanand Rajabhau More v. State of Maharashtra*, reported in (2019) 1 AIR Bom R (Cri) 59, and *Ittarsingh s/o Janaklal Dahikar v. State of Maharashtra*, reported in (2019) 1 AIR Bom R (Cri) 385, this Court had found that, there was no proper evidence to prove the age of the girl. The school leaving certificate was not believed and was held to be not proper evidence and, therefore, benefit was given to the accused.

9. Per contra, the learned Additional Public Prosecutor strongly opposed the submissions by the learned Advocate for the appellant. It has been submitted that, the victim has specifically stated that the accused had sexual intercourse with her. Though she has stated that, it was with her consent, in fact she being the minor, her consent is no consent. Accused used to stay with the informant and the victim and, therefore, he had every knowledge about the age of the victim. Prosecution has examined the delivery register Exhibit 56 in which entry is taken regarding the delivery of mother of the victim, and as per the said record, the date of birth of the victim is 27-02-2000. Exhibit 57 is the birth certificate. Further P.W.2 Narayan Nangare is the Headmaster of the school where the victim

had taken education and her school leaving certificate Exhibit 63 has been proved. All these documents would definitely show that the girl was "minor" on the date of the incident. Therefore, it cannot be stated that, she would have given consent either for going along with the accused or for sexual intercourse. The medical report has been proved through the medical officer. Though at that time the final report was not given since the chemical reports were awaited, yet during the course of deposition, the medical officer after going through Chemical Analysis report has given final opinion in the Court. She has not ruled out the sexual intercourse and further when the victim herself has stated about the same, it will have to be said that it is proved that accused had sexual intercourse with the victim and, therefore, offence punishable under Section 6 POCSO Act is proved beyond reasonable doubt. Further, the victim could not have given consent to go along with the accused since she was a minor, yet if for the sake of arguments it is accepted that, the offence under Section 363 or 366 (A) of Indian Penal Code has not been made out, yet now the sentence that was imposed for the said offence i.e. six years has already been undergone by the accused. There is absolutely no necessity to interfere in the impugned order. He, therefore, prayed for the dismissal of the appeal.

10. Here in this case, the accused has not denied a fact that, prior to the incident he was residing with the informant. It has come on record that informant was residing with the mother of the victim, victim and brother of the victim. They are residing together since last many years. Even if we accept that informant can not be considered as the 'guardian' of the victim here, yet she is being minor was naturally under the guardianship of mother. Criminal law can be set in motion by anybody. It was not necessary that only mother of the victim alone ought to have lodged the report. There is no legal defect in accepting the report lodged by PW 2 as First Information Report as contemplated under Section 154 of Code of Criminal Procedure. Thus, when accused is accepting that he was residing with informant, victim and her mother, then, it would be but natural that, he would be knowing the age of the victim. Now her age has been disputed in appeal but that does not appear to be the fact when the trial was going on. Mere denial in the testimony of witness examined to prove school leaving certificate will not be sufficient requirement. The prosecution has led evidence to prove her birth date to which there was no serious challenge by the accused. The deposition of the victim would show that, she has

given her date of birth in her examination-in-chief and there is absolutely no denial to that effect in the cross-examination conducted on behalf of the accused. Therefore, that fact that she was born on 27-02-2000 has gone unchallenged. Secondly P.W.4 - mother of the victim has stated in her examination-in-chief that, the age of the victim on the date of her deposition is 15 years. She has stated that, she does not recollect the birth date of the victim, but then there was an attempt to extract as to what was the age of the mother of the victim when she got married to the natural father of the victim, to which we have no concern. However it is to be noted that, there is no specific denial to her statement that the age of the victim on the date when she deposed, was 15 years. The third piece of evidence regarding the age of the victim is the testimony of P.W.10 Dr. Jadhav who was the medical officer posted at Public Health Centre, Kalgaon Tq. Patan Dist. Satara. He has deposed that, the mother of the victim who was then aged 24, had given birth to a female child on 27-02-2000 in Government Hospital. He has produced the extract of register kept at Primary Health Centre, Kalgaon showing the entry regarding delivery of the mother of the victim. No doubt, name of the girl is not mentioned in the said register but the fact remains that, the girl was born to the mother of

the victim on that day. It is sufficiently indicating towards the birth date of the victim. Further the reflection of the same has been taken in the school record. The school leaving certificate has been proved through P.W.12 Sunanda Mane who was the Headmistress of the school where the victim had taken education. No doubt the birth date on said certificate as well as school was on the basis of the school leaving certificate of the earlier school of the victim. Thus, taking into consideration all these pieces of evidence, it can be conclusively held that, the victim was minor on the date of incident. Therefore, she is covered under the definition of "child", as defined in POCSO Act.

11. The testimony of the victim would show that, she had run away with accused on 27-05-2015. According to her, her family members were harassing her. The cross-examination conducted on behalf of the accused is totally silent as to why the family members of the victim were harassing her and she had taken such a drastic step to flee away with accused. It was tried to be submitted on behalf of the appellant that, the victim had not approved the alleged illicit relations between the informant and her mother and therefore she had decided to go with accused. Not approving the relationship

is a different fact than harassment; as tried to be contended in her examination-in-chief. Further, there is absolutely no explanation on behalf of the accused as to why he helped the victim and went to so many places along with her. Accused is major and at the time of incident he was aged 28 years. In his statement under Section 313 of Code of Criminal Procedure, he has not given the details of said harassment and has not come with the story that, since the victim was harassed, he had decided to help her. Therefore, whatever the victim has stated or tried to give a reason for her action, accused cannot be allowed to make use of the said circumstance. Accused could have given understanding to the victim or advised her properly, explained her plan to flee away to her parents. Taking into consideration the fact that, the accused was given shelter in the house of the informant, he could not have forgotten the fact that the victim is minor and she could have been exposed to the outside world in her minority. Accused has not come with the case that, there was any kind of love affair between him and the victim. There are no suggestions to that effect to the victim or her mother, father or his own statement under Section 313 of Code of Criminal Procedure. There is absolutely no explanation on behalf of the accused as to why he had gone along with the victim, if he wants to

rely on the fact, that the victim had run away with him. The learned Advocate for the appellant has stated that, the victim had left the guardianship of her guardian voluntarily and then joined the company of the accused. It is to be noted that, if such interpretation is allowed to be used by the accused, when he is not coming with a case of any love affair and has not given any explanation as to why he went along with the victim, then there would be no meaning to the offence with which the accused has been prosecuted. Accused is not the family member of victim. He can not assume any authority in himself under such situation nor he can claim himself to be the protector of minor victim. The law does not permit consent by a victim to a third person for taking that minor out of the guardianship without the consent of the guardian for no reason at all. Benefit of ratio in *S. Varadrajan v. State of Madras* reported in *AIR 1965 SC 942* can not be given to present appellant, as in that case the minor had left custody of guardianship as there was love affair between her and accused. Therefore, this Court is not in agreement that the submissions by the learned Advocate for the appellant that, the offence under Section 363 and 366 (A) of the Indian Penal Code are not attracted. The submission by learned APP is acceptable that even if it is concluded now that the conviction

under these sections is not sustainable, yet now the sentence under those sections has already been undergone, it might then be only an academic discussion.

12. The victim has further stated that, after she went along with the accused, they went to Mumbai. They resided there for about 15 days. She has specifically stated that, prior to going to Mumbai, once the accused had sexual intercourse with her in her house. It appears that, the prosecution has not extracted from the victim nor there was such investigation as to where they both had resided in Mumbai and whether there was sexual intercourse at that place also. But then on the basis of her examination-in-chief, it appears that the act of sexual intercourse had taken place at Tuljapur and then in the cross taken on behalf of the accused she has admitted that, the accused had sexual intercourse with her, with her consent. When the girl is minor, there is no question of consent by a minor for sexual intercourse. Again at the cost of repetition it can be said that, when the accused is not coming with the defence of love affair and that he had plans to marry the girl, there was no question of her giving consent for sexual intercourse. It is unacceptable and unethical to think that minor girl can give consent for sexual

intercourse and such defence should be accepted by Courts of Law. If such interpretation is allowed as defence, then the provisions under Section 375 of Indian Penal Code to that extent and entire POCSO Act will have to be discarded. It was not the intention of the legislature to include such defence an accused facing rape charges for having sexual intercourse with a minor girl. Rape is an offence against the society as well as against a woman in particular, which leaves a scar on her mind through out her life. A woman will never desire to loose her soul and would give consent for sexual intercourse with such a man who is not her husband or who has no love for her. A minor girl is not expected to understand all these aspects and therefore accused can not be allowed to take advantage of such admission. After extracting the said admission from the victim in this case, surprisingly again question was asked to deny the said fact. But then the victim has categorically denied that, she is deposing falsely that the accused had sexual intercourse with her. Thus, when suggestion was given that the accused had sexual intercourse with the victim, we may not even go to the medical evidence. However, the testimony of P.W.5 Dr. Kiran Rochakari, who had examined the victim at Sub-District Hospital, Tuljapur would show that, her findings were consistent with sexual

intercourse, however she had reserved the final opinion till receipt of FSL report. The FSL report was shown to her in Court while she was deposing and after going through those reports, though they were negative, she was firmed in saying that, the clinical findings show that there was sexual intercourse. Further explanation about her findings has been given in her cross-examination and she has denied the suggestion that, because of the bicycle riding the hymen can ruptured, but then she has explained that, in that case there cannot be passing of one finger in p/v examination. Thus the medical report is supporting the ocular evidence in this case.

13. The other evidence is in the form of proof of various panchanamas i.e. the spot panchanama, seizure of clothes panchanama of the accused as well as victim, as well as the testimony of the doctor who had examined the accused and taken samples, examination of the carrier. Nothing adverse or showing any doubt over the prosecution story has been transpired in the cross-examination of all these witnesses. Therefore, taking into consideration the entire evidence the learned Special Judge has rightly come to the conclusion that the offence with which the accused has been charged, has been proved beyond reasonable

doubt.

14. As regards the various authorities which have been relied by the learned Advocate for the appellant, it can be said that, on the basis of the evidence in each of those cases, this Court had come to the conclusion that, in two of the Judgments the age of the victim has not been proved beyond reasonable doubt, and in other cases the other technical aspects have not been proved beyond reasonable doubt, therefore those cases are not applicable here. In other words, it can be said that those citations are not helpful to the appellant in this case.

15. When the victim in this case is a child and strong evidence has been brought on record to prove that accused has committed offence punishable under Section 6 of POCSO Act, then the presumption under Section 29 of the said Act would definitely required to be invoked, which runs thus ;

“Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

I agree with the observations made in, *Navin Dhaniram Baraiye*

(*Supra*) as to when the presumption under Section 29 of the Act would operate. It runs as under ;

“17. A perusal of the above quoted provisions does show that it is for the accused to prove the contrary and in case he fails to do so the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.”

16. Here in this case, the accused has not produced any reliable evidence rather he is accepting the fact that the victim is minor and he had sexual intercourse with her. The only defence he tries to put is that, it was with the consent of the minor, when in fact at the cost

of repetition, consent of minor is no consent at all. Hence, the findings as well as conviction of the appellant deserves to be confirmed.

17. It has been alternatively submitted on behalf of the appellant that, he has already undergone six years of imprisonment and, therefore, his conviction be reduced to the period he has already undergone. At the outset it can be said that, no reasons have been stated by the learned Advocate for the appellant in his submissions as to why the sentence should be reduced. Merely because the accused was 28 years old at the time of incident, no leniency can be shown when he is committing such a heinous crime against a child. As regards those pronouncements by this Court in which this Court had reduced the sentence, it can be said that, on the basis of facts as well as reasons those were put forward by the concerned appellants, the sentence was reduced, however no such reason appears to be there in this case. Reliance can be placed on the decision in, *Satish Kumar Jayanti Lal Dabgar v. State Of Gujarat* reported in [(2015) 7 SCC 359] wherein it has been observed that,

“First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 of the IPC would get attracted making her consent

for sexual intercourse as immaterial and inconsequential.”

It reads as follows:

"375. Rape-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

xx xx xx

Sixthly - With or without her consent, when she is under sixteen years of age. Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

"15) The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the

so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.”

16) Once we put the things in right perspective in the manner stated above, we have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act”.

18. Further, in *Mahesh v/s. State of M. P.* reported in (1987) 2 SCR 710), while refusing to reduce the death sentence Hon'ble Supreme Court has observed that:

"It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon".

Decision in *State Of Madhya Pradesh vs Babbu Barkare @ Dalap Singh* reported in [(2005) 5 SCC 413] was relied and it was further observed that,

“Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not

long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. Thus the Appellate Court is not required to take unnecessary lenient view and reduce the sentence in respect of heinous crimes”.

Therefore, the said prayer to reduce the sentence of the appellant deserves to be rejected. There is no merit in the present appeal and, therefore, it deserves to be dismissed, accordingly it is dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.