

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL No. 147/2020.

Bholasingh @ Rahul Dilipkumar Udeh,
Aged 20 years, Occupation -
Labourer, resident of Pahadiya, Scool
tola Mehandwani, Tahsil Shahpura,
District Dindori (M.P.)
Presently incarcerated at Central
Prison, Nagpur. ... **APPELLANT.**

VERSUS

The State of Maharashtra
through Police Station Officer,
Ganeshpeth, District Nagpur. ... **RESPONDENT.**

Mr. J.S. Chilotra, Advocate for the Appellant.
Ms. M.D. Deshmukh, A.P.P. for the Respondent.

CORAM : VINAY JOSHI, J.

DATE OF RESERVING THE JUDGMENT : 29.09.2020
DATE OF PRONOUNCEMENT : 19.10.2020

JUDGMENT :

Heard learned Counsel appearing for the parties.

2. Being aggrieved by the judgment and order passed by the learned Extra Joint Additional District Judge, Nagpur in Sessions Trial (Special Child Protection) Case No. 39/2018 dated 31.01.2020, thereby convicting the appellant for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “**the POCSO Act**” for short) and under Section 376 [2][n] of the Indian Penal Code, and sentencing him to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 1000/-, in default of payment of fine to suffer rigorous imprisonment for 2 months, the appellant has approached this Court.

3. The prosecution story as could be gathered from the material placed on record is thus -

P.W.3 – PSI Digambar Rathod, was attached to Ganeshpeth Police Station during the year 2014 to 2017. On 29.03.2017, the informant lady came to the police station along with minor victim and lodged report (Exh.31). It is the contention of the informant that she was living with her parents-in-law and a daughter [victim], aged 16 years. At the relevant time the victim had left her schooling after completing 9th standard education and was staying at

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home. The informant was working on a construction site, where the accused was also doing centering work.

4. On 26.03.2017, the victim was not seen in the house, however, the informant received a victim's phone call informing that she is alongwith the accused. Then on 28.03.2017 in the evening the victim returned to the house. On enquiry, the victim disclosed that she was having love affair with the accused. She stated that the accused assured her for marriage, and they had physical relations. Victim detailed that in the earlier month also the accused had sexual intercourse with her in the building where they were working.

5. On the basis of said report, police registered crime vide C.R.No.173/2017 and carried investigation. Panchnama of the scene of offence was drawn, clothes of victim were seized, necessary samples were collected, victim was got medically examined and on completion of investigation, final report came to be filed in the Special Court constituted under POCSO Act. Since accused denied the charge, prosecution has examined as many as 6 witnesses to bring home the guilt of the accused. The prosecution evidence consists of victim, informant, medical officer and police persons.

The prosecution also banks upon certain documents including medical examination report and documents relating to date of birth of victim girl. On appreciation of evidence, the trial Court held that the prosecution succeeded in proving that the victim was a “child” within the meaning of Section 2[d] of the POCSO Act. Further it is held that the prosecution succeeded in proving that the accused committed repetitive penetrative sexual assault on the victim girl and accordingly, convicted him for the offence under Section 5[l] i.e. aggravated penetrative sexual assault, punishable under Section 6 of the POCSO Act, and for the offence punishable under Section 376[2] [n] of the Indian Penal Code.

6. The learned counsel appearing on behalf of the appellant/accused submitted that the learned trial Judge has grossly erred in passing the order of conviction and sentence. He submits that there is an inordinate delay in lodging the first information report (FIR). He further submitted that the perusal of evidence of P.W.1 victim and P.W.2 Informant would reveal that there were material inconsistencies and omissions. It is his submission that the prosecution has miserably failed to establish that the victim was below 18 years of age i.e. a child, within the meaning of Section 2[d]

of the POCSO Act. According to him, at the most it is a case of consensual sex with a major girl.

7. Per contra, the learned A.P.P. appearing for State has submitted that in view of the provisions of Section 29 of the POCSO Act, there is statutory presumption against the accused. It is submitted that the appellant grossly failed to rebut the presumption. According to him, the prosecution has successfully proved by documentary evidence that the victim was minor at the relevant time. It is her submission that the evidence of victim as well as informant is trustworthy and reliable. According to the learned A.P.P., the prosecution has duly explained the delay in lodgment of FIR and as such, the order of conviction calls for no interference.

8. While appreciating the rival submissions, it will be necessary to bear in mind that the term “child”, has been defined under Section 2[d] of the POCSO Act, as it means any person below the age of 18 years. While appreciating evidence, one should also bear in mind that Section 29 of the POCSO Act, provides a presumption in favour of the prosecution regarding commission of offence under Sections 3,5,7 and 9 of the POCSO Act. No doubt the

presumption can be lifted by adducing contrary evidence. It is the duty of the prosecution firstly to establish beyond reasonable doubt that the victim was a child. Unless the prosecution proves that she is a child, a person cannot be convicted under the provisions of POCSO Act. Since the presumption is running against the accused, the evidence requires minor scrutiny.

9. The victim deposed that her date of birth is 04.11.2001, meaning thereby on the date of occurrence she was 15 years 5 months of age. As per the prosecution case, the incident took place during the month of January 2017 to March, 2017. The victim's mother i.e. informant also stated that date of birth of victim is 04.11.2001. Moreover, she has produced a copy of hospital certificate (Exh.15) showing the date of birth of victim and copy of school transfer certificate to support that victim is a minor. The learned counsel for accused straneously argued that the prosecution has miserably failed to prove that the victim was minor at the relevant time. He has strongly criticized two documents tendered by the prosecution during the course of evidence. It is also submitted that those two documents does not form part of charge sheet, but, at the time of recording evidence, they were tendered. It is his

submission that without looking to the authenticity of these documents or without examining the author of those documents, the learned trial Judge has wrongly relied on them. He would submit that the prosecution has not produced birth date certificate issued by the Corporation or Local Authority, nor school leaving certificate of first school attended.

10. Since the age of victim is a vital aspect in this case, it needs serious consideration. Undoubtedly, the prosecution has not examined any witness to prove either certificate issued by the Hospital or School leaving certificate. Careful examination of record indicates that both documents were not part of the charge sheet. It reveals that victim girl was examined on 08.03.2019, whilst both documents were tendered later on 26.03.2019, when the informant P.W.2 was examined. On perusal of the evidence of P.W. 2 victim's mother, it reveals that, at the time of giving evidence she has referred to a certificate issued by the Hospital (Exh.15), and school leaving certificate (Ex.16), which are exhibited. The trial Court while evaluating both the documents (paragraph no.8) observed that the accused has not challenged these documents. To my mind without any material the trial Court has proceeded by presuming

that these two documents are not challenged. Pertinent to note that during cross examination of P.W.1 [paragraph no.6], it was suggested that the victim was about 18 years of age at the time of occurrence. Likewise, in paragraph no.3 suggestion was given to the informant [P.W.2] that both the certificates, Exhs.15 and 16, are wrong. Inasmuch as during statement under Section 313 of the Code of Criminal Procedure, the accused never admitted the genuineness of these documents. Therefore, on the legal touchstone it requires consideration whether both these documents are proved in accordance with law, whether the contents of the documents are proved and further whether they are reliable.

11. The learned Counsel for the appellant while criticizing the said evidence has relied on various decisions of this Court, in cases of :-

- (1) **Ravi Anandrao Gulpude .vrs. State of Maharashtra – 2017 All MR (Cri) 1509.**
- (2) **Raju Sukhdeo Dabhade .vrs. The State of Maharashtra – 2018 All MR (Cri) 4841.**
- (3) **Dilip s/o Bhaiyyasingh Tekan .vrs. State of Maharashtra – 2018 All MR (Cri) 5092.**
- (4) **Ittarsingh Janaklal Dahikar .vrs. The State of**

Maharashtra – 2019 All MR (Cri) 1081.

(5) Ganesh Manoharrao Palaspagar .vrs. State of Maharashtra – 2020 (1) Mh.L.J. (Cri) 294.

12. Close reading of these decision postulates that heavy burden lies on the prosecution to prove that the victim was a “child” on the date of incident. It is the duty of the investigating officer to collect the evidence about the age of victim. Production of documents relating to age of the victim must be at the earliest possible opportunity. The school leaving certificate issued by the second school attended by the victim is not a primary evidence. Lastly, it is observe that the evidentiary value of the school record would depend on proof of primary evidence or source of information on the basis of which entry is recorded. In the light of these settled propositions, the evidence about age of victim requires scrutiny. As noted above, the prosecution has not tendered both documents along with the charge sheet. Pertinent to note that at the time of examination of P.W.2 (victim’s mother), the documents were tendered.

13. At this juncture a profitable reference can be made to the decision of the Hon’ble Supreme Court in case of **Jarnail Singh .vrs.**

State of Haryana – 2013 All MR (Cri) 2946 S.C. In said case it is ruled that, while determining the age of the prosecutrix, rules framed under the Juvenile Justice Rules should be the basis for such determination. Therefore, it would be just and proper to apply the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 to determine the age of the victim. The new enactment i.e. the Juvenile Justice (Care and Protection of Children) Act, 2015 has made an inbuilt provision in Section 94 about determination of age. It provides that the primacy should be given to the date of birth certificate of school or matriculation certification, in absence, birth certificate issued by the Corporation or the Municipal Authorities or Panchayat and in absence of that, one should rely on medical examination.

14. Here the prosecution has neither collected the date of birth certificate from the local authority, nor the certificate Exh.15, is issued by such authority. Pertinent to note that the certificate issued by the Jan Seva Hospital, Itarsi has been styled as 'Birth Certificate'. Neither the person who has issued the said certificate nor the custodian of said record, has been examined. The original record on the basis of which said certificate is issued, has not been produced.

In absence of certificate from the Corporation or the Local Authority, such certificate issued by the hospital without any basis cannot be relied.

15. To the next, the prosecution has relied on the school transfer certificate [Exh.16], of the victim. Apparently it is not the date of birth certificate issued by the school first attended. Though under Section 35 of the Evidence Act, this document is having probative value, it is not safe to rely on said certificate, since source of information is not disclosed. The certificate Exh.16, discloses that the student [victim] attended the school from 30.06.2015 to 30.09.2016 and has left the school since failed in 9th standard. Therefore, it is apparent that the victim has studied there only in 9th standard, meaning thereby this is not a certificate issued by the first school attended. The prosecution has not examined the custodian of the original record on the basis of which the certificate was issued. Always evidentiary value of the school record would depend on the primary evidence or on the source of information on the basis of which the entry is recorded. In this regard, I may refer to the observations of the Hon'ble Supreme Court in case of **Birad Mal Singhvi .vrs. Anand Purohit – 1998 (supp) SCC 604**. The relevant

observations recorded in paragraph no.14 of the said judgment reads as under :

“The date of birth mentioned in the scholars’ register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar’s register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of person concerned. If the entry in the scholar’s register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but, if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.”

In view of that, for more than one reason, the school transfer certificate [Exh.16] cannot be relied. The reasons are not far to seek, as apparently, the person who has carried said entry has not been examined. It is not disclosed that, at whose instance the date of birth has been recorded. Notably it is not the school first attended by the child. Moreover, the certificate is silent about the source of information on the basis of which the entry was taken. The evidence of investigating officer is totally silent on the aspect of

collection of evidence regarding date of birth of victim. There is no evidence to suggest that the said document is collected or verified by the concerned authority. A careful evaluation of evidence brought by the prosecution about the age of victim raises entertainable doubt about the date of birth of victim as 04.11.2001. In that view of the matter, the prosecution has utterly failed to discharge its bounden duty to prove the age of victim that she was a child within the meaning of Section 2[d] of the POCSO Act, and therefore, benefit will have to be extended in that behalf to the appellant / accused. In consequence, charge of commission of offence punishable under Section 6 of the POCSO Act would fail.

16. This leaves me to see whether the conviction under Section 376 [2][n] of the Indian Penal Code is sustainable. In view of the finding recorded above, the prosecution has failed to establish that the victim was below 18 years of age. In such a background if there happens to be consensual sex, then it does not amount to rape at all. On failure of prosecution to establish that the victim was below 18 years of age, the prosecution has to establish that the sexual intercourse was against the will and without the consent of the prosecutrix. The evidence of prosecutrix discloses that she had

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sexual relations firstly in the month of January and then in the following month. Admittedly at that time, she has not put any grievance to anybody. It is the evidence of victim that on 26.03.2017, she went along with the accused to his native place and stayed in the house of sister-in-law of accused, where they had physical relations. It emerges from record that both were residing adjacent to each other and there happened to be a love affair in between them. The victim not only submitted her body to the accused only once, but, repeatedly. They had enjoyed the sexual pleasures during the period of three months. In the circumstances, it cannot be said that the accused has forcibly maintained sexual relations with the victim girl. There is no material to suggest that the victim has submitted herself on misconception of fact. It reveals that the victim and accused who was barely 18 years of age, were neighbours and were in love. The evidence nowhere indicates that since inception the accused was carrying deceptive intention or he knows that consent was given by the victim on his assurance to marry. Therefore, the conviction under Section 376 of the Indian Penal Code would not sustain.

17. In the result, the appeal is allowed. The order of

conviction and sentence passed by the Extra Joint Additional District Judge, Nagpur in Sessions Trial (Special Child Protection Case No.39/2018) dated 31.01.2020, convicting the appellant for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and under Section 376 [2][n] of the Indian Penal Code, is hereby quashed and set aside. The appellant / accused is acquitted from the aforesaid offences and he be set at liberty forthwith, if not required in any other case. Fine amount deposited by the appellant/accused (if any), be refunded to him. Muddemal property be dealt as per law.

JUDGE

Rgd.