

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

CRIMINAL APPEAL NO. 794 OF 2019

1) Sunita @ Neha Machhindra Chandne,
Age 24 years, Occ.
R/o. Sirasdevi Phata, Tq. Georai,
Dist. Beed.

2) Sharda Machindra Chandne,
Age 60 years, Occ.
R/o. Sirasdevi Phata Tq. Georai,
District Beed.

... **Appellants.**

VERSUS

1) The State of Maharashtra
Through Police Station Talwada,
Tq. Georai, Dist. Beed.
In Police Station Officer.

2) XYZ...

... **Respondents.**

...

Advocate for the Appellants : Mr. Aniket Vagal.
APP for the Respondent No. 1/State : Mr. S. N. Morampalle.
Advocate for Respondent No. 2 : Mrs. Rashmi S. Kulkarni.

CORAM	:	MANGESH S. PATIL, J.
RESERVED ON	:	30.07.2021.
PRONUNCED ON	:	09.08.2021.

JUDGMENT :

This is an appeal under Section 374 of the Code of Criminal Procedure against conviction of the appellants for the offences punishable under Section 370 read with Section 34 of the Indian Penal Code, under Section 5 and 6 of the Immoral Traffic Prevention Act, 1956 (hereinafter ' the PITA') and under Section 4 read with Section 17 of Protection of Children from Sexual Offences Act (hereinafter 'the POCSO Act') and sentencing them to

substantive sentences and fine, maximum of which is 10 years rigorous imprisonment.

2. The allegations of the prosecution as can be discerned from the F.I.R. and the record are to the effect that the appellants are mother and daughter. P.S.I. Gite (PW. 4) of Anti Human Trafficking Unit Superintendent of Police Office Beed received an information that the appellants were running a brothel at Sirasdevi Phata Georai, on 05.01.2018. She verified the genuineness of the information and after it was confirmed, reported the matter to the Superintendent of Police. Police Inspector Jadhav of the Anti-Human Trafficking Unit was directed to conduct a raid. He arranged for panch witnesses, one of whom was a woman, Kamal (PW.2). A Pre-trap panchnama was conducted (Exh. 24). Police Constable Bahirwal (PW. 3) and Constable S.S. Shaikh were sent as decoy customers. Accordingly, Police Inspector Jadhav conducted the raid in presence of panchas at 5 p.m. in the house of the appellants. The respondent No.2 who was then 17 years of age was found in a room with constable Bahirwal (PW.3). A specified denomination currency note of Rs. 500/- was found in possession of the appellant No. 2. Five to six used condoms and 200 pieces of unused condoms in a packet were found. Those were seized under a panchnama (Exh. 25). The appellants and the respondent No. 2 were taken to the Police Station and P.S.I. Gite (PW. 4) lodged the complaint and the crime was registered as Crime No. 5/2007 for the offences punishable under Section 366A, 370, 372 read with Section 34 of the Indian Penal Code, Section 3, 4, 5, 6 and 7 of the PITA and Section 12 and section 4 read with Section 17 of the POCSO Act.

3. The respondent No. 2 (victim PW. 1) was then got medically examined and then lodged in an Observation Home. Her statement was recorded under Section 164 of the Code of Criminal Procedure. She alleged that she was in search of work. Sister of the appellant No. 1 by name Shantabai assured to fetch her work and under that pretext took her to Georai where

from she was taken to the house of appellants and was confined there and forced into prostitution. After completing the investigation, the charge-sheet was filed. At the end of the trial the learned Special Court convicted and sentenced the appellants as mentioned herein above. It is necessary to note that the appellants were acquitted of the offences punishable under Section 366A and 372 of the Indian Penal Code, of Section 12 of the POCSO Act and of Section 7 of the PITA.

4. The learned advocate Mr. Vagal for the appellants would submit that the age of the victim (P.W. 1) has been in dispute. There is no concrete evidence to reach a conclusion that she was a child within the meaning of Section 2(d) of the POCSO Act on the date of the incident. Though some attempt was made to prove her date of birth by examining Head Master of School Mrs. More (P.W. 5), there is no evidence to demonstrate as to at whose instance it was recorded in the school register. He would further submit that though some kind of ossification test was undertaken, there is no uniformity in the opinions of the Dentist and Radiologist. The approximate range of her age is stated to be 14 to 16 ½ years and bearing in mind the margin of error of two or three years, benefit of doubt ought to have been extended to the appellants. The parents of the victim were also not examined to prove her date of birth and in the absence of such concrete evidence it could not have been concluded that she was a child so as to invoke the provisions of POCSO Act. In support of such submission he would place reliance on the following decisions :

- (1) **Balasaheb Vs. The State of Maharashtra;**
1994 Cri.L.J. 3044.
- 2) **Domnic Misquita and etc. Vs. The State;**
1996 Cri. L.J. 2799
- (3) **Shaikh Feroz s/o Shaikh Jainoddin Vs. State of Maharashtra;**
2011 ALL MR (Cri.) 538.

- (4) **Sunil Vs. State of Haryana;**
(2010) 1 Supreme Court Cases 742.
- (5) **Smt. Jaya Rama Gauda & Oth Vs. The State of**
Maharashtra in Criminal Appeal No. 596/2009
decided on 11.12.2012

5. The learned advocate Mr. Vagal then submitted that there is a basic flaw in not undertaking the investigation strictly in accordance with the mandate of Sections 13 to 15 of the PITA. By referring to the provisions of the PITA he would point out as to how the investigation of any offence under it can only be conducted by a Special Police Officer and since the investigation in the matter in hand has not been undertaken by any such Special Police Officer, the trial in its entirety stands vitiated. He would refer to the majority decision of the Supreme Court in the cases of **Delhi Administration Vs. Ram Singh; AIR 1962 Supreme Court 63** and **Mumtaj alias Behri Vs. The State (Govt of NCT Delhi); 2003 Cri. L. J. 533**. The learned advocate Mr. Vagal would then submit that no independent witness has been examined to substantiate the interested version of the witnesses who are primarily from the Police Department to substantiate the allegations regarding conduct of the raid even though P.S.I. Gite (PW. 4) admitted that about 10 to 12 persons had gathered at the time of raid.

6. Learned advocate Mr. Vagal would further point out that though it is being alleged that it was one Shantabai who had lured the victim (PW. 1) she has not been arrayed as an accused. Though the appellants have been convicted for the offence punishable under Section 370 of the Indian Penal Code there is no proof regarding selling and purchase. Similarly, he would submit that the conduct of the victim (PW. 1) is such that she had willingly indulged in such trade of her own freewill and if there is a serious doubt about her being a child her such conduct would not only be relevant but would be eloquent enough to prove that she was not forced into the trade.

7. He would further submit that the learned Special Judge has miserably

failed to appreciate the evidence in the proper perspective. There is non-application of mind. The appellants have been sentenced to suffer 10 years rigorous imprisonment for the offence punishable under Section 370 of the Indian Penal Code when the law prescribes maximum of seven years of imprisonment. Abetment which is an offence punishable under Section 17 of the POCSO Act has not been brought home inasmuch as no independent witness on that point has been examined. He would therefore submit that there is not enough evidence to convict and sentence the appellants. The impugned judgment be quashed and set aside and they may be acquitted.

8. The learned A.P.P. and the learned advocate for the respondent No. 2 Mrs. Kulkarni would vehemently submit that the provision of Section 94 of the Juvenile Justice (Care and Protection of children) Act (hereinafter 'J.J. Act') has to be followed even in respect of a dispute regarding age of the victim as laid down in the case of ***Jarnail Singh Vs. State of Haryana; MANU/SC/0626/2013***. Depending upon the degree of proof the preferences have been laid down in that provision. It is the birth certificate or the school record which has to be considered as a primary evidence and in the absence of which ossification test is to be resorted to. They would submit that in the matter in hand there is not only a school record but even an ossification test has been undertaken and duly establishes that the victim (PW. 1) was a child at the time of the incident.

9. They would therefore submit that in the light of such evidence, a presumption under Section 29 of the POCSO Act will have to be raised and the onus would shift to the appellants to prove that they have not committed any offence under that Act. They would therefore submit that once it is established that the victim (PW. 1) was a child at the time of incident, by referring to the presumption under Section 29 of the POCSO Act several facts and circumstances which have come on record should have been met by the appellants but they have miserably failed to do so.

10. A decoy customer was sent, a specified currency note was found in possession of the appellant No. 2, the used and unused condoms were found, the decoy customer along with the victim was found in a room and all these circumstances have not been squarely met by the appellants and are sufficient to give rise to presumption under Section 29 of the POCSO Act which in turn is sufficient to uphold the conviction.

11. The learned A.P.P. and learned advocate Mrs. Kulkarni would then submit that the very fact that the raid was conducted by Police Inspector Jadhav, who at the relevant time was appointed as a Special Police Officer in the Anti Trafficking Cell in the Office of the Superintendent of Police Beed is sufficient to demonstrate that he was duly authorised to conduct the investigation under the provisions of the PITA. They would also point out that the Trial Court in paragraph No. 23 has specifically referred to a Government Resolution/notification and the transfer order of Police Inspector Jadhav. This would clearly indicate that it has objectively examined this aspect and has rightly held that there was no error of non-compliance with the provision of the PITA.

12. The learned APP and the learned advocate Mrs. Kulkarni would, lastly, submit that once it is concluded that the victim (P.W. 1) was a child at the time of incident, there is no escape from the conclusion that she was forced into the trade, her consent or willingness being irrelevant. They would therefore submit that there is no error or illegality committed by the learned Special Judge in appreciating the evidence and convicting and sentencing the appellants.

13. Since these are the matters involving the provisions of the POCSO Act and the PITA the provisions of Section 2(a) and 2(aa) of those acts respectively would be relevant. It will have to be at the outset determined as to if the victim (P.W.1) who was less than 18/16 years of age so as to be a child within the meaning of those provisions. The further consequences

would ensue depending upon the answer to this question.

14. Suffice for the purpose to remember at the outset that even though it is the victim (PW.1) whose age is to be determined, in view of the decision of the Supreme Court in the case of *Jarnail Singh (supra)*, the age of a victim also has to be determined by following the provisions contained in the J.J. Act 2015. It is to be noted that since Juvenile Justice (Care and Protection of Children) Act 2007 was then relevant and therefore it was observed that the age of a victim will have to be determined by following Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007, the provision contained in that Rule is similar to the one prescribed under Section 94 of the J.J. Act.

15. Though the learned Special Judge in the matter in hand does not seem to have specifically referred to this position of law she has proceeded to determine this issue apparently in accordance with the provision of Section 94 of the J.J. Act. She has initially referred to the evidence in the form of school record and thereafter proceeded to conclude that the victim (PW.1) was a child by seeking a corroboration from the medical evidence. This is what has been precisely laid down under Section 94(2) of the J.J. Act. It inter alia lays down that the process of age determination is to be undertaken by seeking evidence by obtaining :

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned Board and in the absence thereof;
- (ii) the birth certificate issued by the Corporation or a Municipal Authority or a Panchayat;
- (iii) and only in the absence of the above two, age shall be determined by resorting to ossification test or any other medical age determination test.

The Sub-section (3) of Section 94 of the J.J. Act further mandates that the age of a person determined by following the above procedure shall be deemed to be the true age of that person.

16. Bearing in mind the above position of law, let us proceed to examine the evidence led before the Special Judge regarding proof of victim's age. The prosecution has examined Mrs. More (PW. 5), who happens to be the Headmaster of Chatrapati Shahu Primary School Beed. She had brought original School Register (Exh. 44) and by going through it confirmed that the date of birth of the victim recorded in her school was 26.10.2002 at Sr. No. 8873. She further stated that earlier the victim was studying in one Yashwant Prathmik Vidyalaya Beed and by obtaining a School Leaving Certificate (Exh. 41) from that school she was admitted in her school where the victim studied up to 7th standard and thereafter left the school. The witness further identified the School Leaving Certificate (Exh. 46) issued by her school. Such evidence is not only in accordance with the requirements of the provisions of Section 94(2) of the J.J. Act but is also relevant and admissible under Section 35 of the Indian Evidence Act. The learned Special Judge has rightly referred to such provision and by relying upon the decisions of the Supreme Court in the case of *Ranjeet Goyal Vs. State of Jharkhand; 2014 (1) SCC 588* and *Ashwani Kumar Saxena vs. State of M.P.; 2012(9) SCC 750* has reached a well reasoned conclusion that such evidence was sufficient to conclude that the birth date of the victim was 26.10.2002 meaning thereby that she was less than 16 years of age when she was allegedly subjected to sexual exploitation.

17. The learned advocate for the appellants submitted that the source of information recorded in the school record has not been duly established and therefore the benefit of doubt should have been extended to them. He would point out that neither of the parents of the victim have been examined as a witness. Even if her father was

mentally challenged, her mother could have been examined. In the absence of their such direct account, the date of birth cannot be merely proved on the basis of the school record.

18. When Section 94 of the J.J. Act and Section 35 of the Indian Evidence Act govern the situation regarding proof of age, the submission of the learned advocate for the appellant is liable to be discarded. When entries in the school record have been made in due course much prior to the occurrence of the alleged offence, possibility of the school record being tampered with can easily be ruled out. Therefore, even if the prosecution, for the reasons best known to it has not examined the parents of the victim, still that would not make any material difference in view of the clinching antecedent school record.

19. Going by the preferences of the evidence regarding date of birth of the victim laid down in Section 94(2) of the J.J. Act ossification test or medical age determination test is to be resorted to only as a last resort. Now that, as has been demonstrated herein above, there is sufficient evidence in the form of school record disclosing the date of birth of the victim, since the prosecution has also taken care to resort to the age determination test which exercise was undertaken by Dr. Shahane (PW. 6) one may deal with it as well, as has been done by the learned Special Judge. Dr. Shahane (PW. 6) specifically submitted that the victim was brought to him for medical examination. The OPD papers (Exh. 50 and 51) were prepared as also he prepared a medical examination report (Exh. 49). She was referred for radiological and dental examination. The Dentist objectively assessed her age to be between 15 to 17 years and the Radiologist assessed that she was less than 16 and half years. Pertinently, Dr. Jain (PW. 7) who is the Radiologist has also been examined to substantiate his conclusions. Conspicuously nothing could be elicited during their cross examination to doubt much less discard their objective conclusion.

20. The decisions cited by the learned advocate for the appellants in my considered view do not strictly govern the fact situation and evidence in the matter in hand. In the case of ***Balasaheb (supra)***, unlike in the matter in hand, the Court was called upon to determine the age of the victim by resorting to ossification test. In the matter in hand, as is mentioned herein above, a clinching school record to prove the birth date of the victim (PW. 1) has already been established. It is only by way of a corroboration that the prosecution has resorted to the ossification test which certainly takes a back seat if one has to follow the provisions of Section 94 of the J.J. Act. In addition, there was evidence to show that the victim in that case was admitted to a school in all probability after she had attained six years of age and commensurate with the date of her admission to school coupled with the margin of error required to be taken into account according to medical jurisprudence that it was held that the victim in that case was more than 16 years of age.

21. In the case of ***Domnic Misquita (supra)***, again, the provisions of Section 94 of the J.J. Act were not governing a situation and the age of the victim was determined on the basis of the ocular version and a radiological test.

22. In case of ***Shaikh Feroz s/o Shaikh Jainoddin (supra)*** the evidence of an illiterate and rustic father of the victim was subjected to scrutiny and depending upon the answers given by him an objective inference was drawn about the age of the victim. True it is that the Single Judge of this Court discarded the school record and the entry regarding birth date mentioned therein but apparently, the father of the victim who was examined as a witness had not stated if the date of birth entered in the school record was correct and as per his personal knowledge. Again, the Medical Officer who was examined during trial had admitted that the age of a person cannot be determined without radiological examination.

Ultimately, on the basis of the medical evidence indicating that she was 17 years of age, giving benefit of margin of error, it was held that she was not a child.

23. In the case of *Sunil (supra)* the Supreme Court specifically held that where there was a dispute as regards the minority of prosecutrix at the time of alleged incident, the clinical examination of the prosecutrix for verification of her age would be more relevant. Since, such medical examination has been resorted to in the matter in hand, these observations in the case of *Sunil (supra)* cannot be taken aid of by the appellants.

24. In view of such state of affairs, when there is ample evidence in the form of school record which duly stands corroborated by the medical age determination test, though the latter is only an approximation, the former being concrete is sufficient to determine and conclude, as has been rightly done by the Special Court that the victim was less than 16 years of age at the relevant time and was therefore a child under POCSO Act as also under the PITA.

25. Having concluded as above, let us turn to the other evidence to ascertain as to how far the prosecution has been able to establish and bring home the charge.

26. At the cost of repetition one may point out that the appellants have been acquitted of the offences punishable under Section 366A, 372 of the Indian Penal Code, Section 12 of the POCSO Act and Section 7 of the PITA. They have been convicted for the offences punishable under Section 370 read with Section 34 of the Indian Penal Code, Section 4 read with Section 17 of the POCSO Act and Section 5 and 6 of the PITA. As is rightly pointed out by the learned advocate for the appellants there are ample circumstances and evidence to demonstrate that the victim (PW. 1) had apparently willingly succumbed to the sexual exploitation.

A no point of time she seems to have made any attempt to escape. Even according to her she was lodged in the house of the appellants for a period of about a month and was subjected to sex twice a day. Not only this but even while narrating the history to the Medical Officer Dr. Shahane (P.W. 6) she disclosed that she was willingly working as a sex worker for a month. However, having concluded on the basis of the evidence as discussed herein above that she was a child within the meaning of Section 2(d) of the POCSO Act and Section 2(aa) of the PITA, her consent becomes irrelevant and it is not a consent in the eye of law. Therefore, no weight can be attached to this fact as to if the victim (P.W. 1) had willingly entered into the trade.

27. If such is the state of affairs, certainly, in view of the provisions of Section 29 of the POCSO Act, a presumption regarding commission of the offences under the Act needed to be raised as has been rightly done by the learned Special Judge. The appellants have miserably failed to displace the burden cast upon them.

28. According to the learned advocate for the appellants, prescribed procedure contained in Section 15(2) of the PITA has not been followed of calling upon two or more respectable inhabitants of the locality in which the place to be searched situate.

29. The prosecution has examined a Social Worker Kamal (P.W. 2) who has stated about having been called upon and acted as a witness not only for verification panchnama (Exh. 23) but for pre-trap panchnama (Exh. 24), post trap panchnama (Exh. 25) and the spot panchnama (Exh. 26). Since she is a woman, the substantive provision contained in Section 15(2) of the PITA which admits of an exception in the form of proviso appended thereto would clearly demonstrate, as has been shown by the learned Special Judge in paragraph No. 24 that the appellants are not entitled to take any benefit and the submission of

their learned advocate in this respect is not tenable.

30. Nothing could be elicited during cross-examination of Kamal (PW.2) so as to disbelieve her version. She is a social worker and as has been elicited she is not in the Government employment. She works under some NGO. She has duly established as to how she had participated in the entire process preceding lodging of the F.I.R. There is nothing to disbelieve her version which clearly establishes the prosecution case regarding the appellants having solicited customers and subjected the victim (PW. 1) to sex trade. The currency note of specified denomination mentioned in pre-trap panchnama (Exh. 24) was recovered from the appellant No. 2 during post-trap panchnama (Exh. 25), a huge stock of used and unused condoms was seized from their house. Mr. Bahirwal (PW 3) had acted as a decoy customer and was found in the house of the appellants along with the victim. Kamal (PW. 2) was a witness to all this. Once it is established that all these circumstances have been duly proved by her, naturally, by virtue of Section 29 of the POCSO Act the burden was on the appellants to dislodge the presumption but neither during the cross-examination of victim (PW. 1) or during their examination under Section 313 of the Code of Criminal Procedure have they been able to do that.

31. This takes us to other legal objections being raised on behalf of the appellants. According to the learned advocate for the appellants the entire investigation is faulty since it has not been carried out by a Special Police Officer or Trafficking Police Officer as is required by Sections 13 to 15 read with Section 2(i) and 2(j) of PITA. Certainly, in view of the decision of the Supreme Court in the case of ***Delhi Administration*** and that of Delhi High Court in case of ***Mumtaz alias Behri (supra)***, these provisions are mandatory and any investigation carried out in breach of such mandate is illegal.

32. However, it is important to note that according to P.S.I. Gite (PW. 4) she was specially employed and posted in the Anti Human Trafficking Unit in the Office of the Superintendent of Police Beed. She had received the information pursuant to which she verified the fact and informed the matter to the Superintendent of Police who in turn directed Police Inspector Jadhav to conduct the raid and accordingly the raid was conducted by Police Inspector Jadhav. She specifically stated that Police Inspector Jadhav was from the Anti Human Trafficking Unit. Conspicuously, her such version has not been specifically disputed during her cross-examination.

33. Apart from the above state of affairs, as is pointed out by the learned Special Judge, a Government Resolution was also produced on record along with the transfer and posting orders, though belatedly, along with application /list (Exh. 64) showing that by the Government Resolution dated 19.07.2013 the appointments of Officers in Anti Human Trafficking Unit at Beed was followed by the transfer order of P.S.I. Gite (PW. 4) and Police Inspector Jadhav dated 31.05.2016 and 31.10.2017 respectively. As per the resolution the Inspector of Police working under Anti Human Trafficking Unit was identified in view of the provisions of Section 13 of the PITA. It further notified all the Police Officers including the women Police Officers subordinate to such Police Inspector to be the Special Officers. It is in view of such clinching record, in my opinion the learned Special Judge had reached the conclusion that there was no flaw much less any illegality in carrying out the investigation by Police Inspector Jadhav who unfortunately was not alive when the matter had gone for trial. Since P.S.I. Gite (PW. 4) was also a Special Officer who had participated in the raid and ultimately lodged the F.I.R. (Exh. 36) , I do not find any illegality and non-compliance of the provisions of Section 13 to 15 of the PITA. The submission of learned advocate for the appellants on this count,

therefore, is not tenable.

34. Coming to the ingredients for the individual offences for which the appellants have been convicted, so far as Section 370 of the Indian Penal Code is concerned, i.e. for trafficking of person, even if it is concluded that since Shantabai has not been arrayed as an accused and therefore there is no evidence in respect of actual sale by her and purchase by the appellants of the victim (PW. 1), on overall appreciation of the evidence it is quite apparent that the victim was induced into trade for the obvious monetary gain which is nothing but a trafficking as defined in Clause Sixthly of Sub Section 1 of Section 370 of the Indian Penal Code. Therefore, no fault can be found in the impugned judgment and order convicting the appellants under that Section.

35. Submission of the learned advocate for the appellants that the offence is punishable only up to seven years is incorrect. As can be seen from Sub Section (2) of Section 370 of the Indian Penal Code the offences of trafficking invites a rigorous imprisonment, the minimum of which shall not be less than seven years but which may extend to 10 years. Therefore the submission is not legally tenable.

36. So far the provisions of Section 5 and 6 of PITA are concerned, the former punishes procurement or inducement or taking a person for the sake of prostitution whereas Section 6 is concerned obviously the victim (PW. 1) was detained in the house of the appellants with intent that she may have sexual intercourse with the persons who were not her spouse which is sufficient to constitute the offence.

37. Now turning to the offence punishable under Section 17 read with Section 4 of the POCSO Act, Section 17 provides for punishment for abetment of any offence under the POCSO Act. Whereas Section 4 provides for punishment for penetrative sexual assault. Section 3 defines penetrative sexual assault to mean the different acts provided for

therein. Since the victim (PW.1) was made to succumb to the penetrative sexual assault by various customers and the appellants had induced her into that trade, one can easily conclude that they have committed an offence punishable under Section 17 and have been rightly convicted and sentenced by the Special Judge.

38. Having concluded thus, I find no illegality in the impugned judgment and order convicting and sentencing the appellants as mentioned herein above.

39. The Appeal fails and is liable to be dismissed.

40. The Appeal is dismissed.

41. Advocate Mrs. Kulkarni has been appointed to represent the victim. Her fees is quantified at Rs. 5000/- (Rs. Five Thousand only),

(MANGESH S. PATIL, J.)

mkd/-