

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

**CRIMINAL APPEAL NO.666 OF 2020 WITH
CRIMINAL APPLICATION NO.1172 OF 2021**

Sunil Vasantao Shinde
Age 25 years, Occu. Labour
R/o Takali (Jama), Tq. Naigaon,
District Nanded

... **APPELLANT**

VERSUS

The State of Maharashtra
Through Police Station Officer,
Nanded (Rural)
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad

... **RESPONDENT**

.....
Shri S.J. Salunke, Advocate for appellant
Shri S.N. Morampalle, A.P.P. for respondent – State
.....

CORAM: R.G. AVACHAT, J.

Date of reserving judgment : 22nd June, 2021

Date of pronouncing judgment : 24th June, 2021

J U D G M E N T :

This appeal is directed against the judgment and order dated 22/6/2020, passed by the Special Judge, Nanded in Special (POCSO) Case No.22/2018. By the impugned judgment, the appellant has been convicted for the offence punishable

under Sections 363 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1000/-, in default to suffer R.I. for one month. The appellant is further convicted for the offence punishable under Section 366-A of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1000/-, in default to suffer R.I. for one month. The appellant is further convicted for the offence punishable under Sections 376(2)(i), 376(2)(n) and 377 of the Indian Penal Code read with Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.2000/-, in default to suffer R.I. for three months. The substantive sentences have been directed to run concurrently.

2. The case of the prosecution is as under :-

Miss Anita (P.W.1) (name changed) is the daughter of Sunita (P.W.2). Anita was stated to be 14 years of age at the relevant time. She was a student of 9th Standard. The appellant was 23 years of age. The house of Ranjana, paternal aunt of the appellant was in the nearby of Anita's school. Acquaintance developed between the two. Anita would visit her residence. On

17/12/2017, Sunita (P.W.2) was away from her residence. Anita and her younger brother were the only persons at home. Anita left the house by 11.00 in the morning. On return of Sunita (P.W.2) home in the evening, she realised Anita's absence. The search was, therefore, taken for Anita for next 4 - 5 days. Sunita (P.W.2) then lodged the First Information Report (FIR) Exh.40, alleging that some unknown person kidnapped her minor daughter, Anita, for unknown reason. A crime vide C.R. No.673/2017, therefore, came to be registered for the offence punishable under Section 363 of the Indian Penal Code. During the investigation, both the appellant and Anita were located in Pune. They were brought back. Statement of Anita was recorded. According to her, the appellant was present at the house of his aunt Ranjana while she visited the house on 17/12/2017. The appellant took her to one of the rooms in the house and committed sexual intercourse with her. He confined Anita in the said house for three days. He then took her to village Takali, kept her there in a tin shed. The appellant then shifted her to Pune and stayed there in a premises taken on rent. The appellant had sexual intercourse with Anita many a time during their stay at Takali and in Pune as well.

3. Based on the statement of Anita, Sections 376(2)(i),

376(2)(n) and 377 of the Indian Penal Code read with Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act came to be invoked against the appellant. Ranjana was also made an accused along with one Santosh Atmaram Jirge, who allegedly helped the appellant in providing shelter to him and Anita at village Takali.

4. Both the appellant and Anita came to be medically examined. It was found that, Anita was pregnant. With the permission of the appropriate authority, Anita underwent medical termination of pregnancy (MTP). Blood samples of both of them therebefore were obtained. DNA profiling was done of foetus. The DNA report indicates both Anita and the appellant to be biological parents of the product of conception. The investigating officer recorded statements of the persons acquainted with the facts and circumstances of the case. Scene of offence panchanama was drawn. Clothes of both the appellant and Anita came to be seized under the panchanama. Their blood samples and seized clothes were examined at Central Forensic Science Laboratory. On completion of the investigation, the appellant, Ranjana and Santosh were proceeded against by filing charge sheet. Charge under Sections 363, 366-A, 376(2)(i), 376(2)(n), 377, 212, 341 read with Section 34 of the Indian Penal Code and

Sections 3, 5(m), 8 and 21 of the Protection of Children from Sexual Offences Act came to be framed.

5. The prosecution examined 19 witnesses and tendered in evidence some documents in the nature of school record, C.A. report, panchanamas etc. On appreciation of the evidence in the case, the trial Court acquitted Ranjana and Santosh. The appellant came to be convicted and sentenced as stated in paragraph No.1 above.

6. Mr. S.J. Salunke, learned counsel for the appellant would submit that, it was a case of emotional involvement. The prosecution has to stand on its own legs. The offences with which the appellant was charged are serious one. The nature and quality of evidence in proof of the charge ought to have, therefore, been conclusive. Here is the case wherein different dates of birth of Anita have come on record. The same indicates the prosecution to have failed to establish the charge beyond all reasonable doubt. The DNA report had not been put to the appellant to solicit his explanation thereon during his examination under Section 313 of the Code of Criminal Procedure. The learned counsel took me through the relevant evidence on record to submit that both P.W.1 Anita and P.W.2

Sunita have given false evidence on many points. To substantiate his point, the learned counsel took me through the oral testimony of both these witnesses and pointed out material omissions amounting to contradictions. The learned counsel has placed reliance on some judgments of this Court and the Hon'ble Supreme Court as well. He ultimately urged for acquittal of the appellant.

7. Mr. Morampalle, learned A.P.P. would, on the other hand, submit that, the DNA report is conclusive in nature. He would further submit that, although there is no consistent evidence as regards date of birth of Anita, the evidence undoubtedly indicates that she was a child (below 18 years of age) when the offence did take place. According to learned A.P.P., conviction for the offence of rape can be founded on testimony of prosecutrix alone. On the question of date of birth of Anita, school leaving certificate is admissible in evidence. Her evidence is more reliable than that of an injured witness. In absence of any evidence contrary to the date of birth as shown in the school leaving certificate, same has to be taken as conclusive proof regarding age of prosecutrix. In support of this submission, the learned A.P.P. has placed reliance on the following authorities :-

- 1) State of Maharashtra Vs. Gajanan
[2008(3) Crimes 212 (SC)]
- 2) State of H.P. Vs. Asha Ram [AIR 2006 SC 381]
- 3) Chhotelal Kandhari Pajapati Vs. The State of Maharashtra
[Criminal Appeal No. 51/2017 – Nagpur Bench]

8. Although the prosecution examined 19 witnesses, the fate of the prosecution case is based on the testimony of Anita (P.W.1) and the evidence regarding her age. Sunita (P.W.2) is the mother of Anita. It is in her evidence that, on 17/12/2017, she was away at her work place. On her return to the house, she found Anita not home. Her son informed her that Anita left the house at 11.00 in the morning. A search was, therefore, taken for Anita on the same day and next four days. She then lodged the F.I.R. (Exh.40). Sunita (P.W.2) in her F.I.R. stated that, Anita was 14 years of age. She is admittedly illiterate. She did not give Anita's date of birth in the F.I.R. or even subsequent thereto. As regards allegations against the appellant to have kidnapped Anita and has sexual intercourse with her many a times is concerned, the evidence of Sunita (P.W.2) in that regard is based on what had been told to her by her daughter – Anita (P.W.1). the same is, therefore, inadmissible, being hear-say.

9. Sunita (P.W.2) testified that, the date of birth of

Anita is 21/3/2004. Anita (P.W.1) stated in her evidence that, on 17/12/2017, she had been to the house of Ranjana. The appellant was present there. He took her to one of the rooms in the house, bolted the door and committed sexual intercourse with her without her consent. It is further in her evidence that, the appellant confined her there for three days. He then took her to village Takali, stayed there for 3 – 4 days. Then shifted to Pune, stayed there in a premises taken on rent. During their stay, he had sexual intercourse with her many a times. It was against her wish and without her consent. The appellant had threatened her with dire consequences if she disclosed the same to anyone. In her evidence she gave her date of birth as 21/3/2014. She also tendered in evidence her school record (Exhibits 32, 33, 34 and 35).

During her cross-examination, many things have surfaced. She admitted to have not stated in her statement to the police that the appellant had confined her at the house of Ranjana for three days.

10. Bhagwan (P.W.14) and Dilip (P.W.15) were the Head Masters of the respective schools wherein Anita studied. Both these witnesses tendered in evidence the relevant school record

containing date of birth of Anita. A reference to their evidence would be made a little later.

11. During medical examination, it was found that Anita was pregnant. Blood samples of both Anita and the appellant were obtained. P.W.6 Dr. Uzma was examined in proof of taking blood samples of both of them for DNA profiling. Dr. Sunil (P.W.4) had examined Anita. He gave certificate (Exh.52). It is in his evidence that he did not notice any fresh injury on the person of Anita. In his opinion, there was no evidence of injury suggesting of application of force. In his further opinion, evidence of sexual intercourse could not be ruled out. He went on to testify that, before medical examination of Anita, he made some enquiry with her. She gave her date of birth.

12. The appreciation of the evidence in the case undoubtedly indicates that, both Anita and the appellant were emotionally involved with each other. Anita left her house on her own. She joined the appellant, stayed with him at his village Takali for 3 – 4 days. Both of them then shifted to Pune and stayed in a premises taken on rent. It is only because of investigation of the crime registered at the instance of the mother of Anita, both of them came to be located in Pune and

brought back. Had there been no crime registered, both Anita and appellant might have continued to live together as husband and wife. The appellant had sexual intercourse with Anita many a times. As a result, she conceived. The DNA report, which is conclusive in nature, indicates both of them to be biological parents of the product of conception. As such, the evidence so far scanned and appreciated do indicate the appellant to have had sexual intercourse with Anita many a times. The question is, whether it amounts to offence of rape and/or offence of penetrative sexual intercourse punishable under Section 4 of the Protection of Children from Sexual Offences Act. The answer thereto is based on evidence as regards age of Anita. She stated her date of birth to be 21/3/2004. Her mother Suman (P.W.2) reiterates the same date as birth date of her daughter P.W.1 Anita. Admittedly, Sunita is illiterate. She did not give date of birth of her daughter in the F.I.R. or even subsequent thereto to the police. P.W.14 Bhagwan was the Head Master of Mahatma Phule Madhyamik Ashram School, Waghala, Nanded. It is in his evidence that, Anita was admitted to the said school in 7th Standard in July 2015. The witness produced on record the duly filled in school admission form of Anita. The date of birth recorded therein is 21/3/2004. It is further in his evidence that,

Anita was given admission to the school on the basis of her transfer certificate issued by her earlier school. The entries in her school admission form and other school record have been made on the basis of the transfer certificate issued by her earlier school. Exhibits 99 and 100 i.e. the entries regarding date of birth of Anita appearing therein would, therefore, not be of much relevance. P.W.14 Bhagwan had not personally made those entries nor did he state that the date of birth recorded therein was stated by either mother or father of P.W.1 Anita for securing admission in the school.

13. Dilip (P.W.15) was the Head Master of Vidya Niketan Primary School. He produced on record the original application said to have been submitted by Anita's mother on 10/6/2008 for admitting her (Anita) in the school. This application was not shown to P.W.2 Sunita in her evidence. The date of birth of Anita given therein is 14/3/2003 while the date of birth of Anita recorded by P.W.4 in his Forensic Medical Examination Report is 15/4/2001. The date of birth is said to have been recorded on the information given by Anita herself. As such, I come to such a pass that, in the evidence the prosecution gives three different dates as 15/4/2001, 14/3/2003 and 21/3/2004 as date of birth of Anita. True, as per all the three dates Anita was a child (below

18 years of age) when the alleged offence did take place. The trial Court observed that, even if we consider any of those dates, Anita was proved to be below 18 years of age and her consent for sexual intercourse was, therefore, immaterial. I do not subscribe to the findings recorded by the trial Court.

14. In case of **Navin Dhaniram Baraiye Vs. The State of Maharashtra [2018 ALL MR (Cri) 4919]**, it has been observed :-

“Section 29 – Presumption as to certain offences – Unless prosecution is able to prove foundational facts in context of allegations made against accused under POCSO Act – Presumption under Section 29 thereof would not operate against accused.”

15. The Division Bench of this Court, in case of **Ravi Anandrao Gulpude Vs. State of Maharashtra [2017 ALL MR (Cri) 1509]**, held :-

“9. The provisions of the Act are stringent in nature. Even there is a statutory presumption under Section 29 of the Act. Since the enactment is stringent in nature, the degree of proof is more strict. The prosecution is under bounden duty to prove the age of the prosecutrix to show that at the time of the incident, the prosecutrix was “Child” within the meaning or provisions of the Act. The burden is on the prosecution to prove that the age of the prosecutrix, on the date of occurrence, was less than 18 years.”

16. It is reiterated that, prosecution did not give accurate date of birth of Anita so as to hold her to be a child. The two different schools give her two different dates of birth. The judgment in case of Gajanan (supra) would, therefore, be of not any assistance for the learned A.P.P.

17. Anita gave some third date to the doctor P.W.4 as her date of birth. As such, there is no conclusive evidence or the evidence which could be safely relied upon to hold Anita (victim) to have been a child during the relevant time. I, thus, find the prosecution to have failed to prove the case beyond reasonable doubt. The conviction of the appellant is, therefore not sustainable. In the result, the appeal succeeds. Hence the following order :

ORDER

(i) The Criminal Appeal is, therefore, allowed. The judgment and order dated 22/6/2020, passed by the Special Judge, Nanded in Special (POCSO) Case No.22/2018 is set aside. The appellant stands acquitted of the offences punishable under Sections 363, 366-A, 376(2)(i), 376(2)(n) and 377 of the Indian Penal Code read with Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012. The appellant be set at

liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to the appellant.

(ii) In view of disposal of the Criminal Appeal, Criminal Application No.1172/2021 does not survive and same stands disposed of.

(R.G. AVACHAT, J.)

fmp/-