

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 255 OF 2020

Abhishek Ganpat Munankar

..Appellant

V/s.

The State of Maharashtra & Anr.

..Respondents

Ms. Rebecca Gonsalves i/b Dr. Yug Mohit Chaudhary for the
Appellant.

Mr. S.H. Yadav, APP for the Respondent/State.

CORAM : C.V. BHADANG, J.

RESERVED ON : 30 NOVEMBER 2021

PRONOUNCED ON : 01 DECEMBER 2021

JUDGMENT

1. By this Appeal, the Appellant-accused is challenging the Judgment and Order dated 30.01.2020 passed by the learned Special Court at Thane in Special (POCSO) Case No. 132 of 2017. By the impugned Judgment, the learned Special Court has convicted the Appellant for the offence punishable under Section 376 of IPC and Section 5 (j)(ii) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('the said Act'). The Appellant has been sentenced to suffer rigorous imprisonment of 10 years with fine, on either counts. Both the sentences have been directed to run concurrently.

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2. The prosecution case may be briefly stated thus:

That the victim (PW-3) is the daughter of the complainant Surekha Shinde PW-1. In the year 2017, PW-3 was stated to be 16 years of age, her date of birth being 16.12.2000. At the relevant time, PW-3 was studying in XI standard in *Dhyan Sadhana* College at Thane. According to her, she was introduced with the Appellant by her friend Neha and after that she was frequently meeting the Appellant after her school hours. PW-3 claims that there was a love affair between her and the Appellant and on the insistence of the Appellant, she had kept sexual relations with the Appellant on 2 to 3 occasions, as a result of which, PW-3 got pregnant. It was only after, she was taken to Dr. Rajesh Gajara at Mulund, as she was complaining of stomach ache and vomiting and upon medical investigation that it was revealed that she was carrying a pregnancy of 18 weeks. PW-1 was intending to abort the pregnancy. However, PW-1 was advised that unless and until, the matter is reported to the police, the pregnancy cannot be medically terminated. It is on account of such an advice, PW-1 lodged a complaint with police station Chembur on 03.02.2017 which is at Exh.10. The statement of PW-3 was recorded at the Chembur police station in a question and answer form and after that the matter was transferred to Naupada police station, Thane, inasmuch as the offence had taken place within the jurisdiction of police station Naupada. Naupada police station had carried out the investigation. In the

meantime, the pregnancy of PW-3 was terminated and after the arrest of the Appellant, a DNA sampling was done, in which the Appellant was found to be the biological father of the foetus. The Appellant as well as PW-3 were medically examined. The Investigating Officer recorded the statement of witnesses and on completion of investigation a chargesheet came to be filed.

3. The learned Special Judge framed a charge under Section 376 of IPC along with Section 3 which is punishable under Section 4 of the said Act and also under Section 7 punishable under Section 8 of the said Act. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant is of total denial and false implication. From the submissions advanced at the bar, it appears to be the alternate defence that the age of PW-3 has not been established and it is not shown that she was a 'child' on the date of incident within the meaning of the said Act and the relationship was consensual in nature.

4. At the trial, the prosecution examined in all 10 witnesses namely, the complainant Surekha Shinde PW-1 and her husband Vinod Shinde PW-2, the victim was examined as PW-3 and her maternal aunt Sujata Lavate as PW-4. There are four Medical Officers examined namely Dr. Sadhana Thorat PW-5, Dr. Sushama Kambale PW-6, Dr. Shirang Rane PW-9 and Dr.

Narayan Mahadevan PW-10, apart from WPSI Trupti Khalge PW-7 and Investigating Officer API Yashwantrao Shinde PW-8. The prosecution produced the record of investigation.

5. The Appellant did not lead any evidence in defence.

6. The learned Special Judge has found the Appellant guilty under Section 376 of the IPC and Section 5 (j)(ii) which is punishable under Section 6 of the said Act. Hence, this Appeal.

7. I have heard Ms. Rebecca Gonsalves, the learned counsel for the Appellant and Mr. Yadav, the learned APP for the Respondent/State. With the assistance of the learned counsel for the parties, I have gone through the record.

8. The main thrust of the argument on behalf of the Appellant is the challenge to the age of PW-3. It is submitted that the prosecution has failed to establish that PW-3 was a 'child' in the year 2017 and therefore, offence under the said Act, cannot be attracted. The learned counsel for the Appellant in order to elaborate the submission has pointed out that the birth date of PW-3 was not mentioned at any point of time before PW-1 was recalled after the prosecution had examined as many as eight witnesses. It is submitted that school leaving certificate from Smt. Nalinibai Prandare High School, is not formally proved or

exhibited. It is submitted that the birth certificate purportedly issued by Municipal Corporation of Greater Mumbai, which is at Exh. 57 is also not produced by the prosecution and it was produced by PW-1. The learned counsel pointed out that the said certificate was not seized or obtained by the Investigating Officer nor the parents of PW-3 had furnished the said certificate to the Investigating Officer during the course of the investigation. The learned counsel pointed out that there is a discrepancy as to the name of the father which is mentioned as Vinod Devarkanath Shinde, when the name of the father is Vinod Dwarkadas Shinde. In the submission of the learned counsel this makes the said certificate doubtful. It is submitted that specific birth date of PW-3 or the evidence in the form of the certificate Exhibit 57 has not been put to the Appellant in his statement under Section 313 of the Cr.P.C. and therefore, cannot be used against him. It is submitted that several other incriminating circumstances have not been put to the Appellant in his statement. Reliance is placed on the illustrated decision of the Supreme Court in *Sharad Birdhichand Sharda v/s. State of Maharashtra*¹ in order to submit that none of these incriminating circumstances can be used against the Appellant. It is submitted that the evidence of Dr.Sadhana Thorat PW-5 who conducted ossification test is also not acceptable. It is pointed out that PW-5 has not obtained X-ray plate of teeth which is an important factor in the matter of age determination. It is submitted that PW-5 on the basis of the test

1 AIR 1984 SUPREME COURT 1622

conducted has stated the age of PW-3 to be between 16 to 17 years. It is submitted that there is an error of 2 years on either side and the evidence of PW-5 cannot conclusively establish that PW-3 was below 18 years of age and thus, was a child.

9. It is submitted that the statement of PW-3 recorded by Chembur police station has been exhibited as Exh.11 by the Special Court which is not permissible. It is submitted that the said statement would be hit by Section 161 of Cr.P.C. and would be inadmissible in evidence. It is submitted that once the prosecution has failed to establish that PW-3 was a child, the complexion of the entire incident is changed, as there is overwhelming material including in the form of evidence of PW-3 to show that PW-3 was a consenting party to the sexual relationship between herself and the Appellant. The learned counsel has extensively taken me through the evidence in order to point out the circumstances to show that the relationship was consensual as PW-3 had of her own volition had accompanied the Appellant to the house of his maternal aunt at Thane, where they had physical relations. The learned counsel pointed out that there is no specific charge framed for the offence under Section 5 which is punishable under Section 6 of the said Act. The learned counsel also pointed out point No.2 as framed by the learned Special Court and submitted that the conviction of the Appellant under Section 5(j)(ii) read with Section 6 of the said Act cannot be sustained in the absence of a charge framed thereunder. The

learned counsel was at pains to point out that the offence under Section 5 which is punishable under Section 6 is a more serious offence and invites stringent punishment than offence punishable under Section 4 and Section 8 of the said Act. This in the submission of the learned counsel is sufficient to hold that there is a perse prejudice to the appellant on account of non framing of proper charge. Lastly, it is submitted that at the relevant time, the offence was punishable with minimum sentence of 7 years and not 10 years as has been done by the learned Special Judge. On behalf of appellant, further reliance is placed on the decision of the Supreme Court in *Jay Mala v/s. Home Secretary, Government of Jammu & Kashmir and Ors.*² *Rajak Mohammad V/s. State of Himachal Pradesh*³ and decision of the *Delhi High Court in State (NCT of Delhi) v/s. Deepak*⁴ and *Sweta Gulati & Anr. v/s. The State Government of NCT of Delhi*⁵.

10. The learned counsel made an alternate submission, stating that the Appellant has since married after the incident and has a minor child and he is only the earning member in the family. It is pointed out that he is 22 years of age and may be dealt with leniently in the event the conviction is sustained.

11. The learned APP has supported the impugned judgment. It is submitted that age of PW-3 has been sufficiently established on

² (1982) 2 Supreme Court Cases 538

³ (2018) 9 Supreme Court Cases 248

⁴ 2019 SCC Online Del 11574

⁵ 2018 SCC Online Del 10448

record on the basis of the evidence of PW-1 and PW-2, who are the parents of PW-3 and are competent to state about her date of birth. It is submitted that PW-3 has also stated about her age in her evidence supported by the birth certificate Exh.57. The learned APP has pointed out that under Section 34(2) of the said Act, it is for the Special Court to decide about the age of the victim on the basis of the evidence led. It is submitted that the evidence of PW-5 on the point of ossification test also cannot be doubted only on the ground of the non obtaining of x-ray of teeth. It is submitted that PW-5 is an independent witness and has no reason to support the prosecution without any reason. It is submitted that once PW-3 is shown to be below 18 years of age, and thus a 'child' under the said Act, the circumstances as to consent, pale into insignificance. It is submitted that evidence as to the DNA mapping clearly shows that Appellant is biological father of the fetus. The learned APP pointed out that the material part of the incriminating circumstances have been put to the Appellant in his statement. It is pointed out that the Appellant was all along aware of the nature of the allegations and the conviction under Section 5(j)(ii) of the said Act can well be sustained. He therefore, submitted that the Appeal be dismissed.

12. I have considered the circumstances and the submissions made. The issue about the age of PW-3 assumes significance in this case, as otherwise there is evidence to show that PW-3 was a consenting party to the relationship. I would advert to said aspect

little later. For the present, it is necessary to deal with the issue of age of PW-3. The complaint Exh.7 does not mention the date of birth of PW-3. It only mentions that her age was 17 years. PW-1 was initially examined on 17.01.2019 and was thereafter recalled on 11.11.2019 after the prosecution had examined eight witnesses. It is only when PW-1 was recalled that during her re-examination, she produced birth certificate issued by the BMC. The said certificate was never produced before the Investigating Officer, nor the Investigating Officer had obtained the said certificate during the course of the investigation. The prosecution has also produced a school leaving certificate dated 31.05.2016 issued by the Head Mistress of the Purandare High School at Mulund which is at Article-A. The said certificate has also not been formally proved or exhibited by examination of any witness from said school with the original record. The certificate at Exh. 57 mentions the name of father as Vinod Devarkanath Shinde while name of the father is shown to be Vinod Dwarkadas Shinde. Although no much significance can be attributed to the discrepancy in the name of the father of PW-2, the fact remains that the said certificate was neither produced before the Investigating Officer, nor obtained by him during the course of the investigation and the said certificate is also not formally proved by examination of any witnesses from the Corporation. There are certain additional circumstances on account of which the prosecution evidence as to the date of birth of PW-3 cannot

be used against the Appellant. I have gone through the statement of the Appellant recorded under Section 313 of Cr.P.C. and indeed it appears that the circumstances as to the date of birth and for the matter of that the certificate Exh.57 and the one at Article-A (if at all the prosecution intended to rely on it) have not been put to the Appellant. It is now well settled that the recording of the statement under Section 313 of Cr.P.C. is not an empty formality and has a specific purpose and object to be achieved. It is trite that any incriminating circumstance which is proposed to be relied upon has to be put to the accused in his statement and his explanation sought for. However, the same is not done in this case. (See the decision of the Supreme Court in Sharad Birdhichand Sharda).

13. This takes me to the evidence of PW-5 Dr. Sadhana Thorat, who had examined PW-3 on 09.03.2017 by obtaining ultrasonography report and x-ray examination on 10.03.2017. PW-5 claims that on the basis of her examination and the investigation done, the approximate age of PW-3 would be between 16 to 17 years. PW-5 admitted that a patient should be sent for x-ray of teeth for age determination and that is one of the factors, while determining the age. However, the x-ray of teeth was not obtained. In the cross-examination, PW-5 had stated that age determination was done on the basis of the examination of the shoulder joint, elbow joint, hip joint or wrist joint from the x-ray plates. It is well settled that age as determined by ossification test

is subject to an error of 2 years on either side. (See the decision of the Supreme Court in Jay Mala). If that be so, the age of PW-3 could well be 19 years on higher side in which case PW-3 would cease to be a 'child' within the meaning of the said Act. Section 2 of the Act prescribes that a 'child' is a person below the age of 18 years.

14. On behalf of the Appellant reliance is placed on the decision of the Delhi High Court in Shweta Gulati (supra). The Delhi High Court has referred to a decision of the Supreme Court in *Jernail Singh v/s. State of Haryana*⁶ in which the Supreme court has held that although Rule 12 of the 2007 rules framed under the Juvenile Justice (Case and Protection of Children) Act, 2000 is for determination of age of a child in conflict with law, the same factors would be germane and should be the basis for determining age, even of a child who is the victim of a crime. The Supreme Court has held that there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law and a child who is a victim of crime. It is necessary to note that provisions of Rule 12 of the 2007 Rules under the Act of 2000 have now been incorporated as Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The provisions of Section 94 give precedence to the date of birth as shown in the certificate of the school or matriculation or equivalent school certificate from the concerned examination

6 (2013)7 SCC 263

board, if available, in the matter of the age determination. It is only in the absence of the said certificate that the birth certificate issued by the Corporation or Municipal Authority or a Panchayat can be taken into consideration and in absence thereof on the basis of the ossification test. Thus, the evidence as to ossification comes as a last resort.

15. In the present case, the Investigating Officer could very well have obtained the certificate from the school or the matriculation certificate as PW-3 was stated to be studying in XI standard. However that certificate from the school is not produced and whatever certificate is produced is not formally proved. The Division Bench of this Court sitting at Nagpur in the case of *Ravi Anandrao Gurpude v/s. State of Maharashtra*⁷ has held that the provisions of the said Act are stringent in nature and therefore, invite a stricter proof. The application of the Act hinges on the question whether the victim is a 'child' within the meaning of the said Act. Having regard to the over all evidence, led by the prosecution, in my humble view, the prosecution has failed to establish beyond reasonable doubt that PW-3 was a 'child' in the year 2017 when PW-3 claims to have physical relations with the Appellant twice. The benefit of any such doubt as to the age, has to go to the Appellant.

⁷ 2018(2) Crimes 390 (Bom.)

16. This takes me to the next question about the offence under Section 376 of IPC. Here again there is enough evidence on record to show that PW-3 was a consenting party to the relationship. PW-3 in her evidence has stated that the Appellant was introduced to her by one of her friends and they regularly used to meet each other and used to talk on phone. She also stated that there was a love affair between herself and the Appellant and the Appellant had promised to marry her after the Appellant got a job. She also claimed that she did not disclose about the sexual relationship between herself and the Appellant to the family members. Her evidence shows that the Appellant had expressed willingness to have sexual relations when she accompanied the Appellant to the house of his maternal aunt at Thane where twice they had physical relations. Once it is held that the prosecution has failed to establish that PW-3 is a child, this part of the evidence indicating a consensual relationship assumes significance. Considering the over all circumstances and the evidence, I find that the Appellant is entitled to benefit of doubt.

17. Before parting with the judgment, it is necessary to note two or three circumstances as to the conduction of the trial. First the learned Special Court has framed a charge under Section 376 of IPC and secondly, under Section 3 which is punishable under Section 4 of the said Act which is essentially a charge for

penetrative sexual assault. Secondly, the learned Special Court has framed point No.2 as to whether the prosecution has proved that the Appellant had committed an offence under Section 3 which is punishable under Section 4 of the said Act. However, the finding recorded against the said point which is in the affirmative, is for the offence under section 5(j)(ii) read with Section 6 of the said Act which is more serious offence than the one under Section 3 read with Section 4 of the said Act. Thirdly, the material circumstances as to the date of birth of PW-3 and evidence produced in support thereof has also not been put to the Appellant in the statement under Section 313 of Cr.P.C.

18. Be that as it may, for the reason that the prosecution has failed to establish the age of PW-3 to bring her within the definition of a 'child', the Appellant deserved to be acquitted as otherwise there is evidence to show that the relationship was consensual.

19. In the circumstances, the following order is passed:

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned conviction and sentence is hereby set aside.

(iii) The Appellant is acquitted from the offence under Section 376 of IPC and Section 5(j)(ii) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

(iv) The Appellant be set at liberty forthwith, if not required in any other case.

(v) Fine, if paid be refunded.

(C.V. BHADANG, J.)