

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

CRIMINAL APPEAL NO. 192 OF 2021

Ajay Bharat Shinde	 Appellant
v/s.	
The State of Maharashtra and anr.	 Respondents

Ms. Saili Dhuru i/b. Mr. Kuldeep Patil a/w. Ms. Heena
Suvarnakar for the Appellant.

Mr. S.V. Gavand, APP for the State.

Mr. Vinod Sangvikar i/b. Mr. Umesh Mankapure for
Respondent No.2.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 16th NOVEMBER, 2021.

ORAL JUDGMENT :-

. This Appeal is directed against the judgment dated 27/01/2021
passed in Special Case (POCSO) No.61/2016, Sangli.

2. By the impugned judgment, the learned Additional Sessions
Judge, Sangli has held the Appellant (hereinafter referred to as ‘the
accused’) guilty of offence under section 376 and 376(2)(n) of the
Indian Penal Code and under section 6 of the Protection of Children
from Sexual Offences (POCSO) Act, 2012 and sentenced him to
undergo rigorous imprisonment for ten years with fine of Rs.25,000/-
in default to undergo rigorous imprisonment for one year.

3. The case of the prosecution in brief is that on 16/06/2016, at about 03:00 a.m., the accused committed rape on the prosecutrix, the minor daughter of PW1- complainant, who belongs to the scheduled caste. It is also alleged that on the same date, at about 05:00 a.m., the accused kidnapped the prosecutrix under a false promise of marriage and with an intention of compelling her to marry him against her wish. It is alleged that the accused had sexual intercourse with the prosecutrix repeatedly from 16/06/2016 to 29/09/2016 and thus committed rape/aggravated penetrative sexual assault.

4. Based on the first information report lodged by PW1-father of the victim, crime was registered against the accused at Kawathe-Mahankal Police Station for offences under sections 376, 376(2)(n), 363, 366 of the Indian Penal Code and section 5(1)(I r/w. section 6 of POCSO Act and section 3(i)(w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The case was initially investigated by PSI – Tamboli and upon his transfer, investigation was taken over by Atul Nikam. He conducted the scene of offence panchanama and seized the incriminating material. He recorded the statement of the prosecutrix and witnesses, traced the accused and placed him under arrest. He referred the prosecutrix and the victim for

medical examination. Since the crime was also registered against Prevention of Atrocities Act, investigation was taken over by PW6 – Naganath Prabhakar Wakurde, ACP, Pune City. He recorded the statement of the witnesses and after completion of the evidence, submitted the charge sheet.

5. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case, examined six witnesses. The statement of the accused was recorded under Section 313 of Cr.P.C. The defence of the accused was of total denial and of false implication.

6. Upon considering the evidence on record, learned Special Judge held that the prosecution has established that the victim was below 18 years of age and a child within the meaning of Section 2(d) of POCSO Act. The learned Judge observed that the prosecution had failed to prove that the accused had kidnapped the prosecutrix with an intention of compelling her to marry him. The learned Judge further held that the prosecution had failed to prove the caste of the prosecutrix. On the basis of the aforesaid observations, the learned Judge acquitted the accused of offences under sections 363, 366 of the Indian Penal Code and section 3(1)(w)(i) of The Scheduled Castes and Scheduled Tribes

(Prevention of Atrocities) Act, 1989.

7. The learned Judge further held that the evidence of the victim proves that the accused had sexual intercourse with her once in her house and later repeatedly in a hut near Yeldari dam in Jintur. The learned Judge therefore held that the prosecution had proved the essential ingredients of rape and aggravated penetrative sexual assault and hence, convicted him for offences under sections 376 and 376(2)(n) of the Indian Penal Code and section 6 of the POCSO Act and sentenced him as stated above. Being aggrieved by the conviction and sentence for offence under section 376 & 376(2)(n) of IPC, the accused has preferred this Appeal under Section 374 of Criminal Procedure Code.

8. Heard Ms. Saili Dhuru, learned counsel for the accused, Mr. S.V. Gavand, learned APP for the State and Mr. Vinod Sangvikar, learned counsel for Respondent No.2. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

9. The accused has been charged for offence under section 6 of

POCSO Act under the premise that the victim was below 18 years of age and a child within the meaning of section 2(d) of the POCSO Act. It may be mentioned here that the POCSO Act has been enacted to protect children from offences of sexual assault, sexual harassment etc., and contains stringent penal provisions as to safeguard the interest and the well being of the children. Hence, to attract the provision of this Act, the onus was on the prosecution to prove that the prosecutrix was a child within the meaning of Section 2(d) of the POCSO Act.

10. It may be noted that Section 34 of POCSO Act prescribes procedure to be followed in case of commission of any offence by a child under the POCSO Act and also deals with determination of age of a person by the Special Court under the POCSO Act. The said section reads as under :-

" 34. Procedure in case of commission of offence by child and determination of age by Special Court :-

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall

be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person. "

11. In ***Jarnail Singh v/s. State of Haryana, 2013 (7) SCC 163***, upon considering the scope of Rule 12, of Juvenile Justice (Care and Protection of Children) Rules, 2007, the Apex Court has held that :-

“Even though Rule 12 is strictly applicable only to determine the age of child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining the age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of child. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix. The manner of determining the age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under this aforesaid provision, the age of a child is ascertained, by adopting the first

available cases, out of a number of options postulated in Rule 12(3). If in the scheme of options under Rule 12(3), option is expressed in a proceeding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule XII(3) matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of said certificate, Rule 12(3), envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a Corporation or a Municipal Authority or a Panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child on the basis of the medical opinion.”

12. The Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 2007 Rules) were framed in terms of Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 2000 Act). Rule 12 (3) contemplated the procedure to be followed in determination of age. The 2000 Act has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 2015 Act). Section 94 (1) of 2015 Act enables the Committee to determine the age of the person based on the appearance of the said person brought before it. It is only in case of reasonable grounds for doubt that the Committee or the Board has to follow the prescribed procedure for determination of age as provided under Section 94 (2) of 2015 Act, which reads thus:-

“ 94 Presumption and determination of age :-

(1). xxx

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the board, as the case may be, shall undertake the process of age determination by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat ;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) xxx”

13. The procedure prescribed under Section 94, to determine the age of a person, is not materially different from the procedure prescribed under Rule 12 (3) of 2007 Rules. A plain reading of this provision clearly indicates that when there is a doubt about the age of the person, the age has to be determined first on the basis of the date of birth certificate from the school or matriculation or equivalent certificate from the concerned examination board and if no such material is available then on the basis of birth certificate given by a Corporation or a Municipal Authority or a Panchayat and only in the absence of such evidence as prescribed in clause (i) and (ii) of Sub Section 2 of Section 94 that the age can be determined by an ossification test or any other medical age determination test.

14. In the instant case, the evidence of the prosecutrix (PW3) reveals that at the relevant time, she was a Class 10 student in Baburao Latthe Vidyamandir at Kuchi. The prosecution has not produced the birth certificate from the school or the birth certificate given by a Corporation or a Municipal Authority or a Panchayat. No reasons have been assigned for not producing any of these material documents as specified under clause (i) and (ii) of Sub Section 2 of Section 94 of 2015 Act. Moreover, it is not the case of the prosecution that such evidence was not available to determine the age of the prosecutrix. Hence, it was not open for the prosecution to rely upon the medical age determination certificate at Exhibit – 49.

15. Be that as it may, the medical age determination certificate states that the estimated age of the victim was 15 to 16 years. It is well settled that the medical evidence is not the conclusive proof of age determination. In *Ram Vijay Singh vs. State of Uttar Pradesh (2021) Cri. Law Journal 2805*, the Apex Court has reiterated that the age ascertained by radiological examination is a useful guiding factor for determining the age of a person, but such evidence is not of conclusive and incontrovertible nature and it is subject to a margin of error.

Similarly, in *Ram Suresh Singh vs. Prabhat Singh alias Chotu Singh, (2009) 6 SCC 681*, the Apex Court has reiterated that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

16. In the instant case, as noted above, the medical evidence indicates that the age of the victim was about 15 to 16 years. Considering the margin of error in age determination and giving flexibility of two years on either side, the estimated age could be between 14 to 18 years. Hence, the upper limit of the estimated age would be 18 years. Giving the benefit of doubt to the accused, the age of the victim has to be taken as 18 years. Thus, the medical evidence does not conclusively prove that the prosecutrix was below 18 years of age as on the date of the incident.

17. It is to be noted that the learned Judge has relied upon the statement of the prosecutrix wherein she has stated her date of birth as 08/05/2000. It is not known as to on what basis she had given her exact date of birth. Moreover, the learned Judge has relied upon this circumstance without bringing the said circumstance to the notice of the accused in the 313 statement. In such circumstances, the learned

Judge could not have held the prosecutrix to be a child solely on the basis of the date of birth as stated by the prosecutrix in her evidence without affording an opportunity to the accused to explain the said circumstance. The prosecution has therefore failed to prove that the prosecutrix was a child within the meaning of Section 2(d) of POCSO Act.

18. The evidence of the prosecutrix - PW3 indicates that the accused was known to her. On 15/06/2016, her brother had met with an accident and her parents had taken him to the hospital. She was residing along with her grand parents. She called the accused to her house at 3 o'clock. She has deposed that she had sexual intercourse with the accused and this was seen by her grand father. She has deposed that thereafter she and the accused started residing in the house of the uncle of her grand father. She thereafter accompanied the accused to the house of his maternal uncle. They stayed at Parbhani and later stayed in a hut of one Wakale at Yeldari. They lived in the said hut for about 3 ½ months and during this period, they had repetitive sexual intercourse. In her cross-examination, she has admitted that she was friendly with the accused and they wanted to marry each other.

19. The evidence of the prosecutrix indicates that the sexual intercourse between her and the accused was consensual. In the absence of any evidence to prove that she was below 18 years of age, consensual sexual relationship would not amount to rape or penetrative sexual assault. Hence, conviction under section 376, 376(2)(n) of IPC and section 6 of the POCSO Act cannot be sustained.

20. Under the circumstances and in view of discussion supra, the Appeal is allowed. The impugned judgment dated 27/01/2021 passed in Special Case (POCSO) No.61/2016, Sangli is quashed and set-aside. The accused is acquitted of offences under section 376 and 376(2)(n) of the Indian Penal Code and section 6 of POCSO Act. He shall be released forthwith, if not required in any other crime. The accused shall furnish bonds before the Trial Court under section 437(A) of Cr.P.C. within the reasonable time.

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(SMT. ANUJA PRABHUDESSAI, J.)