

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

CRIMINAL APPEAL NO. 418 OF 2021

Ketan Sanjay Kokate
Age 26 yers, Occ: Service,
r/at. Shramik Vasahat,
Chawl No.10, Karvenagar,
District Pune
(At present lodged at
Yerwada Central Prison,
Pune 5)

..Appellant

v/s.

1. The State of Maharashtra
(through Officer in charge of
Khadki Police Station, Pune)

2. Nagesh Baburao Naidu
Age 42, Occ: Govt. Servant,
Res. At Range Hills, Khadki,
District Pune.

..Respondent/s

Mr. Ghansham Jadhav i/b. B.A.Aloor for the Appellant.
Mr. S.V.Gavand, APP for the Respondent-State.
Ms. Megha Bajoria for the Respondent No.2.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 23rd DECEMBER, 2021.**

JUDGMENT.

1. This is an appeal under Section 374 of Cr.P.C. challenging the judgment and order dated 30.03.2020 in Special POCSO Case No.107 of 2016, Pune.

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2. By the impugned judgment, the learned Special Judge, POCSO, Pune has held the Appellant (hereinafter referred to as the accused) guilty of offence punishable under Section 376 IPC and under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO). He has been sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.10,000/- i.d. rigorous imprisonment for 3 months in respect of offence punishable under Section 4 of POCSO Act. No separate sentence has been imposed under Section 376 IPC in view of Section 42 of the POCSO Act.

3. PW1- father of the victim had lodged a missing report alleging that his daughter (PW2) had left the house on 25.5.2014 and that she had not returned. Subsequently, he lodged the First Information Report suspecting that the Accused herein had enticed her to accompany him under the promise of marriage. Pursuant to the FIR lodged by PW1 Crime No. 131 of 2014 was registered against the accused at Range Hill Police Chowki, Khadki.

4. PW10 Sharad Kale investigated the crime. He traced the accused and the victim at Warje. He brought them to the police station, recorded the statement of the victim and arrested the accused under arrest panchanama at Exhibit 44. He referred the victim for medical examination. She was examined by PW7 Dr. Yogesh Thawal. The statement of the victim and the medical opinion revealed that the accused had subjected the victim to penetrative sexual assault. Accordingly, the provisions under the POCSO Act were invoked. The Investigating Officer recorded the statements of the other witnesses, he seized all the incriminating material and upon completion of investigation filed the chargesheet against the accused for offences under Section 363, 366(A), 376 of IPC and Section 3 r/w. 4 of POCSO Act.

5. The accused pleaded not guilty to the charge and claimed to be tried. Prosecution, in support of its case examined 10 witnesses. The defence of the accused was of total denial. The learned Judge, upon appreciation of evidence held that the prosecution had established that the victim was a 'child' within the meaning of Section 2(d) of POCSO Act. The learned Judge held

that the prosecution had failed to prove that the Appellant herein had enticed the victim to accompany him under the promise of marriage. The learned Judge therefore acquitted the accused of the offences under Section 363 and 366A of IPC. The learned Judge held that the testimony of the victim proves that the accused had sexual relationship with her. Her evidence is further corroborated by medical evidence, under the circumstances the learned Judge held the accused guilty of offences under Section 376 of IPC and Section 4 of the POCSO Act and convicted and sentenced him as stated above. Being aggrieved by this judgment, the accused has filed this Appeal under Section 374 of Cr.P.C.

6. Mr. Jadhav, learned Counsel for the accused submits that the prosecution has not proved that the victim was below 18 years of age. He has submitted that the incriminating circumstances regarding the age of the victim was not put to the accused in his statement under Section 313 of Cr.P.C. and as such the said circumstance could not have been used against him. In support of his contention he has relied upon the decision of the Apex Court in ***Maheshwar Tigga vs. State of Jharkhand (2020) 10 SCC 108*** ,

Parminder Kaur vs. State of Punjab (2020) 8 SCC 811, and *Reena Hazarika vs. State of Assam (2019) 13 SCC 289*. He submits that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt and hence the conviction and sentence cannot be sustained.

7. Per contra, Shri Gavand, ld. APP, submits that the accused has admitted the date of birth of the victim. He further submits that the accused was well aware that the victim was below 18 years of age, despite which he has subjected the victim to penetrative sexual assault. He submits that no prejudice is caused to the accused by not putting incriminating material regards the date of birth to the accused in his statement under Section 313 of Cr.P.C.

8. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

9. PW1 Nagesh is the father of the victim. He has stated that the birth date of the victim is 6.9.1997. He has deposed that at

the relevant time his daughter was studying in 10th Class in All Saints English School, Khadki. He has deposed that the accused is related to one Sonali Gulavali who was residing on the fourth floor of the same building. He used to visit Sonali and that Sonali had introduced the accused to him and his daughter. He has deposed that Sonali had told him that the accused liked the victim. He had told Sonali that the victim was not of marriageable age and she had to complete her education. He has deposed that on 26.5.2015 at 10.30 p.m. Sonali left the house under the pretext of going for a walk. She did not return till 11.30 p.m. They could not trace her. Hence he filed a missing report at Exhibit 22.

10. PW1 suspected that the accused had enticed his daughter and hence on 2.6.2014 he lodged the FIR (Exh.23) against the accused. His daughter was traced on 3.6.2014 in the house of the accused at Karve Nagar. The police referred the victim to Sasoon Hospital, Pune for medical examination.

11. PW1 has stated in his cross examination that after about a year of the incident, his daughter i.e. the victim has married one

Babu @ Kishor Krishna Bahadur. He has deposed that said Babu is the friend of the accused. He has denied that his daughter was in love with Babu and has stated that it was an arranged marriage. He has denied the suggestion that the marriage of the victim was fixed with the accused and that he had agreed to perform the marriage ceremony after she completed 18 years of age. He has denied the suggestion that the accused refused to marry the victim when he came to know that she was in love with Babu.

12. PW2 is the victim. She has deposed that her date of birth is 6.9.1997 and at the relevant time she was studying in Xth standard at All Saints English Medium High School. She has deposed that the accused is the cousin of Sonali who was residing on the fourth floor of the same building. She has deposed that she got acquainted with the accused and that they fell in love with each other.

13. The victim (PW2) has deposed that in the year 2014 the accused suggested to her that they should elope. He called her on 25.5.2014 at about 11.40 p.m. and on the next date he called her

to the ground floor of their building. She, her brother and another boy by name Sagar were playing on the ground floor. She told her brother that she was going home, and instead she went behind the building and thereafter went with the accused on his motorcycle at Panhala. They stayed in a lodge at Panhala for about eight days, during which period they had sexual relations with each other. The accused received a phone call from his mother, hence they left the lodge and went to the house of his mother's friend. The police came to the said house and took them to the police station.

14. In her cross examination, PW2 has admitted that she has married Babu. She has stated that there was no talk of marriage between her and the accused either before or after the incident. She has stated that Babu is her childhood friend. She has deposed that there was no love affair between her and Babu, though Babu had expressed his love towards her. She has denied the suggestion that after receiving the phone call from the mother of the accused, she directly came to the police station. She has admitted that when she returned to Pune, she was not willing to

lodge a complaint against the accused. She has denied that her father had pressurized her to give the statement against the accused. She has denied that the accused did not have sexual relationship with her at Panhala. She has also denied that she was having physical relationship with Babu even before she had eloped with the accused. She has stated that her marriage with Babu was arranged after the incident. She has denied that Babu had threatened her to depose against the accused.

15. PW7 Dr. Yogesh Thawal, was attached to Sasoon Hospital, Pune. He has deposed that on 9.6.2014 the police had referred the victim for medical examination. He examined the victim. Her hymen was torn completely. The tears were 3 to 7 O'Clock and were healed. The clinical examination revealed the possibility of sexual intercourse. He has stated that the Medical Certificate (Exh.33) was prepared by Dr. Tanya and he has confirmed the contents of the same.

16. PW9 Janak Kumar is a purohit. He has deposed that on 23.6.2014, one Kondiba Ghanwat had come with a boy and a girl

and had requested him to solemnize their marriage. The said girl had disclosed her name and had told him that she was above 18 years of age. He has identified the accused as the boy who had accompanied the victim girl.

17. PW10 Sharad Kale is the Investigating Officer. He was attached to Range Hill Police Chowki. Khadki. He has deposed that the father of the victim had initially filed a missing report and thereafter a complaint. He has stated that he took search of the accused and traced the victim and the accused at Warje. He has produced the birth certificate of the victim at Exh. 63. He had filed the chargesheet after completing the investigation.

18. The evidence of the victim clearly indicates that she was in love with the accused. These two youngsters, infatuated with each other, eloped and stayed in a lodge at Panhala for eight days. During this period they indulged in sexual activity. Pursuant to the missing report and the complaint lodged by the father of the victim, the Investigating Officer PW10 took search and traced them at Warje. They were brought to the police station. The

accused was arrested and is presently in custody, while the victim has married her childhood friend and has settled down in life.

19. The evidence of the prosecutrix amply proves that the relationship was consensual. Hence the core question for consideration is whether the victim was a 'child' within the meaning of Section 2(d) of the POCSO Act.

20. 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. "

21. 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.”

22. The crime in the present case was registered prior to 2015 amendment of the Juvenile Justice Act, and hence the determination of age would be in accordance with and as per the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and the Rules framed thereunder. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules 2007 (for short 2007 Rules) which contemplates the procedure to be followed in determination of age reads thus :-

“(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a) (i) the matriculation or equivalent certificate, if available, and in the absence whereof;

(ii) The date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

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

(b) and only in the absence of either (i), (ii) or (iii) of

clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

23. A plain reading of this Rule and the decision of the Apex Court in Jarnail Singh (supra) makes its abundantly clear that under Sub Rule (3) of Rule 12 the age of a child is ascertained by adopting the first available basis, out of a number of options postulated in the said Rule. From the options available under Rule 12(3), an option in the preceding clause will have over riding

effect over an option in subsequent clause. Under Rule 12(3), date of birth recorded in matriculation (or equivalent) certificate of the concerned child, is the first option. In the absence of such certificate, Rule 12(3) envisages consideration of the date of birth recorded in the first attended school (other than a play school) and it is only in the absence of such certificate, the age can be proved by producing the birth certificate issued by a Corporation, or Municipal Authority or a Panchayat and in the absence of the above, by medical opinion.

24. It may be mentioned that age determination of a victim is vital for the applicability of the POCSO Act. Hence, the burden was on the prosecution to prove that the victim was below 18 years of age. Though Sub Section 2 of Section 34 does not prescribe any specific procedure for determination of the age of the child, who is the victim of crime, the Hon'ble Supreme Court has held that Rule 12 (3) should be the basis for determining the age of the victim. It has to be borne in mind that the POCSO Act contains stringent provisions and mandates minimum sentence of imprisonment. Hence, following the well settled principle that

stringent provisions require strict compliance of the provisions, the prosecution was required to prove the age of the victim in strict compliance of the law, as laid down by the Apex Court.

25. In this regard it is to be noted that PW1 and PW2 have stated that the date of birth of the victim (PW2) is 6.9.1997, thus indicating that the age of the victim on the date of the incident was of 16 years and 8 months. It is to be noted that the evidence of PW9 indicates that at the time of solemnisation of marriage, the victim had stated her age as 18 years. There is thus no consistency in the oral evidence of the victim as regards her age.

26. The evidence of PW1 and PW2 clearly indicates that at the time of the incident, the victim was a student of Class X in All Saints English School, Khadki. These witnesses have not produced any document to prove the age of the victim as recorded in the school records. No reasons have been assigned for withholding these material documents.

27. It is pertinent to note that PW10, the Investigating Officer has produced the birth certificate of the victim issued by the

Corporation. This Certificate was produced by the Investigating Officer at the fag end of the trial. As a result, the accused had no opportunity to cross examine the victim or her father on the said certificate. Needless to state that such a procedure impacts right to fair trial.

28. It is also to be noted that the circumstance as regards the age of the victim, as deposed by PW1 and PW2 and/or as reflected in the birth certificate was not brought to the notice of the accused in the statement under Section 313 Cr.P.C. The accused therefore had no opportunity to explain this circumstance. In the case of Maheshwar Tigga (supra) the Hon'ble Supreme Court has held that *"it stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides in the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the*

requirement of proof beyond reasonable doubt.”

29. Similarly, in Reena Hazareeka (Supra) the Hon’ble Supreme Court has reiterated that “*Section 313 Cr.PC. cannot be seen simply as part of audi alteram partem. It confers a valuable right upon a accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313 (2) of Cr.PC.*”

30. In the instant case, the relevant evidence as regards the date of birth of the victim, as per the oral evidence of PW1 and PW2 or as recorded in the birth certificate, has not been put to the accused under Section 313 of Cr.PC. As noted above, the applicability of the provisions of the POCSO Act depends on the age of the victim. Hence the evidence relating to the age of the victim was a vital circumstance appearing against the accused. It was therefore fundamental that his attention should have been drawn to every inculpatory material so as to enable him to explain it. The trial

Court has not drawn the attention of the accused to this vital circumstance and he had no opportunity to explain the circumstance appearing against him. In such circumstances, prejudice is implicit. Having failed to draw the attention of the accused on this vital circumstance, the trial Court could not have relied upon the same.

31. It is true that it was suggested to PW1 that he had agreed to get the victim married to the accused after she became 18 years of age. In *Rajesh Namdev Mhatre vs. State of Maharashtra (2002) 4 Mh.L.J. 266*, the Division Bench of this Court has reiterated that the suggestions made in the cross-examination of the prosecution witnesses cannot be used to fill in the gaps in the evidence of the prosecution and the burden lies on the prosecution to prove the guilt of the accused. It is further held that though the suggestion made in the cross-examination is not evidence but it can be used to lend assurance to the prosecution case. Be that as it may, this suggestion does not specify as to when PW1 had so agreed, whether it was immediately before the incident, several months or years before the incident. Hence the said suggestion cannot be

construed as an admission of the fact that as on the date of the incident, the victim was below 18 years of age.

32. The sexual relationship between the victim and the accused was consensual. The prosecution has failed to prove beyond doubt that the victim was below 18 years of age as on the date of the incident. Under these circumstances, the accused cannot be held guilty of offences under Section 376 of IPC or 4 of the POCSO Act. Consequently, the impugned judgment and sentence cannot be sustained.

33. Hence, the appeal is allowed. The impugned judgment and order is quashed and set aside. The accused is acquitted of offence under Section 376 of IPC and Section 4 of the POCSO Act. The accused be released forthwith, if not required in any other case. Fine amount, if deposited, be refunded to the accused. The accused shall furnish bond under Section 437A of Cr.P.C. before the Special Court within a period of two months.

(ANUJA PRABHUDESSAI, J.)