

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

APPEAL NO.1497 of 2019

Mahadev Rambhau Khodave ..Appellant

v/s.

The State of Maharashtra & Anr. ..Respondent/s

Mr. Ghansham Jadhav for the Appellant .

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

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 1st SEPTEMBER, 2021.**

ORAL JUDGMENT.

1. This is an Appeal under Section 374 of Cr.PC. directed against the judgment dated 21.09.2019 in POCSO Special Case No.489 of 2016. By the impugned judgment the learned Special Judge, POCSO Court, Pune has held the Appellant guilty of the Offences under Section 363, 366, 376(2)(i) of Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences Act (POCSO), 2012 and sentenced him as under:

- (i) rigorous imprisonment for three years with fine of Rs.1000/- i.d. simple imprisonment for three

months for offence under Section 363 IPC.

(ii) rigorous imprisonment for three years and fine of Rs.1000/- I.d. simple imprisonment for three months for offence under Section 366 of IPC.

(iii) rigorous imprisonment for 10 years and fine of Rs.5000/- I.d. simple imprisonment for four months for offence punishable under Section 376(2)(i) of IPC.

. No separate punishment has bene awarded for offence under Section 4 of POCSO Act, 2012. The substantive sentence has been ordered to run concurrently.

2. The case of the prosecution in brief is that in the year 2015 the prosecutrix (PW4) was residing with her parents at Lohagaon, Pune. She was studying in 9th standard in BJS College. On 08.04.2015 at about 3.00.pm. while the victim was in the house of her paternal aunt, the appellant came and told that her mother had sent him to pick her up. She accompanied the Appellant on his motorcycle. It is alleged that instead of taking her home, the Appellant forcibly took the prosecutrix to Dadar, Mumbai and

thereafter to Pandharpur. The Appellant hired a room at Pandharpur. The prosecutrix has alleged that the Appellant had forcible sexual intercourse with her at Pandharpur. Later, after about 2-3 days they returned to Pune via Jejuri. The Appellant dropped her near Indrayani Hotel, at Wagholi, Pune. She called her brother at the spot and went to the police station along with her brother and father. Her father lodged the FIR against the Appellant for kidnapping and committing rape/ committing sexual assault on the prosecutrix. Pursuant to the said FIR Crime No. 114 of 2015 came to be registered against the Appellant. PW6 Poonam Patil, PSI attached to Lonikand Police Station recorded the statement of the victim. Further investigation was carried out by PW5 Shivshan Lalasaheb Khose. Upon completion of investigation, chargesheet came to be filed against the Appellant.

3. Charge was framed and explained to which the Appellant pleaded not guilty and claimed to be tried. Prosecution in support of its case examined 8 witnesses. The statement of the Appellant was recorded under Section 313 of Cr.P.C. The defence of the Appellant was of total denial. The learned Judge after

considering oral as well as documentary evidence, convicted and sentenced the Appellant as stated above. Being aggrieved, the Appellant has preferred the present Appeal.

4. Mr. Jadhav, learned Counsel for the Appellant submits that the prosecution has failed to prove that the prosecutrix was a child within the meaning of Section 2(d) of POCSO Act, 2012. He submits that the School Leaving Certificate at Exhibit 30 was issued subsequent to the date of the incident. He submits that the prosecution has not examined the person who had disclosed the date of birth of the prosecutrix and has not placed on record any material to prove that the date of birth of the prosecutrix was 04.02.2001. He therefore contends that the school leaving certificate has no evidentiary value. He has relied upon the judgment of the Apex Court in *Alanelu & Anr. vs. State (2011) 2 SCC 385* and the judgment of the Bombay High Court in *Santosh @ Abasaheb Thorat vs. State of Maharashtra 2018 ALL MR (Cri.) 3625*.

5. Learned Counsel for the Appellant further submits that the

evidence of PW3, brother of the prosecutrix indicates that he was 27 years of age as on the date of the incident and that he has admitted in his cross examination that the prosecutrix was five years younger to him. He therefore contends that the evidence of PW3 reveals that the prosecutrix was about 22 years of age on the date of the incident. Learned Counsel for the Appellant further submits that the photographs at Exhibit 30 falsify the charge of abduction and rape. He further submits that the prosecutrix had accompanied the Appellant from Pune to Dadar, Mumbai on a motorcycle and thereafter to Pandharpur by bus, and that she had stayed with him at Pandharpur for 2-3 days. She had neither raised alarm nor made attempt to escape, and this according to him belies the contention of the prosecutrix that the Appellant had enticed her to accompany him and that he had forcible sexual intercourse with her against her wish and without her consent. Learned Counsel for the Appellant submits that the prosecution has failed to establish the guilt of the Appellant beyond reasonable doubt and as such the learned Judge was not justified in holding the Appellant guilty and convicting and sentencing him as stated above.

6. Per contra, learned APP states that the evidence of the prosecutrix and her brother (PW3) vis-a-vis the school leaving certificate (Exh. 30) and the evidence of PW7 Ankush Balkrishna More, a junior clerk of the said school clearly indicates that she was a student of 9th standard and that as on the date of the incident she was 14 years of age. Learned APP further submits that the evidence of PW1 also proves that the Appellant had taken the prosecutrix on a false pretext that she was called by her mother. Ld.APP has urged that the evidence of the prosecutrix proves that the Appellant had forcible sexual intercourse with her. It is contended that the prosecutrix was a minor and the consent, if any, is immaterial. Moreover, the Appellant had not taken such defence before the trial Court.

7. I have perused the records and considered the submissions advanced by the learned Counsel for the Appellant and the learned APP for the State, and Ms. Dhuru, learned Counsel for the prosecutrix.

8. The Appellant herein has been held guilty of offence under Section 363, 366, 376(2)(i) of Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences Act (POCSO), 2012 . 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 safe guard 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. The prosecution in order to prove that the prosecutrix was 14 years of age, has relied upon the School Leaving Certificate (Exhibit 30) issued by Sant Tukaram Vidyalaya, Lohgaon.

9. In *Alamelu & Anr.* (supra) the Hon'ble Supreme Court has observed that the date of birth mentioned in the Transfer Certificate would have no evidentiary value. In the absence of the material on the basis of which the age was recorded or unless the person who made an entry or who gave the date of birth is examined. In the instant case, the school leaving certificate

records the date of birth as 04.02.2001. The Certificate (Exh.30) also reveals that the prosecutrix had taken admission in the said school on 15.06.2016 i.e. after the date of the alleged incidence. The Certificate was procured on 27.07.2016 i.e. more than a year after the incident. The evidence of PW7 Ankush More, the Junior Clerk of Sant Tukaram Vidyalaya , indicates that as per the School records the prosecutrix had earlier attended the Zilla Parishad Prathamik School, Digrajwadi. He has further admitted that whenever a student is admitted in the first standard, birth certificate is taken from her parents. He has further admitted that Sant Tukaram Vidyalaya had not taken birth Certificate when the prosecutrix was admitted in Sant Tukaram Vidyalaya School at Lohogaon.

10. The evidence of PW7 thus reveals that the birth date of the prosecutrix was not recorded in the School Leaving Certificate (Exh.30) on the basis of the Birth Certificate. The witness has not explained as to on what basis the birth date of the prosecutrix was recorded as 04.02.2001. The prosecution has not examined the Headmaster of the school or the person who had issued the

School Leaving Certificate at Exhibit 30 or the person who had recorded the date of birth in the said Certificate. The prosecution has also not examined the person who had disclosed the date of birth of the prosecutrix to the School Authorities. In the absence of such evidence, the School Leaving Certificate (Exh.30) has no evidentiary value.

11. It is also pertinent to note that PW3 as well as PW4 have not deposed that the date of birth of the prosecutrix is 4.2.2001. On the contrary, the evidence of PW3, brother of the prosecutrix indicates that he was 27 years of age as on the date of the incident. He has deposed that the prosecutrix is five years younger to him. His statement therefore indicates that the victim was about 22 years of age on the date of the incident. The evidence of PW1, uncle of the prosecutrix also indicates that the victim got married about two to three months after the incident, which fact also belies the contention that the proecutrix was 14 years of age as on the date of the incident. Hence, in my considered view, the prosecution has failed to establish beyond reasonable doubt that the prosecutrix was a 'child' within the

meaning of Section 2(d) of the POCSO Act. Hence conviction of the Appellant under Section 363 IPC and under Section 4 of POCSO Act cannot be sustained.

12. The next question is whether the prosecution has established that the Appellant had compelled the prosecutrix by deceitful means to accompany him and whether he had sexual intercourse without her consent.

13. PW1 Madhukar Kayande, paternal uncle of the prosecutrix has deposed that on 8.4.2015 the prosecutrix had come to his house. He states that some time later the Appellant came on a motorcycle and took the prosecutrix along with him under the pretext that she was called by her mother. He has admitted in his cross examination that he was not present in the house at the time of the incident. It is thus evident that the statement made by him in his examination-in chief is not based on his personal knowledge and has no evidentiary value.

14. PW4 also claims that the Appellant had come to the house

of her paternal aunt at about 3.00 p.m. and had persuaded her to accompany him on his motorcycle under the pretext that she was called by her mother. She claims that instead of taking her home, the Appellant took her to Dadar, Mumbai. She claims that they reached Dadar the next morning. They went to Dadar Beach and later they went to Pandharpur by bus. They hired a room near Janabai temple and stayed in the said room. She claims that while they were staying at Pandharpur the Appellant had forcible sexual intercourse with her during her menstrual cycle.

15. The evidence of the prosecutrix (PW4) clearly indicates that she had traveled with the Appellant on his motorcycle from Pune to Dadar, Mumbai. She has gone to Dadar Beach along with the Appellant and thereafter traveled with him by bus from Mumbai to Pandharpur. She has stayed with him in a rented room for a couple of days. During the entire stay with the Appellant, the prosecutrix had not raised an alarm and she did not inform anyone that she was being forced or compelled to accompany him. On the contrary, her evidence indicates that even after the alleged incident of rape she had voluntarily accompanied the Appellant to

Jejuri. The conduct of the prosecutrix clearly indicates that she had accompanied the Appellant on her own free will and stayed with him. This is further fortified by the photographs at Exhibit 26 to 29. The prosecutrix has admitted that these photographs were taken at Dadar and Pandharur. These photographs not only falsify the contention that the prosecutrix was under pressure and or frightened but demonstrates that the prosecutrix was very much comfortable and happy in the company of the Appellant.

16. It is also to be noted that though the first information report was lodged on 10.04.2015, the prosecutrix was sent for medical examination only on 27.04.2015. There is no explanation for the delay in medical examination. Be that as it may, PW8 Dr. Shailendra Pawar has deposed that the prosecutrix had given the history of sexual intercourse by the Appellant under the promise of marrying her. He has deposed that there were no external bodily surface injuries, the hymen had old healed tears, there was no perihymenal inflammation. He has further stated in the cross examination that the prosecutrix had not given the history of the Appellant having sexual intercourse with her during her

menstruation period, on the contrary she had stated that her last menstruation period was on 12.02.2015. The history given to the doctor by the prosecutrix is not in consonance with her evidence before the Court. The medical evidence does not corroborate the case of forcible sexual intercourse.

17. The evidence on record therefore suggests that the physical relationship between the Appellant and the prosecutrix was consensual. The prosecution has thus failed to establish the charge of kidnapping/abduction and rape. Consequently, the conviction and sentence for offence under Section 366, 376(2)(1) cannot be sustained.

18. Under the circumstances, the Appeal is allowed. The order of conviction and sentence for the offences punishable under Section 363, 366, 376(2)(i) of Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences Act (POCSO), 2012 is quashed and set aside. The Appellant is acquitted of the offences under Section 363, 366, 376(2)(i) of Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences Act (POCSO), 2012. Fine amount,

if deposited, be refunded to the Appellant. The Appellant be set at liberty forthwith, if not required in any other case.

PRASANNA P
SALGAONKAR

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(ANUJA PRABHUDESSAI, J.)