

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 292/2019

Kanhaiya S/o Moti Harde,
Aged about 28 years,
Occ. Labour, R/o. Khamari,
Tah. Mohadi, Dist. Bhandara.

.... APPELLANT

// VERSUS //

1. State of Maharashtra,
through Police Station Officer,
Police Station Andhalgoan,
Tah. Mohadi, Dist. Bhandara.
2. Ku. Budhawari d/o. Amol Jangle,
Aged about 28 years, Occ. Labour,
R/o. Khamari, Tah. Mohadi,
Dist. Bhandara

.... RESPONDENTS

Shri Amol G. Hunge, Advocate for appellant.
Ms. H. N. Jaipurkar, A. P. P for respondent No.1.
Shri V. S. Bapat, Advocate for respondent No. 2.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT ON : 17.12 .2020
JUDGMENT PRONOUNCED ON : 06.01.2021

JUDGMENT

Heard.

2. By this appeal, appellant/accused Kanhaiya Harde is challenging the judgment and order dated 27.02.2019 passed by the learned Special Judge (under POCSO Act), Bhandara, thereby convicted appellant (accused) of the offence punishable under Sections 376(2)(i)(n), 363 of the Indian Penal Code and Section 4 read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (short 'POCSO Act') and for the offence punishable under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (short 'SC and ST Act'). By resorting the provision of Section 42 of the POCSO Act, the Trial Court has awarded punishment for the offence punishable under Section 6 of the POCSO Act instead of Section 376(2)(i)(n) of the Indian Penal Code. Though the different term of sentence has been imposed under rest of the offences, the maximum term of imprisonment imposed for the offences punishable under Section 6 of the POCSO Act was to undergo rigorous imprisonment for 10 years and a total fine of Rs. 52,000/- with stipulation of default has been imposed.

3. Facts leading to the prosecution and resultant conviction of accused are as under:-

(a) According to the case of prosecution, the victim (PW1) of the crime was a school going girl taking education in 9th standard at relevant time. She was residing along with her parents at village Kharmari (Budh), Tah. Mohadi, Dist. Bhandara. Her date of birth was 03.06.1999, meaning thereby she was 16 years of age at the time of occurrence.

(b) The accused – Kanhaiya was resident of the same village. On 16.09.2014, victim attended school in early hours and then in the afternoon around 02.00 p.m. she went outside to answer nature's call. At that time, the accused arrived and on the point of knife asked her to sit on his motorcycle. She initially resisted but due to fear, accompanied him on his motorcycle upto Nagpur.

(c) On the same day in the evening around 08.00 p.m., they reached Nagpur where victim was taken to a room. Both of them stayed for ten days where accused had committed repeated sexual intercourse with her.

(d) Thereafter, the accused brought victim by train to village Khamari where the accused was staying. He took her to his house, however his family members refused to accept, hence both of them stayed in their cattle shade for two days. During that period, accused had committed forcible sexual intercourse with her.

(e) Thereafter, accused took her in rented house where both of them stayed for 10 to 12 days. During said period also she was subjected to forcible sexual intercourse.

(f) Thereafter, accused went to village Khusavri, Tah. Mohadi, but he did not return. The victim made phone call to the accused but he did not respond. Since accused never returned for two days, victim returned to her parental house.

(g) After return to her house, the victim girl has informed the things to her parents. She stated that the accused by giving promise to marry and under compulsion had committed repetitive sexual intercourse with her. On 06.01.2015, victim went to the Police Station along with her parents and lodged report (Exh. 25).

4. On the basis of report regarding commission of cognizable offence, the Police registered Crime No. 1/2015 for the offence punishable under Sections 363, 366(A) 376(2)(i)(n), 201, 417, 506 of the Indian Penal Code, Sections 3, 4, 5, 6 of the POCSO Act, and Section 3(1)(xii) of the SC and ST Act. Since the offence was registered under the provisions of SC and ST Act, investigation was handed over to the Sub-Divisional Police Officer, Bhandara. During course of investigation, victim girl was sent for medical examination, Panchanama of the scene of offence was drawn, knife and motorcycle used in commission of crime were seized, clothes of victim girl were seized, her caste certificate was collected and necessary samples were collected for chemical analysis. After completion of investigation, final report has been submitted in the Special Court. The defence of accused was of total denial. The prosecution has examined as many as 14 witnesses to establish the guilt of the accused. Moreover, prosecution relied on several documents to substantiate its case.

5. After hearing the parties, the Trial Court by the impugned judgment and order, came to the conclusion that the victim was a child at relevant time. It is held that accused had committed rape amounting to penetrative sexual assault on her at various places and

that is how he had committed the offence of rape and repetitive penetrative sexual intercourse punishable under Section 376 of the Indian Penal Code and under Section 6 of the POCSO Act. Accordingly, accused came to be convicted and sentenced as indicated above.

6. Heard Shri Hunge, learned counsel for accused. He has vehemently argued that the prosecution evidence is totally inadequate to establish the age of victim. He has strongly criticized the birth certificate produced by prosecution during course of evidence. There is variance in the name of mother of child as well as the place of birth has not been recorded hence the document cannot be believed at all. He would submit that neither source of information for recording date of birth has been brought on record nor parents of victim girl led evidence about her date of birth. According to him, in absence of link evidence, the birth certificate cannot be relied at all. Beside that, he would submit that the evidence of victim is totally unreliable and unacceptable. According to him at the most it was a case of consensual sex with major girl.

7. As against this, Ms. Jaipurkar, learned Additional Public Prosecutor argued that the age of victim was duly established by tendering birth certificate which is having presumptive value. She

would submit that the victim has specifically stated that under threat, she was compelled to succumb her body to the accused against her wishes. Since the medical examination was after prolonged delay, medical evidence would hardly be available and cannot be expected. In short, the prosecution evidence is sufficient to establish the guilt of the accused and therefore, judgment and order of conviction calls no interference. Shri V. S. Bapat, learned counsel for victim girl has tendered written notes of arguments in support of the conviction.

8. I have considered the arguments advanced by the learned counsel for the parties and also perused record, written notes of arguments, and various reported decisions cited by defence.

9. For the purpose of quick appreciation, it can be recapitulated that victim girl was allegedly kidnapped by accused on 16.09.2014 on the point of knife. She was taken at various places where the accused had committed forcible sexual intercourse. Finally, as accused left her alone, she returned to her house and lodged report.

10. The charge is for committing the offence of rape punishable under Section 376 of the Indian Penal Code along with offence of repetitive sexual assault punishable under Section 6 of the

POCSO Act. The age of victim is crucial aspect of the case, since if prosecution fails to establish that victim was below 18 years of age then the charge under the POCSO Act would not stand. True, the charge for rape would stand against a female of whatsoever age, but there is further requirement that the act must be against her will and without her consent. I am coming to said aspect in latter part of judgment.

11. So far as the occurrence is concerned, the prosecution is mainly banking upon the evidence of victim. It is her evidence that on the day of occurrence while she went to answer nature's call, accused accosted her, on the point of knife made her to sit on motorcycle and took away. Accused kept her in one small room for ten days at Nagpur where he committed forcible sexual intercourse. Thereafter, accused took her to village Khamari at his house. The parents of accused disowned them hence both of them stayed in cattle shade for two days where again there was sexual intercourse. She deposed that then accused took her to rented room where they stayed for 10 to 12 days where the story of sexual assault was repeated. Precisely, it is her evidence that for near about one month, they stayed at various places where she was sexually assaulted.

12. At the first blush, the entire evidence of victim itself discloses that there was no force or compulsion. This is so because she had ample opportunity for obtaining public recourse but she did not. Certain evidence reaffirms her voluntariness in the entire occurrence. To name few, on the day of occurrence she had traveled on motorcycle with accused for near about six hours. Certainly, on public road, she had ample opportunity to expose the things, but she did not. Then at Nagpur, she stayed for ten days in rented house where also she could have informed to others for rescue or could have run away. It is not her evidence that she was kept under confinement or under strict vigil. It is her evidence that when the parents of accused disallowed them, they stayed in the cattle shade. Certainly, it was open premises from where she could have easily escaped. Thereafter, also she stayed in rented room for 10 to 12 days at another place where also she had ample opportunity.

13. Pertinent to note that lastly, the accused went to village Khutsawari leaving her alone. At that time, the victim girl herself had telephonically contacted accused, still he did not return. The entire story discloses that absolutely there was no force or compulsion, rather she was willing to stay with accused therefore, she called accused to

come back but when he did not, having no option, she went to her parents and lodged report. Therefore, there is no manner of doubt that the entire occurrence was voluntary one. It reveals that the victim at her own will and desire left her parents' house and stayed with accused at different places. Sometime, they also worked as labour which denotes that she was very much interested to live with accused and therefore, it is not a case of forcible sexual intercourse at all.

14. Coming to the core issue which is about the age of victim, the prosecution is heavily and solely relying on the birth certificate of victim girl (Exh. 29) showing her date of birth as 03.06.1999. On the basis of said birth certificate, it is tried to impress that this being public document, it is decisive to establish her age. No doubt, if the birth certificate is believed, then on the day of occurrence, victim was below 18 years of age, meaning thereby she was 'child' within the meaning of Section 2(d) of the POCSO Act as well as in that case her consent would be of no significance she being minor.

15. Though prosecution has examined in all 14 witnesses, on the point of date of birth none of them is of use. The victim stated her date of birth as 30.07.1999, however her parents have not supported her case. The victim's father has not been examined. Though victim's

mother (PW11) Hemin Jangale has been examined, her evidence is totally silent about date of birth or age of victim. Neither school record nor any other document to corroborate the evidence of date of birth has been tendered. In absence of other material, the isolated document of date of birth requires strict scrutiny. The Trial Court has not seriously dealt with the issue of date of birth which was rather important aspect of the case. The Trial Court (Para 36 of the judgment) has simply believed on the date of birth certificate by stating that it being a public document, bares presumptive value. Besides that, the Trial Court has not considered the pros and cons, credibility and reliability of such isolated document. Certainly, the said task has to be undertaken in the appeal to satisfy the judicial mind.

16. The learned counsel for defence strongly criticized the judgment of Trial Court, by submitting that it utterly failed to appreciate birth certificate in its proper perspective. He would submit that, without getting assured about correctness and genuineness of the sole document, the Trial Court failed in relying the same. In support of said contention, the defence relied on several decisions of this Court and the Supreme Court.

17. The first reliance is placed on the decision of the Supreme Court in case of *Alamelu & Anr. Vs. State represented by Inspector of Police, 2011 ALL MR (Cri) 1278 (S.C.)*. In said case, it has been ruled that the date of birth noted on transfer certificate cannot be relied in absence of examination of father who has recorded her date of birth. It is observed that though such document is admissible under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age in absence of the material on the basis of which the age was recorded.

18. In case at hand, the Investigating Agency has merely produced the date of birth certificate obtained during the course of evidence. Neither any witness is examined nor even Investigating Officer has deposed as to when and how he has obtained said certificate. Merely because the document (Exh. 29) was proved being public document, it does not mean that the contents of document were also proved. Needless to say that mere exhibiting a document would not tantamount to the proof of all the contents or the correctness of the date of birth stated in the document. Neither mother of victim girl uttered a single word about date of birth of victim nor father has been

examined to state who has given information for recording her date of birth.

19. Learned defence counsel submitted that in cases under the POCSO Act, heavy burden lies on the prosecution to establish that the victim was a 'child' within the meaning of Section 2(d) of the POCSO Act. So also, it is submitted that a birth certificate issued by the Grampanchayat produced at belated stage cannot be relied. In this regard, reliance has been placed on the decision in case of ***Ravi Anandrao Gulpude Vs. State of Maharashtra, 2017 ALL MR (Cri) 1509.*** The Division Bench of this Court has expressed that though the document of birth is having its presumptive value, it is not safe to rely for various reasons as set of in para 11 of the judgment. The reasons are that the date of birth of siblings were not stated, no explanation about late procurement of birth certificate, difference in name of the victim, first time disclosing the date of birth in evidence etc. In the instant case also there are similar features. First Information Report (Exh. 25) is totally silent about the date of birth of victim. The tainted birth certificate was issued on 27.11.2018 i.e. one day prior to the commencement of prosecution evidence. Strikingly the name of mother of child as mentioned in birth certificate is different. As per

birth certificate (Exh. 29) mother's name is mentioned as "Memibai" whilst the name of mother i.e. PW 11 is Hemin. Moreover, the place of birth has not been mentioned in the certificate nor registration number has been stated. Thus, there are several reasons which puts Court on guard while accepting the evidence of such isolated document.

20. Learned counsel for defence argued that in absence of source of information for recording date of birth, the evidence of birth certificate cannot be relied. To uphold said proposition, he relied on the decision of this Court in case of *Dilip S/o Bhaiyyasingh Tekan Vs State of Maharashtra, 2018 ALL MR (Cri) 5092*. In said case, the Division Bench of this Court has discarded the evidence of birth certificate on the ground that there was nothing to show as to what was the source of said certificate. Learned counsel for defence by placing reliance on the decision of this Court in case of *Pramod Dattatraya Jadhav Vs. The State of Maharashtra, 2019 ALL MR (Cri) 1742* would submit that in absence of link evidence to demonstrate that birth certificate relates to the victim, the birth certificate would not be of any assistance.

21. Taking into consideration all above decisions, it is apparent that in absence of link evidence or source for information, the isolated

evidence may be admissible under the Evidence Act, but cannot be relied. Herein undoubtedly the birth certificate was seized in isolation without any explanation. The legal position is not in dispute that mere production and marking of document as exhibit cannot be held to be due proof of its contents. There is no whisper in the First Information Report about the birth date of victim, though she stated her date of birth during the course of evidence. The victim has stated her birth date first time during the course of evidence. The birth certificate issued by the Grampanchayat, Khamari is not free from doubt, particularly there was difference in name of mother of child whilst the registration number has not been mentioned. The evidence of the Investigating Officer is totally silent about collection of birth certificate. The Investigating Officer was well aware that the age of victim was mostly a decisive factor in such type of case, however no reliable evidence has been collected. The Trial Court in casual manner closed the chapter by merely stating that the certificate is public document. Undoubtedly, the tainted birth certificate (Exh. 29) is not free from doubt and therefore, it cannot be relied to base a conviction.

22. Reverting back, as discussed above, I hold that the prosecution evidence failed to establish that the accused had forcibly

committed rape or penetrative sexual assault on the victim girl. On the contrary, the entire story discloses that the victim was totally consenting party. She had stayed with accused at various places. Despite having ample opportunity, she never ran away which reaffirms her volition of mind. Since prosecution failed to establish that victim was below 18 years of age i.e. 'child' within the meaning of Section 2(d) of the POCSO Act, the case under special Act would not stand. Inasmuch as failure of prosecution to establish that victim was below 18 years, would also exclude the culpability from the charge of kidnapping and rape since it was consensual act.

23. The above discussion also leads me to hold that the act being voluntary, it cannot be held that the accused has committed the act, only because the victim belongs to Scheduled Caste, therefore, conviction under Section 3(1)(xii) would also fail.

24. In the result, it cannot be said that the sexual intercourse between the accused and victim was amounting to rape or penetrative sexual assault. The accused is well entitled for benefit of doubt. The above discussion leads me to hold that the impugned judgment and order of conviction would not sustain and as such the appeal deserves to be allowed and hereby allowed accordingly.

25. The impugned judgment and order of conviction and resultant sentence dated 27.02.2019 passed by the Special Judge (under POCSO Act), Bhandara in Special Cri. (Child) Case No. 17/2015 is quashed and set aside. Accused – Kanhaiya S/o Moti Harde is acquitted of the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act and Section 3(1)(xii) of the SC and ST Act. Accused – Kanhaiya S/o Moti Harde be set at liberty forthwith, if not required in any other case.

26. Fine amount if deposited, be refunded to the accused.

27. Muddemal property be dealt with in accordance with law.

28. Appeal is disposed of accordingly.

JUDGE