

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 327/2019.

Gajanan s/o Devrao Rathod,
Aged about 22 years, Occupation Daily
Wages, resident of Ner, Ta. Ner,
District Yavatmal (In Jail)
C-5305 at Central Prison, Nagpur. ... **APPELLANT.**

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Ner,
District Yavatmal. ... **RESPONDENT.**

Mr. V.P. Mohod, Advocate (Appointed) for the Appellant.
Mr. I.J. Damle, A.P.P. for the Respondent.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT ON : 02.08.2021
JUDGMENT PRONOUNCED ON : 27.08.2021

JUDGMENT :

The appellant is convicted for the offence punishable

2

under Sections 363, 366, 376(2) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The trial Court has imposed maximum sentence of rigorous imprisonment for 10 years for the offence punishable under Section 376[2] of the Indian Penal code. The total fine of Rs.11,000/- has been imposed. All the substantive sentences were directed to run concurrently. Being aggrieved and dissatisfied by the said judgment and order dated 18.06.2018, passed by the Special Judge (POCSO Act) Yavatmal in Special Criminal Case No.81/2016, this appeal is preferred.

2. It is the prosecution case that the informant is mother of the victim girl aged 14 years. On 27.06.2016, the informant mother sent the victim to the fair price shop of village Vاتفالي to bring grocery material, but, she did not return. The informant had searched for the victim at possible places, but, she could not be traced. The informant came to know that the accused Gajanan, who is also resident of same village also went missing, therefore, the informant went to the house of the accused, on which she learnt that Gajanan went away with the minor victim. Thereafter the informant

3

went to the concerned police station and lodged report. The police initially registered crime vide C.R.No.232/2016 for the offence punishable under Sections 363 and 366-A of the Indian Penal Code. After recording the statement of the victim, penal provision of Section 376 of the Indian Penal Code and Section 3 read with Section 4 of the POCSO Act were added.

3. It is the prosecution case that on 27.06.2016, when the victim got down from the bus near Government Hospital, Ner, the accused and his sister met her. Sister of the accused asked her to go with the accused and gave a sum of Rs.1000/- to the accused. Then the accused took the victim girl by bus to Amravati, then to Morshi and finally took her at his paternal aunts' house at village Lahegaon. The accused told to his paternal aunt that he has performed marriage with the victim and asked to allow them to stay for some days. In the said house, the accused stayed with the victim in separate room. On both successive nights, the accused committed forcible sexual intercourse with the victim. Accused also threatened the victim not to disclose the things. On third day one relative of appellant/accused namely Narubai came and took the victim to

4

village Ner at the house of one Punjabrao. Thereafter, the victim was taken to the police station where informant was also called. The police recorded statement of victim girl and carried further investigation. On completion of investigation, final report is filed in the Special Court.

4. The trial Court has framed charge and on denial of the guilt, the prosecution has examined in all 8 witnesses to establish the guilt. The accused has also examined one witness namely Sitabai in defence. The statement of accused was recorded by the trial Court to seek his explanation on incriminating material. The prosecution also banks upon certain documents in support of its case. The defence of accused is of total denial, and false implication. After considering the oral and documentary evidence, the trial Court has recorded a finding of guilt in respect of the charged offence and imposed punishment as mentioned hereinbefore.

5. I have heard Shri Mohod, learned Counsel [appointed] for the appellant/accused and Shri Damle, learned A.P.P. for respondent – State.

5

6. The learned Counsel for the appellant strenuously argued that the prosecution has utterly failed to prove the age of the victim. By denying the occurrence, it is submitted that there is no material to establish that the accused has kidnapped the minor, and had forcible sexual intercourse. In short, it is contended that this is a case of false implication, hence, he urged to acquit the accused by reversing the findings recorded by the trial Court.

7. Per contra, the learned A.P.P. would submit that the prosecution has duly established the leveled charges with requisite standard of proof. The victims' evidence is well supported by various circumstances. The medical examination report shows that hymen was found teared, and it was opined that possibility of sexual assault cannot be ruled out. According to the learned A.P.P., on the basis of date of birth certificate the prosecution has established that the victim was minor at the time of occurrence. He would submit that the trial Court has appreciated the evidence in its proper perspective, hence, the judgment and order of conviction calls for no interference.

8. It is the prosecution case that on 27.06.2016, the accused

6

has eloped with the minor victim aged 14 years, took her to his relatives house and had sexual intercourse with her repeatedly for two days. Two fold defence has been raised, firstly, the victim was not minor and secondly, at the most it was a case of consensual sexual relations. In view of the nature of allegations and defence, the age of the victim is a crucial factor for consideration. Inasmuch as unless the victim is a child, within the meaning of Section 2[d] of the POCSO Act, the provisions of the stringent Special Act cannot be invoked. Therefore, at the inception it would be apt to deal with the aspect of the age of the victim at the time of occurrence.

9. In this regard, the prosecution has placed on record victim's date of birth certificate [Exh.36], issued under the provisions of Registration of Births and Death Act, 1969 by Gram Panchayat, Walki. The investigating officer has collected said certificate from the Gram Panchayat, Walki. The birth certificate – Exh.36 is issued on 28.06.2016. It shows that the date of birth of the victim [full name mentioned] is 03.05.2002, whilst the birth entry was registered on 04.10.2002 vide entry no.3. The incident took place during the period from 27.06.2016 to 29.06.2016,

meaning thereby as per the birth certificate [Exh.36], the victim was 14 years and 1 month old at the time of occurrence.

10. The learned Counsel for the appellant has strongly denied the age of the victim. According to him, the victim was major at the time of occurrence, and therefore, the provisions of POCSO Act would not apply. It is argued that the first information report does not bear the date of birth of the victim, nor it was stated by the informant during her evidence. According to him, merely on the basis of date of birth certificate, the age of the victim cannot be proved. He would submit that the source of information about the birth certificate and its validity has not been tested or proved. In support of said submission, he has relied on various decisions of this Court.

By placing reliance on the decision of this Court in case of **Ravi Anandrao Gulpude .vrs. State of Maharashtra (2017 All MR (Cri) 1509)**, it has been argued that it is not safe to rely on mere birth certificate of the prosecutrix. It reveals from the decision that due to certain deficiencies, this Court has not relied on the birth certificate. This Court has taken into account that the birth date

certificate was issued prior to the issuance of requisition letter and more particularly the name of the victim was mentioned differently in the certificate. It was observed that there were three sisters to the prosecutrix, whose date of birth were not brought on record. Having regard to these deficiencies, this Court has shown its reluctance to rely on the date of birth certificate.

On the same point, next reliance is placed on the decision of this Court in case of **Raju Sukhdeo Dabhade .vrs. The State of Maharashtra and another (2018 All MR (Cri) 4841)**. In the said case date of birth certificate was not produced, but, school record was produced to establish the date of birth. This Court found it unsafe to rely on the school record where the victim took admission in 6th standard. The school record of previous school attended was not produced. In these distinct facts benefit was given to the accused which is not the case under consideration. Likewise, the decision relied by the appellant in case of **Dilip Bhaiyyasingh Tekam .vrs. State of Maharashtra (2018 All MR (Cri) 5092)**, would not assist, since in the said case mere copy of birth certificate was produced.

11. I have considered the decision of this Court in case of

Ittarsingh Janaklal Dahikar .vrs. The State of Maharashtra (2019 All MR (Cri) 1081), on which reliance is placed to discard the evidence on the point of date of birth of the victim. In said case the initial certificate issued by the Gram Panchayat on its letter head was suppressed. This Court noted that on the very next day of birth of the child, name of the child was recorded in the certificate. On that basis this Court has expressed that as to how on the next day of birth, there would be naming ceremony, hence showed its reluctance to rely on the certificate. The last reliance is on the decision of this Court in case of **Ganesh Manoharrao Palaspagar .vrs. State of Maharashtra [2020 (1) Mh.L.J. (Cri) 294]**. Again the said decision is distinguishable on facts. In said case, the primary evidence in the nature of date of birth certificate was not produced. In absence of cogent material this Court has not relied on the extract of admission register, which is not the case in hand.

12. Reverting to the facts of this case, the prosecution has produced birth date certificate of the victim issued by the Secretary of the concerned Gram Panchayat. In terms of Section 35 of the Indian Evidence Act, this document is having a presumptive value.

10

The alleged incident took place on 27.06.2016, whilst the first information report was lodged on 01.07.2016. Pertinent to note that prior to the registration of the first information report, birth certificate was issued on 28.06.2016. It requires to be noted that within 6 months from the date of birth, entry was taken in the register on 04.10.2002, which assures about its credibility. Always birth date certificate is a primary evidence which can be relied, unless its credentials are doubted, based on some material. Besides mere denial, the appellant has not brought any material on record to create doubt about the credibility of the birth date certificate. There is no reason to discard the primary document about the date of birth of victim. The prosecution has duly established that the victim was born on 03.05.2002, meaning thereby she was 14 years of age at the time of occurrence, thus a 'child' within the meaning of Section 2[d] of the POCSO Act.

13. Having been held so, the next part is about the alleged incident. Though it is argued that the evidence discloses that the victim was consenting party, however, the said submission is untenable in the light of above discussion that the victim was minor

11

at the time of occurrence. Needless to say that minors' consent is no consent in the eyes of law.

14. The victim has been examined at Exh.37. She stated that on 27.06.2016, she went to the control shop for fetching grain. The accused met her and at the instigation of his sister, took her by bus to Amravati, then to Morshi and then both went to Village Lahegaon. The victim stated that at Lahegaon, the accused took her to the house of his paternal aunt and said that both of them got married. On the request of the accused to permit them to stay for 2-3 days, his paternal aunt gave them one room.

15. On the point of actual incident, victim stated that in the said room the accused Gajanan forcibly committed sexual intercourse with her. The accused threatened her for not to disclose the things, and on the following day again did the same act. After two days, maternal aunt of the accused namely Narubai brought victim back, and then ultimately she went to the police station. All the while it was suggested that at the instance of one Pritam Rathod, a false report has been lodged. It is suggested that Pritam Rathod was having illicit relations with the mother of the victim, and since

12

the said fact was known to the accused, he has been roped in the false case. However, all the suggestions in that regard were denied by the victim as well as her mother. The victim has faired in entire cross examination on material aspect. Her evidence remained unimpeachable on the test of cross-examination.

16. The prosecution has examined P.W.7- Dr. Kapildev Patil, who has examined the victim on 02.07.2016. It has come in his evidence that on examination he did not found external injuries on her person, but, multiple old healed hymeneal tear was noted. He has opined that possibility of sexual assault cannot be ruled out. Medico legal report (Exh.54), equally speaks about multiple old healed hymeneal tear. According to the defence, the medical evidence does not support the prosecution case, since there were no external injuries. It requires to be noted that the victim voluntarily went with the accused and stayed with him for two days. It is apparent that there was no resistance on the part of the victim, therefore, external injuries were not possible. Tear of hymen supports the prosecution case about case of sexual assault. It emerges from the victims' evidence that she had sexual intercourse

13

with the accused. However, the victim being minor, it amounts to rape within the meaning of Section 375[a] of the Indian Penal Code. Moreover, in view of Section 3 of the POCSO Act, in case of a minor, insertion of penis into vagina to any extent, amounts to penetrative sexual assault.

17. The learned counsel appearing for the defence has submitted that though the Special Act provides presumption under Sections 29 and 30, however, unless basic facts are proved, the statutory presumption cannot be invoked. In this regard, he relied on the decisions of the Court in cases of - (1) **Mohan Ambadas Meshram .vrs. State of Maharashtra (2018 All MR (Cri) 4362)**, (2) **Ramprasad Fagulal Amdare .vrs. State of Maharashtra (2018 All MR (Cri) 4849)** and (3) **Navin Dhaniram Baraiye .vrs. The State of Maharashtra (2018 All MR (Cri) 4919)**. There cannot be debate regarding the proposition laid down by this Court about the applicability of the statutory presumption. Always it depends on the facts and circumstances of each case, whether in given facts the prosecution has ably established the essential fundamental facts to constitute an offence. No doubt the presumption does not take away

14

the essential duty of the Court to analyze the evidence on record, however, defence was not able to shatter the credibility of the victim during her evidence. Nor during the course of examination, improbabilities or infirmities had surfaced.

18. In above discussion, I have held that the evidence of the victim clearly speaks about the sexual assault made by the accused. The evidence of victim inspires full confidence. Moreover, her evidence is corroborated by the medical evidence. Thus, the prosecution has succeeded in establishing the essential facts from the evidence.

19. In sum and substance, the prosecution has duly established that the victim girl was 14 years of age at the time of occurrence. The evidence of the victim, coupled with her mothers' evidence specifically points finger towards the accused. The minor victim has stated about the entire occurrence, including the repetitive sexual assault for two days. At the cost of repetition, I may reiterate that since the victim was minor, the submission about consensual sex bears no substance in the eyes of law. In the result,

15

the prosecution has proved that the accused has committed sexual intercourse on the minor, which amounts to commission of offence of rape and penetrative sexual assault. The prosecution has also sufficiently established that a minor was taken away from the lawful guardianship, without the consent of the guardian. The learned trial Court has rightly appreciated the entire oral and documentary evidence. On re-appreciation of the entire material, I find no substance in the appeal. In view of that, the appeal being devoid of merit stands dismissed.

20. Fees of the appointed Counsel be paid as per Rules.

JUDGE

Rgd.