

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

CRIMINAL APPEAL NO. 745 OF 2019

Shri Rahul s/o Dagdu Sirsat
Aged about 36 years, Occ. Labour,
R/o Akolkhed, Tq. Akot and Distt. Akola.

.... APPELLANT

// VERSUS //

State of Maharashtra, through its Police
Station Officer, Police Station, Akot Rural,
Tq. Akot, Distt. Amravati.

.... RESPONDENTS

Shri D.A. Sonwane, Advocate for Appellant (Appointed.)
Ms. T. Udeshi, A.P.P. for Respondent-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

CLOSE FOR JUDGMENT : 02.02.2021

DATE OF PRONOUNCEMENT : 05.02.2021

JUDGMENT :

Heard finally by consent of both the parties.

2. This appeal filed under Section 374 of the Code of Criminal Procedure assails the judgment dated 27.11.2018 passed by the Additional Sessions Judge, Akot in Sessions Trial No.05 of 2016. By the impugned judgment, learned Additional Sessions Judge has held the Appellant, guilty of offence punishable under Sections 450, 452,

376(2) of the Indian Penal Code and Section 5(k) and 9(k) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). The Appellant has been sentenced to undergo rigorous imprisonment for 10 years and fine of Rs.20,000/-in respect of offence under Section 5(k) of the POCSO Act, rigorous imprisonment for 5 years and fine of Rs.10,000/- in default simple imprisonment for 1 year in respect of offence under Section 450 of the Indian Penal Code, rigorous imprisonment for three years and fine of Rs.5,000/- in default simple imprisonment for 6 months for the offence under Section 452 of the Indian Penal Code.

3. The brief facts necessary to decide this appeal are as under :

(a) The first informant P.W.1 Shobha has two sons and a minor daughter, who is mentally challenged. On 17.11.2015, P.W.1 Shobha and her husband and one of the sons had gone to the field. When they returned in the afternoon, they saw the victim girl and son P. W. 4 Amol crying. Upon being questioned, P.W.4 Amol told her that, the Accused herein had entered the house and had sexual intercourse with the victim girl. P.W.1 Shobha confirmed this fact from her daughter, and thereafter, went to the Police Station and lodged the First

Information Report at Exhibit 70. On the basis of said report, P.W.9 Balasaheb Naik (P.S.I.) registered Crime No.101 of 2015 against the Accused. The victim was medically examined by P.W.5 Dr. Prachi and P.W.6 Dr. Shwetambari. P.W.9 visited the spot and conducted spot panchnama at Exhibit 96 in presence of P.W.7 Gadre. He seized a blankets and the clothes of the victim under seizure memo at Exhibit 97 and 72. He recorded the statement of the victim and other witnesses. The Accused was arrested under the Arrest Panchnama at Exhibit 110, and the cloths worn by him were seized under seizure memo at Exhibit 90. The Accused was also sent for medical examination. The biological sample of the Victim as well as the Accused, the cloths and other incriminating material, were sent for chemical analysis and charge-sheet came to be filed against the Accused after completion of investigation.

(b) The charge was framed and explained to the Accused. The Accused pleaded not guilty and claimed to be tried.

4. The Prosecution in support of its case, examined 9 witnesses. The statement of the Accused was recorded under Section 313 of the Code of Criminal Procedure. The Accused pleaded false implication. He claimed that his Buffalo had damaged the wall of P.W.1

Shobha and that there was quarrel between them over the said incident. The Accused claimed that the first informant had falsely implicated him since he had refused to pay money for the damage caused to the wall. The Accused examined one defence witness.

5. Upon considering the evidence adduced by the Prosecution as well as the defence evidence, learned judge held that the victim was a child within the meaning of Section 2(d) of the POCSO Act. Learned Judge has further held that the victim was mentally challenged and that taking advantage of her mental disability, the accused had criminally trespassed into the house and committed aggravated penetrative sexual assault within the meaning of Section 5(k) of the POCSO Act and hence, convicted and sentenced the Accused as stated above.

6. Learned Counsel for the Accused has strenuously argued that the Prosecution has failed to prove that the Victim is a child within the meaning of Section 2(d) of POCSO Act. He submits that the birth certificate at Exhibit 103 produced by the Prosecution shows that the place of birth at Akolkhed. He states that the said birth certificate cannot be relied upon in view of the certificate at Exhibit 105 issued by the Village Development Officer. He further submits that the evidence

on record clearly indicates that the first informant and the victim have been residing at Mumbai, Nashik etc., and this falsifies the case of the prosecution that the victim was born on 13.03.1998 at Akolkhed.

7. Learned Counsel for the Accused further submits that the medical evidence indicates that the victim had not sustained any injuries. He therefore, claims that the medical evidence does not support the case of the prosecution. He submits that the First Informant (P.W.1) was not an eye witness. The only other eye witness is a minor brother of the victim, and being a minor no reliance can be placed on his testimony. He submits that the Accused has proved the defence through D.W.1, whose testimony clearly indicates that there was quarrel between the Accused and the first informant, in view of the damage caused to her wall by the Buffalo of the Accused. Learned Counsel for the Accused submits that the prosecution has failed to prove the offence beyond reasonable doubt hence the Accused is entitled for acquittal.

8. Per contra, learned A.P.P. submits that the birth certificate at Exhibit 103, sufficiently proves that the victim is a child. She submits that the evidence of the victim which is duly corroborated by her brother P.W.4, proves that the Accused had committed rape on a minor

girl. She submits that the evidence of the victim and P.W.4 is further corroborated by medical evidence as well as CFL report. Learned A.P.P. submits that the defence raised by the Accused is neither probable nor plausible.

9. I have considered the submissions advanced by the learned Counsel for the respective parties. The questions for consideration are whether the victim girl is a 'child' within the meaning of Section 2(d) of the POCSO Act and whether the Accused committed penetrative sexual assault on the child taking advantage of her mental disability under Section 2(d) of the POCSO Act, 'child' means any person below the age of 18 years.

10. It is the case of the prosecution, that the victim was a child i.e. below 18 years of age as on the date of the incident. The prosecution has relied upon the birth certificate at Exhibit 103, a perusal of which, indicates that the victim was born on 13.03.1998 at Akolkhed. The birth was registered on 17.03.1998. Immediate registration of birth, rules out the possibility of manipulation. In the case of *Jayant Gopalrao Pachade vs. Motilal Kuber Kanoje and anr.* **2008(5) ALL MR 725**, the Division Bench of this Court relied upon the decision in the case of *Gopi Chand Arya vs. Sm. Bedamo Kuer and ors.*

AIR 1996 PATNA 231 (V 53 C 48) and has held that birth/death certificate being an entry made by a public servant in the ordinary course of his public duties and which is a public document, must undoubtedly have a presumption of correctness attached to it. Similarly, the Apex Court in the case of ***CIDCO vs. Vasudha Gorakhan Mandvelkar (2009) 7 SCC 283*** has held that the entry in a birth register, raises a presumption of correction. In the case of ***Ishwarlal Mohanlal Thakkar vs. Paschim Gujarat VJ Company Ltd. And anr. (2014) 6 SCC 434***, the Apex Court had observed that the High Court had committed grave miscarriage of justice by not accepting the birth certificate as conclusive proof of age, same being an entry in public record.

11. The residential certificate dated 16.12.2015 at Exhibit 105 relied upon the Accused to rebut the presumption only states that the first informant has been residing in the house of one Vinod Bhagat since about 9 to 10 months. This certificate as well as the admission by the first informant that they had resided at Mumbai and Nashik do not rebut the presumption of the correctness of the birth certificate, as neither the said certificate nor the evidence on record indicates that as on the date the victim was born, the first informant was residing at any place other than Akolkhed. Hence, this certificate at Exhibit 105 or the

so called admission on the part of the complainant do no in any manner rebut the presumption of the correctness and genuineness of the birth certificate. The birth certificate at Exhibit 103 proves that the Victim was below 18 years of age, hence a 'child' within the meaning of Section of POCSO Act.

12. It is an evidence that the victim is mentally challenged. The evidence of P.W.6 Dr. Shwetambari, reveals that she had examined the victim girl. She has deposed that the victim was referred from Government Medical College, Akola. She has deposed that the victim was suffering from speech disability. She was unable to communicate in full sentence. Her vision and audition was normal. Her gross motor ability and fine motor ability was normal. She could not perform her daily chores independently and needed assistance. She could identify her body parts. This witness has deposed that the victim had severe mental retardation. Her Intelligence quotient (I.Q.) was 25, Social quotient (S.O.) was 30 and her adoptive behavior age was 4 years six months. The evidence of this witness amply proves that the victim was suffering from mental disability.

13. The evidence of P.W.1 Shobha reveals that on the date of the incident, she and her husband had gone to the paddle field leaving

behind her minor son Amol and the victim girl. She has deposed that when they returned home they saw both the children crying and upon inquiry, they informed her that the accused had entered the house and raped the victim girl. The testimony of the PW.1 is duly corroborated by PW.4 Amol brother of the victim girl, He has deposed that on 17.11.2015, his parents and brother had gone to the field, leaving him and his sister at home. He has stated that he had gone to the tap to fetch water. When he returned home, he found that the front door was closed. He pushed, open the rear door of the house and saw one person lying on top of his sister. There were no clothes on his sister. The said person had worn only a shirt and he was having sexual intercourse with his sister. This witness has deposed that he went towards the front side of the house and shouted for help. The Accused thereafter, wore his pant and ran away from the rear door. He has identified the Accused as the same person who had committed rape on his sister. This witness has stated that he had followed the accused up to his house and questioned him why he had committed such an act. He has deposed that the mother of the accused told him that not to make false allegation against the Accused. He thereafter returned home and told his parents about the said incident. Though this witnesses was cross-examined at length, nothing has been brought on record to

impeach the credibility of this witnesses.

14. The evidence of victim could not be recorded as she was unable to depose due to her mental disability. Nevertheless the evidence on record reveals that Akot Rural Police had referred to Government Medical College/Hospital for medical examination. She was medically examined by P.W.5 Dr. Prachi, Assistant Professor of Gynecology, Government Medical College, Akola. The testimony of P.W.5 vis-a-vis medical papers at Exhibit 84, 85 and 86 proves that the victim was examined on 18.11.2015 under anesthesia. P.W.5 has deposed that there were no injury marks over her body and breasts. However, there was a small fresh tear on hymen at 5 O'clock position. It was not bleeding but edges had swelling. There was an abrasion on the posterior part of genital region. P.W.5 has opined that the said injury could be due to penetration of genital area.

15. The case of the prosecution is thus fully corroborated by medical evidence. The defence witness does not dent the prosecution case and is not creditworthy to rebut the presumption under Section 29 of the POCSO Act.

16. Considering the facts and circumstances of the case, the Prosecution having established the guilt of the Accused beyond

reasonable doubt, learned Sessions Judge was fully justified in holding the Accused guilty for the offences for which he was charged. There is nothing on record to suggest even remotely that the Accused has been falsely implicated. Hence, there is no justification to interfere with the impugned judgment. Accordingly, the appeal is dismissed.

17. Fees of the learned Counsel appointed to represent the Appellant-Accused, is quantified at Rs.5,000/-.

JUDGE

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