

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 48 OF 2021

Pandhari s/o Kachru Pawar
Age: 25 years, Occu: Agril.,
R/o. Asegaon, Tq. Jintur,
Dist. Parbhani

... **Applicant**

Versus

The State of Maharashtra and another

... **Respondents**

....

Mr. S. J. Salunke, Advocate for appellant

Mr. R. B. Bagul, APP for respondent No.1

Mr. G. B. Patunkar, Advocate (appointed through Legal Aid) for
respondent No.2

Mr. Y. H. Lagad, Advocate (appointed by Court) for respondent No.2

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CORAM : R. G. AVACHAT, J.

RESERVED ON : 01st APRIL, 2022

PRONOUNCED ON : 04th JULY, 2022

J U D G M E N T :-

This appeal is directed against the order of conviction and resultant sentence passed by the Sessions Judge, Parbhani in Special Case (POCSO) No.40 of 2016. Vide impugned judgment and order dated 03.04.2018, the appellant was convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences

(POCSO) Act and therefore, sentenced to suffer rigorous imprisonment for ten years and fine of Rs.5,000/-. In default of payment of fine, the appellant is directed to suffer rigorous imprisonment for one year. No separate sentence was awarded for the offence punishable under Section 4 of the POCSO Act in view of Section 42 thereof. The appellant was acquitted of the offence punishable under Section 366 of the Indian Penal Code. The State has not preferred appeal against acquittal.

2. Facts giving rise to the present appeal are as under:

The appellant and PW1-A, hail from one and the same village. The appellant had a bore-well. The bore-well had lot of water. In the days of water scarcity, he had supplied water through water connections to some of the villagers. The family of PW2 was one of such families. PW1-A was in 9th standard during relevant days. The appellant would occasionally visit her house. Acquaintance developed between the two. The appellant had given her a cell-phone to have regular talk inter-se.

3. It is the case of the prosecution that on 27.06.2016, PW2 Bhagwan, father of PW1-A, returned home from Mumbai. All of his

family members including himself went to sleep. Little past 11.30 p.m., he woke up to his ease himself. He found PW1-A not at her place. He found her not home as well. He, therefore, made inquiry in the village to find the appellant too has not been his home. He, therefore, realised the appellant to have kidnapped his daughter (PW1-A). He, therefore, lodged First Information Report (FIR) Exh.20.

4. Initially, Crime for the offence punishable under Section 366 of the Indian Penal Code was registered vide C.R. No.116 of 2016. During the investigation, it was found that the appellant and PW1-A were at Pandharpur. Both of them came back in response to request made by their relations. On their arrival, the appellant was arrested. PW1-A gave her statement alleging the appellant to have had kidnapped her. She also stated to have been sexually exploited. According to her, she was 15 years of age. Her school record was obtained in proof of her date of birth. She was medically screened as well. Cloths on the person of both the appellant and PW1-A at the relevant time were taken charge of. The articles were sent to Central Forensic Science Laboratory (CFSL). The statements of persons acquainted with the facts and circumstances of the case, were

recorded. On completion of the investigation, the appellant was proceeded against by filing charge-sheet.

5. The learned Sessions Judge charged the appellant with offences punishable under Sections 366, 376(2)(i) of Indian Penal Code and Section 4 of the POCSO Act. The appellant pleaded not guilty. His defense is of false implication.

6. To establish the charge, prosecution examined nine witnesses and placed on record certain documents. On appreciation of the evidence in the case, the learned Sessions Judge held the appellant guilty of offence punishable under Section 376 of Indian Penal Code and Section 4 of the POCSO Act and therefore sentenced him as stated above.

7. Heard.

Learned Advocate for the appellant would submit that the offence is serious one. The appellant at the relevant time was around 21 years of age. There was no reliable evidence in proof of age of the prosecutrix (PW1-A). Even if her evidence is accepted as it is, the same is not convincing to convict the appellant for offence of rape. According to the learned Advocate, what she has stated is that

there were physical relationship between the two. According to him, she did not state in so many words that the appellant had sexual intercourse with her. According to the learned Advocate, the medical evidence runs counter to the prosecution case. Chemical Analysis (C.A.) report do not favour the prosecution. According to him, it is a case of acquittal of the appellant. He, therefore, urged for allowing the appeal.

8. The learned APP would, on the other hand, submit that the complainant gave date of birth of his daughter. Birth date certificate issued by a competent authority has been placed on record. There is no specific cross examination disputing the said document. The prosecutrix also gave her date of birth. Her school record, which came into being in the official course of business reinforces the prosecution case that the prosecutrix was below 16 years of age at the relevant time. The learned APP would submit that interest of victim also needs to be protected by the Court. The victim is neglected before this Court. According to the learned APP, PW1-A had no reason to falsely implicate the appellant. No case is made out for interference with the impugned judgment. According to the learned APP, the trial Court has rightly convicted the appellant. In

view of Section 29 of the POCSO Act, it is a case of reverse burden. The appellant has not discharged the same. He, therefore, urged for dismissal of the appeal.

9. The learned Advocate appointed to represent the respondent No.2 (prosecutrix) took me through para 26 of the impugned judgment to submit that relying on the Apex Court judgment in the case of *Jarnail Singh Vs. State of Haryana* reported in *2013 All MR (Cri) 2946*. The trial Court has observed that age of a child has to be ascertained in view of Rule 12 of Juvenile Justice Rules 2007. The father of the prosecutrix gave her date of birth. Her school record along with birth date certificate issued by a public authority go a long way in proof of the age of the prosecutrix to be below 16 years. The learned Advocate has relied on the following two authorities.

- (i) Pintu S/o Uttamrao Sonale Vs. The State of Maharashtra – Criminal Appeal No.515 of 2016 (High Court of Bombay, Bench at Aurangabad);
- (ii) Sayeed Aleem S/o Sayeed Babu Vs. The State of Telangane – Criminal Appeal No.1026 of 2019 (High Court of Telangana, at Hyderabad).

According to him, minimum sentence has been imposed. The Court has no reason to even reduce the same. The learned Advocate, ultimately urged for dismissal of the appeal.

10. Heard the submissions advanced. Perused the evidence in the case. Also perused the authorities relied on.

To bring home the charge, the prosecution examined nine witnesses and let in evidence certain documents. For deciding the present appeal, the relevant evidence would be that of PW2 Bhagwan (informant), father of the prosecutrix, PW1-A (prosecutrix), PW6 and PW8 Head Masters of the school in which the prosecutrix studied.

11. Let us appreciate the evidence in the case.

12. The FIR was lodged on 28.06.2016 by PW2 Bhagwan. He gave evidence consistent with the averments in the FIR. It is in his evidence that his daughter PW1-A was born on 25.08.2000. The appellant and himself are the residents of the same village. He had obtained a water connection of the appellant's borewell. The appellant therefore used to visit his residence occasionally.

Acquaintance developed between the appellant and PW1-A, prosecutrix. Since the appellant used to talk with her, PW2 Bhagwan had restrained the appellant from visiting his residence. The water connection was also disconnected. On 27.06.2016, he had returned from Mumbai. All of his family members including him were fast-sleep. He got up post 11.30 p.m. to answer nature's call. He found his daughter not at her place. He also found her not home and in village, as well. The appellant too was also not his home. He, therefore, lodged FIR against the appellant on suspicion.

13. Evidence of PW2 does not further the prosecution case. Based on his evidence, it can only be said that a criminal law was set in motion at his instance. His evidence undoubtedly indicate that there was acquaintance between the appellant and his daughter and having realised it to be a case of emotional involvement, he had even restrained the appellant from visiting his house.

14. PW1-A testified that she was born on 25.08.2000. She was in 10th standard in Zilla Parishad school in the year 2016. She had acquaintance with the appellant. He used to visit her house occasionally. The appellant had even given her a cell-phone to talk

with him. Both used to talk on cell-phone. It is further in her evidence that the appellant had planned to elope. He told her that if she did not join him, he would kill her father. It is further in her evidence that the appellant first took her to Parbhani on 27.06.2016. Forced her to stay with him in a lodge overnight. He had physical relations with her there. On the next day, he took her to Pandharpur (religious place). A room was taken on rent. They stayed at Pandharpur upto 06.07.2016. The appellant had physical relationship with her many a time. It is further in her evidence that both of them returned to Parbhani on 06.07.2016. The appellant's maternal uncle had asked her to tell the Police to have had accompanied the appellant on her own. It is further in her evidence that she was medically screened.

15. In response to the questions put to her during cross examination, she deposed that the appellant had not provided her any cell-phone. She denied to have any communication with the appellant on cell-phone. She went to Parbhani along with the appellant. Both of them stayed in a lodge at Parbhani. She did not make any grievance or complaint to anyone during her stay at Parbhani or any time until she return back to Parbhani after 10-12

days of leaving the village. It is in her evidence that both of them went to Pandharpur. Took a bath in holy river. Then went to a temple. Took darshan. A room was taken on rent. Stayed therein. It was the appellant who brought her back to Parbhani. His relatives were present at the railway station. The police official Shri Sanap was her relative. She, however, denied the appellant to have not any physical relationship with her.

16. PW3 Vishnu was a Manager of Satkar Lodge, Parbhani. It is in his evidence that on 27.06.2016, the appellant accompanied by a woman had checked in the lodge. She claimed to be the wife of the appellant. They stayed overnight.

17. PW4 Gopal is a panch witness. In his presence, panchanama (Exh.28) relating to seizure of bedsheet, taking charge of lodge register, etc., was drawn. His evidence is of not much assistance to the prosecution.

18. PW5 Dr. Archana had examined PW1-A medically on 07.07.2016. She issued medical examination certificate Exh.33. It is in her evidence that during clinical examination of PW1-A, she noticed no external injury on her person. She found hymen was torn.

No external injury on labia majora and labia minora. Condition of hymen was old, torn, healed hymen, admits two fingers tight. She collected blood samples, vaginal swab, public hairs and fingers nail, etc. She did not give her opinion on medical examination of PW1-A. She reserved it pending receipt of C.A. reports. After going through the C.A. reports before the Court, she expressed inability to give any opinion as to whether PW1-A had been subjected to sexually assault in a recent past of the medical examination. It is in her evidence that PW1-A was not subjected to Ossification test. As such, medical examination report and the C.A. reports do not support the prosecution case.

19. PW6 Navneet was the Head Master of Zilla Parishad School. He tendered in evidence the school record of PW1-A. It is in his evidence that PW1-A was admitted to school in June 2011 in 5th standard. Therefore she had studied in Zilla Parishad Primary School for 1st to 4th standard. According to him, as per the school record, her date of birth is 25.08.2000. The school leaving certificate is at Exh.46. A copy of her school admission form is at Exh.48. It is in his evidence that the girl was 9th standard dropout. During cross examination, the witness testified to have given evidence on the

basis of school record. He claimed to have no personal knowledge about the date of birth of PW1-A.

20. PW8 – Sudhakar Nagare was the In-charge Head Master of Zilla Parishad Primary School. He produced in evidence school admission register, birth certificate etc. (Exh. 56 to 61). It has come in evidence during his cross examination that one Parve was Head Master when the victim was admitted to the school. Her admission to the first standard was a case of repeat admission in the same standard. He claimed to have no knowledge about the age of the prosecutrix.

21. Appreciation of the aforesaid evidence would indicate the appellant and the prosecutrix were emotionally involved. Both of them eloped on the night of 27.06.2016. They first visited Parbhani. Stayed in a lodge overnight. The prosecutrix claimed to be the wife of the appellant for securing a room in a lodge. They then went to Pandharpur. Stayed together in a room taken on rent. It is only on 7th July, 2016, i.e. after about ten (10) days of having stayed together, they came back to Parbhani at the instance of their relations. The trial Court has therefore rightly acquitted the appellant for the

offence of kidnapping punishable under Section 366 of the Indian Penal Code.

22. The question is whether during this stay at various places, the appellant had sexual intercourse with the prosecutrix. If so, whether it amounts an offence of rape on account of she being below 18 years of age. Except the evidence of the prosecutrix, there is no evidence in support of her claim of their having been physical relationship with the appellant. In spite of having been eloped with the appellant, the prosecutrix claimed to have been kidnapped. She gave answers convenient to her. The Court, therefore, finds her to be not a witness on whose testimony reliance is to be placed to sentence the appellant without there being any corroborative evidence. What was testified is that the appellant had physical relationship with her during their joint stay. Admittedly, on her immediate parting with the appellant, she was medically screened. Although her hymen was torn, the doctor who had examined her, did not give her opinion as to whether the prosecutrix was sexually assaulted. Even after going through the C.A. report before the Court, the Medical Officer expressed her inability to give any opinion in that regard. As such, it is a case of sole testimony of the prosecutrix to be relied on to

convict the appellant (a 21 years old boy at the relevant time), for the offence of rape and to confirm his sentence of ten (10) years rigorous imprisonment. This Court, therefore, finds that whatever has been testified by the prosecutrix might be true. One has to travel a long to reach from 'might be' to 'must be'.

23. Even we accept the case of the prosecutrix as it is, then it is a case of consensual sexual intercourse. The question therefore would be whether her consent was immaterial or non-est in view of her age at the relevant time. The prosecutrix gave her date of birth as 25.08.2000. Her evidence in this regard has to be taken as inadmissible, being hearsay. The father gave her date of birth as 25.08.2000. He, however, did not give it in his FIR. He has admitted in no uncertain terms that while admitting her in the school he had not given her birth certificate. In view of this, the school record of the prosecutrix is not sufficient to make out her date of birth. The secondary school record is of no much assistance for the prosecution since entries therein were made on the basis of the previous school record of the prosecutrix. Admittedly, the prosecutrix had studied in Zilla Parishad Primary School upto 4th standard. Then she was admitted to Secondary School. Her Secondary School record Exh.46

to Exh.49 therefore cannot be relied on since no person from the school was examined to show as to who prepared the school record. PW6 – Navneet claimed to have no personal knowledge about date of birth of the prosecutrix. He also claimed to have no personal knowledge on the basis of what document the record regarding her date of birth was made in the school record. The strong reliance was therefore placed on the evidence of PW8 In-charge Head Master of the Primary School. He placed on record school admission register (Exh.59), copy of school admission form and birth date certificate allegedly issued by Gramvikas Adhikari. The school admission form was not referred to PW2, father of the prosecutrix. It is therefore not known as to who had filled in the said form and submitted to the school for securing admission. PW2 has admitted to have had not given birth certificate of the prosecutrix for securing admission. The Head Master has unequivocally admitted that the admission of the prosecutrix in the first standard was repeat admission. It means she studied for two years in first standard. Birth certificate of the prosecutrix has not been placed on record. What is on record is the so called birth date certificate issued by Gramvikas Adhikari. It is shown to have been issued in June 2007 i.e. seven years after the so

called date of birth of the prosecutrix. It is not known as to who has issued the said certificate and on the basis of what record. The columns in the certificate, namely the details of Grampanchayat office, taluka and district thereof are blank. It is also not a certified copy of public document. The person who has issued the same has not been examined, nor there is evidence to indicate the same to have been issued by a Gramvikas Adhikari.

24. The Hon'ble Apex Court in the case of ***Alamelu and another vs State – AIR 2011 SC 715*** has observed thus:

“39. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of Birad Mal Singhvi Vs. Anand Purohit – (AIR 1988 SC 1796), observed as follows:-

*"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....
.....*

Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or

contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.” The same proposition of law is reiterated by this Court in the case of Narbada Devi Gupta Vs. Birendra Kumar Jaiswal (AIR 2004 SC 175), where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue."

25. The learned APP relied on the judgment in the case of ***Jarnail Singh (supra)***, to contend that the school record of the victim is very much admissible in evidence in proof of her age. He also placed reliance on relevant provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Protection of Children from Sexual Offences (POCSO) Act, 2012.

26. The Hon'ble Apex Court in the case of **Jarnail Singh**

(*supra*), has observed as under:

“Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining 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 crime. 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 VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding 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 12(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 the 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 medical opinion.”

27. He relied on Section 34 of the POCSO Act and Section 94 of the Juvenile Justice Act. For better appreciation, Section 34 of the POCSO Act and Section 94 of the Juvenile Justice Act are reproduced below:

“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 Procedure in 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 an) subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

“94. Presumption and determination of age - (1) *Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

28. In view of Section 94(3) of the Juvenile Justice Act, the age recorded by the Committee or the Board, shall, for the purposes of Juvenile Justice Act only, is deemed to be the true age of that person. Meaning thereby, the provisions of Section 94 shall/may have no application in the cases other than one under the Juvenile Justice Act. Section 34 of the POCSO Act speaks about an offence committed by a child. Sub Section (2) thereof speaks about whether a person is a child or not on the date of commission of offence. It

doesn't speak about a person committing an offence against a child. But, Section 94(2) of the Juvenile Justice Act mandates that in case, the Committee or the Board has doubt regarding age of a child brought before it, which may seek production of evidence in the nature of date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board, if available, then it may seek production of birth certificate given by Corporation or Municipal authority or Panchayat. Only in absence of all such documents, the age is to be determined by an ossification test or any other medical age determination test.

29. It needs no mention that the truthfulness of the contents of the document is to be proved independently, so has been observed by the Hon'ble Apex Court in the case of *Alamelu and another (supra)*. This judgment of the Apex Court is prior to the judgment of the Apex Court in *Jarnail Singh (supra)*.

30. This Court, in paragraph 23 above, has already observed that entries in the school record of the victim and even her birth certificate have not been duly proved. On mere production of those documents without concrete proof of authenticity of the contents

therein, it would be difficult for this Court to hold the victim to have been below 18 years of age when the offence took place. This Court has also observed that the sole testimony of the victim did not inspire confidence. Medical evidence doesn't support the prosecution case. For all these reasons, the benefit of doubt needs to be extended to the appellant herein, who was in his twenties when the offence took place and has been behind the bars for little over 5 ½ years. Interference with the order of conviction and resultant sentence is therefore warranted.

31. For the reasons given herein above, the appeal is allowed in terms of the following order:-

ORDER

- (i) The appeal is allowed.
- (ii) The judgment and order dated 03.04.2018, passed by the learned Sessions Judge, Parbhani, District Parbhani, in Special Case (POCSO) No. 40 of 2016, convicting and sentencing the appellant for the offence punishable under Section 376(2)(i) of the Indian Penal Code, is set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 376(2)(i) of the Indian Penal Code.

- (iv) The appellant be released immediately, if not required in any other offence.
- (v) The amount of fine, if paid, be returned to the appellant.

32. The fees of Mr. Y. H. Lagad, learned Advocate appointed for respondent No.2 is quantified at Rs.8,000/-.

[R. G. AVACHAT, J.]

SMS