

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

CRIMINAL APPEAL NO.329 OF 2018

Ajit @ Lalya Dilip Veer,
Age:23 years, Occ. Nil,
r/o. Alanee,
Tq. and Dist. Osmanabad

..Appellant

Vs.

1. The State of Maharashtra
2. ABC

..Respondents

**AND
CRIMINAL APPEAL NO.282 OF 2019**

Shailesh Netaji Redke,
Age:25 years, Occ. Labour,
r/o. Alanee,
Tq. and Dist. Osmanabad

..Appellant

Vs.

1. The State of Maharashtra
2. ABC

..Respondents

Mr.S.J.Salunke, Advocate for appellants
Mrs.G.L.Deshpande, APP for respondent no.1
Mr.Abhay Ostwal with Mr.Mohit Deoda, Advocates for respondent no.2

**CORAM : R.G. AVACHAT, J.
RESERVED ON : FEBRUARY 15, 2022
PRONOUNCED ON : FEBRUARY 17, 2022**

JUDGMENT :-

Both these appeals are being decided by this common judgment since they are interconnected.

2. The challenge in these appeals is to the judgment of conviction and resultant order of sentence passed by learned Special Judge, Osmanabad, in Special (POCSO) Case No.22 of 2015. The details of the conviction and the quantum of sentence are as under :-

Appellant	Section	Sentence
In Criminal Appeal No. 329 of 2018 (Ajit)	(i) Section 363 r/w. Section 34 of I.P.C.	R.I. for five years and to pay fine of Rs.2,000/-, in default, to suffer R.I. for Six months
	(ii) Section 366-A read with Section 34 of I.P.C.	R.I. for five years and to pay fine of Rs.2,000/-, in default, to suffer R.I. for six months
	(iii) Section 376(2)(i)(n) of I.P.C.	R.I. for ten years and to pay fine of Rs.50,000/-, in default, to suffer R.I. for two years
	(iv) Sections 4 and 10 of POCSO Act	No separate sentence
In Criminal Appeal No. 282 of 2019 (Shailesh)	(i) Section 363 r/w. Section 34 of I.P.C.	R.I. for five years and to pay fine of Rs.2,000/-, in default, to suffer R.I. for Six months
	(ii) Section 366-A read with Section 34 of I.P.C.	R.I. for five years and to pay fine of Rs.2,000/-, in default, to suffer R.I. for six months

3. The facts giving rise to the present appeals are as follows:-

PW 1 - "A" (prosecutrix) was resident of village "X" in District Osmanabad. She was 15 years of age at the relevant time.

During her childhood, her mother passed away. The father of prosecutrix is alcoholic and mentally challenged as well. The prosecutrix was, therefore, residing along with her uncle and his family. Both the appellants were residing in the very village. The house of the appellant – Shailesh was just opposite the house of uncle of the prosecutrix. Appellant – Ajit and appellant -Shailesh are friends *inter-se*. Ajit would, therefore, frequently visit the house of Shailesh. As such, acquaintance developed between the prosecutrix and Ajit.

4. It so happened that on 06.05.2015, Shailesh came to the house of the prosecutrix and told that Ajit was waiting outside. He asked the prosecutrix to join Ajit and if she would refuse to join, Ajit may kill her cousin. The prosecutrix, therefore, accompanied Ajit. He took the prosecutrix to Latur on his motorbike and kept her in a lodge overnight. He had sexual intercourse with her there without her consent. Since the prosecutrix was found missing from the house, her uncle and aunt took search for her. The aunt, PW 2, lodged a report against Ajit on suspicion.

5. It is further case of the prosecution that Ajit then took the prosecutrix to Nanded and stayed there in a temple. Thereafter,

both of them shifted to Aurangabad and stayed in one lodge. Ajit then took a room on rent and stayed therein for about a month. Ajit had sexual intercourse with the prosecutrix many a time without her consent. At Aurangabad, he would leave the room bolting from outside. After little over a month, he brought the prosecutrix back to the village and left. She went to the house of her uncle. On the next day, i.e. on 12.06.2015, all of them went to the police station. The prosecutrix gave her statement. She was medically screened. On the basis of the FIR lodged by the prosecutrix, crime was registered for the offence punishable under Section 363 of I.P.C. After recording statement of the prosecutrix, offences under Sections 366-A and 376(2)(i)(n) of I.P.C. and Sections 4 and 10 of POCSO Act came to be invoked. Both the appellants were arrested. They were medically examined. Their clothes also came to be seized. Their blood samples were obtained. All the seized articles were sent to the Forensic Science Laboratory. Statements of the persons acquainted with the facts and circumstances of the case, were recorded. On completion of investigation, both the appellants were proceeded against.

6. The trial Court framed Charge (Exh.4) against both of them. They pleaded not guilty. Their defence was of false implication. The prosecution examined nineteen witnesses and produced in evidence various documents to establish the charge. On appreciation of the evidence, the trial Court convicted the appellants, as stated above.

7. Learned counsel for the appellants would submit that there was no concrete evidence to establish the prosecutrix to have been a child during the material time. It might be a case of emotional involvement. The medical examination report of the prosecutrix does not reinforce the prosecution case. The prosecutrix gave evidence inconsistent with her case before the Investigating Officer. As such, it was not reliable evidence to sustain the conviction of the appellants. Learned counsel took me through the evidence, to ultimately submit that the same fell short to sustain the conviction. He, therefore, urged for acquittal of the appellants.

8. Learned APP would, on the other hand, submit that the prosecutrix was a helpless child. The mother of prosecutrix died during her childhood. Her father was alcoholic. The prosecutrix had, therefore, to take shelter at the house of her uncle. Both the

appellants kidnapped her. Appellant – Ajit took her to various places. She was confined at most of the places and sexually exploited as well. On the question of age of the prosecutrix, learned APP would submit that her school record was placed on record. The concerned Headmasters of the school testified in proof of the date of birth of the prosecutrix. Her grand-mother had secured admission of the prosecutrix to the primary school. It was she, who gave her date of birth. The school record is admissible in evidence and carries probative value in view of Section 35 of the Indian Evidence Act. According to learned APP, based on the evidence of the prosecutrix, the Charge had duly been proved. The appellants have rightly been convicted. No interference is warranted with the impugned order of conviction and the consequential sentence. Learned APP has relied on the decisions in the cases of (i) **State (GNCT of Delhi) Vs. Hargovind, 2018 SCC OnLine Del 9607**; and (ii) **Mohd. Afsar Vs. State, 2022 SCC OnLine Del 51**.

9. Learned counsel for respondent no.2 – victim supported the impugned judgment.

10. Considered the submissions advanced by learned counsel for the parties. Perused the evidence and the documents relied on. Let us appreciate the same.

11. Although the prosecution has examined 19 witnesses, for deciding this matter, the evidence relevant would be that of the prosecutrix, her aunt, the Medical Officer and the witnesses examined in proof of age of prosecutrix. It is in the evidence of the prosecutrix that she was born on 01.05.2000. Her mother was no more. Her father was addicted to alcohol. She had, therefore, been residing along with her uncle and his family. The appellant - Shailesh has his residence opposite the house of the prosecutrix. The appellant - Ajit was his friend. He would, therefore, visit the house of Shailesh. It is further in her evidence that by 9:00 p.m. on 06.05.2015, Shailesh came to her house that and and told that Ajit was waiting outside. She also told her that if she would not join Ajit, he would kill her cousin. She, therefore, joined him under compulsion.

12. In cross-examination, the prosecutrix stated that Ajit asked her to seat on his motorbike, else he would kill her. He gagged her mouth and made her seat on the motorbike. He then took her to Latur. She could not shout due to the threat to her life. Ajit then took her to one lodge at Latur. He had sexual intercourse with her against her will. It is further in her evidence that on the

next day, he took her to Nanded and forced her to stay in a temple. Then brought her to Aurangabad and kept in one lodge. Thereafter, he took a room on rent and kept her there for about a month. He would go out of the room after confining her in. It is further in her evidence that during all these days, he had sexual intercourse with her many a time. She was subjected to searching cross-examination. In response to the questions put to her in cross-examination, she denied to have been provided with a cell-phone by Ajit. She was, however, confronted with her police station, wherein she had stated to have been given a cell-phone by the appellant - Ajit. She further stated that in a room at Aurangabad, it was she, who would cook food. She was confronted with five photographs, wherein she was appearing with Ajit. She was sporting Mangalsutra. The photographs were snapped at tourist destinations such as, Ghrushnewar Temple and Daulatabad. It is her case that on 11.06.2015, Ajit brought her back to the village.

13. PW 2 - "B", aunt of the prosecutrix, testified that on 06.05.2015 at about 09.00 p.m., the prosecutrix went out of the house to answer the nature's call. She did not return. A search was, therefore, made for the prosecutrix. She, ultimately, lodged

the FIR (Exh.30) since she had suspected Ajit to have kidnapped the prosecutrix.

14. On return of the prosecutrix, she was medically screened. PW 11 - Dr.Ashwini examined her. The medical examination report is to the effect that on clinical examination, no injury on the person of the prosecutrix was noticed. Her hymen was not intact. The opinion was, however, reserved until receipt of F.S.L. report. It is in the evidence of Dr.Ashwini that the Radiologist examined the prosecutrix to ascertain her age. In the opinion of the Radiologist, the prosecutrix was in the age group of 16-17 years (including of margin of either side). She has, however, admitted in the cross-examination that in her opinion, the age of the prosecutrix might be upto 18 years. The C.A. reports (Exh.78 to Exh.80) did not further the prosecution case.

15. On appreciation of the evidence referred to herein above, it would be beyond a pale of doubt that the prosecutrix is not a witness of truth. The evidence suggests that there was emotional involvement between her and Ajit. PW 2 - "B" was specific to state that the prosecution left the house under the pretext of going to

answer the nature's call. She has also stated to PW 11 - Doctor, while she was examined that Ajit had given her cell-phone. On the night of 06.05.2015, he called her on cell-phone and asked her to come out of the house. This evidence, undoubtedly, indicate that her case that the appellant - Shailesh had come to her residence and asked her to join Ajit, is not true. No further role has been attributed to the appellant - Shailesh. Based on such evidence, Shailesh remained behind the bars for not less than one and half years. The trial Court ought to have acquitted him.

16. For little over a month, the prosecutrix had been in the company of Ajit. Both of them stayed in not less than three hotel/lodge and then, in a room taken on rent. She would cook food for both of them. She had been to tourist destinations. They posed for photographs. She is appearing along with him in the photographs sporting Mangalsutra. This evidence, undoubtedly, lead this Court to find the prosecutrix to have had left her house on her own and joined Ajit. As such, the offence of kidnapping fails. Her statement that during her stay with Ajit, he had sexual intercourse with her many a time, appears to be probable and has, therefore, to be accepted. Same is taken to be as consensual relationship. The

question is, whether the consent of the prosecutrix, therefor, was immaterial in view of her age factor. On the question of proof of her age, the evidence of the prosecutrix in that regard is inadmissible being hearsay. In proof of age of a particular person, best evidence would be that of his parents. In the present case, the mother of the prosecutrix was no more. The father could not be examined. The prosecution, therefore, relies on her school record. PW 13 – Hanumant was Headmaster of the Zilla Parishad school, wherein the prosecutrix was admitted. The witness placed reliance on her school record wherefrom it is evident that she was admitted to the school for first standard on 12.06.2006. As per the school record, her date of birth is 01.05.2000. The witness, however, was categorical to admit that the entries in the school record have not been made by him. The birth certificate of the prosecutrix or entry in the birth register was not supplied along with the school admission form. It appears that the grandmother of the prosecutrix had filled in the school admission form. She has not been examined. The evidence of PW 16 – Rajendra, Headmaster of the secondary school wherein the prosecutrix took education, is not much relevant. Her school record came into being on the basis of her primary school record, which has been proved by the evidence of PW 13 – Hanumant.

17. Learned APP, no doubt, was justified in relying on the judgment of the Delhi High Court in the case of **Hargovind (supra)**. In that judgment, the Delhi High Court had an occasion to refer to the decision in the case of **NCT of Delhi Vs. Dharmendra, Cri. A. 1184 of 2017 decided on 13.03.2018**. In that judgment, there is reference of the Apex Court decision in the case of **Satpal Singh Vs. State of Haryana, (2010)8 SCC 714**, wherein it is observed thus :-

“28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/ certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case.”

18. Learned counsel for the appellant placed reliance on the Apex Court judgment in the case of **Alamelu and anr. Vs. State, Represented by Inspector of Police Sekar and anr., AIR 2011 SC 715**, wherein it has been observed:-

(B) Penal Code (45 of 1960), S.366-Abduction-Entire story of abduction by car and forced marriage-Concocted to falsely implicate accused and relatives-Possibility cannot be ruled out of

father of girl suspecting that his daughter was romantically involved with accused-Therefore, when she disappeared from home accused was presumed to be responsible for it - Hence, false story of abduction – Even in face of wholly unreliable evidence, both Courts have convicted all accused u/s.366 and u/s.376, IPC – High Court confirming conviction of accused/appellants u/s. 366, Erroneous.

(C) Penal Code (45 of 1860), S.376-Evidence Act (1 of 1872), S.35-Rape-Age of prosecutrix-Transfer certificate issued by Govt. school duly signed by Headmaster-Certificate would be admissible in evidence u/s.35 of Evidence Act-However, admissibility of such document would be of not much evidentiary value to prove age of girl in absence of materials on basis of which age was recorded-Date of birth mentioned in transfer certificate would have no evidentiary value unless person, who made entry or who gave date of birth is examined-Non examination of Headmaster of school who made entry-Entry in transfer certificate cannot be relied upon to definitely fix age of girl.

(D) Penal Code (45 of 1860), S.376 – Rape – Age of prosecutrix – X-ray expert had clearly stated in cross-examination that on basis of medical evidence generally, age of individual could be fixed approximately – He had also stated that it is likely that age may vary from individual to individual – Doctor has also stated that in view of possible variation in age, certificate mentioned possible age between one specific age to another specific age-It would not be possible to give a firm opinion that girl was definitely below 18 years of age – Expert evidence does not rule out possibility of girl being major – Can be held that prosecution has failed to prove that girl was minor on relevant date.”

19. The Radiologist who examined the prosecutrix to ascertain her age was not examined. The certificate issued by the Radiologist is in the nature of opinion only. The evidence of the prosecutrix as regards her date of birth is already stated to be inadmissible being hearsay. Though the school record does indicate

her date of birth as 01.05.2000, no person, on whose information the school record, came into being was examined. Neither the birth certificate nor the entry in the birth register maintained by the local authorities was placed in evidence. The prosecutrix had herself joined the appellant-Ajit. At the material time, Ajit was 21 years of age only. He is behind the bars for little over five years. For want of concrete evidence about age of the prosecutrix to suggest to have been child at the relevant time, it has to be held that the prosecution failed to establish the charge beyond reasonable doubt. Based on such evidence, the trial Court ought not to have held the appellants guilty.

20. For the reasons stated herein above, the appeals succeed. Hence, I pass the following order:-

- (i) Both the appeals are allowed.
- (ii) The order of conviction and resultant sentence dated 28.02.2018 passed by learned Special Judge, Osmanabad, in Special (POCSO) Case No.22 of 2015, is set aside.
- (iii) The appellant in Criminal Appeal No.282 of 2019 namely, Shailesh, is acquitted of the offences punishable under

Sections 363, 366-A read with Section 34 of Indian Penal Code. His bail bonds shall stand cancelled.

- (iv) The appellant in Criminal Appeal No.329 of 2018 namely, Ajit, is acquitted of the offences punishable under Sections 363, 366-A read with Section 34, Section 376(2)(i)(n) of I.P.C. and Sections 4 and 10 of POCSO Act. He be released forthwith, if not required in any other case.
- (v) Fine amount, if any, paid by the appellants be refunded to them.

[R.G. AVACHAT, J.]

KBP