

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

CRIMINAL APPEAL NO.472 OF 2017

Mahesh S/o Kundlik Dhavare,
Age-22 years, Occupation: Labour,
R/o- Datta Nagar, Dhoki,
Tq. & Dist-Osmanabad.

...APPELLANT

VERSUS

- 1) The State of Maharashtra,
- 2) X. Y. Z.
Through her father
(Name is not mentioned)

...RESPONDENTS

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Mr.Z.H. Farooqui Advocate appointed for Appellant.
Mr.R.B. Bagul, A.P.P. for Respondent No.1.
Mr.A.P Khedkar appointed for Respondent No.2 through
Legal Aid.

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CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 5th JULY, 2022

JUDGMENT :

1. Present Appeal has been filed by the original accused challenging his conviction in Special (POCSO) Case No.26 of 2015 under Section 3 punishable under Section 4 of the

Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act") and Section 376(2)(i) of the Indian Penal Code by the learned Special Judge, Osmanabad on 23rd March 2017, thereby convicting him for the said offence and sentencing him to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer further rigorous imprisonment for one year.

2. It will not be out of place to mention here before proceeding further that earlier Advocate who was representing the appellant, failed to cause his appearance after 27th September 2021. The appellant is in jail, in view of the fact that his application for suspension of sentence came to be rejected by this Court. By order dated 17th February 2022 when it was again found that the learned Advocate, then representing the appellant – the accused, who was in jail, has not caused his appearance, it was made clear that this Court would appoint some other Advocate to assist the Court. Accordingly, by order dated 29th April 2022 learned Advocate Mr. Z.H. Farooqui came to be appointed as Amicus Curiae to assist the Court, to represent the cause of the appellant.

3. Heard Mr. Farooqui, learned Advocate appointed for Appellant, Mr. Bagul, learned A.P.P. for Respondent No.1 and Mr. Khedkar appointed for Respondent No.2 through Legal Aid. Perused the Paper-Book.

4. The prosecution story, in short, is that the prosecutrix – victim is 15 years old girl, residing in the neighbourhood of the accused. Accused was residing along with his wife and mother. In the house of the informant – victim, she was residing with her sisters, brother and parents. According to the prosecutrix, on 21st August 2015 the accused called her to his house at about 9.00 a.m. and asked that in the evening they would go to Pune to get married at Pune. About 3 to 4 months prior to that wife of the accused had gone for delivery to her parental house at Dindur. Thereafter, the love relationship developed between the prosecutrix and accused and thereafter on the said date i.e. 21st August 2015 said proposal was made by the accused. The prosecutrix states that though her parents and she herself had gone to watch T.V. in the house of the accused at about 7.00 p.m. on the same day, she had returned to her house on the ground that she want to take dinner. However, thereafter she as

well as accused went up to petrol pump of Dhoki by walk and then by taking a bus they went to Pune. They reached Pune around 5.00 a.m. on 22nd August 2015 and then they had gone to the house of the brother of the accused. After 8.00 p.m. on that day said brother of the accused and his wife had gone out of the house and then by giving promise to marry, the accused had committed sexual intercourse with her. On 23rd August 2015 father of the prosecutrix had given a call to the accused and asked them to return and he promised that they would do as per their wish. Thereafter the prosecutrix and accused went to the house of another brother of the accused, halted there at night, and again on next date i.e. 24th August 2015 went to the house of the brother of the accused where they had earlier stayed. Then on 24th August 2015 at about 7.30 p.m. they started from Pune to Dhoki. They returned on the next day morning i.e. on 25th August 2015, near the petrol pump of Dhoki where her parents were waiting and then she went to the Police Station. She narrated the entire incident and accordingly her First Information Report (for short "FIR") Exhibit-9 was recorded. She was then sent for medical examination. She had produced her clothes. Her statement under Section 164 of the Code of

Criminal Procedure was also thereafter recorded by the learned Judicial Magistrate First Class, Osmanabad.

5. On the basis of the said FIR, offence vide Crime No.67 of 2015 came to be registered under Section 376, 366-A, 363 of the Indian Penal Code and Section 4 of the POCSO Act and further investigation was undertaken by the Police Inspector, Dhoki Police Station, District-Osmanabad.

6. During the course of the investigation, the statements of the witnesses were recorded, panchnama of the spot came to be executed with the help of two panchas. Accused came to be arrested. The clothes of the victim as well as accused came to be seized by drawing panchnama. The medical report of the victim was collected. The swab and samples those were taken, were sent along with the clothes seized, for the chemical analysis and after completion of the investigation charge-sheet came to be filed before the learned Special Judge under the POCSO Act, Osmanabad.

7. After the charge-sheet was presented, cognizance of the offence was taken by the learned Special Judge and thereafter charge came to be framed at Exhibit-3, under Section 363, 366-A, 376 of the Indian Penal Code and Section 3 punishable under Section 4 of the POCSO Act, on 7th November 2015. The contents of the charge were read over and explained to the accused in vernacular. He pleaded not guilty and thereafter trial has been conducted. The prosecution has examined in all seven witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both the sides, the learned Special Judge has held the accused guilty of committing offence under Section 4 of the POCSO Act and Section 376(2)(i) of the Indian Penal Code and sentenced him as aforesaid. The set off has been granted to the accused under Section 428 of the Code of Criminal Procedure. Fine appears to have been paid before the trial Court on 30th March 2017. The said conviction is under challenge in this Appeal.

8. In view of the acquittal of the appellant – accused for the offence under Section 363 and 366-A of the Indian Penal Code and the prosecution not preferring any appeal challenging the

said acquittal, the scope of the Appeal would be limited to conviction under Section 4 of the POCSO Act and Section 376(2) (i) of the Indian Penal Code. It will not be out of place to mention here that there is no separate sentence awarded under both the offences and definitely it is in view of Section 42 of the POCSO Act. Hence, following point arise for determination of this Court, and finding and reasons for the same are as follows:-

POINT	FINDING
1) Whether the prosecution has proved that on 22 nd August 2015 the accused had penetrative sexual intercourse with the prosecutrix, who was a child under the provisions of POCSO Act, and the said sexual intercourse was against her wish?	Yes.

Reasons

9. The learned Advocate appearing for the appellant has vehemently submitted that the learned Special Judge ought to have considered the consequences of his finding in respect of acquittal of the accused under Section 363 and 366-A of the Indian Penal Code. The consequences of that acquittal is that the accused had not forcibly taken the victim – prosecutrix along with him. Thereafter whatever had taken place between them

was with consent. In her examination-in-chief itself PW-1 (Prosecutrix / victim) has stated that after the wife of the accused had gone for delivery about 3 to 4 months prior to 21st August 2015, prosecutrix developed contacts with accused and they had started loving each other. Under such circumstances, there was no force applied by the accused to take her away with him. Further the admissions those have been given by the victim in her cross-examination have not been considered at all by the learned Special Judge. In clear terms the victim had admitted that about fifteen days prior to filing of the complaint, a boy had come to see her along with his parents and had approved her proposal. She in fact had not approved that boy and she was not even mentally prepared to marry with said boy. She has also admitted that her father had told her that since they are poor, she should marry with that boy as no dowry would be required to be paid to that boy. She had then confirmed with the father that she would perform the marriage with that boy and then she further admits that she thought that her parents would perform her marriage with that boy and then she went with the accused. That means she was loving accused and yet she was being forced to marry another boy, though as per her contentions she

was then minor, she had taken that decision to go with the accused. When no force was applied by the accused, there is no question of commission of sexual intercourse against her wish.

10. Learned Advocate for the appellant further submits that if we consider the spot panchnama Exhibit-24 drawn on 27th August 2015, it can be seen that there was no cot or any other such article in the house on which there could have been such act. It was the house of brother of the accused. In her cross-examination PW-1 has stated that when she had gone along with the police to the house of the brother of the accused, at that time there was no cot in that room. Another point that is required to be noted is that there is discrepancy between the testimony of the victim and the testimony of the father PW-3. In his testimony PW-3 has stated that after watching T.V. in the house of the accused when he returned to his house at about 9.45 p.m., the accused was still in his house. The question is, as to when accused and victim had left the village Dhoki. Further the father says that he had gone twice to police station on 25th August 2015 and had discussed with the family members including the victim as to how to lodge the complaint. That

means the FIR is outcome of discussions and therefore, false implication of the accused cannot be ruled out.

11. The learned Advocate for the appellant has further submitted that the testimony of PW-5 Doctor Tanaji would show that he had examined the prosecutrix on 25th August 2015. He could not find any injury on the person of the prosecutrix. When injuries were not at all caused, it cannot be said that it was a forcible intercourse and the report Exhibit-27 would show that he had reserved the opinion till the receipt of report from the Forensic Lab and then the final opinion was never given. The reports of the chemical analyzer are mostly inconclusive and therefore, it cannot be said that the medical evidence is supporting ocular evidence.

12. It has been further submitted on behalf of the appellant on the point of age of the prosecutrix that no document was earlier collected by the Investigating Officer. Though the medical officer is saying that in order to determine the age of the prosecutrix they had taken the X-rays and opinion has been given by the Radiologist, the said Radiologist has not been examined. No

doubt, in his deposition PW-7 Ankush, the headmaster of the school has produced at Exhibit-43 general admission register of the school in respect of the victim and birth certificate issued by the Grampanchayat, yet it cannot be said that it has been proved by the prosecution that the prosecutrix was a child as defined under Section 2(d) of the POCSO Act. In his statement under Section 313 of the Code of Criminal Procedure, the appellant – accused has stated that since he had denied to marry the victim as he was already married, a false complaint came to be lodged by the victim in collusion with her parents. This also ought to have been considered by the learned Special Judge.

13. Lastly the learned Advocate for the appellant has submitted that since the date of his arrest i.e. 25th August 2015 the accused is in jail / custody and the total imprisonment that has been undergone would be around six years ten months and therefore, taking into consideration his age at the time of commission of alleged crime as 22 years, and the responsibility of wife and a child, his sentence be reduced to the sentence already undergone.

14. Per contra the learned APP and learned Advocate Mr. Khedkar for respondent No.2 (appointed through Legal Aid) strongly opposed the Appeal and also the alternative prayer of reduction of sentence. Both of them have submitted that there is ample evidence against the appellant to prove the offence beyond reasonable doubt. The age of the victim - prosecutrix PW-1 has been proved through herself i.e. she has entered the witness box and has given her age as 15 years and was studying in 7th standard at the time of incident. Her father, PW-3 has also deposed that the age of the prosecutrix was 15 years at that time. The age of the prosecutrix has been determined through medical evidence also. Her X-rays were taken and the Radiologist has given the report. That report was considered by PW-5 Doctor Tanaji and then he has stated that the age of the victim was between 15 to 16 years. Even if we give plus minus margin of one or two, that would be below 18 years. That means, she had not completed her 18 years of age on the date of incident. Further, PW-7 Ankush is the headmaster of Terna Sugar Factory Primary School, Terna Nagar, Dhoki. He was the headmaster since 1999 and the victim PW-1 had taken admission in his school on 16th June 20017 in 1st standard. That means on the

date of her entry in the school, the same person was the headmaster and he had brought not only the school admission register but also the certificate of birth dated 15th June 2007 issued by Grampanchayat Office, Kasbe Dhoki stating that date of birth of victim is 30th January 2000. That was the basis on which her birth date was registered in the school record. That birth certificate has been issued by the competent authority under the Registration of Births and Deaths Act. Taking into consideration all these pieces of evidence, it can be said that on the date of incident the age of the prosecutrix was 15 years and 6 months. It cannot be said that she had the knowledge of wisdom. Though she states that she had developed love relationship with the accused in spite of having knowledge that he is already married, it cannot be said that every thing which she has done was voluntary in nature. The accused cannot take disadvantage of the minority of the prosecutrix and her statements / so-called admissions, to arrive at a conclusion that he had not applied any force against her to take her to Pune. The fact remains is that even if we consider that she had gone along with him, according to prosecutrix it was by giving promise to marry her at Pune, which even the accused had the

knowledge that he he could not have, in view of the fact that he was already married. The testimony of PW-1 stands supported by medical evidence in the form of testimony of PW-5 Doctor Tanaji. Though there were no injuries on the person of the prosecutrix when she was examined on 25th August 2015, it cannot be said that there was no sexual intercourse at all. The prosecutrix was not in a position to give consent for the sexual intercourse and therefore, when she is minor, her consent is no consent at all. The offence under Section 376(2)(i) of the Indian Penal Code as well as Section 3 punishable under Section 4 of the POCSO Act was proved by the prosecution beyond reasonable doubt. The other prosecution witnesses have supported the prosecution story and therefore, the conviction awarded to the appellant is perfectly legal which does not require any kind of interference.

15. As aforesaid, the learned Special Judge has acquitted the accused of committing offence under Section 363 and 366-A of the Indian Penal Code and neither the prosecution nor the prosecutrix has preferred any appeal challenging the said acquittal. Definitely, we are also required to consider as to

whether that acquittal has any kind of effect on the offence which stated to have been proved beyond reasonable doubt by the learned Special Judge. However, we cannot have a discretion in respect of those facts which could have attracted the ingredients of Section 363 and 366-A of the Indian Penal Code.

16. The testimony of PW-1 prosecutrix would show that accused was residing in front of her house and she had the knowledge that the accused was married. The wife of the accused had gone for delivery about 3 to 4 months prior to the incident and then she says that thereafter the accused and herself developed love relationship. We can consider the point here that why the accused could have chosen that period for advances in favour of the prosecutrix, but there is no such specific statement by the prosecutrix in her examination-in-chief. But at the same time we cannot get any suggestion in her cross-examination on behalf of the accused that taking advantage of absence of his wife the prosecutrix had made advances or seduced him to have such relationship. Even if we consider it for the sake of argument, yet accused being the married man, could have restrained himself and if the prosecutrix was behaving in

any wrong manner then he could have disclosed the said fact to her parents. We are unable to get any suggestion in the cross-examination of the prosecutrix or he father PW-3 that accused had made complaint about the behaviour of the prosecutrix with him and then her parents had decided to settle her marriage with another boy. Though PW-1 prosecutrix has given certain admissions on that point, we are unable to get that it is the outcome of the complaint made by the accused in respect of the behaviour of the prosecutrix against him. Therefore, we will have to take that it was the simple love that was developed, but at the same time the accused being major and married, could have avoided and restrained himself from any further consequences. It appears to be his voluntary act to give response to the prosecutrix. The story does not end there.

17. PW-1 has further deposed that she was called by accused at about 9.00 a.m. on 21st August 2015 and then he informed that they would go to Pune and get married at Pune. That means, this advancement to take her to Pune was from the accused knowing fully well that the prosecutrix is minor. According to the prosecutrix, they both left village Dhoki by the

night bus and went to Pune on 22th August 2015 at about 5.00 a.m. According to her, the accused had taken her to his brother's place, but then she says that till 8.00 p.m. there was nothing, that means, no incident had taken place. But thereafter, at about 8.00 p.m. when the brother of accused went out of the house along with the wife, accused had sexual intercourse with her by giving promise to marry. This Court can take the liberty in interpreting that since the prosecutrix was minor, she believed in what the accused was saying. It was the outcome of the love affair also and with that faith and promise she had come along with the accused to Pune. When she appear to have submitted herself to the accused when he promised to marry and had sexual intercourse, there was no question of any injury to her person. Though the said act appears to have been done on 22nd August 2015 and they both came back to village Dhoki on 25th August 2015, thereafter for those two days, as per her examination-in-chief there was no second act of sexual intercourse. One more fact which is required to be noted is that though certain admissions have been given by the prosecutrix, she has flatly denied that her parents had settled her marriage and even fixed the date of marriage with the said boy. She has

further denied that she had left the house suo moto. But then she says that she had no objection to go with the accused. As aforesaid, it appears to be the result of blind love. She has further specifically denied that she had told to police that there was no sexual intercourse between her and the accused in the room at Pune which she had shown. But, interestingly the suggestion has been given that the sexual intercourse had occurred at the village itself. Why this kind of suggestion was given on behalf of the accused is not understandable, otherwise if it has to be taken as it is, it gives an impression that the accused was admitting that he has sexual intercourse with the prosecutrix which had taken place in the village itself, which is not even the prosecution story. No doubt, prosecutrix says that initially she has told to the police that she has no complaint to make against the accused, but then she admits that when she made that statement, police had called her father. She has then denied the suggestion that due to insistence by her father she has lodged the report.

18. Thus, taking into consideration the entire evidence of the prosecutrix, it can be said that her testimony is inspiring

confidence and there is no reason to disbelieve her. There is consistency in her FIR, statement under Section 164 of the Code of Criminal Procedure and the testimony before the Court.

19. PW-3 is the father of the prosecutrix. However, his testimony is of little help. He has only stated those facts which were within his knowledge. Interestingly, there is absolutely no suggestion to this witness regarding his plan to settle the marriage of the prosecutrix with another boy. There is no reason to disbelieve him for whatever statements he has made which were in his knowledge.

20. Another important piece of evidence is testimony of PW-5 Doctor Tanaji. As aforesaid, there was no question of any injury on the person of the prosecutrix. Possibility of prosecutrix submitting herself to the accused cannot be ruled out taking into consideration the love affair. PW-5 has also stated that the age of the prosecutrix is between 14 to 16 years. No doubt the Radiologist has not been examined in this case. Non-examination of Radiologist is not fatal in this case in view of the necessary documents coming forward on record. After clinically examining

the prosecutrix, the witness has specifically stated that he had reserved the final opinion and after considering the C.A. Reports, he has given the final opinion in the witness box, stating that there is possibility of sexual assault on the victim to whom he had examined. He has also examined the accused and had opined that he was capable of performing sexual intercourse. Of course the accused has not taken any objection for such opinion.

21. The clothes of the accused as well as prosecutrix have been seized and sent to chemical analysis. If we consider the reports, it appears that no semen or blood was found on any of the clothes. The testimony of the panch witness to the spot at Pune was important though he had noted that there was no cot or any such article in the room. The police and panchas found that it was the room that was taken by Santosh – brother of the accused, which was taken on rent. It is then stated that there were household articles in the house but there was no cot in the room. Mere absence of cot will not lead us to infer that there was no sexual intercourse at all.

22. PW-6 is the Investigating Officer who has given the account as to how he has conducted investigation of the case. Nothing contradictory is said to have been transpired in his cross-examination.

23. PW-7 Ankush is the headmaster of the school, where prosecutrix was taking education. As aforesaid, this witness has produced the general admission register of the school and birth certificate of the prosecutrix issued by Grampanchayat of village Dhoki, showing date of birth of the prosecutrix as 30th January 2000.

24. Thus, scanning of entire evidence would show that prosecution had proved that the prosecutrix was "child" as defined under Section 2(d) of the POCSO Act and she cannot be said to be a person capable of giving consent for sexual intercourse.

25. Therefore, the conclusion arrived at by the learned Special Judge that the offence has been proved beyond reasonable doubt and then convicting the accused for the offence under

Section 3 punishable under Section 4 of the POCSO Act is perfectly legal. In view of Section 42 of the POCSO Act, there could not have been a separate punishment under Section 376(2)(i) of the Indian Penal Code. The point is therefore, answered in the affirmative.

26. Now, turning towards the alternative prayer to reduce the sentence to already undergone is concerned, it can be said that when the accused himself, though married, has done such act with a minor and then taken a stand in his statement under Section 313 of the Code of Criminal Procedure that the love of the victim – informant was one sided on him and as he had not consented for marriage with her, leading to false implication, appears to be the defence taken after thought. The age of the accused, under this situation, does not carry importance, when to its comparison the age of the prosecutrix will have to be considered. Entire life of the prosecutrix has been ruined and therefore, there is no question of reducing the said sentence to already undergone. There is no merit in the present Appeal and it deserves to be dismissed. Accordingly, following order is passed:

ORDER

(I) The Appeal stands dismissed.

(II) The conviction and sentence awarded to the appellant – accused in Special (POCSO) Case No.26 of 2015 by the learned Special Judge, Osmanabad by Judgment and order dated 23rd March 2017, stands confirmed.

(III) The fees of Mr. Z.H. Farooqui, the learned appointed Advocate who was asked to represent the cause of the appellant, is quantified at Rs.8,000/-, to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

(IV) Accused is in jail. Inform him accordingly.

[SMT. VIBHA KANKANWADI, J.]