

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

**CRIMINAL APPEAL NO.888 OF 2019 WITH
CRIMINAL APPLICATION NO.966 OF 2022**

Anil s/o Vitthal Jadhav
Age 23 years, Occ. Labour,
R/o Pimparkheda, Tq. Gangapur,
District Aurangabad

... APPELLANT

VERSUS

1. The State of Maharashtra
(Copy to be served on the
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)

2. A B C

... RESPONDENTS

.....
Mr. S.G. Bobde, Advocate for appellant
Mr. S.P. Sonpavale, A.P.P. for respondent No.1 - State
Mrs. S.L. Awachar, Advocate for respondent No.2.

.....

CORAM : R. G. AVACHAT, J.

DATE : 20th APRIL, 2022.

J U D G M E N T :

The challenge in this appeal is to a judgment and order of conviction and sentence, dated 27/5/2019, passed by learned Additional Sessions Judge, Vaijapur, District Aurangabad in Special Case (Child Pro.) No.10/2017. The appellant has been convicted for the offence punishable under

Sections 363, 376(2)(i) of the Indian Penal Code as well as under Section 3 read with 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for 1 month and rigorous imprisonment for 10 years and to pay fine of Rs.5000/-, in default, to suffer rigorous imprisonment for 3 months respectively.

2. The facts giving rise to the present appeal are as follows :-

P.W.3 'R' (victim) was residing along with her maternal grandparents at Pimparkheda. It was about 7.30 p.m. on 22/3/2017, she was proceeding to fetch milk. The appellant met her on way. He snatched her hand and took control of empty pot. He pulled her close to him, pressed her mouth, lifted her and took in a nearby onion field. The victim tried to shout. The appellant, however, gagged her mouth. He removed her pant and inner-wear as well. He too undressed himself and committed sexual intercourse with her against her wish and without her consent. He then left the place. The victim came home weeping. She informed her

aunt (Swati) and grantparents as well. The victim was thereafter taken to the Waluj Police Station. She lodged F.I.R. (Exh.32). Based on the same, C.R. No.43/2007 was registered initially for offences punishable under Sections 376(2)(i) and 363 of the Indian Penal Code and for the offence punishable under Section 3 read with Section 4 of the Protection of Children from Sexual Offences Act. Scene of offence panchanama was drawn. Appellant came to be arrested. The victim was medically screened. Clothes on the person of both of them at the material time were taken charge of under the panchanama. School record of the victim was obtained. On completion of investigation, the appellant was proceeded against.

3. The trial Court framed charge (Exh.C/5). The appellant pleaded not guilty. His defence is of false implication. According to him, the victim was in love with 2 – 3 village boys. He had seen her with them. A false F.I.R. has, therefore, been lodged.

4. The prosecution examined 6 witnesses and produced in evidence certain documents. The trial Court convicted the appellant and consequently sentenced him

punishment as stated above.

5. Heard. The Learned counsel for the appellant would submit that, the aunt and the grandparents of the victim have not been examined. The medical evidence does not support the prosecution. C.A. Reports have not been placed on record. There is no concrete evidence in proof of age of the victim. The appellant was 21 years of age at the relevant time. He has been behind the bars for little over 5 years. He, therefore, urged for acquittal of the appellant.

6. The learned A.P.P. would, on the other hand, submit that, the sole testimony of the prosecutrix is sufficient to constitute offence of rape. Penetration howsoever slight, is sufficient to constitute the offence. The school record of the victim proves her to have been below 18 years of age at the material time. The learned A.P.P. supported the impugned judgment and order.

7. Considered the submissions advanced. Perused the evidence relied on. Although 6 witnesses have been examined, the only evidence that would be relevant for deciding the present appeal is that of the victim, the Medical

Officer who screened her and the Incharge Head Mistress of the school, wherein the victim had studied.

8. P.W.3 'R' victim testified that, it was 7.30 a.m. on 22/3/2017, she was proceeding to fetch milk. The appellant met her on way. He snatched her hand and took control of empty pot. He pulled her close to him, pressed her mouth, lifted her and took in a nearby onion field. The victim tried to shout. The appellant, however, gagged her mouth. He removed her pant and inner-wear as well. He too undressed himself and committed sexual intercourse with her against her wish and without her consent. He then left the place. The victim came home weeping. She informed her aunt (Swati) and grantparents as well.

9. The victim was subjected to a searching cross-examination. The defence case was put to her in the form of suggestions. She did not give in. She also denied that her maternal uncle would abuse the appellant and his family members under influence of liquor.

10. P.W.6 Dr. Pratibha was Assistant Professor, Civil Hospital, Aurangabad. It is in her evidence that, she

medically screened the victim on 23/2/2017. The victim had related the history of sexual assault. In her opinion, upon external examination of the victim, she found two strand of dry grass on her hair which were length of 2 cm. Tenderness was noticed on left buttock. On touch to that portion, the victim felt pain. Hymen was ruptured, margins erythmetous and no bleeding was there. According to the doctor, the alleged sexual assault had occurred within 16 hours next before her medical examination. There were signs suggestive of recent use of force and forcful penetration of vagina. She, however, did not give her final opinion. The opinion was reserved pending availability of forensic science laboratory reports. Exh.50 is the medical examination report of the victim.

11. During cross-examination, the doctor testified to have not conducted the examination of per specus, speculum and per vaginum.

12. P.W.1 Sulabha, Incharge Head Mistress, Zilla Parishad School, Pimparkheda was examined. She produced on record the school leaving certificate, wherein her date of birth is recorded as 21/11/2002. It is in her evidence that,

the victim had earlier took education in Zilla Parishad School at Imampur, Taluka Paithan. Her school record of that school was not placed on record. The witness did not have personal knowledge about date of birth of the victim.

13. P.W.2 Abhay is a witness to the panchanama, whereunder, pursuant to the disclosure statement made by the appellant, cloth on his person at the relevant time were recovered from his residence. The panchanama is at Exh.28. P.W.4 is a witness to the scene of offence panchanama (Exh.38). It is in his evidence that a pair of ladies slipper was recovered from the scene of offence. P.W.5 Shashikant was the investigating officer.

14. The question is, whether, based on the aforesaid evidence, the charge against the appellant did get established beyond reasonable doubt.

15. Admittedly, the aunt and grandparents of the victim have not been examined. The victim gave her date of birth as 21/11/2002. Her evidence in regard to her date of birth is necessarily hear-say. In her statement (Exh.32) recorded by the Magistrate under Section 164 of the Criminal

Procedure Code, she gave her date of birth as 21/11/2003. Her parents have not been examined in proof of her age. The school leaving certificate, although may be admissible in evidence under Section 35 of the Evidence Act, probative value of the contents therein have to be proved independently. No evidence in the nature of birth certificate of the victim was placed on record nor there is any evidence of her primary school record.

16. In the case of **Harpal Singh and another Vs State of H. P. - AIR 1981 SC 361**, relied on by the learned Advocate representing the victim would be of little consequence, since a certified copy of a relevant entry in the birth register was before the Court.

17. In the case of **Alamelu and another Vs. State - AIR 2011 SC 715**, it has been observed thus:

“(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.”

In para 38 and 39, it has further been observed as under:

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed.

She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

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"."

18. In the case in hand, the evidence against the appellant herein is only that of the victim. Victim's maternal aunt and grantparents have not been examined. Her own evidence about her age is hear-say. There is also inconsistency between her age stated before the Court and in the statement under Section 164 of the Cr.P.C. The secondary school record tendered in evidence in proof of her age did not have foundation. The school Head Mistress who was examined was not the author of the school record produced before the Court. Primary school record of the victim, on the basis of which secondary school record was brought into being, particularly as regards the victim's age, was not placed

before the Court. No birth certificate was produced in evidence. The medical officer did not give her opinion soon after the victim was medically screened. C.A. report regarding vaginal swab was not before the Court. There is nothing to indicate that blood or semen sample of the appellant was obtained. As such, the evidence for the prosecution fell very short to bring home the charge. Based on such evidence, the trial Court ought not to have convicted the appellant who has been behind the bars for over five years. This Court is, therefore, not at one with the impugned judgment and order. The appeal thus succeeds. Hence the order :-

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The judgment and order of conviction and sentence, dated 27/5/2019, passed by learned Additional Sessions Judge, Vaijapur, District Aurangabad in Special Case (Child Pro.) No.10/2017 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 363, 376(2)(i) of the Indian Penal Code and Section 3 read with 4 of the Protection of Children from Sexual Offences Act, 2012. The appellant be set at liberty forthwith if not required in any

other offence. Fine amount, if paid, be refunded to the appellant.

(iii) In view of the above, Criminal Application No.966/2022 stands disposed of.

(iv) Fees of Mrs. S.L. Avachar, learned counsel who was appointed to represent respondent No.2, is quantified at Rs.6000/- (Rupees six thousand).

**(R. G. AVACHAT)
JUDGE**

fmp/-