

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.1187 OF 2019

Asif s/o Jakir Pathan
Age: 24 years, Occu. Labour
R/o. Amalner, Tq. Gangapur,
Dist. Aurangabad,
at present R/o. Pangra, Tq. Paithan
Dist. Aurangabad

.. Appellant

Versus

1. The State of Maharashtra
Through Police Station, Bidkin,
Tq. Paithan, Dist. Aurangabad

2. XYZ

.. Respondents

...
Mr. M. D. Gitte, Advocate for appellant.
Mr. R. B. Bagul, APP for respondent No.1.
Mr. V. P. Bakal, Advocate for respondent No.2.
...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 22nd June, 2022.
PRONOUNCED ON : 22nd September, 2022.

JUDGMENT :-

. The appellant is the original accused, who has been convicted in Special Case (POCSO) No.173 of 2016 by learned Special Judge/ Additional Sessions Judge, Aurangabad on 11.12.2017.

2. The prosecution story is that the victim who is aged 6, residing in the neighbourhood of the accused along with the

informant – mother and family members, was playing outside the house around 3.00 p.m. on 04.08.2016. The accused took her to his house where nobody was there and he had forcible sexual intercourse/penetrative sexual assault on the victim.

3. After the alleged incident, the victim immediately informed the said fact to her mother. The father of the victim came to house around 5.00 p.m. and thereafter, they went to Police Station to lodge report. After the report Exhibit-18 was lodged, the victim was sent for medical examination. The accused came to be arrested. Panchanama of the spot came to be executed. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure (for short "Cr.P.C.") as well as 164 of Cr.P.C. by learned Judicial Magistrate First Class. The record regarding the date of birth of the victim has been collected from the school, where she used to take education. The clothes of the victim as well as accused came to be seized and they were sent for chemical analysis. After the completion of the investigation, charge-sheet was filed before the learned Special Judge under the POCSO Act.

4. Charge came to be framed at Exhibit-10 against the accused under Section 376 of Indian Penal Code (for short "IPC") and Sections 4, 6, 8, 10 and 11 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the "POCSO

Act"). The accused pleaded not guilty and trial has been conducted. The prosecution has examined in all eight witnesses to bring home the guilt of the accused.

5. After considering the evidence on record and hearing both sides, the learned Special Judge has held that the victim was minor on 04.08.2016 and the accused has committed aggravated penetrative sexual assault on the minor victim. However, as regards the points of sexual assault, aggravated sexual assault and sexual harassment are concerned, the findings are given as does not survive. Thereafter, taking into consideration Section 42 of the POCSO Act and findings that offence has been made out under Section 376(2)(i) of IPC, which has more punishment than Sections 4 and 6 of the POCSO Act, the conviction has been awarded for the offence punishable under Section 376(2)(i) of IPC. The accused has been sentenced to suffer rigorous imprisonment for 10 years and pay fine of Rs.50,000/-, in default of payment of fine to undergo simple imprisonment for six months. The amount of fine was directed to be given to the victim under Section 357(1) of the Cr.P.C. This judgment and order is under challenge in this appeal.

6. Heard learned Advocate Mr. M. D. Gitte for the appellant, learned APP Mr. R. B. Bagul for respondent No.1 – State and learned Advocate Mr. V. P. Bakal for respondent No.2.

7. Learned Advocate for the appellant has vehemently submitted that P.W.6 – Rajani Dattatraya Joshi is the Head Mistress of Zilla Parishad Primary School and she has produced the register of admission of the students and the relevant entry in respect of the victim is produced at Exhibit-33, however, this entry is not supported by birth certificate and, therefore, when supporting document is not produced and proved, said Exhibit-33 cannot be read in evidence. It will have to be held that the age of the victim is not proved. Though P.W.1 – the mother has stated about the age of the victim so also the P.W.2 – the victim has stated about her age, since Exhibit-33 is not supported by authentic public document, it cannot be considered. Another fact that is required to be noted is that the victim was a school going girl and the record shows that the school timing was till 4.00 p.m. As per the prosecution story, the incident has taken place at 3.00 p.m. The question then arises how the girl was in her house at 3.00 p.m. Neither the mother, nor the victim is saying that on that day the girl had not gone to school. The mother of the victim has tried to say that on Thursday the school timings were till 12.00 noon, but the girl has not stated this fact. It appears that the girl had gone to school on that day and no such incident as narrated had ever taken place. The child appears to be tutored by the mother and other family members. P.W.1 – mother has supported her FIR Exhibit-18

as well as her statement under Section 164 of Cr.P.C. Exhibit-19, however, in her cross-examination it was specifically put to her that in order to harass the accused and his family members, a false case has been filed. The husband of the informant wanted to purchase the house of the accused and, therefore, it appears that he has implicated the accused.

8. The learned Advocate for the appellant has then pointed out the contradictions in the testimony of victim and her statement recorded by the Investigating Officer under Section 161 of Cr.P.C.. In her statement under Section 161 of Cr.P.C., the girl had stated that she was watching movie on the mobile of accused in his house, just before the alleged incident, but now in her testimony she says that she was playing outside the house when the accused had forcibly taken her to his house and then ravished her. This shows how the mother of the victim had tutored her. P.W.3 Circle Inspector is the panch to the spot panchanama. P.W.4 Javed Pathan is the panch to the seizure of clothes of the victim. P.W.5 Tayyab Pathan is the panch to the seizure of clothes of the accused. Though the clothes of the victim and accused are seized, yet the CA reports are not supporting the prosecution story. P.W.8 Dr. Jaiswal is the medical officer, who had conducted medical examination of the victim. He has specifically stated that there were no marks of

violence on the other parts of the body of the victim. He could not find blood marks. There was no history of semen on the thigh or genital. Under such circumstance, it cannot be said that victim was subjected to forcible sexual intercourse. The learned Special Judge went wrong in convicting the appellant as he has failed to appreciate the evidence properly. Therefore, the said conviction deserves to be set aside.

9. Per contra, the learned APP as well as learned Advocate representing respondent No.2 - informant have strongly opposed the appeal and submitted that all the witnesses have corroborated to the prosecution story. The age of the victim is proved as 6 years on the date of the incident. In fact, there was no cross on this point to P.W.1 and P.W.2. P.W.6 Rajani Joshi is the Head Mistress of the first school where the girl had taken admission. In her cross-examination, she has specifically stated that though it is a normal rule to get the birth certificate, however, as regards the villages are concerned, they have directions from the Government that admission can be given to such child and birth date in the official record of the school can be taken as per the say of the parents. P.W.2 victim has specifically stated about the acts done by the accused to her and also told it to her mother. There is consistency in the story of the prosecution by the prosecution witnesses. The

lodging of the FIR is also prompt. The story was told to P.W.8 Dr. Jaiswal also. The house in which the accused was residing was not in his name and this can be seen from the cross-examination of the witnesses. It is standing in the name of some other person. Under such circumstance, how there could be a right with the accused to sell that property to anybody else. This does not indicate that there was any kind of dispute between the father of the victim and the accused. There was no reason for framing the accused. It is the heinous act of the accused to fulfill his lust. The conviction awarded by the trial Court is correct and does not require any interference.

10. At the outset, it can be certainly said that the point of age of the victim appears to be unnecessarily raised on behalf of the appellant. Definitely, the girl is below 18 years of age. Whether she was exactly 6 years old or plus or minus two will not be the question involved here. When there is so much of gap between her age and the age of majority, we can definitely rely on the school record which was on the basis of the information given by the parents of the girl. Along with it, it is also to be noted that there is absolutely no cross on the point of age to P.W.1 informant and P.W.2 victim. Rather in the cross-examination of P.W.1 informant, it has been extracted that she has three children, elder child is 6 years old, middle child is 4 years old and younger child is two years old.

The victim is the elder daughter of the informant. When this has been extracted in the cross, then there cannot be denial of the same. If there was serious dispute about the age of the girl, then P.W.1 informant and P.W.2 victim were there in the dock. The informant has stated the age in her testimony as 6 years, whereas the victim had stated her age in her testimony as 7 years. In his statement under Section 313 of Cr.P.C. also, the appellant has not denied in specific words that the age of the girl is 6 years. It will have to be therefore held that the prosecution has proved that the age of the victim on the date of incident was 6 years or was 'minor'/ 'child' at the time of incident.

11. In ***Dada Laxman Gaikwad vs. State of Maharashtra, 2018 ALL MR (Cri) 2240***, it has been held that on the basis of documents namely, school leaving certificate and general register of school where the prosecutrix was studying, tendered in evidence; then these documents give rise to presumption under Section 35 of the Indian Evidence Act and are admissible in evidence unless contrary is proved. It has been further held that evidence of clerk maintaining documents revealing date of birth of prosecutrix that entry was taken in handwriting of previous clerk would be sufficient. Evidence in the form of public documents tendered through public officer would be sufficient and a conclusive evidence as regards age

of prosecutrix.

12. In ***Mahadeo S/o Kerba Maske vs. State of Maharashtra and another, (2013) 14 Supreme Court Cases 637***, in Para Nos.12 and 13, it has been held that:-

“12. We can also in this connection make reference to a statutory provision contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12(3) of the said Rules, it is stated that:

“12.(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining-

- (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;”

Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for.

In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.

13. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same. "

13. Thus, taking into consideration the oral evidence as well as the legal position stated above, wherein we can definitely rely upon the school record, the victim in this case was the "child" as defined in Section 2(d) of the POCSO Act.

14. The testimony of P.W.1 informant is consistent with her FIR Exhibit-18, statement under Section 164 of Cr.P.C. Exhibit-19 and it

is corroborated by the testimony of P.W.2 victim, the statement of the victim under Section 164 Cr.P.C. and medical evidence in the form of testimony of P.W.8 Dr. Jaiswal and the medical certificate Exhibit-50 issued by him. As per the testimony of P.W.1 informant, the victim was crying in the house and she was frightened. When she asked the girl as to what had happened then the girl told that the neighbour i.e. accused had taken her to his house. Nobody else was present in the house. He caused the girl to lie on the floor, undressed her and had sexual intercourse. Thereafter, the father of the girl came at 5.00 p.m. and then informant had told him about the incident and then went to lodge report Exhibit-18. In her cross-examination, the informant had stated that the normal school hours are from 9.00 a.m. to 4.00 p.m., however, on Thursday the school timing is till 12.00 noon. This fact has been extracted by the accused in the cross-examination of the informant. It was not asked to the informant as to what is the name of the school of the victim. However, it is to be noted that it was asked to P.W.2 victim and she has stated that the name of her school is Axa that means it is not the same school of P.W.6 Rajani Joshi. P.W.6 Rajani Joshi is the Head Mistress of Zilla Parishad Primary School, where the girl had taken admission first. Therefore, though the school timings were asked to P.W.6 Rajani Joshi and she has stated that on Thursday, the school timing is 10.00 a.m. to 4.00 p.m. will not be applicable

to the school timing of Axa Urdu School. In Exhibit-33, which is the register of school leaving, it is stated that why the girl had left the school and it appears that she wanted to take admission with Axa Urdu Primary School. She had left the school from Zilla Parishad Primary School. In her cross-examination, the girl had stated that she used to go to school at 8.00 a.m. and returned by 4.00 p.m. It was not at all suggested to her that on that day, she had gone to school. When the witness was available to ask the question and intentionally it is not asked, then there is no scope for inferences to be drawn that she would have gone to the school on the day of incident also. The accused though called upon to lead witness in defence, had not asked the school authorities of Axa Urdu Primary School to come and depose in respect of whether the girl had attended the school on the day of incident. There was second opportunity available to the accused to examine the witness in defence. That opportunity is also not availed by the accused. Therefore, when two to three opportunities were available to the accused to ask in the cross of the informant, victim and to bring the defence witness, and it has not been utilized, then the inference as asked by the learned Advocate for the appellant that she had attended the school on the day of the incident and no such incident as narrated by the victim had ever taken place, cannot be drawn.

15. The victim, in her examination-in-chief, has specifically stated by pointing out towards accused that on the day of incident, he had taken her to his house and thereafter, he had sexual intercourse with her. A detailed cross-examination has been taken, but her statement about committing of rape by the accused on her is not shaken. No doubt there appears to be some contradiction in her testimony, as in her statement under Section 161 of Cr.P.C. she has stated that she was watching movie on the mobile of the accused and then now she is giving a different story that when she was playing outside the house she was taken away by the accused. Yet it is to be noted that even if we take the earlier statement that she was watching movie on the mobile of the accused, it rather gives disadvantage to the accused, thereby it is then admitted that she was already in the house of the accused at the time of incident. Such contradiction is bound to be there but what is consistent in her testimony will have to be considered and it is in respect of sexual intercourse by the accused on her. So also, it appears from the cross-examination of P.W.7 – Investigating Officer that in the statement under Section 161 of Cr.P.C. the victim had disclosed that her Salwar was torn and the victim had stated that the accused had done the sexual intercourse from the torn portion of the Salwar. In fact, the clothes of the victim were seized by drawing panchanama in presence of P.W.4 – Javed Pathan. Question has not been put to

the said witness that the Salwar which was seized in his presence was torn; nor it is the case of the accused that some different clothes have been seized. There is no such suggestion to P.W.1 informant, who had identified the clothes of the victim, nor such suggestion is appearing in the cross-examination of P.W.2 victim. The third point which was then tried to be raised in the cross-examination of P.W.7 Investigating Officer is that after the family members of the accused came, the girl ran away. Such statement appears to have been recorded by the Investigating Officer, but it cannot be taken as major contradiction, because none of the family members of the accused have been examined in this case either on behalf of prosecution or as a defence witness by the accused. Therefore, whatever contradictions have been pointed out on behalf of the accused cannot be said to be material contradictions, which are going to the root of the case thereby negativating the prosecution story. Further, those contradictions also cannot be taken as tutoring of the girl by the mother or father of the girl.

16. The defence of the accused is that he has been falsely implicated as the husband of P.W.1 wanted to purchase the house of the accused, but it was refused by the accused. He has put such defence in his statement under Section 313 of the Code of Criminal Procedure also. This fact is denied by P.W.1 informant in her cross-

examination. Further, in the cross of P.W.7 Investigating Officer, it was suggested on behalf of the accused that the house in which the accused is residing stands in the name of one Chand Kha. If it stands in the name of Chand Kha, then how the accused has any right to sell the said property is a question. Even if for the sake of arguments, we accept that such right is available to the accused and husband of the informant wanted to purchase the said house, yet it is unbelievable that just to frame the accused, the father would put such burden on the minor daughter which may also bring defame to the family itself. Therefore, the said defence which has been taken appears to be an afterthought and there was no such reason for the informant or the victim to implicate the accused.

17. P.W.3 is the panch to spot panchanama. He has proved the same and the location of the spot panchanama would show that the said place where the girl was ravished was much inside and at a distance from the informant's house.

18. P.W.4 – Javed Pathan and P.W.5 – Tayyab Pathan are the panch witnesses to the seizure of clothes of the informant as well as accused. No doubt, the CA report says that there was no semen detected on Exhibit-1 and 2 i.e. vaginal swab and vaginal smear and also no semen was detected on the clothes of the girl, there is other ample evidence on record which would prove the guilt of the

accused.

19. P.W.8 Dr. Jaiswal is the medical officer, who had examined the victim. He has deposed that on the examination of genital area, the posterior fouchette was intact, hymen was intact and situated deeper which was normal for age. But he says that peri hymenal redness was present at 5.00 O Clock and 7.00 O Clock position. Therefore, on the basis of history and clinical examination, his impression was that there were signs suggestive of recent forceful penetration in vagina. He says that the sexual intercourse could not be ruled out and then he issued the medical report Exhibit-50. In his cross-examination he has stated that he could not find the marks of violence on other parts of the body of the victim. No history of semen on thigh or genital was given but then he has stated that the injury on the vital part was possible and it depends on the disparity of size between survivor and accused. It appears that he intended to indicate difference and height also in word 'size'. Further, he says that there is possibility of injury, but sometimes it may happen that the 6 years child being afraid may give up. He had not specifically stated that the victim was frightened but then he states that he had sent her to Social Worker for Counseling. Definitely, the said fact is required to be taken into consideration that taking into consideration the size and the force that is used by

the accused, a small child may give up and then there may not be injury to the other parts of the body. Merely because there were no injuries on the other part of the body, we cannot say that there was no sexual intercourse. Rather, the situation of the genital has been told by this witness was sufficient to suggest forceful penetrative sexual assault.

20. Therefore, taking into consideration the re-assessment of evidence adduced by the prosecution, it can be certainly said that the prosecution has proved that the girl was subjected to rape/penetrative sexual assault of aggravated form. Here, it is to be noted that the date of offence is 04.08.2016. Section 6 of the POCSO Act got amended w.e.f. 16.08.2019 and, therefore, the said Section prior to its substitution should be considered and at that time, the punishment that was provided was for a term which shall not be less than 10 years, but which may extend to imprisonment for life and shall also be liable to fine. As regards Sections 8 and 10 of the POCSO Act are concerned, they are lesser offences and when the higher offence is proved i.e. aggravated penetrative sexual assault defined in Section 5 of the POCSO Act, that was required to be considered and almost similar punishment was then provided in Section 376(2)(i) of Indian Penal Code. Section 376(2)(i) of Indian Penal Code came to be omitted w.e.f. 21.04.2018, but it was there

on the date of the offence in this case. Under such circumstance, Section 42 of the POCSO Act appears to have been considered by the learned Special Judge.

21. The conclusion arrived at by the learned Special Judge and the punishment awarded is perfectly legal and correct. There is no merit in the present appeal. There is also no question of awarding less punishment than awarded, as the minimum sentence has been awarded in this case. Appeal deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm