

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

CRIMINAL APPEAL NO.733 OF 2018

Yadav Chandoba Dawlekar,
Age-30 years, Occu:Builder,
R/o-Badur, Tq-Biloli, Dist-Nanded.

...APPELLANT

VERSUS

- 1) The State of Maharashtra,
Through the Bhagyanagar Police
Station, Nanded, Dist-Nanded,
- 2) Ranjana W/o Amrut Gaikwad,
Age-38 years, Occu:Labour,
R/o- At-Taddkhel--, Tq-Degloor,
Dist-Nanded.

...RESPONDENTS

...
Mr. R.O. Awasarmol Advocate for Appellant.
Mr. A.M. Phule , A.P.P. for Respondent No.1 – State.
Mrs. Pooja V. Langhe Advocate appointed for Respondent
No.2.

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CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING JUDGMENT : 23rd JUNE 2022

DATE OF PRONOUNCING JUDGMENT : 8th SEPTEMBER 2022

JUDGMENT :

1. The appellant is the original accused who has been convicted in Special Case (POCSO) No.19 of 2015 by the learned Special Judge / Additional Sessions Judge-4, Nanded on 17th August 2018 after holding him guilty of committing offence punishable under Sections 363, 376 of the Indian Penal Code and Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act (for short "POCSO Act"). The appellant – accused has been sentenced to suffer simple imprisonment for five years and to pay fine of Rs.5000/- for the offence punishable under Section 363 of the Indian Penal Code and in default of payment of fine he has to suffer further simple imprisonment for two months. Further, appellant has been sentenced to suffer rigorous imprisonment for ten years for the offence punishable under Section 3 read with Section 4 of the POCSO Act and to pay fine of Rs.5000/- and in default of payment of fine, to suffer further rigorous imprisonment for six months. However, appellant has been acquitted of the offence punishable under Section 366-A of the Indian Penal Code. No separate sentence has been awarded for the offence punishable under Section 376 of the Indian Penal Code.

2. Heard learned Advocate Mr. Awasarmol for the appellant, learned APP Mr. Phule for respondent No.1 – State and learned Advocate Mrs. Langhe appointed for respondent No.2.

3. It has been vehemently submitted on behalf of the appellant that the learned Special Judge has not considered the evidence properly. The crux of the matter is, as to whether the prosecution has proved that the girl is “child” as defined under Section 2(d) of the POCSO Act. If we consider Exhibit-26, which is the statement of mother of the victim - PW-1, which was taken on 5th February 2015, then at that time she has given age of the victim as 19 years. In this case, the First Information Report (for short “FIR”) is stated to have been lodged on 15th February 2015. When the FIR was lodged, it was only under Section 363 and 366-A of the Indian Penal Code and there was absolutely no mention about the age of the girl. Further, as per the prosecution story itself the earlier incident is stated to have taken place on 19th November 2014 when mother of the victim had received message that the girl was missing from Nanded where she was residing in hostel. Even it was told by brother of the accused that the girl has been kidnapped by the accused and on the request to the said brother of the accused, the girl was brought to the house of the informant on 26th November 2014.

There was no FIR lodged at that time, though it is stated that by the said statement dated 5th February 2015 it was informed by the informant to the Police that the girl has been found. Naturally, it would have been on the basis that the informant herself told to the Police that the girl is 19 years of age. Though in her testimony PW-1 has tried to say that at that time her daughter was 16 years of age, but her own statement Exhibit-26 would disclose that the victim was 19 years of age. The second incident is stated to have taken place on 12th February 2015 when the victim did not return from her coaching class. The FIR, thereafter has been lodged on 15th February 2015. Therefore, in this case it was utmost necessary for the prosecution to prove the birth date of the girl to show that she was "child". In her cross-examination, PW-1 has stated that the birth certificate of the girl is available and she can produce it, however it was not produced at all. The defence of the accused is that the girl was major and had eloped with the accused with consent as well as she had physical relations with him with consent. The victim is now saying that at the time of incident she was 16 years of age. She has denied portion of her statement also which indicates that in her statement under Section 161 of the Code of Criminal

Procedure she had accepted that she was loving accused and had gone along with accused voluntarily.

4. The learned Advocate for the appellant has further submitted that the medical evidence may support the prosecution on the point of physical relations. So also the testimony of other witnesses like panchas to the spot as well as seizure of clothes panchnamas may support the prosecution, however, the important testimony is also that of PW-7 Vishwanath who was the headmaster of Milind Primary School, Waghala. He has produced the extract of school admission and leaving register at Exhibit-58 and thereafter he has proved the extract of the school register which was produced by the mother of the victim i.e. Exhibit-59 and 60. However, in his cross-examination, he has stated that birth certificate of the victim was not given along with admission form, no age proof was given along with admission form, so also the identity proof of the victim's mother was not given along with the admission form. In the school admission and leaving register, it was mentioned that the school leaving certificate is issued on the request of the guardian. The date of birth was recorded on the say of the parents of the victim when the victim had taken admission in that school. Under such circumstance, when the birth certificate

was not the basis for the date of birth to be recorded in the school register, then Exhibit-58, 59 and 60 cannot be said to be admissible documents. Since it has not been proved by the prosecution that the victim girl is child, then the beneficial interpretation, that the girl was major and had gone along with the accused voluntarily and has sexual intercourse voluntarily, will have to be drawn. The learned Special Judge failed to consider this aspect and on the assumption that the date of birth has been proved, wrongly held that the victim is child.

5. The learned Advocate for the appellant has relied on the decision of this Court in ***Shri Amit S/o Ranglal Shende vs. State of Maharashtra, 2018 ALL MR (Cri) 1915***. In this case also the victim had deposed about her date of birth and the admission register of the school was showing the same date, however, entry in the said register was not on the basis of the documents admissible in evidence. The headmaster of the school had admitted that the said entry was taken on the basis of the affidavits of the parents of the victim and no ossification report was produced by the prosecution, then it was held that the prosecution has failed to prove that at the relevant time the victim was below 18 years of age. It was then further held that

the victim was a consenting party since she was major and therefore, the conviction was quashed.

6. Further, reliance has been placed by the learned Advocate for the appellant on the decision in ***Sandeep Janaji Konde vs the State of Maharashtra, 2016 ALL MR (Cri) 1433***, wherein it has been held that entry relating to the date of birth made in the school register would be relevant and admissible under Section 35 of the Indian Evidence Act but such entry has no evidentiary value in absence of material on which age was recorded. Further, reliance has been placed on ***Gautam Chandrakant Khairnar vs. State of Maharashtra, Through Inspector, Parola Police and Another, 2022 SCC OnLine Bom. 1025***. In this case, in Para 38 and 39, it has been observed thus:-

” 38. A legal inference can be drawn only in the given facts i.e. only when legal and admissible evidence is adduced by the prosecution. The determinative question would be whether the presumption under section 29 of the POCSO Act discharges the prosecution of proving its case beyond reasonable doubt? We are constrained to hold that the prosecution cannot be discharged of proving its case by way of such admissible evidence which would appeal to a prudent and a logical mind and hence judicial conscience.

39. It cannot be said that the presumption under Section 29 of the POCSO Act is conclusive presumption which cannot be overcome by any additional evidence or argument. In legal terminology a presumption cannot be absolute presumption, as such, presumption would usually be mere fiction to disguise a rule of substantive law. A judgment in the court of law shall necessarily be governed by rule of evidence. "

7. Learned Advocate appearing for the appellant, therefore, prayed for setting aside the conviction and release of the appellant by acquitting him.

8. Per contra, the learned APP as well as learned Advocate appearing for respondent No.2, supported the reasons given by the learned Special Judge and submitted that the appellant cannot forget his relationship with the victim before posing the question, as to whether the victim is a child. Accused is husband of the sister of mother of the victim i.e. PW-1. In fact, it was his personal knowledge also as to what is the age of the victim. Even then, as law requires that the prosecution should prove its case beyond reasonable doubt and then the presumption under Section 29 of the POCSO Act will get attracted shifting the burden on the accused to disprove that victim was below 18

years of age on the date of incident. Herein this case the birth date of the victim is 5th June 1998. The incident had taken place on two occasions, firstly on 19th November 2014 and secondly on 12th June 2015. At the time of both the incidents the victim was below 18 years of age. PW-1, mother of the victim has not given the date of birth of the victim in her examination-in-chief, however, she has specifically stated that at the time of incident victim was 16 years of age. There was searching cross-examination and everything has been brought on record. In fact PW-1 has disclosed it in cross-examination that the victim was admitted in 1st standard in Milind Primary School, Waghala, Nanded and thereafter, how and when she has changed schools of the victim has been extracted. It was also stated that mother of the victim got married in the year 1993. She has specifically denied that she had given age of the victim as 19 years in Exhibit-26. Therefore, it can be said that the mother when clearly stating on oath that age of her daughter is below 18 years, there is no hurdle in accepting the same. Similarly, the victim in her testimony has stated that she was below 18 years of age on the date of incident. Even in her cross-examination it was tried to be brought on record that she was more than 18 years of age at the time of incidents but nothing contradictory

has been transpired. Testimony of PW-7, the headmaster is important and he has clearly proved the age of the victim by producing on record the admission register and the form that was filled in by the victim and her parents. It was the school where the victim had taken the admission first in time and therefore, that evidence is admissible in view of Section 35 of the Indian Evidence Act.

9. Learned APP further submitted that PW-8 is the medical officer who had medically examined the victim. In his cross-examination, it has been extracted that the victim might be 16 years of age when he medically examined her. No doubt, he has stated that without radiology test he will not be able to say the exact age, still his opinion would be important in view of the fact that it has been extracted in the cross-examination.

10. Learned APP has relied on the decision by the Hon'ble Madras High Court in ***K. Muthu Mariappan vs. the State represented by the Inspector of Police, Arumuganeri Police Station, Tuticorin District, 2015(3) MLJ (Cri) 429***. In this case it was held that when the accused had called the victim who had not completed the age of 18 years, then Section 30 of

the POCSO Act regarding presumption of culpable mental state will have to be raised.

11. Learned Advocate for respondent No.2 has relied on the decision of this Court in ***Dada Laxman Gaikwad vs. State of Maharashtra, 2018 ALL MR (Cri) 2240***, wherein 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. Learned APP as well as learned Advocate for respondent No.2, both have relied on the decision in ***Mahadeo S/o Kerba Maske vs. State of Maharashtra and another, (2013) 14 Supreme Court Cases 637***, wherein 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. On the basis of these decisions it was submitted by the learned APP as well as learned Advocate for respondent No.2 that when the age of the victim in this case has been proved to be below 18 years and the girl by entering the witness box has stated that as to how she was taken away by the accused, at which places and where they had sexual intercourse, then offence under Section 3 punishable under Section 4 of the POCSO Act has been definitely proved. The girl was taken away from the guardianship of her guardian. Though on the first occasion she was staying in the hostel but that does not mean that she was not under the shelter of her guardian. On the

second occasion her grand-parents used to reside with her and it can be said that taking into consideration the past experience the grand-parents were kept along with her to take care of her, yet from the coaching class she was taken away. It appears that the accused had prevailed over her to have attraction for him and then taken her along with him. When in fact accused was the uncle of the victim (husband of her maternal aunt – मावशी), he ought to have considered the age before indulging in such activities. The special Judge has rightly convicted him and imposed suitable sentence. It does not require any interference at all.

14. The first and foremost thing that is to be taken note of is the relationship between the victim and the accused. As aforesaid, the accused is husband of sister of mother of the victim. Unfortunately, it has not been brought on record as to when accused got married to the sister of the informant. Further, it has not been brought on record by the prosecution as to whether marriage of the accused with sister of the informant was prior to the birth of the victim or after that. What has not been denied in the cross-examination of PW-1 and PW-2 is the fact that sister of the informant as well as accused were on visiting

terms in the house of the victim. Victim has stated that her aunt i.e. wife of the accused and accused were residing in the same town i.e. Degloor in the year 2015, where she was residing with her family. When accused was expressing his love towards the victim, she had told the said fact to her mother and then mother, PW-1 had abused the accused, which resulted in the quarrel between accused and his wife and therefore they had gone to their village Badur. However, after two years, they again came to reside in Degloor and started residing in the neighbourhood of the informant. All these facts have not been denied by the accused in the cross-examination of the victim. All these things indicate that even the accused had the special knowledge about the age of the victim and now it appears that he has raised a false defence or an intentional defence by stating that the girl is more than 18 years of age. No doubt he is taking advantage of the statement given by PW-1 at Exhibit-26 on 5th February 2015, in which the age of the victim has been stated as 19 years. However, that document will not prevail over the admissible documents. It appears that the informant, who is a labourer, is hardly able to write, therefore, accused cannot be given an advantage of her illiteracy by misquoting the age of the victim as 19 years.

15. Even as per the prosecution, the victim was kidnapped twice. Firstly she was kidnapped on 19th November 2014 and at that time informant had lodged missing complaint with the Police Station on the same day. However, it appears that later on, since the girl was brought and given in custody of the informant on 26th November 2014, no complaint was lodged by her and only statement was recorded on 5th February 2015. In her said statement, she has stated that since she has got the daughter back, the missing report should be filed. There appears to be a lethargy or intentional inaction on the part of the Police. The informant appears to be not given an idea that she can still file a complaint regarding kidnapping. What appears from the evidence that was adduced in this case by the prosecution is that the then Police Officer had not made any inquiry with the victim after she was found and given in custody of the informant. In fact at that time itself everything would have been revealed. Another possibility is that since the girl was found and due to the fear of defame, the informant would not have lodged any report. This usually happens when the accused is closely related to the victim and in certain cases the other relatives prevail on the victim and the parents for not to lodge report to avoid

defamation in the society. However, we cannot take note of the earlier incident as an offence in view of the fact that the learned Special Judge while framing charge against the appellant had not considered the prosecution case properly and there is no charge framed for the earlier incident of kidnapping.

16. The charge framed against the appellant is in respect of the incident dated 12th February 2015. In respect of the said fact the informant has stated that after one month when victim was brought back, she was kept in a rented room along with her grand-parents. From there the girl was attending coaching classes. She then says that the accused had forcibly kidnapped the girl on 12th February 2015. She came to know about it through the grand-parents and then after coming down to Nanded and searching girl, she lodged the report on 15th February 2015, Exhibit-27. In her cross-examination, she has admitted that the accused on his own, had brought the girl to the Police Station. This fact cannot be taken in favour of the appellant, for the simple reason that it would not have been that the accused was helping the victim. In fact, it would have been on the basis of the insistence of his own relatives that he would have brought the girl to the Police Station. The cross-examination of the informant is mainly on the point to bring the

fact on record that the girl was more than 18 years of age at the time of incident.

17. PW-2 is the victim and she has stated that when she was staying in the hostel, accused used to give her phone calls and used to say that he wants to meet her. Thereafter she had met him at Taroda and at that time, accused had told her that he would marry her. They had sexual intercourse, though she says that she had opposed the sexual intercourse, the accused told her that he will marry her and further told that otherwise he would endanger his life. After that incident also repeatedly he used to give phone calls to her. According to her, after that incident then she was called at the railway station, Nanded and by saying that accused will marry her, he has taken her to Nizamabad. After staying two days there in Nizamabad in the room of the friend of accused, the accused had taken her to Kamareddy. At that place accused received phone call from his brother and they were called to village Badur. From there, brother of the accused had given phone call to mother of the victim and relatives. Thereafter she was brought to her village by her parents and relatives. This all had happened at the time of first incident, but as aforesaid, unfortunately the same had not

taken the shape of an offence and case because of the negligence of the Police authorities.

18. PW-2, victim further says that after residing with her parents for about 1 to 2 months, she went again to Nanded for education and started staying with her grand-parents. Thereafter also accused used to give her calls and in the month of January 2015 the accused had met her in front of coaching class. He had taken her to University and then it was told to her that they would again go, that means they would elope. From railway station, they went to Hyderabad. After staying 2 to 3 days there in a room of the friend of the accused, where accused had forcible intercourse with her, she was taken by the accused to village Bhaisa. By staying one day there, they went to Hapispath. Then they went to the house of aunt of the accused at Biloli and then to Daryapur. At Daryapur, brother of the accused came and he brought them to Nanded on 22nd February 2015. The victim has categorically stated that she was 16 years of age when the incident had taken place. As aforesaid, again she has been cross-examined thoroughly just to get an admission that she was more than 18 years of age at the time of incident and that since she was also loving accused, she had voluntarily gone with him. But the victim has not given any kind

of admission, though it appears that in her statement before Police she has stated that she was loving accused and had gone along with him.

19. It now becomes relevant to consider as to whether the prosecution has proved the age of the victim. PW-7 is the important witness from that angle. PW-7 – Vishwanath has deposed that since 1995 he was serving in Milind Primary School, Waghala. Further, he says that since 2003 he was working as Headmaster of the school. According to him, victim had taken admission in his school on 15th June 2004 for 1st standard. Admission form is at Exhibit-58. The entry in respect of her date of birth was taken as 5th June 1998 and the register extract is at Exhibit-59 and 60. In his cross-examination, it was not tried to be extracted that prior to this school whether the victim had taken education in another school. Then naturally, this is the first school in which victim has taken admission. No doubt in his cross-examination, PW-7 has stated that birth certificate of the victim or any other document regarding her age proof was not given along with the admission form. Naturally, the age of the student at the time of admission would be firstly taken as per the oral statement of the parents and then along with admission form if documents are given, then it would be on

the basis of those documents. Admission form Exhibit-61 bears the signature of the father of the victim. In the said portion also the date of birth that has been given is the same. The ratio laid down in ***Mahadeo S/o Kerba Maske vs. State of Maharashtra and another*** (supra), which is the decision by the Hon'ble Supreme Court, will have to prevail. When the date of birth certificate from the school (other than play school) first attended has been given precedence over the birth certificate given by a corporation or municipal authority or a Panchayat, then that will prevail. Further, when the appropriate person from the school, which gave admission to the victim first, has been examined, the record kept by that school would be certainly admissible under Section 35 of the Indian Evidence Act.

20. Here, it is to be noted that the register which is kept by the concerned school was not on the basis of any document, but only on the basis of oral information, but then it was on the basis of admission form. If we minutely consider admission form, Exhibit-61, then it appears that first part is the admission request of the student and second part is in respect of certification to be made by the parents in respect of age and the language in which the education was to be given to the student.

As regards the age is concerned, Clause (a) is in the form of verification as such. So it gives an additional assurance to the school regarding date of birth of student. Therefore, when that entry was taken by the school of PW-7 Vishwanath, then it had basis. Under such circumstance, the decisions relied by the learned Advocate for the appellant i.e. in ***Shri Amit S/o Ranglal Shende vs. State of Maharashtra***, (supra) and in ***Sandeep Janaji Konde vs the State of Maharashtra***, (supra), are not applicable to the facts of this case. Taking into consideration the cumulative evidence of the mother, the victim and the school authorities, the learned Special Judge has rightly held that prosecution has proved that on the date of the incident victim was "child" as defined in Section 2(d) of the POCSO Act.

21. Now turning towards the other evidence which is in the nature of panchas and investigating officer, it is formal and corroborative in nature. However, we will have to consider the testimony of PW-8 Dr. Santosh. The history that was told by the victim to him is about forcible intercourse and he has, after the thorough examination, though there was no injury found on the genital, had given opinion that "examination findings neither confirm nor refute forceful sexual intercourse. However final opinion will be given after receipt of FSL report." In his

examination-in-chief, PW-8 has again stated that even after the receipt of CA report, he maintained the same opinion. First and foremost thing is that he was to give an opinion as to whether there was sexual intercourse and then to go towards the allegation whether it was forceful or not. It is important to note that the medical examination has been done after so many days of the incident and therefore, it will not give any injury marks or there would be a very less possibility of injury marks on the private area of the girl. However, in his cross-examination, PW-8 has clearly stated that he has not collected any age proof of the victim, yet it appears that further question was asked and then he has stated that, on development of secondary sexual characteristics, age of the victim might be around 16 years. Then he says that without radiology test he would not be able to say firmly about her age. When, in fact PW-8 has specifically stated that they have not collected any age proof, that means they had not made any test for determination of the age of the victim, then further question ought not to have been asked on behalf of the accused. Yet the question is asked and therefore, we will have to consider that statement. When his opinion has been sought, PW-8 has stated that the age of the victim would be

around 16 years and therefore, even if we add “ + or – rule ”, yet, the age of the victim would be below 18 years.

22. When the girl was below 18 years of age, her consent for any act cannot be taken as consent at all and therefore, it will have to be held that the prosecution had proved that the accused had kidnapped the victim and thereafter had committed penetrative sexual assault on her. Presumption under Section 29 of the POCSO Act as well as presumption under Section 30 of the said Act will have to be raised and the accused has not adduced any evidence to rebut the said presumption. If we consider his statement under Section 313 of the Code of Criminal Procedure, then for many questions accused has answered as, he don't know. Even he has claimed ignorance of the fact that on 19th November 2014 the victim was 16 years of age. Thereafter he has, as usual, given answers to every question that it is false. He has never stated to any question that the girl was major, and to the last question he has stated that false case has been filed against him. At the cost of repetition, it will have to be observed that though the accused had personal knowledge or he supposed to have the personal knowledge about the age of the victim in view of the relationship between him and the mother of the victim and the victim, yet intentionally that ignorance has been

tried to be shown by him. In view of all these facts, the Special Judge has rightly held that the accused has committed offence punishable under Section 363 of the Indian Penal Code and Section 3 punishable under Section 4 of the POCSO Act and the accused has been rightly sentenced. The prosecution has not challenged his acquittal for the offence punishable under Section 366-A of the Indian Penal Code and therefore, it cannot be considered at all. There is no merit in the present Appeal and the same deserves to be dismissed.

23. The Appeal is dismissed.

24. The fees of the learned Advocate Mrs. Pooja V. Langhe appointed to represent respondent No.2, is quantified at Rs.10,000/- (Rupees Ten Thousand), to be paid by the High Court Legal Services Sub Committee, Aurangabad.

[SMT. VIBHA KANKANWADI , J.]