

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

CRIMINAL APPEAL NO. 914 OF 2018

Satesing @ Aaba Manga Thakare (Bhil)

Age:- 22 years, Occu:- Agril.,

R/o Dongargaon, Tq. Shahada,

Dist. Nandurbar

... **Appellant**

Versus

The State of Maharashtra and another

... **Respondents**

....

Mr. Chaitanya R. Deshpande, Advocate for appellant

Mr. S. P. Sonpawale, APP for respondent No.1 – State

Smt. Sabahat Kazi, Advocate for respondent No.2 (Appointed)

....

CORAM : R. G. AVACHAT, J.

DATED : 19th APRIL, 2022

J U D G M E N T :-

. This is an appeal against conviction and consequential sentence. Vide judgment and order dated 21.11.2018, passed by the learned Additional Sessions Judge, Shahada, District Nandurbar in Sessions Case No.35 of 2015, the appellant has been convicted for the offence punishable under Section 376 of the Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for ten (10) years and was directed to pay fine of Rs.5000/-, in default, to suffer rigorous imprisonment for five (5) months.

2. The challenge is mainly on the ground of age of the victim. It is the case of the prosecution that the victim, at the relevant time, was little over 13 years of age. The appellant, with a promise of marriage, had sexual intercourse with her. As a result thereof, she conceived. When her pregnancy became visible, she was taken to a hospital for medical screening. The same day, she gave her statement-cum-First Information Report (FIR) (Exh.22), wherein she attributed someone else to have pregnant her. 3–4 days thereafter, she gave additional statement alleging the appellant to have been responsible for her pregnancy. The appellant was therefore arrested. Both were medically examined. Their blood samples were obtained and submitted for DNA profile. The DNA report (Exh.70) indicated the victim and the appellant to be the biological parents of fetus. Thereafter, the victim underwent medical termination of pregnancy. As such, the learned Advocate for the appellant did not dispute sexual relationship between the appellant and the victim. The question is whether the victim was below 18 years of age at the relevant time and her consent therefore was invalid.

3. Let us therefore appreciate the evidence of the prosecution in proof of age of the victim at the relevant time. The

victim – PW1, testified that at the relevant time she was 15 years of age. She, however, did not give her date of birth. Even if she had given her date of birth, the same would have been inadmissible being hearsay.

4. The second witness is the mother of the victim. It is in her evidence that by the time of the incident, the victim was 15 years of age. She, however, did not give date of birth of the victim. On the contrary, she testified in her cross examination that she could not tell the exact age of her children. She was also unable to tell year of their birth/s. She claimed to be unable to read and write Marathi. She is uneducated. She even went on to state to have lodged the report against the appellant since he refused to marry the victim. As such, the evidence of the mother of the victim is also not helpful for the prosecution to prove the age of the victim.

5. PW3 – Dr. Yogesh Patil had conducted urine pregnancy test of the victim and found her to have been pregnant of little over sixteen (16) weeks. According to him, the victim was 13 years of age. Admittedly, the victim was subjected to ossification test for ascertaining her age.

6. PW4 – Dr. Shila Bokare, who had also medically screened the victim and had obtained her blood samples for DNA profiling, testified the victim was 14 years of age. She gave this evidence based on the information given by the victim. As such, so far, there is no concrete evidence about the age of the victim.

7. The prosecution produced in evidence the school record of the victim. PW5 – Smt. Sayyad Shahin Jakir Hussain was the Head Mistress of Sharda Kanya Vidyalaya, The victim was admitted to the said school for 5th standard in June 2013. As per the school record, her date of birth was 26.12.1999. Admittedly, it was a secondary school. The details about the age of the victim and other matters were recorded in the said school record on the basis of the victim's school leaving certificate of her primary school. The same has not been placed on record. PW5 admitted that the date of birth of the victim given in the school leaving certificate Exh.48, was not recorded on the basis of her date of birth certificate. She made a general statement that on the basis of oral information given by the parents of a pupil, to be admitted in the school, the date of birth of the pupil is noted in the school record. As such, the secondary school record of the prosecutrix in the nature of school leaving certificate,

school admission register and even bona-fide certificate, are all of little consequence to prove the age of the victim. To top it, the Investigating Officer in his evidence testified the age of victim was 16 years at the relevant time. As such, five prosecution witnesses gave the age of the victim from 13 to 16.

8. Although the school record being brought into existence in discharge of official duties and the same would therefore be admissible in evidence in view of Section 35 of the Evidence Act, there is no presumption of correctness as to the entries in the school record. 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. All the prosecution witnesses were cross examined on the question of the age of the victim. It therefore cannot be said that the school record of the victim went unchallenged.

9. 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.PC. 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".

10. The trial Court ought not to have held victim to have been below 18 years of age merely on relying on school record. The rape is a serious offence. Punishment provided therefor is severe one. The prosecution is required to prove its case beyond reasonable doubt. It was a case of emotional involvement. The appellant at the relevant time was 19 years of age. He has been behind the bars since 21.11.2018.

11. It is reiterated that the trial Court relying on such a shaky evidence, ought not to have held the prosecution to have proved the charge. This Court is therefore not at one with the

findings recorded by the trial Court. The interference therewith is thus, warranted. In the result, appeal succeeds. Hence, following order:-

ORDER

- (i) The appeal is allowed.
- (ii) The conviction and sentence imposed upon the appellant vide judgment and order dated 21.11.2018 passed by the learned Additional Sessions Judge, Shahada, District Nandurbar in Sessions Case No.35 of 2015 is set aside.
- (iii) The appellant is acquitted of the charge of commission of offence under Section 376 of the Indian penal Code and under Sections 4 and 6 of the Protection of Children from Sexual Offences (POCSO) Act.
- (iv) The appellant be released immediately, if not required in any other offence.
- (v) Fine amount if paid, be refunded to the appellant.

12. The fees of Smt. Sabahat Kazi, learned Advocate appointed for respondent No.2 is quantified at Rs.8,000/-.

[R. G. AVACHAT, J.]