

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.544 OF 2018

Vilas Maruti Sherkhane
Aged 27 years, Indian inhabitant
Residing at 755/1A,
Godutai Vidi Gharkul, Kumbhari,
Taluka – South Solapur, Dist-Solapur Appellant

versus

1. State of Maharashtra
2. Senior Inspector of Police
Valsang Police Station, Valsang
3. XYZ
R/o. 754/1A Division,
Godutai Vidi Gharkul, Kumbhari,
Taluka & Dist-Solapur Respondents

.....

- Mr. Vinit Vinod Jain (Appointed Advocate) for Appellant.
- Mr. R. M. Pethe, APP for the State/Respondent No.1.
- Ms. Janhavi Karnik (Appointed Advocate) for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 20th AUGUST, 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 05/04/2018 passed by the Additional Sessions Judge,

Solapur, passed in Sessions Case No.175 of 2015. The Appellant was convicted for commission of offence punishable u/s 3 and 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. He was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.30,000/-, in default to suffer further rigorous imprisonment for six months. He was also convicted for the offence punishable u/s 376 of the IPC. However, no separate sentence was imposed for commission of offence punishable u/s 376 of the IPC. Out of fine amount Rs.25,000/- were directed to be paid to the victim as compensation. The Appellant was granted set off u/s 428 of Cr.PC. All the substantive sentences were directed to run concurrently. The Appellant was acquitted from the charges of commission of offence punishable u/s 363, 506 of the IPC.

2. The prosecution case is that the Appellant was residing in neighbourhood of the victim. The incident occurred around March 2015. The FIR was lodged on 12/03/2015 at about 04.00 p.m. at Valsang Police Station, vide C.R. No.52/1015. The

allegations are that on four occasions the Applicant established physical relations with the victim against her wish. On three occasions she was taken to a secluded spot in a forest and on one occasion she was called to his own house, when his wife had gone to her parent's house. The Appellant was a married man. The victim's date of birth was 02/02/1998. Thus, in March 2015 she was 17 years and 1 month of age. After her mother came to know about the incident, she took the victim to the police station and lodged the FIR. The Appellant was arrested on 12/03/2015 at about 08.00 p.m. The investigation was carried out. The victim was referred for medical examination. The statement of witnesses were recorded. The articles were sent for chemical analysis and at the conclusion of the investigation, charge-sheet was filed. The case was committed to the Court of Sessions.

3. During trial the prosecution examined 8 witnesses including the victim, her mother, Panchas, medical officer, Sub-Registrar in Birth and Death Registration Department, working

with Solapur Municipal Corporation and the Investigating Officer. The defence of the Appellant was of total denial. According to him he was implicated falsely at the instance of his landlord. At the conclusion of the trial, after hearing the parties, the learned Judge recorded his findings and convicted the Appellant as mentioned earlier.

4. The prosecution case is based on evidence of PW.1, the victim herself. She has deposed that she was educated upto 8th standard. She was residing with her parents, sister and brother. Her father was working in a showroom of textile company. The victim was helping her mother in making Bidis. She has stated that her date of birth is 02/02/1998.

5. The Appellant was residing very close in the house of one Shankar Sagar. The Appellant was his tenant. PW.1 was acquainted with him. Since January 2015, the Appellant and the victim used to talk. About one month prior to lodging of the FIR when there was no one in her house, the Appellant came there

and asked her to accompany him on his motorcycle. She latched the door of her house and went to Hall No.3 where Bidis were made. The Appellant was standing there. He started his motorcycle and asked the P.W.1 to accompany him. She sat on his motorcycle. He then took her to forest. They got down. There he committed forcible intercourse with her. He then threatened her that whenever he called her, she should respond otherwise he would tell others. That incident took place at about 07.30 p.m. After that he left her near Hall No.3. It is her case that after 15 days, the Appellant again took her in the forest at the same spot and again committed the same act and again left her near Hall No.3. This act was repeated one week after the second incident. On the last occasion, a week prior to lodging of the FIR, the Appellant's wife had gone to her parental house. The Appellant called P.W.1 to his house at about 10.00 p.m. She went there and again he repeated his act. Again she was threatened. She did not disclose those incidents to anybody. Somehow her parents got to know about this from others. They enquired with her but due to fear of the Appellant she did not disclose the

incident to them and on the next day she was taken to the police station. She gave her FIR. The FIR is produced on record at Ex.9. P.W.1 identified the Appellant in the Court through video conferencing. After registration of FIR, the police referred her to civil hospital for medical examination. Her clothes were seized. Her statement was also recorded by J.M.F.C. Hingane u/s 164 of Cr.PC.

In the cross-examination she deposed that the Appellant was residing with his wife. There were 250 to 300 houses around her house. The Appellant's house was in front of her house. It took about 10 minutes to reach the forest area from the Hall No.3. Nobody had seen them going together. She admitted that though she resisted the Appellant before sitting on his motorcycle, she did not raise shouts and seek help of others. She denied that she used to visit the Appellant's house and used to talk with his wife. She also denied that prior to lodging of the FIR they had gone to the Appellant's landlord Shankar Sagar. But she admitted that Shankar Sagar told her father about the

relations between P.W.1 and the Appellant. She also admitted that P.W.1 was confronted with this, in presence of the Appellant's wife and P.W.1's parents in the house of Shankar Sagar. At that time she had denied about other relations with the Appellant, but had admitted that she used to only talk with him. About the last incident, she admitted that when she went to the house of the Appellant, she did not raise any shouts.

6. P.W.4 was the mother of the victim. She has deposed that Shankar Sagar told her that the Appellant had taken the P.W.1 on his motorcycle. P.W.4 then questioned her daughter. P.W.1 told her that the Appellant had taken her on three occasions to the forest and had played some mischief. It is her case that the Appellant had committed sexual intercourse with her daughter. On 12/03/2015 P.W.4 went to his house and questioned him. He did not answer properly and then she went to the police station and lodged the FIR.

In the cross-examination she deposed that the Appellant was tenant of Shankar Sagar. P.W.4's family was

having cordial relations with Shankar Sagar and they were on visiting terms. She admitted that before coming to know about the relationship between the P.W.1 and the Appellant from Shankar Sagar she did not have any grievance about P.W.1. She admitted that when she questioned her daughter, she told P.W.4 that she used to frequently talk with the Appellant because he had threatened her. There were about 100 houses surrounding her house. But except Shankar Sagar, nobody had complained about her daughter. The Hall No.3 was situated in front of her house. There used to be crowd in front of the Hall. From Hall No.3, P.W.4's house and Appellant's house were visible. She did not make any enquiry with the people from Hall No.3 about P.W.1 and the Appellant. She denied any knowledge about the dispute between Shankar Sagar and the Appellant in respect of vacating Shankar's premises. She admitted that P.W.1 told her only that the Appellant had taken her on his motorcycle. Beyond that she had not told her anything.

7. P.W.2 Suryaprakash Katiyayani was a Pancha for Spot

Panchanama. He was called to the house of the Appellant where the incident had taken place. Panchanama was carried out. Spot Panchanama is produced on record at Ex.18.

8. P.W.3 Advocate Varsha Dudam acted as a translator because she knew Marathi as well as Telgu language.
9. P.W.5 Shankar Madhukar Sagar is another important witness. He was landlord of Appellant. He has stated that he came to know from the people of locality that there was some affair between the Appellant and the victim. He informed about this affair to P.W.1's parents. They then questioned P.W.1. They came to know from the victim/P.W.1 that the Appellant had taken her on a motorcycle in the forest area, had kissed her and committed sexual intercourse with her. Then they went to the house of the Appellant. They made enquiries with the Appellant. He denied the allegation. After that they went to the police station and P.W.1 lodged the FIR. After that the Appellant was not residing in his house. In the cross-examination he has

deposed that the Appellant was residing with his wife and sister-in-law. He denied the suggestion that there was quarrel between the Appellant and him on the demand of increasing the rent.

10. P.W.6 Dr. Chaitali Vinayak Thakur had conducted the medical examination of P.W.1 on 13/03/2015. She had opined that during the examination, findings were consistent with sexual intercourse. The hymen was ruptured. P.W.6 collected blood sample, nail clipping, vaginal smear etc. Ossification test was conducted and according to medical opinion, the age of the victim was more than 19 years. The medical certificates were produced at Ex.29 and 30. She admitted that her opinion regarding sexual intercourse were based only on the fact that the hymen was torn and that there were other possibilities causing that tear. She reiterated that the opinion of the radiologist regarding age of the prosecutrix, she was above 19 years.

11. P.W.7 API Asaram Chormule had conducted the investigation. He has deposed about the steps taken by him from

the time of lodging of FIR. He had carried out various Panchanamas, seized clothes, arrested the accused and seized the motorcycle, had recorded the statements of witnesses, had sent the victim for medical examination, recorded statements of witnesses and at the conclusion of the investigation, had filed the charge-sheet. He had not collected the birth certificate.

12. The prosecution therefore examined P.W.8 Mahadeo Sherkhane, who working as Sub-Registrar in Birth and Death Registration Department of Solapur Municipal Corporation. He brought the relevant register. The entry in the register shows that the date of birth of the victim was 02/02/1998. The entry was made on 03/02/1998. They received the information from ESI Hospital. The names of the parents were mentioned. The entry was at Sr.No.942. The extract of the entry register was produced at Ex.53. The birth certificate is produced at Ex.54 showing the date of birth.

13. This, in short, was the evidence led by the prosecution.

The specific defence of the Appellant was that he is falsely implicated because of the dispute with his landlord i.e. PW.5. After considering the evidence on record and the defence of the Appellant and after hearing the parties, the learned Judge convicted him as mentioned above.

14. Learned Judge relied on the birth certificate to conclude that the victim was below 18 years of age and therefore in any case, the offence was made out against the Appellant. He believed the version of PW.1.

15. He also discussed regarding the sentence of 10 years. This discussion is from paragraph No.63 to 70 of his judgment.

16. Learned counsel for Appellant submitted that there are major contradictions in the deposition of the victim/PW.1 and the medical history given by her. Because in the medical history there is reference to only one occasion of forcible intercourse. He submitted that there was no other independent witness who had seen the Appellant and PW.1 going on his motorcycle

towards the forest area. The age of the victim was proved to be more than 19 years from the ossification test. This is a serious consideration and therefore considering totality of the evidence if it is assumed, there was sexual intercourse, it was with her consent and since her age was more than 19 years, no offence was made out.

17. Learned APP as well as learned counsel for Respondent No.3/victim submitted that there is no reason to disbelieve the version of the victim. She has given narration of the incident truthfully. On four occasions, the act was repeated. Therefore offence would fall within the meaning of section 376(2)(n) of the IPC and also u/s 5(L) of POCSO and therefore even sentence awarded was proper. The medical evidence also supports the P.W.1's case. There was no delay in lodging the FIR. As soon as the facts were known to the parents of the victim, they approached the Appellant and the FIR was lodged. There are hardly any contradictions as submitted by learned counsel for the Appellant.

18. I have considered these submissions. First of all, the question of age of the P.W.1 needs to be decided because it was an important aspect for the outcome of this Appeal. Though the Medical Officer has stated that the radiologist's opinion after ossification test was that the victim was more than 19 years of age, the birth certificate produced by the prosecution takes precedence over his opinion. The prosecution has examined P.W.8 in this behalf. He has produced the relevant entry in the register as well as the birth certificate of the victim and accordingly the birth certificate was also proved. There is no scope even to argue that these documents were forged. The birth certificate mentions the name of the victim as well as the names of her parents.

19. There was hardly any cross-examination of significance of P.W.8. Therefore it has to be held that the prosecution has proved that date of birth of the victim was 02/02/2019.

20. Since the victim was below 18 years of age her consent in this case is immaterial. There are indications that the victim had willingly accompanied the Appellant to the forest area. Her mother has deposed that the victim had not told her anything initially. She had also not raised any shouts or had not sought help from neighbours and others when the Appellant had taken the victim to the forest area on the first occasion. Therefore there are strong indications that she was not pressurized and that the Appellant had not used any force and or threatened her. Therefore to that extent the prosecution story is doubtful. Therefore the conviction u/s 506 of the IPC is not sustainable. But even then the Appellant cannot be acquitted from the offence punishable u/s 376(2)(n) of the IPC and u/s 4 of POCSO for which he is convicted and sentenced. In that context, the evidence of P.W.1 is important. She has given truthful answers with clarity. She has given details as to how the Appellant persistently pursued her and took her to forest area. He repeated this act on 3 more occasions. On two occasions she was taken to forest and on the last occasion she was taken to his

own house when his wife had gone to her parent's house. The landlord came to know about their affair and then he told about this to her parents. Therefore to that effect P.W.1's evidence is corroborated by other evidence. There is nothing in the cross-examination that helps the Appellant to show that the incident of sexual intercourse had not taken place between P.W.1 and the Appellant. Since the FIR was lodged more than 7 days from the incident, the C.A. report would not reveal anything. In any case, no C.A. reports are produced on record. Therefore the prosecution case revolves only around the evidence of P.W.1. In this case, the P.W.1 has given a clear evidence. There was no reason for her to implicate the Applicant falsely. The defence taken by the Appellant does not help him. There is nothing to suggest that the victim wanted to help P.W.5. In fact, the P.W.5 confronted her with all these allegations. She denied everything and therefore there was no reason for her to implicate the Applicant falsely to help the Appellant's landlord i.e. P.W.5. She has described the incident in detail. There is a presumption u/s 29 of POCSO which the Appellant has not rebutted by leading

evidence or even by showing the shortcoming from the prosecution evidence. Therefore the prosecution has proved its case as far as the offence u/s 376 and u/s 3 r/w 4 of POCSO. However, as discussed, the prosecution has not proved the offence u/s 506 of the IPC. The Appellant is anyway acquitted from the charges of commission of offence punishable u/s 363 of the IPC. The Appellant is awarded minimum sentence u/s 376(2)(n) of the IPC. Though under section 4 of POCSO at the relevant time minimum sentence was 7 years. The punishment for offence punishable us 376(2)(n) is minimum 10 years. The trial Court has imposed the minimum sentence and therefore it cannot be interfered with.

21. Hence, the following order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) The Appellant is acquitted from the charges and

commission of offence punishable u/s 506 of the Indian Penal Code and sentence imposed on him of rigorous imprisonment on that count is set aside.

(iii) However the conviction and sentence recorded against him for commission of offence punishable u/s 376 of IPC and u/s 3 r/w 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, for rigorous imprisonment of 10 years and to pay a fine of Rs.30,000/-, is maintained. In default of payment of fine, rigorous imprisonment for six months is also maintained.

(iv) Appeal is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)