

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

CRIMINAL APPEAL NO. 393 OF 2020

Vasant Shankar Waghmare
Age 32 years, Occ. Nil,
R/at. Galsurekathi, Adivasiwadi,
Tal.: Shriwardhan, District. Raigad ..Appellant
Vs.

1. The State of Maharashtra
Through Shriwardhan Police Station

2. Ms. X through her father
Mr. Rajanikant Rajaram Kolekar
R/at. Nigadi Kathi, Shriwardhan
District Raigad. ..Respondents

Mr. Irfan A. Shaikh, Advocate for the Appellant (Appointed).
Mr. S. H. Yadav, APP for the Respondent / State.

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CORAM : C.V. BHADANG, J.

RESERVED ON : 18 NOVEMBER 2021

PRONOUNCED ON : 12 APRIL 2022

Judgment :

. By this Appeal, the Appellant is challenging the judgment and order dated 14 November 2018 passed by the learned Special Court at Mangaon, District Raigad in Special Case (POCSO) No.14/2017. By the impugned judgment, the Appellant – Accused has been

convicted for the offence punishable under Section 376, 363, 366A and 506 of the Indian Penal Code and Section 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The sentence of ten years of Rigorous Imprisonment and fine has been awarded under Section 366A of IPC and Section 6 of the POCSO Act. Separate sentence has been awarded under other Sections.

2. The prosecution case may be briefly stated thus

The victim (P.W.2) is a girl who at the relevant time was studying in 10th standard in Galsure Vidya Mandir. She is the daughter of Complainant Rajanikant Polekar (P.W.1). On 16 May 2017, at about 9.30 p.m. the Complainant and his family members took meals and went to sleep. At about 5.45 a.m. the Complainant's wife informed him that the victim is missing and therefore her search was taken with the relatives and her friends. As the victim could not be traced, a missing complaint came to be lodged, on the basis of which Crime No.41/2017 was registered. After the victim returned to her house, her statement came to be recorded in presence of members of *Mahila Dakshata Committee* and lady Police Naik. She was referred for medical examination to Civil Hospital at Alibag. According to the victim, the Appellant used to visit her house in the absence of her parents and had forcible sexual intercourse with her on two to three occasions on account of which

she became pregnant. The Appellant accordingly came to be arrested and after completion of investigation, a chargesheet was filed.

3. The learned Special Judge framed charge against the Appellant for the offence punishable under Section 376, 363, 366A and 506 of IPC and Section 3(a), 4, 5 and 6 of the POCSO Act. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant is one of total denial and false implication.

4. At the trial, the prosecution examined in all four witnesses and produced the record of investigation. The Appellant did not lead any evidence in defence.

5. The learned Special Judge by the impugned judgment has found the Appellant guilty. Hence this Appeal.

6. I have heard Mr. Irfan Shaikh, the learned counsel for the Appellant and Mr. Yadav, learned APP for the Respondent / State. With the assistance of the learned counsel for the parties, I have gone through the record.

7. The learned counsel for the Appellant has mainly challenged the prosecution case, as to the age of the victim, in order to submit that the prosecution has not established that the victim was a 'child' within the meaning of the said Act. It is submitted that P.W.1 has not mentioned the date of birth of P.W.2 in the complaint (Exh.13) except mentioning that she was 15 years and 11 months of age. In the submission of the learned counsel, it is necessary for the Complainant to mention the date of birth of the victim, in the complaint, in the absence of which, the evidence as to the date of birth, subsequently led cannot be accepted. For this purpose, reliance is placed on the judgment of this Court in *Ravi Anandrao Gulpude Vs. State of Maharashtra*¹. It is submitted that the learned Special Judge was in error, while observing in para 23 of the judgment that various documents as referred in the said para are admitted by the Appellant. It is submitted that except the spot panchanama (Exh.24) seizure panchanama of the clothes of the victim (Exh.25) and the spot panchanama (Exh.26), the other documents are not admitted. It is submitted that the prosecution is required to establish the age of the victim in accordance with the Juvenile Justice (Care and Protection of Children) Act 2015 and the Rules framed thereunder. The learned counsel in this regard has placed reliance on the decision of the Supreme Court in *Jarnail Singh Vs. State of Haryana*². It is submitted that as per Rule 12 of

¹In 2011 ALL MR (Cri.) 1509

²2013 AIR (SC) 3467

the 2007 Rules, framed under the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act of 2000), the prosecution is obliged to first obtain the school certificate which is not done in this case, although P.W.2 had admittedly appeared for the standard 10th examination. It is submitted that the evidence of P.W.3 Shailesh Patil who is a Gram Sevak working at Nigadi is not sufficient to prove the birth certificate (Exh.12). The learned counsel also submitted that P.W.3 has admitted that there is a overwriting in the said certificate and the said correction is not shown to be carried out in accordance with the Registration of Births and Deaths Act, 1969 (Act of 1969) and the Rules framed thereunder. He therefore submitted that no reliance can be placed on the evidence of P.W.3 and no presumption can arise in the absence of the said date of birth being recorded in accordance with the provisions of the said Act and unless it is shown that the certificate is issued in accordance with the said Rules. It is submitted that the Rules require a copy of the birth certificate being issued to the person at the instance of whom, the birth is registered. It is pointed out that P.W.1 has not produced any such certificate obtained at the time when the birth was registered. Reliance is placed on the decision of the Supreme Court in *Tomaso Bruno and Anr. Vs. State of Uttar Pradesh*¹ and *Om Prakash Berlia and Anr. Vs. Unit Trust of India & Ors.*². It is thus submitted that P.W.2 is not shown to be a 'child' and therefore the conviction under

¹2015 Cri.Lj. 1690

²1983 AIR (Bombay) 1

the said Act cannot be sustained. In so far as the offence under Section 376 of IPC is concerned, it is submitted that the evidence of P.W.2 would show that she was a consenting party and therefore no offence under Section 376 would be made out.

8. Learned APP has placed reliance on the Rules framed by the State Government under the Act of 1969 and a notification by which the Gram Sevak has been authorised as a Registrar within the jurisdiction of Gram Panchayat under the Said Act. He submitted that evidence of P.W.3 is sufficient to establish the birth certificate (Exh.12) which shows the date of birth of P.W.2 as 17 June 2001. He submitted that age of P.W.2 on the date of incident was 15 years and 11 months and she was a child. It is submitted that the decisions on which reliance is placed on behalf of the Appellant turned on their own facts. In the submission of learned APP, none of these judgments lay down that it is peremptory to mention the date of birth in the complaint. It is submitted that any such requirement would run counter to the object of the said Act, as there may be cases where birth may not be registered and/or the birth certificate may not be available. It is submitted that the evidence of P.W.2 who had attained the age of understanding, alongwith the evidence of P.W.1 is sufficient to establish that the Appellant had sexually exploited P.W.2 on account of which she became pregnant and

delivered a child. He therefore submitted that the prosecution has established the charge beyond reasonable doubt.

9. I have considered the rival circumstances and the submissions made.

10. The material issue is about the age of the victim and whether the prosecution has established that she was a 'child' on the date of the incident, within the meaning of POCSO Act. Section 2(d) of the POCSO Act defines a 'child', to be a person, below the age of 18 years. According to the prosecution, the date of birth of P.W.2 is 17 June 2001 and she was 15 years and 11 months of age, as on the date of the incident. The specific birth date is not mentioned in the FIR Exh.13. The prosecution has produced a birth certificate (Exh.12) issued by P.W.3 Shailesh Patil who is working as a Gram Sevak at Nigadi. He has stated that the said certificate is issued on the basis of the original birth and death register maintained by their office. Although P.W.3 had produced the original birth certificate at the time of examination, a copy of the relevant extract of the register has not been retained on record. In the cross examination, he has admitted that there is certain overwriting in respect of the date of birth, in so far as the month is concerned. The learned counsel for the Appellant has strenuously urged that any such correction has not been shown to be carried out in accordance with the Act of 1969.

11. Be that as it may, the learned counsel for the Appellant has placed strong reliance on the decision of the Supreme Court in *Jarnail Singh* (supra) in order to submit that even under the POCSO Act where the child is a 'victim', the issue of determination of age is governed by the provisions of the Juvenile Justice (Care and Protection of Children) Act and the rules framed thereunder. Specific reliance is placed on Rule 12(3) of 2007 Rules framed under the Act of 2000.

12. In order to appreciate the contentions raised, it would be necessary to reproduce Rule 12(3) of the Rules of 2007 framed under the Act of 2000 which is relevant for the purpose, which reads thus-

12. *Procedure to be followed in determination of age-*

(1) -----

(2) -----

(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, 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;*

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) -----

(5) -----

(6) -----

13. In *Jarnail Singh*, Supreme Court was dealing with a challenge to the conviction of the Appellant under Section 376 of IPC. One of the issues was whether the act was consensual. Considering the fact that it was a case of gang rape, the Supreme Court found that it cannot be consensual in nature. In so far as the manner in which the age of the victim is to be determined, the Supreme Court has referred to Rule 12 of the 2007 Rules framed under the Act of

2000. In para 20 of the judgment, the Supreme Court has held thus-

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal

authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

14. It can thus be seen that the Supreme Court has held that there is hardly any difference in so far as the issue of minority is concerned between a 'child in conflict with law' and a 'child' who is a victim of crime. Rule 12 has now been incorporated in the form of Section 94 of the Act of 2015. It envisages that the age has to be determined firstly on the basis of the matriculation or equivalent certificate, if available and in absence thereof on the basis of the date of birth certificate from the school (other than the play school), first attended by the victim. It is only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, that the medical opinion in respect of the age determination becomes relevant and can be taken into consideration. The Supreme Court has held that the highest rated option is the matriculation or equivalent certificate, if available.

15. Coming to the present case, the prosecution has produced the birth certificate (Exh.12) on the basis of evidence of P.W.3. However, the prosecution has not produced the extract of relevant

birth register maintained by the Village Panchayat, on the basis of which the certificate (Exh.12) is issued. Although, no much significance can be attached to the contention on behalf of the Appellant about there being overwriting in the birth certificate, for the reason that the said overwriting is in respect of the month and would not make any difference, in as so far as year of birth is concerned, the fact remains that although the victim had studied upto 10th standard, the matriculation or equivalent certificate which the Supreme Court has held to be 'highest rated option' has not been obtained by the Investigating Officer. Not even the second option namely the birth certificate from the school first attended has been produced on record. As indicated earlier, even going by the certificate (Exh.12), the prosecution has not produced the extract of the birth register from the Village Panchayat.

16. The Division Bench of this Court in case of *Ravi Anandrao Gulpude (supra)* has held that the provisions of the Act are stringent in nature and therefore, a stricter degree of proof, would be required and has to be insisted upon. Thus, the prosecution is required to establish by acceptable evidence that the victim was a child within the meaning of the said Act at the time of the incident.

17. Thus, in my considered view, the prosecution has failed to establish beyond reasonable doubt, that the victim was a 'child' on

the date of incident and therefore, the conviction under the provisions of the POCSO Act cannot be sustained.

18. Coming to the offence under IPC, the possibility of P.W.2 being a consenting party cannot be ruled out. P.W.2 states that the Appellant used to come to her house. They were knowing each other since last seven years and the Appellant used to have sexual intercourse with her in the absence of her parents and this happened about 2 to 3 times on account of which P.W.2 became pregnant and delivered a child. In the cross examination, she has admitted that she had developed love relations with the Appellant. The prosecution evidence indicates that on the date of incident when P.W.2 had gone missing and the day prior thereto the family members had taken meal and gone to sleep and in the wee hours at about 5 to 5.45 a.m. the following morning, she was found missing. It is highly improbable that the Appellant would forcibly or otherwise entice away the victim, in the dead of night, when she was sleeping with her parents and other family members. Consequently, the allegations about holding out any threat to the victim also cannot be accepted. Once it is held that the prosecution has not established that she was a child, this part of evidence which indicates a consensual relationship, assumes importance. In such circumstances, in my considered view, the Appellant is entitled to benefit of doubt. Hence, the following order.

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned judgment and order is hereby set aside.
- (iii) The Appellant is acquitted of the offences as charged.
- (iv) The Appellant be set at liberty forthwith, if not required in any other case.

C.V. BHADANG, J.