

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 89 OF 2021****WITH****INTERIM APPLICATION NO. 386 OF 2022**

Ramchandra Thangappan Aachari,
Age – 51 years, Occ: - Business,
R/o. J/5, Plot No.5, Road No.1,
Shivaji Nagar, Govandi, Mumbai-400 043.

At present lodged at Kolahapur Central Prison,
Kalamba, Dist. Kohlapur.

.....Appellant

Vs.

1. The State of Maharashtra,
Through Shivajinagar Police Station,
Govandi, Mumbai.

2. Ms. XYZ

.....Respondents

Mr. Aditya Bapat, Appointed Advocate for Appellant.
Mr. R. M. Pethe, APP for Respondent No.1-State.
Ms. Priyanka Chavan for Respondent No.2.

CORAM : A. S. GADKARI, J.
DATE : 15th JUNE, 2022.

ORAL JUDGMENT:-

Appellant has questioned correctness of the Judgment and Order dated 19th June, 2019 passed in POCSO Special Case No.429 of 2017 by the learned Special Judge, Greater Mumbai, convicting and sentencing Appellant under Sections 4, 6 and 8 of the Protection of Children from Sexual Offence Act, 2012 (for short “POCSO Act”) and sentenced him to

suffer maximum rigorous imprisonment of ten years and to pay a total fine of Rs.30,000/- (Rupees Thirty Thousand Only), in default of payment of fine to further undergo specified period of imprisonment.

2. Heard Mr. Bapat, learned Advocate appointed by the High Court Legal Services Committee, Mumbai to represent the Appellant, Ms. Chavhan, learned Advocate appointed by High Court Legal Services Committee, Mumbai to represent Respondent No.2 (victim) and Mr. Pethe, learned APP for Respondent No.1-State. Perused entire record.

3. As the victim was minor, aged about 15 years on the date of lodgement of crime, with a view to protect her identity and in-consonance with Section 228-A of the IPC and Section 33(7) of the POCSO Act, the facts disclosing her identity are hereinafter avoided in the present Judgment.

4. It is the prosecution case that, on 12th July 2017 Smt. Laxmi Sakat (PW.1), Helpline Associate/Volunteer of Yuva Urban Initiative, an NGO, received a phone call on their Child Helpline informing that, the Appellant had kept in wrongful confinement a 15 years old victim and was sexually abusing her. The address of the place where the victim was confined was also informed. In turn the volunteer of the said NGO informed the said fact to Shivajinagar Police Station, Govandi, Mumbai and accordingly with the help of Police, they visited the premises of the Appellant, where they found Appellant and victim (PW.2). The Appellant

informed them that, the victim (PW.2) was his wife. The victim was wearing Mangalsutra. No other person was in the said premises.

5. A Crime bearing No. 267 of 2017 dated 14th July 2017 under Sections 343, 365 and 376 of the IPC and under Sections 4, 5, 8 and 12 of the POCSO Act was registered with Shivajinagar Police Station, Govandi, Mumbai. During the course of investigation, the statement of victim (Exh.3) under Section 164 of the Criminal Procedure Code (for short "Cr.P.C.") was recorded by the learned Metropolitan Magistrate, Mumbai. Dr. Gajanan Sanap, (PW.8) conducted Age Verification/ Determination Test of the victim and opined that, she was 14 to 15 years old with error of plus - minus 6 months on either side. After completion of investigation, Police submitted charge-sheet against the Appellant before the Trial Court.

6. The Trial Court framed charge below Exh.4. The said charge was read over and explained to the Appellant in vernacular language to which the Appellant pleaded not guilty and claimed to be tried. The defence of the Appellant was that, he had married with the victim at the instance of his father and had established sexual relations with her as she was his wife. He has stated that, he was not aware about the age of the victim. It is his further defence that, he has been falsely implicated in the present crime by his sisters and nephew after the death of his father.

7. In support of its case the prosecution has examined in all eight witnesses namely (i) Smt. Laxmi Sakat (PW.2), first informant, (ii) victim

(PW.2), (iii) Smt. Deepali Ratnakar Patil (PW.3), Woman P.S.I., who accompanied PW.1 to visit the house of the Appellant on 14th July 2017, (iv) Smt. Sanjeevani Aarand (PW.4), Woman P.S.I., who conducted spot panchanama (Exh.12), (v) Smt. Shailabe Lalbhai Pathan (PW.5) who was Police Station Incharge on 14th July 2017, who recorded the Information Report from PW.1, (vi) Mr. Satish Kasbe (PW.6), Investigating Officer, who had referred victim for recording her statement under Section 164 of the Cr.P.C. to the concerned Magistrate, (vii) Dr. Shradha Shigvan (PW.7), who examined Prosecutrix after lodgement of crime and gave Medico-Legal Certificate (Exh.26), (viii) Dr. Gajanan K. Sanap (PW.8), who had conducted age verification/determination test of victim (Exh.25) and had produced X-ray plates (Exh.32).

The Trial Court after recording evidence of the said witnesses and hearing the learned Advocates for respective parties has convicted and sentenced the Appellant as noted hereinabove.

8. Mr. Bapat, learned Advocate for the Appellant submitted that, the Appellant has admitted the fact that, he had married with the victim and as per the Appellant, at the relevant time the age of the victim was above 18 years and therefore the provisions of POCSO Act can not be made applicable to the present crime. He submitted that, the Trial Court has already acquitted Appellant from the offences under the provisions of IPC. He submitted that, in the cross-examination of PW.8 i.e. Dr. Sanap, an

admission is extracted by the Appellant that, the necessary chart describing age of the victim was not produced on record by the said witness, which is fatal to the prosecution. He submitted that, the concerned Doctor has not properly evaluated the age of the Prosecutrix. That, according to the Appellant, at the relevant time, the victim was above 18 years of age and therefore he had performed marriage with her under the directions of his father namely Thangappan Nana Aachari. That, there are contradictions in the evidence of victim with respect to her age. That the victim was not certain about her age and at different places she has stated her age differently. He submitted that, the presumption as contemplated under Section 29 of the POCSO Act will come into fray provided the prosecution establishes that, the victim was a child within the meaning of Section 2(d) of the Act. The prosecution has failed to establish the fact that, the victim was below the age of 18 years. He submitted that, in the present case the prosecution has failed to establish the age of victim beyond reasonable doubt and therefore the benefit thereof be given to Appellant. He therefore submitted that, the impugned Judgment and Order be quashed and set aside by allowing the present Appeal.

9. Per contra, Ms. Chavan, learned Advocate for Respondent No.2 and Mr. Pethe, learned APP vehemently opposed the Appeal and submitted that, the victim (PW.2) and Dr. Gajanan Sanap (PW.8) are reliable and trustworthy witnesses and needs no second opinion about their evidence.

Both of them, therefore, prayed that the present Appeal may be dismissed.

10. In the present case, though the prosecution has examined aforestated eight witnesses, the evidence of victim (P.W.2) and Dr. Gajanan Sanap (P.W.8) is important and most relevant for consideration.

11. The Prosecutrix has deposed that, at the time of incident she was 15 years of age. Her parents were no more and Thangappan Nana had adopted her. Initially she was residing with the daughter of Thangappan Nana at Ulhasnagar. However, she returned to the house of Thangappan Nana as she was not allowed to study at Ulhasnagar. The Appellant is son of Thangappan Nana. She has categorically deposed that, when she was residing with the Appellant and Thangappan Nana, Appellant was performing sexual intercourse with her like husband and wife. She told Thangappan Nana about the wrong acts committed by the Appellant, but Thangappan Nana did not do anything. In her cross-examination she has given an admission which is fatal to the Appellant that, Thangappan Nana was aware of her real age. She has further denied the suggestion that, Thangappan Nana and Appellant were aware that she was more than 18 years and therefore, Appellant got married with her. She has admitted that, even though she disliked Appellant, she did not leave him because there was nobody to look after her.

12. Taking into consideration the testimony of the Prosecutrix accompanied with the fact that, the Appellant has admitted in his defence

that, he established physical relations with the victim as he had performed marriage with her, the fact of Appellant committing sexual intercourse with the victim is proved by the prosecution.

13. The only question which remains for consideration is, whether the victim was below 18 years of age on the date of lodgement of crime i.e. on 14th July 2017 to attract the provisions of POCSO Act. Prosecution has examined Dr. Gajanan Sanap (PW.8), who had conducted age determination test of the victim. In his testimony he has deposed that, he has done M.D. (Medicine) and had handled about 100 cases of age determination. He has deposed that, he had done X-ray examination of elbow, wrist, shoulder and knee joint of the victim. He therefore opined that, victim was aged about 14 to 15 years with plus-minus 6 months of error on either side. He proved report of age determination (Exh.25) prepared by him and report of X-ray plates (Exh.32).

In his cross-examination, the Appellant has brought on record that, he has not produced the chart in which he has described the ages of various parts of the body of the victim. The said witness has emphatically stated that, production of said Chart in Court is not necessary.

14. The evidence of Dr. Ganajan Sawant (PW.8) is not only reliable and trustworthy but is of sterling quality. The said witness is specialist in his field and there is no reason to either disbelieve or to express any second opinion about his evidence regarding ascertainment of age of the victim. In

view thereof, this Court is of the considered opinion that the prosecution has proved that, on the date of lodgment of crime i.e. on 14th July 2017, the victim was below the age of 18 years and the Appellant had committed sexual intercourse with her at least on five occasions prior thereto. The evidence produced by the prosecution is wholly reliable. The prosecution has successfully proved all the charges levelled against the Appellant.

15. In view of the above, this Court therefore is of the opinion that, the Trial Court has not committed any error in convicting and sentencing the Appellant for the offence lodged against him. There are no merits in the Appeal.

Appeal is accordingly dismissed.

16. In view of disposal of Appeal, Interim Application No. 386 of 2022 pending therein does not survive and is accordingly disposed off.

17. Before parting with the Judgment, this Court places on record a word of appreciation for the efforts put in by Mr. Aditya Bapat, learned Advocate appointed through the High Court Legal Services Committee, Mumbai for espousing the cause of Appellant.

18. Appellant is lodged in Kolhapur Central Prison. Registry is directed to forward a copy of this Judgment to the Appellant.

(A.S. GADKARI, J.)