

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.786 OF 2019

Anis Shah Kairushah,
Aged 30 years, Occupation : Labour,
Resident of Kharbadi Road, Ward No.5,
Motala, Tah. Motala, Dist. Buldhana.
(In Central Jail, Amravati)

..... APPELLANT
(In Jail)
(Orig. Accused)

// VERSUS //

The State of Maharashtra,
Through Police Station Officer,
Police Station Borakhedi,
District Buldhana.

..... RESPONDENT

Mr. Amit Ravikant Prasad, Advocate for appellant.
Mr. A. R. Chutke, APP for the respondent/State.

CORAM : AVINASH G. GHAROTE, J.

DATED : 07/06/2022

ORAL JUDGMENT :

2. Heard Mr. Prasad learned counsel for the appellant. The basic contention advanced, based upon Section 2 (d) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as “the

POCSO Act”) is that the age of the victim, has not been established and therefore, the presumption under Section 29 of the POCSO Act would not be attracted. Reliance is place upon ***Ravi Anandrao Gulpude Vs. State of Maharashtra (2017 (3) Mh.L.J. (Cri.) 354 (V)*** in support of the aforesaid contention. Further reliance is placed upon Exh.24 (pg.25), the oral report by the father/Ajij Kha Roshan Kha to contend that the complaint does not state the date of birth of the victim. The evidence of the mother / Smt. Rashidabi Ajikha is also relied upon to contend that in her evidence no date of birth of the victim has been given, though a bare statement has been made that the victim was studying in 10th standard. Even the approximate age of the victim is not stated. It is further submitted that in order to establish the age of the victim PW 9 the in-charge School Teacher of the school in which the victim had studied was examined namely Shri Sheikh Abdul Rashid (pg.66) however, it is contended that the documents claimed to have been exhibited in his evidence have not been proved as per law. It is further submitted that even the radiologist Dr. Manwar, who has given opinion about the age of the victim has not been examined, as a result of which, the burden upon the prosecution to prove the age of the victim has not been discharged, which being so, the provisions of the POCSO Act would clearly not be attracted, resultantly the presumption under Section 29 of the said Act being unavailable. It is further submitted that though the

documents Exhs.51 to 53 brought by PW 9 were exhibited subject to objection being raised by the learned counsel for the accused, the objections were never decided which is reflected from the impugned judgment and therefore any conviction based upon such documents which were not proved as per law cannot be sustained.

3. In so far as the merits of the matter is concerned, it is contended that the mother of the victim, had herself disclosed to Dr. Mahajan/PW 8 (pg.65) that the victim had sustained the injury on account of a her falling on a chip of tile (digar) and therefore, the allegation of sexual penetrated assault was factually incorrect. It is therefore, submitted that the impugned judgment cannot be sustained on the touchstone of law as applicable to the factuality availing on record and it is liable to be quashed and set aside and the appellant is entitled to be acquitted.

4. Mr. Chutke, learned APP for the respondent/State opposes the appeal and submits that the date of birth of the victim and the age has been duly proved. He submits, that the date of birth of the victim, is 01.09.2003, and therefore, her age as on the date of the incident which had happened on 10.05.2013 at about 09.00 p.m., in the night was about 10 years. He submits, that the victim/PW-2 (page 31), in her evidence has categorically stated her date of birth and there is no cross-

examination worth the name on this ground. He further submits, that the in-charge Head Master of the School in which the victim was studying has been examined as PW-9 and has produced the entry of the Admission Register at Exh.52 and the affidavit of the mother of the victim at Exh. 51, on the basis of which, the entry regarding the date of birth was taken (pages 68 and 69). He further submits, that the ossification test conducted upon the victim also establishes her age to be 10 years at the time of the incident (Exh. 60 page 80). He also submits, that though the father of the victim PW-1 (page 22) was given a suggestion regarding the victim being major, the same has been denied by him. It is therefore submitted, that the age of the victim at the time of the incident has been conclusively established. He further submits, that there is no time lag between the incident and the examination of the victim by Dr. Mahajan and the lodging of the complaint and the entire chain of events has been clearly established on record. It is further contended, that nothing has been brought out in the cross-examination to discredit the evidence of the victim, and therefore, the conviction as recorded by the learned Sessions Court needs to be maintained.

5. The incident is dated 10.05.2013 at about 09.00 p.m., when it is claimed that the appellant/accused who was the neighbour of the victim had called her inside the house when there was no one, locked the door from inside, turned up the volume of the T.V. set, took out her

clothes and lay down upon her and committed penetrative sexual assault, as a result of which, there was profuse bleeding which stained her salwar. At the time of the incident itself, there was a knock on the door by the father of the accused, as a result of which, the accused was forced to abort the further crime and upon opening the door, the victim managed to run away. The victim thereafter is said to have come to her house weeping and upon an enquiry by the father and mother is stated to have narrated the incident whereupon she was taken by her mother to Dr. Mahajan (PW 8/pg.65) a private Doctor (page 65), on 10.05.2013 around 09.30 to 10.00 p.m., who examined her and referred the victim to the Gynaecologist at Buldhana for further treatment. On the next day i.e. on 11/05/2013 the report was lodged at about 03.45 a.m., whereupon the victim was referred to PW-10 Dr. Brahmanand (page 71), who upon physically examining her, had opined that the injury was indicative of penetrative sexual assault and had issued a certificate to that effect at Exh. 58. The blood stained salwar of the victim was seized under panchnama at Exh.33 and is claimed to have been duly proved by the panch witness PW-4 Sk. Rafique Sk Lal at Exh. 29 (page 39).

6. Insofar as the age of the victim is concerned, the initial burden, is on the prosecution to establish the age being less than 18 years as provided in Section 2 (d) of the POCSO Act so as to attract the provisions of the said Act. It is therefore, necessary to see as to what is

the material available on record in this regard. The oral complaint at Exh.24 (pg.25) dated 11/05/2013 lodged by the father of the victim namely Shri Ajij Kha does not disclose the date of birth of the victim. All that is said is that victim was 10 years of age and nothing else. In the complaint at Exh.24 itself the father of the victim namely Ajij Kha states that he has five daughters and two sons, namely (1) Asama bi – 17 years, (2) Arifa bi – 15 years (3) Aslam Kha – 14 years (4) Anjum Parveen – age not mentioned, (5) Nasiba bi – age not mentioned, (6) Ayasha bi – age not mentioned and (7) Imran Khan – age not mentioned. The evidence of Ajij Kha PW 1 (pg.22) at Exh.23 is worthy of consideration in this regard in as much as in his examination in chief he does not state what is the date of birth of the victim. Not only this he does not even state the approximate age of the victim as on the date of the incident. In cross-examination he categorically admits in para 4 (pg.24) “I cannot say the date/year of the birth of victim”. The evidence of the mother, namely Rashidabi (Exh.35/pg.55) also does not disclose the date of birth of the victim, nor does it disclose the age of the victim. All that it states is that the victim as studying in 10th standard at the relevant time and was her fourth daughter. Thus, in so far as the parents of the victim are concerned, there is no mention in the complaint or the evidence regarding the date of birth of the victim nor the age of the victim altogether. This being the position, it was necessary for the

prosecution to unequivocally establish on record the date of birth of the victim so that the provisions of the POCSO Act could be invoked.

7. Apart from the above two witnesses, the prosecution has examined PW 9- Sk. Abdul Rashid, who was serving as an English Teacher in Z.P. Urdu School, Motala where the victim is stated to be studying (Exh.50/pg.66). Three documents have been brought by PW 9 in order to establish the age of victim namely Exh.51 (Pg. 68), the verified copy of a so called affidavit given by the mother of the victim Rashidabi at the time of admission in the school of the victim on 01/08/2009, stating the date of birth of the victim to be 01/09/2003; Exh.52 (pg.69) the extract of admission register of the school and Exh.53 a certificate issued by the Headmaster Z.P. Urdu Secondary School, Motala dated 01/06/2013 (pg.70). What is material to note, is that the originals of these documents/registers were not brought by the witness/PW9 along with him which is reflected from the evidence of PW 9. Objections to their exhibition taken by the learned counsel appearing for the accused have been recorded in the deposition at Exh.50 and the learned Sessions Court has categorically opined in the deposition that an order exhibiting documents does not amount to proof therefore the objection is disposed off accordingly. It is thus apparent, that Exhs.51 to 53 during the deposition of PW 9, were marked merely for the purpose of identification, as the deposition records that the original of these

documents were not brought along with him by PW 9, who in his chief itself states that the originals of these documents were available in the school. This being the position, in my considered opinion, the further proof of these documents by producing the originals on record and comparing Exhs.51 to 53 with the originals was necessary. That having not been done it cannot be said that the contents of Exhs.51 to 53 have been proved in law. What is also further material to note is the nature of the cross-examination in which PW 9 has categorically stated that he was not present when the certificate at Exh.53 was issued by the Headmaster Dilnavas Khan. PW 9 further admits in his cross-examination that he was not present in the school when the affidavit was submitted by Rashidabi the mother of the victim on the basis of which the entry regarding the date of birth is claimed to have been taken. In the cross-examination he further states that he could produce the original of the documents below Exh.51 and 52 which in turn would substantiate the plea which is raised that the originals of the these documents were not available with PW 9 during the course of his deposition and cross-examination. It is thus apparent, that mere marking of the documents referred to above namely the affidavit of Rashidabi; the entry in Dhakal Register and the certificate at Exhs.51 to 53 in absence of their originals being produced on record or made available for the perusal of the Court for their comparison with the documents at

Exhs.51 to 53 would indicate that the contents of these documents were not proved. Though, the learned Sessions Court, in the deposition of PW 9 has categorically recorded that the order exhibiting these documents at Exhs.51 to 53 would not amount to proof of these documents and has disposed off the objection accordingly, surprisingly in the impugned judgment these very documents have been relied upon by the learned Sessions Court to hold that the prosecution has proved the age of the victim, which can be discerned from a perusal of para 14 of the impugned judgment, where these documents at Exhs.51 to 53 have been considered to hold that the date of birth of the victim was 01/09/2003. In my considered opinion such a course of action was not permissible for the learned Sessions Court, as it could not have dispensed with the proof of the contents of the documents in the manner indicated above. Even during the course of the judgment, the aspect regarding the objection raised and its effect have not been dealt with or decided by the learned Sessions Court. It is therefore, apparent that Exhs.51 to 53 are of no assistance to the prosecution for establishing the age of the victim.

8. Apart from Exhs.51 to 53 and the deposition of PW 9 the prosecution has relied upon the evidence of PW 10 Dr. Brahmanand Ashruji Chavan, the Medical Superintendent (Exh.57/pg.71) to hold that the age of the victim was 10 years. A perusal of the evidence of PW 10 Brahmanand would indicate that in para 3 and 6 of his examination-in-

chief he states that for age determination of the victim her x-rays were obtained. He further states that the victim was hardly 10 years old which opinion was on the basis of her physical body development. In para 6, he categorically states that the x-ray report was given by radiologist Dr. Manwar according to whose report the victim was aged 10 to 12 years and then goes on to exhibit the report of the radiologist as Exh.60 on the ground that he was acquainted with his signature and handwriting. It is material to state that though the report at Exh.60 was given by Dr. Manwar the radiologist he has not been examined at all. It is therefore apparent that Dr. Brahmanand PW 10 could not have proved the certificate at Exh.60, merely on the basis that he was acquainted with the signature and handwriting of Dr. Manwar as what was necessary in law, was for Dr. Manwar to have been examined who was the person who has taken the x-rays of the victim and had prepared the report at Exh.60 under his signature. Thus, non-examination of Dr. Manwar clearly is fatal to the plea put-forth by the prosecution regarding the age of the victim.

9. It is further material to note that though the mother of the victim, namely Rashidabi PW 5 has categorically deposed that she has five daughters and two sons however, the date of birth of any of the children has not been brought on record. It is thus apparent that the findings rendered by the learned Sessions Court regarding the age of the

victim, as on the date of the incident is not supported by anything whatsoever. It is material to note that except for the deposition of the victim who was examined as PW 2 (Exh.26 pg.31), wherein in the examination-in-chief, she has stated her date of birth to be 01/09/2003, there is absolutely nothing on record to substantiate this position. Mr. Chutke, learned APP for the respondent/State has not able to point out to me any earlier statement, admissible in law, of any one, including the victim, which discloses either the age of the victim or the date of birth of the victim. It is thus apparent, that a mere statement coming for the first time in the examination-in-chief of the victim wherein her date of birth is stated, without anything else to establish the same on record as required by law, would not enure to the benefit of the prosecution to claim that the age of the victim has been established. The learned Division Bench of this Court in ***Ravi Anandrao Gulpude*** (supra) has categorically held that it is the bounden duty of the prosecution to prove age of the prosecutrix to show that at the time of the incident, the prosecutrix was 'child' within the meaning of the Section 2(d) of the POCSO Act and in absence of the same the stringent provisions of the POCSO Act cannot be claimed to be attracted. In the instant case also, considering what has been discussed above there is no legal evidence on record to indicate the date of birth of the victim. Though learned APP for the respondent/State has relied upon ***Kundan Nanaji Pendor Vs. The***

State of Maharashtra (2017 ALL MR (Cri) 1137) to contend that in absence of any cross-examination of the victim as to her date of birth her statement was required to be accepted, it is however, material to note that ***Kundan Nanaji Pendor*** (supra) was a case in which even as per the statement of the Investigating Officer / PW 11 the birth certificate of the prosecutrix had not been collected nor was the birth verified from the Nagar Parishad and therefore, there was no document on record to demonstrate the age of the prosecutrix, in light of which, it appears that the absence of cross-examination for the prosecutrix as to her date of birth has been considered. In the instant matter, however the factual position is something different inasmuch as the prosecution had examined PW 9 Sk. Abdul Rashid (Exh.50 pg.66) specifically for the purpose of proving the age of the victim, which as discussed above, the prosecution has failed to establish. In my considered opinion, therefore, the present matter would be covered by what has been held in ***Ravi Anandrao Gulpude*** (supra).

10. It is further material to note, that even the mother of the prosecutrix namely Rashidabi – PW 5 in her examination-in-chief itself points out that the mother of the accused was also present at the time the victim was taken to the hospital of Dr. Mahajan PW 8. It is also material to note that none of the them discloses to Dr. Mahajan the reason why the bleeding was occurring. Rather on the contrary, the

cross-examination of PW 5 Rashidabi (Exh.35 pg 57) categorically admits this position in para 4. Dr. Mahajan PW 8 (Ex.48 pg. 65) on the other hand categorically states that PW 5 Rashidabi the mother of the victim had told him that the victim had sustained injury on her vaginal part with the chip of tile (digar). Dr. Brahmanand PW 10 (Exh.57 pg. 71) in his cross-examination, para 8/pg. 73, categorically states that it is possible that person will sustain injury if he or she falls on diger or any pointed object on the particular part of body, which would indicate that the nature of injury suffered by the victim could not be attributed only to a penetrative sexual assault. In this context, the evidence of PW 2 victim, assumes significance inasmuch as in her cross-examination (para 3 page 33) she categorically states that though she had stated to the police at the time of recording of her statement that the accused penetrated his private part (penis) in my private part (vagina) she cannot assign any reason as to why this fact is not mentioned in her police statement. In my considered opinion, this is a material omission which has a relevant bearing upon the deposition on the victim PW 2 itself for the reason, that the above statement is the basis of the offence and since this statement is absent in her statement to the police, what has been stated in the examination-in-chief can be said to be only an improvement made for the purpose of the prosecution and nothing else. The absence of such a statement of the victim PW 2, in her statement to

the police is corroborated by the cross examination of the Investigating Officer namely Shivaji Arunkumar Tavre PW 11 (Exh.62 pg 81) – para 18. The evidence of PW 10 Dr. Brahmanand categorically states that the victim was not capable of sexual intercourse although she was subject to sexual intercourse, considering which, it was necessary for the prosecution to have established by medical evidence on record, any injury to the private part of the accused corresponding to a penetrative sexual assault. The record however demonstrates that nothing has been brought on record by the prosecution in this regard, which would have demonstrated any injury to the private part (penis) of the accused which injury ought to have been there considering what has been stated by Dr. Brahmanand PW 10 in his examination-in-chief (last lines of para 2/ page 72).

11. It is thus apparent, that even on the merits of the matter the possibility of the injury to the victim being caused by falling on digger (chip of tile) cannot be ruled out as that is what has been initially stated by PW 5 the mother of the victim to Dr. Mahajan PW 8 and is also the possibility as opined by Dr. Brahmanand PW 10.

12. The perusal of the impugned judgment merely discloses that the aforesaid position has not been considered at all and material which was not legally proved (Exhs.51 to 53) has been taken into consideration

by the learned Sessions Court which vitiates the entire trial. Though, the learned Sessions Court notes the omission between the statement of the victim PW 2 regarding the absence of penetrative sexual assault and that of the Investigating Officer PW 11, in para 20 of the impugned judgment he merely brushes asides the omission by saying that the victim cannot be blamed for the same. In my considered opinion the absence of any mention of penetrative sexual assault in the statement of the victim initially recorded would be something which would be fatal to the prosecution as it forms the very gravamen of the allegation in respect to the offence claimed to have been committed by the accused, which absence cannot be rectified at any later point of time.

13. The evidence of Khatoonbi PW 3 (Exh.27 pg.35), who resides in the neighbour hood has to be taken with a pinch of salt as she admits that the complainant (father of the victim) was her cousin brother apart from which in para 2 of her cross-examination she admits that there are material omissions in her statement before the police in as much as though she claims that she had told that accused has removed his clothes and the clothes of the victim or that she had applied cloth on the private part of the victim to stop the blood staining the clothes, those were absent from her statement. This is supported by the statement of PW 11 in his cross-examination para 19. Even the victim PW 2, has not stated that she has disclosed anything to PW 3 whereas a contrary

statement is made by PW 3 Khatoonbi in her evidence. It is therefore apparent that the evidence of Khatoonbi is not worthy of credentials for the aforesaid reasons.

14. It is thus apparent, in view of what has been discussed above, that neither the age of the victim has been establish on record within the meaning of Section 2 (d) of the POCSO Act so as to attract the provisions of the POCSO Act nor on the merits of the matter there is a conclusivity to the allegations made, in view of what has been stated by PW 5 and 11 regarding the possibility of the nature of injury also likely to be caused due to fall on digar, in view of which, in my considered opinion, the prosecution has failed to establish the guilt of the accused beyond reasonable doubt which was necessary in view of the stringent provisions of the POCSO Act, for which reasons, the impugned judgment, cannot be sustained.

15. The appeal is allowed and the impugned judgment is hereby quashed and set aside. The conviction of the appellant under Sections 3 punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2012 is quashed and set aside and the appellant is acquitted of the aforesaid charges.

16. The appellant be released forthwith from jail, in case he is not required in any other offence. His bail bond stands cancelled.

(AVINASH G. GHAROTE, J)

Sarkate.