

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

CRIMINAL APPEAL NO. 15 OF 2021

XYZ ... **Appellant**

VERSUS

1. The State of Maharashtra ... **Respondents**
Through Georai Police Station,
District Beed
2. Nitin s/o Bhagwan Panchal
Age 31 years, Occu: Agri.
R/o Savargaon Tq.Majalgaon Dist. Beed

Mr. Amol S. Gandhi, Advocate for the appellant,
Mr. R. D. Sanap, APP for respondent-State
Mr. B.S. Doifode h/for Mr. S.S. Randive, advocate for respondent No.2

**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRADE, JJ.**

DATE : 06.03.2023

JUDGMENT (Per Y. G. Khobragade, J.):

1. The appellant/original complainant invoked jurisdiction of this Court under section 372 of the Code of Criminal Procedure and assailed judgment and order dated 13.06.2018 passed by the learned Special Judge, Beed in Special (POCSO) Case No. 5 of 2017, whereby the present respondent No.2-accused is acquitted of the offence punishable under sections 376(2) of the Indian Penal Code and under

section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act).

2. In short, it is the case of the prosecution that on 15.07.2013, the informant/victim lodged a report with Georai Police Station, District Beed that alleging she is resident of village Raj-Pimpri and in the year 2010, she was residing at the house of her aunt at village Savargaon Tq. Majalgaon Dist.Beed for her education. Prior to three years of lodging of the report, she returned back to reside with her parents. When she was residing at her aunt's house, the accused Nitin Bhagwan Panchal who is son of her aunt was serving as Teacher in Ashram School at Georai and he was in visiting term at her house at Sawargaon. The victim and accused are relative. Therefore they were acquainted to each other. The informant/victim alleged that prior to 8-9 months of lodging of the report, accused visited at her house in the evening time and stayed at her house. On that day, when her parents and brother were in sitting-room watching TV, and she was doing household work in the backside room, at that time, the accused entered in the said room, gagged her mouth, performed sexual intercourse against her wish but she did not disclose said fact to anybody because she was afraid. However, again after one month, the accused again visited at her house alongwith his mother and in that night her father, brother and accused were sleeping in sitting-room whereas she, her

mother and sister were seating in another room. Thereafter, her mother, her aunt and sister went to sleep in open space, she was alone in the room and at that time, the accused entered in said room and performed sexual intercourse with her and assured her to perform marriage with her and due to said sexual intercourse she conceived and faced stomach pain, therefore she disclosed said fact to her mother. Thereafter, her aunt, and mother checked her and realized about conceivment of three and half months. On the basis of the said report, Crime No. 127 of 2013 registered against the respondent No.2-accused for the offence punishable under section 376(2) of the Indian Penal Code.

3. The victim was referred for medical examination. Investigating officer recorded statement of witnesses and arrested accused on 15.07.2013 under the arrest panchnama Exh. 67. The investigating officer collected documents pertaining to age i.e. school admission record of the victim and found that victim was below the age of 18 years, therefore, Section 4 of the POCSO Act added in Crime No 127 of 2013. After completion of the investigation, charge sheet came to be filed on 07.10.2013. Since the offence pertaining to POCSO Act, it was registered as Special Case and tried by the special court as per the provisions of the POCSO Act. The learned trial court framed charge against the accused for the offences punishable under section 376 (2) of

the IPC and section 4 of the POCSO Act at Exh. 17. The plea of accused was recorded at Exh. 18. The accused pleaded not guilty and claimed for trial.

4. In order to prove the charges, the prosecution examined victim PW-1 at Exhibit 58 and PW-2, father of victim at Exhibit 60. The prosecution produced documentary evidence i.e. Spot panchanama, Medical report of victim, arrest panchanama, school admission record, DNA reports. The respondent accused admitted those documentary evidence under section 294 of the Cr.P.C. Therefore, admitted documents are exhibited as under:

Spot Panchanama Exhibit 61, Medical examination reports of victim at Exhs .62, 63, 64, 65 and 66, arrest Panchanama at Exh.67, school admission record Exh. 68, DNA reprot of victim and accused at Exh/70 and 71.

5. The prosecution examined victim PW-1 and PW2-father, however, both these witnesses have not supported case of the prosecution and turned hostile. Since the prosecution failed to bring any incriminating evidence against the accused, the statement of accused under section 313 of the Cr.P.C. was dispensed with. After conclusion of the trial, on 13.06.2018, the trial court passed the judgment and order and acquitted the respondent No.2 accused for the

offences punishable under section 376(2) IPC and section 4 of the POCSO Act.

6. The learned counsel appearing for the appellant victim submitted that the learned trial court committed grave error while holding that the prosecution failed to prove that prior to 8-9 months of lodging the report, the respondent accused visited at the house of the victim at Rajpimpri and committed forcible sexual intercourse with the appellant prosecutrix without her consent under the pretext of marriage. The learned trial court wrongly held that the prosecution failed to prove that the accused committed sexual intercourse with the victim against her will in the year 2013 and due to sexual intercourse, the appellant conceived at the age of 17 years. Therefore impugned judgment and order acquitting the accused is illegal, perverse and liable to be quashed and set aside and the respondent/accused is liable to be held guilty for the offences punishable under section 376(2) IPC and section 4 of the POCSO Act.

7. The learned counsel appearing for the victim further canvassed that the trial was posted for evidence, but prior to entering the victim into witness box, the respondent accused and his family members approached the victim with a request not to depose adverse against the the accused, otherwise, the respondent/accused would be convicted for the offences and assured about performing marriage with the appellant

and they would take her care and care of newly born child. The mother of the accused executed registered Gift Deed No. 2492/2018 on 01.06.2018 and gifted 0.40 H.R. agricultural land to newly born female child as promised. So also on 03.06.2018, the respondent accused performed marriage with the appellant victim as per the compromise. Therefore, upon entering settlement between them, the appellant victim did not depose against the respondent No.2/ accused and the learned trial court acquitted the accused for the offence punishable under section 376(2) IPC and section 4 of the POCSO Act. However, subsequently, on 04.12.2018, the respondent No.2 accused instituted a HMP No. 106 of 2018 before the learned Senior Judge, Senior Division, Majalgaon under section 10(1)(c) of the Hindu Marriage Act, 1955 and prayed for decree of annulment of marriage between the appellant-victim and the accused. So also, the mother of the accused filed Special Civil Suit No. 16 of 2018 before the learned Civil Judge, Senior Division, Majalgaon seeking declaration that the registered Gift Deed No.2492/2018 executed on 01.06.2018 in favour of newly born female child be declared as null and void on the ground that it was executed by way of force. Further, on 08.12.2018, a compromise deed filed in matrimonial proceeding bearing HMP No. 106 of 2018. Though the appellant did not swear the affidavit but on the basis of said compromise deed, said HMP petition came to be disposed of vide order

dated 08.04.2019. Therefore the judgment and order of acquittal passed on the basis of testimony of the appellant victim is not justifiable and prayed to quash and set aside the same.

8. The learned counsel appearing for the appellant further canvassed that in order to avoid conviction and to overcome from the trial of offence of rape and under the POCSO Act, the respondent accused performed marriage with the appellant-victim on 03.06.2018 and executed Gift Deed in favour of the child born out of sexual relation but subsequently, mother of the respondent-accused filed a civil proceedings for revocation of Gift Deed of 0.40 H.R. land and also obtained a compromise order on 08.04.2019 by misleading the facts. The learned trial court failed to consider this design by `accused acquitted the accused. Therefore, the impugned judgment and order of acquittal is not just, proper and prayed to quash and set aside the same.

9. Per contra, the learned counsel appearing for respondent no.2 accused supported that the findings recorded by the learned trial court and submitted that though the prosecution examined the appellant victim at Exh. 58, but she did not support the prosecution case and report itself is not proved. The prosecutrix herself admitted in her cross examination that the police obtained her signature on a blank paper and recital of report was not read over to her. The prosecutrix

further admitted about not giving birth register extract while lodging the report and she did not gave her date of birth. Her parents are illiterate and her date of birth given approximately as per the school record and when she visited the police station, to lodge the report, that time, she was 18 years old.

10. The learned defence counsel submitted that though the prosecutrix alleged about her conception due to sexual intercourse between the accused and the victim and she delivered a female child, however, the DNA reports Exh. 70 and 71 do not support the prosecution case that the accused is biological father of the new born female child. Therefore, evidence of the prosecution witness is not in corroboration and the learned trial court recorded findings that, victim deposed that she had love affair with the accused and at the time of lodging report, she was 18 years old and the appellant has not set out substantial grounds to interfere with the findings recorded by the trial court, hence, prayed for dismissal of the appeal.

11. Having regard to the submissions canvassed on behalf of both the sides, we have gone through the record.

12. It would be worthwhile to mention here that in criminal proceeding accusation against the accused is always based on the quality of evidence led by the prosecution and such evidence must

inspire confidence of the court of law that the accused committed alleged offence for which he is charge-sheeted and if the prosecution witness fails to testify about commission of alleged offence of the accused, in such circumstances the court would certainly acquit the accused. In order to constitute the offence punishable under section 376 (2) of the IPC, the burden lies upon the prosecution to prove that the accused committed sexual intercourse with the appellant victim against her will and without her consent. In order to attract section 4 of the POCSO Act, it is necessary on the part of the prosecution to prove that on the date of incident, the victim was child within the meaning of section 2(d) of the POCSO Act and she was sexually abused.

13. In order to bring home the guilt of accused for the offence punishable under section 376(2) of the IPC and section 4 of the POCSO Act, the appellant prosecutrix entered into witness box and deposed at Exh. 58 that her date of birth is 01.07.1996 and in the year 2010 she was residing at the house of her aunt i.e. mother of respondent accused. When she was residing at her aunt's house, at that time, respondent no.2 was serving as teacher and while her stay at her aunt's house, nothing was happened. The appellant (victim) who herself lodged a report turned hostile and did not support her report. Though the prosecution alleged that the accused committed rape on victim, when she was at the age of 17 years, however, the prosecution

failed to prove exact age of the appellant- victim. In order to prove date of birth of the victim, the prosecution produced school admission record of the victim at Exh. 68, wherein the date of birth of the appellant victim described as 01.07.1996, however, the appellant victim herself admitted in her cross examination that her date of birth was given approximately by her parents while admitting her in the school. The victim further admitted that the respondent-accused had not committed sexual intercourse against her wish and she was in love with the accused.

14. It is submitted that the school admission record is not conclusive proof of date of birth and while admission of child in the school, parents of the pupil used to record birth date just to secure admission of the child even at the early age. As per the provisions Registration of Births and Deaths Act, 1969 the birth of child is required to be registered. If the said extract of birth register is furnished with the school authority while admitting the child in the school, and the school admission record discloses the date of birth of the child, on the basis of birth certificate certified issued by the Registrar under the said Act, in that circumstance, if the said evidence is corroborated by the school authority, the said date of birth can be presumed to be correct. In the case in hand, the prosecution failed to produce the exact date of birth of the victim. On the face of record, it appears that during course

of trial, the learned trial court passed an order dated 03.05.2018 below Exh. 1 and directed the prosecution to produce birth extract of the victim but no such birth extract is produced. Therefore, considering the evidence available on record, the trial Court held that the prosecution miserably failed to prove that on the date of the incident of rape, the appellant victim was below the age of 18 years.

15. The evidence of the appellant/ prosecutrix itself suggests that, the appellant prosecutrix herself admitted that she was in love with the accused. On the day of incident, victim was not child within the meaning of section 2(d) of the POCSO Act. Nonetheless, the appellant/ prosecutrix and the respondent accused entered into compromise deed in HMP No. 106 of 2018, wherein the appellant victim herself stated that she was in love with some one else in her village and out of sexual intercourse with her friend, she conceived but on 15.07.2013, at the behest of her parents, she lodged FIR with with Georai Polie Station being Crime No. 127 of 2013 against the respondent/accused and she did not conceive out of sexual intercourse between her and the accused.

16. The appellant prosecutrix produced record pertaining to matrimonial proceeding bearing HMP No. 106 of 2018 and on perusal of the same, it reveals that during the pendency of HMP No. 106 of 2018, respondent No.2 accused and the appellant/victim executed compromise deed, wherein the victim herself admitted that, first

marriage of the respondent no.2 accused solemnized on 15.05.2015 as per Hindu customs & rites with one Meera and out of said marital relation, the respondent accused is having one son and one daughter. Smt. Meera, the first wife of accused cohabiting with the respondent no.2/accused. It is further stated that she delivered a female child on 25.10.2013 and the said female child is not born from the respondent accused. Therefore, statement of the victim appellant itself proves there was no sexual intercourse between victim and the respondent/accused. No doubt, during course of trial, the prosecution produced DNA reports Exhs.70 and 71 but DNA reports prove that the respondent/accused is not biological father of the female child born to the appellant. Now the appellant wants to say that the action of gift-deed, marriage with her, compromise-deed etc. are the design of accused to get acquittal. We are not convinced with it. The fact of gift-deed and persuing her to perform marriage might be with an intention to get acquittal but when it was the compromise-deed before the Civil Court in HMP, she admitted different facts. She has not given details now as to how alleged fraud has been committed on her to enter into compromise-deed. It was in the judicial process and therefore unless the details of fraud are given, we cannot take cognizance of it. Even in respect of marriage, it appears that she performed marriage with accused knowing the fact that he was already married and has to

children. Therefore, the grounds set out in the appeal are not substantial to interfere with the findings recorded by the trial Court.

17. The appellant/victim herself turned hostile and did not support the prosecution case and no substantial evidence brought on record to constitute the offence under section 376(2) of the IPC and section 4 of the POCSO Act as against the accused. Therefore, the learned trial court passed the impugned judgment and order and acquitted the accused, which is itself justifiable while acquitting the accused and the appellant victim has not made out any substantial ground to interfere with the findings recorded by the learned trial court. Therefore, the present appeal deserves to be dismissed. Hence, following order:

O R D E R

Criminal appeal is dismissed.

(Y. G. KHOBRAGADE, J.)

(SMT. VIBHA KANKANWADI, J.)

JPChavan