

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

CRIMINAL APPEAL NO. 53 OF 2022

XXX ... Applicant
Versus

The State of Maharashtra and others ... Respondents

....
Mr. Kanwade Ajay T., Advocate for appellant
Mr. R. V. Dasalkar, APP for respondent No.1 - State
....

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

DATE : 23.03.2023.

ORDER (PER Y. G. KHOBRAGADE, J.) :-

. The present appeal under Section 372 of the Code of Criminal Procedure has been filed by the original informant / victim challenging the order of acquittal of respondent Nos. 2 and 3 for the offences punishable under Sections 366, 376 read with Section 34 of the Indian Penal Code, under Sections 4, 8, 12 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and under Section 3(1) (iii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 passed by

the learned Special Judge, Ahmednagar in Special Case No.356/2018.

2. The prosecution case in short is that the mother of victim lodged a report with the Police Station on 23.07.2018 alleging that her daughter aged about 17 years and 6 months, who was studied upto 10th standard got married on 19.09.2016 with a teacher resident of Mumbai. After marriage, her daughter / victim cohabited with her husband at her matrimonial house for one year, however, due to frequent quarrel between her in-laws and victim, she was brought at informant's house. Informant's son-in-law visited her house on 14.07.2018 and after due negotiations, victim agreed to cohabit with her husband. Accordingly, her daughter and son-in-law boarded in Shirdi - Mumbai passenger train to go to Mumbai on 15.07.2018; however, informant received a phone call from her son-in-law at about 10.00 p.m., informing that her daughter missing from Daund Railway Station. Therefore, informant had taken search of her daughter, but could not find her. Therefore, informant lodged a missing complaint No.4/2018. Her daughter / victim came to her house on 16.07.2018, and told informant that, the accused had enticed her and look her from Daund Railway Station in a lodge and committed sexual intercourse with her on the pretext of

performing marriage. Thereafter, informant lodged such report with Police. On the basis of said report, Crime No.393/2018 was registered against the accused. The victim was referred for medical examination. During the course of the investigation, spot panchanama came to be executed. Clothes of the victim and accused came to be seized under seizure panchanama. All seized articles were sent for Chemical Analysis and recorded statements of the witnesses. Investigating Officer has collected victim's birth certificate as well as caste certificate, as it was transpired that the victim is a member of Scheduled Caste. On the completion of investigation, charge-sheet came to be filed.

3. The learned Special Court framed the charge at Exh.11 against the accused. The accused pleaded not guilty and claimed for trial. In order to bring home the guilt of accused, the prosecution examined total five witnesses. After conclusion of the trial, the statements of both the accused were recorded under Section 313 of the Code of Criminal Procedure at Exhs.46 and 47. The defence of both the accused is of total denial and their false implication in the crime.

4. The learned Special Judge passed the impugned judgment and order on 20.11.2021 and acquitted both the accused for the offence punishable under Sections 366, 376 read

with Section 34 of the Indian Penal Code, under Sections, 4, 8, 12 of POCSO Act, under Section 3(1)(iii) of S.C. and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

5. The learned Advocate appearing for the appellant vehemently canvassed that the prosecution examined five witnesses and proved that the victim had boarded Shirdi - Mumbai passenger on 15.07.2018 with her husband and around 10.00 p.m. the husband of the victim informed informant i.e. the victim's mother about missing of victim from Daund Railway Station. As the victim was not traceable, missing complaint No.4/2018 was lodged. It is also proved that the victim returned to her parental house but on 16.07.2018, and disclosed her mother/informant about enticing and taking her away by the accused from Daund Railway Station to a Lodge and committed sexual intercourse with her on the pretext of performance of marriage. The victim belongs to Cobbler community, which is recognized as Scheduled Caste and on the day of incident the victim was 'child' within the definition of Section 2(d) of the POCSO Act. However, the learned trial Court failed to consider the testimony of victim. It has been unnecessarily observed that the victim has sufficient maturity and it is a case of consensual sex. In fact, when the victim is the 'child', her consent was no consent at all. The sole testimony of the victim

ought to have been held sufficient to convict the accused. There was no reason for the victim to implicate the accused. Therefore, findings recorded by the learned trial Court are perverse and liable to be quashed and set aside.

6. On perusal of record, it can be seen that the victim's marriage was solemnized on 19.09.2016 with a teacher from Mumbai. That means though the victim was 'minor' the informant has given her in marriage. Now, informant or victim cannot take advantage of the minority of the victim. Further it has come in evidence that the victim was cohabiting with her husband at her matrimonial house for one year. It appears that due to the dispute between herself and husband's family members she started residing at her parental house. It is further proved that the husband of the victim visited at her parental house on 14.07.2018, and after due negotiations, victim agreed to resume the cohabitation with husband. The victim boarded in Shirdi - Mumbai passenger train on 15.07.2018 with her husband. These facts have been proved by PW2 Informant and PW Victim.

7. PW-2 informant / mother of victim has deposed that she had received the call from her son-in-law around 10.00 p.m. informing about disappearance of the victim from Dound. Therefore, she lodged missing complaint with Railway Police

Station on 16.07.2018, but on the same day, her daughter victim returned to house in evening, and told about enticing and taking her away by the accused No.1 on the pretext of performing marriage and committed sexual intercourse with her in the lodge and accused No.2 was accompanied with the accused No.1. This fact is corroborated in-chief by the Victim also.

8. However, it to be noted from the testimony of the victim that after she returned from her matrimonial house, she developed friendship relations with the accused. She has avoided to say that it was the love affair, but the subsequent narration would give the said picture. She has deposed that when she boarded the train on 15.07.2018 with her husband for going to Mumbai, at that time the accused along with his friend accused No.2 also boarded the same train. She stats that when the train reached Daund Railway Station she was asked by accused No.1 to alight. She says that accordingly she alighted from the train. Thereafter, she and accused went to Kashti by auto-rickshaw and therefrom they went to Ralegan Mhadoba on a two-wheeler. Accused took her to a Lodge around 3.00 a.m., where the accused introduced her as his wife. After getting a room in the said lodge he had committed sexual intercourse with her. Now the victim says that the accused had committed sexual intercourse by giving

promise to marry. However, on next day, the accused told her that as she has not completed 18 years of age, she should return back to her parental house. We would like to say that since the victim was married and even had cohabited for a year with her husband, had knowledge about what is sexual relationship. It appears that after return to parental house, when she had developed love affair with accused, she had no desire to resume the cohabitation with her husband. It can be read between the lines that due to pressure from parents, she agreed to go with husband. However, it can be further seen that she as well accused had then decided to elope. How accused came to know that she would be going by the said train? It is certain that they both had planned it in that way. Benefit of age cannot be given to the victim here as her marriage was performed. Therefore, conduct and behaviour of the victim itself clarifies that she was consenting party for physical relations. Another point is that the Victim has not stated that she had told about her age at any prior time to the accused. Accused would have been justified in considering her as adult, as she was married. Now, the victim wants to take advantage of her minority. She has not stated that at any point of time she had raised voice for help, when her husband was accompanying her in the train.

One more fact to be noted is that though the informant-mother of the victim claimed that victim was below the age of 18 years on the day of incidence, however, as per the evidence of PW-4, the Head Master of the school in which victim took education has deposed that date of birth of the victim is 04.12.2000. He was deposing on the basis of school record. He was not sure as to on which basis the birth date of the victim was so mentioned in the school record. In the case of ***Sandeep Janaji Konde Vs. The State of Maharashtra - 2016 All M.R. (Cri.) 1433***, the Coordinate bench of this Court held that even if it is presumed that the school leaving certificate contains an accurate record of the entries made in the General Register maintained by the school, it will not be conclusive proof of date of birth and the prosecution failed to bring birth register of the victim maintained under the provisions of the Birth and Death Registration Act. Therefore, it cannot be conclusively held that on the day of incident the victim was child within the meaning of Section 2(d) of the POCSO Act. At the cost of repetition, as aforesaid, even if it is held for the sake of arguments that date of birth of the victim was proved, yet, her marriage was performed in the minority by informant and her family members. Therefore, the minority cannot be used as weapon of attack by them.

9. Further, though the prosecutrix claimed that she belongs to Cobbler community and the accused is belongs to others, however, the evidence led by the prosecution does not reveal that the accused sexually exploited the victim with the mala-fide intention, because the victim belongs to Scheduled Caste.

10. On face of record it further appears that the medical evidence and FSL report does not reveal about forcible sexual intercourse with the victim at the hands of the accused. Therefore, the prosecution failed to bring substantial evidence on record to prove the guilt of the accused. The learned Special Court has rightly passed the impugned order and acquitted the accused for the said offence. No substantial grounds are set out to interfere with the findings recorded by the Special Court. Therefore, no case is made out to admit the appeal. It deserves to be dismissed at the stage of admission itself. Accordingly, the appeal stands dismissed.

[Y. G. KHOBRADE, J.] [SMT. VIBHA KANKANWADI, J.]