

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

CRIMINAL APPEAL NO.407 OF 2023

. The State of Maharashtra
Through Police Station Waluj,
Tq.Gangapur, Dist.Aurangabad. ..Applicant

VERSUS

1. Deelip Vitthal Rathod
Age: 22 years, Occu.: Labour,
R/o. Takarwan Tanda-1,
Tq.Majalgaon, Dist.Beed.
2. Devidas Nagorao Jadhav
Age: 42 years, Occu.: Labourer,
R/o. Antarwao, Tq.Ghansawangi,
Dist.Jalna. ..Respondents
(Res.1 – Orig. Accused)

.....
Mrs.VS.Choudhari, APP for Appellant

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 18 JULY, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Appellant State is hereby assailing the judgment and order dated 18-12-2018 passed by the learned Additional Sessions Judge, Vaijapur, Dist.Aurangabad in Special Case (POCSO) No.23 of 2016 by which respondent no.1 herein is acquitted from all charges viz. under Sections 302, 201 of the Indian Penal Code (IPC), under Section 8 read with 7 of the Protection of Children from Sexual Offences Act (for short “POCSO”) and under Sections

3(1)(r) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for short “the SC and ST Act”).

BRIEF FACTS OF THE CASE BEFORE TRIAL COURT

2. Deceased victim was reported to be admitted in GHATI Hospital, Aurangabad on 31-05-2016. On receipt of MLC, Police official of Waluj Police Station visited the hospital and approached Doctor. He recorded statement of the victim wherein she narrated that her parents were sugarcane cutting labours and she was also joining them in said labour work. She had been to Pandharpur. At that time, accused Deelip Vitthal Rathod was also amongst the said gang. There, deceased victim came in contact and got acquainted with him. After the job was over, they went to Majalgaon. There, accused Deelip maintained physical relations with her and thereafter, he lured her and took her to Aurangabad. He had taken a room on rental basis at Ranjangaon-Shenpunji. She gave statement that accused took up a job in the Industry. On 14-05-2016, when she insisted accused to send her to her parents, he abused her, assaulted her and poured kerosene on her person and set her ablaze.

On the strength of above statement, crime bearing no.264 of 2016 was registered but only for offences under Sections 307, 504, 506, 323 of the IPC. During treatment, deceased victim died. Therefore, charge under Section 302 of IPC has been added. Investigation revealed that she belongs to Scheduled Caste and she was also minor by age and therefore, charges under SC and ST

Act and POCSO Act came to be added and chargesheet was duly filed.

3. Learned trial Judge appreciated the evidence adduced by the prosecution and reached to a finding that at the first count prosecution failed to establish death of deceased to be homicidal. Secondly, to screen himself, accused caused disappearance of evidence. Learned trial Judge also reached to a finding that prosecution failed to establish charge under Section 8 read with 7 of POCSO Act and that it further failed to show that accused was knowing deceased to be belonging to the Scheduled Caste and he thereby committed above offence. The cumulative effect of above findings was recording of acquittal.

The above judgment is questioned by State by way of instant appeal.

SUBMISSIONS

On Behalf of Appellant State :

4. According to the learned APP, judgment under challenge is patently illegal. According to her, deceased was shown to be a minor. There is evidence in the form of **PW7** Sanjay Jadhav (Head Master), who had produced documents regarding minority of the victim. Thus, according to learned APP, there was cogent and reliable evidence regarding age of the victim. It is further pointed out that caste certificate of victim was also gathered during investigation, which substantiated that she belongs to member of Scheduled

Caste. That deceased victim had given statement about accused luring her and taking her to various places and committed forcible sexual intercourse with her. Being a minor, it is pointed out that provisions under Section 8 of the POCSO Act were clearly attracted. That she has stated about accused pouring kerosene on her person and igniting her and causing her burn injury. She has succumbed to burns i.e. due to “septicemia due to dermo-epidermal thermal burns”. Therefore, even the offence of homicide was proved by examining **PW6** Dr. Santosh Bhosale (Autopsy Doctor). According to learned APP, all crucial aspects and circumstances required for recording guilt for above charges were very much available, but learned trial Court misread the evidence and failed to appreciate evidence available on record and has acquitted respondent no.1 - accused in a serious offence. That the findings reached at are not supported by sound reasons and therefore, the judgment under challenge being perverse, it is submitted that appeal deserves to be allowed.

5. We have heard arguments submitted before us at length. We have carefully sifted the oral and documentary evidence adduced before us.

EVIDENCE ON BEHALF OF PROSECUTION

It seems that in support of charges and accusations, prosecution has examined in all ten witnesses. Their status is as under :

PW1 Santosh Daulat Jadhav is Panch to spot. His evidence is at Exh.25.

PW2 Devidas Nagorao Jadhav is father of deceased victim. His evidence is at Exh.33.

PW3 Ramnath Sakharam Hivale is owner of the spot house. His evidence is at Exh.34.

PW4 Dr.Rohini Baburao Sapkal is the Doctor, who gave fitness certificate for giving statement.

PW5 Meena Bhalchandra Warade is the Special Executive Magistrate, who recorded dying declaration Exh.42.

PW6 Dr.Santosh Harischandra Bhosale is Autopsy Doctor. His evidence is at Exh.48.

PW7 Sanjay Asaram Jadhav is Head Master of the School, where victim was taking education. His evidence is at Exh.52.

PW8 Raosheb Manikarao Jondhale (PSI), **PW9** Ashok Piraji Zine (ASI) and **PW10** Ravikant Vishnupant Buwa (ACP) are the Police Officials.

6. On taking stock of above evidence on behalf of prosecution, accusations against respondent no.1 are that he lured the minor victim and maintained physical relations with her. She belongs to Scheduled Caste. When she insisted for taking her to her parents' house, accused - respondent no.1 incinerated her by pouring kerosene on her person and igniting her.

Fundamental case of prosecution is that victim was a minor.

7. Prosecution evidence suggests that date of birth of victim is given as 07-04-1999. To determine the age, prosecution seems to have adduced evidence of **PW7** Sanjay Jadhav, Head Master of School where deceased allegedly undertook education. **PW2** Devidas, father of deceased in his evidence at Exh.33 has unfortunately not given the date of birth of his daughter. Therefore, the only piece of evidence that remains for consideration is the evidence of **PW7** Sanjay, Head Master. However, what **PW7** Sanjay, Head Master had placed on record is not extract of admission register, or matriculation certificate or birth certificate issued by competent authority. Rather it is a leaving certificate showing that she left the School while she was studying in 9th Standard. Even **PW5** Meena and **PW9** Ashok are not consistent about age of deceased victim.

8. For establishing or determining age of victim of crime under the POCSO Act, Courts are required to take recourse to the steps indicated in Section 94 of the Juvenile Justice (Care and Protection of Children) Act. The nature of proof which said Act requires consideration are as follows :

- (i) The date of birth certificate from the School, or the matriculation or equivalent certificate from the concerned examination board, if available;
- (ii) The birth certificate given by a Corporation or a municipal authority or a

panchayat;

(iii) and only in absence of (ii) and (iii), age shall be determined by ossification test or any other particular test conducted by the Committee or the Board.

9. Therefore, the above provisions make it apparently clear that date of birth certificate from the School or matriculation or equivalent certificate issued by examination board and in absence of birth certificate issued by Corporation, or Municipal Authority or Panchayat and further in absence of it, ossification test report conducted by medical authorities would be decisive.

10. This legal requirement has been spelt out in the cases of *Rishipal Singh Solanki v. State of Uttar Pradesh & Ors.*; 2021(12) SCR 502 and *Sanjeev Kumar Gupta v. The State of Uttar Pradesh & Ors.*; [2019] 9 SCR 735 as well as in the case of *P. Yuvaprakash v. State Rep. by Inspector of Police* in Criminal appeal No.1898 of 2023 i.e. in a very recent judgment of the Hon'ble Apex Court reported in *2023 SCC Online SC 846*.

In the light of above requirement, if the document which is gathered during investigation and is sought to be relied by prosecution is seen, it is not a certificate issued by any of above authorities, but it is apparently a School Leaving Certificate. In paragraph no.19 of above referred judgment, the Hon'ble Apex Court has held that transfer certificates and extracts of

admission register not being included in provisions of Section 94(2)(i), which is mandated one, leaving certificate cannot be taken recourse to or relied for determination of age.

For above reasons and taking into account evidence available on record, we are convinced as like trial Court that, prosecution has failed to prove that victim was falling in the definition of a 'child' so as to held her as a minor.

11. Now as regards to involvement of accused - respondent no.1 in the alleged burns suffered by deceased victim is concerned, prosecution seems to have taken recourse to the dying declarations at Exh.42 and Exh.65 and evidence of **PW3** Ramnath. He claims to have seen the incident and even gone to her rescue to extinguish the fire. He is the star witness for prosecution.

On visiting his evidence, it is revealed that according to him, on 14-05-2016, he was in his house. Hearing shouts from upper premises, he went there and according to him, he observed that victim was burning. He stated that accused was standing there, but as a mute spectator. He claimed that he extinguished fire and according to him, he made enquiry to victim as to how incident took place and she told that she insisted respondent no.1 to take her to her parents' house and at that time, respondent no.1 got annoyed and poured kerosene on her person and set her on fire.

Record shows that apart from his statement under Section 161 of Code of Criminal Procedure (Cr.P.C.), prosecution has also got his statement

recorded under Section 164 of Cr.P.C. by producing him before the Judicial Magistrate. In said statement, he seems to have stated that when he went after hearing the shouts, he saw victim burning and respondent no.1 pouring water on her person and trying to extinguish the fire. Therefore, he is giving self contradictory versions and therefore, we do not find his testimony worthy of credence. Therefore, so called ocular evidence on behalf of prosecution cannot be straightaway accepted.

12. We now shift to other evidence i.e. alleged dying declarations noted by **PW5** Menna and **PW9** Ashok at Exhibits 42 and 65 respectively. Dying declaration at Exh.42 seems to be in question answer form. It is pertinent to note that there is no certification or endorsement of Doctor over it. There is scratching and overwriting while writing answer to question no.1 about name. About how incident occurred, answer is noted that 'burned' Deelip poured kerosene and she had married him in a temple. Regarding question as to when the incident took place, she has given date as 14-05-2016. To a question as to whether she suspects anyone, answer is noted that objection on Deelip and he tried to kill her. To the question as to what was intention, answer is noted that for not permitting her to go to her parents. To the question as to who was present and what was done, she has answered that Deelip brought her to the hospital. This dying declaration seems to be recorded on 01-06-2016 at 06:40 p.m. Apparently the right thumb impression is not

identified.

13. Second dying declaration recorded by **PW9** Ashok is at Exh.65. However, even this statement recorded by **PW9** Ashok, which is subsequent to the one which is recorded by **PW5** Meena i.e. on 02-06-2016, there is no certification of fitness of the victim to give statement. It is in details recorded by Police Official **PW9** Ashok. This Police Officer has in examination-in-chief itself stated about receipt of MLC on 31-05-2016 from Civil Hospital. However, he has apparently recorded her statement on 02-06-2016. Thus, there is no prompt effort to record dying declaration on receipt of MLC on 31-05-2016. **PW9** Ashok seems to have stated that he initially recorded dying declaration and thereafter communicated Special Executive Magistrate also to record dying declaration. Therefore, apart from inordinate delay in recording dying declaration, said dying declaration being in detail, possibility of tutoring crops up. Apparently dying declaration recorded by **PW5** Meena is full of overwriting and not clear, whereas the one allegedly recorded by **PW9** Ashok is in detail narration but is subsequent to dying declaration recorded by **PW5** Meena. Consequently, the dying declarations are not inspiring confidence.

ANALYSIS

14. Alleged incident had taken place on 14-05-2016 at 09:30 a.m. but crime is registered on 02-06-2016 i.e. almost after 20 days and this also gives a

serious dent to the credibility of the dying declarations.

15. Apart from written dying declarations, prosecution also seems to be taking recourse to oral dying declaration allegedly given by deceased to her father. **PW2** Devidas is father of deceased. His evidence at Exh.33 goes to show that on 17-04-2016 his victim daughter left the house without informing and inspite of search she was not found. He claims that he received a phone call from accused respondent no.1 informing about burns suffered by victim and when this witness went with his family, he did not trace his daughter. According to him, on the next day, at around 04:00 p.m., he learnt that victim was admitted in Ward No.22-23. He stated that accused - respondent no.1 was not present there. On enquiry, deceased victim told him that respondent no.1 took her away on the premise of marriage and performed marriage with her. She further told that when she asked him to take her to her parents' house for meeting, he abused her and set her ablaze by pouring kerosene on her person.

In **cross-examination**, he has admitted that he, his wife were present in the hospital from 20-05-2016 to 04-06-2016. He admitted about Police Chowki right in front of Civil Hospital. According to him, he informed Police but Waluj Police did not take his complaint. He is also not remembering the date when he approached Waluj Police Station. He states that he had been to Police Chowki in front of GHATI hospital. According to him, Police told him

that they did not register case in Police Chowki.

16. Evidence of **PW2** Devidas, father of deceased, on careful scrutiny shows that he had allegedly received a phone call from respondent no.1 on 20-05-2016 itself and inspite of visiting Civil Hospital up to 04-06-2016, he has not taken steps of lodging complaint on his own on the strength of alleged oral dying declaration. Rather since victim left his house on 17-04-2016, no efforts are made by him to lodge missing or any sort of complaint.

SUMMATION

17. Therefore, on critical analysis of evidence adduced by prosecution in the trial Court, it is emerging that **firstly** victim had left the house on her own. **Secondly**, though it is claimed that she was a minor, her age has not been substantiated by leading legally acceptable evidence. **Thirdly**, as prosecution has not demonstrated victim to be a minor, offence of POCSO, more particularly, Section 8 is also not attracted. Particularly, evidence to that extent is also not inspiring confidence. Therefore, merely because victim was belonging to Scheduled Caste, when prosecution has utterly failed to establish the above crucial aspects, guilt cannot be fastened. Prosecution evidence is patently weak and fragile in nature and therefore, in our opinion also, prosecution has failed to establish the charges.

18. We have carefully gone through the impugned judgment. The evidence adduced by prosecution has been correctly appreciated by the learned trial Judge. Required law has also been applied at required places. Findings reached at are based on reasons which are not shown to be faulted. Considering the above, we do not find any merit in the appeal and hence, we proceed to pass the following order :

ORDER

Criminal Appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT