

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

905 CRIMINAL APPEAL NO.497 OF 2023

XYZ

... Appellant

... **Versus** ...

- 1 The State of Maharashtra
Through the Police Inspector,
Police Station, Hasnabad,
Tq. Bhokardan, Dist. Jalna.
- 2 Rameshwar Pandharinath Sormare,
Age 26 yrs., Occ. Agri.,
R/o Goshegaon, Tq. Bhokardan,
Dist. Jalna.
- 3 Ankush Kaduba Mohite,
Age 32 yrs., Occ. Agri.,
R/o as above.
- 4 Vikram Sheshrao Ghode,
Age 28 yrs., Occ. Agri.,
R/o as above.

... Respondents

...

Mr. A.L. Kanade, Advocate for appellant

Mr. S.J. Salgare, APP for respondent

...

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

DATE : 11th JULY, 2023

ORDER :

1 Present appeal has been filed under Section 372 of the Code of Criminal Procedure, 1973 to challenge the acquittal of respondent Nos.2 to 4 by learned Extra Joint District Judge and Additional Sessions Judge (POCSO), Jalna in Special Case (Child) No.39/2018 on 18.04.2023 from the offences punishable under Section 354-D, 363, 366, 376(2)(i)(n) read with Section 34 of the Indian Penal Code, 1860 and under Section 4 read with Section 3 and under Section 17 read with Section 16 of the Protection of Children from Sexual Offences Act, 2012.

2 We have heard learned Advocate Mr. A.L. Kanade for the appellant/informant and with his able assistance we have gone through the material which was before the learned Trial Judge.

3 In the nutshell, the learned Advocate Mr. A.L. Kanade would submit that the Trial Judge has not appreciated the evidence properly, though there was evidence to show that on the date of the incident the victim was minor. The learned Judge has not accepted the same and gave answer to point No.1 in the negative. The date of birth of the girl has been told by the father i.e. the present appellant and also it has been brought on record by

examining the Headmaster of the school, where the girl was first admitted. PW 7 Deepak Thakre had brought the original record of the school which showed that the girl was born on 17.04.2003 and the incident occurred on 13.03.2018. It was, therefore, conclusively proved that the victim was aged 15 and studying in 9th standard. The learned Trial Judge has also not considered the alternative fact that if at all he was of the opinion that the girl is not “child” as defined under Section 2(1)(d) of the POCSO Act, then it ought to have been considered that whether the offence under the Indian Penal Code sections have been proved or not by considering the victim as major on the date of the incident. The other points are also answered in the negative. He, therefore, prayed for admitting the appeal.

4 At the outset, it is to be noted that in order to arrive at a conclusion, as to whether the victim was child, not only the deposition of the present appellant, victim and the concern person who produced the documentary evidence is required to be considered, but it should be also cumulatively considered. PW 1 – the appellant has stated that the victim was born on 17.04.2003 and he had admitted his daughter in first standard in Government school. He himself had given the date of birth of the victim in the school, but in the cross-examination he admitted that those statements disclosing the date of birth and he admitted the girl to the Government

school in first standard turned out to be improvements. He had not stated the said facts before the police in his First Information Report (Exh.57). Secondly, the girl has stated her date of birth in her examination-in-chief, however, it can be seen from the cross-examination that everything has been disputed by the accused persons. Therefore, it was the bounden duty of the prosecution to bring on record proper proof. PW 7 Thakre is the Headmaster, who had brought the original record Exhs.102 and 103 which was the Admission Form and Admission and Leaving Register. However, in the cross-examination he has admitted that those entries were not taken before him. Even the document of Admission Form i.e. Exh.102 does not bear the signature of the then Headmaster below caption "Anumati" (approval). He further admitted that father of the girl has not submitted any documentary proof in respect of date of birth of his daughter i.e. victim. In his examination-in-chief he has stated that the date of birth of the girl was given on affidavit by father. PW 1 – the appellant has not stated in his examination-in-chief as to why he had not got the birth of his child registered in the Birth and Deaths Register, at the place where she was born. In his cross-examination the father was unable to give the date of his marriage and also the date of birth of his children and categorical terms he states that the date of birth of his daughter was given by him in school approximately. He was unable to state name of the Principal of the school at the time of

admission of his daughter. He was also unable to state the date and year when he had admitted the daughter in the school. Under the said circumstance, the learned Trial Judge has held that whatever evidence has been adduced is not sufficient to prove that the girl was below 18 years on the date of incident and, therefore, she is not child within the definition of Section 2 (1)(d) of the POCSO Act. We do not find any error or perversity on the part of the Trial Court in arriving at the said conclusion.

5 As the prosecution has failed to prove that the girl was child within the definition of POCSO, provisions of POCSO Act will not be applicable and, therefore, the acquittal of the accused persons from those provisions/offences cannot be doubted.

6 Now, it is required to be seen, as to whether there was any evidence in respect of the other sections or offences. The testimony of the victim – PW 2 would show that five months prior to fleeing away when she was returning home, accused No.1 had met, expressed his love for her and thereafter he used to follow her. She says that four months prior to the incident the accused had sexual intercourse with her in cotton field belonging to her father. But then she says that he gave threat that he would commit suicide by hanging himself if she discloses the incident to anybody. She then

stated that accused No.1 had physical relations with her 4-5 times in the field when she was alone, and this all had happened prior to the fleeing away. She has not disclosed the fact to anybody. This shows that she would be consenting party, and at the costs of repetition, it can be said that when she is not a child within POCSO, submitting to accused No.1 appears to be then voluntary. She has given further acts also alleged to have been done by accused No.1 subsequently. It appears that accused No.1 and she herself decided to elope and, therefore, around 9.00 p.m. on 12.03.2018 under the pretext that she is going for nature's call she was taken in the agricultural land. Though she has given the fact that it was forceful, but then she is not explaining as to why she has not shouted, if at all it was forceful. The other accused i.e. accused Nos.2 and 3 were present in the field and then all of them went and arrangements were made for the marriage between the girl and accused No.1. They had also gone to Rajur in Ganpati Temple and according to her, accused No.1 had left her in the temple under the pretext that he would fetch money. Since he did not return and there were police, she disclosed this fact to them, who then took her to Police Chowky. It also appears that at that time she had not given the complete facts and says that when she tried to disclose the incident to police, the police did not listen. The cross-examination would show that there were chances for her to flee away, but she has not taken that liberty. Therefore, all these facts are

required to be considered which would definitely show that she was the consenting party and, therefore, we may not stress on the medical evidence.

7 It is also to be noted that after the girl was traced out and brought to Police Station, it appears that her parents met her. Though the girl is denying the suggestion that the parents had refused to take her to home, she admitted that she was sent to Remand Home. According to her, her father was with her till Remand Home. Present appellant is not explaining when he was there, why girl should be kept in Remand Home. In the cross-examination the girl further says that after she was released from Remand Home, she went to the house of her maternal uncle and stayed there for 2 to 2½ years. Though she says that her parents had met her in the house of her maternal uncle, once again the appellant is not explaining why he had not taken the girl to his house. Under the said circumstance, now, after the acquittal of the accused whether the appellant can be said to be really a victim as contemplated under Section 2(wa) of the Code of Criminal Procedure, is a question. Merely, because he is the informant, he will not become a victim, his own act, in literally refusing to give support to the girl would speak for itself.

8 We do not find any illegality or perversity in the judgment of

acquittal by the learned Trial Judge. Appeal is devoid of merits and, therefore, deserves to be dismissed at the threshold. Accordingly, it is dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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