

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

CRIMINAL APPEAL NO. 547 OF 2020

X Y Z

... **Appellant**
(Informant)

Versus

1. The State of Maharashtra
Through Police Inspector, WALUJ (M),
Police Station Taluka and Dist. Aurangabad
2. Santosh alias Sainath Lad
Age: 32 years, Occu. Laborer
R/o Zhalta Taluka and Dist. Aurangabad
3. Vandana alias Sheela Raju Gaikwad
Age: 35 years, Occ. House Hold,
R/o Zhalta Taluka and Dist. Aurangabad ... **Respondents**
(R.Nos. 2 and 3 are accused)

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Mr. A. N. Saud Deshmukh, Advocate for appellant
Mr. R. D. Sanap, APP for respondent No.1 - State

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

DATE : 27.04.2023.

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

By the present appeal under Section 372 of the Code of Criminal Procedure, the prosecutrix is challenging the judgment and order dated 07.11.2019, passed by the learned Special Court

under the POCSO Act and Additional Sessions Judge, Aurangabad in Special Case Child Prot. No.62/2015, thereby acquitting respondent Nos.2 and 3 original accused Nos.1 and 2 for the offences punishable under Sections 363, 366-A, 376(2)(i) read with Section 34 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

2. As per the provisions of Section 228-A of the Indian Penal Code, identity of victim in rape (sexual offences) is concealed in all manner including names of her relatives and the School/College where the victim studied.

3. In nutshell, the prosecution story is that on 14.11.2014, the victim's mother lodged report with the concerned Police Station alleging that on 11.11.2014 at about 3.00 p.m., she with her minor victim daughter had gone to the house of her foster sister. At that time, her victim daughter had stayed outside of her sister's house and she was taking tea inside the house of her sister. However, at that time her victim daughter went away without informing her. She and her sister with their relatives had taken search of victim, but the victim was not traceable. After 2 – 3 days, she (informant) came to know that the accused enticed away her daughter victim on promise

of marriage, hence, she lodged report, on which basis Crime No.I-218/2014 registered against the accused for the offence under Sections 363, 366(A) of the Indian Penal Code. The investigation was carried out by PW-7 PSI Venkatesh Ranvirkar. During the course of investigation, it has revealed that the accused No.2 helped the accused No.1 while taking away the victim minor. On 16.11.2014, the Investigating Officer searched the accused and victim on the basis of mobile tower location. On inquiry, the victim disclosed that, since last two years she is in love affairs with accused. On 12.11.2014 the step-mother of accused consented for marriage between her and accused and permitted both of them to stay in one room, where they developed physical relations. Accordingly, offence under Section 376(2) of the Indian Penal Code and Section 5(1) and 6 of the POCSO Act added in Crime No.I-218/2014. The PW-7 PSI drawn spot panchanama, seizure panchanama and arrested both the accused. The Investigating Officer collected the evidence pertaining to age of victim. The statement of victim came to be recorded under Section 164 of the Code of Criminal Procedure through the Judicial Magistrate, First Class. The call detail report (CDR) of cell phone of accused collected and on completion of investigation, charge-sheet came to be filed against the accused.

4. The learned trial Court framed charge at Exh.17. Both the accused pleaded not guilty and claimed for trial.

5. The prosecution examined in all total eight (8) witnesses to bring the home of the accused for the said offences as under:

PW-1 Dhanraj Gangavne, panch witness, cloth seizure panchanama of victim (PW-2), PW-2, PW-3 – Shakubai - mother of victim, PW-4 Mangal Dhas Head Mistress of Zilla Parishad Primary School of victim, PW-5 Kailas Magare, panch witness to the spot panchanama, PW-6 Ganesh, PW-7 Venkatesh Ranvirkar, PSI, Investigating Officer, PW-8 Dr. Balvin Kaur Ghar, Medical Officer who had medically examined the victim. Beside oral evidence, the prosecution relied on documentary evidence i.e. Exh.39 seizure panchanama of victim's clothes, Exh.50 FIR, Exh.54 Victim's school leaving certificate, Exh.65 spot panchanama, Exh.67 clothes seizure panchanama of accused, Exh.89 and 93 arrest panchanama, Exh.90 & 91 letters under which said articles were returned, report Exh.92 statement of victim under Section 164 of Cr.PC. Exh.94, 95 and 96 C.A. reports.

6. After conclusion of trial, the statements of both the respondent Nos. 2 and 3 accused recorded under Section 313 of the Code of Criminal Procedure. The defence of the accused is that they have been falsely implicated in the crime. According to the respondent Nos. 2 and 3 the victim PW-2 was in love affair with the accused No.1 and at her own will she accompanied the accused No.1 to Kolhapur from Aurangabad without informing to anyone and both of them moved from one place to another. So also on the day of incident the victim was not minor within the meaning of Section 2(1) (d) of the POCSO Act and no sexual assault was made against the victim, hence prayed for acquittal.

7. On 07.11.2019, the learned Special Court passed the impugned judgment and order and acquitted the respondent Nos.2 and 3 for said offences. Hence, present appeal.

8. The learned Advocate appearing for the appellant/prosecutrix vehemently canvassed that the prosecution has adduced supporting evidence to prove the contents of the First Information Report (F.I.R.) and proved that the appellant / prosecutrix and the respondent No.2 accused were knowing each

other. The respondent No.2 / accused No.1 established physical relations with the prosecutrix PW-2 under the false promise of marriage when prosecutrix was minor. As per the testimony of PW-4 Head Mistress of victim's Zilla Parishad School, the date of birth of the victim is 20.06.2002, which is in corroboration with school leaving certificate Exh.54 and alleged offence of sexual assault committed on 11.11.2014. The respondents accused have not shaken testimony of PW-2 and PW-4. Therefore, the prosecution proved beyond reasonable doubt that on the day of incident the victim PW-2 was child and the accused No.1 sexually assaulted the victim. However, the learned trial Court recorded perverse finding. Hence, prayed to quashed and set aside the same.

9. The learned Advocate appearing for the appellant/victim further canvassed that PW-2 prosecutrix deposed that on 11.11.2014 she with her mother PW-3 had visited at the house of her maternal aunt and after having talk with the accused, she visited the accused near Baba Petrol Pump, Aurangabad. Thereafter, the accused Nos.1 and 2 took her in a vehicle, then at Kolhapur by Bus. Accused No.1 committed sexual intercourse with her at the house of his step-mother. The evidence of Medical Officer PW-8 corroborated about

rupture of hymen, which proves sexual assault with the victim at the hands of accused No.1. However, the learned trial Court mechanically and without appreciating evidence in positive manner passed the impugned judgment and order, which resulted in miscarriage of justice, hence, prayed to quash and set aside the impugned judgment and order.

10. 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 have committed alleged offence for which they are 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.

11. In order to constitute the offences punishable under Sections 363, 366, 376(2) read with Section 34 of the Indian Penal Code, the burden lies upon the prosecution to prove that both the accused enticed the minor victim without consent of her guardian to compel her marriage and the accused No.1 committed sexual intercourse with the minor 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.

12. In order to prove that, on the day of alleged incident of abduction and sexual assault, the victim (PW-2) was child within the meaning of Section 2(1)(d) of the POCSO Act, the prosecution examined the prosecutrix PW-2 at Exh.45 and PW-4 Head Mistress of Zilla Parishad Primary School at Exh.53. The PW-2 victim has not deposed in her evidence about her date of birth, however, it has been brought in her cross examination that, date of birth of victim is 21.06.2002. The PW-2 victim stated that in the year 2013 she was studying in VIIth standard. Prior to one year of entering into the witness box, her marriage was solemnized and she blessed with female child. She was having love affair with accused No.1. She was frequently visiting grocery shop of accused No.2 Vandana for purchase of grocery articles. She further admitted that she was acquainted with the accused since many years. The PW-4 produced victim's school leaving certificate Exh.54, wherein date of birth of victim mentioned as 20.06.2002. The PW-4 Head Mistress has

admitted in her cross examination that she never seen seen birth certificate of the victim PW-2 and she did not prepare school leaving certificate Exh.54. She has no occasion to see the documents of the victim who had secured admission of the victim prior to 2014. The prosecution failed to produce birth certificate of the victim PW-2 maintained under the Birth and Death Registration Act.

13. In the case of *Jabar Singh Vs. Dinesh and another* - reported in *2010(3) SCC 757*, ruled that the entry in admission form, school record and transfer certificate did not satisfy the conditions laid down in Section 35 of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of duty specially enjoined for the law of the country and, therefore, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determination of age.

14. In the present case, any absence of primary evidence, mainly, the birth certificate tither from the Municipal Corporation or from the competent authority under the Birth and Death Registration Act, which would have best evidently value as laid down in Section 35 of the Evidence Act and in absence of ossification test report of the

prosecutrix. The prosecution loses credibility as regards the age of prosecutrix. Evaluation of aforesaid in our conscious view, the prosecution was unable to bring its case in respect of age of the prosecutrix beyond reasonable doubt.

15. As per ratio laid down in the case of *Jarnail Sing. Vs. State of Haryana (2013 AIR (SC) 3467)*, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth

certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

16. In the case of ***State of Maharashtra Vs. Ramesh Babulal Rewtkar, (2017 ALL MR (Cri) 3980)***, the coordinate bench of this court found that while school record was based on the leaving certificate issued by the primary school, no data from primary school was brought on record. In the case in hand, it *prima-facie* appears that the victim PW-1 has not stated her date of birth. Extract from birth register Exh.40, extract of school register Exh.43 and school leaving certificate Exh.44 do not refer date of birth of victim PW-1 recorded on the date of first occasion. No birth certificate is produced on record. Moreover, when the entries were taken in the school register and school leaving certificate no reference has been given on which basis date of birth of victim was recorded. Precisely, for this reason, the learned trial court has found that the prosecution failed to

prove that at the time of incident, victim PW-1 was below the age of 18 years.

17. In case in hand, the PW-2 victim admitted that her date of birth is 21.06.2002. PW-4 Head Mistress of primary school of victim stated as per the school leaving certificate Exh.54 victim's date of birth is 20.06.2002, which does corroborate. As per the statement of victim recorded under Section 164 of Cr.P.C., the victim appears to be the age of 17 years old at the relevant time. While lodging report Exh.50, the PW-3 informant gave age of victim PW-2 as about 13 years. As per the testimony of PW-3 victim's mother, she had given to the Police, the document pertaining to the age of victim PW-2 and school leaving certificate, but the Investigating Officer PW-7 has not stated about obtaining document pertaining to birth date of victim from PW-3. The evidence of Investigating Officer PW-7 appears that he had not obtained birth certificate of the victim PW-2 either from Municipal Corporation or any competent authority under the Birth and Death Registration Act. He further stated that though he had requested the Medical Officer for ossification test of victim PW-2, but no ossification report produced on record. Therefore, considering the testimony of victim that the marriage of victim PW-2 already

solemnized and blessed a half years old female child. Therefore, the evidence of prosecution witnesses does not inspire confidence and trustworthy to prove date of birth of the victim PW-2. Therefore, considering the evidence available on record the trial Court held that the prosecution failed to prove on the date of incident of rape the appellant victim was child within the meaning of Section 2(1)(d) of POCSO Act.

18. The testimony of PW-2 victim itself suggest that on 11.11.2014, she had visited at her maternal aunt with her mother PW-3. The sister of respondent No.2 accused gave her cell number of accused No.1. Thereafter, she talked with respondent No.1 accused. Then she alone went near Baba Petrol Pump, Aurangabad. Thereafter, accused No.1 along with accused No.2 and his mother came in a vehicle near Baba Petrol Pump, Then she herself and both accused went to Kolhapur by Bus and then at village Mirajwadi. Thereafter, she and the accused slept in one room and the accused committed sexual intercourse with her. On next day, her mother along with police visited there and then both of them were brought at Police Station, Aurangabad. It is trite settled that, when there is no evidence that the PW-2 victim is below the age of 18 years and she by her own

accord left company of her guardian, it can said that the victim girl was abducted.

19. Further, in order to bring the guilt of accused under Section 363, 366A of the Indian Penal Code, the prosecution required to establish that the accused No.1 induced the victim PW-2 to go from one place to another by deceitful means or kidnap the victim with an intention that the victim may be seduced to have illicit intercourse. Further the accused induced the victim minor under the age of 18 years with an intention to seduce her to have illicit intercourse. In the case in hand, it appears that the victim PW-2 was having full maturity of understanding about consequence of sexual intercourse. The testimony of PW-2 victim does not suggest that the accused No.1 seduced her from moving one place to another to have illicit intercourse. The testimony of PW-2 victim itself suggest that she was in love affair with accused No.1 and she alone visited at Baba Petrol Pump, Aurangabad from the house of her maternal aunt. Thereafter, she accompanied with accused from Aurangabad to Kolhapur in Bus and then another village where they spent night.

20. In the case of **S. Varadarajan Vs. State of Madras - 1965 AIR 942**, wherein the Hon'ble Supreme Court held thus:

“Where a minor girl, alleged to be taken away by the accused person, had left her father's protection knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, it could not be said that the accused had taken her away from the keeping of her lawful guardian within the meaning of Section 361 of the Indian Penal Code (Act XLV of 1860). Something more had to be done in a case of that kind, such as an inducement held out by the accused person or an active participation by him in the formation of the intention, either immediately prior to the minor leaving her father's protection or at some earlier stage. If the evidence failed to establish one of these things, the accused would not be guilty of the offence merely because after she had actually left her guardian's house or a house where her guardian had kept her she - joined the accused, and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place.”

In that case the prosecutrix had consistently stated that she had accompanied the accused out of her own will. The prosecutrix in that case was at the verge of attaining majority. Considering the deposition and conduct of the victim it is not safe to infer the accused had taken the victim away from the keeping, of her lawful guardian.

21. Testimony of Medical Officer PW-8 appears that she examined the victim PW-2 and the accused No.1. The Medical Officer has not found any mark of injury, but hymen of victim was completely

torn. PW-8 opined about possibility of sexual intercourse with the victim. Accordingly, issued certificate Exh.98. The necessary sample of victim i.e. pubic hair, semen, vaginal swab, nail clippings, blood sample were referred for Chemical Examination. The C.A. report Exh.95 does not corroborate about finding of semen in vaginal swab of the victim, so also no any tissues about nail clipping is in corroboration. The spot panchanama and seizure of clothes of victim and the accused not seriously disputed. The seized articles i.e. clothes of victim and accused are not in corroboration about sexual intercourse.

22. It is trite settled that hymen of female can be reaptured while playing games, cycling or other activities including fingering and merely the hymen of victim found rapture, which does not constitute forcible sexual intercourse.

23. In the case in hand, the evidence of prosecutrix does not corroborate about sexual exploitation at the hands of the accused and when she herself admitted that she was in love affair with the accused, then it is hard to believe that the accused induced her by deceitful means and kidnapped to have illicit intercourse. Therefore, the learned trial Court passed the impugned judgment and order and

acquitted the respondents 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, the appeal is dismissed.

[Y. G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]

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