

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.890 OF 2018

Maroti s/o Bhujang Gedam
Age – 27 years, Occ – Labour
At Present Nil
R/o Pitambarwadi (Bhimpuri)
Taluka – Kinwat, District – Nanded
(Original Accused)

APPELLANT

VERSUS

1. The State of Maharashtra
Through Kinwat Police Station,
Taluka – Kinwat, District – Nanded
2. XYZ

RESPONDENTS

.....

Mr. Subodh P. Shah, Amicus curiae for the applicant
Mr. A. A. Jagatkar, APP for respondent - State
Mr. D. G. Nagode, Advocate for respondent No.2 (appointed)

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 14th FEBRUARY, 2023

JUDGMENT:

1. The appellant – accused, who is convicted for offence punishable under section 376 (2) (n) of the Indian Penal Code, section 3 read with 4, section 5 (j) (ii) read with 6 and section 5 (l) read with 6 of the Protection of Children From Sexual Offences Act and sentenced to suffer Rigorous Imprisonment for 10 years and directed to pay a fine of Rs.30,000/- for the

offence punishable under section 5 (j) (ii) read with 6 of the POCSO Act and in default of payment of fine directed to suffer further Rigorous Imprisonment for six months and sentenced to suffer Rigorous Imprisonment of 10 years and directed to pay a fine of Rs.30,000/- for offence punishable under section 5 (l) read with 6 of the POCSO Act and in default, directed to suffer further Rigorous Imprisonment for six months, by this appeal, challenges his conviction and sentence.

2. In short, prosecution case is that on 12th December, 2014, the victim, aged 15 years, lodged report Exhibit-36 with Kinwat Police Station, contending that four to five months back, while she was working in the field of Buchanna, the appellant, by giving threat to kill her, had forcible sexual intercourse with her on four to five occasions, due to which she became pregnant. Out of fear, she did not disclose the incidents to anybody. One day, she had abdominal pain and, therefore, she disclosed the incidents to her parents. Thereafter, she, along with her parents, Sarpancha, village Police Patil and others went to the appellant, but he refused to marry her, claiming that he is already married. On the basis of the report lodged by the victim, Crime No. 99 of 2014, for offence punishable under sections, 376 (2) (i) of the Indian Penal Code and under section 4 of the POCSO Act was

registered with Kinwat Police Station and after completion of investigation, charge sheet was filed.

3. The appellant was charged for offence punishable under section 376 (2) (i) and (n) of the Indian Penal Code and under sections, 3 read with 4, 5 (j) (ii) and (l) read with 6 of the POCSO Act. He pleaded not guilty and claimed to be tried. His defense was of total denial. After recording evidence and considering the rival submissions, the Additional Sessions Judge convicted the appellant as above.

4. Heard Mr. S. P. Shah, learned advocate appointed as Amicus Curiae for the appellant, Mr. A. A. Jagatkar, learned Additional Public Prosecutor, Mr. D. G. Nagode, learned advocate appointed for respondent No.2. Perused the record and proceedings.

5. Challenge in the present appeal is limited on the ground that the prosecution has failed to prove that the victim was '*child*' within the meaning of section 2 (1) (d) of the POCSO Act, on the date of the alleged incidents. Arguments were advanced by both the sides, only on this point.

6. "*Child*" is defined in section 2 (1) (d) of the POCSO Act as follows: -

"Child means any person below the age of eighteen years"

7. Learned advocate for the appellant submits that the Trial Court has held that the victim was child at the time of the incidents, on the basis of ossification test report Exhibit-44. Age of the victim is not mentioned in the ossification test report. According to him, medical board has not conducted the ossification test and the doctors, who have conducted the ossification test, were not radiologists. By pointing out birth certificate Exhibit-66 of the child delivered by the victim on 3rd March, 2015, he submits that the victim herself has given her age as 19 years in the certificate. Rule 12 of the Juvenile Justice Act is quoted by the Trial Court, while delivering the impugned judgment, however, said rule is not properly appreciated by the Trial Court. In terms of the Rule 12 of the Juvenile Justice Act, Medical Board has to conduct the ossification test, which is not done in the present case. There is no reliable evidence of age of the victim, brought on record by the prosecution. Therefore, the finding recorded by the Trial Court that the victim was child at time of the incidents, is unsustainable.

8. He submits that there is four to five months' delay in lodging the FIR. There were talks of marriage between the victim and the appellant, which is admitted by the mother of the victim,

therefore, it can be presumed that the victim was of marriageable age at the time of the incidents and the physical contact between the victim and the appellant was with consent of the victim. Therefore, according to him, conviction and sentence of the appellant in the facts of the present case, is unsustainable.

9. In the alternative, he submits that the appellant has undergone 8 years' sentence and he may be released on sentence already undergone.

10. In support of his submissions, he relied on judgments in the cases of ***"Mohan Ambadas Meshram V/s State of Maharashtra" 2018 SCC OnLine Bom 1436*** and ***"Ravi Anandrao Gulpude V/s State of Maharashtra" 2016 SCC OnLine Bom 16146***.

11. Learned Additional Public Prosecutor, on the other hand, supported the impugned judgment. He submits that the Trial Court was justified in recording the finding that the victim was child at the time of the incidents. By relying on the deposition of the victim, he submits that the victim has categorically deposed that her menstrual cycle started two years back that itself, according to him, is sufficient to hold that the victim was child at

the time of the incidents. He further submits that the medical officer has proved that the victim was child or minor at the time of the incidents. According to him, school leaving certificate of the victim is proved on record at Exhibit-46. Entry in her school record matches with the entry in the school leaving certificate. He further submits that medical officer is M.D. in forensic sciences. Therefore, though he is not radiologist, he can give opinion about ossification test conducted by him. He submits that at the time of the incidents, the appellant was married and in spite of that he kept physical relations with the victim, who was minor at that point of time. According to him, age of the victim is proved by documentary and medical evidence. He submits that Exhibit-66 is rightly ignored by the Trial Court.

12. Learned advocate for respondent No.2 submits that in the birth certificate Exhibit-66, age of the victim is shown as 19 years on 3rd March, 2015. Thus, even if we go one year behind, still it is rightly held by the Trial Court that the victim was minor at the time of the incidents. He supports the impugned judgment and order of conviction.

13. To prove the age of the victim, prosecution has examined PW-3 – Medical Officer, who had conducted Ossification test and has issued certificate Exhibit-44, to prove the age of the victim.

In Exhibit-44, no specific opinion of approximate age of the victim is given by PW-3. For the first time, in his deposition he has stated that in their opinion, age of the victim is between 15 and 16 years, including margin of errors.

In cross-examination, he has denied that error of margin for medical determination of age is 2 years on either side. He has stated that up to 20 years, it is one year.

14. When the approximate age of the victim is not stated in the ossification test report, it is not clear as on what basis PW- 3 has given opinion that age of the victim was between 15 and 16 years. The medical evidence, therefore, cannot be relied on, to ascertain age of the victim at the time of the incidents. Medical evidence, therefore, is of no help to the prosecution to prove that the victim was child or minor at the time of the incidents.

15. Then, there is evidence of school admission register Exhibit-46, wherein birth date of the victim is recorded as 1st May, 1999. Said certificate is proved, through PW-4 – in charge Head Master of Zilla Parishad Primary School, Pitambarwadi (Bhimpur) Taluka – Kinwat.

In cross-examination, he has admitted that while giving admission to students, they obtain birth certificate issued by

Gram Panchayat or Health Department. He could not find birth certificate of the victim in the school record. He has further admitted that in absence of birth certificate, they record date of birth on the say of parents of students.

16. Victim's mother is examined as PW-1. Though she has not stated anything about birth date of the victim in her deposition, yet she has admitted that after birth of child in their community, they do not prepare horoscope nor do they get entry about birth of child recorded in Gram Panchayat record. She has further admitted that at the time of admitting the victim in the school, her husband has given her approximate age. She further admitted that when the victim was admitted in the school in first standard, her age might have been 10 years. She has further admitted that on the date of giving evidence, the victim's age may be about 20 years.

17. Birth certificate of the child, delivered by the victim is placed on record at Exhibit-66. The same is dated 3rd March, 2015, wherein victim herself has given her age as 19 years.

18. Considering the above evidence, there appears substance in the contention of the appellant that the prosecution has failed to prove that at the time of the incidents, the victim was child or

minor. Admittedly, the incidents have taken place in the months of July and August, 2014. Even if we go one year behind from 3rd March, 2015, still it is clear that the victim had completed 18 years of age in the month of March, 2014 and admittedly the incidents have taken place in the months of July and August, 2014. In this view of the matter, benefit of doubt is required to be given to the appellant and it is required to be held that the prosecution has failed to prove that the victim was child within the meaning of section 2 (1) (d) of the POCSO Act, at the time of the incidents.

19. Decisions in the cases of "**Mohan Ambadas Meshram**" and "**Ravi Anandrao Gulpude**" (supra) relied on by the learned advocate for the appellant, support the case of the appellant.

20. The Trial Court has erroneously relied on the decisions in "**Rajinder Chandra V/s State of Chhattisgarh and Another**" (2002) 2 SCC 287 and "**Mukarrab and Others V/s State of Uttar Pradesh**" (2017) 2 SCC 210. Both these judgments, relate to Juvenile Justice Act and are on the point of benefit of provisions of Act to the accused or child in conflict with law and it is held that their age can be determined by preponderance of probabilities. Reliance placed by the Trial Court in these two decisions, is misplaced and misconceived.

21. Fact remains that approximate age of the victim is not mentioned in the ossification test report and the said test is not conducted by radiologists and / or by medical board, as contemplated under Rule 12 of the Juvenile Justice Act. The Trial Court has erred in placing reliance on the age of the victim, mentioned by PW-3, by way of opinion of ossification test.

22. Admissions given by PW-1 that had the accused transferred 5 acres of land in the name of the victim and / or her child, then they would not have lodged the FIR in question, also needs to be considered in favour of defence.

23. For the aforesaid reasons, since the prosecution has failed to prove that the victim was child within the meaning of section 2 (1) (d) of the POCSO Act, at the time of the incidents, benefit of doubt needs to be given to the appellant and the impugned judgment and order of conviction passed by the Trial Court, is liable to be quashed and set aside being unsustainable.

24. In the result, the appeal is allowed. Impugned judgment and order of conviction dated 14th November, 2017 passed by Additional Sessions Judge-5, Nanded in Special Case (POCSO) No.3 of 2015 is hereby quashed and set aside. The appellant – accused be released forthwith, if not required in any other case.

The appellant to execute personal bond of Rs.25,000/- in terms of section 437-A of the Criminal Procedure Code.

25. The efforts taken by the Amicus curiae in arguing the matter are highly appreciated.

26. Fees, payable to learned advocate Mr. D. G. Nagode, appointed for respondent No.2 is quantified at Rs.5000/- to be paid by Legal Aid Services, Sub Committee, High Court, Aurangabad, within four weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE