

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

CRIMINAL APPEAL NO.673 OF 2022

Balasaheb @ Khandu Dhananjay Walse
Age 25 years, Occu. Pan Stall,
R/o Walse Vasti, Kaij, Tq. Kaij,
District Beed.

... APPELLANT

VERSUS

1. The State of Maharashtra
(Copy to be served on the Public
Prosecutor, High Court of Bombay,
Bench at Aurangabad)

2. X (Name Withheld)

... RESPONDENTS

.....
Mr. S.J. Salunke, Advocate with
Mr. R.D. Khadap, Advocate for appellant
Ms. R.P. Gaur, A.P.P. for respondent No.1 – State
Mr. Z.H. Farooqui, Advocate for respondent No.2 (appointed)
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CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 11th April, 2023

Date of pronouncing judgment : 26th April, 2023

J U D G M E N T :

The challenge in this appeal is to the judgment and order of conviction and consequential sentence dated 12/8/2022, passed by Additional Sessions Judge, Ambajogai in Spl. POCSO Case No.24/2017. By the impugned judgment and

order, the appellant herein, a 20 year old boy then, has been convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act and therefore sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1 Lakh with default stipulation.

2. The facts in brief giving rise to the present appeal are as follows :-

It is a case of the prosecution that, P.W.3 (victim) was little over 16 years of age in June 2017. On 25th April 2017, she was passing by the bus stand. The appellant and his friend (acquitted accused) came in a Scorpio vehicle. They forcibly took her in the car. She was taken to some other village, Talegaon Dabhade. The appellant took a room on rent. He made the victim stay with him in the said room. Whenever he used to go out of the room, he would bolt the entrance door of the room from outside, confining the victim in. During their such stay, the appellant had sexual intercourse with the victim many a time.

On the very next day i.e. on 26th April 2017, the

mother of the prosecutrix (P.W.1) lodged F.I.R. (Exh.47) at Kaij Police Station, alleging appellant to have kidnapped the victim. The crime vide C.R. No.197/2017 for offence punishable under Section 363 of the Indian Penal Code was, therefore, registered at Kaij Police Station.

3. When the appellant forgot to latch the door from outside when he went out of the room, the victim contacted her mother (P.W.1) on cell phone. It was 5th of June 2017. She told her mother about her whereabouts. Parents and other relations of the victim, therefore, rushed to Talegaon Dabhade. Having realised the parents of the victim to have been coming to Talegaon Dabhade, the appellant fled. The parents first took the victim to the house of her maternal aunt in Mumbai. After 10 – 15 days stay thereat, they came back to Kaij. Statement of the victim was recorded. She was medically screened. The appellant was arrested. He too was medically examined. Seized articles namely the clothes of both, the appellant and the victim were sent to Forensic Science Laboratory for analysis and report. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant and his friend were proceeded against by filing the charge sheet.

4. The learned Judge (Trial Court) framed the charge (Exh.35). The defence of the appellant was of false implication. The prosecution, in support of its case, examined 7 witnesses and produced in evidence certain documents. On appreciation of the evidence in the case, the trial Court acquitted the friend of the appellant in toto. The appellant was acquitted of the charge punishable under Sections 363 and 344 of the Indian Penal Code. He was however, convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act and sentenced as stated above. The State has not preferred appeal against his acquittal.

5. The learned counsel for the appellant would submit that, it may be a case of consensual relationship. The prosecution miserably failed to prove the victim to have been a child when the alleged offence did take place. According to him, neither the birth certificate nor entry of the victim's date of birth recorded in the birth register maintained by the local authority was tendered in evidence. The school record indicating the date of birth of the victim although relevant, cannot be relied upon to definitely fix age of the victim. He

would further submit that, the medical screening report of the victim indicates she was not subjected to sexual assault. According to learned counsel, the appellant, at the relevant time, was just 20 years of age. He has been behind bars post conviction dated 12/8/2022. He was also in jail for some time during enquiry, investigation and trial as well. He, therefore, urged for allowing the appeal.

6. The learned A.P.P. and the learned counsel for the victim would, on the other hand, submit that, there is consistency in the evidence as to date of birth of the victim in the evidence of the prosecutrix, her mother, school record and even the age stated to the Medical Officer while the victim was medically screened. According to learned counsel, what the medical examination report suggests that there was no sexual assault. It does not say that there was no sexual intercourse. Both, the appellant and the victim were together for little over a month's period. It would, therefore, be illogical to imagine the appellant to have had no sexual intercourse with the victim. According to them, victim has no reason to depose against the appellant. Nothing has been brought on record to indicate the family of the victim to have any reason to falsely implicate him. The learned A.P.P. relied on the judgment of the Apex Court in

case of **Ranjeet Hazarika Vs. State of Assam (1998) 8 SCC 735** and submitted, the testimony of the victim cannot be termed to be that of an accomplice. The evidence of the victim in the case is such that it requires no corroboration. The learned A.P.P. ultimately urged for dismissal of the appeal.

7. Considered the submissions advanced. Perused the evidence on record. Let us appreciate the evidence.

Based on the F.I.R. (Exh.47) lodged by P.W.1 (mother of the victim), crime came to be registered. It is in her evidence that on 25/4/2017, at 9.00 in the morning the victim left the house for attending Mehendi Class. When P.W.1 returned home, she realised the victim to have not returned. She, therefore, informed the same to her husband. A search was made for the victim. Ultimately the F.I.R. was lodged on the following day, suspecting the appellant to have kidnapped the victim. It is further in her evidence that, a month thereafter the victim called her on cell phone and told to have been at village Talegaon Dabhade. She along with her relations, therefore, went there. The appellant had already fled. She took the victim to her sister's house in Mumbai and after 10 days' stay thereat, returned to village Kaij. It is further in her

evidence that, once before 25/4/2017, the appellant had dropped a love letter in a vessel while the victim was returning from a flour mill. She had, therefore, scolded the appellant and even slapped him. Since then the appellant had discontinued to be after the victim.

8. During cross-examination of P.W.1, it has come in the evidence that, she was married in May 1997. Her son Pruthviraj was born in August 2003. There is a gap of one year between birth of two children. The questions suggesting the defence of the appellant were denied.

9. P.W.2 Ankush is a witness to the scene of offence panchanama (Exh.51). His evidence does not further the prosecution case, as nothing incriminating is forthcoming from the scene of offence panchanama.

10. P.W.3 – victim testified that she was born on 16/9/2001. She was in 9th Standard in the year 2016. Once she was returning from a flour mill. The appellant put a chit in her vessel containing flour. She showed the said chit to her mother (P.W.1). The mother, therefore, scolded the appellant.

It is further in her evidence that, her S.S.C. examinations were over in March 2017. She joined Mehendi Class. It was 25/4/2017. She was proceeding for the class. The appellant and his friend Dipak made her sit in a vehicle and took her to Talegaon Dabhade. A room was taken on rent at Talegaon Dabhade. She was kept in the room. Whenever he used to go out, he would ensure that the door of the room is bolted from outside. The appellant had physical relations with her. It is further in her evidence that, once the appellant forgot to latch the door from outside when he went out. She immediately contacted her mother on a cell phone. It was from the cell phone of a stranger. She related her mother to have been brought to Talegaon Dabhade. She requested her to come and get her back. It was 5/6/2017. it is further in her evidence, her parents and other relations came to Talegaon Dabhade. After having realised that they were coming, the appellant fled. She was first taken to her maternal aunt's residence in Mumbai. She came to Kaij after 10-15 days. Police recorded her statement. She was medically screened. She related the medical officer what had happened with her. Her statement was again recorded by judicial officer.

11. During her cross-examination, it has come on record

that, until a room was taken on rent, the appellant and herself resided together at one house. She, however, could not name the person whom the said house belonged. The victim meant to say that, they were residing along with the family of that person. She used to talk with the wife of the person in whose premises they had stayed for about 2-3 days. The room taken on rent was self-contained. Outside the room, there was water tap. She, however, denied that, a W.C. facility was outside the room. It is further in her evidence that, while she was brought back to Kaij, it was her parents, uncle and aunt who told the police all the information. The learned counsel for the appellant brought attention of this Court to two specific questions, in answer to which she kept mum. The learned counsel meant to say that, her silence amounts to consent. Those questions were in the form of suggestion that she gave evidence about the appellant to have kidnapped her and kept in a room at Talegaon Dabhade. The witness was confronted with her police statement. It has come on record that, she did not relate the police that the appellant whenever used to go out of the room, would latch it from outside. As such, a material omission amounting to contradiction has been brought on record.

12. P.W.4 Madhukar is a panch witness to another scene

of offence panchanama. P.W.5 Pandurang was a Head Master of Jai Bhavani Kanya Prashala, Kaij. He tendered in evidence original school register (Exh.70). Entry at Sr.No.2753 pertains to the admission of the victim to the school. As per the said school record, the date of birth is 15/6/2011.

13. The cross-examination of this witness indicates that date of birth of the victim was recorded in the school record on the basis of the victim's earlier school record. According to him, the victim was admitted to his school for 5th Standard. It is further in his evidence that, for recording of date of birth in the school record, the school insists for a birth certificate issued by Gramsevak or Village Panchayat.

14. P.W.5 is a Medical Officer, who examined the victim on 16/7/2017. It is in her evidence that, the victim gave history of sexual intercourse many a time at Talegaon Dabhade. The medical examination report (Exh.82) and the related C.A. reports (Exh.84) indicate the documents to have not been favourable to the prosecution. In the opinion of the Medical Officer, the victim was not subjected to sexual assault.

15. P.W.6 Suresh and P.W.8 Raosaheb are the police

officials who did investigation of the crime.

16. The question is, whether the aforesaid evidence brings home the charge against the appellant beyond reasonable doubt. Admittedly, the appellant was prosecuted for kidnapping of the victim, an offence punishable under Section 363 of the Indian Penal Code. He has been acquitted of the said charge. The State has not preferred appeal against acquittal. As such, the fact that the prosecution failed to prove the appellant to have kidnapped the victim, attained finality. Close scrutiny of the evidence and reading between the lines indicate that both, the appellant and the victim were emotionally involved. The victim left her residence under pretext of attending Mehendi Class. She appears to have joined the appellant and then both of them eloped. They went to Talegaon Dabhade. Took a room on rent. Stayed there for little over one month. The victim was specific to state that it were her relations to give all the information relating to her to the police. It is true that, it is in her evidence that the appellant had sexual intercourse with her during stay at Talegaon Dabhade. The victim's medical examination report rules out sexual assault. True, the victim was medically screened about 15 days after she was separated from the appellant. The

question would, therefore, be, whether the sole testimony of the victim inspires confidence to attribute the conviction. Admittedly, the appellant at the relevant time was 20 years of age. He has been behind bars post conviction dated 12/8/2022. He was also in jail for some time during enquiry, investigation and trial as well.

17. The victim, after having eloped with the appellant, stayed with him for little over one month and then turns around to contend the appellant to have kidnapped her and confined in the room. She is not a witness of truth. Her evidence, therefore, does not inspire confidence. Moreover, the victim's medical screening report rules out sexual assault.

18. The question is, even if it is assumed that the appellant had sexual intercourse with the victim, whether she was a child at the relevant time and, therefore, her consent to be non-est in the eye of law. The victim's evidence about her date of birth to be in September 2001 is hit by hear-say. Her mother – P.W.1 did not give the victim's date of birth in examination-in-chief. It is only in her evidence that the victim at the relevant time was 16 years of age. Admittedly, the victim's mother got married in May 1997. According to her, her

son was born on 20/8/2003. Gap between birth of her two children was of one year. There is, however, no specific evidence to indicate the victim to have only one sibling. On the contrary, the victim's evidence indicate she was elder to her brother. The victim's mother was not specific to state that her first child was born in sixth year of her marriage. Age of the victim to be 16 years appearing in her medical examination report cannot be relied on for want of cogent and reliable supporting evidence. The victim's statement recorded under Section 164 of the Cr.P.C. is also silent to state her date of birth therein.

19. Then what remains in proof of the age of the victim, is her school record. P.W.5 Pandurang, Head Master of Jai Bhavani Kanya Prashala, Kaij, produced in evidence school admission register. The entry therein regarding the victim's school admission suggests she was born on 16/9/2001. P.W.5 Pandurang has categorically deposed that the date of birth recorded therein was on the basis of the victim's earlier school record. His evidence suggests that the victim took education up to 4th Standard in some other school whereas the mother of the victim testified the victim to have not changed school any time. Even if the school record in proof of age of the victim is

relevant and admissible, the same could not be held to be correct. The Apex Court, in case of **Birad Mal Singh Vs. Anand Purohit [AIR 1988 SC 1976]**, has observed :

“An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded.”

In the present case, previous school record on the basis of which her date of birth came to be recorded in the record of the school – Jai Bhavani Kanya Prashala, Kaij has admittedly not been produced. Moreover, the person who gave the date of birth for being recorded in the school record of the victim has admittedly not been examined. The Apex Court, in case of **Alamelu & anr. Vs. State [AIR 2011 SC 715]**, held :

“Rape – Age of prosecutrix – Transfer certificate issued by Govt. school duly signed by Headmaster– Certificate would be admissible in evidence u/s.35 of Evidence Act – However, admissibility of such document would be of not much evidentiary value to prove age of girl in absence of materials on basis of which age was recorded – Date of birth mentioned in transfer

certificate would have no evidentiary value unless person, who made entry or who gave date of birth is examined – Non examination of Headmaster of school who made entry – Entry in transfer certificate cannot be relied upon to definitely fix age of girl.”

20. Thus, there is no cogent, convincing and reliable evidence in proof of the age of the victim at the relevant time. It has, therefore, to be observed that the prosecution has failed to prove the victim to have been a child when she was subjected to alleged sexual intercourse.

21. The learned A.P.P., relying on Section 29 of the POCSO Act, submitted that, on prosecution of the appellant for offence punishable under either Section 3, 5, 7 or 9 of the POCSO Act, it was obligatory on the part of this Court to presume the appellant to have committed the offence. Needless to mention, though it is a statutory presumption, the same is rebuttable one. For rebutting the same, the appellant was not required to lead any defence evidence. He can make out his case on preponderance of probabilities. He may also rely on the weakness of the prosecution case. Needless to mention that, by virtue of principle of reverse burden, the burden of the prosecution to prove the offence beyond

reasonable doubt does not get relaxed.

22. The facts in case of Ranjeet Hazarika (supra) were altogether different. The evidence of P.W.2 and P.W.3, parents of the victim in the said case, had gone unchallenged. The prosecutrix therein had related her parents about the incident of rape on her. Needless to mention, each case has to be decided on its facts and circumstances.

23. Let us have a glance at the relevant provisions relied on by the learned A.P.P. Sections 29 and 30 of the Protection of Children from Sexual Offences Act read thus :

“29. Presumption as to certain offences:-

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state :-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged

as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation:- In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

24. The aforesaid provisions are pari materia with provisions of Sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act. For better appreciation, those provisions are reproduced below :-

“35. Presumption of culpable mental state :

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation :- In this section “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of

probability.

54. Presumption from possession of illicit articles:-

In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of –

- (a)
- (b)
- (c)
- (d)

for the possession of which he fails to account satisfactorily.”

The aforesaid provisions of the N.D.P.S. Act were subject of interpretation by Hon’ble Supreme Court in case of **Noor Aga Vs. State of Punjab & anr. [(2008) 16 SCC 417]**, wherein it has been observed that :-

“56. The provisions of the Act and the punishment prescribed therein being indisputedly stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. “proof beyond all reasonable doubt” would be more onerous. A heightened scrutiny test would be necessarily to be invoked. It is so because whereas, on the one hand, the Court must strive towards

giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of “wider civilisation”. The Court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab Vs. Baldev Singh* (1999) 6 SCC 172 : 1999 SCC (Cri) 1080, it was stated : (SCC p. 199, para 28)

“28. ... It must be borne in mind that severer the punishment, greater has to be care taken to see that all the safeguards provided in a statute are scrupulously followed.”

See also *Ritesh Chakarvarti Vs. State of M.P.* (2006) 12 SCC 321 : (2007) 1 SCC (Cri) 744

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any Court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would

the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.”

25. In short, the sole testimony of the victim found to be not inspiring confidence. The prosecution failed to prove the victim to have been a child at the relevant time. With such quality of evidence, this Court is not in agreement with the findings recorded by the trial Court. The appeal, therefore, succeeds. Hence the order :

ORDER

(i) The Criminal Appeal is allowed.

(ii) The impugned order of conviction and consequential sentence dated 12/8/2022, passed by learned Additional Sessions Judge, Ambajogai in Spl. POCSO Case No.24/2017 is hereby set aside. The appellant is acquitted of the offence punishable under Section 376(2)(i) and Section 6 of the Protection of Children from Sexual Offences Act. The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

(iii) Fees of Mr. Z.H. Farooqui, Advocate appointed for respondent No.2 is quantified at Rs.8000/- (Rupees eight thousand).

(R.G. AVACHAT, J.)

fmp/-