

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.215 OF 2018

The State of Maharashtra
Through, Police Station Officer,
Police Station Deogaon Rangari,
Tq. Kannad, District Aurangabad

.. Applicant

Versus

Anil Ramnath Gautam
Age: 22 years, Occu.: Nil,
R/o. Ummaprit/Ummarpur Pritam
Tq. Shafipur, Dist. : Unnav

.. Respondent

...

Mrs. V. S. Choudhari, APP for the applicant – State.

...

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

DATE : 14th September, 2023.

ORDER :-

. Present application has been filed under Section 378(1)(b) of the Code of Criminal Procedure seeking leave to file an appeal challenging the judgment and order dated 02.04.2018 passed by the learned Additional Sessions Judge-8, Aurangabad in Special (POCSO) No.118 of 2016; thereby acquitting the respondent from the offence punishable under Sections 363, 366-A, 376, 417 of Indian Penal Code and under Section 4, 6, 11 punishable under Section 12 of the Protection of Children from Sexual

Offences Act, 2012 (for short “POCSO Act”).

2. Heard learned APP Mrs. V. S. Choudhari for the applicant – State. With the able assistance of learned APP, we have gone through the record, which was before the learned Trial Judge.

3. It has been vehemently submitted on behalf of the prosecution that the learned Trial Judge has not appreciated the evidence properly. The informant has categorically stated that she was 16 years old when the incident took place. She has also stated that the accused, who was knowing to her, forced her to accompany him on 07.04.2016 and took her to Madhya Pradesh, which was the native place of the accused and at that place, he had committed forcible sexual intercourse on her. She was confined in a room at that place. The medical evidence supports the testimony of the victim, however, by taking a hyper technical approach and rather going on the conduct of the victim, who was a minor, benefit has been given to the accused. Reliance on the decision in **S. Varadarajan Vs. State of Madras, (1965 AIR 942 : 1965 SCR (1) 243)** has been wrongly placed when the girl was rather kidnapped and by giving promise to marry, there was forcible sexual intercourse. The accused ought to have been convicted. The matter therefore deserves re-appreciation of evidence.

4. The prosecution story is that the accused was doing the work of

fixing safety tanks in the village of the victim. He had come to reside near the house of the victim thereby they got acquainted and were talking with each other. It is alleged that at that time the victim was 14 years of age. The accused had given her promise to marry and then he kidnapped her under the said pretext and took her to the native place and thereby committed rape on her. The father of the victim had lodged missing report and then the location of the accused was traced out with the help of his mobile and it was found that he had gone to his Umarpur Pritam situated in District Unnav at Uttar Pradesh. Maharashtra Police went to Uttar Pradesh and with the help of local police, they found out the house of accused. Accused and victim found there and were brought to Maharashtra and the FIR came to be lodged.

5. After the completion of investigation, charge-sheet was filed. Prosecution examined in all eleven witnesses to bring home the guilt of the accused. Two of them are the medical officers, one who examined the victim and another is the medical officer who has examined the accused. Here, the crucial point is as to whether the prosecution was able to prove the age of the victim on the relevant day. Though the victim and her father PW.1 gave the age of the victim as 14 years, it has to be independently proved. PW.8 Raghunath was the head master of the school where victim was studying. As per the school record, the date of birth of victim is

07.05.2001, but in the cross-examination, he has clearly stated that when the victim was admitted in the school, her birth certificate was not obtained from her parents. There was no documentary evidence produced before the school authority, at the time of admission of the victim, to support her birth date. The victim in her examination-in-chief has said the same date, however, there is no explanation by her father PW.1 as to why he had not produced documentary proof regarding the date of birth of the victim when she was admitted to school. The prosecution has not brought on record her birth certificate.

6. Reliance can be placed on the decision in **P. Yuvaprakash Vs. State represented by Inspector of Police, [Criminal Appeal No.1898 of 2023]** decided by the Hon'ble Supreme Court on 18.07.2023, wherein it has been observed that :-

“It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned

examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”

7. Now, though the certificate from the school record is coming forward, yet there was no documentary support to the said record collected by the school. Therefore, it cannot be said that the age of the girl was below 18 years. The learned Trial Judge has rightly held that the prosecution has failed to prove that the victim was child as per the definition of POCSO Act and, therefore, presumption under Section 29 of the Act cannot be given in favour of prosecution.

8. Even if it is accepted that the prosecution was able to prove the age of the victim, then also we are required to consider the facts of the case. Here, the prosecution story as per the testimony of PW.2 Victim is that she had gone to school on that day. Prior to 07.04.2016, accused had told her that they would go to attend the marriage ceremony of his brother and they would perform marriage. She had negatived the said proposal, but when she came out of the bag's shop on 07.04.2016, she felt like fainting or

giddiness and she suddenly found that she was in a bus. She was unable to know where she was going, but she could find the accused near her. She then says that from Aurangabad, they went to Bhusaval and then to Madhya Pradesh. Thereafter, she was able to understand, but still unable to know which was the place where the accused had brought her. The accused had kept her in his house and there used to be lock to the said house. The accused used to come to the said house and used to rape her. His mother, brother and sisters used to be around and they also used to come in her room. She used to feel that she should contact her parents, but she was not having the phone. She was confined there for 2-3 days and thereafter after 2-3 days, her father, maternal uncle and police arrived at the said place. She then says that at that time accused and his family members were not allowing to open the door, but it was forcibly opened by the police. From the said testimony, it can be seen that the girl appears to have left her house voluntarily and she is suppressing the real facts. Merely because she can be said to be a minor, we cannot give the leniency. The accused is from Uttar Pradesh, which is a long journey. When she allegedly came out of a bag's shop on 07.04.2016, she doesn't say that accused was there around her and he had given something to consume or had put anything on her mouth so that she could faint or hypnotize. Unless something would have been done that feeling cannot come and when she could find that she has come to Aurangabad, why she had not raise shouts

and same at Bhusawal also. By which means she was taken to Bhusawal has not been told by her in her examination-in-chief. Her cross-examination shatters her examination-in-chief. When prior to 07.04.2016 accused had allegedly given her promise to marry and asked her to accompany him, why she had not told the said fact to her parents, is a question. Even on the day of incident i.e. 07.04.2016, she says that she was wearing school uniform. Her friends were with her. Then why the friends had not informed anything to the father and why they had not resisted taking away of the girl by the accused. In her statement under Section 161 of the Code of Criminal Procedure, she has disclosed that accused joined her at Aurangabad, that means he was not accompanying her from her village to Aurangabad. She has tried to pretend that how she reached, that means the medium of transport from Aurangabad to Bhusawal. She is not ruling out the possibility that people were there around her at Aurangabad in the bus as well as at Bhusawal. Then she says that from Bhusawal to Madhya Pradesh they went by train. She is claiming ignorance that many people were present in the train. The girl was then studying in 9th standard and, therefore, we can presume that at least she could understand the names of the village. In her cross-examination, as regards the birth date is concerned, it is said that when she was medically examined, her birth date was given as 29.01.2002. She has stated that while taking admission intentionally her birth date was increased. In her words, she has admitted that her birth

date given in school is false. Therefore, taking into consideration all those admissions, the learned Trial Judge has rightly inferred that the girl appears to have taken active part. She was major. What was done by her was voluntary and, therefore, there is no question of any offence committed by the accused. Now, it appears that under the pressure from her family members, she was supporting the family members. The impugned judgment is not perverse and, therefore, no case is made out for re-appreciating the evidence. The application stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm