

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

CRIMINAL APPEAL NO.1290 OF 2019

Laxman s/o Baburao Limbhore
Age 36 years, Occu. Agriculture,
R/o Pimpala, Tq. & Dist. Beed.

... APPELLANT

VERSUS

1. The State of Maharashtra
through Ambhora Police Station,
Tq. Ashti, District Beed.
(Copy to be served on the Public
Prosecutor, High Court of Bombay,
Bench at Aurangabad)

2. X Y Z

... RESPONDENTS

.....
Mr. S.S. Bora, Advocate for appellant
Mr. K.N. Lokhande, A.P.P. for respondent No.1.
Ms. Jayashree Nawale, Advocate for respondent No.2 (appointed)

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CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 17th March, 2023

Date of pronouncing judgment : 21st April, 2023

JUDGMENT :

This is an appeal from conviction. The appellant has been convicted for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act for short) and under Section 363 of the Indian Penal Code and,

therefore, directed to suffer rigorous imprisonment for ten years and three years respectively with fine of Rs.1000/- on both counts with default stipulation. Both the sentences have been directed to run concurrently. The appellant has been acquitted of the offence punishable under Sections 366 and 376(1) of the Indian Penal Code and under Section 4 of the POCSO Act. The judgment and order of conviction and consequential sentence has been passed by the Court of Special Judge, Beed in Special (POCSO) Case No.29/2018.

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

The victim "X" (P.W.1) is a daughter of P.W.2 Rajendra. The victim was stated to be little over 17 years of age at the relevant time. It so happened that the victim went missing (left the home) on the night of 12/4/2018. Her father P.W.2 Rajendra therefore initially lodged a missing person's report (Exh.24) at Ambhora Police Station on 12/4/2018. After 2 days, he realised that the appellant, a resident of the very village, was also missing from his residence. P.W.2 Rajendra, therefore, lodged First Information Report (F.I.R.) (Exh.25), alleging the appellant to have kidnapped the victim with a false

promise of marriage. Based on the said F.I.R., Crime vide C.R. No.91/2018 came to be registered.

3. It is the case of the prosecution that, the appellant, after having realised a crime to have been registered, dropped the victim at her maternal grand-parent's house at village Ambilwadi. Since the crime had already been registered, police reached there and took the victim to the police station. Her statement was recorded there. Her statement under Section 164 of the Code of Criminal Procedure was also recorded. The victim was medically screened. The appellant came to be arrested. He too was medically examined. It was found that, the appellant and the victim had stayed together at the house of one Kakade in Pune. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant was proceeded against by filing the charge sheet.

4. The trial Court framed the charge (Exh.14). The appellant pleaded not guilty. To bring home the charge, the prosecution examined 5 witnesses and produced in evidence certain documents. The appellant examined one witness in his defence. On appreciation of the evidence in the case, the trial

Court convicted and sentenced the appellant as stated above.

5. The learned counsel for the appellant first took this Court through the entire evidence on record to submit that the victim herself had urged the appellant to take her with him, lest she would commit suicide. The victim, therefore, joined him. They stayed at the house of Smt. Kakade in Pune. Smt. Kakade was at her residence all the time throughout their stay thereat. There is no evidence to suggest the victim to have been a child, being below 18 years of age at the relevant time. The evidence produced in that regard has been tampered with. According to learned counsel, the victim changed version many a time and thus, is an unreliable witness. He, therefore, urged for allowing the appeal.

6. The learned A.P.P. and the learned counsel appointed to represent the victim would, on the other hand, submit that, entry in the birth register indicates the victim to have been a child at the time the offence took place. Medical evidence supports the prosecution case. The appellant took advantage of his closeness with the father of the victim and even his foster relationship. The appellant is married and a father of two children. According to learned counsel, the trial

Court has rightly convicted the appellant and no interference with the impugned order is, therefore, warranted.

7. Considered the submissions advanced. Perused the evidence relied on. The appellant was in jail since the date of judgment of conviction i.e. from 29/11/2019 to the date of his release on bail on 17/3/2023. He was also behind the bars for some months pending the enquiry, investigation and trial of the case. Be that as it may.

8. The victim gave her evidence on oath. According to her, she was born on 5/3/2001. her father was in milk business. The appellant was foster nephew of her father (son of foster sister). It is further in his evidence that, the appellant used to visit her residence. Once she fell sick. She had a stomach problem. She was, therefore, admitted to a hospital at Ahmednagar. The appellant had visited the hospital. Her father had asked the appellant to take the victim to the hospital at Loni. The appellant had, therefore, taken her to the hospital at Loni. After taking treatment, both of them started to return to the village on a motorbike. On way to the village, the appellant took the victim to a hilly area. He gave threats to her life. He committed sexual intercourse with her without her consent and

against her wish.

9. It is further in her evidence that, on 10/4/2018, her parents were away in the field for watering the crop. She was fast asleep at her residence. The appellant came to her residence. He woke her up. He asked her to accompany him. He threatened her if she did not join him. He told her that he will not allow her to marry anyone. He promised to marry her. The appellant then took her to Pune. He took her to a house of one Kakadebai in Pune. The appellant committed sexual intercourse with her there. When Kakadebai realised the victim's father to have lodged F.I.R., she made both of them leave her residence. The appellant, therefore, brought the victim to her grand-parent's house and then he went away. It is further in her evidence that, police officers of Ambhora Police Station took her to the police station. Constable Zade and Ramsingh compelled her to give statements favourable to the appellant.

10. The victim was subjected to a searching cross-examination. Her attention was drawn to her police statement and the statement under Section 164 of the Code of Criminal Procedure. Whatever she has deposed to in her examination-

in-chief has all been missing in her police statement and even in the statement recorded by Judicial Magistrate. As such, omissions amounting to material contradictions have been brought on record. Those would be adverted to later on. It is further in her evidence that, she was medically examined. She gave a history as per the say of Constable Zade and Ramsingh. After her medical examination, her custody was given to her parents.

11. Then there is evidence of the informant P.W.2 (father of the victim). It is in his evidence that, first he lodged a missing person's report (Exh.24) when he found his daughter to have left the residence on intervening night of 9th and 10th April 2018. It is further in his evidence that, he realised that the appellant too was missing from the village. He, therefore, lodged the F.I.R. (Exh.25), stating therein the appellant to have kidnapped his daughter with a false promise of marriage.

12. P.W.3 Bansi is a witness to the panchanama of seizure of clothes of the victim. P.W.4 Dr. Satish had medically screened the victim. It is in his evidence that the victim herself narrated the history of sexual intercourse with her own consent with a person named Laxman Limbhore on three different

occasions about 8 days back. It is further in his evidence that, he did not notice any external injuries on her person. Hymen was torn. No fresh injury. Old tears. He gave opinion suggestive of vaginal penetration. Final opinion was reserved pending C.F.S.L. reports. It is further in his evidence that, the victim was subjected to radiological examination for ascertaining of her age. She was opined to be in the age group of 16–18 years. After having referred the C.A. reports (Exhs.47, 48 and 49), in his opinion, the victim was subjected to sexual intercourse.

13. P.W.5 Vithal was a police constable who carried the clothes and other articles to C.F.S.L., Aurangabad. P.W.6 Yashwant did the investigation of the crime. While P.W.7 Swamini was a Gramsevak of village Ambilwadi. She produced in evidence a birth certificate, stated to be of the victim. As per the birth certificate (Exh.74), the date of birth of the victim is said to be 5/3/2001. Necessarily she was below 18 years of age at the relevant time.

14. Let us now appreciate the evidence on record. The date of birth given by the victim herself is inadmissible in evidence, being hear-say. Whatever she has deposed in her

examination-in-chief against the appellant herein do not find place in her police statement and statement recorded under Section 164 of the Cr.P.C. She made a complete turn around while giving her evidence in the Court. She was duly confronted with her previous statement. In her statement to the police dated 16/4/2018, she stated, she had sexual intercourse with the appellant on 3–4 occasions. It so happened some days before her statement dated 16/4/2018. The victim is not specific about the date, time and place whereat such incidence took place. It is further in her police statement that, her uncle had once seen her in the company of the appellant. That day also there was sexual intercourse between her and the appellant. She denied that her uncle might relate the same to her father. **She, therefore, made a phone call to the appellant and told that both of them would elope and shall stay together.** The appellant told her that she had not completed 18 years of age. It is not easy to stay together outside. She thereupon told him that if he did not take her with him, she would commit suicide. It is further in her police statement that, they therefore decided to elope. On the night of 9th and 10th April, she took Rs.1000/- and gold ornaments of her mother. She also took all her papers (educational) and joined the appellant. Both of them first went

to Shirur. From Shirur they went to Dahanu. They made a search to take a room on rent. They, however, could not get any room. Since both of them were all along travelling, there was no occasion for them to have sexual intercourse. On 15/4/2018, the appellant brought her to her maternal grand-parent's resident at Ambilwadi and left.

15. On the same lines is her statement (Exh.22) recorded by Judicial Magistrate. In the said statement, she has stated that, there was sexual intercourse between them about 8 days before they eloped. The learned counsel for the appellant drew this Court's attention to the charge wherein the appellant has been charged for the incident from the day the victim went missing from the house i.e. from 4th April.

16. It was the case of the victim that, the police officials Zade and Ramsingh compelled her to give such statement. Admittedly, neither the victim nor her parents have made any grievance in that regard to the Superintendent of Police or any other police officer.

17. The appellant has examined a defence witness, D.W.1 Vaijayanta Kakade. Admittedly, both, the appellant and

the victim had stayed at the residence of D.W.1 Vaijayanta. It is in her evidence that, about one and half year before, the appellant along with one girl had been to her house. It is further in her evidence that, she enquired with the girl and learnt from her that her father suspected her character and therefore, she had asked the appellant to take her with him. It is further in the evidence of D.W.1 Vaijayanta that she told the victim that she would approach her father and request him to get her back. The victim was, however, not ready to go back. They stayed in her room overnight. On the next day, they were asked to leave her room. It is further in her evidence that, she herself along with her son were there in the said room. The witness meant to suggest that it being a single room occupied by four of them, on that night there was no sexual relationship between the appellant and the victim.

18. True, the father of the victim stated in his evidence that the victim was below 18 years of age. He also gave the date of birth of the victim. The radiological examination of the victim suggests her to be in the age group of 16 – 18 years. In proof of age of the victim, P.W.7 Swamini was examined. She was Gramsevak of the village at the time she was summoned to give evidence in the Court. Admittedly, there is no evidence to

suggest on whose report date of birth was recorded in the birth register. A certified copy of the entry in the birth register was placed on record vide Exh.74. The name of the victim has been stated therein. While the witness P.W.7 Swamini was cross-examined and confronted with the original register, she admitted that there was overwriting in the column of the name of the child appearing in the original register. According to her, it was she who mentioned the name of the victim in the certified copy. The witness was categorical to admit that name of the victim does not figure in the original birth register. In view of the same, both the documents namely the certified copy of the extract from the birth register and original entry in the birth register lose their efficacy.

19. The C.A. reports (Exhs.47 to 49) do not support the prosecution. The medical officer who examined the victim testified that the victim had told him to have used contraceptive during sexual intercourse. The medical examination report does not indicate signs of recent sexual intercourse although hymen was torn. The doctor had even reserved his final opinion pending receipt of C.A. reports.

20. As such, the evidence on record indicates that, there

is no concrete evidence about the age of the victim. The victim was emotionally involved with the appellant. She on her own left her residence on the night of 10/4/2018. She took with her a sum of Rs.1000/-, gold ornaments of her mother and even papers relating to her education. The same suggests her to have left the house with an intention of no return. Her statement to the police and even to the Judicial Magistrate indicate that she compelled the appellant to take her with him. Her police statement further indicates that there was no occasion for them to have sexual intercourse since they were travelling all along. Although they had stayed at the house of Smt. Kakade, the evidence of defence witness indicates that it was a one room premise shared by both, the appellant and the victim; Smt. Kakade and her son. The same rule out the appellant and the victim to have sexual intercourse at the house of Smt. Kakade. So far as regards the case of the victim that while she was being brought back to her residence from the hospital, the appellant took her to a hilly place and had sexual intercourse with her, is stated to be rejected for want of specific details and corroborative evidence in that regard. Suffice it to say that, the evidence of the victim alone, in the facts and circumstances of the case, does not inspire confidence. This Court is, therefore, of the view that the prosecution failed to

establish the charge beyond reasonable doubt. The trial Court ought not to have convicted the appellant based on such evidence.

21. In the result, the appeal succeeds. Hence the order :

ORDER

(i) The Criminal Appeal is allowed.

(ii) The order of conviction and sentence dated 29/11/2019, imposed upon the appellant by learned Special Judge, Beed in Special (POCSO) Case No.29/2018 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 6 of the Protection of Children from Sexual Offences Act and Section 363 of the Indian Penal Code. Fine amount, if paid, be refunded to him.

(iii) The appellant is on bail. His bail bonds are cancelled.

(R.G. AVACHAT, J.)

fmp/-