



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

CRIMINAL APPEAL NO. 230/2023

Mohd. Siddique @ Bholu Mohd. Ismail
Aged about 36 years, occu: Labour
R/o Timki , Dadrapul, C/o Savita Barhate
Nagpur.

..APPELLANT

v e r s u s

1) State of Maharashtra
Through Police Station Officer
Police Station Tahsil, Nagpur.

2) XYZ in {Crime No.125/2016}
Registered by the Tahsil Police Station
Nagpur.

..RESPONDENTS

.....
Mr. S.D. Chande, Advocate for the appellant
Mr.A.R. Chutke, APP for Respondent no.1-State
Ms. S.P. Dhotre, Advocate (appointed) for Respondent No.2
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CORAM: ANIL L. PANSARE, J.
Date of Reserving : 13.10.2023
Date of Pronouncement: 19.10.2023

JUDGMENT :

Heard Mr.S.D.Chande, the learned counsel for the appellant;
Mr. A.R.Chutke, the learned APP for the respondent no.1-State and Ms.
S.P. Dhotre, the learned counsel (appointed) for the Respondent no.2-
victim, at length, and perused the record.

2. The appellant/original accused no.1 has challenged the judgment and order dated 17.01.2022 passed by the learned Extra Joint Additional Sessions Judge and (Special Judge, POCSO Nagpur) in Special Criminal (Child) Case No.241/2016, thereby convicting the appellant/accused for the offences punishable under Sections 363, 376 of the Indian Penal Code (in short “IPC”) and sentenced him to undergo rigorous imprisonment for three years and ten years respectively and to pay a fine of Rs. 10,000/- and Rs. 25,000/- respectively, in default, to suffer further RI for a period of three months and six months respectively.

3. The appellant has also been convicted for the offence punishable under section 4 of the Protection of Children from Sexual Offences Act (in short “POCSO Act”), however, since the punishment provided u/s 376 of the IPC is greater in degree as compared to Section 4 of the POCSO Act, the Court below has imposed the punishment u/s. 376 of the IPC.

4. In all, a total of five persons were accused of commission of the crime. Accused Nos. 3 to 5 have been shown absconding. Accused no.2 is the wife of the accused no.1-Mohd. Siddique. The accused no.2 was charge-sheeted for the abetment of crime. She has, however, been acquitted of the said crime. The prosecution has not challenged the judgment. The appellant/accused no.1 has challenged his conviction and the same is being tested in the present Appeal.

4. Briefly stated, the facts of the case are these :-

The mother of the victim has, on 21.06.2016, lodged a report of her missing daughter with Tahsil Police Station, Nagpur. The mother stated that her daughter is missing since 12.00 noon. Initially, the report was lodged against an unknown person. Prior to lodging the report, she had taken search of the victim within the nearby vicinity. The informant came to know from the accused no.2 that the victim had gone to the house of her aunt (father's sister). The informant and her elder son went to the house of accused no.2. She did not give any information about the victim, but stated that the victim had been to her house but left in few minutes. The informant then made an enquiry with daughter of accused no.2-Sarika who stated that the victim had gone to the house of her aunt. The informant then called police by dialling No.100. She narrated the incident to the police. A lady constable and the informant then proceeded in search of the victim. The informant and her relatives then took a frantic search. They visited the house of accused no.2 on couple of occasions. She was either not present or did not cooperate. The accused no.3-Mohd.Juber, who is relative of accused no.2 also did not cooperate; the accused no.4-Umesh, being resident of the locality, too did not cooperate.

5. At around 10.00 pm, the informant and 2/3 boys again approached the house of the accused no.2. The boys represented themselves as Crime Branch Officers and enquired with the accused no.2. She gave address of accused no.5-Bhagat, who was working under accused no.1 at his kiosk of coconut water. They all then proceeded towards the kiosk in a four-wheeler and reached the spot at about 11.00 p.m. Accused no.5-Bhagat was found present at the stall, but he did not tell anything about the victim and gave evasive replies/ answers.

While taking search, the son and nephew of the informant jumped across the wall with a torch and searched the victim. After some time, the victim was found with accused no.1. The victim was frightened she was brought back home. The victim informed them that the accused no.1 has committed rape on her.

6. The informant and the victim and others approached the Police Station after 12.00 midnight. The accused persons were arrested in the same night. The victim was forwarded for medical examination which was conducted at 5.00 am. The investigation was carried out and charge-sheet came to be filed. The accused did not plead guilty to the charges framed. The prosecution has examined a total of twelve witnesses to bring home the guilt of the accused. The defence of the accused is of total denial and false implication.

7. Having heard both sides and having gone through the impugned judgment and the material placed before me, the following points arise for my consideration. I have recorded my findings thereon for the reasons to follow :-

Sr.No	Points	Findings
i)	Has the prosecution proved that the accused no.1/appellant kidnapped the victim ?	Not proved
ii)	Has the prosecution proved that the appellant/accused no.1 committed rape on the victim ?	Proved

iii)	Has the prosecution proved that the appellant/accused no.1 has committed penetrative sexual assault upon the victim in terms of provisions of POCSO Act?	Not proved
iv)	Whether interference is called for in the impugned judgment?	Yes
v)	What order ?	As per final order

REASONS

8. As to Point Nos. (i) to (iii): These three points being interlinked, are decided by common reasoning.

9. Before I deal with the rival contentions, it will be appropriate to go through the evidence led before the trial Court.

10. PW1 is the victim. She deposed that she was studying in standard X when the incident in question had occurred. On 21.06.2016 there occurred a quarrel between her (victim) and her mother. She left the house in a huff. After the mother and brother of the victim went out, she went to the house of accused nos. 1 and 2 for the reason that previously the victim and her family were residing in the same area. Accused Nos.1, 2 and 3 were present in the house. Accused no.1 said to victim that he will drop her at his sister's house. Accordingly, accused no.1, his son and victim went to the house of sister of accused no.1. She stayed there till 5.30 pm. Accused no.1 then said to the victim that he will drop her home. Accordingly, both left, but the accused no.1 forcibly took her to a cinema hall. They watched a movie called "*Udta Punjab*" between 6 and 9 pm. Thereafter, the victim requested him to drop her to

her house, but the accused no.1 took her to a nearby place at 11.00 pm. She was taken to a jungle at Sonegaon. At that place, there was a stall which was owned by accused no.1. His servant Bhagat/original accused no.5 was present. The accused no.1 instructed Bhagat not to speak to anyone and asked him whether bedding has been placed. Accused no.1 asked the victim to jump to the other side of the wall. Accused no.1 himself also jumped. It was dark there. Bedding was laid; the accused made her to sleep, removed her leggings and inner-wear and committed sexual intercourse. The victim was crying. The accused no.1 gave her life threats. After some time, the victim saw something like torch. She pushed the accused aside and started crying loudly. She came towards the road where her brother, maternal uncle and mother were present. She was brought back to house. She then narrated the story. They approached Police Station. She was referred to Indira Gandhi Medical College & Hospital, Nagpur. She was examined by a Doctor. Her clothes were seized.

11. In the cross-examination, there is absolutely nothing to disbelieve her version. A futile attempt was made to show that she did not raise shouts in the theatre to contend that she willingly went with the accused no.1. The evidence of the victim indicates that she went to accused no.1's family because they were known to her. Thereafter, the accused on the false pretext, took her to the cinema hall. Watching movie together, by itself, cannot attribute willingness of the victim to accompany accused no.1. To my mind, considering her age, the attraction of watching movie is pretty normal and therefore there is no reason why should she shout in the theatre.

12. PW2-Sanjay is the Panch witness to spot *panchnama* which I need not discuss elaborately since the spot has not been seriously disputed.

13. PW 3-Meena is the mother of the victim. She has deposed that on 21.06.2016 she had been to Police Station because her daughter was missing. Oral report(Exh.61) and printed FIR(Exh.62) were marked through her evidence. This witness has narrated the facts as stated earlier. The most crucial evidence is that while taking search at about 11.30 pm, the victim was found at Sonegaon Jungle. A person was present at that place near the coconut kiosk. When enquired, he falsely stated that the victim had not come there. The informant and her associates took search of the victim with a torch. At that time, she heard a crying voice of her daughter. Her brother and son jumped towards the other side of the wall. The victim came towards them running. The accused no.1 took to his heels from the spot. The mother states that the victim's legging was not present on the person of the victim. The victim narrated the story stating therein that the accused no.1 has committed rape by removing her clothes. The mother then deposed that the victim was taken to the Police Station. The police has recorded her statement as also of the victim. The rest of the version unflinchingly supports the case of the prosecution.

14. In the cross-examination, it is brought on record that the victim and accused no.2 were in talking terms. It is further brought on record that the informant and others had jumped across the wall while taking search of the victim. She admits that it was dark at the place but volunteered that they were possessing a torch. She denied the suggestion

that the voice of the cries was heard from a far distance. She admits that there were shrubs. She further admits that the victim came running towards them. She had denied that since the person present with victim ran away, the informant and others have not seen that person. She has further denied that because of darkness, she or her associates could not witness the face of the culprit.

15. The above cross-examination would, in a way, support the prosecution version. The cross-examination indicates that the victim and accused no.1 were in talking terms. Therefore, there is every reason to believe that the victim had been to the place of the accused nos. 1 and 2. The cross-examination further proves the presence of the informant and associates at the spot of the incident, that too along with a torch. It further ratifies that the voice of crying was heard. The cross-examination further admits presence of the victim at the spot, since it has been brought on record that the victim came running towards her mother and other relatives. The presence of the culprit is also brought on record with an attempt to show that the culprit was not accused no.1. However the suggestion was denied outrightly. In the circumstances, when the presence of culprit with the victim and the spot has been proved in the cross-examination of the mother. The said cross-examination coupled with the evidence of the victim who narrated the events of entire day, of her spending time with accused no.1, would prove beyond reasonable doubt, the presence of accused no.1 at the spot. If the aforesaid cross-examination is read with the testimony of the PW1 victim, the offence of rape could be said to have been proved by the prosecution.

16. On the point of rape, the Doctor's evidence would further

cement the prosecution story. PW4-Dr. Bhakti Deshpande, has deposed that on 22.06.2016, the next day of the incident, she has examined the victim. Her evidence indicates that there was hymenal tear at 6 o' clock position of size 0.5 cm. The tear was fresh and blood was oozing from tear ends. The tenderness was present. She opined that there is evidence of recent sexual intercourse or assault. This testimony has not been shaken in the cross-examination and, therefore, the ingredients of offence punishable u/s. 376 of the IPC have been certainly proved by the prosecution.

17. PW5-Dharmendra is the Doctor who has medically examined the accused and opined that there is nothing to suggest that the accused was incapable of performing sexual intercourse.

18. PW6-Gaurav, is one of the associates who accompanied the informant. His evidence is in tune with the mother on the point of search of the victim and thus corroborates the victim's version.

19. PW7-Vrushali, is the Assistant Police Inspector. She has taken down the oral report of the victim, so also recorded statement of her mother. She has drawn the spot *panchnama*. She has arrested accused no.2,3,4 and 5. As regards accused no.1, he had left for other State and was arrested subsequently on 03.04.2016. She, after collecting evidence, has filed a charge-sheet against the accused persons.

20. PW 8-Gunvant, PW-Raisingh, PW10-Mangesh, PW11-Sandhya and PW12-Anand, are either the Headmaster or Headmistress of different Schools where the victim has taken education. All have

brought School Leaving Certificates and those certificates have been proved through their testimony being Exhs. 94, 100, 108, 115 and 124. All these witnesses have been cross-examined and have stated that none of them have asked for the birth certificates of the victim.

21. The most important testimony amongst these five is of PW12-Anand, for the reason that the victim was first admitted in this School in first standard where PW12 was working as a teacher. This was the first instance where the entry of birth has been recorded in the school register. The date of birth has been recorded as 28.06.1999. All the witnesses have stated said date of birth of the victim. The subsequent school leaving certificates have been issued on the basis of the entry taken in the school where PW12 was working. In the cross-examination, it is elicited that he cannot tell whether the date of birth mentioned in Exh.124 is correct or not.

22. The contention of Mr S.D.Chande, the learned counsel for the accused is that in absence of source of date of birth, the entry in the school register cannot be taken aid of, to prove the age of the victim. He has relied upon the judgment in the case of **P Yuvaprakash vs. State**¹ more particularly, para Nos. 13 to 15 which are quoted herein-below :-

“13. 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 :

¹ MANU/SC/0777/2023

- (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.*

14. *Section 94(2) (iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or court. In the present case, concededly only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Exh. C1 i.e. the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness i.e. CW-1. The burden is always upon the prosecution to establish what is alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3 the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the record for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94 (2)(i) as it was a mere transfer certificate, Exh. C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.*

15. *In a recent decision, in **Rishipal Singh Solanki***

v.State of Uttar Pradesh and others MANU/SC/1081/2021
 “2021 (12) SCR 502 this court outlined the procedure to be followed in cases where age determination is required. The Court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows :

20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided *prima facie* on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available in the absence whereof ; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof ; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

23. Thus, the Supreme Court in the above-referred judgment as also the judgment which are relied by it, has held that mere transfer certificate could not be relied as a proof of victim’s age. The Court further held that admissible evidence for proof of age is : (i) the matriculation or equivalent certificate if available and in the absence whereof (ii) the date of birth certificate from the school other than the play school, first attended and in the absence whereof (iii) the birth certificate given by the Corporation or the Municipal Authority or Panchayat. The Court further held that medical opinion could be sought from the Medical

Board only in absence of the first three evidences.

24. In the case in hand, the prosecution has not produced matriculation or equivalent certificate. The reason has not been given but in its absence, the prosecution ought to have filed the date of birth certificate from the school first attended. This would mean the date of birth certificate which is filed by the parents of the victim in the school first attended and on the basis of which the entry is supposed to be made in the school register and further on the basis of which the school leaving certificate is to be issued. The prosecution failed to produce the date of birth certificate from the school and, therefore, the third option available was to produce the birth certificate given by the Corporation or municipal authority or Panchayat. The prosecution has not produced this document as well. In the circumstances, the inference that follows is that the prosecution failed to prove that the victim, at the relevant time, was a minor.

25. This would result into acquittal of accused no.1 u/s. 4 of the POCSO Act as also Section 363 of the IPC, for the reason that to attract these two provisions, age of the victim must be below 18 years. Nonetheless, the ingredients of Section 376 have been proved and, therefore, the conviction of the appellant u/s 376 will have to be maintained. Hence I answer the Point nos. (i) to (iii) accordingly.

As regards Point Nos. (iv) and (v):

26. Having answered the first three points as above, the impugned judgment would call for interference by modifying the same as under :-

ORDER

- i) Criminal Appeal No.230/2023 is **partly** allowed.
- ii) The judgment and order dated 17.01.2022 rendered by the learned Extra Joint Additional Sessions Judge (Spl.Judge POCSO Court) Nagpur in Spl. Cri. (Child) Case No. 241/2016, convicting and sentencing the appellant for the offence punishable u/s 363 of the IPC and under Section 4 of the POCSO Act, is set aside.
- iii) The judgment and order dated 17.01.2022 rendered by the learned Extra Joint Additional Sessions Judge (Spl.Judge POCSO Court) Nagpur in Spl. Cri. (Child) Case No. 241/2016, convicting and sentencing the appellant u/s 376 of the IPC is **maintained**, as it is.
- iv) Professional fees of Ms S.P. Dhotre, learned Advocate (appointed) for the victim, be quantified and paid as per the Rules.
- v) No separate orders are necessary on Criminal Application No 382/2023 seeking suspension of sentence. The same is disposed of.

(ANIL L. PANSARE, J.)