

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

CRIMINAL APPEAL No. 335/2021.

Kailas s/o Hiranman Salve,
Aged about 30 years,
resident of Opp.Andh Vidyalaymalkapur,
Taluq and District Akola. ... **APPELLANT.**

VERSUS

1.The State of Maharashtra,
through Police Station Officer
Khadan, Taluq and District
Akola.

2.XYZ
through its Complainant Vide
Crime No.81/2014, Police Station
Officer, Khadan, Taluq and
District Akola. ... **RESPONDENTS.**

Mr. A.S. Londhe, Advocate for the Appellant.
Mr. V.A. Thakare, A.P.P. for Respondent No.1.
Respondent No.2 - Served.

CORAM : VINAY JOSHI AND
VALMIKI SA MENEZES, JJ.

JUDGMENT RESERVED ON : 09.06.2023.
JUDGMENT PRONOUNCED ON : 28.07.2023.

JUDGMENT (PER VINAY JOSHI, J.) :

Conviction and sentence for the offence punishable under Sections 363, 366, 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act (POCSO), led the appellant (convicted accused), to challenge the judgment and order of conviction in Session Trial No.172/2014 dated 05.08.2021, by this appeal.

2. The appellant/accused was charged for the aforesaid offences. The prosecution led evidence of 8 witnesses to substantiate the charge. The Trial Court held that the prosecution succeeded in proving the leveled charges and separately punished for each of the offences. The maximum sentence imposed for the offence punishable under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act is to undergo imprisonment for life along with fine of Rs.1 lakh on each count. Besides that the appellant/accused was

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also convicted for the offence punishable under Sections 363 and 366 of the Indian Penal Code for which punishment was imposed to undergo imprisonment for 7 and 10 years respectively, with fine of Rs.1 lakh each on both count. All the sentences are directed to run concurrently. The maximum sentence imposed by the trial Court is to undergo imprisonment for life along with total fine of Rs.4 lakhs, with stipulation of default.

3. The prosecution case in brief is that - the informant Dhanraj was living with his family including his sister [victim], aged 15 years and 6 months. On 06.03.2014, in the evening the victim left away by leaving her house. Family members took search, but, in vain. They have filed report about the missing of victim girl. On the following day, the informant – brother learnt that the neighbouring resident Kailash [accused] also went missing, and therefore, he lodged a report [Exh.54] with the police. On the basis of said report, the police have registered the offence of kidnapping, and inducing a women to compel for illicit intercourse.

4. P.W.5 – API Thakre was entrusted with the investigation.

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On 22.03.2014, wife of the accused lodged missing report [Exh.62], stating that her husband also went missing. On secret information, the police took both the victim and accused in custody on 23.05.2014. Statement of the victim was recorded. Since there were allegations of sexual intercourse, provisions of Section 376 of the Indian Penal Code and the victim being minor, provisions of POCSO Act have also been invoked. During the course of investigation, the victim got medically examined. Documents relating to date of birth of victim were collected. Clothes of the victim were seized. Necessary samples were taken and sent for chemical analization. Panchnama of the scene of offence was drawn. After completion of the investigation, final report has been filed. The trial Court has framed charges to which the accused disowned the guilt. On appreciation of the available material, the trial Court held that the prosecution succeeded in proving the leveled charges, and imposed the aforesaid punishment.

5. We have heard the learned Counsel appearing for the appellant, as well as gone through written notes of arguments. We have also heard the learned A.P.P. in resistance. Respondent no.2

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though served, has chosen not to appear in the matter.

6. The defence of the accused is of total denial and of false implication. The learned Counsel appearing for the accused would submit that the trial Court has miserably failed in appreciating the evidence. The trial Court has misread the evidence pertaining to the date of birth of the victim girl. It is argued that the victim herself has admitted that no such incident had occurred. Medical evidence does not support the prosecution case. It is submitted that the prosecution failed to establish the minority of the victim, and thus, the judgment and order of conviction is unsustainable in the eyes of law.

7. Per contra, the learned A.P.P. has supported the judgment and order of conviction. It is submitted that the victim girl gave specific evidence about sexual assault. Since the victim was a minor, and was in confused state, her stray admissions cannot be considered. The prosecution has duly proved the age of the victim by examining the school authorities and producing admission register. It is submitted that since the victim was minor at the time of occurrence, though she ran with the accused and had sexual

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intercourse with consent, however, the same amounts to “rape” within the meaning of Section 376 of the Indian Penal Code and “penetrative sexual assault” in terms of Section 3 of the POCSO Act.

8. Precisely, it is the prosecution case that the victim girl aged 15 years eloped with a neighboring person [accused], stayed for 15 days and had sexual intercourse. Since the victim was minor, it amounts to offence of rape, therefore, the question about minority of the victim largely falls for consideration. Likewise to invoke the stringent provisions of the POCSO Act, it is for the prosecution to establish that the victim was a ‘child’ within the meaning of Section 2[d] of the POCSO Act. The prosecution has examined two witnesses to establish the date of birth of the victim girl. It is prosecution case that date of birth of the victim is 29.09.1999. The prosecution has examined P.W.7 – Satpute, Headmaster of Zilla Parishad Primary School, Malkapur. He has brought the original admission register of the school. It is his evidence that the original register bears entry no.35 [enrollment no.7971] pertaining to the victim. As per said entry, her date of birth is 29.09.1999. The said entry was taken on the basis of an affidavit filed by the mother of the

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victim girl. The said entry [Exh.92] has been proved. As per said entry, the victim born on 29.09.1999 and was admitted in the school on 29.06.2006. It was the first school attended by the victim.

9. Though the prosecution has examined P.W.1 -Nandkumar Unhale, Headmaster of Sarasvati Vidyalaya, Akola, however, it was the second school attended by the victim girl. He has brought the school admission register which bears entry no.2442 pertaining to the victim. The said entry denotes the date of birth of the victim as 29.09.1999. He has also produced bonafide certificate of the victim issued on the basis of the entry in the school admission register.

10. Always evidence pertaining to first school attended by the child carries importance. Undeniably, on the basis of the school leaving certificate issued by the first school, the entry as regards to the date of birth was taken in the second school. Thus, primarily the worth of first school attended is required to be assessed. Admittedly, the prosecution has not made any efforts to collect the date of birth certificate of the victim. As per evidence of P.W.7 the school entry was taken on the basis of mother's affidavit, which has not been

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tendered. In the wake of such position, we have gone through the relevant entry no.7971, which is at Exh.92. It is apparent that name of the child was written in different ink. It is brought to our notice that it does not bear signature of the witness. It has come in the evidence of the informant that he has one another sister. Since the name of the child was written in different ink, it is a matter of suspicion. The learned A.P.P. would submit that since original school record has been maintained in regular course of business, it can be safely relied. In this regard, he has relied on the decision of the Supreme Court in case of **State of Maharashtra .vrs. Gajanan Hemand Janardhan Wankhede – [2008] 8 SCC 38**. Moreover, to impress the authenticity of the record maintained by the school, reliance is placed on the decision of the Supreme Court in case of **State of Madhya Pradesh .vrs. Preetam – [2018] 17 SCC 658**. On the other hand, the learned Counsel appearing for the appellant has relied on the decision of this Court in case of **Ravi Anandrao Gurpude .vrs. State of Maharashtra – 2017 All MR [Cri] 1509**, to contend that in case of discrepancy in the school register, it is not safe to place reliance.

11. Always it depends on the facts and circumstances of the case, whether a particular school record is acceptable. It is to be remembered that the prosecution has not made any endeavor to bring date of birth certificate of victim. In the said background, we have examined the school record of the first school attended by the child. The relevant entry was taken on the basis of mother's affidavit. However, the same has not been produced. We do not find any plausible explanation from the side of the prosecution for not collecting those document to vouch the credibility about the birth entry. Moreover, the school entry which was taken after 6 years from the date of birth, bears name of the girl and her mother in different ink, which is not free from doubt.

12. The provisions of POCSO Act are stringent in nature, as there is a statutory presumption under Section 29 of the Act. Since the enactment is stringent one, the degree of proof is very strict. The prosecution has to prove the age of the victim to show that at the time of incident she was a 'child' within the meaning of the provisions of the Act. In the light of such legal requirement, we have assessed the school record, but, unable to convince ourselves to

place implicit faith on the school register for the aforesaid reasons.

13. Though the prosecution has examined a witness from the second school, however, the said entry in the second school was obviously taken on the basis of the record of the first school. Therefore, it loses its significance. In the circumstances, we do not find it safe to rely on the prosecution evidence on the point of age to establish that the victim was a 'child' within the meaning of Section 2[d] of the POCSO Act.

14. During the course of investigation, the victim was sent for ossification test. In this regard the prosecution has examined P.W.8 – Dr.Pankaj Badarkhe, who was a Radiologist. On his radio-logical examination, the approximate age of the victim was around 16 years with one year plus or minus difference, which certificate is at Exh.107. In view of the decisions of Supreme Court in case of (1) **Jaya Mala .vrs. Home Secretary, Government of Jammu and Kashmir** – AIR 1982 SC 1297 and (2) **Darga Ram @ Gunga .vrs. State of Rajasthan** – [2015] 2 SCC 775, the margin of error in the age ascertained by the radio-logical examination is of two years on either

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side. Besides that the learned Counsel for the appellant has relied on the decision of Rajasthan High Court in case of **Nand Kishore .vrs. State of Rajasthan – 2002 Cri.L.J. 4157**, wherein margin of error of 2-3 years has been considered. In view of that, the evidence on the point of radio-logical examination is of no help, as the victim can be more than 18 years. The prosecution has not examined either of the parents of the victim, who could have stated about the date of birth of the victim. Though the prosecution has examined brother of the victim – P.W.4, however, he is silent about the age of the victim. Moreover, the victim in her evidence stated that she has stated false date of birth in her evidence. In substance, the prosecution has failed to establish that the victim girl was below 18 years of age at the time of occurrence.

15. Having held so, we have gone through the evidence of P.W.3 – victim girl. It appears that she has given evidence in confused state of mind. During chief-examination, she has stated that the accused has kidnapped her and committed sexual intercourse. However, during the cross examination, she stated that

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no such incident took place nor accused had committed sexual intercourse with her. Besides that the prosecution has examined P.W.2 Dr. Patil, Medical Officer, who has examined the victim on the point of sexual assault. The medical officer did not found injuries on the person of the victim. Particularly he stated that during examination no genital injuries were found. Though he has stated that sexual intercourse cannot be ruled out, however, he stated that his opinion is not of conclusive nature.

16. It is the prosecution case itself that the victim girl ran away with the accused and stayed for near about 15 days. Obviously, it is a case of consent. Since the prosecution has failed to establish that the victim was minor, it would not attract the offence of rape or penetrative sexual assault. As the prosecution has failed to establish that the victim was a minor, the offence of kidnapping cannot be made out. There is no material to indicate that the accused has abducted the victim, and therefore, the provisions of Section 366 of the Indian Penal Code would not attract.

17. In our view, the trial Court erred in appreciating the

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evidence on the point of age of the victim. The trial Court ought not to have relied on the shaky evidence regarding the date of birth, which resulted into causing miscarriage of justice. In criminal cases, heavy burden lies on the prosecution to establish the guilt of the accused. It is a case where both have eloped and stayed some where for 15 days. Thus, the crucial aspect was pertaining to the age, on which the prosecution failed to lead credible evidence. In view of the foregoing analysis and conclusions, this Court is of the opinion that the prosecution has failed to establish essentials to constitute the leveled charges on the touchstone of requisite standard of proof. In the result, the impugned judgment and order of conviction would not sustain in the eyes of law. The appeal is liable to be allowed, hence the following order.

ORDER

- [i] Criminal Appeal is allowed.
- [ii] The impugned judgment and order of passed by the Extra Joint District Judge and Additional Sessions Judge, Akola in Session Trial No.172/2014 dated 05.08.2021, is hereby quashed and set aside. The appellant/accused is acquitted

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from the charge of offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, (POCSO). He be released forthwith, if not required in any other offence.

- [iii] Fine amount, if any, deposited by the appellant/accused be refunded to him.
- [iv] Muddemal property be dealt with in accordance with the Rules.

JUDGE**JUDGE**