

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

CRIMINAL APPEAL NO. 509/2022

Praful s/o Bhimrao Savale,
r/o Nandura (Bk), Taluka Babhulgaon,
District Yavatmal, Maharashtra.**APPELLANT**

...V E R S U S...

1. State of Maharashtra,
through its Officer in charge,
Police Station, Babhulgaon, Tq.
Babhulgaon, Dist. Yavatmal,
Maharashtra.
2. XYZ (Victim),
through Complainant, in
Crime No. 158/2019, registered
with P. s. Babhulgaon, Tq. Babhulgaon,
Dist. Yavatmla.**RESPONDENTS**

Mr. I. Haque, Advocate for appellant.
Mr. I. Damle, A.P.P. for respondent no.1-State.
Mr. S. S. Das, Advocate appointed for respondent no.2

CORAM:- ANIL L. PANSARE, J.
DATED :- 06.04.2023

ORAL JUDGMENT

This appeal under Section 374 of the Criminal Procedure Code, 1973 takes an exception to judgment and order dated 22.06.2022 passed by the Special Judge, POCSO Act in Special Criminal Case No.30/2019. The appellant-accused faced trial for the following charges:

“That on or about 01/04/2019, at about 10.00 a.m. at Mitnapur Fata, Babhulgaon, Tq. Babhulgaon, Distt. Yavatmal, you accused kidnapped a minor victim girl, below 18 years of age by taking or enticing her out of keeping of the lawful guardianship of her Mother Sau. Mandabai Subhash Kamble & father Subhash Kisan Kamble & father Subhas Kisan Kamble, without the consent of said lawful guardian and thereby committed an offence punishable under Section 363 of Indian Penal Code, 1860.

Secondly, on the same date, time and place, you kidnapped a minor girl child with intent that she may be forced or seduced to illicit intercourse or knowing it likely that she will be forced or seduced illicit intercourse and thereby committed an offence punishable u/sec. 366-A of the Indian Penal Code, 1860.

Thirdly, on 01/04/2019 and thereafter continuously you accused committed rape on a minor victim and thereby you have committed an offence punishable under Section 376 the Indian Penal Code, 1860.

Fourthly, on 01/04/2019 and thereafter continuously, you accused repeatedly committed rape on a minor girl below 16 years of age who is incapable of giving consent, without her legal consent and thereby you have committed an offence punishable under Section 376(2)(i)(j)(n) of the Indian Penal Code, 1860.

Fifthly, on or about 01/04/2019 and then thereafter continuously, you accused committed penetrative sexual assault on a child and thereby you have committed an offence punishable u/s 4 of the Protection of Children From Sexual Offences Act, 2012 and within the cognizance of this Special Court of Sessions.

Lastly, on or about 01/04/2019 and then thereafter continuously, you accused kidnapped a minor victim girl below 18 years, with sexual intent which involved physical contact with the said child and thereby you have committed an offence of sexual harassment punishable u/s. 12 of the Protection of Children From Sexual Offences Act, 2012 and within the cognizance of this Special Court of Sessions.”

2. The accused has been convicted for the offence punishable under Section 363 of the Indian Penal Code, 1860 and Section 4 of the Protection of Children From Sexual Offences Act, 2012. He has been acquitted for the rest of the charges. The prosecution has not challenged the judgment and order of acquittal and that therefore the order of acquittal attains finality.

3. The case of the prosecution is that respondent no.2-victim was aged about 14 years at the relevant time. She was studying in the 9th standard. On 01.04.2019 at about 10:00 a.m., the victim and her mother came to Babulgaon from their village. The victim was supposed to go to the school for appearing in the examination. The mother of the victim left for hospital. From hospital she returned back home. The victim did not return home in the evening. She was searched but not found. It was noticed that the accused, who is resident of the same village was also missing. Father of the victim suspected the involvement of the accused in kidnapping his daughter. He approached Babhulgaon Police Station and lodged FIR against the accused blaming him of kidnapping his minor daughter. The FIR came to be registered against the accused vide Crime No.159/2019 under Section 363 of the IPC. The investigation commenced.

4. However, on 04.04.2019, the victim came back home. Her statement was recorded. The victim stated before the police that she was acquainted with the accused. Both were in a relationship. The accused wished to marry her but she refused on the ground that she was minor. The victim then states that on 01.04.2019, she had gone to Babhulgaon with her mother. The accused had called her and then took her to Nagpur. They stayed in one room belonging to the friend of the accused. The accused committed repeated sexual intercourse with her and on 04.04.2019, accused brought her back to the village.

5. Based on the statement of the victim, the provisions under Sections 366A, 376 (2)(n) of the IPC and Sections 8 and 12 of the POCSO Act were added. The investigation was then carried out. The victim and accused were subjected to medical examination. DNA sample was also taken. The victim was found carrying pregnancy of 5 weeks and 6 days. At the request of the victim's parents, the child was aborted on 17.05.2019. The medical officer collected the abortus of victim as also blood sample of the accused and were sent to the forensic laboratory for DNA profile. The investigation culminated into filing of charge-sheet.

6. The charges were framed. The accused did not plead guilty and claimed to be tried. The prosecution witnesses were

examined. The defence of the accused was that he has been falsely implicated as he and his parents refused to accept the proposal of victim's parents to get both married.

7. Learned Special Judge, after having heard both the sides and having gone through the evidence and documents, has passed the impugned order.

8. Heard both the sides and with their assistance, I have gone through the evidence led before the Special Court. I will refer to the arguments, evidence, documents, etc. to the extent necessary to decide following points that arise for my determination.

Sr.No.	Points	Findings
(i)	Has the prosecution proved that on 01.04.2019, the accused kidnapped the victim by taking her out of lawful guardianship of her parents, without their consent?	In the Affirmative
(ii)	Has the prosecution proved that the accused has committed penetrative sexual assault on the victim, who was below 16 years of age?	In the Affirmative
(iii)	Whether interference is required in the impugned judgment?	In the Negative.
(iv)	What order?	As per final order

9. **As to point nos (i) to (iii) :**

Point nos (i) to (iii), being interlinked, are decided by common reasoning.

The accusation against the accused is that he has, on 01.04.2019, kidnapped the victim, who was minor by taking her out of the keeping of the lawful guardianship of her parents, without their consent and has committed penetrative sexual assault on the victim. Sections 361 and 363 of the IPC read thus:

“361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping — Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

10. Thus, Section 361 of the IPC defines kidnapping of a minor to mean taking a female below 18 years of age out of the keeping of lawful guardianship without their consent. Section 363

of the IPC provides for punishment for kidnapping, which may extend to seven years and which shall also be a fine.

11. The first question therefore that requires answer is whether the prosecution has proved that victim was minor i.e. below 18 years.

12. PW1 is the victim herself. She has deposed that her date of birth is 28.08.2004. She had brought her birth certificate. The true copy of the birth certificate was produced. The true copy was verified from the original and was found to be genuine. Accordingly, the true copy of birth certificate was marked as Exh.-13. She has then deposed that the accused had proposed her for marriage but she refused on the ground that she is minor. She states that she was 14 years old at that time. The cross-examination on this point indicates that the victim has informed the accused that her age was less than 18 years. She has then deposed in the cross-examination that in her AADHAR, the date of birth is mentioned as 28.08.2004. Thereafter, one fatal suggestion had been given that the victim was willing to marry the accused but the accused told her that since she has not completed the age of 18 years, he cannot marry her. This suggestion has been denied. However, the case put forth by the accused in the cross-

examination would prove beyond reasonable doubt that the accused was aware of the fact that the victim was minor at the relevant time.

13. Learned counsel for the respondent no.2 has, on the point of suggestion in cross-examination, relied upon the judgment in the case of *State of Maharashtra Vs. Bharat Fakira Dhiwar*¹. The case before the Supreme Court was pertaining to rape and murder of three years old girl. On the point of suggestion, the Court observed that during the cross-examination of the child witness, it has been put to them that they would have been lighting crackers near their house and that they could not have seen the respondent from near their house. The Court opined that this suggestion shows that even the defence accepted that they stayed in the locality. These observations were made by Hon'ble Supreme court on the ground that the High Court therein has erred in arriving at the conclusion that the prosecution has not shown that two children stayed in the locality. Applying same analogy in the present case, the suggestion given by the accused would show that the defence has admitted that the victim was minor at the relevant time.

1 (2002) 1 SCC 622.

14. That apart, the victim has deposed that her date of birth is 28.08.2004. Her birth certificate would show that her date of birth is 28.08.2004. The victim's evidence indicates that she was learning in the 9th standard and was 14 years old at the relevant time. The birth certificate has been issued by Public Officer, who is a competent authority under the Registration of Births and Deaths Act, 1969. The incident of kidnapping has occurred on 01.04.2019. Thus, by arithmetical calculation, age of the victim was fourteen years seven months and two days i.e. below 18 years.

15. Learned counsel for the appellant has argued that the date of birth has not been mentioned in the FIR. True it is that the date of birth is not mentioned. However, if the FIR Exh.-49, is looked into, the informant, who is father of the victim, has stated before the police that the victim was 14 years old. Thus, though the exact date of birth has not been mentioned in the FIR, which even otherwise is not expected from the informant, age of the victim having been mentioned in the FIR, the date of birth can always be proved during the evidence and for that purpose, the birth certificate is the best evidence. In such situation, the accused cannot take advantage of the omission of the date of birth of the victim, which even otherwise, appears to be natural conduct of the

father, who is unaware of the significance and advantage of mentioning the date of birth of the victim while lodging the FIR.

16. Be that as it may, as stated above, the cross-examination of PW1 is sufficient to prove that not only the age of the victim has been proved in her evidence but the fact that the accused had knowledge of victim being minor has also been proved in the cross-examination.

17. Thus, the prosecution has proved that the victim was minor at the time of incident i.e. on 01.04.2019.

18. The next question that arises is whether the accused has taken the victim out of the keeping of the lawful guardianship of her parents without their consent. The FIR lodged by the informant is itself sufficient to prove that the parents had not given consent for taking away their daughter out of their lawful guardianship.

19. The evidence of PW1 on this point is that on 01.04.2019, she had gone to Babhulgaon with her mother to appear in her examination. The mother left for hospital. The accused called her at junction (fata) of village Mithnapur. The

victim went there by taxi. The accused sat in taxi. Both alighted at Falegaon junction. The accused informed the victim that they are going to Nagpur. The accused also informed that he will search job and will reside in the rented room. The victim refused (but impliedly consented by her subsequent acts). At that time, the bus arrived. Accused asked the victim to sit in the bus. Both accused and victim came down to Dhamangaon. From there they came to Nagpur by taxi. They went to the house of one Santosh. Santosh took them to his parent's house. Accused requested them to permit them to stay being late in the night by giving assurance that both will leave in the morning. They stayed there. Accused forcibly committed sexual intercourse. On the next date, both have left the house. The accused searched for job but did not get. He was receiving phone calls from the village. On 04.04.2019 he brought the victim back to the village. The victim, thereafter, narrated the incident to her parents. The victim's statement was recorded by police.

20. In the cross-examination nothing fruitful could be brought on record. The victim withstood the cross-examination. In the cross-examination the defence made an attempt to bring the theory of consensual sexual relationship and eloping with consent. In fact, this attempt appears to be the real fact. The conduct of

victim is such that she responded to the call of accused to meet him at the place at Mitnapur. She boarded the bus and thereafter a train to reach Nagpur. Both stayed together. Accused was receiving calls and he himself brought the victim back. Thus, it cannot be said that he has without consent of the victim taken her out of the lawful guardianship of her parents. However, Section 361 of the IPC provides that the consent of parent and not of the child is mandatory. In the present case, there is absolutely no doubt that the parents had not consented for the act. Therefore, the ingredients of Section 361 of the IPC have been clearly made out against the applicant and that therefore he has been rightly convicted for the offence punishable under Section 363 of the IPC.

21. The next question that requires answer is whether the accused has committed penetrative sexual assault on the victim, aged below 16 years.

22. The evidence on the point of age has already been discussed. The victim was below 16 years at the relevant time. She has deposed in her examination-in-chief that the accused has committed forcible sexual intercourse on arriving at the house of the parents of Santosh. This evidence is supported by PW2 Dr. Rajani Kamble. She was serving as Assistant Professor in

Gynecology Department at VNGMC and Hospital, Yavatmal. On 05.04.2019, the victim was produced before her. Her medical examination was done. Dr. noticed that hymen of the victim was torn. She opined that the victim has undergone sexual intercourse. In the cross-examination, she has deposed that while narrating history, the victim stated to her that she and accused were having love affair for last one year and that she left the house and went to Nagpur on 01.04.2019. Thus, the theory of consensual relationship has been corroborated by this witness. However, the cross-examination on the point of sexual intercourse and age of the victim could not get any yield in favour of the accused, except to indicate that sexual intercourse was also consensual.

23. PW3 Dr. Savita Ghomgde is another doctor. She was Resident Medical Officer in VNGMC and Hospital, Yavatmal. The victim was produced before her on 01.05.2019. The victim was found pregnant. The pregnancy was of 5 weeks and 6 days. On 17.05.2019, the pregnancy was terminated. The aborted material of victim was handed over to police. The police brought DNA Kit so also the aborted material in the sealed condition. In cross-examination it is brought on record that on 02.05.2019, pregnancy was of 41 days.

24. PW4 Dr. Prakash Chimnani is another doctor who was serving as Medical Officer at Rural Hospital, Babhulgaon. The accused was produced before him. The medical examination was conducted and samples were collected. In the cross-examination, the doctor has deposed that he has not noticed any injury on the private part of the accused. The blood sample was taken in test-tube and sample of nail and pubic hair were taken in plastic cup and were sealed and thereafter label was affixed on it. The samples were handed over to police.

25. PW5 Subhash is father of informant. He deposed that when he returned back home on 01.04.2019, the victim was not present in the house. His wife informed that the victim has not returned back. He searched for the victim. The friend of the victim informed him that she had not attended the school. He suspected involvement of accused in kidnapping his daughter. Accordingly, he lodged the FIR. In the cross-examination, the accused had made an attempt to bring on record the theory of consensual relationship. A further attempt was made to show that the victim was major. However, as stated earlier, the accused in the cross-examination of PW1, has himself given a fatal suggestion that the victim was minor at the relevant time.

26. PW6 Suresh Mohale and PW7 Vinod Deshmukh are investigating officers who had deposed about the manner in which investigation was carried out which includes drawing spot panchanama, arresting accused, referring the victim and accused to the medical officer, collecting blood samples, collecting samples of DNA, recording statements of witnesses, filing charge-sheet, etc.

27. Learned counsel for the accused, though repeatedly stated that the accused has been falsely implicated in the case, he could not point out, from the evidence or documents, any material to support such theory. As stated earlier, the relationship appears to be consensual. But then consent here is immediate considering the age of the victim, which at the relevant time was about 14 years and 7 months.

28. Learned counsel for the accused has argued that the DNA report is inconclusive. Even the learned Judge is of the view that the DNA report Exh.-14 has exonerated the accused and that the prosecution failed to connect the accused with pregnancy of victim. The DNA profile was found to be unsuitable for paternity analysis. In that sense and strictly speaking the paternity is not proved.

29. Despite above discrepancy, the finding of the learned Special Judge that the accused has committed sexual intercourse with the victim is based on the appreciation of the evidence, supported by sound reasoning. The result of the DNA and the incident of sexual intercourse committed by the accused with the victim are two distinct episodes. Merely because the DNA profile failed to prove paternity of the accused, that by itself doesn't absolve him of the act of sexual intercourse committed by him. The blame as such was of repetitive sexual intercourse but then on the basis of the testimony of PW1, learned Special Judge has rightly arrived at the conclusion that the evidence on the point of repetitive sexual intercourse is absent. The victim has deposed only of one incident. The accused, therefore, has been rightly convicted for the offence of penetrative sexual assault on minor girl below 16 years of age.

30. On the point of sentence, learned counsel for the appellant has submitted that leniency be shown, considering the fact that the accused and victim had consensual relationship. To my mind, leniency has already been shown by the learned Special Judge. The minimum punishment, at the relevant time (prior to the amendment) for the offence punishable under Section 6 of the

POCSO Act was 10 years and the same has been imposed by the learned Special Judge. Thus, no more leniency can be extended.

31. Learned Special Judge has rightly marshalled the entire evidence and has correctly arrived at a conclusion of guilt of accused for the offence punishable under Section 363 of the IPC and Section 6 of the POCSO Act. The finding is supported by sound reasoning and therefore the finding will have to be upheld.

32. I accordingly answer point Nos.1 and 2 in the affirmative and point No. 3 in the negative.

33. **As to Point No.4:**

Having answered first three points in the manner hereinabove, the appellant-accused failed to make out a case. The appeal, therefore, is liable to be dismissed and is dismissed accordingly.

(Anil L. Pansare, J)

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