



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

CRIMINAL APPEAL NO.397 OF 2020

Pawan s/o Pramod Kulkarni
Age 29 years, Occu. Nil,
R/o N-11, B Sector, 5/4
Subhash Chandra Bose Nagar,
Hudco, Aurangabad

... APPELLANT

VERSUS

1. The State of Maharashtra
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad)

2. XYZ XYZ X Y Z

... RESPONDENTS

.....
Mr. Abhishek Kulkarni, Advocate for appellant
Mrs. U.S. Bhosle, A.P.P. for respondent No.1.
Mrs. Sharda Chate, Advocate for respondent No.2.
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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 20th March, 2024

Date of pronouncing judgment : 22nd March, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

The appellant was prosecuted for the offences punishable under Sections 363, 376, 376(2)(n), 506 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for

short) and, therefore, consequently sentenced to suffer various terms of imprisonment as detailed below :-

Section	Sentence of Imprisonment	Fine
Section 5 (I), punishable under Section 6 of POCSO Act	---	---
Section 363 of IPC	R.I. for 5 years	Rs.2500/-, in default to undergo S.I. for 6 months
Section 376(2)(n) of IPC	Imprisonment for life	Rs.15,000/-, in default to undergo S.I. for 1 year.
Section 506 of IPC	R.I. for 2 years	Rs.2500/-, in default to undergo S.I. for 6 months.
The substantive sentences have been directed to run concurrently.		

2. The First Information Report (F.I.R. Exh.24) was lodged by the victim herself. It is her case that, in August 2017, she was 13 years of age. The appellant was residing in her neighbourhood. About 10 days before 12/8/2017, the appellant shifted his residence to a nearby vicinity. It was 12/8/2017, parents of the victim had gone to their native – village Deulgaon Raja, District Buldhana. The victim's house was upstairs (First Floor). While the ground floor premises was occupied by her uncle and his family. It was about 10.30 p.m. of 12/8/2017, the victim's brother was

away from house for practicing "Dahi-Handi". Uncle and his wife were taking dinner at their residence. The appellant all of a sudden came close to the victim and asked to come to him. When the victim enquired what kind of work he had with her, he told that the same would be related to her at his residence. The appellant took the victim to his house. Bolted the door from inside. He removed clothes on the person of the victim and himself as well. The appellant committed sexual intercourse with the victim and then asked her to leave his residence. The appellant even gave the victim threats to her life if she went public with the incidence. She, therefore, did not relate the same to her uncle and his wife.

3. It is further the case of the victim that, on the following day her parents came. She related them what the appellant did with her. The parents accompanied her to the Police Station. The victim there lodged the F.I.R. (Exh.24). A crime vide C.R. No.522/2017 for offences punishable under Sections 376(A), 506 of the Indian Penal Code and Section 4 of the POCSO Act was registered against the appellant. The victim, on the following day again approached the Police Station and gave a supplementary

statement, alleging the appellant to have had sexual intercourse with her 3-4 times before 12/8/2017. Section 6 of the POCSO Act and Section 376(2)(n) of the Indian Penal Code, therefore, came to be additionally invoked.

4. The victim was subjected to medical screening. Scene of offence panchanama was drawn. The appellant was arrested. He too was medically screened. Clothes on the person of both, the victim and the appellant were seized. During her medical screening, samples of certain things like blood, semen etc. were obtained. All the seized articles were sent to Forensic Science Laboratory for chemical analysis and report. Statements of persons acquainted with the facts and circumstances of the case were recorded. Upon completion of the investigation, the appellant was proceeded against by filing a Charge Sheet before the Special Court constituted for trial of offences under the POCSO Act (Trial Court).

5. The Trial Court framed the Charge Exh.10. The appellant pleaded not guilty. It was his defence that, he would occasionally serve with one Tathe. The uncle of the victim was addicted to alcohol. Once there was a quarrel

between Tathe and the victim's uncle. He intervened. The victim's uncle thereupon gave him threats of settling score with him by implicating in a serious crime. In short, according to the appellant, the crime has been registered at the behest of the victim's uncle.

6. To bring home the charge, the prosecution examined 8 witnesses and produced in evidence certain documents. The appellant examined himself as a defence witness. The Trial Court, on appreciation of the evidence in the case, convicted the appellant and consequently sentenced as detailed above.

7. Heard. Learned counsel for the appellant would submit that, there was close acquaintance between the appellant and the family of the victim. They were on visiting terms. The uncle of the victim did not like the same. Even on the Raksha Bandhan day, the victim tied him a "Rakhi". He would further submit that, except the testimony of interest witness (victim), there is nothing to make out the offence/s. The medical examination report of the victim and the C.A. reports do not support the prosecution case. The victim did not give details as to alleged previous sexual

assaults. Even the case of the prosecution is accepted as it is, it relates to the incident dated 12/8/2017. The victim on her own joined the appellant. There was, therefore, no question of kidnapping the victim. The learned counsel ultimately urged for allowing the appeal.

8. The learned A.P.P. and learned counsel for respondent No.2 took us through the evidence on record. They would submit that, the victim was just 13 years of age. Her birth certificate has been tendered in evidence by her mother. The mother gave the date of birth of the victim. On the given day, the parents of the victim were not home. The appellant lured her and took her to his residence and sexually exploited. Similar incidents took place in the past. The medical examination report of the victim do not rule out sexual assault. Our attention was also adverted to the C.A. reports. Both the learned counsel ultimately urged for dismissal of the appeal.

9. Considered the submissions advanced. Perused the evidence on record and the judgment impugned herein. Let us advert to the evidence on record and appreciate the same.

10. The victim "X" testified that, in August 2017, she was studying in 7th Standard. The appellant was residing in her neighbourhood. He was unmarried. The appellant would occasionally visit her residence. Ten days before 12/8/2017, the appellant shifted his residence to nearby residential colony. Thereafter on the day of Raksha Bandhan, he had been to her residence and asked her to tie a Rakhi. She tied him Rakhi.

11. It is further in her evidence that, it was 5.00 p.m. on 12/8/2017, her parents had gone to their native – Deulgaon Raja, District Buldhana. She was alone at home. Her brother was away for practicing Dahi-Handi. Her uncle Anand would reside on ground floor premises with his wife. On dinner, she came down and was resting in the Varandah of their house. It was 10.30 p.m. Neighbouring Aunty was with her. The appellant suddenly came. He asked her to come to him. When the victim enquired what kind of work he had with her, he told that the same would be related to her at his residence. The appellant took the victim to his house. Bolted the door from inside. He removed clothes on the person of the victim and himself as well. The

appellant committed sexual intercourse with the victim and then asked her to leave his residence. The appellant even gave threats to her life if she went public with the incidence. Clothes on the person of the victim at the relevant time were seized by the police. Those were shown to her before the Court. She identified them.

12. It is further in the evidence of the the victim that, she returned to her residence. Her uncle and Aunty enquired with her as to where was she. She did not relate them anything because of fear of the appellant. Her uncle suspected something amiss. He talked her parents on phone. Her parents came back from their native. She then narrated them what the appellant did with her. She thereafter accompanied her parents to the Police Station and lodged the F.I.R. (Exh.24).

13. The victim's substantive evidence is consistent with the averments in the F.I.R. As such, her evidence before the Court is reinforced (corroborated) by the F.I.R.

14. It is further in her evidence that, she was referred for medical screening. She gave the Medical Officer there

history of sexual assault. She was medically screened. Samples of certain things were obtained. Police seized clothes on her person at the relevant time under panchanama Exh.26. She then pointed out the scene of offence. The police drew the scene of offence panchanama. It is further in her evidence that, on the following day, she again went to the Police Station and gave a supplementary statement, alleging the appellant to have had sexual intercourse with her 3-4 times in the past.

15. The victim was subjected to a searching cross-examination. She admitted that her residence was located in a densely populated area. She admitted that she was treating the appellant as her brother. She would ride cycle, play Kabaddi and Kho-Kho in the year 2017. She even admitted to have acquaintance with the parents of the appellant. Her evidence further indicates that the appellant was residing in her neighbourhood. A few days before the incidence, the appellant shifted his residence. She had assisted the appellant in transporting his household articles to a new place of his residence. She went on to admit to have had not lodged any report with police or got medically examined before 14/8/2017. It is further in her evidence

that, her uncle Anand was annoyed with her and the appellant as well on account of both of them were on talking terms. She, however, denied to have lodged the F.I.R. at the instance of her uncle. Her evidence further indicates that, her statement was recorded under Section 164 of the Cr.P.C. Her uncle had accompanied her for recording such statement.

16. Then we have the evidence of P.W.2 “Y”, mother of the victim. Most of her evidence is hear-say. She reiterated in her evidence what had been stated to her by the victim as regards the appellant’s behaviour with her at the relevant time (incident). P.W.2 tendered in evidence a certified copy of the birth certificate of the victim. She gave the victim’s birth date as 31/7/2004. It is further in her evidence that, her brother-in-law informed her on cell phone that something had happened with her daughter. She along with her husband, therefore, returned. After the victim related her as to what the appellant did with her, she accompanied the victim and lodged the F.I.R.

17. During her cross-examination, P.W.2 admitted to have had not stated in her police statement the date of birth

of the victim. The mother's evidence is not of much importance. The fact, however, remains that, she testified consistent with what has been deposed to by her daughter (victim) in her examination-in-chief. A delay of little over one and half day in registration of the F.I.R. has been explained. The delay seems to have occurred since the parents were first informed by the uncle. They came from their native back to Aurangabad. They took the victim into confidence. The victim related them the ordeal and then the F.I.R. was lodged. We have no reason to suspect the F.I.R. to have been lodged with deliberation and oblique motive.

18. P.W.3 Dr. Shagufta medically screened the victim. It is in her evidence that, she clinically examined the victim. Collected her blood sample. Samples of vaginal swab, vulval swab and the vaginal smear for analysis and opinion. It is further in her evidence that, on her clinical examination, she found her hymen was ruptured at 6.00 o'clock position. In her opinion, there were signs suggestive recent forceful penetration of vaginal sexual intercourse. She accordingly issued her certificate (Exh.43). In her cross-examination, she admitted that no injury was found

on victim's labia majora and labia minora. She denied the victim to have been habitual to sexual intercourse. It is further in her evidence that, no semen was found on vaginal or genital part of the victim. According to the doctor, the clinical examination was done two days after the alleged incident and during the said period, the victim had taken bath.

19. P.W.4 Dr. Megha examined the appellant to find him potent. Her report is at Exh.58. She claims to have collected the appellant's blood sample and semen sample as well, besides nail and public hair.

20. P.W.5 Swati was the neighbour of the victim. It is in her evidence that, she was sitting on the platform. It was 10.30 p.m. The appellant called the victim and took her away with him. She told the victim's aunt that the appellant had come and the victim went along with him. In her cross-examination, she testified that the victim joined the appellant since he called him.

21. P.W.8 Sagar is the investigating officer who conducted investigation into the crime.

22. Appreciation of the aforesaid evidence would indicate that the victim at the relevant time was a student of 7th Standard. By no stretch of imagination she could be stated to be of 18 years or more. The mother (P.W.2), who could be the best witness to give evidence about the date of birth of her child gave the victim's date of birth as 31/7/2004. We do not propose to rely on the birth certificate tendered before the Trial Court first time during the mother's evidence. The evidence of the victim as regards her age is hear-say. The fact, however, remains that, the victim was just 13 years of age since her mother gave her date of birth. The evidence further indicates that, there was close acquaintance between the victim and the appellant. Even it was a case of emotional relationship. Both used to visit each other's residence. There is evidence of independent witness P.W.5 Swati, who testified the victim to have joined the company of the appellant on his call.

23. Section 363 of the Indian Penal Code reads :-

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.

24. In case of **Varadarajan Vs. State of Madras** [AIR 195 SC 942], it has been observed that :-

“There is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361. Where the minor leaves her father’s protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

25. The evidence on record undoubtedly indicates that, in view of the emotional relationship between the two and the parents of the victim were not home at the relevant time, the victim joined the appellant and went to his residence. True, the appellant did sexual intercourse with her at his residence, the victim being below 18 years of age at the relevant time, her consent for sexual intercourse was

immaterial. It was the incident dated 12/8/2017. So far as regards past incidents of sexual intercourse alleged by the victim are concerned, we are not inclined to believe her testimony, she did not give day, date and time thereof. her F.I.R. is also silent in that regard. Only after giving supplementary statement, she made reference thereto. In our view, therefore, it is a single incident of sexual assault committed by the appellant on the victim. The same being an offence under Section 3 read with 4 of the POCSO Act, and under Section 376 of the Indian Penal Code, the minimum sentence prescribed for the said offence is that of 7 years imprisonment, which may extend to imprisonment for life and also be liable to fine.

26. So far as regards conviction for the offence under Section 506 of the Indian Penal Code is concerned, we are not relying on the evidence of the victim. It is reiterated that, she was emotionally involved with the appellant.

27. For all the aforesaid reasons, interference with the impugned order of conviction and consequential sentence is, therefore, warranted. In the result, the appeal partly succeeds. Hence the order :

ORDER

(i) The Criminal Appeal is partly allowed.

(ii) The order of conviction and sentence dated 7/2/2020, passed by learned Additional Sessions Judge-10, Aurangabad in Special Case Child Prot. No.164/2017, convicting the appellant for the offences under Section 5(l) punishable under Section 6 of the Protection of Children from Sexual Offences Act and under Sections 363, 376(2) (n) and 506 of the Indian Penal Code is hereby set aside. The appellant is acquitted thereof.

(iii) Instead, the appellant is hereby convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act and therefore, sentenced to suffer rigorous imprisonment for seven and half (7 ½) years and to pay fine of Rs.2000/- (Rupees two thousand), in default to suffer simple imprisonment for six months.

(iv) No separate sentence is awarded for offence punishable under Section 376 of the Indian Penal Code.

(v) The appellant is entitled for set off as per Section 428

of the Cr.P.C. for the period for which he was in jail.

(vi) The Criminal Appeal stands disposed of.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-