



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

CRIMINAL APPEAL NO.540 OF 2022

Kamesh s/o. Jagan Mate,
Age : 26 years, Occ. Labour,
r/o. Sitalnagar, Flat No.F-4,
Shahnoorwadi,
Tq. and Dist. Aurangabad

..Appellant

Vs.

1. The State of Maharashtra
2. XYZ

..Respondent

Mr.S.J.Salunke, Advocate for appellant
Mr.B.B.Bhise, APP for respondent no.1
Mr.Rohit Patwardhan, Advocate for respondent no.2

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
DATE : MARCH 27, 2024**

JUDGMENT (PER R.G.AVACHAT) :-

The challenge in this appeal is to the judgment and order of conviction and consequential sentence passed by learned Special Judge (POCSO Act), Aurangabad, in Special Case No.342 of 2021. The operative order of conviction and consequential sentence, reads as follows :-

1 Accused Kamesh Jagan Mate is hereby convicted of the offence punishable under section 506 of the Indian Penal Code, under sections 4, 5(l) r/w 6, 5(n) r/w 6, 8, 9(l) r/w 10 and 9(n) r/w 10 of the Protection of Children from Sexual Offences Act,

2012 and 75 of Juvenile Justice (Care and Protection of Children) Act, 2015, as per section 235(2) of Code of Criminal Procedure.

2 Accused is convicted of the offence punishable under section 506 of the Indian Penal Code as per section 235(2) of the Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for two years only.

3 Accused is convicted of the offence punishable under section 4 of the Protection of Children from Sexual Offences Act, 2012 as per section 235 (2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1000/- (Rs.One thousand).

4 Accused is convicted of the offence punishable under section 5(l) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 as per section 235(2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 1000/- (Rs. One thousand).

5 Accused is convicted of the offence punishable under section 5(n) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 as per section 235 (2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 1000/- (Rs. One thousand).

6 Accused is convicted of the offence punishable under section 8 of the Protection of Children from Sexual Offences Act. 2012 as per section 235(2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 500/- (Rs. Five hundred), in default to further undergo rigorous imprisonment for one month.

7 Accused is convicted of the offence punishable Under section 9(l) r/w 10 of the Protection of Children from Sexual Offences Act,

2012 as per Section 235(2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs. 500/- (Rs. Five hundred), in default to further undergo rigorous imprisonment for one month.

8 Accused is convicted of the offence punishable under section 9(n) r/w 10 of the Protection of Children from Sexual Offences Act, 2012 as per section 235(2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs. 500/- (Rs. Five hundred), in default to further undergo rigorous imprisonment for one month.

9 Accused is convicted of the offence punishable under section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 as per section 235(2) of Code of Criminal Procedure and sentence to suffer rigorous imprisonment for three years and to pay fine of Rs. 500/- (Rs. Five hundred), in default to further undergo rigorous imprisonment for one month.

10 All the sentences to run concurrently.
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The appellant is, therefore, before us in this appeal.

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

The First Information Report has been lodged by PW 2 - victim ('X') on 02.09.2021. It is her case that she was born on

18.12.2004. She was residing along with her mother, brother and appellant (step-father). One Raju Bhalerao was her biological father. Two years before the alleged incident, marriage between her mother and said Raju was dissolved by a decree of divorce. Her mother got remarried with the appellant. All of them, therefore, started residing near Morya Mangal Karyalaya. Initially, the appellant was behaving properly. Once, her mother was out of the house. The appellant touched the victim's private part. He removed her clothes and did sexual intercourse with her. The appellant had threatened her if she disclose the same to her mother. The appellant did the same thing many a time, whenever her mother and brother used to be away from home.

3. It is her further case that then, they shifted their residence to Ramanagar. On the given day (02.09.2021), her mother had gone to Beed-bye-pass road for some work. Her brother had gone for tuition. It was about little past 02.00 p.m. The appellant again did sexual intercourse with her. The victim related the same to her mother on her arrival. The mother, therefore, accompanied her to the police station. The victim lodged the FIR (Exh.29). Based on the FIR, a crime vide C.R. No.350 of 2021, came to be registered with Pundlik Nagar Police Station, Aurangabad. The victim was medically

screened. The appellant was arrested. He too was medically examined. The scene of offence panchnama (Exh.37) was drawn. During the medical screening of both of them, samples of certain things were obtained. Those were sent to F.S.L. for chemical analysis and report. Upon completion of the investigation, the appellant was proceeded against by filing charge sheet. The case was committed to the Court of learned Special Judge (POCSO Act), Aurangabad (trial court), for trial in accordance with law.

4. The trial court framed Charge (Exh.13). The appellant pleaded not guilty. His defence was of false implication.

5. To bring home the charge, the prosecution has examined four witnesses and produced in evidence certain documents. The trial court, on appreciation of the evidence in the case, convicted the appellant and consequently, sentenced as stated above.

6. Heard learned counsel for the parties.

7. Learned counsel for the appellant would submit that the victim, in her cross-examination, did not stand by the prosecution. The victim was not declared to have been won over by the appellant. As such, whatever has been deposed to by her in her examination-in-chief, has been washed out during her cross-examination. The

victim's mother also did not stand by the prosecution. The medical screening report of the victim would, therefore, be of little consequence. He, therefore, urged for allowing the appeal.

8. Learned APP supports the impugned judgment and order. Learned counsel for respondent no.2 – victim submitted for rejection of the appeal.

9. Let us advert to the evidence on record and appreciate the same.

PW 1 – Hajuri Kaur was in-charge Headmistress of Guru Teg Bahadur Primary English School, Osmanpura, Aurangabad. She tendered in evidence the extract from the victim's school admission register (Exh.24). During cross-examination, she testified to have no personal knowledge about the date of birth of the victim. She, however, testified that according to the school record, the date of birth of the victim is 18.12.2004.

10. PW 2 – 'X' (victim) testified on oath. It is in her evidence that she was born on 18.12.2004. She was residing along with her mother, brother and appellant (step-father). One Raju Bhalerao was her biological father. Two years before the alleged incident, marriage between her mother and said Raju was dissolved by a decree of

divorce. Her mother got remarried with the appellant. All of them, therefore, started residing near Morya Mangal Karyalaya. Initially, the appellant was behaving properly. Once, her mother was out of the house. The appellant touched the victim's private part. He removed her clothes and did sexual intercourse with her. The appellant had threatened her if she disclose the same to her mother. The appellant did the same thing many a time, whenever her mother and brother used to be away from home. It is her further case that then they shifted their residence to Ramanagar. On the given day (02.09.2021), her mother had gone to Beed-bye-pass road for some work. Her brother had gone for tuition. It was about little past 02.00 p.m. The appellant again did sexual intercourse with her. The victim related the same to her mother on her arrival. The mother, therefore, accompanied her to the police station.

11. During the cross-examination, what has been deposed to by PW 2 - victim in her examination-in-chief, has been rendered unreliable. In response to the questions put to her in cross-examination, she testified that after taking admission in the school, she realised that her date of birth was 18.12.2002. It is further in her evidence that since before marriage of her mother with the appellant, he (appellant) was residing with them. The appellant was addicted to alcohol. He used to hurl abuses to her and her mother.

Because of his harassment, her mother and herself had got fed up. It is further in her evidence that on having been fed up, they decided to approach the police station. It is further in her evidence that she, therefore, approached the police on 02.09.2021 to lodge the report about harassment meted out to her by the appellant. It is further in her evidence that the police had called the appellant to the police station in their presence. The appellant was under influence of alcohol. Quarrel between him and the police took place at the police station. It is further in her evidence that the police had asked her mother and herself to sit in a separate room. The police obtained all the information about the appellant from them. It is further in her evidence that the police obtained her signature on typed papers. She went on to state that the police did not read over the contents of the said document. It is further in her evidence that before recording her statement under Section 164 of the Code of Criminal Procedure, the police had called her. She was provided with a written paper and was asked to state accordingly, during recording of such statement. The victim went on to state that except the harassment meted out to her by the appellant under influence of liquor, he did nothing with her. To top of it, she testified to have been treated by the appellant like his daughter. According to her, there was no any other kind of relationship between her and the appellant.

12. PW 3 - 'Y', mother of the victim, was also examined. She too did not stand by the prosecution. Learned APP did cross-examine her extensively. However, nothing fruitful could be brought on record. She too was subjected to cross-examination on behalf of the appellant. It is in her evidence that the appellant would illtreat her under consumption of alcohol. He uttered abusive words. So, she and the victim had been to the police station to lodge report against him. It is in her evidence that on the date of lodging of the report, the appellant had consumed liquor very much. After lodging of the report, the appellant was called to the police station. He had quarreled with the police. It is further in her evidence, that the police obtained signature of the victim and herself on written papers. She went on to admit that the victim was more than 19 years of age, while the report (FIR) was lodged. She testified that the victim's date of birth in the school record was incorrect.

13. The medical screening report (Exh.35) indicates that there were no signs of use of force. The Medical Officer reserved her final opinion, pending the availability of the F.S.L. report. Sexual intercourse, however, could not be ruled out.

14. C.A. report (Exh.51) do not support the prosecution case. No semen was detected on 'vaginal swab'. No semen was detected

on the clothes including knicker of the victim. Same is the case of vaginal and verbal swab and smear of the victim.

15. In view of the aforesaid evidence on record, the trial court ought not to have convicted the appellant. We are, therefore, not at one with the findings recorded by the trial court. Interference with the impugned order of conviction and sentence is, therefore, warranted.

16. In the result, the appeal succeeds. Hence, the following order :-

i) The Criminal Appeal is allowed.

(ii) The Judgment and Order dated 22/06/2022, passed by the learned Special Judge [POCSO Act], Aurangabad in Special Case No.342/2021 convicting and sentencing the Appellant for the offences punishable under Section 506 of the Indian Penal Code, Sections 4, 5[l] r/w 6, 5[n] r/w 6, 8, 9[l] r/w 10 and 9[n] r/w 10 of the Protection of Children from Sexual Offences Act, 2012 and Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015, is set aside.

(iii) He stands acquitted of the offences for which he was convicted and consequently sentenced under the order impugned herein.

(iv) He be released forthwith, if not required in any other case.

(v) Fine amount paid by the Appellant, if any, be refunded to him.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP