



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 1262 OF 2019
WITH
CRIMINAL APPLICATION NO. 2718 OF 2023
IN CRIMINAL APPEAL NO. 1262 OF 2019**

Anil s/o Sunil Pawar
Age 23 years, Occupation Labour,
R/o Bajrang Nagar, Beed,
Taluka and District Beed.

... Appellant
[Orig. Accused]

Versus

1. The State of Maharashtra
For the Shivaji Nagar Police Station,
Beed, Taluka and District Beed.

2. XYZ

... Respondent

.....

Mr. Abhaykumar D. Ostwal, Advocate for the Appellant (appointed).
Mr. D. J. Patil, APP for Respondent No.1-State.
Mr. Suhas R. Shirsat, Advocate for Respondent No.2.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 25.04.2024

Pronounced on : 09.05.2024

JUDGMENT :

1. Correctness, legality and sustainability of the judgment and order passed by learned Special Judge, Beed in Special (POSCO) Case No. 22 of 2017 recording guilt of appellant for offence punishable

under Sections 363, 366 376(2)(i)(j) of the Indian Penal Code [IPC] and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act] is under consideration in this appeal.

IN BRIEF PROSECUTION CASE IS AS UNDER

2. Victim aged 15 years, 3 months and some days old, had been to fetch water on 11.05.2017 at about 10.45 hours. Accused appellant, who was on his motorcycle, issued threats to kill victim's parents and forcibly took her on his motorcycle. She was taken to various places like Harki Nimgaon, Hadgaon. During stay at Hadgaon and Harki Nimgaon, accused had sexual intercourse with her against her wish. Meanwhile, since victim and accused were both not traceable, mother of victim had lodged report at Shivaji Nagar Police Station, Beed on 11.05.2017 itself. Finally, on 27.05.2017, police who were on a lookout, found accused with the victim and they both were brought to police station.

3. Victim's statement was recorded. PW9, a lady police officer who was entrusted with investigation, carried out the same, gathered evidence, referred victim as well as accused to medical examination. Clothes over their person which were seized, were sent to analyzer,

necessary samples were got drawn and were also sent for analysis. After gathering sufficient evidence, appellant came to be chargesheeted and finally tried by learned Special Judge, Beed, vide Special (POCSO) Case No. 22 of 2017, who on appreciating and analyzing the evidence, held accused appellant guilty for offence punishable under Sections 363, 366, 376(2)(i)(j) of IPC and Sections 4 and 6 of POCSO Act and sentenced him to suffer imprisonment as well as to pay fine.

It is the above judgment and order which is challenged by appellant on various grounds raised in the appeal memo.

SUBMISSIONS IN BRIEF

On behalf of the appellant :

4. Criticizing the prosecution case, learned counsel for the appellant pointed out that here, at the outset prosecution had failed to establish that victim was a minor so as to invoke the provisions of POCSO Act. He pointed out that prosecution's evidence itself is confusing and there is no acceptable evidence about exact date of birth of victim. On this count, he took this Court through the evidence of victim, her mother as well as the Doctor who ran maternity home

and who placed extracts of register on record maintained by the hospital. Learned counsel has accused prosecution for fabricating and manufacturing the documents like birth certificate, hospital extract and he pointed out that in the very birth certificate relied by the prosecution, gender of victim is shown as male. He pointed out that Investigating Officer had not gathered documents like original birth certificate or original school record to establish victim to be a minor, even when chargesheet was filed by invoking the provisions under the POCSO Act. Consequently, according to him, prosecution having miserably failed to prove victim to be below 18 years of age, he questioned the very charge of prosecution as well as judgment and conclusion reached at by the learned Sessions Court.

5. Second attack of learned counsel on the prosecution version is that even going by the victim's evidence, it is apparent that she was not kidnapped. He pointed out that she has left the house on her own. According to him, it is impossible to kidnap a girl in broad day light, that too on a motorcycle from a crowded locality. Moreover, brother was also present there. He pointed out that there was no resistance or alarm, and the accusations of threats to kill parents is a concocted version and victim has deposed to that extent on being tutored out of fear of parents. He pointed out that there are allegations of traveling

miles and to different places and even staying for long time in house of relatives of accused, but victim did not attempt to inform parents or those relatives. Consequently, it is his case that she too was interested in the accused. According to him, there was in fact affair between both of them.

6. He pointed out that PW5 Doctor has deposed in the witness box about victim to be between 15 to 18 years of age, and so, he strenuously submits that, applying margin to such age, she might be 18 years of age and/or she had reached the age of discretion. He further pointed out that, it has come in the cross of victim and her mother that at the time of incident, victim's marriage was settled. This itself shows that victim was of marriageable age. For all above reasons, he submits that offence under Section 366 IPC ought not to have been invoked. He pointed out that even essential ingredients for attracting Section 366 IPC are patently missing from prosecution evidence and as such, he submits that, charges are misplaced and misconstrued.

7. As regards offence of rape is concerned, he submits that except tutored testimony of victim, there is no corroboration, either from independent corner or even from medical expert or forensic expert. He invited attention of the Court to the testimony of victim and

submitted that there are allegations of repeated physical contact, but there are no injuries of forceful act. There were no internal or external injuries and rather medical expert, on examination, noticed victim to have an old hymen tear. At such point he also puts up a case of consensual coitus. He pointed out that neither there is concrete medical opinion confirming rape, nor there is supporting forensic evidence. He also pointed out that in spite of DNA samples being subjected to analysis, reports are negative, thereby completely ruling out rape and consequently, he submits that very case of prosecution about rape also collapses as there is no convincing evidence whatsoever in that regard.

8. Lastly he submitted that accused is barely 23 years of age. There was affair as well as consensual acts. There was no forceful rape as alleged. That, prosecution had miserably failed to prove victim to be minor and that she was kidnapped and raped against her wish and will, and therefore he prays to allow the appeal by setting aside the impugned judgment.

9. Learned counsel for the appellant places reliance on following rulings:

1. *Parvej Khan v. State of Maharashtra, through the Bori Police Station and Another* 2023 SCC OnLine Bom 2705.
2. *Prakash Nishad alias Kewat Zinak Nishad v. State of Maharashtra* 2023 SCC OnLine SC 666.
3. *Maherban Hasan Babu Khan v. State of Maharashtra and Another* 2023 SCC OnLine Bom 1027.
4. *Maghavendra Pratap Siingh alias Pankaj Singh v. State of Chhattisgarh* 2023 SCC OnLine SC 486.
5. *Rahul v. State of Delhi, Ministry of Home Affairs and Another* (2023) 1 SCC 83.
6. *Anil Ratre v. State of Chhattisgarh through District Magistrate* 2022 SCC OnLine Chh 625.
7. *Ram Das v. The State of Madhya Pradesh* 1970 (3) SCC 211.
8. *S. Varadarajan v. State of Madras* 1964 SCC OnLine SC 36.
9. *Nura and Other v. REX* Indian Law Reports 1950 All. 787.

On behalf of the State :

10. In answer to above, learned APP pointed out that there is overwhelming evidence about age of victim. He pointed out that victim and her mother have given date of birth. The Doctor, in whose hospital birth of victim took place, has also been examined by prosecution. He further pointed out that on order of learned trial court, investigating machinery has procured very birth certificate issued by Municipal authority. That, such document categorically shows that victim was of 15 years 3 months and some days old and therefore, she being below 18 years of age, was proved to be a child. Resultantly, he submits that, once prosecution established victim to be minor, the offences of kidnapping, i.e. removal from guardianship without consent, having sexual intercourse, even though consensual, has no significance or bearing.

11. It is pointed out that victim has categorically stated that she was threatened and forcibly taken on motorcycle. That repeatedly accused had intercourse with her against her wish. Her evidence has remained unshaken in spite of lengthy cross. Her evidence is supported by her own mother. Coupled with this, according to him, medical evidence of

Doctor who examined victim, has also confirmed forceful act of rape. Resultantly, it is submitted that all charges for which appellant was tried, are cogently and firmly proved. Learned trial court has correctly appreciated the evidence and has reached to correct conclusion. That, There is no infirmity or perversity. Consequently, he prays to dismiss the appeal for want of merits.

On behalf of the victim :

12. Learned counsel for victim also supported the judgment of trial court pointing out that victim was minor. It is so proved by sufficient evidence. Victim herself having stated that there was sexual intercourse against her wish and moreover, she being minor, there is no question of consent and so, offence is complete once victim firmly deposed about she being raped number of times. Even he submits that there is medical corroboration. Therefore, all legal requirements for bringing home the charge of kidnapping and rape being established, it is his submission that trial Judge committed no error in recording guilt and he too prays to dismiss the appeal.

STATUS OF THE PROSECUTION WITNESSES

13. Prosecution has examined as many as 9 witnesses in support of its case. Their status and sum and substance of their evidence is as under:

PW1 is the victim. The gist of her evidence is that, her date of birth is 22.01.2002, accused to be their neighbour and he stalking her and even attempting to talk to her. On 11.05.2017 when she went out to bring water, he followed her, threatened to kill her parents and even threatened to obstruct her proposed marriage. Because of threats, she accompanied him on a motorcycle and he took her to Hadgaon and stayed at his relative's place for two to three days. There, he had sexual intercourse with her every day. Then he took her to Harki Nimgaon and stayed in a hut and there too, he had sexual intercourse against her. He sold her ornaments. On 27.05.2017, police came and brought them to Shivaji Nagar, Beed Police Station, where her statement was recorded. She was subjected to medical examination and produced before the Magistrate for recording statement under Section 164 of Cr.P.C.

PW2 Mother of victim also gave date of birth of victim as 22.01.2002. According to her, accused residing in the adjacent house used to follow her daughter and tease her. His family members were duly informed about his behaviour. On

11.05.2017 when her daughter went to fetch water around 10.30 a.m., she did not return. In spite of search, she was not found and they learnt from people about she being taken on a motorcycle. Therefore, she had approached police and lodged report Exhibit 28. According to her, victim was below 18 years of age.

PW3 maternal aunt of victim and sister of PW2 deposed that she learnt from her sister about victim being kidnapped. She and her sister both went to search for accused and victim where they learnt both going on motorcycle and therefore, they approached police.

PW4 younger brother stated that on 11.05.2017, while playing out of the house, he saw his sister going to bring water in front of the house of Shri Kulkarni. That time, he saw accused standing on road with Hero Honda motorcycle and he further saw accused and his sister proceeding and he also claims to have given call to wait. Thereafter he informed his mother.

PW5 Medical Officer, who examined victim, noted history and issued opinion that victim was between 15 to 18 years of age. According to this Medical Officer, there were tears to hymen but old healed. She issued report Exhibit 44, and gave opinion about sexual violence cannot be ruled out.

PW6 is the pancha to spot panchanama Exhibit 51.

PW7 is the maternal uncle and pancha to seizure of mobile phone of accused.

PW8 is the Doctor in whose hospital PW2 delivered victim. She placed on record hospital papers Exhibits 65, 66 and 67.

PW9 PSI Sonar is the Investigating Officer, who narrated all steps taken by him during investigation.

14. Heard at length. The main grounds of challenge in appeal could be summarized as under:

1. Failure of prosecution to prove victim to be a minor.
2. No corroboration to the testimony of victim and her mother on the point of kidnapping.
3. There being previous acquaintance and affair, sexual relations were consensual.
4. Medical evidence belies and falsifies rape.
5. Scientific evidence not supporting prosecution version.

15. In the light of nature of charge and controversy being raised about age, this Court is now called upon to decide at the threshold

whether, as claimed by prosecution, victim is established to be a minor. Once controversy to this extent is resolved, the aspect of applicability of provisions of POCSO Act as well as offence of kidnapping and rape come into play for consideration.

16. On age, the sum and substance of argument is that, there is no proof of age. Victim and mother admit about marriage of victim to be fixed. Medical opinion about age group between 15 to 18 years and applying margin available, victim is not minor. Learned counsel for the appellant also emphasized that at the time of filing chargesheet or even after commencement of trial, there was no age proof and midway trial court directed Investigating Officer to procure evidence of age and consequently, Investigating Officer managed and produced fabricated documents of birth and age.

17. It is true that record does show that charge-sheet was filed on 04.07.2017. Order of trial court dated 16.10.2018 shows that learned Special Judge passed order below Exhibit 1 noting that Investigating Officer has not collected birth extract which is a basic document in case under POCSO Act, and therefore, directions seem to have been issued to seek documents and place it before the court. Resultantly, what is emerging is that, in the midst of the trial, evidence about age

of victim is tendered in the court. In the considered opinion of this Court, the above referred failure of Investigating Officer to gather and annex proof of age at the inception stage and at the time of filing charge sheet could be at the most termed as a lapse on his part. In a case of such nature, such lapses itself would not be sufficient to cast doubt about the evidence gathered subsequently and straightway term it as a manufactured document or fabricated evidence.

18. Here, PW1 a victim, herself deposed at Exhibit 25 and gave her date of birth as 22.01.2002 and that she was in 10th standard. In cross she has denied completing 10th standard in 2017 itself. She denied that her results were also declared on the date of incident i.e. 11.05.2017. She further denied that she was studying in 11th standard. She answered that she undertook education up to 7th standard in Shivneri Vidyalaya, but thereafter, i.e. 8th standard onwards to 10th standard she was in Adarsha Vidyalaya. She admitted that prior to the incident in question, her marriage was settled.

19. PW2 mother of victim and complainant also in her evidence at Exhibit 27 gave date of birth of her daughter as 22.01.2002. She also gave the name of hospital where she delivered victim. While under cross, she answered that she had informed date of birth of victim

while giving statement to police, but she is unable to assign reason why it is not appearing. She also admitted that at the time of incident, marriage of victim was fixed.

20. PW5, a Medical Officer and a gynecologist claims that victim was referred to dental examination and radiological examination and the findings received from these departments were noted and as per the report, the age of victim was between 16 to 18 years.

21. PW8 is the Doctor who runs hospital at Beed by name Prashant Hospital. In her evidence at Exhibit 64, she deposed that she was carrying original register maintained by her hospital. Referring to Delivery Register page 12, she pointed to the entry at serial number 56 of year 2002 and narrated name of mother with her address for having delivered female child on 22.01.2002. She further deposed that in 2002, they were intimating Nagar Parishad all deliveries taking place. She placed photocopies of the record before the court as true and correct as per the original and same were marked as Exhibits 65, 66 and 67.

While under cross, this Doctor admitted that in the register carried by her, register number of the form sent to Nagar Parishad is

not noted. She also admitted that the office copy of the form relating to victim sent to Nagar Parishad is not maintained and therefore not brought. She is unable to remember whether register of 2002 is maintained or not. She further answered that at present they are intimating birth of child to Nagar Parishad by online process. She admitted that she did not obtain signature of parents in the register before information was sent to Nagar Parishad. She is unable to state when patient was admitted in hospital. She answered that delivery being of 2002 and it having taken place 5 years back, they did not keep the record and so it is not available. She is also unable to state after how many days from birth of baby, intimation was forwarded to Nagar Parishad.

ANALYSIS AND SUMMATION ON THE AGE

22. This Court has meticulously and carefully gone through the evidence of victim, her mother as well as both medical experts. It is clearly emerging that in the very opening para, victim gave her date of birth as 22.01.2002. She admitted in para 5 of her cross that her marriage was settled and invitation cards were also printed. But she again corrected herself and stated that marriage cards were not printed. She admitted that now she is already married with the boy with whom her marriage was settled prior to the incident. She

admitted having two brothers. In para 7, she flatly denied that her parents performed her marriage after she completed 18 years of age. Rather she volunteered that because of this incident, her parents have performed her marriage even when she was 17 years of age.

23. Likewise, mother PW2 also in the very opening para gave date of birth of her daughter as 22.01.2002. It is merely brought in cross that date of birth is not appearing in the complaint, but she ascertained in cross that she did inform police the date of birth as 22.01.2002.

Therefore, here, both victim and mother are specific and categorical about date of birth as 22.01.2002.

24. Though PW5 noted radiological opinion as 16 to 18 years, it is not the only evidence as regards age is concerned because here, prosecution has taken care to examine the gynecologist who ran maternity home where PW2 delivered baby girl, i.e. PW8, and her testimony is already discussed in aforesaid para. She (PW8) is an independent witness. There is no reason for her to oblige investigating machinery by fabricating documents regarding delivery of PW2 at her maternity home. She has carried the record and those documents are

exhibited by trial court at Exhibits 65, 66 and 67. Except branding documents to be fabricated, there is nothing concrete in support of such accusation. PW8 has explained the procedure of intimating Nagar Parishad of all deliveries and births. It is upon such source, Investigating Officer has gathered birth certificate Exhibit 79. It is true that gender of the new born in said document is shown as male but it can be attributed to be a typographical mistake. PW8 has given date of delivery as well as gender of the new born as female. Therefore, there is credible evidence regarding birth of victim on 22.01.2002. In the light of above material on record, even in the considered of this Court, prosecution did establish that on the date of incident i.e. 11.05.2017, victim was below 18 years of age.

Controversy on age having been settled, it is to be seen whether remaining charges under Section 363, 366 and rape/sexual assault are also cogently, firmly proved beyond reasonable doubt.

KIDNAPPING AND SECTION 366 OF IPC

25. Prosecution charge is that, victim, a minor, was removed from the lawful custody of her parents and hence the charge under Section 363 IPC. Section 363 of IPC reads as under :

“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.”

What amounts to ‘kidnapping from lawful guardianship’ is dealt with in Section 361 IPC which reads as under:

“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 the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

Thus, the essential ingredients of Section 363 IPC can be summarized as under:

- (i) That the accused did forceful compulsion or inducement by deceitful means.
- (ii) The object of such compulsion or inducement must be the going of a person from any place.
- (iii) That such kidnapping or any person was done from India or from the lawful guardianship.

26. Again, evidence of victim and her mother is of significance. Visiting the evidence of victim, which is reproduce in foregoing para, it is observed that she left the house to fetch water. She claims that accused followed her, threatened to harm her parents and even threatened to create obstructions in her marriage and precisely for the said reason, she claims that, she accompanied him on the motorcycle and he took her to various placed till being apprehended. Mother has lodged report finding her girl missing. Therefore, there is clear evidence that there is removal of minor from the custody of mother. A feeble attempt is made by learned counsel to question prosecution version on this count by stating that victim herself left the house and there was no kidnapping. It is true that victim left the house on her

own but it was not for accompanying accused, rather she had been to fetch water and from there, accused took her on motorcycle. The act being without consent of parents, rigors of Section 363 IPC get attracted. Therefore, evidence of victim herself is sufficient to hold charge of kidnapping as proved.

27. As regards Section 366 IPC is concerned, it is incumbent upon prosecution to establish that kidnapping was with sole intention of performing marriage. Here, it is pertinent to note that testimony of victim is absolutely silent that she was kidnapped on the pretext of performing marriage. Therefore, required ingredients of Section 366 IPC are not available to hold accused guilty for the same.

CHARGE OF RAPE/OFFENCE UNDER POCSO ACT

28. The fate of even such charge rests entirely on the testimony of victim and examining doctor.

29. The testimony of victim on above aspect, which is in para 2 of her evidence at Exhibit 25, is reproduced for the sake of proper comprehension.

“..... Thereafter he took me to Hadgaon in the house of his relative. We reached to Hadgaon at about 04-00 p.m. He. told his relatives that I am daughter of his relative. We resided there for 2-3 days. **He did sexual intercourse with me against my wish every day.** We resided at Harki Nimgaon in small hut. **He did sexual intercourse with me in that hut against my wish.”**

Cross examination on above aspect is found in para 7. She answered that she told family members and female members in the house of relative of accused that accused kidnapped her and had forcible sexual intercourse with her. She answered that they told her not to speak anything even to police. Thereafter, cross on sexual intercourse is abandoned. Therefore, above is the only cross on forceful sexual intercourse.

30. PW5 is the doctor who examined victim. This independent witness narrated and reproduced the history given by victim regarding intercourse against her will at Hadgaon till 17.05.2017 and at Harki Nimgaon between 17.05.2017 to 28.05.2017. Expert deposed that there were no external injuries. However, she noticed hymen torn and position of tear at 3, 9, 2, 7 O'clock and age of tear to be old healed. She deposed that after the examination of genitals, she recorded

finding about sexual intercourse to have occurred. In final opinion, she gave finding as sexual violence cannot be ruled out.

Above evidence about findings on examination have not been apparently touched while cross-examining above expert.

31. Therefore, victim is categorical about sexual intercourse against her wish. She is already proved to be a minor. Medical evidence is also clear about tear to the hymen. True it is that it is old and healed, but examination is on 29.05.2017 whereas, accused had sex with victim between 17.05.2017 to 27.05.2017. PW5 has confirmed sexual intercourse as well as opined that sexual violence cannot be ruled out. Resultantly, evidence of victim is deriving strength from medical evidence.

Therefore, charges under Section 376(2)(i)(j) of IPC and Section 4 and 6 of POCSO Act stand proved.

32. Now let us deal with the other grounds and objections raised by learned counsel for the appellant.

Learned counsel for the appellant would point out that in this case, there has been unfair trial of appellant. According to him, the counsel who first appeared on behalf of accused, for the best reasons known to him, had tendered pursis before the court seeking discharge from representing accused. It is pointed out that his such pursis is brought on record. He further pointed out that on same day, accused had sought appointment of counsel through legal aid, but learned trial Judge, without appointing counsel from legal aid and without adjourning the matter, surprisingly appointed very counsel who initially appeared, i.e. Advocate Kolhe, and for the best reasons known to it, he was allowed to conduct trial on behalf of accused. He pointed out that in quick succession dates were given and therefore, the counsel who was unwilling to defend accused, was made to continue and therefore there was no effective cross and hence unfair trial. Consequently learned counsel prays that it is a fit case for remand for *de novo* trial. In support of such submissions, he sought reliance on ***Naveen alias Ajay v. State of Madhya Pradesh*** 2023 SCC OnLine SC 1365.

33. In the light of above submissions, this Court is constrained to visit the record and on going through the roznama, it is seen that Sessions Case came on the file of the Court on 04.07.2017 and trial

commenced since 12.11.2018 on which day evidence of victim was recorded. At that time, State was represented by Advocate Hasegaonkar, whereas accused is shown to be represented by Advocate G. B. Kolhe. On 27.11.2018, evidence of victim's mother seems to be recorded. On 21.01.2019, Advocate Kolhe seems to have filed pursis Exhibit 59 seeking permission to withdraw his appearance. On same day, i.e. on 21.01.2019, there is application by accused for legal aid vide application Exhibit 60/C and on said application, there is order of the trial Judge observing that Advocate G. B. Kolhe conducted the matter and so he is appointed as Advocate for the accused and accused to provide all information to him, office to pay necessary charges as per rules and to inform said order to D.L.S.A. Thereafter, again Advocate Kolhe seems to have resumed representing accused. Thus, the counsel who finally sought to withdraw his appearance, seems to have been made to continue appearing for accused and defend him.

34. As many as 9 witnesses seem to have been examined by prosecution. On visiting the cross faced by each of the witnesses, there is no reason to hold that there was improper cross as all relevant questions seem to have been put according to the status of the witnesses. It was a case under POCSO Act and therefore, learned trial

Judge seems to have conducted trial even by putting court questions. Therefore, there is no reason to hold that there was unfair trial. It is also not a case that an incompetent or inexperienced Advocate was made to defend accused. On the contrary, the counsel engaged by him at the inception and who even cross-examined crucial witnesses like complainant and victim, is further made to continue cross-examination and defend the case of accused. There is nothing to hold that there was any prejudice caused or there is mistrial or unfair trial. All documents relied by prosecution are made available. Cross-examiner also seems to have put relevant questions. Therefore, this Court finds no substance in the argument that there is unfair trial and so case is required to be remanded back for *de nove* trial. No contingency or case to that extent being brought to the notice of this Court, such plea is turned down.

35. Learned counsel for the appellant also strenuously submitted that forensic and scientific evidence also does not support prosecution.

If we scan the evidence, it is emerging that complaint is lodged by PW2 mother on 11.05.2017. According to victim, on 27.05.2017 police came at Harki Nimgaon and brought herself and accused at

Shivaji Nagar Police Station, Beed. Evidence of PW9 Investigating Officer shows that victim was referred to medical examination with lady constable vide letter Exhibit 43. PW5 Medical Officer claims that on 29.05.2017 victim was produced for medical examination. On same date, Doctor collected necessary samples like vaginal swab, blood, nails, pubic hair etc. for C.A. After arrest of accused, he was also subjected to medical examination. Cloths of both, victim as well as accused, are seized of which there is not dispute. C.A. reports at Exhibits 47, 48 and 49 go to show that articles were sent to C.A. i.e. clothes of victim on 12.06.2017, biological samples of accused sent on 30.05.2017, whereas biological samples of victim are shown to be dispatched to C.A. on 29.05.2017.

36. It is to be borne in mind that from the evidence of victim, it has come on record that from 11.05.2017, while they were staying at Hadgaon for two to three days, accused had sexual intercourse with her against her wish every day. As stated above, they were brought to police station on 27.05.2017 and samples and clothes are seized thereafter and sent for analysis. Obviously, because of lapse of time and clothes not shown to be unwashed or clothes on the person of both, accused and victim, to be the same which they were wearing at the time of incident, analytical results are obviously going to be nil.

37. Mere scientific evidence not being concrete, the other incriminating evidence i.e. credible evidence of victim coupled with that of doctor, cannot be ignored or rendered doubtful. FSL report or forensic reports have mere corroborative value and nothing beyond that. Law is fairly settled that even failure of police machinery to send seized clothes to forensic laboratory is held insignificant once the court believed victim's version. Here, precisely, this court has found victim's version to be carrying ring of truth and therefore, non-availability of other scientific evidence, should not come in the way to disbelieve prosecution version.

38. To sum up, there is credible and trustworthy evidence on age of victim. On the date of occurrence she is proved to be a minor. She was removed from the custody of her mother without consent. Thus, charge of kidnapping gets attracted. Sexual intercourse being against her wish, and she being minor, offence under Section 376(2)(i)(j) of IPC and Sections 4 and 6 of POCSO Act also would get attracted.

39. On going through the judgment under challenge, there is no illegality, perversity or infirmity in the appreciation, except regarding findings on Section 366 IPC. Rest of the findings are in consonance with the evidence on record. Resultantly, I proceed to pass following order :

ORDER

- I. The Appeal is partly allowed.
 - II. The judgment and order dated 10.04.2019 passed by learned Special Judge, Beed in Special (POCSO) Case No. 22 of 2017 is upheld except conviction for offence under Section 366 of IPC.
 - III. Clause (2) of the operative part of the order convicting appellant for offence punishable under Section 366 of IPC is hereby quashed and set aside
 - IV. The appellant is acquitted of the offence punishable under Section 366 of IPC.
 - V. Rest of the judgment and order of conviction is hereby kept intact and maintained.
 - VI. In view of disposal of the appeal itself, nothing survives for consideration in Criminal Application No. 2718 of 2023 and the same also stands disposed of.
 - VII. Fees of the counsel appointed to represent the appellant is quantified at Rs.15,000/- [Rupees Fifteen Thousand only] to be paid by High Court Legal Services Sub Committee, Aurangabad.
40. On pronouncement of judgment, learned counsel Mr. Abhaykumar D. Ostwal, appointed to represent the appellant

expressed his willingness to donate his legal fees, which is quantified at Rs.15,000/-, to the Government Cancer Hospital, Chhatrapati Sambhajinagar. Office to take steps accordingly.

[ABHAY S. WAGHWASE, J.]

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