

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 433 OF 2019

Dhanaji Navnath Aahire	..Appellant
Versus	
The State of Maharashtra & Anr.	..Respondents

Mr. Jaydeep D. Mane (Appointed Advocate) for Appellant.

Mr. Prashant P. Jadhav, APP for State/Respondent.

Mr. Yashpal Thakur (Appointed Advocaee) for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 20 JUNE 2024**

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 21.02.2019 passed by the Sessions Judge, Sindhudurg, Oros, in Special Case No.20 of 2017. The Appellant was convicted and sentenced as follows:

- i. The Appellant was convicted for the offence punishable under section 363 of the I.P.C. and was sentenced to suffer R.I. for three years and to pay a fine of Rs.1000/- and in default to suffer S.I. for six months.

- ii. He was convicted for the offence punishable under section 366 of the I.P.C. and was sentenced to suffer R.I. for three years and to pay a fine of Rs.1000/- and in default to suffer S.I. for six months.
- iii. He was convicted for the offence punishable under section 376 of the I.P.C. and U/s.4 of the Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act') and was sentenced to suffer R.I. for seven years and to pay a fine of Rs.2000/- and in default to suffer S.I. for six months.
- iv. He was convicted for the offence punishable under section 8 POCSO Act and was sentenced to suffer R.I. for three years and to pay a fine of Rs.1000/- and in default to suffer S.I. for six months.
- v. He was acquitted of the offence punishable U/s.12 of the POCSO Act.

All the substantive sentences were directed to run concurrently. The Appellant was given set off U/s.428 of the Cr.p.c.

2. As per the Charge, the prosecution case is as follows:

The date of birth of the victim in this case was 10.01.2003. On 15.07.2017, at about 11:45p.m. the appellant

abducted her on his motorcycle from the lawful guardianship of her parents. He took her to a lodge at Kavthe-Mahankal and thereafter to a tin shed at village Pimpalner. He committed rape on her and thus, committed the offences for which he was convicted.

3. The complaint was lodged by the victim's parents. The appellant was arrested. The investigation was carried out. The statement of the victim was also recorded. The charge-sheet was filed and he faced the trial before the learned Special Judge; as mentioned earlier.

4. During trial, the prosecution examined 13 witnesses including the victim, her mother who had lodged the F.I.R., the Medical Officer, the Manager of the lodge and the persons connected to the schools where the victim had studied, to prove her date of birth through school record. The police witnesses in the form of carrier of the articles, and the investigating officer, as well as, the pancha witnesses were also examined.

5. The defence of the appellant was of total denial. He had filed a written statement U/s.313 of the Cr.p.c. in which, he had

taken a stand that PW-1 was fed up with her parents and she had left her house on her own. The Appellant, in fact, helped her parents in searching for PW-1, but because of the grudge that PW-1's parents were holding against the appellant, this false case was lodged against him. The learned Judge after considering the evidence on record, the defence taken and after hearing the parties, convicted and sentenced the appellant as mentioned earlier.

6. The main evidence in this case is that of the victim-PW-1 herself. She has stated that her date of birth was 10.07.2003, however, the school record shows that her date of birth was 10.01.2003. She knew the appellant. He was residing near her house. On 15.07.2017, after having dinner she was sleeping in her bedroom. In the night, she had pain in stomach. She told her mother about it who gave her some tablet and then PW-1 slept. At about 11:00p.m. she went out of the house for answering nature's call. The appellant was standing outside their house. It is her case that, he pressed her mouth and latched the door of the house from outside. It is her case that, he forced her to sit on his motorcycle by

threatening to kill her. She got scared. She was taken to Kolhapur. They reached there at about 3:00a.m. He took her to a lodge and had sexual intercourse with her. In the evening, he took her to Kavthe Mahankal. Again he took her to a lodge and kept physical relations with her in that lodge. Then they went to Pandharpur on his motorcycle. He suggested that, they could marry there. From there, the appellant took PW-1 to his village and kept her in his house with his parents. Then he took her to Pimpalner. There he kept her in a tin shed situated in sugarcane garden. The police came there and took both of them to Devgad police station. Her statement was recorded. She was referred to medical examination. Her clothes were seized. She identified her clothes and the appellant in the court.

In the cross-examination, she stated that she studied in Zilla Parishad school at Radde. In between, she stayed with her grand mother for two years and did not attend the school during that period. She was in a school at Talebazar since 6th standard. She denied the suggestion that she was having love affair with the appellant and that her parents were opposing the relationship. She

also denied the suggestion that, she herself told the appellant that she was fed up of her parents and that she wanted to marry him. She further stated that, when they were going on the appellant's motorcycle, she did not shout because her mouth was tied. When they stayed in a lodge, she tried to run away. The appellant did not allow her to leave the lodge. He used to bring food in the room. She had not stated in her statement before the police that, they had stayed with the appellant's parents. She denied the suggestion that the appellant did not have physical relations with her. She also denied the suggestion that, on the date of incident she was above 18 years of age.

7. PW-2 was the mother of the victim. She had narrated how the victim went missing in the night on 15.07.2017 and how they searched for her. She deposed that, in the night she found that the door of the house was latched from the outside. Her son went out of the house by climbing the wall and then opened the door. The appellant was also missing. PW-2's family tried to contact the appellant through his mobile phone. It was switched off. They suspected the appellant's role in the missing of PW-1. She

then went to the police station and lodged her F.I.R. The F.I.R. is produced on record at Exhibit-17. In the F.I.R. itself the date of birth of PW-1 was mentioned as in the year 2003. The suspicion was expressed against the appellant. The F.I.R. was lodged at Devgad police station vide the C.R.No.77 of 2017 U/s.363 of the I.P.C. In her deposition, she has stated that the date of birth of the victim was 10.01.2003. She identified PW-1's clothes produced in the court.

In the cross-examination, she deposed that, she obtained the birth certificate of her daughter prior to one month of her deposition. PW-2's marriage was performed prior to 17 to 18 years. She further deposed that, PW-1 was admitted in the Zilla Parishad school in the 1st standard at Radde. After that, PW-1 was admitted in the school at Devgad in the 6th standard. She also admitted that, on the date of incident, her purse with her *mangalsutra* was lost. This question was asked to suggest that PW-1 had left on her own will with some ornaments and money.

8. PW-3 Neha Deshpande was a pancha in whose presence the victim's clothes were produced on 19.07.2017 in the morning, and, in the afternoon, the clothes of the appellant were also seized. At that time, the appellant was present in the police station. Two separate panchanamas were carried out which were produced on record at Exhibit-20 and 21. She admitted that, on both these occasions, the clothes of the victim, as well as, of the appellant were already kept on the table in the police station. This particular admission is important and, therefore, seizure of the clothes and subsequent C.A. reports lose their significance to a large extent, though, C.A. reports show that there was some semen on the clothes of the appellant as well as the victim.

9. PW-4 Tushar Walvi was the pancha in whose presence the spot was shown by PW-2. It was their house from where PW-1 was abducted. The spot panchanama is produced on record at Exhibit-26. Nothing much turns on this spot panchanama because it is hardly in dispute that PW-1 was missing from her house.

10. PW-5 Dr. Chandso Shikalgar had examined PW-1. There was no injury on her private parts. Her hymen was not intact. His opinion was that, PW-1 was subjected to penetrative sexual intercourse.

11. PW-6 Sagar Kolhapure was the Manager of the lodge at Kavthe-Mahankal. He has deposed, that on 17.07.2017, at about 10:30p.m., the appellant came there with a girl and rented a room in the night. The appellant produced his Aadhaar card. The girl's name was given as PW-1's name. He entered her name in the register. They occupied room No.106 in the hotel and they left at about 2:30a.m. He produced the relevant entry from the extract of the register at Exhibit-31.

In the cross-examination, he deposed that the said entry was in a different ink, but he explained that he could have used different ink at that time. The said extract at Exhibit-31 shows that all those entries were made in ordinary course.

12. PW-7 Mukesh Parkar was another pancha in whose presence the appellant showed different places including the

lodges where the appellant had taken PW-1. But since nothing further was discovered in those panchanamas, his evidence can be left out of consideration.

13. PW-8 Amol Burte was a carrier who had carried seized articles to the Forensic Laboratory. However, since the seizure of the clothes was doubtful, this particular evidence can also be left out of consideration.

14. PW-10 PSI Prabhakar Shivgan was the investigating officer. He has deposed about carrying out panchanamas, recording statements of the witnesses and collecting school leaving certificates. He also caused the statements of PW-1 and 2 to be recorded by the Magistrate U/s.164 of the Cr.p.c.

In the cross-examination, he admitted that, he did not have birth certificate of PW-1. He did not get ossification test conducted and he did not record the statement of the Head Master of the school at village Radde. Apart from that, there is nothing much in his cross-examination.

15. PW-12 Vaibhav Kelkar was the Photographer who had

produced various photographs of the house and other spots. Nothing much turns on his evidence.

16. The important witnesses in this case are PW-9, PW-11 and PW-13 in respect of the evidence regarding age of the victim PW-1.

17. PW-9 Suryakant Palekar was a Supervisor in Mahatma Gandhi Vidyamandir, Talebazar, Taluka Devgad. He deposed that, he was asked by the Head Master by giving authority to give evidence in this case. He deposed that, PW-1 had taken admission in their school on 31.07.2013. Before that, she was studying in Shree Laxmidevi Vidyamandir School at Radde. She had brought her school leaving certificate from that school to PW-9's school and accordingly the entry was made in the general register at Sr.No.4866. As per the entry, her date of birth was 10.01.2003. It was mentioned as per the previous school leaving certificate. PW-1 had taken admission in Mahatma Gandhi Vidyamandir at Talebazar in 6th standard. PW-9 brought the previous school leaving certificate. It was produced on record at Exhibit-43. The

entry in the general register was produced at Exhibit-44.

Only cross-examination of this witness was that, he himself had not made entries in the general register and that, he did not have personal knowledge about the entries. The bonafide certificate of Mahatma Gandhi Vidyamandir at Talebazar was produced at Exhibit-45 and here again her date of birth was mentioned as 10.01.2003.

18. PW-11 Sadashiv Patil was the Head Master of Mahatma Gandhi Vidyamandir, Talebazar. He deposed that, PW-1 took admission in their school on 31.07.2013. Before that, she was studying in Shree Laxmi Vidyamandir, at Radde. She had produced her school leaving certificate of Shree Laxmi Vidyamandir school at Radde while taking admission in PW-11's school. In short, his evidence is similar to the evidence of PW-9. He also identified the school leaving certificate of Shree Laxmi Vidyamandir at Radde which was produced at Exhibit-43 and the other entries.

In the cross-examination, he admitted that, he had not made those entries personally.

19. PW-13 Bandopant Mahamore was the Head Master of Shree Laxmidevi Vidyamandir at Redde. He was working as Assistant Teacher in that school since 1988. He brought the admission record of PW-1 who had taken admission in their school on 18.06.2012, before that, she was studying in Zilla Parishad Primary school at Redde. Her admission entry was at Sr.No.2531. The entire school record and the birth date was entered as per her previous school leaving certificate. Her date of birth was 10.01.2003. She had studied upto 5th standard in their school and after obtaining the school leaving certificate from PW-13's school, she took admission in Mahatma Gandhi Vidyamandir at Talebazar.

In the cross-examination, he deposed that, he did not have personal knowledge about PW-1's entry made in the register in the year 2012. Apart from that, merely suggestions were put to him that he was deposing falsely which he had denied. There is absolutely no important cross-examination of this witness particular in respect of the school leaving certificate of the Z.P. Primary School at Redde. Therefore, his evidence and entries produced on record at Exhibit-76 and 77 have remained

unchallenged.

This, in short, was the prosecution evidence.

20. Learned counsel for the Appellant submitted that, from the nature of the evidence, it is quite clear that it was a consensual physical relationship. The victim did not raise any shouts while the appellant had taken her from her house to various places in Kolhapur district. It was not possible to believe that, she had not accompanied the appellant willingly. He, therefore, submitted that the important question would be about her age. In that regard, the school record of the first school i.e. Zilla Parishad Primary School is not produced by the prosecution and, therefore, the fact that she was a minor is not proved by the prosecution. In this view of the matter, benefit of doubt be given to the appellant. Learned counsel submitted that there is no other corroborative piece of evidence.

21. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that, there is no requirement of producing the school record of the first school. Both of them relied particularly on Sub Section 2 of Section 94 of the Juvenile Justice

(Care and Protection of Children) Act, 2015.

Section 94 of the Juvenile Justice Act reads thus:

Presumption and determination of age.

94. (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining --

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be

completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

22. They submitted that, there is sufficient evidence on record to show that PW-1's date of birth was 10.01.2003. Three witnesses namely PW-9, PW-10 and PW-13 have deposed consistently. They have produced the register and the entries maintained in ordinary course of business. There was no reason to doubt those entries. There is no effective cross-examination of these witnesses and, therefore, it cannot be said that the prosecution has failed to prove that the victim PW-1 was below 18 years of age. They submitted that, even otherwise, PW-1's evidence shows that she was forced to accompany the appellant under threats and there was no consent given by her for keeping physical relations with the appellant.

23. I have considered these submissions. The important aspect in this case is about the evidence of PW-1. She is the victim in this case. She has deposed that, she knew the appellant as he

was residing behind their house. She had described the incident in the night of 15.07.2017. According to her, she was forced by the appellant to accompany him on his motorcycle to various places. The fact that PW-1 went missing in that night is deposed by PW-2 who had promptly lodged an F.I.R. expressing suspicion against the present appellant. Thus, it is proved beyond reasonable doubt that PW-1 was taken away by the appellant in the night of 15.07.2017 from the lawful custody of her parents. The evidence of PW-1 shows that, she was taken to various places including the lodges and a tin shed. Though, she had not narrated in her police statement, that she was taken to the parents of the appellant, she had deposed that fact only in his deposition. Otherwise, she has also stated that, she was taken to different places by the appellant.

24. The Medical Officer's evidence shows that she was subjected sexual intercourse. However, I find substance in the submissions of the learned counsel for the appellant that PW-1 had willingly accompanied the appellant to those various places. First of all, all these places were at distant places. On no occasion, she raised any shout or grievance to anybody else. The appellant

taking her on his motorcycle from her house suggests that even at that point of time she did not raise any shouts. The appellant had latched her house from the outside once PW-1 had come out of her house. There was absolutely no resistance on her part. It is difficult to believe that because of the threats given by the appellant, PW-1 was forced to come with him at various distant places.

25. Secondly, even as per the evidence of the Manager of the lodge who had produced the relevant entry, a girl had accompanied the appellant. His evidence does not show that, even at that point of time, PW-1 had raised any grievance or had complained to this witness that she was forced by the appellant to accompany him. There was no use of weapon or force on the part of the appellant. On the next day, she was taken to a different place. Even during that period, there was no resistance from her and she had not sought help from anybody else; though, she had sufficient opportunity. All this shows that PW-1 had willingly accompanied the appellant and, therefore, there is force in the submission that it was a consensual relationship.

26. However, even assuming that there was consent on the part of PW-1, the most important question in this case would be the age of the victim. If the PW-1 was below 18 years of age then the consent did not matter.

Section 375 of the I.P.C. reads thus:-

375. Rape.-- A man is said to commit "rape" if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

First. -- Against her will.

Secondly. -- Without her consent.

Thirdly. -- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. -- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. -- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. -- With or without her consent, when she is under eighteen years of age.

Seventhly. -- When she is unable to communicate consent.

27. The POCSO Act defines ‘minor’ U/s.2(d) as follows:

2. Definitions. - (1) In this Act, unless the context otherwise requires, -

(a)

(b)

(c)

(d) “child” means any person below the age of eighteen years;

28. Section 3 of the POCSO Act reads thus:

3. Penetrative Sexual Assault -

A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

29. Since the act was repeated more than once, even Section 5(l) of the POCSO Act would be attracted. Therefore, it is necessary to see the evidence adduced by the prosecution in respect of the age of the victim. In that context, as mentioned earlier, the evidence of PW-9, PW-10 and PW-13 is very important. The evidence of PW-9 and PW-10 is similar. They were attached to the same school at Talebazar. They have

proved the entries from their register and their school leaving certificate showing the date of birth of PW-1 as 10.01.2003. They have stated that the entry in their register was taken on the basis of school leaving certificate of Shree Laxmidevi Vidyamandir, at Redde. PW-13 was the Head Master of Shree Laxmidevi Vidyamandir school at Redde and as per that school record, PW-1's date of birth was 10.01.2003. He produced the relevant entry. As mentioned earlier, there was hardly any cross-examination of this witness in respect of the entry and the school leaving certificate issued by the said school. All these entries were made in the register maintained in the ordinary course of business. They were produced by the authorized persons from the school. Therefore, it did not matter that they themselves had not taken those entries in the register. The defence has not really challenged those entries through effective cross-examination. No reasonable doubt is raised in respect of those entries and in particular regarding the entries made in the school record of the Shree Laxmidevi Vidyamandir at Radde. It is not the case of the defence that the source of those entries was manipulated or was not genuine. Therefore, in the facts of this case and on the basis of the evidence produced by the prosecution in respect of those entries and certificates, I am of the opinion that the prosecution has proved beyond reasonable doubt that the date of birth of PW-1 was 10.01.2003 and,

therefore, she was only 14 years of age at the time of the incident.

30. In this view of the matter, the charge against the appellant stands proved. Therefore, the order of conviction and sentence recorded by the learned Trial Judge is proper. In this view of the matter, I do not find any reason to interfere with the impugned Judgment and order.

31. Consequently, the Appeal is dismissed.

(SARANG V. KOTWAL, J.)