

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 148 OF 2023
WITH
INTERIM APPLICATION NO. 1096 OF 2020

Mahadev Sambhaji Birange ... Appellant/
 Age 20 years, Occ. Labour, Resident of : Manerajuri, Applicant
 Taluka – Tasgaon, District Sangli.

Versus

- 1 State of Maharashtra
 At the Instance of : Miraj Rural Police Station,
 Sangli, District Sangli
- 2 XYZ
 Indira Nagar, Tal. Miraj, Dist. Sangli ... Respondents

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Mr. Ganesh Bhujbal a/w. Mr. B.D.Shinde, Advocate for the Appellant.
 Mr. Vinik A. Kulkarni, APP for Respondent No.1.
 Ms. Shraddha Sawant, Appointed Advocate for Respondent No.2.

CORAM : SHIVKUMAR DIGE, J.
DATED : 17th OCTOBER, 2024.

JUDGMENT :

1. This appeal is preferred against the Judgment and Order passed by learned Additional Sessions Judge, Sangli in Special Child Case (POCSO) No. 13 of 2016.
2. By the impugned Judgment and Order the appellant has been convicted for the offence punishable under Section 363 of Indian Penal Code, 1860 (“**IPC**”) and sentenced to suffer rigorous imprisonment for period of two years and to pay a fine of Rs.500/- in default to suffer rigorous imprisonment for one month. Under Section 366-A of IPC the appellant is sentenced to suffer imprisonment for three years and pay fine

of Rs.500/- in default suffer rigorous imprisonment for one month. Under Section 376(2)(i) of IPC appellant sentenced to suffer rigorous imprisonment for a period of 10 years and to pay fine of Rs.500/- in default rigorous imprisonment for one month. Under Section 4 of Protection of Children from Sexual Offences Act, 2012 (for short “**POCSO Act**”) the appellant is sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.500/- in default rigorous imprisonment for one month. Under Section 6 of POCSO Act, the appellant is sentenced to suffer imprisonment for 10 years and to pay fine of Rs.500/- in default rigorous imprisonment for one month.

3. It is prosecution’s case that appellant was staying near the house of the victim girl. The victim was studying in 8th Standard. On 03.11.2015, when the mother of victim girl had gone for labour work. The appellant came to the house of victim and told her that he would help her in getting Aadhar card and took her on his motorcycle to Tasgaon. When mother of the victim came back from work she did not find victim so she and her family members searched her in the village. The elder daughter of the first informant informed that the appellant had come to the house in the morning and he had taken the victim to get her Aadhar card at Tasgaon. When the informant went to the house of the appellant she did not find him so she lodged missing report about her daughter. In investigation,

police found the appellant and victim at his relatives house at Takali. It is alleged that when victim girl was with appellant he sexually assaulted her. Police recorded the statement of the victim in presence of her mother i.e. first informant and accordingly FIR was registered against the appellant. After the trial appellant has been convicted as referred above.

4. It is contention of learned counsel for the appellant that appellant has been falsely implicated in this case. Victim girl herself had gone with the appellant. Learned counsel further submitted that victim girl was happily staying with the appellant at his relative's place but police implicated the appellant in serious offence. The Appellant did not kidnap the victim girl. The family members of the victim girl had fixed her marriage without her consent. The victim girl did not want to marry with other person hence victim girl left with the appellant at her own will and wish but the learned Sessions Judge did not consider this material fact. Learned counsel further submitted that victim had consented for physical relation with the appellant hence it cannot be said that it was rape by the appellant on victim. Learned counsel further submitted that as per Section 4 of POCSO Act whoever commits penetrative sexual assault shall be punished but in this case no penetrative sexual assault at all. The victim girl during her examination in chief deposed that she resided with the appellant at his relative's house for six days and kept physical relation

with him. It shows that physical relation between the appellant and victim are consensual. It has come on record that victim's sister was married after completing education of sixth standard so there is custom that girl's marry at early stage at the age of 14 to 16 and victim's mother had fixed her marriage hence it was against her will but these facts are not considered by the learned Special Court. The Judgment and Order passed by the Special Court is erroneous. The evidence produced on record is not properly considered hence requested to allow the appeal.

5. It is contention of learned APP that at the time of incident victim was 13 years old and the Appellant was 26 years old. He took away the victim on the pretext of preparing her Aadhar card and taken her away at relative's house and at various places and sexually assaulted her. The medical evidence supports the prosecution's case. The learned Special Judge has passed well reasoned order, no interference is required in it.

6. It is contention of learned counsel for respondent No.2 that the appellant was married. He had two kids and he was aware about the age of the victim girl. He took her at various places and sexually assaulted her. Prosecution has proved the case beyond reasonable doubt. No interference is required in it and requested to dismiss the appeal.

7. I have heard all learned counsel. Perused the impugned Judgment and Order and evidence produced on record. The victim girl has deposed

as PW-1 at Exhibit-23. She has stated that on 03.11.2015 at about 11:00 am the appellant came to her house and told her to take out her Aadhar card and took her to Tasgaon on his motorcycle. Thereafter from Tasgaon he taken her at Takali at his nephew's house. Thereafter he took her to Pappu Kengar, Patane Phata, Tal. Chandgad, District Kolhapur, there they resided for six days from 04.11.2015 to 09.11.2015. There he kept physical relation with her. Thereafter they shifted to new room. On 14.11.2015 police came to place where they were residing and brought them to Tasgaon police station and police recorded her statement. Her medical examination was done on 15.11.2015. Nothing elicited in the cross examination of this witness to disbelieve her evidence about the sexual assault done by the appellant on her. The evidence of this witness supported by medical evidence. PW-6 Dr. Sachin Gaikwad at Exhibit-38 who examined the victim girl has stated that he did the medical examination of the victim girl and gave his opinion that there were hymeneal tears which indicates that the overall finding are consistent with sexual intercourse. PW-7 Dr. Pankaj Varpe at Exhibit-55 has stated that he took the vaginal swab, gynecological examination and age determination of the victim girl. PW-8 Dr. Arihant Magdum has stated that hymeneal tears on the victim indicates intercourse however upon perusing the FSL report he stated that in present case except hymeneal tear other aspects

are absent. Nothing elicited in the cross examination of these witnesses. The appellant is harping on the issue that the relationship between the victim girl and the appellant were consensual and she had herself come with the appellant and her mother i.e. first informant had fixed her marriage with other person which victim girl was not willing to do. In my view, admittedly at the time to incident victim girl was 13 years old and the appellant was 26 years old married man. The appellant was staying near the house of victim girl. He was aware about her age. He took her on the pretext of preparing Aadhar card, though the appellant is contending that physical relations with victim was consensual, the consent given by the girl below 18 years is immaterial. The Special Court has passed well reasoned order and has considered evidence produced on record hence, I do not find interference in it. In view of above, I pass following order:

ORDER

- (i) The Appeal is dismissed.
- (ii) In view of the dismissal of appeal pending applications, if any, also disposed of.

(SHIVKUMAR DIGE, J.)

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