



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 794 OF 2023

APPELLANT : Shankar S/o. Shekhar Korwan, Aged
about 26 Years, Occ: Driver, R/o.
Bhadrawati, Tah. Bhadrawati,
District: Chandrapur.

//VERSUS//

RESPONDENT : State of Maharashtra, through Police
Station Officer, Police Station
Bramhapuri, Tahsil : Bramhapuri,
District: Chandrapur.

Mr. R.M. Daga, Advocate for the Appellant.
Mr. Ganesh Umale, APP for the Respondent/State.

CORAM : G. A. SANAP, J.
DATED : 19th DECEMBER, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order dated 30.11.2023, passed by the learned Additional Sessions Judge/Special Judge, Chandrapur, whereby the learned Judge convicted the appellant for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act"), and sentenced him to suffer rigorous

imprisonment for 10 years and to pay a fine of Rs.5,000/- and in default to suffer rigorous imprisonment for 6 months.

02] Background Facts:

The crime, in this case, was registered on the report of the victim-girl. The prosecution case, which can be unfolded from the report and other materials, is that on 2nd June, 2014, at about 7:00 p.m., the victim was proceeding towards her computer class. One Shubham Shambharkar (tried as a juvenile hereinafter referred to as the "J.O.") requested her to accompany him. The victim did not agree to wander with him. The J.O. requested her not to go for class and accompany him. When they were walking towards her computer class, two friends of the J.O. came there on Pulsar motor-cycle. The J.O. asked the victim to sit on the motor-cycle. The victim was reluctant to sit on the motor-cycle. The J.O. under the threat and force compelled her to sit on the motor-cycle. The J.O. also sat on the motor-cycle. They took the motor-cycle towards the railway crossing on Chandgaon Road. They stopped the motor-cycle near the railway crossing. The J.O. took the victim by the side of the road. Two friends of the J.O. were standing on the road at some distance. It is stated that thereafter the J.O. removed the cloths of the victim and committed sexual intercourse with her.

After committing sexual intercourse, he called his friend Shankar Korwan (appellant). Shankar went to them. The J.O. told the victim to allow Shankar to have intercourse with her. The victim refused to do so. The J.O. and accused Shankar, under the threat, committed a forcible intercourse with her. Thereafter, the J.O. called his another friend, but he did not do anything. Thereafter, she was dropped at her house by the appellant.

03] On reaching the house, the mother of the victim made enquiry with her. However, she did not disclose anything. She was frightened. On the second day, the mother made enquiry with her. On the third day, when the mother made enquiry, she disclosed about the incident to her. Therefore, the mother took her to Bramhapuri Police Station. The victim lodged the report.

04] On the basis of her report, a crime bearing No.85/2014 was registered against the accused persons. PW-7 initially carried out the investigation. He arrested the J.O. and accused Ashish Gedam. Shankar Korwan was absconding. The J.O. was sent to the Juvenile Justice Board for his trial. The victim was referred for medical examination. The ossification test of the victim was also conducted by the Medical Officer. The Investigating Officer

recorded the statements of the witnesses. The Investigating Officer thereafter filed the charge-sheet.

05] Initially, the charge was framed against the accused Ashish Gedam. After recording the evidence of PW-2, the victim-girl, the accused Ashish absconded. The trial against Ashish could not be completed. The Investigating Officer in the meantime arrested the appellant Shankar on 26th May, 2022. After his arrest, further investigation was conducted and supplementary charge-sheet was filed.

06] The learned Judge framed the charge against the appellant Shankar. The appellant pleaded not guilty. His defence is of false implication. The prosecution, in order to bring home the guilt of the appellant, examined 8 witnesses. The learned Judge, on consideration of the evidence, held the appellant guilty of the offence punishable under Section 4 of the POCSO Act and sentenced him as above. However, the learned Judge acquitted the appellant of the offences punishable under Sections 363, 366-A and 376-D read with Section 34 of the Indian Penal Code, 1860 (for short, "IPC"). The appellant being aggrieved by the judgment and order has come before this Court in appeal.

07] I have heard Mr. R.M. Daga, learned advocate for the appellant and Mr. Ganesh Umale, learned APP for the respondent/State. Perused the record and proceedings.

08] Learned advocate for the appellant submitted that the prosecution has miserably failed to prove that the victim-girl on the date of the incident was below 18 years of age. Learned advocate took me through the medical examination report and pointed out that, in the said document, the age of the victim was recorded as 18 years. It is also pointed out that, in the radiological examination report of the victim, the expert opined that her age was not more than 19 years. Learned advocate further submitted that, during the course of the investigation, the Investigating Officer did not collect the birth certificate or the school record to show that the victim was below 18 years of age. Learned advocate submitted that PW-6 was summoned for the first time at the stage of the evidence to produce the college admission register. Learned advocate submitted that the evidence of PW-6 and the documentary evidence produced by him cannot be relied upon. The documentary evidence was produced for the first time. It is further submitted that the school leaving certificate of the victim, which was submitted while taking admission at Dr. Babasaheb Ambedkar College, Bramhapuri, was

not produced. It is, therefore, submitted that the prosecution has miserably failed to prove that the victim was below 18 years of age on the date of the incident. Learned advocate, therefore, submitted that the conviction and sentence under Section 4 of the POCSO Act cannot be sustained.

09] Learned APP submitted that failure of the Investigating Officer to collect the evidence with regard to the birth date of the victim at the stage of the investigation could not be said to be fatal to the case of prosecution. PW-6 was summoned by the Court on the application of the learned APP. PW-6 had produced the college admission register, wherein the birth date of the victim was recorded. The birth date of the victim is 4th November, 1996. Learned APP further submitted that the victim, in her evidence, has stated that her birth date is 4th November, 1996. Learned APP submitted that, as far as the result of the ossification test is concerned, there is always a margin of error of two years on either side. It is submitted that, therefore, the inference, consistent with the case of prosecution that the victim was below 18 years of age on the date of the incident, needs to be drawn.

10] It is to be noted that, in order to invoke the provisions of the POCSO Act, the child, who is the victim of crime, must be below 18 years of age. The Investigating Officer is required to collect the evidence with regard to the age of the victim in a POCSO case. PW-1 is the mother of the victim. PW-1, in her evidence, has not stated the birth date of the victim. She has stated that, before two years, the age of the victim was 16 years old. She has stated that, at the time of the incident, she had passed 12th Standard. The mother was the proper person to depose about the exact birth date of the victim. In her cross-examination, she was confronted with the statement recorded by the police. It is portion marked-A and later on marked as Exh.103. This admission of the mother of the victim would show that while recording her statement by the police, she stated that the victim was 18 years of age. It is, therefore, apparent that the evidence of the mother of the victim is hardly of any use to prove the birth date of the victim and as such her age. Her evidence is not sufficient to prove that, on the date of the incident, the victim was below 18 years of age.

11] PW-2 is the victim-girl. In her evidence, she has stated that, on the date of the incident, she was 17 years of age. She has stated that her birth date is 4th November, 1996. In her entire

evidence, she has nowhere stated that she provided either her birth certificate or her school leaving certificate or any other documents to the police with regard to her birth date. In her report, she has stated that her age was 17 years and 7 months. Her ossification test was conducted. The Radiologist has opined that her age was not more than 19 years on the date of the examination i.e. 05.06.2014. The result of the ossification test is also not helpful to the case of prosecution.

12] In this context, it is necessary to peruse the evidence of the Investigating Officer (PW-7). He carried out the initial investigation. In his examination-in-chief, he has nowhere stated that he collected either the birth certificate or the school leaving certificate of the victim during the investigation. I have perused the list of documents annexed with the charge-sheet. Perusal of the list of documents would show that the birth certificate or the school leaving certificate was not included in the said list of documents. The Investigating Officer is silent as to why he did not collect the birth certificate or the school leaving certificate during the course of investigation. It is to be noted that since the victim had stated in her report that she was 17 years and 7 months old, it was absolutely necessary on the part of the Investigating Officer to collect the

concrete material with regard to the birth date of the victim and compile the same in the charge-sheet. In my view, failure to collect such evidence is fatal to the case of prosecution. The Investigating Officer invoked the stringent provisions of the POCSO Act against the accused. In this background, it would be necessary to consider the evidence of PW-6 and the documents produced by him.

13] The record shows that the application was made at the stage of the evidence by the learned APP to summon this witness for production of the admission register from the college. It is to be noted that, in the list of witnesses, any witness from the college was not cited. This witness was summoned for the first time in the year 2023 for production of the documents. This witness had produced the college admission register of the students. He has stated that the victim was admitted in the college. The admission serial number is 13333. He has stated that, as per the admission register, the birth date of the victim is 4th November, 1996. He has stated that this entry was taken on the basis of the school leaving certificate from the previous school. The extract of the admission register is at Exh.89. It is also seen that the original entry from the admission register was not exhibited. He has stated that previously the victim had studied in Savitribai Fule Kanya Vidyalaya,

Bramhapuri. PW-6 did not produce any document submitted by the victim at the time of the admission from Savitribai Fule Kanya Vidyalaya, Bramhapuri. This witness has categorically stated about this fact. He has admitted that he does not know on what basis the date of the birth of the victim-girl was recorded in the school leaving certificate issued by Savitribai Fule Kanya Vidyalaya, Bramhapuri.

14] It is to be noted that this witness was required to produce some more record. He was required at least to produce the copy of the school leaving certificate submitted by the victim from Savitribai Fule Kanya Vidyalaya, Bramhapuri. In my view, the evidence of this witness cannot be accepted for more than one reason. The copy of the admission register was not collected by the Investigating Officer during the course of investigation. No investigation was conducted to that effect. The extract from the admission register was not part of the charge-sheet. For the first time, at the stage of the evidence, this witness was summoned for production of the document. It needs to be stated that in some cases the secondary evidence may be part of the record or charge-sheet. In such a case, the prosecution can summon the witness for production of the primary evidence. It is to be noted that the

production of primary evidence at the stage of the evidence cannot prejudice the accused, where the secondary evidence is already compiled in the charge-sheet and provided to the accused. The original document cannot be introduced for the first time at the stage of the evidence. Such an exercise would not only prejudice the accused but also would be against the principle of fair trial.

15] In this case, the record shows that the certified extract of the admission register was not collected by the Investigating Officer. No enquiry was made to verify whether such record is maintained with the school/college. This fact could have been verified by collecting the document or certified extract of the admission register during the course of investigation. In my view, therefore, the documentary evidence, which has been produced for the first time, is required to be eschewed from consideration. If this evidence is kept aside, then there is no evidence to prove that the birth date of the victim is 4th November, 1996.

16] The victim, in her evidence, has stated that her birth date is 4th November, 1996. While lodging the report, she had stated that her age was 17 years and 7 months. At the time of her medical examination, she has stated that her age was 18 years. Her mother,

during the course of the police investigation, stated that the victim was 18 years of age. The result of ossification test does not support the case of prosecution. The prosecution has failed to produce either the birth certificate of the victim or the school record where she was admitted for the first time in 1st Standard. There is no plausible explanation on record. The Investigating Officer is conspicuously silent about the investigation on this point. In my view, therefore, this is a doubtful circumstance. On the basis of the available evidence, it is not possible to conclude that the prosecution has proved that the victim was below 18 years of age on the date of the incident. In my view, therefore, the very foundation of the case of prosecution to sustain the charge under the POCSO Act falls flat. The appellant has been convicted for the offence punishable under Section 4 of the POCSO Act. Since the prosecution has failed to prove the birth date of the victim beyond doubt, the appellant is entitled to get the benefit of the same.

17] Learned advocate for the appellant submitted that the evidence of the victim-girl is not sufficient to prove the charge against the appellant. Learned advocate submitted that, as per the version of the victim-girl, the appellant was not known to her prior to this incident. It is pointed out that she told the name of the

accused before the police because, on the spot of the incident, the J.O. had called one person out of the two by name Shankar. The police did not conduct the Test Identification Parade. Learned advocate submitted that the evidence of the victim recorded before Court is also not sufficient to prove the identification of the appellant. Learned advocate submitted that there was inordinate delay in lodging the report. The identification of the appellant is doubtful for one more reason, namely the incident occurred on 2nd June, 2014, and the appellant was arrested after 8-9 years on 26th May, 2022. Learned advocate submitted that, in view of this time gap from the date of the offence till the arrest of the appellant, the prosecution was required to subject the appellant to the Test Identification Parade through the victim-girl.

18] Learned APP submitted that the identification of the accused by the witness in the Court is a substantive piece of evidence. Failure to conduct the Test Identification Parade by the Investigating Officer is not always fatal to the case of prosecution. The evidence of the Test Identification Parade conducted by the Investigating Officer can be used for the purpose of corroboration. It is submitted that, since the appellant was absconding till 26th May, 2022, there was no question of conducting his Test

Identification Parade. Learned APP submitted that the evidence of the victim-girl as against the appellant is cogent, concrete, and reliable. In short, the learned APP submitted that the well-reasoned judgment passed by the learned Judge does not warrant interference.

19] It needs to be stated at the outset that the appellant has been acquitted by the learned Judge for the offences punishable under Sections 363, 366-A and 376-D read with Section 34 of the IPC. The State has not filed appeal against the acquittal of the appellant under Sections 363, 366-A and 376-D read with Section 34 of the IPC. In this appeal, therefore, there is no scope to interfere with the order of the acquittal of the appellant passed by the learned Judge. The Investigating Officer was required to subject the appellant to the Test Identification Parade. It is necessary to consider the evidence of the Investigating Officer (PW-8), who had arrested the appellant. In his cross-examination, he has stated that he did not conduct the Test Identification Parade of the appellant, and therefore he cannot say that the accused in his custody by name Shankar was the same person who was mentioned in the FIR. The answer given by the Investigating Officer would show that he himself did not crosscheck the identity of the

appellant. He was arrested on 26th May, 2022. The crime was committed on 2nd June, 2014. In this factual situation, the conduct of the Test Identification Parade was essential. There would have been change in the appearance of the appellant in those 8 to 9 years. It was, therefore, necessary for the prosecution to establish the identification of the accused beyond reasonable doubt. In this context, it would be necessary to consider the evidence of the victim-girl.

20] As stated above, initially, the case proceeded against the accused Ashish. After recording the evidence of the victim-girl on 5th October, 2016, the accused Ashish absconded. He has not been arrested till date. The trial against the accused was in limbo till the arrest of the appellant on 26th May, 2022. After his arrest, the supplementary charge-sheet was filed. The victim-girl was summoned to depose before the Court on 27th April, 2023. Her examination-in-chief is hardly of 2-3 lines. Perusal of her examination-in-chief would show that it is a shorn of necessary details with regard to the identification of the appellant in the Court. She has stated that she knows the accused Shankar. She has stated that in the year 2014, accused Shankar committed rape on her twice. This is the only evidence against the appellant with

regard to his identification. Since the Test Identification Parade was not conducted, it was expected of the learned APP to establish the identification of the appellant in the Court by following the proper procedure. Perusal of the examination-in-chief of the victim does not show that the appellant was shown to the victim. She was not asked any other question with regard to the identification of the accused. At the time of the evidence, the proper procedure to crosscheck the identification of the accused was not followed. It was expected in this situation to ask the witness to identify the accused present in the Court. The accused, as can be seen from her examination-in-chief, was not shown to her in the Court. Her cross-examination is very material. She has admitted that she did not identify the accused Shankar in the police station as well as in jail. In my view, therefore, the identification of the appellant is also doubtful.

21] As far as the identification of the accused is concerned, it would be appropriate to make a useful reference to the decision of the Hon'ble Apex Court in the case of ***Malkhansingh Vs. State of Madhya Pradesh [(2003) 5 SCC 746]***. In this case, the Hon'ble Apex Court has held as under:

"The evidence of mere identification of the accused person

at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. But failure to hold a test identification parade would not make inadmissible the evidence of identification in court.

The identification parades belong to the stage of investigation, and there is no provision in the CrPC which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. These parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

22] In my opinion, the exposition of the law in this case in the teeth of the available evidence supports the submissions

advanced on behalf of the appellant. The victim-girl is the only person to depose against the accused. Her evidence lacks clarity. Her evidence, therefore, inherently of a weak character.

23] The learned Judge has not believed the evidence of the victim-girl to prove the charge for the offences for which he has been acquitted. The finding of the learned Judge appears to be self-contradictory. The learned Judge, on the basis of the same material, has held the appellant guilty of the charge under Section 4 of the POCSO Act, but acquitted him of the charge under Sections 363, 366-A and 376-D read with Section 34 of the IPC. Be that as it may, the fact remains that there is no independent evidence with regard to the identification of the accused. The J.O. was the friend of the victim-girl. She has admitted that he was hell-bent to marry her. She did not agree for the same. She has stated that she had love affair with him. She has stated that, on one occasion, accused Shankar had indulged in sexual intercourse with her. The statement made by her in her examination-in-chief that Shankar had committed sexual intercourse with her twice, is contrary to her report. She has categorically stated that before the incident, she was not knowing Shankar i.e. appellant. She has stated that she came to know that the said person was Shankar because the J.O. at the time

of the incident called him by name Shankar. The victim-girl has nowhere stated other relevant facts to justify the identification of the accused in this manner before Court.

24] The medical evidence is hardly of any help to the case of prosecution as against the appellant. The victim-girl has stated that she had love affair with J.O. The J.O. had promised to marry her. She has stated that she came to know that the J.O. had committed the murder of one person at Nagpur. She has stated that, after coming to know of this fact, she was not ready to marry the J.O. She has stated that, in spite of that, the J.O. used to meet her and insist for marriage. She has stated that she informed this fact to her mother. It has come on record in her evidence that, after registration of this crime and after release of the J.O. from jail, she went to Hingana, Nagpur, and resided at Industrial Residential Colony in one room for six months. She has stated that her mother and sister came there. She did not accompany her mother. She has stated that, after six months, she went back along with her mother. This shows that the victim had physical relations with J.O. prior to this incident. The doctor has stated that there was old healed hymen tear. The doctor did not mention the age of the said injury. In my view, in the above stated facts, this injury could not be

attributed to the appellant. In my opinion, the evidence of the victim-girl as against the appellant is doubtful. The credibility of the victim has been shaken. The victim-girl even after release of the J.O. from jail continued to stay with him. She has admitted her love affair with J.O.

25] In this view of the matter, the evidence of the victim-girl as against the appellant is not credible and trustworthy. The prosecution has failed to prove that the victim-girl was below 18 years of age. In the totality of the facts and evidence, the prosecution has failed to prove the charge under Section 4 of the POCSO Act against the appellant. The appellant, therefore, deserves to be acquitted. Hence, I proceed to pass the following order:

ORDER

- i] The Criminal Appeal is **allowed**.
- ii] The judgment and order of conviction and sentence passed against the appellant by the learned Additional Sessions Judge/Special Judge, Chandrapur, dated 30.11.2023, in Special (POCSO) Case No.58/2014, is quashed and set aside.
- iii] The appellant/accused – Shankar S/o. Shekhar Korwan

is acquitted of the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

iv] The appellant/accused - Shankar S/o. Shekhar Korwan is in jail. He be released forthwith, if not required in any other case/crime.

v] The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

Vijay