



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

CRIMINAL APPEAL NO. 168 OF 2020

Balaji S/o. Malhari Devkate
Age 43 years, Occ. Nil,
R/o. Phulenagar, Himayatnagar,
Tq. Himayatnagar, Dist. Nanded.

.. APPELLANT

VERSUS

The State of Maharashtra
...

.. RESPONDENT

Mr. Santosh C. Bhosale, Advocate for appellant,
Mr. N.S. Takale, APP for respondent.

**CORAM : SANDIPKUMAR C. MORE AND
MEHROZ K. PATHAN, JJ.**

**RESERVED ON: 9 SEPTEMBER, 2025.
PRONOUNCED ON : 16 OCTOBER, 2025.**

JUDGMENT [PER MEHROZ K. PATHAN, J]

1. The appellant has filed the present appeal, thereby praying for quashing and setting aside the judgment and order passed by the Additional Sessions Judge, dated 14.1.2020 passed by the Additional Sessions Judge, Bhokar in Special Case (POCSO) No. 10 of 2019 thereby convicting the appellant for the offence punishable under Section 376(2) (i) of IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO” Act for the sake of brevity)

2. The case of the prosecution is that, complainant (mother of the victim) has lodged a report stating that on 16.3.2019 at about 5.45 p.m. her daughter victim “Y” and two other friends had gone for playing out of the house. After some time, she came to know that accused, who is the neighbouring resident, namely, Balaji Deokate, had committed rape

on victim "X" in the ditch situated near the village. The police had also registered complaint for committing rape on victim girl "X". They called the complainant to record the statement of her daughter i.e. present victim "Y" and accordingly, she was brought in the police station for recording her statement. The victim "Y" narrated in her statement that the accused, who is referred to as "Balumama" had asked the victim "Y" to bring victim "X" to him in the ditch and if she failed to do so, he will kill her. The victim "Y" then took another victim "X" to the appellant/accused. The appellant accused removed the clothes of the victim "X" and thereafter committed rape on her. The appellant accused had thereafter committed rape on the present victim "Y".

3. The present victim "Y" was thereafter taken to the Judicial Magistrate Hadgaon for recording her statement under Section 164 of Cr.P.C. wherein, she narrated the same story about the appellant having committed rape on victim "X" and present victim "Y". She further narrated in her statement under Section 164 that the accused/appellant gave a currency note of Rs. 10/-, saying that victim "X" and victim "Y" shall distribute Rs. 5/- each. The present victim "Y" then had shown the well and ditch which is situated in the field of one Shaikh Mukhid, where, accused Balumama had committed rape. She further stated that though the said Balumama had committed rape on victim "X" and her. She did not report the incident having fear about getting defamed and thus, there was delay of 3 months in lodging the report. The Police Station Officer, Himayat Nagar registered crime No. 26 of 2019 for the offence punishable under Sections 376(2)(i) and Sections 4 and 6 of the POCSO Act. The investigating Officer, SDOP, Bhokar, directed the Police Sub Inspector Poonam Suryawanshi to record the statement of victim "Y". The present Crime bearing No. 97 of 2019 was registered against the accused for committing rape on present victim "Y" after 3 months of the date of incident on the report filed by mother of victim. The Investigating

Officer had collected the Birth Certificate of the victim from the Municipal Council, Himayat Nagar and also sent the victim "Y" for medical examination at the Civil Hospital, Nanded and collected the medical papers of the victim from Govt. Hospital, Nanded. The Investigating Officer obtained the school birth extract of the victim from Head Master of the Zilla Parishad Primary School, Phule Nagar, Himayat Nagar and after drawing the sketch map of the spot of incident, has prepared the spot panchanama. The accused was arrested and his medical report was also obtained. After completing investigation, charge sheet was filed as sufficient evidence was collected to bring home the guilt of the accused.

4. The prosecution has examined in all 8 witnesses in support of their case and has relied upon the various documents, in support of their case. The learned trial court, after going through the entire evidence led by the prosecution and the documents relied upon, was pleased to convict the appellant/accused for the offence punishable under Section 376(2)(i) of IPC thereby directed the appellant to undergo life imprisonment, which shall mean the remainder of persons natural life. The appellant was also convicted for the offence punishable under Section 6 of the POCSO Act for aggravated sexual assault and was directed to undergo life imprisonment and both the substantive sentences were directed to run concurrently.

5. We have considered the submissions advanced by Mr. Bhosale, learned advocate for the appellant; Mr. N.S. Tekale APP for State.

6. Perusal of the testimony of PW-4 (mother of victim) would show that she had lodged report on 23.6.2019 for the incident which had

taken place on 16.3.2019. It is pertinent to point out that on 16.3.2019, there was already one offence registered vide Crime No. 26 of 2019 for the offence of rape against the victim girl "X". The victim of the present case minor girl "Y" recorded her statement under Section 164 of Cr.P.C. in POCSO Special Case No. 8 of 2019, thereby also stating about rape committed on her. It is further stated in her statement that she wanted to lodge report against accused, however, was disturbed as the matter was related to the character of daughter. She further stated that, by making consultation with the relatives/informant had lodged the report on 23.6.2019 i.e. after 3 months of the incident.

7. Thus, it could be seen that though there is a considerable delay in lodging the report against the applicant/accused by the mother of the victim girl "Y", the said delay has been overlooked by the Court on the ground that that the Investigating Officer ought to have himself registered the FIR in stead of complainant, as the Police had every right to register the second crime, as soon as the statement was given by the victim in Crime No. 26 of 2019. The delay in lodging report is, therefore, ignored by the Court on the ground that defect in the investigation cannot go to the benefit of the accused.

8. This observation, in our view is erroneous inasmuch as, the stringent law of POCSO warrants stringent scrutiny of evidence which has to be cogent enough to inspire confidence from the testimony of the victim and the conduct of the complainant to rest upon a conviction as the punishment under the POCSO Act is severe. The delay in lodging the FIR is therefore fatal to the prosecution.

9. Another witness relied upon by the prosecution was PW-5 Bashir Khan, who has simply deposed that on 16.3.2019, when he was returning back, he saw the appellant/accused together with other girls

and asked the little girls to go to their houses as it was evening time. Accused Balaji informed him that he was going to answer nature's call, however, the girls are following him. Apart from above fact, there is nothing referred in the testimony of PW-5 Bashirkhan, which would corroborate the allegations of rape as made by the complainant and victim minor girl "Y". Thus, the testimony of PW-5 may not be helpful to the prosecution case.

10. Another important witness examined by the prosecution is PW-3 Sheela Gangadhar Komwad, who happens to be the Head Mistress of the school who had produced the Admission Register of the minor victim girl "Y" to prove her date of birth. It is pertinent to point out here that the testimony of PW-3 would show that she had brought the extract of School Admission Register (Exh.15) of the victim which shows her date of birth to be 1.9.2011. The minor victim girl in her testimony did not state about her date of birth, nor has the PW-4 complainant (mother of victim) stated in her deposition about the date of birth of the victim. It is pertinent to note that the prosecution has relied upon the document Exh.38, which is the Birth Certificate issued by the Gram Panchayat, which shows the date of birth, which is in variance with the date of birth shown in the Admission Register. The date of birth as reflected in Birth Certificate (Exh.38) is 2.9.2011, whereas, the date of birth in the Admission Register (Exh.15) is 1.9.2011.

11. The Division Bench of the Bombay High Court in the case of ***Ravi Anandrao Gulpude vs. State of Maharashtra 2017 All MR (Cri.) 1509***, was pleased to hold that Section 6 of the POCSO Act, provides for punishment for aggravated penetrative sexual assault as enumerated in Section 5 of the Act. From the aforesaid provisions, it is crystal clear that the prosecution is under bounden duty to prove that the victim is a child. Unless the prosecution successfully establishes that the victim is a child

within the meaning of clause (d) of Section 2 of the Act, a person cannot be convicted for the offence punishable under Section 6 of the Act. The Division Bench in the aforesaid case, was pleased to observe in para. 8 as under :-

“The provisions of the Act are stringent in nature. Even there is a statutory presumption under Section 29 of the Act. Since the enactment is stringent in nature, the degree of proof is more strict. The prosecution is under bounden duty to prove the age of the prosecutrix to show that at the time of the incident, the prosecutrix was “Child” within the meaning of the provisions of the Act. The burden is on the prosecution to prove that the age of prosecutrix on the date of occurrence, was less than 18 years.”

12. Thus, after considering Exhibit 38 and Exhibit 15, we find that there is a material discrepancy in the date of birth of the child and which the Trial Court has failed to consider. In view of the judgment cited above, the strict proof is required to rest upon the conviction under the POCSO Act and as such, the age of the child cannot be said to have been established in view of the discrepancy in the date of birth. The depositions of PW-1 victim as well as deposition of PW-4 her mother, do not reflect the exact date of birth being mentioned by them in their testimony. It would therefore be unsafe to rest conviction on such shaky piece of evidence pertaining to the very important aspect i.e. date of birth of the child.

13. Another important witness relied upon by the prosecution is PW-6 Dr. Sunil Madhewad, who had examined the victim girl “Y” on 24.3.2019 between 11.45 a.m. and 12.45 p.m., as there was already one crime registered as regards sexual assault against victim girl “X” being Crime No., 26 of 2019, wherein, she is also alleged to have been raped by the present appellant/accused. The Medical Examination Report Exh.27 prepared by PW-6 shows that there was no evidence of any surface injury. The hymen was intact. No evidence of any tear or any perennial tear was

noticed. It is further observed in one of the columns by the said witness that there were no injuries suggestive of application of force/restraint. These relevant entries in Exh.27 coupled with the testimony of witness herself, who has admitted about such entries being taken by him, would suggest that the medical evidence also do not corroborate the allegations of rape made against the present appellant by the victim girl or the complainant (mother of victim).

14. Thus, looking it from any angle, we are of the considered opinion that the evidence led by the prosecution in the present case does not inspire confidence so as to prove the case of aggravated sexual assault against the present appellant. The prosecution evidence falls short of the evidence necessary to bring home the guilt of the present appellant in present crime. In our view, therefore, the conviction of the appellant for the offence punishable under section 376(2)(i) and Section 6 of the POCSO Act, cannot be sustained. Hence, we pass the following order :-

O R D E R

[I] The appeal stands allowed;

[ii] The impugned judgment and order of conviction of the appellant dated 14.1.2020 passed by the Additional Sessions Judge, Bhokar, for the offence under Section 376(2)(i) of IPC and under Sections 4 and 6 of the POCSO Act, in Special case (POCSO) No. 10 of 2019, is hereby quashed and set aside;

[iii] The appellant is acquitted of the offence punishable under Section 376(2)(i) of IPC and Sections 4 and 6 of the POCSO Act.

[iv] The appeal is allowed in above terms and same is disposed of.

[MEHROZ K. PATHAN]
JUDGE

[SANDIPKUMAR C. MORE]
JUDGE.

grt/-