



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

CRIMINAL APPEAL NO.469 OF 2021

Dhiraj s/o. Pashya Pawar,
Age : 29 years, Occ. Driver,
r/o. Dudhale, Tq. and Dist.Nandurbar

..Appellant

Vs.

1. The State of Maharashtra,
Through City Police Station,
Nandurbar, Tq. and Dist. Nandurbar

2. XYZ (Victim)

..Respondent

Mr.Yogesh B. Bolkar, Advocate for appellant
Mr.S.J.Salgare, APP for respondent no.1
Ms.Suvarna Zaware, Advocate for respondent no.2 (appointed)

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
RESERVED ON : JANUARY 20, 2025
PRONOUNCED ON : APRIL 01, 2025**

JUDGMENT (Per R.G.Avachat, J.) :-

The challenge in this appeal is to the judgment of conviction and order of consequential sentence dated 01.09.2021, passed by learned Sessions Judge, Nandurbar (Trial Court), in Special Case No.25 of 2019. It was a case, wherein the appellant was tried for the offences punishable under Sections 363 and 366 of Indian Penal Code and Section 6 of the Protection of Children from Sexual Offence Act, 2012 ("POCSO Act", for short). The trial court acquitted the

appellant of the offences punishable under Sections 363 and 366 of Indian Penal Code. It has, however, convicted him for the offence punishable under Section 6 of the POCSO Act and therefore, sentenced to suffer imprisonment for life and fine of Rs.5,000/-, with default stipulation. The appellant has, therefore, preferred this appeal. The State did not prefer appeal against acquittal.

2. The facts, in brief, giving rise to the present appeal are as follows:-

PW1 - "K" (name withheld) was in the age group of 15-16 years at the relevant time. She was resident of one of the villages in Taluka and Dist. Nandurbar. The appellant too was resident of the very village. The appellant is married and blessed with two children. According to PW1 - "K" (victim), the appellant was after her. He proposed her many a time through her friend. She was reluctant. She wanted to study. The appellant, however, threatened that her parents would be done away with, if she did not join him to make love. She had no option but to relent. Once, the appellant intercepted when she had been to answer the nature's call. He took her in a field and committed sexual intercourse. Such things happened thereafter a few times.

3. On 08.05.2019, the appellant called her on phone and asked her to join him at Sakri. Her parents had been away to village Adachi for marriage. Due to the threats extended by the appellant, the victim went to Sakri. The appellant then took her to Nashik on motorbike. He secured a room on rent. He made her stay with him for about twenty days. During that period, he had sexual intercourse with her many a time. The victim was said to have conceived by him.

4. One Navashibai informed her father that the victim left the house for answering nature's call, but did not return. He (father) came back to the village and took search for the victim. As the victim was not found, he lodged the FIR (Ex.35) with Nandurbar City Police Station, alleging an unknown person to have kidnapped his minor daughter. A crime, vide C.R. No.151 of 2015 was, therefore, registered for the offence punishable under Section 363 of Indian Penal Code. It was investigated. During the investigation, the appellant and the victim were located at Nashik. They were brought back to the village. The victim was subjected to medical screening. She was found to have been pregnant of two months. The appellant was arrested. He too was medically screened. It appears that the victim underwent Medical Termination of Pregnancy (M.T.P.).

Thereafter, blood samples of both appellant and victim were obtained besides the fetus. Moreover, the clothes on the person of both of them were seized. The crime-scene panchnama (Exh.41) was drawn. Blood samples were submitted for DNA analysis. The statements of the persons acquainted with the facts and circumstances of the case were recorded and upon completion of the investigation, the appellant was proceeded against by filing charge sheet.

5. The trial court framed Charge (Exh.3). The appellant pleaded not guilty. His defence was of false implication. The prosecution examined eight witnesses and adduced in evidence certain documents. On appreciation of the evidence in the case, the trial court passed the impugned judgment and order.

6. Heard learned counsel for the parties. Learned counsel for the appellant would submit that there was no evidence to indicate the victim to have been below 18 years of age at the relevant time. The school admission form along with the birth certificate was admitted in evidence. The witness who produced the same was serving with Village Panchayat only for five years next before her evidence was recorded. The parents of the victim did not

give information for recording date of birth of the victim. The information was stated to be given by her grandmother. Her signature was not there on the registration form. The oral evidence of the victim about her date of birth is hearsay. The father's evidence in this regard would be of little consequence since he was illiterate and rustic person. He must have been tutored. Learned counsel took us through the evidence of the victim and her previous statement, to submit that her evidence is altogether unreliable. It is a serious offence. The appellant has been sentenced to suffer life imprisonment. For sustaining such conviction, the evidence should be cogent and reliable one. Except the testimony of the victim, no other evidence is there to reinforce the prosecution case. The DNA report is not on record. The medical examination of the victim does not support the prosecution. Learned counsel, ultimately, urged for allowing the appeal.

7. Learned APP and learned counsel representing the victim would, on the other hand, submit that the school admission form accompanied by the birth certificate proved the age of the victim. The victim's father also gave her date of birth. The father is the best witness in proof of date of birth of his child. The victim was away from village for over 20 days. She was found in the company of the

appellant in Nashik. Both of them were brought back. They were subjected to medical examination. The victim was pregnant. The appellant was married. Section 29 of POCSO Act was relied on. They also relied on the Apex Court's judgment **In Re : Right to Privacy of Adolescents with Criminal Appeal No.1451 of 2024 and Suo Motu Writ Petition (C) No.3 of 2023 decided on 20.08.2024 (2024 SCC OnLine SC 2055)**. Learned counsel took us through the entire evidence on record and then reiterated the reasons given by the trial court in support of the impugned order. According to them, no interference with the impugned order is warranted. They, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the judgment impugned herein. Let us advert to the evidence on record and appreciate the same.

9. The FIR was lodged by the father of the victim, PW2 - Dangal. He testified that the victim was born on 17.10.2003. According to him, she was 15 years of age, taking education in 8th standard at the relevant time. He received a phone-call of one Navashibai, informing him that the victim left the house under the pretext of attending nature's call and did not return. He, therefore,

took search for her. After twenty days from 08.05.2019, the police brought her. There-before, he had lodged the FIR (Exh.35). The appreciation of the evidence of PW2-Dangal indicates that the victim was below 18 years of age on the day, i.e. on 08.05.2019, when she left the home.

10. The fate of the case would be dependent on the testimony of the victim and the medical evidence. The trial court has already acquitted the appellant of the offence of kidnapping the victim. Neither the State nor the victim has preferred an appeal against acquittal. Same has, thus, attained finality.

11. Let us, now, turn to the evidence of victim "K" (PW1). The trial court put her certain questions and from the answers thereto, found her to be competent witness. Naturally so, since the victim was 16 years of age when she gave evidence before the court. She too stated her date of birth as 17.10.2003. Same is, however, hit by hearsay. She testified that the appellant would reside in the very village. He was married. Whenever she was on her way to school, the appellant used to intercept her and extend threats to kill her father and brother. She further testified that about 8-9 days thereafter, her friends - Gayatri, Mogara and Sanjana had been to

her residence. They told her that one boy had affection for her. She, in turn, informed them that she did not wish to fall in love and she wanted to pursue her education. She further testified that about 4-5 days thereafter, the appellant sent her friend Gayatri to her residence. She accompanied Gayatri to her house. The appellant was present there. He expressed his desire to marry her. She flatly refused. He asked her to join him so that they may elope. She further testified that 4-5 days thereafter, she had been to attend the nature's call. It was little past 4.00 p.m. The appellant had hidden himself in that area. He suddenly emerged. He took her towards a *Nala* and committed rape of her. He also gave threats to kill her father and brother. Six-seven days thereafter, one Sonu, Pappu, Nilesh and Dinesh met her on way to school. The victim further testified that on 08.05.2019, her parents had been to village Aadachi. Nilesh came to her house and informed to have been sent by the appellant to take her. He also told her that if she did not join him, he would kill her family. Due to those threats, she joined him. The appellant then took her to various places on motorbike. He, ultimately, took her to Nashik and took a room on rent. He kept her with him for 19-20 days. During all those days, he committed sexual intercourse with her. The police, thereafter, arrived and brought them to the village. She was medically screened. She was found to

be pregnant of two months. She referred her statement recorded under Section 164 of the Code of Criminal Procedure.

12. PW1 - "K" (victim) was subjected to searching cross-examination. She denied to have been 18 plus. She also denied that a false case was lodged by her father since the appellant and her father had dispute *inter se* over money of Ayurvedic medicines. She also denied to have written love-letter to the appellant. She was confronted with her police statement. Same is silent to record that Nilesh had come to her residence to take her. The portion marked "A" was brought to her notice. She denied to have stated the same. Said statement is to the effect that since her parents had been to Aadachi wadi for marriage, she alone went to Sakri bus stand by 3.00 pm. She admitted to have not stated to the police in her statement, that 8-9 months prior to the incident, her friends - Gayatri, Mogra and Sanjana had been to her residence; they stated her that one boy (appellant) was in love with her. She turned down the proposal as she wanted to pursue her education. Her police statement is also silent to record therein that after 4-5 days, when she had been to answer the nature's call, the appellant suddenly emerged. Then, she was confronted with her statement recorded, under Section 164 of the Code of Criminal Procedure (Exh. 33), wherein, she stated to

have told the Magistrate that she was willing to reside (cohabit) with the appellant and she did not want to state anything more. Said statement is silent to record that the appellant had threatened to kill her father and brother. It has specifically been stated in her statement under 164 of Cr.P.C. that:-

मी धीरजला फोनवर सांगितले की, आपण पळून जाऊ. परंतु त्याने त्यास नकार दिला. पण मी माझ्या जीवाचे बरे वाईट करून घेईन असे त्यास सांगितल्याने त्याने निलेश नावाच्या मुलास मला घेण्यासाठी गाडीवर पाठवले. निलेशने मला पिंपळनेर येथे सोडले. तिथे मला घेण्यासाठी धीरज आला होता. धीरज मला नाशिक येथे घेऊन गेला. नाशिकला एक आठवडा आम्ही सोबत राहिलो. नंतर पोलीस व माझ्या वडिलांनी माझा शोध लावला.

The appellant sent Nilesh to get her. Nilesh took her to Pimpalner. There, she joined the appellant. She did not raise any hue and cry when she was along with the appellant on motorbike. She denied that the appellant did not have sexual intercourse with her.

13. PW3 – Kiran was owner of the premises in Nashik. He testified that he let out the room to the appellant at a monthly rent of Rs.2,800/-. He was, however, categorical to state that he had never seen the victim or any woman in the said room. He is witness to the crime scene panchnama (Exh.41).

14. PW6 – Dr. Vivekanand was on duty at Nandurbar Civil Hospital. He examined the victim on 26.05.2019. According to him, the victim narrated the history. He medically screened her and found her to be pregnant. He issued the medical certificates (Exh.62 and 63 respectively). What has been stated in the history of the victim to the Medical Officer (PW6) was not stated by the victim in her examination-in-chief. The medical examination report indicates that there was no injury mark on her person or even on her private part. For DNA analysis, blood samples of both appellant and victim were obtained and sent to F.S.L. The report in that regard indicates that the sample could not be amplified. As such, the DNA profiling could not be obtained. It is not known, whether the victim has undergone medical termination of pregnancy, lateron. The C.A. report (Exh.90) indicates that the blood group of the appellant was “A”. One semen stain was found on knicker (Article 3); while four small stains were found on Article 4. Those were of group “A”. Those are said to be the clothes of woman, seized in the presence of the panch witness, PW5 – Shakuntala, on 27.05.2019.

15. PW8 – Kamlakar was Investigating Officer. He reiterated about seizure of the clothes, etc. and sent the same for analysis. An employee from the office of village panchayat was also examined in

proof of age of the victim. Since the victim's father gave the date of birth of the victim and he being best witness in that regard, we rely on his evidence that the victim was below 18 years of age at the relevant time.

16. The offence is serious one. The appellant has been sentenced for life imprisonment. It needs no mention that serious is the offence, stricter shall be the proof. Appreciation of the evidence of the victim indicates that her evidence inspires no confidence. She made so many improvements in her evidence before the court. She alleged the appellant to have had extended threats to kill her father and brother and therefore, she joined him; whereas, her statement (under Section 164 of Cr.P.C.) indicates that it was the victim herself, who joined the appellant. The victim even threatened the appellant that if she was not taken with him, she would commit suicide. As such, whatever things appear to have had happened, were at the behest and insistence of the victim. The appellant was even reluctant to take her with him. The victim also testified that she had stayed at Nashik. The landlord (PW 4), in whose room she claimed to have stayed with the appellant at Nashik, stated to have never seen any lady or even the victim to have been staying with the appellant. When the Investigating Officer testified that he arrested the

appellant and took the victim into custody and brought them back; arrest panchnama was drawn at the police station. There is no evidence at all to indicate the victim was really pregnant, that too, by the appellant.

17. The panchnama relating to the seizure of clothes is conspicuously silent to state therein that those clothes were packed/wrapped and sealed, meaning thereby, those clothes were as it is, until the day on which those were sent to the F.S.L. for analysis. Finding of few semen stains thereon of the blood group of the appellant is short for us to jump to the conclusion that those were that of the appellant and were there as a result of the sexual intercourse between him and the victim. All in all, the evidence of the victim being not of sterling quality, we find the sentence of life imprisonment, based on such evidence, is unsustainable in law. The appellant is in jail since may, 2019, i.e. two months short of six years.

18. For all the aforesaid reasons, we are inclined to allow the appeal. In the result, the appeal succeeds. Hence, the following order:-

- (i) The appeal is allowed.
- (ii) The impugned order of conviction and sentence dated 01.09.2021, passed by learned Sessions Judge, Nandurbar (Trial Court), in Special Case No.25 of 2019, for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012, is set aside. The appellant is acquitted thereof.
- (iii) The appellant be released forthwith, if not required in any other offences.
- (iv) Fine amount paid by the appellant, if any, be refunded to him.
- (v) Fee of learned counsel appointed to represent respondent no.2 is quantified at Rs.10,000/- (Rupees Ten Thousand).

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP