

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

CRIMINAL APPEAL NO. 68 OF 2018

APPELLANT : Sujoy @ Sanjay Laltu Chakravarty,
Aged about 25 years, Occu. Labour,
R/o Gipiganj, Tah. Mednipur (West),
Dist. Mednipur, West Bengal.

VERSUS

RESPONDENTS : State of Maharashtra,
through Police Station Officer,
Tirora Police Station, Dist. Gondia

Mr. Mir Nagman Ali, Advocate for the appellant
Mr. V. A. Thakre, A. P. P for the respondent/State

CORAM : V. M. DESHPANDE, J.

DATE : FEBRUARY 26, 2018.

JUDGMENT

Heard Shri Mir Nagman Ali, the learned counsel for the appellant and Shri V.A. Thakre, the learned Additional Public Prosecutor for the respondent-State.

2. By the present appeal, the appellant is challenging the judgment and order of conviction passed by the learned Special

Judge, Gondia, dated 09.6.2016 in Special POCSO Case No. 11/2014, by which, the appellant was convicted for the offence punishable under Section 363 of the Indian Penal Code and was directed to suffer rigorous imprisonment of five years and to pay fine of Rs.1,000/- and in default of payment of fine, to suffer simple imprisonment for one month. He is also convicted for the offence punishable under Section 366 of the Indian Penal Code and on that count, he was directed to suffer rigorous imprisonment for 7 years and to pay fine of Rs.2,000/-, in default to suffer simple imprisonment for two months. He was also convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 5(a)(i) and (I) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act” for the sake of brevity) and on these counts, he was directed to suffer rigorous imprisonment for 10 years, respectively and to pay fine of Rs.3,000/- on each count and in default to suffer simple imprisonment for three months.

3. The facts giving rise to the present appeal, in nut shell, are as under :

Raghunath Kisan Shelke (PW6) on 20.12.2013 was attached to Police Station, Tiroda as Head Constable. On the said day, Lokram Bhelave (PW4) came to police station and lodged a report that the appellant had kidnapped his daughter. Raghunath (PW6) reduced the report of Lokram into writing (Exh.25). Since, the report was disclosing commission of a cognizable offence, he registered crime against the appellant vide Crime No. 191/2013 for the offences punishable under Sections 363, 366(A) of the Indian Penal Code. The printed first information report is at Exh.26.

4. As per the report of Lokram (PW4), the father of the victim, he resides at Wadegaon and he is a labour. He is having one daughter and one son. He gave their ages as 15 years and 12 years, respectively. It is also stated in the first information report that the victim girl is taking education in 9th standard at Zilla Parishad High School at Wadegaon. It is also stated that the appellant used to work in a jewelery shop of Deepak Gajapure (PW8) and he used to reside in his house and he was in talking terms with the victim girl. It is also stated in the first information report that on 19.12.2013, he went for his work at Bidi company and when returned at 6.00

O'clock in the evening, that time his wife Sindhubai (PW2) informed him that the victim girl, who left the house at 10.00 O'clock in the morning on the pretext of going to school, has failed to return home. It is stated in the first information report that since the victim girl used to go to the house of Digambar Gajapure (PW8), he went there for enquiry. That time it was found by him that even the appellant was also not present and therefore, on suspicion he lodged the report that the appellant must have kidnapped his daughter, the victim.

5. After registration of the crime, the case diary was made over to Ajit Kumbhar (PW10), who at the relevant time was working as Assistant Police Inspector. He visited the place of incident and prepared spot panchanama (Exh.28) in presence of panch Kailash Dhapade (PW5). During investigation, it was revealed to him that the appellant was resident of West Bengal and therefore, a team of police personnel was formed and was sent to search the appellant and the victim girl. The said team was consisting of Raghunath Shelke (PW6), one Fanindra Mugare and lady constable Rakhade.

6. After being sent to West Bengal, PW6 Raghunath Shelke

along with the members of the team went to Daspur police station at West Bengal and along with the four persons from Daspur police station they went to the house of the appellant, however, he was not present there. Thereafter, they all went to the the house of aunt of the appellant, who was residing in village Najirganj and in the evening, the appellant came out of the house along with victim for evening walk. That time, they were apprehended. Such information was given by PW.6 Shelke, Police Head Constable to Najirganj police station by communication (Exh.34). Thereafter, the appellant was produced before the Calcutta Court and obtained police custody remand. It was revealed to the Head Constable that there occurred sexual intercourse between the appellant and the victim girl in the house of the aunt and therefore, PW6 Shelke prepared spot panchanama of the house of aunt of the appellant (Exh.35) and thereafter, he brought the appellant and the victim girl at Tiroda.

7. After the victim girl was brought at Tiroda, her statement was recorded by API Smt. Sarita Bhand, to whom as per the prosecution, it was disclosed that the appellant had committed sexual intercourse with the victim girl and therefore, the relevant

offence under Section 376 of the Indian Penal Code and Section 5 read with section 6 of the POCSO Act was added to the crime. Thereafter, the victim girl was sent for her medical examination at Sub-Rural Hospital, Tiroda. Her medical certificate (Exh.22) was obtained from Dr. Rekha Ramteke (PW3). PW10 API Kumbhar also seized the clothes of victim as well as the appellant in presence of panch witness PW5 Kailash Dhapade vide seizure memos (Exhs.17 and 19), respectively. For age purpose, IO Shri Kumbhar, by giving requisition (Exh.52), obtained the certificate (Exh.42). After completion of the other usual investigation, the final report was presented in the Court of law.

8. The learned Special Judge, Gondia framed the Charge against the appellant for the offences punishable under Sections 363, 366, 366(A) , 376(2)(i) of the Indian Penal Code and under Section 5(a)(i) and (I) punishable under Section 6 of the POCSO Act. The appellant abjured his guilt and claimed for his trial. In order to bring home the guilt of the appellant/accused, the prosecution has examined in all 10 witnesses. After the evidence of prosecution was over, the appellant was examined by the learned Judge of the Special

Court under Section 313 of the Code of Criminal Procedure. According to the defence, he is being falsely implicated in the crime.

9. The medical report (Exh.22) is duly proved by Dr.Ku. Rekha Ramteke (PW3). The said certificate shows that sexual intercourse had taken place with the victim girl.

10. The victim girl is examined as PW.1. Her evidence shows that in the year 2013, she was studying in 9th standard at Zilla Parishad High School, Wadegaon and during the period of Diwali vacation, she used to work at one cloth shop owned by Digambar Gajapure, who is examined by the prosecution as its witness no.8. Similarly, it is her evidence that the appellant used to work at a jewelery shop of the said prosecution witness and both the shops were near to each other. It is further evidence of the victim girl that due to this reason, there was a friendship between her and the appellant. After Diwali vacation, she left the job to attend the school regularly, however, the appellant gave a cell phone to her for contact, which was returned by her.

Her evidence would disclose that on 18.12.2013, the

appellant called her near temple behind the school and pleaded that both of them will run away. Accordingly on the next day, as per the version of the victim, they ran away from their home. Firstly they went at Tiroda by bus and thereafter they came to Gondia and from there, they reached to Raipur by train and by another train they reached to Machanda from Raipur. From there, she made a phone call to her father that she is fine and nobody should worry about her. It is also stated in her evidence by the victim that she would disclose her address later on. Her evidence would disclose that from Machanda, the appellant and the victim girl went to Medigram in the house of sister of the appellant's mother by name Chhabi Mandal. As per the version of the victim, there sexual relations were developed in between them and though they stayed there for three days, only once the appellant had sexual intercourse with her. It is further stated in her evidence that when in the evening she and appellant stepped outside the house for stroll, that time they were picked up by the police and brought to Tiroda.

11. From the aforesaid version as appearing in the prosecution case from the witness box through the mouth of the

victim, it is crystal clear that the element of force at the hands of the appellant is totally absent. All the acts done by the victim are voluntary in nature. Her evidence in examination-in-chief shows that even there was no promise at all to her of any sort. Further, the sexual intercourse was also not repeated one, but it occurred only once.

12. Section 363 of the Indian Penal Code reads as under :

363. Punishment for kidnapping.—Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

13. Kidnapping is defined in Section 359 of the Indian Penal Code, which reads that :- Kidnapping is of two kinds (1) kidnapping from India and (2) kidnapping from lawful guardianship. In the present case, we are concerned with kidnapping from lawful guardianship.

14. Section 361 of the Indian Penal Code reads as under :

*361. Kidnapping from lawful guardianship.—
Whoever takes or entices any minor under [sixteen]
years of age if a male, or under [eighteen] years of
age if a female, or any person of unsound mind, out
of the keeping of the lawful guardian of such minor
or person of unsound mind, without the consent of
such guardian, is said to kidnap such minor or
person from lawful guardianship.*

15. After the amendment to Section 375 of the Indian Penal Code, a man is said to have committed 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 or 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 :-

(i) against her will ;

(ii) without her consent ;

(iii) 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 ;

(iv) 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 ;

(v) 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 ;

(vi) with or without her consent, when she is under eighteen years of age ; and

(vii) when she is unable to communicate consent.

The 'Child' is defined under Clause (d) of sub-section 1 of Section 2 of the POCSO Act and as per the said definition, "Child" means any person below the age of eighteen years.

16. In order to bring home the guilt of the appellant for the offences punishable under Sections 363, 366, 366(A), 376(2)(i) of the Indian Penal Code and 5(a)(i) and (I) punishable under Section 6 of the POCSO Act, the burden was cast on the shoulder of the prosecution to prove that in any case, the age of the victim was below 16 years, at the time of commission of offence.

17. If a girl more than age of 16 years on her own leaves her house then in such event, the person with whom she had eloped cannot be held guilty for the offence punishable under Section 363 of the Indian Penal Code. There can not be the defence of the accused that sexual relations with victim was there with her consent, if it is proved that at that time age of victim was below 18 years. In that event, the person who is facing the charge for offence punishable under Section 376 of the IPC and under relevant provisions of POCSO Act, cannot avoid legal punishment.

18. In view of the aforesaid, primarily, the burden firmly rests on the shoulder of the prosecution to prove the age of the victim girl, if the prosecution wants to succeed to bring home the

guilt of the person so charged by adducing admissible, cogent and reliable evidence.

19. In one of the Division Bench decisions of this Court in the case of **Ravi Anandrao Gurupude .vs. State of Maharashtra**, reported in **2017 All M.R. (Cri.) 1509**, to which I am party, the Division Bench in paragraphs 7 and 9 observed as under :

7. It would be useful to refer few provisions of the Act for apt consideration of the submission made by the learned counsel for appellant.

The Parliament has enacted the Act, 2012 in order to protect children from the offence of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The act extends to the whole of India except the State of Jammu and Kashmir.

Clause (d) of Section 2 of the Act reads as under:

"(d) "child" means any person below the age of eighteen years."

Section 5 deals with the aggravated penetrative sexual assault. Clause (j) of Section 5 reads as under:

"(j) whoever commits penetrative sexual assault on a child, which-

(i)

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;"

Clause (1) of Section 5 reads as under:

"(1) whoever commits penetrative sexual assault

on the child more than once or repeatedly."
Section 6 provides for punishment for aggravated and 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.

9. 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 provisions of the Act. The burden is on the prosecution to prove that the age of the prosecutrix, on the date of the occurrence, was less than 18 years. As observed above, at the first opportunity, the date of birth of the prosecutrix is not available in the prosecution case. The Investigating Officer has given a requisition to Sarpanch of Gram Panchayat, Panjarepar by which the Sarpancha was requested by the Investigating Officer to furnish the birth certificate of the prosecutrix. The said requisition is at Exh.-56. It is dated 25.09.2013 and it appears that it was sent under Outward No.100/2013.

The prosecution has placed on record, the birth certificate issued by the Birth and Death Record Officer, Gram Panchayat, Panjarepar. The said certificate is at Exh.-57. According to the Investigating Officer, the said is obtained by him from Gram Panchayat.

The document Exh.-57, the birth certificate is issued on 16.09.2013. It shows that it is in respect of one female, "Bali". The date of birth is 23.08.1995.

20. In another reported judgment of this Court in the case of **Deepak S/o Jitendra Sawant .vs. State of Maharashtra**, reported in **2017 All MR (Cri) 2058**, the Division Bench has followed the *Ravi Gulpude's* case, cited supra.

21. Thus, insofar as the POCSO Act is concerned, this Court has ruled that the enactment is stringent in nature and therefore, a stricter proof is required.

22. Let us examine whether in the present case, the prosecution has discharged its burden in respect of the age of the victim girl and whether the prosecution has brought on record sufficient admissible evidence to prove that on the date of the incident, the victim girl was below the age of consent.

23. The criminal law was set into motion by Lokram (PW4). This prosecution witness is the father of the victim girl. His report

Exh.25 does not disclose what is the date of birth of the victim girl. His report only recites that the age of his daughter is 15 years. The first information report is not a substantive piece of evidence. It can be used either for corroboration or contradiction of the maker. Lokram (PW4) is totally silent from the witness box about the age of his daughter. He did not state from the witness box that the age of his daughter was 15 years at the time of incident, as stated in the first information report. Further, even from the witness box, this prosecution witness did not disclose the date of birth of his daughter, the victim girl.

24. The prosecution has examined Smt. Sindhubai Bhelave (PW2), the mother of the victim girl. Her evidence is also silent about the age of the victim. Even this prosecution witness, is silent in her evidence about the date of birth of the victim.

25. The last oral evidence in respect of the age is of the victim. Though, she has stated her age as 17 years prior to administering the oath, even this prime witness has not given her date of birth. The victim girl was taking education that too in 9th

standard, and therefore, it is unbelievable that she was not knowing her date of birth.

26. In absence of any oral evidence on the date of birth or age of the victim, let us see whether the prosecution has proved the age of the victim by any documentary evidence.

27. The prosecution has filed three documents on record. Those are at Exh.41, 42 and 43. By heavily relying on these three documents, the learned Additional Public Prosecutor for the State Shri Thakre would submit that the prosecution has proved the date of birth of the victim girl as 21.5.1999 and on the date of the offence i.e. 19.12.2013, according to him, the girl was below the age of 16 years and therefore, even though she herself left her place and had sexual relations with the appellant voluntarily, such consent is no consent in the eye of law and therefore, the appellant cannot avoid legal punishment.

28. Now, let us test the submission of the learned Additional Public Prosecutor for the State. Exhibits 41, 42 and 43 are proved by

PW7 Prabhu Kantode. This prosecution witness, at the time of deposing from the witness box, was serving as Junior Assistant in Zilla Parishad High School and Junior College, Wadegaon. He was authorized by the Head Master of the School to appear and produce the register in the case. He produced the authority letter given to him by the Head Master of the School to depose before the Court (Exh.40). As per his evidence, the name of the victim girl is appearing at Entry No.6534 in the Admission Register of the school and her date of birth is shown as 21.5.1999. He deposed that she was admitted in the school in 5th standard on 26.6.2009. The extract of the Admission Register is at Exh.41. Similarly, in the Admission Register of the Junior College, the name of the victim is appearing at Serial No.2700 and she had taken admission in 11th standard on 01.7.2015 and the said extract is at Exh.42. He also proved the Bonafide Certificate placed on record given by the Head Master Shri Rahangadale and since this witness has identified the signature of Shri Rahangadale, the said Bonafide Certificate was also admitted in evidence and it is at Exh.43. These three documents show that the date of birth of the victim is 21.5.1999.

29. Exh.41 is the extract of admission register of the high school. As per the evidence of PW7 Prabhu Kantode and perusal of Exh.41 shows that, the victim girl was admitted in 5th standard on 26.6.2009. Exh.41 would reveal that there are total 15 vertical columns. The 7th column of such vertical columns is in respect of “last school attended” and against entry No.6534, which pertains to the victim girl, the 7th column shows that she was, prior to taking admission in Zilla Parishad High School, admitted in Zilla Parishad Primary School, Wadegaon.

30. Similarly, in Exh.42, which is the extract of admission register of Junior College, in respect of entry No. 2700 which pertains to the victim girl, the 6th column shows that prior to taking admission in junior college, the victim girl was admitted in Zilla Parishad High School, Wadegaon.

31. Exh.43 is the Bonafide Certificate and the Headmaster of Zilla Parishad High School, Wadegaon has given declaration that as per the school record, the date of birth of the victim girl was 21.5.1999.

32. Thus, on the basis of these two extracts (Exhs.41 & 42) and on the basis of Bonafide Certificate (Exh.43), the prosecution wish to contend before this Court that the date of birth of the victim girl is duly proved by the prosecution. Section 35 of the Indian Evidence Act, 1872 is as under :

35. Relevancy of entry in public [record or an electronic record] made in performance of duty.— *An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact.*

33. What would be the evidentiary value of the admission register or the transfer certificate is no more in *res integra*. In **Birad Mal Singhvi .vs. Anand Purohit**, reported in AIR 1988 SC 1796, in this authoritative pronouncement the Hon'ble Apex Court held that to render a document admissible under Section 35 of the Evidence Act, three conditions must be satisfied. Firstly, the entry that is relied on must be done in public or other official book, register or record, secondly, it must be an entry stating the fact in issue or relevant fact and thirdly, it must be made by a public servant in discharge of his

official duty or any other person in performance of a duty specially enjoined by the law. An entry relating to the date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry regarding age of a person in a school register is not of much evidentiary value to prove the age of the person in absence of material on which the age was recorded.

Similarly, in **Sushil Kumar .vs. Rakesh Kumar**, reported in **AIR 2004 SC 230**, the Hon'ble Apex Court in paragraphs 33 and 34 has stated as under and are reproduced hereinunder :

33. Under Section 35 of the Indian Evidence Act, a register maintained in terms of a statute or by a statutory authority in regular course of business would be a relevant fact. Had such a vital evidence been produced, it would have clinched the issue. The respondent did not choose to do so.

34. In the aforementioned backdrop the evidences brought on record are required to be considered. The Admission Register or a Transfer Certificate issued by a Primary School do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any reasonable person.

34. It is clear that Exh.43 is given on the basis of the entry

made in Exh.41. Similarly, entry in respect of age on Exh.42 is on the basis of entry made in Exh.41. Now, Exh.41, as observed in preceding paragraph, is having 15 vertical columns and column no.7 shows that the date of birth of the victim girl was initially recorded in Zilla Parishad Primary School, Wadegaon. In my view, this particular document would have been a primary document and an attempt ought to have been made by the prosecution to produce this particular document on record. Not only that, it was further obligatory on the part of the prosecution to prove that on whose statement, the date of birth of the victim was recorded as 21.5.1999 even in Zilla Parishad Primary School. The parents of the victim are blissfully silent in their evidence that while taking admission of their ward namely the victim they disclosed to the school authorities that date of birth of the victim as 21.5.1999, in absence of this material piece of evidence on record insofar as date of birth of the victim as 21.5.1999, in my view is mere a guess work.

35. Further, in that behalf, it would be useful to have a glance to the cross-examination of PW10 Ajit Kumbhar, the Investigating Officer and it is reproduced herein under :

“It is true that entry of date of birth is made at Gram Panchayat or Municipal Council. I did not make any attempt to collect birth certificate of victim girl from G.P. It is not true that during the period of incident, the age of victim girl was more than 18 years and therefore, I did not obtain her birth certificate from G.P.”

From the aforesaid, it is clear that the Investigating Officer has failed to discharge his duty properly and in half hearted manner he conducted investigation in such a serious offence. The Investigating Officer cannot take the side of the complainant or the accused. It is expected that he will investigate the matter impartially. In the present case, when it was revealed to the Investigating Officer that the victim girl on her own had left the home and had sexual bout with the appellant, it was obligatory on his part to investigate the matter throughly and impartially in order to establish the date of birth of the victim girl. It was not expected from the Investigating Officer to complete the investigation mechanically. In my view, had the Investigating Officer collected the birth certificate from the Gram Panchayat, the justice would have been done to both, the victim as well as the accused. Further, it is not the evidence of the Investigating Officer that though he had attempted to procure the

birth certificate from Gram Panchayat record, it was not made available to him, therefore, an adverse inference is required to be drawn against the prosecution in that behalf.

36. The cumulative effect of re-appreciation of the prosecution case leads me to record a finding that from the evidence of the victim girl, it is clear that she eloped with the appellant on her own and had sexual intercourse on her own and thus, she was a consenting party. The prosecution has utterly failed to prove that the age of the victim girl was below the age of 16 years, insofar as offence punishable under Section 363 of the IPC and below the age of 18 years insofar as the offences punishable under Section 376(2) (i) of IPC and under Section 5(a)(i) and (I) read with Section 6 of the POCSO Act are concerned. Resultantly, I pass the following order :

ORDER

- (i) The criminal appeal is allowed.
- (ii) The judgment and order of conviction passed by the learned Special Judge, Gondia, dated 09.6.2016 in Special POCSO Case No. 11/2014, is hereby quashed

and set aside.

- (iii) The appellant is acquitted of the offences punishable under Sections 363, 366, 366(A), 376(2)(i) of the Indian Penal Code and under Section 5(a)(i) and (I) punishable under Section 6 of the POCSO Act.
- (iv) The appellant, who is in jail, be set at liberty forthwith, if not required in any other case.
- (v) The criminal appeal is allowed and disposed of.

Diwale

JUDGE

