



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

**CRIMINAL APPEAL NO.43/2018**

Prashant s/o Daulat Korwate  
aged 20 years, Occ. Labour,  
r/o Chincholi, Tq. Dist. Chandrapur. ....**APPELLANT**

**...V E R S U S...**

State of Maharashtra through  
Police Station Durgapur, Tq. Dist.  
Chandrapur. ....**RESPONDENT**

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Mr. A. C. Jaltare, Advocate for appellant.  
Mr. A. Madiwale, A.P.P. for respondent-State.  
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**CORAM:- V. M. DESHPANDE, J.**

**DATED :- 27.03.2018**

**ORAL JUDGMENT**

1. The appellant is convicted by the learned Special Judge and Additional Sessions Judge, Chandrapur in Special (POCSO) Case No.68/2015 dated 09.01.2018. He approached to this Court by presenting this appeal under Section 374 (2) of the Code of Criminal Procedure. The appeal was admitted on 08.02.2018 and record and proceedings were called and it was observed that the application for suspension of substantive jail sentence will be considered after receipt of the record and proceedings.

On 21.03.2018, the application for bail was placed for consideration along with record and proceedings. It was noticed that even during the pendency of the trial, the appellant was not

on bail and he has already undergone a period of two years in jail out of seven years' sentence imposed on him. The learned counsel for the appellant submitted that he is ready to argue the matter finally and therefore filing of the paper book was dispensed with. In view of the receipt of the record and proceedings and since the appellant was in jail, the appeal was taken up today for its final hearing.

2. By the impugned judgment, the learned Judge of the Court below convicted the appellant for the offence punishable under Section 376 (1) of the Indian Penal Code read with Section 3 punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2002 and was directed to suffer rigorous imprisonment for seven years and to pay a fine of Rs.3,000/-, in default to suffer simple imprisonment for three months.

3. The appellant was charged for the offence punishable under Section 363, 376 (2) (J) (N) of the IPC read with Section 5 (L), (6) of the POCSO Act on 29.06.2017 in Special (POCSO) Case No.68/2015. The appellant denied the charge and claimed for his trial. To bring home the guilt of the appellant, the prosecution has

examined in all seven witnesses namely; Sunita (PW1), mother of the victim, Kistapal Ratnaparkhi (PW2), panch on the spot panchanama (Exh.-26), Victim (PW3), Kailas Pajankar (PW4), Incharge Head Master of Zilla Parishad School of Chincholi who proved the documents from Exhs.46 to 48 to prove that the date of birth of the victim was 11.11.2000, Dr. Ghanshyam Patil (PW5) examined by the prosecution to prove the Ossification Test Report (Exh.-54), PSI Sangita Kadam (PW6), the investigating officer and Dr. Jaya Bhongale (PW7) who examined the victim after obtaining her consent (Exh.-20) and proved medical certificate (Exh.-65.).

After appreciation of the prosecution case, the learned Judge of the Court below acquitted the appellant of the offence punishable under Section 363 of the Indian Penal Code. However, he was convicted for an offence punishable under Sections 376 (1) of the IPC read with Section 3 punishable under Section 4 of the POCSO Act. Hence this appeal.

4. Heard Mr. Jaltare, learned counsel for the appellant and Mr. Madiwale, learned A.P.P. for the State in extenso. I have perused the entire record and proceedings with the assistance of both the learned counsel.

5. According to the submission of the learned counsel for the appellant, the prosecution has utterly failed to prove the age of the victim and consequently, he submits that the victim cannot be termed as “Child” within the meaning of the POCSO Act. It is his submission that the prosecution has utterly failed to prove that the sexual assault was made on the victim. Alternatively, he submits that the victim was the consenting party. He therefore submitted that the appeal be allowed.

Per contra, the learned A.P.P. would submit that the prosecution has proved the date of birth of the victim as 11.11.2000 in view of the documentary evidence as brought on record and it is proved by Kailas (PW4), incharge Head Master of the school. He also submitted that in view of the evidence of Dr.Ghanshyam (PW5), the age of the victim was more than 15 years and less than 16 years. Therefore, the victim was child within the meaning of the Act. If that be so, according to his submission, consent if any extended by the victim is of no consequence and therefore he prayed for dismissal of the appeal.

6. Before advertng to the question as to whether the victim was a child within the meaning of Section 2 (d) of the Act,

it would be useful to give in short, the prosecution case as it is brought on record through the FIR (Exh.-18) filed by Sunita (PW1) mother of the victim.

As per the report (Exh.-18) dated 25.04.2015, the first informant is having two sons Anil and Abhishek. Their ages are 17 years and 4 years respectively. The age of the victim as mentioned in the FIR is 16 years. The first informant and her husband Suresh used to work as labours in the agriculture fields. The victim was admitted at a school known as Siddharth School. She used to reside at Chokha Mela Hostel. On 21.04.2015, there was a marriage ceremony in village Chincholi. Therefore, the first informant had been to the said programme as a cook. That time, her two sons and daughter were present in the house. Her husband went for labour work. The first informant came at 5.00 O'clock in the evening, that time every member of the family was present. At 8.00 O'clock in the night the victim, again whose age is mentioned as 16 years, without intimating anybody, took exit from the house by the rear door. Since, she failed to come till 9.00 O'clock, she was searched by the first informant, her husband and her son at various places. It was also noticed that Rs.1450/- was also missing from the house. It is stated that the victim was in

habit of leaving the house. Therefore, the first informant thought that she must have left the house by taking the said money. During search, it was revealed to her that the victim was having love affair with the appellant, aged 20 years as disclosed to her by one Nirasha alias Kiran that she noticed the appellant in the house of the first informant in her absence. Therefore, the first informant went to the house of the appellant that time he was not present and his relatives gave evasive replies to her. Therefore, she lodged a complaint that the appellant has kidnapped her daughter.

7. PSI Sangita Kadam (PW6) the investigating officer registered the FIR (Exh.-19) lodged by Sunita (PW1) vide Crime No.33/2015 for an offence punishable under Section 363 of the IPC. Subsequently, when the victim was traced out, Section 376 of the IPC and the relevant provisions under the POCSO Act were added. The investigating officer recorded the statements of victim and also other witnesses. Clothes of both; the appellant and the victim were seized, the blood samples and the semen sample of the appellant were also obtained so also vaginal swab of the victim was also obtained by the investigating officer and the seized property was forwarded to the chemical analyzer. The

investigating officer also obtained school leaving certificate from the Zilla Parishad Primary School, Chincholi. After completion of the other investigation, the charge-sheet was filed.

8. A serious dispute is raised by the learned counsel for the appellant about the age of the victim. According to the learned counsel, on the basis of the available evidence, it cannot be held that the prosecution has proved the age of the victim to show her as a child beyond reasonable doubt. He submits that the documentary evidence is wholly unreliable to reach to the conclusion that the victim was a child.

9. The appellant was charged and is convicted under the relevant section of the POCSO Act. The Division Bench of this Court in **Ravi Anandrao Gurpude .vs. State of Maharashtra;** reported in **2017 ALL MR (Cri) 1509**, has ruled that the provisions of the POCSO Act are stringent in nature and since the enactment is stringent in nature the degree of proof is stricter one.

In the backdrop of the law laid down by the Division Bench in **Ravi Anandrao Gurpude's** case supra, the burden is on the shoulder of the prosecution to prove its case beyond

reasonable doubt by adducing the clinching evidence that on the day of the offence, the victim was a child.

10. In order to prove the age, the prosecution is relying on; (i) the documentary evidence and (ii) the medical evidence in the nature of ossification test. It would be useful to record here that the date of birth of the victim is not stated by Sunita (PW1), mother of the victim so also the victim has not stated in her evidence what was her date of birth. Not only that, the oral report (Exh.-18) is also totally silent on the said point and in the FIR also, it is stated on two occasions that the age of the victim is 16 years.

In absence of the date of birth in the substantive evidence of the victim and her mother, the available date of birth on record is 11.11.2000, which according to the prosecution is recorded in the school record.

11. Extracts of Admission and Leaving Register of primary school at Chincholi (Exh.-46 and 47) and school leaving certificate (Exh.-49) of the victim, these three documents are proved by Kailas (PW4).

Kailas (PW4) is a teacher working at Zilla Parishad

School, Chincholi since 2005. At the time of deposition before the Court, he was also holding the post of Incharge Head Master. In view of the summons, he brought the record of admission and leaving of the victim in the Court. As per the school record the name of the victim is registered at Sr. No.426 on 19.06.2006 and her date of birth is shown as 11.11.2000. The victim left the school on 01.05.2010 after passing 4<sup>th</sup> standard examination.

Kailas (PW4) brought the original record for perusal of the Court and photocopy of the original was placed on record (Exh.-46). He also states that during investigation, he gave extract (Exh.-47) to the police . He also gave school leaving certificate of the victim (Exh.-48). It is his deposition that school leaving certificate (Exh.-48) is prepared on the basis of the original record i.e. entry in the Admission and Leaving Register (Exh.-46).

These three documents show that the date of birth is 11.11.2000. The question is whether this documentary evidence can safely be accepted as conclusive proof of the date of birth.

12. In the cross-examination, Kailas (PW4) has admitted that the handwriting on extract (Exh.-46) belongs to him. He candidly admitted that the parents of the victim did not produce

before him any birth certificate either issued by the Gram Panchayat or the Municipal Council at the time of obtaining admission in the school nor he made demand of the original birth certificate of the victim from her parents. Kailas (PW4) volunteers that he took entry about the date of birth of the victim on the basis of the entries in Anganwadi centre. However, he did not produce anything on record about the said Anganwadi where the victim took her earlier education.

13. Kailas (PW4) was required to admit when the extract (Exh.-46) was confronted to him that there is a overwriting in the name of father of the victim whose name appears at Sr. No. 426 at Exh.-46. He also admitted that earlier the name of the father of the victim was written as “Suresh Namdeo” and later on Namdeo was rounded off and the name “Bala” is inserted. However, he admitted that the name of father of the victim in the school leaving certificate (Exh.-48) is shown as “Suresh Namdeo”.

14. The law in respect of evidentiary value is no more *res integra* in view of the authoritative pronouncement of the Hon'ble Apex Court in **Birad Mal Singhvi .vs. Anand Purohit**, reported in

**AIR 1988 SC 1796.** The relevant portion in paragraph 15 of the said authoritative pronouncement is reproduced hereinbelow:

*“15. ....To render a document admissible under Section 35 of the Evidence Act three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a 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 law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry regarding the age of 3 person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”*

Time and again the said proposition is reiterated by the Hon'ble Apex Court in various subsequent pronouncements.

15. While discussing the evidence of Kailas (PW4) it is noticed that at the time of taking notes of the date of birth of the victim, the certificate from Gram Panchayat or from the Municipal Council was not produced before him nor he asked for the production of the same. What is important to note is that he

noted the date of birth of the victim as 11.11.2000 on the basis of the victim's earlier school record from Anganwadi school, which in my view, will be the primary document insofar as the admission and leaving extract (Exh.-46) is concerned. However, the said primary document from Anganwadi school is not produced on record. Therefore, everybody is at loss to know what was the date of birth that was noted in the earlier school record of the victim on the basis of which the admission and leaving extract (Exh.-46) was prepared. This assumes importance when in the cross-examination of Kailas (PW4), the authenticity of the documents from Exhs.-46 to 48 was seriously challenged by the appellant.

16. In the evidence of Sunita (PW1), it is brought on record that her husband for obtaining the admission of the victim in the first standard told the date of birth that too approximately. Therefore, it is the father of the victim, who firstly disclosed before any school authority regarding the date of birth of his daughter, might be approximately. The evidence of father of the victim would have been useful to see as to what date he had disclosed firstly before the School authority as the date of birth of his

daughter i.e. the victim. Surprisingly, father of the victim is not examined by the prosecution in the present sessions trial. The record shows that even he was not cited as a witness of the prosecution. He would have been the best person to throw light on important aspect of date of birth for determining as to whether the victim was a child within the preview of the definition as legislated in the POCSO Act. For not examining or even citing this best witness to vouchsafe the authenticity of the school record, the prosecution must suffer.

17. It is established on record through the evidence of mother of the victim that the birth place of the victim is at village Waneri, Taluka Sindewahi and there is a Gram Panchayat at the said village. Though the mother of the victim claims that they did not make any entry of the birth date of the victim with Gram Panchayat, she has admitted that Kotwal/Gram Sevak of the Gram Panchayat, Waneri collected the information about the birth date from her father after her birth. Obviously, this was done by Kotwal/Gram Sevak in discharge of his official duty. Since, the said Gram Sevak has obtained the date of birth of the victim, that must have recorded in the official records of the gram panchayat

of Waneri and it would have been the primary evidence since the public servant was maintaining the date of birth of the victim in the official records. It was always open for the investigating officer or for the prosecution to make inquiry with the Gram Panchayat and could have brought the birth certificate from the said Gram Panchayat or even it was always open for the prosecution to summon the Secretary of the said Gram Panchayat for producing the record. Nothing that sort of has been done either by the investigating officer during the course of investigation or by the prosecution during the pendency of the trial. Thus, the best important documentary evidence which would have clinchingly settled the issue about the date of birth of the victim either in favour of the prosecution or in favour of the appellant is not coming on record. No reasons are supplemented by the prosecution for not placing the said on record. In fact, PSI Sangita Kadam (PW6) the investigating officer was required to admit the fact about the existence of Gram Panchayat at Waneri and that she has not forwarded any letter to the said Gram Panchayat for collection of the information about the birth date of the victim. Therefore, the submission of the learned counsel has some grain that since the said document was in support of the appellant and

purposefully the said is not brought on record.

18. In view of the aforesaid, this Court is of the view that in spite of availability of the primary evidence which would have clinchingly settled the issue about the date of birth, the prosecution has failed to produce it on record for its appreciation by the Court. Hence, I have no hesitation in my mind to draw an inference against the prosecution on the said aspect.

19. The other piece of evidence on which the prosecution relies for determination of the age is the Ossification Test report (Exh.-54). The said is proved by Dr. Ghanshyam Patil (PW5). Dr. Patil is a Radiologist at Civil Hospital, Chandrapur. The Medical Officer of casualty ward referred the victim to him for conducting ossification test to determine her age. Accordingly, he performed the ossification test and on examination, as per his evidence, he concluded that the concerned girl appears to be of the age in between 15 to 16 years. He states that according to him, the girl is not less than 14 years and not more than 16 years.

20. Dr. Patil (PW5) is a Radiologist. He has not taken X-

ray of the victim. He states that it is not his duty. From the tenor of his cross-examination, it appears that the X-ray plates on the basis of which Dr. Patil has formed his opinion were handed over to the investigating officer. However, he admitted that the X-ray plates are not filed along with the charge-sheet. Not only that, PSI Sangita Kadam (PW6) the investigating officer has stated in her cross-examination that she is unable to tell where the X-ray plates of the victim are lying.

21. From the evidence of Dr. Patil (PW5), it is clear that he has not taken X-ray. The person who took X-ray is not examined by the prosecution. Further, there is nothing available on record to show that it is the only X-rays of the victim those were placed before Dr. Patil on the basis of which he has formed his opinion and reduced it by drawing the report (Exh.-54). Therefore, in my view, it is hazardous to rely on the testimony of Dr. Patil to determine the age of the victim.

22. From the report (Exh.-18), it is clear that the victim was in habit of leaving the house. The victim herself has stated

that she was knowing the appellant and she used to talk with him and they used to meet regularly within 2-3 days. There is no evidence available on record to show that under coercion the appellant and the victim left her house. Not only that, her evidence shows that when she was in the company of the appellant, they stayed for 2-3 days at the house of the maternal uncle of the appellant and prior to that for one night they had stayed at village Tikhamba at the house of the friend of the appellant. Though the victim states that the appellant established sexual relations against her will and forcefully, the medical report (Exh.-65) does not show that the victim was having any type of injury on her person whether on private part or anywhere on her body. Further, even according to the victim, on the next day of the sexual relations there was an opportunity for her to disclose the fact to the persons with whom she came in contact. However, till the appellant and she were apprehended by the investigating officer, there was no disclosure on the part of the victim.

23. Dr. Jaya Bhongale (PW7) has clinically examined the victim after obtaining her consent (Exh.-20). She noticed that the victim's hymen was torn in circumferential shape. She states that

the hymen rupture was an old one. Not only that she has admitted that hymen can be ruptured by any other mode than the sexual intercourse. She further states that merely because hymen is ruptured, it is not the conclusive proof of sexual intercourse. The appellant and the victim were apprehended on 25.04.2015 and the consent of the girl was obtained on 26.04.2015. In view of the medical evidence, which the Court is required to consider only because the version of the victim is not inspiring confidence, shows that the doctor opined that conclusively she cannot state that there was sexual intercourse.

24. Thus, on reappraisal of the entire prosecution case, I am of the firm view that the prosecution was unable to come out of the mist of suspension. The cumulative effect of reappraisal of date of birth, according to me shows that it would be very risky to jump to the conclusion about the date of birth. The availability of the evidence, in my view is too sketchy rather it is highly insufficient to curtail the liberty of the citizen.

Consequently, I pass the following order.

**ORDER**

- (i) Criminal Appeal No.43/2018 is allowed.

(ii) Judgment and order of conviction dated 09.01.2018 in Special (POCSO) Case No.68/2015 passed by Special Court, Chandrapur, thereby convicting the appellant for an offence punishable under Section 376 (1) of the Indian Penal Code read with Section 3 punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2002 is hereby set aside.

(iii) The appellant-Prashant Daulat Korwate is acquitted of the offence punishable under Section 376 (1) of the Indian Penal Code read with Section 3 punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2002.

(iv) The appellant who is in jail shall be released forthwith, if not required in any other crime.

**JUDGE**

kahale