



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 478 OF 2023

Lalu @ Sanju Bhisn Sonawane

Age : 24 years, Occu : Agril.

R/o Shafepur, Pishor, Taluka Kannad,

District Aurangabad.

(Appellant in jail)

... Appellant

Versus

1. The State of Maharashtra,
Through : Police Inspector,
Pishor Police Station,
Taluka : Kannad, District Aurangabad.

2. XYZ

... Respondents

.....

Mr. Sopan G. Bobde, Advocate for the Appellant

Mr. N. S. Tekale, APP for Respondent No.1-State

Mr. Kiran P. Rathod, Advocate for Respondent No.2 (appointed)

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 23.03.2026

Pronounced on : 25.03.2026

JUDGMENT :

1. Convict for offence under Sections 363, 376(2)(n) of IPC and Sections 4(2) and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), hereby takes exception to the judgment and order passed by learned Special Judge (POCSO), Aurangabad dated 27.04.2023 in Special Case (POCSO) No. 185 of 2020.

2. In brief, prosecution case is that, on 25.03.2020, daughter of informant PW2 had carried lunch for him while he was working in the field. After handing over the lunch box, she left the field to go home, but she had not reached home and therefore, he lodged complaint against unknown person for offence of kidnapping. On the next day, his daughter was brought by police from house of sister of accused and thereafter, crime was registered by Pishor Police Station bearing No. 68 of 2020 for above offences. Investigation culminated into filing chargesheet and trial was conducted by above said court who, after appreciating oral and documentary evidence, convicted the appellant, who now challenges the above judgment and order of conviction.

SUBMISSIONS

On behalf of appellant :

3. Learned counsel for the appellant would point out that, at the threshold, prosecution had failed to prove that victim was minor. He took this court through the evidence of complainant and more particularly, her cross, and would point out that, she had admitted that on 25.03.2020, she was of 18 years of age. That, her marriage was also performed and therefore according to him, she was not minor.

4. He further submitted that, admittedly FIR was against unknown person. That, there was no witness seeing accused taking the girl. Therefore, according to him, chargesheeting accused and further holding him guilty is a mistake by prosecution.

5. He further took this court through the evidence of father and more particularly his cross, and would point out that, father has admitted that he has not handed over birth certificate or extract to the police and therefore, in absence of cogent and convincing evidence about age, it is his submission that, learned trial court ought not to have invoked provisions of the POCSO Act.

6. On the point of sexual assault and rape, he took this court through the evidence of doctor PW5, more particularly the answer given while facing cross, and would submit that doctor has admitted that she could not firmly state whether there was sexual activity and as such, he questions the finding and conclusion of rape recorded by learned trial court.

7. Lastly he criticized the prosecution case on the ground that here, Investigating Officer (IO) has not been examined and according to him, it was fatal for prosecution. He emphasized that, because of

non examination of IO, defence lost the opportunity to bring material omissions and contradictions and as such, serious prejudice has been caused to the accused.

For all above reasons, he urges to allow the appeal by setting the impugned judgment of conviction.

On behalf of the State as well as the victim :

8. Learned APP for State as well as learned counsel appointed for respondent-complainant, both would support and justify the order of conviction, and for want of merits, prayed to dismiss the appeal.

BRIEF ACCOUNT OF EVIDENCE ON RECORD

9. It seems that, in order to establish its case, prosecution has examined as many as five witnesses. Their role and status as well as the sum and substance of their evidence can be summarized as under :

10. PW1 victim, who is examined at Exhibit 21, while in witness box, gave her age as 16 years and about she having studied up to 7th standard. According to her, incident took place three years back, that

was in the day of Gudi Padwa (new year as per Marathi Calender). That, she went along with her siblings to supply lunch to her father at field. While her siblings were playing, around 4.00 p.m. she was about to return home, but according to her, at that time accused present in the court, caught her, pulled her, gagged her, took her towards Kolambi river towards a shed and in the evening, after shutting the door, he had sexual intercourse with her three to four times that night. In the morning he took her to his sister's place where police reached and she was accordingly brought and she claims to have narrated the incident to police who referred her for medical examination.

11. PW2 father gave evidence that occurrence is of 25.03.2020. Around 2.00 p.m., his children and victim came with his lunch. While his other daughters were playing and he was watering the field, his daughter left saying that she has to go home as it was festival. That time, his daughter's age was 13 to 14 years. After half an hour when he inquired with his wife over phone whether daughter has reached home, it was informed that she has not reached and therefore, after conducting search, he lodged complaint of kidnapping. That, sister of accused informed police about arrival of his daughter and accused and he accompanied police to bring her at village Naigaon and on

inquiry, he claims that his daughter informed that while she was returning home from the field, accused gagged her, threatened to kill her and took her to his field and had physical relations with her three to four times and thereafter took her to his sister's place.

12. PW3 is the headmistress of Z.P. Primary School and according to her, she carried entire original record maintained by the school on the basis of which she deposed that, victim was admitted in their school in first standard on 21.06.2012. Guardian of the victim had entered her name in the admission record. According to this witness, date of birth of the victim was 24.01.2005 and she placed on record applications Exhibits 31 and 32 as well as extract Exhibit 33.

13. PW4 is the pancha to spot panchanama, i.e. spot shown by accused at Exhibit 35.

14. PW5 is the medical expert, who deposed about obtaining consent, conducting medical examination, noting the history where she gave her age as 15 years and about sexual assault by accused on the night of 25.03.2020. According to her, there were no signs of use of force and she reserved final opinion pending FSL report, but narrated that intercourse cannot be ruled out.

ANALYSIS AND CONCLUSION

15. Learned trial Judge has convicted appellant for offence under Sections 363, 376(2)(n) of IPC and Sections 4(2) and 6 of POCSO Act.

16. The fundamental grounds of challenge which are emerging from the submissions advanced before this Court are that, *firstly*, prosecution's failure to prove victim to be minor, *secondly*, medical evidence not supporting offence of rape or sexual assault, *thirdly*, no independent witness to corroborate testimony of victim and *lastly*, failure of prosecution to examine the IO thereby causing prejudice to the accused.

17. On above lines, evidence on record is re-appreciated and re-analyzed. In view of the charge of POCSO along with IPC, indeed it is mandatory and obligatory on the part of prosecution to first establish that victim was a minor, and more particularly when there is challenge to the very issue by defence.

18. Here, there is evidence of victim, her father and Headmistress. On meticulous study of evidence of victim PW1 victim, it is noticed

that before the court while giving testimony, she has given her age as 16 years and she has stated that she has studied up to 7th standard. As pointed out by learned counsel for the appellant, she has not stated her exact date of birth. In cross para 4, she seems to have admitted that on 25.03.2020 she was above 18 years of age. Learned trial court seems to have noted during recording of evidence itself that, prior to recording above answer, court had explained the witness that in title clause she has given her age as 16 years and as such, how she could be more than 18 years in the year 2020, but still witness stated that she was 18 years of age in the year 2020.

19. The next piece of evidence is father of complainant who has also unfortunately not given date of birth of his daughter and he has only narrated about offence of kidnapping and rape with his daughter on 25.03.2020. He merely stated that at that time, his daughter was 13 to 14 years of age. While facing cross, he seems to have admitted that till date he has not given birth extract to police.

20. The third witness on the point of age is PW3 who is examined at Exhibit 30, and who in the capacity of Headmistress of Z.P. Primary School, Shafepur, initially narrated about procedure of admission and in para 2 testified that victim was student of their school and her

original record of admission was brought in the court. On going through the same, she deposed that victim was admitted in their school in 1st standard on 21.06.2012. She further deposed that the girl's guardian had tendered admission application. On the basis of record she deposed that date of birth of victim is 24.01.2005 and she has placed on record attested copy of application form Exhibits 31 and 32 as well as admission register extract Exhibit 33.

21. Above witness has faced cross wherein she admitted that students are admitted in the 1st standard after attending 6 years of age. She admitted that application form of the victim does not bear the signatures of parents as well as student. She admitted that, even request application does not bear their signatures and that thumb impression over it is not attested by anyone. She answered that, at the time of admission, she was not the headmistress or class teacher.

22. Above is the evidence on the point of age of victim. Admittedly, age of the victim at the time of evidence, as narrated by her, was 16 years. Neither she nor her father PW2 has narrated her date of birth. But it is to be borne in mind that, father is illiterate and admittedly admission in the school seems to have been taken by grandmother in the capacity of guardian. It is also true that in cross, victim has

admitted that on 25.03.2020, she was above 18 years of age. However, here, PW3 headmistress, who is an independent witness and who has carried original record showing admission of the victim in 1st standard in their school on 21.06.2012, has also reproduced the date of birth reflected in the school admission register as 24.01.2005. Therefore, merely because father failed to narrate the date of birth, he being illiterate, and though victim herself admitted, that too in cross, that she was above 18 years of age at the time of incident, the testimony of PW3 cannot be discarded or brushed aside. Going by the testimony of PW3, there is no reason to disbelieve the date of birth of victim to be 24.01.2005. Going by such date of birth, and taking into account the date of occurrence i.e. 25.03.2020, victim was around 15 years of age. Father also, in his chief has stated that his daughter at that time was 13 to 14 years of age. Hence, there is evidence on behalf of prosecution suggesting victim to be minor at the time of incident. Consequently, no fault can be found in the findings and conclusion recorded by trial court that victim was a minor and prosecution having discharged its burden of proving the same.

23. The another ground of challenge in this appeal is that, offence of rape or sexual assault has not been proved. Reliance is placed on the testimony of doctor PW5.

24. Here, victim in her substantive evidence has narrated that, around 4.00 p.m. while she was returning home, she was intercepted by accused, who she claims to have caught her and pulled her by pressing her mouth as a result of which, she claims that, she could not raise hue and cry. He took her to a shed and there he allegedly had sexual intercourse with her three to four times during night. On visiting her cross, there is mere suggestion that no such occurrence has taken place. Admittedly, father has hearsay information. PW5, a medical expert who deposed at Exhibit 36, has recorded the history wherein victim narrated about visit to her field to carry tiffin to her father and there, according to medical expert, it was reported that assailant met her on the way and asked her to come to other farm and that night he asked her to remove the clothes and when she denied, he removed her clothes and had sexual intercourse with her. Though there is slight variance in the story of victim and that of the history reported to the medical expert at later point of time, core of the accusation about taking her to the shed and having sexual intercourse multiple times has remained undisturbed. In fact, to the medical expert it was reported that after asking her to remove clothes, victim had denied and thereafter accused himself had disrobed her. As regards to evidence of this witness that there were no signs of use of fresh and there was no fresh hymenal tear, apparently examination is

done on 27.03.2020 i.e. two days after the fateful night. Therefore, there may not be evidence of fresh tear. Even if forensic or scientific evidence is not supporting prosecution, in cases of such nature, when sole testimony of victim inspires confidence, there is no need for further corroboration from any other corner and law is fairly settled to that extent. Moreover, when the girl is proved to be a minor, even if she is consenting party, her said consent is irrelevant. As stated above, victim in her cross has denied that she had consumed any medicine prior to the incident. Such suggestion itself shows that occurrence is not seriously disputed. Rather, in the chief, she has identified accused in the Court and she has also named him. There is nothing suggesting false implication. For above reasons, even offence of rape, and she being minor, provisions of Sections 4(2) and 6 of POCSO rightly get gravitated.

25. One more ground is pressed by learned counsel before this Court, i.e. failure of prosecution to examine the Investigating Officer. It is submitted that, defence is deprived of opportunity to bring on record material omissions, contradictions and variances.

26. In the light of above, in the considered opinion of this Court, it is fairly settled position that non-examination of Investigating Officer

in criminal cases is of considerable significance and it may undermine principle of fair trial as defence is deprived of opportunity to cross-examine the Investigating Officer on material biases, findings or omissions. However, it is also fairly settled position that, mere non-examination of Investigating Officer would not be fatal to the prosecution if there were no material contradictions in the testimony of witnesses. Law to this extent is dealt in the cases of *S. K. Rashid and others v. State of Bihar* MANU/BH/0173/1986, *Bahadur Naik v. State of Bihar* (2000) 9 SCC 153, *Ambika Prasad and another v. State (Delhi Administration)* AIR 2000 SC 718, *Arvind Sing v. State of Bihar* (2001) 6 SCC 407, *Lahu Kamlakar Patil v. State of Maharashtra* (2013) 6 SCC 417 and the recent case of *Munnalal v. State of Uttar Pradesh* 2023 LiveLaw (SC) 60; (2023) SCC OnLine SC 80.

Though it is open for defence to set up a plea of prejudice, it is further expected of defence to demonstrate what were the prejudices caused and more particularly, what were the material omissions and contradictions which were to be brought on record by cross-examining the Investigating Officer. Here, there is not a single contradiction or omission in the cross of any of the prosecution witnesses to which attention of this Court is invited and therefore, mere submissions that prejudice has been caused to the defence,

holds no substance. On the contrary, having gone through the evidence of victim, the same inspires confidence. Resultantly, there being no merits in the appeal, following order is passed :

ORDER

- I. The appeal is dismissed.

- II. Fees of the learned counsel appointed to represent respondent no.2 be paid by the High Court Legal Services Sub-Committee, Aurangabad, as per rules.

[ABHAY S. WAGHWASE, J.]

vre