



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1184 OF 2019

Ashik Ramjan Ansari .. Appellant

Versus

The State of Maharashtra & Anr. .. Respondents

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Mr.Murtaza Najmi with Mrs.Farida Murtaza Najmi,
Ms.Davinder Sabharwal, Ms.Siddhi Ghogale, Ms.Sulbha
Chakranarayan and Ms.Aqsa Tajuddin for the Appellant.

Mr.S.R.Agarkar, A.P.P. for the State.

Ms.Sonali Sable with Mr.Macchindra Bodke for the
Respondent No.2/Complainant present.

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CORAM: BHARATI DANGRE, J.

RESERVED ON : 17th MARCH, 2023

PRONOUNCED ON : 10th JULY, 2023

JUDGMENT:-

1. The Appellant, on being tried by the Special Judge at Gr.Bombay in POCSO Spl. Case No.203 of 2016 for the offences punishable under Sections 363, 376, 107 and 109 of the Indian Penal Code (for short, "IPC") and under Sections 4, 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (for short, "the POCSO Act"), stand convicted by judgment and order dated 21/02/2019. He is handed over a sentence of R.I. for 10 years, on being convicted under Section 6 of the POCSO Act and to pay fine of Rs.2,000/-, in default to undergo R.I. for

one month. Though found guilty, for committing the offence under Section 376 of IPC as well as under Sections 4 and 6 of the POCSO Act, no separate punishment is awarded to him.

2. The prosecution case was unfolded before the learned Special Judge through PW1, brother of the prosecutrix as well as the prosecutrix (PW 4) herself and can be culled out as below :

(a) PW 1 deposed that his sister was going in Madarasa and when their grandmother, residing in Jharkhand, expired on 29/01/2016, all members of the family except his sister (the prosecutrix), his wife and their children, went for her last rituals.

On 30/01/2016, he received a phone call from his wife, informing that his sister was missing from the house and, therefore, he immediately reached Mumbai and took a frantic search for his sister. Before one month of the incident, he had become aware that his sister was having affair with the accused and suspecting that he might have some role to play in the incident, he lodged a complaint expressing his suspicion upon the accused. He mentioned the age of his sister as 17 years.

The FIR came to be lodged on 01/02/2016, where he expressed his suspicion and the offence under Section 363 of IPC was registered.

(b) The prosecutrix was traced out alongwith the accused at Hadgood, District Anand, State of Gujarat on 18/03/2016.

Both the prosecutrix and the accused were brought to Byculla Police Station and her statement came to be recorded under Section 164 of Cr.P.C.. The birth certificate of the prosecutrix was collected during investigation, which in fact is a School Leaving Certificate, revealed her date of birth as 05/09/1998. Since, she being a minor, the offences under Section 376 of IPC and Sections 4 and 6 of the POCSO Act came to be added.

(c) The prosecutrix was forwarded for medical examination to Grant Government Medical Collage and Sir J.J.Hospital, Mumbai, where she gave a history of love relationship with a known person, named Ashik, since one year. She admit of having penovaginal sexual intercourse multiple times, without force, with her consent and narrated that the person had promised her of marriage, but later on he denied.

The medical examination recorded presence of old healed hymenal tears at 4 & 8 O'clock position. However, since the victim was examined after 7 days of the incident, no fresh injuries were noticed on her genitals.

(d) The prosecutrix was carrying a pregnancy of 14.6 weeks, she aborted the pregnancy on 22/03/2016 by consent of her father.

The sample from the right femur bone from abortus was compared with maternal blood and cord blood and it was sent for comparison with the DNA of the accused and the report placed in the investigation papers conclusively record that foetus, which was aborted, had the prosecutrix and the accused, as his biological parents.

3. The accused, thus, faced the charge of kidnapping the prosecutrix from Mumbai and carrying her to Gujarat and U.P. and for committing rape on her from 30/01/2016 to 18/03/2016. He is also accused of committing the offences under Sections 3 and 4 of the POCSO Act.

Alongwith the present Appellant, two other persons were charge-sheeted for abetting the offence committed by the Appellant/Accused No.1 and they came to be charged under Section 109 read with Section 34 of IPC as well as Section 17 of the POCSO Act.

4. Since the accused pleaded not guilty, the prosecution proceeded to prove the charge levelled against the accused persons and examined six witnesses, including the prosecutrix being examined as PW 4.

The version of PW 4 unfold that she was studying in 10th standard in a Girls High School and her date of birth being 05/09/1998, which she stated to be so on the basis of the original Birth Certificate (School Leaving Certificate) produced by her.

She deposed before the Court that she was knowing the accused-Ashik since last two years prior to the incident, as he was the friend of her brother and he was on visiting terms to their house, but her father restrained him from coming to their house and, therefore, he used to meet her outside. He gave his mobile number to her, upon which, she used to make the phone call. He expressed his willingness to marry her and took her to one lodge, where he established sexual relationship.

In January 2015, on the suggestion of accused-Ashik to flee away from the house, since her father was not accepting the relationship, she accompanied co-accused Amir and this was at the time, when her family members were out of Mumbai on account of demise of their relative. She stated before the Court that she was taken to Gujarat and, thereafter, to U.P. via Rajasthan, where she continued to stay with Ashik for one month and, thereafter, they returned to Gujarat. She deposed that Ashik had hired a room, where she stayed alongwith him for one week, when her father tracked her with the help of the police and she was brought home.

She admitted that throughout the period when she was in the company of accused No.1-Ashik, there was sexual relationship between them. She also admit that in the J.J.Hospital, she terminated her pregnancy and on discharge, she left for home.

The relevant admissions from her deposition, which have surfaced on record, are to the following effect :-

“8. Our love affair was going on for 1 ½ to 2 years. It is true to say that there is much difference in between financial condition of his family and my family. It is true to say that our financial condition was sound while his financial condition was poor. It is true to say that accused Ashik and his family members were working in factory of my father....

9.

10. On 30.01.2016 when I left home my Badi Bhabhi was at home. Badi Bhabhi has not went to Zharkhand because of school of her children while I stayed to accompany her. It is not true to say that my father has not taken myself and Bhadi Bhabhi to Zharkhand as our relatives at Zharkhan were well aware about my love affair. Witness volunteers that I have told my father that I will not come to Zharkhand. It is true to say that I have declined to go Zharkhand as I was intending to elope with the accused Ashik.

11.
12.

13. When I was staying with accused Ashik I have written two letters to Dongri Police Station. Witness now shown two letters, one in Hindi and another in English. Both bear my signatures. As witness has admitted both the letters and her signatures those are marked at Exh.46 (Letter in Hindi) and Exh.47 (Letter in English).

14.
15.
16.

17. It is not true to say that today because of family pressure I am deposing few false things. It is not true to say that our Nikah was performed on 06.09.2014. It is true to say that in Gujrat, Rajasthan and UP we stayed as husband and wife.

18.

19. It is true to say that as per Shariyat girl below age of 18 years can marry if she is willing to marry. It is true to say that as per Shariyat muslim man can marry for more than once. Witness volunteers that however for 2nd marriage permission of earlier wife is necessary.”

5. In the cross-examination, there is reference of two letters written by the prosecutrix, addressed to Dongri Police Station, and, since, she admitted that the letters are written by her and bear her signature, they came to be exhibited as Exh.46 and Exh.47.

The said letters came to be obtained under RTI from Byculla Police Station and Exh.46 is a letter in Hindi addressed to the Police Inspector, Dongri Police Station and Exh.47 is a letter scribed in English, addressed to the same authority.

Letter at Exh.46 is written on 30/01/2016, whereas the letter at Exh.47 do not bear any date.

6. The letters at Exhibits 46 and 47 written by the prosecutrix state that she is Muslim by religion and as per Muslim Personal Law, she is an adult, capable of performing Nikah as per Islamic Shariyat Law and on 06/09/2014, her Nikah was performed with accused No.1-Ashik, as she was in love with him since many years and she had decided to live with him. She informed the police that the Nikah was performed by her free will and consent. She had attained puberty and, therefore, was entitled to marry as per Islamic law. It is categorically stated therein, that the family of her husband is lower in financial status and, therefore, her father was not agreeable for performance of the marriage, though the accused belong to the same caste and religion and when her father gained knowledge that she had married Ashik, he pressurized her to obtain divorce. She also narrate that she was abducted by her father and kept in house under CCTV surveillance and she was emotionally blackmailed to separate from her legally wedded husband, but she had knowledge of law, being living in city like Mumbai and passing of 10th standard, she categorically informed that Nikah was performed, without any influence, instigation, inducement, threat, force or coercion and rather it was performed on her free will and she requested to Maulana in a good state of mind, as she wanted the accused Ashik to be her husband. She also state that her father had filed a false complaint against her husband, just for pressurizing her to obtain Talaq.

In the letter at Exh.46, she also state that she has conceived from her husband and she is apprehensive that her father will not permit her to reside with her husband and she

would be separated from him. She requested the police authority not to take cognizance of any complaint filed by her father, as she continued to reside with her legally wedded husband with her free consent.

PW 4 admitted the contents of the letter and also admitted her signatures on Exhs.46 and 47.

7. Though there is no Birth Certificate brought on record, as it appears that the learned Judge erred in referring to the document at Exh.45 as a Birth Certificate, which in fact is a School Leaving Certificate of Hume High School, where the prosecutrix was studying in 9th standard and left the school on account of long absence. The certificate record her caste as Muslim and her date of birth as 05/09/1998 (Fifth September Nineteen Ninety Eight), the date of leaving the school is recorded as 31/01/2013.

The Investigating Officer has also deposed that he has collected the original Birth Certificate of the prosecutrix and it is exhibited, but what he is referring to Exh.45, is in fact a School Leaving Certificate.

Admittedly, the prosecutrix was a minor and on the date of lodging of the FIR, as her age was as 17 years and 5 months.

8. From the entire deposition of the prosecutrix, including her cross-examination, it has clearly surfaced on record that she had a love relationship with accused No.1 and as far as the date on which she accompanied the accused, taking advantage of absence of her family members in the city, she willingly

accompanied him, as she continued to reside with him for over a period of one month and moved to distinct cities like UP, Gujarat and Rajasthan and lastly continued to stay in Gujarat in rented premises. She also visited Dentist in Gujarat and even took treatment for pregnancy, indicating that she continued to stay with the accused, by her free will and she never attempted to contact her family members nor did she make any attempt to run away from the place, where she was residing with him. She categorically admit that she stayed with accused No.1-Ashik by projecting herself to be his wife.

The learned Special Judge has, therefore, rightly acquitted accused No.1/Appellant from the offence of kidnapping punishable under Section 363 of IPC, by specifically appreciating the willful act of the prosecutrix in accompanying accused No.1 and by relying upon the decision of the Hon'ble Apex Court in the case of ***S. Varadarajan Vs. State of Madras***¹.

9. The issue which arose for consideration before the learned Special Judge and as framed by him as point Nos.2, 3 and 4 was, whether the prosecution has proved that from 30/01/2016 to 17/03/2016, accused No.1-Ashik committed rape/penetrative sexual assault/aggravated penetrative sexual assault on the prosecutrix below age of 18 years and whether he is guilty of the offences under Section 376 of IPC and Sections 4 and 6 of the POCSO Act and to this point, the learned Special Judge has recorded a finding in the affirmative i.e. the prosecution has proved the said charge against accused No.1-Ashik.

¹ AIR 1965 SC 942

While I have gone through the impugned judgment, though the learned Judge has appreciated the evidence of the prosecutrix elicited through the cross-examination that prior to 1 ½ to 2 years of incident, a love affair was going on and that the financial condition of the accused was not sound and, therefore, her father disliked him and also an admission that on 29/01/2016, she did not accompany her father, as she was intending to elope with the accused, the learned Special Judge has restricted these admissions only for concluding that an offence under Section 363 is not made out and he concluded as below :-

“There is nothing in the evidence to show that accused has taken away or enticed her to flee with him. Therefore, the case of kidnapping as contemplated under Section 363 of IPC is not made out.”

However, while appreciating the very same evidence for establishing, whether an offence of rape has been committed, the learned Special Judge has concluded as under :-

“However, it is established that during their stay at village Bhargen and Hadgud they had sexual relations. Here, as discussed earlier at the time of incident prosecutrix was minor. She was aged about 17 years and 5-6 months. Now as per definition of rape as given in Section 375 of IPC if the prosecutrix is minor then the sexual relations with or without her consent amounts to rape. Here, as discussed earlier it is the case of consensual sex. However, as that time prosecutrix was minor, her consent was immaterial and therefore, it amounts to rape.”

10. Now, while dealing with the aspect about the capability of a Muslim girl to perform marriage, on attaining puberty without consent of her guardian or parents and this being

juxtaposed against the Indian Majority Act, the learned Special Judge recorded as under :-

“As observed earlier in all the citations, parties are Muslim. It is observed that as per Article 251 of Mohammedan Law which deals with capacity of marriage says that every Muslim who has attained puberty may enter into contract of marriage without consent of guardian or parents. As per explanation of said Article Puberty is presumed, in the absence of evidence, on completion of the age of 15 years. It clearly shows that every Muslim who has attained puberty is capable to validly enter into contract of marriage. The Mohammedan Law is materially altered by Indian Majority Act and the only matters in which a Mohammedan is now entitled to act on attaining the age of 15 years are marriage, dower and divorce. So, the result is that on the date of marriage the Muslim girl aged about 15 years may be minor under the Indian Law and under Section 361 of IPC, she is able to marry being attained puberty. So, considering this provision of Mohammedan Law and the love affair between the parties, it is concluded that it is not a case of kidnapping as contemplated under Section 363 of IPC.”

On the aforesaid finding being recorded, the conclusion being drawn is to the effect that since it is the case of love affair and consensual sex and, therefore, case of kidnapping under Section 363 of IPC is not made out. But, as per Section 376 of IPC, since the consent of minor girl in case of sexual intercourse is immaterial, it amounts to rape and this is the foundational ground for awarding conviction to accused No.1 under Section 376 as well as under Sections 4 and 6 of the POCSO Act.

11. In order to appreciate, whether the finding recorded by the learned Judge would justify his conviction and in turn the sentence imposed, I have carefully scrutinized the evidence of PW 4 as well as the evidence of PW 1, her brother.

It is admitted by both of them that the prosecutrix was having a love affair with the accused and this was known to her family members. For some reason, the family was opposed to this alliance. The prosecutrix was determined to lead her life with the accused and taking opportunity of the situation that the elder members of her family, except her sister-in-law, were not present in the house, she accompanied the accused persons and, therefore the principle laid down in the case of *S. Varadarajan* (supra) gets attracted.

She has clearly admitted that a love affair was going on between the two for 1 ½ to 2 years and her family atmosphere was orthodox. She also admit that prior to the date on which she eloped with the accused, they had sexual relationship and for some point of time, there was quibble between the couple as one lady, projecting to be the wife of the accused, had phoned her father apprising him of the love affair between herself and her husband Ashik and when she questioned him, whether he is married, he convinced her that he is not and she disclosed to him that she had conceived and he advised to flee away, which she willingly agreed.

All the while i.e. while the accused established physical relationship with the prosecutrix and knowing very well that she had conceived from him, she made her choice of eloping with him, since she was apprehensive that her family members, including her father would not support the alliance. While she decided to elope, she addressed two letters to the police station, which have been proved through her and were exhibited during trial, where she even admit that a Nikah was performed by accused No.1 with her on 06/09/2014, to which

she accorded consent, as she had attained puberty and was eligible to marry as per Islamic law.

Unfortunately, the prosecution has not brought any evidence of the Nikah on record and PW 5 and PW 6, the Investigating Officers are silent on the said aspect though PW 5, when cross-examined on behalf of accused Nos.1 to 3, has admitted that he recorded the statement of Kazi as per his say, but the said Kazi was not brought to the witness box and, therefore, the statement of Kazi about the Nikah being performed, never came before the Court, for the reasons, not to be left to guess.

Since there is no material brought on record by the prosecution nor by the accused, establishing the factum of Nikah being performed and, particularly, when PW 4 during her cross examination volunteered that there was no marriage between her and the accused, I do not think that the fact of marriage being performed and whether it is permissible as per Muslim law to perform Nikah and after its performance, whether sex committed with wife would be covered under the exception to Section 375 or not, is a matter which can be gone into by me.

12. On reading of the examination-in-chief of the prosecutrix as well as her cross-examination, one thing which immediately strikes is, a bond of love shared by her with the accused and which was deeply rooted for almost two years.

The relationship was strongly opposed by her family to such an extent that PW 1 admit in his cross-examination that they did not take her to Jharkhand to participate in the last rites of their grandmother, as they were apprehending that the name of their father would be spoiled due to her affair and a

categorical admission comes from PW 1 that the family was not ready to accept the accused. An impression was given to her that he was already married, as an attempt to deter her from continuing the relationship with the accused, but nothing is brought on record corroborating the story that the accused was already married and though PW 4 in her cross-examination halfheartedly say that one lady was projecting herself to be the wife of the accused, she also admit that she had never asked for Nikahnama and, therefore, she was never convinced on the said aspect, as she herself had deposed that when she confronted the accused with this revelation, he categorically denied and she disclosed about the pregnancy and, therefore, continued in the venture to elope with him on realizing that she had conceived from him and the family may not permit the relationship to be continued.

Immediately after the accused was arrested and she was brought to her home, she terminated the pregnancy.

13. The version of the love affair, which has come through the PW 4 i.e. the prosecutrix, make it evident that as an adolescent, crossing the age of 17, but not yet attained the age of majority i.e. 18 years, she was in the gray area of age, where she was smitten, but at the same time was unable to decide herself, legally and validly considering that she was a minor and still required some more months to pass, till she attain majority. The prosecutrix was clear in her version and about her expectation from her own life, fully aware and ready for taking the consequences flowing from the relationship, she was maintaining with the accused, a man aged 25 years. In such a

scenario, a question arises, when there is a consensual relationship maintained between the two and the prosecutrix never alleged that the physical relationship was maintained by the accused with her, without her consent or against her will, whether the conviction of the accused under Section 376 of IPC and Sections 4 and 6 of the POCSO Act is justiciable.

14. The POCSO Act, which is specifically enacted for protection of a “child” being defined as any person below the age of 18 years, is not dependent upon the factor of “consent”. In offence of sexual assault, since Section 375 is attracted whenever a man commits an act of “rape” with a woman with or without her consent, when she is under 18 years of the age, that is making the consent of a girl, who has not attained majority, immaterial and, hence, inconsequential.

The need was felt for special enactment to protect the children from sexual assault, sexual harassment and pornography, keeping in mind Clause (3) of Article 15 of the Constitution, which empowers the State to make special provision for the children and the Government of India having acceded to the Convention on the Rights of the child, contemplated by the General Assembly of the United Nations, which prescribe a set of standards to be followed by all State parties in securing the best interest of the child. A law was, therefore, needed which would operate in the best interest and well being of the child, to be regarded as being paramount importance at every stage, to ensure his healthy, physical, emotional, intellectual and social development. Apart from this, Article 39 of the Constitution of India, also provided that

the State shall, in particular, direct its policy towards securing that the tender aged children are not abused and their childhood and youth is protected against exploitation, so that they are afforded opportunities and facilities to develop in a healthy manner, conditioned with freedom and dignity.

15. The salient features of the Act enacted by the Parliament in form of the POCSO Act, 2012, being a gender neutral enactment, which regarded the best interest and well being of the child as of paramount importance at every stage, so as to cater the physical, emotional, intellectual and social development of a child, considered as vulnerable, to exploitation.

All those acts covered by the POCSO Act of 2012, whether it is an act of 'aggravated penetrative sexual assault', 'aggravated sexual assault', 'sexual assault' with a definite meaning assigned to it under the enactment, amount to offence, when committed against a child i.e. a person below age of 18 years.

It is little more than a decade that the special Act is in operation and pertinent to note that at the time of introduction of the POCSO Act, "age of consent" for unmarried girl was 16 and it was presumed that any one below this age cannot lawfully consent to sexual intercourse. The POCSO Act raised the "age of consent" to 18 years and following the recommendations of Justice J.S.Verma Committee, in the wake of a gruesome incident, which took place in NCT, Section 375 of IPC was also amended by the Criminal Law (Amendment) Act, 2013.

As a consequence of the aforesaid provisions, an act of sexual indulgence with a girl below 18 years, would attract the rigors of the POCSO Act as well as the offence under Section 376 of IPC, being immaterial, whether it is a consensual relationship, as the law presumes that a girl below 18 years is not capable of consenting to sexual intercourse and in such a scenario, even if a girl below 18, consents to a sexual intercourse, her consent must be ignored and the other party shall be guilty of committing an offence under the POCSO Act.

This provision, though definitely intended to target sexual exploitation of children i.e. a male or a female, however, has created a gray area, as it has definitely resulted in criminalizing consensual adolescence/teenage relationship and after the POCSO Act raised the age of consent from 16 to 18, even in case of a consensual sexual activity, where one of the parties is an adolescent and the other a major, the act of the other party is liable for criminal action.

15. In a case like the one before me, where the prosecutrix is of 17 years and 5 months when the FIR is lodged and she had indulged into sex voluntarily with the accused with her will and consent, clearly reflecting a romantic relationship between the two, the question is whether merely because she has not touched 18, and barely a few months away from attaining majority as per law, whether the act of sexual intercourse would attract the offence under the POCSO Act and would it amount to an offence of rape, as Section 375 contemplates, an act of penetration of penis into the vagina of a woman would amount to rape, even if it has occurred with her consent, just because she is under 18 years of age.

Pertinent to note that Section 375 itself by virtue of Explanation 2, define “consent” to mean an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act, with a proviso being appended that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

The essence of “consent” lies in the surrounding circumstances, which would lead to an inference of “consent” and which is accorded by a woman by the manner set out in Explanation 2.

16. Sexual Autonomy encompasses both, the right to engage in wanted sexual activity and right to be protected from unwanted sexual aggression. Only when both aspects of adolescent's rights are recognized, human sexual dignity can be considered to be fully respected.

Development of sexuality starts as early as in intrauterine life following conception and continues through infancy, childhood, adolescence, adulthood till death. Self-awareness about sexuality evolves during the childhood. Adolescence is a phase of transition during which major developments of sexuality takes place, with puberty being marked as a major landmark in the journey of sexuality. It is during this period, cognitive development takes place and it result into development of thinking and reasoning. This is also a phase of emotional development, which would necessarily

involve, social involvement, peer interaction, as well as sexual interest.

Different behavioral experimentation is seen in early adolescence, risk taking in middle adolescence, followed by stage of assessing their own risk factoring, accompanied with change in lifestyle due to urbanization, migration, education, and mixing of cultures, each factor contributing in it's own way towards the development and its manner. Adolescence is a period during which individual's thought perception as well as response gets colored sexually. It is an age to explore and understand sexuality. Sexual curiosity in the adolescence often lead to exposure to pornography, indulgence in sexual activities, and also increase in the vulnerability for sexual abuse.

Sometimes it is difficult to control the feelings arising in an adolescent, in the wake of many critical biological as well as psychological changes occurring during this phase. Development of secondary sexual characteristics and psychological changes are often aid these challenges. These are supplemented by family and society's attitude as well as cultural influence, particularly at the time of puberty. Various factors would play a major role in deciding the adolescent's sexual behaviour after puberty.

17. With the advent of easy accessibility of information made available and as Internet has become widely used resource for sexual information, especially amongst the adolescents, where the appeal lies in the ease and anonymity where the OnLine seeker can obtain information regarding sensitive topics and this generates curiosity, which may have positive as well as negative influences, upon the youth of today.

In the era where the adolescents have free access to the Internet, Mobile, OTT Platform, Movies, which create a deep impact upon their minds, coupled with inquisitiveness about sex alongwith physical attraction towards other sex and infatuation, which is definitely a matter of research as the question of youthful sexuality has to be tackled in the current society, by appropriately moderating their behaviour.

18. The United Nations formally defines “adolescent” as the party between 10 and 19 years of age and “young people” as between 10 to 24 years of age in the South Asia Region. The roots of the age of consent are traced back to a 19th century, case of Phulmoni Dasi, a minor woman, who married a man aged 35, when she was 11 and who died when her husband forcibly consummated the marriage. This incident, allegedly rape committed by a man upon a minor girl, served a way for enacting the legislation in form of the Age of Consent Act, 1891. Though the husband was acquitted of rape charge, he was found guilty of causing death by rash and negligent act.

Over the time, the age of consent has been increased by various statutes in India and it was maintained at 16 from 1940 till 2012, when POCSO Act raised the age of consent to 18 years, probably one of the highest ages globally, as majority of countries have set their age of consent in the range of 14 to 16 years. Children in the age group of 14 are considered capable of giving consent to sex in countries like Germany, Italy, Portugal, Hungary etc. In London and Wales, the age of consent is 16. Among Asian countries, Japan has set the age of consent as 13. In Bangladesh, Section 9(1) of the Women and

Child Abuse Prevention Act, 2000 define 'rape' as sexual intercourse with a woman, with or without her consent, when she is below 16 years of age. Similarly, in Srilanka, the age of consent is 16.

In comparison, as far as India is concerned, the age of marriage for male and female is fixed as 21 and 18 years as per Child Marriage Prohibition Act, 2006. The definition of the term "child" varies from statute to statute and as per the POCSO Act any person below 18 years is considered to be "child" and it criminalize all sexual activities for those under the age of 18 years, even if the act was committed by consent.

19. This aspect of the POCSO Act was flagged by various High Courts.

In *G. Vijayalakshmi Vs. State*², the Madras High Court, while dealing with the case for quashing the proceedings against the accused under the IPC, POCSO Act and the Prohibition of Child Marriage Act, 2006 by consent, found in a hapless situation, as while the trial was undergoing, the victim and her family turned hostile, stating that the relationship was consensual and she had eloped on her own alongwith him.

On personally interacting with the victim and examining her statement given on oath, the Court was satisfied that the relationship maintained by her with the accused was consensual. However, the rigors of the POCSO Act would not have permitted quashing of proceedings, since any sexual indulgence with a minor would fall within the scope and ambit of the act in form of Sections 4, 6 etc., Justice N Anand Venkatesh, by relying upon the earlier decision of the learned

² 2021 SCC OnLine Mad 317

single Judge in the case of in *Sabari Vs. Inspector of Police*³, held as under :-

“11. There can be no second thought as to the seriousness of offences under the POCSO Act and the object it seeks to achieve. However, it is also imperative for this Court to draw the thin line that demarcates the nature of acts that should not be made to fall within the scope of the Act, for such is the severity of the sentences provided under the Act, justifiably so, that if acted upon hastily or irresponsibly, it could lead to irreparable damage to the reputation and livelihood of youth whose actions would have been only innocuous. What came to be a law to protect and render justice to victims and survivors of child abuse, can, become a tool in the hands of certain sections of the society to abuse the process of law.

12. As rightly recognized by the Learned Single Judge of this Court in Sabari’s Case (cited supra), incidences where teenagers and young adults fall victim to offences under the POCSO Act being slapped against them without understanding the implication of the severity of the enactment is an issue that brings much concern to the conscience of this Court. A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India, 1950 and the Convention on the Rights of the Child. However, a large array of cases filed under the POCSO Act seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.”

20. This view was followed by another judgment of Calcutta High Court, (Justice Sabyasachi Bhattacharya) in case of *Ranjit Rajbanshi Vs. The State of West Bengal & Ors.*⁴, while dealing with an appeal filed by a convict, who was held guilty

³ 2019 (3) MLJ CrI 110

⁴ 2021 SCC OnLine Cal 2470

of “penetrative sexual assault”. The learned Judge noted the physical intimacy between the accused and the victim and also referred to the meeting between the families to propose a marriage between the two, which however did not work out and in this background, decided question whether the provisions of the POCSO Act should be applied to “a voluntary joint act of sexual union”. Recording that the victim was above 16 years, but below 18 years, Justice Bhattacharya posed a moot question, as to how consent shall be discarded when the girl is 17 years and 364 days, but on 17 years and 365 days, when she is capable of according the consent.

The Karnataka High Court in the case of **State of Karnataka Vs. Basavraj s/o Yellappa Madar**⁵ made very pertinent observations, as under :-

“29.7 The aim and objective of POCSO Act is to protect the minor children from sexual exploitation and it is made clear that a minor cannot provide consent, the minor under POCSO Act being a person under the age of 18 years.

29.8 Having come across several cases relating to minor girls above the age of 16 years having fallen in love and eloped and in the meantime, having had sexual intercourse with the boy, we are of the considered opinion that the Law Commission of India would have to rethink on the age criteria, so as to take into consideration the ground realities.

29.9 The aspect of consent even by a girl of 16 years and above would have to be considered if there is indeed an offence under the IPC and/or or POCSO Act. Normally when evidence is lead the victim is a major and the testimony given then of an act committed while being a minor would have to be given due value.

29.10 It is also seen that many of the above offences which are deemed offences are deemed to have been committed as a result of or on account of lack of knowledge on the part of the minor girl and the boy. Many a time the boy and girl involved

5 2022 SCC OnLine Kar 1608

are either closely related and/or very well known to each other being class mates or otherwise. One thing leads to the other and being of an impressionable age, some things are done by a boy and girl, which ought not to have been done and done without knowing the applicability of POCSO Act or certain provisions of the IPC, which make them an offence. Though lack of knowledge of law is no excuse, can minors be presumed to have knowledge of the applicable law would be the question required to be asked in such a situation.”

In the case of *Atul Mishra Vs. State of U.P.*⁶, while deciding the bail application of the accused, who had committed the offence under the POCSO Act, the Court noted that the victim and the accused knew each other from school, had eloped, and been staying with each other for a few years. They even had a child together out of the said relationship, clearly indicating that the relationship shared by them was consensual. The Court focused upon the aspect of the teenagers and concluded as under :-

“A “bio-social approach” needs to be adopted and appreciated i.e. one that conceptualizes the biological and social requirements of two teenagers, who on account of mutual infatuation are attracted and decide for their future. Their decision could be impulsive, immature but certainly not sinful or tainted as branded in the F.I.R. or complaint of the informant.”

21. Recently, Justice Deepak Kumar Agarwal, a Judge on the Gwalior Bench of Madhya Pradesh High Court requested the Central Government to reduce the age of the female to 16 and observed that present age of 18 is disturbing the fabric of the society, as it is upon the adolescent’s choice. Justice Agarwal clearly recorded that every every male or female near the age

6 Cri.Misc.Bail Application No.53947/21 decided on 25/01/2022

of 14 years, due to social media awareness and easily accessible internet connectivity is getting puberty in early age and they get attracted to each other, which ultimately result in consensual physical relationship.

22. The scenario, which emerges is, in the backdrop of a girl below 18 being considered as minor, with a presupposed notion that she is not expected to indulge herself into a sexual activity and even if she does so, being an active participant in the activity, her consent is immaterial and is no consent in the eyes of law. Such an act would mean to statutory rape as one of the said persons is legally too young to consent to the sex and, since, her consent is no consent in the eyes of law, the act attracts the charge of rape and also attract grave offence under the POCSO Act.

As a result of this scenario, even a boy aged 20 indulges with a girl aged 17 years and 364 days, he would be found guilty of committing rape upon her, despite the girl clearly admitting that she was equally involved in the act of sex. The minor is not considered to be capable enough to give valid consent in the eyes of law for entering into consensual sex.

No doubt, the age of consent has been kept on increasing by various legislatures, after passing of the Age of Consent Act, 1891 and at present, it has increased to 18 in India with the enactment of special law in form of the POCSO Act, which was intended to protect a minor from being cajoled by the older one for entering into a sexual activity.

However, in the cases of the teenagers, who fall for attraction of the opposite sex and enter into a sexual

relationship, out of impulsiveness, only one has to take the consequences, on being charged for committing an offence of rape, though the other had also indulged into the same act.

The concern about the rising number of cases, where minor are punished under the POCSO Act are being expressed by various fronts in distinct proceedings before the Hon'ble Supreme Court, the High Courts of the country as well as the POCSO Special Court, where the POCSO cases are tried. Despite a clear stand being taken by a female in such an act, that it was a case of consensual sex, the other part i.e. the male stand convicted under the POCSO Act with a specific reasoning, being supporting that POCSO Act was never intended to include consensual sex with the minor.

23. A case of physical attraction or infatuation always come forth, when a teenager enter into a sexual relationship and it is high time that our country is also cognizant of happenings around the world. In country like Japan, a movement supported by students is gaining momentum. It is necessary that our country will have to look around and observe all that is happening around the world in this regard, but one thing is sure that in this whole scenario, if a young boy is castigated for being guilty of committing the rape on a minor girl, merely because she is below 18, but an equal participant in the act, he would suffer a severe dent, which he will have to carry lifelong. With no option left to the Courts trying the POCSO cases, to impose punishment lesser than the one prescribed for committing penetrative sexual assault, the accused necessarily has to undertake the maximum punishment and in

this scenario, the question that the Madhya Pradesh High Court has recently posed, by referring to the injustice going on with adolescent boys, assumes great significance.

Ultimately, it is for the Parliament to ponder upon the said issue, but being cognizant of the cases, which are coming before the Courts, with a huge chunk, being the romantic relationship.

24. The United Nations Committee on the Rights of Child (CRC), in General Comment No.20, with respect to the minimum age of consent for sexual intercourse, has urged the States to strike a balance between protection of children from sexual exploitation and abuse and in respect for their evolving autonomy. It has recommended as under :-

“States parties should take into account the need to balance protection and evolving capacities and define an acceptable minimum age, when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non exploitative sexual activity.”

25. Whilst all children are entitled to be protected from sexual violence, such protection should also enable young people to extend their boundaries, exercise choices and engage in necessary risk taking though not exposing them to inappropriate response, harm and danger. The penal approach towards adolescents' sexuality has impacted their life to a barrier free access to sexual and reproductive health services. The criminilization of romantic relationship has overburdened the criminal justice system by consuming significant time of the judiciary, police and the child protection system and

ultimately when the victim turns hostile by not supporting the charge against the accused, in the wake of the romantic relationship she shared with him, it can only result in an acquittal. Though the POCSO Act cannot stop the natural feelings towards the opposite sex, particularly in the age which account for biological and psychological changes, punishing a minor boy, who entered into a relationship with a minor girl, who were in the grip of their hormones and biological changes would be against the best interest of child and though it is the duty of the State to safeguard the ability to take decisions and to protect the autonomy of the individual, the adolescents cannot be deprived of this right. The mere apprehension that adolescents would make an impulsive and bad decision, cannot classify them under one head and by ignoring their will and wishes. The age of consent necessarily has to be distinguished from the age of marriage as sexual acts do not happen only in the confines of marriage and not only the society, but the judicial system must take note of this important aspect.

26. A balance between the protection of vulnerable class and that, capable of exercising the power to decide, what is right for them, must be necessarily struck. As rightly observed by Their Lordship Dr.D.Y.Chandrachud in the case of ***Justice K. S.Puttaswamy (Retd). Vs. Union of India***, “the duty of the State is to safeguard the ability to take decisions- the autonomy of the individual - and not to dictate those decisions.”

7 (2017) 10 SCC 1

27. A provision which does not take into consideration our societal realities and proceed on an assumption, that every sexual indulgence with a minor, irrespective of whether she was capable of being an equal participant in the act, has definitely created a situation, resulting in acquittal of the accused in cases of consensual sexual relationship, where the gap in the age of accused and that of victim is small.

28. Turning to the facts before me, which involve a situation, where the accused and the prosecutrix were indulged in a love affair and in cross-examination, she specifically admitting about the same, is one another case, amongst many others coming before the Court, involving a romantic relationship. The girl on her own, left her house and accompanied the accused, where she travelled in distinct States and made no attempt to flee away and rather addressed letters to the concerned police stations about she willingly accompanying the accused and referring to "Nikah", being performed with the accused.

With the evidence on record, the learned Special Judge has rightly derived a conclusion that there is no evidence led by the prosecution, establishing that the accused had taken away or enticed her and, therefore, an offence under Section 363 of IPC is not made out. However, with the evidence coming on record to the effect that she continued to stay with the accused and physical relationship was established between them, considering that she was aged 17 years and 5-6 months, a conclusion was derived that the act of the accused amounted to an offence of rape as, she being minor, sexual relationship

maintained with her, either with or without consent, would amount to rape. The learned Special Judge, though derived a conclusion that it is a case of consensual sex, found the consent immaterial, since the prosecutrix was minor. Left with no option to come out of the rigors of Section 375, since the consent of the minor girl in cases of sexual intercourse is immaterial, the learned Special Judge recorded a finding of guilt against the accused and found him guilty of committing the offence under Section 376 of IPC as well as Sections 4 and 6 of the POCSO Act.

This is a peculiar case, where the evidence on record has clearly made out a case for consensual sex, as nowhere in the examination-in-chief or her cross-examination, the prosecutrix has alleged that sexual intercourse was forcible and without her consent and throughout her deposition, she is consistent on the said stand though state that she was informed that the accused was already married to some other woman.

29. In the wake of the clear case of consensual sex, emerging from the prosecution case, between a girl aged 17 years and 5 months and a man aged 25, merely because the statute provide punishment for an act of sexual indulgence, as the girl has not attained the age of maturity i.e. 18, when it can be specifically inferred from her conduct that she was capable of understanding the consequences of her act, I am of the opinion that the learned Special Judge has erred in convicting the appellant for committing the offence of rape under Section 376 of IPC as well as the offences under Sections 4 and 6 of the

POCSO Act and awarded him the sentence in the impugned judgment.

In the wake of the aforesaid discussion, since I am unable to concur with the conclusion derived by the learned Judge, merely on the ground that though the sexual intercourse was consensual, but the girl was minor and based on this aspect, the appellant, in my considered opinion, cannot suffer the sentence, in case of a consensual sexual act.

30. As a result of the above discussion, the impugned judgment dated 21/02/2019 passed by the learned Special Judge in POCSO Special Case No.203 of 2016 is set aside.

The appellant is entitled to his liberty, on being acquitted of the charges levelled against him. He shall be released forthwith, unless his custody is required in some other criminal case.

(SMT. BHARATI DANGRE, J.)