

	Presented on : 23.03.2017.
	Registered on : 24.03.2017.
	Decided on : 13.11.2019.
	Duration : Y. M. D. 02 07 21

IN THE COURT OF ADDITIONAL SESSION JUDGE, AT : PUNE
(Presided over by Smt. R.V.Adone)

Spl. (POCSO) S.C. No.135/2017
Exh.No.

The State of Maharashtra,
Through Bharati Vidyapeeth Police Station.
(Through first informant mother of victim) ... **Prosecution.**

Versus

Shankar Bharat Biramane
Age- 24 years, Occp- Service
R/at- Survey No.18, Ashtavinayak Nagar,
Building No.18, Opp. Ganapati Mandir,
Ambegaon Pathar, Pune. ... **Accused.**

OFFENCES PUNISHABLE UNDER SECTIONS
376(2)(i),363 OF INDIAN PENAL CODE
AND SECTIONS 4,8,12 OF POCSO ACT.

Appearances :

Ld. APP Smt. Nikam, for the State.
Ld. Advocate Shri P. R. Chavan, for Accused.

J U D G M E N T
(Delivered on 13rd November, 2019)

Charge-sheet is filed against accused for the offences punishable under Sections 376 (2)(i), 363 of Indian Penal Code and under Section 3 p/u/s. 4, s. 7 p/u/s.8 and s. 11 p/u/s. 12 of Protection of Children from Sexual Offences Act, 2012.

2] Facts in nutshell are as under -

Mother of victim lodged report stating that she resides along with her husband, two children, mother-in-law at Ambegaon Pathar, Tal- Velhe, Dist-Pune. Victim aged 14 years is her daughter and she was studying in 8th standard in 2016. On 25.12.2016 her husband went to work. Victim went to her school for Kabaddi competition practice and returned at 11.30 am. Thereafter, at 1.00 pm, they went to Engagement Ceremony of son of her sister-in-law and returned at 5.00 pm. After sometime, victim went away from house and did not return though time elapsed. First informant searched victim by going to the house of her friend. Sister of friend of victim told that all the girls went at Sai Siddhi Chowk to see Santa Clause. After sometime, first informant received call on mobile of her husband and victim told that she was returning to house within sometime.

3] It is further case of prosecution that at 9.30 pm victim returned to house and was in frightened condition. She was not talking anything and started crying. Upon asking, she told that she was returning to house by meeting her friends, one boy residing behind their house i.e. child in conflict with law made phone call on mobile of friend of victim and asked her to meet him behind their house. Victim and her friend went to meet child in conflict with law at 5.45 pm and on his mobile he received call of accused Shankar Biramane. Victim told accused that she and child in conflict with law were coming near Pride School and they went there. Accused came there at 6.00 pm and talked with child in

conflict with law. Then, accused asked victim that he want to talk with her, made her to sit on his vehicle though she refused. Child in conflict with law asked victim to go with accused as accused is his relative. Accused took victim ahead new Katraj Tunnel and stopped vehicle at the side of road in dark. He took her in land property. Victim was frightened and refused to go with him, but accused forcibly took her in land property. He told that he likes her and want to marry with her, he tried to create intimacy with victim, she resisted, but he kissed her, forcibly removed her clothes and committed forcible sexual intercourse with her. Then, they were returning on vehicle, victim made phone call to child in conflict with law behind back of accused. Child in conflict with law came near Chintamani School and she narrated incident to him, then she met her uncle and went with him to her house. She then narrated incident to her parents. Her mother lodged report about incident.

4] After completion of investigation, charge-sheet is filed against accused. In view of recitals in the First Information Report charge was framed against accused at Exh.4. He pleaded not guilty and claimed the trial. In view of charge framed against accused, on behalf of prosecution witnesses namely PW1 victim at Exh.12, PW2 mother of victim at Exh. 134, PW3 Vishwanath Jaishet, a panch at Exh. 20, PW4 Sunanda Mahadik - Headmistress at Exh.27, PW5 Investigating Officer PSI Ashwini Patil, at Exh.31 were examined. A.P.P. filed evidence closed pursis at Exh. 46. Statement of accused under section 313 of Code of Criminal Procedure was recorded.

According to him, false case is filed against him.

5] Heard A.P.P. Smt. Nikam for State and Adv. Shri. Chavan for accused. In view of the charge levelled against accused and other material on record, following points arise for determination and findings for the same with reasons thereon are given as follows:-

Sr.No.	POINTS	FINDINGS
1]	Does prosecution prove that accused on 15.12.2016 at about 18.00 hrs or thereabout, kidnapped victim aged 14 years from the lawful guardianship of her parents and thereby committed an offence p/u/s. 363 of Indian Penal Code?	-- In negative.
2]	Does prosecution prove that on aforesaid day, date, at about 18.00 hrs to 20.30 hrs or thereabout, in the field, out of Katraj Tunnel, Shindewadi, Tal-Haveli, Dist-Pune and during course of same transaction, accused committed forcible sexual intercourse with victim aged 14 years and thereby committed an offence punishable under Section 376(2)(i) of Indian Penal Code ?	-- In negative.
3]	Does prosecution prove that accused, on the aforesaid date, time and place and during course of same transaction, committed penetrative sexual assault on victim aged about 14 years and thereby committed an offence under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act ?	-- In negative.

- 4] Does prosecution prove that accused, on the aforesaid date, time and place and during course of same transaction, with sexual intent, touched the vagina of minor victim girl aged 14 years which involves physical contact or to commit sexual assault upon victim and thereby committed an offence under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act ? -- In negative.
- 5] Does prosecution prove that accused, on the aforesaid date, time and place and during course of same transaction, made any gesture or exhibited any object or part of body i.e. inserting his penis into vagina of minor victim girl aged 14 years, with intention that such gesture or object or part of body shall be seen by victim and thereby committed an offence under Section 11 punishable under Section 12 of the Protection of Children from Sexual Offences Act ? -- In negative.
- 6] What order ? As per final order.

REASONS

AS TO POINT NOS. 1 TO 5:-

6] As all points are interlinked, they are discussed together. For establishing offences under Sections 376(2)(i), 363 of Indian Penal Code and offence under Section 3 p/u/s. 4, section 7 p/u/s. 8 of POCSO Act and Section 11 p/u/s. 12 of Protection of Children from Sexual Offences Act, it is for prosecution to prove that accused kidnapped victim from lawful guardianship i.e. her parents

and committed penetrative sexual assault on victim aged 14 years and touched the private part of victim and inserted his penis into vagina of minor victim girl aged 14 years, with intention that such gesture or object or part of body shall be seen by victim. Accused also committed sexual harassment of victim.

7] As offences punishable under section 4, 8 and 12 of the POCSO Act are levelled against accused, it is necessary to determine whether victim was 'child' within meaning of Section 2(d) of said Act at the time of incident. PW1 i.e. victim deposed that in 2016 she was 14 years old and studying in 8th standard. Her birth date is 03.7.2003. Victim is not cross examined by accused, so there is no challenge to the evidence of victim including her birth date. PW2 i.e. mother of victim similarly stated her birth date 03.7.2003 and fact that victim was 14 years old in 2016, was studying in 8th standard. This evidence is also not challenged by Advocate of accused, so as there is no cross examination of PW2 by accused. Therefore, there is no reason to discard the evidence of PW1 and PW2 with regard to age and birth date of victim. In addition to that, APP relied on evidence of PW4 i.e. Headmistress Sunanda Mahadik who deposed vide Exh.27 that victim took admission in their school in 8th standard on 15.6.20016. They used to take School Leaving Certificate of previous school and they took entry in General Register of the school. She brought before the Court original General Register of the school and filed verified copy of relevant extract, in which there are details of victim including her birth date as 03.7.2003. Same is properly proved at

Exh.28. PW4 issued Bonafide Certificate of victim showing similar birth date as 03.7.2003. During cross examination, she admitted that she has no personal knowledge on what basis entries were taken in Register regarding birth of victim. Thereafter, except denials nothing has come on record.

8] In this context, it is necessary to rely on authority cited in, **(i) Rehenjya Shelya Pawara V/s. The State of Maharashtra, 2015 ALL M.R.(Cri) 545**, in which it is observed that, entry of date of birth of prosecutrix in school leaving certificate and school register duly proved by Head Master of school are admissible in evidence U/sec. 35 of Indian Evidence Act. Those are taken in day-to-day working and business of the school. School register is record which is duly maintained in ordinary course of business of school. Genuineness of entries therein cannot be doubted in absence of any contrary material. **(ii) Mahesh s/o. Tarachand Surywanshi V/s. State of Maharashtra, 2013 Criminal Law Journal, 4557**, in which, it is observed that as per section 35 of Indian Evidence Act and section 17(2) of Registration of Births and Deaths Act, entry made in Birth register has presumptive value. Entry made in school register regarding date of birth is also relevant though it has no presumptive value like entry made in birth register.

Ratios laid down in all above cited rulings are noted. In case in hand, on behalf of accused, no evidence is adduced to prove that victim was more than 18 years old at the time of incident. The documents filed by prosecution and oral evidence of victim is sufficient to prove her age below 18 years at the time of incident.

9] It is necessary to note that in Exh.28, entries were taken at the time of admission of victim in the school and at relevant time, nobody anticipated that same are to be used in a case filed by the victim. So, there is no reason for School Authority to make false and fabricated entries in Exh. 28 or in Bonafide Certificate. No doubt, birth certificate of victim i.e. authentic document is not on record, but entries in General Register are duly proved from evidence of PW4 and those are relevant and admissible. Incident took place on 25.12.2016. Date of birth of victim is proved as 03.7.2003. Therefore, on the day of incident, victim was 13 years 5 months and 22 days old. i.e. she was child within the meaning of section 2(d) of POCSO Act.

10] In sexual offences, evidence of victim is material and plays important role. Victim deposed vide Exh.12 that incident took place on 25.12.2016. She went to school at 9.30 am due to Kabaddi competition and returned at 11.30 am. Thereafter, she along with her mother, brother and other family members went to Zulelal Temple, near Ruby Hall for attending engagement ceremony of son of her aunt and returned back to 5.00 pm. Then, she went to house of her friend and remained in the house of her friend. Meanwhile, her mother lodged Missing Report. Victim denied that when she went to house of her friend, she received call from child in conflict with law who asked her to come to meet him, then she met him where accused came and met her.

11] Victim did not support the material aspects of prosecution case. Hence, she was cross examined by APP at length, but in her

cross examination by APP, she was denied that her statement was recorded by police on 29.12.2016 as per her instance and she stated before police that when she met accused, he compelled her to go with him and forcibly took her from his vehicle, he took her at Gogalwadi from new Katraj tunnel in one land property, by holding her hand; he told that he likes her and want to marry with her, he then kissed her, she shouted, but he forcibly removed her clothes and committed forcible sexual intercourse with her. She further denied that she narrated incident to child in conflict with law and then to her parents, when she reached at house. She specifically denied portion marked 'A' in her statement dt. 29.12.2016 and also the contents of her statement u/s. 164 of Cr.P.C. recorded before Judicial Magistrate First class. She denied that her statement before Magistrate was recorded as per her instance and then, she signed on the same. She has no knowledge whether her clothes were given to police by her mother, but she identified her clothes i.e. green coloured half sleeves top, yellow coloured jerkin, cream coloured slip, pink coloured full pant, yellow coloured knicker which are at Art A to E. She denied that she was sent to Sassoon hospital for medical examination and she narrated the history to Doctor about forcible sexual intercourse by accused Shankar in land property. She denied that her mother is working as a Sarpanch and settlement took place between their family members and accused, therefore she is deposing falsely against him only to save him.

12] Similarly, mother of victim PW2 deposed vide Exh. 13

only with regard the birth date of victim, her age and fact that on 25.12.2016 they went to attend engagement ceremony of son of her sister in law at Wanwadi and about going of victim away from house after 5.00 pm on that day. According to PW2, as victim did not return to house she lodged report of missing. But, she has denied the contents of her statement dt. 26.12.2016. Therefore, she was cross examined at length by APP and in her cross examination by APP she denied that on 25.12.2016 victim went away from house, search was made, inquiry was made with her friends and, sister of her friend told that she saw victim and her friend going to see Santa Clause in Saisiddhi chowk. PW2 further denied that after sometime she received call from victim who told that she was near Chintamani school and would come within sometime.

13] Mother of victim PW2 also denied that at 9.30 pm victim came in house in frightened condition, upon inquiry, she started crying and told that child in conflict with law made phone call on mobile of her friend, she went to meet him, then on mobile of child in conflict with law she received phone call of accused Shankar, who called them near Pride School, they went there at 6.00 pm, accused came and told something to child in conflict with law, then he forcibly took her from his vehicle at Gogalwadi from new Katraj Tunnel. She further denied that he stopped vehicle at the side of road, took her in land property in dark, he told her that he likes her and want to marry her, he kissed her, she shouted, but he forcibly removed her clothes and forcibly committed sexual

intercourse with her. It is denied by her that then she made phone call to child in conflict with law and narrated incident and thereafter when she reached the house incident was disclosed to the family members. Hence, PW2 mother of victim denied that she stated before police portion marked A and B in her statement and she was unable to tell the reason why her statement is recorded as above. She denied that she gave statement before police and also denied the suggestion that as she is Sarpanch, matter settled between both family members and to save accused she was deposing falsely.

14] As discussed above, material witnesses did not support prosecution case, hence, there is no direct and substantive piece of evidence. In addition to above, prosecution is relying on evidence which is in the nature of corroborative evidence i.e. seizure of clothes, mobiles, disclosure of spot and seizure of vehicles at the instance of accused. In that regard, there is evidence of PW3 and Investigating Officer PW5 Ashwini Patil. PW3 deposed vide Exh. 18 that on 29.12.2016 while in police custody, accused voluntarily gave statement before him, another panch and Investigating Officer that he was ready to show the spot where he committed forcible sexual intercourse with victim and ready to show vehicle on which his friend came and vehicle on which his friend brought victim. Accordingly, memorandum statement of accused was reduced in writing. Thereafter, as per instance of accused, both panch witnesses, police officers and police staff went near Katraj Dairy chowk as per direction told by accused, then they went to Sai

Siddhi chowk and reached at Rajaram Gas chowk. Then, they went from backside of Bharati Vidyapeeth and towards Bharati Vihar. Accused asked to stop the vehicle at the side of wall. Two vehicles were parked at that place in open place. Out of that, one was Hero Honda Deluxe motorcycle, and accused told that it was of his uncle. Second vehicle was Hero Inflex motorcycle and it was of his friend. Both vehicles were seized by police in their presence. Thereafter, at the instance of accused, they went at Nilgiri chowk towards Nawale Bridge by Satara road, ahead Katraj new tunnel Shindewadi. Accused asked to stop vehicle in open space at right side near canal. Then they went to field of maize, accused showed that spot where incident took place. Therefore, police prepared panchanama of that spot. Memorandum statement and panchanama both are at Exh.19.

15] According to PW3 as incident took place prior to two years, he was unable to remember whether accused before the Court is the same person who made memorandum statement and showed the spot of incident. In that regard, the witness was cross examined by APP and again he stated that he does not exactly remember whether accused before the Court was the same person who gave statement, showed the spot.

16] During his cross examination by accused, he admitted that he did not work as a panch prior to this and also denied that police prepared memorandum statement and only obtained his signature. According to him, panchanama was prepared in police station and

then he signed on it. In police station, no accused or any person gave memorandum statement before him. Evidence of PW3 is self contradictory, firstly in chief examination he is stating about memorandum statement of the accused in Bharati Vidyapeeth police station, but later on, he stated that panchanama was prepared in police station, no accused or any person gave memorandum statement before him. Moreover, due to lapse of time, he is unable to identify the accused before the Court. Therefore, his evidence is not consistent with prosecution case. Moreover, Exh.19 i.e. memorandum statement on first page after completion of the statement, it does not bear signature of accused, panch witness and Investigating Officer. There is signature of accused on running panchanama from second page and at the end of entire panchanama.

17] PW5 Investigating Officer deposed vide Exh. 31 about recording statement of first informant as per her instance and same is at Exh.14. F.I.R. is at Exh. 32. She gave letter to Sr. Police Inspector for taking entry regarding registration of offence, she arrested the accused and filled up Arrest Form Exh. 34 in presence of two panch witnesses. He prepared physical search panchanama of accused which is at Exh.15, she seized clothes of accused and victim on 26.12.2016, she prepared seizure panchanama of clothes of victim in presence of two panch witnesses which is at Exh.16. On 28.12.2016 she seized mobile of child in conflict with law vide panchanama Exh. 36, on 28.12.2016 she seized mobile of accused in presence of two panch witnesses vide seizure panchanama

Exh.17. She stated about memorandum statement of accused dt. 29.12.2016 while in police custody and in respect of spot and seizure panchnama at the instance of accused.

18] Evidence of PW5 further shows that she gave letter to Sassoon hospital for medical examination of accused, she recorded statement of victim as per her instance and portion marked 'A' in the statement of victim is at Exh.37, she gave letter to Sassoon hospital for Potency Test of accused and letter for recording statement of victim u/s. 164 of Cr.P.C., she sent seized muddemal to Chemical Laboratory and obtained reports. Exh.41 is report of samples of accused showing his blood group 'B' and Ex.3 i.e. pubic hair is not suitable for such determination. Exh. 42 is C.A. report of samples of victim and her blood group cannot be determined as results are inconclusive. Exh.43 is C.A. report about the clothes of victim and accused. Ex.4 i.e. jeggins of victim is stained with blood on middle portion which is human blood, but grouping is inconclusive. As grouping is inconclusive and blood group of victim is not determined, Chemical Analysis reports are not helpful to prosecution to prove the guilt of accused.

19] During investigation, Medical Certificate of victim is collected and same is admitted by accused, so it is at Exh.,21. It shows that victim 14 years girl narrated history of sexual assault. Accused Shankar known to her since 2 to 3 months and on 25.12.2016, accused took victim on two wheeler at Shindewadi at some field. He attempted vaginal intercourse 1 to 2 times after removing clothes. Medical Officer opined that from history and

clinical examination, there is no evidence of hymenal tears with no evidence of vaginal penetration with no fresh physical injuries. However, possibility of attempt of vaginal penetration cannot be ruled out. Statement of victim u/s. 164 of Cr.P.C. is at Exh.25 and as per guidelines in **R. Murugesan M. Selvam V/s. State, Criminal Appeal No. 393 and 396 of 2012**, it is observed that a statement u/s. 164 Cr.P.C. is not substantive evidence and cannot be made use of except to corroborate and contradict the witness. Statement u/s. 164 of Cr. P. C. cannot be treated as substantive evidence and the accused cannot be convicted based on it.

Ratio laid down in above cited ruling is noted. In statement u/s. 164 of Cr. P. C., victim narrated incident dt. 25.12.2016 in detail and fact that by forcibly taking in one field, accused Shankar committed forcible sexual intercourse with her by removing clothes. Though victim gave statement as above before Magistrate, before this Court in oral version, she denied that her statement was recorded before Magistrate as per her instance and she signed on it. In the light of above discussion, it is clear that, as victim, her mother i.e. material witnesses did not support prosecution case, there is no direct and substantive piece of evidence. Victim and her mother are cross examined by APP at length. However, nothing has come on record to show that, they both were pressurized, forced to resile from their statement. It is not brought on record that, victim was seen at the spot of incident with accused. Though memorandum statement and discovery panchanama is exhibited, said panch witness could not identify

accused as a same person who gave memorandum statement. Moreover, he admitted that, he signed on panchanama in police station which creates doubt in mind about said panchanama.

20] It is material to note that, no circumstantial evidence is brought on record against the accused to prove his presence at the spot with victim. In such circumstances, there is only corroborative piece of evidence in the nature of memorandum statement, panchanamas, statement of victim u/s. 164 of Cr. P. C. and medical evidence. As per prosecution case, the act was forceful but in medical certificate, there are no fresh injuries on person or private part of victim. Doctor opined that, there is no evidence of vaginal penetration with no fresh physical injuries. No doubt, doctor opined that, possibility of attempt of vaginal penetration cannot be ruled out.

21] In medical certificate, victim gave history of attempted vaginal intercourse one to two times by removing her clothes. But in her oral version, victim denied that, she gave history of incident to Medical Officer or she gave statement about forcible sexual intercourse before Magistrate u/s. 164 of Cr. P. C. Due to this, there is no substantive piece of evidence and it is settled principle of law that, facts are to be proved by way of direct or circumstantial evidence. Thereafter, court can look into corroborative piece of evidence. However, in case in hand, in absence of direct, circumstantial evidence, only on the basis of corroborative piece of evidence it cannot be said that, offences levelled against accused are proved beyond reasonable doubt.

22] Age of victim is proved, but victim did not state about kidnapping her by accused from lawful guardianship of her parents. She did not state about forcible penetrative sexual intercourse by accused with her. Her evidence is also not sufficient to prove her sexual harassment or sexual assault by accused. Therefore, in view of above discussion, it is clear that there is no evidence for the proof of alleged offences. Hence, it cannot be said that accused kidnapped victim and he committed or attempted to commit sexual intercourse with victim. Therefore, offences of kidnapping, inducement and forcible sexual intercourse or attempt of penetrative sexual intercourse, cannot be attributed to accused in absence of cogent, reliable and trustworthy evidence. Hence, ingredients of offences punishable under section 363, 376(2)(i) of Indian Penal Code and Section 3 p/u/s. 4 and S. 7 p/u/s. 8, 11 p/u/s. 12 of Protection of Children from Sexual Offences Act are not proved against the accused beyond reasonable doubt. Hence, point nos. 1 to 5 are answered in the negative and point no. 6 is answered as per final order and following order is passed-

ORDER

- 1] Accused Shankar Bharat Biramane is acquitted from the offences punishable under Sections 376(2)(i), 363 of the Indian Penal Code and Section 3 p/u/s. 4, 7 p/u/s. 8 and S. 11 p/u/s. 12 of Protection of Children from Sexual Offences Act vide Section 235(1) of Code of Criminal Procedure.
- 2] As case against child in conflict with law is pending bearing no. SCC 216/2017, the seized muddemal i.e. clothes of accused i.e. black coloured full sleeves shirt, blue coloured jeans, underwear of Jocky company, red coloured half sleeves vest of Jocky company, clothes of

victim i.e. one parrot green coloured half sleeves top, yellow coloured jerkin, cream coloured slip, pink coloured full pant and yellow coloured nicker be preserved till decision of that matter.

- 3] As case against child in conflict with law is pending bearing no. SCC 216/2017, the seized muddemal i.e. one black coloured Honda CD Deluxe bearing no. MH 12/HQ/5297 and black coloured Impuls Hero Motorcycle bearing no. MH 12/JD/4213 be preserved till decision of that matter.
- 4] As case against child in conflict with law is pending bearing no. SCC 216/2017, the seized muddemal i.e. black coloured OPPO company mobile having model no. A33F and black coloured mobile handset of Samsung model no. GT19082 be preserved till decision of that matter.
- 5] Accused to furnish Personal Bond and Surety Bond of Rs.15,000/- in view of compliance under Section 437-A of Code of Criminal Procedure with current address proof and undertaking that he will appear before Appellate Court in case the appeal is preferred.
- 6] Today, accused is released on PR of Rs 15,000/- and time granted to furnish surety.
- 7] Judgment dictated and declared in open court.

Pune.
Date – 13/11/2019.

(R. V. Adone)
Addl. Sessions Judge, Pune.

Certificate

“ I affirm that the contents of the P.D.F. File Judgment are same word for word as per original judgment.

Name of Steno	- G. S. Chougule
Court Name	- Smt. R.V.Adone, Addl. Sessions Judge,Pune.
Date of Order	- 13.11.2019.
Order signed by P.O.	- 14.11.2019.
Order uploaded on	- 16.11.2019.

