

(2024) 08 BOM CK 0019
In the Bombay High Court
Case No : Criminal Appeal No. 223 Of 2021

Akash Dilip More

APPELLANT

Vs

State Of Maharashtra, Thr Pso Ps Warora Dist Chandrapur

RESPONDENT

Date of Decision : 13-08-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 164, 313
Indian Penal Code, 1860 — Section 376(2)(j)(n), 506(II)
Protection of Children from Sexual Offences Act, 2012 — Section 4, 6, 29

Citation : (2024) 08 BOM CK 0019

Hon'ble Judges : G. A. Sanap, J

Bench : Single Bench

Advocate : Y.B. Mandpe, S.V. Kolhe

Final Decision : Disposed Of

Judgement

G. A. Sanap, J

1. In this appeal, challenge is to the judgment and order dated 10/05/2021 passed by the learned Special Court, Warora, whereby the learned Judge held the accused guilty of the offence punishable under Section 376 (2)(j)(n) of the Indian Penal Code read with Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as "the POCSO Act" for short) and under Section 506(II) of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay fine of Rs.3,000/- and in default to suffer simple imprisonment for three months for the offence under Section 376 (2)(j)(n) of the Indian Penal Code read with Sections 4 and 6 of the POCSO Act. He is further sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.2,000/- and in default to suffer simple imprisonment for three months for the offence under Section 506(II) of the IPC.

Background facts:

2. The informant (PW3) in this case is the mother of the victim. On the day of

the incident, the victim was 10 years and 3 months old. The husband of the informant died in the year 2017. The informant with her son and the victim was residing at Warora. She is doing labour work. It is stated that the accused used to come to her house frequently. The incident in question occurred on 19/04/2019. The informant came to know about the same on 21/06/2019. It is the case of the prosecution that the accused on 19/04/2019 came to the house of the informant. The victim was not well. She was sleeping in the house on the cot. The accused closed the door from inside and committed forcible intercourse with the victim initially at 2.00 p.m. It is stated that the accused again committed sexual intercourse with her at 3.00 p.m. The victim had narrated the incident to her neighbour (PW-6) Kantabai Ukey. PW-5 Rashida Sheikh is also the neighbour of the victim. Kantabai (PW-6) informed about the incident to the informant. PW-5 came to know about the incident. They made an enquiry with the accused. However, the accused flatly denied the incident. PW-3 mother of the victim went to Police Station, Warora, on 21/06/2019 and lodged the report. On the basis of this report, a crime bearing No.697/2019 was registered against the accused for the above offences.

3. PW-7 carried out the investigation. The victim was sent to the Medical Officer for her examination. The statement of the victim under Section 164 of the Code of Criminal Procedure was recorded. The victim was referred to the Radiologist for determination of her age. The investigating officer prepared the spot Punchnama and collected the samples. The investigation revealed the complicity of the accused in the crime and, therefore, PW-7 filed chargesheet against the accused before the Special Court.

4. Learned Special Judge framed the charge against the accused. The accused pleaded not guilty. The defence of the accused is of false implication at the instigation of PW-5 Rashida Sheikh and PW-6 Kantabai Ukey. The prosecution examined seven witnesses. The learned Special Judge, on consideration of the evidence, held the accused guilty and sentenced him as above. The appellant has come before this Court in appeal against the said judgment and order.

5. I heard Shri Y.B. Mandpe, learned advocate for the appellant and Mrs. S.V. Kolhe, learned APP for the State. Perused the record and proceedings.

6. The learned advocate for the appellant took me through the evidence of victim (PW-1) and the evidence of her mother (PW-3) and submitted that the evidence of these two witnesses is not sufficient to prove the charge against the accused. Learned advocate submitted that PW-3 informant has even denied her signature on the report. It is pointed out that in her evidence she has categorically stated that the signature on the report was made by PW-5 and PW-5 was instrumental in lodging the report. The learned advocate submitted that the victim (PW-1) on the date of the incident the victim was not below 18 years of age. Learned advocate submitted that the victim in her examination-in-chief has, to some extent, supported the case of the prosecution. However, in cross-examination, she has completely disowned the case of the prosecution and the incident.

Learned advocate pointed out from the evidence of PW-1 victim that she has categorically admitted that the accused used to come to the house and on account of the frequent visits of the accused to their house, mother did not want the children at house and, therefore, she admitted them in the hostel. It is pointed out that she has further admitted that in order to separate her mother and the accused, she has planned a strategy with her friends and lodged the false report.

7. Learned advocate submitted that learned Judge has failed to consider the cross-examination of the victim while appreciating her evidence. Learned advocate submitted that there is no concrete evidence to prove that the victim on the date of the crime was below 18 years of age. Learned advocate submitted that the report of the Radiologist cannot be made the sole basis to decide the age of the victim. Learned advocate submitted that the prosecution has failed to prove the date of birth of the victim on the basis of documentary evidence. Learned advocate submitted that the very foundation of the case of the prosecution has fallen flat in view of the doubtful evidence of the victim and, therefore, the evidence of the Medical Officer PW-4 alone would not be sufficient to convict the accused. Learned advocate, further submitted that the vital and important circumstances were not put to the accused in his 313 statement and, therefore, the judgment has been vitiated. The learned advocate submitted that the learned Special Judge has failed to properly appreciate the evidence and as such, has come to a wrong conclusion.

8. Learned APP submitted that the report of the Radiologist at exhibit 43 is sufficient to prove that on the date of the incident, the age of the victim was between 10 to 12 years. Learned APP submitted that this report has not been challenged at all. Learned APP submitted that except the report of the Radiologist, the prosecution has not adduced any other documentary evidence to prove the age of the victim. Learned APP further submitted that the cross-examination of the victim was recorded after one year from the date of recording of examination-in-chief. Learned APP submitted that therefore, the statements made by the victim in her examination-in-chief cannot be completely discarded. Learned APP submitted that at the time of cross-examination, the victim was tutored or pressurized and, therefore, she gave all favourable answers in her cross-examination. Learned APP submitted that the evidence of independent witnesses Rashida Sheikh (PW-5) and Kantabai Ukey (PW-6) cannot be discarded. It was not suggested in their cross-examination that for one reason or the other, they have deposed falsely against the accused. Learned APP submitted that the victim girl in her examination-in-chief has narrated that her mother was taking side of the accused and, therefore, she did not narrate the incident to her mother. It is pointed out that she has stated that when she was beaten by her mother, on a next day, she went to the house of Kantabai and narrated the incident to her. Learned APP submitted that on the basis of some of the answers given by the victim in cross-examination, her entire evidence cannot be discarded. Learned APP submitted that on medical examination of the victim, the

medical officer found that there was fresh hymen tear injury. The hymen tear was in 6 o'clock position and caused 2 to 3 days back. Learned APP submitted that this evidence is sufficient to corroborate the version of the victim (PW-1) and PW-5 and PW-6. Learned APP submitted that the learned Judge has properly appreciated the evidence and as such, the well reasoned judgment and order does not warrant interference.

9. I have minutely perused the oral and documentary evidence adduced by the prosecution. It needs to be stated at the outset that in the examination-in-chief, the victim (PW-1) has narrated the incident in great detail. It is seen that on the date of recording of her examination-in-chief, she did not insist for the presence of her mother in the Court hall. It appears that after completion of the examination-in-chief, the advocate for the accused, after asking 4 to 5 questions, applied for adjournment. Learned Judge was pleased to reject the said application and treated the cross-examination as closed. In my view, the learned Judge was not sensitive to the issue involved before him. He could have granted 2-3 days adjournment and recorded cross-examination. It is to be noted that the victim in her examination-in-chief has categorically disclosed that her mother would take the side of the accused. She has stated that therefore she did not trust her mother for any help. She has stated in her examination-in-chief that in the evening of the date of the incident, she did not narrate the incident to her mother because the accused had extended threat to kill her, in case she disclosed of the incident to her mother. The learned Judge was, therefore, aware that the victim did not narrate the incident to her mother but narrated the same to Kanta Aaji (PW-6). The accused, being aggrieved by this order of closure of the cross-examination, filed a writ petition in this Court and this Court vide order dated 01/12/2020 set aside the said order and granted permission for further cross-examination of the victim. The examination-in-chief of the victim was completed on 12/03/2020. In the above background and after the order of the High Court, the cross-examination was recorded on 09/02/2021 i.e. after one year. It appears that the accused has capitalized this opportunity. The victim in her cross-examination, gave a complete somersault to her earlier version. It appears that in her cross-examination, she has narrated the version of her mother. Be that as it may, the Court has to consider the examination-in-chief as well as cross-examination. The purpose of cross-examination is to test the veracity and credibility of the witnesses. The credibility and veracity of the witnesses can be tested by bringing on record relevant facts and circumstances. In this case, the victim has caused complete damage to the case of the prosecution. The learned Judge, on the basis of examination-in-chief and completely ignoring the cross-examination, placed implicit reliance on the evidence of the victim. The victim in her cross-examination has caused sufficient damage to the case of the prosecution. In her cross-examination, she has stated that she and her brother were staying at hostel at Warora. On holidays and vacations they used to go to the house. The accused would also come to their house. She has stated that her mother would get annoyed because of their visit

to the house. Her mother told her that she should not frequently come to the house from the hostel. She would sometime beat her on that count. She has stated that on account of suspected intimacy between her mother and accused, her friends in their friendly discussion, suggested her to cause trouble to them. She has stated that since then, she started disliking her mother and the accused. In short, she has stated that she planned to do something to create a problem in the relations of her mother and the accused. They therefore, decided to create a false story. She has further stated that at the time of the incident, there was itching to her whole body. She has categorically stated that on account of itching of the private part, she had sustained the injuries to her private part. In my view, in the backdrop of such answers in her cross-examination, it is not possible to place implicit reliance on her version in the examination-in-chief. It is evident that on account of the hasty approach of the learned Judge, the victim changed her stand and stance completely after one year. There is a scope to make this observation. It needs to be stated that this is most unfortunate, but, the Court cannot reverse the position. It needs to be stated that the witness is master of his or her version. No one, including the Court, can compel the witness to depose in a particular manner. The Court has to consider the statement made by the witness while deciding the matter.

10. It is to be noted that her mother did not support the case of prosecution. The mother even denied her signature on the report lodged to the police by her. In her evidence, mother has stated that the report was lodged by PW-5 and PW-5 made signature on the said report. The prosecution has not taken appropriate steps to prove this aspect beyond doubt. In my view, therefore, the learned Judge was not right in placing implicit reliance on the evidence of the victim.

11. PW-3 is the mother of the victim, she has not supported the case of the prosecution. PW-5 and PW-6 have supported the case of the prosecution. They have placed before the Court in their evidence the account of the incident and the relevant facts thereto, narrated to them by the victim and mother of the victim. They are not the eye witnesses to any incident. Even if, it is assumed for the sake of argument that the victim had faith and confidence in them that by itself would not be sufficient to accept their version. PW-6 Kantabai has deposed that on 20/06/2019, the victim was sitting near the shop of one Patil and crying. She made enquiry with her and at that time, the victim narrated the incident of rape on her. She has stated that thereafter, she contacted her mother and narrated the incident to her mother. She has stated that she informed the mother of the victim that there was swelling on her private part. She has further stated that when she narrated the incident, the mother could not believe it. The mother, on the contrary, confidently told her that the accused could not do such an act with her daughter. In her cross-examination, a statement with regard to the swelling noticed on the private part of the victim has been proved to be the omission.

12. In this backdrop, it is necessary to consider the evidence of PW-5 Rashida

Sheikh. She has stated that on 24/06/2019, in the morning, after hearing conversation of the ladies, she came out of her house. She heard that something wrong had happened with the victim. She has stated that thereafter, she called the victim to her house and made enquiry with her about the incident. She has stated that the victim narrated the incident to her. She has further stated that thereafter, she went to the house of the informant and narrated the incident to her. She has further stated that the informant told her that she is confident that the accused cannot do such an act. In short, she showed more faith and trust in the accused than in her daughter. It is to be noted that the evidence of PW-5 and PW-6 could not be said to be the direct evidence. PW-5 is Social Protection Officer at Warora. It was but natural for her to look into such a serious matter being a social protection officer. However, simply because of her position, the implicit reliance cannot be placed on her evidence. The evidence of PW-5 and PW-6 at the most could be used as a corroborative piece of evidence. In this case, on account of failure of the victim to stick up to the statements made in her examination-in-chief, the entire edifice of the case of the prosecution has collapsed. In view of this, the evidence of PW-5 and PW-6 would not be sufficient to prove the charge against the accused.

13. The Medical Officer (PW-4) has also, to some extent, supported the theory of sexual assault on the victim. The Medical Officer did not notice any other external injury on the person of the victim. He has stated that he only noticed the hymen tear. He has also stated the age of the hymen tear. It was within 2-3 days of the examination. In my view, in the absence of the cogent and concrete evidence of the victim, the medical evidence cannot be made the sole basis of the conviction.

14. The investigating officer, as can be seen from the report, had collected the photocopies of the school leaving certificate and birth certificate. The investigating officer did not obtain the original documents. It is evident that the investigating officer was not alive to the seriousness of the crime in question. The investigating officer for the purpose of the POCSO Act was the designated officer for conducting the investigation. The Investigating officer was required to collect the original documents. Similarly, the In-charge prosecutor of the case before the learned Trial Court was required to examine the witness to prove the school leaving certificate as well as birth certificate. Since the photocopies were part of the record, learned prosecutor could have summoned the witness from the concerned department, with an original record to prove these documents. It, therefore, appears that there is collective failure on the part of the investigating officer as well as the prosecutor. The proof of the birth date of victim, in such a crime, is very important. It must be proved that on the date of the offence, the victim was below 18 years of age.

15. In this case, the victim was examined by the Radiologist. The Radiologist has not been examined. The certificate of radiological age of the victim is at exhibit 43. This certificate was exhibited at the time of evidence of the investigating

officer without examining the Radiologist. The learned prosecutor, considering the absence of proper documentary evidence or proof of the age of the victim, was expected to summon the Radiologist. The evidence of the Radiologist in my view would have extended the support to the case of the prosecution. As per the report of the Radiologist, the radiological age of the victim was between 10 to 12 years. It is to be noted that at this stage, if there is concrete documentary evidence of the age of the victim, to prove that the victim was below 18 years of age, then the report of the Radiologist can be used as a corroborative piece of evidence. In such a situation, if there is a dispute as to the age of the victim, the documentary evidence of the birth date deserves preference.

16. In this context, a useful reference can be made to the decision of the Hon'ble Apex Court in the case of Vishnu alias Undrya Vs. State of Maharashtra, (2006) 1 SCC 283. In this case, the Hon'ble Apex Court has held that if the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test.

17. The learned Judge has placed implicit reliance on the report of the Radiologist at exhibit 43. I have minutely perused the statement of the accused recorded under Section 313 of the Cr.P.C. Perusal of the statement would show that this report was not specifically put to the accused, so as to offer him an opportunity to explain this incriminating material. Learned Judge was expected to put the accused in brief, the findings and opinion of the radiologist from this certificate. He was also required to draw the attention of the accused to the contents of the certificate by explaining the same in the language understood by the accused. It is seen that exhibit 43 is in English. This vital piece of incriminating material was not put to the accused in the language understood by him. It is further seen that statement of the victim recorded under Section 164 of the Criminal Procedure Code was not shown to the victim at the time of her examination-in-chief. It has not been exhibited. It reflects upon carelessness on the part of the in-charge prosecutor. Similarly, the Court was also not careful in conducting such a serious matter. The statement of the victim under Section 164 of the Criminal Procedure Code was part of the record. The Presiding Officer of the Court is required to actively participate in the conduct of the proceedings. The Presiding Officer must always be in a command and control of the proceedings. The Presiding Officer cannot afford to give control of the proceedings to others. The proceedings conducted before the Court must reflect that the learned Presiding Officer was not mere a silent spectator. The involvement of the Court at every stage of the proceedings is absolutely necessary. If the Presiding Officer acts as a silent spectator, then the prosecutor, the advocate for the accused or even for that matter, the accused can control the rein of the proceedings. It is further seen that the 164 statement of the victim was not put to the accused in his 313 statement. It is further noted that history of assault narrated to the Medical Officer (PW-4) by the victim and recorded by

doctor in his report at exhibit 31 was also not put to the accused in his 313 statement.

18. In my view, therefore these lacunae are very material. The lacunae can be exploited and made use by the accused. On appreciation of the evidence, I am satisfied that in this case, the prosecution has even failed to prove the date of birth of the victim. It reflects upon the casual approach of the investigating officer at the stage of the investigation, the prosecutor In-charge, at the time of leading the evidence and learned Judge at the time of recording of the evidence. In my opinion, if all the relevant facts had been properly brought on record, then the relevant evidence would have been available for tying the loose ends in the case. The apparent failure as stated above has denied this opportunity to the prosecution. In view of this, I conclude that there is substance in the submissions advanced by the learned advocate for the accused.

19. The conviction on the basis of such doubtful and weak evidence can not be sustained. Learned Judge has invoked the provisions of Section 29 of the POCSO Act. It needs to be stated that the presumption provided under Section 29 of the POCSO Act does not get triggered automatically. In order to trigger the presumption, the prosecution is duty-bound to prove the foundational facts. The foundational facts vis-a-vis the charge framed against the accused must be established to the satisfaction of the Court, on the basis of the evidence. The presumption under Section 29 of the POCSO Act is not an absolute presumption. Once the presumption is triggered against the accused then the accused is duty bound to rebut the said presumption. In this case, the foundational facts have not been established and, therefore, the learned Judge was not right in invoking the presumption under Section 29 of the POCSO Act against the accused.

20. In view of the above observations, I am of the view that the appeal deserves to be allowed. The appeal is accordingly allowed.

21. The judgment and order of conviction and sentence passed against the appellant by learned Additional Sessions Judge, Warora, dated 10/05/2021 in Special (POCSO) Case No.27/2019 is quashed and set aside.

22. Appellant – Akash Dilip More is acquitted of the offence punishable under Section 376(2)(j)(n) of the Indian Penal Code r/w Section 4 and 6 of the Protection of Children from Sexual Offences Act, 2012.

23. Appellant – Akash Dilip More is in jail. He be released forthwith if not required in any other crime.

24. The appeal stands disposed of in the aforesaid terms.