

(2017) 01 BOM CK 0194
In the Bombay High Court
Case No : 246 of 2015

Deepak

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-01-2017

Acts Referred:

Indian Penal Code, 1860, Section 376,
Section 506 - Punishment for rape - Punishment for
criminal ,intimidation
Protection Of Children From Sexual Offences Act, 2012 ,

Citation : (2017) 01 BOM CK 0194

Hon'ble Judges : B.R. Gavai, Kum. Indira Jain

Bench : DIVISON BENCH

Advocate : R.M. Daga, A.D. Sonak

Judgement

1. Being aggrieved by the judgment and order of conviction in Spl. (Ch. Act) Case No.144/2013 by the learned Additional Sessions Judge, Wardha on 8.5.2015, the sole accused has preferred this appeal. By the said judgment and order, appellant has been convicted and sentenced as under :

Sr. Nos.	Conviction under sections	Punishments
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1.	376, IPC R.I. for life and fine of Rs. 1000/-, in-default to S.I. for 3 months.	
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2.	506, IPC R.I. for 2 years and fine of Rs. 1000/- in-default to S.I. of 15 days.	
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3.	5 (n), PCSO Act R.I. for life and fine of Rs. 1000/- in-default to S.I. for 3 months.	
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The learned Additional Sessions Judge directed that all the sentences shall run concurrently. 2. Briefly stated, prosecution case is as under : (a) Prosecutrix, a minor, was residing at Inzapur with her mother, younger brother and the accused. Accused was in relation to mother of prosecutrix. According to her,

whenever she was staying alone in the house, accused was sexually assaulting her. He threatened her of dire consequences, if she would disclose the incident to anyone. As it became unbearable, on 2.4.2013 report came to be lodged. On the basis of her report, Crime No.80/2013 came to be registered under Sections 376, 506 of the Indian Penal Code and Sections 4, 6, 7 and 8 of the Protection of Children from Sexual Offences Act, 2012 (for short "PCSO Act, 2012") against the accused. (b) PSI Vaishali Totewar took over investigation. Prosecutrix was sent for medical examination. Spot panchanama was drawn. Accused was arrested. He was also sent for medical examination. The clothes of prosecutrix and accused were seized. Seizure panchanamas were accordingly drawn. (c) PW7 Dr. Smita Gajbhiye examined the prosecutrix on 2.4.2013. She collected samples of hair, vaginal swab, blood and nail clippings of the victim, sealed in a bottle and handed over to the Lady Police Constable, who took the victim to Civil Hospital, Wardha. (d) The blood sample and samples of pubic hair and nail clippings of accused were also collected during his medical examination. Seized clothes of the victim and accused and samples collected were sent to Forensic Laboratory for analysis. (e) Investigating Officer recorded statements of the witnesses, collected medical certificates and Chemical Analyser's reports. On completing investigation, charge-sheet was submitted to the Special Court, Wardha. 3. Charge was framed vide Exh.5. Accused pleaded not guilty and claimed to be tried. His defence was of total denial and false implication. 4. Prosecution examined in all eight witnesses in support of its case. On hearing both the sides and considering the evidence, learned Additional Sessions Judge came to the conclusion that except charge for the offence under Section 9 (n) of PCSO Act, 2012 punishable under Section 10 of the said Act, all other charges were duly proved by the prosecution. In consequence thereof, appellant was convicted and sentenced as stated in para 1 above. 5. Shri R.M. Daga, learned counsel for appellant, submitted that incidents, according to the prosecutrix, took place from March-2011 to 26.3.2013. She did not disclose the incident to anyone for a long period. There is no proof of age of the prosecutrix. Her solitary statement on date of birth, without any convincing proof on age, came to be relied upon by the trial court which resulted into wrong findings. The learned counsel points out that mother and grandmother of victim were the material witnesses. They were kept away from the witness box. He submits that medical evidence and chemical analyser's reports are completely in the negative. It is submitted that in the absence of legal proof of age, charge under the PCSO Act, 2012 would fall to the ground and so far as Sections 376 and 506 of the Indian Penal Code are concerned, evidence of the prosecutrix, who kept mum for around two years, could not have been relied upon to base a conviction. In support of submissions, learned counsel placed reliance on the judgment of this Court, dated 1.8.2016 in Criminal Appeal No.412/2014 (Ravi Anandrao Gorpude v. State of Maharashtra). 6. Per contra, learned APP submitted that the learned Additional Sessions Judge has evaluated the prosecution case minutely and the correct finding of guilt recorded by the trial court needs no interference in the present appeal. 7. The prime question in the case on hand is regarding age of

prosecutrix. For apt consideration of the submission made by the learned counsel for appellant, it would be useful to refer to the relevant provisions of Act of 2012. Section 2(d) of the PCSO Act, 2012 reads as under : "2 (d) "Child" means any person below the age of eighteen years." Section 5 deals with the aggravated penetrative sexual assault. Clause (1) of Section 5 reads as under : "(1) whoever commits penetrative sexual assault on the child more than once or repeatedly." Further Section 6 provides for punishment for aggravated and penetrative sexual assault as enumerated in Section 5 of the Act. From the aforesaid provisions, it is crystal clear that prosecution is duty bound to prove that victim is a child. Unless the prosecution successfully establishes that victim is a child within the meaning of clause (d) of Section 2 of the Act, a person cannot be convicted for the offence punishable under Section 6 of the Act. 8. The First Information Report in the present case was lodged on 2.4.2013. There is no whisper in the First Information Report about the date of birth of prosecutrix, though she states her age as 14 years. She gave her date of birth during her evidence recorded on 1.9.2014 as 16.3.1999. The offences alleged to have been committed as per FIR (Exh.29) and printed FIR (Exh.30) were between March-2011 and 26.3.2013. Till the evidence of prosecutrix was recorded before the trial court, she never disclosed her date of birth. Investigating Officer did not bother to collect the birth certificate, school certificate or any other cogent material to indicate that date of birth of prosecutrix was 16.3.1999. 9. Needless to state that provisions of PCSO Act are stringent in nature. The degree of proof is heavy and prosecution was under legal obligation to establish age of prosecutrix clearly showing that at the time of incident, prosecutrix was "child" within the meaning of the provisions of PCSO Act. There is nothing on record to prima facie indicate that investigating officer made genuine efforts to get the proof of age of prosecutrix. Trial Court placed reliance on the solitary statement of prosecutrix in evidence for the first time to hold the prosecutrix as a "child" within the meaning of the Act. We are afraid that in the absence of conclusive proof of age of prosecutrix, which was easily available to the prosecution, reliance can be placed on a singular statement of prosecutrix, who claims her date of birth as 16.3.1999, for the first time in the course of evidence recorded in the court. If statement of prosecutrix regarding her date of birth goes away nothing remains on record to show the age of prosecutrix and in such a situation, accused could not have been convicted for the offences punishable under the PCSO Act, 2012. 10. So far as offences under Sections 376 and 506 of the Indian Penal Code are concerned, with the assistance of the learned counsel for the parties, we have gone through the evidence of prosecutrix (PW-4) and her maternal uncle Anand Ganve (PW-5). As stated by prosecutrix, accused was residing with them. In 2011, they shifted to Wardha from Mumbai, as relations between her father and mother were not cordial. She states that they started residing at Inzapur in a rented accommodation. She stated that in March-2011, her mother had gone for work. She had a morning school. In the afternoon, she came home and was sleeping. She was alone in the house. The evidence of prosecutrix shows that in the afternoon, when she was sleeping, accused entered the house and moved his

hands over her stomach. When she told him that she would inform her mother, he went away. After 4-5 days, she was playing outside. That time accused came and called her inside the house. He asked her to make available water to him for bath. After she entered the house, accused closed the doors and windows and sexually assaulted her. He threatened to kill her in case she discloses the incident to anyone. She then states that thereafter accused ravished her many times, but due to the threats, she did not disclose the same. She however told her mother that accused used to utter bad words to her and he was a bad person. The response of her mother was that accused cannot do such things and he was looking after her. The activities of accused continued even thereafter. 11. It further appears from the testimony of the victim that before 15 days of lodging FIR she was crying in school. Her teacher PW-6 Sheela Giri asked her why was she crying. She narrated the incident to teacher. Sheela Giri informed the same to grandmother of prosecutrix, residing at Mumbai and called her to Wardha. She states that her grandmother did not come to Wardha. Then on 26.3.2013, accused sexually assaulted the prosecutrix and when it became extremely intolerable, she informed her maternal uncle (PW- 5) Anand Ganve on telephone. Her uncle came to Wardha and took her away with him. Thereafter, report was lodged and investigation was set into motion. FIR proved by prosecutrix is at Exh.29 and printed FIR is at Exh.30. From the cross-examination of prosecutrix, it can be seen that she did not disclose about the sexual assault from time to time by the accused to anyone including her mother. 12. In the report lodged on 2.4.2013, she stated her age as 14 years. In the evidence recorded on 1.9.2014, she disclosed for the first time that her date of birth is 16.3.1999. The principal question is, whether oral statement of prosecutrix regarding her date of birth disclosed for the first time in evidence is enough to prove the age of prosecutrix at the relevant time. We have already observed above that in the absence of conclusive proof of age which was available to the investigating agency, it would be risky to place reliance on the solitary and belated statement of prosecutrix regarding her age. The prosecution has not brought on record the best available evidence in the form of birth certificate, school certificate or even an ossification test. There is no whisper in the entire evidence of investigating officer to show that she made any effort to collect the proof of date of birth of prosecutrix. 13. It is significant to note that prosecutrix was not a child of too tender age. She was a girl of sufficient maturity. Her conduct is indicative of the fact that for about two years, she was totally silent and did not narrate the incident even to her close relatives like mother, brother and sister etc. True that solitary testimony of prosecutrix can be relied upon to base a conviction under Section 376 of the Indian Penal Code. The precondition to rely upon the sole testimony is that it is otherwise found to be reliable, trustworthy and believable. In the case on hand, we find that medical evidence is in the negative. On the basis of Chemical Analyser's reports, accused cannot be connected with the offences alleged. Chemical Analyser's reports are also in the negative. The conduct of prosecutrix through out does not rule out the theory of consent. If she was a minor, consent would be irrelevant. If she was major, her consent would have been a relevant

fact. In this background, it was essential for the prosecution to prove the case beyond reasonable doubt including the age of prosecutrix. Since the prosecution has miserably failed for the same, we find it unsafe to rely upon the sole testimony of the victim and proceed to pass the following order : (i) The Criminal Appeal is allowed. (ii) The order of conviction and sentence passed by the learned trial Judge is set aside. The appellant/accused is acquitted of the charges charged with. (iii) The appellant be set at liberty forthwith, if not required in any other case. Appeal allowed.