

(2017) 01 BOM CK 0192
In the Bombay High Court
Case No : 74 of 2015

Dilip s/o Bhaiyyasingh Tekan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-01-2017

Acts Referred:

Indian Penal Code, 1860, Section 376 -
Punishment for rape
Protection Of Children From Sexual Offences Act, 2012, Section 4, Section 6, <a href=1428

Citation : (2017) 01 BOM CK 0192

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

Bench : DIVISON BENCH

Advocate : Mahesh Rai, R.S. Nayak

Judgement

1. Being aggrieved by the judgment and order passed by the learned Additional Sessions Judge, Amravati in Sessions Trial No.155 of 2013 dated 31.10.2014 thereby convicting the appellant for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act) and sentencing him to suffer imprisonment for life and to pay fine of Rs.2,000/- and in default of payment of fine to suffer rigorous imprisonment for one year and also convicting him for the offence punishable under Section 4 of the POSCO Act and Section 376 of the Indian Penal Code, the appellant has approached this Court.

2. The prosecution story as could be gathered from the material placed on record is thus:- PW2 Sangita is widow of Bhojraj Yadav. She was residing at Adarsh Nagar, Amravati along with the prosecutrix PW1 and her son Raj. After the death of Bhojraj, PW2 Sangita married the accused, who was already having two sons from his first marriage. After marriage with Sangita, the accused started residing in the house of Sangita along with her family members. Sangita was also having elder daughter namely Dimple, who was already married and residing at Khamgaon.

3. It is the prosecution case that in the month of January, 2013, Sangita had been to Amla, district Baitul in the State of Madhya Pradesh since her mother was ailing. At that time, the prosecutrix and her brother Raj continued to stay at home along with their step father. It is the prosecution case that during that period on one of the nights, after having meals, the prosecutrix and her younger brother slept on the bed in the hall and her step father slept on the bed on the floor. It is further the prosecution case that between 11 p.m. and 12 midnight, her step father dragged her down. He made her to sleep down and pressed her mouth. She could not even raise any shouts. He gave her threats that if she would raise shout, he would kill her. He removed her pajama and knicker, so also his clothes and committed sexual intercourse with her. It is also the prosecution case that even on the next day during night hours, the accused repeated the said act. It is the prosecution case that the accused had threatened her with dire consequences and, therefore, even after her mother's arrival, she did not disclose the incident to her.

4. After lapse of some period, the prosecutrix started feeling giddiness and vomiting. Since her mother had undergone operation, she had called her elder daughter Dimple (elder sister of prosecutrix) from Khamgaon. Due to vomiting and giddiness, the mother of the prosecutrix suspected something and asked her elder sister to bring pregnancy test kit and after checking, it was found that the result was positive. At that time, her mother asked her who has done this and, therefore, the prosecutrix disclosed the name of the appellant. Thereafter the accused carried her to the hospital of Dr. Manjusha Boke at Kavar Nagar. The lady doctor examined her and asked her to sit out of the chamber and asked her to send her father inside. After coming out of the chamber, her father told her that doctor had asked for Rs.10,000/-. Thereafter she along with the accused returned on two wheeler. She told her mother what had happened in the hospital. As her 10th standard examination was going on, it was suggested by the accused that after her examination, they will go to the hospital. It is further the prosecution case that the accused always used to threaten the prosecutrix that if she discloses the incident to anybody, he would kill her, her mother and brother. She further states that thereafter the accused brought the pills and asked her to have pills and she ate it. After 2-3 days, her menstrual started. She states that even thereafter, the accused attempted to repeat the said act. She told about the same to her mother. There was a quarrel between her mother and the accused and thereafter they went to the Police Station. On the basis of the oral report, first information report came to be lodged. During investigation, the accused as well as the prosecutrix were subjected to medical examination. After completion of the investigation, the charge sheet was filed.

5. The learned trial Judge framed the charge for the offence punishable under Section 376 of the Indian Penal Code and so also for the offence punishable under Section 4 of POCSO Act. Subsequently an additional charge for the offence punishable under Section 6 and Section 6-(j)(ii) of the POCSO Act came to be framed. At the conclusion of the trial, the learned trial Judge passed the order of

conviction and sentenced the appellant as aforesaid. Being aggrieved thereby, the present appeal.

6. The learned counsel for the appellant submits that the learned trial Judge has grossly erred in passing the order of conviction and sentence. He submits that there is an inordinate delay in lodging the first information report. He further submits that the perusal of the evidence of PW1 prosecutrix and PW2 Sangita would reveal that there are material contradictions and omissions in their evidence. It is, therefore, submitted that the conviction on the testimony of these two witnesses would not be sustainable.

7. Per contra, the learned Additional Public Prosecutor submits that in view of the provisions of Section 29 of the POCSO Act, there is a statutory presumption against the accused. It is submitted that the appellant has grossly failed in rebutting the said presumption and as such the order of conviction warrants no interference.

8. For appreciating the rival submissions, it will be necessary to refer to Clause (d) of Section 2 so also Section 3 of the POCSO Act which read thus:- "Section 2..... (d) "child" means any person below the age of eighteen years; 3. Penetrative sexual assault- A person is said to commit "penetrative sexual assault" if (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person: or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person"

9. The perusal of the aforesaid provisions would reveal that for attracting the provisions of the said enactment, it is the duty of the prosecution firstly to establish beyond reasonable doubt that the victim is "child". Unless the prosecution proves that the victim is a child within the meaning of Clause (d) of Section 2 of the POCSO Act, a person cannot be convicted for the offences punishable under the said Act.

10. The prosecutrix in her deposition stated that her date of birth is 21.10.1996. No doubt that if the said date of birth is considered to be the proven date of birth of the prosecutrix, then at the time of incident which is alleged to have taken place in the month of January 2013, the prosecutrix would be below 18 years of age and as such "child" within the meaning of POCSO Act, However, it is to be noted that the prosecutrix clearly admitted in her evidence that while lodging the report and giving her statement to the Police, she had not given her date of birth as 21.10.1996. It is further to be noted that, perusal of the deposition of the investigating officer would show that he has also not done any investigation to

find out as to whether the prosecutrix was below 18 years of age or not at the time of the incident. The learned trial Judge has found that the prosecutrix in her examination-in-chief has stated that her date of birth was 21.10.1996 and it was sufficient to establish that she was child on the date of the incident. We find that taking into consideration the stringent nature of the provisions, it was necessary for the prosecution to have established beyond reasonable doubt that the prosecutrix was a "child" within the meaning of Clause (d) of Section 2 of the POCSO Act. No doubt that the mother of the prosecutrix in her evidence has placed on record the copy of birth certificate. However, nothing is discussed in the judgment by the learned trial Judge as to what is the source of the said certificate. On the contrary, there is not even a reference to the said certificate in the judgment of the learned trial Judge. Had the certified copy of the birth certificate been brought on record, then in view of the provisions of Section 35 of the Indian Evidence Act, there would have been some material to establish that the prosecutrix was below 18 years of age. However, nothing of that sort has been done. In that view of the matter, we find that the conviction of the appellant under the provisions of POCSO Act would not be sustainable.

11. That leaves us with the conviction under Section 376 of the Indian Penal Code. Admittedly, in the present case the medical expert has not been examined. There is no medical evidence to support the case of forcible intercourse. In that view of the matter, the only evidence to establish the guilt of the accused would be the oral testimony of PW1 prosecutrix and her mother PW2 Sangita.

12. The testimony of these two witnesses would reveal that there are material contradictions and omissions in their evidence. The perusal of the cross-examination of PW1 prosecutrix would reveal that she had not given her date of birth as 21.10.1996 in the first information report. It is further to be noted that the incident initially is alleged to have taken place in the month of January, 2013 and that too on 2-3 occasions. However, the report is lodged for the first time on 1.4.2013. The evidence of the prosecutrix would herself reveal that on the pregnancy test being found positive, her mother has asked her as to who has done this. She has disclosed the name of her father. After such disclosure even according to the prosecutrix, she and the accused went to the doctor. It is further her case that since her 10th standard examination was going on, it was decided by the present accused that after examination, they will go to the hospital. Not only that but she has admitted in her evidence, that one Jajoo used to fix marriages and he had suggested a proposal from Ahmadabad for her and for that purpose she along with the accused, her mother and her elder sister Dimple and the said Jaju had gone to Ahmadabad. She has further admitted that after they returned from Ahmadabad, the accused had beaten her and, therefore, she went to lodge the report. She has further admitted that on that date, the accused had abused her and her mother in filthy language.

13. Even insofar as the evidence of PW2 Sangita is concerned, there are material omissions and contradictions. Her evidence would reveal that she has made

many improvements in her evidence. She has also admitted that on the date of the report, the accused assaulted her and prosecutrix and people had gathered in front of her house. A suggestion is given to this witness that though she was insisting the accused to come to her house, the accused was not willing and, therefore, there was quarrel between her on one hand and the accused, his wife and children on the other hand.

14. It could thus be seen that even according to the prosecutrix and her mother, even after the fact of the accused committing the heinous act on the prosecutrix was disclosed to PW2 Sangita, the accused continued to stay with them. It is also the version of the prosecutrix and her mother that after coming to know about the prosecutrix became pregnant due to the accused committed by the accused, it was the accused who had taken her to the hospital. Not only that thereafter the accused along with the prosecutrix had gone to Ahmadabad in relation to marriage proposal for prosecutrix. They also admitted that the report was lodged on the date on which there was quarrel between the accused on one hand and these two witnesses on the other hand, wherein the accused had abused, assaulted and used filthy language. It could thus be seen that the defence of the accused that since he had stopped visiting the house of PW2 Sangita, PW2 Sangita insisted her daughter to lodge the false report, cannot be said to improbable. We find that the prosecution has failed to prove the case beyond reasonable doubt. As such the conviction under Section 376 of the Indian Penal Code would also not be sustainable.

15. In the result, the appeal is allowed. The order of conviction and sentence for the offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012, so also under Section 4 of the said Act and Section 376 of the Indian Penal Code is quashed and set aside and the appellant is acquitted of the offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012, so also under Section 4 of the said Act and Section 376 of the Indian Penal Code. Appellant be set at liberty forthwith, if not required in any case.