

(2019) 07 BOM CK 0021
In the Bombay High Court
Case No : Criminal Appeal No. 88 Of 2019

Guruprasad

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 04-07-2019

Acts Referred:

Protection Of Children From Sexual Offences Act, 2012 — Section 2(d), 2(1)(d), 3(a), 5(j)(ii), 5(l), 29
Evidence Act, 1872 — Section 138, 146
Juvenile Justice (Care And Protection Of Children) Rules, 2007 — Section 12(3), 12(3)(b), 12(3)(a)(i), 12(3)(a)(ii), 12(3)(a)(iii)

Citation : (2019) 07 BOM CK 0021

Hon'ble Judges : Rohit B. Deo, J

Bench : Single Bench

Advocate : Ashwin Wasnik, Amit Chutake

Final Decision : Dismissed

Judgement

Offence,Punishment

Section 344 of the IPC,"Rigorous Imprisonment for one year and payment of fine of

Rs.1,000/Â?, in default to undergo simple imprisonment for one month.

Section 354Â?A of the IPC,"Rigorous Imprisonment for two years and payment of fine of

Rs.1,000/Â?, in default to undergo simple imprisonment for one month.

Section 323 of the IPC,Rigorous imprisonment for six months.

Section 506 of the IPC,Rigorous imprisonment for one year.

Section 376(2)(f)(n) of the IPC and Sections 4,5(j)(ii)(l)

(n), 6 of the POCSO Act.,"Rigorous imprisonment for ten years and to payment

of fine of

Rs.5,000/Â?, in default to undergo simple imprisonment for two months.

8. The DNA report apart, the evidence of the victim PW 1 is consistent with the report, and is implicitly reliable. No omission partaking the character",

of contradiction or any other infirmity is brought out in the crossÂexamination. General suggestions are given that the accused did not subject the,

victim to forcible sexual intercourse and that the victim was in a relationship with one Sunil Uike. The suggestions are denied. It is brought on record in,

the crossÂ examination that the accused narrated the name and address of the victim to the doctor and stated the age of the victim as 20 years. The,

victim is confronted with the medical card of the Saoner Hospital. The response of the victim is that the doctor refused to treat her unless the name of,

the father of the child is disclosed. This is in the context of the name disclosed which suggests that the victim is the wife of the accused and is aged 20,

years. The disclosure of age as 20 years is of no significance and was obviously at the instance of the accused. I am satisfied, that the evidence of the",

victim is confidence inspiring.,

9. No corroboration is necessary if the evidence of the victim of sexual assault is found trustworthy. If the evidence is not implicitly reliable,"

assurance, short of corroboration can be sought from other evidence."

10. Sufficient assurance of the credibility and veracity of the version of the victim is available from the evidence on record. The evidence of PW 2Â?,

Devki Salame, who is the mother of the victim and who speaks of the disclosure made by the victim, is consistent with the version of the victim."

Similar is the evidence of PW 3ÂGita Dhurve who is the sister of PW 2. PW 5ÂDr. Sangita Jain examined the victim on 11Â5Â2016 and diagnosed,

the pregnancy. PW 5 states that the victim was carrying fetus of five and half months. PW 5 has deposed that though the victim was insisting on,

aborting the fetus, she refused to oblige since abortion at the advanced stage of pregnancy would have endangered the victim's life. PW 6ÂDr.",

Promod Kodape is the Resident Medical Officer at the Forensic Department who medically examined the victim and proved the report Exhibit 42 and,

the sonography report Exhibit 43. PW 6Â?Dr. Pramod Kodape has deposed that he collected the samples for the purpose of DNA profiling and handed,

over the samples to WPC Pratima in sealed condition. The evidence that PW

6. Dr. Pramod Kodape collected the samples for DNA profiling, sealed", the samples and handed them over to PWC Pratima is not challenged in the cross-examination. PW 7. Pratima Telgote states that she deposited the, samples in the police station. A bare suggestion is given that she did not deposit the sample in the police station, which suggestion is denied. PW 10. "Namdev Pujari is the Investigating Officer, who has stated that the samples collected by WPC Kalpana which she deposited in the police station in", sealed condition were seized in presence of panchas vide seizure panchanama Exhibit 62 and after the birth of the child, the DNA sample of the new", born child was collected and then the DNA sample of the accused, the victim and the child were sent to Chemical Analyzer. Nothing is brought out in", the cross-examination to discredit the testimony of the Investigating Officer. There is no serious challenge to the testimony that the samples were, collected, sealed and forwarded for chemical analysis in sealed condition. A bare suggestion is given that the Investigating Officer did not collect or", seal the samples of the victim, the accused and the new born child, is denied.",

11. Considering the evidence on record, it is irrefutable that the prosecution has established beyond reasonable doubt that the accused subjected the", victim to sexual intercourse and that the victim conceived and delivered a male child. The accused and the victim are the biological parents of the male, child. In the context of the evidence on record, all that remains to be seen is whether there is any merit in the submission of the learned Counsel for", the accused that the prosecution has not proved that the victim was a child as on the date of the incident.,

12. The victim has deposed that her date of birth is 22.5.1999. It is not even suggested to the victim in the cross-examination that the date of birth, of the victim is not 22.5.1999. The evidence of the victim on the date of birth has gone unchallenged. The victim has also stated in the report that, she is aged 16 years. The mother of the victim PW 2 states that the victim was 13-14 years old as on the date of the incident. In the cross-examination, she admits that she cannot state the date of birth of the victim. The suggestion that the age of the victim is more than 18 years is", however, denied. PW 8. Bhaurao Dhurve is the Headmaster of the Government Primary School, in which school the victim was admitted in the 1st", Standard. PW 8 has deposed that he is incharge of the admissions and other

activities of the school and maintains the relevant record. The school, register (Exhibit 49) in which the date of birth of the victim is recorded as 22-05-1999 is proved. PW 8 has also proved the entry in the school register, taken while issuing the transfer certificate which was issued on 03-12-2013. The date recorded in the School Leaving Certificate/Transfer, Certificate and the original register of the school is the same, is the deposition. It is elicited in the cross-examination that PW 8 is not aware whether, birth certificate was produced by the victim while securing admission in the school. The witness admits that the school cannot admit student without, birth certificate.,

13. Shri Amit Chutake, learned Additional Public Prosecutor relies on the decision of the Hon'ble Apex Court in *Sarwan Singh vs. State of Punjab*,"

2004 ALL MR (Cri) 156 (SC) to buttress the submission that if the evidence has gone unchallenged in the cross-examination, the evidence ought to",

be accepted. The reliance on the said decision is in the context of the accused not cross-examining the victim on the date of birth deposed. Shri Amit,

Chutake would then rely on the Division Bench judgment of this Court in *Kundan s/o Nanaji Pendor vs. The State of Maharashtra*, 2017 All MR (Cri)",

1137 and particularly paragraph 11 thereof which reads thus :,

11. Since the appellant has been charged with having committed offence under Sections 3(a), 5 (j) (ii) and 5 (l) of the Act of 2002, as per Charge",

at Exh.4, it would be necessary to first record a finding as to the age of "S". As per provisions of Section 2(1) (d) of the said Act, a child means a",

person below the age of eighteen years. As noted above, the prosecutrix had stated on oath that her date of birth was 5th January, 1997. There is no",

cross-examination, whatsoever, to this specific assertion made by the prosecutrix in her Examination-in-Chief. Her said statement has gone totally",

unchallenged. It is a settled position of law that if a witness is not cross-examined on a particular portion of her deposition in her Examination-in-Chief,

said statement is required to be accepted as the same is not challenged by the defence. Reference in this regard can be made to the",

observations of the Hon'ble Supreme Court in paragraphs 13 and 14 of its decision in *State of U.P. Vs. Nahar Singh (dead) & others* [(1998) 3 SCC,

561] : [1998 All MR (Cri) 1308] which are quoted below:Â?

13. It may be noted here that that part of the statement of PW¹ was not cross-examined by the accused. In the absence of cross-examination on",
the explanation of delay, the evidence PW¹ remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by, Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity,"

(2) to discover who he is and what is his position in life, or",

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might",

expose or tend directly or indirectly to expose him to a penalty or forfeiture.â??,

14. The oft-quoted observation of Lord Herschell, L.C. in *Browne vs. Dunn* clearly elucidates the principle underlying those provisions. It reads thus:",

I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is",

not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation",

is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to",

explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that story he",

tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a",

witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is",

not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."",

Similarly, in *Sarwan Singh Vs. State of Punjab* [(2003) 1 SCC 240], the Hon'ble Supreme Court reiterated this position by observing in Paragraph 9 of",

its judgment as under:â??,

9.It is a rule of essential justice that whenever the opponent has declined to avail himself of the",

opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.",

Hence, following aforesaid position of law, there would be no difficulty in accepting the unchallenged version of the prosecutrix that her date of birth",
 was 5th January, 1997. Though it is true, as urged by the learned counsel for the appellant, that the initial burden to prove the age of the prosecutrix",
 lies on the prosecution, it is also true that if the relevant version of the prosecutrix as regards her date of birth has gone unchallenged, it means that the",
 defence has accepted said statement made on oath by the witness. Hence, there is no reason to discard the unchallenged version of ""S"" that her date",
 of birth was 5th January, 1997.â??",

14. Shri Amit Chutake would further rely on the decision of the Hon'ble Apex Court in State of Madhya Pradesh vs. Anoop Singh, (2015) SCC 773",
 and in particular paragraphs 14, 15 and 16 thereof which read thus :",

â??14. This Court in Mahadeo v. State of Maharashtra, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules,"
 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:"

â??12(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board",

or, as the case may be, the Committee by seeking evidence by obtaining â?" (a)
 (i) the matriculation or equivalent certificates, if available; and in the",
 absence whereof;,,

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;,,

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;,,

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board,"

which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be,"

the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on",

lower side within the margin of one year.,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may",

be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b)",

shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.â??,

15. This Court further held in paragraph 12 of Mahadeo as under:,

â??12. ...under Rule 12(3)(b), it is specifically provided that only in absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the",

medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion,"

the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.,

(Emphasis supplied),

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In para 13, this Court observed (Mahadeo",

vase, SCC p.641)",

13. In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and",

in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.5.1990 and this document was also",

proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the",

prosecutrix had her initial education, also confirmed the date of birth as 20.5.1990. The reliance placed upon the said evidence by the Courts below to",

arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do,

not find any grounds to interfere with the same.â??,

16. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time",

the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in,

the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. PÂ5 and PÂ6 cannot be",

discarded. Therefore, the trial Court was correct in relying on the documents.â??",

15. Shri Ashwin Wasnik, learned Counsel for the accused would rely on the

Division Bench decision of this Court in Ravi Anandrao Gulpude vs. State",
of Maharashtra, 2017 All MR (Cr) 1509. The Division Bench articulated that the
prosecution is under the bounden duty to prove that the victim is a",
child within the meaning of Section 2(d) of the POCSO Act. The Division Bench
holds that since the provisions of the POCSO Act are stringent and,
Section 29 thereof provides for statutory presumption, the degree of proof is
stricter. I am respectfully bound by the enunciation of law by the Division",
Bench. However, the said decision is of no assistance to the accused in the facts
of the present case. It does not appear from the facts noted by the",
Division Bench that the evidence of the prosecutrix on the date of birth remained
unchallenged. In Ravi Anandrao Gulpude vs. State of Maharashtra",
the birth certificate recorded name of the child as â??Baliâ?. The Division Bench
notes that there is no evidence to connect the name Bali with the,
victim. The decision in Ravi Anandrao Gulpude Vs. State of Maharashtra, turns
on the facts of that case. As I have observed supra, the evidence of",
the prosecutrix having gone unchallenged, in view of the enunciation of law in
Kundan s/o Nanaji Pendor vs. The State of Maharashtra, it must be",
held that the date of birth as disclosed by the victim is not in dispute.,
16. In the light of the discussion supra, I am satisfied that the judgment of
conviction needs no interference and the appeal merits dismissal.",
17. The appeal is dismissed.,