

(2020) 08 GUJ CK 0261
In the Gujarat High Court
Case No : R/Criminal Appeal No. 1321 Of 2016

?Kalpeshbhai Bhavanbhai Dabhi

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 25-08-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 374(2)

Indian Penal Code, 1860 — Section 363, 366, 376

Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4, 29, 30

Citation : (2020) 08 GUJ CK 0261

Hon'ble Judges : R.M.Chhaya, J

Bench : Single Bench

Advocate : UM Shastri, Krina Calla

Final Decision : Dismissed

Judgement

R.M.Chhaya, J

1. The present appeal under sections 374(2) of Cr.P.C. is directed against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge and Special Judge at Panchmahal at Godhra in Special Case (POCSO) No. 23 of 2014. The appellant has been convicted for offences under sections 363, 366 of IPC and was sentenced to undergo Rigorous Imprisonment of 2 years and fine of Rs.1,000/- and in default to undergo simple imprisonment of 2 months. The appellant also came to be convicted for the offence under section 376 of IPC and section 3, 4 of the POCSO Act and was sentenced to undergo Rigorous Imprisonment for 7 years and fine of Rs. 5000/- and in default to undergo Simple Imprisonment for 1 year by the Additional Sessions Judge and Special Judge, Godhra, District Panchmahal.

2. The case of the prosecution in a nutshell is as under -

2.1 That father of the prosecutrix Motibhai Dolatbhai Parmar lodged a report on 17.06.2013 with Sahera Police Station that on 09.06.2013 when the original

complainant had gone out of station with his wife, and when he came back the next day, i.e. 10.06.2013, he did not found his daughter in the bed kept in lobby. It is further the case of the prosecution that the original complainant made frantic efforts through his relatives and neighbours to find out the whereabouts of his daughter who was a minor aged 16 years and 11 months. It is the case of the prosecution that the appellant kidnapped the minor daughter of the original complainant and lured her for marriage and committed the offence of rape against her wish and will. The First Information Report was lodged with Sahera Police Station which was registered as I-CR No.55/2013 for offences under section 363 and 366 and 376.

2.2 After preliminary investigation was conducted by the investigating authorities, the appellant and the prosecutrix were produced before the Sahera Police Station. After the completion of the investigation, charge-sheet came to be filed and the case was committed to the Sessions Court and the same was registered as Session Case No.15 of 2014. The record indicates that before the charge came to be framed, application below exhibit 3 was filed by the prosecution and offences under section 3, 4 of Prevention of Children from Sexual Offences Act, 2012 came to be added. The same came to be registered as Special Case (POCSO) No. 23 of 2014. The charge was framed at exhibit 5 and as the appellant did not plead guilty, the case was committed for trial. The prosecution relied upon 11 prosecution witnesses being Motibhai Dolatbhai Parmar, being father at exhibit 10, panch witnesses at exhibit 13, 18, 20, 31, respectively. The prosecution also relied upon the oral testimony of the prosecutrix at exhibit 15, brother of the prosecutrix at exhibit 25, oral testimony of Dr. Baria at exhibit 27. The prosecution also examined Hasmukhbhai Babubhai Gameti, the Police Officer who lodged the complaint at exhibit 39 and also relied upon the deposition of IO Shri Bharwad at exhibit 40. The prosecution also relied upon documentary evidence FIR, panchnama of the scene of occurrence at exhibit 13, another panchnama at exhibit 19, the panchnama of the cloths of the prosecutrix at exhibit 21, the medical certificate issued by the medical centre at Sahera at exhibit 30, the medical certificate of the appellant at exhibit 28, Serological report at exhibit 44 and 47 in particular. The statement of the appellant as provided under section 313 of the Cr.P.C. was recorded wherein the allegations came to be denied by the appellant, however the appellant preferred not to adduce any evidence. The learned Special Court after appreciating the evidence on record, came to the conclusion that the prosecution has been able to establish the guilt of the appellant and by the impugned judgment and order of conviction, convicted the appellant for the offences under section 363, 366, 376 of IPC and section 3, 4 of POCSO Act and sentenced the appellant as described hereinabove. Being aggrieved by the judgment and order of conviction and sentence, the appellant has preferred this appeal.

3. Heard Mr. Mayur Rana, learned advocate for UM Shastri, learned advocate for the appellant and Ms. Krina Calla, learned APP for the respondent State. I have also perused the paper book.

4. Mr. Rana learned advocate appearing for the appellant has submitted that the Special Court has committed an error and without their being any evidence against the appellant, the appellant has been convicted. Mr. Rana further submitted that the whole story of the complainant is not trustworthy and the same does not inspire any confidence and the prosecution has failed to bring home the charges against the appellant. It was also contended that the case of the appellant is based on hearsay evidence and no witnesses had any personal knowledge about the incident. It was also contended by Mr. Rana that the version of the complainant is not supported by the medical evidence and even considering the medical evidence on record, it cannot be said that the appellant has committed any offence forcefully. It was also contended that the prosecutrix was not minor even as per the medical evidence and therefore, no offence under section 3, 4 of the POCSO Act is established. It was contended that the prosecution has failed to prove the charges against the appellant beyond doubt and therefore submitted that the appeal be allowed and the order of conviction and sentence be set aside.

5. Per contra Ms. Calla has supported the impugned judgment and order of conviction and sentence. Ms. Calla has submitted that the prosecutrix was admittedly a minor and considering the oral testimony of prosecutrix, supported by oral evidence adduced by the complainant and other witnesses relied upon by the prosecution, the learned Special Court has rightly passed the order of conviction and has rightly sentenced the appellant. Relying upon the certificate at exhibit 12, Ms. Calla submitted that the DOB of the prosecutrix is 15.07.1997 and therefore, the prosecutrix was minor on the date of the incident. According to learned APP, the Special Court has correctly appreciated the evidence on record and the prosecutrix was lured at a tender age of 16 years under the false promise of getting married even though the appellant was aware that the prosecutrix was not of marriageable age and thus has committed the offence as per the testimony of the prosecutrix herself. Ms. Calla further contended that except oral contention, the appellant has not been able to prove to the contrary that the prosecutrix was not a minor on the date of the incident. Ms. Calla therefore submitted that the Special Court has rightly considered the provisions of the POCSO Act and has rightly drawn presumption under sections 29 and 30 of the POCSO Act. Ms. Calla contended that no interference is called for in exercise of appellate jurisdiction of this Court and the appeal being meritless deserves to be dismissed.

6. No other or further submissions, contentions or grounds are raised by the learned advocates appearing for the parties.

7. Upon re-appreciation of the evidence on record, reference be made to the birth certificate of the prosecutrix at exhibit 12. The same shows that the DOB of the prosecutrix is 15.07.1997. The said copy also indicates that the same was registered in the Register of Birth and Death on 21.07.1997. Even in the deposition of the prosecutrix, at exhibit 15, she has clearly stated that her date

of birth is 15.07.1997. The prosecution has therefore proved beyond doubt that the prosecutrix was minor on the date of incident. Only because on examination, the Doctor has stated in the certificate that the age of the prosecutrix may be between 17-20 years, cannot be made the basis to determine the age of the prosecutrix, when cogent evidence of birth certificate issued under special act, viz., the Birth and Death Registration Act, 1969, is produced and proved.

8. The record and the set of evidence on record indicates that the prosecution relied upon the oral deposition of 11 prosecution witnesses.

9. The testimony of the prosecutrix at exhibit 15 clearly establishes the fact that a minor girl hardly aged 16 years who was studying in 8th standard came to be lured by the appellant. Upon re-appreciating the oral testimony of prosecutrix at exhibit 15, who has been examined by the prosecution as p.w.3, deserves to be accepted in toto. The prosecutrix has stated that the appellant and the prosecutrix were studying in the same school. The prosecutrix has clearly narrated that on 09.06.2013, when the parents of the prosecutrix had gone out of station to village Dhokava, the appellant came during night hours and while she was sleeping in the lobby of the house. The prosecutrix has further clearly stated that she was taken to the nursery of the forest department situated on the outskirts of the village and was lured by the appellant to elope. The prosecutrix has also clearly stated that the appellant committed rape on that very day beneath the tree against the wish and will of the prosecutrix. She has further stated that thereafter, the appellant did not permit her to go back to home but firstly took her to Godhra and then to Ahmedabad and Gandhinagar and ultimately to village Chhatral where the prosecutrix was kept by the appellant in a room in GIDC area. The prosecutrix has clearly stated that on many occasions, the appellant committed rape upon the prosecutrix against her wish. She has also further stated that after staying for about 2 months at Chhatral GIDC, the appellant brought her to Baroda and the prosecutrix thereafter contacted her brother-in-law who took her to Sahera Police Station. The learned Special Court has clearly stated in the judgment that requisite and necessary arrangements were made for the deposition of prosecutrix who can be termed as vulnerable witness and the prosecutrix has identified the appellant. Even in her cross examination, the prosecutrix has stick to her version in examination-in-chief and the appellant in defence has not been able to dislodge the version of the prosecutrix.

10. Upon re-appreciation of this piece of evidence, in opinion of this Court, the Special Court has rightly appreciated the evidence and made the basis of the conviction. This Court finds that the version of the prosecutrix is wholly trustworthy.

11. Upon re-appreciating the other evidence on record, both oral and documentary this Court finds that there is not infirmity in the impugned judgment of conviction. The contentions and grounds raised by the learned advocate appearing for the appellant deserves to be negated.

12. As observed hereinabove, the version of the prosecutrix clearly establishes the guilt of the appellant beyond doubt and the prosecution in particular has been able to prove the age of the prosecutrix beyond doubt as observed hereinabove. The Special Court has rightly appreciated the evidence on record and has rightly applied correct application of the provisions of sections 29 and 30 of the POCSO Act.

13. Even the contention raised by the appellant that the conviction is based on hearsay evidence is incorrect. As described hereinabove, the prosecutrix was examined as p.w.3 who has clearly narrated the agony through which she had to pass for almost three months at a tender age of 16 years. Upon re-appreciation of the total evidence on record, no infirmity is found and in totality of the facts and evidence on record, no interference is called for.

14. In view of the reasons recorded in the judgment and order, the present appeal is dismissed.