
(2016) 09 BOM CK 0142
In the Bombay High Court
Case No : Criminal Appeal No. 806 of 2015

Kishan s/o Sheshrao Khawas

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-09-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 376 (2)(n)

Protection of Children from Sexual Offences Act, 2012 — Section 3, Section 4

Citation : (2017) 1 AIRBomRCri 340 : (2017) ALLMRCri 2151

Hon'ble Judges : V.L. Achliya, J.

Bench : Single Bench

Advocate : Mrs. P.V. Diggikar, APP, for the Respondent-State; Mrs. R.R. Mane, Advocate (appointed by Court to represent the appellant), for the Appellant

Final Decision : Partly Allowed

Judgement

V.L. Achliya, J. (Oral) - Being aggrieved by the judgment and order dated 31/3/2015 passed by Special Judge, Nanded in Special Case No.14/2013 convicting the appellant-accused under section 376(2) (n) of IPC and Section 3 r/w 4 of Protection of Children from Sexual Offences Act (for short POCSO Act) and awarded sentence to suffer rigorous imprisonment for 10 years and pay fine of Rs.2 lakhs and in default to undergo R.I. for 2 years, the appellant has preferred this appeal on various grounds as set out in detail in the memo of appeal.

2. Before advertng to appreciate submissions advanced, it is necessary to consider the few facts leading to filing of appeal. On 10/10/2013, Police Patil of village Saregaon, Tq. Mukhed, Dist.Nanded informed to official of police station Barad to the effect that one newly born baby with placenta found lying in a dilapidated house located by the side of Maroti temple in village. On receipt of said information, Police personnel visited the place and found newly born baby i.e. male child lying at the place. On the basis of report lodged by Sukhdeo Sambhaji Bhise, the Police Patil of village Saregaon, initially registered offence under Section 317 of IPC registered against unknown woman vide Crime

No.44/13. During investigation, it was revealed that said baby was given birth by Victim girl (PW1) involved in this case. Therefore she was taken in custody and referred for medical examination. In the medical examination, it was revealed that she has given birth to child within 24 hours of her medical examination. Since the age of the victim girl was below 18 years, she was produced in juvenile Court. Later on she was released on bail. After release on bail the statement was recorded. In her statement, she disclosed that since about 2 years back, she got acquainted with accused. The relations of accused with his wife were strained and therefore, wife of accused had left the house of accused and residing at her parental place. The accused was residing in the house of Shobhabai (i.e. deceased original accused no.2). She further disclosed that Shobhabai instigated her to maintain sexual relationship with the accused. She further disclosed that some time during the period closed to Deepawali, the accused had taken her to nearby agricultural field and persuaded her to have sexual intercourse with him by promising to marry with her. Relying upon the assurance, she consented to have sexual intercourse with her. Subsequent thereto, several times, accused committed sexual intercourse with her. Although she insisted to abort the pregnancy which she was carrying from accused, the accused was not inclined to do so as he wanted to have a son to be born from her. Accused no.2 was fully aware about physical relationship between her and the appellant-accused no.1. On 10/10/2013, at about 6.15 a.m. she developed abdominal pain. Therefore, she went to dilapidated house located in the village for easing, where she gave birth to male child. She threw that newly born baby to nearby place and went to her house and after taking bath, went to school. While she was going to school, she heard the people talking about the newly born child found in the village. Pursuant to the disclosure made by the victim girl, the offence under Section 376 (2) (n) of IPC and Sections 4, 5(J) (ii) 6, 16, 17 of POCSO Act came to be registered against the appellant and co-accused Shobhabai vide Crime No.45/13.

3. API Rathod (PW5) conducted the investigation. During the course of investigation he recorded statement of Ayanath Tukaram Gire (PW2) father of the victim girl and also obtained the copy of school leaving certificate of the victim girl from Zilla Parishad School at Mukhed to ascertain the date of birth and age of victim girl. He arrested both the accused. He referred the accused to medical officer, Government Hospital, Nanded for medical examination as well as to collect the sample for the purpose of conducting DNA test and other related examination. He also referred the victim girl to medical officer to obtain sample for the purpose of conducting DNA test of the newly born child. It was revealed that at the time of commission of offence, the girl was 15 years of age. Report of DNA test has confirmed that the accused and the victim girl to be biological parents of the said baby delivered by PW1. On conclusion of the investigation, as sufficient evidence was found to prosecute both the accused, charge sheet was prepared and filed in the Court of Special Judge.

4. Charge was framed on 3/12/2013. Both the accused pleaded not guilty and claimed to be tried. During the pendency of proceeding, accused no.2 died on

10/12/2014. Hence the case abated against original accused no.2.

5. In order to prove its case, prosecution has examined 4 witnesses and further proved certain documents by giving notice under Section 294 of Cr.P.C. The accused has not disputed that he had sexual relationship with the victim girl and the baby which was born was out of their physical relationship. He has also not disputed that he is biological father of baby abandoned after birth by P.W.1. The defence of the accused appears to be that he has married with the victim girl and he had sexual relationship with the consent of victim girl, who according to him was major in age at the time of incident.

6. On conclusion of the trial, trial Court has found the appellant guilty of offence punishable under section 376(2) (n) of IPC and Section 3 r/w Section 4 of POCSO Act and sentenced to undergo R.I. for 10 years and to pay fine of Rs.2 lakhs.

7. Mrs. Mane, learned counsel appointed to represent the appellant has strenuously contended that the prosecution has utterly failed to establish that at the time of incident the victim girl i.e. P.W.1 was minor. She has submitted that the testimony of P.W.3 is of no avail to prove the date of birth of the prosecutrix. She has submitted that school leaving certificate and entry taken in the school admission register which have been proved through testimony of PW3 are not the conclusive proof of age of prosecutrix. She has submitted that the entry in the school admission register proved to be recorded on the oral say of father of the victim girl. Prosecution has not adduced any evidence to conclusively prove that the prosecutrix was born on 07/09/1998 and she was minor at the time of commission of offence. She has further submitted that as per the opinion given by the medical officer which is at Exhibit 43 the age of the prosecutrix was found to be in between 17 to 19 years. By referring the reasons and findings recorded by trial Court on the point of age of the prosecutrix, the learned counsel has submitted that the same are perverse and not sustainable in law. She has submitted that in absence of primary evidence to establish the age of the prosecutrix the conviction of the appellant is not sustainable in law and accused deserves to be acquitted.

8. On the other hand the learned APP strenuously contended that the prosecution has adduced cogent and convincing evidence to establish the fact that victim was minor at the time of commission of offence. She has pointed out that PW 1 has categorically deposed that her date of birth is 07/09/1998. She has further deposed that the incident was occurred while she was studying in 9th standard and the first incident of sexual intercourse was taken place sometime closed to Divali during the year 2012. She gave birth to the child on 10/10/2013. The father of the victim girl has categorically deposed that at the time of incident age of his daughter 15 years. Learned APP has contended that the report of medical examination at Exhibit 43 cannot be treated as conclusive evidence to establish the age of the prosecutrix as more than 18 years. She has submitted that there is no report determining age of prosecution. The learned APP has pointed out

that as per the facts deposed by PW 3 the victim girl was admitted in school on 01/07/2004 in 1 st standard. She left the school after completing 6th standard. Therefore taking into consideration that P.W.1 was admitted in 1 st standard, while she was aged 6 years, it can safely be inferred that in the year 2010 when she left the school she was about 11 to 12 years of age. The incident was occurred in the year 2012. In this view the trial Court has rightly held that at the time of incident the girl was below 15 years of age.

9. I have carefully considered the submissions advanced in the light of evidence on record. In my view, the reasons and findings recorded by the trial Court are based upon due appreciation of evidence on record and there is no scope to interfere with the reasons and findings recorded by trial Court.

10. Prosecution has examined the victim girl as PW1. She has deposed that the incident was occurred while she was studying in 9th standard she got acquainted with accused and then they used to have sexual intercourse in the agricultural field situated at some distance away from their home. When she realised that she has developed pregnancy from accused, she disclosed the same to accused and also requested him to procure tablets to get the pregnancy terminated. However, the accused failed to bring tablets. As the pregnancy was advancing and her belly was enlarging, she again asked the accused to bring tablets but he did nothing. She further disclosed that when she went to answer nature's call, she gave birth to baby. She left the baby at that place and returned to her home. After taking bath, she went to school. Thereafter, police came in the village and took the baby in their custody. She was called by the police and referred for medical examination. Thereafter, police recorded her complaint. The P.W.1 has supported the prosecution to the extent of accused no.1. She has not supported the case of the prosecution as against accused no.2.

11. P.W.1 was cross examined at length. In her cross examination, she has stated that her elder sister Kalpana married about 3 to 3½ years back and the age difference between them is about 2 to 3 years. She further admitted that at the time of marriage of Kalpana, her age was 18 years. If we consider the cross examination, then the facts deposed by P.W.1 about her physical relationship and conceiving the pregnancy and birth of child from the accused has not been challenged. On the contrary, it has been suggested in the cross examination that they had sexual relationship and intermittently they used to perform sexual intercourse in the agricultural field of Kishan. She has denied the suggestion that at the time of incident she was more than 18 years of age. She has further denied the suggestion that accused had performed marriage with her at Pathard. Thus, if we consider overall cross examination of the victim girl (PW1) then there is no challenge to the fact that accused had sexual relationship with the victim for long time and the child which was born on 10/10/2013 was conceived and delivered by her out of physical relationship with the accused.

12. On the same line, prosecution witness Ayenath Gire (PW2), the father of the victim girl has deposed that at the time of incident, age of his daughter i.e. P.W.1

was 15 years. He has further deposed that on 10/10/2013, when she went to answer nature's call, she delivered a child which she threw into garbage. He further deposed that police made an enquiry with his daughter wherein she disclosed that she conceived the said baby from accused and gave birth to said male child. He further deposed that his daughter was examined by medical officer P.W.2. Thus P.W.2 has fully supported the case of the prosecution to the extent of accused no.1. He has not supported the case as against accused no.2. In the cross examination, he admitted that he has two daughters and his elder daughter Kalpana married about 2-3 years back. The age difference between his daughter Kalpana and P.W.1 is more than 3 years. He further admitted that he got admitted P.W.1 in school by mentioning her date of birth by approximation and he is not in a position to tell the exact date of birth of his daughter Swarupa.

13. In order to prove the age of the prosecutrix, the prosecution has examined Shivaji Jadhav (PW3) who is testified before the Court as per Exh.44. He has deposed that the prosecutrix was admitted in school on 1/7/2004. At the time of admission, her date of birth recorded in the school register as 7/9/1998. She left the school on 17/6/2010 after completing education upto 6th standard. He produced the copy of school admission register, the application for admission made in the year 2004 and copy of the school leaving certificate. All these documents consistently establishes that at the time of seeking admission in 1st standard, the date of birth of the victim girl was disclosed as 7/9/1998. In the cross examination, the witness has admitted that at the time of admission, no separate certificate of birth was obtained and date of birth stands recorded in the school admission register is as per the oral say of father of the victim girl. Prosecution has examined API Rathod the investigating officer who has deposed in detail as to investigation conducted in the matter.

14. Besides examining four witnesses, the prosecution has proved certain documents which have been admitted in evidence by dispensing with its formal proof. The report of the DNA test conducted is at Exh.26. Provisional report issued by medical officer about age of the prosecutrix is at Exh.43. The spot panchanama of place of incident and place where the baby was delivered and found abandoned are at Exhs. 32 and 34, respectively.

15. In the light of the evidence on record and the fact that accused has not disputed repeated sexual intercourse with the victim girl as well as the birth of child out of the pregnancy carried by her from him. I have no hesitation to hold that the prosecution had proved its case beyond reasonable doubt that accused had committed act of rape on a girl below 18 years of age. In this view, reasons and findings recorded by the trial Court are fully in consonance with the evidence on record and calls for no interference. There is absolutely no perversity in any of the reasons and findings recorded by the trial Court.

16. As discussed the victim girl has supported the case of the prosecution to the extent that appellant-accused had repeatedly committed sexual intercourse with her and she conceived the child from accused and gave birth to male child on

10/10/2013. The accused has not disputed the fact that he had repeated sexual intercourse with the victim girl. On the contrary it is suggested in the cross examination of P.W.1 that the acts of sexual intercourse were committed in the agricultural field of accused. In the statement recorded under section 313 of Cr.P.C., the accused has admitted about the sexual relationship with the prosecutrix and further admitted that he is the biological father of the baby delivered on 10/10/2013. If we consider the overall defence of the accused then the defence of the accused is that he has performed the marriage with the prosecutrix and the act in question not amounting to "rape" within the meaning of "rape" as defined under Section 375 of IPC punishable under Section 376 (2) (n) of IPC.

17. The accused has expressed ignorance about the age of the victim. Therefore the only question which calls for consideration and needs to be examined, whether the prosecution has proved that at the time of commission of offence, the prosecutrix was minor. As discussed in the forgoing para, the evidence adduced by the prosecution, the prosecutrix has categorically deposed that her date of birth is 07/09/1998. The fact to this effect has not been challenged in the cross examination. PW 3 Head Master of the school examined by the prosecution has deposed on the basis on record maintained by the school authority. He has categorically deposed that as per the entry recorded at serial No. 73 in the school admission register, the victim girl was admitted in the school on 01/07/2004 in 1st standard. She left the school on 17/06/2010 after completing 6th standard and accordingly school leaving certificate was issued. Copy of the application made at the time of admitting victim girl in school is produced at Exhibit 46. The extract of the school admission register is produced at Exhibit.47. Copy of the school leaving certificate is produced at Exhibit.45. In the application made to admit victim girl in the school the date of birth disclosed as 07/09/1998. Application for admission in the school appears to be made and signed by father of the victim girl i.e. PW 2. The school leaving certificate at Exhibit 45 was issued on the basis of school admission register, the extract of which is produced at Exhibit 47. There is no contra evidence brought on record to establish that the entries in the record have been manipulated or tampered. Therefore the entry recorded in the school admission register as to date of birth of victim can very well be taken as proof of age of the prosecutrix.

18. If we take the date of admission of the prosecutrix in the school as 01/07/2004 in 1st standard and she left the school in 2010 after completing 6th standard then naturally she was 11 to 12 years of age when she left the school by taking into consideration that she was admitted in school at the age of 6 years i.e. normal age to admit the child in 1st standard. She left the school in 2010. Thus at the time of leaving school in 6th standard, her age was about 12 years. The first sexual intercourse alleged to have taken place around Diwali 2012, while she was studying in 9th standard. Therefore if we take the evidence in its totality, then it can safely stated that at the time of incident the age of the prosecutrix was about 15 years. The report at Exhibit 43 is of no avail to find

support to the case of the defence that the prosecutrix was above 18 years of age. Perusal of the report reveals that the report has been issued in a most cryptic manner. The age of 17 to 19 years referred in the two line opinion not refers to the age of the prosecutrix but refers to age of the bones. It appears that the medical officer has failed to discharge his obligation to issue proper certificate after conducting proper medical examination i.e. clinical as well as radiological examination. Apart from this the report of age determined on the basis of medical examination can not be treated as conclusive proof of exact age of the person. It always refers to probable age of the person. In the instant case there is documentary evidence in the form of school admission register, wherein the date of birth of prosecutrix found to be recorded as 07/09/1998. In my view, there is no reason to discard or disbelieve such evidence.

19. The learned counsel for appellant further invited my attention to the testimony of PW 1 and 2 and submitted that it has been brought on record that Kalpana the elder sister of the prosecutrix was 3 years older than the prosecutrix. Her marriage was performed about 2 to 3 years prior to incident. In the light of this evidence, it is contended that if it is presumed that she married after attaining the age of majority i.e. 18 years, and her marriage had taken place about 3 years back, it can be inferred that the prosecutrix was above 18 years of age. I am not inclined to accept this contention for the sole reason that there is no evidence brought on record as to the exact age of the elder sister of the prosecutrix. It can not be presumed that she was married after attaining the age of majority.

20. In this view I am of the opinion that the prosecution has proved his case beyond reasonable doubt. No case is made out to interfere with the reasons and findings recorded by the trial Court to convict the appellant under section 376(2) (n) of IPC and Section 3 r/w 4 of Protection of Children from Sexual Offences Act (for short POCSO Act).

21. Mrs. Mane learned counsel for the appellant lastly argued that the appellant is a married person and he has two children and entire family is dependent on him. The act in question though technically can be termed as a "rape" within the meaning of law but in fact that it was with the consent of prosecutrix. The victim girl has nowhere stated that the accused has committed forcible sexual intercourse either by putting her under fear of causing bodily injury or otherwise. Only for the reason the prosecutrix is found to be minor, the accused has been convicted. She has further submitted that the offence in question was committed prior to amendment made to Section 376 of IPC which is brought into force w.e.f. 03/02/2013 and therefore the embargo put under the amended act that sentence awarded to be not less than 10 years is not applicable in the facts and circumstances of the case and urged to reduce the sentence.

22. On the other hand learned APP submitted that looking to the fact that the accused has committed heinous offence of rape, no leniency be shown in the matter.

23. On due consideration of submissions advanced, in the light of over all evidence, I am of the view that the sentence awarded needs to be reduced from 10 years to 7 years. As discussed, the prosecutrix has not deposed that accused has forcibly committed sexual intercourse by putting her under threat nor there is any case of consent being obtained by making false promise to marry. On the contrary the evidence on record shows that there was acquaintance between appellant and victim girl. It is the defence of the accused that he has performed marriage with the prosecutrix. The object of sentencing is not elimination of a criminal but it is removal of criminality from the mind of the person. It is therefore necessary that while awarding the sentence, the appropriate sentence be awarded by looking over all facts of the case. Since the embargo of awarding sentence not below 10 years introduced by the Ahmedabad Act of 2013, brought into force w.e.f. 03/02/2013, the sentence below 10 years can be awarded in the instant case as the offence in question committed prior to 8/12/2013. In this view, I am inclined to reduce the sentence from ten years to seven years by maintaining rest of the order as to fine, payment of compensation etc.

Hence the following order:

ORDER

I] In the result, appeal is partly allowed to above extent. Conviction of the appellant is maintained, however, the substantive sentence awarded i.e. R.I. for 10 years, is modified and reduced to R.I. for 7 years. Rest of the sentence awarded of payment of fine and sentence in default to pay fine and the compensation is maintained. Appeal stands disposed of in above terms.

II] The High Court Legal Services Authority, Aurangabad, is directed to pay Rs.3000/- towards fees to Mrs.Mane, learned counsel appointed as amicus curiae to represent the appellant.

III] Record and Proceeding be sent back to trial Court.