

(2017) 12 BOM CK 0074
In the Bombay High Court
Case No : 393 of 2016

Mangesh s/o Damodhar Chandankhede

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-12-2017

Acts Referred:

Indian Penal Code, 1860, Section 448,
Section 376(2) - Punishment for house-trespass -
Punishment for rape
Protection Of Children From Sexual Offences Act, 2012, Protection Of Children From Sexual Offences Act, 2012

Citation : (2017) 12 BOM CK 0074

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : R.S. Renu, N.B. Jawade

Final Decision : Dismissed

Judgement

1. The appellant is aggrieved by the judgment and order dated 23.02.2015 in Special Child Protection Case 27/2013, delivered by Additional Sessions Judge1, Nagpur, by and under which, the appellant is convicted of offence punishable under section 376(2)(i) of the Indian Penal Code ("IPC" for short) and under section 3 read with section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO" for short) and is sentenced to suffer rigorous imprisonment for 10 years and to payment of fine of Rs.15,000/. The accused is further convicted of offence punishable under section 448 of the IPC and is sentenced to suffer rigorous imprisonment for three months and to payment of fine of Rs.500/.
2. Heard Shri R.S. Renu, the learned counsel for the appellant and Shri N.B. Jawade, the learned Additional Public Prosecutor for the respondent/State.
3. The submission of Shri Renu, the learned counsel for the appellant (hereinafter referred to as "the accused") is that the evidence on record is marred by omissions partaking the nature of contradictions and inter se inconsistencies and discrepancies in the evidence of the prosecution witnesses.

The First Information Report is unreasonably delayed and no satisfactory explanation is forthcoming to explain the delay, is the submission. The version of the victim is inconsistent with the medical evidence on record and the prosecution version of the appellant having secured entry in the house of the complainant through a window without grill, is inherently improbable and must be disregarded since the panch witness to the spot panchnama did not support the prosecution. The defence of false implication due to a dispute between the appellant and the husband of the complainant is more than probalised, is the submission.

4. Per contra, the learned Additional Public Prosecutor, Shri N.B. Jawade, submits that the evidence on record is cogent, reliable and confidence inspiring. The conviction of the appellant is unexceptionable, in the teeth of the evidence on record, is the submission. The presumption under section 29 of the POCSO Act is activated and is not rebutted by the appellant, is the submission.

5. The complainant, who is the mother of the victim girl then aged 12 years, was residing with her husband and victim at Awandhi situated in Tahsil Kamptee, District Nagpur. The elder daughter of the complainant was studying in school at Yerkheda and was residing at the house of the complainant's sisterinlaw. The victim was then studying in 4th standard. The appellant is also a resident of the same village and was residing in the vicinity.

6. The case of the prosecution is that the parents of the victim left home in the morning for labour work on 03.03.2013 and the victim was alone in the house. The complainant returned home at 7:30 p.m. and was told by the victim that at 10:30 a.m. or thereabout, when the victim was about to have a bath, the appellant entered the house through the window, offered her Rs.50/and asked the victim to allow him to have sexual intercourse. The victim refused, the appellant spread a bed sheet on the floor, made the victim lay down, removed her clothes, undressed and forcibly committed sexual intercourse. The victim narrated to her mother that the appellant pressed her mouth and after ravishing her, warned her not to disclose the incident to anyone. The complainant noticed blood stains on the knicker of the victim. On the morning of the day after the incident, the accused had a verbal altercation with the complainant and her family members and threatened to cause them physical harm if a report is lodged. In view of the threats, the report was not lodged on 04.03.2013. However, at 6:30 p.m. on 05.03.2013 the complainant and the victim went to the Kamptee Police Station and lodged a report (Exh.14). On the basis of the said report Crime 38/2013 was registered and the wheels of investigation were set in motion.

7. The accused was arrested on 05.03.2013. Both the accused and the victim were medically examined. The medical examination report of the accused is Exh.28 and that of the victim is Exh.30 on the record of the trial Court. The Investigating Officer seized the clothes of the victim from the complainant vide panchnama Exh.10 and the clothes of the accused under panchnama Exh.21.

The statement of the victim was recorded in presence of two Mahila Samiti members, the school certificate of the victim was obtained (Exh.44) evidencing the date of birth to be 23.05.2001. The victim was referred to the Mayo Hospital for the age determination test and the report is Exh.57. The seized articles were sent for chemical analysis and the reports are Exh.68 to 71. The statements of witnesses were recorded and the culmination of investigation led to submission of the charge sheet in the Special Court. The learned Judge framed charge at Exh.2. The accused abjured guilt and claimed to be tried. The defence is of false implication. According to the accused there was a dispute between the husband of the complainant and the accused pertaining to brokerage charges and therefore, he is falsely implicated.

8. The prosecution has conclusively proved that the victim was then aged less than 12 years. The school certificate of the victim (Exh.44), is admitted by the defence. Notwithstanding the admission, the Medical Officer who determined the age of the victim and issued certificate Exh.57 is examined as P.W.9. The certificate Exh. 57 opines that the victim was aged 12 years plus or minus one year. Complainant has also deposed that the victim was aged 11 years and concededly was studying in the 4th standard.

9. The prosecution relies on the evidence of the victim P.W.2, her mother P.W.3 and sisterinlaw of the complainant P.W.4 substantially, if not entirely, to prove that the accused subjected the victim to forcibly intercourse. The victim has deposed that on the day of the incident she was alone in the house since her parents were away for the labour work. She was about to take bath and had closed the door of the house from inside. The accused entered the house through window and when the prosecutrix went to the bed room to change her clothes, the accused had concealed himself under the cot. The accused then spread a bed sheet on the floor, made the victim to lay down, removed her clothes including inner wear and after getting undressed himself, ravished the victim. Attempt to shout was foiled by gagging her mouth. The accused offered Rs.50/and threatened that if she disclosed the incident to any one she would be physically harmed. She reported the incident to her mother in the evening. Her mother confronted the accused the next day. However, the accused reacted aggressively and on the third day the mother of the victim accompanied by the victim went to the Police Station and lodged the report. The mother of the victim who lodged the report is examined as P.W.3 she corroborates the testimony of the victim to the extent she deposes that the victim disclosed the incident to her in the evening. P.W.3 states that the next day she confronted the accused and the response of the accused was to abuse her and to threaten that if the incident is reported to the Police severe consequences will have to be faced. P.W.3 states that she lodged the report on the third day of the incident which report is Exh.14 on the record of the trial Court. Vimal, who is the sisterinlaw of the mother of the victim is examined as P.W.4. She states that on the next day of the incident her brother informed her about the incident on phone and she went to Awandhi on 05.03.2013 and the victim disclosed the incident to her. Shri Renu, the learned

counsel for the accused attacks the testimony of the three witnesses contending that the said evidence is marred by material and significant omissions which tantamount to contradictions. The evidence is rendered suspect since the explanation for the delayed police report is not satisfactory, is the submission of the learned counsel for the accused. I have given anxious consideration to the testimony of the victim P.W.2, her mother P.W.3 Jyoti Ashok Somkuwar and P.W.4 Vimal Vinod Pantawne to ascertain whether the omissions brought on record dent the credibility of the said witnesses. I am not persuaded to accept the submission of the learned counsel for the accused that the evidence is rendered unreliable due to the omissions. It is trite law that not every omission is per se fatal. If the fact which is stated in the evidence is duly corroborated by other evidence, the fact that the witness omitted to disclose the fact in the previous statement may not be of significant relevance. Illustratively, although the statement in the evidence of the victim that the accused offered her Rs.50/ is an omission, her mother whose report is recorded prior in point of time to the statement of the victim does state in the report that it was narrated to her by the victim that the accused offered her Rs.50/. Similarly, the omission brought on record in the evidence of the victim that her mother went to the house of the accused to confront him and the accused responded aggressively is not fatal since the said fact is duly mentioned in the report lodged by the complainant. In so far as the omissions which are brought on record in the crossexamination of the complainant P.W.3, the F.I.R. is not expected to be an encyclopedia and the fact that every relevant fact or minute detail is not stated in the First Information Report will not ipso facto dilute the probative value of the evidence of the informant. Ultimately the purpose of the First Information Report is to set in motion the wheels of the criminal law and it would suffice if the basic and core facts are stated therein. Similarly, the omission which is brought on record in the evidence of P.W.4 which is that she was informed about the incident on telephone by her brother does not touch the core aspect of the incident. What is material is that she came to know of the incident and went to the residence of the victim and was narrated the incident.

10. It is strenuously contended on behalf of the accused that the prosecution version that the accused entered the house of the victim through the open window is falsified by the evidence of the victim that the window was closed and that the window had glass panes. However, it is not even suggested to the victim that the window was closed from inside which would render any entry in the house improbable. P.W.1 who is examined as witness to the spot panchnama did not support the prosecution. However, he does state that on 06.03.2013 the police called him to the house of the complainant, inspected the house and obtained his signature on the panchnama. The witness admits the presence of another panch Pankaj Gotmare. The panchnama which is proved through the Investigating Officer records that there was one window to the house of the victim which had no grill. It is not suggested either to the complainant or the victim or to the Investigating Officer that the window did have a grill and

therefore, entry through the window is not possible. In the light of the evidence on record, I am not inclined to agree with the learned counsel for the accused that the prosecution story that the accused entered the house of the victim through the window is suspect.

11. I am also not inclined to agree with the learned counsel for the accused who contends that the delayed F.I.R. renders the case of the prosecution vulnerable. The delay is satisfactorily explained. The explanation is that the complainant was threatened with dire consequences when she confronted the accused on the next day of the incident. It is trite law, that there cannot be a ritualistic cut and dried formula to determine the implication of delay in lodging the F.I.R. The court is expected to be alive to the sensitivity of the victim of sexual offences, particularly in the context of the nonpermissive Indian society which unfortunately view rape as a stigma and is more often and than not likely to ostracize the victim insinuating and at times bluntly blaming the victim for the loss of chastity.

12. Shri Renu, the learned counsel for the accused then submits that the medical evidence on record is not consistent with, and indeed falsifies, the version of the victim that she was subjected to forcible intercourse. The victim was examined after two days of the incident and although no injury was visible on the external genitalia the hymen was found torn. Two linear abrasions of brown colour caused within 48 to 72 hours were noticed. The absence of injury on the male organ of the accused is again not decisive. It would be apposite to refer to the following observations of the Apex Court in *Vijay alias Chinees vs. State of Madhya Pradesh* (2010) 8 SCC 191: 25. In *Gurcharan Singh v. State of Haryana* this Court has held that: (SCC p. 753, para 8) the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape.

It would also be relevant to reproduce the opinion expressed by Modi in *Medical Jurisprudence and Toxicology* (22nd Edn.) at p. 495 which reads thus:

"Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora of the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim.

The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

Equally relevant is the opinion expressed in Parikh's Textbook of Medical Jurisprudence and Toxicology which defines sexual intercourse:

"Sexual intercourse.-In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

13. The defence that the accused is falsely implicated due to dispute regarding commission charges of the accused and the father of the victim is not probalised even on the touchstone of preponderance of probabilities. It would be in a rare case, if at all, that a father would use his minor daughter as a tool to wreak vengeance on a person due to monetary dispute. In the teeth of the evidence, the defence taken must deserve consideration only for rejection. The appeal is without substance and is dismissed.