

(2018) 01 BOM CK 0249
In the Bombay High Court
Case No : 83 of 2016

Mukesh @ Vicky s/o. Suresh Dendule

APPELLANT

Vs

The State of Maharashtra,

RESPONDENT

Date of Decision : 08-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 376](#) - Punishment for rape
[Protection Of Children From Sexual Offences Act, 2012](#), [Section 6](#), [Section 5\(m\)](#)

Citation : (2018) 01 BOM CK 0249

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : R.M. Daga, N.R. Patil

Final Decision : Partly Allowed

Judgement

1. The judgment and order dated 8.1.2016 delivered by the additional Sessions Judge, Washim in Special Session Trial 58 of 2015, by and under which, the appellant (hereinafter referred to as "the accused") is convicted of offence punishable under section 376 of the Indian Penal Code (" IPC " for short) and sentenced to suffer rigorous imprisonment for seven years and to payment of fine of Rs. 3,000/- and is further convicted of offence punishable under section 6 read with section 5 (m) of Protection of Children from Sexual Offence Act, ("POCSO Act" for short) and sentenced to suffer rigorous imprisonment for ten years and to

payment of fine of Rs. 5,000/- is assailed herein.

2. Heard Shri. R. M. Daga, the learned counsel for the accused and Shri. N.R. Patil, the learned Additional Public Prosecutor for the respondent / State.

3. The gist of the prosecution case, as is unfolded during the trial is thus:-

The informant Sau. Anju Manoj Jadhav who belongs to the Banjara community is a resident of Karanja and has two daughters then aged 7 and 4 years who used to attend the tuition classes of one Mayuri Dandule. The accused is the brother of Mayuri Dandule. Both the daughters attended the tuition class on 5.12.2013. The child victim aged 4 years narrated to her mother Sau Anju that the accused approached her when she had stepped out of the tuition class to urinate, took her behind the house, took out his male organ and rubbed it on her vagina. She resisted and was slapped by the accused. The child victim returned to the class and narrated the said incident to Mayuri disclosing the name of the offender as Vikki Dada.

4. The mother of the child victim confronted Mayuri.

She was accompanied by one Suchita Rathod. Three boys were engaged in painting work in the house of the tuition teacher Mayuri. The child victim however said that none of the three boys were involved in the sexual assault. However, the child victim identified the brother of Mayuri as Vikki Dada who assaulted her sexually. The informant Sau. Anju then confronted Mayuri and Vicky who drove her out of the house. Sau. Anju informed her husband about the incident on mobile who asked his father and brother Prakash Jadhav and Vinod Jadhav and Sau. Anju's brother Bandi Chavan to visit Karanja. The said relatives accordingly came to Karanja and Sau. Anju narrated them the incident in detail.

The report was lodged at Police Station Karanja on 6.12.2013.

On the basis of the said report offence punishable under section 376 of IPC and section 6 read with section 5 (m) of POCSO Act was registered against the accused by the Investigating officer PSI - Varsha Mate. The Investigating Officer went to the spot and prepared spot panchanama in presence of the panchas, recorded the statement of Sau. Anju and other witnesses. The accused was arrested, and his clothes and the clothes of the child victim were seized, the accused and the child victim were medically examined, the seized articles were sent to the Chemical Analyzer and after completing the investigation the charge sheet was presented before the learned Sessions Judge who framed charge for offence punishable under section 376 of IPC and under section 6 read with section 5 (m) of POCSO Act. The accused abjured guilt and claimed to be tried in accordance with law.

5. The defence of the accused is total denial and false implication. The accused stated in the written statement under section 313 of the Code of Criminal Procedure that since his uncle is a politician, the family has many political opponents.

6. Shri. R.M. Daga, the learned counsel for the accused submits that the conviction is against the weight of the evidence on record. The identity of the offender is serious doubt, is the submission. He submits that even if the evidence is accepted at face value, offence punishable under section 376 of IPC and under section 6 read with section 5 (m) of POCSO Act is not made out.

Per contra, Shri N.R. Patil, the learned Additional Public Prosecutor supports the judgment and order impugned and submits that the testimony of child victim is reliable and deserves acceptance without any corroboration. The child victim or her family nursed no ill will against the accused and false implication

is a defence which needs consideration only for rejection, is the submission.

7. I have given my anxious consideration to the evidence on record, the judgment and order impugned and the submission of the learned counsel for the accused Shri. R.M. Daga and Shri. N.R. Patil, the learned Additional Public Prosecutor for the respondent, and having done so, while I concur with the view of the learned Sessions Judge that the testimony of the child victim is reliable and no reason is demonstrated for this Court to disbelieve the child victim, the learned counsel for the accused is justified in contending that even if the evidence of the child victim is accepted at face value, the offence under section 376 of IPC and under section 6 read with section 5 (m) of POCSO Act is not established.

8. The child victim is examined as PW 2. She has deposed that when she stepped out of the tuition room for urination, Vikki Dada took her to the backside of the house and rubbed his "Shingi" on her private part. She resisted, Vikki Dada slapped her and she slapped him back. She disclosed the incident to the tuition teacher and the response of the tuition teacher was to slap her and ask her to keep quiet. The child victim states that when she went back alongwith her elder sister, she narrated the incident to her mother.

The child victim has been subjected to extensive cross-examination. However, the testimony of the child victim is not shaken. While appreciating the evidence of the child victim who has deposed that the accused rubbed his Shingi on her private part, it must be noted that her mother PW 1 - Sau Anju has deposed that in Banjara language Shingi means the male organ.

9. The evidence of the child victim is more than amply corroborated by the evidence of her mother Sau Anju who is

examined as PW 1 and that of Suchita Rathod who is examined as PW 3. PW 1 has deposed substantially consistent with the First Information Report. She has proved oral report Exh. 14 and printed First Information Report Exh. 15. She has sufficiently explained why the report was not lodged on the same day and was lodged on the next day on 6.12.2013. It is true, as submitted by the learned counsel for the accused, that the defence did bring on record a few omissions and exaggerations in the deposition of both PW 1 Sau Anju and PW 3 Suchita. But then, the omissions and embellishments do not destroy the core of the testimony illustratively, the exaggeration to which PW 3 - Suchita has resorted to is as regards the altercation with Mayuri. PW 1 - Sau Manju has deposed that 5 to 7 boys were doing the painting work in the house of the tuition teacher Mayuri which is inconsistent with the First Information Report in which the reference is to only three boys. However, both the witnesses do corroborate the substratum of the evidence of the child victim. The witnesses do have tendency to exaggerate and improvise. It is trite law, that the Court is duty bound to separate the chaff from the grain. I have no hesitation in recording that the evidence of the child victim, confidence inspiring as the evidence is, amply corroborated on material aspect by PW 1 Sau. Anju and PW 3 Suchita.

10. However, even if the evidence is accepted at face value, the only offence which is made out is under section 354 of IPC and section 9 read with section 10 of POCSO Act. The child victim states that the accused rubbed his male organ on her private part. However, there is absolutely no evidence on record to show that there was any penetration, to any extent even in the labia majora of the child victim. Indeed it is not even the version of the child victim that other than rubbing the male organ on the

private part, the accused attempted to penetrate her vagina which is explained in the amended section 375 of IPC to include labia majora. The accused has however committed an offence punishable under section 354 of IPC by outraging her modesty. It is evident, that since there is no evidence to prove penetrative sexual assault, the conviction under section 6 read with section 5(m) of POCSO Act is equally unsustainable and the offence which is made out would be aggravate sexual assault punishable under section 10 of the POCSO Act.

11. In the light of the discussion supra, the conviction and sentence under section 376 of IPC and under section 6 read with section 5 (m) of POCSO Act is set aside and instead the accused is convicted for offence under section 354 of IPC and under section 9 read with section 10 of POCSO Act.

12. The accused is sentenced to suffer rigorous imprisonment for 3 years for offence punishable under section 354 of IPC and to suffer rigorous imprisonment for 5 years for offence under section 9 read with section 10 of POCSO Act. The accused shall be entitled to set of under section 428 of the Code of Criminal Procedure.

13. Sentence of fine imposed by the Trial Court is maintained.

14. The appeal is partly allowed and disposed of in the above terms.