

(2022) 07 BOM CK 0022
In the Bombay High Court
Case No : Criminal Appeal No. 1544 Of 2019

Popat Navasu Bendkoli

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 12-07-2022

Acts Referred:

Indian Penal Code, 1860 — Section 228(A), 363, 366
Protection Of Children From Sexual Offences Act, 2012 — Section 2(d), 3(a), 4, 5,
5(1), 6, 33(7)
Code Of Criminal Procedure, 1973 — Section 164, 173(2), 294

Citation : (2022) 07 BOM CK 0022

Hon'ble Judges : A. S. Gadkari, J

Bench : Single Bench

Advocate : Aniket Vagal, S. S. Hulke, Priyanka Chavan

Final Decision : Dismissed

Judgement

A. S. Gadkari, J

1. Appellant/original Accused No.1 has questioned correctness of the Judgment and Order dated 13th March, 2018 passed in Sessions Case No.93 of 2017 by the learned Special Judge (POCSOA), Nashik convicting him under Section 366 of Indian Penal Code (for short IPC) and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.3,000/- (Rupees Three Thousand Only), in default of payment of fine to suffer further rigorous imprisonment for three months and for offence committed under Section 5(1) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.10,000/- (Rupees Ten Thousand Only), in default of payment of fine to further suffer rigorous imprisonment for six months.

2. Heard Mr. Aniket Vagal, learned Advocate for the Appellant, Ms. Priyanka Chavan, learned Advocate appointed by the High Court Legal Services Committee, Mumbai to represent Respondent No.2 (victim) and learned APP.

Perused entire record.

3. As the victim was minor, aged about 16 years and 11 months on the date of commission of offence i.e. on 30th June, 2016, with a view to protect her identity and in consonance with provisions of Section 228(A) of IPC and Section 33(7) of the POCSO Act, the facts or any other material disclosing her identity are hereinafter avoided.

4. It is the prosecution case that, the Respondent No.2 (victim) and her friend who was also a minor, used to go for labour work at Nashik in a track jeep of Appellant. They used to return at home by 8.00 p.m. every day. That, on 30th June, 2016, at about 7.00 a.m., Respondent No.2 (victim) and her friend (victim No.2) went to do labour work at Nashik from the jeep of the Appellant, however they did not return till late night. Therefore, the father (PW No.3) of the victim and the father of the victim No.2 tried to search them in the vicinity, however they were not traced. They continued their search for two days. However, as the said two girls were not traced out, he ultimately lodged First Information Report on 2nd July, 2016 with Harsul Police Station, District Nashik bearing Crime No.28 of 2016 under Section 363, 366 of the IPC and under Section 4 of the POCSO Act. After registration of the crime, investigation of the same was taken over by PSI Mr. Ghuge. During the course of the investigation it was revealed that, the Respondent No.2 along with Appellant were residing at village Tokwade and Inde, Taluka Murbad, District Thane, within the jurisdiction of Tokwade Police Station. On 22nd August, 2016, police apprehended Appellant and along with Respondent No.2 brought him to Harsul Police Station. The medical examination of victim was conducted by the Medical Officer of General Hospital, Nashik on 22nd August, 2016 itself. After completion of the investigation, investigating officer submitted final report under Section 173(2) of Code of Criminal Procedure, 1973 (for short Cr.P.C.), under Section 366 of IPC and under Section 5(1) read with Section 6 of the POCSO Act before the special Court.

5. The trial Court took cognizance of the said offences against Appellant and accused No.2 Ankush Ananda Mondhe and framed charge below Exh.18. The contents of the said charge were read over and explained to the accused in vernacular language to which they pleaded not guilty and claimed to be tried. To establish its case, the prosecution examined in all four witnesses namely the victim (PW No.1); another victim (PW No.2) who had eloped with accused No.2 Ankush Mondhe; Mr. Manglu Raghu Bendkoli (PW No.3), father of victim and Mr. Pravin P. Salunke (PW No.4), Assistant Police Inspector, investigating officer. The prosecution has also proved statement of victim recorded under Section 164 of Cr.P.C. through her which is on record at Exh.27.

The trial Court after recording evidence and hearing learned Advocates for the respective parties, has convicted Appellant as noted hereinabove by its impugned Judgment and Order dated 13th March, 2018.

6. Mr. Vagal, learned Advocate for the Appellant submitted that, the Appellant

has admitted medical reports of Respondent No.2 under Section 294 of Cr.P.C. He submitted that, in her medical report, the Medical Officer has clearly mentioned in para No.12(c) that Hymen was intact. That, the Medical Officer while expressing clinical opinion in para 15(b) has stated that, "Not consistent with recent sexual intercourse/assault". He further submitted that, the Appellant has brought on record a vital omission from the Respondent No.2 from which it can be safely inferred that, the Appellant did not commit an act of 'aggravated penetrative sexual assault' as defined in Section 5 of the POCSO Act to attract punishment under Section 6 of POCSO Act. He submitted that, at the most, offence under Section 366 of IPC can be alleged against the Appellant, however in view of the categorical opinion expressed by Medical Officer, no offence under Section 6 of POCSO Act has been made out by the prosecution. He submitted that, the trial Court has failed to take into consideration these aspects and has committed error while convicting the Appellant under Section 6 of POCSO Act. He therefore prayed that, the impugned Judgment and Order may be set aside and the Appellant may be acquitted.

7. Per contra Ms. Chavan, learned Advocate appointed to represent Respondent No.2 and learned APP vehemently opposed the Appeal. Ms. Chavan submitted that, the testimony of prosecutrix is fully reliable to base conviction solely on the same. In support of her contention, she relied on decisions in the case of (i) Mohd. Imran Khan Vs. State Government (NCT of Delhi) reported in (2011) 10 SCC 192; (ii) Vijay alias Chinee Vs. State of Madhya Pradesh reported in (2010) 8 SCC 191 and (iii) State of Uttar Pradesh Vs. Chhotey Lal reported in (2011) 2 SCC 550. She further submitted that, conviction can be awarded on the basis of sole testimony of the prosecutrix, if Court finds that it is genuine and reliable. She therefore submitted that, there are no merits in the Appeal and the same may be dismissed.

Learned APP submitted that, non-rupture of hymen or absence of injury on victim's private parts, does not belie her testimony. That, to constitute rape penetration however slight is sufficient. That, opinion of doctor cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. In support of his contention he relied on a decision of the Hon'ble Supreme Court in the case of Ranjit Hazarika Vs. State of Assam reported in (1998) 8 SCC 635.

8. Perusal of evidence on record reveals that, PW No.2 (victim No.2) did not support prosecution's case and was declared hostile. In her cross-examination by the learned APP, she admitted that, she was having an affair with accused No.2 Ankush Mondhe and in the month of June, she and Ankush Mondhe decided to run away and accordingly she joined the company of Ankush Mondhe on 30th June, 2016 and along with him she started residing as husband and wife at Thane. She has further stated that, she has married with Ankush Mondhe and she has no grievance with anybody.

9. PW No.3 i.e. father of the victim has deposed about the fact of victim used to go to work at Nashik from the vehicle of Appellant and her not returning to home

on 30th June, 2016 and lodgment of crime. He has also deposed that, the Respondent No.2 along with other victim girl were not found in the village and he had having doubt about the other victim joining the company of Ankush Mondhe. PW No.4 Mr. Pravin Salunke, Assistant Police Inspector has deposed about the investigation carried out by him with respect to present crime i.e. Crime No.28 of 2016 and his tracing out of other victim girl along with Ankush Mondhe. He has stated that, further investigation was thereafter handed over to original investigating officer Mr. Ghuge, who completed the investigation and submitted the charge-sheet.

10. This leads me to deal with the most important deposition in the entire case that is of Respondent No.2 (PW No.1) victim. The victim in her deposition has stated that, prior to a year, the Appellant took her and her friend (victim No.2) to Thane. There he took a room on rent. That, victim No.2 and Ankush Mondhe were residing in a separate room and the Appellant and Respondent No.2 were residing separately. That, the Appellant used to extend threats of serious and dire consequences and established physical relations with her. That, she along with Appellant stayed there for about a month. During the said period, Appellant established physical relations with her on various occasions. She has further deposed that, the police from Tokwade Police Station came there and took her and Appellant at Police Station. They were thereafter brought to Harsul Police Station, where her statement came to be recorded. Her medical examination was also conducted. She has further deposed that, her statement was recorded by Judicial Magistrate which is at Exh.27. The said witness has proved the said exhibit i.e. her statement under Section 164 recorded by Judicial Magistrate.

Even in her detailed cross-examination except an omission that she did not state before the police that, the Appellant took her under the pretext of going to work, took her to Thane and established physical relations with her against her will and that he also threatened her with dire consequences, nothing more beneficial to Appellant has been brought on record. The fact of Appellant established physical relations with Respondent No.2 and continued it for a month has not been shaken in her cross-examination.

11. Though, the medical report mentions that, Hymen of Respondent No.2 was found to be intact and no injuries were found on her person and therefore the case of sexual assault is not consistent with recent sexual intercourse/assault is concerned, it is the settled position of law and as held in the case of Ranjit Hazarika (supra), even if the medical evidence does not support the prosecution case, the deposition of prosecutrix cannot be brushed aside if it is found to be otherwise reliable and trustworthy. In the present case, this Court finds that the testimony of prosecutrix is wholly reliable and trustworthy.

12. Section 3(a) of the POCSO Act states that, a person is said to 'commit penetrative sexual assault' if he penetrates his penis to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or with any other person. Section 5 of the Act defines 'aggravated penetrative

sexual assault'. Section 5(1) mentions about penetrative sexual assault on the child more than once or repeatedly. In view of the testimony of the victim (PW No.1) it is clear that, the Appellant has committed an act as contemplated under Section 3(a) read with Section 5(1) punishable under Section 6 of the POCSO Act. It is an admitted fact on record that, on the date of the commission of offence i.e. 30th June, 2016, age of the prosecutrix was 16 years and 11 months and therefore she was a child within the meaning of Section 2(d) of the Act. Appellant forced her to join his company from the lawful guardianship of her parents. In view thereof, the offence under Section 366 of the IPC and under Section 6 of POCSO Act is proved by the prosecution.

13. The aforementioned deliberation would lead to draw a safe inference that, the Trial Court has not committed any error while convicting and sentencing the Appellant by its impugned Judgment and Order. There are no merits in Appeal and is accordingly dismissed.

14. Before parting with the Judgment, this Court places on record a word of appreciation for the efforts put in by Ms. Chavan, learned Advocate appointed through the High Court Legal Services Committee, Mumbai for espousing the cause of Respondent No.2, as she was thoroughly prepared in the matter and rendered proper assistance to the Court.