

(2024) 02 BOM CK 0048
In the Bombay High Court
Case No : Criminal Appeal No. 802 Of 2022

Pravin Popat Kharat

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 21-02-2024

Acts Referred:

Indian Penal Code, 1860 — Section 376(1)
Protection Of Children From Sexual Offences Act, 2012 — Section 4, 34
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 94
Code Of Criminal Procedure, 1973 — Section 164

Citation : (2024) 02 BOM CK 0048

Hon'ble Judges : Abhay S. Waghware, J

Bench : Single Bench

Advocate : Sanjay Bhaskar Shirsat, N.D.Batule, Arvind G. Ambetkar

Final Decision : Dismissed

Judgement

@JUDGEMENT- JUDGEMENT

Abhay S. Waghware, J

1. Convict for offence under Section 376(1) of the Indian Penal Code (IPC) and Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, is hereby assailing the judgment and order dated 13-09-2022 passed by the Special Judge under POCSO Act, Ahmednagar in Special Case No.109 of 2019.

CASE OF PROSECUTION IN BRIEF

2. PW1 Victim studied in 11th standard in Shri Sant Nilobaray Mahavidyalaya at Ralegansiddhi. In marriage of one Yogesh Jadhav, victim got acquainted with accused. Thereafter, there were talks of marriage but as victim had not completed 18 years of age and was pursuing education, marriage proposal was not accepted. However, accused started meeting victim inspite of her refusal. Accused threatened her and forcibly took her in a hotel and against her wish and without her consent, he had sexual intercourse with her several times.

Subsequently, her pregnancy was revealed and therefore, on 17-02-2019, she consumed insecticide and was required to be hospitalized. While taking treatment, her statement was recorded and crime was registered which was finally investigated by PW14 Sone (API), who on completion of investigation, chargesheeted accused and was further tried by the learned Special Judge under POCSO Act, Ahmednagar, who on appreciating oral and documentary evidence, recorded guilt for above Sections and the same is now challenged by way of instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Putting up a defence of false implication, learned Counsel for appellant would submit that except sole testimony of victim, there is no cogent, reliable, independent evidence. He alleges false implication to cover up the alleged suicidal attempt by victim. According to him, contents of the report and testimony of the victim are inconsistent. He also questions the age of the victim on the ground that there is no conclusive evidence about her age. That though PW15 Navnath Katke and P16 Dilip Deshmukh are examined, there is doubt whether victim was a minor as name of the victim is missing from the birth certificate. According to him, birth certificate shows date of birth of prosecutrix as 16-09-2002, however, in school leaving certificate, different date is reflected i.e. 17-09-2002 and therefore, being difference in both, he prays to discard the evidence adduced by the prosecution on the point of age.

He criticizes the impugned judgment by submitting that even learned trial Court has failed to appreciate evidence in such a serious case in its proper perspective and has not considered settled law. He also accuses investigating machinery for improper investigation alleging several lapses and deliberate implication.

Defence put up is that there is false implication as prosecutrix was found to have advance pregnancy and its termination was not possible and merely to save reputation and face, allegations of rape are levelled. He further argues that evidence of entire prosecution witnesses is full of material omissions, contradictions and the same ought not to have been accepted by the trial Court.

He also questioned the DNA evidence by submitting that there is no link evidence, even there is no proper procedure adopted for collection of samples and therefore, its analysis, according to him, cannot be taken recourse to, or relied by the prosecution.

Lastly, he submitted that prosecution having failed to establish the charges beyond reasonable doubt, as is expected from them, he prays to set aside the impugned judgment by allowing the appeal.

On behalf of State :

4. While answering the above arguments, learned APP would submit that victim

is below 18 years of age and there is full-proof and conclusive evidence adduced by prosecution in the trial Court. According to him, victim herself deposed about she being threatened and taken to hotel several times and against her wish accused had sexual intercourse with her and even impregnated her. Therefore, incidents being against her wish, offence of rape is complete. He further pointed out that victim did not inform anyone because of threats. Prosecution has adduced evidence of as many as 16 witnesses. Medical experts, who examined victim, have also been examined by prosecution. In view of pregnancy and DNA evidence, identity of accused is established beyond reasonable doubt and therefore, learned trial Court has rightly returned the guilt and hence, he prays to dismiss the appeal.

On behalf of victim :

5. Learned Counsel for the victim also supported the judgment and also by endorsing the submissions of learned APP reiterated that there is correct appreciation of available evidence. There is no illegality or infirmity in the order of conviction and he too prays to maintain the conviction by dismissing the appeal.

6. This Court, being first appellate Court and last fact finding Court is expected to re-appreciate, re-analyze and re-examine the entire oral and documentary evidence adduced by prosecution.

In support of its case, prosecution has adduced evidence of in all sixteen witnesses. Their status is as under :

PROSECUTION EVIDENCE

FIRST SET – VICTIM AND HER FATHER

PW1 is victim.

PW2 is father of victim.

SECOND SET - PANCHA

PW3 Baban Nathaji Datir is Panch to spot and disclosure memorandum of accused.

THIRD SET – MEDICAL OFFICERS

PW4 Dr.Vishal Vasudev Mahajan is Medical Officer, who examined victim and issued opinion.

PW5 Dr.Robin Mujumdar is another Medical Officer, who performed Sonography of victim and confirmed pregnancy.

PW6 Dr.Balasaheb Bande is Medical Officer, who treated victim on account of consumption of poison.

PW7 Dr.Abhilasha Shinde is also a Doctor, who examined accused on the point of

potency.

PW11 Dr.Manisha Pralhad Undare is Doctor, who collected blood samples of accused for DNA test.

PW12 Dr.Neha Vijendra Lohiya is Doctor at GHATI hospital, who conducted termination of pregnancy of victim.

FOURTH SET – INVESTIGATING MACHINERY

PW9 Kalyan Narayan Lagad is carrier, who took muddemal DNA from hospital.

PW10 Vilas Janardhan Adik is another carrier, who took blood samples of victim and foetus to Nashik.

PW13 Dr.Deepak Yadav Kudekar, Assistant Chemical Analyzer, who conducted forensic examination and issued DNA report exh.98. PW14 Sanjaykumar Tukaram Sone (API) is the Investigating Officer.

FIFTH SET – OTHER WITNESSES

PW8 Navnath Ramdas Katke is hotel owner, who produced register. PW15 Shivaji Bhivesen Khamkar is Gramsevak, who placed on record birth certificate of victim exh.124, 125.

PW16 Dilip Suryabhan Deshmukh is Principal of Shri Sant Nilobaray Mahavidyalaya at Ralegansiddhi, who placed on record school leaving certificate exh.127, 128, 129.

7. The fundamental grounds of challenge could be enumerated as under:

GROUND

Firstly, victim is not proved to be a minor and contrary dates of birth are coming on record.

Secondly, there is no corroboration to the testimony of the victim / prosecutrix

Thirdly, delayed FIR

Fourthly, false implication only to hush-up pregnancy Fifthly, chain of custody not proved.

8. Before embarking on the prosecution evidence on aspect of sexual intercourse, it is desirable to first analyze and discuss the evidence to ascertain whether as objected, victim is established to be a minor.

PW1 Victim reported her to be studying in 11th standard. She herself did not give her date of birth.

Even her cross-examination seems to be silent regarding her date of birth.

PW2 father of victim, who is examined at exh.23 gave her date of birth as 16-09-2002.

In cross-examination, he has given date of birth of his son as 14-06-2001 and further answered that his both children were born at Javala. He flatly denied birth of victim to be prior to 2000.

PW15 Khamkar is Gramsevak, who deposed at exh.123 that he is working in Gram Panchayat and he takes entry of birth and death. According to him, record brought by him shows entry of birth of victim taken on 28-09-2002 and her name is at entry sr.no.65.

Name of her father and mother is mentioned. They are residents of Wadeghavan. Birth of victim took place in Dr.Pathare Hospital. Birth date of child was 16-09-2002. He placed copy of extract of register exh.124 on record and he was also carrying birth certificate of the child which he placed on record at exh.125.

While under cross-examination, above witness has admitted that there is no document to show birth of child taking place in hospital of Dr.Pathare. He admitted that name of child is not appearing on exh.124. He is unable to give name of Gramsevak, who took entry on exh.124 and he further admitted that till today, the name of child is not entered in the register. He also admitted that exh.125 does not carry name of child.

PW16 Deshmukh, Principal of Sant Nilobharay Vidyalaya, Parner, is also examined by prosecution in support of age and he placed on record school leaving certificate exh.127, copy of extract of register at exh.128, according to which birth date of victim is 17-09-2002. He also placed on record school leaving certificate exh.129 and bonafide certificate exh.130.

In cross-examination, above authority has stated that he is unable to give the basis of noting date of birth in exh.127. He further admitted that parents of the child did not handover birth certificate of child while admitting in school and on exh.127, 128,129,130 there is no mention that date of birth is mentioned on the basis of birth certificate.

ANALYSIS ON AGE OF VICTIM

9. On analyzing above evidence on age, here PW2 father of victim gave date of birth as 16-09-2002. PW15 Khamkar, Gramsevak has given date of birth as per exh.124 as 16-09-2002. Gram Panchayat record exh.125 also carries same date, but name of the child is not appearing on the same. Name of parents are however, reflected on the birth certificate.

PW16 Deshmukh, a Principal of Shri Sant Nilobharay Vidyalaya has tendered school leaving certificate wherein date of birth is reflected as 17-09-2002 i.e. after victim cleared SSC exam. This witness, in substantive evidence, gave the said date of birth by placing on record exh.128, which is an extract of school wherein date is noted as 17-09-2002.

Therefore, here PW2 father and PW15 Khamkar, Gram Panchayat Authority are giving date of birth as 16-09-2002, whereas the record submitted by PW16

Deshmukh, carries date of birth as 17-09-2002. Therefore, as pointed out, two distinct dates of birth are apparently coming on record.

10. Above issue having cropped up, it is desirable to deal with settled legal position about the nature of evidence necessary for determining age, more particularly, in cases of such nature.

In the case of *Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263 the Hon'ble Apex Court has held that age of the prosecutrix should be determined on the following grounds :

"a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of juvenile or child. In case exact assessment of the age cannot be done, the Court or the board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, given benefit to the child or juvenile by considering his/her age on lower side within the margin of one year."

Very recently in the case of *P. Yuvarakash v. State Rep. By Inspector of Police*, AIR 2023 Supreme Court 3525, as regards to computation of age, Section 34 of the POCSO Act is discussed and following nature of evidence is considered relevant for determination of age;

"13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".

Both above referred rulings have spelt out and prioritized nature of evidence that should be preferred while determining age. Here victim was born in a village having Gram Panchayat. Official of Gram Panchayat placed on record document exhibits 124 and 125 wherein date of birth is reflected as 16-09-2002. Biological father of victim has also given same date as birth date of his daughter. Therefore, such evidence would prevail over exh.128, which is a school extract. Exhibits 124 and 125 are required proofs as described in both above rulings. Therefore, the same needs to be taken into consideration for determining age.

Considering such date of birth of victim and date of occurrence, in the considered opinion of this Court, victim is shown to be around 15 years and 2 months age only and hence, a minor.

11. Second attack of learned Counsel is that there is no corroboration to the testimony of victim.

When sole testimony of victim inspires confidence, Court need not seek corroboration. Law to this extent has been expounded and settled in numerous judgments and few could be named as under:

- (a) State of Maharashtra v. Chandrapraksh Kewalchand Jain, AIR 1990 SC 658;
- (b) State of U.P. v. Pappu alias Yunus and another, AIR 2005 SC 1248,
- (c) State of Punjab v. Gurmit Singh and others, AIR 1996 SC 1393
- (d) Vijay @ Chinee v. State of Madhya Pradesh, (2010) 8 SCC 191.

In the above cases, it has been reiterated that there is no need or legal compulsion to look for corroboration or other evidence to accept the case of prosecutrix for recording conviction. Only condition is that the testimony of the victim should be worthy of credence and further reliable.

12. Keeping above legal position in mind, if evidence of PW1 victim is analyzed, she is found to be deposing that she got acquainted with accused in a marriage. Father and uncle of accused approached PW2 father of victim with proposal of marriage of accused and victim, but victim herself deposed that as she had not completed 18 years of age and her education was in progress, her father turned down the proposal. She further deposed that accused started meeting her in the college and she is also very categorical that she refused to meet him but further deposed that he used to threaten to kill her father and uncle and took her towards Pune in a hotel, asked her to pose herself as his wife and expressing his liking for her and expressing his desire to marry her, she stated that accused without her consent had sexual intercourse with her three times and further threatened to not to disclose it to anyone. She skipped menstrual cycle and subsequently, on examination, her pregnancy was detected. Therefore, she consumed poison and after her treatment, when her statement was recorded she reported the above.

In her cross-examination, there are questions about mobiles possessed by her

father, number and nature of vehicles, agriculture holding, strength of live stock and regarding their milk business.

Then she is questioned about going to the college, her company, mode of transport, timing of the same, timing of the college. She has admitted that her maternal uncle is husband of sister of accused. Then mobile number of her brother, father, accused are asked and she has provided the same. She is asked on which all days accused visited her in college. Suggestions are given that there are hotels, shops around the bus-stop and said owners of hotel and shop keeper to be acquainted with her father. Initially she denied her photograph with accused exh.22 but on confrontation she has confirmed it. Suggestion that whenever she and accused met, she used to tell that she is above eighteen years and that they should marry has been turned down by her. She admitted about consumption of thymidine but rest all are denials.

Exhibit 19, which is her statement, seems to be recorded on 04-03-2019 i.e. while she was taking treatment at KEM hospital Pune. Even her statement under Section 164 is recorded at exh.20 wherein she had alleged forceful sexual atrocity.

13. It is pertinent to note that victim has not specifically stated the dates on which accused had sexual intercourse with her by assuring marriage. She has spoken about three sexual encounters in a hotel.

PW8 Navnath Ramdas Katke, hotel owner placed on record hotel extract showing visit of accused and occupying room no.102 on 21-11-2018. Only one single date has come on record.

14. PW5 Dr.Robin, who conducted sonography of victim, has confirmed pregnancy of the victim to be 22-23 weeks old on 18-02-2019. Taking such dates into consideration, the pregnancy can be said to be over five months old. Considering such period and taking into consideration date of visit of accused to hotel in November, 2011, there is material indicating that intercourse might have taken place on or around such date.

15. Though as stated above, victim has not given specific date, it is to be noted that she is already found to be below 18 years of age. PW13 Dr.Kudekar, Assistant Chemical Analyzer, who conducted DNA and placed on record report has confirmed accused and victim to be biological parents of the fetus. Such evidence further cements and fortifies sexual intercourse by accused with victim. On the strength of above discussed material, this Court has already found victim who was studying in 11th standard had not completed 18 years of age. Further when victim herself deposed that marriage proposal was refused because she had not completed 18 years also clearly shows that she was below 18 years of age. Ones victim has herself deposed and when even accused is also aware that she is not of marriageable age, he ought not to have taken her to hotel and maintained physical relations with her on the pretext of his desire to marry her. It goes to show without saying that she being below 18 years, even if she is

passive participant, its benefit would not go to the accused, more particularly, when victim has deposed about having sexual intercourse with her without consent.

Therefore, on the basis of above discussed material, offence under Section 376(1) of the IPC gets squarely attracted.

16. Likewise victim being shown to be below 18 years of age, provisions of the POCSO Act automatically gets attracted further attracting provisions of Section 4 of the POCSO Act.

17. Now let us deal with the grounds of objection.

Learned Counsel for the appellant would point out that there is false implication on the basis of false and afterthought complaint. He alleges implication to cover up pregnancy.

It is true that there is delayed reporting i.e. only on detection of pregnancy. However, it is also settled position that in cases of such nature, delay cannot be given much importance. Victim has reported only when her pregnancy was revealed and thereafter, she has attempted to end up her life by consuming insecticide. Admittedly, she has not reported till detection of pregnancy, but once it is shown that victim is below 18 years of age and she has categorically stated about assurance of marriage, and thereafter maintaining physical relations, no defence whatsoever lies for accused, who is aware that she was not of marriageable age at the time of intercourse. For all above reasons, delay cannot be made a ground to give benefit to the accused.

18. Learned Counsel also attacked prosecution case on the ground of chain of custody not being proved. However, except making argument to this extent, how chain of custody is broken and where was the possibility of contamination of evidence has not been specifically pointed out. Here PW11 Dr.Manisha, who is examined at exh.87, claims to have obtained blood for DNA on 01-04-2019 i.e. of accused. PW12 Dr.Neha deposed about admission of victim in the hospital on 25-03-2019 i.e. prior to the blood sample of accused extracted by PW11 Dr.Manisha and on 27-03-2019 this medical expert collected baby blood from the cord alongwith that of the mother. PW11 Dr.Manisha in cross-examination deposed that blood was collected in bulb and bulb was kept in a bottle and it was wrapped with cotton and kept in ice box and its temperature was maintained. PW12 Dr.Neha in cross-examination stated that DNA kit being brought by Constable on 26-03-2019 and in cross-examination she stated that she handed over sealed sample on 29-03-2019. PW9 Kalyan Narayan Lagad, carrier deposed about approaching Ccvil Hospital on 17-03-2019 thereafter he carried letter issued by PSI on 22-03-2019 for providing ice box, collected the same from Medical Officer, Parner and then visited Ghati Hospital alongwith letter for getting blood sample of new born and her mother in two DNA kits and further carrying kits to Supa Police Station and further carrying letter of Police Station for keeping the samples in necessary temperature addressed to Medical Officer, Rural

Hospital, Parner. It is merely brought in his cross-examination that he did not enquire with Medical Officer regarding the temperature which was maintained in the ice box.

PW10 Vilas Janardhan Adik, another carrier, who is examined at exh.76 deposed about carrying letter exh.75 on 30-03-2019 to Nashik and handing over the letter as well as collected samples and receiving acknowledgment.

He admitted in cross-examination that there is scoring of date 22-03-2019 to 29-03-2019. This exh.77 is mere a communication of acknowledgment.

19. Above discussed material does not create doubt about collection of samples, retention of the same in unprotected place in unprotected form or samples to be in tampered condition or possibility of it being tampered at any point of time. Therefore, when except raising oral concern about link evidence, as no specific infirmity is brought to the notice so as to doubt the link evidence, above objection has no significance.

SUMMATION

20. To sum up, here victim is shown to be below 18 years of age. Accused is aware of the same. He has taken her to a hotel couple of times and expressing his desire to marry her, he had impregnated her knowing well that she was below 18 years of age. Victim has deposed about said acts without her consent. Therefore, provisions of rape under the IPC as well as POCSO Act gets gravitated

21. On going through the impugned judgment and on complete re-appreciation and reanalysis of entire prosecution evidence, no perversity or illegality is relatable to the trial Court in reaching to the findings and conclusion. No case being made out on merit, appeal deserves to be dismissed. Accordingly, I proceed to pass following order:

ORDER

Criminal Appeal No.802 of 2022 stands dismissed.