
(2024) 01 BOM CK 0084

In the Bombay High Court

Case No : Criminal Appeal No. 1103 Of 2019, Criminal Application No. 3284 Of 2019

Rajesh And Others

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 22-01-2024

Acts Referred:

Indian Penal Code, 1860 — Section 375(b), 376(2)(i), 376(2)(m)
Protection Of Children From Sexual Offences Act, 2012 — Section 5, 6, 7, 8

Citation : (2024) 01 BOM CK 0084

Hon'ble Judges : Abhay S. Waghware, J

Bench : Single Bench

Advocate : Vikrant P. Raje, N.D.Batule, Z.H.Farooqui

Final Decision : Partly Allowed

Judgement

Abhay S. Waghware, J

1. By way of instant appeal convict original accused is assailing the judgment and order passed by Additional Sessions Judge, Shahada in Sessions Case No.51 of 2016 holding appellant guilty for offence under Section 376(2)(m) of the Indian Penal Code (IPC) and Section 6 read with 5 of the Protection of Children from Sexual Offences Act (the POCSO Act) and to pay fine respectively.

FACTS LEADING TO THE TRIAL ARE AS UNDER

2. Akkalkuwa Police Station chargesheeted appellant for above offence alleging that victim who was studying in 5th standard, went to attend tuition to the accused, a Tutor, on 12-09-2016. According to prosecution, after making other children leave, victim was directed to stay back by accused on the pretext of giving homework. When everybody left, he shut the door, remove his own clothes and directed victim also to get undressed. When she refused, he forcibly removed her clothes, made her sleep on the cot, moved and felt his hands over her breast, private parts and tried to insert his male organ in her private part.

3. The girl returned home and seeing her condition, on being asked, she narrated the act of accused and therefore, Police was approached and PW2 mother lodged complaint exh.14. After statement of victim was recorded, crime was registered and finally investigated by PW8 Bhavsar (API), who after gathering sufficient evidence filed challan and accused was tried by Additional Sessions Judge, Shahada, who permitted prosecution to adduce evidence. Evidence so adduced was appreciated and learned trial Judge held the charges proved and convicted appellant resulting into challenge by way of instant appeal.¹

SUBMISSIONS

On behalf of appellant :

4. Learned Counsel for appellant pointed out that it is apparently false implication on account of some rivalry between two education institutions. It is submitted that complaint is narrated by somebody else and is merely signed by mother of the victim. That victim has been tutored to name accused. He would submit that very evidence of medical expert belies the accusation of rape. That even there are material inconsistencies in the testimony of victim and her mother coupled with the lapses and lacunas on behalf of investigating machinery. Resultantly, it is his submission that there is no sufficient corroboration and case being not proved beyond reasonable doubt, he submits that appeal deserves to be allowed by setting aside the impugned judgment.

On behalf of State :

5. Supporting the judgment under challenge, learned APP would point out that victim is admittedly a child and hence a minor. He would strenuously submit that there is apparently criminal breach of trust by accused, who is a teacher and to whom victim was sent by her parents for education. However, she has been victimized in his house by the accused. Learned APP pointed out that victim's testimony is itself sufficient to bring home the charges. He pointed out that she has narrated each and every act indulged into by accused after closing the door. She has faced cross-examination and it has remained unflinched, thereby keeping her testimony intact.

6. He next submitted that mother of victim has shortly met the victim and had noticed the condition of her daughter and victim daughter promptly narrated the ordeal faced by her and she was thereafter taken to hospital and Police has been approached on the same day. Therefore, he submits that there is prompt lodgement of complaint.

7. He further submitted that victim's evidence is fortified by medical evidence, who has testified about receiving history and on examination report was issued. Learned APP, at this juncture, would strenuously submit that mere absence of injuries itself would not negate the case of rape and therefore, even if no injuries are noticed by PW4 Dr.Balapure, it is his submission that it is inconsequential as according to him, very testimony of victim itself is clear about commission of

offence of sexual intercourse. He added that considering the age of child, her evidence is required to be assessed and analyzed.

8. Lastly, he submitted that there is clinching incriminating material. The same has been correctly appreciated by learned trial Judge. According to him, law on rape is correctly applied and so he prays to dismiss the appeal for want of merit.

9. Being first appellate Court, this Court is required to re-examine, re-appreciate, and re-analyze evidence adduced by the prosecution to find whether there is merit in the appeal. Consequently, evidence on behalf of prosecution in the trial Court is visited and subjected to re-appreciation.

PROSECUTION WITNESSES

10. It is noticed that following witnesses were examined by the prosecution in support of its case.

PW1 victim at exh.8.

PW2 mother of victim at exh.12

PW3 Dr.Mangala Yuvraj Tungar, Medical Officer, who physically examined victim and issued certificate / report exh.23 and 24.

PW4 Dr.Vivekanand Baburao Balapure, is a Medical Officer, who physically examined accused.

PW5 Darshana d/o. Gemu Gaviti (LPC) accompanied victim when her statement was recorded and she had taken victim for the medical examination at Civil Hospital, Nandurbar.

PW6 Ganesh Madhukar Nhayade is API, who conducted part investigation and subsequently handed it over to other Police Official. PW7 Vijaya d/o. Bhimsing Vasave, is Head Mistress of School of victim.

PW8 Rajendra Dagadu Bhavsar, is the Investigating Officer.

ANALYSIS

11. At the outset, after hearing learned Counsel for appellant and on taking survey of the prosecution evidence, it needs to be mentioned that there is no serious challenge regarding age of the victim. Therefore, there is no hesitation to hold that victim was a child at the time of alleged occurrence.

12. On going through the chargesheet, it transpires that charge was framed against accused vide exh.2 for commission of offence under Section 376(2)(i) read with Section 375(b) of the IPC and under Section 6 read with Section 5 of the POCSO Act.

13. However, on appreciation of evidence learned trial Court has recorded guilt for commission of offence under Section 376(2)(m) as well as for offence under Section 6 read with 5 of the POCOS Act. Resultantly, it is desirable to reproduce

both above provisions for proper comprehension.

Section 376(2)(m) of the IPC is as under :

"Section 376. Punishment for rape – (1)

(2) Whoever, -

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman."

Section 6 of the POCSO Act is as under :

"6. Punishment for aggravated penetrative sexual assault – Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for remainder of natural life of that person and shall also be liable to fine, or with death."

14. Now having reproduced the provisions for which there is conviction, this Court proceeds to deal with the substantive evidence on behalf of prosecution. Again for proper comprehension, the testimonies of PW1 victim, PW2 her mother and PW3 Dr.Tungar, medical expert, who had examined victim is required to be dealt and is so reproduced as under:

On going through the testimony of PW1 victim at exh.8, it is emerging that learned trial Judge has put questions to the girl, who gave her age as 12 years. Questions are regarding where she was on 12-09-2016 and she answered that she was in tuition class. To next question to where she had gone, she answered and named accused and further answered that as her health was not proper, she went to tuition at 04:30 p.m. On being asked as to who all were with her in the tuition, she had named five children and to a question as to what happened thereafter, she has answered that after giving homework, accused sent other children home and to further question, she answered that she stopped in the tuition on being asked by accused and on query as to what happened thereafter, she has answered that accused told her that he is giving homework to her. Accused closed the door of the room. He removed his clothes and asked her to remove her clothes. Then to further question what happened thereafter, she has answered as followed :

"Answer – As I did not remove he removed my dress forcibly. He slept me on bed. He touched his hand on my chest and urinal place. Then he touched his urinal place and my urinal place. Then Nair sir pressed my mouth behind the door. After asking to boys my mother came there. My mother knocked the door and at that time sir told that Nikita is not there. Then, my mother asked Himanshu to knock the door. Then, my mother pushed the door and took me outside."

15. To further question she stated that they went to her Dadi Vimalabai and her

parents went to Police Station, Police came, inspected the house of accused. Lady Police asked her what happened and she narrated and it was reduced in writing in Marathi language. She stated that she narrated them in Hindi. She also answered about causing signature. She had identified her signature on exh.9 and 10.

While under cross-examination, she is asked about her parents, grandparents, about her community, name of teacher, which subject he taught, strength of students for the tuition, timing of tuition. Questions are put about her uncle, who is said to be a leader, nature of business, she appearing in Court and giving statement in Akkalkuwa Court. In paragraph no.7 of the cross, after above questions, she has denied that it did not so happen that accused asked her to stop, close the door, removed his own clothes, then asked her to remove her clothes, that he did not touch her private parts or body or mouth, urinal part and that she falsely depose about her mother coming in search of her and knocking the door.

Therefore, above testimony of victim clearly shows that there is virtually no serious dispute about actual alleged act by accused on victim.

16. PW2 mother of victim has apparently received information from PW1 victim, her daughter and she had met victim after the occurrence, whatever information she has and whatever she has narrated is apparently the information passed to her by her daughter and she has reproduced it.

17. The other crucial witness is medical expert, who had occasion to physically examine victim i.e. PW3 Dr.Tungar. Her testimony in witness box, which is at exh.21 is reproduced in verbatim and the same is as under :

1] On 13-09-2016 I was working as casualty medical officer at Civil Hospital, Nandurbar. On that day the victim was brought to me by LPC Darshana Gavit of Akkalkuwa Police Station for medical examination. A letter for examination of the victim was also submitted to me. I made signature on copy of the letter and retained the original with me. The copy of the letter from record now shown to witness. It bears my signature about receipt of letter. It is marked at Exh.22. Accordingly I examined victim. At the time of examination the age of victim was 11 years. She was female child. She was brought to me at 01:30 p.m. The mother of victim was with her. She gave consent for examination of the victim. For the identity purpose I obtained the thumb impression of victim or report. The mother of victim told the history of assault as sexual assault on victim on 12-09-2016 at 04-30 to 04-00 p.m. by her tuition sir.

2] I examined the victim. I found no injuries over body and hymen of the victim. The observations of my examination are noted by me in the examination report. The examination report now shown to witness. It bears my signature. It is in my handwriting , its contents are correct. It is at Exh.23. On the basis of the report I also issued the examination certificate on same day. It is in my handwriting. It bears my signature. Its contents are correct. It is at Exh.24.

3] If anyone touch the finger without force to the private part of the victim, then there may no be injury or redness. The hymen will remain intact.”

Therefore, according to medical expert, there were no injuries on the person of victim or hymen when victim was examined on 13-09-2016 i.e. next day of occurrence.

18. On careful and meticulous re-examination of testimony of victim reproduced in aforesaid paragraph goes to show that after disrobing victim, accused made her sleep on the bed and has “touched” her chest and urinal place. He “touched” his own urinal place and her urinal place. He pressed her mouth behind the door. Even the translated version / Marathi version is as under i.e. answers to relevant question as to what happened to her after he closed the door, removed his clothes and removed her clothes, it is noted -

What can be gathered from above testimony is that accused had allegedly touched breast, place of urinal of the victim and even his own urinal place. This is the act which is attributable to the accused from the testimony of victim. As stated above on examination of victim on next day, PW3 Dr.Tungar has not noticed any injury to the body or hymen and Doctor has also noted history which was said to be narrated by her mother.

19. Comparing the above testimony of PW1 victim and PW3 Doctor, with essential ingredients required for attracting Section 376(2)(m), it is conspicuously emerging, that said, required ingredients are patently missing in the evidence of victim as well as Doctor. What 376(2)(m) requires is “while committing rape causing grievous bodily harm or maims (which according to Oxford English Dictionary means “wound or injure (someone) so that part of the body is permanently damaged) or disfigures or endangers the life of a woman.”

Here taking into account the above discussed legal requirements, it is noticed that none of the ingredients required for attracting above offence are available in the testimony of PW1 victim and PW3 Dr.Tungar.

On what foundation above offence is held by the learned trial Judge to be established is not elaborated. There is no reasoning supplied for holding above offence to be proved.

20. The second offence for which appellant is held guilty is Section 6 read with 5 of the POCSO Act. However, again on carefully considering the testimony of PW1 victim and PW3 Dr.Tungar, medical expert, which are crucial, it is emerging that even there is no material suggesting aggravated penetrative sexual assault. As to what amounts to aggravated penetrative sexual assault is also dealt and defined in the POCSO Act and the same is as under:

“3. Penetrative Sexual assault : - A person is said to commit “penetrative sexual assault” if -

(a) 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 any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

21. On careful analysis of above definition provided in the Statute i.e. clause (a), (b),(c),(d), in the considered opinion of this Court, here there is no allegation of penetration into the vagina, mouth, urethra, anus nor there is allegation of insertion of any object not being penis into above referred parts of the child and even there are no allegations of manipulating any part of the body of child which would cause penetration in said part or made the child to do it with accused. Even there are no allegations that accused applied his mouth to the private part of child or made the child to do it. Requirement of penetration is patently missing.

Resultantly, even as like Section 376(2)(m) of the IPC, necessary ingredients for attracting Section 6 read with Section 5 of the POCSO Act also are conspicuously missing from the testimony of the victim.

Therefore, even said charge cannot be said to be brought home.

22. As stated above learned trial Judge has not offered any reasoning as to why and how and on what basis above offences are made out. Apparently mere discussions are made on the manner of appreciation of evidence on rape on a child, but learned trial Court seems to have lost sight of availability of essential ingredients which are necessary for recording the guilty.

23. However, taking into account the testimony of the child and testing it with legal requirements, in the considered opinion of this Court, definitely offence under Section 7 of the POCSO Act is can be said to be committed by the accused. Said Section deals with sexual assault and the Act provides for meaning of sexual assault, which is as under:

“7. Sexual assault - Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

The essential ingredients of the offence of “sexual assault” are as under:

“A. Accused, with sexual intent touches

(i) the vagina or a child aged below 18 years; or

- (ii) the penis of a child aged below 18 years; or
- (iii) the anus of a child aged below 18 years; or
- (iv) the breast of a child aged below 18 years; or

B. Accused with sexual intent makes the child aged below 18 years to touch his or any other person's

- (a) vagina; or (b) penis; or (c) anus; or (d) breast; or

C. Accused with sexual intent does any other act besides those mentioned above which involves physical contact without penetration."

24. The Hon'ble Apex Court presided by Hon'ble Three Judges, while delivering judgment in the case of Attorney General of India v. Satish and another in Criminal Appeal No.1410 of 2021 reported in (2022) 5 SCC 545, has elaborately but lucidly and succinctly dealt with the words and phrases like "sexual assault"; "sexual intent"; discussed the dictionary meanings of words "touches"; "physical contact" and has thereby unanimously held as discussed hereunder :

"34. Now, from the bare reading of Section 7 of the Act, which pertains to the "sexual assault", it appears that it is in two parts. The first part of the section mentions about the act of touching the specific sexual parts of the body with sexual intent. The second part mentions about "any other act" done with sexual intent which involves physical contact without penetration. Since the bone of contention is raised by Ld. Senior Advocate, Mr. Luthra with regard to the words "touch", and "Physical Contact" used in the said section, it would be beneficial first to refer to the dictionary meaning of the said words.

35. The word "touch" as defined in the Oxford Advanced Learner's Dictionary means "the sense that enables you to be aware of things and what are like when you put your hands and fingers on them". The word "physical" as defined in the Advanced Law Lexicon, 3rd Edition, means "of or relating to body....." and the word "contact" means "the state or condition of touching; touch; the act of touching.....". Thus, having regard to the dictionary meaning of the words "touch" and "physical contact", the Court finds much force in the submission of Ms. Geetha Luthra, learned senior Advocate appearing for the National Commission for Women that both the said words have been interchangeably used in Section 7 by the legislature. The word "touch" has been used specifically with regard to the sexual parts of the body, whereas the word "physical contact" has been used for any other act. Therefore, the act of touching the sexual part of body or any other act involving physical contact, if done with "sexual intent" would amount to "sexual assault" within the meaning of Section 7 of the POCSO Act."

25. Bearing in mind the above observations and revisiting the act allegedly indulged into by appellant and narrated by victim herself, in the considered opinion of this Court, an offence of sexual assault is apparently made out calling

for awarding punishment as provided under Section 8 of the POCSO Act.

26. In the totality of the circumstances, here accused appellant, who was engaged as a tutor to impart education, has victimized a girl of 11 years, who had approached him to gain knowledge. He has made her stay back, closed the door, and has undressed her. Such circumstances clearly show that he had sexual intent. His act of touching her breast, urinal place of the girl as well as his own, leaves no manner of doubt about his sinister motive. Offence of sexual assault is clearly made out and therefore, he is liable to be held guilty for such offence.

27. Appellant was tried and convicted by the learned Additional Session Judge, Shahada by order dated 14-06-2018 and since then he is in prison. Now, his conviction under Section 376(2)(m) of the IPC and under Section 6 read with 5 of the POCSO Act has been set aside and he is held guilty for offence under Section 7 read with Section 8 of the POCSO Act. Section 8 of the POCSO Act provides punishment in the range of 3 years to 5 years. Resultantly, considering the circumstances in which incident has taken place, he is liable to suffer maximum sentence of five years. Accordingly, I proceed to pass following order :

ORDER

(i) Criminal Appeal No.1103 of 2019 is partly allowed.

(ii) The conviction and sentence awarded by the Additional Sessions Judge, Shahada in Sessions Case No.51 of 2016 on 14-06-2018 to appellant Rajesh S/o. Rajan Nair for the offence punishable under Section 376(2)(m) of the IPC and Section 6 read with 5 of the the POCSO Act, stands set aside.

(iii) Instead, appellant Rajesh S/o. Rajan Nair is hereby convicted for commission of offence punishable under Section 7 read with Section 8 of the POCSO Act and is hereby sentenced to suffer rigorous imprisonment for five years.

(iv) Order of the trial Court as regards to payment of fine amount is maintained.

(v) Set off as provided under Section 428 of the Code of Criminal Procedure, if entitled to, be given to the appellant.

(vi) It is clarified that there is no change in rest of the order of the trial Court.

(vii) As appeal itself is decided, Criminal Application No.3284 of 2019 does not survive and accordingly, it is disposed of.