
(2016) 08 BOM CK 0008
In the Bombay High Court
Case No : Criminal Appeal No. 412 of 2014

Ravi Anandrao Gulpude

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-08-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 506
Protection of Children from Sexual Offences Act, 2012 — Section 3(a), 4, 5(1), 5(j)(ii),
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Citation : (2016) 3 AIRBomRCri 218 : (2017) ALLMRCri 1509 : (2017) 3 MhLJCri 354

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. R.M. Daga, Advocate, for the Appellant; Mr. N.B. Jawade, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

V.M. Deshpande, J.—The appellant is convicted for the offence punishable under Section 3 (a) punishable under Section 4 and for the offence under Section 5 (j) (ii) and 5 (I) punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012, by the learned Special Judge, Warora on 21.04.2014 in Special (POCSO) Case No. 2/2013 and directed that the appellant shall suffer imprisonment for life and pay a fine of Rs. 5,000/- and in default to undergo rigorous imprisonment for six months. The appellant is further convicted for the offence punishable under Section 506 of the IPC and sentenced to suffer rigorous imprisonment for one year.

2. The prosecution case as it is unfolded during the course of trial is narrated hereunder:

(a) On 09.09.2013, Siddhanand Mandavkar (PW7) was discharging his duties as Police Inspector at Police Station, Bhisi. On the said day at 2.00 p.m. the prosecutrix along with her father Bhagwan Gongal (PW5) came to Police Station.

The prosecutrix lodged her oral report. It was reduced into writing as per her say. The oral report is at Exh.52.

On the basis of the said, Siddhanand (PW7), registered the offence against the appellant vide Crime No. 45/2013 for the offence punishable under Section 376, 506 of the IPC and under Section 4 and 6 of the POCSO Act (Hereinafter referred to as the "Act" for the sake of brevity). The printed FIR is at Exh.13.

(b) The oral report of the prosecutrix shows that when she was residing at mouja Panjrepar, Dist. Chandrapur in the month of March 2013, her father had been to her elder sister Pushpa who stays outstation. The Prosecutrix had been to her agricultural field for grazing her she goats. That time, at about 2.00 p.m. the appellant suddenly came from her behind and forced her to fell down. She raised hue and cry, then started running towards the village. That time the appellant followed her and thereafter committed forcible sexual intercourse with her. After the sexual assault, he extended the threats to her. In the evening, the prosecutrix returned to her house. However, since, her father was out of station, she could not narrate the incident to anybody.

On the second day also, the appellate repeated his act on the prosecutrix. Not only that, he continued to fulfil his lust for a period of three days.

It is further stated in the FIR that thereafter whenever father of the prosecutrix was not available in the house, the appellant used to commit sexual intercourse in her agricultural field. In the month of May, the marriage of the appellant took place and he left along with his wife. Thereafter, the prosecutrix noticed that she is pregnant. When the pregnancy became visible, her father gave courage to her and thereafter the report was lodged.

(c) The Investigating Officer, after registration of crime, sent the prosecutrix to Primary Health Centre, Bhis. However, her medical examination could not be done there. Therefore, she was sent to the Rural Hospital, Chimur under requisition Exh.44. He arrested the appellant on 09.09.2013 under arrest memo Exh.55. On 10.09.2013, the Investigating Officer visited the spot of incident. The spot was shown by the prosecutrix. The spot panchanama was drawn in presence of pancha witness Nanaji Lokhande (PW2), which is at Exh.17. He also recorded statement of some witnesses. He also sent the appellant for medical examination. All the formalities for DNA test were also completed. He thereafter obtained birth certificate from Sarpanch of the Gram Panchayat. The Prosecutrix was sent to the General Hospital from Chimur hospital. She gave birth to one female child. The blood sample for DNA test was also collected. On 27.09.2013, the Investigating Officer received the information that newly born child is dead. Therefore, he registered Accidental Death No. 32/2013 and sent the dead body of autopsy. After completion of other investigation, charge-sheet was filed before the Court of law.

(d) The J.M.F.C. in whose Court, the charge-sheet was presented found that the offence is exclusively triable by the Court of Sessions. Therefore, the case was

committed in the Court of Special Judge, Warora, Dist. Chandrapur and it was registered as Special Case No. 2/2013.

(e) The learned Special Judge framed the charge against the appellant for the offence punishable under Section 5 (j) (2) and 5 (c) punishable under Section 6 of the Act. Similarly, the appellant was also charged for the offence punishable under Section 506 of the IPC. After full dress trial, the learned special Judge convicted the appellant as observed in the opening paragraph of the judgment. Hence, this appeal.

3. We have heard Mr. Daga, learned counsel for the appellant and Mr. Jawade, learned A.P.P. for the State. The learned counsel for the appellant vehemently submitted that the prosecution has utterly failed to prove the age of the prosecutrix. In that view of the matter, he submitted that the conviction of the appellant for the offence punishable under the Act cannot stand to the scrutiny of law. Insofar as conviction under Section 506 of the IPC is concerned, he submitted that the evidence of the prosecutrix is not reliable for not disclosing the incident for a long time.

Per contra, learned A.P.P. submitted that the learned Special Judge has evaluated the prosecution case correctly and has recorded the correct finding of guilt committed by the appellant. Hence, he prays for dismissal of the appeal.

4. Though, the FIR and charge-sheet was filed against the appellant for the offence punishable under Section 376 of the IPC in addition to the offence for which the appellant is convicted, the learned Special Judge did not frame the charge against the appellant for the offence punishable under Section 376 of the IPC. The said omission of not framing the charge under Section 376 of the IPC was not challenged by the prosecution. Further, even during the course of the trial, though it was open for the learned Special Judge to alter the charge in view of the provisions of Section 216 of Cr. P.C., it was not altered.

5. The prosecution, in the present case, has proved that the prosecutrix gave birth to a female child. The scientific evidence in the nature of DNA test which is placed on record at Exh.63, shows that the prosecutrix and the present appellant are the biological parents of the baby of the prosecutrix. In that view of the matter, the sexual intercourse with the prosecutrix by the appellant is a foregone conclusion.

6. The question that has to be decided by this Court is as to whether the prosecution is successful to establish the charge, which was framed against the appellant.

7. It would be useful to refer few provisions of the Act for apt consideration of the submission made by the learned counsel for appellant.

The Parliament has enacted the Act, 2012 in order to protect children from the offence of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters

connected therewith or incidental thereto. The act extends to the whole of India except the State of Jammu and Kashmir.

Clause (d) of Section 2 of the Act reads as under:

"(d) "child" means any person below the age of eighteen years."

Section 5 deals with the aggravated penetrative sexual assault. Clause (j) of Section 5 reads as under:

"(j) whoever commits penetrative sexual assault on a child, which

(i)

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;"

Clause (l) of Section 5 reads as under:

"(l) whoever commits penetrative sexual assault on the child more than once or repeatedly."

Section 6 provides for punishment for aggravated and penetrative sexual assault as enumerated in Section 5 of the Act.

From the aforesaid provisions, it is crystal clear that the prosecution is under bounden duty to prove that the victim is a child. Unless the prosecution successfully establishes that the victim is a child within the meaning of clause (d) of Section 2 of the Act, a person cannot be convicted for the offence punishable under Section 6 of the Act.

8. In the present case, the FIR is dated 09.09.2013. The FIR is silent about the date of birth of the prosecutrix though she has stated that her age is 17 years. She gave her date of birth during her evidence as 23.08.1995. Her evidence is recorded on 26.11.2013. Worth to note here that prior to recording of her evidence, nowhere the prosecutrix has disclosed her date of birth. Though, the Investigating Officer has stated in his cross-examination that after giving report, when he made inquiry with the prosecutrix, she gave her date of birth. However, there is nothing available on record to substantiate the said claim of the Investigating Officer.

9. The provisions of the Act are stringent in nature. Even there is a statutory presumption under Section 29 of the Act. Since the enactment is stringent in nature, the degree of proof is more strict. The prosecution is under bounden duty to prove the age of the prosecutrix to show that at the time of the incident, the prosecutrix was "Child" within the meaning of provisions of the Act. The burden is on the prosecution to prove that the age of the prosecutrix, on the date of the occurrence, was less than 18 years. As observed above, at the first opportunity, the date of birth of the prosecutrix is not available in the prosecution case. The Investigating Officer has given a requisition to Sarpanch of Gram Panchayat, Panjarepar by which the Sarpancha was requested by the Investigating Officer to

furnish the birth certificate of the prosecutrix. The said requisition is at Exh.56. It is dated 25.09.2013 and it appears that it was sent under Outward No. 100/2013.

The prosecution has placed on record, the birth certificate issued by the Birth and Death Record Officer, Gram Panchayat, Panjarepar. The said certificate is at Exh.57. According to the Investigating Officer, the said is obtained by him from Gram Panchayat.

The document Exh.57, the birth certificate is issued on 16.09.2013. It shows that it is in respect of one female, "Bali". The date of birth is 23.08.1995.

10. The learned A.P.P. submitted that this particular certificate is a conclusive proof to show that the date of birth of the prosecutrix was 23.08.1995 and, therefore, on the date of incident in March 2013, her age was 17 years 5 months and thus she was below 18 years of age and was child within the meaning of the Act.

11. Though, under Section 35 of the Evidence Act, this document is having its presumptive value, we are afraid that for the following reasons, reliance cannot be placed on Exh.57 to determine the date of birth of the prosecutrix as 23.08.1995.

"(A) The prosecutrix has stated in her evidence that she is having one brother and three sisters. The said fact is also corroborated by her sister Savita (PW4) and her father Bhagwan. (PW5). The date of birth of any of her sister is not brought on record.

(B) Exh.56 a requisition from the Investigating Officer to the Sarpancha of Gram Panchayat, Panjarepar is dated 25.09.2013. It is not the case of the prosecution that prior to issuance of requisition Exh.56, there was any occasion for the prosecutrix or for her family to obtain the birth certificate in respect of the prosecutrix.

(C) Though, Exh.56 requisition is dated 25.09.2013, Exh.57, birth certificate is issued on 16.09.2013. The birth certificate Exh.57 appears to have been issued even prior to the requisition Exh.56. The prosecution has completely failed to reconcile this situation.

(D) Further, Exh.57 shows that the name of the child as "Bali". Normally, when the birth certificate is obtained immediately after the birth i.e. even prior to the naming ceremony, the pen name appears on the said certificate. However, in the present case, even according to the prosecution, the date of birth is 23.08.1995 and the birth certificate is not issued in the name of the prosecutrix. Neither it is stated in the FIR nor in the substantive evidence, the prosecutrix deposed that she is also known as "Bali". Further, Savita (PW4) and Bhagwan (PW5) sister and father of the prosecutrix are also completely silent in that behalf. Not only that, the evidence of these witnesses is conspicuously silent on the point that any other sister of the prosecutrix is not known as "Bali".

(E) In view of the aforesaid, it is really doubtful that the birth certificate Exh.57

pertains to the prosecutrix and the prosecutrix alone. Further, there is no evidence available in the prosecution case that there is only one Bhagwan Maroti Gangal in the village, who is shown to be the father of Bali. These all were required to be proved by the prosecution in view of the stringent provisions contained in the Act.

In view of the aforesaid, we are of the opinion that, it would be hazardous to accept Exh.57, the birth certificate as the birth certificate of the prosecutrix. Further, the prosecutrix is giving her date of birth only during the course of her evidence, which was recorded after obtaining certificate Exh.57 by the Investigating Officer and in absence of non disclosure of her date of birth at the first opportunity, much reliance cannot be placed on her evidence in respect of the date of birth also.

12. Once the aforesaid evidence in respect of the date of birth goes, then it is crystal clear that the prosecution has utterly failed to prove that the prosecutrix was child on the date of the incident within the meaning of the provisions of the Act. Once, the prosecution has failed to prove that she was child, consequently, the applicant cannot be convicted for the offence for which he was charged under the provisions of the Act and is entitled to be acquitted.

13. Insofar as the punishment under Section 506 of the IPC is concerned, the evidence of the prosecutrix as well as the FIR shows that the act of sexual assault continued for number of days and even though her father was available, nothing was disclosed to the father by the prosecutrix and only after the pregnancy became visible, the report was lodged. Therefore, we are of the view that conviction for the offence punishable under Section 506 of the IPC also cannot be confirmed.

14. In view of above, following order is passed.

(i) Criminal Appeal No. 412/2014 is allowed.

(ii) The judgment of conviction and order of sentence dated 21.04.2014 in Special (POCSO) Case No. 2/2013 passed by Special Judge, Warora, thereby convicting the appellant Ravi s/o Anandrao Gulpude for the offence under Section 3 (a) punishable under Section 4; for the offence under Section 5 (j) (ii) and 5 (l) punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012 and for an offence punishable under Section 506 of the Indian Penal Code is quashed and set aside.

(iii) The appellant be set at liberty forthwith, if not required in any other crime.