

(2018) 12 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 124 Of 2018

Rupesh Parasram Nehare

APPELLANT

Vs

State Of Maharashtra, Thr. P.S.O. P.S. Chimur, Chandrapur

RESPONDENT

Date of Decision : 03-12-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 363, 366A, 376
Protection of Children from Sexual Offences Act, 2012 — Section 2(1)(d), 3(a), 4, 5(1), 6
Evidence Act, 1872 — Section 35

Citation : (2018) 12 BOM CK 0014

Hon'ble Judges : V.M. Deshpande, J

Bench : Single Bench

Advocate : S. B. Khobragade, S. M. Ghodeswar

Final Decision : Dismissed

Judgement

1. By the present appeal, the appellant is challenging the judgment and order of conviction passed by the learned Special Judge, Warora in Special

(POCSO) Case No. 05 of 2015 on 27.4.2016. By the impugned judgment, the appellant stands convicted for the offence under Section 5(1) punishable

under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POSCO Act" for short) and for

that he is directed to suffer rigorous imprisonment for Ten years and to pay a fine of Rs.1,500/— and in default to suffer simple imprisonment for eight

months. He is also convicted for the offence punishable under Section 363 of the Indian Penal Code and he is directed to suffer rigorous imprisonment

for three years and to pay a fine of Rs.500/— and in default of payment of fine, to undergo simple imprisonment for three months. The appellant is also

convicted for the offence punishable under Section 366A of the Indian Penal

Code and he is directed to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000/ and in default of payment of fine, to undergo simple imprisonment for six months. Similarly, he is convicted for the offence punishable under Section 376 of the Indian Penal Code and under Section 3(a) punishable under Section 4 of the POCSO Act, however no separate sentence was awarded for the same. The Court below has directed that all the sentences shall run concurrently.

2. Initially, the appellant along with one Pramod Wasnik were charged for the offence punishable under Sections 363, 366 read with Section 34 of the Indian Penal Code so also under Section 3(a) read with Section 5(1) and under Section 4 punishable under Section 6 of the POCSO Act and also under Section 376 of the Indian Penal Code. However, by the impugned judgment, the Court below has acquitted the original accused no.2 Pramod Wasnik from all the charges. Though, accused Pramod Wasnik is acquitted from all the charges, the State has not preferred any appeal challenging his acquittal.

3. The prosecution case, in short, is as under :

Victim PW1, a minor girl, was kidnapped by the appellant and she was taken from one place to another and during the stay of about nine days, the appellant committed sexual intercourse against her wish.

4. Since, the victim failed to return to the house, her mother Smt. Kaushalyabai (PW4) initially took the help of her relatives to trace her daughter, however, in vain. Therefore, on 20.10.2014, she lodged her oral report with Police Station, Chimur (Exh.32) on the basis of which a crime was registered vide Crime No 115 of 2014 under the relevant sections of the Indian Penal Code and the POCSO Act. The investigation was conducted by API Moreshwar Meshram (PW9). He has done all the investigation and filed the charge sheet in the Court of law.

5. In order to bring home the guilt of the appellant, in all nine witnesses were examined by the prosecution.

6. It is the submission of the learned counsel for the appellant Ku. S.B. Khobragade that in the present case, the victim (PW1) herself was a consenting party and she on her own eloped with the appellant and therefore, she cannot be said to have been kidnapped by the appellant. It is also her submission that though, for good nine days the victim girl was staying with the

appellant and though, she was having all opportunity to resist and to point out that against her wish the appellant has taken her from one place to another and has committed sexual intercourse against her wish, the same has not been done. According to the learned counsel, that shows that the victim has extended her consent for having sexual relations with the appellant. It is also submitted that there is a delay in lodging the first information report and therefore, the false implication at the behest of the victim and her mother cannot be ruled out, especially when during their cross-examination, it was suggested to them that there was some monetary dispute.

She, therefore, submitted that the appeal be allowed and the appellant be released from jail.

7. Per contra, Mr. S.M. Ghodeswar, the learned Additional Public Prosecutor for the State would submit that if the entire prosecution case is scanned closely, then it would reveal that on the day of the incident, the victim was a child and therefore, even assuming for the sake of argument that there was a consent on the part of the girl, such consent is having no value in the eye of law and it cannot be termed as consent. He also submitted that the prosecution has established by cogent evidence the date of birth of the victim.

8. Out of total nine witnesses examined by the prosecution, PW2 Ashok Thakre and PW3 Ashok Randive are panch witnesses. They have proved the spot panchanama Exh.28 and Exh.30 respectively. Exh.28 shows that the spot is a house situated at Mouza Kolar, whereat the appellant has committed rape on the victim girl. In this house, the appellant took one room on rent. Exh.30 is the spot panchanama in respect of the agricultural field of one Vitthal Nannaware. In this agricultural field, the initial forcible sexual intercourse took place.

9. PW5 Keshav Nannaware and PW6 Vinod Randive are the relatives of Kaushalyabai (PW4), the mother of the victim. Their evidence would show that Kaushalyabai had been to them and informed that after the victim girl left the house for attending nature's call, she failed to return. Their evidence would show that search was taken. Even they went to the house of the appellant, however, the appellant or the victim was not found there. PW4 is Smt. Kaushalyabai. She is the mother of the victim. Her evidence would reveal that her husband is mentally ill. Therefore, she was residing at village

Manjara along with her mother and the victim was her elder daughter. At the relevant time, the victim was taking education in 9th standard. Her

evidence shows and it is not at all disputed that the appellant and the acquitted accused used to come to the house of one Rane, her neighbour, for

construction work. Her evidence would show that the appellant used to tease her daughter under the influence of liquor. This fact was communicated

by Smt. Kaushalyabai to Shri Rane, however without yielding any positive result.

PW4 Kaushalyabai's evidence further show that on the day of Kojagiri at about 8.00 pm, the victim left the house by telling Kaushalyabai that she is

going to answer nature's call, however, she failed to return. Therefore, she including PW5 Keshav, PW6 Vinod and others made a search, even in the

house of the appellant. She further ultimately lodged the report (Exh.32), on the basis of which, the first information report was lodged. The printed

first information report is at Exh.33. According to the evidence of PW4 Kaushalyabai, the age of her daughter, the victim, was below 16 years.

10. The main witness in the present prosecution case is the victim herself. She is examined as PW1. Her evidence would show that at the relevant

time, she was residing with her mother and grandmother at village Manjara and she was taking education in 9th standard.Â She was knowing the

appellant since he used to come to the house of one Wamanrao Rane for doing labour work. The identity of the appellant was never in question and

was never challenged by the defence either during the course of the trial or even before this Court. According to the victim, on 07.10.2014, she left

the house for answering nature's call. At the time of returning from the same, the appellant came on the motorcycle and extended threat that if she

does not accompany him, he will kill his mother and grandmother. Therefore, out of fear she sat on the motorcycle and accompanied the appellant. As

per her evidence, the appellant took her firstly in the agricultural field of one Nannaware and there he committed forcible sexual intercourse and from

there she was taken to Navegaon at his house. When they reached in the night at that time, the family members of the appellant were sleeping.

Therefore, he took her on the slab of the house and at about 4 O'clock in the morning, he took her to Umred in the house of one Pramod Wasnik

(acquitted accused). It is her evidence that the appellant was asking her to marry with him, however, the said was stoutly refuted by the victim by

saying that she has not attained the age of marriage and she is taking education. It is her evidence that in spite of resistance, sexual intercourse was done by the appellant against her will. During the course of the investigation, the victim was sent to Civil Hospital, Chandrapur for her medical examination. There, she was examined by PW7 Dr. Dipti Shrirame. As per the evidence of PW7, she took history from the victim girl there. As per the evidence, the victim gave history that her boy friend Rupesh Nehare and she eloped on 07.10.2017 and married on next day and had sexual intercourse on 3-4 occasions and thereafter, they returned on 21.10.2014. Thereafter, on 22.10.2014, she was medically examined. From the line of cross-examination of the prosecution witnesses and even before this Court, it is the submission on the part of the appellant that though, there were sexual relations between the appellant and the victim girl, the said was with the consent of the victim girl.

11. According to the prosecution, the victim was unable to give any consent since she was a 'Child' within the meaning of the provisions of the POCSO Act.

12. In view of the rival contentions, this Court is required to decide as to whether the girl was a 'Child' within the meaning of the provisions of the POCSO Act. If the victim is a 'Child', then the theory of consent extended by the victim as sought to be put forth before this Court, will be meaningless. However, if the Court finds that the victim is not a 'Child', then from the evidence of the victim, there may be a grain of truth and in that event the benefit will have to be extended in favour of the appellant.

13. As per the provision of Clause (d) of sub-section 1 of Section 2 of the POCSO Act, the definition of 'Child' is as under :

'(d) Child' means any person below the age of eighteen years .

14. In the present case, though the date of birth is not stated in the first information report, in Exh.32 (oral report) mother Kaushalyabai (PW4) has stated the age of the girl as 14 years. Further, in the examination-in-chief itself, the victim has given her date of birth as 20.12.2000.

15. Though, the victim has specifically stated her date of birth, there is no cross-examination whatsoever to the specific assertion made by the victim in her examination-in-chief. In fact, her said statement has totally gone unchallenged. In that view of the matter, the learned Additional Public

Prosecutor Shri S.M. Ghodeswar is right in placing reliance on the Division Bench judgment of this Court in the case of Kundan S/o Nanaji Pendor

.vs. State of Maharashtra, reported in 2017 All M.R. (Cri.) 1137. In the said case also, though the victim specifically gave her date of birth in her

examination. In chief, there was no cross-examination whatsoever in nature. Therefore, the assertion made by the victim gone unchallenged and

therefore, after having survey of various decisions of the Hon'ble Apex Court, this Court in the said case ruled that there is no option for the Court but

to record a finding by accepting the version of the victim girl.

16. In the present case, in addition to that, the Investigating Officer during the course of investigation has collected the birth certificate (Exh.65). Prior

to obtaining the birth certificate, the Investigating Officer gave requisition to the Sarpanch of Gram Panchayat, Khadsangi and demanded the birth

certificate of the victim. The birth certificate (Exh.65) corroborates the statement of the victim, which she made during her examination. In chief that

her date of birth is 20.12.2000. Exh.65 documentary evidence is coming on record from proper custody. The said is issued by the appropriate authority

and therefore, the said is admissible under Section 35 of the Evidence Act. In addition to that, the defence could not point out during the course of the

trial that PW9 API Moreshwar Meshram, the Investigating Officer, has illegally or without following the procedure has procured the said birth

certificate. In that view of the matter, in my view, the Court below has correctly recorded the finding which I affirm on re-appreciation that the

prosecution has ably proved the date of birth of the victim (PW1) as 20.12.2000.

17. Since, the date of birth of the victim is 20.12.2000 and initially she left her house for answering nature's call on 07.10.2014 and when returning she

was forcibly taken by the appellant, that time she was minor even below age of 16 years. Since, the appellant by using force in the nature of extending

threat to the victim took her with him, a finding will have to be recorded that the victim was taken away from the lawful custody of her mother and

therefore, the appellant has committed the offence punishable under section 363 of the Indian Penal Code.

18. The evidence of the victim shows that after she was taken away, against her wish, sexual intercourse was done by the appellant. Since, the victim

was a Child at the time of incident in question, the Court below, in my view, has

rightly punished the appellant by recording a finding that the prosecution has proved the charges framed against the appellant.

19. On reÂAppreciation of the entire prosecution case, I see no reason to upset the judgment delivered by the Court below. Consequently, I dismiss the appeal. The judgment and order of conviction passed by the learned Special Judge, Warora in Special (POCSO) Case No. 05 of 2015 on 27.4.2016 is hereby confirmed.