

(2023) 04 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 246 Of 2018

Vijay

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 03-04-2023

Acts Referred:

Protection Of Children From Sexual Offences Act, 2012 — Section 5,5(I), 6, 7, 8, 12, 17, 29
Indian Penal Code, 1860 — Section 109, 212, 354A, 363, 366, 376, 366
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 35

Citation : (2023) 04 BOM CK 0009

Hon'ble Judges : Nitin B. Suryawanshi, J

Bench : Single Bench

Advocate : Ravindra Nirmal, R.P. Gour, G.A. Kulkarni

Final Decision : Partly Allowed

Judgement

Nitin B. Suryawanshi, J

1. The appellant/accused is convicted by the learned Additional Sessions Judge, Parbhani in Special Case (POCSO) No. 23 of 2014 by the judgment and order dated 09/02/2018 as follows:-

(I) For offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 sentenced to suffer rigorous imprisonment for 15 years and further to pay fine of Rs. 500/- and in-default of payment of fine amount simple imprisonment for one month;

(II) For offence punishable under section 363 of the Indian Penal Code sentenced to suffer rigorous imprisonment for 5 years and pay fine of Rs.500/- in-default simple imprisonment for one month;

(III) For offence punishable under section 366 of the Indian Penal Code sentenced to suffer rigorous imprisonment for 5 years and to pay fine of

Rs.500/- in-default simple imprisonment for one month;

(IV) For offence punishable under section 12 of the Protection of Children from Sexual Offences Act, 2012 sentenced to suffer rigorous imprisonment for 2 years and to pay fine of Rs. 500/- in-default simple imprisonment for one month.

The appellant has challenged this conviction.

2. Prosecution case in short is that, father of the victim has two daughters. Victim aged 15 years and younger daughter aged 2 years. Victim was taking education at Parbhani. Accused Vijay used to harass the victim. Therefore, on 20/02/2014, he sent victim with his brother Narsing at Lohgaon. On 25/02/2014, his brother brought victim back to his house. At about 1.00 p.m., when his wife was sleeping, at that time, accused Vijay abducted victim by giving promise of marriage. He was informed by his wife at about 1.30 p.m. Thereafter, he took search of his daughter, however, she could not be found. Therefore, he lodged a report at Kotwali Police Station, Parbhani on 26/02/2014. He had also lodged report about accused Vijay harassing victim at Kotwali Police Station on 03/02/2014. On the basis of report dated 26/02/2014, Crime No. 35 of 2014 for offences punishable under sections 363, 366 of the Indian Penal Code and under sections 7, 8 of the Protection of Children from Sexual Offences Act, 2012 was registered. During the course of investigation, it was transpired that accused Vijay committed rape on victim, and co-accused has abated the crime and harboured accused No.1 Vijay. On completion of investigation, charge-sheet was filed.

3. Charge under sections 376, 354-A, 326B, 366, 212, 109 of the Indian Penal Code and under sections 5 and 16 punishable under sections 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') was framed against the applicant. He denied the charge.

4. In support of it's case, the prosecution has examined 12 witnesses. The defence of accused is total denial. In the written statement submitted by him under section 313 of the Code of Criminal Procedure, he has stated that he is a married person having 2 children. Victim had one-sided love on him. Though his wife and others tried to convince the victim, she was not ready to listen to anybody, and she tried to commit suicide in which her hand was burnt. Her parents were afraid that they have might be implicated in offence because of her attempt to commit suicide, therefore false case is filed against him.

5. Heard the learned advocate for the appellant, learned Additional Public Prosecutor for the respondent No.1 - State and learned advocate for respondent No.2.

6. Learned advocate for the appellant submits that the prosecution has failed to prove that the victim was minor on the date of incident. The evidence brought on record by the prosecution to prove birth date of the victim is inconsistent. Though the Headmaster is examined to prove birth date recorded in school

record, the person who took entry in earlier school record of the victim is not examined. Two documents placed on record to prove the birth date of the victim had different information. By relying on *Ravi Anandrao Gulpude Vs. State of Maharashtra*, 2017 ALL MR (Cri.) 1509 and *Deelip Singh @ Dilip Kumar Vs. State of Bihar*, (2005) 1 SCC 88, he submits that prosecution has failed to prove that victim was minor on the date of incident. He submits that there are omissions and contradictions in the evidence of victim. Both certificates show difference birth place of victim. He submits that the medical evidence does not support the prosecution, because the medical officer who has examined the victim has stated in his cross that she has mentioned sexual relations of appellant and victim at the instance of police and relative of victim. The prosecution has failed to prove the charge beyond reasonable doubt. The trial court has committed an error in convicting the appellant in absence of sufficient material on record. The trial court has erroneously appreciated the evidence, and has wrongly convicted the appellant.

7. Further submission is that, as of date, the appellant has undergone 5 years imprisonment. If this Court comes to a conclusion that appellant has committed offence, then he may be released on sentence already undergone.

8. Learned Additional Public Prosecutor supported the impugned judgment and order of conviction, she submits that prosecution has proved that the victim was below 18 years, and hence her consent is immaterial. In missing report also, victim's age is mentioned as 15 years. Victim has also stated that she was 15 years old on the date of incident. According to her medical evidence supports the prosecution case. For 4 months, the victim was with the appellant, and he has committed repeated sexual assault on the victim, which amounts to aggravated penetrative sexual assault under section 5(I) of the Protection of Children from Sexual Offences Act. Under section 6 of the said act, punishment up to 20 years is prescribed. At the time of commission of offence, punishment prescribed was not less than 10 years, but which may extend to imprisonment for life. In the present case, only 15 years imprisonment is awarded to the appellant. She submits that appellant was married at the time of incident, which circumstance needs to be held against the appellant.

She submits that the trial court has rightly appreciated the evidence, and has convicted the appellant. No case is made out by the appellant to interfere in the impugned judgment and order of conviction.

9. Learned advocate for respondent No.2/victim submits that bona fide certificate of the victim and birth certificate are proved on record, which are relevant under section 35 of the Evidence Act. Her birth certificate corroborates admission register on the point of date of birth. Further submission is that, no question was asked in cross-examination to the victim's mother about the birth certificate. By relying on *Phool Singh Vs. State of Madhya Pradesh*, (2022) 2 SCC 74, he submits that conviction can be based on sole testimony of the victim/prosecutrix, when her deposition is found to be trustworthy, unblemished, credible and her

evidence is of sterling quality. According to him, in the present case, evidence of the victim is found to be trustworthy and credible, hence the trial court has rightly convicted the accused. By relying on *Ranjit Hazarika Vs. State of Assam*, (1998) 8 SCC 635, he submits that mere non rupture of hymen or absence of injury on victim's private part does not belie her testimony. According to him, case of *Deelip Sing @ Delip Kumar* (supra) relied by the appellant is decided before the POCSO Act came into force, hence that judgment would not help the accused. He, therefore, submits that there is no merit in the appeal and appeal is liable to be dismissed.

10. Heard the learned advocate for the appellant, learned Additional Public Prosecutor for the respondent No.1 - State and learned advocate for respondent No.2 at length. Perused the record and the citations relied upon by the respective parties.

11. To prove its case, the prosecution has examined PW-4/victim. She deposed that at the time of incident her age was 15 years, and she was in 9th Standard. Their neighbour Kaviraj Mate was having a car and accused Vijay was driver on his car. She used to go to school on her bicycle. Accused Vijay used to stay outside the school and used to talk with her. She narrated this fact to her parents due to increase of behaviors of Vijay, her father lodged report against him. Even thereafter, he used to harass her. Thereafter, on 27/01/2014, accused took her on motorcycle of Datta Mate and had taken her at Aundha Nagnath. He assured her to perform marriage and that he will keep her happy. Thereafter, when she was going to school, Vijay threatened her that if she did not love him then he will kill her, and her father. On 20/02/2014, due to harassment of accused, her father reached her to the house of her uncle at Lohgaon. She returned from there on 25/02/2014 at noon time. At 1.00 p.m., when her mother was sleeping, accused came in her house with knife, he threatened her to come with him. He took her to the house of one Mule situated at Shastri Nagar, Jawala Bazar, Tq. Aundha. His brother was residing there with a girl kidnapped by him. Accused sold her silver foot chain and fetched Rs.700/- and purchased Mani Mangalsutra, ear rings and foot finger ring. He put her those ornaments and in that night he told her that she is his wife, and he is her husband. Then he established physical relations with her. She sustained pain due to physical contact for number of days. Due to pain there was bleeding. Thereafter, he was kept daily physical contact with her. After one month, he took her to Aurangabad to the house of one Mohd. Shaikh Hasan, a Contractor. His house was situated at Mouje Balapur, Tq. Paithan out of Aurangabad City. There also the accused kept physical contact with her. Due to the physical contact, on ground, victim complained of backache. The parents of the accused were residing at Akhada of Mujju Seth at Balapur Shiwar. He took her there and kept physical contact with her there also. His parents were continuously keeping watch on her. There was mosquito problem at Akhada, for that they used to burn wood. Since she declined for physical contract, accused burnt her hand with burning wood. On 22/06/2014, Parbhani Police took her, Vijay and his brother in custody. When they were taken in police jeep, accused

threatened her to tell lie to the police that initially they were at Pune at the house of Vivek, a truck driver. Under his pressure, she told the police accordingly.

In cross-examination, following omissions are brought on record:

- (a) "accused stated that he will sustain jail".
- (b) "On 20/02/2014, due to harassment of Vijay, my father reached me to the house of her uncle at Lohgaon."
- (c) "I had returned on 25/02/2014 at noon time".
- (d) "he took me to the house of one Mule situated at Shastri Nagar, Jawala Bazar, Tq. Aundha".
- (e) "he sold out my silver foot chain and fetched Rs.700/- and purchased Mani Mangalsutra, ear rings and foot finger ring".
- (f) "he was taken me to Aurangabad to the house of one Mohd. Shaikh Hasan, a Contractor. His house was situated at Mouje Balapur, Tq. Paithan out of Aurangabad City".
- (g) "at the Balapur the accused No.1 used to keep physical contact with me against my will".
- (h) "as at the Akhada there was mosquito problem so wood was burn. As I declined for physical contact so he burnt my hand with burning wood".
- (i) "she can not state as to why the above facts are not reflected in her statement".

She claimed that all the above statements were made by her to police.

She has further stated that name of her mother was Rajashree, and she is no more. She expired in the year 2006. Name of her step mother is Sakhu. She has not informed to Mate Sir that accused Vijay was harassing her. She did not shout on 25/02/2014, when the accused had shown knife to her. She denied the suggestion that when she was admitted in the 1st Standard, her age was shown less, and at the time of lodging of report, her age was more than 18 years. She denied the other suggestions of the defence.

12. Father of the victim/informant is examined as PW-3. He has stated that he has two daughters. Victim aged about

15 years, and younger one is 2 years old. Victim is taking education in Raosaheb Jamkar Vidyalaya, Pabhai. Incident is dated 20/02/2014. On that day, he came to know that accused Vijay was harassing his daughter, so he sent his daughter (victim) along with his brother Narsing at Lohgaon. On 25/02/2014, his brother reached victim to his house. At about 1.00 p.m., when his wife was sleeping, at that time, accused Vijay fled away with his daughter Anjali by giving promise of marriage. His wife informed him at about 1.30 p.m. He took search of his

daughter. Thereafter, on 26/02/2014, since his daughter could not be found, he lodged report (Exhibit 30). On 03/02/2014, he lodged report (Exhibit 31) at Kotwali Police Station, Parbhani that accused Vijay used to harass his daughter. He produced bona fide certificate (Article 'A') of victim issued by Raosaheb Jamkar Vidyalaya, Parbhani.

In cross-examination, he admitted that, he had not stated in his report to police that, "my daughter is taking education in Raosaheb Jamkar College and incident took place on 20/02/2014". He admitted that PSI Jukte working at Kotwali Police Station is his brother. He did not remember which documents were submitted while taking admission of victim in the 1st Standard. He did not remember whether he had submitted birth certificate from Grampanchayat or Municipal Corporation. He has not informed to teacher of victim about the harassment by the accused. He did not inform the same to Principal also. He did not lodge written complaint to school. He denied that the victim is major, and she was having one-sided love on accused Vijay, and accused had given understanding to the victim that he is married, and she should concentrate on study. He denied all the suggestions given by the defence.

13. Victim's mother is examined as PW-11. She deposed that incident took place in the year 2014, and at that time, victim was in 9th Standard in Nutan Vidyalaya, Parbhani. Since last some days, accused Vijay was stalking to the victim. He was teasing her by singing song. Victim informed her and her husband. Victim was sent to the house of brother of her husband, on 20/02/2014. On 25/02/2014, Narsing reached victim to Parbhani. On that day, at about 1.00 p.m., when she was sleeping due to headache, and victim was sitting in the drawing room, accused Vijay abducted victim by giving false promise of marriage. She brought on record original birth certificate (Exhibit 42) and Board certificate.

In cross-examination, she deposed that the certificate which she produced on record was brought by her husband from Nasik. She admitted that she did not know what birth date of victim was mentioned in the school. She denied all the suggestions given to her by defence that Anajli had one-sided love, and she tried to commit suicide and received burn injuries.

14. To prove the date of birth, prosecution has examined Headmaster of victim's school as PW-5. He deposed that victim was student of their school namely, Raosaheb Jamkar Secondary and Higher Secondary School, Parbhani. She was studying in 9th Standard in academic year 2013-14. He issued bona fide certificate (Exhibit 43) to show that she was studying in their school. Birth date of victim in the said certificate is recorded as 22/06/1999. He mentioned the birth date on the basis of school leaving certificate issued by Sharda High School, Parbhani. He produced the original record of Pravesh Nirgam register of the school. The extract of Pravesh Nirgam register is at Exhibit 44.

In cross-examination, he has stated that contents of Exhibit 43 are written by

class teacher Shri Khurdhane. He did not remember the name of police to whom he handed over the certificate. He did not receive any letter, and police had come to collect certificate. He admitted that at the time of taking admission in 1st Standard, birth certificate of student is necessary. He was not aware as to which documents were furnished at the time of taking victim's admission in 1st Standard. He denied that Exhibits 43 and 44 are not as per school record.

15. PW-7 is Pralhad Karhale, resident of informant's colony. He deposed that he knew Mate sir and other persons residing in their colony. He also knows the victim. She was taking education in 9th Standard at Nutan Vidyalaya, Jintur Road, Parbhani. He knew accused, who was driver on the car of Mate sir. Accused had kidnapped victim on 25/02/2014. On 24/02/2014, informant had given understanding to Mate sir that his driver is misbehaving with his daughter.

In cross-examination, he admitted that informant is his good friend. He also admitted that he did not state to police that, on 22/02/2014, he and informant gave understanding to Mate sir that his driver is misbehaving with his daughter. He has stated that he had seen accused Vijay while misbehaving with victim at Dargah ground. He denied that he is deposed at the instance of informant.

16. PW-2 is the Medical Officer, who examined the victim. On 22/06/2014, victim was brought for medical examination. She has stated that at the time of examination of victim, brief history was taken, which was narrated partly by relative, partly by victim and partly by ASI Panchal. She conducted victim's medical examination. On medical examination, there was no any evidence of injury in respect of labia majora and labia minora. There was no tear on fourchette. Perineum is normal. Hymen is torn. Victim had given history of repeated sexual intercourse with her. Since victim was having menstrual bleeding, she called victim again after two days. On 25/06/2014, she again examined victim, at that time she collected blood sample, pubic hair and vaginal swab for chemical analysis, and the samples were handed over to ASI Panchal. She reserved her opinion till chemical analysis reports are received. In the chemical analysis report, in sample of vaginal swab no semen was detected as duration between commission of offence and collection of swab was more. She proved medical certificate (Exhibit 27) and chemical analysis report (Exhibit 28).

In cross-examination, she deposed that she did not conduct any examination for age determination of victim.

Parents were not with the victim, therefore, she did not obtain their consent. She did not mention in medical certificate about burning injury. She admitted that she had mentioned the history of repeated sexual contact at the instance of ASI Panchal and relative of victim. She also admitted that contents of report (Exhibit 27) column Nos. 1 to 7 may be written by Assistant, so there is difference in handwriting. She admitted that hymen may be torn due to cycling or any other reason. She denied suggestions that medical certificate (Exhibit 27) is issued at the instance of ASI Panchal and relative of the victim, and that she is deposing

falsely at the instance of victim's relative.

17. PW-1 is the Medical Officer, who examined the accused and proved medical certificate (Exhibit 22).

18. PW-6 is the photographer who has taken photographs of the room where the victim was staying with the accused.

19. PW-8 is panch to seizure panchanama (Exhibit 49) of cell phone of accused. He is cousin of the informant.

20. PW-9 is panch to the spot panchanama (Exhibit 53).

21. PW-10 is panch to seizure panchanama (Exhibit 57) of cloths of victim and the accused.

22. PW-12 is the Investigating Officer, who has proved omissions in the evidence of the victim.

23. On careful scrutiny of the evidence on record, I am of the considered view that there is no substance in the challenge to the conviction, raised by the accused in the present appeal.

24. By placing strong reliance in Ravi Anandrao Gulpude (supra), the learned advocate for the accused contended that the prosecution has failed to prove that the victim was child at the time of alleged incident. The prosecution has proved the birthdate of victim by examining PW-5 Headmaster, who has brought on record bona fide certificate (Exhibit-43) and admission register extract (Exhibit-44), wherein the birthdate of victim is recorded as 22/06/1999. The said fact is corroborated by birth certificate (Exhibit-42) issued by Municipal Corporation, Nashik, which also reflects the same date of birth of victim. The entry of birth is taken by the Municipal Corporation on 16/07/1999 at registration No.05811, which is relevant under section 35 of the Evidence Act. No question is asked to the mother of victim PW-11 to challenge the date of birth mentioned in the birth certificate proved by her. Further, at the first opportunity, the victim has disclosed her age as 15 years. Admittedly, the victim was studying in 9th Standard at the time of incident. Therefore, conclusion drawn by the trial Court that the victim was minor at the date of alleged offence cannot be faulted with.

25. Mere fact that place of birth of victim is recorded different than birth certificate and admission register extract itself is not sufficient to doubt the prosecution case as in both these documents same date of birth is recorded as 22/06/1999.

26. In view of the aforesaid evidence, and in the facts of the present case, ruling in Ravi Gulpude (supra) would not help to the accused.

27. The sole testimony of victim is reliable and is found to be credible. The victim has categorically stated in her evidence that on the false promise of marriage, the accused has repeatedly kept physical relations with her. The victim was with

the accused for a period of about 4 months.

28. History given by the victim at the time of medical examination, wherein she has specifically stated about repeated sexual contact by the accused, corroborates the prosecution case. Merely because of the medical examination of the victim was conducted after she completed her menstrual cycle, negative chemical analysis reports have come, but that is not sufficient to diminish the quality of evidence of the victim.

29. In Phool Singh (supra), the Apex Court has observed:

"There can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality."

"As a general rule, if credible, conviction of the accused can be based on sole testimony, without corroboration. Sole testimony of the prosecutrix should not be doubted by the court merely on basis of assumptions and surmises."

"Testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Further, seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury."

30. Since, in the present case, the testimony of the victim is found to be reliable and trustworthy, the conviction can be based on the sole testimony of the victim. Some omissions are brought on record in the evidence of victim, those do not go to the root of the matter, so as to create serious doubt about veracity of the victim's deposition. They are insignificant/minor omissions which do not affect the prosecution case.

31. There is absolutely no reason for the victim to falsely implicate the accused at the risk of her honour.

32. The prosecution, in the present case, has proved the foundational facts, and therefore, presumption under section

29 of the POCSO Act is liable to be drawn against the accused. The accused has failed to rebut the said presumption, and hence, his conviction is liable to be upheld.

33. It is a matter of record that the accused is a married person, as is clear from the suggestions given by the defence to the prosecution witnesses, as well as statements made in the written statement filed by the accused under section 313 of the Code of Criminal Procedure. His defence that the victim was having one-sided love towards him and she was given understanding by him, his wife, his parents, Mate Sir, his brother as well as from the President of their Colony is not probable and acceptable, in view of the evidence led by the prosecution.

34. There is more than sufficient material on record to sustain the conviction of the accused under section 363 and 366 of the Indian Penal Code and under sections 6 and 12 of the POCSO Act. The trial Court has properly appreciated the evidence on record and has rightly come to a conclusion that the evidence of victim inspires confidence, and it is proved by the prosecution that the accused has committed repeated intercourse with victim, who at the relevant time was minor. By committing repeated aggravated penetrative assault, the accused has committed offence as defined under section 5(I) of the POCSO Act. At the time of incident, the victim was below 15 years of age, hence, the trial Court has rightly convicted the accused for the offence under section 6 of the Protection of Children from Sexual Offences Act. There is no illegality or perversity in the finding of guilt recorded by the trial Court, and the trial Court has rightly convicted the accused.

35. In my opinion, however, the sentence of rigorous imprisonment of 15 years imposed by the trial Court is harsh and excessive. Section 6 of the POCSO Act was substituted by Act of 25 of 2019 with effect from 16/08/2019, which provides for minimum sentence of imprisonment of 20 years, which may extend to life imprisonment. At the time of conviction of the accused, minimum sentence of imprisonment prescribed under section 6 of POCSO Act was 10 years rigorous imprisonment, which may extend to life imprisonment.

36. Taking into consideration the facts of the present case, and the fact that accused is a married person having children, and is only earning member of his family, I am of the view that 10 years sentence would meet the ends of justice. In the result, following order:-

ORDER

(I) The appeal is partly allowed.

(II) The conviction of the accused under sections 6 and 12 of the of the Protection of Children from Sexual Offences Act, and under sections 363 and 366 of the Indian Penal Code is hereby maintained.

(III) The sentence to suffer rigorous imprisonment for 15 years is modified, and the accused is directed to suffer rigorous imprisonment for 10 years.

(IV) Sentence of fine imposed by the trial Court is maintained.