

(2018) 12 BOM CK 0106

In the Bombay High Court

Case No : Criminal Appeal No. 359, 361, 386, 391, 740 Of 2018

Vimalbai Manohar Doballiwar (In Jail)

APPELLANT

Vs

State Of Maharashtra Thr. Its P.S.O., P.S. Ram Nagar

RESPONDENT

Date of Decision : 19-12-2018

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(2)(n)
Protection of Children from sexual Offences Act, 2012 —, Section 3, 4
Prohibition of Child Marriage Act, 2006 — Section 9, 10
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3(1)(xii)

Citation : (2018) 12 BOM CK 0106

Hon'ble Judges : S. B. Shukre, J;S.M. Modak, J

Bench : Division Bench

Advocate : A.A. Dhawas, N.B. Jawade, Mahesh Rai

Final Decision : Allowed

Judgement

S.B. Shukre, J

1. These appeals are being disposed of by common judgment as they arise out of the same judgment and order dated 30th May, 2018 rendered by the learned Special Judge, Chandrapur in Special POCSO Case No.62/2015.

2. For the sake of convenience, the parties to the appeal i.e. appellants and respondent shall now be referred to as the accused in the same order as they are arraigned in the criminal trial held against them and the respondent respectively.

3. Facts of the case stated in brief are as under :

The accused No.1 Rameshwarlal Hemram Jat (Choudhary) is the person with whom marriage of victim, alleged to be child at the time of her marriage, has been performed with the aid and instigation of the remaining accused, i.e. accused No.2 to 8.

It has been alleged that at the time of marriage, which was solemnized on

8.4.2015, the victim was aged about 15 years and studying in 9th standard in an Ashram Shala, situated Kawathala, Tq. Korpana, District Chandrapur, while her parents i.e. accused Nos.7 and 8, resided at Chandrapur. They earned their livelihood by dint of their labour work. The accused No.7 finding it difficult to make both ends meet, thought that her burden would be lessened if her daughter, victim of crime, was married off as she had already, in their opinion, come of age. With this aim in mind, she used to broach the subject of marriage with the victim but the victim used to stoically refuse the proposal saying that she was more interested in her studies. It appears that accused No.8, father of victim, was initially on the side of the victim, but later on, perhaps on the influence of his wife, had changed his mind and also accepted the proposal of his wife.

As the days passed by, an opportunity for fulfilling the wish of the parents presented itself to accused Nos.7 and 8. Accused No.2, a neighbour of accused Nos.7 and 8 informed the parents of the victim that one eligible boy having good financial background was available and with the consent of the boy and the girl their marriage could be performed. In order to take this proposal forward some negotiations were held and ultimately, the marriage of the victim was solemnized with the accused No.1 who was then aged about 29 years. According to the victim, this was against her consent, but she had no other alternative than to bow before the wishes of her parents. However, her dislike towards the accused No.1 and her displeasure with the remaining accused continued. Soon after the marriage, accused No.1 consummated the relationship and started living with the victim as her own husband. There was hardly anything which the victim could do to resist the accused No.1 and his advances towards her. The physical relationship between the two thus went on unrestricted. However, within her mind, the victim had always wanted to play rebel. Meanwhile, the accused No.1 had also taken the victim to his native place in Rajasthan and there also, both of them lived as husband and wife. While in Rajasthan, the victim stole an opportunity of running away from the house of accused No.1 on the pretext of celebrating her birthday at her parental house.

The victim returned to Chandrapur and without losing time registered F.I.R. against her parents, accused No.1 and all those including her neighbours, who were involved in solemnizing her marriage with accused No.1 without her consent. Offences punishable under Section 376 Indian Penal Code (in short, "I.P.C."), Section 4 read with Section 3 of the Protection of Children from sexual Offences Act, 2012 and Section 9 and 10 of the Prohibition of Child Marriage Act, 2006 were registered against all these persons and investigation was carried out. These accused persons were ultimately charge-sheeted by Police in the Special Court constituted under the provisions of the Protection of Children from Sexual Offences Act, 2012 (in short, "PoCSO Act, 2012"). They were prosecuted for offences punishable under Section 376(2)(n) I.P.C., Section 4 read with Section 3 of the PoCSO Act, 2012, Sections 9 & 10 of the Prohibition of Child Marriage Act, 2006 and Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes

(Prevention of Atrocities) Act, 1989 (in short, "Atrocities Act, 1989"). On merits of the case, learned Sessions Judge found that offences punishable under Section 376(2)(n) I.P.C., Section 4 read with Section 3 of PoCSO Act, 2012, Section 9 of the Prohibition of Child Marriage Act, 2006 and Section 3(1)(xii) of the Atrocities Act, 1989 were proved as against accused No.1. Learned Sessions Judge further found that an offence under Section 376(2)(n) I.P.C. and also an offence punishable under Section 10 of the Prohibition of Child Marriage Act, 2006 were proved against the accused Nos.2 to 8.

Having recorded such findings of guilt as against accused No.1 and the remaining accused persons, by the judgment and order dated 30th May, 2018, the learned Special Judge of PoCSO Court convicted all the accused persons and awarded them different sentences ranging from rigorous imprisonment for life for remainder of natural life of accused No.1 to 14 years, 5 years, 2 years together with separate sentences of fine and default sentences. Being aggrieved by the same these accused persons are before this Court in this bunch of appeals.

4. We have heard Shri Mahesh Rai, learned counsel for accused Nos.1, 3 and 6, Shri A.A. Dhawas, learned counsel for accused No.2,4,5,7 & 8 and Shri N.B. Jawade, learned Additional Public Prosecutor for the respondent/State. We have carefully gone through the record of the case including the impugned judgment and order.

5. In this case, the prosecution has examined as many as 16 witnesses and also adduced in evidence some documents in order to prove the age of the prosecutrix as below 18 years.

6. The PoCSO Act, 2012 is a special Statute enacted in the year 2012 with a view to protect the children from offences of sexual assault, sexual harassment and so on and so forth and also provide a separate mechanism for trial of the offences against these children. It defines a child to be a person below the age of 18 years. In the present case, the accused No.1 has also been charged with offences punishable under Sections 4 and 12 read with Section 3 of the PoCSO Act, 2012 and, therefore, definition of the child as given in the PoCSO Act, 2012 would be relevant. At the same time, the remaining accused have also been charged not under the PoCSO Act, 2012, but for an offence punishable under Section 376(2)(n) I.P.C. Additionally, accused No.1 has been charged for offences punishable under Sections 9 and 10 of the Prohibition of Child Marriage Act, 2006 and remaining accused are charged for an offence punishable under Sections 10 of the Prohibition of Child Marriage Act, 2006 in which the same definition of the child as has been given in the PoCSO Act, 2012 has been prescribed.

7. It is the contention of the learned counsel for the accused persons that in the present case the age of the victim has not been proved in any manner by the prosecution and according to them, the victim was well above the age of 18 years at the time of marriage and there being no dispute about solemnization of the marriage with accused No.1, the whole edifice of the case has crumbled and,

therefore, all the accused persons are entitled to be declared innocent in the present case. This is however, strongly disagreed to by the learned A.P.P., who submits that even though there are at least two dates of birth which have appeared on record from the evidence of the victim (PW 2), it becomes quite clear that at the time of the incident she was about 15 years, 11 months and 23 days old and therefore, no interference with the impugned judgment and order is warranted.

8. Considering the fact that the main issue involved in this petition is that of the age of the prosecutrix/victim and also the settled law that no conviction under PoCSO Act, 2012 can be sustained unless the prosecution discharges its burden to prove that victim was a "child" on the date of incident as held in the case of Ravi Anandrao Gulpude vs. State of Maharashtra, reported in 2017 All MR (Cri) 1509) it would be useful for us to first consider the evidence of the prosecution on this aspect of the matter.

9. The victim (PW 2) has stated her date of birth to be 15.3.1999 and the date of incident to be 8.4.2015. As regards the date of incident, there is no dispute but, about the date of birth there is indeed a dispute. The date of birth so stated by the victim has been seriously disputed by the accused persons. This could be seen from a specific suggestion given to her during the course of the cross-examination. According to this suggestion, the accused persons suggested that date of birth of the victim was 1.10.1994. Of course, the suggestion has been denied by the prosecution. But, the fact remains that the date of birth as stated by the victim has not been accepted as it is by the accused persons. Therefore, it has become necessary for the prosecution to discharge its burden regarding proving of date of birth and resultantly the age of the victim at the time of the incident beyond reasonable doubt.

10. It is seen from the evidence available on record that the burden has been sought to be discharged by the prosecution through the documents adduced in evidence and testimonies of PW 9 Sudhakar, the Headmaster of Ashram Shala, Kawathala, PW 16 Vasanti Bahadure, the employee of the Chandrapur Municipal Council and Incharge of birth and death register and PW 6 Dr. Ritesh Rane, Medical Officer, General Hospital, Chandrapur who had examined the X-ray report taken out as a part of ossification test of the victim.

11. PW 9 has deposed that the date of birth of the prosecutrix was not 15.3.1999, but was 15.5.1999. He has stated that an entry in this regard has been taken by him in the school register, but he admits that the basis of this entry was not the birth certificate of the victim, but a certificate issued by a Ward Member of Municipal Council, Chandrapur. With this admission, the birth entry taken by PW 9 in the school register has been rendered baseless and, therefore, as not admissible in evidence. For the same reason, the school leaving certificate (Exh.-89) which records the date of birth of the victim as 15.5.1999 can also not be relied upon. The evidence of this witness on the aspect of age of the victim at the time of the incident deserves to be rejected as not worthy of credit though, it

appears to us that it has been accepted as reliable, without considering the vital admission given by this witness and quite erroneously by the learned Special Judge.

12. PW 16 is an employee of the Municipal Council, Chandrapur and her evidence considering her duty is very important. Admittedly, she is Incharge of birth and death register. Therefore, her evidence regarding taking of the birth entry and its being maintained at her office would have great significance in this case. She had brought abstract of birth and death register's relevant page. This page is at Exh.-145. At Sr.No.13 at Exh.-145, there is an entry regarding birth of one female on 1.10.1994 with accused No.7 and 8 having been shown as father and mother.

Name of the child is not mentioned therein and the relevant column has been left blank. No reason has been given by this witness for leaving blank the column of name of the new born, though we do not find anything amiss in it as it would be too naive to expect that any parents would assign a name to an infant immediately on birth and without completing customary rituals, which have a customary day fixed to follow. Nevertheless, she has deposed about making of corrections later on at the behest of accused Nos.7 and 8. There is no dispute about the fact that these corrections were sought and granted by the Municipal Council, Chandrapur after registration of crime against the accused persons in the present case. By these corrections the name of the child i.e. victim came to be entered in the birth register and also in the birth certificate issued by the Municipal Council, Chandrapur. Along with the name of the victim the nick name "Mondi" of accused No.8, has also been inserted in this document. This was done, according to evidence of PW 16 Vasanti, by following the due procedure of law in the sense that proper verification on the basis of such documents as PAN Card, Aadhar Card, Ration Card, and affidavit was carried out and the claim made by the parents of the child was found to be correct. Now, the question would arise as to whether or not any reliance could be placed upon evidence of this witness and the document that has been proved by the prosecution through her evidence.

13. The question has been answered by the learned Sessions Judge in a negative manner. She has rejected the evidence of PW 16 on the ground that all these corrections were made after the offences in the present case came to be registered. We find that the ground taken by the learned Special Judge for discrediting PW 16, Vasanti, is not borne out from the record and also agitates against the own case of the prosecution.

14. If we take a careful look at the evidence of PW 16 Vasanti, we would find that this witness was examined as a prosecution witness and we do not know as to what made the prosecution examine this witness as it's own witness, at least this is what appears from the recorded deposition. After having examined its own witness and after having not declared the witness with the permission of the Court as hostile to the prosecution, it is not permissible under the law for the prosecution to disown its own witness. It is also not permissible in law for the

Court to say that the witness of the prosecution having gone against the prosecution cannot be believed when the Court has not found any element of hostility in such a witness. The prosecution has also not brought on record through the evidence of this witness that the correct date of birth was either 15.5.1999 or 15.3.1999 and the date of birth shown in Municipal Council record as 1.10.1994 to be incorrect. No suggestion in this regard appears to have been given to PW 16 by the learned A.P.P. Rather, she has been examined as a prosecution witness in such a manner as to create an impression that the prosecution desired more strongly to prove the date of birth of the victim to be 1.10.1994 than anything else. There is absolutely nothing in the entire evidence of PW 16 to find that this witness has spoken some falsehood on oath before the Court.

15. If such is the impression which one gets logically on reading the evidence of PW 16 Vasanti, we doubt, if such a witness could be declared as untrustworthy just because she has stated a different date of birth of the victim which was not in accordance with the expectations of the Court. However, this is how the evidence of PW 16 has been appreciated by the learned Special Judge and we find, with due respect to the learned judge, that the inference drawn by her cannot arise logically on assessment of the evidence of PW 16 Vasanti. We are also of the opinion that there is nothing in her evidence to doubt what she has stated about the date of birth of the victim and taking of entry (Exh.145) in the birth register showing the date of birth of the victim to be 1.10.1994. Accordingly, we find her evidence and Exh.-145 as reliable.

16. Now, the position is that the date of birth of the victim has been proved to be of 1.10.1994 and so we see no difficulty to find that on the date of incident, that is 8.4.2015, the victim had completed her 20 years of age and thus was not a child as defined under the provisions of the PoCSO Act, 2012 as well as the Prohibition of Child Marriage Act. The evidence of PW 16 having been found to be reliable and directly proving the date of birth of the victim, we see no reason to consider the result of the ossification test as opined by PW 6 Ritesh Rane. The ossification test would come into picture only when the documentary and other evidence brought on record by the prosecution does not convincingly or beyond reasonable doubt establish the age of the victim, wherever it is relevant. In this regard, we rely upon the law settled by Hon'ble Apex Court in the cases of i) Mahadeo s/o. Kerba Maske vs. State of Maharashtra, reported in (2013)14 SCC 637 and ii) State of Madhya Pradesh vs. Anoop Singh, reported in (2015)7 SCC 773 That being not the case here, we do not think it necessary to consider the evidence of PW 6 Dr. Ritesh.

17. Even otherwise, Dr. Ritesh has opined that according to him, the ossification test result shows the victim to be not less than 15 years of age and not more than 16 years of age with margin of error on both sides to be of 2 to 3 years. If such evidence is taken as reliable, the inference regarding age of the victim would not be any substantially different from what we have concluded in the

previous paragraph. This way, the evidence of PW 6 Dr. Ritesh, we would say, supports the case of the defence that at the time of incident, the victim was not a child but a girl who had attained majority having crossed 18 years of age.

18. With these conclusions we find that whole basis of the prosecution case has met the dust and that would obviate the need for us to consider other evidence. Then what would follow would be the admitted fact which shows that the victim, a major girl, was given away in marriage by her parents, to accused No.1 with whom the girl cohabited as his wife. PW 2, the victim of crime, has given several admissions which indicate that while she was cohabiting with accused No.1, she really did not object to all that the accused No.1 did to her and that she also did not raise any protest when various post marriage rituals were performed at different places including those in Rajasthan during which several villagers were invited and had participated. Such conduct of the prosecutrxx would only bolster up our conclusion that the victim was a girl of majority at the time of the incident and this would give rise to another inference that the marriage could not have been performed without active or passive consent of the victim. It is a different matter that the victim changed her mind later on perhaps due to the admitted fact that since before her marriage, she was already engaged in a love affair with another boy. So, the offences relating to rape and child marriage with which the accused are charged herein stand not proved.

19. Accused No.1 has also been convicted for an offence punishable under Section 3(1)(xii) of the Atrocities Act, 1989. However, we do not see even an iota of evidence to prove guilt of the accused for this offence. There is no caste validity certificate adduced in evidence by the prosecution. There is not even a whisper on the part of any of the prosecution witnesses that the accused being in dominating position over the victim, used that position to sexually exploit the victim on the ground of family members particular caste. We find that even this offence has not been proved by the prosecution.

20. It is seen from the impugned judgment that all the aspects as pointed out above have not been considered in any manner by the learned Special Judge and, therefore, the result is of erroneous conclusion regarding establishing guilt of all the accused persons for the offences with which they have been charged in the present case. Accordingly we find that the prosecution has failed to establish beyond reasonable doubt all the offences with which the accused persons have been charged in the present case and it follows that all the accused persons deserve to be acquitted of the same by interfering with the impugned judgment and order.

21. The appeals are allowed.

22. The impugned judgment and orders are quashed and set aside.

23. The accused No.1 is acquitted of 376(2)(n) of the Indian Penal Code and also under Section 3 and 4 of Protection of Children from sexual Offences Act, 2012, Section 9 of the Prohibition of Child Marriage Act, 2006 and Section 3(1)(xii) of

the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and remaining accused Nos.2 to 8 are acquitted of offences under Section 376(2) (n) of the Indian Penal Code and Section 10 of the Prohibition of Child Marriage Act, 2006.

24. If the fine amounts have been paid, they be refunded to the accused persons.

25. The accused Nos.1,4,7 and 8 are in jail. They be released forthwith, if not required in any other crime.

26. The bail bonds of the remaining accused persons stand discharged.

27. The Muddemal property being useless be destroyed in accordance with law.