

(2018) 03 BOM CK 0012
In the Bombay High Court
Case No : 630 of 2017

Vinod s/o Gulab Dongre

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-03-2018

Acts Referred:

Indian Penal Code, 1860, Section 375,
Section 376(1) - Rape - Punishment for rape
Protection Of Children From Sexual Offences Act, 2012, Section 8, Section 12

Citation : (2018) 03 BOM CK 0012

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : Sk. Sabahatullah, ?V.P. Maldhure

Final Decision : Allowed

Judgement

1. Challenge is to the judgment and order dated 20-11-2017 rendered by the learned Additional Sessions Judge-3, Nagpur in Special Child Protection Case 49/2015, by and under which the appellant-accused is convicted for offence punishable under Section 376(1) of the Indian Penal Code (" IPC " for short) and is sentenced to suffer rigorous imprisonment for seven years and to payment of fine of Rs.1,000/- and is further convicted for offence punishable under Section 8 of the Protection of Children from Sexual Offences Act ("POCSO Act" for short) and is sentenced to suffer rigorous imprisonment for three years and to payment of fine of Rs.1,000/-.

2. The prosecution case :

The incident occurred on 21-12-2014. The complainant (P.W.3) and his wife left their residence for work at 10-00 a.m. The child victim, then aged 6 years, was alone in the house. Normally in view of the cordial relationship with the accused Vinod Dongre, P.W.3 and his wife used to leave the child victim in the custody of the accused at his residence. Since 21-12-2014 was a Sunday, the child victim was left alone in the house. At 12-00 noon P.W.3 was telephonically informed by a neighbour one Ms. Borkar that the accused is doing some wrong act with his daughter by closing the door of the house. The complainant returned, made enquiries with the child victim who narrated as follows :

The accused came to her house, demanded food, then closed the door and kissed the child victim, removed his clothes, put his hand in her knicker and inserted finger in her private part. A neighbour Julie Aunty (P.W.4) saw the incident, raised an alarm, the accused tried to escape by opening the door but was apprehended by the ladies, who assaulted him and informed the police. The accused was apprehended at the spot by the police. The complainant went to the police station with the victim and lodged report (Exhibit 33).

The Jaripatka Police Station registered offence punishable under Section 376(2) of the IPC and Sections 8 and 12 of the POCSO Act.

3. The learned Sessions Judge framed charge (Exhibit 14) under Section 376 of the IPC and Sections 8 and 12 of the POCSO Act. The accused abjured guilt and claimed to be tried in accordance with law. The defence is of total denial and false implication.

4. The prosecution examined as many as ten witnesses, who are : P.W.1 child victim at Exhibit 28, P.W.2 Annapurna Meshram-eyewitness at Exhibit 29, P.W.3 Jitendra Mishra-the complainant at Exhibit 32, P.W.4 Julie Nainwani-eyewitness at Exhibit 36, P.W.5-

Rajiya Begum-panch witness at Exhibit 37, P.W.6-Asha Farnandis-panch witness at Exhibit 39, P.W.7 Sudhakar Gourkhede at Exhibit 44, P.W.8 Shalini Khuje, investigating officer at Exhibit 50, P.W.9 Shalini Kinnake, investigating officer at Exhibit 52 and P.W.10 Dr. Sandeepkumar Gajbhiye, who has examined the accused, at Exhibit 60. Apart from this, the prosecution has strongly relied on oral report Exhibit 33 and first information report Exhibit 34, spot panchanama Exhibit 30, arrest panchanama Exhibit 54, seizure panchanama Exhibit 38, birth certificate of victim Exhibit 45 & 46, letter correspondence with RMO Exhibits 53 & 54, requisition to lab Exhibit 56 and its acknowledgment Exhibit 57, letter to Judicial Magistrate First Class by police Exhibit 55, sample of victim Exhibit 57, medical certificate of the accused Exhibit 62 and closed the evidence of prosecution side vide pursis Exhibit 63.

The submission of the learned Counsel Shri Sk.

Sabhatullah is that the prosecution has not proved the offence under Section 376(1) and Section 8 of the POCSO Act beyond reasonable doubt. The evidence of the child victim, whose statement was recorded after one month is not confidence inspiring is the submission. The learned Counsel attacks the prosecution case on the plank of the failure of the prosecution to examine Ketki and Saniya, the friends of the victim who according to the prosecution version were driven out from the house by the accused. The evidence of the child victim is criticized as unreliable in view of the material contradictions and embellishment.

5. Per contra, the learned Additional Public Prosecutor Shri V.P. Maldhure would submit that the evidence of the child victim is implicitly reliable and confidence inspiring and is corroborated by P.W.4 Julie Nainwani, an eyewitness to the incident. The evidence of P.W.1 and P.W.4 is further corroborated by P.W.2 Annapurna, a neighbour who has deposed that she saw the accused entering the

house of the child victim and closing the door after driving out her two friends. The evidence of the child victim receives corroboration from the evidence of her father P.W.3 Jitendra Mishra, is the submission.

6. P.W.1 is the child victim who has deposed that on the day of the incident, at 12-00 noon she was going to the grocery shop to purchase chocolate when the accused met her on the way and enquired with the child victim as to where she was going. When the child victim told the accused that she was going to the grocery shop to purchase chocolate, the accused gave her Rs.1/-. The accused came to her residence after sometime. Two friends Saniya and Ketki were present and on seeing them the accused left. The accused returned after sometime and told Ketki to leave the house as her father was calling her. Saniya was not inclined to leave and was driven out by the accused on the pretext that her grandfather is calling her. The accused then asked the child victim for food. The child victim provided the accused food which he ate, then closed the door and removed the slack and knicker of the child victim, touched the private part and kissed her on lips and cheek. The child victim was asked to sit down which she refused. The child victim then wore her knicker and tried to maintain a distance from the accused who kept on trying to establish contact with the child victim. The incident was witnessed by P.W.4 Julie Nainwani from the window and she raised an alarm. The accused opened the door and attempted to flee. By that time a crowd had gathered. The accused was beaten up by the crowd. Somebody informed the parents of the child victim who came and the report was lodged.

In the cross-examination, portion marked "A" in the examination-in-chief is brought on record as an omission vis-a-vis the statement recorded by the police. Similarly, portion marked "B" is also brought on record as an omission. The child victim denied the suggestion that she was tutored by her parents to give the evidence.

She further denies the suggestion that she is deposing false at the instigation of her parents. The portions which are brought on record as omissions do not touch the substratum or core of the prosecution version.

7. P.W.2 Annapurna corroborates the version of P.W.1 to the extent she has deposed that she saw the accused coming to the house of the child victim who was playing with her two friends. P.W.2 states that the accused left and then again came to the house of the victim and drove out her two friends Saniya and Ketki. The accused closed the door of the house of the victim, P.W.2 suspected foul play and alerted the ladies in the locality, one of whom Julie Nainwani (P.W.4) peeped from window and saw the accused removing the knicker of the victim and inserting his hand in her knicker. P.W.2 Annapurna informed the other ladies and knocked the door of the victim's house. The accused opened the door, was assaulted by the ladies and by then a crowd gathered and the parents of the child victim were summoned. Nothing is elicited in the cross-examination of P.W.2 to assist the defence. Her testimony is not shaken in the cross-examination.

8. P.W.3 Jitendra Mishra is the father of the child victim who has deposed that the incident was narrated to him by the ladies who had gathered in front of his house who were beating the accused. P.W.3 states that he enquired from the child victim who disclosed the incident. P.W.3 states that the disclosure was that the accused closed the door, kissed the cheek of the child victim and put his finger in the private part. P.W.3 states that he then slapped the accused twice or thrice and lodged the report (Exhibit 33) and printed first information report (Exhibit 34).

The entire testimony of P.W.3 has gone virtually unchallenged. The only suggestion given is that no incident took place

as alleged.

9. P.W.4 Julie is an eye witness who has deposed that she saw from the window that the accused kissed the child victim and put his hand on the knicker of the victim.

In the cross-examination, an attempt is made to bring on record strained relationship between the mother of the P.W.4 and the wife of the accused. P.W.4 has denied the suggestion. The cross-examination of P.W.4 does not take the case of the defence any further.

10. P.W.5 Rajiya proves the seizure panchanama (Exhibit 38) of the clothes of the victim, P.W.6 Asha who is examined to prove the seizure of the clothes of the accused did not support the prosecution, P.W.7 Sudhakar who is examined to prove the entry (Exhibit 45) in the birth register evidencing the date of birth of the child victim as 08-2-2008. However, it is not even argued before me that the child victim was less than 18 years of the age on the day of the incident.

11. P.W.8 Sudhakar Khuje is one of the investigating officers who has proved oral report (Exhibit 33) and printed first information report (Exhibit 34). It is elicited in his cross-examination that he has not recorded the statement of the victim. P.W.9 Shalini Kinnake is the investigating officer who took over the investigation from P.W.8. She has recorded the statement of the victim in the presence of the parents and has deposed that the statement of the victim was also recorded under Section 164 of the Criminal Procedure Code. It is elicited in the cross-examination that the statement of the victim was recorded on 21-1-2015.

12. The learned Counsel Shri Sk. Sabahatullah is justified in submitting that the evidence on record is not sufficient to establish offence under Section 376(1) of the IPC. Rape is defined, post the 2013 Amendment to Section 375 of the IPC thus :

"375. Rape.- A man is said to commit "rape" if he -

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the

body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.

Explanation 1--For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2--Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist

to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.--A medical procedure or intervention shall not constitute rape.

Exception 2.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape".

13. The learned Sessions Judge appears to have invoked sub-section (b) of Section 375 of the IPC. However, the evidence on record is not sufficient to hold that any object or a part of the body was inserted, to any extent, into the vagina of the child victim. The child victim is not medically examined since her mother refused to accord consent. Neither the testimony of the child victim nor the testimony of the eyewitness P.W.4 proves that the accused inserted his finger or any other body part or object in the vagina of the child victim. The evidence of the child victim, even accepting the evidence at face value, is that the accused kissed her lips and cheek and touched her private part. The evidence of P.W.4 Julie is that she saw the accused kissing the child victim and put his hand on the knicker of the victim. In my opinion, in the teeth of the evidence of P.W.1 and P.W.4, it cannot be held, with any degree of certainty, that the prosecution has proved the offence under Section 376(1) of the IPC.

14. However, the conviction of the accused under Section 8 of the POCSO Act is unexceptionable. The evidence of the child victim P.W.1 and P.W.4 Julie who is an eyewitness, is implicitly reliable and confidence inspiring. The evidence of P.W.1 and P.W.4 is more than amply corroborated by the evidence of P.W.2 Annapurna and P.W.3 Jitendra, complainant. The prosecution has proved beyond reasonable doubt that the accused sexually assaulted the child victim.

15. In the result, the appeal is partly allowed.

16. The conviction of the accused under Section 376 ((1) of the IPC is set aside. The conviction under Section 8 of the POCSO Act and the sentence imposed is upheld.