

(2014) 12 BOM CK 0193
In the Bombay High Court
Case No : Criminal Appeal No. 795 of 2014

Vishal and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294
Penal Code, 1860 (IPC) — Section 363, 366, 376(D)
Protection of Children from Sexual Offences Act, 2012 — Section 29

Citation : (2015) ALLMR(Cri) 301

Hon'ble Judges : P.V. Hardas, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Anjali Patil, Advocates for the Appellant; U.V. Kejriwal, APP,
Advocates for the Respondent

Judgement

P.V. Hardas, J.—The appellants/Original Accused Nos. 1 to 3, who stand convicted for offence punishable under Sections 363, 366, 376(D) of the Indian Penal Code and sentenced to RI for five years and each accused to pay a fine of Rs. 2000/-, in default of which to undergo further RI for one year, RI for seven years and each accused to pay a fine of Rs. 2000/- in default of which to undergo further RI for two years and imprisonment for life and each accused to pay a fine of Rs. 2000/-, with further direction that compensation of Rs. 15,000/- be paid to the victim and with a direction that the substantive sentences shall run concurrently, by the Designated Court under Protection of Children From Sexual Offences Act, 2012, for Greater Bombay, by judgment dated 30/09/2014, in Sessions Case No. 880 of 2013, by this appeal challenge their conviction and sentence. This court, while deciding Criminal Application No. 1429 of 2014, after perusing the depositions of the witnesses, directed that the appeal be set down for final hearing after receipt of record and proceedings. This court by the aforesaid order further dispensed with the preparation of a formal paper book as the copies of the depositions of the witnesses had been annexed by the appellants. Accordingly, after receipt of record and proceedings, this appeal has been listed

before us for final hearing.

2. Facts in brief, as are necessary for the decision of this appeal may be stated thus:--

"PW 3 - PSI Jitesh Shingote, who was attached to the Chembur Police Station and was on duty on 20/6/2013, recorded the missing complaint lodged by PW 2 - Jayram on 20/6/2013 at 3 p.m. in the said missing complaint, PW 2 - Jayram had disclosed that his daughter - victim aged about 13 years was missing since 19/6/2013. Accordingly, on the basis of the complaint of PW 2 - Jayram, it was registered as missing Complaint No. 11 of 2013. An entry in that behalf was taken in the station diary at Exh. 37. After registering the missing complaint, PW 3 - PSI Shingote deputed two lady constables along with the complainant in search of victim. During that search, victim was found in the Sandu Garden, Chembur and was accordingly brought to the police station. PW 2 - Jayram thereafter lodged a complaint at the police station at Exh. 21, on the basis of which an offence vide Crime No. 164 of 2013 was registered. After registration of the offence, the clothes of PW 1 - victim were seized under seizure memo at Exh. 22. The victim was thereafter referred to the Nagpada Police Station for medical examination. On the next day, statement of PW 1-victim was recorded. PW 3 - PSI Shingote thereafter proceeded to the scene of the incident and drew the scene of the incident panchanama in the presence of panchas at Exh. 23. The police officers searched for the whereabouts of the accused and they were then taken into custody and brought to the police station. The accused were arrested under arrest panchanamas at Exhs. 33, 34 and 35. The clothes on the person of the accused were seized under seizure memo at Exhs. 24, 25 and 26.

The accused were thereafter referred to the Nagpada Police Station for medical examination. The birth certificate of the victim was collected and is at Exh. 20. Further investigation was thereafter transferred to PW 4 - PSI Yashodhara Muneshwar.

PW 4 - PSI Muneshwar recorded the further statement of PW 2 - Jayram and after receipt of the blood samples, forwarded the seized properties to the Chemical Analyzer under requisitions at Exhs. 31 and 32. Statement of one Kamladevi Katar was also recorded. Statements of other witnesses were also recorded. The medical certificates of the accused are at Exhs. 28, 29, 30 and the medical certificate of the victim is at Exh. 27. Further to the completion of investigation, a charge-sheet against the appellants was filed.

Victim was examined by the Medical Officer and the certificate of examination of the victim is at Exh. 27. As per Exh. 27, the Medical Officer found that the hymen of the victim was torn and the position of the tears 12, 2, 3, 5 O'clock. The age of the tears were old healed. The victim had given the history to the Medical Officer that since last one year she was in love with one Vishal and had given history of multiple, repeated consensual sexual intercourse with him since last one year. The medical certificates of the accused do not disclose that the accused

had sustained any injury."

3. On the case being committed to the Court of Sessions, Trial Court framed charge against the appellants. The accused denied their guilt and claimed to be tried. Prosecution in support of its case, surprisingly, examined only 4 witnesses. The victim was examined as PW 1, who did not support the prosecution and was cross-examined. PW 2 -Jayram also did not support the prosecution and was cross-examined. The other two witnesses are police officers, namely, PW 3 -PSI Shingote and PW 4 - PSI Muneshwar. The medical certificates of the accused and the victim were admitted under Section 294 of the Cr.P.C.

4. We have heard Mrs. Anjali Patil, learned Counsel for the appellants and the learned APR in order to effectively deal with the submissions, which have been advanced before by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined the victim as PW 1. The name of the victim is deliberately withheld. The victim deposes that she knew one Vishal who was residing in her locality. The victim claims that she had a love affair with Vishal and, therefore, used to meet Vishal to the rear of the in Lax Hospital at Chembur. She has admitted that she had illicit relations with Vishal. According to her, on 19/6/2013 at about 8.30 p.m. she had gone to Chembur Camp along with her father for purchasing vegetables. She had noticed Vishal standing in front of the in Lax Hospital and Vishal gestured her to meet him. At about 9.30 p.m. the victim left the place and met Vishal. She thereafter telephoned one Gautam from the mobile of Vishal and also invited him for going for a stroll. Gautam arrived there and thereafter one Suresh and Avinash came there. All of them then went to Sandu Garden and before that they had gone to Ramtekdi near the Golf Club. Thereafter they had gone to the room of the maternal uncle of Sagar @ Vishal. They had consumed beer in the said room and while they were singing songs, accused-Vishal deluded the victim and committed sexual intercourse with the victim. The other accused also committed sexual intercourse with the victim against her consent. According to the victim, she had then gone to the Sandu Garden, where she met her sister and the lady police. She was then to the police station, where she narrated the incident and her statement was scribed. In the examination-in-chief itself, she has declined to identify the accused as the same persons who had committed forcible sexual intercourse with her. In fact, she states, "I cannot identify the persons who are now shown to me".

6. In cross-examination on behalf of the prosecution, she has admitted as correct that accused Nos. 1 to 3, who were now shown to her were the same accused who had committed forcible sexual intercourse with her. In cross-examination on behalf of the accused, she has admitted as true that the accused who were shown to her were not the accused who had taken her with them and who had committed forcible sexual intercourse with her. She has admitted as correct that after her father had lodged the missing complaint, her father and her sister met her when she was loitering and had taken her to the police station. She has also

admitted that whatever she had deposed had been deposed by her at the instance of the police. She has also declined to identify the clothes to be hers.

7. The learned counsel for the appellants has rightly urged before us that no reliance whatsoever can be placed on the testimony of PW 1 - victim, as initially the victim has declined to identify the accused and thereafter at the behest of the prosecution identified the accused. Victim thereafter during the cross-examination on behalf of the accused has declined to identify the accused and in categorical terms had stated that the accused were not the offenders who had committed the crime. In our opinion, no reliance whatsoever could have been placed on the testimony of PW 1 - victim as the victim was making inconsistent and irreconcilable statement in the examination-in-chief and in the cross-examination.

8. Prosecution has examined PW 2 - Jayram, father of the victim, who also did not support the prosecution and was declared hostile. PW 3 - Jayram has admitted about lodging of the missing complaint but thereafter has completely somersaulted from the previous statement. He was confronted with the portions from his earlier statement, which he had declined to have stated. The contradictions have been duly proved by the examination of the Investigating Officer. The contradictions in the 161 statements do not form substantive evidence.

9. The trial court also, in our opinion, erred in relying on the presumption under Section 29 of the Protection of Children From Sexual Offences Act, 2012. The prosecution, in the present case, had utterly even failed to remotely connect the appellants with the commission of the offence. The substantive evidence also does not disclose that the prosecutrix/victim had named the accused as the offenders. In the absence of that, therefore, the presumption cannot be drawn. Such is not the scope of presumption under Section 29 of the Protection of Children From Sexual Offences Act, 2012.

10. It would thus be seen that there is no substantive evidence at all that the appellants were the offenders who had forcibly taken the victim along with them and had committed forcible sexual intercourse. Mere narration of history given by the victim to the Medical Officer and which is reflected in the medical certificate at Exh. 27 by itself would not constitute evidence nor does it established a nexus between the said persons and the accused before the court. For sustaining the conviction of an accused, there has to be substantive evidence and the prosecution is not absolved from proving the offence against the accused beyond reasonable doubt. In the present case there is no evidence whatsoever to prove the offence against the appellants beyond reasonable doubt. The appellants, in our opinion, therefore, are entitled to be given the benefit of doubt. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the appellants is hereby quashed and set aside and the appellants are acquitted of the offence with which they were charged and convicted. Fine, if paid by the appellants, be refunded to them. Since the appellants are in jail, they be released forthwith, if

not required in any other case.