

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 78 OF 2015

Sachin S/o Baliram Kakde,
Age 23 years, Occu.: Education,
R/o Near Gajanan Temple, Latur,
Dist. : Latur

.. Appellant
(Orig. Accused)

Vs.

The State of Maharashtra,
Through Police Station MIDC,
Latur, Dist. Latur

.. Respondent

Mr. N.S. Tekale, Advocate for the appellant
Mr. V.P. Kadam, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.

DATE : 10/08/2015

ORAL JUDGMENT :

. Heard both sides.

2. Aggrieved by the recording of conviction of the present appellant by the learned Special Judge, Latur vide judgment and order dated 5th December, 2014 in Spl. Case (POCSO Act) No. 14 of 2013 for the offences punishable under section 376 of the Indian Penal Code and section 6, 12 of the Protection of

Children from Sexual Offences (**POCSO**) Act and under section 292 and 506 of the Indian Penal Code, and consequently sentencing him to suffer rigorous imprisonment for 10 years and to pay fine of 2,000/-, in default to suffer rigorous imprisonment for 2 months for the offence punishable under section 6 of the Protection of Children from Sexual Offences Act, to suffer rigorous imprisonment for 3 years and to pay fine of 1,000/-, in default to suffer rigorous imprisonment for 1 month for the offence punishable under section 12 of the Protection of Children from Sexual Offences Act and to suffer rigorous imprisonment for 2 years and to pay fine of 2,000/-, in default to suffer rigorous imprisonment for 2 months for the offence punishable under section 292 of the Indian Penal Code and to suffer rigorous imprisonment for 1 year and to pay fine of 500/-, in default to suffer rigorous imprisonment for 15 days for the offence punishable under section 506 of the Indian Penal Code, with further direction to run the substantive sentences concurrently, the present appeal is preferred.

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

. That the victim of the offence, a 16 years old girl resides in Latur. Her father has given on rent one room to the appellant and his family members. The mother of the prosecutrix, who is the complainant carries a household mess in the same house. The victim was studying in one school, namely, 'Sanskar Vardhini'.

. It was noted by mother of the victim that for a period of one week preceding the filing of the FIR on 16/05/2013, the victim had changed her behaviour. She used to remain gloomy and did not properly eat. In the circumstances, upon counseling, she told the mother that, for a period of about one month, the present appellant used to threat her and, therefore, used to make her to come on the upper floor of the building and rape her by threatening her that the video clip made by him of their relations in the mobile would be made public.

. Even on 10/05/2013, in the noon, the appellant compelled her to visit his plot and thereat, he raped

her. There, he also threatened that in case, the incidents are made public, he would kill her.

. All these narrations were made by the victim to her mother on 12/05/2013. On the very same day, the appellant came in front of the house. At that time, the complainant made enquiry with him. Upon that, he showed the video clip to the mother of the prosecutrix also and threatened that he would make the video clip public and, thereafter went away.

. Upon further enquiry with the prosecutrix, she told her mother that initially, the present appellant had administered certain tablets to her and while she was stupefied, he made the video shooting in his mobile phone. In the circumstances, on the next day, the complaint came to be filed.

4. The investigation was carried. Statements of the witnesses including that of the victim was recorded. The victim was sent for medical examination. Regular exercise like that of seizing of the clothes was carried. The mobile phone of the present appellant

was seized in which the video clipping was found. The Investigating Officer therefore prepared the compact disk (C.D.) of the same. The appellant also handed over empty packet of tablet named 'vigora'. Necessary property was sent for chemical analysis and ultimately the chargesheet came to be filed.

5. Before the learned Special Judge, Latur in all 12 witnesses were examined. Out of them, P.W. 1 is the victim. P.W. 2 is her mother. P.W. 3 — Dr. Umesh Selukar had examined the appellant and rest of the witnesses are the panch witnesses regarding seizure of the property, Headmaster of the school of the prosecutrix, the Computer Operator, who prepared the compact disk (C.D.), Police Constable, Investigating Officer etc.

6. Though the Medical Officer, who has examined the prosecutrix was not examined, his examination report is on record, which would reveal that the hymen was intact and no tears were found besides the finding that no marks of violence were found on her person.

7. The mother of the victim deposed on the line of the prosecution case. Sister of the victim also deposed that the victim had narrated the facts of the incidents to her.

8. Mobile claimed to have been seized from the possession of the present appellant had video recording and the learned Special Judge had scrutinized the said video clip, which according to the learned Special Judge, did not show that the prosecutrix was anyway seen as stupefied during the time of recording, as against her deposition that, upon administration of the pill, she had fallen asleep and when she woke up, she found herself all alone. It was therefore observed by the learned Special Judge that the statement of the victim that the appellant had administered her certain pill, does not inspire any confidence.

. According to the learned Special Judge, in view of the provisions of section 29 of the POCSO Act, the presumption arises that the accused had committed

the offences where the said accused is prosecuted for committing any of the offence specified in the said section under the POCSO Act.

. It was further found that the prosecutrix was just 15 years of age at the time of the said incident and, therefore, the conviction and sentences, as detailed supra, came to be recorded.

9. Mr. Tekale, learned counsel for the appellant made before me number of submissions. He submits that the entire story is unbelievable. The medical evidence, which was suppressed by the prosecution, by not examining the Medical Officer, who has examined the victim, would clearly falsify the prosecution case.

. The learned counsel further took me through the evidence and argued that even the case of seizure of the mobile and evidence regarding the age of the victim is also suspicious.

10. On the other hand, the learned A.P.P. supported the reasoning forwarded by the learned

Special Judge, Latur.

11. On the basis of this material, following points arise for my determination :-

I) Whether the prosecution has proved that for a period of one month prior to 10/05/2013 so also on 10/05/2013, the present appellant on the given time and place has committed forcible sexual intercourses with the victim, who was below the age of 18 years ?

II) Whether the prosecution has proved that during the relevant period, the present appellant has videographed the private part of the victim and thereby prepared a obscene video clip ?

III) Whether the prosecution has further proved that the present appellant made the victim to exhibit her body parts, so as to be seen by him and thereby committed sexual harassment ?

IV) Whether the prosecution has further proved that the present appellant has committed criminal intimidation by

threatening the prosecutrix of causing injury to her ?

My findings to all the above points are in the negative. The appeal is therefore allowed and the appellant is acquitted of the offences punishable under section 376 of the Indian Penal Code, section 6, 12 of the Protection of Children from Sexual Offences (POCSO) Act and under section 292 and 506 of the Indian Penal Code, for the reasons to follow.

R E A S O N S

12. The prosecution case, as is revealed from the F.I.R. and the subsequent statements of the victim and her mother is to the effect that initially, the present appellant has administered certain tablet to her and when she was stupefied, he committed sexual intercourse with her. He also videographed the said incident. Thereafter, under the threat to make the video clip public, he, time and again raped her on the upper floor room. Lastly, he has committed rape by calling her on

his plot. Ultimately, she had divulged the same to her mother and, therefore, the complaint came to be filed.

13. Thus, the prosecution case would show that for a period of atleast one month, time and again, the present appellant has committed sexual intercourses with the victim either by stupefying her or thereafter under the threat to make the video clip public.

14. As against this oral evidence, the medical evidence which was placed on record by the prosecution regarding the examination of the prosecutrix, would show that her hymen was intact. The Medical Officer, in the medical certificate has clearly recorded that no tears were found on the hymen.

15. Since the prosecution case is that either by stupefying the victim or under the threat to the victim, the appellant continued to have sexual intercourses with the victim time and again, there may not be any evidence of physical violence against the body, however, the fact remains that despite these

repeated sexual intercourses, as claimed by the prosecutrix, the hymen was found intact by the Medical Officer.

16. The learned Special Judge had occasion to note the demeanor of the witnesses and more particularly of the victim. Further, upon going through the video clipping, the learned Special Judge came to the conclusion that case of stupefying the victim cannot be accepted.

. However, merely relying on the presumption available under section 29 of the POCSO Act, the appellant was convicted.

17. The provisions of section 29 of the POCSO Act runs as under:-

"29. Presumption as to certain offences – Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

18. Thus, when a person is prosecuted for commission of the offence specified in the said section, the Court is required to presume that the said person has committed the said offence unless the contrary is proved.

19. The presumption, however, cannot be said to be irrebuttable. In-fact, no presumption is irrebuttable in law, as this cannot be equated with conclusive proof. The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved.

20. One has to keep in mind, as expressed by an eminent jurist that presumptions are bats in law; they fly in a twilight but vanish in the light of facts.

21. Here, the prosecution case of stupefying the victim is belied by the very video clip. Further, the presumption also stands rebutted in view of the medical examination of the prosecutrix, as detailed supra.

22. In that view of the matter, we shall have to find out, as to whether, the present appellant has made or caused to make the videograph of the private part of the appellant.

23. Learned counsel for the appellant has pointed towards different I.M.E.I. (International Mobile Equipment Identity) number of the mobile handset of the appellant than those are described in the seizure panchanama at Exhibit 48 and the call details record at Exhibit 59.

24. In that view of the matter, a reasonable doubt has arisen regarding holding of the mobile handset by the present appellant. In the result, the following order :

25. Criminal Appeal is hereby allowed.

26. The impugned judgment and order passed by the learned Special Judge, Latur dated 5th December, 2014 in Spl. Case (POCSO Act) No. 14 of 2013, convicting the

appellant for the offences punishable under section 376 of the Indian Penal Code and section 6, 12 of the Protection of Children from Sexual Offences (POCSO) Act and under section 292 and 506 of the Indian Penal Code, and consequently sentencing him to suffer rigorous imprisonment for 10 years and to pay fine of 2,000/-, in default to suffer rigorous imprisonment for 2 months for the offence punishable under section 6 of the Protection of Children from Sexual Offences Act, to suffer rigorous imprisonment for 3 years and to pay fine of 1,000/-, in default to suffer rigorous imprisonment for 1 month for the offence punishable under section 12 of the Protection of Children from Sexual Offences Act and to suffer rigorous imprisonment for 2 years and to pay fine of 2,000/-, in default to suffer rigorous imprisonment for 2 months for the offence punishable under section 292 of the Indian Penal Code and to suffer rigorous imprisonment for 1 year and to pay fine of 500/-, in default to suffer rigorous imprisonment for 15 days for the offence punishable under section 506 of the Indian Penal Code, with further direction to run the substantive sentences

concurrently, is hereby set aside.

. Instead, the appellant is acquitted of the offences punishable under section 376 of the Indian Penal Code, section 6, 12 of the Protection of Children from Sexual Offences (POCSO) Act and under section 292 and 506 of the Indian Penal Code.

27. The appellant be released forthwith, if not required in any other offence/s.

28. Disposal of the property shall be carried in terms of the directions issued by the learned Special Judge, Latur.

29. Fine amount, if deposited by the appellant, be refunded to him after a period of sixty (60) days from the date of this judgment.

30. Criminal Appeal stands disposed of accordingly.

[M.T. JOSHI]
JUDGE

arp/