

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.584 OF 2015

SANDESH VASANT MOHITE

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Vikas Singh, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 18th DECEMBER 2018

ORAL JUDGMENT :

1 The appellant/accused, by this appeal, is challenging the judgment and order dated 26th February 2015, passed by the learned Special Judge under Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act for the sake of brevity) for Greater Mumbai, in Sessions Case No.715 of 2013, thereby convicting him of offences punishable under

Section 4 of the POCSO Act as well as under Section 366 and 376 of the Indian Penal Code. For the offence punishable under Section 4 of the POCSO Act, the appellant/accused is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.500/- and in default, to undergo further simple imprisonment for 7 days. For the offence punishable under Section 366 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for rigorous imprisonment for 6 months apart from direction to pay fine of Rs.500, and in default, further simple imprisonment for 7 days. As the appellant/accused is sentenced for the offence punishable under Section 4 of the POCSO Act, no separate sentence was passed against him for the offence punishable under Section 376 of the Indian Penal Code.

2 Facts in brief, leading to the prosecution of the appellant/accused and the resultant sentence can be summarized thus :

(a) First Informant/PW1 Jijabai used to reside at New Gautam Nagar, area of Govandi, Mumbai, since long. Her family

comprised of her husband, son aged about 14 years as well as the victim female child, who at the relevant time, was less than 16 years of age. Elder daughter of First Informant PW1 Jijabai was married to the appellant/accused and she used to reside with the appellant/accused at Mankhurd area of Govandi, Mumbai. The victim of the crime in question/PW2 being sister-in-law of the appellant/accused used to visit his house frequently. Because of such frequent visits, love relation between the appellant/accused and his sister-in-law/victim female child i.e. PW2 developed. Ultimately, on 19th June 2013, the victim female child/PW2 had eloped with the appellant/accused, after meeting him at Shivaji Garden area of Mumbai. On 20th June 2013, PW1 Jijabai lodged missing report Exhibit 13A with Police Station Deonar. The couple went to Karad town of Satara district. After spending few days there as well as at different places, the couple returned to Mumbai on 28th June 2013 and started residing at Sion Koliwada area of Mumbai. Ultimately, police apprehended the appellant/accused and

he along with victim female child/PW2 were brought to Police Station Deonar. PW1 Jijabai then lodged report Exhibit 11 on 1st July 2013 which resulted in registration of Crime No.170 of 2013 for the offence punishable under Section 363 of the Indian Penal Code.

- (b) After recording statement of the victim female child/PW2 she was sent for medical examination. Section 376 of the Indian Penal Code as well as Section 4 of the POCSO Act were added to the Case Diary of the crime. Routine investigation followed which ultimately resulted in filing of the charge-sheet against the appellant/accused.
- (c) The designated court under the POCSO Act framed Charge for offences punishable under Sections 363, 366 and 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act against the appellant/accused. He pleaded not guilty and claimed trial.

- (d) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all six witnesses. First Informant Jijabai is examined as PW1 whereas Missing Report lodged by her is at Exhibit 13A. The First Information Report (FIR) is at Exhibit 11. The victim female child is examined as PW2. Her elder sister Archana is examined as PW3. Two Investigating Officers, namely, Assistant Police Inspector Tukaram Nimbalkar and Police Inspector Siddheshwar Kamble are examined as PW4 and PW5 respectively. Dr.Ashwini Darade, Medical Officer, working with J.J.Hospital, Mumbai, is examined as PW6. The defence of the appellant/accused was that of total denial. According to him, he never married with PW3 Archana, who was already married and having one child from her husband. The defence has contended that PW3 Archana approached him as she was being chased by three to four boys. She, then, told him that her husband had ousted her and her mother also wanted to oust her from the house. She, therefore, left the house with her friends and

she has no shelter. Hence, according to the defence, PW3 Archana asked for shelter from him for herself as well as her female child. It is also contended by the defence that PW3 Archana brought her sister i.e. victim female child/PW2 at his house because her parents were harassing the victim female child/PW2. The victim female child/PW2 was having injuries on her body. Subsequently, love affair between him and the victim female child/PW2 developed and he along with the victim female child/PW2 went to his native place and then to Tirupati Balaji. Thereafter, they stayed at Sion Koliwada area. However, they were apprehended by the police. According to the appellant/accused, the victim female child/PW2 had informed him that she is more than 18 years of age and she wants to marry him. Everything was done with her consent. He is falsely implicated in the crime in question.

- (e) After hearing the parties, the learned trial court was pleased to convict the appellant/accused and sentenced him

accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Mr.Vikas Singh, the learned counsel appointed to represent the appellant/accused at the costs of the State. He vehemently argued that the prosecution has failed to prove age of the victim female child/PW2. In submission of the learned counsel for the appellant/accused, the alleged victim female child/PW2 was more than 18 years of age and relations of the appellant/accused with her were consensual in nature, as admitted by her. Evidence regarding age of the victim female child/PW2 is discrepant and lacunic. Therefore, the appellant/accused is entitled for benefit of doubt.

4 The learned APP supported the impugned judgment and order of conviction by stating that the prosecution has proved age of the victim female child/PW2 beyond all reasonable doubts and as the penetrative sexual assault on the victim female child/PW2 is undisputed, the appeal is liable to be dismissed.

5 I have considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence.

6 In the case in hand, undisputedly, the appellant/accused along with the alleged victim female child/PW2 left Mumbai for Karad on 19th June 2013 and after spending few days there, they went to visit Lord Balaji at Tirupati. They, then, returned to Mumbai on 28th June 2013, and thereafter, they started residing in the rented room at Sion Koliwada area of Mumbai. According to the appellant/accused, he had sexual intercourse with the alleged victim female child/PW2 during that period. It was a consensual act. Even the alleged victim female child/PW2 has categorically deposed that because of love affair between the appellant/accused and herself, she eloped from the house after meeting the appellant/accused at Shivaji Garden of Mumbai, on 19th June 2013. Evidence of this witness further reveals that she stayed with the appellant/accused subsequently,

till they were apprehended by police, and during that period she had consensual sex with the appellant/accused.

7 After apprehending the appellant/accused, who was in the company of the alleged victim female child/PW2, the police had sent her for medical examination to J.J.Hospital, Mumbai, where she was examined by PW6 Dr.Ashwini Darade. Evidence of this Medical Officer goes to show that upon examination, she found hymen of the victim female child/PW2 in torn condition and there were no injuries on the person of the alleged victim female child/PW2. With this evidence it needs to be concluded that the appellant/accused had indulged in sexual intercourse with the alleged victim female child/PW2. However, now one will have to determine whether this act, which was with full consent of the victim female child/PW2, amounts to rape and penetrative sexual assault. The term penetrative sexual assault is defined by Section 3 of the POCSO Act and the same is made punishable under Section 4 thereof. Section 3 of the POCSO Act reads thus :

“3 Penetrative sexual assault -

A person is said to commit "penetrative sexual assault" if -

- a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

Section 2(d) of the POCSO Act defines the term “child” which means any person below the age of 18 years. Similarly, sexual intercourse by man with a woman when she was under 18 years

of age at the time of the said act amounts to rape, as provided by Section 375 of the Indian Penal Code. Now let us examine whether during the period of the incident i.e. from 19th June 2013 to 1st July 2013, the alleged victim female child/PW2 was below 18 years of age.

8 In order to prove age of the victim female child/PW2, the prosecution has heavily relied on the document at Exhibit 17 which is Birth Certificate of the victim female child/PW2 issued under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969, by the Sub-Registrar. Section 17 of the said Act reads thus :

“17 Search of births and deaths register -

(1) Subject to any rules made in this behalf by the State Government, including rules relating to the payment of fees and postal charges, any person may -

(a) cause a search to be made by the Registrar for any entry in a register of births and deaths;

(b) obtain an extract from such register relating to any birth or death: Provided that no

extract relating to any death, issued to any person, shall disclose the particulars regarding the cause of death as entered in the register.

(2) All extracts given under this section shall be certified by the Registrar or any other officer authorised by the State Government to give such extracts as provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872), and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.”

It is, thus, clear that, the Birth Certificate issued by the authorities under the Registration of Births and Deaths Act, 1969, is admissible in evidence for the purpose of proving birth of the victim female child/PW2. The Birth Certificate at Exhibit 17 is issued by the Sub-Registrar, M/East Ward of the Mumbai Municipal Corporation. Thus, the age of the victim female child/PW2 is reflected from her date of birth mentioned in the Birth Certificate Exhibit 17 issued by the Competent Authority. Such certificate has presumption of genuineness, it being a public document.

9 Considering the purport and totality of the scheme of the Act, namely the Registrar and Sub-Registrar are public officers and they have statutory duty to maintain the record, the entries made by them will have to be attached value of the category “shall presume” and it would be open to the parties to prove to the contrary by proving a fact to the contrary by producing primary evidence if available.

10 The appellant/accused has tried to dislodge this evidence by contending that in the School Leaving Certificate Exhibit 12, date of birth of the victim female child/PW2 is shown as 5th July 1997. However, the victim female child/PW2 in her evidence has categorically deposed about her date of birth as 5th November 1997. When evidence regarding the age is comprising of the certificate issued by the registering authority under the Registration of Births and Deaths Act, 1969, by following due procedure of law, then that evidence shall have precedence over the date of birth recorded in the school record. Generally, at the time of taking admission in the school, parents of the child give

the date of birth relying on their memory and as per their convenience. However, the Registration of Births and Deaths Act, 1969, prescribes the procedure for recording the date of birth of a child by even casting obligation on the concerned to report births to the authorities. Hence, it needs to be held that the victim female child/PW2 was born on 5th November 1997. Even if for the sake of argument it is accepted that she was born on 5th July 1997 as per her recorded date of birth in the school record, then also the victim female child/PW2 was less than 18 years of age at the time of the incident in question. As such, the victim female child/PW2 was certainly a child, as defined by Section 2(d) of the POCSO Act, at the time of commission of the offence of penetrative sexual assault on her, by the appellant/accused. In this view of the matter, no infirmity can be found in the impugned judgment and order of conviction and the resultant sentence.

11 Minimum sentence is imposed on the appellant/accused by the learned designated court, considering the peculiar facts and circumstances of the case. Hence, the following order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)