

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.156 OF 2015

AARIF MAHAMADKHAN MALDAR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ganesh Bhujbal, Advocate for the Appellant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 3rd JANUARY 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 29th November 2014 passed by the learned Additional Sessions Judge and Designated court under Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO Act for the sake of brevity), Ratnagiri, in Sessions Case No.16 of 2013, thereby convicting the appellant/accused of offences punishable under Sections 10 read

with 9(i) of the POCSO Act as well as under Section 323 of the Indian Penal Code. He was, however, acquitted of offences punishable under Sections 376, 504 and 506 of the Indian Penal Code as well as of offences punishable under Sections 5(h) read with 6 of the POCSO Act. For offences punishable under Sections 10 read with 9(i) of the POCSO Act, the appellant/accused is sentenced to suffer rigorous imprisonment for 5 years apart from imposition of fine of Rs.5,000/- and default sentence of simple imprisonment for 6 months. For the offence punishable under Section 323 of the Indian Penal Code, he is sentenced to suffer simple imprisonment for 6 months apart from direction to pay fine of Rs.500/- and in default, to undergo further simple imprisonment for 1 month.

2 Facts in nutshell, leading to the prosecution of the appellant/accused, can be summarized thus :

- (a) First Informant is the victim female child. She was residing at Village Talavade in Lanja Taluka of Ratnagiri District. The appellant/accused was also residing in the same village.

He was insisting the victim female child/PW1 to marry him. The incident in question allegedly took place on 1st February 2013. On that day, at about 10.00 a.m., the victim female child/PW1 was proceeding to attend Jagannath Pednekar Middle School where she was taking education in 10th Standard. On the way to school, the appellant/accused accosted her. He took her in the adjoining nala and pressed her mouth, after showing a knife to her. The victim female child/PW1 became unconscious. When she regained consciousness after half an hour, she saw the appellant/accused sitting near her legs. The victim female child/PW1 found herself in half nude condition. Her salwar as well as knicker was found to be removed and her top was found lifted upward. She was in her menses and she felt pain in her private part. She sensed that the appellant/accused had committed forcible sexual intercourse with her. He threatened her that if the incident is disclosed to anybody else, he would kill her. The victim female child/PW1 then went to her house after wearing

clothes. For the whole night, she suffered pain as well as bleeding. She, therefore, disclosed the incident to her maternal aunt and then went to Police Station Lanja and lodged report Exhibit 21, which ultimately resulted in registration of Crime No.6 of 2013 for offences punishable under Sections 376, 323, 504 and 506 of the Indian Penal Code.

- (b) Routine investigation followed. During the course of investigation, the victim female child/PW1 was referred to the Civil Hospital, Ratnagiri, for medical examination. The spot was inspected and panchnama was prepared. Clothes of the victim female child/PW1 came to be seized. Clothes of the appellant/accused were also seized. On the basis of voluntary disclosure statement of the appellant/accused, a knife came to be seized. The appellant/accused was got medically examined and sample of his blood was also collected. On completion of routine investigation, the appellant/accused came to be charge-sheeted. The learned

trial court framed Charge for offences punishable under Sections 376, 323, 504 and 506 of the Indian Penal Code as well as under Section 5(h) read with Section 6 of the POCSO Act. The appellant/accused pleaded not guilty and claimed trial.

- (c) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all six witnesses. The victim female child is examined as PW1. The First Information Report (FIR) lodged by her is at Exhibit 21. Her aunt Khairun Maldar is examined as PW2. Mohamad Ali – panch witness to the voluntary disclosure statement of the appellant/accused is examined as PW3. Exhibit 30 is the voluntary disclosure statement whereas Exhibit 31 is the resultant Recovery Panchnama of the knife. Investigating Officer Dipika Jounjal, Police Sub-Inspector with Police Station Lanja is examined as PW4. Ramchandra Jadhav, Head Master of Jagannath Pednekar Madhyamik VVidyalay at Talavade is examined as PW5. Exhibit 71 is the copy of

the General Register of the school whereas Exhibit 8 is the bonafide certificate of the victim female child/PW1. Shashikant Kambale, Extension Officer with Panchayat Samiti Lanja is examined as PW6. Exhibit 77 is the extract of the Birth Register whereas Exhibit 81 is the Birth Certificate of the victim female child/PW1 issued under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. The defence of the appellant/accused was that of total denial. However, he did not enter in the defence.

- (d) After hearing the parties, by the impugned judgment and order, the learned trial court came to the conclusion that the victim of the crime in question is a child aged about 17 years and the prosecution has failed to establish penetrative sexual assault on her because the medical certificate does not reflect any injury to her private part and being a virgin girl, such injuries are must in order to establish the case of penetrative sexual assault. The learned trial court concluded that the prosecution has, however, proved the

offence of aggravated sexual assault on the victim female child/PW1 by the appellant/accused. Accordingly, he came to be convicted and sentenced, as indicated in the opening paragraph of this judgment.

3 I have heard Mr.Ganesh Bhujbal, the learned advocate appointed to represent the appellant/accused at the costs of the State. He argued that it was incumbent on the part of the prosecution to examine the Medical Officer in order to prove the fact that there was assault on the victim female child/PW1 and that sexual assault was caused by causing either grievous hurt or bodily harm and injury to the victim female child/PW1. Such evidence is absent. The learned advocate further argued that evidence of the victim female child/PW1 is artificial and she has not deposed anything to make out any offence against the appellant/accused. Her evidence shows that she was unconscious and therefore, it cannot be said that the prosecution has proved the offence of aggravated sexual assault against the appellant/accused.

4 As against this, the learned APP supported the impugned judgment and order of conviction and resultant sentence.

5 I have considered the rival submissions and also perused the record and proceedings including deposition of prosecution witnesses as well as documentary evidence adduced by the prosecution.

6 Considering the nature of the Charge, fate of the prosecution case, to a large extent, hinges on the testimony of the victim of the crime in question. By now, it is well settled that for making out the offence of penetrative sexual assault or rape, it is not necessary that the victim should suffer any external or internal injury. Valuable reference to this proposition can be had from the judgment of the Honourable Apex Court in the matter of **B.C.Deva vs. State of Karnataka**¹ wherein it is observed as under :

“18 The plea that no marks of injuries were found either on the person of the accused or the

1 (2007) 12 SCC 122

person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

7 Similarly, it is also settled that if evidence of the victim of the sexual offence is found trustworthy and reliable, then the court is not required to seek any corroboration to such evidence. In the matter of State of Punjab vs. Gurmeet Singh² the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

“....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the

2 1996 Cri.L.J. 172

attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice.

The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

8 At the outset, let us examine whether the prosecution has established that the victim female child/PW1, at the relevant time, was a child as defined by Section 2(d) of the POCSO Act. A person below age of 18 years is termed as a “child”. The victim female child/PW1 has categorically deposed about her date of birth as 16th July 1995. This evidence has virtually remained unchallenged. In addition to this evidence, the prosecution has examined PW6 Shashikant Kambale, Extension Officer, working with Panchayat Samiti Lanja. He appears to be the Sub-Registrar under the provisions of Registration of Births and Deaths Act, 1969. Evidence of this witness shows that the recorded date of birth of the victim female child/PW1 in the Birth Register maintained under the Registration of Births and Deaths Act, 1969, is 16th July 1995. This witness has proved extract of Birth Register

Exhibit 77 disclosing this date of birth of the victim female child/PW1 and has also proved the Birth Certificate Exhibit 81 issued by the Sub-Registrar under the provisions of the Registration of Births and Deaths Act, 1969. This Birth Certificate is also reflecting the date of birth of the victim female child/PW1 as 16th July 1995. The incident in question allegedly took place on 1st February 2013. As such, on the date of the incident, the victim female child/PW1 was certainly below 18 years of age.

9 Now let us examine what is deposed by the victim female child/PW1 in respect of the incident in question. Evidence of the victim female child/PW1 shows that the appellant/accused was having one sided love on her and he was insisting her to marry him. As per version of the victim female child/PW1, on 1st February 2013 when she was proceeding to attend her school at about 10.15 a.m., the appellant/accused accosted her at a place locally known as 'Piracha Mala' and dragged her to a stream-let. He laid her on ground, gagged her mouth and showed a knife to her. The victim female child/PW1 further deposed that then she

became unconscious and when she regained consciousness after half an hour, she found the appellant/accused sitting near her legs. Her odni was found to be removed from her person. Her knicker was found to be removed. The top of her dress was found to be pulled upward. She was in her menses and her sanitary napkin was also found to be removed. With this condition, she inferred that the appellant/accused might have committed sexual intercourse with her. She, then, returned to her house after receiving threats from the appellant/accused. As per version of the victim female child/PW1, she then tried to sleep but she could not sleep as she was suffering from bodily pain. As per her version, because of the incident, she had sustained injuries on her person. She, therefore, disclosed the incident to her maternal aunt and then went to Police Station Lanja and lodged the FIR Exhibit 21.

10 Cross-examination of the victim female child/PW1 could not bring on record anything which could have doubted her version in respect of the incident. On the contrary, from her cross-

examination, it is brought on record that the victim female child/PW1 was unconscious for a period of about thirty minutes. Similarly, it is brought on record that she was on the spot of the incident up to 12 noon.

11 Evidence of the victim female child/PW1 is gaining corroboration from the undisputed medical certificate which is at Exhibit 9. The victim female child/PW1 was medically examined by the Medical Officer of the Civil Hospital on the very next day i.e. on 2nd February 2013. The Medical Officer found abrasions over left elbow joint, right knee, right elbow joint and left side of cheek of the victim female child/PW1. This medical evidence coupled with the version of the victim female child/PW1 to the effect that the appellant/accused pressed her mouth and dragged her near the stream-let clinches the issue. Version of the victim female child/PW1 that after regaining consciousness, she found herself in half nude condition makes out the case of sexual assault on her by inflicting injuries to her.

12 In this view of the matter, no case for interference in the impugned judgment and order of conviction and the resultant sentence is made out. Therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)