

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.782 OF 2016

ASHOK DASHRATH KAKLIJ

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Chaitrali Deshmukh, Advocate for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 25th SEPTEMBER 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 10th November 2016 passed by the learned Ad-hoc Additional Sessions Judge, Malegaon, District Nashik, in Sessions Case No.22 of 2013, thereby convicting him of offences punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO

Act for the sake of brevity) as well as under Section 376(2)(j) and 506 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 10 years apart from direction to pay fine of Rs.5,000/- and in default, to undergo rigorous imprisonment for 3 months. For the offence punishable under Section 506 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 2 years apart from direction to pay fine of Rs.1,000/- and in default, to undergo rigorous imprisonment for 1 month. No separate sentence was awarded for the offence punishable under Section 376(2)(j) of the Indian Penal Code.

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

- (a) The victim female child/PW1, at the relevant time, was about 13 years of age. She was taking education in 6th Standard at Zilla Parishad School at Pimprale, Taluka Nandgaon, District Nashik. She, along with her parents, brothers and sisters,

used to reside in their agricultural field at Pimprale Shivar in Nandgaon Taluka of Nashik District. Field of the appellant/accused was adjacent to the field of the father of the victim female child/PW1. The alleged incident took place at about 2.00 p.m. of 11th August 2013. On that day, the victim female child/PW1 had been to Nagzari tank for washing clothes. The appellant/accused came there and asked the victim female child/PW1 to accompany him. She refused. The appellant/accused, then, pressed her mouth and took her to the adjacent field. He, then, gagged her mouth by a scarf and committed rape on her. Thereafter, the appellant/accused threatened her not to disclose the incident to anybody else. The victim female child/PW1 then returned to her house and narrated the incident to her grandmother as well as uncle. She was then taken to Police Station Nandgaon on 11th August 2013 itself, where she lodged First Information Report (FIR) which resulted in registration of Crime No.128 of 2013.

- (b) The victim female child/PW1 was then referred to the Civil Hospital, Nashik, where she was examined by PW10 Dr.Swaruprani Deelip Thakur. The appellant/accused came to be arrested and he was also sent for medical examination at the same hospital. PW11 Dr.Nareshkumar Bagul examined him. Routine investigation followed and on completion of investigation, the appellant/accused came to be charge-sheeted.
- (c) The learned trial court framed and explained the Charge to 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 twelve witnesses.
- (e) Defence of the appellant/accused was that of total denial. According to him, he is falsely implicated in the crime in question because of previous dispute.

(f) After hearing the parties, the learned trial court, by the impugned judgment and order was pleased to convict the appellant/accused and sentenced him accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Chaitrali Deshmukh, the learned advocate appointed to represent the appellant/accused at the costs of the State. She vehemently argued that there is no trustworthy evidence to establish that the victim female child/PW1 was a child, as defined by Section 2(d) of the POCSO Act. PW7 Mrs.Pratibha Ahire, Incharge Head Mistress of the school, was not knowing the fact as to who had admitted the victim female child/PW1 to the school and she had not maintained the General Register of the school of her own. The school was not having Birth Certificate of the victim female child/PW1. Similarly, it was further argued that evidence of the victim female child/PW1 is not reliable and trustworthy. There is no material to corroborate her version in respect of the incident in question.

4 The learned APP supported the impugned judgment and order of conviction as well as the resultant sentence.

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

6 The appellant/accused is held guilty of the offence punishable under Section 4 of the POCSO Act and as such, it was incumbent on the part of the prosecution to establish that the victim of the crime in question, at the time of commission of the offence, was below 18 years of age. To prove the age of the victim female child/PW1, the prosecution has examined PW7 Mrs.Pratibha Ahire, Incharge Head Mistress of the Zilla Parishad Primary School, where the victim female child/PW1 was taking education. On the basis of entry made in the General Register of the school, PW7 Mrs.Pratibha Ahire, Incharge Head Mistress of the Zilla Parishad Primary School, had issued School Leaving Certificate of the victim female child/PW1, which is at Exhibit 43.

As per the school record, date of birth of the victim female child/PW1 is 1st February 2000. However, PW7 Mrs. Pratibha Ahire, Incharge Head Mistress of the Zilla Parishad Primary School, has accepted in her cross-examination that she did not make entry in the General Register in respect of the victim female child/PW1. The school is not having any record as to who admitted the victim female child/PW1 to the school by disclosing her date of birth and admission form of the victim female child/PW1 is not available in the school records. The school was not having any certificate of the Sarpanch or Gram Sevak in that regard.

7 The Hon'ble Supreme Court in the case of **Mahadeo S/o. Kerba Maske vs. State of Maharashtra and Anr.**¹ has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“Rule 12(3) : In every case concerning a child or juvenile in conflict with law, the age

1 (2013) 14 SCC 637

determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a

finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

The Hon'ble Supreme Court further held in paragraph 12 of **Mahadeo S/o Kerba Maske (supra)** as under:

“12Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3) (a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well.

(Emphasis supplied)”

8 Entries in General Register of the school are made in the regular course of business by the school authority. Official acts

are regularly performed is a wise principle adopted by the legislature. The victim female child/PW1 was taking education in the Zilla Parishad school and the entry of her date of birth taken ante litem motam, as such, assumes significance. The date of birth recorded in the school record is recognized for determining age of the child as per the provisions of the Juvenile Justice (Care and Protection of Children) Rules 2007. As such, there is no reason to disbelieve this evidence in respect of date of birth of the victim female child/PW1.

9 An attempt was made by cross-examining the victim female child/PW1 to show that she was more than 18 years of age at the time of the incident in question. It was suggested to her that she has five sisters and each sister is younger by three years than the elder sister. However, this admission in the cross-examination of the victim female child/PW1 cannot over ride the documentary evidence regarding date of birth of the victim female child/PW1. On the contrary, from cross-examination of the victim female child/PW1, it is brought on record that she left the school

when she was 15 years old and it is further brought on record that it was after the incident, she did not resume school education. This implies that admission given by the victim female child/PW1 that she is the eldest daughter and her other five sisters are younger by three years than the elder sister is of no consequence. Thus, on the basis of her recorded date of birth in the school record, the victim female child/PW1 is proved to be below 18 years of age, at the time of the incident, which took place on 11th August 2013.

10 So far as the incident of rape is concerned, the victim female child/PW1 has categorically deposed that she had been to Nagzari tank for washing clothes, and at that time, the appellant/accused came and took her to his field, where after removing her clothes, he had committed rape on her. The victim female child/PW1 has also spoken about threat given by the appellant/accused to her after the act.

11 Cross-examination of the victim female child/PW1 is relevant. It is brought on record from her cross-examination that at the time of the incident, she raised alarm and scratched the face of the appellant/accused. She has also stated in her cross-examination that her neck was swollen because of the resistance given by her to the overt act of the appellant/accused.

12 Evidence of PW10 Dr.Swaruprani Thakur, who examined the victim female child/PW1 immediately on the next day of the incident, fully corroborates the version of the victim female child/PW1 appearing on record from her cross-examination. Upon examination of the victim female child/PW1, PW10 Dr.Swaruprani Thakur noticed that the victim female child/PW1 was having abrasion on neck of size 10 x 0.5 cm. Similarly, the appellant/accused was medically examined on the next day of the incident by PW11 Dr.Nareshkumar Bagul. In his medical examination, it was found that the appellant/accused was having abrasion over upper lip as well as abrasion over middle moustache region. Thus, version of the victim female child/PW1, that she

had scratched the face of the appellant/accused in the course of offering resistance, is substantiated by evidence of PW11 Dr.Nareshkumar Bagul. The claim of injury suffered by the victim female child/PW1 during the incident is also gaining corroboration from evidence of PW10 Dr.Swaruprani Thakur.

13 Apart from this, during medical examination of the victim female child/PW1, PW10 Dr.Swaruprani Thakur had found that there were injuries on the private part of the victim female child/PW1. Labia majora of the victim female child/PW1 was swollen, edematous and bruised. Similarly, it was noticed that labia minora was also swollen, bruised and tender. The Medical Officer noticed abrasion of size 1.3 cm x 0.8 cm on fourchette of the victim female child/PW1. Her vulva was found reddish in colour and perineum was found swollen and tender. Hymen of the victim female child/PW1 was having tears at 5, 6 and 7 O' Clock position. With these findings, the Medical Officer has opined that the victim female child/PW1 was subjected to sexual intercourse recently. It is, thus, clear that, medical evidence

adduced by the prosecution is fully supporting the version of the victim female child/PW1 in respect of the brutal sexual assault on her by the appellant/accused. Evidence of PW10 Dr.Swaruprani Thakur in respect of her findings upon examination of the victim female child/PW1 is not at all shattered in the cross-examination. Non-mentioning of age of hymenal tear is of no consequence when the Medical Officer has noted that the tear was a fresh one.

14 In the result, with this evidence, it needs to be held that the appellant/accused had committed penetrative sexual assault on the victim female child/PW1 on 11th August 2013, and thereafter, criminally intimidated her by threatening her not to disclose the incident to anybody else. No infirmity can be found in the impugned judgment and order of conviction and the resultant sentence. The appeal, as such, is devoid of merits. Therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)