

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.540/2017

Alpesh Gunwant Patil,
aged 20 years, Occ. Labourer,
r/o Sanjay Gandhi Nagar No.2,
Near Statue of Gautam Buddha,
Amravati.

.....APPELLANT

...V E R S U S...

The State of Maharashtra through
Police Station Officer, Police Station,
Frezarpura, Amravati.

...RESPONDENT

Mr. N. A. Badar, Advocate for appellant.
Mr. A. M. Joshi, A.P.P. for respondent.

CORAM:- V. M. DESHPANDE, J.
DATED :- 22.02.2019

ORAL JUDGMENT

1. By present appeal, appellant is challenging judgment and order of conviction dated 22.09.2017 passed by learned Additional Sessions Judge-2, Amravati in Special (POCSO) Case No.44/2017 by which appellant is convicted for an offence punishable under Section 363 of the Indian Penal Code (IPC) and is directed to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000/-, in default of payment of fine, to suffer further simple imprisonment for one month.

He is also convicted for an offence punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2012 (POCSO) and is directed to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for one month. Though, appellant is convicted for an offence under Section 376 (2) (i) of the IPC, no separate punishment is imposed on him on that count. At the same time, learned Judge of Court below has acquitted appellant of an offence punishable under Section 341, 506 of the IPC as well as under Section 6 of the POCSO Act.

2. PSI Ram Kadam (PW5) was attached to Police Station, Frezarpura. On 15.11.2016 Kailash (PW1) lodged his oral report, Exh.-10. On the basis of said report, PSI Kadam (PW5) registered crime for an offence punishable under Section 363 vide Crime No.944/2016. Printed FIR is at Exh.-11.

Report Exh.-10 lodged by Kailash (PW1) is dated 15.11.2016. Report shows that Kailash is having one son and one daughter, the victim. Her age is shown as 14 years and she was taking education in 8th standard in a school situated at Jalaram

Nagar, Amravati and she used to go to her school along with her friends at 11.00 O'clock in the morning and used to return at 5.15 in the evening. However, On 15.11.2016, she alone went to school at 11.00 O'clock and failed to return to the house. Therefore, he and his wife Sunita made search of her. However, she could not be traced. In Exh.-10, description of girl is given. In the report, it is stated that the girl has left somewhere and therefore she should be traced.

Exh.-11 printed FIR shows that an offence was registered against unknown persons. After registration of crime on 16.11.2016, PSI Kadam 9PW5) went to house of first informant and prepared spot panchanama, Exh.-12 and thereafter investigation was handed over to API Ingle.

3. After being entrusted with investigation, API Ingle (PW3) took search of missing girl by displaying her photographs on Television and internet. During investigation, location of the appellant and victim girl were found at Bhosri, which was obtained from Cyber Cell, Amravati since the appellant made a phone call to his friend on his mobile. Accordingly, API Ingle went to Alandi from where both were brought at Amravati. Appellant

was arrested under arrest panchanama Exh.-16. API Ingle thereafter handed over investigation to Woman PSI Bhoi.

4. After handing over investigation to PSI Bhoi (PW4), statement of witnesses were also recorded. Necessary steps were taken for recording statements of victim under Section 164 of the Code of Criminal Procedure. The said is also recorded. Birth certificate of victim was also collected, which was issued by Municipal Corporation, Akola. It is at Exh.-38. During the course of investigation, according to the investigating officer, sexual intercourse was committed. After completion of investigation, investigating officer filed charge-sheet under relevant penal provisions.

5. Learned Sessions Judge framed charge against appellant for an offence punishable under Section 365, 376 (2) (i) (ii), 241, 506 of the IPC and Section 3 and 4 punishable under Section 5 of the POCSO Act. In order to bring home guilt of the appellant, the prosecution has examined in all 7 witnesses. After a full dress trial, learned Judge of the Court has passed the impugned judgment.

6. I have heard Mr. Badar, learned counsel for appellant and Mr. Joshi, learned A.P.P. for the State, in extenso.

7. For determining age of the prosecution, the prosecution has relied upon birth certificate issued by Akola Municipal Corporation. It is at Exh.-38 and also examined Pravin Baitule (PW7), Head Master of the school wherein the victim was taking education. He has filed on record, general register, Exh.-53 in which name of the victim is appearing at Sr.No.1108. As per birth certificate issued by competent authority and evidence of Pravin (PW5), date of birth of victim is 18.03.2004. Further, during the course of submission, Mr. Badar, learned counsel for appellant did not dispute date of birth of the victim. The offence is committed on 15.11.2016. Thus, it is crystal clear that on the date of offence, when the victim girl was found to be missing, she was below the age of 18 years.

8. Evidence of the victim is recorded. Her evidence would show that she has eloped with appellant. Exh.-24 is a chit written by the victim to her friend Bawali. The victim has admitted that she has written the said chit. However, she has specifically denied

that phone number of appellant appearing at the bottom of said chit is in her handwriting. The chit Exh.-24 is undated. Perusal of the said chit shows that appellant-victim and one Akshay, they wandered at Mahadeo Khor.

9. This submission of learned counsel for appellant that on her own, victim has accompanied from Amravati to Bhosri, she stated in a room provided by one Mr.Pole for 2-3 days and thereafter on her own she went to Alandi. He, therefore, submitted that appellant cannot be convicted for an offence under Section 363 of the IPC. I am afraid, this submission of learned counsel for the appellant can be accepted. Once, age of the victim is found well below 18 years, consent is immaterial. Therefore, it is crystal clear that the prosecution has proved its case for an offence under Section 363 of the IPC. Therefore, there is no hesitation in my mind to record a finding that appellant has accompanied a minor girl from the lawful guardianship of her parents.

10. That takes me to examine whether the Court below was right in convicting the appellant for an offence punishable under Section 376 (2) (i) of the IPC and under Section 4 of the POCSO

Act. Finding of the Court below for reaching to the conclusion that the appellant has committed an offence under Section 4 of the POCSO Act and Section 376 (2) (i) of the IPC is primarily based on the reasoning that the version of the victim girl (PW2) inspires confidence and safe to record the said finding.

The learned A.P.P. for the State also has made a submission on the same line.

11. Status of the victim in rape cases is on higher pedestal than that of an injured person in an attack. It is always open for the Court to record a finding of guilt on the solitary evidence of the victim, if it is found to be trustworthy and inspires confidence. If this crucial test is found to be passed while examining evidence of the victim then Court need not search for corroboration for the victim's version. However, if the victim's evidence fail to pass this test then the Court searches for other available evidence seeking corroboration to the victim's evidence.

12. Recitals of Exh.-24, chit which was seized under seizure memo Exh.-13 on 10.02.2017 i.e. after victim girl and appellant were brought to Amravati from Alandi, shows that appellant is not

an unknown person to the victim. Not only that its reading would show that they were acquainted with each other and prior to said incident along with their common friend, Akshay they had a trip to Mahadeo Khor.

13. Evidence of victim (PW2) would show that one Shobha Borkar used to reside in the house of victim as tenant and appellant used to come to Shobha Borkar. Evidence further shows that appellant used to follow her and used to try to talk with her. However, she used to refuse to have a talk with him.

14. Prior to 15 days of the lodging of the missing report by father of the victim girl, as per the evidence of victim, appellant asked her to have friendship with him and caught her hand. Though, these types of adventerous acts were made by appellant, the said fact was not disclosed by the girl to her parents. The explanation as it could be noticed from the evidence for the same is that she claims that she was frightened. In this context, I would like to observe that as per claim of the victim that when the appellant caught hold of her hands and gave a proposal for friendship and when it was denied, no threats were extended by

the appellant. Thus, it is clear that a young boy made a proposal for friendship by holding hand of an adolescent girl, which was not liked by the said girl, therefore, there was no reason for the girl, who was taking education in eighth standard not to report the matter to her parents.

15. Victim's evidence would show that thereafter accused tried to talk with her and as per version of victim, he states that if she is not talking with him, he will commit something wrong "with his life." This evidence, in my view, shows that the appellant was in deep love with the victim. In fact, said is the specific defence of the appellant when he was examined by the learned Judge under Section 313 of the Cr.P.C.

16. As per the evidence of the victim, after reaching to Bhosri in Pune District by railway, they came to house of one Mr.Pole. They stayed there for three days in a room of said Mr.Pole. According to the victim, she was introduced to Mr. Pole as his sister. As per version of the victim, during the said three days in the house of Mr.Pole, appellant has established sexual relations with her. From cross-examination of victim, it is clear

that during their stay at Bhosri, the girl used to step outside the house and go along with appellant for doing labour work. It is the version of the girl in cross-examination that appellant Alpesh used to do labour work for earning money.

17. The girl did not disclose any physical relations to Mr.Pole established by the appellant against her wish. Not disclosing this fact appears very unnatural especially when appellant introduced the girl with Mr. Pole as his sister. Therefore, had any wrong was really committed, it was open for this girl to report the matter to Mr. Pole in whose house they stayed for 3-4 days.

18. Spot panchanama, Exh.-12 is in respect of house of Kailash (PW1). Though API Ingle has brought the victim and appellant from Alandi, neither he nor PSI Bhoi (PW4), who has investigated the crime, took steps for recording panchanama of the spot where alleged sexual intercourse had taken place.

19. Kailash (PW1) is father of victim. His evidence would show that father of victim and appellants were brought to

Frezarpura Police Station, Amravati. He made inquiry with the victim, who disclosed about her kidnapping. His evidence is conspicuously silent in respect of the fact that the victim disclosed to her father that during their stay at Bhosri and Alandi, sexual intercourse had taken place between them against her wish.

20. Mother of victim is not examined by the prosecution. Relations between mother and daughter are special one. Unless otherwise pointed out, it is always safe for the Court to record that the daughter will not hesitate to disclose any untoward incident happened to her to her mother. Victim girl's evidence also does not show that after she was brought to police station and after her custody was handed over to her parents, she narrated the incident of sexual assault on her, either to her mother or to her father. This, in my view is most unnatural, which shows that the Court should not readily accept the version of the victim girl.

21. Since, evidence of father of victim is totally silent about sexual assault on his daughter the victim's evidence does not allow the Court to readily accept her version, Court is required to search for other evidence, which could be corroborative in nature.

22. After victim was brought to Amravati, she was sent for her medical examination at General Hospital, Amravati. Dr.Prashant Kalbande (PW6) has examined her. The doctor's evidence would show that when he examined the victim, he found tear on fourchette area, size 1 X 1 cm. In the examination in chief itself, the examining Doctor states that fourchette area is entrance point of vagina. His evidence shows that due to insertion of any object in the private part, tear on fourchette area is possible. After examining the girl in presence of her mother Sunita, he gave certificate, which is available on record at Exh.-44. Exh.-45 are notes of physical examination of the victim in prescribed format. Perusal of same shows that Doctor was unable to give exact opinion in respect of commission of rape. On 02.02.2017, investigating Officer Bhoi (PW4) made a query by giving query letter Exh.-36, seeking opinion of Doctor as to whether injury as noticed in Exh.-45 is caused due to sexual intercourse. Exh.-46 is opinion of Dr. Prashant which reveals that the Doctor was unable to make any comment on it.

23. When Dr. Prashant (PW6) was under cross-examination, he admitted that at the time of examination, he

found that hymen of the girl was intact and was unruptured. The contemporaneous document Exh.-45 is also conspicuously silent about the same. Further, Exh.-45 shows that alleged incident of sexual bout was in the midnight on 03.12.2016. The victim girl's evidence does not show that prior to she being brought at Amravati on 04.12.2016, she washed her clothes. Clothes of the appellant as well as victim were seized. Exh.-23 is seizure panchanama seizing clothes of the victim. There is nothing on record to show as to why those clothes were not sent to the chemical analyser for obtaining a word from the scientific expert. Thus, it is very clear to this Court that there is no corroborative evidence whatsoever in nature to corroborate testimony of victim whose evidence was found to be shaky and was not found to be having any sterling quality for its ready acceptance.

24. In view of aforesaid, there is no hesitation in my mind to upset the finding recorded by learned Judge of the Court below in respect of the offence punishable under Section 376 (2) (i) of the IPC and Section 4 of the POCSO Act and by exercising my appellate jurisdiction, I set aside the finding and the reasoning given by the learned Judge of the trial Court for those finding.

25. It is noticed by this Court that appellant has committed an offence under Section 363 of the IPC. The Court below has awarded punishment of 5 years for the said offence.

From Exh.-44 and observation of the Doctor, it is clear that the victim was having love affair with the appellant and in fact it is his defence also. Appellant is also of tender age. His age is only 20 years. The appellant was in jail from 05.12.2016 i.e. the date of arrest till 30.06.2017 when he was released on bail. Thus, for a period of six months he was an under trial prisoner. After judgment dated 22.09.2017, the appellant is in jail till today. Thus, appellant is in jail for about one year five months. Thus, total jail period of appellant will be one year eleven months and twenty days. Section 363 of the IPC does not prescribe any maximum or any minimum sentence.

26. Looking to the fact that there was a love affair between appellant and victim girl, who was unfortunately a minor and the appellant has already spent the aforesaid period in jail, in my view, the appellant need not to continue his jail presence with other hardened criminals. That allows me to exercise my discretion to reduce the quantum of sentence.

27. Conspectus of the above discussion and reappraisal of the entire prosecution case leads me to pass the following order.

ORDER

(i) The appeal is partly allowed.

(ii) Impugned judgment and order dated 22.09.2017, passed by Additional Sessions Judge-2 and Special Judge, Amravati in Special POCSO Case No.44/2017, convicting the appellant for an offence punishable under Section 376 (2) (i) of the Indian Penal Code and Section 4 of Protection of Children From Sexual Offences Act, is hereby quashed and set aside.

(iii) Appellant-Alpesh Gunwant Patil, is acquitted of the offence punishable under Section 376 (2) (i) of the IPC and Section 4 of the POCSO Act.

(iv) Judgment and order dated 22.09.2017, passed by Additional Sessions Judge-2 and Special Judge, Amravati in Special POCSO Case No.44/2017, convicting appellant for an offence punishable under Section 363 of the IPC is confirmed. However, for the said offence, instead of five years of jail term imposed by the Court below, the jail term of the appellant shall be the period, which he has already undergone in jail.

(v) Fine amount of Rs.1,000/- for an offence under Section 363 of the IPC is maintained.

(vi) The appellant shall be released forthwith, if not required in any other case.

JUDGE

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