

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.611 OF 2017

Mahesh Tukaram Pawar	]	
AGE – 31 Years, Occu- Driving,	]	
R/O House No.93 A,	]	
Pali, Bauddhawadi,	]	
Tal. & Dist. Ratnagiri,	]	
(at present in Central Jail, Ratnagiri.)	]	Appellant

Versus

THE STATE OF MAHARASHTRA	]	
(At the instance of Session Case	]	
No.30 of 2015 pending Before the	]	
Judge of Special Court Ratnagiri.)	]	Respondent

.....
Ms. Nasreen S.K. Ayubi, for Appellant.

Mr. P.H. Gaikwad-Patil, Additional Public Prosecutor, for Respondent-State.
.....

CORAM: PRITHVIRAJ K. CHAVAN, J.

RESERVED ON: 13TH FEBRUARY, 2020.

PRONOUNCED ON: 21st FEBRUARY, 2020.

JUDGMENT:

Challenge in this appeal is to a judgment and order of conviction and sentence dated 6th June, 2017 in Special Case No.30 of 2015 passed by the learned Additional Sessions Judge, Ratnagiri in Special Case No.30 of 2015 by which the appellant came to be convicted of an offence

punishable under section 376 (j) of the Indian Penal Code (for short 'I.P.C') and has been sentenced to suffer rigorous imprisonment for 10 years with fine of Rs.10,000/-, in default, simple imprisonment for 6 months.

The appellant has been further convicted of an offence punishable under section 506 of the I.P.C and has been sentenced to suffer rigorous imprisonment for one year with fine of Rs.600/-, in default, simple imprisonment for one month.

The appellant has been further convicted of an offence under section 5 (j) (ii) punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO') and has been sentenced to suffer rigorous imprisonment for ten years with fine of Rs.10,000/-, in default, simple imprisonment for six months.

2. The learned Special Judge has, *inter alia*, directed that amount of Rs.5,000/- be paid to the victim by way of compensation under section 357 of the Code of Criminal Procedure, 1973 (for short 'Cr. P.C') from the fine amount.

3. The prosecution case, as emerged from the record, can be summarized as follows:

Father of the victim runs a hotel at Pali. He had shifted from Mahad to Pali. Name of the hotel is “Varad”. After some time, since the hotel was running well, victim’s father shifted the family to Pali. The victim took an admission to a local College at Pali in 11th standard. She also used to help her parents in their business. They were residing in the part of the hotel.

The appellant got acquainted with P.W.3- victim’s father as he used to visit their hotel for breakfast and lunch. He slowly developed his relations and acquaintance with the family of the victim. Sometime in the month of May, 2015, the appellant expressed his love to the victim and sought her response to which the victim refused and declined his offer. Sometime in the month of June, 2015 when the victim was alone in the room above the hotel and rest of the family members were working in the hotel, the appellant entered into the room and pulled the shutter to half of its length. The victim was on the bed. She asked him to go down, however, he did not listen and thereafter by taking disadvantage of her loneliness committed forcible sexual intercourse with her. He had also threatened not to disclose the incident to anyone.

In the month of July, 2015, there was no menstrual period and, therefore, her mother asked about the same and took her to the Hospital on

two to three occasions. However, her menstruation period did not commence. Her father took her to a Sonography centre in a town Lanja, where, after examination, it revealed that the victim was carrying a fetus in her womb. The victim thereafter disclosed the incident in question to the parents.

4. On the basis of the report and statement of the victim, a crime bearing No.125 of 2015 came to be registered against the appellant at Ratnagiri Rural Police Station under the relevant sections of POCSO Act and I.P.C.

5. The Investigating Officer held investigation into the crime. He recorded the statement of the victim and her parents, drew spot panchanama in the presence of pancha witnesses by visiting the scene of occurrence. He had prepared a sketch of the spot. The victim and the appellant were referred for medical examination. Their blood samples and other material were obtained for medical analysis. The Assistant Chemical Analyzer of the Government Regional Forensic Science Laboratory, Pune after carrying out various tests as well as D.N.A test of the appellant vis-a-vis the fetus and the victim, conclusively opined that the appellant and the victim are concluded to be biological parents of the fetus. The Chemical Analyst analyzed all the 15 different genetic systems which matched with the fetus of the victim.

Similarly, the same matched with victim's fetus at all loci. After investigation, a charge-sheet came to be filed.

6. The appellant appeared before the learned Special Court, Ratnagiri on 11th August, 2016. A charge was framed in terms of **Exhibit 16** under sections referred hereinabove. It was read over and explained to the appellant in vernacular to which he pleaded not guilty and claimed a trial. The defence of the appellant, as emerged from the line of the cross-examination as well as from his statement under section 313 is that he has been falsely implicated in this case and that he did nothing to the victim. It is also the contention of the appellant that he has been implicated only on suspicion. No defence evidence has been adduced on his behalf.

7. To substantiate the charge, prosecution examined in all twelve witnesses. The learned Special Judge, after going through the evidence of the prosecution witnesses and the report of the chemical analyzer held the appellant guilty as above.

8. I heard Ms. Nasreen Ayubi, learned Counsel for the appellant extensively, who took me through the evidence of prosecution witnesses and urged to give the benefit of doubt to the appellant in view of the fact that it seems to be a consensual act as the victim did not immediately inform her

parents about alleged act of the appellant. It is also contended that there was no resistance offered by the victim who was quite grown up as her date of birth, un-disputedly is 24th May, 1999. However, while concluding her arguments, learned Counsel for the appellant submitted that if this Court is inclined to dismiss the appeal then looking to the harshness of the sentence and in view of the fact that the appellant had already undergone 4 and ½ years incarceration, he may be released by awarding the sentence already undergone.

9. On the other hand, the learned A.P.P supported the impugned judgment by contending that not only the testimony of the victim but the testimony of P.W.4-Dr. Vikas Kumare conclusively established the charge against the appellant beyond reasonable doubts. The learned A.P.P drew my attention to the evidence in proof of the date of birth of the victim which is 24th May, 1999, meaning thereby, she was 16 years one month old in the month of June, 2015. The learned A.P.P has also emphasized upon the D.N.A report.

10. Undisputedly, after shifting his family from Mahad to Pali, victim's father had opened a hotel by name 'Varad' which was running in good condition and that the appellant was a regular visitor. The testimony of the victim reveals that she took admission in 11th standard at Pali and at

the same time, she was helping her parents in the business of hotel. The appellant was a regular customer of the hotel who used to take his daily breakfast and lunch. The acquaintance and closeness with the family of the victim increased by passage of time. In the year 2015, the appellant proposed his love to the victim but she refused. In June, 2015, when she was sleeping in the room on the first floor of the hotel, the appellant entered into her room and closed the shutter to its half. He came to her bed and woke her up. The victim asked him to go downstairs but instead he committed sexual intercourse against her will. He also threatened her not to tell about it to any person and, therefore, she did not disclose the incident to anyone. When she missed her menstruation in the month of July, 2015, her mother inquired and thereafter, the victim was taken to the Hospital on two occasions. Ultimately, on 6th October, 2015, when she was taken to Lanja in *Nishkarsh* Sonography Centre, it revealed that she was pregnant. The victim thereafter informed her father about the incident.

11. During her cross, the defence could not rebut her version except bringing a few minor omissions which are insignificant. Even if it is presumed for the sake of arguments and in view of some admissions given by the victim that she used to send messages to the appellant and that, to some extent, the act alleged was consensual, yet it cannot be lost sight of the fact that indubitably the victim was a minor at the time of the incident and,

therefore, consent of the victim, even if it is presumed, is immaterial. The victim was 16 years old at the time of the incident and when she was examined by the Doctor, it revealed that she was carrying a fetus of 15 weeks three days in her womb.

12. The testimony of the victim is corroborated by P.W.9- Dr. Nilesh Naphade who carried out the sonography. According to P.W.9- Dr. Naphade, Dr. Preeti Kulkarni had carried out sonography of the victim. The report is proved at **Exhibit 44** establishing the fact of 15 weeks pregnancy of the victim.

13. As per the evidence of P.W.5-Senior Clerk (Junior College, Pali) date of birth of the victim as per the school record and school leaving certificate is 24th May, 1999. The bona fide certificate is at **Exhibit 32**. There is no reason to disbelieve this documentary evidence. The date of birth has further been substantiated by P.W.6-Gramsevak at Gandharpali, Taluka Mahad, District Raigad. He had produced original birth certificate. He had brought the register of 1999. The entry of birth is in respect of the victim which indicates that she was born on 24th May, 1999. This evidence remained intact. The learned trial Judge has, therefore, correctly and properly evaluated the evidence of almost all the prosecution witnesses and reached a legal and correct conclusion holding the appellant guilty of the

offences with which he has been charged. The prosecution has satisfactorily explained the delay in filing the F.I.R as normally, in such cases, it is not expected of the parents or the victim to immediately approach the Police since the reputation of the family is at stake.

14. P.W.8- Dr. Deepa Pawaskar is M.D in Gynecology. She had examined the victim on 8th October, 2015 in her hospital. She had requested father of the victim to lodge a report with the Police as the victim was minor. The said advice was given to this witness after examining the sonography report. The victim was admitted in the hospital for four days and was discharged on 5th day. This witness had collected the blood and urine sample and thereafter carried on her abortion.

15. P.W.1- Sanjay Kumbhar acted as a panch witness on the site spot. Sport panchnama is proved at **Exhibit 22**. His evidence is formal in nature. P.W.3 is father of the victim who supported the testimony of his daughter in respect of acquaintance with the appellant who used to attend his hotel for breakfast, meals and cold drinks. The appellant started frequenting their house who was working as Driver on a tourist car and was providing transportation to the victim's father and their family. The evidence of this witness as regards the alleged act of the appellant is as per the narrations made to him by the victim.

16. P.W.4-Dr. Vikram Kumare examined the appellant on 12th October, 2015 and found that he was able to do sexual intercourse.

17. P.W.12-Mahesh Thite was attached to Sangmeshwar Police Station as In-charge Police Inspector. He had conducted investigation in this crime. His evidence is restricted to the extent as to how he recorded the statements of the witnesses, collected the blood samples and D.N.A sample of the victim and the appellant. Nothing could be elicited in his cross which would show that it is not a genuine case.

18. Thus, having considered the entire evidence on record and after going through the documents, I do not find any reason to interfere with the impugned judgment and order of conviction.

19. The learned Counsel for the appellant submits that the appellant be released considering his age, with no criminal antecedents as well as the fact that he had already undergone four and half years sentence. It is prayed that he may be released by reducing the sentence to the extent he has already undergone.

20. The learned A.P.P has strongly objected the submissions of the learned Counsel for the appellant by contending that the appellant not only cheated the victim but also betrayed the trust of her father and the family

with whom he was closely associated. It is not the case of the appellant that he wanted to marry the victim. It is submitted that there is no substance in the submissions made by the learned Counsel for the appellant.

21. Indeed, the appellant had betrayed the trust of the victim and her family by sexually exploiting the victim who was minor in age. The statement of objects and reasons of the POCSO Act, *inter alia*, provides protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child. A large number of such offences are being reported in recent past and, therefore, an adequate punishment is the need of the hour.

22. For these reasons, I am not inclined to accept request of the learned Counsel for the appellant. Consequently, the appeal is devoid of merits and hence is dismissed.

[PRITHVIRAJ K. CHAVAN, J.]