

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 227 OF 2018

Ashok @ Bhaiyya s/o Magan Koli,
Age : 24 years, Occu. Labour,
R/o Parsamal, Tq. Shindkheda,
District Dhule

APPELLANT

VERSUS

1. The State of Maharashtra,
through P.S.I., City Police,
Shindkheda, Tq. Shindkheda,
District Dhule

2. XYZ,
Age : 17 years, through her
guardian Ramchandra Pandit Koli,
Age : 40 years, Occu. Agri.,
R/o Parsamal, Tq. Shindkheda,
District Dhule

RESPONDENTS

Mr. Prakashsing B. Patil, Advocate for the appellant
Mr. S.N. Morampalle, A.P.P. for the respondent/State
Mr. Kumar Gaurav M. More, Advocate for respondent No.2

CORAM : MANGESH S. PATIL, J.

DATE OF JUDGMENT RESERVED : 22.07.2021
DATE OF JUDGMENT PRONOUNCED: 27.07.2021

JUDGMENT :

This is an appeal under Section 374 (2) of the Code of Criminal Procedure against conviction of the appellant for the offence punishable under Section 6 of the Protection of Children from Sexual

Offences Act, 2012 (hereinafter referred to as “POCSO Act”) and under Sections 452 and 506 of the Indian Penal Code and sentencing him to punishments, the maximum of which is rigorous imprisonment for ten years and fine of Rs.35,000/-, in default simple imprisonment for one year for the offence punishable under Section 6 of the POCSO Act.

2. The criminal law was set in motion by the respondent No.2 (hereinafter referred to as “victim”) stated to be of 16 years and three months old on the date of lodging of the FIR on 28.03.2017. She alleges that she has been residing with her parents, two brothers and grandmother at village Parsamal, Taluka Shindkheda, District Dhule. Her date of birth is 15.08.2001. Her parents alongwith one of her brothers had gone to Selamba on 19.03.2017. She alongwith her grandmother and another brother were at home at Parsamal. She then alleges that on 24.03.2017, during afternoon hours, her grandmother had taken her brother Akash for medical treatment to a doctor. She was alone in the home. She bolted the backside door and was having meals in the front room. She alleges that at about 1.30 p.m., the appellant effected entry into the house by unbolting the backside door by putting the hand inside. When she questioned him as to how and why he had entered into the house in this manner, he pulled her to the inside room, disrobed her and committed rape at the point of knife. He also threatened her of dire consequences if the incident was disclosed. After the incident, he left from the backside door. She tried to raise hue and cry, but he had gagged

her mouth during the incident and also threatened her because of which she was frightened. When her grandmother and brother came back and saw her dejected, the grandmother asked her the reason but she could not disclose anything. Her parents returned on 26.03.2017 and thereafter she started crying and narrated the incident to her parents. Since both of them and grandmother were unable to comprehend how to meet the situation as they were apprehensive of there being a social stigma, after giving some thought, they went to the Police Station on 28.03.2017 and lodged the report.

3. The offence was registered. The victim (PW1) was sent for medical examination. Her clothes were seized under seizure panchanama (Exh-22). The appellant was arrested. Even his clothes were seized under seizure panchanama (Exh-21). Samples were collected. A spot panchanama (Exh-28) was drawn. The samples were forwarded for chemical analysis and the reports were received. In due course of time, after conclusion of the investigation, PSI Potadar (PW8) submitted the chargesheet. A charge was framed for the offences punishable under Sections 376(2), 452 and 506 of the Indian Penal Code and for the offences punishable under Sections 4, 6 and 8 of the POCSO Act. The appellant pleaded not guilty. The prosecution led its evidence.

4. The defence of the appellant is mainly of total denial. I am using the word 'mainly' purposely inasmuch as in an extrajudicial confession made to Dr. Sonawane (PW5), who medically examined the appellant, he had

narrated the history by saying that he was having an affair with the victim (PW1). He had entered the house as alleged and both of them had hugged each other though there was no sexual intercourse. However, during his examination under Section 313 of the Code of Criminal Procedure, he has not come out with any such version and has merely asserted that he has been falsely implicated by the mother of the victim because of some monetary reasons. There is also an attempt by the defence to dispute the age of the victim (PW1).

5. At the end of the trial, the learned Special Judge, by the impugned judgment and order, concluded that the victim (PW1) was indeed a child, who was born on 15.08.2001 and was 15 years 7 months and 9 days old on the date of the incident. He also concluded that though there was no concrete medical evidence inasmuch as the chemical analysis reports were in the negative, the version of the victim (PW1) was reliable and was also supported by some medical evidence in the form of tear of hymen and opinion expressed by Dr. More (PW4) regarding such finding being consistent with the forcible sexual intercourse. By raising a presumption under Section 29 of the POCSO Act and holding that the appellant had failed to rebut it, the learned Special Judge convicted and sentenced the appellant as mentioned hereinabove. No separate sentence was awarded for the offence under Section 376(2) of the IPV in view of the provisions of Section 42 of the POCSO Act.

6. (i) Mr. P.B. Patil, learned Advocate for the appellant submits that the date of birth of the victim (PW1) has not been duly proved and consequently, there is a serious doubt as to if she was a child within the meaning of Section 2(d) of the POCSO Act on the date of the incident. He would further point out that there is enormous delay of 4 to 5 days in reporting the matter to police. No plausible explanation is coming forth. On the contrary, the father of the victim (PW3) admitted during his cross-examination to have deliberated before approaching the police and lodging the FIR, which clearly shows that there is an element of concoction.

(ii) The learned Advocate would further submit that the story being tried to be built up by the victim (PW1) is unbelievable. Having asserted about having bolted the backside door of the house from inside, one cannot comprehend as to how entry could have been effected in the house by unbolting the door. Similarly, he would submit that though she is pretending to have made an attempt to raise an alarm, even this version of her is not plausible inasmuch as she admits that the house is surrounded by several other relatives of her father. He would submit that even the inference drawn by the learned Special Judge regarding resistance merely on the basis of some injury found on the hand of the appellant is a mere conjecture.

(iii) Lastly, Mr. Patil would submit that there is not enough material to prove the offence and the learned Special Judge has, without

assigning cogent and convincing reasons, illegally convicted and sentenced the appellant. The impugned judgment being unsustainable be quashed and set aside and the appellant be acquitted.

(iv) In support of his submissions, the learned Advocate relies upon the decisions in the cases of *Shaikh Mahemood Sk. Osman Vs. The State of Maharashtra Criminal Appeal No.120 of 2000, dated 19.03.2014, Babloo Pasi Vs. State of Jharkhand and another Criminal Appeal No.1572 of 2008, arising out of S.L.P (Criminal) No.1620 of 2007, dated 03.10.2008, Shubham Rajesh Kanojia Vs. The State of Maharashtra Criminal Appeal No.385 of 2019, dated 07.08.2019 (Nagpur Bench) and Ram Singh Vs. State of Maharashtra and another, 1999 CriLJ 3763.*

7. (i) Per contra, the learned A.P.P strongly supports the impugned judgment and order. He submits that the delay has been properly explained. It is a matter of great social implications and not only the victim but even the parents of the victim would be shy and apprehensive in readily making the incident public. Appreciating these aspects, the learned Special Judge has rightly held that the delay in the facts and circumstances of the case can be easily explained away.

(ii) The learned A.P.P would submit that so far as age of the victim is concerned, there is matriculation certificate (Exh-55) produced on record, which is duly proved by Patil (PW6), who is the Headmaster of the

school, on the basis of the School Register (Exh-36). It is further substantiated by the source on the basis of which the date of birth of the victim was recorded in the primary school as per the certificate (Exh-37), which is also duly proved by the Headmaster of that school by name Saindane (PW7). This birth date record duly corroborates the direct evidence of the father of the victim (PW3). Therefore, no error or illegality is committed by the learned Special Judge in concluding that the date of birth of the victim was as mentioned by these witnesses and recorded in the School Registers and she was a child within the meaning of Section 2 (d) of the POCSO Act on the date of the incident.

(iii) Lastly, the learned A.PP. would submit that there is no requirement of law of seeking corroboration to the testimony of a victim and the conviction in a rape matter can be returned on her sole testimony if it is found to be reliable and trustworthy. The learned Special Judge has followed all these principles and has rightly convicted and sentenced the appellant and the appeal be dismissed.

8. To begin with the aspect of delay in lodging the FIR, true it is that the incident is alleged to have taken place on 24.03.2017 whereas the FIR (Exh-17) has been lodged on 28.03.2017. However, it is trite, as has been held in the case of *Satpal Singh Vs. Stat of Haryana MANU/SC/0537/2010*, delay in case of sexual assault cannot be equitated with the cases involving other offences. Several factors weigh in the mind of

the prosecutrix and her family members before making the incident public by approaching police, more particularly in rural areas. It would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. Bearing in mind such emphatic observation of the Supreme Court, if one scrutinizes the matter in hand, it is the consistent version of the victim (PW1) not only in the FIR (Exh-17) but even in her statement under Section 164 of the Code of Criminal Procedure (Exh-19) and her testimony before the Special Court that she was threatened by the appellant at the point of knife if the incident was disclosed.

9. The parents of the victim had gone out and she could not disclose it to her grandmother though she was noticed to be dejected by the former. After arrival of her parents on 26.03.2017, she immediately disclosed the incident to them but even they were unsure about the steps to be taken. This is what has been precisely noted by the Supreme Court in the case of ***Satpal Singh*** (supra). After having found that their minor girl, having two other siblings, has been a victim of a sexual assault, one can easily comprehend as to what trauma must have been faced by them having heard the news. The FIR has been lodged on 28.03.2017. Meaning thereby that having heard the news on 26.03.2017, they could manage to approach the police alongwith their daughter – the victim (PW1) within 48 hours. Bearing in mind this scenario, one can easily appreciate the valid reasons for not lodging the FIR promptly. The learned Special Judge has rightly appreciated

these facts and circumstances and has come to a legal conclusion about there being sufficient and cogent reasons for the delay in lodging the FIR, the benefit of which cannot be allowed to be taken by the appellant.

10. Though the learned Special Judge has missed the point, in my considered view, there is one more circumstance which, perhaps, would explain the delay. Though the victim (PW1) has denied to have any affair with the appellant, in his extrajudicial confession made to the Medical Officer Dr. Sonawane (PW5), as mentioned earlier, the appellant has stated that he was having affair with her for a while and had effected the entry into the house with her consent. Though he denies to have had any sexual intercourse, this circumstance would indicate that though being a child, her consent is inconsequential, if the incident had taken place because of such an affair, obviously, one can comprehend that this could be a reason for delay in lodging the FIR. Whatever may be the case, the delay that has occurred in lodging the FIR (Exh-17) can easily be explained away and would not be decisive of the matter much less to throw out the prosecution case in its entirety.

11. This takes us to the more important aspect of the matter as to the age of the victim (PW1) on the date of the incident. She and her father (PW3) both have stated her date of birth as 15.08.2001. Obviously, she cannot be a witness to her own birth and her evidence in that respect cannot be relied upon. However, the same cannot be stated about her father (PW3),

who being the direct witness to her birth, one cannot easily brush aside his testimony as regards her date of birth, more so when nothing could be extracted during his cross-examination to question his direct knowledge about her date of birth.

12. In the case of *Jarnail Singh Vs. State of Haryana; MANU/SC/0626/2013*, relied upon by the learned Special Judge, it has been observed that even in respect of the dispute as to determination of the age of victim, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, ought to be looked into and applied. However, since the incident has taken place on 24.03.2017, after coming into force of the Act on 15.01.2016, this case would be governed by the similar provision contained in Section 94 of the Act. Conspicuously, the provision does not comprehend as to what would be the status of a direct evidence of the mother or father of the child as regards the date of birth. It postulates the steps to be taken by the Committee or the Board constituted under the Act when it entertains a doubt regarding whether the person brought before it is a child or not. It is only in that eventuality that the provision further enlists the record to be looked into and lays down its priority. Therefore, in my considered view, when there is a direct evidence of the father (PW3) about the date of birth of the victim (PW1), in the absence of any material to discard his testimony, one can safely proceed simply on the basis of his such evidence.

13. Independent of the above state-of-affair, even if one tends to

follow the course as followed by the learned Special Judge by following the provision of Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, the date in the birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, would be the primary evidence for determining the age. It is in the absence of such record that a birth certificate given by the Corporation or a municipal authority or a panchayat and in the absence of both of these, the ossification test or any other medical age determination test is to be relied upon by the Committee or the Board.

14. Bearing in mind such statutory provision, when Patil (PW6), Headmaster of the Secondary and Higher Secondary School has specifically stated on the basis of the original School Register that the date of birth of the victim (PW1) recorded in the school is 15.08.2001 and there is a matriculation Passing Certificate (Exh-55) showing same date of birth, one need not delve deep into the issue but subscribe to the conclusions based on such evidence, rightly drawn by the learned Special Judge.

15. Over and above, there is evidence of even the Headmaster of the Primary School Mr. Saindane (PW7), who has also on the basis of his school record mentioned date of birth of the victim (PW1) being 15.08.2001. No fault can be found with the conclusion drawn by the learned Special Judge in upholding such evidence while concluding that the victim (PW1) was indeed a child on the date of the offence.

16. The three decisions of this Court namely ***Shaikh Mahemood Sk. Osman, Shubham Rajesh Kanojia*** and ***Ram Singh*** (supra), relied upon by the learned Advocate for the appellant, were clearly based on the facts, circumstances and evidence that was available before the respective Courts. In the case of ***Shaikh Mahemood Sk. Osman*** (supra), father of the victim had given the age of his other son, who at the time of incident was studying in Matric and should have been atleast 16 years of age and the victim being 2 to 3 years older than him was held to be major.

17. In the case of ***Babloo Pasi*** (supra), the Board had determined the age of the juvenile in conflict with law by referring to an entry in the voters' list. Therefore, on facts, in the absence of evidence to show on what material, the entry in the voters' list was taken, mere production of a copy of the voters' list was not held to be sufficient in terms of Section 35 of the Evidence Act to prove the age. Here, apart from the direct evidence in the form of testimony of father of the victim (PW3), regarding date of birth, there is also a School Record and matriculation Passing Certificate (Exh-55), which corroborates his direct evidence which was not a fact situation before the Supreme Court.

18. In case of ***Shubham Rajesh Kanojia*** (supra), the victim was an orphan who was lodged in an Orphanage when her mother (PW1) and her husband had adopted her. Since it was a case of such an orphan child, who

was subsequently adopted, on the facts and evidence, specifically led before the Court that it was concluded that the victim was major and was capable of giving consent for the consensual relation with the accused. In the matter in hand, the biological father (PW3) of the victim (PW1) has specifically deposed about the date of birth which further stands corroborated by the school record and consequently, I find no hesitation in confirming the finding and the conclusion arrived by the learned Special Judge in holding that the victim (PW1) was a child within the meaning of Section 2(d) of the POCSO Act on the date of the offence.

19. This takes us to the evidence regarding the incident. It is trite, as laid down in the case of ***Mohd. Imran Khan Vs. State (Govt. of NCT of Delhi)*** ***MANU/SC/1224/2011*** and several other decisions, conviction in rape cases can be based on testimony of the prosecutrix alone if it is cogent and reliable. Therefore, when in the matter in hand, the medical evidence is scant inasmuch as for the obvious reason of there being delay in lodging the FIR (Exh-17), chemical analysis reports have turned out to be negative, the evidence of the victim (PW1) needs to be appreciated carefully.

20. The victim (PW1), in her testimony, has clearly stated the events strictly in accordance with the FIR (Exh-17). Her such testimony is also substantiated by a similar account given by her in her statement (Exh-19) under Section 164 of the Code of Criminal Procedure. True it is that she states about having made an attempt to raise hue and cry and even to resist

the appellant. However, simultaneously though she admits that her house is surrounded by several residential premises of her father's relatives, she also states that the appellant had committed rape by putting a knife to her throat and by threatening her. If such is the state-of-affairs, the appellant cannot be allowed to make capital of the fact that the neighbours had not heard any such hue and cry.

21. As regards the attempt by the appellant to disprove the victim (PW1) by saying that if the backside door of the house was closed, it was impossible for anybody to have effected entry, one needs to only refer to the spot panchanama (Exh-28), which shows the structure of the backside door, which is in the form of an iron grill and in the absence of any other concrete material, it clearly shows that a human hand can easily be inserted inside through the grill.

22. Apart from the above state-of-affairs, at the cost of repetition, if one simultaneously bears in mind the extrajudicial confession made by the appellant to Dr. Sonawane (PW5), if he was having an affair with the victim (PW1) and had lured her, this circumstance of effecting entry into the house by unbolting the backside door, can easily be explained away. It is to be borne in mind that the principle *falsus in uno, falsus in omnibus* is not applicable in India. Though because of such enticement, the victim (PW1) had succumbed to the lust of the appellant, having found that she was a child who was incapable of giving a valid consent, the appellant is not entitled to derive any

benefit from her such stand even if it is held to be her lame attempt to pretend it to be forcible sex.

23. In this respect, it is equally important to note that the ocular account of the victim (PW1) atleast stands corroborated from the medical evidence wherein Dr. Sonawane (PW5) noticed an injury to the hymen at 5, 7 and 11 “O” clock and his further opinion about she having been subjected to forcible sexual intercourse.

24. Therefore, merely because the victim (PW1) has not sustained any external injury and her version regarding the incident having taken place when the appellant effected entry into the house by unbolting backside door is not accepted, her version is sufficient to conclude that he had indulged into penetrative sexual assault.

25. On overall conspectus of the matter, no exception can be taken to the conclusion drawn by the learned Special Judge about commission of the offence. He has correctly appreciated the facts, circumstances and the evidence and has rightly convicted and sentenced the appellant, albeit, there could not have been a conviction for the offence punishable under Section 8 of the POCSO Act for sexual assault without penetration when he was simultaneously convicting and sentencing the appellant for the offence under Section 4 for penetrative sexual assault and Section 6 for aggravated penetrative sexual assault having been committed on the victim at the point

of knife. However, since no separate sentence is pronounced for the offences under Sections 4 and 8 of the POCSO Act, in view of the provisions of Section 42 of the Act, this illegality would be inconsequential.

26. There is no merit in the appeal and it is liable to be dismissed. The appeal is dismissed.

[MANGESH S. PATIL]
JUDGE

npj/CRIAPL227-2018