

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

CRIMINAL APPEAL NO. 20 OF 2020

Jageshwar Wasudeo Kawle,
aged about 27 years, Occ. Driver,
R/o Gosikhurd, Tahsil and District Chandrapur.

...APPELLANT

Versus

State of Maharashtra,
through Police Station Officer,
Police Station Girad, Tah. Samudrapur,
District Wardha.

...RESPONDENT

Shri R.M. Patwardhan, Advocate for the appellant.
Shri H.D. Dubey, A.P.P. for the respondent.

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CORAM : PUSHPA V. GANEDIWALA, J.
DATED : JANUARY 14, 2021.

ORAL JUDGMENT :

Heard.

2. This appeal is directed against the judgment and order dated 12/11/2019 passed by the Additional Sessions Judge, Hinganghat in Special (Ch.) Case No. 17/2017, by which the appellant/accused is convicted for the offence punishable under Sections 376(2)(n) of the Indian Penal Code,

1860 (for short “IPC”), and Section 5 punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”), and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5,000/- (rupees five thousand), in default, to suffer rigorous imprisonment for 3 months.

3. The case of the prosecution, in nutshell, is as under :

i. At the relevant time, the age of the prosecutrix was 17 years and 9 months. The birth certificate (Exh.62) shows her date of birth as 01/08/1997. For the purpose of studies, she was residing in one rented room at Hinganghat. The appellant/accused was also residing in the same premises on rent. As he assisted her during her illness, friendship was developed between the duo. After completing her studies, she returned to her parents house at Umari, Tah. Samudrapur, District - Wardha. After couple of days, she again returned to Hinganghat for the purpose of attaining tuition classes of 12th

standard. The appellant/accused came to receive her at Bus Stand, Hinganghat. Both went to his parents house at Village Gosikhurd, District - Chandrapur, and stayed there for couple of days. From there, he brought her at the house of his sister Rekha (accused No.2-acquitted) at Village Sinhala, District - Chandrapur, where they stayed for about two months. It is alleged that during that period, the appellant/accused committed sexual intercourse with her on many occasions.

ii. Initially, on 08/05/2015, the father of the prosecutrix lodged a missing report with Girad Police Station which caused registration of crime under Section 363 of the IPC. When the prosecutrix and the appellant/accused were brought at Hinganghat, they were sent for medical examination. Initially, as the prosecutrix was not ready for her medical examination, she was produced before the Magistrate, who in turn has directed to produce her before the Child Welfare Committee, Wardha, where she was persuaded for medical examination. During her medical examination, her Urine pregnancy test (UPT) was found positive. Accordingly,

Section 376 of the IPC came to be added against the appellant/accused.

iii. On completion of investigation, chargesheet came to be filed before the Court of Magistrate, who in turn, committed the case to the Special POCSO Court, Hinganghat.

iv. The Special Court, Hinganghat framed charge against the appellant/accused for the offence punishable under Sections 363 and 376(2)(n) of the IPC, and Section 4 of the POCSO Act. The sister of the accused Rekha also arraigned as an accused No.2, being an abettor. The charge was read over and explained to both the accused, to which they pleaded not guilty and claimed to be tried. Their plea was recorded.

v. To establish the guilt against the appellant/accused, the prosecution examined in all 14 witnesses, and also brought on record some relevant documents. The trial Court recorded statements of the accused persons under Section 313 of the Code of Criminal Procedure, 1973.

vi. After hearing both the sides, the trial Court convicted the appellant/accused for the offence punishable under Section 376(2)(n) of the IPC and Section 5 punishable under Section 6 of the POCSO Act, and acquitted him of the offence punishable under Section 363 of the IPC. That the trial Court acquitted accused No.2 Rekha (sister of the appellant/accused) from all the offences. This judgment is impugned in the instant appeal.

4. I have heard Shri Patwardhan, learned counsel for the appellant/accused, and Shri Dubey, learned A.P.P. for the respondent. I also perused the record and proceedings with the assistance of learned both the counsel.

5. At the outset, the testimony of the prosecutrix (PW3) is only material on the point of rape. The prosecution also examined father of the prosecutrix, neighbours, panch, police and medical officers. The neighbour witnesses, who are neighbours of sister of the appellant/accused, have turned hostile and did not support the prosecution case.

6. With regard to pregnancy, the prosecutrix did not say anything about the same. There is absolutely nothing on record as to what happened to her pregnancy. With regard to age of the prosecutrix, as per birth certificate (Exh.62) and the testimony of her father, her date of birth is stated to be 01/08/1997. So, at the relevant time, she was just three months short of attaining the age of majority.

7. Now, the question to be considered by this Court is whether the testimony of the prosecutrix inspire confidence of this Court to fix the criminal liability on the appellant/accused so as to sentence him with minimum ten years imprisonment for ?

8. A perusal of the testimony of the prosecutrix would reflect that she has vividly described about her love relationship with the appellant/accused. With regard to incident, the relevant part of her testimony is reproduced below :

“2. XXXX Thereafter accused no.1 took me to the house of his sister Rekha Manthanwar at village Sinhala. We stayed there for two months. During that period accused committed sexual intercourse with me by inducing me on so many occasions.”

9. Learned defence counsel brought to the notice of this Court the material omission, in her cross-examination, relevant portion of which is reproduced below :

“7.XXXX At the time of recording of my statement I stated to the police that accused committed sexual intercourse with me by inducing me on so many occasions. I cannot assign any reason as to why it is not mentioned in my statements dated 26.06.2015.”

This omission is so much material in nature that it has strength to decide the fate of the case. She has not stated before the police the incidents of sexual relations between them at his sister's place. The offence of rape came to be added on the basis of positive pregnancy test.

10. Evidently, initially, she was not ready for her medical examination. On lots of persuasion, her medical

examination was done. However, there is no conclusive evidence before this Court to conclude that she conceived from the appellant/accused. The prosecution also did not find it necessary to conduct DNA examination. The record is silent with regard to DNA test and what happened to her pregnancy. Except the above statement of the prosecutrix, with regard to sexual intercourse at the house of the sister of the appellant/accused, there is absolutely nothing supporting the prosecution case of rape. Only on the basis of allegation with regard to commitment of sexual intercourse on many occasions, it would be highly irrational to convict the appellant/accused with 10 years imprisonment.

11. In addition to this, she does not depose with regard to dates, times, who were present in the house at the relevant time, how the other members of the house permitted the unmarried boy and girl to sleep together, how many rooms were there in the house, how could the prosecutrix and the appellant/accused got privacy, under what circumstances the prosecutrix was forced to establish physical relationship with

the appellant/accused etc. No doubt, the testimony of the prosecutrix is sufficient for conviction of the appellant/accused, however, the same ought to inspire confidence of this Court. It ought to be of sterling quality.

12. Given the aforesaid facts and circumstances of the case, this Court is of the opinion that the prosecution could not establish, beyond reasonable doubt, the offence of rape against the appellant/accused. Hence, this Court is inclined to allow the appeal and proceed to pass the following order :

ORDER.

- i. The Criminal Appeal is allowed.
- ii. The judgment and order dated 12/11/2019 passed by the Additional Sessions Judge, Hinganghat in Special (Ch.) Case No. 17/2017, is quashed and set aside. The appellant stands acquitted of the offence punishable under Sections 376(2)(n) of the IPC, and Section 5 punishable under Section 6 of the POCSO Act. He be released forthwith, if not required in

any other case.

Sumit

JUDGE