

rajshree

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.196 OF 2019**

Ajay Ashok Kshirsagar	]	..	Appellant
vs.			
State of Maharashtra & Anr.	]	..	Respondents

Mr.Kuldeep Nikam for the Appellant.

Ms.P.N. Dabholkar, APP for the State-Respondent No.1.

Mr.Swapnil Chopade for Respondent No.2.

CORAM : BHARATI DANGRE, J

DATE : 21st April, 2023.

JUDGMENT :

1] A teenage girl has once again fallen prey for infatuation and it is the present Appellant before me, who having taken advantage of the situation and the circumstances, came to be charged for committing forcible intercourse with her.

PW 2 the victim girl, aged 15 years, studying in 8th standard in a local school, as usual was en route her school, when the Appellant followed her and expressed his liking towards her. He waxed her to meet him after two days, at the gate of her school. As directed, she reached the spot indicated and was asked to accompany the Appellant on his bike. She was hesitant, as she stated that she wanted to attend the school and raised cries, but on being threatened by the Appellant she rode as pillion rider on his bike.

She was taken to an utensil shop in Paranda and taking advantage of the isolation, she was sexually assaulted. On an attempt by her to scream, she was threatened at the point of knife and was warned that she shall not disclose the incident to anybody.

She was dropped near the school and she found herself in a disturbed state of mind. Her mother noticing her abnormal behaviour on 26.03.2017 enquired from her about any unusual occurrence in her life which had shaken her and she disclosed the incident to her mother.

It is at the instance of PW 1 – mother of the victim girl, the complaint was lodged with Barshi Police Station on 26.03.2017 against the Appellant, as he was known to the victim and her mother, as he was residing in the same locality.

2] The investigating machinery was set into motion upon the complaint being instituted and the statement of the victim girl was recorded under Section 164 of the Cr.P.C. before the Magistrate on 27.03.2017. She was also referred for medical examination and PW 7 examined her on 28.03.2017, who recorded the history narrated by her.

On medical examination of the private parts, the Doctor found hymeneal tear at the position of 3, 5, 9 and 11 O'clock. The opinion was expressed by the expert that evidence of sexual intercourse or assault cannot be ruled out. In final opinion, it was specifically recorded that sexual intercourse or assault had possibly taken place.

3] The entire evidence collected during the course of investigation was compiled in the charge-sheet, which was presented before the competent Court.

The Appellant was charged for kidnapping the victim girl, aged 14 years from lawful guardianship of the complainant, with an intention to

commit forcible sexual intercourse and thus committing offence punishable under Section 363 and 363A of the IPC.

For the act of committing forcible sexual intercourse, on the given date, he was charged for committing offence punishable under Section 376(1) of the IPC and he was also charged for committing offence punishable under Section 4 of the POCSO Act, as the victim girl was minor.

4] In order to establish the guilt of the Appellant, the mother of the victim girl was examined as PW 1.

She deposed about the incident, as narrated to her, by her daughter, when she enquired with her about her unusual behaviour. She has proved the FIR marked as Exhibit 19 and extensive cross-examination of this witness has not discredited her version and in fact, though she admit that the appellant was residing in their neighbourhood, she denied that there were cordial relations between her family and the family of the Appellant.

The key witness of the prosecution, the victim girl is examined as PW 2 and she narrated the happenings of the date of incident i.e. on 22.03.2017, preceded by the incident dated 20.03.2017, when the Appellant approached her and expressed his liking towards her.

About the incident dated 22.03.2017, she has deposed that she was forced by the Appellant to sit on his bike and she was threatened by means of a knife not to make any noise. She was taken to an isolated place in Paranda in a utensil shop. Her specific version is that, she was made to lie on the ground and he slept on her person. She specifically deposed as under :-

“He inserted genital in my private part. He showed me knife and warned not to disclose incident to anybody.”

She admitted that the Appellant was residing in the neighbourhood. She also denied the suggestion, showing any proximity with the family of the Appellant, specifically about the father of the Appellant running a grocery shop. She also denied the suggestion given to her indicating that, it is she, who attempted to develop proximity with the Appellant.

In cross-examination, she admit that the Appellant did not actually show the knife, but continued with her version that she was under threat and therefore she accompanied the Appellant. In her extensive cross-examination, certain omissions are attempted to be brought on record, but in my considered opinion, they are not on the material aspect of the case of prosecution.

Much advantage is sought to be drawn from the following admission given by the victim girl in her cross-examination :-

“According to me two acts namely keeping the male genitals on female body and inserting male genital into female genital are not distinct.”

5] On reading the above, I do not think that, this assertion by PW 2 has created any dent in the case of prosecution for two reasons; firstly, the victim girl appear to be little shy in deposing before the Court as the Judge has recorded that the witness is suggested to be very specific and to answer little loudly.

This shows the hesitancy on the part of a young girl who had to narrate her ordeal before a third person. Secondly, an attempt to confuse the witness as to whether there was vaginal penetration or not, has proved to be unsuccessful, as the victim girl had categorically deposed in her examination-in-chief about the actual act by stating that the Appellant had inserted his genital in her private part.

6] It is pertinent to note that the victim girl when medically examined, on 28.03.2017 i.e. after 6 days, of the reported incident, hymeneal tears were found to be present at the position of 3, 5, 9 and 11 O'clock.

The pictorial reproduction of her private part in the report of medical examination conducted by PW 7, Gynecologist, clearly refer to the position of hymeneal tear.

PW 7 specifically deposed about his final opinion as, "Sexual intercourse or assault cannot be ruled out".

The Gynecologist was also subjected to regressive cross-examination and an attempt was made to discredit him as he had inquired with the victim girl about the facts and this has been deposed by PW 7 in the following manner :-

"It is true that on next query she did not tell whether she suffered pains during or after the act. It is true that she did not tell whether she had sustained any injury on her genitals or anybody parts during and after the act. It is true that she did not reply the query as to whether she had adopted any step to resist the said act."

7] The aforesaid evidence brought before the learned Judge, is appreciated by him and he derived a conclusion of guilt of the accused and found him guilty of committing offence under Section 376 of the IPC and Section 7 of the POCSO Act.

However, while imposing penalty, the learned Judge has relied upon Section 42 of the POCSO Act and deemed it appropriate to impose penalty under Section 4 of the POCSO Act, by imposing sentence of RI of 10 years and fine of Rs.20,000/-, i.d. to undergo RI for one year.

8] I am unable to persuade myself to accept the submission of the learned counsel for the Appellant that the victim girl, being unable to

depose clearly about the actual act which was committed by the Appellant, on the date of the incident and hence it is not the case of penetrative assault.

Section 3 of the POCSO Act define penetrative assault and a person is said to commit "penetrative sexual assault" if-

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b)
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person.

From bare reading of the aforesaid provision, penetration of penis into the vagina of a child would attract punishment under Section 4 of the POCSO Act. Apart from this, by virtue of clause 'c' if a person manipulates any part of the body of the child, so as to cause penetration into the vagina, he is said to have committed 'penetrative sexual assault'.

9] In the present case, as per the version of the victim girl, as deposed in examination-in-chief, she clearly speak of insertion of genitals into her private part.

In the cross-examination, when she was specifically asked about her version to the police, where she has stated that accused had kept his penis on her vagina, she responded by stating that she do not remember. However, she has deposed that she remember what she had stated before the Magistrate and reiterate that she had categorically stated before the Magistrate, that the Accused has inserted his penis in to her vagina.

Her version of insertion of penis into her vagina, is corroborated by the medical evidence, as it record presence of hymeneal tear.

10] The learned Special Judge has rightly appreciated the evidence of the victim girl coupled with the medical evidence and since PW 2 was found to be reliable and trustworthy, despite she being subjected to extensive cross-examination on the material aspect of forcible sexual intercourse, she remained consistent and considering that the victim girl is minor, the learned Judge, on finding the Appellant guilty of committing offence punishable under Section 4 of the POCSO Act, has rightly imposed imprisonment for 10 years, since prior to the Section being amended by Act No.25 of 2019, the punishment for committing penetrative sexual assault, was prescribed as imprisonment for either description of a term which shall not be less than 7 years, which may extend to imprisonment for life.

11] Though the learned counsel for the appellant, would plead before me that the punishment imposed should be reduced to 7 years, I am not impressed with the said submission, since the minimum punishment prescribed prior to the Amendment of 2019, was imprisonment of 7 years, and it was permissible to extend it to imprisonment for life. The learned Judge, on recording that that the victim has been lured by the appellant to accompany him and taking advantage of her innocent behaviour and of the situation, he has forced himself upon her and in this background, he has exercised his discretion and imposed imprisonment of 10 years on being found guilty of committing an offence under Section 4 of the POCSO Act.

Upon conviction, neither the finding of conviction in the impugned Judgment nor the sentence imposed, warrant any interference.

Resultantly, by upholding the impugned Judgment dated 11.01.2019 in Special Case No.16 of 2017, the Appeal is dismissed.

[BHARATI DANGRE, J]