

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 78 OF 2019

Santosh Dhondiram Kende .. Applicant
Versus
The State of Maharashtra .. Respondent

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Mr.Harshad Bhadbhade with Vidhya Mangavde, Swati Khot, Shagufa Patel, Shweta Redij and Shweta Bhadbhade for the appellant.

Mr.Abdul Wahab Shaikh for respondent no.2.

Mr.N.B. Patil, learned APP for the State.

CORAM: BHARATI DANGRE, J.
RESERVED : 5th APRIL, 2023
PRONOUNCED : 21st APRIL, 2023

JUDGMENT:-

1 The prosecution case which has been culled out by the Special Judge, Khed, in the impugned judgment read thus :-

“2 The prosecution case in short is that, the victim child (P.W.1) was residing at village Ambavali, Bhingarwadi, Taluka Chiplun, District Ratnagiri along with her mother and two brothers. The victim child (P.W.1) has completed her education upto 7th standard. Then after she left her school. At the relevant time she used to graze the cattle at various places commonly known as Mal, Takicha Vahal, Devtak etc. It is alleged that the birth date of the victim child (P.W.1) is 14.09.2000. It is alleged that at the relevant time the age of the victim child (P.W.1) was 16 years and 2 months. It is also alleged that Santosh

Dhondiram @ Kondiram Kende (the accused) was a neighbour of the victim child (P.W.1).

3 The prosecution has further alleged that some time in April 2016 when the victim child (P.W.1) has gone to graze cattle as usual at a place commonly called as Mal of village Bhingarwadi, the accused committed a rape on her. The accused threatened the victim child (P.W.1) with a sickle that if she narrate the incident to her mother he will commit her murder. So, the victim child (P.W.1) has not narrated this incident to any one. It is further alleged that up to festival of Depawali the accused was repeatedly committing rape on the victim child. But, due to threats given by the accused the victim child (P.W.1) has not narrated these incidents to her mother or to any other relative. The prosecution has further alleged that the mother of the victim child suspected that she is pregnant. So, on 23.01.2017 the mother of the victim child brought her to Government Hospital, Ambavali. After her medical examination the Medical Officer told the mother of the victim child that the victim child is pregnant of about 30 to 32 weeks. Then after the mother of the victim child inquired with her about her pregnancy. That time victim child narrated the incidents of sexual harassments and rape committed by the accused.

4 The prosecution has further alleged that Vasanti (P.W.2), the mother of the victim child (P.W.1) filed a complaint before Mahatma Gandhi Tanta Mukti Samittee of her village. The Chairman of said Samittee called a meeting on 28.01.2017. The victim child and her mother and other villagers were present in this meeting, but, the accused was not present. So, lastly on 28.01.2017 the victim child (P.W.1) lodged a complaint at Khed Police Station. On her complaint C.R. No. 18/2017 came to be registered at Khed Police Station”.

2 On completion of investigation of the subject C.R registered with Khed Police Station, charge-sheet was filed and the accused came to be tried for committing forcible sexual intercourse with the victim girl dated 16 years, 4 months, from

the month of April 2016, till 28/10/2016, and came to be charged for committing an offence punishable u/s.376(2)(j) of the IPC and for repeatedly committing the act u/s.376 (2)(n) of the IPC. Since the victim girl was minor at the time the aforesaid act, he was also charged for the offence punishable under Section 3 r/w Section 4 as well as Section 5(j)(ii) and Section 6 of the POCSO Act. He was also charged for committing sexual harassment on a minor girl, an offence punishable u/s.11 r/w Section 12 of the POCSO Act. The charge was also framed against him u/s.506 IPC, since it is the case of the prosecution that the prosecutrix was intimidated with an intent to cause harm to her.

The accused pleaded not guilty and was subjected to trial in Special POCSO Case No.9 of 2017. The prosecution examined 10 witnesses, which included the victim and her mother. The Medical Officers, Officials working in Panchayat at Khed, a Teacher in the school where the victim was admitted as well as the panch witness and the Investigating Officer were examined as other prosecution witnesses.

The Special Court, on appreciating the evidence, found him guilty of committing an offence u/s.376(2)(n) of IPC, Section 4 and 6 of POCSO Act, and convicted him for the same. He came to be acquitted for the offence u/s.12 of POCSO Act and 506 IPC.

On being convicted, he was sentenced to suffer RI for 10 years and fine of Rs.10,000/-, in default to suffer SI for one year.

3 The learned counsel Mr.Harshad Bhadbhade for the appellant would focus his submissions on two major aspects; the first being that the prosecutrix was major at the time when the alleged offence was committed; and the second aspect being, from the evidence placed on record, it would clearly lead to a case of consensual sex and according to him, this is very apparent from reading of the evidence of PW 1, the victim herself. The learned counsel is extremely critical about the attempt of the prosecution to remain inconclusive about the date of birth of the victim, and according to the learned counsel, if this Court comes to a conclusion that there is no positive evidence to establish that the girl was minor, in that case, it would be easily assumed from her own testimony that the relationship maintained between them, was consensual in nature and out of the relationship, a child was born whose DNA identified the appellant and the prosecutrix, as the parents of the newly born.

The learned counsel would submit that since the prosecution has failed to discharge the burden that the girl is minor, the case that emerges from the evidence on record, is of consensual relationship and in any case, if the age of the prosecutrix is not established by reliable evidence capable of being admitted, a conviction on the basis of an assumption that

she was minor, deserve a reversal. In case, if the age of the prosecutrix was doubtful, according to Mr.Bhadbhade, the prosecution should have undertaken the exercise of estimating her age from a dental surgeon or a Radiologist, by carrying out necessary tests for ascertaining the age. The pin-pointed loopholes in the case of the prosecution, create a benefit of doubt, is his specific submission and according to him, the benefit must necessarily go to the appellant.

Per contra, learned APP Mr.Patil appearing for the State and Advocate Abdul V. Shaikh, appearing for the respondent no.2, would strenuously urge that the birth certificate of the victim placed on record, has established that she is born on 14/9/2000, and therefore, on the date when the incident took place, she was minor, and the prosecution is expected to prove nothing more than this. Once her date of birth is established, the version of the prosecutrix that she was subject to forcible sexual intercourse, deserve an acceptance, as no material is brought on record by the accused to discredit her, is their submission.

According to the learned APP, a minor girl was subjected to sexual abuse for a continuous span of time and she conceived and gave birth to a child on 31/1/2017, and since the DNA profiling conclusively establish the appellant to be the father of the child born to the prosecutrix, the cogent and reliable evidence is led before the Special Court, and on being satisfied that the said evidence, which met the parameters of law, the

conviction has been awarded to him, is the submission.

4 The prosecutrix entered into the witness box as PW 1 and described herself to be 17 years of age, her date of birth being 14/9/2000. She deposed that she had left the school four years back, when she was in 7th Std.

The prosecutrix deposed that she is maintaining cattle and used to take them for grazing at places known at Takichi Vahal and Devtak. As per her version, one day in the month of April 2016, since she was unable to recollect the exact date, when she went for grazing the cattle at *Mal*, the accused, who reside in her neighborhood, followed her with his cattle.

She state that at around 2.00 p.m, by threatening her, with a sickle in his hand, and taking advantage of the situation that she was all alone, her hands were tied with a rope and he forcibly committed sexual intercourse with her, without her consent, by removing the clothes. She was also threatened not to disclose the incident to anyone, which constrained her to keep mum.

The victim deposed that till the Diwali festival of 2016, he maintained sexual relations with her for about 2 to 3 times. She missed her menstrual cycle and therefore, she was taken to the Government Hospital at Ambavali to be disclosed that she was eight months pregnant. On making necessary inquiries, she disclosed the name of the accused, who was

responsible for her pregnancy. A complaint was, therefore, filed with the Dispute Resolution Committee in the village, but the accused avoided to attend the meeting and therefore, a report was lodged with the Khed Police Station.

5 The testimony of the victim to a large extent is corroborated by PW 2, her mother, who has deposed that she noticed that her daughter had a growing stomach, and she took her to the Government hospital at Ambavali where the pregnancy was revealed. The prosecutrix delivered a female child in the hospital at Ratnagiri and she was discharged after eight days.

6 The foremost question that has been raised in the Appeal, is whether the prosecutrix was minor or not, I must fetch for this question answers from these two witnesses.

The prosecutrix disclosed her age as 17 years, and has given her date of birth as 14/9/2000. She also admit that she was born in Ambavali, Bhingarwadi. She also specifically state that she is heighted and therefore, people understood that she was 22 years old.

Now, coming to PW 2, she deposed that her daughter is aged 18 years, though she has failed to clearly state her date of birth. She admit that her maternal home is Ambavali Bhingarwadi, which comprise of 10 to 12 houses and she is on visiting terms with the residents therein.

PW 2, however, avoided to give the exact date of birth of all her three children and though, she deny the suggestion that her marriage was solemnized when she was 12 to 13 years, she admit that her elder son was born three years after her marriage and he is aged 30 years. After him, her second son Santosh was born after three years and thereafter, the victim was born. She refused to answer to the question asked as to how many days 'XYZ' was born after birth of Santosh. She specifically deny his suggestion that the prosecutrix is aged 22 to 23 years. PW 2 gave admission that she admitted her in the school, but at that time, she had not stated her date of birth, being unaware about it.

In the statement u/s.164 of Cr.P.C, PW 2 had stated that her husband expired 16-17 years back.

7 PW 2 is an illiterate lady and was unable to give her own age at the time of her marriage, but denied the suggestion that her marriage was performed at the age of 12-13. She specifically deposed that her elder son was aged 30 years and her younger son was born three years after the birth of her elder son, and thereafter 'X' was born. She refused to give the date of birth of the prosecutrix, though she was aware how old her elder son was. Going by the said analogy, if her elder son was 30 years, her middle son can be somewhere between 26 - 27 years and the prosecutrix was born to PW 2 after him, by no stretch of

imagination, could she be aged 17 as the approximate gap is of 10 years. PW 2 has deposed that her husband had expired 10 – 12 years before.

Thus, it can be seen that PW 2 clearly avoided to disclose the date of birth of her daughter, but PW 1 has given her date of birth as '14/9/2000'.

8 Now, in order to establish the date of birth as '14/9/2000', three documents have come on record; the first being the birth certificate issued by the Health Department of Tisangi, Taluka Khed, District Ratnagiri. In the said document, the date of registration is scribed as '27/9/2000' and the date of issuance of the document is 16/2/2018 (Exhibit-41) i.e. after the date of the incident. The second document is the School Leaving Certificate exhibited as 'Exhibit-64' through PW 9, and the third document is the extract of Birth Register no.1, at Exhibit-109 and one another document in form of extract of General Register, Part 1, Rule 7.

In order to prove the birth certificate (Exhibit-41) PW 7 Dattaram Jagade, Junior Assistant at Panchayat Samiti, Khed, in-charge of the birth and death registration division came to be examined. He deposed about the entry of the date of birth of the prosecutrix, being taken at Sr.No.37 (Exhibit-109) on 27/9/2000. In cross-examination, he admit that on producing evidence of date of birth, endorsement is to be made in the

endorsement column, as the register contains a column of endorsement (*shera*) which is not filled in.

When this document is perused, the prosecutrix is shown to have born to Ramchandra and Vasanti, and their address of permanent residence is shown at 'Tisang', the place of birth of prosecutrix is recorded at Tisangi. There cannot be any doubt that the birth taking place at place 'X' can be registered at place 'Y', but the learned counsel Mr.Bhadbhade would submit that PW 2 has never deposed that she along with her husband ever resided at Tisangi, and on the contrary, she has categorically deposed that her maternal home is situated at Ambavali, Dhangarwadi itself, where she continued to stay after her marriage. She had also deposed in the cross-examination that the relatives from the side of her husband are also in Ambavali.

The submission of the learned counsel for the appellant is, that the document at Exhibit-107 is doubtful, carry sufficient substance.

9 PW 9, (Varsha Walwi) the Assistant Teacher in the Zilla Parishad School at Ambavali is examined by the prosecution, to prove School Leaving Certificate at Exhibit-64. She depose that as per their record of school, date of birth of prosecutrix is 14/9/2000 and her date of admission is 11/7/2006, and she had taken education upto 7th Std. PW 9 specifically depose as under :-

"For admitting the students in our school, we used to obtain application of parents and birth certificate of child. After

verifying the documents, we used to give admission to the students in our school. Head Master used to take entry of date of birth of students in the record of the school”.

On being confronted with the School Leaving Certificate, marked as Exhibit-64, PW 9 admit that the certificate is issued by her, in her handwriting and it bear her signature and the seal of the school. She certify that the entries therein are true and correct as per the school record.

In the cross-examination, however, she admit that in the entry of date of birth, 14/9/2000, figure ‘2’ is an overwriting. A categorical admission comes from her to the following effect :

“I had not personally taken the said entry. Today, I have not brought the application which was filed in our School at the time of admitting ‘X’ in our School. Block Education Officer used to verify entries in this register”.

Another admission comes from this witness, and it is below:

“Today, I have not seen the birth certificate of ‘X’. I have not studied on what basis entry at Sr.No. 371 has been taken. I cannot tell on which basis date of birth 14/9/2000 is recorded. I have personally seen ‘X’ who is a tall girl”.

In the wake of the aforesaid admissions given by PW 9, the authenticity of the entry in the School Leaving Certificate also come under cloud, as the in-charge Head Master has deposed that she is not aware whether the entry of date of birth in the School Leaving Certificate, is taken on the basis of the birth certificate.

The entry no.371 as depicted in Exhibit-110, the extract of birth register, which is exhibited through PW 9, therefore, loses its conclusivity, and the entry of date of birth of 'X' as 14/9/2000, becomes doubtful.

10 The appellant was made to face charge under the POCSO Act, on the basis that sexual indulgence was alleged to have been committed with a child which is defined as 'any person below the age of 18 years'. The conviction of the accused under the provisions of the POCSO Act, i.e. Section 4 and 6, is premised on the basis that the prosecutrix is minor.

The burden that she is minor, has to be discharged by the prosecution and the prosecution has failed to conclusively establish that she was minor. No ossification test is carried out to re-assure that she is a minor and the birth certificate as well as the School Leaving Certificate are doubtful documents. This affect the prosecution case, largely on the aspect of sexual assault being committed upon a minor girl. Since the prosecution has failed to establish the age of the prosecutrix to be less than 18 years, the conviction of the appellant under POCSO Act, cannot be sustained, as the inference of guilt must be based on a definite evidence, free from all objectionable features or infirmities which may legitimately lead to a conclusion of establishing the fact conclusively.

11 Now, dealing with the second ground raised in the Appeal by Mr.Bhadbhade about the act complained of being consensual or otherwise, once again, I must turn my attention to the evidence of prosecutrix, PW 1, who has narrated the act of forcible intercourse alleged to have been committed in April 2016, without giving the exact date. She depose that when she took the cattle for grazing, the accused who used to reside in the neighborhood, followed her and by pointing out the sickle in his hand, committed intercourse with her, without her consent. She identified the sickle used by the accused in commission of crime, and also identified the rope used for tying her. In the cross-examination, she deny the suggestion that she did not raise any cry during the incident and she admit that nobody heard it, since only two of them, were present there.

 In the examination in chief, she deposed that since she was threatened, that if she disclose the incident to anyone, she would be killed along with her mother and brothers, and hence, she did not disclose the incident to her family members. PW 1 specifically deposed as under :-

“Till Diwali festival 2016, I shall taking my cattle for grazing. He used to bring his cattle for grazing behind me at the place at Takichi Vahal, Devka. He used to give threat to kill me and was maintaining sexual relations with me. Till Diwali festival of 2016, he maintained sexual relations with me for about 2 to 3 times. He was giving threats of killing me, therefore, I had not disclosed incidents at my house or relatives”.

In the cross-examination, she specifically admit as under :

“It is my say that since the month of April, continuously for four months in the forest area daily, accused was committing rape on me”

Her further admission is recorded as under :

“During the period of four months of rape, I was daily going at about 10.00 am in the forest”.

12 Suggestions are given to PW 2, the mother of the victim about the locality in which they were residing and in the cross-examination, she admitted that at Ambavali, the relatives from the side of her husband are residing and there are 10-12 houses and she is on visiting terms to the house of the persons and was participating in various festivals, marriages etc.

13 PW 1 has specifically deposed that the accused was residing in the neighborhood, i.e. in the same wadi and was known to her. From April, for a period of four months, it is the version of PW 1 that she was continuously raped. However, on her own admission, she did not stop going to the forest everyday. This conduct speaks for itself, as for all these months, she did not narrate the incident to her mother, her brothers, or anybody residing in the neighborhood. It is difficult to believe her version that four months she went through an ordeal of going to the forest and being coerced into a sexual relationship without her consent, to the exclusion of the entire locality, in the wilderness of the forest, till it was discovered that she was pregnant, it was not

disclosed to anyone.

14 The learned counsel for the appellant is therefore, justified in submitting that since the prosecution has failed to prove its case, that the prosecutrix was a minor and considering that she was not a child, from her conduct, which has surfaced through her own deposition, it can be gainfully inferred that the relationship was consensual, as for a period of four months, she never disclosed the incident to anyone including her own mother.

15 It is the duty of the prosecution to establish its case beyond reasonable doubt and every circumstance which point out to the guilt of the accused, must be conclusively established by laying foundational evidence, which should be cogent and reliable. This duty of the prosecution becomes more onerous in case of special statute like the POCSO Act, which is enacted with an avowed purpose of child abuse. The chain of circumstances must conclusively establish the guilt of the accused before he stand convicted for the offence with which he is charged and when the prosecution failed to prove its case, by adducing evidence sufficient to justify the conviction and leave loopholes, the benefit of it must definitely yield in favour of the accused.

16 The conduct of the prosecutrix about not complaining about the act of the accused for a considerable length of four months, would lead to an inference which Mr.Bhadbade want to derive, that the relationship is consensual in nature. The

child is born out of the relationship and the DNA test has clearly established so, once an inference is drawn that the relationship is consensual and when the prosecution has failed to establish that the girl was minor, justifying the invocation of the provisions of the POCSO Act, the end result of he being tried for the offence of rape as well as Section 4 and 6 of the POCSO Act, ought to have resulted in his acquittal, but the Special Judge has failed to note these loopholes in the case of the prosecution and has convicted him.

The accused is sentenced to undergo 10 years of Imprisonment on being convicted under the impugned judgment, out of which he has already undergone 7 years of imprisonment.

On recording a finding to the above effect, that the Special Judge has erred in not noticing the grave lacunae in the case of the prosecution where it has failed to prove the charge against the appellant, and for this reason, the impugned judgment dated 5/1/2019 passed by the Special Judge, Khed in Special Case No.09/2017, deserve to be set aside.

Resultantly, the Appeal stand allowed by conferring the appellant with his liberty and he is directed to set free unless his incarceration is required in some other crime.

(SMT. BHARATI DANGRE, J.)