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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.583 OF 2019
WITH
CRIMINAL APPLICATION NO.733 OF 2019
IN
CRIMINAL APPEAL NO.583 OF 2019

Sitaram Dina Mandal	]	..	Appellant
vs.			
State of Maharashtra & Anr.	]	..	Respondents

Ms.Megha Bajoria for Appellant.

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

Mr.R.S. Alange, for Respondent No.2.

CORAM : BHARATI DANGRE, J

DATE : 3rd April, 2023

JUDGMENT :

1] The Appellant stand convicted at the hands of the Special Judge (POCSO) Thane in Special Case No.124/2017 for committing an offence punishable under Section 376(2)(i) of the IPC and he is sentenced to undergo RI for 10 years and to pay fine of Rs.3000/- , in default to undergo RI for 3 months.

He is also convicted under Section 6 read with Section 5(j)(ii) of the POCSO Act and sentenced to undergo RI for 10 years and to pay fine of Rs.3000/-, in default to undergo RI for 3 months.

The two sentences are directed to run concurrently. Though the Appellant is found guilty of committing an offence under Section 4 and 6 of the POCSO Act, no separate sentence is awarded.

It is this Judgment dated 31.08.2018, which is challenged in the Appeal, which came to be admitted on 30.04.2019.

The Appellant has undergone 6 years out of 10 years of the sentence imposed on conviction, on 16.03.2023, I directed the Appeal to be listed for final hearing since the record and proceedings with paper-book are already received in the Registry.

2] Heard Ms.Megha Bajoria, learned appointed counsel for the Appellant and Mr.R.S. Alange, who represent the complainant, on being appointed through legal aid and Ms.P.N. Dabholkar, learned APP for the State.

The Appellant face the prosecution for committing forcible sexual intercourse upon the victim girl, aged 17 years, without her consent and against her will, by imposing threat that he would cause harm to her as well as to her parents. The incident is alleged to have taken place in her house in the last week of May 2016, when it is alleged by the Prosecutrix that, while she was alone at home, the Appellant to whom she referred to as 'Kaka' came to the house for collecting tiffin. As per her version, he caught hold of her and when she questioned his act, he threatened that he will kill her and also her parents and after forcibly removing clothes, he committed rape on her. She was threatened not to disclose the incident to anybody.

3] Upon the complaint being filed, the investigation commenced and after recording the necessary statements, charge-sheet came to be filed against the Appellant. He was charged under Section under

Section 3(a) which is punishable under Section 4 of the POCSO Act. He was also charged under Section 5(j)(ii) of the POCSO Act, which is punishable under Section 6 of the Act of 2012.

4] The alleged incident was not reported by the Prosecutrix to any one and immediately 15 days thereafter, she left for Vashind and within these 15 days, the Appellant never visited her place. When she returned after 5-6 months, on noticing something unusual, she was taken to doctor where it was disclosed that she was carrying pregnancy. When enquired by her mother as to why this was not disclosed to her, she revealed that threat was given to her.

The Prosecutrix gave birth to a male child on 24.02.2017 in NMMC Hospital and thereafter on 04.03.2017, a complaint was lodged, which came to be registered as FIR.

In the complaint, the Prosecutrix allege that, it is the Appellant, who committed forcible sexual intercourse with her, without her consent and against her will.

5] The Prosecutrix stepped in the witness box to prove the charge against the Appellant and she reiterated her version in the complaint that when the statement was recorded, the Appellant was brought to the Hospital and she identified him and thereafter her supplementary statement was recorded on the next day. She has deposed that her statement was recorded before the Judge (Statement recorded under Section 164 of the Cr.P.C.). She also disclosed her date of birth as 07.08.2000.

The Prosecutrix, further revealed that she is illiterate and therefore cannot exactly disclose the date of the incident, but according to her it happened in rainy days of the last year.

The version of the Prosecutrix is corroborated by her mother PW 2, who deposed that the Prosecutrix had visited her mother's house, where she resided for 3-4 months and when she came back for Diwali, she disclosed about missing her menses and on being taken to the hospital, she was found to be pregnant. PW 2 state that her daughter disclosed to her that it was the Appellant Sitaram who had committed rape upon her. She also deposed that since she was carrying vegetables from the rickshaw of the Appellant, he was known to them and he was visiting their house for collecting tiffin.

She categorically admit that she used to leave the house for her work in the morning and even her elder daughter would also go for household work, leaving the Prosecutrix alone at home.

The owner of the room, where PW 1 and 2 were residing, was examined as PW 3 and he also corroborated the version of the earlier two witnesses by deposing that the Appellant used to come to the house of Prosecutrix for taking tiffin.

6] The accusation faced by the Appellant stood fortified by the report from the Directorate of Forensic Science Laboratories, exhibited as Exhibit 14, which compared the DNA extracted from the blood sample of the Prosecutrix and the baby which was born to her and the Appellant. The said report opined that the Prosecutrix and the Appellant are the biological parents of the child born to her.

Two Medical Officers are examined as PW 4 and PW 5. PW 4 Dr.Aarti Ganvir, CMO at Vashi General Hospital deposed that she had examined the Appellant who gave history of knowing the Prosecutrix for 2 to 4 years and about the sexual relationship being established between them many times, 20 to 25 times, and last one being in May

2016. The sample of his semen, nail clipping and blood was collected by PW 4.

PW 5 Priyal Ankhad is the Medical Officer in NMMC Hospital, Vashi, who deposed that she was present in the Hospital when the Prosecutrix was admitted and at that time she was aged 17 years and 5 months and was 9 months pregnant. Her delivery was performed on emergency basis and the medical papers about the same including the admission card is exhibited through PW 5. She also produced on record the treatment administered as well as discharge summary.

7] During the course of hearing, Ms.Rekha Bajoria, appearing for the Appellant would describe the prosecution case doubtful, by submitting that there is a cloud of suspicion, over the date of birth of the Prosecutrix, as according to her, it has not been conclusively established by the prosecution that she was minor at the time of occurrence of the offence. Her specific submission is that when test was carried out for age determination by radiographic bone age estimation, her age is shown to be 17 years +/- 6 months.

Therefore, Ms. Bajoria express a possibility that the Prosecutrix could have been over 17 years also and in such a case, the provisions of POCSO Act could not have been invoked and since the case of the Appellant is specific that the relationship between them was consensual, no charge could have been said to be proved against the Appellant.

Apart from this, Ms. Bajoria would also lay emphasis upon the conduct of the Prosecutrix, who did not disclose the incident till her mother noticed the pregnancy and the submission is, even when the Prosecutrix was found to be pregnant, the incident was reported to the

police belatedly i.e. only after the child was delivered and this creates a doubt about the involvement of the Appellant in the entire episode.

8] Ms.Bajoria would place reliance upon the decision of the Hon'ble Apex Court in the case of **Ram Suresh Singh vs. Prabhat Singh alias Chhotu Singh**¹ to buttress her submission that the age of the person is required to be determined having regard to the provisions contained in Section 35 of the Indian Evidence Act and while determining the age by ossification test, error of two years on either side is possible.

She would also press into service the position of law, as settled by the Supreme Court in several decisions, where a judicial note is taken of the fact that the margin of error in age ascertained by radiographic examination is two years on either side and when the question comes, whether the lower of the age or the higher of the age is to be taken into consideration, benefit of doubt should be given to the accused and therefore the higher limit should be taken into account.

Apart from this, in order to establish that the relationship was consensual in nature, it is sought to be argued by Ms.Bajoria that the Prosecutrix was residing in a chawl type structure with adjoining rooms and an attempt is made to rely upon the cross-examination of PW 3 who has admitted that during the day time, doors of all the tenants are open and there is common gallery to all the adjoining rooms. Hence, her submission is, if the physical indulgence was forceful, there would have been some cry for help, which would have saved her, but in absentia, an inference can be drawn that the sex was consensual.

9] On appreciation of the evidence placed on record, it can be seen that the Prosecutrix has narrated her date of birth as 07.08.2000. PW 7

1 (2009) 6 SCC 681

Investigating Officer has deposed that he had collected the birth certificate from her and it was marked as Article 1. PW 2, the mother of the Prosecutrix deposed that the age of her younger daughter is 17 years. The X-ray report of radiographic bone age estimation, establish the age of the Prosecutrix as 17 years +/- 6 months. The X-ray report (Exhibit 23) is admitted by the Appellant.

When the cross-examination of PW 1 and PW 2 is carefully perused, there is no challenge to the deposition of PW 1 who has disclosed her date of birth to be 07.08.2000 and neither PW 1 nor PW 2 has been cross-examined on the birth certificate furnished to the police, which came to be marked as Article 1 through the evidence of Investigating Officer.

In absence of any doubt being raised about the date of birth of the Prosecutrix, which had come on record through the evidence of PW 1 as 07.08.2000, I do not think that, it is open for the Appellant to raise an issue that the prosecution has failed to establish that the Prosecutrix was minor.

10] As far as the theory of consensual sex which is sought to be argued on behalf of the Appellant is concerned, it can be seen that the Appellant, at the relevant time, was aged 45 years, whereas, the Prosecutrix was below 18 years, a minor, and there is no circumstance brought on record by the Appellant to establish that the sex was consensual except the history given to the Medical Officer.

The mere fact that the rooms in the chawl in which the Prosecutrix was residing are adjoining to each other and the argument, that whatever happens in one room is known to the occupant of the other room, is merely an assumption. The version of PW 1 cannot be doubted, as even the Appellant has not denied that he committed sex

with her, the only defence which he take is that sexual indulgence was consensual. Since the Prosecutrix is minor, her consent is of no consequence for the purpose of offence under Section 375 of the IPC and undisputedly, if she is minor, commission of penetrative sexual assault is liable for punishment under Section 4 and 6 of the POCSO Act.

11] Appreciating the evidence on record, the learned Special Judge has rightly convicted the Appellant for committing an offence of rape and also for committing offence of penetrative sexual assault on a minor girl, offence under the provisions of POCSO Act. Since the offence committed is prior to Amendment of 2019 in the POCSO Act, he has rightly awarded maximum punishment on convicting the Appellant under Section 4 and 6 of the POCSO Act. But, since the punishment of 10 years is already awarded for committing the offence under Section 376 (2)(i) of the IPC, no separate sentence is awarded though the Appellant is found guilty for committing offence under Section 4 and 6 of the POCSO Act.

12] In the wake of aforesaid observation, since it has been established that it is the Appellant, who has committed forcible sexual intercourse with the Prosecutrix, as a consequence of which she conceived and gave birth to male child, whose DNA testing has established that the Appellant is the father of the child, there is no reason to doubt the version of PW 1, who has specifically attributed the charge of rape to the present Appellant. Except denying the case of the prosecution in statement recorded under Section 313 of the Cr.P.C. , the Appellant did not rebut presumption under the POCSO Act by adducing any positive evidence and particularly as to the age of the

Prosecutrix or the accusation of forcible penetrative sexual intercourse being committed on her.

13] In the wake of above, by upholding the impugned Judgment dated 31.08.2018, the Appeal deserve dismissal and is accordingly dismissed. The Appellant shall undergo the remaining sentence awarded to him under the impugned Judgment.

14] Before parting, I must record my appreciation for Ms.Megha Bajoria and Mr.R.S. Alange, who have rendered effective assistance to this Court, on being appointed through Legal Services Authority for representing the Appellant and Complainant, respectively.

The Legal Services Authority is directed to pay legal remuneration, due and payable to the respective counsel, within a period of six weeks from today.

In the wake of disposal of Criminal Appeal No.583/2019, Criminal Application No.733/2019 is also disposed off.

[BHARATI DANGRE, J]