



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 853 OF 2019

Prakash @ Pappu s/o Vishwanath Zinzurde
Age 27 years, Occu- Labour,
R/o Sindkhedraja, Taluka Sindkhedraja,
District Buldhana.

... Appellant
[Orig. Accused]

Versus

1. The State of Maharashtra
For Shivaji Nagar Police Station, Beed.
2. XYZ

... Respondents

.....
Mr. Sudhakar T. Mahajan, Advocate for the Appellant.
Mr. N. D. Batule, APP for Respondent No.1-State.
Mr. M. B. Sandanshiv, Advocate for Respondent No.2.
.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 05.02.2024
Pronounced on : 12.02.2024

JUDGMENT :

1. Appellant-convict takes exception to the judgment and order of conviction passed by learned Special Judge, Beed dated 17.07.2019 passed in Special (POCSO) Case No. 17 of 2018 for commission of offences punishable under Sections 363, 366-A, 376(2)(f)(n) of the Indian Penal Code [IPC] and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act].

CASE OF PROSECUTION IN TRIAL COURT

2. PW2 victim studying in 10th standard was alone at home on 09.05.2016 while her mother PW1, a worker in the hospital, went to attend duties. Cousin of mother, i.e. accused, visited her house and finding victim alone, he told that he desires to marry her and suggested that they should run away and perform marriage. He latched the door. At that time another uncle, namely, Sham came and thereafter he scolded accused. However, after said uncle Sham left, accused again told the girl that they should run away and accordingly, he took her to Jalna road, Beed and then brought her to Aurangabad, spent night at the room of one Prakash and thereafter he took the girl to Manmad by train and from there to Yeola in a bus, their they halted at his aunt and then he took her to Ahmednagar. Finding girl missing, mother suspected accused, who was regularly visiting her house, to be responsible and she lodged FIR Exhibit 26.

3. Police found victim after 11 months and thereafter she made disclosure that accused promised to marry her, took her from the house to various places and had sexual intercourse with her, impregnated her and even forced to get pregnancy aborted and accordingly, her statement was also recorded.

4. After completion of investigation, PW5 IO chargesheeted accused for above offences and he was made to face trial before learned Special Judge, who after appreciating oral and documentary evidence of prosecution, held accused guilty as above.

Above judgment and order of conviction is now questioned before this court by filing instant appeal.

SUBMISSIONS

5. Learned counsel for the appellant would submit that at first count, there is no convincing, cogent, reliable evidence about victim to be minor. That, moreover victim had attained age of discretion. She had willingly accompanied accused with whom she had love affair. Prosecution's own evidence reflects the same. It is pointed out that victim has spent over 11 months in the company of accused. At no point of time, since she accompanied accused, she ever raised alarm or resisted. Though they had been to various places, she did not inform anyone about being kidnapped or forcibly brought under the pretext of marriage. He pointed out that she spoke about conceiving from accused. At no point of time she had resisted and therefore, whatever happened was consensual.

6. It is further pointed out that in this case, Section 366-A of IPC was applied, however, according to him, taking into consideration the necessary ingredients for the said offence, case of prosecution was not that victim was forcibly taken with intention that she would be made to have sexual intercourse with another person. Therefore, according to him said charge is misplaced.

7. Relying on *Ashik Ramjan Ansari v. State of Maharashtra and another* [2023 (3) Bom. C.R. (Cri.) 322], he further submitted that as girl had attained age of understanding and she willingly accompanied accused due to their long standing affair, accused ought not to have been held guilty and thus, he finds fault in the case of prosecution as well as appreciation and findings of learned trial Judge and so he prays to allow the appeal by setting aside the impugned judgment.

8. Per contra, learned APP pointed out that victim was studying in 10th standard. Her mother as well as victim herself have given date of birth. Copy of birth certificate has been laid hands by the Investigating Officer and it is part of record, which clearly shows that victim was minor. Accused was in fact maternal uncle of victim. Taking disadvantage of her loneliness, he promised her of marriage

even when she was minor, and had taken her to various places. Being a minor, mere non resistance of victim would not absolve accused, rather he had impregnated her twice/thrice and it is narrated by victim herself. That, he further forced her to get abortion done. Thus, there is clear evidence suggesting sexual intercourse. That, girl being minor, provisions of POCSO Act are automatically attracted. Therefore, learned trial Judge, finding all necessary ingredients available on record, rightly convicted accused and sentenced him as per law. Hence, he prays that there being no merit in the appeal, it be dismissed.

9. On behalf of victim too, above arguments are advanced. Canvassing in favour of the impugned judgment, it is submitted that victim was minor. She was lured on promise of marriage. She was not of marriageable age being minor. In spite of knowing about it, her uncle-accused took her away without consent of mother and therefore, offence of kidnapping is brought home. He further submits that victim was forced to have sexual intercourse. Therefore even other charges for which accused was chargesheeted, are cogently established. Victim adduced evidence, naming accused for the said acts. That, there is ample evidence about age of victim. Her mother has also deposed to that extent. He submits that medical evidence

supports prosecution version and as such, no fault can be found in the impugned judgment and so he too prays to dismiss the appeal.

EVIDENCE BEFORE THE TRIAL COURT

10. After considering submissions of both sides and on re-appreciating the evidence, it is emerging that here, six witnesses are examined by prosecution to establish its case. Their status and sum and substance of their evidence is summarized as under:

11. **PW1** mother gave date of birth of her daughter as 23.03.2001 and she to be studying in 9th / 10th standard. She deposed that accused is her cousin brother and he is already married, having a son and a daughter. That, 15 days prior to the incident, accused had been to her house and again visited on 09.05.2016 while she was attending duty. Around 2.30 p.m. she learnt from her mother-in-law that victim was not in the house. In spite of search when victim was not found, mother approached police station and lodged FIR Exhibit 26 against accused. This witness further deposed that her daughter was not found for 11 months but when police traced and brought her daughter, she disclosed that she was taken to various places by accused, mangalsutra was also tied to her neck showing marriage and that she was impregnated by him twice/thrice and even given pills for

abortion. This witness deposed that her such statement was also recorded before learned Magistrate.

12. **PW2** victim at Exhibit 28 stated that she was in 10th standard. The incident occurred on 09.05.2016. Her mother went to hospital for job and while she was alone in the house, around 1.30 p.m. her maternal uncle accused came and told her that he wants to marry her and suggested that they should run away and get married. That time another uncle came and even he scolded accused. But when said uncle went away, accused again told her to accompany him and that they would get married and took her to various places. She gave details of all places taken to by him. She also stated that he took her to Mahadev Temple, tied mangalsutra and thereafter they started residing as husband and wife on a construction site and worked there during which he had sexual intercourse with her and that she was impregnated by him twice/thrice and even given pills to abort. Thereafter he started consuming liquor and assaulting her. She further deposed that while at Amravati, police from Beed came and took her and accused to Beed. She was subjected to medical examination and her statement was recorded before learned JMFC. She further stated that accused used to prevent her from going out of the house or contacting her parents.

13. **PW3** Dr. Shivanikar is the medical officer who examined victim on 12.04.2017 and gave examination report Exhibit 35. He deposed about referring victim for radiological and dental examination. According to him, radiological and dental examination suggested her age to be between 17 to 19 years and 16 to 18 years respectively. On clinical examination, it was his opinion that victim had sustained sexual intercourse.

14. **PW4** Police Head constable Sanap was in the police team who brought accused and victim from Amravati. He also caused spot panchanama Exhibit 53.

15. **PW5** API Baravkar is the Investigating Officer. He carried out investigation and narrated all steps taken by him during investigation till filing of charge sheet.

16. **PW6** API Pathan is another police officer who had carried out part investigation and had searched victim. He is examined at Exhibit 68/C.

ANALYSIS

17. At the threshold, fundamental objection raised regarding age is required to be dealt and decided. Learned counsel for appellant would submit that prosecution failed to establish that victim was minor so as to attract charges of kidnapping, forceful rape and under the provisions of the POCSO Act. Her mother, while in witness box, has apparently given date of birth of victim as 23.03.2001. She has even given the class in which the victim had studied up to. PW2 victim, though has not given specific date of birth, learned Sessions Judge seems to have, by passing express order below Exhibit 82 on 15.04.2019, taken efforts to collect birth certificate of victim and it is now part of record which shows that the Health Department of Government of Maharashtra, Nashik Municipal Corporation has issued birth certificate of victim which shows her date of birth as 23.03.2001.

18. Alleged occurrence is of 09.05.2016. Obviously, taking such date of birth and date of occurrence into consideration, victim was around 15 years of age at the time of occurrence and hence, below 16/18 years. Though medical expert has given radiological and dental age, in the light of conclusive evidence in the form of birth certificate

issued by the Municipal Corporation, the same would prevail and as such, there is no hesitation to hold that victim is established to be a minor.

19. Now it is to be seen whether other offences, for which accused is chargesheeted, are made out or not, for which evidence of victim, her mother as well as the evidence of medical expert needs to be visited.

20. Evidence of victim is at Exhibit 28. On its close scrutiny, its substance is that the incident occurred on 09.05.2016 while she was in 10th standard and was alone in the house. Accused offered to marry her and suggested to accompany him and took her to various places and even stayed at Ahmendagar. There, he tied mangalsutra to her neck in Mahadev Temple and thereafter, while residing at a construction site, he had sexual intercourse with her. According to her, she became pregnant two to three times and accused gave her pills for abortion. After staying for three to four months at Ahmednagar, they further went to Pandharpur and spent two to three months there and then went to Amravati where Beed police came and apprehended them.

In her cross-examination, which was extensive, there was suggestion regarding she to be in the company of her father and adjoining people when accused went to her on 09.05.2016, which she flatly denied. She answered that while at Ahmednagar, she was not going out of the house as accused was locking her in the house. She also answered that she shouted many times. All suggestions are turned down by the victim. Court questions are also posed which are, as to whether accused was cousin brother of her mother, whether he was married and whether she gave information to police and all answers are given by her in affirmative. It is pertinent to note that there is no effective cross on accused taking her from her house while she was alone till she was taken in custody by police.

21. PW1 mother, the sum and substance of whose evidence is also discussed above, is found to be categorically speaking about accused to be her cousin brother and that 15 days prior to the incident, he had come to her house on the day of incident i.e. on 09.05.2016 also he had visited her. That, on finding victim missing, she had suspected him for taking her daughter and had lodged complaint Exhibit 28. She has specifically named accused in the FIR lodged by her on 10.05.2016.

22. PW3 Dr. Shivanikar, though claims that he did not notice external injuries, he has come across old tears to hymen. Doctor has categorically opined that sexual intercourse has occurred and on going through the CA report and on the basis of clinical examination, doctor has specifically issued final opinion that victim had sustained sexual intercourse. Nothing adverse is brought in the cross of doctor.

23. Therefore, here, on carefully analyzing the evidence, on the strength of birth certificate, which shows date of birth of victim to be 23.03.2001 and date of taking away victim as 09.05.2016, she was apparently 15 years of age. Therefore, she is shown to be **minor** on the date of occurrence. She was taken away from her house without consent of mother. Therefore there is offence of **kidnapping**. **Sexual intercourse** is proved through PW3 doctor. Therefore, even offences under the POCSO Act are successfully brought on record by prosecution.

24. Learned counsel for the appellant has sought reliance on the ruling of **Ashik Ramjan Ansari** (supra), however, on going through the facts in the said case and considering the facts in the case in hand, said judgment being on distinct facts, cannot be taken aid of.

25. During appeal, specific objection has been raised by learned counsel for the appellant that charge under Section 366-A of IPC is misplaced and even learned trial court erred in recording guilt and conviction for offence under Section 366-A of IPC. This court, on appreciating the available evidence, finds force in the above submission. It needs to be noted that Section 366-A of IPC provides as under:

“366-A. Procurement of minor girl. - Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.”

26. Law regarding applicability of Section 366-A IPC has been dealt in the following cases and relevant observations are as under:

In ***Ramesh v. The State of Maharashtra*** AIR 1962 SC 1908, the Hon’ble Supreme Court has in para 7 observed thus:

“7. There are three principal ingredients of the offence.

(a) That a minor girl below the age of 18 years is induced by the accused,

(b) that she is induced to go from any place or to do any act, and

(c) that she is so induced with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.”

In *Mohammed Nisar Riyaz Khan and Etc. v. State of Maharashtra* 2007 CriLJ 562 (Bom)/2006 (6) AIR BOM R 610, this court at its principal seat has observed in para 12 as under:

“12. Accused No. 1 has been found guilty of the offence under Section 366A of I.P. Code. Insofar as that finding is concerned, it is rightly submitted that the section would come into play, if it was to be established by the prosecution that the minor girl was taken away with intent or knowledge that she was likely to be forced or seduced to illicit intercourse with "another person". In the present case, the charge against the appellant/accused No. 1 was that he himself committed forcible sexual intercourse on the minor girl Kum. Anjum. In such a case Section 366A will have no application. That section could have been invoked at best against the accused No. 2, that is not the offence for which accused No. 2 has been found guilty by the lower Court. The State has not challenged that part of the decision of the trial Court. Suffice it to observe that accused No. 1 cannot be proceeded for offence under Section 366A of I.P. Code.”

In ***Sat Parkash v. State of Haryana and another*** ABC 2016 (I) 180 SC, following observations are made in para 5 and 6 by the Hon'ble Apex Court:

“5. The charge with reference to Section 366A of the Indian Penal Code needs a closer examination. Section 366A of the Indian Penal Code is extracted hereunder:

“366A Procuration of minor girl – Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.”

6. A perusal of the aforesaid section reveals, that the inducing of the minor to constitute an offence under Section 366A, should have been with reference to an intent to force or seduce her “... to illicit intercourse with another person...””

In ***Iqbal v. State of Kerala*** (2007) 2 SCC 724, the Hon'ble Apex Court has in para 9 and 10 observed thus:

“ 9. The residual question is of applicability of Section 366A IPC. In order to attract Section 366A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act.

10. In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366A has no application.”

27. Taking into account the above discussed material, here, accused is the only person involved in the crime. There is no “another person” as is contemplated in Section 366-A IPC and therefore, in the considered opinion of this Court, both, charge for said offence under

Section 366-A IPC as well as guilt recorded by learned trial Judge with regard to such offence, cannot be allowed to be sustained. Judgment and order of conviction to that extent needs to be set aside by partly allowing the appeal. Hence, I proceed to pass the following order:

ORDER

- I. The appeal is hereby partly allowed.
- II. The conviction awarded to the appellant Prakash @ Pappu s/o Vishwanath Zinzurde by the learned Special Judge, Beed in Special (POCSO) Case No. 17 of 2018 on 17.07.2019, to the extent of offence under Section 366-A of IPC i.e. vide clause (2) of the operative part of the order, is hereby quashed and set aside.
- III. Appellant stands acquitted to the extent of the offence punishable under Section 366-A of IPC.
- IV. Rest of the judgment and order of conviction, i.e. vide clauses (1) and (3) to (10) of the operative part of the order, is hereby maintained.

[ABHAY S. WAGHWASE, J.]