Bombay High Court
Santosh S/O Abasaheb Thorat vs The State Of Maharashtra on 28 August, 2017
Bench: Sangitrao S. Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 32 OF 2017

Santosh s/o Abasaheb Thorat,
Age : 25 years, Occu.: Labour Work,
R/o : Baraskarwadi, Tq. Shevgaon,
District Ahmednagar ..Appellant

VERSUS

The State of Maharashtra,
through Police Inspector,
Police Station, Shevgaon,
District Ahmednagar ..Respondent

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Mr.M.A.Tandale, Advocate (Appointed), for the appellant

Mr.G.O.Wattamwar, A.P.P. for respondent/State

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CORAM : SANGITRAO S. PATIL, J.

DATE : AUGUST 28, 2017 ORAL JUDGMENT :

The appellant has challenged the vires of the judgment and order dated 29.03.2016 passed in Sessions Case No.365 of 2014 by the learned Special Judge, Ahmednagar, convicting him for the offence under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act", for short) and for the offences 2 28-cri.appeal.32-2017 punishable under Sections 376(2)(f) and 366-A of the Indian Penal Code ("I.P.C.", for short), sentencing him to suffer rigorous imprisonment for ten years for the offence punishable under Section 4 of the POCSO Act and to suffer rigorous imprisonment for five years for the offence under Section 366-A of the I.P.C., besides amount of fine of Rs.5,000/- on each count, in default to suffer simple imprisonment for six months on each count. Since the appellant has been sentenced for the offence punishable under Section 4 of the POCSO Act, no separate sentence has been passed in respect of the offence punishable under section 376(2)(f) of the I.P.C. The substantive sentences have been ordered to run concurrently. The appellant has not deposited the fine amount.

2. On 08.06.2014, at about at about 8.30 p.m., the appellant, who is cousin maternal uncle of the victim girl, called her to Paithan-Road at Shevgaon, Tq. and Dist. Ahmednagar and kidnapped her with an intent to perform marriage with her. He resided with 3 28-cri.appeal.32-2017 her till 30.07.2014 at various places and during that period, he committed sexual intercourse with her. She

was aged about 17 years at that time. On the report of the victim girl, Crime No.213 of 2014 came to be registered against him in Police Station Shevgaon on 16.08.2014. The investigation followed. Statements of witnesses were recorded. The victim girl was medically examined. After completion of the investigation, the appellant came to be prosecuted for the above-mentioned offences. The prosecution examined nine witnesses to establish guilt of the appellant. The learned Special Judge, after scrutiny of the evidence produced by the prosecution, held the appellant guilty of the said offences and convicted and sentenced him, as stated above.

3. The learned Counsel for the appellant submits that the victim girl was the only material witness to state as to how and why she left the house of her parents, where she resided after leaving her parental home and what happened to her during the 4 28-cri.appeal.32-2017 period till she came back to her parental home. However, the prosecution has not examined the victim girl on the lame excuse that she was not traceable. He submits that the evidence of the parents of the victim girl is not sufficient to connect the appellant with the above-mentioned offences in the absence of evidence of the victim girl. He submits that the age of the victim girl also has been proved to be below 18 years during the above-mentioned period. According to him, the delay in lodging the report has not been explained by the prosecution. This unexplained delay is fatal to the prosecution. He submits that the learned trial Judge has wrongly held the appellant guilty of the above-mentioned offences. He, therefore, prays that the impugned judgment and order may be set aside.

4. On the other hand, the learned APP supports the impugned judgment and order. He submits that the victim girl could not be examined, but according to him, the evidence of the parents of the victim girl 5 28-cri.appeal.32-2017 is sufficient to prove that it is the appellant only, who took her with him and had sexual intercourse with her. He submits that the medical evidence shows that the victim girl was pregnant when she came back to her parental home. Therefore, inference has been rightly drawn by the trial Court that it is because of the sexual intercourse committed by the appellant that she became pregnant. He states that the evidence of the Headmaster of the school, where the victim girl was studying, shows that the date of her birth was 23.02.1997. As such, she was of below 18 years of age at the time of the incident. Therefore, her consent was not at all material. According to him, the trial Court has rightly convicted and sentenced the appellant for the above-mentioned offences.

5. Gorakshnath (PW 7)(Exh.27) is the Headmaster of Adarsh Secondary and Higher Secondary High School, Bramhani, Tq. Rahuri. He deposes that the victim girl was admitted in his school in 6th standard on 01.09.2008. He has produced a copy of the school 6 28-cri.appeal.32-2017 leaving certificate issued by the school, where the victim girl was previously studying. On the basis of the date of birth mentioned in that certificate, entry no.10890 was taken in the general register of the school and the date of birth of the victim girl was mentioned as 23.02.1997. It is, thus, clear that the date of birth of the victim girl was not mentioned in the general register (Exh.29) for the first time since the victim girl was not a fresher at the time of her admission in the said school. Therefore, the record in respect of date of birth of the victim girl cannot be said to be the original record. In the school leaving certificate (Exh.28), it is mentioned that the victim girl was studying in Z.P. Primary School, Renubai Mala, Chakan, Tq. Khed, Dist. Pune. The prosecution did not produce the general register or other record from that school to establish date of birth of the victim girl. No explanation

has been given as to why, the said record has not been produced.

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6. Raosaheb (PW 2)(Exh.16) - father of the victim girl states that the victim girl was 17 years of age at the time of the incident. However, he states that he cannot state the date of birth of his first child. He admits that the dates of birth of his children were recorded by the school teacher approximately. He admits that the year of birth of the victim girl was written by the School teacher as 1995 at his own. As such, Raosaheb (PW 2) himself is not sure about the exact date or year of birth of the victim girl.

7. Kamal (PW 3)(Exh.18) - mother of the victim girl, states that at the time of the incident, the victim girl was 18 years old.

8. Kavita (PW 4)(Exh.20), the younger sister of the victim girl, states that the victim girl was 2 years older than her. She was examined before the Court on 13.10.2015. At that time, she had stated her age as 17 years. That means, in the year 2014, she 8 28-cri.appeal.32-2017 was 16 years of age. It follows that in the year 2014, the victim girl was aged about 18 years. There is no medical evidence to show the age of the victim girl. No ossification test or radiological examination was conducted to ascertain her age.

9. In the above circumstances, the date of birth of the victim girl mentioned in the general register (Exh.29) cannot be attached with any importance. The said date of birth has not been corroborated by the parents and sister of the victim girl. There is nothing on record to show as to who had given that date of birth when the victim girl was admitted in the previous school. Thus, the prosecution has failed to establish that the victim girl was below 18 years of age at the time of the incident. On the contrary, it seems that she had completed 18 years of age at the time of the incident. In the circumstances, the offence under Section 3 of the POCSO Act cannot be attributed against the appellant. Consequently, the presumptions 9 28-cri.appeal.32-2017 under Sections 29 and 30 would not assist the prosecution in establishing guilt of the appellant for the said offence.

10. Raosaheb (PW 2) states that on the day of the incident i.e. on 08.06.2014, he saw the victim girl proceeding along at Paithan Road. He asked her as to where she was going, whereon she replied that the appellant was waiting for her at Paithan-Road and that she was going there. In paragraph 5 of his cross-examination, he admits that he had not personally seen the victim girl going along with the appellant.

11. Kamal (PW 3) states that the victim girl received a phone call from the appellants and in response to that call, she left home and went to Paithan Road at about 5.00 p.m. In paragraph 10 of her deposition, she states that she had stated to the police that the victim received a phone call from Santosh (appellant), and left the house at 5.00 p.m, 10 28-cri.appeal.32-2017 however, the said facts were not stated by her before the police. She states that the said facts were stated by her for the first time before the Court. If this version is considered, her earlier version that the victim went to Paithan Road in response to the phone call of the appellant, does not stand to reason.

12. Kavita (PW 4) states that the victim girl went to Paithan-Road in response to the phone call of the appellant on 08.06.2014 at about 8.30 p.m. If her evidence is accepted, the evidence of Raosaheb (PW 2) and Kamal (PW 3) that the victim girl left the house at about 5.00 p.m. in response to the phone-call of the appellant cannot be believed. The evidence of these witness about leaving the house by the victim in response to phone call of the appellant being doubtful, would not be helpful to the prosecution to establish that the appellant took or enticed the victim out of the keeping of her parents.

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13. Considering the above evidence of the parents and sister of the victim, it was immensely necessary to have the evidence of the victim herself to ascertain the circumstances, in which she left the house of her parents. In the absence of her evidence, it cannot be inferred that the appellant took or enticed her and thereby kidnapped her.

14. It has come in the evidence of Raosaheb (PW2) and Kavita (PW 4) that on 30.07.2014, they had gone to Georai bus stand along with one Laxman, the brother-in-law of Raosaheb (PW2). At that time, Kavita (PW4) gave a phone call to the victim and asked her as to where she was. At that time, the victim informed that she was at Jayakwadi camp. Then she asked the victim to come and meet her at Georai bus stand. Then within half an hour, the victim came there to meet her. There is nothing in the evidence of this witness to show that when the victim came to meet them at Georai bus stand, the appellant was with her or they saw the appellant at any nearby place.

12 28-cri.appeal.32-2017 Whatever stated by the victim to this witness would be hearsay evidence and would not be admissible in evidence.

15. Ramesh (PW 5) (Exh.21) states that he saw the appellant and a girl residing in a Government quarter of Irrigation Department for one and half month from 16.06.2014 onwards. He states that he was looking after maintenance of the Government quarters. He admits that there is a register of temporary occupants of the Government quarters, however, he did not take entry therein about residence of the appellant. This witness has not stated the name of any particular village, city, town, etc. where he was serving and where those Government quarters were. He does not state that the girl residing with the appellant was the victim girl only. He has not even stated the name or description of the girl. His evidence is of no use to establish that the victim girl only was found residing with the appellant. Such vague and scanty evidence would not be helpful 13 28-cri.appeal.32-2017 to the prosecution to establish that the appellant resided with the victim girl at any particular place as husband and wife for a period of one and half month. This witness seems to be a got up witness.

16. The victim girl has not been examined by the prosecution. It was tried to show that she was not traceable. No effective steps seem to have been taken by the prosecution to secure presence of the victim. It was alleged that she had left the village along with her maternal uncle and his family members, who was a sugarcane cutter. It is difficult to accept the stand of the prosecution that neither the maternal uncle of the deceased nor his family members were traceable. In any case, the

fact remains that the evidence of the victim girl, which was essential to connect the appellant with the above-mentioned offences, has not been produced by the prosecution. The evidence of Raosaheb (PW 2), Kamal (PW 3) and Kavita (PW 4) about what the victim girl told them in respect of the circumstances under which she left 14 28-cri.appeal.32-2017 their house, what happened to her during her stay until she met them at Georai bus stand and the allegations made against the appellant, being hearsay, is not at all admissible in evidence. As per Section 32 of the Evidence Act, statement of relevant facts made by a person who is dead or cannot be found, etc. are themselves relevant facts in the cases enumerated in sub-sections (1) to (8). The statements alleged to have been made by the victim girl before the above-named three witnesses do not fall under any of sub-sections (1) to (8) under Section 32 of the Evidence Act. Therefore, they were not legally admissible in evidence. The learned Trial Judge wrongly admitted this inadmissible evidence and wrongly relied on it to connect the appellant with the above-mentioned offences.

17. The learned Trial Judge treated the F.I.R (Exh.53) as substantial piece of evidence. It is well settled that F.I.R can be used to corroborate or 15 28-cri.appeal.32-2017 contradict the evidence of the author thereof. Since the F.I.R (Exh.53) was not in respect of the facts falling under any of sub-sections (1) to (8) under Section 32 of the Evidence Act, in the absence of the evidence of the victim girl, the contents of the F.I.R (Exh.53) were not at all admissible in evidence. However, the learned Trial Judge wrongly treated the F.I.R (Exh.53) as substantive piece of evidence and relied on the contents thereof to convict the appellant. Thus, there is no legally admissible evidence to establish that the appellant kidnapped the victim girl and raped her. Therefore, only because the medical evidence shows that the victim girl was pregnant when she was examined by Dr.Ghawate (PW 6) on 17.08.2014, it cannot be said that it is because the appellant committed sexual intercourse with her that she became pregnant.

18. It is well settled that the conviction of a person has to be based on legally admissible evidence. Moral conviction is not at all sustainable.

16 28-cri.appeal.32-2017 In the present case, in the absence of the evidence of the victim girl, it is not possible to connect the appellant with the above-mentioned offences.

19. As stated above, the prosecution failed to establish that the victim girl was below 18 years of age at the time of the incident. The prosecution further failed to establish that the appellant kidnapped her and committed sexual intercourse with her. The learned trial Judge convicted the appellant on the basis of inadmissible evidence. The impugned judgment and order, therefore, would not be sustainable in law. They are liable to be set aside.

20. In the result, I pass the following order :-

(i) The appeal is allowed.

(ii) The impugned judgment and order dated

29.03.2016 passed in Sessions Case No.365 of 2014 by the learned Judge, Special Court and ASJ, Ahmednagar, are set aside.

(iii) The appellant is acquitted of the offence

under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and the offences punishable under Sections 376(2)(f) and 366-A of the Indian Penal Code.

(iv) The appellant be set at liberty forthwith, if not required in any other case.

(v) The appeal is accordingly disposed of.

(vi) As Mr.M.A.Tandale, learned Counsel was appointed to represent the appellant in this case through the High Court Legal Services Sub-Committee, Aurangabad, his fees is quantified at Rs.5,000/-, to be paid to him by the said Committee.

[SANGITRAO S. PATIL, J.] kbp/28-cri.appeal.32-2017