

Bombay High Court

Anil S/O Duryodhan Gharat (In ... vs The State Of Maharashtra, Thr. ... on 23 August, 2017

Bench: R. B. Deo

apeal319.16.J.odt

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.319 OF 2016

Anil s/o Duryodhan Gharat,
Aged about 36 years,
Occ: Cultivation,
R/o Pathari (Goregaon),
Tah. Goregaon, District Gondia.

..... APPELLANT

...V E R S U S...

The State of Maharashtra,
Through Police Station Officer,
Police Station Goregaon,
District Gondia.

..... RESPONDENT

Shri R.M. Daga with Ms. F.N. Haidari, Advocate for
Appellant.
Mrs. M.H. Deshmukh, APP for Respondent/State.

CORAM: ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 07.08.2017
DATE OF PRONOUNCING THE JUDGMENT : 23.08.2017

1] The appellant is aggrieved by judgment and order

dated 23.02.2016 delivered by the Special Judge, Gondia in Special Case 49/2014 by and under which the appellant is convicted for offence punishable under section 3 read with section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO') and is sentenced to suffer rigorous imprisonment for ten years and to additionally pay fine of Rs.5000/-, and is further convicted for offence punishable under section 376(2)(i) of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for ten years and to additionally pay a fine of Rs.5000/-.

2] The prosecution case, as is unfolded during the course of trial is thus. P.W.2 victim girl was residing at Pathari (Goregaon) along with her two sisters Durga, Anjali and grand-mother Nirmalabai Raut. Her parents and brother were away in Hyderabad for labour work. The

grand-mother of the victim girl informed her mother Sushilabai on 19.05.2014 telephonically that prior to eight days the accused sexually assaulted the victim girl in a field on the pretext of giving sweets and chocolate. Sushilabai and her husband returned to village Pathari on 22.05.2014, made inquiry with the victim girl, were told by the victim girl that the accused took her to a field, removed his pant and her clothes, sat on her and inserted his private organ into her vagina. Sushilabai lodged report (Exh.12) against the accused on 23.05.2014 at Goregaon Police Station. An offence punishable under section 3 read with section 4 of POCSO and 376(2)(i) of the I.P.C. was registered against the accused vide Crime 41/2014. A spot panchnama was drawn, the accused was arrested, the victim girl was medically examined, her blood sample and vaginal swab sample were collected, C.A. report and the birth certificate of the victim girl were obtained and after completion of the investigation charge-sheet was submitted in the Special Court.

3] The Trial Court framed charge (Exh.8), the accused pleaded not guilty and claimed to be tried. The prosecution examined eight witnesses, the statement of accused was recorded under section 313 of Cr.P.C. in which the accused contended that he is falsely implicated due to old enmity. The judgment of conviction is assailed in the present appeal.

4] Heard Shri R.M. Daga and Ms. F.N. Haidari, the learned counsels for the appellant-accused and Mrs. M.H. Deshmukh, the Additional Public Prosecutor for the State. Shri R.M. Daga, contends that the evidence of the victim girl who is examined as P.W.2 is not confidence inspiring and her conduct of regularly attending the school and playing with her friends even after the alleged incident, is unnatural. He contends that the failure of P.W.2 to disclose the incident to anybody for 12 to 13 days renders her testimony wholly unreliable and the conviction on the basis of such testimony is unsustainable. The learned counsel contends that the testimony of P.W.2 victim girl is not corroborated by the medical evidence. The learned counsel further contends that the age of the minor is not proved conclusively. The learned counsel would invite my attention to certain omissions which by partake the character of contradiction which are duly proved and the submission is that the contradiction renders the testimony of P.W.1 untrustworthy. In the alternative, it is the contention of Shri R.M. Daga, that even if the evidence is taken at face value, only an attempt to commit offence punishable under section 3 read with section 4 of the Protection of Children from Sexual Offences Act, 2012 and 376(2)(i) of the Indian Penal Code is made out.

5] Per contra, Mrs. M.H. Deshmukh, the learned A.P.P. would urge that the testimony of the victim girl is absolutely reliable and confidence inspiring. She would urge that the victim girl who is proved to be of 11 years as on the date of the incident did not have any reason much less motive to falsely implicate the accused. The testimony of the victim girl is corroborated by the medical evidence. The learned A.P.P. would urge that it is a well established position of law that the conviction can be based on the uncorroborated testimony of the victim - prosecutrix if the testimony is otherwise confidence inspiring. The learned A.P.P. contends that it is conclusively established that the victim was a minor and the alternate submission of the learned counsel for the accused that the evidence at the most is suggestive of an attempt to commit rape holds no water and militates against the evidence of the victim girl which is corroborated by the medical evidence. 6] I have minutely scrutinized the evidence on record and having done so, I am unable to accept the submission of the learned counsel Shri R.M. Daga that the judgment impugned is unsustainable in law nor am I

persuaded to agree with the alternate submission that the evidence at the most is suggestive of an attempt to commit rape.

7] The mother of the victim girl Sushilabai is examined as P.W.1. Her evidence reveals that she along with her husband and son were in Hyderabad when she received a phone call from her mother-in-law (P.W.3) on 19.05.2014 informing that the accused had committed forcible sexual intercourse with the victim girl after inducing the victim girl to accompany the accused to a field under the pretext of giving her sweet and chocolate. P.W.1 was informed by P.W.3 that the accused inserted his private organ in the vagina of the victim girl. She states that since she and her husband did not have money for traveling, they arranged money and on 22.05.2014 reached Pathari village. She made inquiry with the victim girl and learnt that the accused took the victim girl to a field, removed his pant and her clothes, sat on her and inserted his private organ in the vagina of the victim girl. She states that a police report Exh.12 was lodged. P.W.1 identifies the accused in the Court and deposes that the accused is residing in front of her house.

8] P.W.1 further states that she accompanied the victim girl to the hospital for her medical examination, that during investigation she handed over the clothes of the victim girl to the police and further identifies the clothes. P.W.1 proves the seizure memorandum Exh.14 by identifying her signature. P.W.1 states that the victim girl was studying in 5 th standard and her month of birth is June, 2003. In the cross-examination, she denies the suggestion that the relationship between Nirmalabai (P.W.3) and the mother of the accused were strained. She denies the suggestion that there was an altercation between P.W.3 and the mother of the accused on the issue of she-goat and hen of the mother of the accused entering the house of P.W.1 and P.W.3. Certain omissions are brought on record in paragraph 8 of the cross-examination. She denies the suggestion that one day prior to the lodging of report she quarreled with the accused. 9] The victim girl is examined as P.W.2. She states that at the time of the incident she was studying in 5 th standard. Accused, whom P.W.2 calls 'Bhau' offered her Rs.10/- which did not accept. She states that she had been to the field for grazing she-goat. She was told by the accused that he would pluck mangoes for her and she was taken by the accused to the field of Dhanna Badole. In the field, the accused removed her underwear, removed his pant and then inserted his male organ in her vagina. P.W.2 victim girl states that the accused threatened her not to disclose the incident to anybody and therefore, she did not disclose the incident to anybody. She states that 12 to 13 days after the incident, she had been to the field to collect wax. She was accompanied by her friend Rohini - the accused gave money to Rohini for purchasing chocolate, Rohini brought chocolate and both P.W.2 and Rohini consumed them. P.W.1 states that at that time also the accused told them to accompany him. P.W.1 and Rohini did not accompany the accused and returned to their respective home. It was then, that P.W.2 disclosed the first incident to P.W.3. She identifies the clothes worn by her on the date of the incident. P.W.2 is extensively cross-examined. It is brought on record that even after the incident P.W.2 was attending school and regularly playing with her friend. She denies the suggestion that her grand-mother (P.W.3), used to reprimand the family members of the accused due to the she-goat of the accused entering in the court-yard of the house of the victim girl. She denies the suggestion that P.W.3 and mother of the accused were not on talking terms. She denies the suggestion that P.W.3 was restraining her from visiting the house of the accused. A suggestion was given to P.W.2 that she was visiting the house of the accused and she was being offered chocolate. P.W.2 victim girl admits

the suggestion and volunteers that after the incident she stopped going to the house of the accused. She admits that before disclosing the incident to P.W.3 she was on talking terms with the accused and that even after the incident she was taking her she-goat for crazing. 10] The grand-mother of the victim girl Nirmalabai is examined as P.W.3 who corroborates the version of the victim girl. She states that the victim girl informed her that the accused took her to the field of Dhanlal Badole, removed her nicker and inserted his male organ in her vagina. She states that on the same day, with the help of her one Durga, she informed the father of the victim girl telephonically and after 2-3 days the parents of the victim girl returned to village Pathari and the victim girl narrated the entire incident to them. She is subjected to grueling cross-examination and the effort is to bring on record motive to falsely implicate the accused. She denies the suggestion that there was a strained relationship between her and the accused and his mother. She denies the suggestion that the day before lodging the report she and her son had an altercation with the accused. She denies the suggestion that due to the altercation, the report was lodged to falsely implicate the accused.

11] Poliram Katre is examined as P.W.4 to prove the seizure panchnama. He did not support the prosecution, is declared hostile and cross-examined by the prosecution. Nothing relevant is brought on record in his cross-examination. 12] P.W.5 Bharat Karade is the Investigating Officer who proves the spot panchnama Exh.26, the arrest panchnama Exh.27, the blood sample and vaginal swab sample seizure panchnama Exh.20, seizure panchnama of the clothes of the victim Exh.14, seizure panchnama of the clothes of the accused Exh.21, the seizure panchnama of the blood sample of the accused Exh.22, C.A. reports Exh.31 to 33 and elaborately deposes about the investigation conducted. P.W.6 Sheela Raut who is the Head Mistress of the School in which the victim girl was studying is examined to prove the age of the victim girl.

13] P.W.7 Dr. Kushal Sakure is examined to prove the medical certificate issued pursuant to the medical examination of the accused. P.W.8 Vijay Dawadi is the Medical Officer who along with Gynecologist Dr. Punam Pardhi examined the victim girl. He states that during the examination the victim girl complained of burning sensation on genital and in urination. Hymen of the victim girl was ruptured and there was redness on her vaginal part with laceration. He states that since the victim girl was having acute pain, the internal examination of vagina could not be done. He confirms the opinion that sexual intercourse had taken place with the victim girl. P.W.8 proves the M.L.C. Exh.45 by identifying his signature and the signature of Gynecologist Dr. Punam Pardhi. During the cross-examination, P.W.8 states that no marks of injuries were found on the body of the victim girl. He states that injury on genital would be found only if the rape is committed by ample force. He denies the suggestion that a false medical certificate is issued at the behest of the police and that the opinion that sexual intercourse took place is incorrect. 14] The testimony of the victim girl P.W.2 is confidence inspiring. Nothing is brought on record to suggest that the 11 years old victim was falsely implicating the accused. The defence that the accused was falsely implicated due to strained relationship between the family of the victim girl and the accused and his mother is unacceptable. Firstly, nothing is brought on record, other than the suggestions given to the prosecution witnesses and which suggestions have been denied, to show that there was strained relationship between the families. On the contrary, it is the case of the defence, as is discernable from the cross-examination of the victim girl, that the victim girl was a regular visitor to the house of the accused. I do not have any reason to seriously consider the possibility that the family of the victim girl could have used her

as a tool in a nefarious design of falsely implicating the accused. No evidence is adduced nor is any realistic possibility of false implication brought on record during the cross-examination of the prosecution witnesses. The testimony of the victim girl, in my opinion, is confidence inspiring and I have accepted the same. The victim girl has testified that the accused put his male organ in her vagina, her testimony is corroborated by medical evidence. In the teeth of evidence on record, I am not in a position to accept the alternate submission of Shri R.M. Daga that even if the evidence is accepted at face value, only an attempt to rape is proved. I am no hesitation in rejecting the alternate submission.

15] The contention of the learned counsel for the accused that the age of the victim girl is not proved holds no water. P.W.6 has proved Exh.36 which certifies the date of birth of the victim girl as 30.06.2003. The certificate is issued on the basis of the school admission register and the relevant entry 3182 is proved and exhibited as Exh.37. The victim girl who was studying in 5 th standard as on the date of the incident is proved to be then of 11 years of age.

16] Shri R.M. Daga contends that entire paragraph 8 of the cross-examination of P.W.1 who is the mother of the accused is an omission. The omission is however, not of the magnitude much less importance as to cast a cloud on the prosecution case. The finding of the learned Special Judge that the delay in lodging the report is satisfactorily explained and the reasoning underlying the finding, as is discernable from the paragraph 33 of the judgment impugned, is unexceptionable. I see no reason, in law or on facts, to take a view different from that taken by the learned Special Judge. The prosecution has proved the offence punishable under section 3 read with section 4 of the Protection of Children from Sexual Offences Act, 2012 and section 376(2)(i) of the Indian Penal Code beyond reasonable doubt.

17] The appeal is sans merit and is, accordingly, dismissed.

JUDGE NSN