Bombay High Court
Ashok S/O Yeshwant Gharat vs The State Of Maharashtra on 1 September, 2017
Bench: Sangitrao S. Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.9 OF 2017
WITH
CRIMINAL REVISION APPLICATION NO. 4 OF 2017

Ashok s/o. Yeshwant Gharat,
Age : 61 years, Occ. Nil.,
r/o. Behind Swami Samarth Temple,
Near Madhav Talkies, Sangamner,
Tq. Sangamner,
Dist. Ahmednagar ..Appellant

Vs.

The State of Maharashtra ..Respondent

Mr.S.K.Shinde, Advocate for appellant

Mr.K.D.Mundhe, APP for respondent

CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : AUGUST 09, 2017
PRONOUNCED ON : SEPTEMBER 01, 2017

JUDGMENT :

Heard

2. Being aggrieved by the conviction and sentence for the offence punishable under Section 376(2)(n) of the Indian Penal Code ("I.P.C.", for 2 cri.appeal.9-2017 short) and under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO", for short) recorded in Sessions Case No.19 of 2016 by the learned Additional Sessions Judge, Sangamner, on 20.12.2016, the original accused has preferred this appeal.

3. It is alleged that on 27.11.2015, 28.11.2015 and 30.11.2015, the appellant committed rape on the victim girl, aged about 11 years, in Vajreshwari temple, situate near Madhav Talkies, at Sangamner, by extending threats to the victim of killing her parents and maternal uncle.

4. The State/prosecution examined nine witnesses to prove the guilt of the appellant for the above-mentioned offences. After evaluating the evidence produced on record, hearing the learned

A.P.P. for the prosecution and the learned Counsel for the appellant, the learned trial Judge found that the prosecution established the guilt of the 3 cri.appeal.9-2017 appellant for the above-mentioned offences, beyond reasonable doubt. The learned trial Judge, therefore, convicted the appellant for the said offences and directed him to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/- for the offence punishable under Section 376(2)(n) of the I.P.C. and also under Section 3 punishable under Section 4 of the POCSO Act; and further sentenced him to suffer simple imprisonment for one month for the offence punishable under Section 506 of the I.P.C.

5. The learned Counsel for the appellant submits that the appellant is aged about 61 years. The victim was residing with her maternal uncle in a house allotted to him under Gharkul Scheme. The appellant also was residing in one of such houses in the same locality. The sister of the appellant namely, Vimal was having one of such houses which was adjoining the house of the maternal uncle of the victim. Her maternal uncle wanted to purchase that house but Vimal sold it to somebody else. Therefore, 4 cri.appeal.9-2017 the maternal uncle of the victim had a grudge against the appellant and he prepared a false case against the appellant in order to take revenge. He submits that the evidence of the victim and other witnesses is not at all believable. The medical evidence does not support the case of the prosecution that there was sexual intercourse with the victim girl. No circumstantial evidence is available to prove the guilt of the appellant. According to him, the appellant has been wrongly convicted and sentenced for the above-mentioned offences.

6. On the other hand, the learned A.P.P. submits that there was no reason for the victim to state false against the appellant. The evidence of the victim is quite natural, probable and believable. The defence of the appellant is not at all probable. He submits that for constituting the offence of rape, slightest penetration is sufficient. There is medical evidence to show that there were nail marks over the right breast and rupture of hymen of the victim.

5 cri.appeal.9-2017 There were blood stains noticed on the garments of the victim. He submits that the evidence of the victim has been corroborated by the eye witnesses. According to him, the appellant has been rightly convicted by the trial Court.

7. The minimum punishment for the offence punishable under Section 376(2)(n) of the I.P.C. is rigorous imprisonment for a period of ten years. No discretion is left with the Court to reduce the sentence of imprisonment less than ten years, however, the learned trial Judge sentenced the appellant for the said offence with rigorous imprisonment for seven years. Therefore, Suo-Motu Criminal Revision Application No.4 of 2017 was registered and notice was issued to the appellant to show cause as to why the sentence of imprisonment shall not be enhanced.

8. The learned Counsel for the appellant submits that considering the age of the appellant, 6 cri.appeal.9-2017 the learned trial Judge has been pleased to reduce the sentence of imprisonment to seven years. According to him, no offence is established against the appellant and even if it is assumed for a while, that the said offences are established against him, the punishment is not liable to be enhanced considering the age of the appellant.

9. The learned A.P.P. submits that considering the minimum sentence prescribed for the offence punishable under Section 376(2)(n) of the I.P.C., the punishment is required to be enhanced at least to the extent of minimum that is prescribed for the said offence.

10. The prosecution has produced bona fide certificates (Exhs.10 and 11) issued by Headmaster, Siddharth Vidyalaya, Sangamner, showing that the victim was studying in 5th standard in that school and her date of birth is 11.06.2004. The genuineness of these documents has not been disputed by the 7 cri.appeal.9-2017 appellant. As such, her date of birth being 11.06.2004, she was aged about 11 years 5 months on the date of the incident.

11. The victim girl states at Exh.27, that on 30.11.2015, she came back from the school and started playing alone on the road in front of Vajreshwari temple. At that time, the appellant came there and took her inside the temple by holding her hand. The appellant placed his palm on her mouth. Therefore, she shouted. The appellant asked her not to shout and assured that he would not do anything. Therefore, she did not shout. The appellant then removed all of her clothes. He then forced her to sleep on the bed that was lying inside the room. He removed his own clothes also. He then put his organ of urine in her organ of urine and raped her. She states that the appellant slapped her twice or thrice and asked her not to disclose the said fact to anyone or else, threatened to kill her parents and maternal uncle. After some time, her maternal aunt - Asha (PW 1)(Exh.22) came 8 cri.appeal.9-2017 there. As Asha (PW 1) called the victim, the appellant asked the victim to wear the clothes. Thereafter, she went outside the temple. As regards the misdeed committed by the appellant, Asha (PW 1) asked him as to whether it was befitting him. Asha (PW 1) then took the victim to her house, where the victim narrated her about the incident.

12. Vijay (PW 4)(Exh.28) is the Panch Witness to the spot panchnama (Exh.29). It has come in his evidence that the spot of the incident is a temple and one room which is a part of that temple. A cot was lying in that room. The spot panchnama (Exh.29) shows the description of the temple and the room attached thereto. It also contains a rough map thereof. From this evidence, it is clear that there was a room, which was a part and parcel of the temple, in which there was a cot, whereon the incident took place.

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13. Sonali (PW 5) (Exh.30) is the sister of the victim girl. The victim and Sonali (PW 5) were residing at the house of their maternal uncle i.e. Vinayak (PW 6)(Exh.31). Sonali (PW 5) states that she was studying in eighth standard in Siddharth Vidyalaya, Sangamner. On the day of the incident i.e. on 30.11.2015, her school hours were 7.15 a.m. to 12.15 O'clock. After coming from the school, she completed her daily work. When she did not see the victim anywhere, she started searching for her at about 2.00 p.m. to 2.30 p.m. She went to Vajreshwari temple along with her brother Akshay and gave calls for the victim. However, there was no response from the victim. The door of the temple was closed. She then peeped inside the temple by pushing aside the curtain of the temple. She noticed that the appellant was sleeping on the body of the victim by removing the clothes and there were no clothes on the body of the victim as well. Then Akshay and herself called 10 cri.appeal.9-2017 Asha (PW1) and told her about the facts noticed by them.

14. Asha (PW 1) states that on the call of Sonali (PW 5) and Akshay, she went to see what was going on inside the Vajreshwari temple. She saw inside the temple by removing the curtain that the appellant was sleeping on the body of the victim and there were no clothes on the persons of both of them. She states that the appellant committed sexual intercourse with the victim. She raised shouts. Then the appellant came outside the temple by wearing his clothes hurriedly. She asked the appellant as to whether it was befitting to him, whereon the appellant challenged her to do whatever she wanted to do. One Seema Jadhav and Mohan Jadhav also came there and they also questioned the appellant about his misdeeds.

15. Asha (PW 1) states that she took the victim to her house. At that time, the victim was 11 cri.appeal.9-2017 frightened. The victim states that she told Asha (PW1) that on Friday and Saturday also, the appellant had committed sexual intercourse with her. Asha (PW1) took the victim to the Police Station and lodged the report (Exh.23) against the appellant. The contents of the F.I.R. (Exh.23) corroborate the version of Asha (PW 1).

16. From the evidence of the victim, which is supported by Sonali (PW 5) and Asha (PW 1), it is clear that the appellant was sleeping over naked body of the victim after removing his own clothes. The evidence of these witnesses is quite consistent. Nothing has been illicited in their cross-examination to doubt their evidence about the position in which the appellant and the victim were seen at the time of the incident.

17. Now it will have to be seen whether there is medical evidence to establish that the appellant committed sexual intercourse by actually penetrating 12 cri.appeal.9-2017 his male organ into female organ of the victim. Dr. Bhavar (PW 7)(Exh.32) states that he conducted medical examination of the victim on 01.12.2015 and noted his observations in the Certificate (Exh.34). He found that there were three nail marks over the right breast of the victim. There were no marks of violence over other parts of her body. He found that her labia majora and minora were well developed. No marks of violence were noted over external genitalia. No discharge was noted from vagina. Hymen was ruptured. No bleeding was noted. No internal vaginal injury was noted. According to him, the findings suggested forceful attempt of sexual assault. In his cross-examination, he states that the hymen of the victim was ruptured prior to more than seven days.

18. The appellant also was examined by the Medical Officer - Dr.Gote on 03.12.2005 at about 4.30 p.m. in Rural Hospital, Sangamner. The medical certificate (Exh.35) is produced by the prosecution. The genuineness of the said certificate has not been 13 cri.appeal.9-2017 disputed by the appellant and therefore, it came to be exhibited without its formal proof by examining Dr.Gote. It was noted in the said certificate that there were no marks of external injury on any part of the body. No abnormality noted. No external injury was noted on external genitals or on any part of the body. It is noted that as the appellant had not given semen sample, it was not possible to give opinion, whether he was capable or not for committing sexual intercourse.

19. The garments of the victim and that of the appellant were seized. The quilt and blanket were also seized from the spot. All these clothes were sent to the Chemical Analyst for report. The report of the

Chemical Analyst shows that on the top of the victim, there were two blood stains, each of 0.5 c.m. in diameter, on the back lower portion. Her Salwar was stained with blood on middle portion. Her nicker was stained with blood on middle portion and appeared to be washed. The group of blood found on the top of 14 cri.appeal.9-2017 the nicker could not be ascertained. However, the blood that was on the Salwar was of 'O' group, which is that of the victim. No semen was detected either on the clothes of the victim or that of the appellant. No blood was detected on the clothes of the appellant. No semen or blood was detected on the quilt or blanket.

20. It is not the version of the victim that the appellant caused nail marks on her right breast. Asha (PW 1) also does not state that the nail marks were noted on the right breast of the victim when she was brought from the spot of the incident. Therefore, the finding of the nail marks on her right breast, would not be helpful to the prosecution to incriminate the appellant.

21. The medical evidence shows that hymen of the victim was ruptured prior to more than seven days of her examination. Admittedly, she was examined on 01.12.2015. The victim deposed that on Friday and Saturday also, the appellant had committed sexual 15 cri.appeal.9-2017 intercourse with her, however, she has not specifically stated as to which Friday or Saturday. Even if it is assumed that it was the Friday and Saturday preceding the date of the incident i.e. Monday, November 30, 2015, the medical evidence showing rupture of her hymen prior to more than seven days of her examination, cannot be connected with the alleged sexual intercourse dated 27.11.2015, 28.11.2015 and 30.11.2015. No blood, no vaginal discharge, no vaginal injury or any injury on the body of the victim, excepting the above-referred nail marks on the right breast, were noticed when she was medically examined on 11.12.2015. Thus, the medical evidence rules out the possibility of actual sexual intercourse committed on the victim either on 27.11.2015, 28.11.2015 or 30.11.2015. The medical evidence does not support the case of the prosecution about actual penetration or sexual intercourse by the appellant with the victim on the above-mentioned dates.

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22. The ocular evidence of the victim corroborated by the evidence of Asha (PW 1) and Sonali (PW 5), however, makes it sufficiently clear that the appellant committed sexual assault as explained in Section 7 of the POCSO Act. Section 7 of the POCSO Act reads as under :-

> "7. Sexual assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

23. As per clause (6) of Section 375 of the I.P.C., a man is said to have committed rape if he has sexual intercourse with a woman with or without her consent, when she is under 16 years of age. Though the victim states that the appellant 17 cri.appeal.9-2017 penetrated his male organ into her vagina, her evidence is not supported by medical evidence. It seems that before the appellant could commit sexual intercourse with the victim, Sonali (PW 5) reached there followed by Asha (PW 1), which made the appellant to withdraw himself from proceeding further and ultimately, he could not

succeed in having penetrative sexual intercourse. However, the evidence on record is sufficiently clear to show that he had made the victim to put off her clothes, he had removed his own clothes, slept on the body of the victim and before he penetrated his male organ into the vagina of the victim, the above-named witnesses interrupted and made him difficult to complete the sexual intercourse. This fact sufficiently makes it clear that the appellant attempted to commit rape on the victim made punishable under Section 511 read with Section 376 of the I.P.C.

24. There is no dependable evidence to show that prior to 30.11.2015 also, the appellant actually 18 cri.appeal.9-2017 committed sexual intercourse with the victim particularly on Friday and Saturday preceding the date of the evidence. In fact, the evidence of the victim in respect of the alleged acts of sexual intercourse committed on Friday and Saturday is very vague and general. She has not given any particular time and the details of the alleged sexual intercourse. The medical evidence also does not support the fact of committing sexual intercourse with the victim within a period of seven days of 30.11.2015. In the circumstances, the prosecution cannot be said to have established guilt of the appellant for the offence punishable under Section 376(2)(n) of the I.P.C.

25. The appellant is charged for the offence under Section 3 punishable under Section 4 of the POCSO Act, on the allegation of committing penetrative sexual assault. Since there is no evidence to prove that there was penetrative sexual assault committed by the appellant, the appellant 19 cri.appeal.9-2017 cannot be said to have rightly convicted for the said offence. Considering the facts and circumstances of the case, I hold that the offence under Section 7 punishable under Section 8 of the POCSO Act of committing sexual assault on the victim has been established beyond reasonable doubt against the appellant.

26. As per Section 29 of the POCSO Act, when a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The appellant has not produced any evidence or has not been able to shatter the evidence of the prosecution disclosing that he committed sexual assault on the victim. The appellant is, therefore, liable to be convicted for the offence under Section 7 punishable under Section 8 of the POCSO Act. The maximum punishment for the offence 20 cri.appeal.9-2017 under Section 7 is imprisonment of either description for a term which shall not be less than three years but which may extend to five years and shall also be liable to fine.

27. As per sub-section (1), Section 376 of the I.P.C., whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

28. In the present case, though it is not established that the appellant committed rape on the victim, the prosecution has proved beyond all reasonable doubts that he attempted to commit rape on the the victim, which is punishable under Section 511 read with Section 376 (1) of the I.P.C. and accordingly, he is liable to be punished for imprisonment of any description provided for the said 21 cri.appeal.9-2017 offence, or the term which may extend to one-half of the imprisonment of life, or,

as the case may be one- half of the longest term of imprisonment provided for that offence or with such fine as is provided for the offence, or with both. Considering the age of the appellant, the fact that he is neither a previous convict nor a person having criminal antecedents and the nature of the offence established against him, I am of the view that it would be just, proper and expedient to sentence him for the offence of attempting to commit rape with rigorous imprisonment for five years and fine of Rs.500/-. The sentence prescribed for the offences of rape/attempt to commit rape being greater in degree, the appellant is liable to be punished for this offence only and not for the offence under Section 7 punishable under Section 8 of the POCSO Act vide Section 42 of the said Act.

29. The victim girl specifically states that at the time of the incident, the appellant threatened to kill her parents and uncle, in case she disclosed 22 cri.appeal.9-2017 them about the incident. She states that she was terribly frightened. When Ashabai (PW 1) asked her about the incident, she slowly disclosed about the incident to Ashabai (PW 1). Ashabai (PW 1) also states that the victim girl was frightened when she was taken to her house after the incident. This evidence has not been shattered in the cross- examination of these witnesses. It is clear from their evidence that because of the threat extended by the appellant, the victim got frightened. The appellant, thus, threatened the victim girl with intent to cause alarm to her to deter her from disclosing about the incident to anybody. The prosecution has, thus, proved that the appellant criminally intimidated the victim girl and committed the offence punishable under Section 506 of the I.P.C. The learned trial Judge has rightly convicted and sentenced the appellant for the said offence. This part of the impugned judgment and order does not call for any inference.

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30. The learned trial Judge did not consider the facts of the case as well as the evidence on record correctly and properly, and wrongly held the appellant guilty of the offence of committing rape, though the medical evidence did not support the version of the victim girl about penetrative sexual assault. The impugned judgment and order will have to be modified accordingly by setting aside conviction of the appellant for the offences under Section 3 punishable under Section 4 of the POCSO Act and under Section 376(2)(n) of the I.P.C.

31. Since the prosecution failed to establish guilt of the appellant for the offences under Section 3 punishable with Section 4 of the POCSO Act and under Section 376(2)(n) of the I.P.C., the question of enhancing the sentence does not survive. Criminal Revision Application No.4 of 2017 is liable to be dismissed.

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

(i) The appeal is partly allowed.

(ii) The impugned judgment and order convicting

and sentencing the appellant for the offences under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and under Section 376(2)(n) of the Indian Penal Code, are set aside and instead, he is convicted for the offences under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and under Section 511 read with sub-section (1), Section 376 of the Indian Penal Code.

(iii) The appellant is sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/-, in default, to suffer rigorous imprisonment for one month.

(iv) The conviction and sentence recorded against the appellant for the offence punishable 25 cri.appeal.9-2017 under Section 506 of the Indian Penal Code are maintained as they are.

(v) The substantive sentences of imprisonment shall run concurrently.

(vi) The appellant be given set off from 01.12.2015 till today vide Section 428 of the Code of Criminal Procedure.

(vii) Criminal Revision Application No.4 of 2017 is dismissed.

[SANGITRAO S. PATIL] JUDGE kbp