

2021 SCC OnLine Bom 325

In the High Court of Bombay<sup>1</sup>  
(BEFORE PUSPA V. GANEDIWALA, J.)

Suraj ... Appellant;  
*Versus*

State of Maharashtra, Through Police Station ... Respondent.  
Criminal Appeal No. 115 of 2020  
Decided on January 15, 2021

Advocates who appeared in this case:

Shri T.M. Malnas, Advocate for the appellant.

Shri M.J. Khan, APP for the respondent - State.

The Judgment of the Court was delivered by

PUSPA V. GANEDIWALA, J.:— Heard Shri T.M. Malnas, learned counsel for the appellant and Shri M.J. Khan, learned Assistant Public Prosecutor for the respondent - State.

2. This is an appeal against conviction of the appellant - Suraj S/o Chandu Kasarkar, for the offence punishable under Sections 376(1) and 451 of the Penal Code, 1860, passed by the Additional Sessions Judge-3, Yavatmal, in Special (POCSO) Case No. 35 of 2016, sentencing him to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 10,000/-, in default of payment of fine, to suffer simple imprisonment for one year and further sentenced him to suffer rigorous imprisonment for two years and to pay fine of Rs. 1,000/-, in default of payment of fine, to suffer simple imprisonment for one month, respectively.

3. The prosecution case in brief is as under:

On 26.07.2013, the prosecutrix lodged a report against the appellant for committing rape on her by criminal trespassing into her house. The age of the prosecutrix is 15 years. On the basis of the report, crime came to be registered against the appellant bearing Crime No. 499 of 2013 for the offence punishable under Sections 376(2)(i)(j) and 451 of the Penal Code, 1860 and under Section 4 of the Protection of Children from Sexual Offences Act, 2012, (hereinafter referred to as POCSO Act).

4. During the investigation, police recorded the statements of witnesses, referred the prosecutrix for medical examination and also prepared spot panchanama. After completing other formalities of investigation, police filed the charge-sheet before the Special POCSO Court, Yavatmal.

5. The Special Court framed charge against the appellant for the offence punishable under Sections 376(2)(i)(j) and 451 of the Penal Code, 1860 and under Section 4 of the POCSO Act. The charge was explained and read over to the appellant in vernacular and he denied the same and pleaded not guilty and his plea was recorded.

6. In order to substantiate the charge against the appellant, the prosecution examined seven witnesses. PW-1 is the prosecutrix, PW-2 is the mother of the victim, PW-3 is Panch, PW-4 is the Medical Officer, PW-5 is Scribe of the F.I.R., PW-6 is Investigation Officer and PW-7 is the Radiologist - Medical Officer.

7. The learned Special Court recorded the statement of the appellant under Section 313 of the Code the Criminal Procedure, His defence is of total denial and false implication. The appellant preferred not to examine any witness.

8. After hearing both the sides, the learned Special Court found that the

prosecution could prove the charge of rape and criminal trespass, however, the learned special Court found that the prosecution could not prove the age of the prosecutrix that at the relevant time she was below 18 years. This judgment of the Special Court is impugned in this Criminal Appeal.

9. I have heard Shri Malnas, learned counsel for the appellant and Shri Khan, learned Assistant Public Prosecutor, on behalf of the respondent - State. I have also perused the record of the trial Court with the assistance of both the counsel.

10. The learned counsel for the appellant read out the testimonies of the material witnesses i.e. PW-1, PW-2 and PW-4 and submitted that the alleged act of forceful sexual intercourse as deposed by the prosecutrix, if read carefully, is unbelievable to the natural human conduct. Shri Malnas, learned counsel for the appellant also read out the cross-objection of the witnesses and submitted that at the relevant time, the age of the prosecutrix was above 18 years and it was the consensual act and as her mother saw the accused running from her house and she enquired with the prosecutrix, she narrated the incident. At the instance of her mother, the report came to be lodged. The learned counsel further submits that as per the medical evidence, she was habitual to sexual intercourse. Lastly, the learned counsel submits that the prosecution has failed to prove beyond reasonable doubt, the alleged offence against the appellant.

11. Per contra, the learned Assistant Public Prosecutor strongly supported the judgment and order of the Trial Court and submitted that the First Information Report came to be lodged immediately after the incident. There is no reason for the prosecutrix to depose false against the appellant. The prosecutrix has clearly described the violent incident against her in her house. The appellant criminally trespassed and entered into her house and committed rape on her. The sole testimony of the prosecutrix is worthy of reliance.

12. Shri Khan, learned Assistant Public Prosecutor further submitted that all the witnesses withstood searching cross-objection and the prosecution could prove the offence against the appellant beyond reasonable doubt. The learned Assistant Public Prosecutor urged to dismiss the appeal.

13. This Court considered the submissions made on behalf of both sides.

14. At the outset, a perusal of the testimony of the prosecutrix, her mother and the medical evidence coupled with birth certificate (Exh. 39), as rightly held by the Trial Court, does not establish the fact that at the relevant time, the prosecutrix was below 18 years of age. The prosecutrix herself in her cross-objection admitted that at the relevant time her age was 18 years and she gave her age 15 years in First Information Report on the say of her mother. Apart from this, the birth certificate (Exh. 39) though is a public document, does not indicate that the same is the extract of the public record kept in the office of Gram Panchayat. Furthermore, who gave the information about the date of birth of prosecutrix and at what time her date of birth is taken on record is not reflected from Exh.39. The same is also not in the format as per law. In such circumstances, the prosecution could not prove the age of the prosecutrix beyond reasonable doubt.

15. With regard to the incident of rape, the relevant portion of the testimony of the prosecutrix is reproduced below:

*"It was the time of 9-30 p.m. At the relevant time, I was lying on a cot in my house. My younger brother was sleeping on ground. My mother had been to natural call out of the house. At that time, accused Suraj came in my house under the influence of liquor. He gagged my mouth and not allowed me to shout when I tried to shout. Thereafter, he removed his clothes and also removed by clothes from my person. He removed my all clothes from my person. He spread my both legs. He inserted his penis in my vagina. After discharge of water, he ran away by taking his*

*clothes. Thereafter, my mother came. I narrated the incident to my mother. We came to police station. I lodged the report."*

16. A perusal of this portion of the testimony of the prosecutrix, as rightly pointed out by the learned defence counsel, does not inspire the confidence of the Court as the incident, as narrated, does not appeal to the reason as it is against the natural human conduct. Undisputedly, the appellant is the neighbour of the prosecutrix. It seems highly impossible for a single man to gag the mouth of the prosecutrix and remove her clothes and his clothes and to perform the forcible sexual act, without any scuffle. The Medical evidence also does not support the case of the prosecutrix.

17. Had it been a case of forcible intercourse, there would have been scuffle between the parties. In medical report, no injuries of scuffle could be seen. The defence of consensual physical relations does appear probable. In cross-examination, the defence could bring on record the probable doubt with regard to consensual relations. In her cross-examination, she has admitted that "it is true that if my mother had not come, I would not have lodged report".

18. The appellant is sentenced to 10 years rigorous imprisonment. As per settled law, stricter the sentence, stricter the proof is required. No doubt, sole testimony of the prosecutrix in rape cases is sufficient to fix the criminal liability against the appellant, however, in the instant case, considering the sub-standard quality of testimony of the prosecutrix, it would be a grave injustice to send the appellant behind the bar for 10 years.

19. Shri Malnas, learned counsel for the appellant rightly placed reliance on the judgment of the Hon'ble Apex Court in the case of *Santosh Prasad @ Santosh Kumar v. State of Bihar*, reported at (2020) 3 SCC 443, wherein the Hon'ble Apex Court has held that if the conviction is to be recorded solely on the testimony of the prosecutrix "sterling quality of evidence" is required.

20. In the instant case, in the opinion of this Court, the prosecution has miserably failed to fix the criminal liability of rape against the appellant by criminal trespassing in the house of the prosecutrix.

21. For the reasons aforesaid, the appellant deserves to be acquitted and he is acquitted. The judgment and order of conviction dated 14.03.2019 passed by the Special Court in Special (POCSO) Case No. 35 of 2016 is quashed and set aside. The appellant is in jail, he shall be set free forthwith, if not required in any other case. The fine, if any, paid by him shall be refunded to the appellant.

22. Criminal Appeal is allowed and disposed of accordingly.

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† Nagpur Bench

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