Chetan Kailas Vaidya Vs State Of Maharashtra

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Oct. 4, 2024

Acts Referred: Code of Criminal Procedure, 1973 â€" Section 293, 313
Indian Penal Code, 1860 â€" Section 376, 376(2)(n)
Protection of Children From Sexual Offences Act, 2012 â€" Section 4, 6

Hon'ble Judges: G. A. Sanap, J

Bench: Single Bench

Advocate: Sapana Jadhav, Harshal Futane, Priyanka Arbat

Final Decision: Disposed Of

Judgement

G. A. Sanap, J

1 Heard.

2 ADMIT. Taken up for final disposal by the consent of learned Advocates for the parties.

3 In this appeal, challenge is to the judgment and order, dated 25.02.2022, passed by the learned Additional Sessions Judge, [Special Court (POCSO

Act)] Yavatmal (for short Ã¢â‚¬Ëœthe learned JudgeÃ¢â‚¬â„¢), whereby the learned Judge, convicted the appellant/ accused for the offence punishable under

Section 376(2)(n) of the Indian Penal Code (for short Ã¢â‚¬Ëœthe IPCÃ¢â‚¬â„¢) and Sections 4 and 6 of the Protection of Children From Sexual Offences Act,

2012 (for short Ã¢â‚¬Ëœthe POCSO ActÃ¢â‚¬â„¢) and sentenced him to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.10,000/-

(Rupees Ten Thousand Only) and in default to suffer simple imprisonment for six months for the offence punishable under Section 376(2)(n) of the

IPC. No separate sentence has been awarded for the offence punishable under Sections 4 and 6 of the POCSO Act.

4 Background facts:

The report against the appellant was lodged by the informant (PW-2) on 02.01.2019 with Gatanji Police Station, District Yavatmal. The case of the

prosecution, which can be gathered from the report is that the appellant is a maternal cousin of the victim. They are residents of the same village. The

appellant would come to the house of the victim. It is stated that in the month of June 2018, the appellant went to the house of the victim and

expressed his love for her. The appellant proposed to the victim to marry with him. The victim consented to marry with the appellant. The appellant

promised to marry with her and on the false promise of marriage, committed a sexual intercourse with her. The appellant would call the victim to his

house on the pretext of doing household work. The appellant on three occasions committed sexual intercourse with the victim on the promise of

marriage. Lastly, on 16.10.2018, at about 8 p.m., the appellant committed sexual intercourse with the victim and at that time the appellant told her to

meet him on 19.10.2018 at his agricultural land. Due to some work, the victim could not go to the land of the appellant. Therefore, the appellant

quarrelled with her. The appellant threatened to kill the victim and members of her family. The appellant since then discontinued his relations with the

victim. It is stated that on account of sexual intercourse committed by the appellant with the victim, she became pregnant. The victim requested the

appellant to marry with her after attaining the age of 18 years. The appellant refused to marry with her. The victim, on being confronted with such a

situation, alongwith her father, went to Ghatanji Police Station on 02.01.2019 and lodged the report against the appellant.

5 On the basis of this report, the crime bearing No. 6 of 2019 was registered against the appellant. PW- 8 Ganpat Pappulwar carried out the

investigation. He referred the victim for medical examination. The appellant was arrested. The blood samples of the victim and the appellant had been

collected. Similarly, the pregnancy test was conducted. The pregnancy test revealed that the victim was carrying 23 weeks pregnancy. The

investigating officer drew the spot panchanama. He seized the clothes of the victim and the clothes of the appellant. The victim delivered a female

child. The blood sample of the female child was collected. The samples had been sent to RFSL, Nagpur for analysis. On completion of the

investigation, the chargesheet was filed against the appellant.

6 The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of a false implication in this crime. The

prosecution, in order to bring home the guilt of the appellant, examined nine witnesses. The learned Judge, on analysis of the evidence adduced by the

prosecution, convicted and sentenced the appellant as above. The appellant has come before this Court in appeal against this judgment and order.

7 I have heard the learned Advocate Ms Sapana Jadhav, for the appellant, the learned APP Mr Harshal Futane for the State and the learned

Advocate Ms Priyanka Arbat (Awathale), appointed to represent respondent No.2. Perused the record and proceedings.

8 Perusal of the evidence of the victim would show that the appellant committed intercourse with her on the false promise to perform a marriage with

her. In other words, the victim was a consenting party to the said sexual intercourse. The learned Judge, on the basis of the available evidence, has

observed that the prosecution has proved that on the date of the incident, the victim was below 18 years of age and thus, the defence of consensual

act would not enure to the benefit of the appellant.

9 Learned Advocate for the appellant submitted that the evidence adduced by the prosecution to prove the age of the victim is not cogent, concrete

and reliable. The primary evidence, namely the entry from the Anganwadi register where the victim first admitted, has not been produced and proved.

No reason has been placed on record for non production of such vital evidence. The birth certificate of the victim is not produced on record. The

learned Advocate further pointed out that the entry from the original admission register brought by PW-9 was also not exhibited.

10 Learned APP submitted that perusal of cross-examination of the victim conducted on behalf of the appellant would show that the

accused/appellant has not challenged either the birth date of the victim or the evidence adduced by the prosecution to prove the birth date of the

victim. Learned APP submitted that this evidence adduced by the prosecution is sufficient to prove that on the date of the incident, the victim was

below 18 years of age. It is submitted that therefore the defence of consensual sexual act would not be of any assistance. to take the defence of the

appellant forward.

11 Learned Advocate appointed to represent victim has adopted the arguments advanced by the learned APP.

12 The victim, as per the case of the prosecution, was

17 years 6 months and 9 days old on the date of the commission of the crime. It is to be noted that the prosecution was duty bound to adduce the

evidence and prove the birth date of the victim. It is the case of the prosecution that the birth date of the victim is 23.07.2001. Admittedly, the birth

certificate of the victim was not produced on record. The document produced on record is the certified extract of the admission register from Zilla

Parishad School at Bhandari. In this context, it would be necessary to consider the evidence of the victim. The parents of the victim have not been

examined. The victim is PW-2. Her evidence would show that after this incident she got married and settled in her life. She has stated that her birth

date is 23.07.2001. Except for this solitary statement that her birth date is 23.07.2001, she has not stated anything about her birth date. She has

nowhere stated that she was admitted in the school and in the school her birth date was recorded as 23.07.2001. She is silent in her evidence about

her admission in the school. Her Adhar Card was produced on record and in the Adhar Card her birth date is mentioned as 23.06.2001. Admittedly,

the birth certificate of the victim has not been obtained either from the Gram Panchayat or from any other authority. It is also not the case of the

prosecution that the birth of the victim was not recorded in the Gram Panchayat record. The investigating officer has not stated that he had made any

inquiry with the Gram Panchayat of the village about the registration of the birth and birth date of the victim. The investigating officer, without

conducting any investigation to that effect, wrote a letter to the headmaster of Zilla Parishad Primary School, Bhandari, and obtained the extract of the

admission register where her birth date was recorded.

13 In the above context, it is necessary to consider the evidence of PW-9 Shivdas Ade, an assistant teacher from Zilla Parishad Primary School,

Bhandari. This witness was summoned with the original Dakhal Kharij Register of the school. He had brought the register for the period from 2002 to

04.08.2012. It is seen on perusal of the record that the admission entry of the victim from the said register was not separately registered. The register

was also not taken on record. Neither the learned Judge nor the learned prosecutor insisted for production of the register. The entry which was

exhibited is the certified extract of the register obtained by the investigating officer at that time. The question is whether this certified extract would be

sufficient to prove the birth date of the victim. In the ordinary circumstances, this Court would not have hesitated to place reliance on this document to

prove the birth date of the victim however, the circumstances of this case are totally different. The evidence of PW-9 itself would be sufficient to

reject this part of the evidence. As stated above, the parents of the victim have not been examined. The birth certificate of the victim from Gram

Panchayat has not been produced. It is not the case of the prosecution that this birth date in the school register was recorded for the first time either

by the parents of the victim or on the basis of birth certificate.

14 PW-9 has stated that the entry in the school register was taken on the basis of the Anganwadi register, where the victim was earlier admitted. He

has stated that on the basis of the Anganwadi entry, the entry in the Dakhal Kharij Register was made. It is further evident on perusal of the record

that PW-9 had produced on record the self attested copy of the Anganwadi register. He has further stated that the name of the victim in the said

register was recorded as Sangita alias Sushma. He has stated that her birth date was also recorded in the said register. It is to be noted that this self

attested copy of the Anganwadi register was not given exhibit number. The prosecution did not take further steps to examine the witness from the

Anganwadi and to prove the original entry from the Anganwadi register. In this case there is no evidence to show that the date of birth recorded in the

Anaganwadi register was as per the information provided by the parents of the victim. The prosecution was required to adduce evidence of the

parents of the victim or any other evidence which would form basis for recording the birth date in Anaganwadi register. The learned Advocate relying

upon the decision of the Division Bench of this Court, of which I was one of the member, in the case of Amol @ Ratan .v/s. State of Maharashtra

2022 GoJuris (Bom) 1270 submitted that the evidence adduced by the prosecution is not sufficient to prove the birth date of the victim. Relying upon

this judgment, the learned Advocate submitted that the main entry from the Anganwadi register ought to have been proved to lead a foundation to this

entry in the school register. In this case, it is observed that the failure to produce such an important document leaves a permanent lacunae in the case

of the prosecution and as such, the evidence produced cannot be accepted.

15 In this case, the prosecution was required to prove the original entry from the Anganwadi register. The victim, as per the evidence of PW-9, was

admitted in Anganwadi and on the basis of the Anganwadi register, the date of birth of the victim was recorded in the school register. The evidence of

PW-9 is silent as to the person who had provided this information of the birth date of the victim while admitting her in the Anganwadi. There is also no

clarification whether the Anganwadi is part of said school or it is a separate institution. If the Anganwadi is part of the same school, then this witness

would have produced the original Anganwadi register as well. It is to be noted that the evidence of PW-9 has caused dent to the case of the

prosecution. It is to be noted that if the victim had been admitted in the Zilla Parishad Primary School, Bhandari, for the first time by her parents, then

this entry would have assumed importance. This entry then would have become primary evidence. The production of the original register and proof of

the relevant entry from the original Dakhal Kharij Register would have been sufficient to prove her birth date. In this case, the important evidence has

not been produced. The parents have not been examined to depose about the birth date of the victim as well as the admission of the victim either in

the Anganwadi or in the Zilla Parishad Primary School. The victim otherwise had no reason to know the registration of her birth date with any

authority or in any school. The victim would not have provided the information to the school while getting admission in the school. In view of this, I am

satisfied that the learned Judge on this point has not properly appreciated the evidence. The prosecution has miserably failed to prove by leading

cogent and concrete evidence that the victim on the date of the crime was 17 years 6 months and 9 days old. The birth date of the victim on the

Adhar Card is different. In my view, therefore, it leaves scope to doubt the credibility of the evidence. The investigating officer did not take care to

collect the proper evidence. In view of this, the prosecution has failed to prove that on the date of the incident, the victim was below 18 years of age.

16 In the backdrop of this finding, it is necessary to appreciate the evidence of the victim. The victim in her evidence has stated that the appellant is

her relative. i.e. maternal cousin brother. He had promised to marry her before establishing sexual relations with her. He had expressed her love for

the victim. She has stated that on the promise of a marriage, the appellant committed sexual intercourse with her on three occasions. She has stated

that it was agreed between them that they would perform the marriage after she attained the age of 18 years. She has stated that she did not go to

meet the appellant as requested by him and therefore, the appellant was annoyed and quarrelled with her and from that day onwards, he discontinued

his relations with her. She has stated that she became pregnant and when the appellant refused to marry with her, she alongwith her father went to

the police station and lodged the report.

17 It is undisputed that the victim gave birth to a female child. The victim has stated that the appellant committed forcible sexual intercourse with her.

In her examination-in-chief, she stated that when the appellant proposed her for marriage, she gave consent. It is her case that the consent was

obtained under the false promise of marriage. It has come on record that the accused/appellant committed intercourse with her on multiple occasions.

She has stated that on 16.10.2018, the appellant had committed intercourse with her and thereafter, the dispute arose between them. The report was

lodged on 02.01.2019. It is evident that there is inordinate delay in lodging the report. The prosecution in this case has failed to prove that the victim

was below 18 years of age. In my view, therefore, the contention of the victim that the appellant committed sexual intercourse with her on the false

promise of marriage needs careful perusal and appreciation. It is evident that the victim was a consenting party. The conduct of the victim in not

disclosing this act committed by the appellant to her parents as well as to the parents of the appellant, who admittedly are her close relatives, is vital

circumstance in favour of the appellant. The age of the victim girl was the most important fact while invoking the provisions of the POCSO Act. In

this case, since the prosecution has failed to prove that the victim was below 18 years of age, the provision of the POCSO Act would not apply.

18 Perusal of her cross examination in entirety would show that the appellant alone was not responsible for this state of affairs. She had consented for

the same. She has categorically admitted that she did not make a complaint to the police with regard to the forcible intercourse committed with her by

the appellant in June 2018, prior to 02.01.2019. In my view, even if it is assumed for the sake of argument that the appellant is the biological father of

the child, in the backdrop of the proved consensual act, it is not possible to hold him guilty of an offence of rape.

19 As far as other evidence is concerned, in my view, in the backdrop of the above-stated findings, it would not be necessary to refer to the same in

detail. The medical officer PW-5 Dr. Amrita Tupkar who had examined the victim has stated that the victim narrated the history of the assault. On

examination, she found that the victim was carrying a pregnancy of 23 weeks. The sample of the victim, the sample of the appellant and the blood

sample of the child of the victim had been collected and sent for analysis to RFSL, Amravati.

20 The prosecution has relied upon the CA reports and DNA reports to seek corroboration to the case of the prosecution. In my view, there is a

serious flaw in the case of the prosecution on this count as well. Even if the findings on the point of age of victim and penetrative sexual assault by the

appellant on the victim has been in favour of the prosecution, the CA reports and DNA reports could not have been considered as a corroborative

piece of evidence by the prosecution. The prosecution has not examined the CA as well as the DNA analyst. I have carefully perused the record and

proceedings. It is evident that no order was passed by the learned Judge under Section 293 of the Code of Criminal Procedure (for short Ã¢â‚¬Ëœ the

Cr.P.C.) while admitting the CA reports and DNA reports in evidence. There are numerous doubtful circumstances on record, which in my view

would reflect upon the authenticity of the DNA reports. The samples had been collected on 3rd & 5th January 2019. The carrier has not been

examined. The panchanama of seizure of the samples is a part of the record at Exh. 48 and Exh. 49.

21 PW-3 Vijay Chavhan, who is a panch witness, has stated that the samples had been seized under panchanamas Exh. 48 and 49 on 07.05.2019.

Perusal of Exh. 48 and 49 and more particularly column No. 4 would show that the samples had been seized on 07.05.2019. If it was a typographical

error, then the prosecutor could have corrected it while recording the evidence. The witness has stated that he was called to the police station on

07.05.2019 and in his presence the biological samples had been seized. Even if it is assumed that the samples had been seized on 07.01.2019, further

connecting evidence is missing. Exh. 90 is the requisition letter to Deputy Director, RFSL, Amravati, by the investigating officer. Perusal of this

requisition letter would show that the samples had been sent to the RFSL, Amravati on 07.02.2019. The carrier has not been examined. The samples

had been collected on 05th and 6th January 2019. The investigating officer is silent about the custody of the sample from the seizure till 7.02.2019,

when the same were carried to RFSL, Amravati. The CA reports, which are part of the record at Exh. 19 to 21, show that the samples had been

received in RFSL Amaravati on 11.02.2019. This evidence would show that samples had been collected by the carrier on 07.02.2019. The samples

were in custody of the carrier till 11.02.2019, when the same were handed over to RFSL, Amravati.

22 It is further pertinent to note that the prosecution has not examined the medical officer, who had collected the blood sample of the female child born

to the victim. It is to be noted that the sample was collected for DNA analysis. The identification form filled in by the medical officer while collecting

the sample is at Exh. 44. It has been exhibited on the basis of the evidence of the victim. The prosecution was required to examine the medical officer,

who had collected the blood samples of the female child. There is one more major flaw in the case of the prosecution and in the backdrop of this

major flaw the CA reports, DNA reports and other connected materials cannot be made the basis of conviction of the appellant. It is seen on perusal

of the statement of the appellant/accused recorded under section 313 of the Cr.P.C. that all these CA reports and DNA reports had not been put to

the appellant. It is to be noted that the opinion of the DNA analyst that the appellant and the victim girl are the biological parents of the child was

required to be specifically put to the appellant. It was not done. In order to appreciate this aspect it would be necessary to see question No. 93 framed

by the learned Judge in the statement recorded under Section 313 of the Cr.P.C. Question No. 93 and the answer are produced below:

Ã¢â‚¬Å“Q. No. 93 : It has further come in his evidence that the CA reports and DNA report are produced on record at Exh. 19 to 21 and 30

and 31 respectively. What you have to say about it ?

Ans : I do not know.Ã¢â‚¬â€‹

It is evident that this vital incriminating material has not been put to the appellant. The appellant did not have an opportunity to explain this vital

evidence. In my view, this is a material drawback in the case of the prosecution. Even otherwise, this evidence in the form of a DNA report could not

be used against the appellant. The opportunity was not given to the appellant to explain such a vital incriminating evidence. The HonÃ¢â‚¬â„¢ble Supreme

Court in the case of Sharad Birdhichand Sarda vs State of Maharashtra AIR 1984 SC 1622 has held that the circumstances which were not put

to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration.

23 In the facts and circumstances, I conclude that the prosecution has miserably failed to prove the charge against the appellant under the POCSO

Act. As far as the charge under Section 376 of the IPC is concerned, the evidence on record is sufficient to prove that it was a consensual act. In

view of this, the learned judge was not right in holding the appellant guilty. The appeal, therefore, deserves to be allowed.

24 The criminal appeal is allowed.

25 The judgment and order of conviction and sentence of the appellant/accused dated 25.02.2022 passed by the learned Additional Session Judge,

[Special Judge (POCSO Act], Yavatmal in Special (Child) Case No. 22 of 2019 is quashed and set aside.

26 The appellant/accused- Chetan Kailas Vaidya is acquitted of the offences punishable under Section 376(2)(n) of the Indian Penal Code and

Sections 4 and 6 of the Protection of Children From Sexual Offences Act, 2012.

27 The appellant, who is in jail, shall be released forthwith, if not required in any other case.

28 Ms Priyanka Arbat (Awathale), learned Advocate appointed to represent respondent No.2 in this appeal, is entitled to receive the fee. The High

Court Legal Services Sub Committee, Nagpur is directed to pay the fee of the learned appointed Advocate, as per the rules.

29 The criminal appeal stands disposed of accordingly. Pending applications, if any, also stand disposed of.