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(2016) 10 GUJ CK 0008

GUJARAT HIGH COURT

Case No: Criminal Misc. Application (For Leave to Appeal) No. 23392 of 2016 in Criminal Appeal No. 1295 of 2016

State of Gujarat APPELLANT

Vs

Sanjaybhai Shamjibhai Sagathiya RESPONDENT

Date of Decision: Oct. 13, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 378
- Penal Code, 1860 (IPC) - Section 363, Section 366, Section 376
- Protection of Children from Sexual Offences Act, 2012 - Section 4, Section 6, Section 8

Citation: (2016) 168 AIC 383

Hon'ble Judges: Mr. Anant S. Dave and Mr. B.N. Karia, JJ.

Bench: Division Bench

Advocate: Ms. Moxa Thakkar, APP, for the Appellant

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Mr. Anant S. Dave, J. (Oral) - This is an application under Section 378 (1) (3) of the Code of Criminal Procedure, 1973 seeking leave to appeal against judgment and order dated 4.7.2016 passed by the Court of learned Special Judge (POCSO), Amreli, in Special (POCSO) Case No.9 of 2016 and 1 of 2016, wherein at the end of trial, learned Judge was pleased to acquit the opponents for the offences under Sections 363, 366, 376 of the Indian Penal Code and Sections 4, 6 and 8 of Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act").

2. Learned Additional Public Prosecution has taken us to the case of prosecution in the backdrop of a complaint dated 15.10.2013 at Savarkundla Rural Police Station, it was disclosed by the complainant that on previous day, he along with his wife, younger daughter and son went to the field around 11 O'' clock in the morning and

his elder daughter Bhavati and Bhavita both were at his house and during noon hours complainant received telephone of his daughter, Bhavita, who informed him that another daughter Bhavati has left the house around 14.00 hours and, thereafter, she has not returned. Inquiry was made and complainant came to know that respondent No. 2 Arvind alias Jayanti son of Dahyabhai Parmar residing in Dalit Vas took his daughter away and later on FIR was registered for the offences for which reference is made in earlier paragraph. At the end of investigation, charge-sheet was filed and looking to the nature of charge it was tried by Special (POCSO) Court, which resulted into acquittal of the respondents.

3. What weighed with the trial Court in ordering acquittal of the respondents is failure on the part of the prosecution to prove its case beyond reasonable doubt and testimonies of prosecutrix, her statement before learned Magistrate under Section 164 of the Code of Criminal Procedure, medical evidence about examination of body of person, cogent and convincing evidence with regard to date of birth of prosecutrix was again not established and the trial Court ordered acquittal of respondents.

4. Ms. Moxa Thakkar, learned Additional Public Prosecutor has strenuously argued that when the victim disappeared from her residence, in fact, she was allured by respondent and was compelled to live with respondent no.2 for about two years and at the time when she left her home, she was studying in available in the record of Village Panchayat, it was clearly established that she was minor and below 18 years and any relationship whether she entered into with respondent no.2 either willingly or without knowing consequence would be immaterial and offences are attracted. Date of birth of the prosecutrix was recorded and appear in the Certificate of Birth reveal that she was born on 27.3.1998 and the incident had taken place on 13.10.2013 and she was 15 years old when the incident had taken place for which offences were registered. Thus, according to learned APP, other facts about travelling and staying with respondent no.2 are of not much importance when the prosecutrix is proved to be below 18 years attracting offences under Sections 363, 366, 376 of Indian Penal Code and Sections 4, 6 and 8 of POCSO Act, 2012.

4.1 Learned APP would further contend that testimonies of complainant and Dr. Kishori Dhirajbhai Chotaliya, PW-2 at Exh.34, who examined the prosecutrix for medical check up and another Dr. Dharmishtaben, PW-3 at Exh.38, and Medial Officer of Savarkundla K.K.Hospital, Dr. Bharatbhai Chudasama, PW-4 at Exh.47, and father of the victim and the complainant, PW-13, Rasikbhai Rajyaguru all would support case of the prosecution and learned trial Judge ought to have believed the case of the prosecution by convicting the respondents for the offences for which they were charged and sentencing them to maximum as provided under law. Therefore, leave be granted, as prayed for.

5. We have carefully perused the judgment and order of acquittal for which leave is sought for and also xerox copies of evidence made available by learned APP. We

find that as per version of prosecutrix she left her parental home without any threat, coercion, allurement or undue influence and decided to leave with respondent No. 2. When she left her home she travelled with respondent no.2 at various places viz. Surat, Mumbai and Rajkot and for about two years she stayed with respondent No. 2 and also performed customary marriage by exchanging and garlanding each other in a temple. As per the statement made by the victim under Section 164 of the Code of Criminal Procedure before the Magistrate nothing appears on record about any involuntary or forcible relationship of prosecutrix with respondent No.2. On the contrary, affidavit executed before Notary stated that prosecutrix and respondent no.2 had entered into matrimonial relationship on 28.3.2014 as she was having affair with respondent no.2. At no point of time, any threat to her life was disclosed. On the contrary, prosecutrix in no clear terms stated that for about five to six months she stayed with respondent no.2 at Mumbai and thereafter for about one and a half years at Rajkot and worked at number of construction sites. When apprehended by the police, prosecutrix preferred to stay at Nari Saranskhan Gruh instead of opting for parental home. Thus, all such statements of prosecutrix herself do not implicate the accused of any forcible attempt either to take out her of parental home or entering into physical relationship forcefully.

6. While appreciating medical evidence, it is clear that prosecutrix was not over-powered or any injury on body of person was noticed. The relationship was consensual and so was deposed even by doctors, who examined her. The fact about date of birth of prosecutrix is again under cloud and suspicion since the prosecution has failed to prove the date of birth beyond reasonable doubt. Even we have carefully perused an extract of register of date of birth which reveal interpolation in the first column about name of mother and person who informed about birth of prosecutrix was also not examined. No school leaving certificate was produced about education last taken by the prosecutrix.

7. Thus, collectively the evidence so surface on record is full of lacunae and was not rightly believed by learned trial Judge, who ordered acquittal warranting no interference in exercise of powers conferred under Section 378 read with Section 386 of the Code of Criminal Procedure. In absence of merit, this application for leave to appeal is dismissed.