2023 STPL(Web) 70 SC
SUPREME COURT OF INDIA

(S. RAVINDRA BHAT AND ARAVIND KUMAR JJ.)

P. YUVAPRAKASH

Appellant

VERSUS

STATE REP. BY INSPECTOR OF POLICE

Respondent

Criminal Appeal No(S). 1898 of 2023-Decided on 18-7-2023

POCSO - Aaggravated penetrative sexual assault – Case not made out

JUDGMENT

S. Ravindra Bhat, J.-The sole appellant is aggrieved by the conviction affirmed and the sentence imposed by the Madras High Court, rejecting his plea[*By common final order dated 14.12.2016 in Cr. A. No. 400/2016.*]. He is acquitted of committing offense under Section 366 of the Indian Penal Code (hereafter "IPC"), but convicted under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter "POCSO Act").

2. The case of the prosecution was that one T. Abdul Hameed complained to the police that his younger daughter (hereafter "M" or "the victim"), aged 17 years (running 18 years), had stomach-ache when he went out on work on 13.01.2015. His elder daughter Vaheedha and his younger sister Ameena had taken M to the hospital. While they were returning home, near Rita School, Shastri Nagar, at about 02.30 hours, one Yuvaprakash and two others reached the spot, kidnapped M, and escaped from there by two-wheeler. This incident was reported to Abdul Hameed by his elder daughter over the phone. He and others searched for M in the nearby areas, but it in vain. Abdul Hameed lodged a complaint*[registered in Crime No. 22 of 2015.]* under Section 366A of the IPC. It was further alleged that on 14.01.2015, the appellant and A-3, A-4, A-6 to A-9 took M to a temple at Kodumudi town, where the appellant tied a thali around M's neck to solemnize their marriage. After the marriage, again the appellant and A-3, A-4, A6 to A9 took M to the second accused's house, where they made her to stay with the appellant. It was alleged that while they were there, the appellant had repeated sexual intercourse with M.

3. It was also alleged that on 15.01.2015, the accused took M in an Omni van to Madurai, where the appellant stayed with her in his uncle's house between 15:01.2015 and 25.01.2015, at Seelanayakanpatti and that during this time too, the appellant repeatedly had sexual intercourse with the victim. Meanwhile, the police investigated the complaint, which was registered as a missing person report. On 25.01.2015, the appellant and the other accused became aware that a complaint had been lodged; as a result, they abandoned M and left Madurai. She then returned to her father's house at Erode, when he took her to the police station and reported what had occurred to the investigating officer (IO), viz. PW-16. PW-16 recorded the victim's statement under Section 161 of the Criminal Procedure Code (hereafter "Cr. PC"). M's statement was also recorded under Section 164 of the Cr. PC. In this, she stated that she had known the accused, and both loved each other, for about a year; this was known to her father and grandmother, who objected to their relationship. This led to her consuming rat poison to commit suicide; however, she was hospitalized and treated. She further stated that she eloped with the appellant voluntarily-a fact known to her aunt and PW-4, her sister. She also stated that the appellant and his relatives solemnized her marriage with him, and they lived as a married couple. According to her, when they were living together, the police came in search of her,

after which she came to know that her father had filed a police complaint. She further clarified that she was never abducted nor married forcibly and that she married the appellant as per her wishes.

4. After M was traced, the police altered the complaint; the first information report now included Section 6 and 17 of the POCSO Act as well as other offences, such as Section 506 of the IPC, Section 10 of the Child Marriage Prohibition Act, 2006. The appellant and other accused (i.e., his parents and relatives, A-2 to A-9) were alleged to have committed the offences they were accused of in the charge sheet. The appellant and other accused were charged with commission of the offences; they abjured guilt and faced trial. The key witnesses relied upon by the prosecution were PW-3 (the victim, i.e., M); PW-4, her sister; PW-5, who turned hostile; PWs 6, 7 and 8, who deposed in relation to a motorcycle said to have been borrowed by the appellant's father. The doctor who examined M was PW-9, as well as PW-11. PW-15, the sub-inspector who registered the case and PW-16, IO, who concluded the investigation. The trial court held the appellant and others guilty; the appellant was sentenced inter alia under Section 6 of the POCSO Act to undergo rigorous imprisonment for life.

5. The High Court, by the impugned judgment modified the conviction. The accused A3, A4, A6 to A9 were convicted under Section 10 of the Prohibition of Child Marriage Act, 2006; the second accused (A2) was acquitted of all charges and the appellant's conviction under the POCSO Act was confirmed but his sentence of life imprisonment with rigorous imprisonment was reduced to 10 years of rigorous imprisonment; he was also convicted under Section 10 of the Prohibition of Child Marriage Act, 2006. The appellant was acquitted from the charge under Section 366 of the IPC and the sentence was set aside.

6. Ms. E.R. Sumathy, learned counsel submitted that the findings of the courts below are unsustainable. Firstly, she relied on the circumstance that the victim M in her statement under Section 164 Cr. PC, clearly indicated that she left with the appellant of her own accord and that her sister and aunt knew these facts. It was pointed out that the same statement further acknowledged that M and the appellant had known and loved each other for a year. In these circumstances, when she eloped with the appellant, the fact that she did not support her previous statement to the Magistrate and resiled from it, should have been an important aspect that cast serious doubts about the prosecution story.

7. The learned counsel highlighted that the trial court's approach in this regard was entirely erroneous because the findings recorded are that the prosecution was unable to show that M was not under some coercion from the appellant. Learned counsel pointed out that this reasoning is without logic. Learned counsel submitted that when the Magistrate recorded the statement, M was clearly not under the influence of the appellant; in fact, Magistrate recorded his opinion in this regard as well.

8. Learned counsel next argued that the courts below fell into error in not appreciating that the prosecution failed to discharge the burden of proof, with respect to the victim's age. Reference was made to Section 34 of the POCSO Act and Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter "JJ Act"), to say that age determination has to be on the basis of settled statutory criteria. In the first instance, the school leaving certificate, or the matriculation certificate had to be seen; if that were not available, the birth certificate or records to that effect issued by the local or municipal authority are to be considered, and if neither of the first two classes of documents are available, then, age determination depends on the ossification test. Learned counsel highlighted that in the present case, the ossification test indicated that M's age was between 18 and 20, proving that she was not a minor. This aspect was deposed to by PW-9, who also produced the test report.

9. The prosecution, however, did not provide any evidence to establish that the victim's age was under 18. It was argued that, given the totality of these circumstances and that the victim had changed her version and deposed contrary to what she stated in her statement under Section 164 of Cr. PC, the appellant could not have been convicted for the offences he was charged with. It is lastly argued that the High Court acquitted the appellant of the charge under Section 366 IPC which gives a complete lie to the prosecution story about the kidnapping or forceful abduction of the victim.

10. Mr. V. Krishnamurthy, Learned Additional Advocate General appearing for the State, supported the concurrent conviction and sentence recorded by the Courts below; he submitted that even though the victim and the appellant knew each other, and even if it was accepted that they had feelings for each other, the fact remains that the victim was below the statutory age, and consent is irrelevant. He submitted that the findings of the courts below with respect to the age of the victim were supported or corroborated only by the testimony of DW-2, the Head Mistress of the school where M had studied. She had deposed that according to the school records, M's date of birth is 11.07.1997.

Analysis and conclusions

11. Before discussing the merits of the contentions and evidence in this case, it is necessary to extract Section 34 of the POCSO Act which reads as follows:

> "34. Procedure in case of commission of offence by child and determination of age by Special Court. –
>
> (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).
>
> (2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.
>
> (3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person."

12. In view of Section 34 (1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:

> "94. Presumption and determination of age. – (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –
>
> > (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
> >
> > (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
> >
> > (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board: Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".

14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in Rishipal Singh Solanki vs. State of Uttar Pradesh & Ors., *[2021 (12) SCR 502]* this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:

"20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year."

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2) of the JJ Act, this court held in Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors[*(2019) 9 SCR 735*] that:

> "Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In Abuzar Hossain @ Gulam Hossain v State of West Bengal[*(2012) 9 SCR 224*], this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.

18. Reverting to the facts of this case, the headmaster of M's School, CW 1, was summoned by the court and produced a Transfer Certificate (Ex.C-1). This witness produced a Transfer Certificate Register containing M's name. He deposed that she had studied in the school for one year, i.e., 2009-10 and that the date of birth was based on the basis of the record sheet given by the school where she studied in the 7th standard. DW-2 TMT Poongothoi, Headmaster of Chinnasoalipalayam Panchayat School, answered the summons served by the court and deposed that 'M' had joined her school with effect from 03.04.2002 and that her date of birth was recorded as 11.07.1997. She admitted that though the date of birth was based on the birth certificate, it would normally be recorded on the basis of horoscope. She conceded to no knowledge about the basis on which the document pertaining to the date of birth was recorded. It is stated earlier on the same issue, i.e., the date of birth, Thiru Prakasam, DW-3 stated that the birth register pertaining to the year 1997 was not available in the record room of his office.

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating "that the age of the said girl would be more than 18 years and less than 20 years". In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94 (2) (i) mandates; nor are they in accord with Section 94 (2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.

20. In this case, the appellant was charged, inter alia, for the offence under Section 6 of the POCSO Act. The offence under Section 6 depends on the proof that a “sexual assault” took place. That term is defined by Section 7, which reads as follows:

> “Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the 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.”

The offence under Section 6, at the relevant time, was defined as follows:

> "Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

Section 3 defines penetrative sexual assault, as follows:

> “3. Penetrative Sexual Assault. -A person is said to commit "penetrative sexual assault" if
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
>
> (b).....
>
> (c).....
>
> (d).....”

Section 2(a) of the POCSO Act provides that 'aggravated penetrative sexual assault' has the same meaning as assigned to it in Section 5.

Therefore, Section 5, which defines 'aggravated penetrative sexual assault' is relevant. Section 5 (l) reads as follows:

> “5. Aggravated Penetrative Sexual Assault.
>
> (a)----------
>
> (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or”

Section 4, at the relevant time, read as follows:

> “(1) Whoever commits penetrative sexual assault shall be punished with 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.”

The expression “assault” is defined in Section 351 IPC as

> “Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.”

The expression “criminal force” is defined by Section 350 IPC as follows:

> "Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other."

21. In her statement under Section 164 of the Cr. PC, the victim M had deposed that she was in love with the appellant, had consumed poison, and had even been hospitalized because she was adamant to live with the appellant. No doubt, she resiled from her statement. Yet, the medical evidence (deposition of PW-11, Dr. Kavitha) indicated that the victim had a ruptured hymen; there was no external injury at her private parts, and that according to her "48 hours before medical examination there was no evidence to show that she had sexual assault is the opinion given by me."

This witness also produced her Notes of examination (Ex. P-11). In view of these facts, this court is of the opinion that the prosecution was not able to establish that there was any penetrative sexual assault as a result of coercion or compulsion on the part of the appellant. Even the High Court recognized this, albeit while reducing the sentence (since, in its opinion, M was a minor at the time), observing that "P.W.3 had gone to the extent of taking poison to commit suicide out of love failure, under enormous pressure, he had accompanied P.W.3, married her and had sexual intercourse with her, both before the marriage as well was after the marriage." From these facts, and the definitions under POCSO Act, especially the definitions of "sexual assault", Sections 5 and 6, read with Sections 350 and 351 IPC, it can be seen that it is only when there is penetrative sexual assault, which implies sexual contact with or without consent of the minor victim, that the offences under the POCSO Act are committed.

22. All the facts proved in this case clearly indicate M's willingness to accompany the appellant and even celebrate their marriage. However, she did not support the statement under Section 164 Cr. PC. To entirely discard that statement, the trial court observed that:

> "In this case, on the orders of the Inspector of P.W.-16 had produced the girl Madheena before the Judicial Magistrate Court, Erode and she has given a statement voluntarily u/s.164 Cr.PC. To prove that the aforesaid statement was not given on any compulsion, no evidences have been put forth before this court."

The above surmise by the trial court is untenable. The prosecution did not concededly produce the Judicial Magistrate who recorded the statement; however, that officer was available and was stationed at Erode. She deposed during the trial, as DW-1, and importantly affirmed the veracity of the victim's statement (Ex. P-4) by stating as follows:

> "It is a true statement given by the said girl wilfully. The said statement was not given on compulsion. It is correct if it is stated that, (M), in her statement, had told me that, I and my neighbour who was in the nearby house, by name Yuvaprakash are in love for the past 1 1/2 years, we used to talk to each other frequently over phone, my grand-mother on seeing me speaking over the phone had told my father about it, I took pesticide for ants and attempted to commit suicide…."

The prosecution did not even cross examine this witness. Having regard to these overall factors, the court is of the opinion that M's statement under Section 164 of the Cr. PC contained a truthful narration of the events. This, in other words, meant that there was no penetrative sexual assault on her. Therefore, the provisions of the POCSO Act will not be applicable in this case. The impugned judgment set aside the charge under Section 366 IPC against the appellant. The charges against him, under Section 6 of the POCSO Act as well as Section 10 of the Prohibition of Child Marriage Act, cannot be sustained; the findings of the courts below, i.e., conviction and sentences imposed are, therefore, set aside.

23. In view of the foregoing analysis and conclusions, this court is of the opinion that the appellant is not guilty of the offences he was charged with; he is hereby acquitted. The impugned judgment and order is hereby set aside; the appellant shall be set at liberty forthwith unless required in connection with any other case. The appeal is allowed, but without order on costs.
