

POCSO SPL.377/19

: 1 :

Judgment

MHCC050053382019



Received on 03/10/2019

Registered on 03/10/2019

Decided on 21/08/2021

Duration 1 Y. : 10 M. : 18 D.

Exh.25

**IN THE COURT OF SPECIAL JUDGE UNDER THE PROTECTION OF
CHILDREN FROM SEXUAL OFFENCES ACT, 2012 AT BORIVALI
DIVISION, DINDOSHI, MUMBAI
POCSO SPECIAL CASE NO.377 OF 2019
CNR NO. : MHCC05-005338-2019
(C.R.No.190/2019)**

THE STATE OF MAHARASHTRA,

At the instance of M.H.B. Colony

Police Station, Mumbai.

vide C.R. No.190/2019

...Complainant
(Prosecution)

Versus

Jacob Muthuswami Naidu

Age : 22 Years, Occ.: Service.

R/o. : Room No.131, Near Indira Nagar,

J. S. Road, Near Happy Home Society,

Dahisar (W), Mumbai-400 068.

...Accused

Mrs. Geeta Malankar, Spl.A.P.P. for the State.

Advocate Mrs. Mamta Tripathi for the Accused.

**CORAM : H.H.THE SPECIAL JUDGE
SMT. H.C.SHENDE (C.R.NO.11)**

DATE : 21st August, 2021

: JUDGMENT :

(Delivered and pronounced in open Court on 21/08/2021)

The accused **Jacob Muthuswami Naidu** is facing trial for the charge U/Sec.376 (2)(n) of Indian Penal Code, 1860 (Hereinafter referred to as “IPC” for the sake of brevity) and U/sec.5 (I) read with section 6 of the Protection of Children from Sexual Offences Act, 2012 (Hereinafter referred to as “POCSO Act” for the sake of brevity)

2. Facts :

(The names of the victim girl and her family members are not mentioned in the Judgment to maintain the confidentiality about their identity as per the rule 33(7) of POCSO Act).

The informant/prosecutrix of this matter is a girl aged 17 years and 8 months. She is a State level throw ball player. For the purpose of practice, she was going at Bandra (W) so also Andheri (E), Mumbai where she came in contact with the present accused. On or about January 2019 the accused called her at Borivali (W) Railway Station to meet him. From there he took her at Room No.131, Indira Nagar, Borivali, Mumbai. He proposed her and then had forceful sexual relations with her. It happened for 3 times. In March 2019 after 12th Standard examination, the prosecutrix was suffering from Jaundice. During it, her menses were stopped. She under the impression that because of her illness, the menses

were stopped, did not pay any heed to it but in June 2019 she was having stomach pain so she complained about it to her mother. Then her mother took her for medical examination to R. S. Amazon Centre, Santacruz (W), Mumbai where they came to know that the prosecutrix was pregnant of 24 weeks. Her mother, therefore, took her to Santacruz Police Station and informed that the accused under the false promise of marriage, committed rape on the victim girl despite of fact knowing that she is minor and so she got pregnant.

First Information Report :

3. As the offence was taken place in the jurisdiction of M.H.B. Colony Police Station, the police of Santacruz Police Station by registering the FIR vide C.R. No.00/2019 u/s.376, 376(2)(n) of IPC and u/s.4, 8 and 12 of POCSO Act transferred the FIR to M.H.B. Colony Police Station. The police of M.H.B. Colony Police Station on receiving the papers, registered the FIR with Crime No.190/2019 under same sections.

Investigation :

4. The investigation then was carried out. During investigation, spot panchnama was carried out. The accused was arrested. The statements of witnesses were recorded. The medical examination of the prosecutrix was taken place in Babasaheb Ambedkar Hospital and Cooper Hospital. The accused was also sent for his medical examination to Nair Hospital.

Chargesheet :

5. On conclusion of investigation, the Charge-sheet came to be filed in this matter.

Charge :

6. The accused is on bail. On appearance of the accused, Charge u/s.376(2)(n) of IPC and u/s.5(1) read with section 6 of POCSO Act was framed against him by this Court at Exh.4 on 06/03/21. Charge is read over and explained to him in vernacular. He understood the same, denied the Charge and claimed to be tried. His defence is of total denial and false implication out of misunderstanding. Actually they both were in love and had sexual relations. Thereafter they got married with each other and are residing happily with their daughter.

7. **Evidence adduced by the prosecution :-**

The prosecution in all has examined four witnesses as under :-

Witness No.	Name of witness	Exh. No.	Document if any proved its Exhibit number
1.	Victim girl/prosecutrix.	Exh.9	Exh.10-FIR. Article A – xerox copy of birth certificate of victim girl.
2.	Mother of the victim girl.	Exh.11	

3.	WAPI Mrs. Aarti Sudhakar Gavare who recorded statement of victim girl and registered the FIR.	Exh.17	Exh.18(colly.)-FIR format with statement of victim girl.
4.	PI Mr. Vijay Vasudeo Kandalgaonkar (investigating officer).	Exh.19	Exh.20-original birth certificate. Exh.21-Letter dated 25/06/19 to the Ld. M.M. Court. Exh.22-Portion marked 'A' in statement of PW 2.

8. The prosecution has filed list of documents vide lists Exh.6 as under :-

Sr.No.	Name of document	Exh.No.
1.	Spot panchnama dated 19/06/19 (admitted by defence).	Exh.12
2.	Arrest surrender form (admitted by defence).	Exh.13
3.	Medical report of victim (admitted by defence).	Exh.14
4.	FIR and statement of victim girl of Santacruz Police Station.	Exh.18(colly.)
5.	Original birth certificate.	Exh.20
6.	Letter dated 25/06/19 to the Ld. M.M. Court.	Exh.21

7.	Portion marked 'A' in statement of PW 2.	Exh.22
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9. The prosecution has filed list of articles **Exh.8** as nil.

10. The prosecution closed its evidence by filing evidence closure pursis at **Exh.23**.

Statement of accused under section 313 of Cr.P.C. :-

11. The statement u/s.313 of Cr.P.C. of accused was recorded at **Exh.24**. He reiterated that he is falsely implicated in this matter out of misunderstanding. Actually the victim girl and he was in love and had sexual relations. Thereafter they got married with each other and are residing happily with their daughter.

12. The defence has not adduced any evidence.

13. Heard the Learned APP Mrs. Geeta Malankar for State and Learned Advocate Mrs. Mamta Tripathi for the accused.

Points for determination :

14. In the light of the charge framed against the accused, evidence on record, the statement U/Sec.313 of the Cr.P.C. and the submission made across the bar by the Learned Counsel of both sides, following points arise for my determination to which I have recorded my findings against each of them for the reasons to follow :

SR.NO.	POINTS	FINDINGS
1.	Does the prosecution prove that the victim girl/informant is minor as per the provision of POCSO Act ?	In the negative.
2.	Does the prosecution prove that the accused from January 2019 till March 2019 at his house i.e. Room No.131, Indira Nagar, Near Happy Home Society, J. S. Road, Borivali (W), Mumbai has committed rape on the minor victim girl/informant aged about 17 years and 8 months of this matter and thereby committed an offence punishable u/s.376(2)(n) of IPC ?	In the negative.
3.	Does the prosecution prove that on the above mentioned period, time and place, the accused has committed aggravated penetrative sexual assault on the minor victim girl/informant aged about 17 years and 8 months of this matter and he has repeatedly committed rape on her and he thereby committed an offence punishable u/s.5(l) r/w.6 of POCSO Act ?	In the negative.
4.	What order ?	Accused is acquitted as per final order.

:: REASONS ::

As to Point Nos.1 to 3 :

15. As the facts are interlinked to each other, it would be appropriate to determine the Point Nos.1 to 3 with common reasoning with distinct observation wherever necessary.

16. In this matter, the prosecution came with the story that the victim girl is minor i.e. below 18 years of age at the relevant time but unfortunately except oral evidence of the victim in which she stated that her birth date is 24/09/2001, there is no cogent proof on record stating that the victim is minor girl below 18 years of age. The prosecution in order to support their contention, though filed on record the birth certificate but it is a xerox copy which is already marked as Article A. Later the birth certificate was produced by the investigating officer but it is not supported by the evidence of star witnesses so it cannot be said that it is a full proof evidence to hold that the victim was minor at the relevant time. So I am of the opinion that the prosecution failed to prove beyond all reasonable doubts that the victim was minor at the relevant time i.e. in between January 2019 to March 2019. Unfortunately in absence of the proof of minority of the victim, the provision of POCSO Act also not involved in this matter.

17. Now let us find out whether the prosecution is able to prove the charges levelled against the accused u/s.376(2)(n) of IPC. For the purpose of finding out whether the accused is guilty of committing rape on the prosecutrix, we have to take into consideration the evidence of the victim girl (**PW 1**) (**Exh.9**). She in her evidence on Oath before the Court deposed that in the year 2019 she was in 11th Standard. She was going in S.N.D.T. College. She was a sports woman playing football and throw ball and for practice of it, she was going to Bandra and Andheri, Mumbai. She knows the accused since long. He is also a player. She then in her examination-in-chief itself suddenly turned down by saying that she never

had lodged any complaint against him. She accepted her signature on the FIR with the statement dated 19/06/19. But further added that she does not know the contents of the FIR. The statement, therefore, was read over to her. She then stated that the contents are same as stated by her to the police and accordingly the FIR was taken down so the FIR was marked at Exh.10. But in her evidence, she stated that she never had gone to Santacruz Police Station and never had lodged any complaint with the allegations of rape on her.

18. As the witness PW 1 was not supporting to the prosecution story, the Learned APP by taking all efforts has taken the cross-examination of this witness PW 1 and tried her level best to elicit the material evidence against the accused for proving his guilt but unfortunately she failed in her efforts. No doubt an important admission was sought by the Learned APP which suggests that the prosecutrix got married with the accused and they have one daughter. In short actually the present accused is the husband of the present prosecutrix and they are residing together as a husband and wife. The Learned APP, therefore, put up the suggestion to PW 1 that as because the accused is her husband, she is deposing false to avoid punishment to the accused but she denied it.

19. Thereafter in cross-examination of PW 1 which is taken by the Learned Advocate for the accused, PW 1 accepted that she had never gone through the contents of the FIR Exh.10 before making her signature on her statement. She does not know the contents of the FIR. They were in deep love with each other and were meeting to each other, doing everything

willingly without any force. She got married with him on 10/10/19. She is having one daughter from the accused. She does not have any grievance against him. She does not wish to proceed with the matter against him.

20. PW 2 is the mother of the victim girl (Exh.11). She stated nothing but that the victim girl is her daughter and except it she does not know anything about the matter. She never had gone to M.H.B. Colony Police Station and she does not recollect whether she had been to M.H.B. Colony Police Station on 24/06/19.

21. The Learned APP, therefore, by taking permission of this Court, cross-examined this witness PW 2 as she has also not supported to the prosecution case. The contents of her statement were read over by the Learned APP to PW 2 in the open Court but she denied the contents of her statement dated 24/06/19 alleged to have been recorded by the investigating officer during the course of investigation of this matter. So it was marked as portion 'A'. PW 2 accepted that she knows the accused. He is the husband of her daughter i.e. the victim girl. Her daughter and the accused got married with each other in August 2020.

22. Now her daughter is residing with the accused. She is happy. She gave birth to one daughter and PW 2 accepted the accused as her son-in-law. Now if we peruse the testimonies of both these witnesses then it is revealed that though the victim according to the prosecution initially through her FIR, made the allegations of rape on her by the accused, it was a forcible act and because of it, she got pregnant but neither the

prosecutrix PW 1 nor her mother PW 2 supported to the prosecution story about committing rape on the prosecutrix by the present accused. On the other hand, they both are saying that the accused is the husband of the victim. They got married with each other in the year 2020 and they have one female child out of the said wedlock. The marriage in between the accused and the victim may be the reason because of which they have not supported to the prosecution case. But because of their attitude, the backbone of the prosecution case has been collapsed. The testimony of PW 1 is full of contradictions. At one moment she accepted the FIR Exh.10 and in another moment, she deposed that she does not know the contents of the FIR, she does not know Marathi language and she never had gone to M.H. B. Colony Police Station for lodging the present FIR. The evidence of PW 1 and PW 2 is full of contradiction. As the settled principle of law, that contradictory evidence cannot be accepted as a full proof and cogent evidence to punish the accused.

23. As this Court has arrived at the conclusion that the prosecution has failed to prove the fact of minority of the victim so the provision of POCSO Act cannot be attracted in this matter. Needless to say that though the offence is registered u/s.5(l) r/w.6 of POCSO Act but as the minority of the victim/prosecutrix is not proved by the prosecution so it cannot be said that the accused is liable to be punished under the provision of POCSO Act or u/s.5(l) r/w.6 of POCSO Act so this Court, actually, proceeded to analyze the evidence of PW 1 and PW 2 to find out whether the offence u/s.376 (2)(n) of IPC is made out or not. But as

mentioned above, neither PW 1 nor PW 2 supported to the prosecution case so there is no evidence on record stating that any forceful sexual acts were committed with the victim girl by the present accused at any time or sexual relations which might have been taken place in between them were against her will and wish. In absence of material evidence which needs to be proved against the accused for punishing him for the offence u/s.376(2) (n) of IPC, it cannot be said that the accused has committed any such crime.

24. Here I would like to have a glance on the evidence of rest two witnesses i.e. **PW 3** WAPI Mrs. Aarti Gavare (**Exh.17**) who on 19/06/19 was present in Santacruz Police Station has taken down initial information from the victim and her mother and then recorded their statements. She supported to the prosecution in all aspects by saying that the statement Exh.18 annexed with the FIR made by the victim girl before her while the victim was inquired by her in Santacruz Police Station.

25. So far as the cross-examination of PW 3 taken by Learned Advocate for accused is concerned, only few denial suggestions were given to her so the cross-examination of this witness PW 3 is not useful to either side. But I am of the opinion that if the victim denies of giving any information to the police at any time about committing sexual assault on her by way of any report, then it would be unsafe to accept that the testimony of PW 3 in respect of the theory of prosecution of giving statement by the victim girl and the contents is cogent evidence and the contents of the FIR are proved beyond doubt. Hence, it cannot be said that

the contents of the FIR are proved against the accused beyond all reasonable doubts and are admissible in the eyes of law against the accused.

26. PW 4 Mr. Vijay Kandalgaonkar (Exh.19) also supported the prosecution case and deposed that he has collected birth certificate of the victim Exh.20. But in my opinion, said birth certificate is not produced from the proper custody. The victim girl has placed on record xerox copy of the birth certificate. Later on it was produced on record by the prosecution through the testimony of the investigating officer PW 4 without any explanation as to how and why it was not placed in the testimony of the PW 1 so it cannot be said that it is proved beyond reasonable doubt. The rest evidence of PW 4 is totally supported to the prosecution case but he is the investigating officer. He deposed as per the steps taken by him. Still his evidence cannot be said to be a full proof and cogent evidence and not the evidence on the basis of which the Court can arrive at the conclusion that as only the investigating officer gave supportive evidence so it is true disclosure and so it is proved that the accused has committed the offence of rape on the victim.

27. This Court is of the humble opinion that in a case of rape, sexual assault, the prosecutrix/victim is the star witness for the prosecution. Her sole testimony can be relied upon to convict the accused if it is trustworthy. The victim/prosecutrix if not supporting to the story of the prosecution of having committing rape on her by the accused or having committed any sexual act against her wish or will which is committed on

her by the accused, then it would be unsafe and unjust rather illegal to say that the accused is guilty of committing rape or penetrative sexual assault on the victim girl.

28. Because of non-supportive attitude of PW 1 and PW 2 who are the star witnesses of the prosecution, case of the prosecution has collapsed, its backbone is cracked down and nothing came on record to prove the guilt of the accused so I am constrained to conclude that the prosecution has failed to prove beyond reasonable doubt the offence of committing rape on the victim by the accused for which he is charged and tried u/s.376 (2)(n) of IPC by the Court.

29. Hence, this Court by answering the Point Nos.1 to 3 in negative, proceed to pass the following order :-

ORDER

1. Accused **Jacob Muthuswami Naidu**, Age : 22 Years, residing at Room No.131, Near Indira Nagar, J. S. Road, Near Happy Home Society, Dahisar (W), Mumbai-400 068 is acquitted of the offences punishable under sections 376 (2)(n) of the Indian Penal Code and under section 5 (l) read with section 6 of the Protection of Children from Sexual Offences Act, 2012 vide Section 235(1) of Code of Criminal Procedure.
2. Accused is on bail. His Bail Bonds stands cancelled.

3. The accused **Jacob Muthuswami Naidu**, is directed to furnish fresh Personal Bond of Rs.10,000/- (Rs.Ten Thousand Only) with one solvent surety in the like amount as per the provision Under Sec.437-(A) of the Code of Criminal Procedure to appear before the Hon'ble High Court, in case appeal against the acquittal is filed and notice issued to the accused.
4. As there is no muddemal filed in this case as per list of articles Exh.8, no order to that effect.
5. The concerned Police Station is directed to hand over the copy of Judgment to the Hon'ble District Magistrate (Collector) to be given to the victim girl and her legal heirs and report the compliance of the same to the Court.
6. The prosecution is directed to take legal steps against the witness who according to the prosecution, has not supported to the prosecution case.
7. The Judgment is pronounced in presence of the Learned Spl.APP for State, Learned Advocate for the accused and accused in the open Court.

Date : 21.08.2021

(H. C. SHENDE)
Special Judge under P.O.C.S.O. Act,
Sessions Court, Borivali Division,
Dindoshi, Goregaon, Mumbai

Dictated on : 21/08/2021
Transcribed on : 23/08/2021
Corrected on : 24/08/2021
Signed on : 24/08/2021
Sent to Dept. on :

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

UPLOAD DATE
AND TIME : 24/08/21 at 12.45 p.m.

Mrs. Vidya Pendharkar
NAME OF STENOGRAPHER

Name of the Judge (with Court Room No.)	HHJ Smt. H. C. Shende (Court Room No.11)
Date of Pronouncement of Judgment/Order	21/08/2021
Judgment/Order signed by P.O. on	24/08/2021
Judgment/Order uploaded on	24/08/2021

POCSO SPL.377/19

: 17 :

Judgment