

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.362 OF 2015

Pravin s/o Vitthal Kamble,
Age-49 years, Occu:Private Service,
R/o-Swaraj Apartment, Wakodi Phata,
Nagar-Solapur Road, Ahmednagar,
Tq. & Dist-Ahmednagar.

...APPELLANT

VERSUS

- 1) The State of Maharashtra,
Through Police Inspector,
Shrirampur City Police Station,
Shrirampur, Tq-Shrirampur,
Dist-Ahmednagar,
- 2) Ashwin s/o Raju Kedari,
Age-22 years, Occu:Education,
C/o-Raju Vishnu Kedari,
R/o-Belwandi, Tq-Shrigonda,
Dist-Ahmednagar.

...RESPONDENTS

...
Mr.A.N. Nagargoje Advocate for Appellant.
Mr.A.S. Shinde, A.P.P. for Respondent No.1.
...

**CORAM: A.B. CHAUDHARI AND
INDIRA K. JAIN, JJ.**

DATE : 11TH SEPTEMBER, 2015

ORDER :

1. The Appellant is a father of the prosecutrix PW-11, who has filed this Appeal being aggrieved by the Judgment and order of acquittal dated 20th January 2015 in Sessions Case No.49 of 2014 by Additional Sessions Judge, Shrirampur.

2. In support of the Appeal, learned counsel for the Appellant strenuously contended that the learned trial Judge himself recorded the findings that, it is not in dispute that the birth date of the prosecutrix is 6th October 1997 and consequently she is below 18 years of age. He then submitted that prosecutrix also deposed that her age was 17 years, apart from the doctor's evidence showing the age of the prosecutrix less than 18 years and therefore according to him, trial Judge ought to have convicted the Respondent-accused for the offence in question. He then submitted that during trial copy of school leaving certificate of

prosecutrix, attested by the Executive Magistrate, filed on record, should have been considered by the trial Judge as a proof of her birth date, but the trial Judge did not rely on it, which is error patent on record. It is submitted that there is no evidence of any 'theory of consent' and even assuming the consent is to be inferred, the fact remains that the girl was below 18 years of age and therefore same was immaterial and consequently the learned trial Judge ought to have recorded conviction.

3. Per contra, the learned A.P.P. supported the impugned Judgment and order, and prayed for dismissal of the Appeal against acquittal.

4. With the assistance of the learned counsel for the Appellant, we have perused the evidence of prosecutrix PW-11, the doctor and also other witnesses. We have also perused the findings and the reasons given by the trial Judge in the

matter. Upon perusal of the evidence of prosecutrix PW-11, particularly Para 3 and 4 thereof, we are satisfied that prosecutrix PW-11 was a consenting party for the sexual intercourse. The question, therefore, is whether she was below 18 years of age. The prosecutrix PW-11 stated in her examination-in-chief that she was studying in 12th standard in Ahmednagar College. Not only that, during trial, Appellant produced copy of school leaving certificate attested by some Executive Magistrate. The investigating machinery, unfortunately did not collect documentary evidence about the date of birth of the prosecutrix. The burden of proof to prove the fact that prosecutrix was below 18 years of age, was certainly on the prosecution and unless that initial burden was discharged, the prosecution could not claim to have proved the case beyond reasonable doubt.

5. In the instant case, the learned counsel

for the Appellant wanted this Court to rely upon only the oral evidence , namely, the date of birth given by the prosecutrix, her father and approximate age stated by the doctor. The law is well settled that when the documentary evidence was available in the form of birth certificate or school leaving certificate, in a criminal trial, the Court would not act on parole evidence. At least, so far as the proof of requirement for prosecution is concerned, the Court expects the production of proof of documentary evidence, particularly, in relation to the cases of such border line case in order to come to a firm conclusion about the minority of the prosecutrix.

6. In the instant case, though the Appellant produced a attested photocopy of the school leaving certificate, no attempt was at all made to prove the said school leaving certificate in accordance with law, nor the said document was even exhibited. Thus, the school leaving

certificate remained a waste paper on the record of the trial Court and could not be looked as evidence. Consequently, what remains on record, is oral evidence. The oral evidence shows border line difference of age and therefore it was of the more importance for the prosecution to prove the fact by documentary evidence available, that she was minor. In such a situation, we find that the trial Court made no mistake in extending benefit of doubt to the Respondent-accused on the said principles of law discussed by us above. We, therefore, do not find any error or perversity on the part of the trial Judge in recording order of acquittal. The ossification test also indicated three years difference on either side and it is well settled that in such event the benefit goes to the accused rather than the prosecutrix.

7. We, thus find that the prosecution kept loop-holes by not producing and proving the documentary evidence, for which the prosecution

has to thank itself. That leads us to make the following order:

O R D E R

. Criminal Appeal No.362 of 2015 is dismissed, summarily.

[INDIRA K. JAIN, J.]

[A.B. CHAUDHARI, J.]

asb/SEP15