

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

CRIMINAL APPEAL NO. 422 OF 2000

Babasaheb s/o Vishwanath Kashid,
aged 43 years, occ. Agril.,
R/o Kemwadi, Tq. Tuljapur,
District Osmanabad

...Appellant

VERSUS

The State of Maharashtra,
through the Police Station,
Tamalwadi, Tq. Tuljapur,
District Osmanabad

...Respondent

.....
Shri S.S.Choudhary, advocate for appellant
Shri A.S.Shinde, A.P.P. for respondent
Shri B.S.Shinde, advocate for first informant
.....

CORAM : V.M.DESHPANDE, J.

DATE OF RESERVING

THE JUDGMENT

: 22.06.2015

DATE OF PRONOUNCEMENT

OF THE JUDGMENT

: 23.07.2015

J U D G M E N T : -

1] The present appeal is directed against the judgment and order of conviction, passed by the learned Assistant Sessions Judge, Osmanabad in Sessions Case No. 103 of 1995, dated 9.12.1999, whereby the learned court below convicted the appellant for the offence punishable under Section 366 of the Indian Penal Code and on that count he was directed to suffer rigorous imprisonment for 5 years and to pay fine of Rs.1,000/-, in default of payment of fine, further to suffer rigorous imprisonment for one year.

The appellant is also convicted for the offence punishable under Section 363 of the Indian Penal Code, however, no separate sentence is passed on that count.

The appellant is further convicted for the offence punishable under Section 376 of the Indian Penal Code and on that count he was directed to suffer rigorous imprisonment for 10 years and to pay fine of Rs.2,000/-, in default of payment of fine, further to suffer rigorous imprisonment for one year.

2] The prosecution case is as under : -

Atmaram Bajirao Khot (PW 1) lodged a report with the police on 1.3.1994. The report is at Exh.21. As per the said report, he is having four sons Ramchandra, Jaywant, Arjun and Kamlakar and one daughter, who is prosecutrix.

In the first information report, it is stated that the age

of the prosecutrix is 17 years and she is educated up to 4th standard and thereafter her education was discontinued. It is further stated in the report that since the prosecution attained the marriageable age, the first informant was searching for suitable groom for her.

As per the complaint, on 20.2.1994, Atmaram (first informant) went to Pune in search of the bridegroom. He returned on 23.2.1994 in the evening. That time, it was informed to him by his wife Taramati that when the first informant left for Pune, from that day the prosecutrix left the house along with her all clothings. On getting such information, search was made, however, in vain. Thereafter he made inquiry in the village. Upon that, it was revealed to him that the prosecutrix was having illicit relations with the appellant and he has enticed her. It is, therefore, complained that present appellant enticed the prosecutrix on 20.2.1994 in between 11.00 to 11.30 and therefore action should be taken against him.

3] Laxminarayan Abarao Shingare (PW 12) was attached to police station Tamalwadi as P.S.I. He took the investigation of Crime No. 18 of 1994. He recorded statement of the prosecutrix. The appellant was arrested by him on 7.3.1994. He sent both the appellant and the prosecutrix for their medical examination. After completion of investigation, the

charge sheet was filed by him.

4] Charge was framed against the appellant that the appellant has committed offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. Charge was denied by the appellant and claimed for his trial.

5] In order to bring home the guilt of the appellant, prosecution has examined in all 13 witnesses. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure. He has also examined 4 defence witnesses.

The learned trial court, after appreciating the prosecution case, has awarded the sentence after recording the conviction against the appellant, as stated in the opening paragraph of this judgment.

6] I have heard Shri S.S.Choudhary, learned counsel for the appellant; Shri A.S.Shinde, learned Additional Public Prosecutor for respondent/State; and Shri B.S.Shinde, learned counsel for the first informant, in extenso. They took me in detail through the entire record and proceedings.

7] According to the learned counsel for the appellant, the date of birth of the prosecutrix is 22.11.1974, and therefore,

on the day of the alleged incident the prosecutrix was not minor, and therefore, he cannot be convicted for the offences punishable under Sections 363 and 366 of the Indian Penal Code. He further submitted that if the entire evidence is scanned properly, then it is clear that no forcible sexual intercourse was committed by the present appellant.

Per contra, according to the learned Additional Public Prosecutor and the learned counsel for the first informant, the prosecutrix was minor on the date of the incident. They submitted that in view of Exh.35, the date of birth of the prosecutrix is 25.12.1977. In that view of the matter, according to them, the appellant has enticed a minor girl and thereby has committed an offence punishable under Sections 363 and 366 of the Indian Penal Code.

8] The primary question that the court is required to answer is what is the date of the prosecutrix; whether her date of birth is 22.11.1974 as claimed by the appellant or 25.12.1977 as claimed by the prosecution.

9] From the prosecution evidence, it is clear that the prosecution has not examined mother of the prosecutrix. Her father PW 1 Atmaram Khot is examined. In his entire examination-in-chief he did not disclose her date of birth, however, in cross-examination he has admitted that she was

born in village Kemwadi. To a very specific question about her date of birth as 22.11.1974, he stated as under : -

“ I do not remember whether Sudamati was born on 22.11.1974.”

It is also his admission that there is a Grampanchayat in his village and birth of prosecutrix was recorded in the Grampanchayat.

In examination-in-chief itself, he has stated as under : -

“ Sudamati was about 17 years old at the time of incident in question.”

10] The prosecutrix is examined as Prosecution Witness No.2. She has stated in her examination-in-chief as under : -

“ I was 17 years old at the time of incident in question.”

She has admitted in her cross-examination that she does not know the date of her birth.

11] The other evidence is of Prosecution Witness No. 7 Annasaheb Surwase. At the time of recording of the evidence, this witness was serving as Incharge Head Master of Zilla Parishad School, Kemwadi. He brought with him the general register of the students and on the basis of the said register, he testified that the prosecutrix was admitted in the school on 2.7.1984 and her date of birth is shown as 25.12.1977.

The entry in the school register is at Sr. No.193 and the relevant extract of the said register is at Exh.36.

Annasaheb Surwase was unable to depose before the court on what basis the entry about the date of birth of the prosecutrix was taken in the register, nor he was aware as to who has taken the said entry. He has admitted that he has not brought the original form of admission pertaining to the prosecutrix, though he has given explanation that the older record was not found in the school.

12] Another evidence in respect of age is through the evidence of Dr. Mamta Venkatesh (PW 13). In the month of March, 1994, she was attached to the Civil Hospital, Osmanabad as a Medical Officer. On 1.3.1994, the prosecutrix was referred by Tamwadi police station for ascertaining her age and information on the point of rape. Her evidence would disclose that on the basis of the physical and radiological examination of the prosecutrix, she came to the conclusion that prosecutrix was about 15 years plus minor two years. X-ray examination of heap joint and elbow was also carried out. Though she opined on the basis of X-ray plates, she has stated that she is not a Radiologist, nor she has obtained any opinion of the Radiologist.

This is the prosecution evidence in so far as date of birth of the prosecutrix.

13] Since the appellant seriously disputed the date of birth of the prosecutrix, he also examined DW 2 Nagnath Mali. His evidence would reveal that he was Sarpanch of village Kemwadi from 21.11.1997. Register of birth duly maintained in the Grampanchayat was brought by him in the court. He issued a certificate pertaining to entry regarding birth of a daughter to Taramati Atmaram Khot on 22.11.1974. The said entry is at Sr. No.16 on 22.11.1974 at Page No.11 of the said register. He proved the said certificate and it is at Exh.77. The original entry no.16 on the register bears the signature of the then Gram Sevak.

14] The defence has also examined the Gram Sevak, who has taken the entry regarding the date of birth of a daughter to Taramati Atmarak Khot. His name is Narhar Bapurao Kulkarni (DW 3). His evidence discloses that in the year 1974 he was serving as Gram Sevak of village Kemwadi. His duty was to maintain the birth register in the Grampanchayat. He used to take entries of birth reported in the said village. He used to take such entry as and when births were reported. When he was in the witness box, birth register for the period 1.1.1974 to March, 1975 containing 13 pages (Exh.81) was shown to him. He testified that all these pages bear his signature and all the entries were taken by him and signed by him. He then proved the entry no.16 of the birth

register (Exh.81). He testified that the said entry was taken by him under his hand writing and under his signature. The said entry is at Exh.81/1 on the record. As per the said entry, Atmaram Khot and his wife Taramati delivered a female issue and entry regarding that was taken on 22.11.1974. As per the evidence of this witness, birth was reported by the then Kotwal, Rangnath Kotwal.

15] Evidence of Annasaheb Surwase (PW 7), on its appreciation would reveal that he is unaware as to who has taken the entry in respect of date of birth of the prosecutrix. Further, he was unable to state, on what basis the said entry was taken in Exh.35 and Exh.36. Further, though he has given explanation that the original form of admission pertaining to prosecutrix was not available, however, fact remained that same was not produced before the court.

Thus, the primary evidence, on the basis of which the entry of date of birth of prosecutrix as 22.11.1974 was taken, was not before the court.

Further, PW1 Atmaram has admitted during his cross-examination that he told the age of the prosecutrix approximately to the school authority.

16] The entry in the birth register duly maintained in the Grampanchayat will be a primary evidence. According to the

evidence of DW 3 Narhar Kulkarni, he took entry of date of birth of the prosecutrix as 22.11.1974 that a female issue was born to Atmaram Khot and his wife Taramati.

There is no dispute that name of the wife of first informant Atmaram is Taramati. From the first information report itself, it is clear that the couple was having only one daughter. It is not the prosecution case either in the first information report or from the witness box by PW 1 Atmaram Khot, the father of the prosecutrix, that, prior to birth of the prosecutrix he was having any predeceased daughter. Thus, it is crystal clear that PW 1 Atmaram is having only one daughter i.e. the prosecutrix. Further, he has also admitted in his evidence about the existence of Grampanchayat in the village and the birth of prosecutrix was recorded in the Grampanchayat.

17] The evidence of DW 3 Narhar Kulkarni, who has taken entry regarding the date of birth of the prosecutrix has not shaken. There is nothing available on record through his cross-examination to suggest that he is there to oblige the appellant. His evidence inspires confidence.

The entry regarding the date of birth of the prosecutrix is thus duly proved by the said witness.

18] Thus, when on record the primary evidence is

available, I see no reason to discard the same. That leads me to reach to the conclusion that the date of birth of the prosecutrix is 22.11.1974.

According to the first information report, the prosecutrix has left her house on 20.2.1994. Thus, on the said date she was aged about 20 years.

In that view of the matter, it cannot be held that the prosecutrix was minor on 20.2.1994.

Further, it looks very unnatural if the first information report is read in correct perspective, as according to the first information report itself PW 1 Atmaram left for Pune on 20.2.1994 in search of suitable groom for prosecutrix and when he returned on 23.2.1994, that time it was informed to him by his wife Taramati that on 20.2.1994 itself the prosecutrix has left the house. Silence on the part of Taramati from 20.2.1994 till 23.2.1994 appears unnatural. In the rural area, no mother will sit quietly if her marriageable daughter is not found to be present in the house.

Further, as per the prosecution case, the appellant has enticed the prosecutrix. From 20.2.1994 to 23.2.1994 Atmaram (PW 1) was not present in the village. Prosecution has not examined Taramati. Further, from the first information report, it is clear that Taramati has not disclosed to first informant that the prosecutrix has left the house in company of the appellant.

19] Evidence of PW 4 Daji Jadhav and PW 5 Bhaskar Patil, who are panch witnesses, is of no use to the prosecution, since they turned hostile.

PW 6 Prabhu Thorat has only recorded the first information report and handed over the investigation.

PW 8 Dr. Manoj Ghogare is the Medical Officer, who has examined the appellant and has issued the injury certificate (Exh.39) and the age certificate (Exh.40) of the appellant. No injuries were found on the private part of the appellant.

Also PW 9 Bhiku Kadam, who was serving as a servant at Mathura Lodge, Pune has not supported the prosecution.

Prosecution is also relying on the evidence of PW 3 Irappa Jadhav. He is close relative of PW 1 Atmaram Khot. His evidence would disclose that he resides at Hande Plot at Solapur. According to his evidence, prosecutrix came to his house in between 8.00 to 9.00 in the night. She came alone. Upon inquiry with the prosecutrix by this witness, whether her father had accompanied her, it was revealed to him that her father is coming later on. His evidence would further disclose that the prosecutrix had a sleep at his house. His evidence further discloses that on the next day the prosecutrix left his home. His evidence is completely silent that the prosecutrix left his house in the company of the appellant.

20] So far as offence punishable under Section 376 of the Indian Penal Code is concerned, the evidence that is available, is of the prosecutrix. Her evidence would disclose that the appellant came in front of her house and thereafter he told her to come to Solapur and from there he will take her either to Pune or Mumbai. Her evidence further discloses that she went to Solapur. To that extent, there is a corroboration from the evidence of PW 3 Irappa Jadhav. Evidence of the prosecutrix would further reveal that from Bus Stand Solapur to the house of PW 3 Irappa Jadhav she was escorted by the appellant, however, there is no corroboration to that effect from PW 3 Irappa Jadhav.

According to the prosecutrix, thereafter she was taken to Mumbai by the appellant in the Bungalow of one M.L.A. From there she was taken to a lodge and in the said lodge the appellant has committed sexual intercourse with her and thereafter they again came to the bungalow of M.L.A. If her evidence is to be believed, the appellant had committed sexual intercourse with the prosecutrix in the bungalow of M.L.A. also. The prosecution case is completely silent, nor there is any investigation in the prosecution case that, who was that M.L.A. in whose bungalow sexual intercourse was committed, which is that lodge at Mumbai whereat the appellant committed sexual intercourse, as alleged by the prosecutrix. According to the prosecutrix, she was also ravished at Manjula Lodge, Pune.

Her evidence would reveal that ample opportunity was available to her to complain the atrocities committed on her, however, she chose not to make any complaint. Further, it is not the version of the prosecutrix that she was under the threat from the appellant.

21] Evidence of PW 13 Dr. Mamta Venkatesh and certificate Exh.58 clearly shows as under : -

“ I did not find any signs of forcible intercourse on Sudamati. I did not find any other injury on any other part of Sudamati's body.”

She has also deposed from the witness box that prosecutrix was habituated to sexual intercourse, however, she was unable to give information about the recent commission of rape, since there were no fresh injuries on the private part of the prosecutrix.

22] From the aforesaid quality of the evidence, it is crystal clear that the prosecution was unable to prove that the prosecutrix was subjected to rape at the hands of the appellant.

23] The aforesaid discussion leads me to pass following order.

(i) Appeal is allowed.

(ii) The judgment and order of conviction, passed by the learned Assistant Sessions Judge, Osmanabad in Sessions Case No. 103 of 1995, dated 9.12.1999, for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code, is quashed and set aside.

(iii) The appellant is acquitted from the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code.

(iv) Bail bonds of the appellant stand cancelled.

(v) Fine amount, if any paid by the appellant, be refunded to him.

[V.M.DESHPANDE, J.]