

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.
CRIMINAL APPELLATE JURISDICTION.**

Criminal Appeal No.439 Of 2000.

Sanjay Sadhu Hatkar.

Age : 22 Years., Occ.: Labourer.

R/o.: Railway Colony, Purna.

District : Purna.

Appellant.

Versus

(1) The State of Maharashtra.
Through : The Police Station
Officer, Police Station, Purna,
Taluka : Purna, District : Parbhani.

(2) "S"
Age:21 Yrs., Occ.: Private Service.
R/o : Wadi, Near Khadakpura,
Nanded.
C/o.: Piraji Pawar,.
R/o : Wadi, Near Khadakpura,
Nanded.

Respondents.

Note : In order to conceal the identity of victim, she is referred to as "S" in this Judgment.

Appearance =>

Mr. S.S. Chaudhari, Advocate for the Appellant.

Mrs. Pratibha Bharad, Additional Public Prosecutor for the State of Maharashtra – Respondent No.1.

CORAM : V.M. DESHPANDE, J.

DATE : 24th JUNE, 2015.

J U D G M E N T :-

Being aggrieved by the Judgment and Order dated 3rd November, 2000 passed by the learned Sessions Judge, Nanded, District – Nanded in Sessions Case No.182 Of 1997, thereby, convicting the Appellant / Accused for the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for five (5) years and to pay fine of Rs.5000/- (Rs. Five Thousand) and in default of payment of fine amount, to suffer further rigorous imprisonment for a period of one (1) year, the Appellant is before this Court.

[2] The Charge was framed against the present Appellant and juvenile accused – Rafique Mehamood Bagwan by the learned trial court in Sessions Case No.182 Of 1997 that, on 27th April, 1997 at about 1.30 a.m. at Nanded Railway Station, in furtherance of their common intention, they kidnapped Parvati w/o Ramesh Shinde and “S”, who were minor and thus they have committed an offence punishable under Section 363 read with 34 of the Indian Penal Code.

They were also charged for the offence punishable under Section 366(b) read with 34 of the Indian Penal Code.

Present Appellant was also charged for commission of rape on “S” in the latrine of Railway bogie on 27th April, 1997 at about 1.30 a.m. at Chudawa Railway Station. Thus, present Appellant was charged for committing an offence punishable under Section 376 of the Indian Penal Code.

[3] The learned trial court acquitted the accused for the offences punishable under Section/s 363 and 366(b) of the Indian Penal Code however, convicted the present Appellant only for the offence punishable under Section 376 of the Indian Penal Code and sentenced him, as observed in the opening paragraph of this judgment.

[4] Though the Appellant was acquitted for the offence punishable under Section/s 366, 366(b) of the Indian Penal Code, no Appeal was carried against him, by the State.

[5] The prosecution case can be enumerated as under, as it emerges during the trial :-

PW No.7 Shivaji Bhivaji Koli was attached to Police Station, Purna as Police-Sub-Inspector in the year 1997. On 26th April, 1997 Rukhminibai Motiram More came in the Railway Police Station. She was referred by the Nanded Police. PW No.7 Shivaji recorded her statement in detail. Her statement is treated as F.I.R. (Exhibit – 10). He registered Crime No.19/1997 on the basis of First Information Report Exhibit – 10. He prepared the spot panchnama. Subsequently, Police Sub Inspector – Nimba Nafar Mali (PW No.8) carried the further investigation and filed the charge-sheet in the court of law.

[6] PW No.1 – Rukhminibai More lodged a report at Exhibit – 10. Her report discloses that her father by name Gangaram took her daughter – Parvati (PW No.4) at Chandrapur for festival on 21st April, 1997. When he was returning on 26th April, 1997 and when they were sleeping on Railway Platform that time, one Ramesh resident of Purna, occupation - door-keeper and his companion – Kale kidnapped Parvati

and "S". The accused person denied the charge and claimed for their trial.

[7] In order to prove the guilt of the accused persons, the prosecution has examined in all eight witnesses :-

PW No.1 : Rukhminibai Motiram More. (First Informant).

PW No.2 : Dr. Vidya Madhavrao Ghatge (who examined Parvati and "S")

PW No.3 : Shaikh Rafiuddin Shaikh Allauddin.
(Panch of seizure of the clothes of the accused, who turned hostile.)

PW No.4 : Parvati Ramesh Shinde – (Victim).

PW No.5 : “S” (Victim)

PW No.6 : Vijay Shankar Kapilmuni Dubey (Panch of seizure of clothes of "S")

PW No.7 : Shivaji Bhivaji Koli, who recorded the statement of Rukhminibai More and who registered the offences.

PW No.8 : Nimba Nafar Mali. (Investigating Officer.)

[8] I have heard Mr. S.S. Chaudhari, learned counsel for the Appellant and Mrs. Pratibha Bharad, Additional Public Prosecutor for the State of Maharashtra – Respondent No.1, in extenso.

Both of them took me through the entire record and proceedings of Sessions Case No.182 Of 1997 in detail. They submitted their elaborate argument for their respective prayer/s.

[9] Name of the Appellant is Sanjay Sadhu Hatkar. His name is not appearing in the First Information Report. The First Information Report was lodged against one Ramesh - Doorkeeper and his companion – Kale. First informant Rukhmini Motiram More (PW No.1) is not eye witness.

[10] Evidence of PW No.1 Rukhminibai would reveal that she is having only one daughter – Parvati (PW No.4). Her marriage was performed with Ramesh. She cohabited with her husband only for one month and since she was deserted, she started residing with Rukhminibai. Old father of Rukhmini also resides with her.

Her evidence would further state that her father took Parvati for pilgrimage and while returning, he alongwith Parvati and one girl – “S” were sleeping on the platform of Nanded Railway Station. Her evidence further discloses that on the same night, her father came to the house. That time, he was crying and was alone. He informed her that one friend of Ramesh i.e. husband of Parvati had taken away Parvati and “S” from Railway Station. Spot panchnama is at Exhibit – 37. Spot panchnama recites that spot was shown by Gangaram More. The name of present Appellant and juvenile accused is reflected in the said spot panchnama, on the basis of information give by Gangaram More. This Gangaram More was not examined as a witness before the court, by the prosecution.

[11] Since the Appellant is already acquitted from the charge of offence punishable under Section/s 363, 366 of the Indian Penal Code and is convicted only for the offence punishable under Section 376 of the Indian Penal Code, the Court would be considering the evidence in

respect of offence punishable under Section 376 of the Indian Penal Code only.

The charge against the Appellant was that he has committed rape on minor girl – "S".

[12] According to the learned counsel for the Appellant, at the relevant time, "S" was not minor and it appears so, if the evidence of prosecution is appreciated in its correct perspective. Date of birth of "S" is not brought on the record. In so far as her age is concerned, the only available evidence is evidence of PW No.2 – Dr. Vidya Madhavrao Ghatge. Even "S" during her examination before the court did not disclose her date of birth.

[13] PW No.2 – Dr. Vidya was serving as Medical Officer in Civil Hospital, Parbhani. She examined both "S" and Parvati, who were referred to her by Railway Police Station, Purna on 9th May, 1997. Medical certificate of "S" is at Exhibit – 15. Evidence of Dr. Vidya would reveal that she noticed that "S" had sexual intercourse however, time cannot be ascertained. Her hymen was found torn. Dr. Vidya did not notice any injury on private part of "S". Radiological examination of "S" was also performed. Radiological examination of "S" assumes importance in absence of any other evidence for determination of age of "S".

[14] The following portion from the evidence of PW No.2 Dr. Vidya is important and hence, it is reproduced :-

“In the instant case in respect of both the girls, fusion of Ilise crest was not completed but, it was under progress. It is

true that the process of fusion of iliac crest might have commenced at the age of 17 years. In both the cases, fusion of head of radius was completed. I cannot tell period prior to examination at which the fusion of head of radius was completed in both the cases. I cannot tell whether it was completed even 2-3 years prior to the examination. I seen table shown at page no.42 of Modi's Medical Jurisprudence (wrongly typed as jurisdiction.) (21st Edi.) I admit that fusion of head of radius according to Madras's women is completed between 14 to 17 years. I cannot tell stage of the fusion process at which the process mentioned by me in the certificates was at the relevant time. I agree with the proposition that the ossification in respect of a girl who reached age of around 16, will not be material for determination of her age. It is true that if appearance of fusion is considered at the age of 14 years and marginal error of 3 years is added, the girls might be of the age of 17.”

Thus from the aforesaid evidence and in absence of any other documentary evidence in respect of date of birth of "S", the court will have to reach to the conclusion that at the relevant time when “S” was medically examined, her age was 17 years.

[15] The Appellant was convicted for committing the rape which has taken place on 27th April, 197. Definition of 'rape' is given in Section 375 of the Indian Penal Code. Section 375 of the Indian Penal Code has undergone drastic changes. Prior to substitution of Section 375 of the Indian Penal Code in the year 2013 the “rape” was defined as under :-

Rape: - A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-

First: - Against her will.

Secondly: -without her consent.

Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: - With or without her consent, when she is under sixteen years of age.

Explanation : - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: - Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.

Since the Appellant is convicted for the incident that had occurred in the year 1997, his case will be covered by definition as it was there in the statute book prior to Amendment in the Indian Penal Code. That definition of “rape” shows that consent is immaterial if the victim is under the age of 16 years.

[16] In the present case, in view of only available material in the nature of evidence of Dr. Vidya, it is clear that at the relevant time, age of "S" was 17 years thus, "S" was of age of consent.

[17] In that backdrop, let's scrutinize the evidence of "S". Her evidence would reveal that she was residing at Nanded in Gokulnagar locality with her grand-mother. PW No.4 Parvati is her friend. She went alongwith Parvati for pilgrimage after obtaining permission from her grand-mother.

[18] Her evidence would further reveal that they were returning alongwith grand-father of Parvati (who was referred by “S” in her oral evidence as “Paru”). They went to watch movie in cinema theater at Purna. Her evidence discloses that Appellant – Sanju is the friend of husband of Parvati. Her evidence would further disclose that, she and Parvati were required to leave the Cinema theater in the middle because some boys started teasing her and Paru and thereafter they came to Railway Station, Purna. Her evidence further discloses that they boarded Purna Railway Station at 9.30 p.m. and reached at Nanded at 10.00 O'clock in night. She claims in her evidence that since it was night time, they three slept on Railway platform at Nanded.

[19] According to the evidence of “S” when grand-father of Parvati was in deep sleep, she and Parvati boarded in another train, which was standing on Railway Station. That train was going towards the direction of Purna. Her evidence would further disclose that in between Railway Station, Chudawa and Purna Railway Station, the Appellant was pulling her hand. That time she found that Parvati was not nearby. According to her evidence, Appellant pulled her in the latrine and there he committed sexual intercourse with her; due to that her private part was bleeding.

[20] On closure scrutiny of evidence of "S", it appears that that there are contradictions and omissions in her previous statement recorded by the Police. All the contradictions are duly proved. Her claim in her examination-in-chief that she awoke in between Railway Station, Chudawa and Railway Station, Purna because the Appellant was pulling her hand, is also proved omission. Further her claim in her examination-in-chief that the Appellant pressed her mouth and committed sexual intercourse with her, is also proved omission.

[21] Evidence of PW No.4 – Parvati and "S" clearly reveal that they alongwith grand father of Parvati came from Purna to Nanded and they were sleeping on the Railway platform of Nanded Railway Station.

When these two ladies alongwith grand-father of Parvati came from Purna to Nanded however, as they were unable to go their home because of the night and, therefore, they were sleeping on the Railway platform, there was no reason for these two ladies to again board a train going towards the direction of Purna.

[22] Relevant portion from the evidence of "S" in that behalf can be reproduced as under :-

“ We 3 boarded in a train at Railway Station, Purna by about 9.30 p.m. and we reached Nanded Railway Station at about 10 – 10.30 p.m. Because it was late in the night, I, PW – Parubai and her grand father slept on the Railway Station. The grand father of PW – Paru scolded her saying that we have unnecessarily gone to the Cinema show. Thereafter, my friend PW – Parubai and me kept quiet till her grand father was in slumber. After he was asleep, I and PW – Parubai boarded in another train which was standing at the platform. That train was going in the direction of Purna...”

The aforesaid evidence also gets support from the evidence of PW No.4 – Parvati. Her evidence would disclose that "S", Parvati (PW No.4) and Appellant boarded the train.

[23] According to the evidence of "S", immediately she narrated about the sexual act on her to Parvati. Evidence of "S" would reveal that after the said act, Parvati and "S" resided for 4 to 5 days at Aurangabad, in the house of husband of Parvati. It is pertinent to note that though ample opportunity was available to “S”, she did not report the incident of commission of rape on her to the Police.

[24] The medical evidence in respect of rape is not clinching. Further chemical analysis report is not much helpful to the prosecution case. According to "S" at the time of commission of offence, she was wearing sari. Said sari was not seized. Exhibit – 36 is only in respect of

seizure of petticoat of "S", which was seized from the house of husband of Parvati. That fact clearly shows that she resided there and inspite of that no report was lodged against the present Appellant.

[25] Overall survey show that prosecution has not proved beyond reasonable doubt that the Appellant is guilty of committing an offence punishable under Section 376 of the Indian Penal Code. Evidence of "S" is not trustworthy. It has suffered from material omissions and contradictions. In that view of the matter, conviction of the Appellant cannot be sustained. That leads me to pass the following order :-

ORDER

(i) Criminal Appeal is allowed.

(ii) Judgment and Order of conviction dated 3rd November, 2000 passed by the learned Sessions Judge, Nanded, District – Nanded in Sessions Case No.182 Of 1997, thereby convicting the Appellant for the offence punishable under Section 376 of the Indian Penal Code, is hereby quashed and set aside.

(iii) Bail bonds of the Appellant stand cancelled.

(iv) Fine amount, if any paid, be refunded to the Appellant.

(V.M. DESHPANDE, J.)