

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 48 OF 2001

Ravindra @ Balu s/o. Sonaji Hivrale,
Age 27 years, Occu. Labourer,
R/o. Village Lad Savangi,
Tq. & Dist. Aurangabad.

....Appellant.

Versus

State of Maharashtra,
Through P.S. karmad,
Dist. Aurangabad.

....Respondent.

Mr. R.S. Deshmukh, Advocate for appellant.
Mr. M.M. Nerlikar, APP for State.

**CORAM : T.V. NALAWADE, J.
RESERVED ON : 16/02/2015
PRONOUNCED ON : 24/02/2015**

JUDGMENT :

1) The appeal is filed against judgment and order of Sessions Case No. 27/1996 which was pending in the Court of Additional Sessions Judge, Aurangabad. The Trial Court has convicted and sentenced the appellant for offences punishable under sections 363, 366-A and 376 of Indian Penal Code. Maximum sentence of R.I. for seven years is given and all the substantive sentences are to run concurrently. Both the sides are heard.

2) Prosecutrix is a daughter of complainant Anna (PW 1). She was studying in 9th standard in a school from Zilla Parishad at Ladsavangi, Tahsil and District Aurangabad at the relevant time. At the relevant time, she was aged about 14 years. A sister of the appellant/accused was a friend of the prosecutrix and the prosecutrix used to visit the house of the said friend frequently. The accused was running a cycle shop at the relevant time near his house and so, he could develop sexual relationship with the prosecutrix. He promised her to marry with her and kept the relationship with her. She became pregnant.

3) Prosecutrix was carrying of about two months. On 11.10.1995 at about 8.30 a.m. when prosecutrix visited the house of accused, he took her to a field and there, he said that he would take her to Aurangabad where he would marry her. He took her first to village Adegaon (Sadak) and then to Aurangabad. In Aurangabad, accused took a room on rent basis where he kept the prosecutrix. Maternal uncle of the accused was making arrangement of their lunch, dinner etc. She was kept there till 18.10.1995.

4) In the meanwhile, when the father of the prosecutrix

realized that prosecutrix was not available at home on 11.10.1995, after the morning, he searched for her. He took the search at various places of his relatives and then on 14.10.1995 he gave missing report in Karmad Police Station.

5) A person from the village of the complainant noticed that accused was posting letters in the post box of village. He and some other persons had suspicion against the appellant that he had taken the prosecutrix away. They took his letter in custody and from that letter, they got the address of the prosecutrix from Aurangabad. Then the relatives of the parents of the accused were contacted and the prosecutrix was brought to her village. She was taken to Karmad Police Station, where her statement came to be recorded. As her age was around 14 years, crime came to be registered for aforesaid offences against the appellant. During the course of investigation, statements of parents and other witnesses came to be recorded. Prosecutrix and accused were referred for medical examination. It became clear that prosecutrix was pregnant from appellant. The statement of land-lady of the house, where the prosecutrix was kept by the accused came to be recorded and after completion of investigation, chargesheet came to be filed for aforesaid offences. The charge was framed and plea was recorded.

Accused took the defence of total denial. It appears that during cross examination, the defence counsel tried to develop defence of consent of prosecutrix. It was also suggested that the prosecutrix was major, but the accused was minor at the relevant time. No such probability could be created. The Trial Court has believed the witnesses and has convicted the appellant for all the aforesaid offences. The same points were argued in this appeal by the learned counsel for the appellant.

6) For proving the offence of kidnapping and also for proving the offence of rape, in view of the defence taken by the accused, it was necessary for prosecution to prove that the age of the prosecutrix was below 18 years at the relevant time. If the age of the prosecutrix was below 16 years, then there was no question of considering the defence of consent of prosecutrix for giving decision on the charge of rape. In **Criminal Appeal No. 499/2012** decided with **Criminal Appeal No. 500/2012 on 11.9.2013 [Between Mahesh Tarachand Suryawanshi Vs. State of Maharashtra]**, this Court had an opportunity to refer the relevant provisions of Evidence Act and also the case law developed on the point of determination of the age of prosecutrix. The observations are as under :-

""13. 'Age' as ingredient of both the

aforesaid offences is required to be proved beyond reasonable doubt. This 'proof' under section 3 of Evidence Act need to be like proof of any other fact in criminal case. Oral evidence as to the age may always be available in such a case. Where a person gives evidence on oath, the Court is expected to start with presumption that he has spoken the truth. Only because in a case like present one, when there is oral evidence on age and it is given by the interested witnesses like mother or father, the Court is expected to look for corroboration. Corroboration need not be only of expert evidence. Corroboration may be of circumstances which may differ for each case. The opinion of doctor on clinical or radiological examination cannot be accepted straight away as a legal proof. The margin of error is of two years on either side even when the age is ascertained on the basis of radiological examination. [Reliance placed on **AIR 1982 SUPREME COURT 1297 [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Ors.]**. It is only medical opinion and other evidence including oral evidence cannot be discarded only because the medical evidence is in conflict with the oral evidence. Further, the medical evidence cannot stand against entries made in birth register, which are properly authenticated. Entry made in birth register has presumptive value in view of section 17 (2) of Birth and Death Registration Act, 1969

and this position of law needs to be kept in mind, when there is conflict between medical evidence and the other evidence.

14. In view of section 35 of Evidence Act, the entry made in school register about the date of birth also needs to be treated as relevant. Such register is kept in regular discharge of duty by school and it is required to be kept as per the Rules made by the State Government. When such entry was made before starting of dispute, many years prior to the commission of offence and when entry is proved by giving oral evidence of the concerned, due weight needs to be given to such entry. Such entries need to be treated as relevant and admissible in evidence, though such entry cannot form sole clinching factor for determining the age. It has no presumptive value like in the case of entry made in birth register as already observed."

7) On the aforesaid point, the learned counsel for appellant placed reliance on some reported case like **1997 Cri.L.J. 4199 Bombay High Court Aurangabad Bench [Prakash s/o. Sakharam Mandale Vs. The State of Maharashtra], AIR 2009 SUPREME COURT 314 [Baboo Pasi Vs. State of Jharkhand and Anr.] and AIR 2010 SC 392 [Sunil Vs. State of Haryana]**. There cannot be dispute over

the propositions made in the aforesaid cases. In the first case, Bombay High Court has observed that for proof of age, the testimony of parents of prosecutrix can be considered, but it needs to be corroborated by surrounding circumstances and medical evidence. In the second case, the Apex Court observed that Medical Boards' opinion based on radiological examination is useful guiding factor for deciding the age though the opinion *per-say* is not conclusive proof of age. In the last case, it is observed by the Apex Court that when reliance is placed on the school record for proving the age, the prosecutrix need to produce the record like admission form and other record on the basis of which the entry in the school register was made. In the present case, there is not only the evidence of the parents and the prosecutrix on the age, but there is also the evidence of school record and there is the medical evidence. In view of the observations made by this Court and the provisions discussed, it can be said that the Court has to start with the evidence of parents given on age and then the Court needs to find out as to whether the circumstances and other material is consistent with the oral evidence of the parents and it gives necessary corroboration. This approach needs to be adopted when there is no record of birth certificate.

8) The learned counsel for appellant placed reliance on two more reported cases like **2013 AIR SCW 2987 [Deepak Gulati Vs. State of Haryana]** and **AIR 1995 SUPREME COURT 2169 [Shyam and Anr. Vs. State of Maharashtra]**.

In these two cases, in view of the facts of the cases, the Apex Court held that there was possibility of consent of prosecutrix. In the first case, there was a charge for the offence punishable under section 376 of I.P.C. and in the second case, there was a charge for the offence punishable under section 366 of I.P.C. If in a case, the prosecution is able to prove that the age of the prosecutrix was below 16 years, then there cannot be question of consent for offence of rape and the Court is not expected to find out as to whether the girl was mature enough to understand what was good for her and in that case, the Court can convict the accused for offence punishable under section 363 of I.P.C. also. In view of this position of law, the two cases need not be referred in the present matter, if the prosecution is able to prove that the age of the prosecutrix was below 16 years at the relevant time. If the age was above 16 years, the observations made by the Apex Court can be considered in favour of accused.

9) The learned APP has placed reliance on two cases reported as **AIR 1981 SUPREME COURT 361 [Harpal Singh**

and Anr. Vs. State of Himachal Pradesh] and 1990 (2) Mah LR 696 BOMBAY HIGH COURT [Anil Pundalik Gaikwad Vs. The State of Maharashtra]. In the second case, the High Court has discussed the importance of entry made in the school register regarding date of birth. The High Court has also discussed the defences available to accused in such a case when the age of the prosecutrix is below 16 years. It is made clear that when it is proved that the age of the prosecutrix was below 16 years, there is no possibility of proving consent for getting acquittal for the offence of rape.

10) Anna (PW 1), the father of the prosecutrix has given evidence that at the relevant time, the prosecutrix was studying in 9th standard in Zilla Parishad School of Ladsavangi and her age was 14 years. He is educated up to 4th standard and it can be said that he is not that literate to remember the dates of birth of his issues after so many years. His evidence was recorded on 4.8.2000 when the incident in question took place in October 1995. On that day, according to him, the age of his eldest daughter was 25 years and the age of his son Kalyan was 22 years. His eldest daughter was married and the prosecutrix was youngest issue. Thus, even Kalyan was not major in the year 1995 as per the evidence given during defence of the accused.

Thus, nothing is brought on the record during his cross examination to show that the prosecutrix was probably major at the relevant time. He gave missing report on 14.10.1995 and on that day, he had no clue that the accused was behind the incident. In the missing report at Exh. 8, PW 1 had given the age of prosecutrix as 14 years. This circumstance needs to be considered in support of the case of prosecution as even the suspicion was not expressed on accused on that day by the complainant.

11) The prosecutrix (PW 7) has given evidence that at the relevant time, she was studying in 9th standard. She gave her age as 18 years, when her evidence was recorded on 18.8.2000. She gave report to police on 18.10.1995 and in the report, she had given her age as 14 years. In the cross examination, she has specifically stated that her age was 14 years at the relevant time. She has admitted that she had studied up to 4th standard in one school and after that she was admitted in another school. She has denied that she failed in any class. From the nature of evidence, it can be said that she had no sufficient understanding and she even does not know the percentage of marks required to be secured for getting through. She has denied the suggestion given to her that she was of 20

years age at the relevant time. She has also not admitted that the accused was aged about 15 years. Thus, nothing is brought on the record in the evidence of prosecutrix to create probability that she was major or she had crossed the age of 16 years at the relevant time. The other cross examination is made to create the probability that there was her consent.

12) Pandit Kshirsagar (PW 12), the Head-Master of the Central School (Zilla Parishad Primary School) from Ladsavangi is examine to prove the date of birth of prosecutrix recorded in the school register. Appellant's counsel took the objection to his evidence by submitting that this witness had not taken entry in the record and so, his evidence is of no use. Such defence is not available as the evidence is given on the document, register which is expected to be kept by the school for running the school. The relevant provisions are already discussed. The entries made in the school register are always relevant and observations in that regard are also made. The evidence of PW 12 shows that as per the information supplied by the parents of prosecutrix, the date of birth was recorded and it was 8.1.1982. The extract of the entry made in the register is proved as Exh. 63. The application given for admission was not produced, but this circumstance cannot make any change as this record was

made long back, in the year 1987, when the prosecutrix was admitted in the school first time. Necessary weight needs to be given to this entry. There is not only this entry in the register, but there are other entries made at the relevant time for admission.

13) Choudhary (PW 8), a teacher of Secondary School of Zilla Parishad from Ladsavangi has given evidence on entry of date of birth made in his school register. This entry was, however, made on the basis of transfer certificate issued by the previous school, primary school. The same date viz. 8.1.1982 is recorded in this school also. The defence counsel has brought on the record few circumstances showing that there was fire in the school and the record was burnt. It can be said that this school reconstructed the record including the school register. As there was the record of previous school, where the prosecutrix studied from 1st to 4th standard, not much can be made out due to circumstance that the record of secondary school was burnt. As per the record of secondary school, the prosecutrix was admitted in this school on 20.6.1995 for 5th standard and this circumstance is consistent with the record of the previous school. This Court has no hesitation to hold that this circumstantial evidence is relevant and it gives necessary

corroboration to the evidence of father of prosecutrix.

14) There is the opinion of Medical Expert also on the point of age of prosecutrix. Dr. Kulkarni (PW 13) has given evidence that on the basis of occification test, he formed opinion that the age of the prosecutrix, at the relevant time, was between 14 and 16 years. The opinion is at Exh. 67. In the cross examination, the defence has brought on the record the grounds, particulars about the age determined by this witness and the doctor has stated that the age was above 14 years, but it was below 16 years. Though it is an opinion about approximate age, this evidence is consistent with the oral evidence given by the father and the aforesaid record. This witness has denied the suggestion given by the defence counsel that the age of the prosecutrix was above 20 years. The reasoning, the particulars of appearance of fusion of the relevant centers are given in Exh. 67. In the statement given under section 313 of Cr.P.C., the accused has stated that he does not know anything about the opinion given by this witness.

15) Dr. Kulkarni (PW 13) has given evidence on age of the accused also. There is need to discuss this evidence as suggestions are given during cross examination of the witnesses

that the age of the accused was 14 years at the relevant time. The age of the accused was also determined on the basis of occification test. According to this witness, the age of the accused was above 20 years at the relevant time. The particulars of the fusion of relevant centers are given in Exh. 66. There is no reason to disbelieve this witness in respect of this opinion also. The accused has denied in the statement given under section 313 of Cr.P.C. that his age was above 20 years, but he has not dared to step in to witness box or produce relevant record about the date of birth. Thus, no probability at all is created by the accused that his age was below 16 or 18 years at the relevant time. Thus, there is more than sufficient evidence to prove that the age of the prosecutrix was below 16 years at the relevant time and the age of the accused was above 20 years. There is one more circumstance that the accused was making earning at the relevant time and he was running a cycle shop.

16) For proving the offences of kidnapping and rape, there is the evidence of prosecutrix. To give corroboration to the evidence of prosecutrix, there is the evidence of her father and there is the evidence of some other witnesses. Thus, there is circumstantial evidence to corroborate the version of the prosecutrix. The prosecutrix (PW 7) has given evidence that a

sister of the accused was her friend and so, she used to visit the house of the accused. In the cross examination of the prosecutrix, it is brought on the record by the defence that the accused also used to visit the house of prosecutrix as mother of the accused was working in the house of prosecutrix. The prosecutrix has given evidence that there was love affair between her and accused and they had developed sexual relations and they were used to have sex for about three months prior to the date of incident. She has specifically given evidence that as a result of relationship with accused, she was carrying of two months at the relevant time. She has given evidence that accused used to say to her that he wanted to marry with her.

17) The prosecutrix (PW 7) has deposed that on 11.10.1995, the date of incident of kidnapping, she had gone to the house of accused at 8.00 a.m. She has deposed that from there, accused took her to the field where there was standing crop of maze and she was concealed there. She has deposed that in this field, they decided to go to Aurangabad, marry there and live there by taking a room on rent basis. She has deposed that on 11.10.1995, from this field, accused took her towards Aurangabad and they reached Aurangabad on morning of 12.10.1995. She has deposed that accused took a room of a

Muslim person on rent basis and she was kept there by the accused. She has specifically stated in her evidence that accused had taken her to Aurangabad without taking the consent of her parents. She has given evidence that on 18.10.1995 she was taken to police station first of Aurangabad and then to police station of her village and till that time, she was kept in this room by the accused.

18) In the cross examination of prosecutrix (PW 7), it is brought on the record by the defence counsel that accused had taken sexual intercourse with her even in the aforesaid field after the incident of kidnapping. She has deposed that by giving promise of marriage, accused had taken sexual intercourse with her and accused had taken her to Aurangabad. In the cross examination, she has stated that accused cheated her. She has stated in her cross examination that due to fear, she did not narrate the incident to anybody immediately. Surprisingly, the learned counsel for the accused gave her suggestion that she had kept relations with others, but this suggestion is denied by the prosecutrix. It appears that this suggestion was given as the prosecutrix was pregnant and there was no room to escape. The evidence of prosecutrix shows that the accused knew that she was pregnant from him and after that, he took her to

Aurangabad and he had given promise of marriage. It is brought on the record during her cross examination by the defence that she used to go to accused whenever accused had called her.

19) In the cross examination of prosecutrix (PW 7), it is brought on the record that accused does not belong to her caste. The defence has tried to suggest that due to this caste problem, there was objection from her parents to marry. The prosecutrix has denied that false report was given by her against the accused as the accused belongs to different caste.

20) The defence could not bring any other probability in favour of the accused on the record. The F.I.R. given by prosecutrix, Exh. 16, is consistent on material points with the version of prosecutrix. The F.I.R. has given necessary corroboration to her version. The F.I.R. was given on 18.10.1995, the date, when she was rescued and she was taken out of the aforesaid room.

21) Anna (PW 1), the father of prosecutrix has given evidence that at 12.00 noon on 11.12.1995 he realized that the prosecutrix was not at home and she was missing. He has deposed that they were searching to trace the prosecutrix till

14.10.1995 and ultimately, they gave missing report on 14.10.1995. The missing report is at Exh. 8. The evidence of Anna shows that accused had no talk with him and there was no consent of parents of prosecutrix for taking the prosecutrix to Aurangabad. His evidence also shows that prosecutrix disclosed to him the incident when she was traced on 18.10.1995.

22) Zaibunnisa (PW 3), the land-lady of a room, where the prosecutrix was kept by the accused has given evidence that the accused had taken a room from her on rent basis. She has deposed that accused had brought a girl with him and they had lived there for about 2 to 4 days. This lady lives in other locality. She has deposed that this couple had informed to her that they were husband and wife. Her evidence shows that no rent receipt was issued. Nothing is brought on the record to create the probability that this witness had any reason to give false evidence against the accused. She is independent witness and her evidence gives corroboration to the version of the prosecutrix.

23) Shantaram (PW 4) lives in the locality where the aforesaid room is situated in Aurangabad. He has given evidence that accused was living with prosecutrix in the aforesaid room

and his house is situated in the vicinity of this room. He identified both the accused and the prosecutrix in the Court. This witness is also independent witness and nothing could be brought on the record during his cross examination to create the probability that he was giving false evidence against the accused. His evidence is also supporting the version of prosecutrix.

24) In addition to aforesaid evidence, there is the evidence of one Ankush (PW 2) to show that he helped the father of prosecutrix to trace the prosecutrix. Though this witness is a relative of the family of the prosecutrix, there is circumstantial check to his evidence. He has given evidence that he noticed that accused was posting letter in Post Box at Ladsavangi and as he had suspicion against the accused, he took the inland letter in his custody. According to him, from the address written on the inland letter, he realized that accused had kept the prosecutrix in Aurangabad. His evidence shows that he first approached mother of the accused, he somehow convinced the mother of the accused and then they all went to address appearing on the inland letter and there they took the prosecutrix in the custody. The inland letter is on the record and this evidence is consistent with the version of prosecutrix and there is also circumstantial

check to the evidence of Ankush as this letter was referred to Handwriting Expert. The defence has not disputed that when the prosecutrix was medically examined on 19.10.1995, she was pregnant. Exh. 69, the medical certificate shows that she was carrying of 26 weeks. Much was argued by the defence counsel on this circumstance and it was submitted that it does not look probable that the parents of the prosecutrix had not noticed that prosecutrix was pregnant when she was carrying of 26 weeks. This submission is hypothetical in nature. The height of the prosecutrix was 5 feet 5 inches. Nothing was suggested to the doctor to show that only from physical appearance, it was possible for layman to notice that the prosecutrix was pregnant. Though in the present case, D.N.A. test was not conducted, the aforesaid evidence is more than sufficient to prove that the prosecutrix was pregnant from the accused. This circumstance is again consistent with the version of prosecutrix and it gives necessary corroboration.

25) The aforesaid letter which was taken in custody by Ankush was handed over to police. This letter was referred to Handwriting Expert along with specimen handwriting of accused. Dhotre (PW 10), Expert has given evidence that there is similarity in the handwriting appearing on the inland letter and

the handwriting of the accused. This opinion again supports the case of prosecution. This letter was addressed to the prosecutrix and the address is the same where the prosecution was found in Aurangabad.

26) The aforesaid evidence is more than sufficient for proving the offences punishable under sections 363, 366-A, 376 of I.P.C. The Trial Court has correctly appreciated the evidence. There is no possibility of interference in the decision given by the Trial Court. On the point of sentence, it can be said that the sentence of seven years is the minimum possible sentence in such a case. So, there is no possibility to interference in the sentence also.

27) In the result, the appeal stands dismissed.

[T.V. NALAWADE, J.]

ssc/