

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 366 OF 2001

Bagatsing S/o Fandu Singh
Jalwal, Age : 17 years,
Occu.: Nil, R/o Jumanwade
Taluka Vaijapur, Dist. Aurangabad .. Appellant

Vs.

The State of Maharashtra .. Respondent

Mr. Zia-Ul-Mustafa, Advocate for the appellant
Mrs. B.B. Gunjal, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.
RESERVED ON : 12/08/2015
PRONOUNCED ON : 26/08/2015

JUDGMENT :

Heard both sides.

2. Aggrieved by the conviction of the present appellant by the learned Additional Sessions Judge, Aurangabad vide judgment and order dated 13/07/2001 passed in Sessions Case No. 17 of 2000 for the offences punishable under section 376(2)(f) and section 323 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5000/-, in default to suffer further rigorous

imprisonment for six months, with no separate sentence for the offence punishable under section 323 of the Indian Penal Code, the present appeal is preferred by the original accused. The appellant, however, was acquitted of the offence punishable under section 377 of the Indian Penal Code.

3. The prosecution case in short is as under:-

. That the victim of the offence P.W. 1 was around 8 - 9 years old girl at the time of the occurrence on 30/9/1999 at around 12:45 pm in the noon at village Jamanwadi, Tq. Vaijapur, Dist. Aurangabad. The victim alongwith her school mates was proceeding to her school. At that time, the present appellant came from one nearby field and dragged the victim in the said field. Her schoolmate girls fled away to call the teacher at the spot of occurrence. The teacher however did not give any response. The present appellant in the meantime, committed forcible sexual intercourse with the victim girl. Firstly, he put his penis in her mouth and, thereafter, committed forcible intercourse with her. In the meantime, the schoolmates had brought the

uncle and uncle's wife of the prosecutrix at the spot. The appellant had left the place. The victim was brought to the Police Station, Vaijapur, wherefrom she was referred to Medical Hospital at Vaijapur. There was rupture to the hymen. Victim was unconscious. Stitches to the private part were required to be given.

. F.I.R. of the victim was recorded on 30/9/1999. Thereafter she was sent to District Hospital i.e. GHATI on the next day i.e. on 1/10/1999. Investigation was carried. The medical evidence was collected. Panchanama of the spot of occurrence was prepared. Necessary articles like clothes etc. of the victim and the appellant were seized. The property was sent to the Chemical Analyzer and ultimately the chargesheet was filed.

4. Before the learned Additional Sessions Judge, Aurangabad, in all 12 witnesses were examined to prove all the above facts.

5. The victim was examined before the learned Additional Sessions Judge. Though the learned

Additional Sessions Judge was satisfied that the victim was able to understand the questions put to her and answer them prudently. However, as regards the facts of the case, however, the victim girl who was hardly eight years old, was unable to make statement in the witness box. Therefore, the prosecution declared her hostile. In her cross-examination at the hands of the prosecution, she resultantly narrated the incident. However, in cross-examination from the side of the defence, she admitted that her father has accompanied her to the Court. The contents of the F.I.R. and some other papers were read over to her. She was asked by her father to depose likewise. She was asked to remember properly. She also deposed that as she fell unconscious, she was not knowing about the incident but the Police had warned her to depose likewise in the Court.

6. One of her schoolmates i.e. P.W. 4 Sunita, her cousin sister, however, narrated the incident of dragging of the victim by the present appellant in the field, she running away to the teacher and, thereafter, accompanying with the uncle of the victim at the place,

finding the victim there in injured condition.

7. Medical evidence of P.W. 3 Dr. Juthika Jadhav at Government Hospital at Aurangabad alongwith the medical certificate issued by her at Exhibit 29 proved that there was rupture of hymen. P.W. 9 Dr. Subhash Khillare had also deposed about these facts. The peripheral evidence like panchanama of spot of occurrence, cloth seizure panchanama and the Chemical Analyzer report also corroborated the case of prosecution.

8. The defence of the appellant, however, was of denial. Alternatively, he submitted that at the time of incident, he was below 16 years of age and, therefore, should be tried by the Juvenile Court. The third of the defence was that he was an insane.

. According to the prosecution case, the appellant was 17 years old at the time of occurrence.

9. The learned Additional Sessions Judge found that though 8 years old victim was unable earlier to

give details of the incident, during cross-examination at the hands of the learned A.P.P., she deposed all the facts. Further, though she deposed that she was tutored by the father, the statement of P.W. 4 – Sunita as supported by the medical evidence, in view of the learned Additional Sessions Judge was sufficient in proving the prosecution case. Hence the conviction and sentence, as detailed supra, came to be recorded.

10. Mr. Zia-Ul-Mustafa, learned counsel for the appellant submitted that the learned Additional Sessions Judge has wrongly brushed aside the testimony of the alleged victim itself and the peripheral evidence was considered. Alternatively, he submitted that at the time of occurrence, as per the prosecution itself, the appellant was 17 years old, i.e. below 18 years of age. Therefore, relying on the definition of "child in conflict with law", as provided by section 2(k) and section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter, referred to as "**Act of 2000**"), as amplified by the ratio in the cases of "**Hari Ram Vs. State of Maharashtra**" 2009 DGLS (Soft.) 646 and "**Dharambir Vs. State (NCT of Delhi) and anr.**",

2010 All M.R. (Cri.) 2300, he submitted that benefit of the provisions of the said Act be also extended to the present appellant.

11. Learned A.P.P. however opposed all the pleas. The reasoning of the learned Additional Sessions Judge was supported by her.

12. On the basis of this material, following points arise for my determination:-

I) Whether the present appellant was a child in conflict with law at the time of occurrence ?

II) Whether the prosecution has proved that on 30/9/1999 at about 12:45 pm at village Jumanwadi, the present appellant has committed forcible sexual intercourse with the victim, aged 9 years ?

My findings to both the points are in the affirmative. In the result, though the conviction is confirmed, no sentence is imposed in view of the fact that the appellant was a child in conflict with law during the relevant period, for the reasons to follow.

R E A S O N S

13. The reasoning of the learned Additional Sessions Judge cannot be faulted with. The victim of the offence was innocent enough to be apprehensive in the witness box. Initially, she did not depose anything regarding the case. However, during cross-examination, at the hands of the learned A.P.P., she narrated all the facts. However, when she faced cross-examination from the defence side, she was straightforward enough to admit the facts as detailed supra.

14. Thus, though in normal course, the prosecution case could have been doubted, the statement of P.W. 4 – Suman, coupled with the fact that the victim was found bleeding at the spot and the case is corroborated by two Medical Officers and further P.W. 3 Dr. Juthika Jadhav making a statement in the cross-examination that though she may have forgotten some details of examination of the patient in a given case, the present case, however, was unique where minor's hymen was found ruptured. Therefore, she was required to give anesthesia to the

victim at the time of examining her. In that view of the matter, no fault with the reasoning of the learned Additional Sessions Judge can be found.

15. The appellant however requires to be extended benefit of the provisions of the Act of 2000 in view of the above quoted provisions as amplified in "**Hari Ram Vs. State of Maharashtra**" and "**Dharambir Vs. State (NCT of Delhi) and anr.**" (cited supra).

16. In the case of "**Dharambir**", cited supra, the appellant was convicted for the offences punishable under section 302 and 307 read with 34 of Indian Penal code. The offence in question, was committed on 25th August, 1991, when the appellant was 16 years 9 months 8 days old and when, the Juvenile Justice Act, 1986 (for short, "Act of 1986") was holding the field. However, in view of the provisions of the Act of 2000, it was held that the benefit of the same will have to be extended to the appellant though, on facts, it was found by the Hon'ble Supreme Court that the offence was committed by the appellant therein, who, by the time, was 35 years old and had undergone imprisonment of

2 years and more. In the said matter, the Supreme Court, while sustaining the conviction, quashed the sentences.

17. In the present case before us, at the time of occurrence, as per the prosecution, the appellant was 17 years old i.e. below 18 years of age. In the circumstances, in view of the provisions of Act of 2000, there cannot be any sentence to the appellant.

18. The natural course therefore would have been for remanding the case for trial by the Juvenile Justice Board. In the case of "**Dharambir**", cited supra, the Supreme Court has taken into consideration the fact of lapse of time, the appellant there not only attaining majority but also becoming a middle aged person. It was further taken into consideration the period of sentences undergone by him. In the circumstances, instead of relegating the matter to the Juvenile Justice Board, appeal was disposed of by maintaining the conviction. On the similar lines, the following order:-

19. The conviction of the present appellant

recorded by the learned Additional Sessions Judge, Aurangabad vide judgment and order dated 13/07/2001 in Sessions Case No. 17 of 2000 for the offences punishable under section 376(2)(f) and 323 of the Indian Penal Code is hereby maintained. The order of sentence is however quashed and set aside.

20. Muddemal property be disposed of as per the directions issued by the learned Additional Sessions Judge, Aurangabad.

21. Bail bonds of the appellant shall stand cancelled.

22. Criminal Appeal stands disposed of accordingly.

[M.T. JOSHI]
JUDGE

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