

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.548 OF 2014

Hemant s/o. Pandurang Shelar,
Age 32 years, Occ. Prisoner,
r/o. Municipal Colony,
Near Gogadev Temple,
Nalegaon, Ahmednagar

..Appellant
[orig.accused no.2]

Versus

1] The State of Maharashtra,
Through P.S.I., Tophkhana
Police Station, Ahmednagar,
Dist. Ahmednagar

2] Dhanshree Yograj Ujagare,
Age 18 years, Occ. Nil,
r/o. Municipal Colony,
Near Gogadev Temple,
Nalegaon, Ahmednagar

..Respondents

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Mr.N.C.Garud, advocate for appellant

Mrs.R.K.Ladda, APP for respondent no.1

Mr.R.R.Karpe, advocate i/b. Mr.S.S.Deshmukh,
advocate for respondent no.2

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CORAM : M.T. JOSHI, J.

DATE : SEPTEMBER 23, 2015

ORAL JUDGMENT :

Heard both sides.

2] Present appellant, who was convicted by learned Addl. Sessions Judge, Ahmednagar in Sessions Case No.16 of 2013 vide judgment and order dated 25th June, 2014 for the offences punishable under Section 363, 366-A and 376 of Indian Penal Code, has preferred the present appeal.

. He was sentenced to suffer rigorous imprisonment for four years, on each counts for the offences punishable under Section 363 and 366-A of Indian Penal Code and to suffer rigorous imprisonment for seven years for the offence punishable under Section 376 of Indian Penal Code. All the sentences were directed to run concurrently.

3] The prosecution case, in short, is as under :-

. That the prosecutrix, who was fifteen years and four months old, was enticed away by present appellant and under the false promise of marriage, illicit intercourse was committed with her by the appellant by keeping her at Bengaluru, Krushnanagar and Pune. One child is also born of the said relationship and D.N.A. test was positive to prove that present appellant is the biological father of the child, born from the proecutrix.

. Fifteen witnesses were examined by the learned Addl. Sessions Judge, Ahmednagar. Initially, the prosecutrix i.e. PW 5 did not support the prosecution case. She was declared hostile by the prosecution. Thereafter, the case was adjourned for thirteen days. However, thereafter, she supported the prosecution case by answering all the leading questions in the affirmative.

. Learned Addl. Sessions Judge found that the medical evidence and more particularly, the D.N.A. test, have proved the prosecution case beyond reasonable doubt and therefore, the conviction and sentence, as detailed supra, came to be recorded against the appellant. Hence, the present appeal.

4] Mr.Garud, learned counsel for the appellant submits that the prosecutrix has failed to corroborate the prosecution case. There is no evidence that any illicit sexual relationship was established between the appellant and the prosecutrix. In the alternative, he submits that considering the fact that as per the prosecution case itself, this being a case of consensual relationship and the fact that present appellant is behind the bars since 19th August, 2012 i.e. for a period of more than three years, the sentences awarded by learned Addl. Sessions Judge, may be reduced in the facts of the case.

5] Learned APP appearing for respondent no.1 – State and learned counsel for respondent no.2 – complainant opposed the appeal. Both of them submit that the D.N.A. test has clearly proved that present appellant is the biological father of the child born to the prosecutrix. The documentary evidence also proved that the prosecutrix was below sixteen years of age and therefore, they submit that the appeal may be dismissed.

6] On the basis of this material, following points arise for my determination :-

I] Whether the prosecution has proved that the appellant, has, on 24th March, 2012, at about 8:30 p.m., enticed the prosecutrix, who was below sixteen years of age, from Nalegaon, Dist. Ahmednagar ?

II] Whether the prosecution has further proved that the appellant enticed the prosecutrix and took away her from the lawful guardianship of her father, under the false promise of marriage ?

III] Whether the prosecution has further proved that from 24th March, 2012 till 19th August, 2012, the present appellant has committed sexual intercourse with the minor prosecutrix at various places at Bengaluru, Krushnanagar and Pune etc. ?

IV] What order ?

. My findings to point nos.[I] to [III] all are in the affirmative. However, as regards the sentence, the same is reduced to the period of imprisonment already undergone by the appellant.

The Appeal is therefore partly allowed for the reasons to follow.

R E A S O N S

7] Though the prosecutrix had not supported the prosecution case initially; during her cross-examination at the hands of learned APP, lateron, she deposed that the present appellant has under the false promise of marriage, committed sexual intercourse with her. During her cross-examination, at the hands of the defence counsel, she admitted that though she was brought at Ahmednagar from Pune by Police, she did not lodge complaint against the appellant either at Bengaluru, Krushnanagar or Pune. Besides this, the D.N.A. test report at Exhibit 42 regarding the blood samples of the appellant has proved that the appellant is the biological father of the child born to the prosecutrix.

. In that view of the matter, ultimately, relying on the ratio laid down in the case of "**Hem Raj Moti Ram Vs. State of Hariyana**" 2014 ALL M.R. (Cri.) 1908 (S.C.), the learned Addl. Sessions Judge has rightly come to the conclusion that the appellant has committed the offences.

8] Mr.Garud, learned counsel for the appellant, relies on the ratio laid down in the cases of "**S. Varadrajan Vs. State of Madras**" 1964 DGLS (Soft.) 211 and "**Nana Ramchandra Jadhav Vs. State of Maharashtra**" 1984(1) Bom.C.R. 453.

. In the case of "**S. Varadrajan**" (cited supra), finding that there was lack of evidence of persuasion from the side of accused, the distinction will have to be made between taking a minor or allowing a minor to accompany the accused. In that view of the matter, finding that

the girl, who was at the verge of attaining majority, has actively took part in going away from the lawful custody of her father, it was observed that no offence under section 363 of the Indian Penal Code was established.

. In the case of "**Nana Jadhav**" (cited supra), in the similar facts of the case that the prosecutrix aged between 15 and 16 years, was a willing partner, it was found that the substantive sentence of rigorous imprisonment for two years would be sufficient.

9] In the present case, the prosecutrix has not deposed that she has taken active part in going away with the appellant. On the other hand, the prosecution case would show that present appellant had given a false promise to marry her and thus, had enticed her away from the lawful custody of her father.

. In that view of the matter, the ratio laid down in the case of **S. Varadrajan** (cited supra) would not apply to the present case.

10] However, considering all the above facts, in my view, the sentences awarded by learned Addl. Sessions Judge to the present appellant, are harsher.

. Since the prosecutrix was a willing partner in commission of sexual intercourse by the appellant with her at various places where both of them had resided, as detailed supra, for a long period, in my view, the sentence of three years for the offence punishable under Section 376 of Indian Penal Code, would be just and sufficient.

11] Hence, the following order :-

A] The appeal is hereby partly allowed as regards the sentences only.

B] The judgment and order of conviction passed by learned Addl. Sessions Judge, Ahmednagar in Sessions Case No.16 of 2013 dated 25th June, 2014, for the offences punishable under Section 363, 366-A and 376 of Indian Penal Code, is hereby maintained.

C] The order passed by learned Addl. Sessions Judge, Ahmednagar, directing the appellant to suffer rigorous imprisonment for four years, on each counts for the offences punishable under Section 363 and 366-A of Indian Penal Code, is hereby set aside. Similarly, the order directing to suffer rigorous imprisonment for seven years for the offence punishable under Section 376 of Indian Penal Code, is hereby set aside.

. Instead, it is hereby directed that the appellant/accused shall suffer rigorous imprisonment for three years on each counts. All the sentences shall run concurrently.

D] The order of learned Addl. Sessions Judge regarding payment of fine amount, is hereby maintained.

E] The order of learned Addl. Sessions Judge regarding payment of all the compensation amount, is hereby maintained.

F] The appellant/accused be released forthwith, if not required in any other offence.

[M.T. JOSHI, J.]

kbp