

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.200 OF 2014

Prakash Jaganath Pawar

] Appellant

Versus

The State of Maharashtra,
Through Patan Police Station,
Dist. Satara

] Respondent

Smt.. Sarojini Upadhyay, Appointed Advocate,
for the Appellant.

Shri. H.J. Dedhia, A.P.P., for the Respondent-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 17TH APRIL, 2015.

PRONOUNCED ON : 21ST APRIL, 2015.

ORAL JUDGMENT :

1. The Appellant, who stands convicted by the Additional Sessions Judge, Karad, Dist. Satara by Judgment dated 6th July, 2013 in Sessions Case No.60 of 2011, for the offence punishable under Section 376 of the IPC and sentenced to suffer R.I. for 10 years and to pay fine of Rs.1,000/-, in default to undergo further R.I. for 6 months; for the offence punishable under Section 451 of the IPC and sentenced to suffer R.I. for 6 months and to pay fine of Rs.500/-, in default to suffer further R.I. for 2 months; and for the offence punishable under Section 506 of the IPC and

sentenced to suffer R.I. for 6 months and to pay fine of Rs.500/-, in default to suffer R.I. for 2 months, by this Appeal challenges his conviction and sentence.

2. Brief facts, as are necessary, for deciding this Appeal may be stated thus :-

PW-4 the Prosecutrix (*name deliberately withheld to protect her identity*) and the Appellant are residents of same village and knowing each other fairly well. Appellant was also the frequent visitor to the house of the Prosecutrix. As per Prosecution case, about one year prior to 7th March, 2011, the Appellant committed forcible sexual intercourse with Prosecutrix, after ascertaining that there was no one else in the house and closing the door from inside. Then he threatened her not to disclose about the said act to anyone else. Subsequent thereto also, on several occasions he came to her house when she was alone and had forcible sexual intercourse with her. As a result, Prosecutrix missed her menstruation cycle and started suffering from stomach pain. When she informed about the said fact to her cousin sister Archana, she has taken her to the Hospital at Tarle, where she was examined and declared to be pregnant. Then she disclosed the said fact to her parents, who, in their turn, informed about the same to the villagers. Four meetings were held by the

respected persons of the village, in which the Appellant was also confronted about the allegation of the Prosecutrix. The Appellant, however, outrightly denied. Hence, on 7th March, 2013, Prosecutrix went to Patan Police Station and lodged complaint (Exhibit-18) against the Appellant.

3. On her complaint, C.R. No.18 of 2011 came to be registered against the Appellant for the offences punishable under Sections 376 and 506 of the IPC. Investigation of the same was taken over by PW-8 API Balkrishna Gade. On the same day, he arrested the Appellant and referred, both, Prosecutrix and Appellant for medical examination to Rural Hospital, Patan. There PW-6 Dr. Pandurang Satpute examined the Prosecutrix and confirmed that she was pregnant of 24 to 26 weeks. Accordingly, he issued Medical Certificate (Exhibit-23). He also collected blood samples of the Prosecutrix and sent it for D.N.A. test to Forensic Science Laboratory at Kalina, Mumbai. On examination of the Appellant also, he collected the necessary samples of blood, semen, nails, public hairs and sent them to Forensic Science Laboratory for D.N.A. testing and chemical analysis. Further on examination, he found the Appellant to be physically and mentally fit to have sexual intercourse. The Medical Certificate of the Appellant is at Exhibit-24.

4. On the next day, PW-8 API Gade prepared Spot Panchanama in the presence of PW-3 Panch Jotiram Pawar vide Exhibit-16. He also collected School Leaving Certificate of the Prosecutrix (Exhibit-12). On 21st March, 2011, he deputed PW-9 Police Naik Kuber Chavan for carrying the D.N.A. Kit, vaginal swab, public hair and other medical samples of Prosecutrix to the Forensic Science Laboratory.

5. On 18th April, 2011, the Prosecutrix delivered a child in Rural Hospital, Patan. PW-8 API Gade collected the blood sample of the child for D.N.A. test and, on the same day, sent it to the Forensic Science Laboratory, Mumbai through Police Constable No.261 Pawar. On 27th June, 2011, he received D.N.A. Report (Exhibit-30), confirming the parentage of the child to be with the Appellant and Prosecutrix. Accordingly, further to completion of investigation, he submitted Charge-Sheet in the Court against the Appellant.

6. On the case being committed to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-5. Appellant pleaded not guilty and claimed to be tried, raising the defence of false implication.

7. In support of its case, though Prosecution examined in all 9 witnesses, the main reliance of the Prosecution remained on the evidence

of PW-4 the Prosecutrix and the D.N.A. Report (Exhibit-30). On appreciation of this evidence, the Trial Court held the guilt of the Appellant to be proved on all the three counts and convicted and sentenced him, as aforesaid.

8. This Judgment of the Trial Court is being assailed in the present Appeal by learned appointed Advocate for the Appellant Smt. Sarojini Upadhyay, whereas, supported by learned A.P.P. for the Respondent-State Shri. H.J. Dedhia. In my considered opinion, in order to effectively deal with the submissions advanced by them, it would be useful to refer to the evidence on record.

9. This being a case of sexual offence, the vital evidence is of the Prosecutrix herself. If her evidence is found to be convincing, consistent and reliable, then, as per the well crystallized position of law, there is no necessity of seeking corroboration to her testimony from any other source. Conversely, to insist on corroboration in the offences of such nature will be adding insult to her injury. The essential condition, however, for placing implicit reliance on her testimony to rest conviction of Accused on her sole testimony is always that, her testimony should be found by the Court to be cogent, natural and not suffering from any basic infirmities or improbabilities, which may render it unworthy of credence.

10. In the instant case, this Court has to consider essentially two aspects; first, whether Proscutrix, at the time of incident, was a minor i.e. below the age of 16 years?. If it is proved to be so, then the question of consent on her part for the sexual intercourse becomes irrelevant. However, if Prosecutrix fails to bring on record the conclusive and clinching evidence as to her age, then the question of consent on her part assumes significance. In this case, as the Trial Court has held the Prosecutrix to be below the age of 16 years at the time of incident, it becomes necessary to first assess the evidence on this aspect.

11. At the time of lodging the complaint (Exhibit-18) on 7th March, 2011, the Prosecutrix has stated her age to be 18 years. In evidence before the Court recorded on 8th January, 2013, also she has given her age as 18 years. In examination-in-chief itself, she has admitted that she does not remember her date of birth. Prosecution has also not examined her parents or any of her relatives to bring on record the evidence relating to her age or the birth date. Prosecution has relied upon only the School Leaving Certificate (Exhibit-12) proved through the evidence of PW-1 Hariba Jadhav, who was working as Head Master in Zilla Parishad School at Village Borgewadi, where Prosecutrix has studied upto 4th Standard. He has brought with him the general register of admissions of the students in

the school, which, according to him, is maintained in regular course of business. On the basis of the said register, he has stated that the birth date of the Prosecutrix, as mentioned therein, is 29th April, 1995 and she was studying in the said school from 8th May, 2001 to 2nd May, 2006. She has passed 5th Standard from the school and thereafter she stopped coming to the school. The said School Leaving Certificate is issued by the School on 9th March, 2011 i.e. after the complaint was lodged and the offence was registered.

12. In his cross-examination, he has admitted that he has joined the said school as a Primary Teacher in the month of August, 2002. Hence, he is not concerned with the entries in the register made prior to August, 2002. He has further admitted that the entry of the Prosecutrix's name is made in the register prior to 2002. Hence, he has no personal knowledge as to who took entry of Prosecutrix's name in the said register at Serial No.18. He has further admitted that this register is from the year 1999 and he took entries in the said register from the previous register. However, as admitted by him, though the said previous register is maintained in the school, he has not brought it in the Court. Further, he has admitted that in the previous register, the entry relating to the Prosecutrix's birth date is made by his predecessor and, therefore, he cannot say whether the said

entry is true or false. He has also admitted that he has no personal knowledge about the date of birth of the Prosecutrix. It is pertinent to note that the relevant extract of the said register is not got produced and exhibited on record, though he has brought it to the Court.

13. Further, this witness has admitted that Prosecutrix was studying in 5th Standard on 2nd May, 2009, as mentioned in the School Leaving Certificate. At the same time, he has admitted that the Prosecutrix has left the school in the year 2006 itself. Hence, according to his own admissions, there is confusion in respect to the Prosecutrix's date of school leaving. He has admitted that he cannot explain why the date 2nd May, 2009 is mentioned in the School Leaving Certificate. Further he has admitted that unless he goes through previous register, he cannot state with certainty anything about all the dates mentioned in the School Leaving Certificate (Exhibit-12), including the date of Prosecutrix's birth.

14. In such situation, it was incumbent on the Prosecution to bring on record the previous register to prove the correctness of the entries made therein. The Prosecution has, however, not done so. Prosecution has also not examined the concerned person from that school, who has made the entry of the name of the Prosecutrix in the previous register. The law, in

such fact situation, is well settled that though the School Leaving Certificate is admissible in evidence under Section 35 of the Indian Evidence Act, however, the evidentiary value of the contents therein will always depend on the material on the basis of which the entries were recorded therein. Unless the person who made the entry or the person who gave the information about the date of birth is examined, the School Leaving Certificate cannot have much evidential value.

15. In the case of ***Shaikh Feroz, s/o. Shaikh Jainoddin Vs. State of Maharashtra, 2011 ALL MR (Cri) 538***, our own High Court refused to accept the date of birth of the victim girl disclosed in the extract of school admission register on the ground that the entry in the said extract was founded on the earlier entries, which were initially recorded in the primary school in village, where the Prosecutrix was initially admitted. The record of her admission in primary school was not called for. As also, the father of the Prosecutrix did not say that information in the School Leaving Certificate was correct and it was as per his personal knowledge. High Court hence did not accept the entry as to the date of birth of the victim girl in School Leaving Certificate on the ground that it was not duly proved calling the register and also by supporting and corroborating evidence from the mouth of the father, who has allegedly given the information.

16. In the instant case also, the previous general register, on the basis of which the entries were made in the current register, is not produced or proved by the Prosecution. The person who has made entries in the previous register is not examined by the Prosecution. Hence, there is no evidence as to who has given the information about her birth date at the time of her admission in the school. The person who has made the entry in this register, namely, PW-1 Head Master Hariba Jadhav has admitted that he cannot be certain about the dates mentioned in the School Leaving Certificate, unless he fortifies the same with the previous register. The father of the Prosecutrix or, for that sake, even mother is also not examined by the Prosecution to prove the correctness of the birth date mentioned in the school register. Thus, there is absolutely no supporting and corroborating evidence on record from any source to prove the entries made in the School Leaving Certificate, especially, when it is issued much after the registration of the offence and, as admitted by PW-1 Head Master Jadhav, there is no guarantee of the truthfulness of the entries made therein. This School Leaving Certificate (Exhibit-12), therefore, cannot be accepted at all to prove the correct birth date and the age of the Prosecutrix.

17. Once School Leaving Certificate (Exhibit-12) is discarded and not

relied upon as the entries therein being not proved properly by Prosecution, then only evidence that remains on record about the birth date of Prosecutrix is her own testimony. As per her own say, at the time of filing the complaint, she was 18 years of age. In evidence before the Court, she has further admitted that her age mentioned as 18 years in the F.I.R. is correct. Further she has admitted that she does not remember her birth date. Therefore, according to her evidence, at the time of incident, she was above the age of 16 years.

18. Another piece of evidence as to her age is the testimony of PW-7 Dr. Chandrashekhar Karanjkar, who has medically examined her on 24th March, 2011, when she was referred there, after lodging of the complaint. He has referred her for X-Ray and accordingly Radiologist Dr. Sonal Bhosale has taken her X-Ray. From X-Ray Report, PW-7 Dr. Karanjkar found her bony age as 17 to 18 years. This Report, thus, goes against the Prosecution. Even if it is assumed that the alleged incident of forcible sexual intercourse had taken place one year prior to the F.I.R. and her examination by PW-7 Dr. Karanjkar, even then, at the time of incident, her age has to be held as 16 to 17 years. As per the well settled position of law, in case of the age ascertained on the basis of ossification test, the benefit of marginal error of one or two years always has to be extended to

the Accused. Hence, if such benefit is extended to the Appellant, then it has to be held that, even on the basis of this report, the age of Prosecutrix, at the time of the incident, was above 16 years. Hence, she cannot be treated as minor.

19. Once it is held that at the time of incident the Prosecutrix was not below the age of 16 years, then the question whether the sexual intercourse was, with or without her consent, assumes significance. For that purpose, it is necessary to appreciate her evidence. According to her, she was residing along with her parents and younger brother. Her parents used to do labour work, whereas, she was doing household work. She was knowing the Appellant as he was also resident of the same village and of the same locality. There were only two to four houses between her house and the house of the Appellant. Since Appellant was from her village and from the same locality, as deposed by her, Appellant used to come to her house and she was acquainted with him. She has further deposed that he used to come to her house in the noon time in between 12 noon to 1 pm, when she was alone in the house. He was coming in her house and was closing the door of the house. He used to sleep her on ground. When she was trying to shout, he was pressing her mouth and committing forcible sexual intercourse with her. He was also threatening

her not to inform about it to anyone. As per her further evidence, Appellant committed the said act on several times, as a result of which she became pregnant. Then she informed about it to her cousin sister. Thereafter she was examined by the Doctor and then she informed to her parents that she was pregnant. Four meetings were held in the village to settle the matter. However, as Appellant did not accept the liability, the complaint came to be lodged.

20. In cross-examination, she has admitted that there were houses of Jotiram Jagannath Pawar, Kalabai Bandu Pawar, Jalindar Jagannath Pawar, Ananda Balu Pawar and Ankush Shivram Pawar near her house. The house of Jalindar Pawar was adjacent to her house. Thus, it is pertinent to note that, even then she could not succeed in attracting attention of her neighbours in any way, when Appellant was coming to her house or committing sexual intercourse with her. She also did not choose to remain absent from the house either by going to the field for labour work with her parents or to the house of her neighbours, when she was knowing that Appellant was coming to her house at a particular time, only in between 12 noon to 1 pm, when she used to be alone in the house.

21. She has further admitted that prior to the incident, she used to go for employment at the Wind Power Mill. As per her evidence, Appellant

used to come to her house on all these occasions in between 12 noon to 1 pm, after confirming that she was inside the house. He was removing his foot-wears outside the door. After entering the house, he was closing the door of the house. She was seeing that he was closing the door of the house, even then she made no attempt to shout. The sexual intercourse used to be committed in the kitchen room, which is at the middle portion of her house. She has further admitted that she was knowing at the time of second and subsequent incident what Appellant was going to do with her. She has described in detail the entire incident of sexual intercourse. She has further stated that they used to talk during the incident and even after sexual intercourse, for five to ten minutes. She has further admitted that at the time of actual incident, the talk between them was about the sexual act.

22. In considered opinion of this Court, these various admissions given by the Prosecutrix in her cross-examination are more than sufficient to rule out the possibility of the forcible sexual intercourse. Conversely, these admissions spell out the possibility of consensual sex; both of them being adult, knowing each other very well and indulging in sexual act, when used to be alone in the house.

23. This inference can further be fortified from the fact that Prosecutrix

was, though residing with her parents and younger brother, she has not disclosed about the incident to anyone. It is pertinent to note that only after she became pregnant and that too of 24 to 26 weeks and she suffered from stomach pain, she was taken to the Doctor. When Doctor confirmed about her pregnancy, as admitted by her, several meetings were held in the village to convince the Appellant to accept her and as he refused, the complaint is lodged.

24. In addition to the evidence of Prosecutrix, there is evidence of PW-5 Hanamant Kadam, the maternal uncle of the Prosecutrix, who has deposed that in these meetings, for which he was present, they were trying to settle the matter. He has explained 'what to settle the matter means', which, according to him, was that the Appellant should maintain the Prosecutrix. It is clear that only when Appellant refused to accept the responsibility, the complaint of rape is lodged.

25. As per evidence of PW-8 API Gade, the complaint (Exhibit-18) is lodged on 7th March, 2011 and Prosecutrix has delivered the child on 18th April, 2011, indicating thereby that at the time of lodging the complaint, she was about 7 to 8 months pregnant. It becomes difficult to accept the silence on the part of her parents and the Prosecutrix for such a long period. The only reason appearing for the same is that they were insisting

on Prosecutrix and Appellant to get married and as Appellant was not ready for the same, the complaint is lodged.

26. The D.N.A. Report (Exhibit-30) clearly goes to prove that she was pregnant and delivered the child from the Appellant.

27. However, the entire circumstances and evidence brought on record through cross-examination of the Prosecutrix herself, leaves no manner of doubt about the case of consensual sexual intercourse. At-least the case of Prosecutrix that she was subjected to forcible sexual intercourse against her wish and without her consent is difficult to be accepted, as all important probability factor does not echo in favour of her evidence. As aforesaid, the law is also clear that the sole testimony of the Prosecutrix can be relied upon, provided, it is cogent, natural and does not suffer from any basic infirmities and improbabilities. In the facts of the case, which are discussed above, and in the light of the evidence on record, the case of the Prosecution on this aspect suffers from infirmities and improbabilities, especially, on the question whether the sexual intercourse was with consent or without consent of the Prosecutrix.

28. Resultantly, in view of failure of the Prosecution to prove beyond

reasonable doubt the fact that the Appellant has committed sexual intercourse with the Prosecutrix without her consent and against her will, the conviction and sentence of the Appellant, as recorded by the Trial Court, cannot be sustained.

29. Consequently, this Criminal Appeal is allowed. The conviction and sentence of the Appellant is quashed and set aside. Appellant is acquitted for the offences punishable under Sections 376, 451 and 506 of the IPC. As the Appellant is in Jail, he may be released forthwith, if not required in any other case.

30. The fees to be payable to the learned Counsel for the Appellant, appointed from Legal Aid Panel, is quantified at Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.]