

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.956 OF 2010

Sandeep Janaji Konde
aged 19 years, Occ.Education
Residint at Keli Gawarwadi,
Tal.Junnar, Dist.Pune .. Appellant

Versus

The State of Maharashtra
(Through Junnar Police Station) .. Respondent

Mr.D.H.Kumthekar, Advocate for the appellant.

Mr.Deepak Thakre, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 4th AUGUST, 2015

ORAL JUDGMENT :

1 This Appeal is directed against the judgment and order dated 16th November 2010 delivered by the Addl. Sessions Judge, in Sessions Case No.358 of 2008, convicting the appellant who was the sole accused in the said case, of an offence punishable under section 376 of the IPC, and sentencing him to suffer Rigorous Imprisonment for a period of 10 years, and to pay a fine of Rs.10,000/-, in default to suffer Rigorous Imprisonment for six months.

2 The facts of the case, as can be seen from the Column No.16 of the printed prescribed proforma of the police report are as follows :-

That the appellant, during the period of about 5 – 6 months prior to 18th January 2008, had, time to time in the house of the First Informant, committed rape on the minor daughter of the First Informant, aged 16 years, by sometimes giving a false promise of marriage or sometimes by beating, abusing and threatening her. That, by repeatedly committing forcible sexual inter-course with the daughter of the First Informant, the appellant made her pregnant, and the said daughter gave birth to a dead child. The appellant had thus, committed offences punishable under section 376 IPC, 323 IPC, 504 IPC and 506 of the IPC.

3 The prosecution case which could be best gathered from the testimony of the First Informant Kantabai (PW 2), may be stated thus :-

That Kantabai has four children and the victim “V” (name not disclosed to prevent disclosure of identity) is the oldest amongst them. The victim was studying in a school. She was in 8th standard. The appellant was known to the victim and to the family of Kantabai. Fasabai – sister-in-law of Kantabai – from the physical appearance of the victim, suspected that she was indulging in sex with someone, and expressed this suspicion to Kantabai. Kantabai then asked the victim whether she

had any relations with anyone when the victim told her the name of the appellant. The victim told Kantabai that she used to meet the appellant, and that the appellant used to come to her and that, they both were in physical relationship. Kantabai also learnt that the victim had become pregnant from the appellant. She and her husband Maruti (PW 3) then took the victim to Junnar Police Station, but instead of lodging a report with the police, entered into negotiations with the relatives of the appellant. A meeting took place in the village when the appellant and his family members agreed that the appellant would marry the victim. The date of marriage was also fixed as 11/2/2008. In the meantime, the victim delivered a female child, but the child was found to be dead. The father of the appellant thereafter refused to perform the marriage of the appellant with the victim. Kantabai then went to the police station and lodged a report against the appellant alleging commission of the offences punishable under section 376 IPC, 504 IPC, 506 IPC, 420 IPC and 323 of the IPC read with section 34 of the IPC. In the course of investigation, not only the appellant, but his family members were also arrested. They were, however, released under section 169 of the Code of Criminal Procedure. After completion of investigation, a charge-sheet came to be filed against the appellant who was prosecuted and convicted, as aforesaid.

4 The prosecution examined 9(nine) witnesses during the trial. The first witness is the victim herself and the second witness is the First Informant Kantabai. Maruti – husband of Kantabai and father of the victim is the third witness. The fourth witness Pandharinath Lande is the Police Patil of the village in

which the victim and the appellant resided. The fifth witness Dr.Ganesh Ingawale is the Medical Officer attached to the Rural Hospital, Junnar, at the material time. He had examined the victim medically on 21st January 2008. He had also conducted post mortem examination on the dead body of the female child born to the victim. The sixth witness Shivram Date was the Head Master of the New English School in which the victim was studying. He has been examined to show the date of birth of the victim. The seventh witness Fasabai, it may be recalled, is the sister-in-law of Kantabai. The eighth witness Govind, a Head Constable of Police is the one who had performed the Inquest Panchnama in respect of the dead body of the female child born to the victim. The ninth and the last witness Vilas Jadhav, Assistant Police Inspector who was attached to Junnar Police Station at the material time, is the Investigating Officer in the matter.

5 I have heard Mr.D.H. Kumthekar, the learned counsel for the appellant. I have heard Mr.Deepak Thakre, learned APP for the State. With their assistance, I have gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

6 Mr.Kumthekar contended that the conviction of the appellant, as recorded by the trial court, is patently illegal. He submitted that it was clear from the prosecution case itself that the victim was a consenting party to the inter-course that was taking place between the appellant and the victim over a period of time. He submitted that simply because the parents of the appellant refused to have the appellant married to the victim, a false case

alleging rape was registered against the appellant. He also submitted that though an attempt was made to show that the victim was below 16 years of age, at the material time, there was no satisfactory evidence in that regard. He submitted that since there was no evidence to show that the victim, at the material time, was below 16 years of age and that since the victim was a consenting party, there would be no question of the appellant being guilty of an offence punishable under section 376 of the IPC.

7 Mr.Thakre, learned APP, in the course of arguments, conceded that the victim was, apparently, a consenting party. He conceded that the allegation that the appellant had threatened the victim, and had forced her to have sexual inter-course with him, was not acceptable in view of the evidence adduced during the trial, and more particularly, because of the acquittal of the appellant with respect to the offences punishable under section 323 IPC, 504 IPC and 506 of the IPC. He, however, submitted that since the age of the victim was less than 16 years at the material time, the question of her consent was immaterial, and that, the appellant, therefore, was guilty of rape.

8 In spite of the concession made by the learned APP that the evidence *did* indicate the victim to be a consenting party, I have examined the evidence with a view to arriving at a finding on this aspect. Now, in her evidence, the victim has stated that she knew the appellant and that he had been residing near her house. That the appellant was taking education in ITI, Manikpur, and that she got acquainted with the appellant who used to meet her after the school would be over. The appellant used to tell the victim

that he loved her and enquired whether she too loved him, to which the victim had replied in negative. That on one occasion, when the sister of the victim was taken to hospital by the victim's father and mother and when there was nobody in the victim's house, except the victim, the appellant came there and committed rape on her. The appellant had given threats to the victim that he would kill her family members if she disclosed the incident to anyone. That, thereafter, on 2 to 3 times, the appellant similarly raped the victim. That the victim then became pregnant which came within the knowledge of the victim's mother. The victim has then stated about a meeting that took place in the village and about the decision that was arrived at with the aid of the *Tanta Mukti Samiti* in the village, whereby it was agreed that the appellant should marry the victim. The victim also stated that the date of marriage was fixed as 11/02/2008, but that after the baby was born dead, the parents of the appellant refused to have the marriage between the appellant and the victim performed. The evidence of Kantabai shows that what she learnt from the victim was that the victim was having physical relations with the appellant. *Kantabai never claimed that the victim had any time told her that the appellant had kept such physical relations with her against the wish of the victim, or by threatening her. What Kantabai claims as having learned from the victim was that the victim was having physical relations with the appellant and not that the appellant had committed rape on her.*

9 In his evidence, Maruti (PW 3), father of the victim said that when the fact that the victim was pregnant was revealed, and when inquiries were made with the victim, the victim had told

him that the appellant had committed rape on her. Maruti stated that the victim had told him that the appellant had slapped her – a fact which was never stated by the victim herself. Maruti also says about learning that the appellant used to visit the house in the absence of the family members of the victim. He also says about a decision that the appellant would marry the victim taking place, and even the date of marriage being fixed as 11/02/2008.

10 Though the victim and Maruti had tried to suggest that the acts of sexual inter-course committed by the appellant with the victim were without the consent of the victim, it is not possible to believe the same. It may be recalled that Kantabai has never said that the acts of the appellant were against the wishes of the victim, or that the victim, at any time said to Kantabai that the appellant had committed rape on her. Obviously, after the appellant had refused to marry the victim, the relations between the families of the appellant and the victim became strained and a police report alleging commission of rape by the appellant came to be lodged. Evidently, therefore, some statements have been made by the victim and by Maruti to the effect that the appellant had committed 'rape' on the victim from time to time by giving threats to her, but the tenor of their evidence leaves no manner of doubt that what the victim actually told to her parents and what they actually learnt was about the physical relations between the appellant and the victim and not about the appellant having raped the victim.

11 In this context, the evidence of Pandharinath (PW 4) – Police Patil is significant. According to him, Maruti had met him

and told him that his (Maruti's) daughter was '*having illicit relationship with Sandip*'. According to Pandharinath, Maruti told him that a meeting was to be held in the village as the victim had become pregnant from the appellant. Pandharinath stated that it was agreed in the meeting that the marriage of the victim was to be performed with the appellant. In the cross-examination, it was suggested to him that no such meeting had taken place, and there was no such proposal of marriage, but this has been denied by this witness. Even Fasabai (PW 7) speaks of the relationship between Vijaya and Sandip as an '*affair*'. She does not state that she learnt either from the victim or from her father or mother, that the appellant had committed rape on her.

12 It is not possible to accept that the victim was forced by the appellant to keep sexual relations with him. It is clear that the relations between the victim and the appellant came to light only because the victim had become pregnant. Even thereafter, neither the victim nor Kantabai nor Maruti had any objection to have the victim's marriage performed with the appellant. Rather, they were insisting on such a marriage and it was only after the parents of the appellant refused to have such marriage performed that the complaint came to be lodged. The theory of the victim that the appellant had threatened that he would kill her parents and that, therefore, she did not disclose the incident to anyone, cannot be accepted. The acts of sexual inter-course were taking place repeatedly within a span of about 5 – 6 months, and the same would not have been possible without the consent of the victim.

13 It is in this context that the question of age of the victim becomes important. It is because if the victim was below 16 years of age, at the material time, then the appellant would be guilty of rape even if the victim had consented for the acts.

14 Since the prosecution case was that the sexual intercourse that had been taking place between the appellant and the victim was against the will of the victim, and without her consent, the question of the age of the victim was not focused during the trial. As shall be discussed later, this aspect was dealt with by the trial court in an evasive manner. In the charge that was framed against the appellant, the victim has been described as of '16 years.' The relevant head of the charge reads as under :-

“That you accused 5 to 6 months prior to 18/1/2008 at about 5.00 p.m and thereafter from time to time till 18/1/2008 at the house of complainant Sou.Kantabai Maruti Gaweri, at village Keli (Gawarwadi), Taluka Junnar, Pune, committed rape on minor girl Miss.Vijaya Maruti Gawari, aged 16 years and thereby committed an offence punishable u/s.376 of the Indian Penal Code and within my cognizance.”

(emphasis supplied)

15 The age of a person is to be proved like any other thing. The date of birth of a person is expected to be known to his or her parents. The date of birth of a person can be given by those who had witnessed the birth of the said person. In this case,

Kantabai (PW 2) and Maruti (PW 3) who are the mother and father of the victim were expected to give her date of birth, but surprisingly, none of them has given it. None of them was questioned during their examination-in-chief about the date of birth of the victim. None of them has, therefore, stated directly or indirectly that the victim was below 16 years of age at the material time. On the contrary, Maruti has stated that, that the victim 'was aged 16 years at the time of the incident' in his examination-in-chief itself. The police report also referred to the victim as of '16 years', and it has already been observed earlier that even the charge framed against the appellant proceeded on that basis. When the victim is referred to as of 16 years, it must be taken as she having completed 16 years of age, and in any case, 'of 16 years' cannot be construed as equivalent to 'below 16 years'. Even the trial Judge was apparently alive to this aspect, as can be seen from the points for determination framed by him in which (point no.1) he described the prosecutrix/victim as 'aged less than 16 years'. The learned Judge who had, in the charge framed against the appellant, had described the victim as 'aged 16 years', perhaps felt the necessity of referring to her as 'aged less than 16 years' because he could see the difficulties in accepting that the victim was not a consenting party to the acts of inter-course. He, however, did not amend the charge accordingly.

16 Anyway, without going into the question of prejudice being caused to the appellant by there being no mention in the charge about the victim being of less than 16 years, what was the evidence regarding the age of the victim, may be examined. It has been observed earlier that her date of birth was not given by

Kantabai or Maruti. It is quite interesting to note that her date of birth was given by the victim herself. The very first sentence in the notes of her evidence in examination-in-chief reads as :-

“my birth has taken place on 11th December 1992”

Now, obviously, a person cannot have the memory as to when he or she was born. Such a fact cannot be said to be within the personal knowledge of the person making such a claim. A person may believe in what he would learn from his parents and other older relatives who would know of his date of birth. When the date of birth of the victim was got to be ascertained not from her father or mother who both were examined as witness, but from the victim herself, such an attempt to 'prove' the age of the victim, needs to be disapproved. Anyway, reliance has been placed on the School Leaving Certificate issued by New English School, Aptale, Junnar in which the victim had been studying. This certificate was tendered in evidence (Exhibit-28). In this certificate, the age of the victim has been mentioned as '11/12/1992'. This certificate also shows that the victim was studying in the 9th standard, and that her name was removed from the rolls on account of her continuous absence. This certificate (Exhibit-28) was produced before the Court by Shivram Date (PW6) – Head Master of the said New English School. His evidence shows that he knew the procedure of admission in the school, and that for taking admission in the school, one has to bring the School Leaving Certificate. His evidence also shows that the school had received one letter from Junnar Police Station regarding the date of birth of the victim and the school had then supplied the copy of the School Leaving Certificate to the police. The School Leaving Certificate

has not been signed by this witness, and according to him, it bears the signature of the former Head Master of the said School. In the cross-examination, it is revealed that the victim had taken admission in the said School on 9th June 2005, and that her name had been entered in the School records after she had brought the earlier School Leaving Certificate. In the cross-examination, this witness admitted that the entries relating to the victim in the General Register of New English School were not made 'during his period'.

17 In this case, the ossification test which is considered as quite reliable and which is usually done to ascertain the age of a person, was not performed. Therefore, a conclusion about the age of the victim is expected to be arrived at on the basis of the victim's own statement about her date of birth and from the School Leaving Certificate (Exhibit-28).

18 A School Leaving Certificate would be admissible in certain cases to prove the date of birth of a person by virtue of the provisions of section 35 of the Evidence Act. A reading of section 35 of the Evidence Act indicates that to render a document admissible under it, three conditions must be satisfied, the first being '*that the entry that is relied upon must be one in a public or other official book register or record*'; the second being '*that it must be an entry stating a fact in issue or relevant fact*;' and the third being '*that it must have been made by a public servant in discharge of his official duty or any other person in performance of a duty specially enjoined by law*.' An entry relating to date of birth made in a school register would be relevant and admissible under

section 35 of the Evidence Act, but, it has been held, that such entry would not have much evidentiary value to prove the age of the person *in the absence of material on which the age was recorded*.

19 In this case, the entries in the school register were not at all produced. Indeed, whether the conditions to render a document admissible under section 35 of the Evidence Act had been satisfied in the case is doubtful, but assuming that the required conditions were satisfied, still, *it was essential that the register containing the relevant entries ought to have been produced before the Court*. What has been produced is a certificate said to have been written on the basis of the entries made in the relevant school register. Now, this certificate has not been issued by Shivram Date (PW 6), and had been signed by the 'previous Head Master'. It was not even signed in the presence of Shivram Date. He even does not state that he was conversant with the signature of the 'former Head Master.' He does not even give his name. There is, therefore, nothing to show that the School Leaving Certificate (Exhibit-28) contains an accurate record of the entries in the General Register maintained by the said New English School, even if the question of the weight to be attached to such entries in the absence of knowledge of the source of these entries, is kept aside. No person who has copied the entries in the General Register maintained by the school in the School Leaving Certificate (Exhibit-28), has been examined.

20 Even if it is presumed that the School Leaving Certificate contains an accurate record of the entries made in the General Register maintained by the New English School, it would

be dangerous to come to the conclusion about the date of birth of the victim solely on that basis. What was important was the date of her birth mentioned in the School Leaving Certificate issued by the victim's earlier school. At the time of entering the date of birth in a School register, information about the same is given generally by someone – generally the parents of the child – and it is the knowledge of the person who gives that information is the basis of the entry. Here, when neither the father nor the mother gives the date of birth of the victim, and none of them is even asked about the date of birth, it would be dangerous to conclude that the date of birth of the victim mentioned therein, must be the correct date. Whether the date of birth was satisfactorily proved would – like any other fact – need determination on consideration of all the relevant aspects of the matter. It is a cardinal principle of the rules of evidence that the *best evidence such as the nature of the case would permit, must be given in all the cases.* There could have been better evidence about the date of birth of the victim. The Investigating Officer could have easily procured the birth certificate, or other more satisfactory evidence regarding the date of birth of the victim when the age of the victim was the crucial factor in determining the guilt of the appellant. There is also no justification for not doing the ossification test. The Investigating Officer had the audacity to reply – when questioned in that regard in the cross-examination – that he did not do so because 'he did not feel it necessary'. It was suggested to him that actually he had sent the victim for medical examination, but since he received a certificate showing that she was aged more than 16 years, he did not produce it. This suggestion has been denied by him, and this aspect of the matter may be left at that, but the fact remains that

no efforts to collect satisfactory evidence about the date of birth of the victim, were made. This was perhaps due to the fact that the case that was sought to be made out was of repeated sexual intercourse *against the will and without the consent of the victim*, in which case the question of age would not have been decisive.

21 I am unable to hold that, that the age of victim was below 16 years of age at the material time, was satisfactorily established in this case. In the light of the aforesaid weaknesses, in the evidence of this aspect, there arises a reasonable doubt about the age of the victim. At the cost of repetition, it must be held that when her own father says that she was at the material time 'of 16 years' does not give her date of birth; and the police report also refers to the victim as 'of 16 years', and when the court also understood the case put forth by the prosecution to be that the victim was 'aged 16 years' – as is evident from the charge framed, it would not be safe to conclude that she was ***certainly below 16 years of age at the material time.***

22 Since the victim appeared to be a consenting party to the acts of sexual inter-course, it was absolutely essential to prove the age of the victim as 'less than 16 years' by satisfactory evidence and beyond reasonable doubt. Since the same has not been done, it is not possible to hold that the appellant had committed rape on the victim.

23 The judgment delivered by the learned Addl. Sessions Judge makes a curious reading in this regard. The defence did canvass before him that, that the age of the victim was less than

16 years, had not been satisfactorily established. The learned Judge in that regard, observed that the concerned Head Master 'had duly proved the School Leaving Certificate *by identifying the signature of the earlier Head Master*'. Now, this statement appearing in the judgment is wrong and improper for atleast two reasons. In the first place, Shri Date (PW 6) has nowhere stated that *he identified the signature of the former Head Master*. What he said is that *the certificate bears the signature of the former Head Master* which was certainly not equivalent to saying that he identifies the signature. This was particularly so because he did not even name that Head Master, or that he knew him; and did not state that he was acquainted with his hand-writing or signature. Secondly, and more importantly, the learned Judge did not realize that what was to be proved was not the School Leaving Certificate, but what was to be proved was *the date of birth of the victim*. The entries in the General Register maintained by the School would be circumstantial evidence of the date of birth and a certificate issued on the basis of the said entries would be the secondary evidence of the entries. Therefore, what the learned Judge should have considered was whether 'the date of birth of the victim as mentioned in the register was correct', (and that too if he was satisfied that the School Leaving Certificate reproduced the entry in the register correctly and truly) and not whether 'the School Leaving Certificate had been proved'. It was the correctness of the entry which had been made, that was necessary to be ascertained. The learned Judge observed that 'the defence had not brought any record or material to show that the School Leaving Certificate was a fabricated document', or that 'Shivram Date was not a reliable witness', which observations are patently improper and uncalled

for. Regarding the observation about reliability of Shivram Date, Shivram Date was not the one who had the knowledge about the date of birth of the victim, or even the knowledge as to, on the basis of what record it had been entered. The question of his reliability, therefore, did not arise at all. He never took the responsibility of claiming that the victim's date of birth was really '11/12/1992'.

24 The learned Judge has resorted to somewhat fallacious reasoning. When the defence attempted to focus on the victim being a consenting party, the learned Judge avoided to form a conclusive opinion in that regard by saying that *anyway the victim was below 16 years of age, and therefore, the question of consent was not conclusive or relevant.* When the defence attempted to focus on the victim's age not having been satisfactorily proved, the learned Judge avoided going deeper into that too, by saying that *the case being not of consent, the age of the victim did not matter.*

25 In my opinion, since the victim appeared to be a consenting party to the acts of sexual inter-course between her and the appellant, it was necessary for the prosecution to establish by satisfactory evidence, that her age at the material time was less than 16 years, if the charge against the appellant was to succeed. Since the evidence of the age of the victim was not satisfactory, and since satisfactory evidence which could have been obtained was not obtained, it would be dangerous to hold that the victim was certainly below 16 years of age when the acts of sexual inter-course between her and the appellant took place.

26 The appellant, therefore, should have been given the benefit of doubt that arises about the age of the victim, and should have been acquitted.

27 The Appeal is allowed.

28 The impugned judgment and order is set aside.

29 The appellant is acquitted.

30 He be set at liberty forthwith, unless required to be detained in connection with some other case.

31 Fine, if paid, be refunded to the appellant.

Appeal is disposed of in the aforesaid terms.

(ABHAY M.THIPSAY, J)