

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.599/2014

Ravindra s/o Laxman Pendor,
aged about 24 years, Occ. Labour,
r/o Gajoli, Tq. Gondpipri, Dist.
Chandrapur.

.....APPELLANT

...V E R S U S...

The State of Maharashtra, through
Police Station Officer, Police Station
Rajura, Dist. Chandrapur.

...RESPONDENT

Ms S. B. Saikhede, Advocate for appellant.
Ms T. H. Udeshi, A.P.P. for respondent-State.

CORAM:- V. M. DESHPANDE, J.
DATED :- 20.10.2015

ORAL JUDGMENT

1. By the present appeal, the appellant is questioning the correctness of judgment and order of conviction passed by the learned Sessions Judge, Chandrapur dated 22.11.2013 in Sessions Case No.72/2012 by which the appellant is convicted for the offence punishable under Section 363 of the IPC and is directed to suffer rigorous imprisonment for three years and to pay a fine of Rs.2,000/- in default of payment of fine, it is directed that the appellant should suffer further rigorous imprisonment for three months.

The appellant is also convicted for the offence punishable under Section 366 of IPC and is directed to suffer rigorous imprisonment for four years and to pay a fine of Rs.2,000/- in default, it is directed that the appellant shall undergo further rigorous imprisonment for three months.

The appellant is also convicted for an offence punishable under Section 376 of IPC and on that count, he is directed to suffer rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for six month.

The learned Judge has directed that all the substantive jail sentences shall run concurrently.

2. The prosecution case, as it was unfolded during the course of the trial, can conveniently be narrated as under:

Mahadev (PW2), father of the prosecutrix reached to the Police Station, Rajura. He gave his oral report. The report is at Exh.-13. It disclosed that the prosecutrix is his third child. She was taking education in the eight standard at Priyadarshani Vidyalaya, Sakhri. It is also stated that the appellant was working as labour with Padmakar Urkunde (PW5). The appellant left his

service and also left the village on 08.03.2012. It is stated in the FIR that the first informant and his family were unaware about the character of the prosecutrix.

As per the FIR, on 21.03.2012, the first informant, his wife and two sons were not present in the house and the prosecutrix alone was present. At 6 O'clock, it is stated in the FIR that the prosecutrix was in the company of the appellant and left the place and it was seen by one Mangesh Katwale and Sachin Katwale. Though the search was made, she was not found. On 21.03.2012, the first informant and the maternal uncle of the first informant went to the village Gojoli village of the appellant. There they made enquiry with the parents of the appellant. Also, they made enquiry with the relatives of the first informant. However, she was not traced and, therefore, the report was lodged that the appellant has kidnapped the prosecutrix.

The oral report was disclosing commission of cognizable offence and, therefore, crime was registered vide Crime No.46/2012 with Police Station, Rajura for an offence punishable under Section 363 and 366 (A) of the IPC. The printed FIR is at Exh.-14.

The investigation was handed over to Nanaji s/o Kisan Karhade (PW7). On 23.03.2012, he visited the spot of the incident and prepared spot panchanama vide Exh.-25. He also recorded statement of the prosecutrix and her other relatives. He referred her for medical examination under requisition Exh.-34. The Medical Officer of Rural Hospital, Rajura referred the prosecutrix to General Hospital, Chandrapur and to that effect, endorsement of the Doctor was made at Exh.-34. Letter was also given to the Medical Officer of General Hospital, Chandrapur and it is at Exh.-22.

The appellant was arrested on 23.03.2012 under arrest memo Exh.-35. He was also sent for medical examination. Blood samples and semen samples of the appellant were also seized. The clothes on the person of the appellant were also seized under the seizure memo Exh.-37. Blood sample of the prosecutrix was also extracted by the Medical Officer and they were seized under the seizure memo Exh.-38. The clothes on the person of the prosecutrix on the day of commission of the offence were also seized under Seizure Memo Exh.-11. The Investigating Officer also sent all muddemal properties to the Chemical Analyser

on 01.04.2012. He also obtained birth certificate of the prosecutrix from Gram Panchayat, Sakhari. The same is at Exh.-30. After completion of the usual investigation, since the Investigating Officer was of the view that sufficient material is collected, sent the appellant for trial vide challan in the Court of Judicial Magistrate First class.

Since the offence was exclusively triable by the Court of Sessions, the learned Magistrate passed the order of committal. After that, the case was registered as Sessions Case No.72/2012 and the learned Sessions Judge, Chandrapur below Exh.-6 framed a charge against the appellant for an offence punishable under Section 373, 366 and 376 of the IPC. The appellant abjured his guilt and claimed for his trial.

3. In order to bring home the guilt of the appellant, the prosecution has examined in all seven witnesses. The prosecution has also mainly relied upon the document Exh.-30 i.e. birth certificate and also Exh.-32 extract of birth and death certificate of village Sakhri to prove that at the relevant time, the prosecutrix was below 16 years of age.

The learned Sessions Judge, Chandrapur recorded a finding that the prosecution has proved that the appellant is guilty for the offence for which he was charged and, therefore, sentenced him for the period as observed in the opening paragraphs of the judgment.

4. I have heard Ms S. B. Saikhede, learned counsel for the appellant and Ms T. H. Udeshi, learned A.P.P. for the State. With their able assistance, I have gone through the record and proceedings. Both the learned counsel articulated their respective submissions for their respective prayers.

5. The first question i.e. posed before this Court is whether the prosecution was successful in respect of the date of birth of the prosecutrix. According to the prosecution, the date of birth of the prosecutrix is 24.10.1997. The prosecutrix has stated in her evidence that her date of birth is shown as 24.10.1997 in the school wherein she is taking education. From the available evidence, it is clear that the prosecutrix was taking education at Priyadarshani Vidyalaya, Sakahri. However, there is no document duly proved by the prosecution in support of the document pertaining to the said school. The prosecution has not examined

either Head Master or any other concerned person to prove the relevant document of the School showing that in the school the date of birth of the prosecutrix is recorded as 24.10.1997.

6. In order to prove that the date of birth of the prosecutrix is 24.10.1997, the prosecution has examined Bhujang Suryavanshi (PW6) and also relied on two documents Exh.-30 and 32, which are birth certificates issued by Sarpanch of Gram Panchayat, Sakhari and Exh.-32, extract of birth and death certificate register.

The father of the prosecutrix Mahadev is examined as PW2. His evidence is completely silent about the date of birth of the prosecutrix. Further, nowhere in his evidence, he claimed that he has disclosed the date of birth of the prosecutrix as 24.10.1997 to the authorities of Gram Panchayat. In this backdrop, now let us scrutinize the evidence of the prosecution in respect of date of birth.

Bhujang Suryawanshi (PW6) is Gram Sevak. His evidence discloses that he is attached to the Gram Panchayat, Sakhari as Secretary. On 24.03.2012, PSI Karhade issued a letter to him and requested for birth certificate of the prosecutrix. The

request letter is at Exh.-29. That shows that the request was made to Sarpanch/Secretary.

According to the evidence of Bhujang (PW6), he has issued the birth certificate (Exh.30). However, Exh.-30 which is available on record, shows that it was not issued by the Secretary, it was issued by Sarpanch of the village, though the signature looks like "Suryawanshi", however, below that the designation is Sarpanch. Bhujang (PW6) is not the Sarpanch. Then surely, he cannot sign as Sarpanch. The Sarpanch of the village is not examined. There is doubt as to really whether Bhujang (PW6) has issued the said certificate or not.

7. Insofar as Exh.-32 is concerned, it is the extract of page of birth and death certificate. The same is in tabular form. It is having 25 columns. Column no.1 is Serial Number, column no.2 is date of registration, column no.3 is birth date and column no.4 is gender, column no.5 is name, column no.6 is place of birth, column no.7 is permanent address of parents, column no.8 to 19 are in respect of particulars of the parents of the newly born child and column no.21 and 22 pertain to the person who has given intimation about the birth.

In this Exh.-32, in column no.1, there is an entry as Sr.No. 24 and at column no.5 name of the prosecutrix is written. Column nos. 21 and 22 show name of Wasudeo Chaudhari, Peon of the Gram Panchayat, in column no.2, registration date is shown as 24.10.1997, date of birth is shown as 24.10.1997.

Thus, it is clear that on the information given by one Wasudeo Chaudhari, who is the Peon of Gram Panchayat, the entry was taken. However, the said Wasudeo Chaudhari was not examined. Mahadeo (PW2) never claims that he has given intimation to the Gram Panchayat in respect of date of birth of the prosecutrix. Therefore, in the absence of Wasudeo, it remained to be proved as to on what basis Wasudeo has given intimation about the date of birth of the prosecutrix. Further, the registration is done on the very same day when the prosecutrix took birth i.e. on 24.10.1997. As already stated, the intimation was given by Wasudeo. Therefore, normally on the said date itself, Wasudeo must not have been knowing the names of the newly born child in spite of the intimation given by him.

Thus, when there is no cogent evidence to show that on what basis Wasudeo has given information about the date of birth, it will be hazardous to rely on the said entry.

8. Exh.-30, the birth certificate is prepared on the basis of Exh.-32. Further, when the prosecutrix was referred for her examination, she was examined by Dr. Dipti Shrirame (PW4). Her evidence would reveal that she has written the age on the form as 15 years, as per the police record. Further, she advised for X-ray test of the prosecutrix for age determination. In spite of the specific directions given by the Medical Officer, no Ossification Test was conducted by the prosecution to prove the radiological age of the prosecutrix.

In view of the aforesaid, there is no hesitation in my mind that the prosecution has utterly failed to prove conclusively that the date of birth of the prosecutrix was 24.10.1997.

9. The prosecutrix is examined as PW1. In her examination-in-chief itself she has stated that there was a love affair between her and the appellant and there was sexual intercourse with her by the appellant. It would be useful to reproduce hereinbelow the following portion from the evidence of the prosecutrix:

“I was liking him. Our love affairs started when I was studying in 7th standard. It is correct to say that I never made complaint against the accused to my parents.”

The alleged incident occurred when she was in the 9th standard. Thus, for two years, even according to the prosecutrix, the love affair was going on. In that context, the following recitals made by the first informant in the FIR assumes importance.

“त्यावेळी मला व माझे कुटुंबाला मुलगी नामे शीतल हिचे चारित्र्याबद्दल काहीही माहिती नव्हती.”

10. According to the prosecutrix, though against her will she accompanied the appellant and firstly he took her to the village Gowari, they stayed there in field and have sexual intercourse. Thereafter, in the morning, they went to the village Sasti, from there by auto rickshaw, they went to Ballarsha from there they went to Gondpimpri and thereafter they went to one field at Gojoli. There police caught them.

It is not the claim of the prosecutrix that during this time, she was put under any threat or under coercion. Her evidence shows that there was an ample opportunity for the prosecutrix to disclose the happenings to her to any person from the society, if not, running away from the appellant.

11. When the prosecutrix was referred for her medical examination, Dr. Dipti Shrirame (PW4) has examined her. Her evidence disclosed that she found her vulva and fourchette was normal. Insofar as her hymen is concerned, there was an old tear. Her digital examination was easy. There was elongation of posterior vaginal fornix. She also noticed that the digital examination of the victim was not painful. It was very easy. She also admitted that the hymen can be torn due to various reasons like cycling, playing etc. She also noticed that there were no injuries on her private part or around her private part. The medical certificate of the prosecutrix is proved at Exh.23.

12. The spot panchanama is at Exh.-25. It shows that it is the residential house of Mahdev, father of the prosecutrix. The prosecutrix never claimed that she was subjected to forcible intercourse in her house. On the contrary, it is clear from that she was sexually abused by the appellant in the agricultural field of village Gowari and then at village Gojoli. However, for the reasons best known to the Investigating Officer, the spot panchanama of these two places are not drawn.

Further, the prosecutrix claims that she was subjected to sexual assault against her will. However, no injuries on external body of the prosecutrix were noticed at the time of her examination. Looking to the claim of the prosecutrix that she was ravished in the agricultural field against her will, appearance of some injuries even minor one could have corroborated the version of the prosecutrix. Even on the version of the prosecutrix, the conviction can be secured. However, for that the evidence of the prosecutrix must inspire confidence. In the present case, as observed above, the prosecutrix was having love affair and it was going on for last two years. Further, the date of birth of the prosecutrix is not at all proved.

13. In that view of the matter, the medical evidence assumes importance, which clearly shows that there was no recent sexual intercourse with the prosecutrix. The said aspect can also be seen from the Chemical Analyser's report. The muddemal property, which was sent to the Chemical Analyser, does not show any blood sample or semen stains on the clothes of the prosecutrix.

14. It is, on the aforesaid evaluation of the prosecution case, this Court is of the view that since the prosecution has utterly failed to prove the date of birth conclusively, it could not be said that the prosecutrix was minor on the date of occurrence and also there is no concrete evidence that the prosecutrix was subjected to sex against her will. That leads me to pass the following order.

ORDER

- (i) Criminal Appeal No.599/2014 is allowed.
- (ii) The impugned judgment of conviction passed by Sessions Judge, Chandrapur in Sessions Case No. 72/2012 convicting the appellant-Ravindra Laxman Pendor for the offence punishable under Section 363, 366 and 376 of IPC is hereby quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Sections 363, 366 and 376 of IPC.
- (iv) The appellant, who is in jail, be set at liberty forthwith, if not required in any other case.

JUDGE