

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.92 OF 2015

- 1] Sunil Baban Gadhave,
age : 28 years, Occu: Labour,
R/o. Ter,
Tq. and Dist. Osmanabad
- 2] Saw. Sarika Sunil Gadhave,
age : 21 years, Occu.: Labour,
R/o.: As above
- 3] Rekha Bachu Kembari,
age : 35 years, Occu.:Labour,
R/o.: Pastepada, Tq. Wada,
Dist. Thane ..APPELLANTS

VERSUS

The State of Maharashtra ..RESPONDENT

**WITH
CRIMINAL APPEAL NO. 293 OF 2015**

Amol Dattu Jadhav,
age : 25 years,
Occu.: Private Service
R/o.: Ramwadi,
Tq. & Dist. Osmanabad ..APPELLANT

VERSUS

The State of Maharashtra ..RESPONDENT

Mr.A.S.More, advocate for appellants in both the appeals

Mr.A.R.Kale, A.P.P. for respondent/State, in both the appeals

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CORAM : M.T. JOSHI, J.

DATE : JANUARY 07, 2016

ORAL JUDGMENT :

Heard Both sides.

2] Present appeals are filed by the accused who are convicted by learned Special Judge, Osmanabad in Spl. (Child Sex) Case No.23 of 2014 for different offences. Appellant — Amol in Criminal Appeal No.293 of 2015/original accused no.1 was convicted for the offences punishable under section 376 of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5000/-.

. The appellants in Criminal Appeal No.92 of 2015/Original accused nos.2, 4 and 7 were convicted for the offences punishable under section 6 punishable under section 17 of the Protection of Children from Sexual Offences Act and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.2000/- each.

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

. That PW 1 – victim of offence, who was 16 years old at the time of occurrence, was residing at village Panwadi along with her parents and a brother. On one day, while PW 1 – victim was working with her brother in the field, original accused no.2 – Sarika came to there. Accused Sarika was working in the neighborhood field. They were introduced to each other. The intimacy grown and accused Sarika told the victim that she liked the nature of the victim. Even mobile

numbers were also exchanged between them. Ultimately, Sarika's husband i.e. appellant/original accused no.2 – Sunil even snapped a photograph of the victim on his mobile and in the said evening, accused Sarika made a phone call to the victim and inquired as to whether, marriage of the victim was arranged. Accused Sarika asked as to whether, the victim wanted to marry and even accused Sarika gave a proposal for marriage with her cousin i.e. accused no.1 – Amol. She further asked the victim to visit her house so that detailed conversation on the subject can be held.

. On the next date, the victim received a phone call from an unknown number. The caller introduced himself as accused Amol. He also proposed the victim for marriage and asked whether, she was ready to marry with him. Upon that, the victim told that she was not ready to marry with him. Accused Amol, however, asked her to meet in the

evening. On the same day i.e. on 25th March, 2014, accused Amol again made a phone call to her and told that he would come with accused Sarika to have a talk. Thereafter, in the night, the victim received a phone call from accused Amol. He told her that he would come to her house at 12:00 in the midnight on a motorcycle and further asked her to wait for him outside her house. Lateron, again a message was sent on the mobile phone by accused Amol asking the victim, whether she would come with him. Upon that, the victim answered in the affirmative.

. After some time, in the midnight accused Amol came near the house of the victim and made a phone call to her on mobile phone and told that she should come outside the house. The victim, therefore, met accused Amol. He told her that his cousin sister i.e. accused Sarika was waiting at some distance and asked the victim to accompany

him on the motorcycle. He then took her to accused Sarika's house at village Ter. At that time, accused Sarika and her uncle Hanumant (original accused no.3) was present there. All of them told the victim that she should not return to her house and should accompany accused Amol. Accused Sarika gave an amount of Rs.5000/- to Amol and thereafter, Amol and the victim proceeded on the motorcycle to Osmanabad. Accused Sunil and his uncle accompanied them by another motorcycle till Osmanabad. Thereafter, accused Sunil and his uncle returned back to the village on both the motorcycles.

. From Osmanabad, accused Amol and the victim went to Tuljapur by a bus of M.S.R.T.C. They further went to Pune via Solapur at about 9:00 a.m. Accused Amol took the victim to his friend's house at Mosi, Pune. However, at that time, said friend i.e. accused Vishal Wakure, received

certain message and refused to give shelter to the couple. Thereafter, the couple went to village Kudus via Bhiwandi and Kalyan. At Kudus, accused Amol took the victim to the house of one unknown lady (who was later on disclosed as accused no.7 – Rekha) on 26th March, 2014 at about 7:00 p.m.

. In the night, while the family members of accused no.7 – Rekha slept in one hall, accused Amol and the victim slept in a separate bed room. In the night, accused Amol gagged mouth of the victim, took out her dress and though the victim refused, committed forcible sexual intercourse with her. The couple slept for whole of the night. In the morning, the victim told accused Rekha about the forcible sexual intercourse committed by accused Amol. Upon that, accused Rekha told that the day the victim has accompanied accused Amol, marriage is assumed to have been performed between them and therefore, she should be ready for sexual intercourse with Amol.

. In the second, third and fourth night, similar forcible sexual intercourse was committed by accused Amol on the victim. In the fifth night when accused Amol tried to have sexual intercourse with the victim, she told that she has met the menstrual cycle and therefore, no sexual intercourse took place between them.

. By that time, Vishal Wakure, friend of accused Amol, on phone, told accused Amol that the parents of the victim were about to file a complaint with the police station and the couple should return to village. Therefore, the couple returned to the village and whereupon, the complaint of the victim was recorded on 31st March, 2015.

. Necessary investigation was carried by PW 13 PSI – Suresh Shejwal. He conducted panchnama regarding seizure of clothes of the victim and

conducted panchnama as regards the spot of occurrence. He also recorded statements of the neighbors of accused Rekha. He collected the school record of the victim. The victim was referred for the medical examination whereat, PW 3 – Dr.Sujit examined her. He found injuries near her private part. He opined that the age of the victim was between 16 and 17 years. Necessary articles were sent to the Chemical Analyst and the charge sheet came to be filed.

4] Before the learned Special Judge, in all thirteen witnesses were examined. PW 1 is the victim. PW 2 is mother of the victim and PW 3 – Dr.Sujit Magar is the Medical Officer. PW 4 – Police Head Constable Khamruddin Shaikh recorded the FIR. PW 5 to PW 8 are the panch witnesses as regards seizure of the clothes, vehicles and panchnama of spot of occurrence etc. PW 9 – Shantaram Paste and PW 10 – Dhyaneshwar Paste were

residing in the neighborhood of accused Rekha. PW 11 - Vasant Jadhav is the Headmaster of the school where the victim was taking education and he has proved the school record. PW 12 - Digambar Shinde A.P.I., recorded the panchnama of spot of occurrence and recorded narration of the victim. PW 13 - Suresh Shejwal, conducted investigation in the matter.

5] The defence of the appellants/accused was that of total denial. In the alternative, it was submitted by them that in fact, the prosecution case that the victim was only 16 years old at the time of the occurrence, was not proved and hence, they claimed acquittal.

6] Learned Special Judge, however, came to the conclusion that the evidence on record would prove that the victim was only 16 years old at the time of the occurrence. The medical evidence would

corroborate the statement of the victim that forcible sexual intercourse was committed with her by accused Amol. It was further found that present appellants in Criminal Appeal No.92 of 2015 have actively abetted commission of the offence and therefore, conviction and sentence, as detailed supra, came to be recorded against the appellants.

7] Mr.More, learned counsel for the appellants, took me through the material on record. He submitted that the entire prosecution case is improbable and unnatural. The prosecution case would show that the victim girl was residing with her parents and brother. According to the prosecution, when accused Amol had asked over mobile phone, as to whether the victim was ready to marry with him, she had refused for the same. According to the prosecution, the couple had not seen each other. Further, though the victim had refused to marry with accused Amol, when he asked

her to meet him in the night, she became ready. Not only this, when accused Amol made a phone call and asked the victim whether she was ready to elope with him, she became ready for that. Even this was confirmed by him by sending SMS over the mobile phone of the victim. The victim replied the said SMS in the affirmative and thereafter, she went away in the midnight with accused Amol, who was not even known to her by that time. Thereafter, the victim accompanied accused Amol at various places viz. Ter, Osmanabad, Pune, Kalyan and ultimately, at village Kudus. At village Kudus, they went to the house of accused Rekha. Thereat, while the family members of Rekha slept in one hall, the victim even became ready to sleep in a separate bed room with accused Amol.

8] Mr.More further submitted that the evidence of the Medical Officer would show that the victim was between 16 and 17 years of age at the time of the

occurrence. However, this conclusion was based on the ossification test and in that test error margin of at least two years is required to be taken into consideration as per the settled law.

. As regards the school record, he submitted that the statement of PW 11 - Vasant Jadhav, Headmaster of the school, would show that the birth date of the victim recorded in the school record is 14th June, 1998. The same was, however, recorded on the basis of the oral statement made by the mother of the victim. He further points out that the said witness admitted that every year, the Headmaster of the school used to bring a list of the eligible students from Anganwadi of the village and details of birth date, caste etc. of the students as detailed in the list, are entered in the school record. He, therefore, submitted that there is no clinching evidence regarding the date of birth of the victim. He

further submitted that the circumstances found from the prosecution case, would suggest that it was a case of consensual eloping by the victim and thereafter, consensual intercourse at village Kudus. He, therefore, submitted that benefit of doubt may be extended to the appellants and they may be acquitted.

9] Learned A.P.P. submitted that the material on record would clearly show that the victim was below 18 years of age at the time of the occurrence. Even otherwise, the medical evidence would show that there were injuries near the private part of the victim. Therefore, he submits that relying on the ratio laid down in the cases (i) of **Balam @ Ankush Anil Chavan Vs. State of Maharashtra, 2015(3) LJSOFT 139**; (ii) **Mahesh s/o. Tarachand Suryawanshi Vs. State of Maharashtra, 2014(1) LJSOFT 154**, no interference in the findings of learned Special Judge is called for.

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

A] Whether the prosecution has proved that in the night between of 25th March, 2014 and 26th March, 2014, present appellants in furtherance of their common intention, had kidnapped the victim from her lawful guardianship ?

B] Whether the prosecution has further proved that the victim was kidnapped with a common intention or knowledge that she may be compelled to marry with appellant/accused Amol or forced to have sexual intercourse with him ?

C] Whether the prosecution has further proved that the present appellant/accused Amol has committed rape on the victim

between 26th March, 2014 and 29th March, 2014 at village Kudus, Dist.thane ?

D] Whether the appellants in Criminal Appeal No.92 of 2015 have abetted commission of the above offence ?

E] What order ?

. My findings to the above points are in the negative. Both the appeals are, therefore, allowed and the appellants in both the appeals are hereby acquitted of all the offences, for the reasons to follow.

R E A S O N S

11] PW 1 – victim and PW 2 – mother of the victim deposed on the lines of the prosecution. The cross-examination of the victim would show that

she had not objected for snapping any photograph. It would further show that all the family members of the victim were sleeping in a common bedroom when she went away with accused Amol. The victim at the time of going away with accused Amol did not inform about the same to any of her family members. Further, she admitted the suggestion that when they proceeded from Osmanabad to Pune via Tuljapur, Solapur etc., many persons were present either at the bus stand or in the bus from which they travelled. Thereafter, when they proceeded to Kudus via Bhiwandi and Kalyan, she did not raise any objection for accompanying the accused Amol. According to her, her marriage was already settled by her parents and dowry of the same was also paid by them.

12] The mother of the victim i.e. PW 2 admitted that marriage of the victim was already arranged with one person from village Devlali, Dist.

Osmanabad. She, however, denied that, the victim did not want to marry with the said person, as he was not of her choice; she was pressing her parents for settling her marriage with accused Amol; and that a false complaint was filed against accused Amol and other accused persons.

13] The very fact that the victim, without intimating her parents in the night, went away with accused Amol on a motorcycle leaving behind her parents, would clearly show the prosecution case, that accused Amol and the victim were not knowing each other, is unreliable. The entire prosecution case itself would suggest that accused Amol and the victim were knowing each other very well.

14] It is obvious that the entire journey from Osmanabad to Pune and thereafter to Kudus, would not have been possible without the consent of the

victim. Not only this, the victim has clearly stated in her FIR that while the family members of accused Rekha had slept in one common hall, she slept with accused Amol in a separate room. The story of the victim that thereafter, however, forcible sexual intercourse was committed on her by accused Amol, appears to be improbable and unreliable.

15] It however can not be disputed that sexual intercourse with her was committed. The issue, therefore, is as to whether, the prosecution has proved that during the period of occurrence, the victim was below 18 years of age.

. In the F.I.R., the victim has informed about her age as 16 years. The medical evidence is that upon examination of the victim, PW 3 - Dr.Sujit Magar, Medical Officer, opined that the victim was between 16 and 17 year of age. The deposition of

PW 11 — Vasant Jadhav, Headmaster of the school couple with the certificate at Exhibit 18, would show that the victim was born on 14th June, 1998. Thus, at the time of occurrence, the victim would be below 18 years of age.

16] The matter, however, does not rest here. It is an established fact that the medical opinion is based on ossification test and a margin of error of two years will have to be assumed while calculating the age. In the circumstances, the medical evidence would show that the victim might be 19 years old at the time of the occurrence.

17] As regards the school record, copy of which is placed at Exhibit 18, it would show that on the statement of mother of the victim, the then Headmaster of the school had entered the date of birth of the victim as 14th June, 1998. The Headmaster has deposed that the it is the practice

that the list of the eligible students is brought from the Anganwadi (Kindergarten) and whatever information was given in the list including the date of birth, is included in the school record.

18] Learned A.P.P. for the State has relied upon the ratio laid down in the case of ***Mahesh Suryawanshi (cited supra)***. In that case also, it has been highlighted by this court that the entry in the register of date of birth would be a reliable piece of evidence, but the entry made in the school record cannot form sole clinching factor for determining the age.

19] In the present case, we have already found that the medical evidence would show that the victim might be 19 years old at the time of the occurrence. There is no other evidence to show that she was below 18 years of age than the school record, which cannot form sole clinching proof to

determine the age. Thus, it cannot be proved beyond the reasonable doubt that the victim was below 18 years of age.

20] Last of the circumstances is that PW 3 – Dr. Sunil Magar found abrasions of small size on the thigh of the victim. Her hymen was ruptured. The Medical Officer, however, did not opine whether the tear of hymen was fresh or old. Since there was no injury to the actual organ of the private part, one cannot jump to the conclusion that minor abrasions found on the thigh, was sure indication of forcible sexual intercourse. If all these factors are taken into consideration, in my view, learned Special Judge has not appreciated the evidence on record in its right perspectives. The very improbabilities rampant in the prosecution case, as highlighted supra, ought to have been taken into consideration by learned Special Judge as regards the actual allegations of the forcible

sexual intercourse and taking away of the victim. Further, learned Special Judge has relied solely on the school record and did not take into consideration the fact that the medical evidence is based on ossification test and a margin of error of two years will have to be assumed.

21] Learned A.P.P. on the strength of the provisions of Section 114-A of the Evidence Act highlighted in the case of ***Mahesh Suryawanshi (Cited supra)***, submits that when the prosecutrix stated that sexual intercourse has occurred against her will, the court is required to presume the said fact.

. The said presumption can be rebutted if the material is brought on record, which would show that the prosecution case is not probable. In the present case, therefore, the ratio laid down in the case of ***Mahesh Suryawanshi (Cited supra)*** has

no application for the reasons cited supra. In the circumstances, therefore, all the appellants deserve to be acquitted of all the offences.

22] Hence, the following order :-

A] Both Criminal Appeals are hereby allowed.

B] Impugned judgment and order dated 22nd January, 2015 passed by learned Special Judge, Osmanabad in Spl.(Child Sex) Case No.23 of 2014, thereby convicting the present appellant in Criminal Appeal No. 293 of 2015/original accused no.1 for the offences punishable under section 376 of Indian Penal Code and section 4 of Protection of Children from Sexual Offences Act, sentencing him to suffer rigorous imprisonment for seven years and to pay fine of Rs.5000/-; and further convicting the appellants in Criminal Appeal No.92 of 2015/Original accused nos.2, 4 and 7 for the

offences punishable under section 16 punishable under section 17 of Protection of Children from Sexual Offences Act and thereby sentencing them to suffer rigorous imprisonment for seven years and to pay fine of Rs.2000/- each, is hereby set aside.

. Instead, the appellants in both the appeals are hereby acquitted of the above offences.

C] Appellant - Amol in Criminal Appeal No. 293 of 2015, who is in jail, be released forthwith, if not required in any other offence.

D] Bail bonds of the appellants shall stand cancelled.

Sd/-
[M.T. JOSHI, J.]

kbp