

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 565 OF 1996

Balu Baburao Kadam)
Aged 26 years, Occ. Agri.)
R/o. Sagunamatanagar, Phaltan,)
Tal. Phaltan, District Satara.).. Appellant
(Orig. Accused)

vs.

1. The State of Maharashtra)
2. Smt. Sindhubai Sadashiv Kardale)
R/o. Sagunamatanagar, Phaltan,)
Dist. Satara.)Respondents

Mr. Tejas Hilage, Advocate appointed, for the appellant.
Ms. A.A. Mane, APP, for the State.

CORAM: SMT. SADHANA S. JADHAV, J.
RESERVED ON : 3rd May, 2016.
PRONOUNCED ON : 9th August, 2016.

JUDGMENT:

The appellant herein is convicted for the offence punishable under Section 376 of the Indian Penal Code and sentenced to undergo R.I. for seven years and fine of Rs.5,000/- in default S.I. for one year by the Vth Addl. Sessions Judge, Satara in Sessions Case No.186 of 1993 vide judgment and order dated 31.8.1996. Hence, this appeal.

2. Such of the facts necessary for the decision of this appeal are as follows :-

The victim was working as an agricultural labourer. She was a minor in the year 1993. She was residing at Phaltan with her parents and an elder brother Shivaji. She has an elder sister Baby, who was married in the year 1991. Her brother Shivaji was working as a cleaner on a truck. The victim had studied in School upto 5th Standard and thereafter she was a dropout. In November 1992, her elder sister Baby had been to the maternal house for the purpose of maternity. On 18.11.1992, she had delivered a baby girl in Mahila Mandal Maternity Home at Phaltan. She was admitted in the hospital for 10 days. Her mother used to stay in the hospital at night along with her sister. Her father was working as a watchman. Her mother was required to attend the elder sister during the day time also. hence, the victim was residing at home alone.

3. It is the case of the prosecution that the present appellant was residing as her neighbour. He was a married man with two children. His mother was also residing with him. That taking

advantage of the fact that the victim girl was alone at home, he used to visit her and had committed sexual intercourse with her. He also used to enquire as to whether she was getting her menses regularly. Initially, she had answered in the affirmative. Her sister had returned to her matrimonial home after three months. One day when the mother of the appellant and the mother of the victim had been to Vaduth to visit the elder sister of the victim, the appellant had once again committed sexual intercourse with her and on that occasion, she had disclosed to him that she was not getting her menses regularly. He had advised her to pretend that everything was normal. She continued to go for labour work.

4. It is further the case of the prosecution that the victim had fractured her right hand. Initially, she took treatment from a quack. Subsequently, she had been taken to the hospital of Dr. Chavan-Patil. At the time of examining her, the doctor had disclosed to her parents that the victim had conceived pregnancy and was pregnant of 32 weeks. Her father enquired with her. She had disclosed about the act of the accused-appellant. The parents of the victim had called the accused to the hospital. According to the prosecution, he had offered

money to abort the child. The parents were then constrained to take recourse to law. They had been to the Court of Phaltan and got reduced into writing their application from a lawyer and the said application was given to the police station. On the basis of the said application, Crime No.140 of 1993 was registered against the accused for the offence punishable under Sections 376 and 363 of the Indian Penal Code. After completion of investigation, charge-sheet was filed on 15.7.1993. The case was committed to the Court of Sessions and was registered as Sessions Case No.186 of 1993. The prosecution examined as many as nine witnesses to bring home the guilt of the accused. The case mainly rests upon the evidence of the parents of the victim, the victim herself, the Medical Officer and the Investigating Officer.

5. PW-2 Sindhubai Kardale happens to be the mother of the victim. She has deposed before the Court that her daughter was working as a labourer. That the hand of her daughter was fractured. she was taken to the Hospital of Dr. Chavan-Patil which disclosed that her daughter was pregnant by 30 to 32 weeks. She has deposed before the Court that upon enuqiry with her daughter, she learnt that when

her elder daughter Baby was admitted in the maternity home, the appellant had taken advantage of the situation and had committed sexual intercourse with her on four occasions. Her daughter had further disclosed that the accused had told her that she should not disclose about having missed her menses to anybody. She has further disclosed that the accused had offered Rs.1,000/- for aborting the pregnancy. Thereafter, they approached the police with an application on the basis of which the crime was registered. The first information report is marked at Exhibit 11.

6. It is elicited in the cross-examination of PW-2 that the application at Exhibit 11 was written and scribed by the Advocate Shri Jadhav. The application was written and typed in the Court premises at Phaltan. At the time of giving instructions to the Advocate, the victim and the father of the victim as well as Dagadu Mistri were present. As far as the narration in respect of offering Rs.1,000/- for aborting pregnancy is the material omission as admitted in the cross-examination. PW-2 has expressed her inability to mention the exact age of the victim or the difference of age between her son Shivaji and the victim girl. According to her, her husband had admitted her in the

school. A suggestion is given in the cross-examination that one Shivaji Dhumal was working as a watchman in the agricultural school where the victim was working as a labourer. The suggestion is denied in respect of any intimacy between Shivaji and the victim girl. However, it is admitted by PW-2 that Shivaji had left his job just 2 – 4 months prior to initiating prosecution against the accused.

It is elicited in the cross-examination that the house of the accused is situated adjacent to the house of the victim. It is admitted that he is married since 10 years and is a father of two children and that his mother also resides in the same house. It was suggested that there is trifling disputes between both the families on account of drainage water. The said suggestion is denied. Animosity between both families is also denied by PW-2.

7. PW-4 Sadashiv Kardale happens to be the father of the victim girl. He has deposed before the Court that he is working as a watchman for 7 years. That the victim was a drop-out of the school after she had failed in 5th Std. The evidence of PW-4 is in consonance with the evidence of PW-2. as far as the disclosure by the victim is

concerned. The suggestion in respect of any animosity between the families is denied. It was suggested that to PW-4 that the victim had intimacy with Shivaji Dhumal. The said suggestion is denied.

8. PW-5 is the victim herself. She has deposed before the Court in consonance with the first information report lodged by her mother. She has also disclosed that upon learning about the conduct of the accused, her father had called upon him and at that stage, the accused had offered money for aborting the pregnancy. She has further deposed that her statement was recorded by the police. She was then taken to Government Medical Dispensary, Phaltan. She was examined. The accused was also examined. Their blood samples were taken. In the cross-examination, the defence has made a frail attempt to bring on record the omission in respect of the time when her father went to work as a watchman. In the cross-examination, she has also stated that the accused was working in Bhagwan Saw Mill at Phaltan. That he used to go for duty at 7.30 a.m. and return home at 7.30 p.m. That he is a married man and father of two children. The suggestion that the accused has been falsely implicated on account of animosity between both the families is specifically denied. The victim

has also denied the suggestion of any intimacy with Shivaji Dhumal.

It is elicited in the cross-examination that the accused was the only son of his mother. That he is calm and quiet. That he or his mother had no dispute or quarrel with anybody. She has admitted that her father was working as a Coolie with Dagadu Mistri.

9. Exhibit 19(2) is the certificate issued by Phaltan Hospital which indicates that the sister of the victim was admitted on 18.11.1992. She delivered a baby girl on the same day at night and she was discharged from the hospital on 26.11.1992.

10. PW-6 Dr. Bhaskar Chavan-Patil is an Orthopedic surgeon who was running a hospital at Phaltan in the name and style of "Accidental Hospital". He has deposed before the Court that on 1.7.1993, the victim was taken to him for examination. She was 14 years old. Her right hand was fractured. She was accompanied by her parents. Upon cross-examination, PW-6 had opined that she needs to undergo an operation. For that purpose, he had subjected her to pathological test in order to enable him to administer anesthesia at the

time of operation. It was revealed that she was carrying pregnancy of 32 weeks. The anesthetist had opined that the patient is likely to go in labour during anesthesia and therefore surgery was not possible. He had disclosed about it to the parents of the patient and had issued a certificate for examination. The said certificate is at Exhibit 22. The defence was unable to create a dent in the evidence of PW-6.

11. PW-7 Dr. Prabhakar Bhoite has examined the victim after the registration of crime. The patient had given the history as follows :-

“Patient given history of intercourse with Balu Kadam 2 times seven months back and two times six months back. The pregnancy was of more than 28 weeks and less than 32 weeks.”

12. PW-8 Arjun Nikam is working as Principal with Maloji Raje Sheti Vidhyalaya & Junior College, Phaltan. he has admitted before the Court that he had issued School Leaving Certificate on 16.7.1993. The witness has proved the contents of the School Leaving Certificate which is at Exhibit 28. The said Certificate shows that the date of birth of the victim was 1.6.1977 and she was admitted in School on 29.7.1991 in 5th Std. and had left the school on

31.1.1992. He has deposed before the Court that he had issued the School Leaving Certificate at Exhibit 28 on the basis of the School Leaving Certificate produced by the student at the time of admission in the said school. he has also stated that he had issued the School Leaving certificate at the instance of PSI.

13. PW-9 Vijaykumar Chougule is the Investigating Officer. he has deposed before the Court that he received a written application on 12.7.1993 and registered it as 254/1993. On 15.7.1993, he called the victim girl to the police station and had recorded her statement. He had obtained the signature of the victim on her statement under Section 161 of Cr.P.C. He has deposed about the steps taken by him in the course of investigation. He has proved the omissions and contradictions in the evidence of witnesses.

14. Upon perusal of the evidence adduced by the prosecution, it is clear that the mother of the victim had not noticed the advanced stage of pregnancy of the victim girl. It is not her case that due to frailty in the physical constitution, the pregnancy had gone unnoticed. It is further pertinent to note that the victim has appreciated

the conduct of the accused by stating that he was a calm and quiet person and had no quarrels with anybody. The most important aspect is that there is no specific allegation :-

- (i) that the consent was obtained fraudulently;
- (ii) that he had committed sexual intercourse under threat or coercion;
- (iii) that he had proposed her for marriage.

All that the victim has stated even before the medical officer is that she had sexual intercourse with the accused. Another important aspect of the accused is that the exact age of the victim has not been established by the prosecution except the school leaving certificate which had no basis. It is well-known that whenever the exact date of birth is not known, the date of birth is shown as first of June of the year when the pupil is admitted in the school. The documents of first attended school are not brought on record by the prosecution. At the time of examination by the doctor on 15.7.1993, the age as mentioned by the victim and her relatives was 16 years. There is no report of ossification test. The medical certificate at Exhibit 24 indicates as follows :-

“For age determination x-ray of wrist, elbow, knee and siac is

required. However, it does not appear that the said test was conducted. “

15. In view of the above circumstances, the learned counsel for the petitioner submits that there is no evidence to show as to whether the victim was a minor and was incapable of giving consent because the specific evidence that she was coerced or threatened or had succumbed to the accused is not on record.

16. The learned counsel has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Deelip Singh alias Dilip Kumar vs. State of Bihar** (2005) 1 SCC 88. The Hon'ble Apex Court in similar circumstances observed thus :-

“Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorises these two expressions under separate heads in order to be as comprehensive as possible. Further, it is not easy to find a dividing line between submission and consent except in the situation contemplated by clause fifthly of Section 375 IPC. Yet, the evidence has to be carefully scanned. The ultimate conclusion depends on the facts of each case.”

The Hon'ble Apex Court has further held as follows :-

“In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.”

17. In the case of **Sunil vs. State of Haryana** AIR 2010 (SC) 392, the Hon'ble Apex Court has held that “The failure of getting the prosecutrix examined from the Dental Surgeon or the Radiologist despite the fact that she was referred to them by Dr. Sadhana Verma, PW1 is a serious flaw in the prosecution version. We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in absence of primary evidence, reports of the Dental Surgeon and the Radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix.”

The School leaving Certificate produced by the prosecution was also procured after registration of the crime and after arrest of the accused. In this case, the victim had joined the school in the middle of the session and left the school in the middle of 100 days was also not held to be reliable evidence. In the above premises, it would be unsafe to base conviction on the facts which are not established

beyond reasonable doubt. In the present case, the victim was fully aware of the fact that the accused was a married man and a father of two children.

18. In view of the above discussion, the consent or absence of it needs to be gathered from the attending circumstances. The fact that the victim had maintained silence for almost 8 months and the fact of pregnancy had come to light because of the fracture sustained by her would show that she had waived the act of the accused. Moreover, even according to the victim, the accused had intermittently enquired with her as to whether she was having her menses regularly. It can therefore be presumed that she knew the consequences of the act and yet maintained silence. The very fact that the minority of the victim is not established by the prosecution goes to the root of the matter. It appears that the victim had submitted herself to the wishes of the accused in a state of infatuation.

19. Section 375 of IPC reads as under :-

**“375 Rape – A man is said to commit
“rape” if he -**

**(a) penetrates his penis, to any extent,
into the vagina, mouth urethra or anus of a woman or
makes her to do so with him or any other person; or**

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

© manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions :-

First – Against her will.

Secondly – Without her consent.

Thirdly – With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

...

Sixthly – With or without her consent, when she is under eighteen years of age.

Seventhly – When she is unable to communicate consent.”

The main ingredient is `consent' and the same has to be considered in the facts of the case. In the present case, due to minority of age – as alleged by the prosecution would make consent, if any, insignificant.

Therefore, it was incumbent upon the prosecution to establish the factum of minority beyond reasonable doubt.

20. The professional fees of the appointed Advocate Mr. Tejas Hilage is quantified at Rs.3,000/- (Rupees three thousand only) to be paid by the High Court Legal Services Committee to him within three months from today.

ORDER

- (i) The appeal is allowed.
 - (ii) The Judgment and order dated 31.8.2016 passed by the Vth Addl. Sessions Judge, Satara, is hereby quashed and set aside.
 - (iii) The appellant-accused is acquitted of the offence punishable under Section 376 of the Indian Penal Code.
 - (iv) The bail bonds stand cancelled.
 - (v) Fine, if paid, be refunded to the appellant.
- Appeal stands disposed of.

(SMT.SADHANA S.JADHAV, J.)

