

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL No.20 OF 2016

Kiran s/o Ashok Gawali
Aged: 22 Yrs., occu. Labour,
R/o Vithal Nagar, Latur,
Tq. and dist. Latur.

= **APPELLANT**
(Orig.Accused)

VERSUS

The State of Maharashtra
Through the Police Station
Officer, Shivaji Nagar
Police Station, Latur,
Tq. and Dist. Latur.

= **RESPONDENT**

Mr.NP Patil-Jamalpurkar, Advocate for Appellant;
Mr.PN Kutti, APP for Respondent-State.

CORAM : P.R.BORA, J.

RESERVED ON:- 26th September,2017

PRONOUNCED ON: 3rd October,2017

JUDGMENT:

1) Appellant has filed the present appeal challenging the judgment and order passed by III Additional Sessions Judge, Latur in Special Case (POCSO) No.28/2014 decided on 27th July, 2015.

2) The appellant was prosecuted in the aforesaid Sessions Case for the offences

punishable under Sections 363, 366, 376(2)(n) of Indian Penal Code and Sections 6 and 10 of the POCSO Act and also under Section 3(1)(w) of The Scheduled Castes, Scheduled Tribes (Prevention of Atrocities) Act. (herein after referred to as the Atrocities Act) The Sessions Court has acquitted the appellant – accused for the offences punishable under the Atrocities Act, but has convicted him for the offences punishable under Sections 363, 366, 376(2)(n) of the Indian Penal Code and Sections 6 and 10 of the POCSO Act. The maximum sentence awarded to the appellant is ten years' rigorous imprisonment and fine of Rs. 5,000/-

3) In brief, it was the case of the prosecution that the accused kidnapped the prosecutrix from the lawful guardianship of her parents on 6th May, 2014 with intent to seduce her to illicit intercourse and took her with him at Pune and the other places and committed repeated rape on her during the period 8.5.2014 to

21.5.2014. According to the prosecution, at the relevant time, the prosecutrix was below 18 years of her age.

4) The charge was framed against the accused on 31st October, 2014 for all the aforesaid offences. The accused did not plead guilty. Further the report filed and claimed to be tried. In order to prove the guilt of the accused, the prosecution examined as many as nine witnesses. The prosecution evidence commenced with the testimony of the panch witness viz. Vaijinath Digambar Panchal (PW 1) and was concluded after the evidence of Dr. Annasaheb Gulabrao Birajdar (PW 9) was recorded. The defence of the accused was that the prosecutrix, at her own, voluntarily accompanied him and nothing was done by him against the wish of the prosecutrix or without consent of prosecutrix. The accused has also examined one Uttam Limbraj Gomsale, who is serving as Gramsevak at Grampanchayat Khadgaon as the Defence witness.

5) The learned Additional Sessions Judge, after having assessed the oral as well as documentary evidence brought on record, held the appellant – accused guilty for the offences punishable under Sections 363, 366 376(2)(n) of IPC ad Sections 6 and 10 of the POCSO Act and sentenced him to suffer R.I. as noted herein above.

6) Shri N.P.Patil – Jamalpurkar, learned Counsel appearing for the appellant, has assailed the impugned judgment on various grounds. However, his thrust was on the issue that though the prosecution has failed in proving that the prosecutrix was minor at the relevant time, the learned Sessions Judge has erroneously held the appellant guilty for the offences charged against him.. As against it, learned APP has supported the impugned judgment and order.

7) After having heard the arguments of the learned Counsel for the appellant and learned APP

and on perusal of the impugned judgment and the evidence on record, it is apparently revealed that the main issue to be decided in the present appeal is, whether the prosecutrix was minor at the relevant time and whether from the evidence on record, the finding recorded by the learned Additional Sessions Judge that the prosecutrix was minor, can be sustained?

8) The evidence on record clearly reveals that the prosecutrix has voluntarily eloped with the accused on 6.5.2014. As has come on record in the cross-examination of the prosecutrix, her parents were about to fix marriage of the prosecutrix with the son of her parental aunt, for which, the prosecutrix was not willing and to avoid the said marriage, she left the house at her own along with the accused. From the testimony of the prosecutrix coupled with the other evidence on record, a reasonable inference can be drawn that the physical relationship established between the prosecutrix and the

accused was with consent. Even father of the prosecutrix has also admitted in his cross-examination that he had fixed the marriage of the prosecutrix with one Yogesh and the marriage was scheduled on 12th May, 2014. He has further candidly admitted that the prosecutrix was not intending to marry with Yogesh and hence, she eloped from the house.

9) In spite of the evidence, as aforesaid, the learned Additional Sessions Judge has held the appellant guilty for the offences charged against him for the only reason that the prosecutrix was minor and as such it was immaterial whether she has consented for the culpable acts alleged against the appellant. In the circumstances, as I noted herein above, the crucial and foremost issue to be determined in the present appeal is, whether from the evidence on record, the prosecution can be said to have proved that the prosecutrix was minor at the relevant time?

10) As has been stated by the prosecutrix herself, as well as her father viz. Babasaheb Narayan Aadsule (PW 2), the date of birth of the prosecutrix is 31st January, 1998. In order to prove the age of the prosecutrix, the prosecution had examined Headmaster of Shree Primary School, Latur, viz. Shri Vaijinath Rarajam Ghatake as its witness (PW 6). As deposed by PW 6 – Vaijinath, the prosecutrix was admitted in Shree Primary School, Latur on 15.7.2004 and at the time of her admission in the said school, her date of birth in the application form was mentioned as 31.1.1998. In the evidence of PW 6 – Vaijinath, the extract of admission register, the application form for the admission of the prosecutrix and the birth certificate issued by Sarpanch, Khadgaon, were exhibited respectively as Exh. 38, 39 and 40. If the date, as mentioned by the prosecutrix and as is appearing in the document at Exh. 38, 39 and 40, is held to be correct, age of the prosecutrix at the relevant time was 16 years and 4 months.

. The accused has seriously disputed that the said is the correct date of birth of the prosecutrix. It is the assertive contention of the accused that the prosecutrix was more than the age of 18 years at the relevant time.

11) The learned Counsel for the accused invited my attention to the birth certificate (Exhibit-40) issued by Sarpanch, Khadgaon. The learned Counsel submitted that Sarpanch of the village is not the authority to issue the birth certificate and such birth certificate has to be issued only by the Gramsevak. The learned Counsel submitted that in the evidence of defence witness, viz. Uttam Limbraj Gomsale, it has specifically come on record that the Grampanchayat record is maintained by the Gramsevak and the Gramsevak only has the authority to issue the birth certificate. The learned Counsel submitted that in such circumstances, no reliance could have been placed on the birth certificate placed on record since it was not coming through the proper authority

and was not issued by the competent person.

12) The learned counsel further brought to my notice that in the certificate at Exh.40, there is over-writing in the year of birth. The learned Counsel submitted that PW 6 – Vaijinath has admitted in his cross-examination that there is over-writing in the year of birth. The learned Counsel submitted that even the said fact can be noticed on bare perusal of the said certificate at Exh.40. The learned Counsel further submitted that the date of birth recorded of the prosecutrix in the school record on the basis of the aforesaid certificate at Exh.40, therefore, is not free from doubt. The learned Counsel submitted that, that is the only evidence brought on record by the prosecution as about the age of the prosecutrix.

13) The learned Counsel, inviting my attention to the report of the Medical Officer, wherein reference is also made to the report of

the Radiologist, urged that from the Medical Certificate, a reasonable inference can be drawn that the prosecutrix was more than the age of 18 years at the relevant time. The learned Counsel submitted that , overwhelming evidence has come on record showing that the prosecutrix was the consenting party in leaving her house and to elope along with the accused. The learned Counsel submitted that the evidence on record further clearly establishes that even the physical relationship established between the accused and the prosecutrix was with consent of the prosecutrix and the element of force or coercion was totally absent. The learned Counsel submitted that as such, in fact, no offence can be said to have been made out against the accused and he deserves to be acquitted from all the charges levelled against him.

14) As against it, it was with equal vehemence argued by the learned APP that the date of birth certificate from the school first

attended by the prosecutrix is held to be the best evidence for proving the age of the minor. The learned APP, invited my attention to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, and more particularly referred to sub-rule (3) of Rule 12. In support of his said contention, the learned APP cited judgment of the Hon'ble Apex court in the case of Mahadeo s/o Kerba Mhaske Vs. State of Maharashtra and Anr. - (2013) 14 SCC 637. The learned APP further submitted that the prosecution has examined the Headmaster of the school, which was first attended by the prosecutrix, and as such, there is no reason for disbelieving the date of birth, as is mentioned in the said school record, which has been duly proved by the prosecution. The learned APP further submitted that the medical evidence as about the age of the minor can only be taken into account in absence of any cogent and sufficient evidence in the form of birth certificate from the Grampanchayat or Municipal Council or from the school record etc.

The learned APP further submitted that even the Medical Officer has certified the age of the prosecutrix to be in between 16 to 17 years. The learned APP further submitted that in the circumstances, no blame can be attributed on part of the learned Special Court in recording the finding that the prosecutrix was minor at the relevant time and as such, the defence of consent put forth by the accused was immaterial to absolve him from the culpability proved against him.

15) As has been held by the Hon'ble Apex court in the case of Mahadeo Mhaske (cited supra), Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is to be applied in determining the age of the victim of rape. Rule 12(3) of the said Rules reads as under, -

"12(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the

Board or, as the case may be, by the Committee by seeking evidence by obtaining, -

(a)(i) the matriculation or equivalent certificate, if available, and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Pachayat."

Under Rule 12(3)(b), it is specifically provided that only in absence of alternative methods described under Rules 12(3)(a)(i) to (iii), medical opinion can be sought for. In view of the law laid down, as above, the evidence in the present matter has to be closely scrutinized. As noted herein above, the prosecution has relied upon the school record pertaining to the prosecutrix wherein her date of birth is mentioned as 31st January, 1998. It is further not in dispute that by examining the Headmaster

of the school, which the prosecutrix first attended, the prosecution has brought on record that the date of birth of the prosecutrix is 31st January, 1998. In the evidence of the said Headmaster (PW 8 Vaijinath), original application form of the prosecutrix; her school leaving certificate and the birth certificate issued by Sarpanch Khadgaon, were brought on record and they were exhibited. From the evidence, which has come record, it is quite evident that the date of birth, as was recorded in the school register, was on the basis of the birth certificate issued by Sarpanch of village Khadgaon, which is at Exh.40. The said certificate is thus the crucial document.

16) I have carefully perused the birth certificate at Exh.40. It is apparently revealed that there is some over-writing in the year of birth. PW 6 - Vaijinath - Headmaster of the school has also admitted the said fact. He has also admitted that the over-writing was since

before admission. He further submitted that he does not know as to who had done the said scoring and when it was done.

17) The birth certificate at Exh.40 is admittedly issued by Sarpanch of village Khadgaon Tq. And District Latur. It was the contention of the learned counsel appearing for the accused that the Sarpanch of the village cannot, under his signature, issue such birth certificate. There is substance in the submission so made. As has come on record in the evidence of DW 1 — Uttam Gomsale, only Gramsevak of the village can issue such certificate. There further cannot be a dispute that Gramsevak is the custodian of the Grampachayat record. It was specifically deposed by DW 1 — Gomsale that Gramsevak only has authority to issue the birth certificate. The prosecution has not brought on record any evidence to show that Sarpanch of the village also can issue the birth certificate.

18) Further, the birth certificate at Exh. 40 does not reveal as to on which date the said entry was taken in the Grampanchayat record. The very second column meant for date of registration of birth is blank. From Exh. 40 it also cannot be gathered as to on which date, the copy of the said birth date certificate was issued by the Grampanchayat and more importantly, there is apparent over-writing in the year of birth. From bare eye, it can be seen that previously some another year of birth was recorded and subsequently figure/digit 8 seems to have been over-written. The aforesaid document is certainly not free from doubt. On the basis of such certificate, it cannot be conclusively said that date of birth of the prosecutrix is 31st January, 1998.

19) Admittedly, Exh.40 is the document on the basis of which the date of birth is recorded in the school record of the prosecutrix. Obviously same date is, therefore, appearing in

admission form and in the school leaving certificate. As has come on record in the cross-examination of PW 2 – Babasaheb Aadsule, i.e. father of the prosecutrix, he also did tell the date of birth of the prosecutrix on the basis of her school leaving certificate. The father of the prosecutrix has nowhere stated that he has provided the information as about the birth of the prosecutrix and that on the basis of the information so provided by him, the entry was taken in the Grampanchayat record.

20) In the above circumstances, the date of birth of the prosecutrix, as is mentioned in the birth certificate at Exh.40, cannot be undoubtedly accepted as the correct date of birth of the prosecutrix. Evidence brought on record by the prosecution to prove that prosecutrix's date of birth is 31.1.1998 is not free from doubt and therefore cannot be depended upon.

21) In the foregoing circumstances, according to me, it would be unsafe to determine

the age of the prosecutrix on the basis of birth certificate on record or on the basis of the school record.. If the aforesaid record is kept out of consideration, the other evidence existing on record is the oral evidence of Dr. Annasaheb Birajdar and the certificate, which was proved through his evidence and marked as Exh. 52. As has come on record through evidence of PW 9 — Dr.Birajdar, age of the person can be opined on the basis of number of teeth. Dr.Birajdar has also admitted that the age of the person having 28 teeth may be more than 18 years. The medical examination report at Exh.52 demonstrates that the prosecutrix is having 28 teeth. Further, the report at Exh.52 reflects that as per the Radiologist's opinion, age of the victim was between 16 to 17 years. As per the medical science, opinion given by the Radiologist can have margin or error on either side up to the period of two years. There is, therefore, reason to believe that the age of the prosecutrix at the relevant time, may be more than 18 years. The

prosecutrix was thus cannot be said to be a child as defined under the Juvenile Justice Act or the POCSO Act.

22) As I have elaborately discussed herein before, there is overwhelming evidence on record to show that the prosecutrix had voluntarily eloped with the accused and no such inference can be drawn from the other evidence on record that the physical relationship, established between the accused and the prosecutrix, was against the will of the prosecutrix or without her consent. The evidence on record clearly establishes that since father of the prosecutrix had fixed the marriage of the prosecutrix with one Yogesh with whom the prosecutrix was not ready to get married, she, at her own, eloped with the accused and further whatever had happened was with consent of the prosecutrix.

23) As I have noted in earlier paras of the judgment, the accused has been held guilty by the

learned Special Judge for the offences alleged against him only for the reason that the prosecutrix was minor at the relevant time and in the circumstances, even if from the prosecution evidence it was revealing that the prosecutrix was the consenting party, the said aspect was kept out of consideration.

24) Now, in view of the finding recorded by me that the prosecution has failed in conclusively establishing that the prosecutrix was below the age of 18 years on the date of offence allegedly committed by the accused, the order of conviction passed by the learned Special Judge cannot be sustained and deserves to be set aside.

25) For the reasons stated above, following order is passed, -

ORDER

i) The judgment and order dated 27th July, 2015 passed by III Additional

Sessions Judge, Latur in Special Case (POCSO) No.28/2014, is quashed and set aside;

ii) The appellant – Kiran s/o Ashok Gawali is acquitted of all the offences charged against him. The appellant be released forthwith, if not required in any other case or crime;

iii) The Criminal Appeal thus stands allowed.

(P.R.BORA)
JUDGE

bdv/
FLDR 27.9.17