

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 397/2009

The State of Maharashtra
Through Public Prosecutor,
High Court, Bench at Aurangabad.

Appellant.

Versus

1. Lingabai w/o Maroti Sahane
Age : 35 yrs, occu. : labourer
R/o Patel Nagar, Kanheri Road,
Latur.

2. Palan s/o Gyanba Kamble
Age : 20 yrs, occu.: labourer
R/o Koli Nagar Zopadpatti,
Latur.

Respondents.
(Original accused)

Mr. A.V. Deshmukh, A.P.P. for the Appellant/State.
Mr. P.M. Gaikwad, Advocate for the respondents/accused.

**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL,JJ.**

Date : 15.01.2018.

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. This appeal is directed against the judgment of acquittal of the offences punishable under Sections 363, 366-A

read with Section 34 and under Section 376 of the Indian Penal Code ("I.P.C." for short), passed by 2nd Ad hoc Sessions Judge, Latur in Sessions Case No.2/2008.

2. Respondent Nos.1 and are the original accused Nos.1 and 2 respectively.

3. Facts leading to institution of this appeal are that accused Nos.1 and 2 were prosecuted for the offences punishable under Sections 363, 366-A read with Section 34 and accused No.2 is prosecuted for the offence punishable under Section 376 of I.P.C. Prosecution case in brief is that informant Shantabai Kisan Kadam (PW-1) used to reside at Patel Nagar, Kanheri road, Latur with her handicapped husband, three daughters and two sons. At the time of occurrence the daughter of the informant was only 16 years old (hereinafter daughter is referred as "victim"). Accused No.1 Lingabai used to live in the same lane where the informant Shantabai resided. Accused No.2 namely Palan Gyanba Kamble was the niece of accused No.1 and he frequently visited the house of accused No.1. Accused No.1 insisted the victim to marry with accused No.2.

On that count understanding was given to accused Nos.1 and 2 by the local leader Shri Ajgar Patel.

4. On 23.09.2007, when the informant Shantabai (PW-1) returned to her residence from the work at about 7.00 p.m., she came to know that her daughter-victim was not present in the house. On inquiry with her son Vishal, she came to know that on that day at about 5.00 p.m. accused No.1 took the victim with her under the pretext of attending call of the nature. When the informant visited the house of accused No.1, she found that it was in locked condition. Therefore, on suspicion on 24.09.2007, the informant Shantabai (PW-1) lodged report (Exh.15) to Police Station, Latur. In the result, offence was registered against accused Nos.1 and 2 under Sections 363, 366-A of I.P.C.

5. On 25.09.2007, accused No.2 and the victim, on their own, visited the Police Station. After recording statement of the victim and accused No.2, they were referred for medical examination. Their clothes were seized and were sent to the

Chemical Analyst. After medical examination the victim was sent to Remand Home as per the order of the Court. Section 376 of I.P.C. was added subsequently with the permission of the Court. After completion of investigation, charge-sheet was submitted in the Court against accused Nos.1 and 2 for commission of offence punishable under Sections 363 and 366-A read with Section 34 and under Section 376 of I.P.C.

5. The offences punishable under Section 366-A and 376 of I.P.C. being exclusively triable by the Court of Session, this case was committed to Sessions Court, Latur.

6. The then Additional Sessions Judge, Latur framed charge (Exh.9) against accused Nos.1 and 2 for the offences punishable under Sections 363 and 366-A read with Section 34 of I.P.C. and against accused No.2 under Section 376 of I.P.C. Accused pleaded not guilty and claimed trial.

7. Prosecution examined total 8 witnesses. After considering the oral and documentary evidence placed on record by prosecution, the learned trial Court pleased to acquit

both the accused of the offences punishable under Sections 363 and 366-A read with Section 34 and accused No.2 for the offence punishable under Section 376 of I.P.C. Against that judgment the State of Maharashtra preferred this appeal.

8. Learned A.P.P. for the State submitted that the victim (PW-4) has fully corroborated the version of informant (PW-1) regarding kidnapping and commission of rape by accused No.2 on victim. According to A.P.P., at the relevant time of the occurrence, the age of the victim was below 16 years, and therefore, consent of the victim for sexual intercourse is immaterial. According to A.P.P., in view of the testimony of Medical Officer Dr. Vaishali Mohite (PW-5), at the time of the offence, age of the victim was between 15 to 17 years and hymen of the victim had old rupture. According to A.P.P., old rupture of hymen together with the testimony of the victim (PW-4) that accused No.2 had forcible sexual intercourse with her is sufficient to establish guilt of the accused.

9. In reply, learned defence Counsel submitted that Dr.

Vaishali Mohite (PW-5) has admitted in her cross-examination that there is error of margin of two years plus-minus regarding the age of the victim which is shown in the certificate (Exh.25). Dr. Vaishali Mohite (PW-5) has also admitted that the victim was habituated to sexual intercourse. The learned defence Counsel submitted that when there was error of margin of two years plus-minus regarding the age of victim, the prosecution cannot establish that at the time of occurrence the victim was below the age of 16 years. He submits that as the victim and accused No.2 appeared at Police Station on their own and as no signs of violence were noticed on the body of the victim, it was the case of sexual intercourse with consent of the victim, who was above 16 years of age. Therefore, no offence of rape is made out.

10. His next submission is that no evidence is available on record which is sufficient to establish that the victim was enticed or forcibly taken away from the custody of her guardian. Therefore, no case of kidnapping is made out.

11. As both the accused are charged for kidnapping

punishable under Section 363 of I.P.C., the burden lies on the prosecution to prove that when the victim was taken away from the custody of lawful guardian, she was below the age of 18 years. If the prosecution can establish that at the time of sexual intercourse with the victim by accused No.2 the victim was below the age of 16 years, then the prosecution can establish the offence of commission of rape, provided that the testimony of the victim is reliable.

12. Shantabai (PW-1) is the mother of victim. From her testimony it emerges that accused No.1 used to insist the victim to marry with accused No.2 and on the date of incident in absence of Shantabai (PW-1), the victim left her house alongwith accused No.1. This incident occurred on 23.09.2007 at about 5.00 p.m. and as the victim was not found, on 24.09.2007 Shantabai (PW-1) lodged F.I.R. (Exh.15) to Rural Police Station, Latur. However, from the recitals of F.I.R. (Exh.15) and the testimony of Shantabai (PW-1) as well as her son Vishal (PW-2), it becomes clear that prior to occurrence of the incident, the victim used to pay visit to the house of accused

No.1 as she was nearby resident. Even on the date of the incident at about 4.00 p.m. the victim left her house alongwith accused No.1 under the pretext for going to answer call of nature. It means that the victim was not taken away from the house of the informant under any type of pressure or force. Even when the victim (PW-4) stepped in witness box, she has only deposed that prior to one day of the incident, accused No.1 asked the victim to perform the marriage with accused No.2 and that she will support them. However, making such offer by accused No.1 to the victim does not amount to any offence. Even such offer cannot be treated as enticing the victim to leave house of her parents.

13. Another aspect is that, though the victim (PW-4) deposed on oath that on the date of the incident at about 4.00 p.m. accused No.1 took the victim with her under the pretext of going to latrine and later on took her to L.I.C. Colony and forced her to sit in Sumo jeep alongwith accused No.2, this version does not inspire confidence because the victim (PW-4) nowhere deposes that when she was forced to sit in the Sumo jeep that time she resisted in any manner or she shouted for any

help from the other citizens. It is hard to accept in a broad daylight the victim would be forcibly kidnapped by compelling her to sit in the jeep and that is without any resistance from the victim. Though the victim narrated the further occurrence of rape by accused No.2 at one house in the village Chanai, the said version of victim (PW-4) is proved as a material omission. The entire story narrated by victim (PW-4) regarding commission of rape by accused No.2 is nothing but a material improvement. In the statement before police victim (PW-4) nowhere uttered single word regarding her forcible kidnapping and commission of rape on her by accused No.2 against her will.

14. On the other hand, from the testimony of Investigating Officer P.S.I. Sonar (PW-8) it emerges that F.I.R. (Exh.15) was lodged on 24.09.2007 and on the next date i.e. on 25.09.2007 victim and accused No.2 visited the Police Station. These circumstances clearly indicate that the victim left the house of her parents on her own and for entire one day she willingly stayed with accused No.2 and thereafter alongwith accused No.2 on her own she appeared before the Investigating Officer at Police Station, Latur. Even Investigating Officer P.S.I.

Sonar (PW-8) has admitted in his cross-examination that the victim never made statement that accused No.1 forcibly made the victim to sit in the jeep and accused No.2 committed rape on the victim. Thus, the above circumstances on record clearly indicate that on the date of the occurrence, the victim (PW-4) willingly left her house and she willingly stayed with accused No.2. No doubt, C.A. Report (Exh.50) shows that blood group of the victim is 'A' and C.A. Report (Exh.49) shows that even the blood group of accused No.2 is also 'A'. Therefore, only because as per C.A. Report (Exh.48) on the Saree and Petticoat of the victim blood stains of blood group 'A' were found and on Petticoat semen of blood group 'A' was found a conclusion cannot be drawn that accused No.2 had sexual intercourse with the victim without her consent.

15. The victim (PW-4) was medical examined by Dr. Vaishali Mohite (PW-5), who also obtained x-ray of the right wrist elbow and pelvis of the victim. Dr. Vaishali Mohite (PW-5) deposes that as per the opinion of Radiologist the age of the victim was 15 to 17 years at the time of the occurrence. This witness has also admitted in her cross-examination that there is

error of margin of two years plus-minus, regarding the age shown in the certificate (Exh.25). It means that as per the medical evidence, age of the victim was in between 15 to 19 years. Thus, in any case the prosecution cannot prove that on the date of the occurrence of the incident the victim was below the age of 16 years or below the age of 18 years. Dr. Vaishali Mohite (PW-5) has also admitted in her cross-examination that the victim was habituated to sexual intercourse as her hymen had rupture and vagina admit two fingers. No signs of violence were noticed on the body of victim by Dr. Vaishali Mohite (PW-5). In the circumstances only because the Medical Officer found old rupture in the hymen of the victim, inference cannot be drawn that accused No.2 had sexual intercourse with the victim against her will or without her consent.

16. On the other hand, overall circumstances of the case indicate that the probability cannot be ruled out that the victim left the house of her parents on her own accord and she had sexual intercourse with accused No.2 with her full consent when she was above the age of 18 years. Therefore, neither the case of kidnapping can be established nor the case of rape.

17. The learned trial Court has carefully considered all these circumstances and rightly acquitted accused Nos.1 and 2 of the offences punishable under Sections 363 and 366-A read with Section 34 and rightly acquitted accused No.2 of the offence punishable under Section 376 of I.P.C. The view taken by the trial Court while acquitting the accused is not impossible view. Therefore, we hold that this Court need not interfere the judgment of acquittal passed by Ad hoc Additional Sessions Judge, Latur in Sessions Case No.2/2008.

18. It follows that this appeal being devoid of merits, deserves to be dismissed.

19. Hence, the following order

ORDER

1. Criminal Appeal No.397/2009 is dismissed.
2. The bail bonds of the respondents /accused shall stand cancelled.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE