IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 813/2006

The State of Maharashtra
Through Police Station Manwat,
District Parbhani. **Appellant**.

Versus

Hanuman @ Bandu s/o Atmaram Kadam
Age : 33 years, occu.: agri.,
R/o Kinhola, Taluka Manwat,
District Parbhani. **Respondent**.

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Mr. R.V. Dasalkar, A.P.P. for the appellant/State.
Mr. S.J. Salunke, Advocate for respondent/accused.

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

DATED : 20th March, 2018.

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

1. Vires of the judgment passed by Ad hoc Additional Sessions Judge, Gangakhed in Sessions Case No. 90/2004, whereby the accused was acquitted of the offences punishable under Sections 376 and 506 of the Indian Penal Code (hereinafter referred to as “I.P.C.”), is challenged by the State of Maharashtra by filing the present appeal. Respondent is the original accused.

2. Prosecution case in brief is that three months after the marriage of victim (PW-1) when she came to her parental home, she

had stomach-ache, and therefore, her husband took her to the hospital at Manwat. That time it was noticed that the victim was carrying pregnancy of five months. Therefore, her husband left her at her parental home. When the parents of the victim inquired with her, that time for the first time victim disclosed that prior to five months when she was alone in the field at about 10.00 to 11.00 a.m., that time accused dragged the victim in the hut situated in the said field and had forcible sexual intercourse with her. Accused also threatened the victim to kill her if she disclosed the incident to anybody. Five to six months thereafter again accused raped the victim at her residence when in the morning hours she was alone in her house. Due to threatening by the accused, victim did not disclose the incident to anybody.

3. At last, victim lodged F.I.R. to Police Station Manwat on 18.06.2004. In the result, Crime No.42/2004 was registered against the accused at Police Station Manwat under Sections 376 and 506 of I.P.C. Police Officer Anil Patil (PW-4) conducted the investigation of this crime, prepared spot panchnama (Exh.17). After delivery of the victim, blood samples of victim, her baby and the blood sample of accused were obtained and it were referred for D.N.A. Test. D.N.A. Report (Exh.33) discloses that the accused was putative father of the baby of victim. After completion of investigation,

charge-sheet was submitted against the accused in the Court of Judicial Magistrate, First Class at Pathri for the offences punishable under Sections 376 and 506 of the I.P.C.

4. Offence punishable under Section 376 of I.P.C. being exclusively triable by the Court of Sessions, this case was committed to Sessions Court, Gangakhed.

5. Charge (Exh. 2) was framed against accused for the offences punishable under Sections 376 and 506 of I.P.C. Accused pleaded not guilty and claimed trial.

6. Accused admitted D.N.A. Report (Exh.33). Defence of the accused is that of total denial.

7. After considering the evidence of four prosecution witnesses, the learned trial Court pleased to acquit the accused. Therefore, this appeal arises.

8. Heard strenuous arguments submitted by learned A.P.P. for the State and learned Counsel Shri S.J. Salunke for the respondent.

9. At the stage of argument, it is not disputed by both the Counsels that the sexual intercourse was done by the accused with victim with her consent. Otherwise also, from the testimony of the victim (PW-1) it emerges that after occurrence of the alleged incident of rape, she did not disclose this occurrence even to her parents. Had the victim kept mum due to threatening by the accused, definitely after some reasonable period when there was no pressure from the accused, the victim would have disclosed the occurrence to her parents. Thus, total silence of the victim and unexplained delay of five months in lodging F.I.R. from the date of occurrence, creates probability that the victim and accused had sexual intercourse with consent of each other.

10. In this appeal the only point agitated in between the parties is regarding the age of victim at the relevant time of the occurrence. If the prosecution can establish that at the time of the occurrence in the year 2004 the victim was below the age of 16 years, then the sexual intercourse by accused with the victim even with her consent would be the offence of rape punishable under Section 376 of I.P.C.

11. Learned A.P.P. for the State placed heavy reliance on birth entry in the School Admission Register (Exh.37) proved by

Headmaster of the Primary School, Kinhola Balaji Gunjkar (PW-3) and School Leaving Certificate (Exh.38), which show that the date of birth of victim is “10.03.1991”. If the prosecution can establish that date of birth of victim is 10.03.1991, then in the year 2004 at the time of occurrence, certainly the victim would be below the age of 15 years.

12. Learned Counsel for the respondent submitted that the birth entry in the School Admission Register (Exh.37) is not supported by date of birth entry in Grampanchayat Office or in any other public record. He pointed out that the School Admission Register (Exh.37) does not indicate that the information recorded therein was given by the parents of victim.

13. In the case at hand, D.N.A. Report (Exh.33) is admitted by defence which indicates that the accused was putative father of the baby of victim. Thus, this evidence is sufficient to hold that the accused had sexual intercourse with victim. But as discussed above, that sexual intercourse was with consent of the victim. Therefore, age of the victim is most important point in the present case.

14. No doubt, from the medical examination report (Exh.41) of the victim it emerges that age of the victim was in between 14 to

17 years. Therefore, the medical evidence on record is of no help to the prosecution to prove that at the relevant time of the incident, the victim was below the age of 16 years.

15. Even from the cross-examination of victim (PW-1), it emerges that at the time of lodging report she probably disclosed her age as '19 years' as in the F.I.R. (Exh.25) her age is mentioned as '19 years'.

16. The damaging blow to the prosecution case is that, though much reliance has been placed on School Admission Entry Register (Exh.37) proved by Balaji Gunjkar (PW-3), does not disclose that at the time of admission in the school of the victim, her date of birth was given by her parents. Even the School Admission Register (Exh.37) is not signed by the parents of the victim. From the cross-examination of Balaji Gunjkar (PW-3) it becomes clear that birth certificate issued by Village Panchayat or Hospital is not available in the school record. Even this witness cannot tell which relative of the victim informed the school about the date of birth of victim.

17. In the School Admission Register (Exh.37) and School Leaving Certificate (Exh.38) the identification mark on the body of

the victim is noted as “mole on the neck”. However, medical examination certificate (Exh.41) does not indicate the same identification mark on the body of victim. Medical Certificate (Exh.41) shows that the identification mark on the body of victim is noted as “mole on the left side of the cheek and mole on the right arm”. Thus, otherwise also, entry in the School Admission Register (Exh.37) about date of birth of victim cannot be treated as reliable document to hold that the date of birth of victim is “10.03.1991”. Father of the victim namely Kishan Kadam (PW-2) has also admitted in his cross-examination that date of birth of victim was not recorded in Birth Register of the Rural Hospital or in Grampanchayat Register. In the circumstances, in absence of birth entry of the victim, only on the basis of doubtful entry in the School Admission Register (Exh.37) on the basis of which School Leaving Certificate (Exh.38) is issued, the prosecution cannot be establish beyond reasonable doubt that on the date of the occurrence of incident, the victim was below the age of 16 years. On the other hand in view of the age of victim mentioned in F.I.R. (Exh.25) and in medical examination certificate (Exh.41), the possibility cannot be ruled out that at the time of occurrence of the incident the victim was above the age of 16 years. Thus, when such two probabilities arise, benefit of doubt goes in favour of the accused.

18. After going through the judgment of the learned trial Court, we are fully satisfied that the trial Court has rightly considered the above discussed evidence available regarding the age of victim at the relevant time of the occurrence. The view taken by the learned trial Court is possible view, and therefore, the judgment of acquittal passed by the trial Court does not call for any interference by this Court.

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

19. Hence, the following order.

ORDER

Criminal Appeal No. 813 of 2006 is dismissed.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

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