

Sharayu Khot.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 100 OF 1999

The State of Maharashtra

**...Appellant
(Orig. Complainant)**

Versus

1. Shantaram Baban Karkare

2. Ganesh Ramji Karkare

**...Respondents (Orig
Accused No. 1 & 2.)**

Ms. P.P. Shinde, APP, for the Appellant-State.

Mr. A.Z. Mookhtiar, a/w Ms. F.M. Chawala, for the
Respondents.

**CORAM : ABHAY S. OKA & AND
RIYAZ I. CHAGLA, JJ.**

DATE : 3 March 2018

ORAL JUDGMENT : [Per A.S. Oka, J.]

1. This is an Appeal preferred by the Appellant-State of
Maharashtra for challenging the judgment and order dated 16

October 1998 by which the 1st Respondent (Accused No. 1) was acquitted for the offences punishable under Section 376 and 417 of the Indian Penal Code. By the same judgment and order, 2nd Respondent (Accused No. 2) was acquitted for the offences punishable under Section 376 of the Indian Penal Code.

2. According to the case of the prosecution, at the relevant time, the prosecutrix was a student of ninth standard. According to the prosecution, 1st Respondent was a schoolmate of the Prosecutrix. When the First Information Report was lodged on 13 November 1995, the Prosecutrix was 30-32 weeks pregnant. According to the case of prosecution, the First Information Report was not registered earlier as there were meetings between the parents of the Prosecutrix and the father of the 1st Respondent in presence of the respectable persons.

3. As far as the age of the Prosecutrix is concerned, the prosecution examined Kashinath Patil, the Head Master of the concerned school who proved the two school leaving certificates

at *Exh.25* and *Exh.26*.

4. The first school leaving certificate was issued at the time of leaving primary school and the second school leaving certificate was issued when the Prosecutrix left the secondary school. Both the school leaving certificates show the birth date of the Prosecutrix as 1 June 1980. Apart from other witnesses, the Prosecutrix has examined the Prosecutrix and her father.

5. The learned APP has taken us through the notes of evidence and the impugned judgment. She pointed out that even taking the findings recorded by the learned Sessions Judge that the relationship maintained by the Prosecutrix with the 1st Respondent was consensual, she submitted that even on the date on which First Information Report was registered (13 November 1995), the Prosecutrix had not completed the age of 16 years, as her year of birth is 1980. She submitted that the reasons for delay in registering the First Information Report are explained in the evidence of Prosecutrix, who is PW-1. She

submitted that there were meetings held between the parents of Prosecutrix and the father of the 1st Respondent in presence of respectable persons. She submitted that both the school leaving certificates at *Exh.25* and *Exh.26* show the date of birth as 1 June 1980. She submitted that even from the perusal of cross examination of the prosecution witnesses, it appears that the fact that the 1st Respondent had maintained physical relationship with the prosecution is not seriously disputed. She would, therefore, submit that as the age of the Prosecutrix at the relevant time was below 16 years, in view of Section 375 of the Indian Penal Code, the conviction was the only possible outcome.

6. The learned Counsel appearing for the Respondents, pointed out that the learned Sessions Judge has accepted the defence case that the age of victim was more than 16 years at the time of incident and even from the deposition of PW-1-Prosecutrix, it is crystal clear that the relationship allegedly maintained between her and 1st Respondent was consensual.

He submitted that the view taken by the learned Sessions Judge is absolutely correct and in any case, it is a possible view.

7. We have given careful consideration to the submissions. On careful perusal of the evidence of PW-1 (the Prosecutrix), it is apparent that she has accepted that she had a love affair with the 1st Respondent. Her case is that as he had promised to marry her, she did not protest. In fact there were meetings held between the family members of the Appellant and the 1st Respondent. She lodged complaint on 13 November 1995, when she was in advanced stage of pregnancy of 30-32 weeks.

8. PW-2 is one Shri. K.M. Patil, who was the Head Master of the relevant school in which the Prosecutrix had studied. He brought the original general register before the Court and the school leaving certificates at *Exh.25* and *Exh.26* which shows the date of birth of the prosecutrix as 1 June 1980. However, in the cross examination, the witness admitted that he

cannot express any opinion that the date of birth of the Prosecutrix was correct or incorrect.

9. PW-3 is Maruti, the father of the Prosecutrix, In paragraph 6 of his cross examination, he claimed that he had carried the birth certificate of the Prosecutrix at the time of admitting the Prosecutrix to the school. However, we find that the birth certificate is not produced on record.

10. Thus, the evidence of age before the Court was in the form of entries in general register of the school, where the Appellant has studied. PW-2 who produced the said evidence has no personal knowledge as to how these entries were made.

11. Dr. Ashok V. Birajdar, Medical Officer, was examined as PW-7, who had examined the prosecutrix. He concluded that only on the basis of the examination of her teeth, he opined that the age of the Prosecutrix was 15 years and it is accordingly mentioned in his report. However, in the cross

examination, he admitted that for ascertaining the age of the Prosecutrix, x-ray of the Prosecutrix was not done and ossification test was not conducted. He has admitted that the DNA test was not carried out. Thus, taking the prosecution case as correct, it creates serious doubt, whether the age of the Prosecutrix was less than 16 years, when the offence was committed. After recording a finding that the age of the Prosecutrix was more than 16 years at the time of commission of offence, the learned Sessions Judge held that the relationship was consensual.

12. After having taken a comprehensive view of both the documentary and oral evidence, the view taken by the learned Sessions Judge that the age of the Prosecutrix at the relevant time was more than 16 years and that the relationship maintained by the 1st Respondent and the Prosecutrix was consensual is a possible view which could have been taken on the basis of the evidence on record. The primary evidence of age in the form of the birth certificate, though available, was not

produced. Even assuming that the learned APP is right, at highest, it could be said that another view is possible. Therefore, no case is made out to interfere with the findings of the learned Session Judge in an Appeal from acquittal.

13. The Appeal is accordingly dismissed.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]