

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL No. 713 OF 1997

The State of Maharashtra

... Appellant
(Original Complainant)

Vs.

Macchindra @ Babdu Gangadhar
Sonawane, Age 41 years,
R/a. Wad, Taluka – Chinchwad,
District Nashik

... Respondents
(Original Accused)

Mrs. M. M. Deshmukh, APP for the Appellant - State.

Mr. Hrishikesh Mundargi a/w Shradha Sawant i/b Girish
Ghumre, for the Respondent .

**CORAM : INDRAJIT MAHANTY, &
V. K. JADHAV, JJ.**

Reserved for Judgment on : NOVEMBER 30, 2018.

Judgment Pronounced on : DECEMBER 22, 2018

JUDGMENT [PER : INDRAJIT MAHANTY, J.]

1. Present appeal under S. 378(1) Cr. P.C. 1973 has been filed by the State of Maharashtra against the order of acquittal dated 24.7.1997 passed by the learned 2nd Additional Sessions Judge, Nashik, of the offences punishable under S. 376 and 342 of the Indian Penal Code.

2. The prosecution case in brief is that on 1.12.1996 the victim, who claims to be of 11 years of age, i.e. at the time of occurrence, was alone in her house, while her father had taken her elder brother to a hospital, since he had sprain in the back. Her mother, a farm labourer, had gone to work and to collect firewood. At that time, the victim having no money had a severe headache and finding no alternative, went to the village grocery shop and requested the accused, for some medicine at around 1.30 p.m. The accused finding the victim to be alone closed doors of his shop and took the victim into the house and committed rape on her.

3. It is further case of the prosecution that after commission of the crime, the accused forcibly threw the victim out of his house and the victim having no other alternative, walked back to her house and sat in front of her house. It appears from the evidence of the informant (PW 3) Khandu Mali (father of the victim) who returned home at 3.00 p.m. that he found the victim sitting in front of his hut with blood

stained clothes. Some time later, the mother of the victim (PW 5) Shahabai Mali ,returned home from the place where she was working as labourer, and after collecting the firewood. When she came home, she noticed that her daughter / victim was bleeding and lying on the ground. Immediately, the victim was taken by her parents in their landlord's tractor to Manmad, initially to one Dr. Joshi and since his dispensary was not open, they took her to the hospital where Dr. Tuse examined the victim and PW 5 Shahabai, learnt from Dr. Tuse that her daughter / victim (PW 4) had suffered from a case of rape and she was advised to take the victim to the municipal hospital. It is further case of the prosecution that PW 5 Shahabai on learning the possibility of rape of her daughter, inquired from the victim about her condition and it is only then, that the victim is stated to have informed her mother PW 5 Shahabai that she had been raped by the accused and that the incident had occurred in the afternoon. It is thereafter that PW 3 Khandu Mali, father of the victim, narrated the event in detail in the Manmad Police Station.

4. In the light of the aforesaid circumstances, the accused faced the trial for the offences punishable under S. 376 and 342 of the Indian Penal Code. During the course of trial, learned trial court framed following two points:

- (i) Whether the accused person committed rape on the victim?
- (ii) Whether the accused person wrongfully confined victim in his house?

5. The aforesaid points were answered in the negative and order of acquittal was passed in favour of the accused. Hence, the present appeal is filed by the Appellant-State.

6. Insofar as reasons for acquittal of accused given by the learned trial court is concerned, the first point that he dealt with was the “determination of age” of the victim.

7. In order to arrive at a conclusion, the learned trial Judge has taken into consideration following aspects:

- (a) The father of victim PW 3 and the victim PW 4 stated on oath that the prosecution was approximately 11 years old and they could not recollect the date of

birth;

- (b) Admittedly, the victim has no birth certificate, no school leaving certificate or any other documentary evidence to prove the age of the victim;
- (c) The only evidence placed on record is the certificate issued by the Medical Officer from Civil Hospital, Nashik. The said certificate is issued by Dr. Chavan, who is a Radiologist and even though he was not examined in the trial court, the said report was submitted by Dr. Chavan to Dr. Kulkarni (PW 1) and the report of radiological examination is exhibited as Exhibit 18.

Dr. Kulkarni, who was examined as PW 1 based his opinion on the X-ray and radiological test and determined age of the victim to be 14 years. Dr. Kulkarni (PW 1) in his cross-examination agreed that as per Modi's Jurisprudence, there is margin of error when age is determined and stated that it is true that as per renowned author of medical Jurisprudence, Shri Modi, error of judgment of three years on either side and as per author Dr. Parekh, it is two years at either side. Based on

margin of error of 2-3 years, the trial court came to be conclusion that the benefit of doubt should be given to the accused, in the absence of any corroborative evidence to prove otherwise. Accordingly, the learned trial court held that age of the victim as 16 years (major).

8. Insofar as second point for determination is concerned, i.e. whether the victim has given “consent” for the alleged act, the trial court arrived at a finding that the victim, who admittedly, had no money and her father had not provided any money for buying any medicine for headache but despite having no money, she went to the shop of accused-respondent for purchasing medicine. The court further found that there are several inconsistencies and improvements in the evidence of PW 3 and PW 4 i.e. father of victim as well as victim and held that the facts stated by the victim are so improbable that “it is not possible to believe that against her will or without her consent this act is committed”. The aforesaid conclusion was arrived at on the basis of further

finding that in the “absence of any injuries” on the person of respondent-accused, such as bites, scratches, etc. and absence of resistance was apparent as the victim did not make any attempt to run away or shout for help. In the light of the aforesaid finding, the learned trial court concluded that the victim had given her “consent” for sexual intercourse.

9. The first issue that needs to be determined in the present appeal is reappraisal of the entire evidence produced in the course of trial and once again to ascertain as to whether the finding of the trial court insofar as age of the victim is in accordance with law or not. In this respect, learned Additional Public Prosecutor Mrs. Deshmukh placed reliance on the oral testimony of the victim's father (PW 3) in which he has categorically stated that age of the victim was approximately 11 years. The victim (PW 4) in her evidence has also stated that her age was 11 years. It is further submitted that in the absence of any documentary evidence. For determining age of the victim, radiological test of her wrist and elbow was

conducted by Dr. Chavan on 5.12.1996 and the report of Dr. Chavan (Exhibit 18) was submitted to Dr. Kulkarni who was examined as PW 1, and proved Exhibit 18 and more importantly confirmed in his testimony that age of the victim is 14 years. It is therefore, submitted that margin of error of two years on either side (as stated in medical jurisprudence of Dr. Parikh and various judgments of Hon'ble Supreme Court), the estimated age of the prosecutrix would be between 12-16 years. Learned APP submitted that in the course of determining age of victim, in the circumstances that arise in the present case where the victim is totally uneducated, as well as come from the poorest of the poor family, various other aspects ought to have been taken into consideration by the Court to determine her age for the following reasons:

- (i) Clause (2) of the radiological report (Exhibit 18) shows that her "iliac crest epiphysis has not appeared. Normally, it appears at the age of 14 years in female;
- (ii) The medical certificate (Exhibit 23) issued by Dr. Tuse (PW 2) of hospital at Manmad noted in fair amount of

detail, the victim's physical growth and development of sexual character. According to Exhibit 23, victim had a moderate body built with a height of 4'-8" and weight 34 Kgs., she had 28 teeth, and there was absence of any secondary sexual characters. Her menstruation cycle had not commenced as yet. Furthermore, she had no signs of developed breasts, growth of pubic hair scanty with no eruption of axillary hair either.

10. It is submitted that all these physical parameters would go to indicate that victim had not attained puberty especially when she had no visible secondary sexual character developed. It is contended that medical jurisprudence lays great stress on the growth of secondary sexual character which commences at the age of 13 , with appearance of menarch being an important indication for the same. It is submitted on behalf of the State that the trial court ought to have taken into consideration the victim's overall behaviour, including her oral testimony and the fact that the victim was an illiterate, coming

from rustic background, coupled with poverty. In the light of aforesaid submission, it is submitted that judicial discretion ought to be exercised in determining the age of victim to be less than 14 years and consequently the minor at the time of occurrence.

11. The learned APP also placed reliance upon the judgment of the Supreme Court in the case of **Ramdeo Chauhan Vs. State of Assam**¹ and submitted that the appellate court has an obligation to scan the entire record of the trial and determine the age of the victim afresh since the finding of the learned trial court that the victim was 16 years of age is a perverse finding in law and not supported by evidence on record. It is therefore, submitted on behalf of the State that the appellate court should determine age of the victim by taking into consideration (a) physical characteristics of the concerned victim (Exhibit 23); (b) oral testimony of the witnesses; (c) X-ray / ossification test report (Exhibit 18).

¹ (2001) 5 SCC 714

12. The learned APP further placed reliance on the judgment of the Apex Court in the case of **Vijay @ Chinee Vs. State of Madhya Pradesh**² to advance the contention that while determining age of the victim, the background of the prosecutix, both educational, financial as well as location ought to be taken into consideration and adequate weightage should also be given to the physical characteristics, general body growth and secondary sexual characteristics of the victim. She further placed reliance on the judgment of the Apex Court in the case of **State of Himachal Pradesh Vs. Mango Ram**³ and submitted that in the present case the victim's overall body characteristics as well as radiological test (Exhibit 18) and medical certificate (Exhibit 23) would adequately indicate that the victim was a minor at the time of the occurrence.

13. The learned advocate Mr. Mundargi for the respondent-accused, on the other hand, submitted that age of the victim at the time of incident was 16 years or more and

² (2000) 8 SCC 191

³ (2000) 7 SCC 224

that she had attained the age of understanding and enable to give her “consent” to the respondent-accused. He further submitted that the only available material in order to determine age of the victim is the document at Exhibit 18, which estimates her age to be about 14 years. As per the 3 parameters considered by PW 1 in the above mentioned document, parameter 1 estimates age of the victim to be more than 14 years; whereas parameters 2 and 3 would put the estimate of the victim's age to be less than 14 years. This, according to the learned advocate, itself would be sufficient to constitute that the age given in Exhibit 18 is not accurate and subject to the rule of +2 and -2, contemplated in several books of medical jurisprudence and toxicology. Mr. Mundargi further contends that finding of PW 1 determining age of victim at about 14 years cannot be accepted to be accurate, and creates reasonable degree of doubt, and consequently the benefit of doubt has to be given to the accused. He further submits that reliance placed by the prosecution on Exhibit 23 is also misplaced since the said medical certificate indicates that

number of teeth in the mouth of victim is 28 as on 1.12.1996. This would indicate that the victim had all her teeth (except 4 wisdom teeth) which establishes the fact that the victim was more than 14 years of age.

14. Reliance is also placed on **Modi's Jurisprudence** on age determination which is on **Page No. 233**, of the **24th Edition 2011** in which it is mentioned that a person would get his 28 teeth at about 14 years of age which also could be suggestive of the fact that the victim was more than 14 years of age at the time of the incident. This would also support the contention of the accused that reasonable doubt on the age exists, and consequently, rule of +2 and -2 would have to be considered, the benefit accrued in favour of the accused.

15. The learned advocate also placed reliance on following judgments:

- (i) **Rajak Mohammad Vs. State of Himachal Pradesh⁴**;
- (ii) **State of Madhya Pradesh Vs. Anoop Singh⁵**

⁴ (2018) 9 SCC 248

⁵ (2015) 7 SCC 773

- (iii) **Mahadeo Mhaske Vs. State of Maharashtra**⁶
- (iv) **Rajinder Chandra Vs. State of Chattisgarh**⁷
- (v) **Arnit Das Vs. State of Bihar (SC)**⁸
- (vi) **Kali Ram Vs. State of Himachal Pradesh**⁹

16. It is well settled by the Hon'ble Supreme Court that the courts are expected to deal with cases of sexual crime against the women with utmost sensitivity and such cases need to be dealt with sternly and severely. In this respect, it would be appropriate to refer to paragraph 1 of the judgment of the Apex Court in **State of Punjab Vs. Ramdev Singh**¹⁰, which reads thus:

“1. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person

6 (2013) 14 SCC 637

7 2002 Bom. C.R.(Cri.) 507

8 (2001) SCC 657

9 1973 SCC (2) 808

10 AIR 2004 SC 1290

of a woman, it is a crime against the entire society. It destroys, as noted by this Court in **Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty (AIR 1996 SC 922)**, the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21 of the Constitution of India, 1950 (in short the 'Constitution'). The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

17. Learned APP Mrs. Deshmukh placed reliance on the judgment of the Hon'ble Supreme Court in **Ramdeo Chauhan @ Raj Nath Vs. State of Assam**¹¹ and submitted that finding of the trial court in determining age of the victim has been arrived in a purely mechanical manner and the marginal error in age ascertained by radiological examination of 2 years on either side has been utilised by the trial court for a finding that the victim was major as on the date occurrence of crime. In this respect, she submitted that in the aforesaid judgment, it is

¹¹ (2001) 5 SCC 714

stated in paragraph 21 that statement of the doctor is no more than an opinion and the court has to base its conclusion upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available, and even though X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform. Therefore, it is contended on behalf of the State that the learned trial court has not only mechanically applied the margin of 2 years to the age of victim, but also has placed too much reliance upon textbooks on medical jurisprudence and toxicology, without itself coming to a conclusion, based on the

facts and circumstances of the present case relating to the examination of the physical features of the victim.

18. At this stage, it becomes imperative for us to first of all go through the evidence on record of the present case for the purpose of appreciating the finding of the learned trial court insofar as determination of age of the victim is concerned. In this respect, reference needs to be made to a judgment of Hon'ble Apex Court in the case of **Vijay @ Chinee Vs. State of Madhya Pradesh** (supra). In the said judgment, Hon'ble Supreme Court has laid down the procedure for determination of age of the victim in paragraph 27, which reads as under:

“Determination of Age

27. As per *Modi's Medical Jurisprudence and Toxicology*, 23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant. ”

In paragraph 25 of the said judgment, it is also observed as under:

Injury on the person of the victim

“25. In the case of ***Gurcharan Singh v. State of Haryana AIR 1972 SC 2661***, this Court has held that "the absence of injury or mark of violence on the private part on the person of the victim is of no consequence when the victim is minor and would merely suggest want of violent resistance on the part of the victim. Further absence of violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape .

...”

19. In the case at hand, evidence on the following aspect, as emanated from examination of victim is noted as under:

1.	Examination of teeth (dental age)	No. of teeth- 28 <u>7 / 7</u> 7 / 7	Exhibit 23
2.	Height	4' - 8"	
	Weight	34 Kg.	
	General Body Build	Moderate (minor signs)	

3.	Secondary Sex characters	Not developed	Exhibit 23
	Hair L. Axillary	Not yet erupted	
	Pubic	Scanty, not well developed.	
	Breast	Not developed.	

4	Ossification of bone	
	(i) Head of radius epiphysis appeared and found. Normally, it finds at the age of 14 years in female; (ii) Iliac crest epiphysis not appeared. Normally, it appears at the age of 14 years in female; (iii) Lower end of Ulnar epiphysis appeared but not found. Normally, it appears at the age of 8 to 10 years in female. Hence, radiological age is about 14 years.	Exhibit 18

20. In the light of aforesaid findings while the Radiologist has opined that the victim's radiological age is about 14 years, similarly, PW 1 Dr. Kulkarni in his evidence

opined as follows:

“On the basis of said X-Ray and radiological test, age of the said girl is determined. I found her age to be 14 years. My opinion is based on the report submitted by our radiologist Dr. P. C. Chavan.”

21. Dr. S. B. Tuse (PW 2) who had examined the victim at Manmad stated that he had examined the victim and enquired from her relative as to whether she is getting menstruation, to which he got reply in the negative, and he noticed that “there was a profused bleeding and her total clothes were blood stained.” He examined the private part and noticed injuries on the hymen. Hyminal tear was there, which is explained in the clock form as 12 O'clock, 3 O'clock, 6 O'clock and 9 O'clock. Then he forwarded the patient to the Rural Hospital, Manmad. He further stated that he noticed that injury to the private part was due to the forceful intercourse committed on her.

22. We are fully aware of the fact general rule about age determination is that age as determined can vary + 2 or -2

years. But it would be useful for us to take note of the guidelines rendered by the Hon'ble Supreme Court in the case of **Mukarrab Etc. Vs. State of U. P.**¹² herein the Apex Court while considering a case under the Juvenile Justice (Care & Protection) Act, 2000 placed reliance on various judgments of the Hon'ble Supreme Court, referred to in paragraph 23, which are quoted as under:

23. In Criminal Appeal No. 486 of 2016 dated 12.05.2016, Parag Bhati (Juvenile) through Legal Guardian-Mother-Smt. Rajni Bhati v. State of Uttar Pradesh and Anr., after referring to Abuzar Hossain case and other decisions of this Court, this Court held as under:

26. It is no doubt true that if there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of the incident and the documentary evidence at least prima facie proves the same, he would be entitled to the special protection under the JJ Act. **But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of**

protecting the confidence of common man in the institution entrusted with the administration of justice.

27. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue.

[Emphasis added]

From the above decision, it is clear that the purpose of Juvenile Justice Act, 2000 is not to give shelter to the accused of grave and heinous offences. ”

23. It would be relevant here also to take note of the fact that when evidence of victim (PW 4) was recorded, the court itself accepted the fact that the victim was a child. The learned trial court having accepted and having recorded age as 11 years, thereafter proceeded to ask question to the victim in order to determine as to whether the victim was mentally

adequate / moderate to give evidence in the trial. The court having asked such question and obtained answers from the victim, satisfied of the availability of the victim to lead evidence in the trial, allowed the prosecution to examine PW 4 as victim in the case.

24. The aforesaid aspect of trial would also be an indicator (though not conclusive) that the trial court even prior to recording evidence of victim (PW 4), had already determined the victim to be a child witness.

25. From the above, it would be clear that the Hon'ble Supreme Court held that the purpose of Juvenile Justice Act is not to shelter the accused of heinous offences and extending the same principle to the facts of the case in hand, the benefit of the so called rule of + 2 and -2 years ought not to be *ipso facto* extended as a right to the benefit of an accused for the aforesaid self same reason. We are of the considered view that when an accused commits a grave and heinous offence and thereafter attempts to take shelter under the claim

that the victim being a major, extending the principle of +2 and -2 years to the age of victim, may in our opinion, amount to a casual or cavalier approach, while determining as to whether the victim is a minor or not. The courts are enjoined with the duty to perform its obligations with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. No doubt, great respect has to be shown to various legal authors but the manner of applicability of their views would have to remain subject to appreciation of facts of each case by the court dealing with such matter and such medical principles ought not to be applied mechanically.

26. We are of the considered view that the medical evidence in the present case about age of the victim is “about 14 years”. If the principle of +2 and -2 years is applied, then the victim could be either 12 years or 16 years. In the case at hand, the age determination test, as noted in the table above in paragraph 17 would clearly assist us in determining that at the

very least, the victim was less than 16 years of age on the date of incident, and therefore, a minor.

27. The aforesaid view expressed by us is further strengthened by the fact that while medical tests have been conducted to determine her age indicates that her age to be that of a minor. A victim, who is admittedly a minor and if medical tests are conducted for determination of age, and even assuming that such medical determination the supports the claim of minor victim, the principle of +2 and -2 cannot and ought not to be mechanically applied to deprive the minor victim of the protection available to such a minor. The same in our considered view would result in failure of the court from performing its duties in protecting the confidence of the common man in the institution. While relying on the medical evidence recorded in the course of trial, as well as oral testimonies of both PW 3 (father of victim) and PW 4 (victim), we are of the considered view that the learned trial court has erred and has acted in casual or cavalier manner in

determining the victim's age to be that of a major.

28. The next issue that has been dealt with by the trial court is issue of “consent”. While we arrived at a finding that the victim was minor on the date of the incident, and consequently, there is no necessity for us to enter into the issue regarding whether she had given her consent or not, yet for the sake of completeness of judgment, we proceed to deal with the said issue as well. We have already noted hereinabove the findings of the trial court on the issue of consent and also the contentions advanced on behalf of the respondent-accused in the matter. One of the reasons ascribed by the learned Sessions Judge for arriving at his conclusion was the absence of any injury on the person of the victim, such as bite marks, scratches, etc. to indicate any resistance by her, nor did the victim make any attempt to run away or shout. Absence of any injury on the body of the victim cannot lead to a conclusion that she had given her consent and all that it indicates is that she did not put up resistance. Lack of any resistance or

absence of injury on the body of the victim are of no consequence vis-a-vis the issue of consent.

29. It is also important to take note of the judgment of the Hon'ble Apex Court in the case of **Vijay @ Chinee** (*supra*) and the fact that Section 114A of the Indian Evidence Act, 1872 had come to be inserted by way of amendment in the year 1988, the same is extracted with Section 4 of the said Act hereinbelow:

S. 114A. *Presumption as to absence of consent in certain prosecutions for rape* - In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she stated in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

“S. 4. “May presume”.- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

“Shall presume”.- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and it is

disproved.”

30. The aforesaid provision is clear and specific that where sexual intercourse by accused is proved and the question is whether it was without consent of a woman, alleged to have been raped and if she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. In the case at hand, the victim (PW 4) categorically and repeatedly has stated in her evidence that not only she never consented to the sexual act, but also she categorically denied of having any relationship with the accused, saying that “it is not true to say that I myself and accused had a fair love affair, that too with consent. It is not true to say that I was having fair relations with him with consent.” Therefore, since the victim in this case has categorically denied consent for sexual intercourse, we are of the considered view that the learned Sessions Judge has lost sight of the provisions of Section 114-A of the Evidence Act, and consequently erred in the finding on the issue of consent itself. We are also at variance of the findings arrived by the

trial court and also conclude that in the facts and situation of the present case, victim did never gave her consent for any sexual intimacy.

31. It would be important for the purpose of this case to take note of the following:

- (i) In the oral testimony, the victim informed the court that she was forcibly taken to the room of the accused and was also “forced “to lie on the bed;
- (ii) The victim expressed deep pain and discomfort by “crying out loud” during the forced penetration;
- (iii) The victim categorically denied of having any affair with the accused and denied consenting of having any relations whatsoever with the accused;
- (iv) The victim bleed profusely and her dress was soaked in blood and felt giddy and unstable after commission of the crime;
- (v) Upon her medical examination, her hymen was found to be torn in all four directions (3 o'clock, 6 o'clock, 9 o'clock and 12 o'clock positions), apart from the inflammation and profuse hemorrhage that was found from tear margins, as found from the medical certificate (Exhibit 23);

- (vi) Slight tear was present on her fourchette region, indicating use of extreme force or violence;
- (vii) A blood stained quilt was recovered from the house of the accused which on chemical analysis was found to contain the blood group "A", (i.e. the same blood group as that of the victim) whereas the accused's blood group was "B";
- (viii) PW 2 Dr. Tuse, who examined the victim has stated in his evidence that on examination of the victim, he found that there was forcible intercourse with the victim (his report is at Exhibit 24);
- (ix) After the criminal act, the accused forcibly threw the victim out of his house.

32. In conclusion, we would like to record that after having gone through the entire evidence, both documentary and oral led in the course of trial, keeping in mind the fact that the victim was born in a family of abject poverty, no education whatsoever and had gone to the grocery shop owned by the father of the accused literally begging him for medicine for the headache for which she was suffering pain and the trauma that the victim must have undergone, the shame and indignity

suffered by her being thrown out of the house after the rape was committed, staggering to her house, sitting outside her house in the condition that she was unable to tell her sister who inquired from her about what had happened, and thereafter being carried to Dr. Tuse at Manmad. It is only at such a stage that the victim has the courage to tell her mother (PW 5) about what had transpired on that afternoon. Even though the incident took place in the year 1996, we remain with the fervent hope and confidence that protecting the confidence of the common man in the institution entrusted with the administration of justice is reaffirmed. In the result, we are inclined to quash and set aside the order of acquittal of the accused of the offence under S. 375 I. P. C., punishable under S. 376 of I. P. C.

Sd/-
[V. K. JADHAV, J.]

Sd/-
[INDRAJIT MAHANTY, J.]

33. The learned advocate Mr. Hemant Sharma i/b Shradha Sawant appearing for the respondent-accused submits that accused was of 19 years of age at the time of the

occurrence, and there has been substantial delay in the trial and in the appeal, and therefore, a lenient view should be taken by the Court and the proviso to Section 376(2) of the I.P.C. should be applied and the Court should consider the imprisonment for a term less than the minimum statutory period.

34. The learned APP, on the other hand, submits that the victim who was a minor, and the circumstances would indicate that a lenient view ought not to be taken in this matter.

35. The issue regarding the power of a Court to impose a lesser punishment under the proviso to sub-section (2) Section 376 was considered by the Hon'ble Supreme Court in the case of **State of Madhya Pradesh Vs. Balu**¹³, where the High Court had reduced the sentence of a convict from guilty of offence under S. 375 of the I.P.C. to the period undergone. The Hon'ble Supreme Court noticed that the sympathy shown

¹³ AIR 2005 SC 222

by the High Court was wholly misplaced and likely to send wrong signal. Their Lordships further found that the High Court grossly erred by reducing the sentence imposed by the Sessions Court. In the aforesaid judgment, reliance was placed on 3-Judge Bench judgment of the Hon'ble Supreme Court in the case of **State of Karnataka Vs. Krishnappa**¹⁴ while considering the question of reduction of sentence in a rape case, it observed thus:

"The approach of the High Court in this case, to say the least, was most casual and inappropriate. There are no good reasons given by the High Court to reduce the sentence, let alone "special or adequate reasons". The High Court exhibited lack of sensitivity towards the victim of rape and the society by reducing the substantive sentence in the established facts and circumstances of the case. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others."

36. In view the submission cited hereinabove, we pass the following order.

ORDER

(i) Appeal is allowed.

- (ii) The Respondent-accused Macchindra @ Babdu Gangadhar Sonawane is convicted for the offence punishable under S. 376 of the Indian Penal Code and sentenced to suffer 7 years rigorous imprisonment.
- (iii) The Respondent-accused shall pay fine of Rs. 1,00,000/- (Rupees one lakh), in default to suffer further one year rigorous imprisonment. Amount of fine is to be deposited in the trial court. On depositing the fine amount of Rs. 1,00,000/- in the court, the same shall be paid to the victim towards compensation.
- (iv) Accused-respondent is entitled to the benefit of set off under S. 428 Cr. P.C.
- (v) Accused-respondent shall surrender the trial court within a period of one month. Bail bond of the accused stands cancelled.
- (vi) We further direct the Secretary of the District Legal Services Authority, Nashik District to locate victim of this case and get application from her, as required

under the National Legal Services Authority compensation scheme for consideration of payment of compensation under the Compensation Scheme for Women Victims / Survivors for Sexual Assault / other Crimes -2018, and we hope and trust that such an application will be dealt with necessary sympathy that the case deserves.

- (vii) The registry to supply copy of this judgment to the Secretary, District Legal Services Authority, for necessary compliance.

Sd/-

[V. K. JADHAV, J.]

Vinayak Halemath

Sd/-

[INDRAJIT MAHANTY, J.]