

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.633 OF 2014

SURESH BALU KAMBALE

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Ganesh Gole, counsel for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 3rd JULY 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 27th January 2014 passed by the learned Additional Sessions Judge, Satara, in Sessions Case No.67 of 2012, thereby convicting the appellant/accused of the offence punishable under Sections 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.5,000/- and default sentence of simple imprisonment for 6 months.

2 Facts leading to the prosecution of the applicant/accused can be summarized thus :

- (a) According to the prosecution case, the prosecutrix/PW3 at the relevant time, was a minor below 16 years of age. She along with her parents including PW1 Balu - father, her mother and brother Ravindra used to reside at Village Ghotil (Varache) in Satara District. The appellant/accused is their distant relative. He also used to reside nearby the house of the prosecutrix/PW3.
- (b) Parents of the prosecutrix/PW3 used to earn their livelihood by working as labourers. Her brother Ravindra was taking school education. The prosecutrix/PW3 had left the school education in 7th Standard, and as such, she used to remain at the house itself.
- (c) The appellant/accused used to visit house of the prosecutrix/PW3 at noon time. Taking advantage of the fact there used to be nobody in the house of the prosecutrix/PW3,

the appellant/accused used to hug her. He used to allure her by saying that he loves her and he will marry her. Six months prior to lodging the First Information Report (FIR) dated 17th June 2012, according to the prosecutrix/PW3, the appellant/accused came to her house. Then, he committed rape on her. After the incident, the prosecutrix/PW3 started weeping. But the appellant/accused consoled her by stating that he will marry her and left the house. Subsequent such incident, according to the prosecution case, was even witnessed by the younger brother of the prosecutrix/PW3. The appellant/accused in this manner committed forcible sexual intercourse with the prosecutrix/PW3 on seven to eight times.

- (d) According to the prosecution case, the prosecutrix/PW3 became pregnant because of commission of repeated rape on her by the appellant/accused. In the meanwhile, her marriage was settled by her parents, and accordingly, she married one Chandrakant from Mumbai on 24th April 2012.

After marriage, the prosecutrix/PW3 started cohabiting with her husband Chandrakant at Mumbai. Soon after marriage, there was pain in abdomen of the prosecutrix/PW3, and therefore, she was taken to the hospital, where the Doctor informed that the prosecutrix/PW3 is carrying pregnancy of five months. Therefore, husband of the prosecutrix/PW3 called her father i.e. PW1 Balu, and by informing him about pregnancy of his daughter, asked him to take his daughter back. That is how, the prosecutrix/PW3 returned back to her village along with her father PW1 Balu. Then, on 17th June 2012, she lodged FIR (Exhibit 17) with Dhebewadi Police Station, which resulted in registration of Crime No.26 of 2012 against the appellant/accused for offences punishable under Sections 376 and 506 of the Indian Penal Code.

- (e) Routine investigation followed. Investigating Officer recorded statements of witnesses, effected seizure and had drawn spot panchnama. Samples of blood of the prosecutrix/PW3, that of the appellant/accused and newly

born baby boy of the prosecutrix, were taken and were sent for forensic examination. On conducting DNA test of those samples, the Forensic Laboratory sent a report stating that the appellant/accused is the biological father of the male child born to the prosecutrix/PW3. Certificate of birth as well as bona fide certificate in respect of the prosecutrix/PW3 came to be collected, and on completion of investigation, the appellant/accused was charge-sheeted.

- (f) Charge for the offence punishable under Section 376 of the Indian Penal Code was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.
- (f) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. PW1 Balu is the father of the prosecutrix/PW3. PW2 Kamal is aunt of the prosecutrix/PW3. The prosecutrix is examined as PW3 and her FIR dated 17th June 2012 is at Exhibit 22. PW4 Dilip Gaikwad is a panch witness to Spot Panchnama (Exhibit 21)

and Seizure Panchnama of clothes of the prosecutrix/PW3, which is at Exhibit 22. Lady Police Constable Vinaya Waghmare is examined as PW5. Dr.Sushama Jadhav and Dr.Sarafraj Attar, Medical Officers working at Rural Hospital, Dhebewadi are examined as PW6 and PW7 respectively. They had examined the prosecutrix/PW3 and the appellant/accused respectively. Circle Officer Dnyandeo Gujar is examined as PW8. He had drawn the map of house of the prosecutrix/PW3 and the same is at Exhibit 36. Investigating Officer, Assistant Police Inspector, Gorakh Darekar of Dhebewadi Police Station is examined as PW9. Report of the DNA test is at Exhibit 43. The defence of the appellant/accused was that of total denial.

- (g) After hearing the parties, by the impugned judgment and order dated 27th January 2014, the learned Additional Sessions Judge, Karad, District Satara, was pleased to convict the appellant/accused of the offence punishable under Section 376 of the Indian Penal Code, and accordingly, he is

sentenced as indicated in opening paragraph of this judgment.

3 I have heard Shri Gole, the learned counsel appearing for the appellant/accused at sufficient length of time. He vehemently argued that the FIR of the instant crime is lodged belatedly and the delay is that of about seven months. The prosecutrix/PW3 was more than 16 years of age at the time of the incident and the FIR lodged by her itself shows her age as 18 years. Evidence in respect of date of birth and age of the prosecutrix/PW3 has come on record by way of omission. The prosecution has not proved School Leaving Certificate of the prosecutrix/PW3 and though the Investigating Officer has deposed that he has collected School Leaving Certificate of prosecutrix/PW3, the same is not placed on record. Birth Certificate of the prosecutrix/PW3 is not exhibited. The learned counsel appearing for the appellant/accused further argued that an application (Exhibit 44) for exhibiting the Birth Certificate came to be filed by the prosecution and it was allowed on 22nd

October 2013, that is, when evidence of the Investigating Officer was already over. The Birth Certificate (Exhibit 46) came to be exhibited under order of the court, but the same is not relied as even date of issuance of that certificate is not mentioned on it. The said certificate cannot be read in evidence and the appellant/accused was not granted an opportunity to rebut that Birth Certificate. The learned counsel further argued that in this factual scenario, it cannot be said that the prosecution has proved age of the prosecutrix/PW3. The learned counsel further argued that as the FIR lodged by the prosecutrix/PW3 is stating her age as 18 years, she was fully grown adult lady at the time of the alleged incident, and even if her evidence is accepted, then also it shows that she was a consenting party to the act. The learned counsel further argued that there is variance in evidence of PW1 Balu and that of the prosecutrix/PW3. Evidence of PW1 Balu shows that after return from the labour work, his daughter had told the incident to him. Evidence of the prosecutrix/PW3 shows that she had not disclosed her pregnancy to anybody till her marriage consummated. Evidence of prosecutrix/PW3, in

submission of the learned counsel for the appellant/accused, shows that there was inimical relations between them, and the prosecutrix/PW3 has candidly admitted that there was discussion between her family members that the complaint should not be lodged against anybody because of her pregnancy before the marriage. This, according to the learned counsel for the appellant/accused, implies false implication of the appellant/accused in the crime in question.

4 The learned Additional Public Prosecutor supported the impugned judgment and order of conviction by contending that the DNA report shows that the appellant/accused is a biological father of the child born to the prosecutrix/PW3, and as such, corroborates the version of the prosecutrix/PW3. The learned Additional Public Prosecutor further argued that the School Leaving Certificate showing date of the birth of the prosecutrix/PW3 was already filed on record, so also the Birth Certificate issued by the Registrar under the Registration of Births and Deaths Act, 1969. This documentary evidence shows that the

prosecutrix/PW3 was below consenting age, at the time of commission of offence.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence.

6 As according to the prosecution case, the appellant/accused had committed rape on the prosecutrix/PW3, who at the relevant time was below consenting age, fate of the prosecution case, to a large extent, hinges on proof of age of the prosecutrix/PW3 as well as on her version, regarding the incidents in question. From evidence adduced by the prosecution, undisputed facts emerging on record are thus :

The prosecutrix/PW3 along with her family comprising of her parents and brother were residing in Village Ghotil (Varache), Taluka Patan, District Satara. The appellant/accused was also resident of the very same village and is neighbour of the prosecutrix/PW3. He is relative of the prosecutrix/PW3. The

prosecutrix/PW3 married a person from Mumbai on 24th April 2012. She had given birth to a male child on 7th September 2012 at the Cottage Hospital, Karad. She had lodged the FIR on 17th June 2012 alleging rape on her by the appellant/accused, about six months prior to lodging the FIR.

7 Let us now, put on record settled legal position regarding appreciation of evidence in cases relating to sexual offences. In the case of **State of Punjab vs. Gurmeet Singh**¹, the Honourable Apex Court took a view that the courts dealing with the rape cases shoulder a great responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

“It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and

1 1996 Cri.L.J. 172

personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the

background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

8 In the matter of Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat² in paragraph 10, the Honourable Apex court has observed thus :

“10Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :-

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any

2 AIR 1983 SC 753

incident which is likely to reflect on her chastity had ever occurred,

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours,

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent.”

9 It is, thus, clear that, evidence of the victim of sexual offence always stands on higher pedestal than that of the injured witness, as such victim suffers not only physical injury but also psychological trauma, which continues till the end of the life of such witness. Though, in the FIR Exhibit 17 lodged by her, the prosecutrix/PW3 has stated her age as 18 years, in her substantive evidence before the court, the prosecutrix/PW3 has stated her date of birth as 20th May 1997. Similarly, Investigating Officer PW9 Gorakh Darekar, Assistant Police Inspector, has deposed about collection of Birth Certificate as well as certificate from the school where the prosecutrix/PW3 had taken education reflecting her date of birth. The prosecution has not examined the Register under the Registration of Births and Deaths Act, 1969, for formal proof of the Birth Certificate Exhibit 46, but same came to be

exhibited directly by the learned trial court by passing orders to that effect on the application Exhibit 44 filed by the prosecution for exhibiting the said Certificate. This application Exhibit 44 came to be allowed by the learned trial court on 22nd December 2013 i.e. after evidence of the Investigating Officer was over. That is how, the Birth Certificate issued by Gram Sevak of Village Panchayat Kasani, Taluka Patan, District Satara, as per provisions of the Registration of Births and Deaths Act, 1969, came to be exhibited at Exhibit 46. This Birth Certificate is showing date of birth of the prosecutrix/PW3 as 20th May 1997. Similarly, the record shows that the prosecutrix/PW3 had moved an application Exhibit 25 on 19th July 2013 for taking Birth Certificate issued by the Gram Sevak of said Village Panchayat Kasani on record. This certificate annexed to the application at Exhibit 25 shows that the same is issued on 16th July 2013, as per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969, as well as Rules framed thereunder, and is reflecting the fact that the prosecutrix/PW3 was born to PW1 Balu on 20th May 1997.

10 Let us now examine whether the Birth Certificate, which is marked at Exhibit 46, can be read in evidence without formal proof thereof. This Birth Certificate at Exhibit 46, so also the unexhibited Birth Certificate with application Exhibit 25 on the record of the learned trial court at Miscellaneous File III are exactly identical certificates, which are issued as per provisions of the Registration of Births and Deaths Act, 1969. Both certificates are issued by the Registrar under the Registration of Births and Deaths Act, 1969. Section 7 of the said Act deals with appointment of Registrars for each local area comprising the area within the jurisdiction of a municipality, panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. This Act provides for his maintenance of register for recording birth and death within the local area. In pursuant to the provisions of Registration of Births and Deaths Act, 1969, certificate at Exhibit 46 came to be issued

by the Registrar as per provisions of Sections 12 as well as 17 of the said Act. The certificate at Exhibit 46 as such is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. It needs to be mentioned here that Section 17 of the said Act as well as Rule 25 of the Rules framed thereunder provides that such certificates are admissible in evidence for the purpose of proving the birth to which the entry therein relates. As such, the Birth Certificate of the prosecutrix /PW3 at Exhibit 46 being the original certificate and a public document, no formal proof thereof is required. It needs to be mentioned here that document forming the acts or records of the acts of public officer are public documents as provided for in Section 74 of the Evidence Act. Section 76 thereof prescribes for issuance of certified copies of such public documents and every public officer having custody of public document is duty bound to give copy thereof on payment of legal fees. Section 77 of the Evidence Act provides that certified copies of public documents

can be produced for proof of contents of public documents. In the case in hand, the Birth Certificate at Exhibit 46 as well as the Birth Certificate with application at Exhibit 25 in Miscellaneous File III of Record and Proceedings are certificates issued under the Registration of Births and Deaths Act, 1969, and those are public documents. Those can be read in proof of contents thereof without formal proof of the same. Valuable reference can be had to this proposition from the judgment of the Honourable Apex Court in the matter of **Harpal Singh & Another vs. State of Himachal Pradesh**³. Relevant portion of paragraph 3 of that judgment needs reproduction and reads thus :

“3This is corroborated by Ex. PF which is an entry in the admission register maintained at the Government girls High School, Samnoli (where in the girl was a student) and which is proved by the Head Master. That entry states the date of birth of the girl as 13th October, 1957. There is yet another document, viz., Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh

3 AIR 1981 SC 361

during her childhood, was born to Lajwanti wife of Daulat Ram on 11-11-1957. Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author.”

The Honourable Apex Court in the matter of **Siddheshwar Ganguli vs. State of West Bengal**⁴ has held that safer proof of age of person in respect of whom offence has been committed is the Birth Certificate of that person. In the matter of **Umeshchandra vs. State of Rajasthan**⁵ the Honourable Apex Court has held that entry in School Register and admission form regarding date of birth constitutes good proof of age. There is no requirement that public or other official book should be kept only

4 AIR 1958 S.C. 143

5 (1982) 2 SCC 202

by a public officer but all that is required under Section 35 of the Evidence Act is that it should be regularly kept in discharge of official duty. At this juncture, it is apposite to look into provisions of Section 35 of the Indian Evidence Act, 1872. Bare perusal of this provision makes it clear that, if entry is made by public servant in official book in discharge of his official duty, then such entry becomes relevant fact and admissible in evidence. It is well settled that certified copy of the entry in the Birth Register maintained by official in discharge of his official duty is admissible under Section 35 of the Indian Evidence Act, 1872, and it is not even necessary to examine officer who records such entry.

11 In view of this discussion, it can safely be concluded that date of birth of the prosecutrix/PW3 is 20th May 1997.

12 Much capital was tried to be made out by the learned counsel for the appellant/accused by relying on the FIR Exhibit 17 and it is contended that this FIR shows age of the prosecutrix/PW3 as 18 years. Similarly, from evidence of the

prosecutrix/PW3 it is brought on record that her evidence in respect of her date of birth as 20th May 1997 has come on record by way of omission. It needs to be mentioned here that the prosecutrix/PW3 was a rustic female child residing in Village Ghotil (Varache), along with her family and her parents were working as labourers. The prosecutrix/PW3 belongs to Scheduled Caste and had left the school education at 7th Standard. Her father PW1 Balu seems to be an uneducated person. As such, the mere oral statement of the prosecutrix/PW3 at the time of lodging the FIR is not sufficient to dislodge legally admissible documentary evidence regarding her age. Evidence of the prosecutrix/PW3 shows that the incident in question took place firstly about six months prior to lodging the FIR. The FIR was lodged by her on 17th June 2012. Even on the date of lodging the FIR, the prosecutrix/PW3 was a female child of 15 years of age, and as such, she had not attained consenting age of 16 years, as per the law prevalent at that time.

13 Evidence of the prosecutrix/PW3 shows that when there used to be nobody at her house, the appellant/accused used to visit her house and used to commit rape on her and this happened for about 7 to 8 times. Her evidence that on one occasion, her brother Ravindra had witnessed such incident from the window of the house, is coming on record by way of omission, but even if such omission is ignored from consideration, then also, there is no material on record in her cross-examination to disbelieve evidence of the prosecutrix/PW3 that the appellant/accused had committed rape on her on 7 to 8 occasions. Evidence of the prosecutrix/PW3 shows that she was married to a person from Mumbai on 24th April 2012 and soon thereafter, her husband detected her pregnancy of five months duration through the doctor. The prosecutrix/PW3 delivered a male child on 7th September 2012 i.e. within five months of her marriage with a person from Mumbai. On complaint from her husband, she was taken back to her parental house by PW1 Balu – her father. Evidence of PW1 Balu shows that his daughter i.e. the

prosecutrix/PW3 had disclosed him about her pregnancy when he returned from the labour work. This evidence obviously indicates admission of pregnancy by the prosecutrix/PW3 to her father after her return from the matrimonial house. As such, this fact is of no assistance to the defence.

14 The prosecutrix/PW3 has deposed about discussion in her family regarding lodging the FIR against anybody, as she became pregnant even prior to her marriage. The prosecutrix/PW3 further stated in her cross-examination that there was dispute between her family members and the appellant/accused over filling of drinking water. However, this evidence cannot cast shadow of doubt on version of the prosecutrix/PW3 that the appellant/accused had committed rape on her. Such trivial incident cannot be construed to dislodge testimony of the prosecutrix/PW3 regarding commission of rape on her, as in such cases, the victim would not spare the real culprit to substitute somebody in his place.

15 It was argued by the learned counsel for the appellant/accused that the Investigator has not followed due procedure for getting the report of DNA Test. Therefore, according to the learned counsel for the appellant/accused, DNA Report at Exhibit 43 cannot be made used of against the appellant/accused. Such submission, to my mind, is devoid of merits. The Investigating Officer i.e. PW9 Gorakh Darekar, has categorically deposed that he collected blood samples of child born to the prosecutrix/PW3 as well as blood sample of the prosecutrix/PW3 and that of the appellant/accused, and those samples were sent to the forensic laboratory for report. Except mere suggestion, nothing is elicited from cross-examination of PW9 Gorakh Darekar, Investigating Officer, to demonstrate that due procedure was not followed by collecting such samples. It is not even suggested to this Investigating Officer that he had collected sample of blood of some other person and sent it in the name of the appellant/accused for forensic examination. The DNA Report at Exhibit 43 sent by the Forensic Science Laboratory at Mumbai shows that the appellant/accused is the biological

father of the baby boy born to the prosecutrix/PW3. This evidence certainly corroborates version of the prosecutrix/PW3, to the effect that, it was the appellant/accused who had committed forcible sexual intercourse with her. It is proved by the prosecution through legally admissible evidence in the form of Birth Certificate issued under the Registration of Births and Deaths Act, 1969, that at the time of commission of sexual intercourse with her, the prosecutrix/PW3 was below 16 years of age. As such, her consent, if any, to the act, is irrelevant.

16 The learned counsel for the appellant/accused placed reliance on the judgment of the Honourable Supreme Court in Jarnail Singh vs. State of Haryana⁶ and contended that procedure envisaged in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, ought to have been followed by the prosecution for establishing the age of the prosecutrix/PW3. In his submission, certificate from the school first attended by the prosecutrix/PW3 should have been proved by the prosecution in support of her age. However, as the

⁶ 2013 ALL MR (Cri) 2946 (S.C.)

prosecution has duly proved age of the prosecutrix/PW3 from the certificate issued by the Registrar under the Registration of Births and Deaths Act, 1969, the submission so advanced is devoid of merits.

17 Evidence of the prosecution, as discussed in foregoing paragraphs, in my considered opinion, is sufficient to hold that the prosecution has established the commission of the offence punishable under Section 376 of the Indian Penal Code, by the appellant/accused. In view of what has been discussed in foregoing paragraphs, it is not necessary to discuss other evidence adduced by the prosecution. Evidence of the prosecutrix/PW3, coupled with the forensic evidence, is sufficient to bring home the guilt to the appellant/accused. The sentence imposed on him is also in consonance with the gravity of the offence committed by him. No case for interference is, therefore, made out. Hence the order :

ORDER

The appeal is dismissed.

Arti Vilas
Khatate

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(A. M. BADAR, J.)