

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 88 OF 2016

Bapu @ Manu Laxman Salunkhe
Age 19 years, occ. labourer
r/o Rajdehere, Chalisgaon
Tq. Chalisgaon, Dist. Jalgaon

Appellant

Versus

The State of Maharashtra
through Chalisgaon Police Station
Tq. Chalisgaon, Dist. Jalgaon

Respondent

Ms. Ashwini Sahastrabuddhe, Advocate holding for Mr. N.R.
Dayama, Advocate for the appellant.
Mr. A.A. Jagatkar, APP for the respondent-State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 30th July, 2019.

ORAL JUDGMENT :

1. Heard.
2. Appellant herein is convicted for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 376(2)(i) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and fine of Rs.3,000/- and Rs. 2,000/- separately for each offence by the learned Special Judge, Jalgaon in Special Case No. 71/2014 vide judgment and order dated 01.12.2015.
3. Such of the facts necessary for decision of this appeal are as follows :

On 28.03.2014, one Latabai Mali, who belongs to Bhil community, lodged a report at the police station alleging therein that she and her husband work on daily wages and they work at the place wherever employment is available. She is the mother of the victim Miss 'X'. For about 5 to 6 months, she was residing at village Rajdehere where she was working on daily wages. Sometimes her daughter Miss 'X' also used to accompany her. She was residing in a hut which was a temporary shed. After five months, they realised that some good work was available at village Babhulwadi and therefore, her family shifted to Babhulwadi. There her daughter was suffering from cough and therefore, she was constrained to take her to civil hospital at Nandgaon. Upon examining Miss 'X', the doctors had disclosed that Miss 'X' was carrying pregnancy. Upon enquiry with the victim, she had disclosed that in the absence of her mother, present appellant, who was residing in the neighbourhood and happens to be a relative of her mother, used to visit the house. Accused was about 19 years old at that time and Miss 'X' was about 14 1/2 years old. They used to chit chat together. One fine day, accused had disclosed to her that he intends to marry her. Thereafter they had developed intimacy which further precipitated into sexual relationship between the teen aged boy and the victim girl. Upon learning about the same, the mother was constrained to approach the police patil and thereafter with his help, she had been to Police Station, Chalisgaon, and lodged report.

Crime No. 13/2014 was registered against the accused for offence punishable under Section 376 of the Indian Penal Code. Accused was arrested on 08.07.2014 and continues to remain in

custody till today. The case was committed to the Special Court and was registered as Special Case No. 71/2014.

4. Prosecution examined as many as 14 witnesses to bring home the guilt of the accused. The case would merely rest upon the evidence of PW 1 Latabai Mali - mother of the victim, PW 2 Sanjay Mali, PW 3 victim herself and PW 14 the Investigating Officer. Since the DNA report shows that the accused happens to be the biological father of the foetus which was terminated, the medical evidence need not be discussed.

5. PW 1 Latabai has proved the contents of the First Information Report and the same is marked as Exhibit 16. According to her, she remembers the date of birth of her daughter as first April because the said day is popularly known as the "April Fool Day". According to her, her daughter has studied upto 2nd or 3rd standard. She further stated before the Court that at Rajdehere, she had stayed in a tent for about two months only and then she shifted to village Babhulwadi. According to her, accused happens to be her distant relative and therefore, he was visiting her house. She used to go for labour work at 10.00 am and returned home at 5.30 or 6.00 pm and again used to go for work in the evening and return home at 10.00 pm. She has further stated that she had erected tent in an isolated place. She had no knowledge that the accused was employed in Bhima Sugar factory. But she was aware that he was residing in the same village. Her evidence has not been shattered in the cross examination.

6. PW 2 - father of the victim has reiterated the contentions of

PW 1 - the mother. He has further deposed that he had admitted his daughter in Zilla Parishad Primary School at Manyad chouki, Babhulwadi. He has specifically admitted before the Court that he and his wife are illiterate. He has no idea of English calendar months. He had not accompanied the victim and her mother to the hospital or police station. The police had recorded his statement after about 4 months of registration of offence. He has fairly admitted that he could not disclose the incident to anyone as it would not be proper to do so.

7. PW 3 - the victim has deposed before the Court that the accused used to visit her house in the absence of her mother. He had expressed his willingness to marry her. She has also disclosed that after they shifted to Babhulgaon, she was suffering from cough. The cross-examination of the victim is irrelevant.

8. In the present case, it is pertinent to note that the accused was not present in the Court at the time of recording of evidence and the prosecutor had shown arrest panchanama of the accused to the victim and she had identified the accused on the basis of the photograph of the accused affixed on the said panchanama. The Investigating Officer was a lady. It is further pertinent to note that said identification was neither challenged by defence at the time of trial nor the issue is raised before this Court. Infact, Section 273 of the Code of Criminal Procedure contemplates that identification in the Court is a substantive evidence and that evidence can be recorded in the absence of the accused provided the advocate pleading for the accused makes an application to that effect. Provisions under Section 273 of the Code of Criminal Procedure

read as under :

273. Evidence to be taken in presence of accused :

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.]

Explanation - In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Be that as it may, since the said issue is not under challenge, it need not be considered.

9. DNA test report shows that the accused and the victim are concluded to be the biological parents of the baby of Miss 'X'.

10. It appears that challenge is only to the date of birth of the victim. Learned counsel for the appellant has vehemently submitted that the prosecution has not proved minority of the victim beyond reasonable doubt because they have not placed on record the birth certificate of victim. Said statement cannot be

taken into consideration for the simple reason that the prosecution has brought on record the school leaving certificate and has examined PW 6 Bapurao Kadam who had brought the original school register alongwith him. According to him, the entry at serial no. 78 is in respect of the victim girl. Her mother's name is mentioned as Kalubai. Her birth place is shown Manyad-Chouki, Tq. Nandgaon, Dist. Nasik and the date of birth is 01.04.2001. Said certificate is compared with the original register marked at Exhibit 32. Upon perusal of Exhibit 32, it appears that entry at serial no. 78 is regarding school admission of the victim in first standard. The date of birth is mentioned as 01.04.2001. It was a fresh admission and the date of admission is 20.06.2008. A stray suggestion is made in the cross-examination that name of the father of the victim is not mentioned in the school register as the husband of Kalubai. This was a futile suggestion as the register shows name of victim as Miss 'X' d/o of Sanjay Mali and mother's name is shown as Kalubai. There is absolutely no reason to disbelieve the date of birth of victim as 01.04.2001.

11. It is pertinent to note that the evidence of the victim inspires confidence to the extent that she has not stated in her evidence that she was coerced or forced to respond to the sexual overtures by the accused-appellant and he had proposed to marry her and they had developed physical intimacy as well. There is no element of coercion in the present case. Learned counsel for the appellant has vehemently submitted that she was a consenting party and therefore, the appellant deserves to be acquitted. As against this, learned APP has submitted that even if it is taken for the sake of argument that she was a consenting party, the statutory mandate

is that consent of a minor cannot be considered in case of rape. Since the victim is a minor girl, her consent cannot be taken into consideration. However, in the course of administration of justice, it would be necessary to ascertain as to whether there would be any extenuating circumstances which can be taken into consideration.

12. Some of the admitted facts are, victim as well as the accused belong to 'Bhil' community which is not only a Nomadic Tribe but is educationally, socially and culturally backward community. They do not have permanent residence and they travel from one place to another. Accused-appellant had just attained majority i.e. he had just completed 18 years of age and he was about 19 years old and the same parameter like that of the victim would be applicable to the accused-appellant also. It is true that the young boy and the girl had fallen in love. They had developed physical intimacy which has been termed as rape since the victim was minor at the time of incident. It is no doubt a heinous offence. At the same time it is to be seen that there was no coercion on the part of the accused-appellant. Said circumstance can be treated as extenuating special circumstance.

13. In any case, accused-appellant has undergone 5 years of rigorous imprisonment. In the special circumstances, the sentence imposed upon the appellant deserves to be reduced to rigorous imprisonment for 7 years. The appellant is in custody from 08.07.2014. Chapter XXXVIII of the Maharashtra Prison Manual contemplates that on an average a prisoner would be entitled to remission for about 3 days per month for good

behaviour, discipline and participation in various activities such as physical training, educational program etc. and, 4 days per month for performing the allotted work in accordance with the prescribed standard. Being a young lad of 19 years, it cannot be said that the appellant would not be entitled to remission of approximately six to seven days per month. He would be entitled to total remission of about 114 days per year excluding National holidays and other remission granted by the Central Government. All these things have to be taken into consideration for the simple reason that a young boy who has undergone substantive punishment in the prison would get more amenable with the hardened criminals and therefore, some leniency is to be shown. In view of this, in all, appellant would be entitled to remission of about 517 days approximately after undergoing rigorous imprisonment for five years. Hence, the appeal is partly allowed.

14. Conviction of appellant for offence punishable under Section 376 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012, is maintained.

15. The sentence of fine is maintained.

16. Appellant is sentenced to imprisonment for seven years.

17. Appeal accordingly stands disposed of.

(SMT. SADHANA S. JADHAV, J.)

dyb/