

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 273 OF 2003

The State of Maharashtra
Through
Police Station, Sonpeth.

... APPELLANT
(Orig. Complainant)

VERSUS

Mahadeo S/o Namdeo Pradhane,
Age : 25 Years, Occu. Education,
R/o. Naukota, Tq. Sonpeth,
Dist. Parbhani.

... RESPONDENT
(Orig. Accused)

....

A.PP for Appellant-State : Mr. D. R. Kale

Advocate for the respondent : Mr. Y. B. Bolkar (Appointed)

.....

**CORAM :T.V. NALAWADE AND
 K.K. SONAWANE ,JJ.**

DATE : 4th JUNE, 2019.

JUDGMENT(PER T.V. NALAWADE, J] :-

1. The appeal is filed by the State against the decision of the acquittal given by the learned Additional Sessions Judge, Parbhani in Sessions Case No. 157 of 2001. The trial Court has acquitted the respondent of the offences punishable under Section 376 and 500(2) of the Indian Penal Code.

2. Heard the learned A.PP Nobody turned up for the respondent.

3. The prosecutrix and the respondent were residents of the same place viz Naukota, Tahsil Sonpeth District Parbhani. The accused was a student at the relevant time. It is case of the prosecutrix that accused was known to her and as accused had given promise of marriage with her she had allowed him to establish physical relation with her. There was such relation for about one year and prosecutrix had become pregnant. When the prosecutrix was pregnant, her marriage was settled with other man and it was performed on 27.05.2001. The prosecutrix did not disclose to anybody that she had relation with the present respondent and she was pregnant from him.

4. After about one month of the marriage of the prosecutrix accused visited the matrimonial house of the prosecutrix and informed to the husband and his relatives that he had physical relationship with the prosecutrix and she was pregnant from him. After this information, the prosecutrix was taken to doctor for medical examination and doctor confirmed that she was carrying of three months pregnancy. Due to this condition of the prosecutrix, she was left at the house of her parents by her husband on 07.07.2001. The husband and his relatives expressed that they would not allow the prosecutrix to cohabit with the husband due to her previous relation and circumstances that she was pregnant from other person.

5. The prosecutrix then disclosed her relationship with respondent to her parents. Attempt was made to see that the respondent marries with the prosecutrix. When he refused to do so, the prosecutrix gave report on 16.07.2001 and the crime for the aforesaid offence came to be registered. In the F.I.R, prosecutrix has given age as 19 years. During the pendency of the matter she delivered a child. Charge was framed for the aforesaid offences and plea of the accused was recorded. Accused pleaded not guilty. The prosecution examined the prosecutrix, her father, the doctor who had examined the prosecutrix for ascertaining the age and other witnesses. Before the Court, prosecutrix gave evidence that she had not completed 16 years of age when accused had taken sexual intercourse with her and even on the date of the deposition she had not completed 17 years of age. Her evidence was recorded on 02.09.2002. No D.N.A test was conducted. Accused took defence of total denial. The trial Court has considered the possibility that prosecutrix had crossed the age of 16 years at the relevant time and there was consent.

6. It is not disputed that during the first disclosure to the police in F.I.R dated 16.07.2001 prosecutrix had given age as 19 years. At that time she was carrying of three months pregnancy. If this circumstance is considered and even her contention that she had relation with accused

for about one year is considered, it can be said that prosecutrix was admitting on 16.07.2001 that she had crossed 16 years of the age when she first came in contact with the accused.

7. Vitthal (P.W. No.2) father of the prosecutrix has not uttered a word about the age of the prosecutrix. This circumstance needs to be kept in mind at the time of appreciation of the substantive evidence given by the prosecutrix evidence on School record and the opinion given by the Medical Officer.

8. Before the Court, the prosecutrix gave her evidence on 02.09.2002 and she gave her age as 17 years. In the substantive evidence also she did not give the date of the birth.

9. The prosecutrix (P.W. No.1) has deposed that the accused was known to her and by giving assurance of the marriage, the accused kept physical relation with her. She has deposed that relationship continued for about one year and due to that she had become pregnant. She had deposed that her father then performed her marriage on 27.05.2001 with other person but she did not disclose that she had relationship with the accused and she was pregnant from the accused. She has given evidence that accused informed to brother of her husband that

prosecutrix was pregnant from him and after that she was taken for medical examination and her husband confirmed that she was already carrying of three months pregnancy. She has deposed that doctor certified that she was carrying of three months pregnancy and on 07.07.2001, she was reached to the house of her parents by the husband and the husband has expressed that it is not possible for him to cohabit with the prosecutrix. She has deposed that her father had requested the accused to settle the matter, but accused refused to do so and so they approached the police and gave the report. Her evidence shows that she had delivered a child when her evidence was recorded.

10. The evidence in the cross examination of the prosecutrix shows that she was meeting the accused at least two times in a week and that was going on for one year. Her evidence shows that she had not informed about her relationship with the accused to anybody and only when she was deserted by the husband she disclosed about the relationship to her parents. On one hand she says that accused had given promise to marry with her and on the other hand her evidence shows that she did not oppose her marriage with other person even when she was pregnant from the accused. This circumstance needs to be kept in mind at the time of considering the case of the prosecution that there was promise of the marriage from the accused.

11. The prosecutrix has given evidence that by mistake she had given her age 19 years to the police at the time of lodging of F.I.R, but she admitted that all the contents in the F.I.R were narrated by her to the police. Her evidence shows that at the relevant time the accused was taking education and he had taken admission for post graduation (M.A.) and he was appearing for M.P.S.C examination. It is not her case that prior to her marriage with third person the accused had refused to marry with her.

12. The prosecution has examined one Shaikh Ahmed (P.W. No.5) to prove the School record in respect of the prosecutrix. Entry in the School record is proved to show that birth date of prosecutrix was given as 05.08.1985. Evidence is given by Ahamad Shaikh that this information was supplied by the father of the prosecutrix. Copies of that entries are taken on record as Exh. 48 to 50. It appears that same date was mentioned when Transfer Certificate was given to the prosecutrix. Though such record is there, the evidence of the father of the prosecutrix does not show that he knew the date of birth of the prosecutrix and he had supplied that information to the School. There is no record like birth certificate in the present matter. Due to these circumstances, not much weight can be given to the entry made in the School record in respect of date of birth.

13. The Prosecution has examined Dr. Shobha Chandak (PW. No.4). Evidence of this doctor shows that she had examined prosecutrix, clinically and radiologically, and on the basis of fusion of bones she gave opinion that the age of the prosecutrix was 14 to 16 years on the date of the examination. The examination was made on 17.07.2001. Her cross-examination shows that fusion of bones depends upon various factors like hereditary factor, nutrition and climate factor etc. It is not her case that as per the table prepared for collecting the data for Parbhani area she had given the opinion. There was complete fusion of humerus to shaft and on that basis she has given this age. According to her the other test which needs to be taken for fixing the age could not be taken as that facility was not available in Civil Hospital Parbhani. She has shown ignorance as to whether there is margin of error of 2 years on either side in respect of opinion given on the basis of ossification test. However, she has tried to say that when she gave the opinion as age between 14 and 16 years she had considered the possible error and this opinion is inclusive of the error. At the end she admitted that the finding given on Exh. 41 regarding the age was on approximation and possibility though she had again tried to say that the prosecutrix had not crossed age of 16 years on the date of examination.

14. The evidence of Shobha (PW.No.4) is of opinion evidence. This

Court cannot ignore the circumstances that the prosecutrix was given in marriage and marriageable age of a girl is 18 years. In any case, it is the father who could have given some reliable evidence about the date of birth, about the age of the prosecutrix as he had given the prosecutrix in marriage many months prior to the date of F.I.R. Due to these circumstances the trial Court has considered the possibility of crossing of age of 16 years by prosecutrix at relevant time. Learned A.P.P placed reliance on the observations made by the Apex Court in the case reported as **2015 DGLS(SC)697 (State of Madhya Pradesh Vs. Anoop Singh)** and submitted that importance needs to be given to the record, if record about the date of birth is available. It is true that necessary importance needs to be given to the record like birth certificate which was available in the reported case and accordingly the Apex Court had considered the date given in birth certificate. In the present matter there are aforesaid circumstances and school record has no such presumptive value. Thus, the view taken by the trial court about the age is possible view, and interference in it is not possible.

15. Once the Court holds that the prosecutrix had crossed 16 years of the age at the relevant time, Court is expected to consider the possibility of the consent of the prosecutrix. The aforesaid circumstances are sufficient to infer that there was consent of the prosecutrix. Her

contention that accused had promised to marry with her has no force as she did not oppose when her father settled her marriage with third person. She could have told to her father about the relationship and she could have insisted the accused for marriage as she was already pregnant from him. That did not happen. Due to all these circumstances, the trial Court has considered the possibility of consent also and benefit of doubt is given to the accused. As the view taken by the trial court is a possible view, this Court holds that interference in the decision given by the trial Court is not possible. In the result, the appeal stands dismissed.

[K.K. SONAWANE]
JUDGE

[T.V. NALAWADE]
JUDGE

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