

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN TCRIMINAL APPELLATE SIDE
CRIMINAL APPEAL NO.762 OF 2002**

The State of Maharashtra	)	
Through Alibag Police Staton;	)	
District - Raigad	)	Appellant/Complainant
V/s.		
Prashant Baburao Gawand	)	Respondent / Accused

Ms Anamika Malhotra, APP for State/Appellant
Mr. Gaurav Parkar for Respondent

**CORAM : K.R.SHRIRAM, J.
DATE : 2nd DECEMBER 2019**

ORAL JUDGMENT.:

1 This is an appeal impugning an order and judgment dated 30-3-2002 passed by the IInd Adhoc Addl. Sessions Judge, Raigad, acquitting respondent Prashant B Gawand (accused) of the offence punishable under Section 376 (*Punishment for rape*) of the IPC.

2 The alleged offence of rape occurred in December 1999 / January 2000, which means it was prior to the Amendment Act 22 of 2018, which came into effect on 21-4-2018. Relevant provision for this matter in the pre Amendment Act would be Section 376(2)(i) and the same reads as under:

“376(2):- Whoever,

(a) to (h)

(i):- Commits rape on a woman when she is under sixteen years of age.

.....”

3 It is the case of prosecution that prosecutrix was working as a maid in the house of accused. Sometime in the month of December 1999, accused asked prosecutrix as to whether she was having physical relations with one Shailesh Vilas Mhatre (Shailesh), to which, prosecutrix answered in the affirmative. Accused then threatened prosecutrix that he would reveal the fact of her physical relation with Shailesh to her parents. 4 or 5 days later at about 4.00 p.m., while the father of accused was sleeping in the verandha outside the house and prosecutrix was working in the house, accused took the prosecutrix in the kitchen and threatened her that if she did not allow him to perform sexual intercourse with her, he would reveal her relation with Shailesh to her mother. Prosecutrix says that accused thereafter performed sexual intercourse with her in the standing position. Accused, it seems had another tryst with prosecutrix in January 2000 when the prosecutrix had gone to the house of accused for preparing food. At about 11.30 / 11.45 a.m., accused again went to her and both of them were alone in the house and when she was preparing food, accused forcibly hugged her and again performed sexual intercourse with her in standing position. Prosecutrix did not disclose any of these to anybody because she was frightened. As rumors started spreading in the village about her

pregnancy from Shailesh and her mother also inquired with her she revealed to her mother that she was pregnant since 5 months. According to prosecutrix, accused was aware of her relationship with Shailesh, who had promised to marry her but taking advantage of her being in physical relationship with Shailesh and by threatening her of disclosing that to her parents, accused forcibly had sexual intercourse with her twice. Accordingly, prosecutrix lodged an FIR on 20-8-2000, under Section 376 of the IPC and after necessary investigation the charge sheet against accused was submitted. In due course, the case was committed to the Court of Sessions Judge. The charge was read over to accused who pleaded not guilty and claimed to be tried. The defence of accused, as we can see from the statement recorded under Section 313 of CrPC, is one of total denial and that a false case has been filed against him.

4 To prove its charge, the prosecution led evidence of 4 witnesses, P.W.-1 Harishchandra Gajanan Bhagat, Head Master of Primary School, Dhokawde, P.W.-2 was prosecutrix, P.W.-3 was Smt. Nisha Bhagat, the mother of prosecutrix and P.W.-4 Harishchandra Salunkhe, Investigating Officer. Accused on his part admitted the seizure panchnama (Exhibit-7) of the underwear belonging to accused, spot panchanama (Exhibit-8), seizure panchanama (Exhibit-9) of nicker belonging to prosecutrix, medical examination report (Exhibit -10) of prosecutrix, injury certificate (Exhibit-

11) of prosecutrix, injury certificate (Exhibit-13) of accused, letter (Exhibit-14) written by Medical Officer, Civil Hospital, Alibag giving opinion of age of prosecutrix to PSI Alibag Police station and chemical analysis report (Exhibit-15 to Exhibit 21) under Section 294 of CrPC.

5 The case of the prosecution was that the evidence of prosecutrix is so convincing and proves that accused committed rape on prosecutrix from time to time. Secondly, since the age of prosecutrix was below 16 years at the time of incident, the probable defence of prosecutrix being a consenting party will also be not available to defence.

6 I have to note that apart from the statement of prosecutrix that accused forcibly had sexual intercourse with her, there is nothing on record to indicate that accused in fact had any physical relationship with prosecutrix. The prosecution's case wholly depends on the testimony of prosecutrix and I would say that it would be dangerous to convict accused on the basis of her sole testimony because prosecutrix's statement, I find is not reliable. In her testimony prosecutrix states that she knew accused for 5 years before the incident. According to prosecutrix, in the month of December 1999, accused asked her when he was alone in the house whether she had physical relation with Shailesh and when she said yes, he threatened to reveal it to her parents. After 4 or 5 days when the father of

accused was sleeping outside the house, accused went to prosecutrix and took her to the kitchen and performed sexual intercourse with her. After 5 or 6 days accused performed again sexual intercourse with prosecutrix in his house. Prosecutrix became pregnant and, thereafter, she lodged an FIR against accused. This is the testimony of prosecutrix. When you compare this to the FIR, the FIR is so elaborate. The FIR was lodged on 20-8-2000 about 8/9 months later. In the FIR, prosecutrix narrates her first sexual encounter. She says that in the year 1999 during the Ganpati Festival on the second day of Ganpati, she had been to the house of Shailesh and after the programme she slept for sometime and then she requested Shailesh to drop her home, which was just next door. Though, the distance is not mentioned anywhere, in her statement prosecutrix has stated after 10 to 12 days in the morning at 10.30 a.m., when she was at her home, Shailesh called her from his house window and told her to come over as he has some work with her. Unless you are absolutely next door or so close and there are no structures between the two houses, one cannot call the other from the window of the house to come over. Going back to the first sexual encounter, according to prosecutrix, when Shailesh was dropping her home, they were passing an old dilapidated house of Shailesh's uncle. Shailesh took her inside and they had sexual intercourse. It seems, Shailesh promised to marry prosecutrix and told her not worry. After 10 to 12 days prosecutrix was at home, Shailesh called her over to his house from his window and

when she went there and as he was alone, they went in to the kitchen and again had sexual intercourse. At that time Shailesh again told prosecutrix not to worry and promised her that he will marry her. Thereafter, Shailesh continued to have sexual intercourse with prosecutrix whenever he got chance either at his house or at his uncle's dilapidated house or at the house of prosecutrix when she was alone. All these are not at all stated in her testimony to the court. In the FIR, prosecutrix states that when accused threatened to inform her parents about her relationship with Shailesh, she was frightened and she refused but accused forcibly did the sexual act with her in standing position in the kitchen and then he left. This according to prosecutrix was at 4.00 p.m. on some day in December 1999. At that time the father of accused was supposed to be sleeping in the verandah. She does not say anything about the other family member of accused, where were they. According to prosecutrix, again in January 2000 when she was preparing food in the house of accused and accused was alone, he came and hugged her and forcibly did the sexual intercourse with her in standing position. In the testimony recorded by the court, there is no mention that she was frightened or accused forced himself on her or it was done in a standing position. In the FIR, it is stated that in February and March 2000, Shailesh forcibly did the sexual intercourse with her from time to time. In the FIR it is stated that she was scared and did not inform anybody about the incident but when the villagers started gossiping and her parents learnt

about it, she then informed her mother that she was pregnant since 5 months. In the FIR dated 20-8-2000, it is stated"..... *then today my mother asked me that, I am pregnant from whom, then I told all the above occurred incident to my parents and also told my parents that I am pregnant since five months.*" The basis is because prosecutrix got pregnant by accused, she informed her parents and lodged a complaint. Prosecutrix has stated that she had relationship with accused only twice in December 1999 and January 2000, but in February and March she continued her relationship with Shailesh and in August 2000 she was 5 months pregnant. Therefore, certainly, prosecutrix could not have been pregnant with child of accused. For an offence of rape, woman need not get pregnant but the reason why I mentioned about her pregnancy was because basis of the prosecution's case is prosecutrix did not tell anybody but only when the people started gossiping that she was made pregnant by Shailesh and that too she was 5 months pregnant, that she disclosed what all she had gone through, to her parents. Only accused in the whole case is respondent. Shailesh is not an accused, though brief charge sheet was filed naming him as accused because it is so mentioned in the roznama. The brief charge sheet gives the name of Shailesh as accused, but when it was committed to the court of Sessions, Shailesh is dropped. Therefore, the whole route adopted by the prosecution is because the prosecutrix was pregnant with the child of accused, and prosecutrix was under 16 years of age at the time of

incident, accused was guilty of rape. As mentioned above, accused could not be responsible for the pregnancy of prosecutrix. There is no evidence also that prosecutrix was ever pregnant. None of the medical reports indicates prosecutrix was pregnant. The entire body has been examined by medical officers for the purpose of age determination but none of the medical officers mentioned that prosecutrix was pregnant. On this alone, the testimony of prosecutrix cannot be accepted that she had a physical relationship with accused. Even if, prosecutrix had a physical relation with accused, I would still say it was consensual, because in the testimony, she does not say that she was threatened or she was scared or she was frightened or accused forcibly had sexual intercourse with her. Moreover, between December 1999 / January 2000 until August 2000, prosecutrix does not tell anybody that she has been subjected to rape by accused, that is for almost 9 months after the first incident and 8 months after the second incident. No complaint or grievance was made by prosecutrix either to the police or to her parents. Accused also never promised to marry prosecutrix, whereas Shailesh promised to marry her, but Shailesh's name was mentioned in the brief charge sheet, but when the case is committed to the Sessions Court, he is not named as accused. Therefore, in such cases, where the sole testimony is that of prosecutrix, it is very dangerous to convict accused. This would leave accused totally defenceless. Had prosecutrix lodged the complaint or informed the parents soon after December 1999

incident or January 2000, there would have been some evidence like medical report or any injury on the body of prosecutrix so as to show the sign of rape. If prosecutrix has willingly submitted to sexual intercourse and I am saying willingly, because she does not say in the testimony that accused forced himself upon her and waited for 9 months for filing the FIR only when the villagers started gossiping that she was pregnant with the child of Shailesh, it would be very hazardous to convict accused relying only on her oral testimony. Medical reports do not say that prosecutrix was pregnant or there were signs of pregnancy. There is no DNA test done of any foetus. There is no evidence to say that prosecutrix miscarried or aborted the child. If she was five months pregnant when she spoke to her parents, that would have probably been beyond the legally permissible safe period of 20/21 weeks. In the face of lack of any other evidence, how could one convict accused.

6 Therefore, we need not even go into the second part of age of prosecutrix, as to whether she was below the age of 16 when the incident happened. Even assuming for the sake of argument, that there was sexual intercourse between prosecutrix and accused on two occasions as stated by prosecutrix, still onus is on the prosecution to prove that prosecutrix was below the age of 16 on the date of incident. For this, prosecution has relied on the testimony of one Harishchandra Gajanan Bhagat (P.W.-1) who was

the Head Master of Primary School, Dhokawade. P.W.-1 produces General Register maintained in the school for recording the date of birth of a student. P.W.-1 also issued certified copy of extract of entry of the said register. As per the General Register, the date of birth of prosecutrix is 18-8-1984. Based on this entry, prosecutrix was 15 years and 4 months when the first incident happened in December 1999 and 15 years and 5 months when the second incident happened in January 2000. But P.W.-1 also states that the entry is made purely on the basis of information given at the time of entry. P.W.-1 does not say who accompanied prosecutrix on 7-7-1990 (date of entry in the register) in respect of birth date of prosecutrix because he has been working as Head Master of the School only since 2001. P.W.-1 also states it is difficult to assess the correctness of the birth date given by the parents about their wards. As against this, the medical reports indicate two different ages. As per the Medical Jurisprudence by Modi, there are various methods to determine the age. The principal means, which enable one to form a fairly accurate opinion about the age of an individual, especially in earlier years, are teeth, height and weight, ossification of bones and minor signs. The Apex Court in *Jaymala Vs. Home Secretary, Government of Jammu and Kashmir*¹ has observed that the margin of error in age ascertained by radiological examination is two years on either side. In this cases, the medical officers have relied on Radiological examination, i.e., X-

1 AIR 1982 SC 1297

rays. The medical evidence produced on record have been admitted by the defence. The medical examination reports of Dr. Bhagat are at Exhibits 10 and 11. Exhibit 10, which is the medical examination report of prosecutrix states Height-60 Inches, Weight-59 kg, Teeth-28 and Secondary Sex- full developed. The Learned APP submitted that Secondary Sex character means pubertal changes such as breast development, fat deposition, development of the genetial area, changes of the larynx and body hair growth. In the case of woman, it would also include widened hips. It does not say prosecutrix was pregnant. Similarly, Exhibit 11 shows the age of prosecutrix as more than 21 years as on 20-8-2000. To arrive at this conclusion, the medical officer Dr.Bhagat has relied upon X-Ray No.7326/7327 and observed that radial epiphysis and iliac apophysis fused.

7 In *Jaymala* (supra) also the report indicated Epiphysis around ankle, lencem wrist, elbow and shoulder joints have appeared and completely fused. Epiphysis for illac crest has appeared and partially fused. Radiological age noted was between eighteen and nineteen years. In the case at hand of prosecutrix, it says 'fused' not partially fused which means, I would hazard a guess that 21 would be a reasonable age. Even if, we consider margin of error of two years on either side, prosecutrix should have been at least 19 years of age in August 2000.

8 Strangely, another Medical Officer, one Dr. K.K.More of Civil Hospital, Alibag, Raigad, after considering same two X-rays, which Dr. Bhagat had considered, opines that the approximate age of prosecutrix is 16 to 18 years. When there are two such reports, which are at variance with each other, the onus was on the part of the prosecution to clear the controversy particularly, when the school register indicates the age of the prosecutrix on the date of lodging the FIR to be around 16 years. The prosecution could have brought birth record from the Grampanchayat to indicate the birth of prosecutrix was on a particular date and corroborate what the school records indicated. The prosecution has done nothing in that regard. In such a situation, how could the court conclude that prosecutrix was below the age of 16 on the date of incident. PW.-1 has stated that the date entered in the register is based on what the parents or the family members who accompanied the child informed the school. That does not mean that the date is absolutely correct unless some other evidence is produced. In these circumstances, the age of accused is not proved.

9 The Apex Court in *Chandrappa & Ors. V/s. State of Karnataka* ² in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

2 (2007) 4 SCC 415

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

10 There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Sessions Court in Appeal rightly observed that the prosecution had failed to prove its case.

11 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

12 Appeal dismissed.

(K.R. SHRIRAM, J.)