

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.263 OF 2016

Lahu Bhausahab Sonwane,
Age 28 yrs., Occ. Supervisor,
R/o Hadas Pimpalgaon,
Tq. Gangapur, Dist. Aurangabad.

... Appellant.

... **Versus** ...

1 The State of Maharashtra,
Through Police Inspector,
Police Station, Shrirampur,
Dist. Ahmednagar.

2 X

... Respondents.

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Mr. M.A. Tandale, Advocate for appellant

Mr. A.A. Jagatkar, APP for respondent No.1

Mrs. R.R. Mane, Advocate for respondent No.2

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 13th FEBRUARY, 2020

PRONOUNCED ON : 09th MARCH, 2020

JUDGMENT :

1 Present appeal has been filed by original accused challenging his conviction by learned Additional Sessions Judge, Shrirampur, Dist. Ahmednagar in Sessions Case No.36/2011 dated 16.10.2014, whereby he was held guilty of committing offence punishable under Section 363, 366-A, 376 of the Indian Penal Code.

2 Informant is the brother of the victim. He lodged report with Shrirampur Police Station on 20.03.2011 stating that his sister, who was then aged 15 was residing with him, another brother, brother's wife and since last about 5 years prior to the said date they all were at Taklibhan, Tq. Shrirampur, in Ashok Nagar Sugar Factory for cutting sugarcane from the jurisdiction of the factory. It was also stated that the brother's wife had gone for delivery, and therefore, his sister i.e. victim was doing all the domestic work including cooking food. On 14.03.2011 at about 7.00 a.m. when the informant was at his house in Agathan, Tq. Gangapur, his brother informed from Taklibhan, that sister is missing since 10.00 p.m. of 13.03.2011. The brother informed, that after the dinner they all went to sleep and in the morning he found that the sister is not in the hut. He waited for a considerable time and then made inquiry, however, she could not be found. Ultimately when inquiry was further made with one lady, she told that the

victim has gone with Lahu Bhausahab Sonwane i.e. accused, and therefore, both of them were searched. They both could not be found. Brother of the accused brought accused as well as the victim to Taklibhan on 20.03.2011 and when inquiry was made with the victim, she told that accused had taken her under the pretext to marry at Zolegaon, and therefore, the informant lodged the report.

3 On the basis of the said First Information Report, offence vide Crime No.29/2011 was registered under Section 363, 366-A of the Indian Penal Code. The accused was produced before the police, so also the victim. The victim was then sent for medical examination. After the medical examination was conducted, offence under Section 376 of the Indian Penal Code was added. Statement of witnesses were recorded. Medical examination of the accused was also got done. Panchnama of the spot was carried out, so also certain articles were seized. Samples were sent for chemical analysis along with the other muddamal and after collecting the evidence charge sheet was filed.

4 The accused appeared before the learned Sessions Judge, after the case was committed and then charge was framed at Exh.6 for the offence punishable under Section 363, 366-A, 376 of the Indian Penal Code. The contents of the charge were read over and explained to the accused in

vernacular. He pleaded not guilty and trial has been conducted. Prosecution has examined in all seven witnesses to bring home the guilt of the accused. After considering the incriminating evidence the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded. After hearing both sides the learned Additional Sessions Judge held the accused guilty. He has been sentenced to suffer rigorous imprisonment for three years and pay fine of Rs.10,000/-, in default to suffer rigorous imprisonment for two months for the offence punishable under Section 363 of the Indian Penal Code. He has been further sentenced to suffer rigorous imprisonment for seven years and pay fine of Rs.15,000/-, in default to suffer rigorous imprisonment for three months for the offence punishable under Section 366-A of the Indian Penal Code. Further, he has been sentenced to suffer rigorous imprisonment for 10 years and pay fine of Rs.20,000/-, in default to suffer rigorous imprisonment for four months for committing offence punishable under Section 376 of the Indian Penal Code. All the sentences have been directed to run concurrently. Set off has been granted under Section 428 of Cr.PC.. Out of the fine amount, amount of Rs.40,000/- was directed to be paid to the victim as compensation under Section 357 of Cr.PC.. This conviction has been challenged by the accused in this appeal.

learned APP Mr. A.A. Jagatkar for respondent No.1-prosecution and learned Advocate Mrs. R.R. Mane (appointed through High Court Legal Services Sub-Committee) for respondent No.2 victim.

6 It has been vehemently submitted on behalf of the appellant that the perusal of the evidence, adduced on behalf of the prosecution, would basically raise a question, that whether the victim was minor on the date of the offence and whether she was a consenting party or not. Though a birth certificate is produced, it has been marked as Article "H" and it was not considered as 'proved' by the learned Trial Judge, however, still he relied on the said document. Article "H" was not a public document and it could not have been read in evidence unless concerned person ought to have been examined. Further, though it has come on record that victim has studied up to 5th standard, yet, the school record was not collected by the Investigating Officer and the school authorities, where she had taken education, was not examined. Though the victim has stated her birth date as '22.03.1995', the said date does not match with the birth certificate on record. In her cross-examination she has stated that after studying up to 5th standard she had left the school about 10-15 years prior to her deposition. Inference can be drawn from the point, that since she was married on the date of her deposition, she says that she was 19 years of age and says that she was having two sons at

that time; she was, in fact, major when the incident took place. The admissions given by the informant as well as the victim in their cross examination have not been considered by the learned Trial Judge. The informant has in clear terms admitted that the victim had gone with accused voluntarily. Though PW 2-victim says that the accused had given promise to marry, we cannot infer that, that promise was an inducement. She has not stated that she was ever, in any way forced, by the accused to come along with him. The entire testimony of the victim shows, that she had left the custody of guardian (if it is presumed that she was minor on that day) on her own. The cross-examination of the victim would also give clear picture that she had ample opportunity to escape but she did not. This also indicates that she had willingly left with the accused. PW 3 is the another brother of the victim, who has, in fact, not supported the prosecution story and in the cross-examination has admitted, that his sister had voluntarily left with the accused. PW 4 is the panch witness, who has witnessed execution of various panchanamas. But the accused is not seriously disputing them. PW 5 Dr. Chhatwani, the Medical Officer has deposed about results of the examination carried out by her on the victim as well as accused and had come to the conclusion that the victim was subjected to sexual intercourse, but the main important point is that she had not conducted ossification test. She had not examined the teeth of the victim. She has also admitted that she is agreeing

with propositions and conclusions drawn in Modi's Textbook on Medical Jurisprudence for conducting ossification test; but, then says that those tests have not been conducted. Therefore, the conclusion will have to be drawn that the age of the accused is not established by the prosecution beyond reasonable doubt. The Chemical Analyzer's Reports are not supporting the prosecution. Therefore, taking into consideration all these aspects the trial Court ought to have acquitted the accused from all the charges.

7 The learned Advocate appearing for the appellant has relied on the decision in **Sunil vs. State of Haryana, 2010 Cri.L.J. 839**, wherein the prosecutrix was in love with accused and was the consenting party. The reports of Dental Surgeon and Radiologist were not produced, though prosecutrix was referred by doctor to them. The clinical examination showing that prosecutrix had well developed secondary sex character. Close and careful determination of age of prosecutrix was imperative. Admission form of the school was not produced and the father was giving age of the prosecutrix only approximately. Under such facts and circumstance, the Hon'ble Apex Court held that the conviction of the accused on such evidence would be improper.

Further, reliance has been placed on the decision in **Deelip Singh @ Dilip Kumar vs. State of Bihar, 2005 ALL MR (Cri) 220 (S.C.)**. In this case

prosecutrix aged 16-17 years fell in love with accused, who was neighbour. In the First Information Report the prsoecutrix stated that because of the repeated promises to marry given by the accused she had surrendered before him. It was held that it was most unlikely, that an unwilling girl will go to a secluded place at mid-night and take the risk of being sexually assaulted, and therefore, the finding was reversed. Further it has been held -

“While a promise to marry without anything more will not give rise to ‘misconception of fact’ within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375, Clause secondly.”

Further, reliance has been placed on the decision in **Alamelu and another vs. State represented by Inspector of Police** and other companion matters, **AIR 2011 SUPREME COURT 715**, wherein the Hon’ble Apex Court held that the entire story of abduction by car and forced marriage appears to be a concocted story to falsely implicate accused and relatives. In this case also though the prosecutrix was medically examined, there was no

determination of age, and therefore, advantage of the said fact was given to the accused.

Further, reliance has been placed on the decision in **Dr. Dhruvaram Murlidhar Sonar vs. The State of Maharashtra and others, 2019 ALL MR (Cri) 771 (S.C.)**, wherein the Hon'ble Apex Court held that -

“Section 90 of Penal Code though does not define “consent”, but describes what is not “consent”. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntarily participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

There is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the

misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.”

8 Per contra, the learned APP as well as the learned Advocate for the respondent No.2 supported the reasons given by the learned Trial Court while convicting the accused. It was submitted that Exh.65, which is the report of Medical Officer regarding age determination coupled with clinical examination shows that Radiologist had given report, that the victim was more than 16 years and less than 18 years of age. Therefore, she was minor and was under the custody of brother. Though the informant was at his native place on that day, yet, she was under the custody of PW 3, who was the another brother of the victim. The medical evidence is supporting the story of sexual intercourse given by the victim. The testimony of the victim is inspiring confidence. She has categorically stated that accused was introduced by the neighbouring lady. Accused used to come to her house regularly and then when accused had given her promise to marry, he had told that they will run away and then accordingly she had gone along with the accused. C.A. report says the tests are positive, and therefore, taking into

consideration the sole testimony of the victim coupled with medical evidence, the learned Trial Judge was justified in holding the accused guilty of committing the offences.

9 PW 1 is the informant, but as aforesaid, as per the contents of the First Information Report as well as his testimony, he was not even at Taklibhan on the day of incident. Therefore, his testimony is based on the information supplied to him, firstly by his elder brother and secondly by the victim after she was brought back. He has also stated that the lady in the neighbourhood by name Mathurabai had given information that the victim had gone along with the accused. Said Mathurabai had not been examined by the prosecution for the reasons best known to it. How Mathurabai got the information or whether she had seen personally victim going along with accused, is a question. It could not also give indication, whether victim had gone voluntarily or was forced by the accused to go along with him. Thereafter, he says that after the sister was brought, upon inquiry she said, that accused had shown willingness to marry and then kidnapped her. But in the cross-examination he has admitted that the sister had gone along with the accused willingly. Accused belongs to their community and they are the relatives and then he has also stated, that due to misunderstanding he had lodged the report against the accused. The said admission ought to have

been considered by the learned Trial Judge. Further, in his examination-in-chief itself it has come on record, that the victim is married and has two children. There was no attempt, on the part of the prosecution, to bring it on record as to when she got married and what are the age of her children. The incident had taken place between intervening night of 13.03.2011 to 14.03.2011 and PW 1 was examined on 19.04.2014. We can not infer that within the span of about three years she got married and had two children. It was also not extracted from PW 1, as to what was the age of the victim when she got married. Therefore, opportunity to bring her age on record through PW 1 was not taken by the prosecution. Since even PW 1 is elder to victim, he would have been in better position to say about the age of the victim.

10 PW 3 is the another brother of the victim, who has stated that the sister was residing with him on the day of incident and they were at Taklibhan. When he got up in the morning he saw that the victim is not in the bed. The neighbour Mathurabai told him that the accused had come and took away the victim. When it was found that the witness was not answering the questions and he was feeling uneasy, a break was taken and after his willingness the remaining questions were asked. He told that the accused had touched the person of the victim and then promised her to marry. His

brother lodged the report. It appears that intentionally the prosecution did not extract all the information from this witness also. PW 3 is younger to PW 1 but elder to victim. He has also not stated as to what was the age of the victim on the day of incident. Other facts have not been extracted from him and it is hard to believe that after the sister would have returned, PW 3 would not have made any inquiry with her, as to what had happened. In his cross-examination this witness is also saying that the sister had told him, that she wished to marry accused and had herself gone with the accused. Again he has stated that the victim has married with another boy. Further, opportunity was available to the prosecution to bring the exact age of the victim on the date of incident on record. But this opportunity has again been not taken.

11 PW 2 is the victim. She has stated that her parents had died and therefore, she was living with her brothers. At the time of incident she was with one brother and as her sister-in-law had gone for delivery, she used to cook food for the brother. Accused used to come to the house of one Nandabai and said Nandabai had introduced the accused to her. Accused had told her that he would marry her and they both would run away, and therefore, she and the accused went to village Zolegaon. They went to Sandip Dhaba, stayed there for a night, where the accused had sexual

intercourse with her. From Zolegaon they went to the house of maternal uncle of accused, where they stayed and also at that place the accused had sexual intercourse with her, and thereafter, the brother of the accused had brought them to Police Station, Shrirampur. Thus, it is to be noted that she had not even stated, that any force was applied by the accused on her. It was his simple statement that they would run away. But since the promise to marry was given, it appears that she voluntarily left. She has stated that her date of birth is 22.03.1995. In her cross-examination she had stated that she had studied up to 5th standard and thereafter left the school about 10-15 years prior to her deposition, which was recorded on 20.04.2014. If we get the calculation about the same, then she would definitely be major on the date of incident. Her School Leaving Certificate was not procured by the Investigating Officer. The testimony of PW 7, PSI Kshatriya, who has done the investigation, is silent on the point, as to why he had not collected any evidence regarding her birth date from school record. At this stage itself, the birth certificate, which is on record, is required to be considered, which has been marked as Article "H". This birth certificate is issued by Rui Grampanchayat, Tq. Kopargaon, Dist. Ahmednagar. Name of the child born on 22.07.1995 is stated. Name of the child is mentioned and name of the parents is also mentioned (That name is not reproduced here with intention that it should not disclose her identity). However, there is difference in the

name of father given by PW 1 to 3 with the said certificate and none of them have stated about the name of her mother. None of them have given that place of birth of victim is Rui, Tq. Kopargaon. This Court does not agree with the submission on behalf of the appellant that birth certificate is not a public document. In fact, it is a public document, which is the extract of the register maintained under the provisions of Birth and Death Registration Act, which is always maintained by the Government servant under the Act. However, as regards present case is concerned, since basic information to connect the said certificate with the victim have not been adduced, it cannot be accepted that the said birth certificate is in respect of the victim. The birth date mentioned by the victim in her examination-in-chief is also different than it has been mentioned in Article "H". The learned Trial Judge has not exhibited the said document. The reasons for non-exhibition of the said document cannot be gathered from the impugned Judgment. But when it was not exhibited then the learned Judge ought not to have read it in evidence. Opportunity to cross examine the concerned person as well as the Investigating Officer has not been properly then given to the accused, when during the evidence it is marked as Article and then it is read in evidence at the time of writing Judgment. Therefore, we cannot consider that document to be a conclusive proof regarding the date of birth of the victim, so as to hold that she was minor, aged around 15, at the time of incident.

12 As regards document Exh.65, it says that the age of the victim was between 16 to 18 years. Though PW 5 Dr. Chhatwani has been examined, Radiologist was different and document Exh.65 was not even referred in the testimony of PW 5 Dr. Chhatwani. From the said document it is absolutely not clear, as to how the said document came to be exhibited. PW 7, PSI Kshatriya was the last witness, examined at Exh.41. The roznama dated 25.09.2014 says that Exh.64 is given to medical certificate and Judgment is at Exh.65. Yet, the document which has the heading 'District Hospital, Ahmednagar' report of medical officer on examination of injuries dated 22.03.2012 has been given Exh.65. That means, Exh.65 is repeated and Exh.64 is given is the MLC document (OPD registration charges), which is generally given at the stage of admission to any patient. Therefore, the procedure adopted by the learned Trial Judge while exhibiting these documents is absolutely illegal and the said document without examining any medical officer, who was either the author or any way connected to the tests conducted. It ought not to have been read in evidence. Thus, there is no authentic document produced by the prosecution to prove that victim was below 18 years of age, on the day of incident. Rather the admissions, that she is married and has two children would show, that she was major or near about 18 when the incident took place. Even if for the sake of convenience we accept that Exh.65 report can be considered, it says that the age of the

victim was between 16 to 18 years and there would be then margin of plus as well as minus two and then when it comes to giving benefit to the accused taken as plus two, therefore, she was having sufficient understanding capacity on the day of incident.

13 Though the medical evidence in the form of PW 5 Dr. Chhatwani can be said to be supporting prosecution and stating, that there were signs of sexual intercourse and coupled with the testimony of the panch witnesses as well as the panchanamas, those have been proved, C.A. report as well as the other aspects deposed by the Investigating Officer, yet, the prosecution has failed to prove that victim was below 18 years of age, on the day of incident, beyond reasonable doubt. She had voluntarily gone with the accused and the accused had not in any way forced her to leave the place, where she was residing with her brother. Apart from the ratio in the decision relied by the learned Advocate for the appellant, we will have to again take into consideration the law laid down by the three Judge Bench of the **Hon'ble Apex Court in S. Varadarajan vs. State of Madras, AIR 1965 Supreme Court 942**, wherein it has been observed that -

“But when the girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is a senior college student) from the house of the relative of the father where she is kept, herself telephones the accused to meet her at a certain place,

and goes there to meet him and finding him waiting with his car gets into that car of her own accord, and the accused takes her to various places and ultimately to the Sub -Registrar's Office where they get an agreement to marry registered, and there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from her side, the accused by complying with her wishes can by no stretch of imagination be said to have "taken" her out of the keeping of her lawful guardianship, that is the father.

The fact of her accompanying the accused all along is quite consistent with her own desire to be the wife of the accused in which the desire of accompanying him wherever he went is of course implicit. Under these circumstances no inference can be drawn that the accused is guilty of taking away the girl out of the keeping of her father. She has willingly accompanied him and the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him."

"There is a distinction between "taking" the allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

14 Taking into consideration the said law laid down and for the above discussion this Court comes to the conclusion, that the learned Trial Judge totally erred in convicting the accused by holding that he has committed offence punishable under Section 363, 366-A, 376 of the Indian Penal Code. The said conviction as well as the order of the payment of compensation under Section 357 of Cr.PC. deserves to be set aside. It will have to be observed, taking into consideration the admissions, those were given and basic documents regarding proof of the age of the victim were not coming forward and also the fact that without any evidence being led and without giving any opportunity to the accused, certain documents have been exhibited behind the back of the accused by the learned Trial Judge, the entire approach of the learned Trial Judge is perverse. Appeal, therefore, deserves to be allowed and following order is passed.

ORDER

1 Appeal stands allowed.

2 The conviction awarded to the appellant by learned Additional Sessions Judge, Shrirampur in Sessions Case No.36/2011 on 16.10.2014 is hereby quashed and set aside including the order of payment of compensation to the victim under Section 357 of the Code of Criminal

Procedure.

3 The accused-appellant stands acquitted of the offence punishable under Section 363, 366-A, 376 of the Indian Penal Code.

4 He be set at liberty forthwith, if not required in any other case.

5 Needless to say that the order regarding disposal of muddemal passed by the learned Trial Judge is confirmed.

(Smt. Vibha Kankanwadi, J.)

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