

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.129 OF 2017

Balu @ Rajendra Bhimsha Gaikwad
age 23 years, Occu. Auto Driver,
R/o Yeli, Tq. Omerga,
District Osmanabad

... **APPELLANT**
(Accused)

VERSUS

The State of Maharashtra
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad

... **RESPONDENT**

.....
Shri S.N. Patne, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent
.....

CORAM: R.G. AVACHAT, J.

Date of reserving judgment : 2nd March, 2020

Date of pronouncing judgment : 3rd March, 2020

J U D G M E N T :

This appeal is directed against the judgment and order dated 18/2/2017, passed by learned Special Judge, Omerga, District Osmanabad in Special (POCSO) Case No.05/2014. By the impugned judgment and order, the appellant has been convicted for offences punishable under Sections 363, 366 and 376 of the Indian Penal Code and Section 4 of the Protection of Children

from Sexual Offences Act, 2012 (POCSO Act for short). The appellant has been sentenced to suffer rigorous imprisonment (R.I.) for five years and to pay fine of Rs.1000/-, in default of payment of fine, to suffer R.I. for six months; R.I. for seven years and fine of Rs.5000/-, in default, R.I. for one year and R.I. for ten years, and fine of Rs.5000/-, in default, R.I. for one year respectively. Substantive sentences have been directed to run concurrently.

2. Facts giving rise to the present appeal are as follows :-

Hanmant (P.W.1) is resident of village Yeli, Taluka Omerga, District Osmanabad. The appellant is his next door neighbour. Anita (name changed) was a 16 year old daughter of P.W.1 Hanmant. On the night of 26/8/2013, all family members including Anita went to sleep. Hanmant woke up by 2.00 a.m. for answering nature's call. He saw Anita fast asleep. He then woke up in the morning at about 6.00 to find Anita was not in her bed. He, therefore, took search for her, but in vain. It was found that, the appellant too had already not been in the village since 26/8/2013. Hanmant, therefore, suspected the appellant to have kidnapped Anita. He, therefore, went to the house of the appellant to learn from his parents that appellant took away Anita

with him. He, therefore, lodged First Information Report (F.I.R.) (Exh.26) on 5/9/2013 against the appellant and his family members.

3. Based on the F.I.R. (Exh.26), crime vide No.177/2013 came to be registered for offences punishable under Sections 363, 366 and 376 of the Indian Penal Code read with Section 4 of the POCSO Act. The scene of offence panchanama was drawn. Statements of persons acquainted with the facts and circumstances of the case were recorded. On 23/9/2013, both - the appellant and Anita were brought to the Police Station. Anita came to be medically examined. She was pregnant. She was, therefore, admitted to Swadhar Mahila Kendra, at Osmanabad. She delivered a baby boy. On completion of investigation, the appellant came to be proceeded against by filing charge sheet.

4. Charge (Exh.4) was framed against the appellant. He abjured the guilt. To establish its case, prosecution examined 10 witnesses. The trial Court, in exercise of power under Section 311 of the Code of Criminal Procedure, examined two more witnesses. On appreciating the evidence in the case, the trial Court convicted and sentenced the appellant as stated above.

5. Heard Mr. S.N. Patne, learned counsel appearing for

the appellant. Also heard Mr. S.N. Sonpawale, learned Additional Public Prosecutor for the respondent – State.

Learned counsel for the appellant would submit that, Anita passed away before she was examined as witness in the case. The F.I.R. has been lodged 9 days after Anita allegedly went missing. None of the witnesses has stated to have ever seen both the appellant and Anita together. The so called extra-judicial confession made by the appellant has not been proved. The trial Court has relied upon inadmissible evidence. Learned counsel, therefore, urged for setting aside the impugned judgment and order.

6. Learned A.P.P. would, on the other hand, submit that, both – the appellant and Anita went missing from the village same day. Both of them were brought to the Police Station. Anita, in her statement, has unequivocally stated to have been with the appellant. During her stay with him, the appellant had sexual intercourse with her many a time. The school record of Anita indicates, she was 16 years of age. Her consent, if any, was, therefore, inconsequential. The appellant made two written communications from jail to the Court, admitting to be natural father of a baby boy delivered by Anita. After having considered overall evidence, the trial Court was justified in convicting the

appellant. No interference with the impugned judgment and order is, therefore, called for, submitted the learned A.P.P.

7. Although 12 witnesses have been examined in the case, evidence of only a few witnesses is material one. Anita passed away before she was examined as a witness in the case. As such, there is no direct evidence implicating the appellant in the offences in question. Hanmant (P.W.1), father of Anita lodged F.I.R. on 5/9/2013. Allegations made in the F.I.R. against the appellant are based on suspicion. It is in the evidence of Hanmant that, he and his family members including Anita went to sleep on the night of 26/8/2013. He woke up at 2.00 a.m. to answer nature's call. Anita was in her bed. He again went to sleep and woke up by 6.00 in the morning. He saw Anita not in her bed. He, therefore, took search for her at the village, but in vain. The appellant is next door neighbour. He would visit Anita's house for charging his cell phone. It is further in his evidence that, Anita was 16 years of age. She was in 10th Standard. Hanmant, however, did not give her date of birth. Basvanappa (P.W.4), Head Master of the school was, therefore, examined. He produced on record Anita's school admission record to state that her date of birth was 17/4/1997. It is further in his evidence that her school admission form had been filled in by Anita's father Hanmant (P.W.1). This witness has not been

subjected to a searching cross-examination. Moreover, P.W.7 Dr. Supriya testified to have had examined Anita for determination of her age. It was Dr. Gosavi who conducted radiology test to find Anita between the age of 14 and 17 years.

On appreciating the evidence, there is no reason to take a different view than the one taken by the trial Court to hold that Anita was minor when the alleged offence took place.

8. The appellant is alleged to have kidnapped/ abducted Anita with a view to induce her to compel her marriage. Kidnapping is of two kinds - kidnapping from India and kidnapping from lawful guardianship. Section 361 of the Indian Penal Code defines kidnapping from lawful guardianship to mean, whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

9. While Section 362 of the Indian Penal Code defines abduction to mean, whoever by force compels, or by any deceitful means induces, any person to go from any place, is said

to abduct that person.

10. In case of **S. Varadarajan Vs. State of Madras,**
AIR 1965 SC 942, it has been observed :-

“Taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. 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” and 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."

11. There is no direct evidence to suggest the appellant to have kidnapped or abducted Anita. Evidence of P.W.1 Hanmant indicates that, he found Anita not home when he got up in the morning of 27/8/2013. None of the prosecution witnesses has testified to have seen the appellant and Anita together. It is true, from the day Anita went missing, the appellant too had not been in the village. P.W.9 Ramhari was Assistant Police Inspector, Omerga Police Station. It is in his evidence that on 22/9/2013, the uncle of the appellant had brought him and Anita to the police station. The uncle has, however, not been examined. Whatever Anita has stated to her father or the investigating officer would be inadmissible in evidence as hearsay. What can be gathered from the prosecution evidence is that as Anita was emotionally involved with the appellant, she appears to have left her house to join the appellant. Both of

them stayed together for about a month. On their return, Anita was sought to be placed in the custody of her father. She flatly refused to go her father's home. She had, therefore, to be admitted to Swadhar Mahila Kendra at Osmanabad. A few months thereafter, Anita died of jaundice.

12. The conclusion drawn by the trial Court that the appellant had kidnapped Anita is based on surmises and conjectures. There is no slightest of evidence to suggest the appellant to have kidnapped Anita. On the contrary, it appears that, Anita on her own joined him and stayed with him for a period of about one month. Had the couple been not brought back and the appellant not been arrested, both of them would have continued to stay together as husband and wife.

13. So far as regards offence of rape is concerned, it is reiterated that Anita could not be examined as a witness. On her delivering a baby boy, the investigating officer did not take pains to have D.N.A. Test. The trial Court relied on so called extra-judicial confession made by the appellant while in jail. In proof of the same, two jail authorities were examined in exercise of power under Section 311 of the Code of Criminal Procedure. They are - Laxman and Rajendra, Jailer - Group I and Jailer - Grade II of District Jail, Osmanabad. It is in their evidence that, the

appellant, on 2/3/2015 and 7/3/2015 gave both of them two written communications (Exh. 72 and Exh.76) for being forwarded to the trial Court. Both of them have countersigned those communications. The appellant has denied to have scribed both the communications. He has, however, admitted his signatures thereon.

14. Before appreciating those communications, it is to be stated that, extra-judicial confession is a weak piece of evidence. There has to be some corroboration to extra-judicial confession.

15. The first communication dated 2/3/2015 records the grievance of the appellant that his wife Anita was staying in Swadhar Mahila Kendra along with their new born. Anita's parents lodged F.I.R. against him as both – the appellant and Anita were emotionally involved. They married each other. Anita died of jaundice. The appellant, however, has not been informed of Anita's death. Without consulting him, the child has been kept in a Children's Home at Pandharpur. He expressed his desire to maintain his child. He, therefore, requested to hand over custody of the child to his (appellant's) parents. It also records that, some false news items have been published against him in the dailies. Enquiry into the same be made.

While the second communication (Exh.76) states that he learnt about the death of his wife from the news published in the daily. The child has been admitted to Orphanage (Children's Home) without his consent. By publishing news items in four dailies, he has been defamed. He also expressed his desire to take him to have glimpse of his child.

16. The appellant, in his examination under Section 313 of the Code of Criminal Procedure, disowned the contents of aforesaid two communications. The record indicates that, the trial Court made one written communication to inform the appellant in jail to take necessary steps for obtaining custody of the child. It needs no mention that, at least twice a month, an undertrial prisoner is required to be produced before the Court seized of the matter. The trial Court ought to have personally verified the veracity of the communications Exh.72 and Exh.76 when the appellant was produced before him. Be that as it may, the appellant has simply admitted his signatures on those two communications. It is common knowledge that, prisoners are not allowed to keep with themselves pointed articles like pen etc. as a security measure for co-prisoners. There is no evidence to indicate as to when the appellant wrote aforesaid two communications voluntarily. The offence of rape is serious offence. Based on the aforesaid communications, the trial Court

ought not to have held the appellant guilty of the offence. Rest of the material relied upon to convict the appellant is found to be inadmissible in evidence. The trial Court has relied on statement of Anita (deceased) to a Warden (P.W.8) of Swadhar Mahila Kendra, wherein she allegedly stated / informed her the appellant to be father of her child. The Court also relied upon the fact that Anita, in the official record, gave the appellant's name as father of her new born.

17. Even if the trial Court wanted to rely on the two communications, Exh.72 and Exh.76, it should have read those communications in toto. The confession has to be read in its entirety. Pick and choose of selective words/ sentences from confessional statements is impermissible. Assuming but not admitting that, both the communications were authored by the appellant, it is to be stated that in both of them, he stated that Anita was his wife. Both of them were emotionally involved. They, therefore, got married.

As per the case of the prosecution, Anita was 16 years of age. On her return, she refused to go her father's home. She preferred to stay in Swadhar Mahila Kendra.

18. Section 375 of the Indian Penal Code defines 'rape'.

Sub-section (2) of Section 375 states that, the sexual intercourse or sexual acts by a man with his own wife, the wife being not under 15 years of age is not rape. True, it may be an offence under the Protection of Children from Sexual Offences Act.

19. It is reiterated that, the aforesaid two communications have not been duly proved. In criminal case, the burden of proof is static. The trial Court has observed that, since the appellant admits his signatures on these two communications, the onus shifted on him to prove the contrary, is not acceptable. It was for the prosecution to prove that both the aforesaid communications had been consciously written by the appellant and the contents therein are true. It is reiterated that, no D.N.A. Test had been performed. A mere admission to have fathered a child is insufficient to convict the appellant for the offence of rape. I am, therefore, not at one with the findings recorded by the trial Court. Interference therewith is, therefore, called for. The appeal, therefore, succeeds. Hence, the following order :

ORDER

20. The Criminal Appeal is allowed.

21. The judgment and order of conviction and sentence dated 18/2/2017, passed by learned Special Judge and Additional Sessions Judge, Omerga, District Osmanabad in Special (POCSO) Case No.05/2014 is set aside. The appellant is acquitted of the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012. The appellant be set at liberty forthwith if not required in any other case. Fine amount, if paid, be returned to him.

(R.G. AVACHAT, J.)

fmp/-