

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

CRIMINAL APPEAL NO.145 OF 2017

Somnath Bajirao Bande,
Age 26 years, Occu. Nil,
R/o Khadki Kd., Tq. Akole,
District Ahmednagar

... **APPELLANT**

VERSUS

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

2. Priyanka Savleram Bhalerao,
Age major, Occu. Student,
R/o Khadki Kd., Tq. Akole,
District Ahmednagar

... **RESPONDENTS**

.....
Shri R.K. Temkar, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent No.1/State
Shri S.R. Andhale, Advocate for respondent No.2
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CORAM: R.G. AVACHAT, J.

Date of reserving order : 2nd March, 2020

Date of pronouncing order : 17th March, 2020

J U D G M E N T :

This appeal has been directed against the judgment and order dated 7/2/2017, passed by Additional Sessions Judge, Sangamner in a case, being Sessions Case No.64/2015. By the impugned judgment and order, the appellant herein has been

convicted for the offence punishable under Section 376(2) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer R.I. for six months. The appellant is further convicted for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act (POCSO Act for short) and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer R.I. for six months. The appellant is further convicted for the offence punishable under Section 366-A of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500/-, in default to suffer S.I. for one month. The appellant is further convicted for the offence punishable under Section 363 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.500/-, in default to suffer S.I. for one month. All the sentences have been directed to run concurrently.

The appellant has been behind the bars since the day of his arrest i.e. 17/6/2015.

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

Miss Anita (P.W.3) is the daughter of Savleram (P.W.1). Anita was stated to be 16/17 years of age in the year 2015. She was a student of 11th Standard. The appellant

Somnath was about 26 years of age. P.W.1, P.W.3 and the appellant are residents of village Khadki, Taluka Akole, District Ahmednagar. The appellant would run a flour mill in the village. There developed acquaintance between Anita and the appellant. The acquaintance turned into an emotional relationship. The appellant is married and blessed with two kids.

3. On the night intervening 26th and 27th May 2015, Anita left the house. After having realised that Anita was not in the house, Savleram (P.W.1) lodged the First Information Report (Exh.23), alleging the appellant to have kidnapped his daughter Anita. The parents of the appellant were alleged to have assisted him in kidnapping Anita. Crime vide C.R. No.29/2015, therefore, came to be registered under Section 363 read with Section 34 of the Indian Penal Code against them. Rahulkumar Patil (P.W.9), Assistant Police Inspector attached to Rajur Police Station, took up the investigation of the crime. He drew scene of offence panchanama (Exh.27). On 16/6/2015, the appellant and Anita came to the police station. Anita's statements under Sections 161 and 164 of the Code of Criminal Procedure came to be recorded. She was medically examined. The appellant came to be arrested. Statements of persons acquainted with the facts and circumstances of the case were recorded. Since Anita informed to have been subjected to sexual intercourse by the appellant, offence punishable under Section 376 of the Indian

Penal Code and Section 6 of the POCSO Act came to be added.

4. Learned Additional Sessions Judge (trial Court) framed the charge. The appellant pleaded not guilty. To substantiate the charge, the prosecution examined 10 witnesses. The case, however, rests on the evidence of P.W.1, P.W.3 and Medical Officers, who examined Anita. After having appreciated the evidence in the case, the trial Court convicted the appellant and sentenced him to imprisonment as stated above.

5. Shri R.K. Temkar, learned counsel appearing for the appellant would submit that, Anita was emotionally involved with the appellant in spite of having been aware of the appellant being a married person. It is Anita who on her own eloped from her parent's house. The trial Court, therefore, ought not to have convicted the appellant for the offences punishable under Sections 363 and 366-A of the Indian Penal Code. On the question of conviction for the offence of rape is concerned, learned counsel would submit that the case was based on testimony of Anita alone. Her evidence is short of inspiring confidence. Her medical examination report belie the prosecution case. Even if her evidence is accepted as it is, it would be a case of consensual relationship. There is no concrete evidence to indicate Anita to have been below 18 years of age at the relevant time. Evidence of P.W.1 would undoubtedly indicate

that she was little over 18 years of age. Her birth certificate (Exh.61) has not been duly proved. Learned counsel, therefore, urged for allowing the appeal and setting aside the impugned judgment and order of conviction and sentence.

6. Learned A.P.P. and learned counsel for respondent No.2 would, on the other hand, submit that P.W.1, father of Anita appears to have been won over. The birth certificate of Anita is very much relevant under Section 35 of the Evidence Act. There is no reason to discard the evidence of Anita. Learned A.P.P. took me through the relevant evidence in the case and the reasons given by the trial Court in support of the impugned judgment and order. He would ultimately urge for dismissal of the appeal.

7. Let us first appreciate the evidence as regards offence of kidnapping/ abduction.

The F.I.R. (Exh.23) has been lodged on suspicion, since the appellant and Anita were emotionally involved. Savleram (P.W.1), father of Anita (victim) testified that, by 11.15 p.m., he woke up to find Anita was not in her bed. Therefore, he took search for her in the village, but in vain. It is further in his evidence that, Anita was in love with the appellant. He and his wife, therefore, reprimanded her many a time. In spite of having kept a close watch on her movements, she ran away from the house without informing him. He, therefore, lodged the F.I.R. as

he was annoyed with her. When Anita met him at the police station, she told him to have run away from the house and she did not have any complaint against the appellant. Anita even refused to accompany him to return home.

8. Sau. Rupabai (P.W.2), mother of Anita testified that both the appellant and Anita fell in love with each other. She, therefore, ran away from the house, deceiving her parents.

9. The material evidence is that of Anita (victim). It is in her evidence that, she used to visit the flour mill run by the appellant. Both of them fell in love with each other. The appellant would propose to marry her. She would, however, tell him that she was minor. It is further in her evidence that, on 26.5.2015, the appellant told her that he would come outside her house by 1.00 a.m. the following day. Accordingly, she came out of the house. The appellant was present outside. He gave her sweets and cold drink (Maaza). Then he took her to a gaathan of the village. His friend Natha took them to village Rajur on his motorbike. Then the appellant took her to Ghoti Phata. Again Natha came. He promised to make arrangements for their residence. The appellant then took her to village Narayangaon. They met two agriculturists Pandurang Wayal (P.W.6) and Maruti Wayal (P.W.7). Both of them worked in their fields as labourers.

They were residing in the house of the said agriculturist. During night, the appellant used to commit sexual intercourse with her, though she was resisting. Both of them stayed there for about 20 days. It is further in her evidence that, on being learnt about having lodged a police report by her father, both of them came to the police station. Her statement was recorded there.

10. In response to the questions put to Anita during cross-examination, she replied to have had not stated in her police statement recorded under Section 164 of the Criminal Procedure Code that the appellant had asked her to accompany him on the night of 17/5/2015. He gave her sweets and cold drinks. Then he took her to various places etc.

11. The trial Court has observed that, there are lots of improvements in the evidence of Anita over her statement before police and Magistrate as well. The trial Court, however, found omissions, amounting to contradictions, to be not so material. The trial Court appears to have even ignored Anita's statement that she on her own/ voluntarily went with the appellant. In my view, this piece of evidence ought to have sealed the fate as regards offence punishable under Section 363/366-A of the Indian Penal Code.

12. 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.

13. 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.

14. 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."

15. The evidence undoubtedly proves that the appellant and Anita were in love with each other albeit the appellant was

married. Efforts of Anita's parents to persuade her to distance from the appellant yielded no result. Anita herself left her parent's house to join the appellant. Anita's evidence that the appellant lured her with the promise of marriage appears to be an afterthought version. It thus appears that the ingredients of the offence punishable under Sections 363 and 366-A of the Indian Penal Code do not get attracted. The trial Court has not appreciated the evidence in right perspective. It has simply believed the testimony of Anita to hold the appellant guilty.

16. So far as regards the offence of rape under the Indian Penal Code and an aggravated penetrative sexual assault under the POCSO Act is concerned, one has to fall back on the evidence of Anita herself. It is in her evidence that, during her stay with the appellant in a house on the field of Pandurang Wayal (P.W.6) and Maruti Wayal (P.W.7), the appellant had sexual intercourse with her during nights, despite her resistance. This is the only one line evidence against the appellant. Anita unequivocally admitted in her evidence that while the appellant and herself had visited the police station, the Police Station Officer recorded her statement. She claims to have stated therein to have no grievance against the appellant. The said statement has been suppressed from the Court. True, Anita had claimed to have given the said statement under compulsion by the appellant and

his relations. She had, however, occasion to come clear on this issue when her statement was recorded by police under Sections 161 and 164 of the Criminal Procedure Code. Anita was medically examined by Dr. Sunil Salunke (P.W.5). It is not in his evidence that Anita gave a history of no sexual intercourse. He has accordingly recorded the same in the certificate (Exh.35). The doctor found that her hymen was ruptured. He was, however, categorical to state that in case of school or college going girl, hymen can be ruptured due to swimming, running or playing football.

17. That evidence of victim of sexual assault may not require corroboration to sustain a conviction, unless there are compelling reasons for the same. In short, the conviction can be sustained on sole testimony of prosecutrix, if it inspires confidence.

18. In case of **Rameshwar Vs. State of Rajasthan, (1952) SCR 377**, it has been observed :

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, . . . The only rule of law is that this rule of prudence must be

present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.”

19. Here the appellant has come with a case of consensual intercourse. Moreover, the case of Anita is believed that the appellant had sexual intercourse with her. It, however, cannot be observed to be non-consensual one. It is Anita who had eloped with the appellant, stayed with him for over 20 days, resided together like husband and wife, to earn living, both of them worked as agricultural laborers. It is only on being learnt about her father to have lodged a report with the police, both of them came to the police station. Her testimony, therefore, cannot be believed to observe that the sexual intercourse that took place between the two was against her wish or without her consent. True, if the prosecution could prove that Anita was below 18 years of age at the relevant time, her consent was inconsequential. It is in her evidence that, her date of birth is 21.6.1999. Her evidence is, however, of little consequence, being hear-say.

20. So far as regards issue of age or date of birth of a particular person is concerned the best evidence would be of his parents. Admittedly, parents of Anita are illiterate. Her mother's evidence did not shed any light on her date of birth. Savleram

(P.W.1) deposed in his cross-examination that, Anita was admitted in the school for 1st Standard, when she was little over 8 years of age. It is further in his evidence that, with a view to get the benefit in the long run, he showed the age of his daughter (Anita) less by 5 years. He went on to state that, Anita might have born 20 years before the day he gave evidence i.e. 20.10.2016.

21. Birth Certificate of Anita had not been a part of police papers. It is only when the last witness in the case was examined, the prosecution sought to produce on record a birth certificate (Exh.61) of Anita. The trial Court allowed the production thereof. The said certificate came to be admitted in evidence by simply marking it Exhibit 61 when Sunil Pawar (P.W.10), the police official testified to have obtained the same from the Grampanchayat of village Khadki. The trial Court then allowed the appellant to recall Savleram (P.W.1) for further cross-examination. It is then in his evidence that when Anita was born in the village, he was staying at Mumbai. He returned to the village in the year 1999. It is in his evidence that, Anita was born in the year 1997. He, however, registered her birth in the year 1999 when the Government officers had visited his residence in connection with Census. At the time of registration of her birth, she was little over 2 years of age.

22. According to the prosecution, the defence appears to have won over P.W.1 Savleram. True, in the F.I.R., her age was shown as 16-17 years. Even if we assume that P.W.1 Savleram did not support the prosecution, the fact remains that he being father of the victim, his evidence about the date of birth of his daughter would prevail when there is no any other cogent and reliable evidence.

23. The Birth Certificate (Exh.61) records the date of birth – 21.6.1999. The trial Court relied on Exh.61 and the evidence of Dr. Ashwini (P.W.4) to hold Anita to have been below 18 years of age at the relevant time. Dr. Ashwini is M.B.B.S. D.G.O. Anita was referred to her for age determination and for Ultra Sonography. The Technician done X-ray. According to the opinion of Radiologist, Anita was below 18 years of age. The certificate to that effect is at Exh.31. It has been issued by Dr. Ashwini and not by Radiologist who examined Anita. During her cross-examination, P.W.4 admitted that, margin of error is of 3 years in case of ossification test. As such, on the basis of Exh.31, it could not be conclusively observed that Anita was below 18 years of age. What remains is the birth certificate, Exh.61. The trial Court, relying on the judgment of the Apex Court in the case of **Harpal Singh & anr., Vs. State of Himachal Pradesh, AIR**

1981 SC 361, held Anita to have been above 18 years of age, at relevant time. The Apex Court, in Harpal's case (supra), observed :

“Evidence Act (1 of 1872), S. 35 – Entry in birth register – Entry made by concerned official in discharge of his official duties – Certified copy of entry – Clearly admissible under S. 35 – Examination of official – Not necessary.”

It was an appeal by special leave. In para 3 of the judgment, it has been observed :-

“In the instant case the prosecution has proved the age of the girl by overwhelming evidence. To begin with, there is the evidence of Dr. Jagdish Rai (PW 14) who is a radiologist and who, after X-Ray examination of the girl found that she was about 15 years of age. This is corroborated by Ex. PF, which is an entry in the admission register maintained at the Government Girls High school, Samnoli (wherein the girl was a student) and which is proved by the Head Master. That entry states the date of birth of the girl as 18th October, 1957. There is yet another document, viz., Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulat Ram on 11.11.1957. Mr. Hardy submitted that in the absence of the examination of the officer/ chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author. From whatever angle we view the evidence, the conclusion is inescapable

that Saroj Kumari was below 16 years of age at the time of the occurrence. Accordingly we agree with judgments of the courts below and see no merit in this appeal which is dismissed.”

24. In the case in hand, the Radiologist has not been examined. No school record of Anita has been tendered in evidence. Her father testified that Anita was born in 1997. No witness has been examined in proof of birth Certificate Exh.61.

In case of **Alamelu & anr. Vs. State represented by Inspector of Police, 2011 ALL MR (Cri) 1278 (S.C.)**, the Apex Court observed in para 39 :-

“Considering the matter in which the facts recorded in a document may be proved, this Court, in the case of **Birad Mal Singhvi Vs. Anand Purohit [1988 (Supp) SCC 604]**, observed as follows :-

“The date of birth mentioned in the scholars’ register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined Merely because the documents Exs.8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs.8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not

furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.”

25. The Hon’ble Supreme Court further held in paragraph No.41 that, in case of determination of age on the basis of Radiological Test, there is margin of error of 2 years. This margin of error in age has been judicially recognized by this Court in the case of **Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors. [1982) SCC 538]**. In the aforesaid judgment, it is observed as follows :

“. . . .However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”

The Apex Court went on to observe in para No.43 :-

“We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested

by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of **Ravinder Singh Gorkhi Vs. State of U.P. [(2006) 5 SCC 584]** held as follows :

“The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.”

26. In view of the aforesaid, the same yardstick is to be applied to a document in the nature of a certified copy of a birth certificate issued on the basis of the entries contained in the original register of birth and deaths, maintained under statutory provisions.

27. Here the appellant has been sentenced to rigorous imprisonment for ten years. It is a minimum sentence that was required to be imposed on offence being proved. The standard of proof has, therefore, necessarily be high. It is reiterated that, the evidence of Anita's father indicates that, she was 18 plus. To overcome this evidence, there is no any other evidence. The Radiologist has not been examined. The certificate Exh.31 issued on the basis of Radiological examination, therefore, loses its efficacy. Moreover, considering the principle of margin of error in ossification test, Anita might have been 18 plus. So far as regards proof of contents of birth certificate Exh.61 is concerned, there is no evidence at all except its production by investigating officer and trial Court directly admitting it in evidence by giving it Exhibit number.

28. In my view, the prosecution has failed to discharge its burden of proof. In other words, the prosecution has failed to establish that Anita was a minor at the relevant time. The conviction recorded by the trial Court is, therefore, unsustainable in law. Benefit of doubt must go to the appellant. The appeal , therefore, deserves to be allowed.

29. Criminal Appeal is allowed. The judgment and order

of conviction and sentence dated 7/2/2017, passed by Additional Sessions Judge, Sangamner in Sessions Case No.64/2015 is set aside. The appellant is acquitted of the offences punishable under Sections 363, 366-A and 376(2) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act. 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/-