

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.465 OF 2002

THE STATE OF MAHARASHTRA)...APPELLANT

V/s.

**SANJAY RANGRAO CHOUKIKAR)
Age 29 years, Occupation : Driver,)
R/o. Paijarwadi, Taluka – Panhala,)
District – Kolhapur)...RESPONDENT**

Mr.V. B. KondeDeshmukh, APP for the Appellant – State.

None for the Respondent.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 22nd OCTOBER, 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 The instant criminal appeal under Section 378(1) of the Code of Criminal Procedure (Cr.P.C.) has been preferred by the State for assailing the judgment and order dated 27th November 2001 passed by the 3rd Ad-hoc Additional Sessions Judge,

Kolhapur in Sessions Case No.13 of 2001, whereby the respondent-accused was acquitted of the charges under Sections 376 and 506 of the Indian Penal Code (IPC).

2 Brief facts necessary for the disposal of the instant appeal are noted herein below :

- (a) The prosecutrix at the relevant time was 15 years old and was a student of Class 9th. Her cousin is married to Sanjay Choukikar (respondent-accused). In the month of April 2000, her cousin had gone for delivery to her parental home and therefore she used to fill water in the house of the respondent-accused.
- (b) The prosecution contends that in the month of April 2000, after returning from the school, she went to the house of the respondent-accused. The respondent-accused was alone in the house. The prosecution alleges that the respondent-accused closed the door and after removing his clothes and

the clothes of the prosecutrix forcibly committed rape on her. The respondent-accused also threatened her that he would kill her, if the incident was disclosed by her to anybody.

- (c) The prosecution next contends that after five and ten days of the earlier incident, the prosecutrix again went to the house of the respondent-accused for filling water and respondent-accused again repeated the same acts followed by death threats. Thus, in all the prosecutrix was ravished thrice by the respondent-accused. The prosecutrix later on missed her menses and the pregnancy was noted by her mother and on being confronted, she narrated the incidents to her mother. When taken to government hospital, it revealed that she was carrying pregnancy of seven months. The prosecutrix's father and uncle discussed the matter with the respondent-accused and even the respondent-accused assured that he would marry the prosecutrix but later on retracted from his promise.

- (d) The prosecutrix accordingly lodged a report on the basis of which Crime No.89 of 2000 under Section 376 and 506 of the IPC came to be registered by Police Station Officer Kodoli.
- (e) The record shows that PW9 Investigating Officer after lodging the First Information Report (FIR) got the prosecutrix medically examined at Rural Hospital, Kodoli, took her to the spot and prepared Spot Panchnama. He also recorded the statement of witnesses and after completion of investigation forwarded the charge-sheet against the respondent-accused.

3 To substantiate the charge against the respondent-accused, the prosecution has examined as many as nine witnesses and exhibited number of documents. He respondent-accused was questioned under Section 313 of the Cr.P.C. about the incriminating evidence and circumstances and the respondent-accused denied all of them and pleaded that he has been falsely implicated and the real culprits are some other persons.

4 Mr.Dedhia, learned APP, submitted that the testimony of PW5 Head Master and as also the oral evidence on record sufficiently prove that on the date of the incident, the prosecutrix was minor. It was wrong on the part of the learned trial Court to hold that the age of the prosecutrix has not been sufficiently established by the prosecution. Even the learned trial Court ignored the evidence of Medical Officers PW7 and PW8. Since the finding of acquittal is erroneously recorded by the learned trial Court and having regard to the evidence as pointed out, the impugned judgment and order of acquittal deserves to be set aside, argued learned APP.

5 None appeared for the respondent-accused, when the matter was called out.

6 We have carefully gone through the record and we note that PW1 prosecutrix and informant, PW3 and PW4 – parents of the prosecutrix, PW5, PW7 and PW8 are the material witnesses examined by the prosecution in order to substantiate the charge against the respondent-accused.

7 PW1 prosecutrix states in her evidence (Exh. 12) that her cousin had gone for second delivery to Kolhapur in March 2000 and she was asked to fill water in the house of the respondent-accused. She, therefore, used to go to the house of the respondent-accused for filling water from March to May 2000. At the relevant time, she was a student of Class 9th and her date of birth is 6th May 1986.

8 It is her further evidence that in the second week of March 2000 when she had gone to the house of respondent-accused after 12.30 p.m., the respondent-accused was alone in his house. He asked her to wash his clothes and when she came inside to take soap cake, the respondent-accused closed the front door and brought her from the back door to the inside room in front side of the house. After removing his clothes and her clothes, he ravished her. It is her further evidence that the respondent-accused after four to five days, when she had been to the latter's house, repeated the same act and also threatened not

to tell any one otherwise he would kill her. Because of fear she did not tell the incident to any one.

9 The remaining part of her evidence is about her pregnancy and knowledge about the same to her parents and lodging of the report at Exh. 13. It also appears that after lodging of the report, she delivered a male child.

10 The whole evidence of the prosecutrix leaves so many unanswered questions and puts a question mark about her credibility. The very questionable conduct which strikes to our mind is that despite having ravished first time, she again went to the house of the respondent-accused at an interval of five and ten days respectively as deposed by her and on both these occasions fell prey to the lust of the respondent-accused. The conduct of the prosecutrix is quite unnatural in visiting the house of the respondent-accused two times after the first sexual encounter. This is something which we are unable to comprehend and even prosecution has not thrown any light on this disturbing aspect.

11 If we go through the cross-examination of prosecutrix, we take her testimony with a pinch of salt wherein she states that she did not try to run away from the back door nor she raised shouts or mounted scratching on the person of accused. She even did not try to push him or get herself freed from his clutches. However, she volunteered that she did not try to do that because of fear. What kind of fear she was harbouring in her mind is nowhere made clear. It is also not the case of the prosecution that the prosecutrix was ravished continuously under the fear of death or physical injury. All that her evidence shows is that after the sexual act was over, the respondent-accused threatened her not to disclose the incident to anyone. There is no evidence to show that this kind of fear was lurking in her mind every time when she was ravished. Her cross-examination also shows that she even did not tell her mother that she does not intend to visit the house of respondent-accused as the accused was troubling her. Moreover, her cross-examination itself shows that she had an opportunity to run away from the back door of the house but she did not opt for that.

12 The whole evidence is suggestive of the fact that there was no resistance at all from the side of prosecutrix and rather it gives a semblance that she submitted to the desire of the respondent-accused voluntarily or to be more precise, indulged in consensual sexual activity.

13 Even if it is so for the sake of argument, then the moot question which is agitating in our mind is the age of the prosecutrix. If the prosecution proves that at the relevant time the prosecutrix was minor, then even if it is a fact that the prosecutrix submitted voluntarily will not make any difference to the cause of prosecution. Therefore, what is to be searched seriously and searchingly is the proof of age of the prosecutrix at the relevant time.

14 PW3 Laxmi Tanaji Chile – mother of the prosecutrix, surprisingly, is treated hostile by the prosecution. According to her, except her pregnancy, the prosecutrix did not tell anything.

Her examination-in-chief also does not show the age of the prosecutrix at the time of the incident nor prosecution tried to elicit from her mouth in her cross-examination. But this witness is subjected to cross-examination by the defence and her cross-examination is quite material as regards the age of the prosecutrix.

15 PW3 in her cross-examination states that her marriage took place twenty-five years ago and after two years of marriage, prosecutrix was born. It appears from her evidence that her testimony came to be recorded on 5th November 2001. If that date is to be reckoned upon ascertaining her date of marriage then it works out to somewhere in 1976 and admittedly after two years of marriage, she gave birth to prosecutrix that is somewhere in the year 1978. Thus, on the date of the incident the prosecutrix was 22 years of age. This is one factor which will have to be kept in mind because ultimately her evidence will have a bearing on the outcome of the prosecution case.

16 PW4 Tanaji Kushappa Chile – father (Exh. 17) has broadly corroborated the fact of pregnancy of the prosecutrix and also that he was told that it was respondent-accused who had raped her four to five times. Interestingly, in the words of the prosecutrix herself she was ravished thrice only. The father also states in his evidence that at the relevant time she was a student of 9th Class. However, the father has nowhere given the date of birth of the prosecutrix.

17 PW5 Balasaheb Vishnu Patil who as Head Master of Devale Vidyalaya at the relevant time states in his evidence (Exh. 18) that the prosecutrix was a student of his school. In the year 2000 she was studying in 9th Class and her date of birth is 6th May 1986. It appears that he had also brought the General Register of school wherein at Serial No.4681 the entry in respect of date of birth of the prosecutrix was recorded and he proved it at Exh. 19. His evidence further shows that the entries in the Register and more particularly pertinent to the prosecutrix is made in the

handwriting of Mr.T.S.Patil working under him and then proved the said entry at Exhibit 21.

18 The cross-examination of this witness is full of substance. The Head Master states in his cross-examination that register is not in his handwriting nor is written in his presence. He further states that he is unable to tell that on what basis entry of date of birth is made in the earlier School Leaving Certificate of the prosecutrix. It may be noted quickly here that the date of birth of the prosecutrix was recorded in the register on the basis of an earlier School Leaving Certificate. This witness then further states that he has deposed only on the basis of record of his school and that he has no personal knowledge about the entries in the register.

19 We are unable to understand as to how this witness is helpful to the prosecution in as much as he has no personal knowledge about the entries recorded in the register which was brought in evidence by this witness. Even it is not his case that

the entries were taken in his very presence. What is of concern is that the entry regarding the prosecutrix in the register was in the handwriting of T.S.Patil which admittedly was not done in his presence. Merely because execution i.e. taking of entry of birth date particulars of the prosecutrix is recorded, it does not mean that, that has been proved in accordance with law. The person who recorded the said entry ought to have been examined by the prosecution to prove that the date of birth of the prosecutrix was correctly recorded on the basis of genuine and legal documents. Here it has not been done so, in as much as, the date of birth of the prosecutrix was recorded on the basis of her earlier School Leaving Certificate which was issued by Vidya Mandir Paijarwadi School which is quite apparent from the examination-in-chief of this witness. The question remained to be answered is that on what basis date of birth of the prosecutrix was taken into the school register, be it her earlier School Leaving Certificate or the school wherein this witness was Head Master. Needless to say, the date of birth of the prosecutrix is not satisfactorily established by the prosecution.

20 Medical evidence awaits. PW7 Dr.Jyoti Jinpal Patil (Exh. 24) examined the prosecutrix, noted pregnancy and accordingly issued certificate at Exh. 27.

21 PW8 Dr.Shrikant Dattatray Bhoi state in his evidence (Exh. 29) that on 18th October 2000 he examined the prosecutrix. He took x-ray of her right elbow and right knee and according to him, the age of the prosecutrix was below 18 years at the time of her examination. He then proved the Medico Legal Case papers at Exh. 31. In the cross-examination he states that the patient i.e. the prosecutrix could also be of 17 years.

22 While considering the question as to whether victim was a minor i.e. below 16 years of age, it is equally important to keep in mind what the Hon'ble Apex Court in **Sidheswar Ganguly vs. State of West Bengal**¹ has held that the age of the person in respect of whom offence has been committed, the only safer proof of that person's age is a Birth Certificate. Admittedly, in the

1 AIR 1958 SC 143

instant case, the prosecution has not produced the Birth Certificate on record. The prosecution relied on the entry in the School Leaving Certificate from school register regarding the date of birth of the prosecutrix which we have elaborately discussed. At the cost of repetition, we may repeat that the school records do not find favour with us.

23 The oral evidence and particularly that of mother gives an altogether different perspective as to the age of the prosecutrix. If regard be had to the medical evidence, it clearly shows that the prosecutrix was below 18 years as opined by PW8 Medical Officer on the basis of her x-ray reports. One can take judicial note that the margin of error in age ascertained by radiological examination is two years on either side. The medical evidence as spoken by Medical Officer is clear enough to show that the age of the prosecutrix was below 18 years but certainly not below 16 years. Therefore, the evidence led by the prosecution either in the form of testimony of mother or School Leaving Certificate or that of Medical Officer does not in whatsoever possible manner clinch the

theory of prosecution that prosecutrix was minor at the time of incident.

24 Apart from above, the damaging piece of evidence comes from the mouth of none other than PW9 Investigating Officer in his cross-examination. It is a sort of admission when the Investigating Officer states that he did not take test to carry out the paternity test of the child of the prosecutrix. Failure on the part of the Investigating Officer to carry out detailed paternity test in order to establish paternity of the child to connect the respondent-accused gives a serious blow to the prosecution theory of rape and contribute further towards failure of the prosecution.

25 Having regard to the above discussion, we are of the considered opinion that the learned trial Court has properly considered the oral and documentary evidence in its proper perspective. We do not find any perversity or illegality in his approach and, therefore are not inclined to disturb the finding of acquittal.

26 We, therefore, dismiss the appeal.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)