

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.533 OF 2002

THE STATE OF MAHARASHTRA)...APPELLANT

V/s.

SHAILESH SADASHIV MOHITE)...RESPONDENT

Mr.A.R.Patil, APP for the Appellant – State.

Mrs.Vrishali R. Raje, Advocate for the Respondent.

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

DATE : 17th DECEMBER 2020

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

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 20th November 2001 passed in Sessions Case No.213 of 1994 by the Sessions Judge, Satara, for the offences punishable under Sections 376, 504, 506 of the Indian Penal Code (IPC) and Section 3(2)(xii) of the Scheduled

Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as S.C.S.T. (Prevention of Atrocities) Act).

2 The factual matrix of the case is that the prosecutrix at the relevant time had just given the examination of 10th Standard. She also knows accused who resides in the same gully where the prosecutrix resides.

3 According to prosecution on 21st June 1984, at about 10.00 a.m., the prosecutrix along with her friend Vanita Narayan Mohite had gone to an open space for excretion. The prosecution alleges that while both of them were returning, the accused intercepted them and in the presence of said Vanita lifted the prosecutrix by gagging her mouth and made her lie on the congress grass and forcibly committed sexual intercourse. When the prosecutrix tried to raise commotion, because of the gagging of her mouth, she could not do so and after satisfying the lust, the accused fled away.

4 When the prosecutrix was returning to her house, she met the mother of the accused and complained her about the rape committed on her by her son. The prosecutrix's mother also met her on the way and enquired as to what had happened to which she narrated the incident. Both of them then went to the house of the accused but the accused was not found in the house and therefore, they went to police station and lodged the report.

5 On the basis of the report of the prosecutrix, Crime No.82 of 1994 under Section 376, 504, 506 of the IPC and Section 3(2) of the S.C.S.T. (Prevention of Atrocities) Act came to be registered by Phaltan Police Station.

6 It appears from the record that PW5 Investigating Officer after getting the prosecutrix examined medically, visited the spot of incident and prepared Spot Panchnama Exh. 24. He also recorded the statement of witnesses and forwarded all the muddemal articles seized in the said crime number to the office of

Forensic Science Laboratory, Pune. After completion of investigation, he forwarded the charge-sheet against the accused.

7 The prosecution, in order to bring home the charge, has examined as many as six witnesses and exhibited a number of documents. The respondent-accused was questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.) about the incriminating evidence and circumstances and he denied all of them as false.

8 Mr.Patil, learned APP, vehemently submitted that the learned trial Court erred in coming to the conclusion that there is absolutely no evidence on record from which inference could be drawn that the accused ravished the prosecutrix and criminally intimidated her by giving threats. The learned Trial Judge lost sight of the fact that there is ample evidence on record to show that the prosecutrix was minor at the time of the incident which is also supported by documentary evidence. Moreover, the theory of rape also gets corroboration from the medical and Forensic

Science Laboratory Report. According to the learned APP, the learned Trial Judge further committed an error by coming to the conclusion that no conviction is warranted for the offence punishable under Section 3(2)(xii) of the S.C.S.T. (Prevention of Atrocities) Act in as much as the prosecution has miserably failed to establish that the prosecutrix belongs to a member of Scheduled Caste and the accused was in a dominated position and that he dominated her will and used that position to exploit her sexually. The entire approach of the learned Trial Judge being illegal and perverse, the impugned judgment and order deserves to be quashed and set aside, argued learned APP.

9 Mrs.Raje, the learned counsel for the respondent-accused, on the other hand, supported the impugned judgment and order of acquittal. The learned counsel took us through the record and tried to impress upon us that there is no credible evidence on record to prove that firstly, the prosecutrix was minor at the time of the alleged incident and, secondly, that she was subjected to forcible sexual intercourse. According to the learned

counsel, the learned Trial Judge has properly taken into consideration all the material available on record and rightly came to the conclusion that the prosecutrix has not been able to prove the guilt beyond reasonable doubt. The judgment and order of acquittal being in accordance with law and the fact that the same is not marred by illegality or perversity, the same should not be interfered by this Court, argued learned counsel.

10 At the very outset, it may be noted from record and more particularly the prosecution case that at the relevant time the prosecutrix-informant was a minor as her date of birth is 11th June 1979. The prosecution has, therefore, led two categories of evidence; (i) the oral evidence that of the prosecutrix PW1 and her father, viz., Ramdas Sadashiv Pendam (PW4) and (ii) the oral evidence of PW6 Sarjerao Mahadeo Bhosale, Head Master, School No.4, Municipal Council School, Phaltan. We would like to consider the age of the victim vis-a-vis the evidence of above noted witnesses.

11 PW1 prosecutrix states in her evidence (Exh. 21) that her date of birth is 11th June 1979. On 21st June 1994 her examination for 10th Standard was over. She belongs to Gaun Adivasi Community which is a Scheduled Tribe caste.

12 She further states that she knows accused as his house is situated at a distance of about sixty feet from her house. Vanita Narayan Mohite is her friend and her house is also situated at a distance of about sixty feet in the same lane.

13 Deposing further, she states that on 21st June 1994, at about 10.30 a.m., she and said Vanita had gone to excretion and while returning, the accused suddenly caught hold of her. Vanita asked as to why he caught hold of the prosecutrix to which the accused said that she should go to her home. The accused then lifted her and took her by the side and by that time Vanita had gone home. According to her, the accused then gagged her mouth and made her lie on the congress grass. As her mouth was gagged, she was not able to make any movement. The accused

then removed her knicker and his clothes and then performed the sexual intercourse. Thereafter, the accused ran away.

14 As per her evidence, by the time the mother of accused had arrived there, she narrated the incident to her. His mother told that she should not be frightened and that she would ask about it to her son. Thereafter, she came in the lane where her mother met and she narrated the entire incident. Both of them then went to the house of the accused but he was not present there and therefore, they went to police station and lodged the report. She then proved the report at Exh. 22.

15 The substantive evidence of the prosecutrix can be divided two parts. The very beginning of her evidence shows that at the time of incident she had not completed sixteen years of age as her date of birth is 21st June 1994. The second part is about the forcible sexual assault on her. Before we look into the factual aspect of the case and as also to the minority or otherwise of the prosecutrix at the time of the incident, we would like to refer to

the judgment of the Hon'ble Apex Court with regard to appreciation of evidence in case of sexual assault.

16 The Hon'ble Apex Court in the judgment rendered in the case of **Mukesh vs. State of Chattisgarh**¹ held that the sole testimony of the prosecutrix is sufficient to establish the offence of rape even in the absence of corroborative evidence. The Hon'ble Apex Court also in the judgment rendered in the case of **State of Himachal Pradesh vs. Manga Singh**² in paragraph no.11 has held as under :

“11 The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not

1 (2014) 10 SCC 327 = (2014) CRI.L.J. 4900 (SC)

2 2018 SCC Online SC 2886 : AIR Online 2018 SC 1019

be a ground for throwing the evidence of the prosecutrix.”

17 Although the evidence of the prosecutrix shows that her date of birth is 21st June 1994 but that appears to be not correct in view of loud admission given by her in her cross-examination. In the cross-examination she has very categorically and clearly stated that she had completed the age of 16 years on the date of incident and that she had not told police her date of birth as 11th June 1979. If the First Information Report (FIR) is to be seen carefully, the prosecutrix has correctly admitted in her cross-examination that at the time of lodging of the FIR, she had indeed not disclosed her date of birth as 11th June 1979. Even otherwise, in view of her categorical admission that she had already completed the age of sixteen years at the time of alleged sexual assault, there remains nothing. Even then, we would like to find out whether she has given acceptable admission or not and that can only be seen after going through the evidence of her father as well as the Head Master (PW6) of the school where she studied last.

18 PW4 Ramdas Sadashiv Pendam, further, stated in his evidence (Exh. 32) that his native place is Nagpur. The prosecutrix was born at Nagpur on 11th June 1979. The entry regarding the birth of prosecutrix was recorded in the Nagpur Municipal Corporation soon after her birth and then he proved the certified entry of the Birth Certificate issued by the Nagpur Municipal Corporation at Exh. 33.

19 It is his further evidence that the prosecutrix was taking education at Senior Mudhoji College, Phaltan and then he proved bonafide certificate issued by that College at Exh. 34. It is his specific evidence that on 18th September 1998 the entry regarding the birth of the prosecutrix was not there in the record of the Nagpur Municipal Corporation as he wanted to have a caste certificate and therefore, there was a delay in recording entry in the Birth Register.

20 Although the evidence of PW4 father shows that prosecutrix was born in Nagpur and her birth date is 18th June

1979 but the same has come on record by way of omission. He was confronted in the cross-examination to the said fact and he stated that police had asked him as to where the prosecutrix had born and he had stated to police that the prosecutrix was born in Nagpur and her birth date is 11th June 1979. However, he was not in a position to assign any reason as to why these material facts are not incorporated in his statement. This major omission is duly proved by PW5 Investigating Officer at paragraph 9 of his cross-examination by stating that PW4 had not stated before him that the prosecutrix was born in Nagpur on 11th June 1979.

21 If his further examination is read carefully then it would be seen that PW4 father had not even produced the extract of the Birth before the police at the time of recording of his statement and that he had obtained the certificate of Birth (Exh. 33) before two to three years.

22 The conduct of PW4 father, therefore, needs to be questioned on more than one counts. Firstly, he speaks lie in his

examination-in-chief when he says that the entry regarding the birth of the prosecutrix was recorded in the Nagpur Municipal Corporation soon after her birth. We say so because his own cross-examination shows that he wanted to have a caste certificate and therefore there was a delay in recording entry in the Birth Register. This is further quite apparent from his cross-examination when he admits that he obtained the Certificate of Birth (Exh. 33) before two to three years only. We fail to understand the reasons given by the PW4 father. There could not have been any occasion to obtain caste certificate of a newly born baby immediately after her birth and all that was expected of him was to get the date of birth entry registered with the Nagpur Municipal Corporation immediately or within a reasonable time which was admittedly not done. Therefore, the said entry is definitely surrounded by suspicious circumstances.

23 The certificate of birth at Exh. 33 itself shows that the date of registration of the birth date of the prosecutrix was taken on record on 18th September 1998 i.e. after 19 years of the birth of

the prosecutrix. The reasons assigned by PW4 father do not find favour with us and more particularly in the light of admission given by the prosecutrix herself that on the date of alleged incident, she had completed the age of 16 years. We, therefore, are not inclined to attach any evidentiary value either to the oral version or to the certificate of birth filed on record. In our considered opinion, the learned Trial Judge also, for the same reasons, rightly rejected the oral and documentary evidence in this regard.

24 The last witness on the point of date of birth of the prosecutrix is PW6 Sarjerao Mahadeo Bhosale. He states in his evidence (Exh. 42) that he is working as a Teacher in Municipal Council School at Phaltan and at the time of recording of evidence, had brought the form of Admission of prosecutrix and School Register. According to him, the school was not taking Birth extract while admitting the ward(s) in the school. He then proved the true extract of the entry recorded in the School Register at Exh. 43.

25 In our considered opinion, the short evidence of this witness does not take the case of the prosecution further in any manner. From the evidence of this witness it appears that at the time of admission of the ward(s) in the school, the school administration was admitting the ward(s) without taking into consideration the birth extract which appears to be quite strange. This simply suggests that the admission and more particularly the date of birth of the concerned ward(s) used to be taken in the Birth Register only on the basis of information supplied by the concerned parents, which according to us is not the correct way of recording the date of birth of the ward(s).

26 There is one more reason to reject the testimony of this witness and that is that he was not working in the school at the time when the prosecutrix was admitted in the school. He admitted in his cross-examination that he does not have any personal knowledge about the entry recorded in the register regarding the birth of the prosecutrix. Thus, it appears to us that only on the basis of documents and after having gone through it,

this witness simply deposed and produced the extract of the entry recorded in the School Register (Exh. 43) which shows the date of birth of the prosecutrix as 11th June 1979. The said entry has absolutely no legal sanctity and basis and therefore cannot be taken into consideration.

27 From the above discussion it is more than clear that the whole prosecution case was based on the minority of the prosecutrix. This was a very material and pertinent aspect from the point of view of the prosecution. For the reasons stated hereinabove, we are constrained to say that the prosecution has completely failed to discharge its burden in that regard. There is absolutely no satisfactory evidence on record to prove that the prosecutrix was minor at the time of incident. On the contrary, as is pointed out by us, in the light of unequivocal admission given by the prosecutrix in her cross-examination, the whole controversy is rest at peace and even the prosecution now cannot say that the prosecutrix was minor at the time of the alleged incident.

28 Equally important aspect before us is whether the alleged sexual act was consensual or otherwise. Assuming for the sake of argument that whatever the prosecutrix has deposed had happened at the relevant time. We have also gone through the Forensic Science Laboratory Report and we find that the Chemical Analyzer's Reports support the case of the prosecution, in as much as, there are positive findings as to detection of semen of the accused on the clothes of the prosecutrix and as also on his own clothes. But then, if the whole evidence of the prosecutrix is read carefully, we find anything but satisfaction.

29 First of all, it may be noted from her evidence that when she was caught hold of by the accused, her friend Vanita asked the accused as to why he caught hold of the prosecutrix and at that time, accused asked her to go home. This conversation between the accused and the said Vanita does not find place in the FIR. Her evidence then shows that after Vanita had left for home, the accused gagged her mouth and made her lie on the congress grass. Again this is contrary to the contents of the

FIR. The FIR, on the other hand, shows that in the very presence of Vanita, the accused lifted her by gagging her mouth. Incidentally, we may point it out here that the said Vanita i.e. PW3 (Exh. 31) has been declared hostile by the prosecution without any gain in the cross-examination. So, we are left with the testimony of the prosecutrix only which itself is not cogent and reliable, if we may say so.

30 From the examination-in-chief of the prosecution, it appears that the accused throughout had gagged her mouth and before ravishing her, not only he removed his own clothes but also the clothes of the prosecutrix. This is something which we are unable to comprehend. We are at a loss of words to understand how with one hand the accused could have done so easily. This is one serious aspect of her evidence. Secondly, her whole evidence does not show any kind of resistance offered by her or that she, in any manner, attempted to thwart the act of accused.

31 One more aspect which concerns us seriously is that during the whole process of ravishment, the prosecutrix did not sustain even a scratch on her person. Her cross-examination gives an insight that the incident of rape took place on the congress grass which is covered by babool trees and other trees. The accused had taken her there right through the bushes and she did not sustain any abrasion while she was so being taken there. Even she was not making movement of her legs and hands on the spot and did not cause any scratch injury to the accused. It is more than clear that except gagging of mouth, it is not the case of the prosecution that the prosecutrix was rendered motionless or that she was not in a position to offer resistance. Moreover, having regard to the location of the place of occurrence as is vividly given by none other than the prosecutrix, she ought to have sustained some kind of injuries but interestingly, she did not sustain even a single scratch on her person, which in itself goes to show that the reality of the incident was something other than what is alleged in the FIR. Thus, the circumstances available on record cannot rule out the possibility of a consensual act.

32 The prosecution has also alleged that the accused committed the offence under Section 3(2)(xii) of the S.C.S.T. (Prevention of Atrocities) Act but the prosecution, in our view, could not establish that the prosecutrix belongs to a member of Scheduled caste and the accused was in a dominating position and that he had dominated her will and used that position to exploit her sexually, to which she would not have otherwise agreed.

33 To sum up, we conclude that the learned Trial Judge was justified in acquitting the accused in the absence of clear and unambiguous evidence about the age of the prosecutrix and as also about the non-establishment of the forcible sexual act. We do not find any illegality or perversity in the finding recorded by the learned Trial Judge.

34 For the aforesaid reasons, we find no merit in the appeal and the same is dismissed accordingly.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)