

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.365 OF 1998

1 Kisan Dashrath Tambile,
age 23 years,
R/o. Fund Galli, Karmala

2 Digambar Sadhu Bhosale,
age 75 years,
Both R/o. Wadgaon (South),
Tal: Karmala, District: Solapur
Both at present in Yerwada
Central Prison

... Appellants

Vs

1 The State of Maharashtra

2 Jyoti Tukaram Jagtap,
Fund Galli, Karmala,
District: Solapur

... Respondents

...

Mr. Sandeep Salunkhe for the Appellant.

Mr. R.M.Pethe, APP for the Respondent-State.

CORAM : SANDEEP K. SHINDE J.
DATE : 1st March, 2021.

ORAL JUDGMENT :

This appeal is directed against the judgment and order dated 20th February, 1998 passed by the II nd Additional Sessions Judge, Solapur in Sessions Case No.81 of 1996 whereby the appellant no.1 has been convicted of the offence punishable under Section 376 of the Indian Penal Code, 1860 ('**IPC**' for short) and sentenced to suffer simple imprisonment for three years and to pay fine of Rs.2,000/- with default stipulation; AND Appellant No.2 has been convicted of the offence punishable under Section 312/511 of the IPC and sentenced to suffer simple imprisonment for three months and fine of Rs.500/- with default stipulation.

2 Pending appeal, it is reported that the appellant no.2-Digambar Sadhu Bhosale, passed way. Appeal thus, abates, against him.

3 Brief facts necessary to dispose of this appeal are that :

. Prosecutrix, P.W.1 fell in love with the appellant no.1 and voluntarily succumbed to his physical desires. As it appears from her testimony and the complaint that she was conceived from the appellant no.1 whereafter both approached, Dr. Saroj Mahajan, for terminating the pregnancy. Dr. Mahajan admits in evidence, that the appellant no.1, the victim and her mother had been to her clinic.

4 Be that as it may, the prosecution evidence has established that sexual relations were consensual, but at the material time, the trial Court found the victim was under 16 years of age and, therefore, consent was not material.

5 It seems, prosecutrix could not afford the fees of Dr. Mahajan and, therefore, victim and the appellant no.1 approached accused/appellant no.2- Digambar Bhosle, who then had administered 'Deshi Dava' (local traditional medicines) to abort fetus, which worsened her health condition. Whereafter, both approached Dr. Mahajan and thereafter Dr. Deshpande at Barshi. Possibly, Dr. Deshpande, reported this fact to the police whereupon the Head-Constable, Tamboli arrested appellant no.2 on 18th March, 1996. In the meantime, the statement of the prosecutrix was recorded whereupon crime under Section 376 of the IPC was registered against appellant no.1 at Karmala Police Station, Solapur on 6th January, 1996. Investigation culminated into final report whereupon the charge was framed under Section 376 of the IPC against the appellant no.1 and under Section 312 read with Section 511 against appellant no.2.

6 Upon appreciating the evidence, appellant no.1 has been convicted of the offence punishable under section 376 of the IPC and sentenced to suffer simple imprisonment for three years and fine of Rs.2,000/-.

7 Heard learned counsel for the appellant and the learned Additional Public Prosecutor for the State.

8 Evidence on record leads to inference that prosecutrix was consenting party. Section 375 of the IPC as it stood before the Criminal Law (Amendment) 2013 of the Penal Code, 1860 states:

*“375. Rape.- A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:
Sixthly.- With or without her consent, when she is under sixteen years of age.”*

9 In the light of the aforesaid provision, it is to be

ascertained whether prosecution has proved at the material time, prosecutrix was under 16 years of age and thus, her 'consent' was immaterial.

. To prove its case, prosecution has produced evidence including the school leaving certificate of the prosecutrix, which has been proved by Sushila Mohite (P.W.3), In-charge Head-Mistress of Municipal School No.1, Karmala. School Leaving Certificate is marked as Exhibit 14, which shows, prosecutrix was born on 16th May, 1982 and at the relevant date, her age was between 13 to 14 years. This witness would testify, entries in the school leaving certificate, were made on the basis of entries in the school register no.1. Largely relying on the evidence of this witness, the Trial Court has held that at the relevant time, prosecutrix was under 16 years of age and, therefore, her consent was not consent in eyes of law.

SUBMISSIONS:

10 The learned counsel for the appellant would contend that evidence of In-charge Head-Mistress could not have been relied on by the learned Trial Court in absence of evidence of a person on whose information date of birth of the prosecutrix was recorded and mentioned in the School Register No.1. The contention is that unless a person on whose information, the date of birth of the prosecutrix has been recorded in the School Register, is examined, only production of school leaving certificate or school register would not further the prosecution case and, therefore, evidence of the In-charge Head-Mistress was not sufficient to prove that at the relevant time, she was under 16 years of age. In support of the submission, the learned counsel has taken me through the complaint filed by the prosecutrix; her evidence and testimony of her father, who was examined as P.W.2. Besides, learned counsel would also rely on the evidence of Dr. Mahajan (P.W.4), who had

examined the victim.

11 Well, Dr. Mahajan in her testimony stated that, from external appearance, age of the prosecutrix was 15 years and in cross-examination, she would admit that medical certificate (Exhibit 17) was issued by her as directed by the police.

12 Be that as it may, prosecutrix in her complaint, filed in January, 1996, disclosed her age was 15 years. Her father would also say that she was 15 years of age. Moreover, it appears from the evidence of the Investigating Officer that the Constable Tamboli made efforts to obtain prosecutrix's birth certificate from the Karmala Municipality but it was not available. Therefore, in contrast to the evidence of In-charge Head-Mistress (P.W.3), evidence of prosecutrix, of her father and of Dr. Mahajan, suggests, at the material time, she was 15 years. It may also be noted that Dr. Mahajan, in the certificate at Exhibit 17 when

opined that from appearance, age of the prosecutrix was 15 years but advised to ascertain her correct age, from the Civil Hospital. Admittedly, prosecution has not made any efforts to determine prosecutrix's age, either by conducting ossification test or otherwise. It is, therefore, to be stated that there is no definite evidence on record to hold that at the relevant time, she was under 16 years of age.

13 Be that as it may, the reliance on the evidence of the Assistant School Teacher has no sanctity in law because, a person at whose instance and the information, prosecutrix's birth date was recorded in the school register, was not examined. The Apex Court in the case of **Birad Mal Singhvi v. Anand Purohit**¹ has held in paragraph 17 thus,

"17.....the entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates were mentioned in the school record was examined."

1 1988 Supp SCC 604

. As also in the case of **Sunil v. State of Haryana**² the Hon'ble Supreme Court has held thus,

"26..... In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date."

14 In view of the evidence on record and the rational in the above mentioned cases, I am of the considered view that the prosecution has failed to prove beyond reasonable doubt that the prosecutrix was less than 16 years of age at the time of the incident.

15 Thus, to be held that she was more than 16 years of age and was competent to give her consent. In the circumstances, question of rape does not arise as consensual sexual intercourse has been proved.

16 In consideration of the facts and in the light of above discussion, the impugned conviction and sentence

2 (2010) 1 SCC 742

imposed on the appellant no.1 in Sessions Case No.81 of 1996 by the learned II nd Additional Sessions Judge, Solapur vide judgment and order dated 20th February, 1998 is set aside.

17 Resultantly, appeal is allowed. Bail bonds of the appellant no.1 stand cancelled. Sureties are discharged. Fine amount, if paid, be refunded to the appellant no.1.

18 Appeal is disposed of.

(SANDEEP K. SHINDE, J.)