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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 763 OF 2002

The State of Maharashtra

}

...Appellant
(Orig. Complainant)

Versus

Shailesh Vlias Mhatre,
Age – 27 years,
R/o. Village Dhokawade No. 1,
Tal. Alibag, Dist. Raigad.

}

...Respondent
(Orig Accused)

Mr. Arfan Sait, APP for Appellant – State.
None for the Respondent.

CORAM : PRASANNA B. VARALE &
N. R. BORKAR, JJ.

DATED : JULY 12, 2021.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Being aggrieved by the judgment and order passed by the learned IInd Adhoc Additional Sessions Judge, Raigad, in Sessions Case No. 157/2000, dated 30.03.2002, whereby respondent herein (Original Accused) was acquitted of the charge for committing offence punishable under Sections 376 of Indian Penal Code (for short “IPC”), the present Criminal Appeal is preferred by the Appellant – State of Maharashtra.

2. At the outset, we may state that though there is a reference of

name of the victim in the judgment of the Trial Court, we deem it appropriate to refer the victim as prosecutrix without disclosing her name.

3. The case of the prosecution, in brief, can be summarized as under:

In the last quarter of year 1999, at the time of Ganpati festival, the prsoecutrix along with a woman of her acquaintance proceeded to the house of accused to see the idol of lord Ganpati. As a celebration the prosecutrix and some other persons who have visited to see the idol of Ganpati danced there upto 12.30 a.m. The prosecutrix slept there at that place only and at about 1.30 to 1.40 a.m when she woke up she found that some boys are playing cards. She made a request to the boys to reach her to her house. The accused had shown his willingness and accordingly the prosecutrix and the accused proceeded. Accused instead of taking the prosecutrix to her house directly took her to a dilapidated house belonging to his uncle. The accused asked the prosecutrix to lie down on the floor/ground and further asked her to remove her undergarments and committed an act of sexual intercourse. Accused then gave threats to the prosecutrix not to disclose incident to

her parents and gave promise of marriage to the prosecutrix. It is further the case of prosecution that after 10 to 12 days again accused called her and committed rape on the prosecutrix. It is further the case of prosecution that thereafter accused time and again sexually exploited the prosecutrix. Then prosecutrix carried pregnancy and this fact was noticed by her mother. On an inquiry to prosecutrix the mother came to know that the prosecutrix was subjected to a forceful sexual intercourse at the hands of accused. Then the mother of prosecutrix lodged a report against the accused on 28.08.2000. On the basis of the report, crime was registered at Alibag Police Station against the accused for commission of offence under Section 376 of IPC.

4. Now though this is the case put up in the Appeal preferred by the State but, it revealed from the perusal of the record that there is an additional angle to the case. On going through the record, it revealed that apart from the present Respondent – accused the prosecutrix had also lodged report against another accused i.e. Prashant Gawand. It was the case of prosecution that the another accused – Prashant Gawand also sexually exploited the prosecutrix. Accused – Prashant Gawand told the prosecutrix that he came to know that the prosecutrix is having physical

relations with accused – Shailesh and on threat of disclosing this fact to her parents accused – Prashant Gawand also sexually exploited the prosecutrix.

5. The record show that the present accused – Shailesh Mhatre and another accused – Prashant Gawand were arrested on the same day i.e. on 20.04.2000. The record further show that on 08.02.2001 separate charge-sheet against the accused were received. Though, it can be seen from the record that the trial against accused persons was separated.

Be that as it may, now coming to the sequence of events it can be stated that on lodgement of the report the investigating agency was set in motion. Statements were recorded, various panchnamas were drawn. The prosecutrix was subjected to medical examination. Certain material collected in the process of investigation was forwarded to the chemical analysis. As stated above, the charge-sheet came to be filed in the Court. As the offence being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions. The defence of the accused was of total denial and false implication. The accused had admitted certain documents. On appreciation of evidence learned Trial Court vide its judgments and order acquitted the accused of the charge.

6. Learned APP appearing for the Appellant – State vehemently submitted that Respondent – Accused was charged for commission of a serious offence i.e. an offence under Section 376 of IPC and the prosecution placed on record the material evidence to show that the victim was a girl below 16 years of age. It is then submitted by learned APP that learned Trial Court erroneously appreciated the evidence and committed serious error in observing that the prosecution failed to show that age of prosecutrix was below 16 years at the time of incident. It is then submitted by learned APP that the prosecution has also collected the medical evidence in support of its case. Learned APP then submitted that the version of the prosecutrix was consistent and trustworthy. Learned APP then submitted that the learned Trial Court gave unnecessary weightage to some variance in medical opinion in respect of age of the prosecutrix and committed an error in not considering the documentary evidence in support of case of prosecution about the age of prosecutrix. It was also the submission of learned APP that the learned Trial Court gave undue importance to minor omissions so as to turn down the case of prosecution. Thus, learned APP prayed for allowing the appeal by setting aside the judgment and order of acquittal.

7. Though, notice was issued and was duly served on the Respondent, the Respondent failed to take any steps so as to engage Counsel to represent his cause.

8. With the assistance of learned APP, we have gone through the record.

9. Prosecution in support of its case examined as many as 4 witnesses i.e. Harishchandra Gajanan Bhagat, Head-Master of Primary School (PW 1), Prosecutrix (PW 2), Nisha Bhagat, mother of prosecutrix (PW 3) and Subhash Harischandra Salunkhe, investigating officer (PW 4).

10. As the prosecution mainly relies on the version of Harishchandra Bhagat (PW 1) and Nisha Bhagat (PW 3), now we may refer to the version of these two witnesses, firstly.

11. Harishchandra Bhagat (PW 1) deposed before the Court that he was working as Head-Master of Primary School, Dhokawade since December, 2001. Then he stated that he had issued a certified extract copy of the entry in the General Register maintained by the school. He

further stated that as per the original register the date of birth of the prosecutrix is 18.08.1984. Now it is interesting to note that this witness was not the Head-Master at the time of the entry of prosecutrix in the school.

In the cross-examination, this witness stated that the birth date recorded in the school register of year 1990 and in the year 1990 this witness was attached to a primary school at a place known as Sudhagad-Patil. He further stated that it is true that it is difficult to assess the birth date given by parents of their ward. Admittedly, there is no reference in the record as to who provided the information about the date of birth at the time of admission of the prosecutrix in the school and accordingly, taking entry in the general register.

12. Nisha Bhagat (PW 3) mother of prosecutrix, stated before the Court that date of birth of prosecutrix is 18.08.1984. In her examination-in-chief she stated that she came to know about the pregnancy of her daughter from the villagers and then her daughter also told her about the pregnancy from accused.

In the cross-examination this witness stated that as accused – Shailesh started abusing them, they went to police station for lodging

report against him. Then she stated that prosecutrix told her that accused Shailesh and Prashant impregnated her.

13. Now as against the evidence in the form of the entry in the general register, there are two medical opinions collected by the investigating agency in respect of age of the prosecutrix, learned Trial Court dealt with these two medical certificates and opinion on the aspect of age of prosecutrix in detail in paragraphs 9 to 18 of the judgment. A reference is also made to the judgment of the Apex Court in the case of Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir reported in 1982 Cr.L.J. 1777, to the legal position with respect to determination of age as per the medical jurisprudence. A reference is also made by the learned Trial Court to secondary sex characters in paragraph 13 of the judgment. It may not be necessary for us to reproduce the same.

14. Now two reports of medical examination i.e. Exhibit 21 and 22 were placed on record. As stated above, the medical evidence was admitted by the defence. In Exhibit 21 it has been mentioned as follows:

- | | | |
|----|-------------------------|-----------------|
| 1. | Height | 60 inches. |
| 2. | Weight | 59 kg. |
| 3. | Teeth | 28 |
| 4. | Secondary sex character | Full developed. |

15. As per Exhibit 22, the medical opinion is that the age of prosecutrix is more than 22 years as on 20.08.2000. As stated above, there is another medical opinion, the learned Trial Court has properly assessed these two opinions and the observations and conclusion drawn in paragraphs 16 and 17 of the judgment, in our opinion, are justified. We may quote those observations for ready reference:

16. *Similarly Ex. 22 shows the age of prosecutrix as more than 21 years as on 20-8-2000. To arrive at this conclusion, column no 8 of Exh 22 shows that the medical officer Shri Bhagat took into consideration the X-ray of the prosecutrix and also noted the Radial epiphysis & iliae apophysis fused. Normally this fusion, as per the Medical Jurisprudence, takes place in 17/18 years of age. Significantly, the Medical Officer has not stated anything about the error of margin while determining the age of prosecutrix.*

17. *Surprisingly, another Medical Officer Shri More gave altogether a different opinion to PSI Alibag Police Station vide his letter At Ex 38. He gave his opinion that the age of the prosecution was 16 to 18 years old. He has also not stated, like Shri Bhagat, anything about the error of margin while determining the age of the prosecutrix. What is baffling is that this Medical Officer*

based his opinion on the same x-ray which was taken into consideration by the earlier Medical Officer. Thus, there are three different dates of birth of the prosecutrix. First, 15 years as per the School Register, second, more than 21 years as per Dr. Bhagat and third 16 to 18 years as per Dr. More, defence, it was incumbent on the prosecution to clear the controversy in respect of varying medical opinions given by two different Doctor on the basis of same X-ray. However, it is not done so.

16. Learned Trial Court was justified at a conclusion drawn in paragraph 20 of the judgment as to the benefit of doubt extended in favour of the accused and it reads thus:

20. On the other hand, the medical evidence is suggestive of the fact that the prosecutrix has developed all the secondary sex character including the height, weight and teeth. The ossification test of bones is of value in determining the age. It is necessarily follows that if other evidence of age is wholly unsatisfactory, the ossification test may be accepted as surer ground for determining the age particularly when the accused gets benefit of doubt on that basis. Here in the present case there are two varying opinions. However, the opinion of Dr. Bhagat should be given preference because he had an

opportunity to examine the prosecutrix wholly whereas it seems that Dr. More only gave opinion on the basis of X-ray. Whatever may be the situation, the fact remain that in the instance case the prosecution has not been able to prove that on the date of alleged incident the prosecutrix was below 16 years. In such circumstance and having regard to the medical opinion, the benefit of doubt must be extended in favour of accused.

17. On going through the version of prosecutrix (PW 2), it clearly revealed that the prosecutrix neither on the first incident of her alleged sexual exploitation nor in those other incident repeated by the accused, resisted the accused. In her examination-in-chief itself prosecutrix stated that she disclosed the name of the accused after her mother came to know about her pregnancy from the villagers.

In the cross-examination the prosecutrix in clear and unambiguous words stated before the Court that “It is true that there was no resistance on my part when the accused first time performed sexual intercourse with me at the time of Ganesh Festival. It is true that I lodged the report only after I became pregnant”. She further stated in the cross-examination that it is true that I have filed complaint against the accused Prashant Gawand for the same offence. She further stated that it is true

that because of pregnancy she filed present case. She further stated that it is true that accused Prashant Gawand is married while accused Shailesh is bachelor. She further admitted in the cross-examination that it was her desire that accused should marry her.

18. Last witness is Subhash Salunkhe (PW 4) is the investigating officer. This witness in the examination-in-chief stated that he was attached to Alibag Police Station at the relevant time. He further deposed about the steps taken by him in the process of investigation i.e. recording the statement of witnesses, seizure of clothes of victim and accused, obtaining medical certificates from the medical officer., etc.

In the cross-examination this witness stated that it is not correct to say that a false charge-sheet is filed against the accused as accused has not committed any offence.

19. Learned Trial Court on appreciation of evidence brought before Court recorded the negative finding to the point set out for determination namely, *“Whether the prosecution proves that accused performed sexual intercourse with prosecutrix against her will of without her consent?”*. We are of the opinion that the learned Trial Court had

properly assessed the evidence and committed no error in arriving at the ultimate conclusion. We are unable to find either any illegality or perversity in the judgment. Appeal, thus, being devoid of any merit, deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.

(N. R. BORKAR, J.)

(PRASANNA B. VARALE, J.)