

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.241 OF 2009

Mohan s/o Mangal Uike,
Aged about 26 years,
Occupation-Labour,
R/o. Wakadi, Tahsil-Kurkheda,
District-Gadchiroli. .. Appellant

.. Versus ..

The State of Maharashtra,
Through P.S.O. Kurkheda,
Tah. Kurkheda, Distt. Gadchiroli. .. Respondent

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Shri Sharad Thakare, Advocate for the Appellant,
Shri I.J. Damle, APP for the Respondent-State.
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CORAM : N.B. SURYAWANSHI, J.
DATED : 11.02.2021.

JUDGMENT

1. The appellant was convicted for the offences punishable under Sections 366 and 376 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- on both the counts by the learned Sessions Judge, Gadchiroli in Sessions Case No.57/2008. The conviction is challenged in the present appeal.

2. The prosecution case, in short, is that in the year 2001 the prosecutrix was residing at the house of her maternal uncle at Wakdi for taking education. She was in 12th Std. in Shriram High School, Kurkheda. On 25.12.2007 at about 10.30 am, she was going to the school on bicycle along with Ku. Soni, daughter of her maternal uncle. On the way near the girls hostel, the prosecutrix got down saying that she wanted to wait for her friend and asked Soni to proceed to school and she would follow later. The accused came there and asked her to marry him. He also threatened to kill her, if she declined to marry him. The accused then asked her to meet him near the river. Accordingly, the prosecutrix went to the bus stop situated near the river. The accused came there in a jeep in which some passengers were travelling. The accused pulled the prosecutrix into a jeep by holding her hand and took her to Korchi. After alighting at Korchi from the jeep, the accused again asked her to marry him. He again threatened to kill her in case she declined to marry him. From there the accused took the prosecutrix to Amgaon and Karanja. At Karanja the accused kept the prosecutrix in a room belonging to his friend Mansaram Uike.

There at night the accused committed sexual intercourse with the prosecutrix against her will and consent. The said act was repeated on the following night also. From there the accused took the prosecutrix at Goregaon, Kurhadi, Tirora and Nawargaon. At Nawargaon, the accused kept the prosecutrix at the house of his paternal aunt. Grandmother of the prosecutrix came there and requested the accused to send the prosecutrix with her, however, the accused declined to do so. The grandmother of the prosecutrix then informed to the maternal uncle and the father of the prosecutrix, as well as to the police of Lalbarra Police Station. The accused and the prosecutrix were brought to Lalbarra Police Station and from there the prosecutrix was taken to Kurkheda Police Station by her father. There her maternal uncle Chintaman Sahare lodged report Exh.13, which was registered at Crime No.47/2007 for the offences under Sections 363 and 366 of the Indian Penal Code. During the course of investigation, on the basis of the statement of the prosecutrix, Section 376 of the Indian Penal Code was added in the crime. After completion of the investigation, charge-sheet was filed before the Sessions Court.

3. The Sessions Court framed charge under Section 363, 366 and 376 of the Indian Penal Code against the appellant. The defence of the appellant was that of total denial. According to him, there was dispute between him and the prosecution witnesses and therefore, they deposed against him. After recording the evidence, the learned trial Court acquitted the appellant of an offence under Section 363, IPC, however, convicted him under Section 366 and 376 of the Indian Penal Code. Hence the present appeal.

4. Heard the learned Advocate for the appellant and the learned APP for the respondent-State. Perused the record.

5. The learned Advocate for the appellant submitted that the prosecution has failed to prove the offences against the appellant by leading cogent evidence. He submitted that the conduct of the prosecutrix shows that she was a consenting party. Though she accompanied the appellant for more than four days, she neither resisted nor complained to anyone about the alleged acts committed by the appellant. By pointing out the relevant portion from the judgment of the trial Court, he submitted that the trial Court has held that the prosecution has

failed to prove that on the date of incident the age of the prosecutrix was below 18 years. In that view, he submitted that the evidence on record shows that the prosecutrix was a consenting party and therefore, the conviction recorded by the learned trial Court is unsustainable. He submitted that FIR was belatedly lodged after a period of four days and the delay is not explained by the prosecution. The learned trial Court was not justified in recording the conviction on the basis of uncorroborated testimony of the prosecutrix. He, therefore, submitted that the conviction recorded by the trial Court is unsustainable and hence the appeal may be allowed and the appellant be acquitted of all the charges.

In support of his submission, he placed reliance on **Rajak Mohammad .vs. State of Himachal Pradesh, (2018) 9 SCC 248** and **Jagannivasan .vs. State of Kerala, 1995 (Supp.3) SCC 204**.

6. *Per contra*, the learned APP supported the judgment of the learned trial Court by arguing that the evidence of the prosecutrix inspires confidence and the same is corroborated by the medical evidence. He further submitted that the prosecution

has brought on record bona-fide certificate (Exh.11) to prove the age of the prosecutrix, which proves that the prosecutrix was born on 27.12.1990. He submitted that the learned trial Court was not justified in holding that the prosecution has failed to prove the age of the prosecutrix. He submitted that on the basis of evidence before it, the learned trial Court was justified in convicting the appellant and no case is made out by the appellant to intervene in the conviction. According to him, the appeal filed by the appellant is liable to be dismissed.

7. In support of its case, the prosecution examined six witnesses. The prosecutrix (PW-1), in her evidence, has deposed that at the time of incident she was studying in 12th Std. in Shriram High School, Kurkheda. On the day of the incident, at about 10.30 am, she was going to the school on a bicycle along with her maternal uncle's daughter Ku. Soni. She got down near the girls hostel and asked Soni to go ahead and told her that she would come along with her friends lateron. When she was waiting for her friends, the appellant came there and asked her to marry with him. He threatened to kill her, if she declined to perform marriage with him. Thereafter he

asked her to meet him near the river. Accordingly, the prosecutrix went to the river and waited there at the bus stop. The appellant came there in a jeep, wherein some passengers were also travelling. The appellant pulled her in the jeep by holding her hand and took her to Korchi. When the prosecutrix asked him, as to why, she was brought there, the appellant proposed to perform marriage with her. He also threatened to kill her, if she declined to perform marriage with him. From there the prosecutrix was taken to Amgaon in another vehicle and from there to Karanja in auto-rickshaw. At Karanja, the prosecutrix was kept in a room belonging to the friend of the appellant where in the night the appellant forcibly committed sexual intercourse against her will and consent. The said act was repeated on the following night also. From there the prosecutrix was taken to Goregaon in auto-rickshaw. From there the prosecutrix and accused walked to village Kurhadi. From Kurhadi the appellant took the prosecutrix to Tirora in a bus. From Tirora, they went to Varashivni by bus. Thereafter, there they went to Nawargaon to the house of the appellant's paternal aunt. When the appellant was asked about the prosecutrix, he told that the prosecutrix was his maternal

uncle's daughter, however, since his paternal aunt was not convinced, she asked them to leave. From there, they both went to another village and again the appellant brought the prosecutrix to Nawargaon. There grandmother of the prosecutrix came and asked the appellant to send the prosecutrix back with her, however, the appellant declined, therefore, she went away. Afterwards, the grandmother came in a vehicle and took the prosecutrix to Lalbarra Police Station. The maternal uncle of the prosecutrix PW-4 Chintaman and her father came there and they took her home. She went to Kurkheda Police Station where she narrated the incident. Her maternal uncle lodged a report about her missing. She was thereafter referred for medical examination to Govt. Hospital. She stated that her date of birth was 27.12.1990.

During cross-examination, the prosecutrix admitted that she did not make any complaint against the appellant either to the passengers or the driver of the jeep. She further admitted that even at village Korchi, where the appellant had taken her, she did not complain to anybody. She denied that she was deposing falsely against the accused.

8. PW-2 Purushottam Bharne is the Headmaster of the school, where the prosecutrix was studying. He produced on record the bona-fide certificate (Exh.11) wherein the birth date of prosecutrix was given as 27.12.1990.

9. PW-3 Kishor Parvate was the Investigating Officer, who registered the offence vide Crime No.47/2007 and recorded the FIR Exh.14. He proved the panchanama of seizure (Exh.15) of clothes etc., panchanama Exhs.16 and 17 and CA report Exh.18. He conducted the investigation and submitted the chargesheet.

10. PW-4 Chintaman Sahare is the maternal uncle of the prosecutrix with whom she was staying for education at the time of incident. He deposed that, on 25.12.2007 the prosecutrix went to the school from his house at about 10.00 am, but she did not return to the house and therefore, the search was initiated for her. On his request, Chitralkha Meshram (PW-5) started searching for the prosecutrix and she informed him that the prosecutrix and the appellant were at Navargaon. When he went to that place, he found that the appellant and the prosecutrix were at Balaghat Police Station.

Thereafter, he brought the prosecutrix back to his village and lodged report (Exh.13) in the Police Station regarding the incident.

During cross-examination, he admitted that the accused had done agricultural work at his field. He denied the suggestion given to him that no incident as alleged by him had taken place.

11. PW-5 Chitrlekha Meshram deposed that she knew the appellant as well as the prosecutrix. On 25.12.2007 she had been to the Lalbarra in search of a suitable match for her daughter. She was aware that the relatives of the appellant were at Navargaon. She also learnt that the appellant and the prosecutrix were missing. At Navargaon she saw the appellant and the prosecutrix at the house of one Dashrath. She requested the appellant to send the prosecutrix back to the house of her parents, but he declined. She, therefore, obtained the help of the police in consultation with Police Patil and brought the appellant and the prosecutrix at Lalbarra Police Station. She informed the said fact to PW-4 on phone. Thereafter, PW-4 and the relatives of the prosecutrix came there

and took her back. During cross-examination she admitted that the complainant was her relative.

12. PW-6 Nilesh Chandekar, the Medical Officer, examined the prosecutrix's and issued medical certificate (Exh.24), he also examined appellant and issued medical certificate (Exh.25).

13. Evaluation of the prosecution evidence reveals that the prosecution has failed to prove that the prosecutrix was below the age of 18 years at the time of incident by leading cogent evidence. The prosecution examined PW-2 to prove the bonafide certificate which gave the date of birth of the prosecutrix as 27.12.1990. According to him, the said bonafide certificate was given on the basis of entry at Sr.No.221 of the admission register. The admission register was not produced and proved on record. Therefore, the prosecution failed to prove that the birth date of the prosecutrix was 27.12.1990.

14. In **Rajak Mohammad** (supra), the Hon'ble Supreme Court, in similar circumstances, held that the prosecution did not succeed in proving that the prosecutrix was a minor on the

date of alleged occurrence. In that case, school admission form and certificate was produced by the prosecution, but the school leaving certificate issued by the Government Primary School, on the basis of which, the details in the admission form were filled in was not exhibited by the prosecution. In the present case also, since the school admission register was not exhibited, the prosecution has failed to prove that the prosecutrix was minor on the date of incident.

15. The learned Trial Court, after considering this evidence, has rightly come to the conclusion that the prosecution cannot be said to have established that on the date of offence prosecutrix was below 18 years of age. Therefore, the appellant was acquitted of offence under Section 363 of the Indian Penal Code.

16. The evidence of the prosecutrix clearly indicates that she was a consenting party. While going to the school along with her cousin Soni, she waited back. From there, when the appellant asked her to meet him near the river, she willingly went there and waited for the appellant. Thereafter, she was taken in the jeep by the appellant. There were other passengers

in the jeep, but she did not protest to a raise alarm. Thereafter, she was taken to different villages but at no point of time did she ever raise an alarm or asked anyone for help. She never complained about alleged kidnapping and/or the sexual assault committed by the appellant, even though several opportunities were available to her.

17. At the time when PW-4 lodged report (Exh.13) of the incident, which was registered for offences under Sections 363 and 366 of the Indian Penal Code, the prosecutrix did not disclose that she was sexually assaulted against her will and consent. That was the first opportunity available to the prosecutrix to disclose about the alleged rape. This also confirms that the prosecutrix was a consenting party. When the medical examination of the prosecutrix was conducted on 2.1.2008, thereafter only, she alleged that she was sexually assaulted by the appellant. No injuries were found either on the body or on the private parts of the prosecutrix. The CA report also does not support the prosecution case. There is a delay of 4 days in lodging FIR, which is unexplained by the prosecution.

18. In **Jagannivasan .vs. State of Kerala, 1995 (Supp.3) SCC 204**, it was held “the prosecutrix Public Witness 1, undeniably was of consenting age, she being sixteen or seventeen years on the date of the occurrence. The prosecutrix and the accused-appellant were neighbours and belonged to the same Harijan community. She was a constant visitor to the house of Public Witness 5. On the invitation of PW-5, she went to his house, but he was not present there and the appellant suddenly came there and took her inside by closing her mouth, thereafter, he raped her. The prosecutrix kept mum for six days. No visible injuries were found on her person in the medical examination. In those circumstances, the Hon’ble Supreme Court held that the prosecutrix was a consenting party.

19. In the case in hand, the evidence on record clearly indicates that the prosecutrix was a consenting party. This vital aspect has been ignored by the learned Trial Court while convicting the appellant. The learned Trial Court was therefore not justified in convicting the appellant.

20. For the aforesaid reasons, the conviction of the appellant is unsustainable. Hence, the following order :

O R D E R

1. Criminal Appeal No.241/2009 is allowed.
2. The impugned judgment and order of conviction passed by the learned Sessions Judge, Gadchiroli in Sessions Case No.57/2008 thereby convicting the appellant for offences punishable under Sections 366 and 376 of the Indian Penal Code is hereby set aside.
3. The appellant is acquitted of all the charges.
4. The bail bond of the appellant stands cancelled.
5. Fine amount, if any, deposited by the appellant to be refunded to him.
6. The appellant to execute PR. Bond in the sum of Rs.10,000/- with one surety in the like amount before the Trial Court in terms of Section 437-A of the Code of Criminal Procedure.

(N.B. Suryawanshi, J.)