

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

CRIMINAL APPEAL NO. 618 OF 2010

Munshi alias Munshiram Rameshwar Khare
Aged about 20 Yrs, Occu : Agriculturist
R/o Bhalava, Post Kirnapur, Distt Balaghat

.... **APPELLANT**

// **VERSUS** //

The State of Maharashtra,
Through PSO, P. S. Weltur,
District Nagpur

.... **RESPONDENT**

Shri S.G. Karmarkar, Advocate appellant
Shri I.J. Damle, A.P.P for respondent/State

CORAM : **N.B. SURYAWANSHI, J.**
DATE : **03/03/2021**

ORAL JUDGMENT:

1. By this appeal, the appellant challenges the judgment and order of conviction passed by the learned Sessions Judge, Nagpur in Sessions Trial No. 285 of 2009 by which the appellant was convicted for an offence punishable under Section 376 (1) of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/-, in default of payment of fine, he was further directed to suffer further rigorous imprisonment for one month.

2. Facts giving rise to the present appeal in nutshell are that, Ramdas, the complainant lodged a report with Weltur Police Station on 17/03/2009 that his 15 years old daughter 'S' went to school on 07/03/2009. However, she did not come back home. Her cycle was brought by her friend Ms Karishma with a message that 'S' had gone to her aunt's house at village Manjari. On an inquiry with the aunt on 15/03/2009, it was revealed that 'S' did not reach there. A search was undertaken with the relatives but she could not be found. On the basis of report (Exh.10), the missing report (Entry No.16/2009) was taken in the Police Station on 17/03/2009. In the meanwhile, nephew of complainant; Mithun informed him that 'S' had called him from Mauza Khutiya, District Balaghat. Inquiry was made there and it was revealed that the accused had taken 'S' to Khutiya at the house of his uncle. The complainant along with police went to Khutiya but the accused and 'S' were not found there. The complainant on 21/03/2009 lodged another report stating that accused had come to his village two months before the incident as an employee on the road construction work. He was residing in the neighbourhood of the complainant and he enticed 'S' on a promise of marriage. Accordingly Crime No.15/2009 for the offence punishable under Sections 363 and 366 of the Indian Penal Code was registered and investigation was initiated. After 2-3 days thereafter, a message was received from Kirnapur Police Station that the kidnapped

girl and the accused were brought there. Accordingly, Weltur Police took the accused and 'S' in their custody and brought them back. During interrogation of 'S', it was revealed that the accused had taken her away and had sexual intercourse with her. Accordingly 'S' was referred to Medical Officer and after receiving the medical certificate, Section 376 of the Indian Penal Code was added in the crime. After completion of the investigation, charge-sheet came to be filed.

3. The learned Sessions Court framed charge against the accused under Sections 363, 366 and 376 of the Indian Penal Code. The accused pleaded not guilty. The learned Trial Court acquitted the accused of the offence punishable under Sections 363 and 366 of the Indian Penal Code however, convicted him under Section 376(1) of the Indian Penal Code. Hence the present appeal.

4. Heard the learned Advocate for the appellant and the learned Additional Public Prosecutor for the State. The learned Advocate for the appellant contended that the learned Trial Court has come to the conclusion that though no offence under Sections 363 and 366 was made out against the appellant. The appellant was wrongly convicted under Section 376 (1) of the Indian Penal Code, the prosecution has failed to prove the age of the prosecutrix. He submitted that the documents placed on record to prove date of birth of

prosecutrix were not sufficient to hold that her date of birth was as described in the said documents. He submitted that in spite of the fact that the learned Trial Court has come to the conclusion that the prosecutrix was a consenting party, the appellant was convicted only on the ground that the prosecutrix was below 16 years age at the time of incident. According to him, the prosecution has failed to prove that the age of the prosecutrix was below 16 years at the time of the incident. The learned Trial Court has recorded erroneous finding in respect of the age of the prosecutrix. Therefore, he submitted that the impugned judgment is liable to be set aside and the appellant deserves acquittal.

In support of his submissions, learned Advocate for the appellant, relied on the ratio in *Sujoy alias Sanjay Laltu Chakravarty Vs. the State of Maharashtra (2018) 2 AIR Bom R (Cri) 307.*

5. Per contra the learned Additional Public Prosecutor supported the decision of the learned Trial Court by arguing that the prosecutrix has stated her date of birth to be 13/04/1994. The Medical Officer has proved that her age was below 16 years at the relevant time. Her date of birth is also proved by the Headmaster - Keshao Raghunath Kharwade (PW1), on the basis of documents, produced on record. He therefore, submitted that there was sufficient evidence on record for the learned Trial Court to come to the conclusion that the

age of the prosecutrix at the relevant time was below 16 years and the consent given by her, therefore, was meaningless. According to him the learned Trial Court has passed correct order and the same is required to be maintained. The appeal filed by the appellant is meritless and the same deserves to be dismissed.

6. Heard the learned Advocate for the appellant and the learned Additional Public Prosecutor for State at length. Perused the record.

In support of its case, the prosecution has examined six witnesses. To prove the age of the victim, Headmaster of the school where the victim was studying, was examined as PW1. He produced on record a Bonafide Certificate (Exh.5), which gave date of birth of the prosecutrix as 13/04/1994. The date of birth according to him was noted on the basis of leaving certificate of the prosecutrix issued by the Upper Primary School, Parsodi (Raja). According to him, the Bonafide Certificate was issued on the basis of original admission register entry. He also brought the original admission register with him.

7. Dr. Prashant Natthuji Barve - Medical Officer (PW5) was examined to prove that at the relevant time the age of the prosecutrix was below 16 years. He stated that on the basis of Morphological Character, he opined her age to be between 14 and 16 years. He

advised X-ray of the prosecutrix. He stated that final opinion as to age could be given on the basis of Morphological Character. He further stated that report of X-ray result was not received by the time, Exh.37 was issued.

8. During cross-examination, he admitted that the age finally could not be determined unless the X-ray report was considered, therefore his opinion about the age was not final. He clarified that the age of prosecutrix was not below 14 years and was above 16 years. He further stated that final opinion as to age is subject to margin of plus/minus six months. He denied the suggestion that marginal error is always of two years plus/minus.

9. The learned Trial Court, after assessing the evidence, has hold that the victim was in love with the accused and she, on her own, eloped with him. The learned Trial Court further recorded a finding that the evidence on record clearly shows that the victim was a consenting party and she had willingly gone with the accused and had consented for sexual intercourse. The Trial Court however, convicted the appellant holding that the victim was below 16 years of age at the time of incident.

10. The learned Trial Court arrived at the conclusion that the victim's date of birth was 13/04/1994 which was deposed by her. So

also, PW1- Headmaster issued bonafide certificate (Exh.5) of the victim on the basis of original admission register mentioned by the school in regular course. In the admission register, her date of birth was recorded as 13/04/1994. That date of birth was noted on the basis of school leaving certificate issued by Primary School, Parsodi(Raja). By relying upon this certificate (Exh.5), the learned Trial Court held that the victim was below 16 years of age at the time of incident and hence convicted the appellant for offence punishable under Section 376 of the Indian Penal Code.

11. In *Sushil Kumar Vs. Rakesh Kumar, AIR 2004 SC 230*, it is held that the Admisssion Register or Transfer Certificate issued by the Primary School do not satisfy the requirements of Section 35 of the Indian Evidence Act.

In similar circumstances, in *Sujoy alias Sanjay Laltu Chakravarty Vs. the State of Maharashtra (supra)* this Court refused to rely upon the bonafide certificate issued by the school authority to prove the date of birth of the prosecutrix.

12. In *Rajak Mohammad Vs. State of Himachal Pradesh (2018) 9 SCC 248* the Hon'ble Supreme Court in similar facts held that the age of the prosecutrix was sought to be proved by the prosecution by bringing on record the School Admission Form and the certificate

issued by PW5, teacher of Government School. PW5 in her deposition had stated that the writing in the school admission form (Ext. PW 5/A) were in her handwriting and the signature affixed was that of the mother of the prosecutrix. In cross examination PW5 had stated that details mentioned in the certificate (Exh.5-A) PW5-A were obtained from the school leaving certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol, on the basis of which the details in the admission form (Exh.PW5-A) was filled up by PW5 has not been exhibited by the prosecution. Therefore, it was held that the prosecution had failed to prove the date of birth of the prosecutrix.

In the case in hand the facts are similar therefore the above ratio's support the case of appellant.

13. Taking into consideration the settled legal position, it is clear that in the present case, the prosecution has failed to prove that the date of birth of victim was 13/04/1994 and the victim was below 16 years at the time of incident. The medical evidence does not conclusively prove that the age of the prosecutrix was below 16 years at the relevant time. The Medical Officer (PW.5) has categorically admitted that the age of victim at the relevant time was above 16 years.

14. The learned Trial Court has committed an error in placing reliance on Bonafide Certificate (Exh.5), while arriving at a conclusion that the victim was below 16 years of age at the time of incident. In view of the settled legal position and the evidence on record, the learned Trial Court was not justified in arriving at the conclusion that the victim was below 16 years of age at the time of incident. The said finding therefore, is unsustainable so also the conviction recorded by the learned Trial Court.

15. For the aforestated reasons, the conviction of the appellant is liable to be set aside and the appeal deserves to be allowed. Hence the following order:

- (i) Criminal Appeal No. 618 of 2010 is allowed.
- (ii) The judgment and order of the conviction passed by the learned Sessions Judge dated 08/11/2010 in Sessions Trial No.285 of 2009, thereby convicting the appellant under Section 376(1) of the Indian Penal Code is quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 376(1) of the Indian Penal Code.
- (iv) The bail bonds of the appellant stand cancelled.
- (v) Fine amount, if any, deposited by the appellant be refunded to him.

(vi) The appellant to execute personal bond of Rs.15,000/- with one surety in the like amount in terms of Section 437-A of the Code of Criminal Procedure before the Trial Court.

JUDGE

J.Pethe..