

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO. 610 OF 2016**

Sonya @ Sachin Kishor Walzade  
Age: 22 years, Occu: Driver,  
R/o. Wankute,  
Tq. Parner, Dist. Ahmednagar

... Appellant

Versus

The State of Maharashtra

... Respondent

....

Mr. Abhijit S. More, Advocate for appellant  
Smt. G. L. Deshpande, APP for respondent

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**CORAM : R. G. AVACHAT, J.**

**RESERVED ON : 16<sup>th</sup> FEBRUARY, 2022**

**PRONOUNCED ON : 22<sup>nd</sup> FEBRUARY, 2022**

**JUDGMENT :-**

. This is an appeal from conviction. The appellant has been convicted for the offence punishable under Section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for fourteen (14) years and to pay fine of Rs.15,000/-, in default, to suffer simple imprisonment for six months. The appellant has also been convicted for the offence punishable under Section 506 of the

Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.5,000/-, in default, to suffer simple imprisonment for two months. Both the sentences are to run concurrently. He is, therefore, in appeal.

2. The facts giving rise to the present appeal are as follows.

PW1- "A" (prosecutrix) was the resident of a village in taluka Parner, District Ahmednagar. She was 14 years of age in the year 2012. She was uneducated. She belongs to Bhil community. She used to be in the field for grazing cattle. On one such occasion, the appellant came to her in the field. He promised to marry her. She succumbed to his promise. Sexual intercourse took place between them. Such incidence happened many a time. The prosecutrix consequently conceived. The change in her physical appearance was noticed by her parents. She was, therefore, medically screened to find to have been pregnant of little over three months. She was therefore admitted to a hospital. She disclosed the incidence(s). Her father, therefore, lodged the First Information Report (FIR) Exh.16 against the appellant on 18.06.2012. The appellant came to be arrested. The prosecutrix delivered a baby girl. Blood samples of

both, the appellant, prosecutrix and the newborn, were obtained for D.N.A. profiling. The D.N.A. report concludes both of them to be the biological parents of the newborn. The scene of offence panchanama was drawn. Statements were recorded of the persons acquainted with the facts and circumstances of the case. On completion of the investigation, the appellant was proceeded against by filing the chargesheet. The trial Court framed the charge. The appellant pleaded not guilty. He claimed to have been falsely implicated. To establish the charge, prosecution examined nine witnesses and produced in evidence certain documents.

3. On appreciation of the evidence in the case, the trial Court convicted the appellant and consequently sentenced him as stated above.

4. The learned Advocate for the appellant would submit that it was a consensual relationship. The offence took place way back in 2012. In those days a man is said to commit rape if he has sexual intercourse with or without her consent, when she is under 16 years of age. According to him, there is no evidence in proof of the age of the prosecutrix. Her age was determined on her radio-logical

examination. It was after all evidence in the nature of opinion. The margin of error was of three years on either side. According to the learned Advocate, the appellant at the relevant time was just 21 years of age. He has been behind the bars for little over 6½ years. The learned Advocate therefore urged for allowing the appeal granting the appellant acquittal.

5. The learned APP would, on the other hand, submit that the prosecutrix and her parents were agriculturist. They, therefore, could not give concrete evidence about her date of birth. Ossification and radiological test conclude the prosecutrix to have been around 14 years of age. The Medical Officer, who gave such opinion was not subjected to detailed cross examination. As such, his evidence almost went unchallenged, particularly, on the question of age of the prosecutrix. According to the learned APP, the child born to the prosecutrix is being taken care of by the prosecutrix herself. According to her, no leniency shall be shown to the appellant herein. She, therefore, urged for dismissal of the appeal.

6. Considered the submissions advanced. Perused the entire evidence in the case. Gone through the documents relied on. Let us appreciate the same.

7. The prosecutrix (PW1) testified that she would graze cattle in the field in the year 2012. She was 14 years of age by then. She did not attend school. She knew the appellant. Once he met her while she was grazing cattle in the field. He promised to marry her. He thus asked her for sexual intercourse. She submitted. Such things happened many a time. She did not disclose these incidents to her parents since the appellant had threatened her. She had ultimately to disclose her parents as she was pregnant. It is further in her evidence that on her such disclosure, the father lodged FIR. She was medically examined. After some days, she delivered a baby girl.

8. In her cross examination itself she was suggested that sexual intercourse between her and the appellant was consensual. It has also come in her evidence that she would occasionally work for loading truck with sand. The appellant was the truck driver. As such, acquaintance between her and the appellant was developed.

9. PW2 "H", the father of the prosecutrix deposed to have had lodged the FIR Exh.16. The prosecutrix disclosed him to have been pregnant by the appellant. His evidence does not further the prosecution case except to the extent of setting the criminal law in motion. He did not give in his evidence date of birth of the prosecutrix. He even did not make any statement as regards age of the prosecutrix at the relevant time.

10. PW3 Dr. Supriya Jagtap had examined the prosecutrix on 18.06.2012. She did gynecological examination of the prosecutrix. She referred her for age determination test. On receipt of such reports, she certified the prosecutrix to be more than 14 years of age, but less than 16. The medical certificate finds placed at Exh.19.

11. PW5 – Dr. Rameshwar Kate had examined the prosecutrix for determination of her age. It is in his evidence that he received the X-rays of wrist joint, elbow joint and iliac crest of the prosecutrix. The X-rays were taken by the Technician. After having gone through the X-rays, he certified the prosecutrix to be more than 14 years of age, but less than 16. The certificate issued by him is at Exh.19.

12. In the cross examination, the doctor testified to have conducted age determination test on the basis of appearance and fusion of epiphysis. He admitted to have gone only through the X-ray plates. He did not personally attended the prosecutrix. It is further in his evidence that fusion of epiphysis jointly depends upon diet, environment. There may be variations in low nutritious food and cool weather, delays the fusion of epiphysis.

13. PW4 – Dr. Prachi Deshmukh testified that she had obtained blood samples of prosecutrix and the appellant for D.N.A. profiling. An official from the concerned police station was present. The blood samples were collected in a kit provided for the purpose. The O.P.D. case papers of both the appellant and the prosecutrix were placed on record vide Exh.23 and Exh.24. It is further in her evidence that she had collected blood sample of newborn for D.N.A. profiling. She delivered the blood sample to a police official present there.

14. PW7 – Mahesh Bhawar, Police Constable attached to Parner Police Station testified that he had obtained D.N.A. kits from Forensic Lab, Kalina, Santacruz, Mumbai. It is further in his evidence

that it was he in whose presence the blood samples of the prosecutrix, her newborn and the appellant were obtained in three different kits. He carried the samples and delivered them to Forensic Lab, Kalina.

15. The evidence regarding collection of blood samples and delivering them to Forensic Lab in sealed condition has not been taken exception to before this Court. The D.N.A. reports (Exh.52) indicate that the samples were received in sealed condition. Seals were intact. The D.N.A. report concludes the appellant and the prosecutrix to be the biological parents of the newborn. D.N.A. report goes in evidence in view of Section 293 of the Code of Criminal Procedure. The conclusion arrived at as a result of D.N.A. analysis is said to be 100% correct. No case is made out to discard the D.N.A. report.

16. As such, the evidence of the prosecutrix coupled with the D.N.A. report undoubtedly indicate the appellant to have fathered her child. The question is whether consensual intercourse between the appellant and the prosecutrix amounts to an offence of rape. The sexual intercourse did take place with her in March 2012.

17. The question is whether the prosecutrix was below 16 years of age when the appellant had sexual intercourse with her and therefor her consent is immaterial. Admittedly, the prosecutrix and her father are illiterate. The father did not give any evidence as regards age of the prosecutrix. Although the prosecutrix testified that she was 14 years of age at the material time, the same is hearsay. On the question of age of the prosecutrix, there is evidence as to her radiological examination. The person who had obtained her X-rays was not examined. PW5 – Dr. Rameshwar, who certified the prosecutrix to be more than 14 years of age, but below 16, has categorically testified that he did not personally examined the prosecutrix. He gave his opinion after having gone through the X-ray plates only. It is further in his evidence that fusion of epiphysis jointly depends upon diet, environment. There may be variation in low nutritious food and cool weather, delays the fusion of epiphysis.

18. In view of this, his evidence which is only in the nature of opinion, cannot be relied upon in an offence of rape, for which the appellant has been sentenced for not less than 14 (fourteen) years of imprisonment. He has been behind the bars close to 7 (seven) years.

The medical jurisprudence states there is always margin of error of two years on either side in case of age determination on the basis of radiological examination. This margin of error may take the prosecutrix beyond 16 years of age. As such, the evidence as regards the age of the prosecutrix is not conclusive in nature. Benefit of doubt is therefore to be extended to the appellant herein, who was just 21 years of age when consensual sexual intercourse took place between him and the prosecutrix. On such evidence, the trial Court ought not to have convicted the appellant. Interference is therefore warranted with the impugned order of conviction.

19. The appeal is therefore allowed.

20. The judgment and order dated 18.12.2015 passed by the Additional Sessions Judge, Ahmednagar in Sessions Case No.420 of 2012, convicting and sentencing the appellant for the offences punishable under Sections 376 and 506 of the Indian Penal Code is set aside.

21. The appellant is hereby acquitted of the offences punishable under Sections 376 and 506 of the Indian Penal Code.

22. The appellant be set at liberty forthwith, if not required in any other case.

23. Fine, if paid, shall be refunded to him.

[ R. G. AVACHAT, J. ]

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