

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

CRIMINAL APPEAL NO.357 OF 2017

Santosh Mukund Ghotekar, Age 25 years,
R/o.Mukhed, Tal.Niphad, District Nashik.
Presently lodged at Nashik Road
Central Prison.

Appellant

versus

1. The State of Maharashtra
2. Renuka Yashwant Kamadi, Age 21 years,
Occ.Household, R/o.Kaire Sadarpada,
Tal.Peth, District Nashik.

Respondents

Mr.Akshay Bankapur and Mr.Rohit Gorade, Advocates for appellant.
Mr.Satyavrat Joshi, Advocate for respondent no.2.
Mr.Arfan Sait, APF, for State.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Judgment : 23rd February 2022

Date of Pronouncing the Judgment : 22nd April 2022

JUDGMENT :

1. The appellant challenges the judgment and order dated 20th October 2016 passed by Additional Sessions Judge, Nashik in Sessions Case No.258 of 2015 whereby appellant is convicted for the offence punishable under Section 376(2)(i) of Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and pay fine of Rs.10,000/-. The appellant was also convicted for offence under Section 363 of Indian Penal Code and sentenced to suffer imprisonment for 3 years and pay fine of Rs.5,000/-. He is further

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convicted for the offence under Section 366 of Indian Penal Code and sentenced to suffer imprisonment for 3 years and to pay fine of Rs.5,000/-.

2. The prosecution case is as under :-

(a) The victim girl was aged around 15 years and 9 months on the date of incident. The report was lodged on 12th June 2015 alleging that victim girl was missing from Saptashruni Gadh. The first informant is the mother of victim girl. On 12th June 2015 the informant received a phone call from Pimpalgaon Baswant Police that victim girl is found at Pimpalgaon Baswant. The informant approached the said Police Station;

(b) The victim girl informed the complainant that accused had kidnapped her from Saptashruni Gadh and took her to Satana. She was kept in agricultural field and the accused had sexual intercourse with her by threatening her;

(c) The accused is a married person and he kidnapped the victim girl who was minor and sexually assaulted her;

(d) The FIR was registered for offences under Sections 363, 366 and 376 of Indian Penal Code and Section 4 of Protection of Children from Sexual Offences Act ('POCSO Act'). The investigation was transferred to Kalvan Police Station vide CR No.48 of 2015;

(e) Statements of victim girl and witnesses were recorded. On completing investigation charge sheet was filed.

3. Charge was framed against accused by order dated 4th January 2016 under Sections 363, 366, 376(2)(i) of Indian Penal Code and Section 4 of POCSO Act.

4. The prosecution had examined six witnesses. PW-1 is the victim girl. PW-2 Shakuntala Kambli is mother of the victim girl. PW-3 Dhanraj Wagh is panch witness for recovery of clothes of victim. PW-4 Dr.Vaibhav Dhoom is the medical officer who examined the victim girl. PW-5 Ankush Borate is Assistant Sub Inspector. He conducted investigation. PW-6 Dr.Pramod Chaudhari is the medical officer who had examined victim girl.

5. Learned advocate for appellant has submitted that no offences are made out against appellant. The age of victim was not proved. There is no evidence to show that victim was minor. The evidence of witnesses suffers from serious doubt. There is no evidence to establish that the victim was kidnapped by the appellant. The evidence of witnesses suffers from omissions and contradictions All the witnesses are interested witnesses and prosecution has not examined any independent witness to establish the guilt of accused beyond reasonable doubt. The testimony of witnesses did not inspire confidence. The relationship was consensual.

6. Learned advocate for appellant has relied upon following decisions :

- (i) *Ittarsingh Janklal Dahikar Vs. State of Maharashtra*¹;
- (ii) *Bharat Vitthal Shete Vs. Rohidas Manaji Wahelkar & others*²;
- (iii) *State of Uttarakhand Vs. Mohan Lal and others*³;
- (iv) *Pramod Dattatray Jadhav Vs. The State of Maharashtra*⁴;

1 AIROnline-2018-Bom-1239

2 Writ Petitionj No.4529 of 2011 decided on 11-7-2012

3 AIROnline-2021-Utr-86

4 2019-ALL MR (Cri)-1742

- (v) *Naresh Sonkusare Vs. The State of Maharashtra*⁵;
- (vi) *Abhishek Ganpat Munarkar Vs. The State of Maharashtra and another*⁶.
- (vii) *Ravi Anandrao Gulpude Vs. State of Maharashtra*⁷.

7. Learned APP submit that version of victim girl establishes guilt of the accused for the offences for which he has been convicted. The accused was married person. He had suppressed the said fact from the victim and subjected her to sexual intercourse. Consent, if any, was obtained by misrepresentation. The victim was minor, which has been proved by evidence and hence assuming that relationship was consensual, the accused cannot be absolved of charges, since such consent is immaterial. The evidence on record proves that victim was less than 16 years of age. The accused was also convicted u/s.4 of POCSO Act. The accused gave belief to victim that he is going to marry the victim girl. The victim was not aware that accused is married person. The victim girl has stated that she was subjected to sexual intercourse under threat.

8. Learned APP has relied upon following decisions :

- (i) *Harpal Singh and another Vs. State of Himachal Pradesh*⁸;
- (ii) *Yedla Srinivasa Rao Vs. State of Andhra Pradesh*⁹;
- (iii) *State of Uttar Pradesh Vs. Naushad*¹⁰;
- (iv) *Fainul Khan Vs. State of Jharkhand and another*¹¹.

5 2006-ALL MR (Cri)-2099

6 Criminal Appeal No.255 of 2020, decided on 1st December 2021

7 2017-ALL MR (Cri)-1509

8 (1981)1-SCC-560

9 (2006)11-SCC-615

10 (2013)16-SCC-651

11 (2019)9-SCC-549

9. Learned advocate representing respondent no.2 has submitted that victim was sexually assaulted by accused. She was minor. The evidence on record establishes that there was false promise of marriage. The accused had suppressed his marriage from the victim. Assuming that relationship was consensual, consent was given under misconception of facts. Such consent is not valid within the meaning of Section 90 of Indian Penal Code. The accused was a married person which was suppressed by him. There was inducement of marriage to the victim. The evidence of victim girl and other witnesses inspires confidence.

10. Learned advocate for respondent no.2 has relied upon decision in the case of *Anurag Soni Vs. State of Chhattisgarh*¹².

11. In the light of submissions advanced by both the sides, the evidence on record was scrutinized by me. PW-1 is the victim girl. She has stated that at the time of recording evidence she is aged around 17 years. Her date of birth is 30th March 1999. She deposed that she had been for Chinchkhed for work along with her aunt in December-2014 and she joined the work in grape export company. She got acquainted with accused in the said company. The accused used to talk to her. The accused asked her whether she would marry him. Accused stated that if she refuses to marry him, he would commit suicide by jumping into well. She declined the proposal. One day while she was sleeping with her aunt, accused came there and took her in his room and had sexual intercourse with her. He threatened her that if she discloses this incident to anybody, he would kill her and her aunt. She did not disclose this incident to

12 (2019)13-SCC-1

anybody. Thereafter she returned to her parents. 15 days thereafter there was quarrel between her parents. She went along with her mother to reside at Saptashruni Gadh at house of her brother. While she was residing at Saptashruni Gadh accused came there and told her that she should marry him. She declined the proposal. Accused returned back to his house. After some days he again came there. The victim told him that her mother and brother have settled her marriage with another boy. The accused threatened her and took her to Brahmangaon at the house of his brother-in-law. After visiting house of the brother-in-law of the accused, the victim came to know that accused is married person and having children. The victim questioned him about his marriage but the accused kept on insisting that he is not married and he would not leave her. He threatened her. She continued to stay with him for 1½ months. There was sexual intercourse between them during the said period. Her statement was recorded by police. She produced her birth certificate issued by Gram Panchayat Kayre.

12. PW-1 was cross-examined. She stated that she had been to Chinchkhed in the month of December for work and stayed with her aunt for one month. About 300 to 350 labourers were working in the company. She did not disclose to her aunt that accused has told her that he likes her and asking her whether she would marry him. She did not disclose to her aunt that accused took her in his room during night hours and sexually assaulted her. She did not disclose in her statement that accused had told her that he likes her and whether she is ready to marry with him and also told her that if she declines to marry him, he would commit suicide by jumping in the well and therefore she consented for marriage. She admitted that

these facts are not narrated to the police in her statement. After returning from Chinchkhed to Kayre Sadar Pada, the accused never came there and did not communicate with her. After 15 days she went to Saptashruni Gadh. The accused met her when she had gone to fetch water. She did not disclose to her brother and mother that she met the accused at Saptashruni Gadh. On the second occasion the accused came at Saptashruni Gadh to take her along with him. Initially she came to village Nanduri and thereafter she went to Satana along with accused. She did not think of lodging report against accused at Nanduri as well as at Satana. She stayed in the house of brother-in-law of the accused along with accused at Satana for one month. Both of them were working in the agricultural field of one Abhay Ahire at Satana. She was residing in the agricultural field of Abhay Ahire for 10-15 days. She admitted that one day wife of accused along with her children stayed in the agricultural field of Abhay Ahire with them. The relative of accused took her and accused to Pimpalgaon Police Station. She called her mother and brother at Police Station. She had stated before Police while recording statement that she had declined the proposal of accused. However, the said fact is not mentioned in her statement. She has stated before Police while recording her statement that accused took her with him in his room. She cannot assign any reason as to why it is not appearing in the statement. The omission was regarding "accused took me". She had stated before Police that accused snatched her mobile phone and threatened her that if she calls her family members he would kill her. She cannot assign any reason why it is not appearing in her statement. She stated before Police that when she was residing with accused at Brahmangaon, there was sexual intercourse between her and accused during the

said period. However, she cannot assign any reason why it is not appearing in the said statement. She had stated before Police that accused forcefully took her with him to Brahmangaon at the house of his brother-in-law. She cannot assign reason as to why it is not appearing in her statement. She admitted that she was residing with accused as his wife. She did not produce her clothes at Kalvan Police Station. It is correct that they had disclosed to Abhay Ahire in whose agricultural field they were working that both of them are husband and wife. She denied having stated to Police that in the month of April-2015 she called accused and told him that she has come to Saptashruni Gadh at her brother's house and he should come to meet her at Saptashruni Gadh. She admitted that she was residing with accused at Satana and Brahmangaon at her own accord.

13. From the evidence of this witness it is clear that she got acquainted with accused. She did not disclose the proposal of accused to her aunt or family members. The first incident of sexual assault had occurred while she was sleeping with her aunt. The accused took her to the room. Her statement does not indicate that she was forcefully taken by accused. The said incident was not disclosed by her to her aunt or any other family members. Her evidence suffers from various improvements/omissions /contradictions. In the statement before police she had stated that she called accused to Saptashruni Gadh. There is no other way as to how the accused came to know that victim is at Saptashruni Gadh. In her evidence the victim girl has deposed contrary to her statement. The victim girl was found missing from Saptashruni Gadh. The victim has not lodged protest anywhere that accused had forcefully kidnapped her. She admitted that the accused took her to

the house of his brother-in-law. She did not lodge any protest. She stayed with the accused for a period of about one month. She did not lodge any complaint. After learning that the accused was married, she did not file any complaint to police. She did not try to contact her parents to lodge complaint. In her statement before police she has stated that while she was residing with accused there were several instances of sexual intercourse. She also stayed with accused, his wife and children. Until the family members of accused including his wife took them to Pimpalgaon Police Station, there was no protest by the victim girl. She admitted that she stayed with the accused and was working in the field of Mr.Ahire and it was disclosed to Mr.Ahire that she is the wife of accused. It is implicit from the evidence on record that victim girl had stayed with accused even after knowing that he is a married person and there were instances of sexual intercourse. In the light of factual aspects falling from the evidence of victim girl, it cannot be said that on account of promise of marriage or by suppressing the fact that accused is already married, she was subjected to sexual intercourse by him. The victim has not stated that on account of false promise of marriage she had consented for physical relationship with accused.

14. PW-1 has produced birth certificate. The date of birth of the victim girl mentioned therein is 30th March 1999. The birth was registered on the same day. The certificate was issued by Gram Panchayat, Kayre. The birth certificate also refers to the name of victim girl. The birth certificate was issued by Gram Panchayat on 16th March 2016. The defence has urged that document is doubtful. As per birth certificate the victim was born on 30th March 1999 and the birth was registered on the same day. The name of victim was

mentioned on the birth certificate. It is difficult to accept that on the date of birth, name of the victim could be provided to Gram Panchayat.

15. PW-2 Shakuntala Kambli is the mother of victim. According to her victim is her younger daughter. She was missing from Saptashruni Gadh. She had visited house of her son at Saptashruni Gadh. On search she could not find her daughter. She lodged missing report with Saptashruni Police Chowky on 12th June 2015. She received call of Pimpalgaon Police Station that they found her daughter at Pimpalgaon. She went to Pimpalgaon along with her son. The victim girl disclosed her that accused had kidnapped her from Saptashruni Gadh and brought her at Satana. She was kept in agricultural field. She was threatened by the accused. She was sexually assaulted. Thereafter PW-2 lodged the FIR. From her version in the examination-in-chief it can be seen that she is silent about the age of victim girl. She has not disclosed the date of birth of victim girl. She did not disclose the date on which the victim was missing. She has not disclosed the date of lodging the missing complaint. She has not disclosed as to what steps were taken by her after victim went missing. The victim girl was traced and call was received by her from Pimpalgaon Police Station on 12th June 2015. Her evidence speaks volumes of doubt about its veracity.

16. In the cross-examination PW-2 has stated that she cannot tell birth date of her daughter but she could say that she is 16 years old. She is the daughter of her second husband. She cannot disclose the date of her second marriage. Her daughter was admitted in Zilla Parishad School at Peth. It is also apparent that she did not produce

any document relating to the date of birth of victim girl. She could not disclose for how many days her daughter stayed with her at Saptashruni Gadh. The victim girl was with her for four months at Saptashruni Gadh. She did not make any complaint that victim was harassed by somebody. She admitted that wife of accused was minor when she visited Pimpalgaon Police Station. Her relatives were also discussing about filing of report against her daughter. On the day when she visited Pimpalgaon Police Station, Police did not ask anything to her nor recorded her statement due to late hours. She had stated before Police that she lodged present report. She cannot assign any reason as to why it is not appearing in her complaint.

17. The evidence of PW-2 is suspicious. She has not produced anything on record about missing complaint lodged by her. It appears that although victim went missing, she did not initiate any action. The FIR was registered on 12th June 2015 after receipt of information that her daughter was traced by Pimpalgaon Police Station.

18. PW-3 Dhanraj Wagh has acted as panch witness. The clothes of victim were produced in his presence. He stated that he cannot tell who had produced said clothes. Panchanama was recorded. He came to police station as he received call from police. When he reached police station clothes were kept at the police station.

19. PW-4 Dr.Vaibhav Dhoom is the medical officer. According to him he was attached to Civil Hospital, Nashik. He examined the victim girl. History of sexual assault was provided to her. There were no external injuries on her person. He issued the certificate. Local

examination of genital parts was carried out by Dr.Chaudhari.

20. PW-5 Ankush Borate was attached to Kalvan Police Station. Initially FIR was registered with Pimpalgaon Police Station. He conducted investigation. On completing investigation charge sheet was filed by him. Cross-examination discloses that he did not record statement of wife of accused. He did not record statement of relatives of wife of accused. He recorded statement of Abhay Ahire. From the statement of Mr.Ahire it was revealed that accused was residing with victim and his first wife Sarla in the rented premises of Abhay Ahire. He did not carry out investigation whether mother of victim girl had lodged missing report about victim missing from house. He had obtained school leaving certificate of the missing girl during investigation. He cannot tell whether victim was admitted in school in 4th standard.

21. Thus, investigation had revealed that victim, wife of accused and the accused were residing together. Surprisingly statement of wife of accused was not recorded. The evidence also reveals that wife of accused was at the police station along with her relatives. The accused was produced along with victim girl by wife of accused and her relatives at Pimpalgaon Police Station and the complaint was registered. Statement of Abhay Ahire that accused and victim were working with him was not examined. It also appears that victim did not lodge any protest for residing with accused and his first wife. The factual aspects emanating from the evidence on record does not indicate in any manner that victim was kidnapped and subjected to forcible sexual intercourse by accused. The evidence of mother of victim is suspicious. There was no action from her after the victim

went missing. The Investigating Officer did not inquire about the alleged missing complaint lodged by mother of victim (PW-2). The Investigating Officer has not disclosed from where he has recovered the birth certificate. No other person from the Gram Panchayat which had issued the birth certificate is examined. The name of victim is appearing in the birth certificate although birth was registered on the date of birth. The said document is under clouds of suspicion. The prosecution has failed to establish that victim was minor on the date of incident.

22. PW-6 Dr.Pramod Chaudhari has examined the victim. He noticed old healed teared hymen. Since he did not receive the C.A report, final report was not given by him. On the date of recording his evidence he has seen the C.A report but on the basis of said report he is not in a position to give any opinion. In case of excessive hard work such type of tear of hymen at a single place is possible but not at multiple sides. He did not notice any injuries on the genitals.

23. Another aspect which is required to be considered is that circumstance about the date of birth of the victim girl based on the birth certificate produced in evidence was not put to the accused while recording his statement under Section 313 of Cr.P.C. In the light of discrepancies about the birth certificate and this omission, it is difficult to accept that prosecution has been able to prove that victim was minor or below 18 years of age at the time of incident. There is no evidence beyond doubt that the victim was kidnapped by the accused or that she was subjected to sexual assault by obtaining her consent under false promise of marriage or by playing deceit.

24. Learned APP has tendered report received from Nashik Road Central Prison about the period of custody undergone by appellant which indicate that he has undergone actual imprisonment of 5 years 3 months and 12 days. Considering remissions, he is in custody for 8 years 7 days and 20 days.

25. In case of Ravi Anandrao Gulpude (supra), the Division Bench of this Court had observed that to maintain conviction under POCSO Act it is required to be proved that victim was child on the date of incident. The birth certificate was not produced at the earliest opportunity. The prosecution is under bounden duty to prove that victim is a child. Unless prosecution successfully establishes that victim is a child within the meaning of Clause(d) of Section 2 of POCSO Act, a person cannot be convicted for the offence u/s.6 of the Act. The provisions of the Act are stringent in nature. Even there is a statutory presumption under Section 29 of the Act. Since the enactment is stringent in nature, the degree of proof is stricter. The prosecution is under bounden duty to prove the age of prosecutrix to show that at the time of incident victim was a child. The burden is on the prosecution to prove that age of the victim on the date of incident was less than 18 years.

26. In the case of Ittarsingh Janaklal Dahikar (supra) this Court had observed that testimony of the victim that she went with the accused on the promise of marriage but she is silent about any force by accused for sexual intercourse and failure of prosecution to prove that victim is minor, is sufficient to acquit the accused of the charges.

27. In the case of Bharat Vitthal Shete (supra) this Court had considered the validity of birth certificate and observed that there was no mention about on whose instance the entry has been taken, neither the name of person is disclosed nor address or identity was disclosed. Such the certificate cannot have presumptive value u/s.114 of Evidence Act nor it can be said that birth certificate is issued under the said Act. In the absence of any evidence to show that the date of birth was recorded at the instance of responsible person, mere production of document in evidence showing date of birth of the applicant is not sufficient and admissions in the register and transfer certificate is not and cannot be relied upon.

28. In the case of Pramod Dattatraya Jadhav (supra) this Court had held that absence of link evidence to demonstrate that birth certificate relates to female-victim whose age is sought to be proved, such birth certificate would not be of any assistance to prosecution.

29. In the case of Harpal Singh and another (supra) relied upon by learned APP, it was observed that prosecution had proved the age of girl. The entry was made by concerned official in discharge of official duties and therefore document was clearly admissible u/s.35 of Evidence Act and it is not necessary for the prosecution to examine its author.

30. In the case of Yedla Shrinivasa Rao (supra) it was held that consent of girl aged about 16 years was obtained by accused by making false promise of marrying her which he never intended to fulfill. Invoking Section 90 of IPC it was held that such fraudulent consent cannot be said to be a consent so as to condone offence of

accused. Such consent was of no consequence. Hence the conviction of accused u/s.376 of IPC was held justified.

31. In the case of State of Uttar Pradesh Vs. Naushad (supra) it was held that consent given under misconception of fact and obtained by giving false promise of marriage and refusal of accused to marry with the victim girl is sufficient to hold the accused guilty of committing rape.

32. In the case of Fainul Khan (supra) it was held that there can be no generalised assumption of prejudice by reason of any omission or inadequate questions put to an accused u/s.313 of Cr.PC and where prejudice was caused will have to be determined in the facts and circumstances of each case on balancing of number of factors.

33. Learned advocate for respondent no.2 has relied upon decision in the case of Anurag Soni (supra) wherein it was held that prosecution has succeeded in proving that from the inception promise given by the accused to marry the victim, was false and there was no intention to marry the victim. Thus, the consent of victim can be said to be consent on misconception of facts as per Section 90 of IPC.

34. Applying the ratio in the aforesaid decision to the facts of present case, there is no reason to believe that consent of victim was obtained under misconception of facts. The victim was residing with accused for a period of about two months. There was no complaint from her that under false promise of marriage she was sexually assaulted. The FIR was registered after the wife of accused and her

relatives approached police. The evidence on record also discloses that the victim was residing with the accused and his first wife till the complaint was lodged. There is no cogent evidence to establish that victim was kidnapped by accused and there was forcible sexual intercourse or consensual sexual intercourse under the guise of promise of marriage.

35. Considering the aforesaid facts, conviction of accused for the offences as stated above is required to be set aside. Hence, I pass following order :

ORDER

- (i) Criminal Appeal No.357 of 2017 is allowed and disposed of;
- (ii) The impugned judgment and order dated 20th October 2016 passed by Additional Sessions Judge, Nashik in Sessions Case No.258 of 2015 is set aside and appellant is acquitted of all the charges.

(PRAKASH D. NAIK, J.)

MST