



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

CRIMINAL APPEAL NO. 732 OF 2002

Dnyaneshwar s/o Maroti Sable
Age: 25 years, Occu.: Private Driver,
R/o. Shengaon (Khodke),
Tal.Shengagoon, Dist.Hingoli.

....Appellant

Versus

State Of Maharashtra
Through Police Station Officer,
Police Station, Goregaon,
Tal. Shengaon, Dist.Hingoli.

.....Respondent

.....
Advocate for Appellant : Mr.S.R.Kedar h/f. Mr. P.R.Patil
APP for Respondent: Mr.N.D.Batule

.....
CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 25 JANUARY, 2024

PRONOUNCED ON : 31 JANUARY, 2024

JUDGMENT :-

1. By instant appeal, convict for offence under Sections 363, 366 and 376 of the Indian Penal Code (IPC) is taking exception to judgment and order passed by Additional Sessions Judge, Hingoli dated 12-12-2002 in S.T.No.16 of 2002.

CASE OF PROSECUTION IN NUTSHELL

2. Appellant was chargesheeted by Goregaon Police Station, Taluka and District Hingoli on the allegations that victim, a minor, was residing with her parents and she had taken education up to 7th standard. Accused was employed as a Driver on the Tractor owned by her paternal uncle. Houses of father of victim and his brother were adjacent to each other, as a result of which, appellant was on talking and visiting terms to the house of victim. Once accused sent a chit to the victim through his master's son. Therefore, accused was reprimanded. However, accused continued to make gestures to the victim.

On 26-11-2001, victim went towards the river with her younger sister for washing clothes and from there, victim parted company of her sister for answering call of nature. According to victim, accused caught hold of her hand. Her attempt to get free went futile and he threatened to kill her if she does not accompany him. According to victim, because of the threats, she accompanied him and he took her to his land and beneath a Neem tree committed rape on her. He also offered to marry her saying that he has left his wife.

That meanwhile, father of victim lodged complaint on the

strength of which Police registered crime against accused.

According to prosecution, accused compelled victim to accompany him to various places named by victim in her statement. Finally, their location was traced by Police machinery and they were both taken in custody and brought from Nashik. Accused was arrested. Victim was subjected to medical examination. Their clothes were seized by Investigating Officer. Documents of age of victim were collected by the Investigating Officer and finally accused were chargesheeted for offence punishable under Sections 363, 366 and 376 of the IPC.

At trial, on appreciation of oral and documentary evidence adduced by the prosecution, learned Additional Sessions Judge, Hingoli accepted the case of prosecution as proved and recorded guilt, which is now assailed before this Court by filing appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant launched criticism about the age of the victim. He submitted that there is no full proof conclusive evidence about age of the victim to be below 15 years of age. He took this Court through the evidence of victim as well as her father

and even Investigating Officer and would submit that there is no legally acceptable proof of age. According to him, school authority had issued certificate only on demand and there is no foundation regarding age of victim. He submitted that school authority produced application / admission form, but the same is in different ink and so possibility of fabrication cannot be ruled out. Thus, he questions victim to be a minor.

4. He further pointed out that victim's own evidence suggests that she had willingly herself eloped from her house and had accompanied accused to numerous places and had spent a month or so in his company without resisting or raising alarm. The allegation of threats to kill are false and afterthought. That inspite of having travelled with accused at several places, at no point of time during journey, she has raised alarm or alerted fellow passengers. He pointed out that there were several opportunities to make her escape good, but no opportunity to that extent is deliberately availed by her and thus it is his submission that it is not open for prosecution, more particularly, in view of admissions given by her in cross-examination, that there was any force exerted on her.

5. It is further pointed out that apart from failure to prove age of

victim and kidnapping, even prosecution failed to establish commission of offence under Section 366 of the IPC. That there is even no supportive medical evidence and thereby it is his submission that prosecution has miserably failed to establish the charges beyond reasonable doubt and for such reason, he prays to set aside the judgment under challenge by branding it to be perverse and illegal.

On behalf of State :

6. Learned APP also placed on record notes of arguments and he justified the conviction by submitting that there is not only overwhelming, clinching evidence regarding commission of kidnapping a minor and on threats, compelling her accompany him to his field, raping her and thereafter, further threatening her and taking her to various places. According to learned APP, very victim has given detailed account of the acts and deeds of accused. That her testimony has remained unshaken and moreover, is inspiring confidence. That there is full proof evidence about her age. That court has examined Head Master of the Zilla Parishad School, Shegaon by exercising powers under Section 311 of the Cr.P.C. That date of birth of victim is proved. That school register and record has been furnished, which clearly establishes her to be a minor.

According to him, deposition of victim about she repeatedly raped in the night, itself is sufficient to fasten the guilt and hence, it is submitted that no fault can be found whatsoever in the impugned judgment.

Learned Counsel for the victim also adopted the above submissions and supported the findings about victim to be a minor, she to be kidnapped from lawful custody of parents, she being raped. Thus, learned Counsel also prays to dismiss the appeal for want of merits.

7. After hearing submissions advanced as narrated above and on re-examination, re-analysis and re-appreciation of prosecution evidence, here it is seen that in support of its charge, prosecution has examined in all following eight witnesses and has also sought reliance on several other documentary evidence.

PROSECUTION WITNESSES

PW1 Father of victim. His evidence is at exh.22.

PW2 Babu Shinde is pancha to seizure panchanama of clothes of victim. His evidence is at exh.24.

PW3 Dr.Mrunal Umrikar, Medical Officer, who examined victim. Her evidence is at exh.33.

PW4 Uttam Gaikwad is pancha to seizure of clothes of accused. His evidence is at exh.35. His evidence is at exh.22.

PW5 is Victim. Her evidence is at exh.37.

PW6 Santosh Mantari is Kirana shop owner. His evidence is at exh.40.

PW7 is paternal uncle of victim. His evidence is at exh.41.

Accused refused and denied to lead any evidence.

Learned trial Judge seems to have examined Head Master of the School where victim studied, as a Court witness and his testimony is at exh.46.

ANALYSIS

8. The fundamental ground raised before this Court is that prosecution failed to establish victim to be a minor. Therefore, it is desirable, at the threshold, to deal with such objection.

On scrutiny of **PW5** victim's evidence, we find her giving her age in the witness box as 15 years. She has deposed about studying up to 7th standard. In her examination-in-chief, she has not given the date of birth, but while under cross, she gave her date of birth as 06-01-1987. Her father PW1, in his evidence at exh.22, stated that his daughter has studied up to 7th Standard and for want of facility of

further education, she stopped her education. Neither in examination-in-chief nor in cross-examination there is any questioning about date of birth of victim.

PW3 Dr.Umrikar, who is examined at exh.33, deposed about examining victim aged 15 years brought by Police. However, Doctor seems to have deposed about opining about age on the basis of clinical examination. Such evidence is of no avail to determine the age. No ossification test has apparently been carried out.

9. In the light of such evidence emerging from prosecution side, learned trial Judge seems to have examined Head Master of Zilla Parishad Primary School, Shegaon by exercising powers under Section 311 of the Cr.PC. and his evidence is at exh.46. On carefully analyzing his evidence, he seems to have carried School Admission Register and prescribed printed application form. He deposed on seeing the record of the victim that she was no more in the school and she has studied only up to 7th standard in 2000. According to him, as per School Admission Register, her date of birth is 06-01-1987 and she was admitted in the School on 08-07-1992. Victim had collected her T.C. He narrated serial number of entry pertaining to the victim in the register.

Above witness is subjected to extensive cross-examination on the points of admission application form, the colour of the ink over it, required procedure for taking entries and maintaining record. He has candidly admitted that father of the victim did not produce birth certificate from Gram Panchayat.

Above is the only evidence as regards to age of victim is concerned. Defence came with a case that prosecution has failed to establish that victim was a minor or below 15 years of age.

10. On appreciating above available evidence, it would be fruitful to deal with settled legal position while appreciating or determining age of a person.

In case of ***Ashwani Kumar Saxena v. State of Madhya Pradesh***, (2012) 9 SCC 750, in paragraph 43, the Hon'ble Apex Court has observed as under :

“43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.”

In the case of ***Jarnail Singh v. State of Haryana***, (2013) 7 SCC 263 the Hon'ble Apex Court has held that age of the prosecutrix should be determined on the following grounds :

“a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of juvenile or child. In case exact assessment of the age cannot be done, the Court or the board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, given benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.”

Very recently in the case of ***P. Yuvaprakash v. State Rep. By Inspector of Police***, AIR 2023 Supreme Court 3525, as regards to computation of age, Section 34 of the POCSO Act is discussed and following nature of evidence is considered relevant for determination of age;

“13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act

requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.”

11. Keeping the above legal requirements and position in mind and on appreciating the evidence adduced by prosecution in this case, there is school record, which carries date of birth of victim as 06-01-1987. In the case of **Ashwani Kumar Saxena** (supra) the Hon'ble Apex Court held that Admission Register of School in which a candidate first attended, is a relevant piece of evidence for determining the date of birth. Court Witness, who is a Head Master, has placed extract of Admission Register on record wherein date of birth is reflected as 06-01-1987. Further in view of ruling of Hon'ble Apex Court in the case of **Jarnail Singh** (supra) and **P. Yuvaprakash** (supra), prosecution can establish age by three modes spelt out in aforesaid paragraph and clause (i) deals with “the date of birth certificate from the school, or the matriculation or equivalent

certificate”. Section 35 of the Indian Evidence Act recognizes school record as a public document. Further victim narrated herself giving the date of birth, more particularly, in her cross-examination at the hands of learned Counsel for accused. Resultantly, in the light of above quality of evidence on the age, there is no reason to doubt the date of birth of victim. Hence it can safely be held that at the time of incident, victim was 13 years and 10 months of age and hence a minor.

12. Age of victim having being established, now it is to be seen whether offences punishable under Sections 363, 366 and 376 of the IPC are proved and established.

Essential ingredients of Sections 363 and 366 are as under:

Section 363 :

Kidnapping from India -

- (1) The victim kidnapped was residing in India at the time of offence;*
- (2) Accused committed offence of enticing the person kidnapped;*
- (3) The kidnapping was without the consent of the victim or of someone legally authorised to give the consent.*

Kidnapping from lawful guardianship -

- (1) The victim kidnapped was a minor being below 16, if male, or below 18, if female;*
- (2) The victim kidnapped was in the keeping of a lawful guardian;*
- (3) Accused took or enticed away the victim from such keeping of the lawful guardian;*

(4) Accused did so without the consent of the lawful guardian.”

Section 366 :

(1) Kidnapping or abducting any woman;

(2) Such kidnapping or abducting must be -

(a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or

(b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

The second part of the section requires two things -

(1) by criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place; and

(2) such going must be with the intent that she may be or with knowledge that it is likely that she will be forced or seduced to illicit intercourse with some person

(3) for ‘abduction’ use of force or deception is essential

(i) Kidnapping/abduction of a girl

(ii) Inducing/compelling by force to marry/to have sexual intercourse against her will.”

13. Obviously, here again evidence of **PW5** victim is crucial. On re-appreciating her evidence, it is emerging that appellant came in contact with victim by virtue of his employment with her paternal uncle. Her evidence suggests that he was interested in her, and has also proposed her to accompany him by assuring to marry her. He allegedly disclosed her that he has left his wife. Such material shows that at that point of time, accused was a matured person and

moreover, a married man.

14. No doubt victim had left the house for washing clothes with her sister and from there, she went to answer call of nature. In paragraph 2 of her examination-in-chief, she states that while she was returning accused met her, caught hold of her hand saying that he wanted to talk to her, she claims that she attempted to release herself from his clutches, but he threatened her and out of fear she accompanied him. She categorically deposed about she been raped beneath Neem tree and suggested that she should come with him as he wants to marry with her. She claims that due to threat she was compelled to go with him and he took her to Shengaoon and to various place till being brought by Police.

15. Here victim is already shown to be a minor. When parents' consent has not been obtained and she having been removed from lawful custody of her parents, offence of kidnapping is squarely attracted. Considering her age, she having deposed about forcibly caught hold of her and taken away, the offence is complete. Legal consequences follow once victim deposes that she was taken away by issuing threats. Therefore, her evidence to that extent clearly brings

home the charge of kidnapping.

16. Victim has categorically deposed about offer and promise of marriage. In view of provisions of Section 366 of the IPC, and taking into account above discussed testimony of victim that after first episode, he offered to marry her and then took her to several places and on same assurance, she claims that he used to rape her. Resultantly, even necessary ingredients of Section 366 are very much existing in her testimony.

CONCLUSION

17. Victim deposed that accused raped her after issuing threats. It is settled legal position that sole testimony of prosecutrix, if inspires confidence, is sufficient to fasten the guilt. Here, unfortunately physical examination of victim has done at a belated stage in view of peculiar circumstances dealt above. Even otherwise, absence of injuries, is itself not sufficient to hold that offence of rape has not been made out. Victim has not at one place but at several places deposed that after taking her forcibly, he raped her. The phraseology used by her, clearly indicates that offence of rape has been committed by him. Even otherwise, she being shown to be a minor, question of her passive submission or not putting up resistance or even

according consent, is insignificant and law to that extent is loud and clear. Even this Court is convinced that by promising to marry, she was removed from her parents' lawful custody and guardianship and taken to various places and physical contact is maintained with her. Victim's evidence shows that accused was already married, still he has indulged in above relations. Hence, all charges for which the appellant was chargesheeted stand proved. None of the points raised in appeal has merit or substance so as to interfere in the findings and conclusion reached at by the trial Judge.

18. Perusal of the impugned judgment shows that all aspects are considered and appreciated in the light of legal requirements. No perversity or illegality is brought to the notice of this Court so as to cause interference. Finding no merits in the appeal, I proceed to pass following order :

ORDER

Criminal Appeal No.732 of 2002 stands dismissed.

**(ABHAY S. WAGHWASE)
JUDGE**