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{crap94.04}

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

CRIMINAL APPEAL NO. 94 OF 2004

Bhausahab Ranganath Virkar
Age. 23 years, Occ. Agriculturist,
R/o. Dhangarwadi, Taluka Nagar,
Dist. Ahmednagar.

.. Appellant
[original
accused]

Versus

The State of Maharashtra

.. Respondent

Mr.D.R. Kale a/w. Mr. Y.H. Lagad Patil, Advocate for the appellant.
Smt. Ashlesha S. Deshmukh, APP for the respondent-State.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 20.08.2024
PRONOUNCED ON : 14.10.2024

J U D G M E N T :-

01. Present appeal arises out of judgment and order dated 23.01.2004 passed by the learned Ist Adhoc Additional Sessions Judge, Ahmednagar, in Sessions Case No. 4 of 2003. The appellant-accused is held guilty of the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code (for short "IPC") and sentenced as follows :-

Sections	Period of Rigorous Imprisonment	Amount of Fine	Sentence in default of fine.
363 of IPC	3 years	Rs.500/-	RI for 3 months.
366 of IPC	5 years	Rs.500/-	RI for 3 months.
376 of IPC	7 years	Rs.1000/-	RI for 3 months.

02. The prosecution started on lodging of the FIR on 25.09.2002 by one Arjun Haribhau Shikare with MIDC Police Station, Ahmednagar. He informed that the prosecutrix i.e. his daughter, studying in 9th standard, went out for urine on 23.09.2002 at 11.00 p.m. in the night. He saw 4-5 persons suddenly came there. On one motor-cycle present accused was seen. On another motor-cycle, other accused persons, namely, Arun Mhaske, Jagannath Virkar and Bhausahab Shikare were sitting. The prosecutrix was on the motor-cycle of the present appellant. One Raghunath was also riding on the same motor-cycle. They took the prosecutrix along with them and since then the prosecutrix was not found.

03. On the basis of this complaint, the police made investigation and filed charge-sheet against five persons. The Trial Court on recording evidence and conducting trial found only present appellant-Bhausahab guilty of the offences. The Trial Court acquitted other four accused persons. Against the conviction, present appellant has approached this

Court. During the trial, the applicant was on bail. After filing of the appeal, presently also the appellant is on bail in view of order dated 09.03.2004 passed by this Court.

04. To prove the guilt, the prosecution examined 12 witnesses, in support of its case.

05. P.W.1-Arjun Haribhau Shikare is the informant – father of the prosecutrix. In his evidence, he gave details of the alleged incident. He stated that accused-Bhausahab always used to harass the prosecutrix while going to school and coming back, on S.T. bus stand. He, therefore, withdrew the prosecutrix from the school. He knows the accused persons as all are from Dhangarwadi. After the appellant took prosecutrix with him, the informant and his family members went to the house of accused-appellant and told his father about the incident of kidnapping. The father of the accused told that the prosecutrix will return home in the morning. However, the prosecutrix did not come back and was not found, thereafter the complaint was lodged.

. In the cross-examination, various omissions are taken on record. He denied the suggestion that there was talk of marriage of the

prosecutrix with the appellant. Further, it is taken that even after lodging the complaint, when the accused persons were in jail, he again lodged one more complaint of kidnapping of the prosecutrix against one Baban Virkar and two others. He accepted that even those persons were arrested by the police. That time though police asked him to take custody of the prosecutrix, he refused to take custody of prosecutrix. He volunteered that it was due to fear of the accused persons. It was suggested that because of the fear, the prosecutrix went with the accused persons. This witness proved the FIR.

06. P.W.Nos. 2,3 and 4 are the panch witnesses, who did not support the prosecution.

07. P.W.5-Chandrakant Gangaram Pansare, who acted as panch, stated about seizure panchanama of the clothes of the prosecutrix. He proved the spot panchanama.

08. P.W.6-Bhagirath Tukaram Jagtap was working as Head Constable, at the relevant time, with MIDC Police Station, Ahmednagar, who recorded the FIR. In the cross-examination, it is stated that the informant had not stated about withdrawing his daughter from school as

the accused-appellant was harassing her. It was also not stated that the accused persons came on two motor-cycles.

09. P.W.7 is the prosecutrix. She stated about her schooling. About the incident, she stated that she had gone for passing urine out of the house. At that time, accused-Bhausahab and other persons came on motor-cycle. She was not knowing other persons. The accused persons took her on the motor-cycle to the house of accused-Bhausahab. She identified other accused persons in the Court. She was not knowing their names. She further stated that by keeping motor-cycle at the house of accused-Bhausahab, they went to some other place and stayed there till morning. In the morning they went to the house of cousin of appellant. As she was having pains in the stomach, they went to one Hospital. From there, they went to Pune and thereafter from Pune they went to Alandi and performed marriage. Though she was not willing to marry, however, later on she agreed to marry. They stayed at Alandi for 2-4 days. During said stay, the accused-Bhausahab established sexual contact with the prosecutrix against her will. They again came back to Nagar. At Nagar they went to MIDC Police Station, where parents of the prosecutrix came there. From MIDC Police Station, she went with her parents.

. In the cross-examination, she accepted that she was withdrawn from school before two years of the incident. Thereafter, she used to assist her mother and aunt in household work. She was receiving marriage proposals. It is the parents and uncles, who were searching for suitable bridegroom. To one such proposal she responded positively. Omissions are taken on record about taking the prosecutrix forcibly. She accepted that she had not stated this before police. However, she volunteered that she was warned by the appellant not to disclose to police, therefore, she did not state that she was forcibly taken by the accused.

10. P.W.8-Dr. Bharti Shahaji Peche is a Doctor working at Civil Hospital, Ahmednagar at the relevant time, who examined the prosecutrix. The prosecutrix narrated her history of sexual intercourse for four to five times. She opined that hymen was not intact. She further stated that the victim had told her that she had consented for sexual intercourse. She also stated that there were no external injuries on other parts of body including genitals. The findings confirmed sexual intercourse. She proved medical certificate.

11. P.W.9-Jaysing Narayan Murkute was working as head constable at MIDC Police Station. The prosecutrix and accused-appellant had been to police station on their own. He recorded statement of both of them. It revealed that the accused seduced the prosecutrix and had intercourse with her. He sent the prosecutrix for medical examination. Thereafter, they were brought back to police station.

. In the cross-examination, the witness accepted that the accused and the prosecutrix had voluntarily come to the police station.

12. P.W.10-Ramesh Ratan Patil is the Investigating Officer. He was Police Station In-charge of MIDC Police Station, he conducted investigation. He stated about part of the investigation. He accepted that there was no panchanama prepared of the arrest of the accused. He proved the panchanama, birth certificate and other relevant documents.

13. P.W.11-Suha Keshav Raskar is In-charge Headmistress in Zilla Parishad School. She proved date of birth of the prosecutrix as per school record. She accepted in her cross-examination that there was scoring in the name of father of the prosecutrix in the school record.

14. P.W.12-Karbhari Sahebrao Aware is Headmaster of Adarsh Kanya Vidyalaya, Jeur, where the prosecutrix was taking education till 9th standard. He proved the school register showing entry of the prosecutrix in the school record.

15. On this evidence, the Trial Court proceeded and accepted that the prosecution has proved guilt of the appellant. So far other accused persons are concerned, they came to be acquitted. Learned Advocate Mr. Kale for the appellant submits that in the present case there is no evidence to prove charges under sections 363 and 366 of the IPC. So far as offence under section 376 of the IPC is concerned, he submits that it has clearly come on record that the prosecutrix had willingly given consent for sexual intercourse. She voluntarily stayed with appellant at his house and thereafter at Pune and Alandi. Thereafter, she even performed a marriage. The father of the prosecutrix did not like his daughter to marry with the appellant and it is only for this reason the complaint was lodged. The father wanted to get her married to some other person. The fact that the prosecutrix went on motor-cycle of the accused-appellant shows that there was no force used while taking the prosecutrix with the appellant. There is no clear evidence about the age of the prosecutrix being below 16 years of age. From the evidence of In-

charge Headmistress of the primary school, it has come on record that there is scoring in the name of the father of the prosecutrix, making the record doubtful. There is also one other girl studying in the same school and same class, namely, Shital, whose father's name was different, which is matching with the name of the prosecutrix, therefore, scoring was done. Such certificate cannot be relied upon and cannot be accepted as a proof of age. The contents of vital documents are not proved. Ossification test of the prosecutrix was conducted. The test certificate Exh.73 shows the age of the girl between 16 to 18 years. He, thus, submits that in any case benefit needs to be given to the accused, when there is no exact proof of age of the prosecutrix, showing that she is below 16 years of age. He submits that the Trial Court has failed to consider this aspect and has held the accused guilty. He submits that when other accused were given benefit, accused No.1-appellant also ought to have been acquitted. He, thus, prays for allowing the appeal.

16. Learned APP vehemently opposed the appeal. She submits that there is clear evidence on record to show that accused persons took the prosecutrix with them. Father of the prosecutrix and the prosecutrix herself have stated about the fact of taking her with the accused. The evidence of the father is duly corroborated by the prosecutrix. There is

medical evidence to prove that there was sexual intercourse. The Doctor has clearly opined and has also proved medical certificate. So far as age is concerned, she submits that the documents are from school and need not be doubted. The learned APP thus submits that the appeal deserves to be dismissed.

17. On going through the evidence it is seen that all the facts are proved by the prosecution. However, the question as to whether all the facts taken to have been proved, make out case under sections 363, 366 and 376 of the IPC. From the evidence of the prosecutrix what is clearly seen is that she went with the accused. She did not raise any hue and cry. She accompanied present appellant to Alandi. At no point of time she offered any resistance. There is nothing on record to show that any point of time, she tried to rescue herself. Though it is stated that she married with the accused against her wish and that thereafter the accused had sexual relationship with her, however, conduct of the prosecutrix does not support her version. The fact that she stayed with the accused without any resistance shows that she voluntarily accompanied the appellant. The conduct of the appellant also needs to be considered. He on his own came to the police station with the prosecutrix. This fact indicates that it was accused who was

apprehending some danger to his life at the hands of the relatives of the prosecutrix and therefore he went directly to the police station. Had there been any intention, he would not have voluntarily come to police station. It has also come on record that father lodged a complaint against present appellant and other accused persons. Within few days he lodged one more complaint against some other accused persons and those persons were also arrested. This shows that the father had not only filed complaint against present appellant, but had also filed complaint against other persons as well. This Court after considering all the facts finds that the conduct of the prosecutrix is decisive factor. Though in the evidence she stated that the because of fear she did not depose against the accused, however, that appears to be a lame excuse, in the background of her conduct that she accompanied the accused, she stayed with the accused and even after so called sexual relationship, she did not try to raise any shouts or tried to rescue herself. This all leads to a conclusion that the prosecutrix voluntarily went along with the accused.

18. To make out a case under section 376 of the IPC, it was necessary for the prosecution to strictly prove the age of the prosecutrix to be below 16. It has come in the evidence of witnesses i.e. headmistress of the school that the name of the father of the prosecutrix

in the school registered was scored out. The defense of the accused appears to be material that there were two girls with the same name and surname. Only there was change in the name of fathers and it is therefore to show that the prosecutrix is below 16 years, in the school register there is scoring in the record. Thus, doubt is created about the authenticity of the entry in the school register. In such circumstances to determine the age, only material available on record is the oscification test, which shows the age of the prosecutrix between 16 to 18 years. Thus, age of the prosecutrix is certainly more than 16. In any case benefit of will have to be given to the accused of the result of osficiation test by concluding that the age of the prosecutrix was more than 16 years. Further facts show that on knowing that the prosecutrix is taken by the appellant with him, father of the relatives and relatives went to the house of the accused and met father of accused. Father of the appellant told that the prosecutrix would come back only next day morning. On that father without going for further search of the daughter, went back to his home, without informing anything to police and filed complaint after two days, Only because the daughter did not come back to home immediately next day, he filed complaint.

19. These facts are important in this case as taking the facts to

have been proved as it is, still this Court finds that no case is made out to convict the accused. Learned Trial Court has believed in the evidence of the prosecution as has taken the age of the prosecutrix below 16 years. The Trial Court has not properly considered the conduct of the prosecutrix and even of the father of the prosecutrix.

20. Taking all these things together a case is made out to give benefit of doubt to the appellant-accused. In view of the same, this Court has no hesitation in holding that the conviction and sentence imposed by the Trial Court deserves to be quashed and set aside by acquitting the accused. Hence, the following order :-

ORDER

- (i) Criminal Appeal is allowed.
- (ii) The judgment and order dated 23.01.2004 passed by the learned Ist Adhoc Additional Sessions Judge, Ahmednagar, in Sessions Case No. 4 of 2003 is quashed and set aside.
- (iii) The appellant-accused - Bhausahab Ranganath Virkar is acquitted of the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code.

- (iv) Fine amount, if any, be refunded to the appellant.
- (v) Bail bond of the appellant-accused stands discharged.

[KISHORE C. SANT, J.]