



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 254 OF 2006

Naresh S/o. Malakhe Dhurmekar,
Age : 23 years, Occu. : Labourer,
R/o. Veer Savarkar Road,
In front of Bhide Bag, Old locality
Deopur, Dhule

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra

... Respondent.
(Orig. Complainant)

.....
Mr. Laxman V. Sangit, Advocate for Appellant.
Mr. V. M. Chate, APP for Respondent - State.
.....

CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 10 FEBRUARY 2025
PRONOUNCED ON : 18 FEBRUARY 2025

JUDGMENT :

1. In this appeal, there is challenge to the judgment and order of conviction dated 27.02.2006 passed by learned III Ad-hoc Additional Sessions Judge, Dhule recording guilt of the appellant for offence punishable under sections 363, 366 and 376 of Indian Penal Code.

FACTUAL MATRIX

2. PW1 informant father approached Deopur police on 04.05.2004 and lodged missing report of his daughter. On 05.06.2004, he lodged further report that appellant lured his minor

daughter on the promise of marriage and kidnapped her. On above report, crime was registered. On completion of investigation and on gathering evidence, PW5 P.I. Borase charge-sheeted accused. Trial was conducted by learned Ad-hoc Additional Sessions Judge, Dhule, who after appreciating the oral and documentary evidence adduced by prosecution vide judgment and order dated 27.02.2006 held appellant guilty for offence punishable under sections 363, 366 and 376 of IPC.

Feeling aggrieved by the above judgment and order of conviction, instant appeal has been preferred.

SUBMISSIONS

On behalf of Appellant :

3. Pleading innocence and false implication learned counsel for appellant forcefully submitted that in this case at the outset prosecution has utterly failed to demonstrate and establish age of the alleged victim. He pointed out that, informant father has admitted that his marriage is 22 years old and therefore going by such year and his admission that victim daughter was born one year after marriage, his eldest daughter victim has to be definitely above 18 years of age. He pointed out that, there is no school record. That, Investigating Officer has merely collected birth certificate of municipal corporation and taken on record i.e. without examining

authorities, who prepared and issued said birth certificate. He also specifically pointed out that, informant father was in the very service of municipal corporation and therefore there is every chance of creation of document to falsely sue prosecution case. He pointed out that, even Investigating Officer has in cross-examination admitted that he did not verify the original record. He also pointed out that, medical examiner also admitted about not ascertaining or determining the age of the victim and the date given by police was noted. For above reasons, learned counsel questions the very assertion of prosecution that victim was below 18 years of age.

4. It is his next submission that, victim's own testimony clearly shows that there was no participation of appellant in making victim escape from the custody of her parents. Learned counsel took this court through her testimony and pointed out that she has herself left her parent's house on her own accord. Therefore, learned counsel submits that, there was no question of invoking section 363 IPC and it is apparently misplaced. He also pointed out that victim has in her evidence admitted about she writing love letters to the appellant. Learned counsel submitted that, there was long stay of victim with appellant and it was further on her own accord. They have together moved to various places. That, at no point of time there was any attempt to raise alarm. He pointed out that though she

deposed under pressure of parents regarding physical relations, she has herself never stated that she has forced upon. Thus, according to learned counsel, with such evidence of very victim, learned trial court ought not to have accepted the prosecution story of commission of offence under section 376 IPC. He also pointed out that, there is weak or no evidence on the point of section 366 IPC. That, medical evidence does not corroborate offence of rape and for all above reasons, learned counsel blames the manner of appreciation, the findings and reasons and he seeks indulgence by allowing the appeal.

In support of above contentions, learned counsel seeks reliance on following rulings :-

(i) *Md. Ali @ Guddu v. State of U.P., Criminal Appeal No.2238 of 2010 (Supreme Court);*

(ii) *Alamelu and Anr. v. State represented by Inspector of Police, (2011) 2 SCC 385.*

On behalf of Respondent - State :

5. Resisting the appeal, learned APP pointed out that, prosecution has proved the charges by adducing overwhelming evidence. That, victim was minor. Her birth certificate is a strong proof in that regard. That, once prosecution discharges the burden of proving victim to be minor, learned APP submitted that, theory put forth about consent or love relations does not survive. That, victim

has also testified. That, informant father lends corroboration. That, Investigating Officer had gathered credible evidence and prosecution having succeeded in establishing the charges, learned APP submitted that there is no infirmity on the part of learned trial Judge in accepting prosecution case. For all above reasons, he prays to dismiss the appeal.

In support of his contentions, learned APP seeks reliance on following rulings :-

(i) Mahesh S/o. Tarachand Surywanshi v. State of Maharashtra, 2013 CRI. L.J. 4557 (Bombay High Court, Aurangabad Bench)

(ii) Harpal Singh and Anr. v. State of H.P. , 1981 CRI. L.J. 1 (Supreme Court)

(iii) State of Chhattisgarh v. Lekhram, AIR 2006 SC 1746

EVIDENCE BEFORE TRIAL COURT

6. The prosecution has examined following 5 witnesses in support of its case. Their role and status are as under :-

PW1 informant father, who set law into motion vide Exh.36.

PW2 is the victim. Her testimony is at Exh.64.

PW3 ASI Pawar, Police Official, who recorded the complaint and registered Crime No.57/2004.

PW4 Dr. Pallavi Shaha is the Medical Officer.

PW5 P.I. Ashok Borase is the Investigating Officer.

7. For proper appreciation and comprehension, it would be fruitful to reproduce the very testimonies of relevant witnesses i.e. PW1 father, PW2 victim and PW4 doctor in verbatim as has been stated in witness box in trial court.

8. **PW1** informant is the father of victim. In his testimony at Exh.35 he deposed as under :-

1. *In the month of June 2004 I was serving as a Watchman in Samabhaji Garden. At that time I was residing in the Sambhaji Garden. My wife, my daughter xyz and my sons were residing with me. At that time xyz was studying in 8th standard in Jijamata High School, Dhule. I do not remember her birth date. I do not remember year of her birth.*

2. *In the year 2004 I had gone to my office. My wife sent message to me that my wife was washing clothes, at that time our daughter victim went away. I searched victim here and there and with my relatives, xyz did not find us. So I gave missing report of xyz to Deopur police station. Now my report is shown to me. It bears my signature. It's contents are true and correct. It is at Exh.No.36. Then after 8 to 15 days I came to know that accused present before Court Naresh Malkhe Dhurmekar induced xyz and he kidnapped her from my lawful guardianship. So I gave complaint against the accused in Deopur police station on 5/6/2004. I told birth date of xyz to police as 19/1/1987. Said birth date is correct. I also gave birth certificate of xyz to police. Now my complaint is shown to me. It bears my signature. It's contents are true and correct. It is at Exh. No.37. Now birth*

certificate of xyz shown to me. It is at Exh. No.38. Then after one month to one and one fourth month xyz returned to our house. At that time father of accused by name Malkhe left xyz to our house. I inquired with xyz. xyz told to me that accused present before court induced xyz to marry with her and he took her to Bhusaval, Akola and other 4 to 5 villages. xyz told to me that accused present before court forcibly did sexual intercourses with her at above said places. I took xyz in Deopur police station. Police recorded our statements. Police sent xyz to hospital for medical examination.

While under cross, he answered that, he served in municipal corporation and that his daughter studied only up to 8th standard. He answered that, he does not remember date, month and year of his marriage, but answered that, it took place 22 years back. He has registered his marriage in Dhule, but he was not carrying said document. He answered that, after one year of his marriage, his wife gave birth to victim. He also answered that her birth in the hospital of the then municipal council. He is unable to state why portion marked 'A' is missing from his complaint. He admitted that, at the time of incident engagement of his daughter was done and bridegroom was from Jalgaon. He admitted his daughter authoring the cheat Exh.41. He further admitted how portion marked 'B' was appearing in his statement. Rest is all denial.

9. The second witness on behalf of prosecution is victim herself (**PW2**). In her testimony at Exh.64 she deposed as under :-

1. On 2/1/2005 my marriage took place along with Subash Thapa at Jalgaon. Prior to that my name was xyz xyz xyz. On 23/4/2004 I was residing along with my parents at Dhule. I know accused present before Court Naresh Malkhe Dhurmekar. I have studied up to 8th standard. I do not remember what happened on 19/4/04. I do not remember what happened on 23/4/2004. When I was studying in school, since that time accused Naresh present before Court used to come to my back. Accused Naresh present before court used to say that he used to laove me. Accused used to come to my back on each day. Accused used to say to me that I should marry with him. I used to refuse to do so and I used to avoid accused. On one day accused took me forcibly through rickshaw at Nagaonbari. Then after accused left me to my house. Then after I left my education then after my father admitted me in Jijamata School.

2. On the day of incident, I had worn Saree. My mother was washing clothes in front of my house. My house My mother told to me that my brother Virendra was not in out house. So I should search him, so I went to Panzara river to search my brother Virendra. Accused present before Court and other two persons took me forcibly through rickshaw form river. Accused and others stopped rickshaw at backside of Ahilyadevi School. Then after accused and other took said rickshaw further. Then after accused and others stopped said rickshaw at some distance. Accused put sindoor on my forehead. Accused put Mangalsutra at my neck. Then after accused took me at Akola - Then after accused took room at Akola on rent. I and accused resided in said room for 15 to 20 days. During above said 15 to 20 days did not happen anything. I am again saying that during above said 15 to 20 days accused forcibly wihout my consent committed

sexual intercourses with me. Accused committed above sexual intercourses with me without my consents for 4 to 5 times. Then after accused left said room, Accused took me to house of his friend at Akola. Accused and resided in house of said friend of accused for 15 to 20 days. A Accused got service at Akola. Accused took one room on rent. Accused took me in said room. I and accused resided in said room for one month. Then after accused took me to the house of his maternal aunt at Bhusawal. I and accused resided in said house of maternal aunt of accused at Bhusawal for 7 to 8 days. Then after accused took me to the house of his relative at Savada. Then after I and accused resided at said house at Savada for 3 to 4 days. Then after accused took me at house of his relative at Dharangaon I and accused resided at that house at Dharangaon for 2 to 4 days. Father of accused came at said house at Dharangaon and he brought me at Dhule and he left me to the house of my father. Prior to that father of accused took me to office of advocate at Dhule. At that time mother of accused was also along with father of accused. At time brother of accused was also along with parents of accused. Accused was also along with us. Said advocate took signatures of my self and accused on blank paper. Said advocate did not ask me anything. Then after father of accused left me in the house of my parents. My father inquired with me. I told above said all facts to my father. Then after my father took me to Deopur Police Station. My father gave complaint against the accused to police and police recorded my statement. Police sent me to Civil Hospital Dhule for my medical examination. Lady doctor examined me. Police seized my nicker and peticoate. Now seized article No.1 petticoat and article No.2 nicker are shown to me. They are of mine.

While under cross, she answered that, she is the eldest daughter and her parents had three sons after her. She admitted writing letters in Exhs.41 to 62 and its contents to be true and correct, which are love letters. She admitted that she did not inform police that accused forced her to write letters. She denied the contents of portion marked 'A' to 'G' to be correct and is unable to assign why the same are appearing in her statement.

10. Paragraph 6 of her cross examination carries omissions about accused following her; asking her to marry him; she avoiding him; accused and two other persons coming in a rickshaw and forcibly taking her; accused applying *sindur* on her forehead; accused having forceful sexual intercourse for 4 to 5 times; she and accused residing in a rented room; they moving to Akola, Dharangaon and Dhule; staying there and she being brought back to police station.

She admitted in paragraph 7 that when accused used to go for work, she used to chat with neighbours; she admitted about not attempting at any time to come back to the home of her father, when accused went for work. Rest is all denial.

11. **PW4** Dr. Pallavi Shaha is the Medical Officer. In her testimony at Exh.72 she deposed as under :-

1. On 6/7/2004 I was on duty as a lecturer in Hire Government Medical College, Dhule in Gynecologist Department. On that day police constable of Deopur Police Station brought xyz xyz xyz in hospital along with letter of Police Inspector of medical examination. Office copy of said letter bears signature of A.G. Pathak. Said copy is at Exh. No.73. I identify the signature of Pathak. I examined xyz xyz xyz. On examination I noticed that hymen of victim was ruptured and it admitted two fingers easily. Accordingly I issued Medical certificate of xyz xyz xyz. Now, I am submitting said certificate. It bears my signature. Its contents are true and correct. It is at Exh. No. 74. It bears my signature in carbon on back page. Now second copy of said certificate given by my to police shown to me. Said copy is at Exh. No.74-A. On the back page of said copy my original signature is on it. Contents of both Exh. Nos. 74 and 74-A are true and correct.

While under cross, she admitted in cross about not conducting ossification test of the victim and that she wrote the age on the basis of police papers.

APPRECIATION OF EVIDENCE AND ITS ANALYSIS

12. Here, principal ground of challenge seems to be the age of victim. Learned counsel has seriously challenged prosecution's case that victim was below 18 years of age. He questions the very validity of birth certificate on the ground of not getting it proved as per Evidence Act. His specific accusation is that birth certificate is

manufactured one as father informant himself was in municipal corporation. Learned APP would counter by submitting that it is a public document and can be straightaway led and even read in evidence.

13. In the light of above assertions and accusation of manufacturing of document, as pointed out, father has indeed in cross examination admitted that he was married 22 years back and birth of the eldest girl child i.e. victim was after one year of the marriage. He has admitted that he was in municipal corporation. It is to be noted that, in his substantive evidence itself, he speaks of his wife giving delivery in the hospital of the then municipal council, but Exh.38 is apparently issued by municipal corporation and not municipal council. It is apparently issued on 07.07.2004 i.e. during investigation. Investigating Officer in cross examination candidly admitted that he did not obtain school leaving certificate of the victim; did not verify register of birth maintained by municipal council; did not record statement of concerned clerk of municipal council and also admitted about not inquiring whether birth of victim took place in the house or hospital.

14. Therefore, above discussion clearly shows that, marriage of informant is 22 years prior to the occurrence. He having admitted

his wife giving birth to victim after one year of marriage, inference can be drawn that victim was over 18 years of age. Birth of victim is shown to have taken place in hospital of municipal council, but apparently Exh.38 is issued by municipal corporation, which came into existence at subsequent point of time. Under such circumstances, it was expected of Investigating Officer to not to merely tender birth certificate on record. Supportive or foundational extract of birth register would have fortified the credibility of Exh.38 which apparently is issued during investigation. Again birth certificate is not admitted by defence as there is no remark to that extent.

Resultantly, taking into account the cross examination of father and very Investigation Officer, there is substance in the doubt raised by learned counsel for appellant regarding the credibility of birth certificate and manner of its procuring. No doubt, document can be taken on record and even read in evidence, if it is produced and exhibited in accordance with the rules and principles laid down. Even otherwise, admission of document in evidence is different from proof of its contents and admission of genuineness is not the same and legal position is fairly settled to that extent. Thus, merely because documents are tendered and the same are public document, in view of specific objection raised, its manner of procurement and the foundational material drawing for birth certificate not being

gathered by Investigating Officer, it is difficult to accept the date reflected over it straightaway to be correct one.

Therefore, here in this case, valid doubt has been raised about credibility of very birth certificate for above reason.

15. Now as regards to other offences are concerned, evidence of victim itself is crucial. Though in examination-in-chief she stated as above, in cross she has admitted that there was love relations and she wrote several letters and even her father informant admits that his daughter had written it i.e. Exhs. 41 to 62. She is unable to state why portion marked 'A' to 'G' is appearing in her statement. Answers given by her in paragraph 6 are apparently material omissions, which categorically go to show that whatever stated in chief is not finding place in her statement to police. Therefore, for above reasons, her evidence comes under shadow of doubt. She has candidly admitted her love relations and she herself seems to have been left the house as there is nothing to show that accused kidnapped her or lured her. She has accompanied him at various places and stayed for considerable period, but in spite of several opportunities, she has not returned home to her parents. Only on her custody being handed over by father of accused, she seems to have accompanied her father to police.

16. Though medical expert is examined and said medical expert PW4 Dr. Shaha has examined the victim on 06.07.2004, opinion issued is “possibility of sexual assault”.

17. As stated above, there is long stay for months together with accused due to admitted love relations. While in witness box she too stated that now she is married. This court has already doubted the claim of prosecution about victim to be minor. Mere testimony at subsequent point of time about forcible sexual intercourse and still continuing stay with the accused till being brought back creates doubt about the credit worthiness of her statement of forceful sexual intercourse.

18. To sum up, here, prosecution failed to establish very age of victim. Birth certificate though brought on record, there are several reasons to question its contents for reasons stated above. Love relations and physical relations resulting into the same are writ large from the very evidence of victim.

19. Learned trial Judge has straightaway accepted the birth certificate holding prosecution proving victim to be minor. Answers given by father and Investigating Officer in cross examination are lost sight of, more particularly, on the point of age and manner of acquisition of birth certificate. Answers given by very victim in

examination-in-chief as well as cross examination are also not apparently taken into account and not correctly appreciated. Therefore, interference is called for. Hence, I proceed to pass the following order :-

ORDER

- (I) Criminal Appeal stands allowed.
- (II) The conviction awarded to appellant Naresh S/o. Malakhe Dhurmekar in Sessions Case No. 76 of 2004 by the learned III Ad-hoc Additional Sessions Judge, Dhule on 27.02.2006 for the offence punishable under sections 363, 366 and 376 of Indian Penal Code, stands quashed and set aside.
- (III) The appellant stands acquitted of the offence punishable under sections 363, 366 and 376 of Indian Penal Code.
- (IV) The bail bonds of the appellant stand cancelled.
- (V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.
- (VI) It is clarified that there is no change as regards the order in respect of disposal of *muddemal*.

(ABHAY S. WAGHWASE, J.)