
(2013) 09 BOM CK 0144
In the Bombay High Court
Case No : Criminal Appeal No. 31 of 2012

Bhaiyya Subhash Panpatil

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-09-2013

Acts Referred:

Evidence Act, 1872 — Section 3, 35, 45
Penal Code, 1860 (IPC) — Section 361, 363, 376

Citation : (2013) 6 ABR 115 : (2014) ALLMR(Cri) 2290 : (2014) 1 BomCR(Cri) 66

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : S.S. Suvarna holding for . Mr. N.L. Choudhary, for the Appellant; R.P. Phatke, APP, for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and order of Sessions Case No. 40/2011, which was pending in the Court of Additional Sessions Judge, Dhule. The appellant is convicted and sentenced for offences punishable under sections 363 and 376 of Indian Penal Code. Both the sides are heard. This Court has already confirmed that the Presiding Officer was vested with the powers of Additional Sessions Judge when she delivered the judgment as the Presiding Officer has mentioned her post as Assistant Sessions Judge. In short, the facts leading to the institution of the appeal, can be stated as follows:-

At the relevant time, the age of the prosecutrix was around 12-13 years. Her father Sanjay works as labour in Gujrat State. The prosecutrix was living with her mother, three sisters and her younger brother in village Takarkheda, Tahsil Sindkheda, District Dhule. Arjun, her grandfather, was living in the vicinity of their house. Accused is her distant relative and he was residing in the same village.

2. On 22.9.2010 at 10.00 a.m. when the prosecutrix and her younger brother

were at home, the accused came there. The mother of the prosecutrix had already left home for doing labour work and no other person was present in the house. The accused gave promise of marriage to the prosecutrix by saying that he wanted to marry her. Accused then said that he wanted to take her for a trip. By saying so, he took the prosecutrix away from her house in one auto-rickshaw. The accused took the prosecutrix first to his friend Pawar. On the request made by accused, Pawar requested his brother-in-law Shri. Walvi, who is resident of Taloda to allow the accused to live in the house of Walvi for few days. Accused then took prosecutrix to Taloda on the same day.

3. Accused and prosecutrix stayed in the house of Walvi from 22nd September to 25th September, 2010. On 23.9.2010 at about 1.00 pm. when Shri. Walvi and his wife were not at home, the accused raped the prosecutrix.

4. On 22.9.2010, when Arjun, grandfather of prosecutrix, returned home in the evening, his other grandson Tirthraj informed that accused had taken away prosecutrix with him and she had not returned to home. They noticed that prosecutrix had taken away mobile handset and cash amount of Rs. 4000/- with her. Search was made, but they could not find out the prosecutrix on 22.9.2010. On 23.9.2010 Arjun gave report to police and informed that accused had kidnapped the prosecutrix. Initially the crime was registered for offence punishable u/s 363 of I.P.C. in Dondaicha Police Station.

5. On 25.9.2010 Police Patil of village Takarkheda noticed prosecutrix and the accused at S.T. Stand of Taloda and he took both of them to Dondaicha Police Station. The statement of prosecutrix came to be recorded. The prosecutrix and accused came to be referred for medical examination. Prosecutrix was medically examined to ascertain her age. After medical examination and recording of the statement of prosecutrix, section 376 of I.P.C. came to be added in the crime registered against the accused. The clothes of the prosecutrix came to be seized and blood samples of prosecutrix and accused came to be collected. These articles came to be forwarded to C.A. Office. Dhondaicha Police Station filed chargesheet for aforesaid offences against the accused.

6. To the charge framed for aforesaid offences, the accused pleaded not guilty. He took the defence of total denial. He contended that he has some dispute with witnesses and due to that dispute, he was falsely implicated in the case. The Trial Court has believed the prosecutrix and other witnesses. The Trial Court has held that the age of the prosecutrix was around 13 year and there was no question of giving consent by the prosecutrix. In the appeal, the learned counsel for the appellant has taken the similar defence. Alternatively, learned counsel submitted that the age of the prosecutrix was probably more than 16 years and there is possibility that prosecutrix had consented for everything.

7. The appellant is convicted and sentenced for offences punishable under sections 363 and 376 of I.P.C. For both the offences, the age of the prosecutrix is relevant factor. The evidence on age of prosecutrix needs to be appreciated in

the light of the law developed in that regard. In view of the definition of "kidnapping", the prosecution is required to prove that the age of the prosecutrix was below 18 years at the relevant time. For proving that, there was no question of giving of consent by prosecutrix for sexual intercourse, the prosecution is required to prove that the age of the prosecutrix was below 16 years and that is in view of the definition of "rape".

8. In Criminal Appeal No. 499/2012 decided with Criminal Appeal No. 500/2012 on 11.9.2013 [Between Mahesh Tarachand Suryawanshi Vs. State of Maharashtra] by Aurangabad Bench of High Court of Bombay, this Court had an opportunity to discuss the law developed on aforesaid point. The discussion is as follows:-

13. "Age" as ingredient of both the aforesaid offences is required to be proved beyond reasonable doubt. This "proof" u/s 3 of Evidence Act need to be like proof of any other fact in criminal case. Oral evidence as to the age may always be available in such a case. Where a person gives evidence on oath, the Court is expected to start with presumption that he has spoken the truth. Only because in a case like present one, when there is oral evidence on age and it is given by the interested witnesses like mother or father, the Court is expected to look for corroboration. Corroboration need not be only of expert evidence. Corroboration may be of circumstances which may differ for each case. The opinion of doctor on clinical or radiological examination cannot be accepted straight away as a legal proof. The margin of error is of two years on either side even when the age is ascertained on the basis of radiological examination. [Reliance placed on *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, . It is only medical opinion and other evidence including oral evidence cannot be discarded only because the medical evidence is in conflict with the oral evidence. Further, the medical evidence cannot stand against entries made in birth register, which are properly authenticated. Entry made in birth register has presumptive value in view of section 17(2) of Birth and Death Registration Act, 1969 and this position of law needs to be kept in mind, when there is conflict between medical evidence and the other evidence.

14. In view of section 35 of Evidence Act, the entry made in school register about the date of birth also needs to be treated as relevant. Such register is kept in regular discharge of duty by school and it is required to be kept as per the Rules made by the State Government. When such entry was made before starting of dispute, many years prior to the commission of offence and when entry is proved by giving oral evidence of the concerned, due weight needs to be given to such entry. Such entries need to be treated as relevant and admissible in evidence, though such entry cannot form sole clinching factor for determining the age. It has no presumptive value like in the case of entry made in birth register as already observed.

15. On the definition of kidnapping, there is the landmark case reported as *S. Varadarajan Vs. State of Madras*, . In this case, the Apex Court has discussed the

difference between the terms like "taking" and "enticing" used in section 361 of I.P.C. The Apex Court has observed that if the prosecutrix had reached the age of discretion, she had crossed the age of 16 years, though she is minor, it is necessary for the prosecution to show that the accused made the prosecutrix to accompany him by administering any threat to her or by blandishment. It is observed that if the prosecutrix had left the house of parents on her own and after that, the accused had given her company, it cannot be said that the act of the accused amounts to kidnapping. In view of peculiar facts of that case, the Apex Court held that the prosecutrix clearly knew what she was doing and what was good for her. In view of the facts of that case, the Apex Court held that the act of giving company of the accused to the prosecutrix was not amounting to offence of kidnapping.

16. Section 361 of I.P.C. reads as under:-

361. Kidnapping from lawful guardianship.-Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.-The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.-This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

17. In view of observations made in Vardarajan's case cited supra, it can be said that if the minor prosecutrix had crossed the age of 16 years, it needs to be ascertained as to whether any active part was played by the accused due to which the prosecutrix left house of her guardian. In the case reported as Thakorlal D. Vadgama Vs. The State of Gujarat, , the Apex Court again discussed the difference between the two terms like "taking" and "enticing". It is laid down that the word "takes" does not connote use of "force" and it means that "to cause to go", "to escort", or "to get into possession". It further means "physical possession". On the other hand, it is inducing a minor to go of her own accord to the kidnapper i.e. the state of mind of willingness of minor is brought about in some way by the accused. This position of law needs to be kept in mind while appreciating the evidence in such a case.

9. For appellant, reliance was placed on one case reported as Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others, . In this case, the Apex Court has discussed the provision of section 45 of Evidence Act, weightage to be given to the opinion of the expert and error which is possible when the age is determined on radiological test. The Apex Court has held that there is margin of error of two years when the age is determined by taking

radiological test. There cannot be dispute over this proposition. One more case reported as Suresh @ Ravi Vs. State of M.P. (Now State of Chhattisgarh), was cited for the appellant. In view of the facts of that case, the High Court held that the age of the prosecutrix was probably more than 16 years and she was consenting party. The facts and circumstances of each and every case are always different and so this case cannot help the appellant. The other observation made by the High Court that there is margin of error of three years, when there is radiological examination to ascertain the age, cannot be considered in view of the observations made by the Apex Court in Jaya Mala's case cited supra.

10. The prosecutrix has given evidence that at the relevant time, her age was 13 years. Her evidence shows that the accused was known to her. She has deposed that on 22.9.2010 at about 10.00 a.m. when she and her younger brother were at home, accused came there. She has deposed that accused said that he wanted to marry with her. She has deposed that the accused said that he wanted to take her outside on a trip. She has deposed that the accused then took her away from her house in one auto-rickshaw. She has deposed that the accused first took her to Sarangkhedda and from there to Taloda. The other evidence shows that at Sarangkhedda, friend of accused namely Pawar lives and she was taken to Pawar first.

11. The prosecutrix has deposed that she and accused stayed in the house of one Walvi from Taloda for three days. Her evidence shows that they reached Taloda on 22nd September and on the next day, i.e. on 23rd September, when Shri. Walvi and his wife were not at home, accused raped her. She has given evidence that on 25.9.2010 the Police Patil of her village took them to Police Station. She has given evidence that she was referred for medical examination and police had taken over her clothes.

12. In the cross examination, it is suggested to prosecutrix that she was given in marriage on 1.5.2011 and her age was 19 years on the date of deposition i.e. on 22.7.2011. She has denied this suggestion. In the cross examination, the prosecutrix has admitted that she did not resist the accused. The medical evidence also shows that no injuries were found on her person. However, in the cross examination, it is brought on the record that prosecutrix had complained to wife of Walvi that accused had raped her, but the wife of Walvi ignored it.

13. The evidence of informant Arjun (PW 2) and Sanjay (PW 4) shows that on 22.9.2010 itself they learnt that accused had taken away the prosecutrix from their house. The F.I.R. at Exh. 18 is proved in the evidence of PW 2. It was given on 23.9.2010. Their evidence shows that search was made on 22.9.2010 and when they realised that they were not able to trace the prosecutrix, the report was given on the next day. Further, the father of prosecutrix was at Surat, he was required to be informed and he rushed to the spot after learning about the incident. This evidence and circumstances of the case are consistent with the version of prosecutrix that she was taken away from her house by the accused on 22.9.2010.

14. Pawar (PW 5) is a friend of accused. He has given evidence that on 22.9.2010 accused came to his shop with a girl and accused said that he wanted to marry with the girl. He has deposed that accused requested him to make some arrangement of his stay in Taloda. He has given evidence that due to such request, he contacted his brother-in-law from Taloda and he made request to make such arrangement. Nothing is brought on the record to create probability that he gave false evidence or he has any reason to give false evidence against the accused.

15. Walvi (PW 6) has given evidence that on 22.9.2010 Pawar (PW 5) requested him to allow the accused to stay in his house from Taloda. His evidence shows that he allowed the accused to stay in his house from 22.9.2013 to 24.9.2013. He has given evidence that accused had informed that prosecutrix was his cousin sister. There is some inconsistency in the evidence of this witness and other evidence as other evidence shows that accused and prosecutrix left his house on 25.9.2010. This inconsistency is not sufficient to discard the evidence of Walvi. He had no reason to give false evidence against the accused. He did not know accused prior to that day and he allowed the accused and prosecutrix to stay in his house only due to request made by his relative, Pawar. Thus, the evidence of Pawar (PW 5) and Walvi (PW 6) is consistent with the evidence of prosecutrix and it gives necessary corroboration to the evidence of prosecutrix.

16. The prosecutrix gave her date of birth as 19.6.1999 in the Court. Though such date was not given in the statement given to police, the record of medical examination shows that this date was given to doctor when she was examined. Arjun (PW 2) has given evidence in cross examination that Sanjay was born in 1972. The incident took place in the year 2010. In the Court when the evidence was given in 2011, Sanjay (PW 4) gave his age as 36 years. Both Sanjay and his father are illiterate persons and they could not give exact date of birth of Sanjay or prosecutrix. Sanjay has, however, denied the suggestion given to him that prosecutrix was aged about 20 years in the year 2011. In the cross examination, Sanjay has admitted that prosecutrix was given in marriage on 1.5.2011, after the incident as she was major. This admission cannot help the defence in view of the other circumstances and expert opinion. After such crime, the parents of such girl are always keen to see that the marriage of their daughter is performed as early as possible. When the marriage of minor is performed, they avoid to admit that she was minor on the date of marriage.

17. The evidence of Dr. Patil (PW 1) and the record created by him show that prosecutrix was examined in Government Hospital on 27.9.2010. Both clinical and radiological examination was done. The certificate at Exh. 12 is duly proved in the evidence of Dr. Patil. On the basis of clinical examination doctor found that the age of the prosecutrix was 12 to 13 years. On the basis of radiological examination, the opinion is given that the age of the prosecutrix was 13 to 14 years. This record shows that on the date of examination, prosecutrix had given date of birth as 19.6.1999. She had informed to doctor that she had studied up

to 6th Standard. It appears that School Leaving Certificate, a copy is produced on record, is not proved and such record was not collected by the investigating agency. There was suggestion in cross examination to Sanjay that approximate date of birth was given in school. Such record would have given further corroboration to the version of prosecutrix.

18. Dr. Ghumre (PW 9) examined prosecutrix on 25.9.2010 to ascertain whether there was sexual intercourse with prosecutrix. He has deposed that on per vaginal examination one finger P.V. easily possible, but 2 finger P.V. difficult. He has deposed that hymen was in torn condition, which was old and healed. Exh. 36, the certificate issued by PW 9 is consistent with the oral evidence. At Exh. 31, there is the certificate in respect of medical examination of accused which is admitted by defence. The certificate, Exh. 31, shows that accused was in a position to take sexual intercourse. These circumstances are consistent with the version of prosecutrix. Not much can be made out due to the circumstance that no injury was found on the person of prosecutrix.

19. The oral evidence of prosecutrix and the evidence of her father on age, has support of the opinion of expert. This Court holds that the age of the prosecutrix was certainly below 16 years at the relevant time. In view of the discussion made, this Court holds that there is no reason to interfere in the finding given by the Trial Court on the point of age of prosecutrix. The evidence is sufficient to prove that the accused took sexual intercourse with the prosecutrix and he knew that at the relevant time, she had not completed 16 years of age. The Trial Court has believed the prosecutrix on the point of offence of rape also. The Appellate Court is not expected to interfere with the findings given by the Trial Court on such point lightly. Thus, this Court holds that there is no reason to interfere in the decision given by the Trial Court. The imprisonment given by the Trial Court in respect of both the offences is on lower side and which is just and proper in view of the age of the accused. On this point also, interference is not possible. In the result, the appeal stands dismissed.