
(2017) 11 BOM CK 0099
In the Bombay High Court
Case No : 564 of 2014

Parvesh s/o. Pralhad Bagde

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 02-11-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 376](#),
[Section 363](#), [Section 366A](#) -
Punishment for rape - Punishment for kidnapping - Procurement of minor girl

Citation : (2017) 11 BOM CK 0099

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : R.M. Daga, P.S. Tembhare

Judgement

1. Challenge is to the judgment and order dated 10.9.2014 in Sessions Case 139 of 2013 delivered by the Additional Sessions Judge, Chandrapur, by and under which, the accused is convicted for offence punishable under section 363 of Indian Penal Code (IPC) and is sentenced to suffer rigorous imprisonment for three years and to payment of fine of Rs. 500/, and is convicted for offence punishable under section 366A of IPC and is sentenced to suffer rigorous imprisonment for five years and to payment of fine of Rs. 1000/and is further convicted for offence punishable under section 376 of IPC and is sentenced to suffer rigorous imprisonment for seven years and to payment of fine of Rs.1000/.

2. Heard Shri. R.M. Daga, the learned counsel for the appellant (hereinafter referred to as "the accused") and Shri. P.S. Tembhare, the learned Additional Public Prosecutor for the respondent / State.

3. The prosecution case, as is unfolded during the course of trial, is thus:The victim is a resident of Kati Birsola Tahsil and District Gondia and was studying in 9th standard in the year 201213. During the summer vacation, she visited her uncle Yograj Dongarwar at Mul and was desirous to join sewing classes. Yograj Dongarwar, found the victim missing in the night intervening 5th and 6th June,

2013. He came to know that the victim was in love with accused. Yograj lodged police report Exh. 10 on the basis of which offence under section 363 and 366A of the IPC was registered against the accused and was investigated by PW 7 Shri. Undirwade. PW 7 recorded the spot panchanama Exh. 17, arrested the accused, collected and seized blood sample, pubic hair and clothes of the accused and collected the birth certificate of the victim. The victim who then aged about 16 years was sent to General Hospital, Chandrapur for medical examination on 16.6.2013. PW 8 Dr. Swapna examined the victim, found the hymen torn, the vagina admitted two fingers easily. She opined that sexual intercourse had taken place. The Investigating Officer Shri. Undirwade submitted chargesheet in the Court of Judicial Magistrate First Class, Mul under section 363, 366A and 376 of the IPC. The learned Magistrate committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge under sections 363, 366A and 376 of the IPC. The accused abjured guilt and claimed to be tried. The defence, as is discernible from the trend of the crossexamination and the statement recorded under section 313 of the Code of Criminal Procedure, is of total denial.

4. The learned counsel for the accused submits that the prosecution has failed to establish that the prosecutrix was aged less than 18 years at the relevant time. Inviting my attention to the evidence of the victim, Shri R.M. Daga would submit that concededly, the victim, and the accused were in love and that since Yograj PW 1 illtreated the victim, she left her house on own accord and joined the company of the accused at Balaghat. The learned counsel Shri. Daga invites my attention to the following portion of the examination in chief of the victim who is examined as PW 6:" Yogiraj Dongarwar r/o. Mul is husband of my mother"s sister. In the year 2013, I was residing at Mul at his house. I know accused. He is resident of kati District Gondia which is my native place. I was born on 29.1.1998". "One day, Yogiraj beat me severally". "In may 2013, I on my own accord, went to Gondia alone. Yogiraj searched me everywhere including my father. He lodged my missing report. Thereafter I went to Sirpur, Balaghat. Accused resides at Balaghat. I went to him and resided for four days. I had love on accused. Today also I love him. During those four days, accused performed sexual intercourse with me. At Sirpur, we resided at the house of relatives of accused". Be it noted that it is elicited in the cross examination of the victim that the date of birth is stated on the say of the parents.

5. The prosecution has examined PW 4 Narhari Katre to prove the age of the victim. PW 4 is the Head Master of Zilla Parishad High School and Junior College. PW 4 admits in the cross examination that the victim was admitted in the said school in 5th standard. The date of birth 29.1.1998 recorded in the school record is on the basis of the previous leaving certificate, is an admission elicited in the crossexamination of PW 4. Concededly, the parents of the victim have not been examined to throw light on the age of the victim. It is elicited in the cross examination of the Investigating Officer PW 7 that the victim was referred for ossification test and the report Exh. 35 opines that the age of the victim appears

to be between 16 years to 18 years.

6. It would be apposite to refer to the following observations of the Hon'ble Supreme Court in *Alamelu & Another Vs. State* represented by Inspector of Police reported in (2011) 2 SCC 385. " 39. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ext. P16 and the certificate issued by PW 8 Dr. Gunasekaran, Radiologist, Ext. P4 and Ext. P5".

"40. Undoubtedly, the transfer certificate, Ext. P16 indicates that the girl's date of birth was 15.6.1997. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident i.e. 31.7.1993. The transfer certificate has been issued by a government school and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined".

"41. We may notice here that PW 1 was examined in the court on 9.8.1999. In his evidence, he made no reference to the transfer certificate (Ext. P. 16). He did not mention the girl's age or date of birth. PW 2 was also examined on 9.8.1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 CrPC seeking permission to produce the transfer certificate and to recall PW 2. This petition was allowed. She was actually recalled and her examination was continued on 26.4.2000. The transfer certificate was marked as Ext. P16 at that stage i.e. 26.4.2000. The judgment was delivered on 28.4.2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ext. P16 issued by the school and accordingly her date of birth was noticed as 15.6.1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate".

"42. Considering the manner in which the facts recorded in a document may be proved, this Court in *Birad Mal Singhvi v. Anand Purohit* observed as follows: (SCC pp. 61819, para 14)

"14.....The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined....Merely because the documents Exts. 8,9,10,11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8,9,10,11 and 12 would not tantamount to proof of all the

contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the document could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances, the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

(emphasis supplied)

"43. The same proposition of law is reiterated by this Court in *Narbada Devi Gupta v. Birendra Kumar Jaiswal* where this Court observed as follows: (SCC p 751, para 16)

"16.... The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in issue".

"44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl".

"45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW 8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the court, PW 8, the Xray expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age."

"46. In addition, the High Court failed to consider the expert evidence given by PW 13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had margin of error in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in *Jaya Mala v. Govt. of J & K*. In the aforesaid judgment, it is observed as follows : (SCC p. 541, para 9)

"9. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side".

Equally relevant and illuminating are observations of the Hon"ble Supreme Court in State of Madhya Pradesh Vs. Anoop Singh (2015) 7 SCC 773 in paragraphs 14, 15 and 16, which read thus :

"14. This Court in Mahadeo v. State of Maharashtra has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12 (3) reads as under:

"12 (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining? (a)(i) the matriculation or equivalent certificate, 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 the 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 recored by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

"15. This Court further held in para 12 of Mahadeo as under: (SCC p. 641)

"12. ... Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3) (a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well."

(emphasis supplied)

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In para 13, this Court observed: (Mahadeo case, SCC p. 641)

"13. In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the school under Ex. 54, the date of birth of the prosecutrix has been clearly noted as 2051990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 2051990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any grounds to interfere with the same."

"16. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P5 and P6 cannot be discarded. Therefore, the trial court was correct in relying on the documents".

7. If the evidence on record is tested on the anvil of the law enunciated by the Hon'ble Supreme Court, it is axiomatic that the prosecution has failed to prove that the age of the victim was less than 18 years. The sexual relationship is concededly consensual. The girl, who was major left the residence of PW 1 on her own accord and joined the company of the accused. The conviction of the accused punishable under section 363, 366A & 376 of the IPC is manifestly erroneous and occasions serious miscarriage of justice. The judgment impugned is set aside. Bail bonds of the accused are discharged. Fine paid by the accused, if any, be refunded. Appeal is allowed.