

(1997) 01 BOM CK 0078

In the Bombay High Court

Case No : Criminal Appeal No. 263 of 1995, 7 and 8-1-1997

Prakash Mandale

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 08-01-1997

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 363, 366, 376

Citation : (1997) 2 MhLj 75

Hon'ble Judges : A.D. Man, J

Bench : Single Bench

Advocate : S.V. Jadhav Patil, for the Appellant; Kishore Patil, Assistant Public Prosecutor and M.B. Bharaswadkar, for the Respondent

Judgement

1. This appeal is preferred by the rape convict who was tried in Sessions Case No. 20/1995 by the learned IInd Additional Sessions Judge, Latur, for offences under Ss. 366, 376 read with S. 34 of the IPC.

2. In nutshell, the prosecution story is as under : The appellant (original accused No. 1) is the brother of the original accused No. 3 who is married to original accused No. 2. Original accused No. 2 and 3 were residing in the Railway quarters at Nevli since original accused No. 2 is working as Porter at Nevli Railway Station in district Latur. The Appellant was residing with the accused Nos. 2 and 3 at Nevli. One Vishwanath Mhaske was also working as Gangman and having his quarter nearby the quarter of the accused No. 2 Vishwanath has daughter by name Nutan who was studying in 7th standard. On 12-10-1994 she went to the school at Borgaon which is about 1 1/2 kms away from Nevli. Usually she ought to have returned home by 5-30 p.m. on that day. She did not return home. Vishwanath and his wife Shashikalabai went in search of Nutan but she could not be traced, in consequence, Vishwanath filed his complaint, exhibit 32, on 24-10-1994 with the Murud Police Station.

3. The offence was registered as Crime No. 19/94 under Ss. 363 and 366 of the IPC. During the course of the investigation, the appellant came to be arrested on

11-11-1994 when he and the prosecutrix Nutan were found coming to Nevli Police Station. Nutan was sent to the Medical Officer at Latur. On the same day the Medical Officer Dr. Sandhya Warad examined her and it was revealed that Nutan was subjected to sexual intercourse, and she was below 16 years of age.

4. After recording the statements of various witnesses, the police filed charge-sheet on the basis of which charge came to be framed against the appellant and original accused Nos. 2 and 3 for offences punishable under Ss. 366, 376 read with S. 34 of the IPC. It may be stated that the charge framed at exhibit 3 also contained a separate charge against the appellant under S. 376 of the IPC. However, the accused denied the charge and pleaded not guilty. It appears from the trend of cross-examination of the witnesses for the prosecution that according to the appellant, Nutan was major and she accompanied with him to conduct marriage with him at her free will.

5. At the trial, the prosecution examined as many as 10 witnesses, namely; P.W. 1 Pandurang Sawla Admane, P.W. 2 Mathurabai Mahadev Admane, P.W. 3 Mahadev Vithoba Admane, P.W. 4 Nutan Vishwanath Maske, Prosecutrix, P.W. 5 Manik Shankar Kulkarni, Head Master of CPS School, Borgaon; P.W. 6 Vishwanath Nivrati Maske, father of the prosecutrix Nutan; P.W. 7 Dr. Shandhya Sanjay Warad, P.W. 8 Shashikala Vishwanath Maske, mother of the prosecutrix Nutan, P.W. 9 Sushila Manohar Taskure, Head Mistress M.C. School No. 4 Kurudwadi District Solapur and P.W. 10 Dagdoba Yadavrao Hinge, Police Head Constable 8. No. 716.

6. On going through the evidence of these witnesses, the learned Additional Sessions Judge firstly held that the prosecutrix was a minor girl below 16 years of age and secondly that the prosecution was successful in proving that the appellant kidnapped or abducted the prosecutrix with intent that she may be compelled either to marry with him against her will or she may be forced or seduced to illicit sexual intercourse. The learned Additional Sessions Judge also found from the medical evidence that the appellant committed sexual intercourse with the prosecutrix against her wish. In consequence, the learned Additional Sessions Judge while acquitting the original accused Nos. 2 and 3 convicted the appellant under Ss. 366 and 376 of the IPC.

7. The appellant has, therefore, questioned the legality or validity of the judgment and order of the conviction and sentence passed against him in this appeal.

8. Mr. Jadhav, learned counsel appearing for the appellant, took me through the entire evidence of the prosecution. The learned counsel for the appellant, apart from his criticism on the evidence of the prosecutrix, strongly urged that the conviction of the appellant is wrong in law, inasmuch as, the prosecution failed to prove that the prosecutrix was below 16 years of age on the date of the alleged offence. In this regard Mr. Jadhav, learned counsel for the appellant, made a great deal of criticism against the medical evidence since the prosecution rested

its case as to the age of the prosecutrix only on medical evidence but the medical evidence is in conflict with the date of birth shown in the school leaving certificate. Mr. Jadhav Patil, therefore, submits that this is a case where in the absence of any evidence sufficient to establish the case of the prosecution as to the age of the prosecutrix, the accused would be entitled to acquittal.

9. I think that in view of the arguments advanced by Mr. Jadhav Patil, learned counsel for the appellant it is not necessary for me to refer to the material evidence of the prosecutrix as well as the witnesses about the circumstances under which the prosecutrix came to be acquainted with the appellant. It is, therefore, necessary to examine that evidence of the prosecution which deals with the age of the victim-prosecutrix. First set of the evidence is the date of birth as appearing in the school leaving certificate. P.W. 5 Manik Head Master produced the school leaving certificate of C.P.S. School Borgaon. He stated that the age of Nutan as per the school register is 4-5-1983. There is no dispute that Nutan was previously admitted in the Municipal school at Kurundwadi. P.W. 9 Sushilabai, Head Mistress, also stated that as per the school register, the date of birth noted in the school register pertaining to Nutan is 4-5-1983. It may be stated that the evidence of the parents is consistent with the birth date referred to in the school register as 4-5-1983 when they stated that Nutan was of 12 years of age at the time of the incident.

10. In contrast to the aforesaid evidence the second set of evidence is the medical evidence. P.W. 7 Dr. Sandhya who is attached to the civil hospital at Latur, examined Nutan on 11-11-1994 at about 5 p.m. Dr. Sandhya examined the prosecutrix from two points of view, firstly : as regards the symptoms of alleged sexual assault and secondly for ascertaining the age of the prosecutrix. P.W. 7 Dr. Sandhya stated that in the first place when she examined the prosecutrix she noticed that hymen was absent as it was ruptured but at the same time she found that her vagina was healthy and was closed. She found that Uterus was of normal size. Secondly she stated that she conducted her radiological examination. She took three X-rays. The first X-ray is of pelvic region, second of elbow joints and third of wrist joints. According to the Dr. Sandhya, epiphysis of iliac-crest appeared and generally it appears in 14 years of age. Further she stated that on going through the X-Rays of pelvic region, it was found that epiphysis of iliac-crest was not fused and it fuses in 17-19 years of age. On the basis of X-ray of Pelvis region, the age of Nutan was more than 14 years but less than 17 to 19 years. On the basis of X-ray of elbow joints she stated that lower end of humerus was fused with shaft and it fuses at the age of 14 years. However, lower end of radius is not fused though it has appeared and it is fused at the age of 16 1/2 years. Thus, according to the doctor, on going through the X-ray plates she formed the opinion that the age of Nutan was less than 16 1/2 years and more than 14 years. Significantly Dr. Sandhya has not stated anything about the error of margin while determining the age of the prosecutrix.

11. It is thus seen that the oral evidence of the parents and the birth date mentioned in the school register varies with the medical evidence. In other words, there is conflict of medical opinion with other evidence as to the age of the prosecutrix. Had there been consistency in other evidence with reference to the medical evidence, perhaps the evidence as to the age rendered medically could have been acceptable in the absence of evidence in rebuttal, inasmuch as, opinion of the doctor as to the age is never certain. Moreover, as observed earlier, Dr. Sandhya P.W. 7, has not stated anything about the error of margin when she gave her opinion about the age of the prosecutrix.

12. The principle which emerges from the various judicial decisions are also to be kept in view, namely; (1) that the medical evidence has to be considered along with other evidence; (2) if other evidence is reliable but inconsistent with the medical evidence, the medical evidence has to be rejected; (4) if the medical evidence supports the conclusion drawn from other evidence it is generally accepted, and (4) if the direct evidence is otherwise unreliable medical evidence alone will not be sufficient to prove the case.

13. The learned Additional Sessions Judge believed the other evidence solely on the ground that there was no reason why the parents should state wrong birth date when the prosecutrix was admitted in the school. Significantly the prosecutrix was first admitted in the school at Barshi, then at Kurudwadi and lastly at Borgaon. The evidence of date of birth from the school of Barshi has not been produced. On the basis of transfer certificate the date of birth of Nutan came to be recorded in the school of Kurudwadi and Borgaon. If it were a case that the date of birth of Nutan as 4-5-1983 was correct obviously the medical evidence, as stated above, as appearing in the evidence of P.W. 7 Dr. Sandhya could not have been with wide margin of difference in age. It cannot be denied that most important amongst all the tests is the ossification test, in the present set of developments in medical medicine and we must proceed with the evidence of age furnished by the ossification test. The ossification test of bones is of value in determining the age. It necessarily follows that if other evidence of age is wholly unsatisfactory, the ossification test may be accepted as surer ground for determining the age particularly when the accused gets a benefit of doubt on that basis. It is not out of place to mention that the opinion based on fusion of bones is more trustworthy. In *Mohamad Said Khan v. The State of Madhya Pradesh* (1985) 1 Crimes 157 it has been held that the ossification test, though not a sure test, is generally accepted as the best available test of age of human being. It is, however, to be kept in view that in the absence of any statement from P.W. 7 Dr. Sandhya about the range of error of margin the normal rule that the range of error in the ossification test may be about two or more years will have to be accepted. In this context regard may be had to the decision in the case of *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, . In para 9 of the report it has been observed that "one can take judicial note that the margin of error in age ascertained by radiological examination is 2 year on either side". The medical evidence as spoken to by Dr. Sandhya is clear

enough to show that the age of the prosecutrix was above 14 years. This circumstance alone makes it difficult for me to believe any other evidence which was accepted by the learned Additional Sessions Judge to hold that the prosecutrix was below 16 years of age.

14. The evidence spoken to by P.W. 2 Dr. Sandhya appears to be based on average and cannot be correct to the date of birth when the opinion of the doctor is that the girl is below 16 years. I think, as discussed hereinafter, the evidence adduced by the prosecution which is in conflict with the medical evidence and other evidence cannot be said to be sufficient establish the case of the prosecution as to the age of the prosecutrix.

15. I think that Mr. Jadhav Patil, learned counsel for the appellant, strongly relied on the decision in the case of State of Karnataka Vs. Sureshbabu Puk Raj Porral, . In support of his argument that the evidence regarding the age of the prosecutrix that she was below 16 years of age was unsatisfactory and the conviction of the appellant was not proper in law. In the case cited supra the trial Court convicted the accused under Ss. 366 and 376 of the IPC but the High Court set-aside the conviction and sentence. According to the prosecution, the age of the prosecutrix was 15 years at the time of occurrence. She was residing with her parents. On the question of age of the prosecutrix the doctor was examined and his evidence showed that the prosecutrix was below 16 years of age and that opinion was corroborated by the transfer certificate issued by the school where the prosecutrix was studying. On behalf of the respondent original accused argument was advanced that the age of the victim was not specifically proved to be below 16 years, inasmuch as, the doctor's evidence showed that her age could be even above 18 or 20 years of age. Finding a considerable force in that argument the Supreme Court observed that the data given by the doctor showed that the age of the prosecutrix could be 18 years also, and the evidence of the parents throws doubt about her age. As regards the date of birth as shown in the transfer certificate it has been observed that the Headmistress simply stated that the entry was made on the basis of the information given by the parents. Under these circumstances the Supreme Court ruled that the evidence about the age was not very convincing. It was, therefore, held that the prosecutrix went to the accused voluntarily and therefore, when the age is in doubt then the question of taking her away from the lawful guardianship does not arise and the part played by the accused does not amount to keeping the prosecutrix out of the lawful guardianship of the parents. In such a situation it was found difficult to hold that the accused had taken away the prosecutrix from the lawful guardianship of the parents and something more has to be shown in the case.

16. In rape cases, the medical evidence of the accused and prosecutrix assumes importance to ascertain as to whether there was sexual intercourse or assault on the victim. In many cases, examination of the prosecutrix victim does not help the court to ascertain the sexual assault as the woman is habituated to the intercourse, then in that case, the medical examiner should examine the

prosecutrix to find out the symptoms of (1) marks of violence near genitals, (2) marks of violence on the body, (3) Gonorrhoeal infection, (4) Blood and seminal stains, presence of spermatozoa in vagina and (6) rupture of hymen. In the instant case admittedly except that there was rupture of hymen none other symptoms could be noticed by P.W. 7 Dr. Sandhya.

How, while considering the question as to whether Nutan was a minor i.e. below 16 years of age, it is equally important to keep in mind what the Apex Court said in *Sidheswar Ganguly Vs. The State of West Bengal*, that "when the age of a person in respect of whom offence has been committed, the only safer proof of that person's age is the birth certificate". However, birth certificate of Nutan is not produced by the prosecution. The prosecution relied on the entry in the transfer certificate from school register regarding the date of birth of Nutan and also the medical evidence. I have already pointed out that there is wide discrepancy as to the age of Nutan on the basis of date of birth shown in the school register and the medical evidence. The testimony of the parents of Nutan is not corroborated by other independent surrounding circumstances such as the birth date of children born to them after Nutan. The mother has stated in her deposition that Rama and Raja were born after Nutan. The prosecution has not produced the birth dates of Rama and Raja. Therefore, her evidence cannot be said to be supporting evidence of the parents to the opinion of the doctor as to the age of Nutan.

Now, returning again to the opinion it lacks material requirements of stating error of margin. In the present case, the Doctor has not noted the error of margin. The Doctor, however, wants to give two opinions namely; (1) Nutan was more than 14 years and less than 17 to 19 years of age". This is what the doctor has stated in para 3 of her deposition. But in para 4 of her deposition it is stated that "the age of Nutan was less than 16 years and 1 1/2 years and more than 14 years". Indeed, the opinion of the doctor in regard to the age of Nutan though not supporting the evidence of the witness but undoubtedly is in uncertain terms. If regard be had to the error of margin perhaps it may not be the case that Nutan was below 16 years of age. She can be said to be above 16 years of age. That is why I am of the view that the evidence about the age is totally unsatisfactory to accept the finding recorded by the learned Additional Sessions Judge holding that Nutan was below 16 years of age.

17. If we turn to the oral evidence of the prosecutrix it is quite clear that her evidence is very consistent with the case of consent on her part. There is no dispute that Nutan went away with the accused at various places and stayed with the relations of the accused. She was away from the place of parents for 20 days. Her evidence further show that she had opportunity to run away from the accused. She never made efforts to leave the company of the accused or to make any complaint to any authority or to the relations of the accused with whom she was staying with the accused for three weeks. All the while she stated that the accused took her to get themselves married. Briefly stated that the first

part of statement of the prosecutrix showing how she came in contact with the accused is difficult to believe. She stated that whenever she used to go on the tap to fetch water the accused used to come on the water tap and used to talk with her forcibly. Next she stated that whenever she used to go to the school from Nevli to Borgaon the accused used to follow her and was trying to talk with her either while going to the school or returning home from the school. Significantly she stated that she used to go and return from the school daily along with her brother. The prosecution has not examined her brother. It was highly improbable that the prosecutrix would allow the accused to talk with her forcibly or to follow her in spite of her objection. In that case, she would have complained to her parents about the conduct of the accused before 21-10-94.

18. The evidence of Nutan further shows that on 22-10-1994 she reached the school at 1 p.m. She was in the examination hall till 5 p.m. She handed over the answer papers to Invigilator at about 5-15 p.m. She started to proceed to Nevli railway station. She was alone on that day. There is a temple in Nevli. When she reached the temple she met her father and Govind near Naka. She talked to her father. The father asked her to go to the house. Significantly at the same time she stated that when she was proceeding to Nevli Railway Station the accused was following her. That was after her father met her on the way. She stated that the accused caught-hold of her hand and forcibly pulled her in the hybrid crops. There, according to her, the accused told her that she should come with him at Solapur and marry with him as he has means to keep her in better way. She stated that upto 7 p.m. the accused was persuading her there and he took her forcibly to village Karkatta. In village Karkatta they stayed in the house of relative of the accused. The house is near the bus-stand at village Karkatta. Next day they went to Barshi in the matador and from there they went to Solapur in the ST bus. At Solapur the appellant took her to Sidheshwar temple. The accused made her to believe that he married her by offering to touch their forehead on the feet of Lord Sidheshwar. Then she stated that she was taken to the house of the sister of the accused in Solapur. In her presence the sister of the accused questioned why he had brought the prosecutrix to her house to which the accused replied that he performed marriage with her. Thus, according to the prosecutrix they stayed for about 20 days. During those days the accused had sexual intercourse with her. It is her claim that he had sexual intercourse with her by force.

19. It is further stated by her that the brother of the accused came and told that the parents of the prosecutrix filed criminal case against him and, therefore, the accused took her to Murud. It was at night hours and therefore, they took halt in the house of maternal aunt of the accused at Murud. They then went to the Murud police station where the accused told the police that he married her. The police, however, arrested the accused and her statement was recorded by the police. Her evidence is full of contradictions when she attributes the force to the accused either in the case of talk with her or the act of sexual intercourse with her.

20. It is equally important to mention that in the course of her cross-examination she stated as under :

"While I was being taken forcibly by the accused Prakash in hybrid crop I raised hue and cry but accused Prakash was giving threats. Even when I was in hybrid crop with accused Prakash I raised cries but he was again threatening me."

She was questioned whether on reaching Murud she thought to make a complaint but she did not try to lodge the complaint against the accused, as, according to her, he was giving threats.

21. If regard be had to the sequence of the events as disclosed by the prosecution in her deposition, it is impossible to believe that part of her version that the accused gave threats subsequently after commencement of her acquaintance with him. I have already observed that the conduct of the prosecutrix in keeping silent throughout is indicative of the fact that she was a consenting party. The learned Additional Sessions Judge, however, accepted her testimony without proper scrutiny when he found that the prosecutrix Nutan was below 16 years of age. Such a finding is, therefore, perverse and also requires to be corrected.

22. In conclusion, I find that the prosecution has failed to prove that the prosecutrix was below 16 years of age on the date of the incident. In consequence the charge levelled against the appellant either for offence under S. 366 or S. 376 of the IPC must fail.

23. In the result, the appeal is, therefore, allowed. The conviction and sentence passed against the appellant is hereby quashed and set-aside. The appellant is acquitted of the offences levelled against him by giving him benefit of doubt. The accused be released forthwith if not required in any other case.

24. Appeal allowed.