

(2010) 06 BOM CK 0085
In the Bombay High Court
Case No : Criminal Appeal No. 780 of 2008

Shrikisan @ Shrikrishna Mahadeorao Japulkar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 08-06-2010

Acts Referred:

Child Marriage Restraint Act, 1929 — Section 4, 5
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2010) 06 BOM CK 0085

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : T.H. Udeshi, for the Appellant; S.S. Doifode, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—This is an appeal by Accused No. 1 who has been convicted.

2. While Accused No. 1 was charged for offences punishable under Sections 363 and 366 of Indian Penal Code, and Section 4 read with Section 5 of the Child Marriage Restraint Act, 1929, the Accused No. 2 was tried for offence punishable u/s 376 of Indian Penal Code.

3. After appreciating the evidence of all witnesses, the learned Sessions Judge convicted the Accused No. 1 for offence punishable u/s 363 as well as Section 366 of Indian Penal Code, and ordered sentence for [a] three years and a fine of Rs. 200/-, in default, Simple Imprisonment for three months for offence u/s 363, Indian Penal Code, and [b] five years, and a fine of Rs. 300-00, in default, Simple Imprisonment for six months.

4. The convicted accused is in appeal before this Court.

5. Heard learned Adv. Ms. T.H. Udeshi for the appellant and learned APP Mr. S.S. Doifode for the respondent.

6. The learned Adv., for the appellant has argued that the evidence in relation to age of the prosecutrix is wholly untrustworthy. Emphasis is given on the sequence of birth and ages of children by P W 3 - Sau. Manda and P.W. 4 - Ganesh, which are coherent in First Information Report, while those are coherently divergent in their testimonies.

7. Prosecution has examined in all nine witnesses. Testimonies of:

[1] P.W.4 - Ganesh Ramchandra Japulkar,

[2] P.W. 3 - Sau. Manda Ganesh Japulkar, father and mother of prosecutrix respectively,

[3] P.W.5 - Radhika, prosecutrix,

[4] P.W.7 - Sudhir Walkhade, Headmaster are relevant.

The requisition [Exh.55] as to age and the Medical Certificate [Exh.34] are another proof of the age of prosecutrix which is relied upon.

8. In so far as fact of kidnapping is concerned, prosecution has relied upon the testimonies of PW 3 - Sau. Manda and P.W. 4 - Ganesh, mother and father respectively, apart from that of PW 5 - Radhika, the prosecutrix, which are the only evidences.

9. Admittedly, there are no other eye-witnesses to the act of kidnapping.

10. P.W. 4 - Ganesh has proved that the Accused No. 1 had requested him to permit him to take the prosecutrix to his village to attend marriage of daughter of Accused No. 1, and that the PW 4 - Ganesh had refused the permission.

11. In so far as somebody's witnessing the fact of kidnapping is concerned, version of P.W. 3 - Sau. Manda reads as follows:

1. ...Old woman disclosed me that Radhika went with the accused No. 1.... "

[Quoted from page No. 24 of the appeal paper-book].

12. Testimony of P.W.5 - Radhika is the primary evidence of the fact of kidnapping. What she says in this regard is as follows:

1. The accused No. 1 Shrikrishna is my cousin uncle. Incident occurred prior to about 7/8 months. When I was alone at my house, accused No. 1 took me on the ground to attend marriage to Yavatmal. Accused No. 1 Shrikrishna took me to Rajasthan....

[Quoted from page No. 30 of the appeal paper-book].

13. Considering that in the present matter, jurisdictional questions revolve around the age of the prosecutrix, and about the fact of act of Accused No. 1 in kidnapping the prosecutrix if she is below 18 years of age.

14. In so far as proof of age is concerned, prosecution has relied upon the School

Leaving Certificate [Exh.46] in which her date of birth is given as "10th May, 1991."

15. In so far as Exh.46 for proof of date of birth is concerned, PW 7 - Sudhir Walkhade, who was Headmaster of G.M. Pethe High School, Bramhanwada Thadi since 1990, is examined. He had tendered the School Leaving Certificate and had brought with him original register.

16. In the cross-examination, PW 7 - the Headmaster - Shri Sudhir Walkhade was asked as to whether he was called by police to produce the certificate, and as to the source of information, on the basis of which the date of birth is recorded. What he states is as follows:

2. ...

Police of P.S. Chandur Bazar had not issued letter to me to issue school leaving certificate of Radhika.

I have maintained the entry on the basis of school leaving certificate issued by Zilla Parishad School Bramhanwada Thadi.

I have not brought school leaving certificate issued by Z.P. School Bramhanwada.

[Quoted from page No. 40 of the appeal paper-book. Sub-paragraphing is done for convenience of reading].

17. In so far as the medical evidence relating to age of the prosecutrix is concerned, the Medical Certificate contains following description:

1) The age of Ku. Radhika might be 17 years.

[Quoted from page No. 34 of the appeal paper-book].

18. It is seen that any Ossification Test was not got done either prior or after issuance of Exh.34. A specific query was made in Exh.55 as to what is the age of Ku. Radhika.

19. It would be useful to see evidence of PW - Mandabai and PW 4 - Ganesh on the point of age of the prosecutrix.

20. It is seen from oral reports - Exh.37 as well as Exh.43 lodged by Mandabai and Ganesh respectively that they have given the sequence of their children and their ages.

21. The version contained in Exh.37 - Oral Report lodged by P.W. 3 - Mandabai reads as follows:

I reside on the aforesaid address and do the labour work. I have four daughters and I reside along with my husband. All the daughters are residing with me. I have 4 daughters namely (1) Ku. Pratibha aged 18 years, (2) Ku. Radhika, aged 16 years, (3) Sharda, aged 14 years and (4) Bharti, aged 11 years....

[Quoted from page No. 26 of the appeal paper-book. Emphasis is provided to highlight the relevant portion.].

22. The version contained in Exh.43 - Oral Report lodged by P.W. 4 - Ganesh Japulkar is as under:

I reside on the aforesaid address and do the labour work. I have four daughters and I along with my all daughters and wife Sau. Mandabai reside together. I have four daughters namely (1) Ku. Pratibha aged 18 years, (2) Ku. Radhika, aged 16 years, (3) Sharda, aged 14 years and (4) Bharti, aged 11 years....

[Quoted from page No. 33 of the appeal paper-book. Emphasis is provided to highlight the relevant portion.].

23. In both these versions, Radhika is shown to be daughter born second in sequence and her age is shown to be 16 years on the date of incident.

24. In the cross-examination of P.W.3 - Mandabai, she admits that Radhika is younger by one year to Pratibha, while Pratibha's age assigned/told by her is 20 years.

25. Learned Adv., for the appellant has relied on reported judgment of Hon''ble Supreme Court in case of Sunil Vs. State of Haryana, .

This Judgment is relied upon to urge that if admission form of the school was not produced, the proof of age was not done legally.

26. Collective effect of the evidence, that has been tendered, can be analyzed, and is done as follows:

[a] Prosecutrix - Radhika has brought forward the story of kidnapping her and act of selling her by Accused No. 1 in Rajasthan for the first time, for which there is no investigation or charge in so far as Accused No. 1 is concerned.

[b] In so far as fact of kidnapping is concerned, eye-witness was available, namely one old lady who reported the matter to PW 3 - Mandabai. It is not clear as to whether the said old lady was even interrogated by the police in the process of investigation.

[c] No explanation and evidence is coming forward as to why efforts were not made to:

[1] collect the original source of recording of date of birth in the school of first instance, and

[2] conduct ossification test,

[d] If at all, ossification test was conducted, it is not explained as to why it is not coming forward unless it is adverse to the prosecution story.

[e] The sequence of birth of children given in the First Information Report is contradicted by P.W.3 - Manda and P.W.4 - Ganesh by way of improvement in

their oral testimonies and they have rendered their own testimonies susceptible to grave doubt.

27. Considering collective effect of the evidence that had come before the Trial Court, the jurisdictional fact, i.e., age of the prosecutrix itself being not proved to be below 18 years, the entire charge has failed.

28. As held by Hon"ble Supreme Court in the case of Sunil v. State of Haryana [cited supra], the admission form, which has to be the primary evidence of parents' version as to age when not brought, proof of alleged date of birth is not done. Even first ever admission record from old school is not called and is not proved.

29. In this background, the Judgment and Order of conviction and sentence passed by Sessions Court is unsustainable being based on foundation that the prosecutrix - Radhika was minor.

30. In the result, appeal succeeds, and is allowed.

Judgment and order of conviction and sentence is set aside. Appellant be set at liberty unless he is required in any other offence.