

MAHADEO S/O KERBA MASKE

v.

STATE OF MAHARASHTRA AND ANR.
(Criminal Appeal No.6 of 2010)

JULY 23, 2013

**[A.K. PATNAIK AND FAKKIR MOHAMED IBRAHIM
KALIFULLA, JJ.]**

Penal Code, 1860 – ss. 363 and 376 – Kidnapping and rape – Of a girl about 15 years of age – Conviction by courts below concluding that prosecutrix was aged below 18 years – Held: In view of the version of the prosecutrix, which was fully supported by chemical analyst report as well as medical evidence, appellant rightly convicted – Conviction upheld.

Criminal Trial – Rape case – Determination of age of prosecutrix – Opinion of doctor as regards age of prosecutrix – Cannot be relied on if such opinion is formed without scientific examination of prosecutrix such as ossification test – r.12(3)(b) of Juvenile Justice Rules specifically provides that medical opinion can be sought only in absence of alternative methods described u/r. 12(3)(a)(i) and (iii) – Juvenile (Care and Protection) Rules, 2007 – ss. 12(3)(a)(i) and (iii) and 12(3)(b).

Prosecution was initiated against the appellant-accused u/ss. 363, 376 and 506 IPC. The prosecution case was that the prosecutrix (a 15 years old girl) who used to participate in programmes of 'Bhajan' singing, got acquainted with the appellant-accused, who was a musician and singer. He allured her to come along with him to prepare audio cassettes of her 'Bhajans' and songs, which would fetch her a lot of money. One day he persuaded her to go along with him to another State and asked her to bring ornaments from her house. As a result, the prosecutrix took gold ornaments worth Rs. one lakh

A and went with him. The accused confined her in a
relative's house for more than one month 20 days and
committed forcible sexual intercourse. When he came to
know that missing report has been lodged, he brought
the prosecutrix back to her place. Trial court convicted
B the accused for the offences charged. High Court
confirmed the conviction u/ss. 363 and 376 IPC, but
acquitted him u/s. 506. Hence the present appeal.

Dismissing the appeal, the Court

C HELD: 1.1. Every relevant factor required for arriving
at a just conclusion about the age of the prosecutrix PW-
3, was appropriately made and consequently the
conclusion arrived at by the trial court and confirmed by
the High Court that the prosecutrix was below 18 years
D of age at the time of the occurrence, was perfectly
justified. [Para 8] [673-C]

1.2. Merely based on the opinion of PW-8 (the
doctor), who in her evidence stated that the age of the
prosecutrix could have been between 17 to 25 years, the
E age of the prosecutrix could not be acted upon. The trial
court correctly found that to rely upon the said version
of PW-8, scientific examination of the prosecutrix such as,
ossification test to ascertain the exact age should have
been conducted which was not done in the present case.
F [Para 9] [673-D-F]

1.3. Under Rule 12(3)(b) of Juvenile Justice (Care and
Protection) Rules, 2007 it is specifically provided that only
in the absence of alternative methods described under
G 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 a juvenile, the same yardstick
can be rightly followed by the Courts for the purpose of
ascertaining the age of a victim as well. [Para 11] [674-C-
H D]

1.4. In the instant case, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW-11. Apart from the transfer certificate as well as the admission form maintained by the primary school where the prosecutrix had her initial education, also confirmed the date of birth as 20.5.1990. 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. [Para 12] [674-E-G]

2.1. The prosecutrix PW-3, in her evidence had narrated every minute detail as to how the appellant allured her by taking advantage of her contact with him while singing Bhajan songs, how he persuaded her by stating that recording of her bhajans in audio cassette would enable her to earn tons of money and in that pretext also tempted her to take away the gold ornaments from the house worth Rs.1 lakh and thus gained her confidence to go along with him and misused his company by keeping her in a place where she was not acquainted with the local language and ultimately, abused her physically at least for more than for a month and twenty days. The vivid description of the behaviour of the appellant during the period when she was kept in his custody was clearly demonstrated by the prosecutrix and any amount of cross examination at the instance of the appellant, did not bring about any candid contradiction in her statement in order to disbelieve her deposition. The version of the prosecutrix was fully supported by the chemical analyst report, as well as , the medical evidence. [Para 15] [676-C-G]

- A 16. In such circumstances, the trial court rightly found the appellant guilty of the offences charged against him. The conclusion of the trial court in having found the appellant guilty of offences u/ss. 363 and 376 IPC was further upheld by the High Court. The conclusion of the High Court is also perfectly justified. [Paras 16 and 17]
B [676-H; 677-A-B]

Lillu alias Rajesh and Anr. vs. State of Haryana AIR (2013) SC 1784 – relied on.

C Case Law Reference:

AIR (2013) SC 1784 relied on Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.6 of 2010.

- D From the Judgment and Order dated 05.03.2008 of the High Court of Judicature of Bombay, Bench at Aurangabad in Criminal Appeal No. 764 of 2006.

Rameshwar Prasad Goyal for the Appellant.

- E Sushil Karanjkar, Sanjay Kharde, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

- F **FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. The sole appellant is before us. The challenge is to the judgment of the learned Single Judge of the High Court of Bombay, Bench at Aurangabad dated 05.03.2008, in Criminal Appeal No.764 of 2006. The appellant was proceeded against for the offences punishable under Sections 363, 376 and 506 of the Indian Penal Code. He was sentenced to suffer rigorous imprisonment for three years, along with fine of Rs.3000/- and in default to suffer rigorous imprisonment for six months for the offence under Section 363 IPC; he was further sentenced to suffer rigorous imprisonment for seven years, along with fine of Rs.5000/- and in default to suffer rigorous imprisonment for
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two years for the offence under Section 376 IPC. The trial Court also punished the appellant under Section 506 IPC and sentenced him to suffer rigorous imprisonment for one year, along with fine of Rs.1000/- with default sentence of two months' rigorous imprisonment. A

2. The High Court by the impugned judgment, though confirmed the conviction and sentence for the offences under Sections 363 and 376 IPC, set aside the sentence for the offence under Section 506 IPC. B

3. Brief facts which are required to be stated are that PW-3, the prosecutrix, was aged about 15 years at the time when the offence was committed and she was doing her XIth standard in a Junior College. Her father was a Police Head Constable. The prosecutrix was residing with her parents, sister and two younger brothers in the government quarter of her father in Police Line, at Latur. She had a flair for music and used to participate in singing Bhajans. The appellant who is also stated to be a musician and a singer, developed acquaintance with the prosecutrix due to her participation in Bhajan programmes along with him and he allured her by stating that if she goes along with him to Hyderabad to prepare audio cassettes of her Bhajans and songs, she can make lot of money. C D E

4. On 18.09.2005, in the morning when the prosecutrix was all alone in her house, the appellant is alleged to have approached her and persuaded her to go along with him to Hyderabad and when she informed him that she had no money to spend, the appellant is stated to have asked her to bring the ornaments from her house, which can be used for the purpose of going to Hyderabad and told her that a lot of money can be earned through the recording of audio cassettes of the prosecutrix's Bhajan songs. The appellant is stated to have succeeded in his allurements and inducement, which ultimately resulted in the prosecutrix going along with the appellant and after going to Hyderabad and from there to a relative's house F G H

A at Karnool (Andhra Pradesh) in the wee hours, the appellant is
 alleged to have committed forcible sexual intercourse by
 confining her in the said place for a month and twenty days.
 During the said period, the appellant is stated to have indulged
 in the said offence repeatedly, till he himself brought her back
 B to Latur, when he came to know that a complaint has been
 lodged. It is in the above stated background that the appellant
 was proceeded against for the offence of kidnapping, rape and
 criminal intimidation, which ultimately resulted in his conviction
 and the sentence imposed upon him as confirmed by the High
 C Court in the impugned judgment.

5. In support of the case of the prosecution, PWs-1 to 13
 were examined and a number of exhibits were also marked.
 For our present purpose, it will be sufficient to refer to the
 evidence of Tukaram Nagnath Surwase (PW-1), the prosecutrix
 D (PW-3) and Dr. Aruna Varte (PW-8), the doctor who examined
 the prosecutrix, the Head Mistress (PW-11) and the Head
 Master (PW-12) of the school in which the prosecutrix pursued
 her school education.

E 6. PW-1, Tukaram Nagnath Surwase, who is the father of
 the prosecutrix, lodged the complaint, Exhibit -26. PW-3 is the
 prosecutrix. PW-8 is Dr. Aruna Varte, who examined PW-3 and
 through her Exhibit 38 the medical report was marked. PW-11
 is the Head Mistress of Dnyaneshwar Vidhyalaya where the
 prosecutrix was admitted to Vth Standard. PW-11 produced
 F Exhibit 54, the school leaving certificate, which disclosed the
 date of birth of the prosecutrix, as 20.05.1990. PW-12,
 Uttamrao Jadhav who is the Head Master of Jawahar Primary
 School, Latur stated that the prosecutrix was admitted in his
 school on 30.08.1995 in 1st standard, that at the time of
 G admission, the father of the prosecutrix produced a birth
 certificate issued by Gram Panchayat, disclosing the date of
 birth of prosecutrix as 20.05.1990. PW-12 produced the
 admission form Exhibit 56 and transfer certificate Exhibit 57
 which mention the date of birth of the prosecutrix as 20.05.1990.
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7. The trial Court considered the evidence of PWs-1, 11 and 12, as well as Exhibits 53, 54, 55, 56 and 57 and concluded that at the time of the commission of the offence which commenced on 20.09.2005 and continued till 07.11.2005 the prosecutrix was aged about 15 years and 4 months. A.

8. When we peruse the discussion made by the trial Court as regards the age factor of the appellant by analyzing the evidence of PW-11 and 12 along with Exhibits 50, 53, 54 to 57, we find that every relevant factor required for arriving at a just conclusion about the age of the prosecutrix PW-3, was appropriately made and consequently the conclusion arrived at by the trial Court and confirmed by the High Court that the prosecutrix was below 18 years of age at the time of the occurrence, was perfectly justified. B
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9. Though the learned counsel for the appellant attempted to find fault with the said conclusion by making reference to the evidence of PW-8, the doctor, who examined the prosecutrix and who in her evidence stated that on her examination she could state that the age of the prosecutrix could have been between 17 to 25 years, it will have to be held that the rejection of the said submission even by the trial Court was perfectly in order and justified. The trial court has found that to rely upon the said version of PW-8, the doctor, scientific examination of the prosecutrix such as, ossification test to ascertain the exact age should have been conducted which was not done in the present case and, therefore, merely based on the opinion of PW-8, the age of the prosecutrix, could not be acted upon. D
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10. We can also in this connection make a reference to a statutory provision contained in the Juvenile Justice (Care and Protection) Rules, 2007, whereunder Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12 (3) of the said Rules, it is stated that in every case concerning a child or juvenile in conflict with law, the age determination enquiry shall be conducted by G
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A the Court or the Board or, as the case may be, by the committee by seeking evidence by obtaining:-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

B (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;

C 11. Under Rule 12 (3) (b), it is specifically provided that only in the absence of alternative methods described under 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 a juvenile, in our considered opinion, the same yardstick
D can be rightly followed by the Courts for the purpose of ascertaining the age of a victim as well.

12. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the
E prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW-11. Apart from the transfer certificate as well as the admission form maintained
F by the primary school Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.5.1990. 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 good grounds to
G interfere with the same.

13. Once the above position that the prosecutrix was a minor was found to be fully established, thereafter, the only other question that needs to be examined is as to the sexual assault
H alleged to have been committed by the appellant on her and

whether such an allegation was satisfactorily established before the Courts below. In this respect, after the prosecutrix was found missing, PW-1 after his initial search to trace his daughter, stated to have preferred missing report in Gandhi Chowk Polic Station, alleging that she was missing along with gold ornaments valued at Rs.1 lakh. Thereafter, the search continued and that according to the prosecution the appellant himself brought back the prosecutrix to village Babhalgaon on 07.11.2005 whereafter the crime came to be registered as Crime No.219 of 2005.

14. After the prosecutrix was secured she was examined by PW-8, Dr. Aruna Varte on 10.11.2005 who issued the certificate Exhibit 43. As per the certificate Exhibit 43, PW-8 confirmed that hymen was old ruptured and that the prosecutrix was used for sexual intercourse. PW-8 confirmed Exhibit.43, medical certificate issued by her. PW-8 also confirmed that based on the chemical analysis report, she issued a medical certificate and confirmed the contents of the certificate Exhibit-43 wherein she had given the opinion that the prosecutrix was used for sexual intercourse. When the chemical analysis report was examined by the trial Court, the trial Court has referred to the contents of the chemical analysis report in Exhibits-60 and 61 and the same can be referred to which has been stated in paragraph 27. Para 27 reads as under:

"27. C.A. report Ex.60 pertains to the Jangiya and petticoat of prosecutrix and nicker of accused and the result of its analysis shows that semen stains were found on Jangiya and petticoat of prosecutrix and nicker of accused and the blood group of said semen is AB. C.A. report Ex.61 pertains to the blood, vaginal swab and pubic hair of prosecutrix and the result of its analysis shows that no semen is detected on vaginal swab and pubic hair and blood group is 'B'. C.A. report Ex.62 pertains to the semen, pubic hair and blood of accused and the result of analysis shows that the blood group of accused is 'AB'; so also, no semen is detected on the pubic hair of

- A accused. Now, from the aforesaid C.A. report, it transpired
that the semen detected on Jangiya and petticoat of
prosecutrix is of accused, because of blood group of
accused as well as the blood group of semen found on the
aforesaid clothes of prosecutrix is same. Therefore, these
B C.A. reports support to the prosecutrix to hold that the
accused has committed rape on the prosecutrix."

(Emphasis added)

15. Keeping the contents of the chemical analysis report,
C as noted by the Courts below in mind, when we consider the
deposition of the prosecutrix PW-3, we find that she had
narrated every minute detail as to how the appellant allured her
by taking advantage of her contact with him while singing
Bhajan songs, how he persuaded her by stating that recording
D of her Bhajans in audio cassette would enable her to earn tons
of money and in that pretext also tempted her to take away the
gold ornaments from the house worth Rs.1 lakh and thus gained
her confidence to go along with him and misused his company
by keeping her in a place at Karnool where she was not
E acquainted with the local language of Telugu and ultimately,
abused her physically at least for more than for a month and
twenty days. The vivid description of the behaviour of the
appellant during the period when she was kept in his custody
i.e., between 20.09.2005 to 07.11.2005, was clearly
F demonstrated by the prosecutrix and any amount of cross
examination at the instance of the appellant, did not bring about
any candid contradiction in her statement in order to disbelieve
her deposition. The trial Court has also elaborately dealt with
her deposition and found that the version of the prosecutrix was
G fully supported by the chemical analyst report, as well as, the
medical evidence.

16. In such circumstances, the trial Court in our considered
opinion rightly found the appellant guilty of the offences charged
against him. The conclusion of the trial Court in having found
H the appellant guilty of offences under Sections 363 and 376 IPC

was further upheld by the High Court by the impugned judgment. The High Court, however, found that the conviction for the offence under Section 506 IPC was not sufficiently supported by evidence and conviction and sentence for offence under Section 506 IPC was set aside. A

17. Having perused the judgment of the High Court, we are also convinced that the said conclusion is also perfectly justified. B

18. This Court in *Lillu alias Rajesh and another vs. State of Haryana* reported in AIR 2013 SC 1784, where one of us was a party, held in para 11 that: C

“11. In *State of Punjab v. Ramdev Singh*, AIR 2004 SC 1290, this Court dealt with the issue and held that rape is violative of victim’s fundamental right under Article 21 of the Constitution. So, the Courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.” D

19. In the light of our above conclusion, we do not find any merit in this appeal. The appeal fails, the same is dismissed. E

20. The appellant is on bail. The bail bond stands cancelled and he shall be taken into custody forthwith to serve out the remaining part of sentence, if any. F