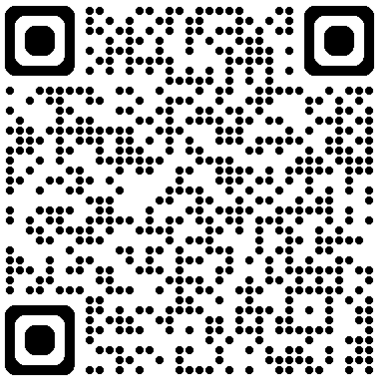
Acquittal in Kidnapping and Rape Case

Case Name: Ramesh S/O Narayan Rathod v. State of Maharashtra

Citation: 2024:BHC-AUG:25876

Act: Indian Penal Code (IPC)



2024:BHC-AUG:25876

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 827 OF 2003

Ramesh s/o Narayan Rathod
Age : 22 years, Occu: Labour,
R/o Karwandi, Taluka Deoni,
District Latur. … Appellant
[Orig. Accused No.1]

Versus

State of Maharashtra … Respondent

.....

Mr. M. L. Dharashive, Advocate for the Appellant.
Mr. S. K. Shirse, APP for Respondent-State.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 16.10.2024
Pronounced on : 22.10.2024

JUDGMENT :

1. Convict for offence under Sections 363, 366, 376 of the Indian Penal Code [IPC] by virtue of judgment dated 08.12.2003 passed in Sessions Case No. 35 of 2003 is hereby taking exception to the above judgment by way of instant appeal.

2. In trial court, case set up by prosecution was that, appellants kidnapped PW4 victim aged 14 years from the lawful custody of her parents with intention that she would be married to appellant no.1 Ramesh and he had illicit intercourse with her. Hence, on report of

PW3 father, crime was registered and after investigation, all four accused were chargesheeted for commission of offence under Sections 363, 366, 376 r/w 34 of IPC and tried by learned Sessions Judge, Latur vide Sessions Case No. 35 of 2003, who, by his judgment dated 08.12.2003 convicted appellant Ramesh alone for offence under Sections 363, 366, 376 of IPC and acquitted accused nos. 2, 3 and 4 from all the charges.

It is the above judgment which is taken exception to by way of instant appeal.

SUBMISSIONS

On behalf of the appellant :

3. Pleading false implication, learned counsel would submit that prosecution has failed to establish the charge beyond reasonable doubt. According to him, at the outset, prosecution has miserably failed to establish that victim was minor. That, there was heavy burden on prosecution to prove age of victim before invoking charge of kidnapping as well as rape. On this count, he took this Court through the evidence of PW1 Dr. Sunita Dombe and pointed out that this medical expert in the witness box opined the age of victim to be 17 to 18 years. That, applying the rule of margin of two years, victim

cannot be said to be minor. He submitted that, there is no cogent evidence about date of birth of victim. He further submitted that, investigating machinery has merely gathered school leaving certificate, but there is no documentary proof of date of birth in the form of birth certificate or school admission extract of the first school where victim took education. Consequently, according to him, there is no legally acceptable proof of age of victim.

4. He further pointed out that here, victim herself has deposed that on her own accord, she accompanied accused. She was not removed by appellant from custody of her parents so as to attract Section 363 of IPC. He also pointed out that victim, in her evidence, herself stated that she was consenting party to the sexual intercourse and as such there was no force or threat or any act against her wish and hence, according to him, even charge of Sections 366 and 376 of IPC collapses. He pointed out that even very father, who set law into motion, has not supported prosecution. There is no medical evidence about forceful rape, nor there is scientific evidence to implicate appellant, still conviction is recorded. According to learned counsel, there is weak or no evidence in support of any of the charges. But still case of prosecution has been accepted and hence, he prays for interference at the hands of appellate court by allowing the appeal.

5. Countering the above submissions, learned APP pointed out that victim was barely 14 years of age. Learned APP invited attention of this court to the testimony of victim, and would submit that in examination-in-chief itself she stated that she was 14 years of age at the time of incident. He submitted that even school record shows that she was minor. That, she was removed from the custody of her parents by appellant with intention to marry her and to have sexual intercourse with her. That, appellant developed physical intimacy at several times. Learned APP submitted that, being minor, her consent is insignificant and hence, according to him, no fault can be found either in the appreciation or the conclusion of guilt reached by learned trial Judge, and so he prays to dismiss the appeal.

SUM AND SUBSTANCE OF THE EVIDENCE IN TRIAL COURT

PW1 Dr. Sunita Dombe, Medical officer posted at Women's Hospital, Latur, gave her qualification as MD Gynec and deposed about victim referred by police, about external and internal examination of the person of victim and gave opinion that there was absence of medical evidence of recent sexual intercourse and victim was habituated to sexual intercourse. She also opined that, upon radiological examination, victim was between 17 to 18 years of age. She identified certificates Exhibits 19 and 20 issued by her.

In cross she admitted that opinion of age of victim was based on radiological examination and there is always error of margin of 2 years on either side, and opinion issued by her is including the error of margin.

PW2 Dr. Gaus, another Medical Officer who examined accused, opined that accused was capable of performing sexual intercourse and he identified certificate Exhibit 22 issued by him. There is no cross of this witness.

PW3 father of victim stated that, 8 to 9 months ago, he was at village Karwandi and his daughter went away with son of Coneja. Later on victim was sent back to his house and dispute was settled. Though he stated about making complaint, he resiled by stating that nothing was stated by him to police and that he could not read, write or sign.

While under cross, he admitted that accused took his daughter by promising her to perform marriage and at that time, his consent or his wife's consent was not obtained. He also admitted that at the time of incident, his daughter was minor. He denied knowing whether accused was previously married. He denied about falsely deposing that there was settlement.

PW4 is the victim. In chief itself she stated that along with accused, on her own, she went to Pune, stayed with him for seven days in a rented room and there, accused had intercourse with her. She had consented for the act of intercourse. Husband of maternal aunt of accused brought both of them to Udgir and

from there to police station by father of accused, and husband of his maternal aunt. She further deposed that she was 14 years of age. Without informing her mother and father, she went along with Ramesh and at that time, he told her that he will perform marriage with her. At that time she was not aware as to whether accused was married or unmarried.

Victim is not cross examined.

PW5 Dagdu, a tenant, stated that a couple resided in a room adjoining to his house for 8 days. He stated that the male accused present in the court resided there with a lady, but he had no talks with them.

PW6 PSO Jadhav, who registered crime on report lodged by father on 21.01.2003.

PW7 ASI Swamy, who conducted spot panchanama, recorded statements and handed over further investigation to another police officer.

PW8 PSI Chaus was the Investigating Officer who chargesheeted accused.

ANALYSIS

6. Prosecution asserts that victim was around 14 years of age and hence a minor. In support of age, prosecution adduced evidence of

radiological opinion and secondly, Exhibit 27 i.e. school leaving certificate.

7. The Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, "Juvenile Justice Act") provides for age determination and it is no longer *res integra* that procedure prescribed in Juvenile Justice Act would not only apply to juvenile offenders, but the same also would apply to all victims of crime.

8. The Hon'ble Apex Court, in two landmark cases, i.e. in the case of ***Jarnail Singh v. State of Haryana*** AIR 2013 SC 3467 : MANU/SC/0626/2013 as well as recently in the case of ***P. Yuvaprakash v. State Rep. by Inspector of Police*** 2023 AIR 2023 SC 3525 : MANU/SC/0777/2023, dealt with the question pertaining to determination of age. The Hon'ble Apex Court has culled out three categories of evidence which are expected to be considered by a court while ascertaining the age.

In para 11 to 16 of ***P. Yuvaprakash*** (supra), the Hon'ble Apex Court has observed as under :

"11. Before discussing the merits of the contentions and evidence in this case, it is necessary to extract Section 34 of the POCSO Act which reads as follows:

> *"34. Procedure in case of commission of offence by child and determination of age by Special Court. –*
>
> *(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).*
>
> *(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.*
>
> *(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person."*

12. In view of Section 34 (1) of the POCSO Act, Section 94 of the JJ Act, 2015 becomes relevant, and applicable. That provision is extracted below:

> *"94. Presumption and determination of age. –*
>
> *(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with*

the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act.

The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

> *"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;*
>
> *(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
>
> *(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".*

14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of

birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in Rishipal Singh Solanki vs. State of Uttar Pradesh & Ors., MANU/SC/2081/2021: 2021 (12) SCR 502 this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:

> *"20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, 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. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year."

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2) of the JJ Act, this court held in Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors MANU/SC/0967/2019 : (2019) 9 SCR 735 that:

"Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the 2021 concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category."

In ***Jarnail Singh*** (supra), the Hon'ble Apex Court elaborated relevant observations in para 20 and the same are borrowed and reproduced as under :

> *"20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:*
>
> > ***12. Procedure to be followed in determination of Age.--***
> >
> > *(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*
> >
> > *(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and sent him to the observation home or in jail.*
> >
> > *(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 certificates, 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 recorded 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.

(4) if the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in Sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an

option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

Similarly, in the case of ***P. Yuvaprakash*** (supra), the Hon'ble Apex court reiterated and echoed the views that the same parameters for age determination as are prescribed in Juvenile Justice Act, would equally apply for determination of age of victim of sexual offences also.

9. Keeping above legal requirements and settled legal principles in mind, here, victim was produced before a gynecologist i.e. PW1 for physical examination and this medical expert speaks that she received report of radiological examination from Civil Hospital, Latur and on its basis, in her opinion, age of the victim was between 17 to 18 years. Her such testimony shows that she herself has not carried out radiological examination or ossification test. In view of above discussed law, confirmed by the Hon'ble Apex Court, radiological opinion falls at the last rung and only in absence of previous two types of evidence, i.e. Birth Certificate or matriculation certificate or extract of admission in first school of the victim, only then courts are expected to appreciate radiological opinion. Here, during investigation, above document Exhibit 27 seems to have been gathered, but it is apparently a school leaving certificate. Though the date of birth is reflected over it, the source from which the date has been recorded is not reflected therein. Victim is shown to have left school in 7th standard. There is no evidence to show that the said school is the only school or the first school wherein she was admitted in 1st standard. Therefore, in the considered opinion of this Court such piece of evidence on the point of age of victim has no probative or evidentiary value. Law is fairly settled that graver the offence, stricter

is the requirement of proof. Burden is on prosecution to establish age of the victim either by placing birth certificate issued by the local body, or the first school wherein victim got admitted. Such type of evidence apparently has not been gathered by investigating machinery. Above all, the authority who issued school leaving certificate is also not examined. Therefore, in the light of above discussion, there is no legally acceptable evidence on the point of age of victim. Neither father nor the victim in their evidence in this case have testified about date of birth while they were examined in the witness box. Consequently, there is no concrete evidence or proof of age.

10. Now, it is to be seen whether offences under Sections 363, 366 and 376 of IPC are proved beyond reasonable doubt.

11. Section 363 IPC contemplates removal of minor from lawful custody of guardian/s without their consent. Here, crucial evidence on this point is that of father and victim. Father PW3 who is examined at Exhibit 23, deposed in para 2 that, "*About 8-9 months ago, I was at village Karwandi. Sunita went away with son of Coneja.*" Victim PW4 in her substantive evidence i.e. examination-in-chief para 1 itself testified that, "*About 10 months ago, I was at Sirsi-Dhanora. I was*

*engaged on labour work for cutting sugarcane in the field. Alongwith Ramesh, "**on my own**" I went to Pune".* Such are the versions of father and victim. Therefore, when the victim on her own went and even when father confirms his daughter going with accused, here, in view of age of victim not being proved and it not being proved beyond reasonable doubt that she was minor, the essential ingredients like "taking" or "enticing" also being missing, said charge cannot be attracted. Victim explicitly deposed about she, on her own, going with accused. Resultantly, imputations of kidnapping cannot be levelled against accused-appellant.

12. Next charge for which guilt is recorded is Section 366 IPC. For attracting said charge, it is essential on the part of prosecution to establish that accused induced the girl who was minor and the inducement was with sole intention that she may be, or knowing that she would be, forced or seduced to have illicit intercourse.

Here, going by the testimony of victim, her testimony is absolutely silent on above legal requirements. There is nothing to suggest enticement or inducement at the end of accused, either in her testimony or her father's testimony. The Hon'ble Apex Court in the recent judgment of ***Mafat Lal and another v State of Rajasthan*** 2022

LiveLaw (SC) 362 propounded law on above section by observing that, *"Section 366 would come into play only when there is forceful compulsion of marriage, by kidnapping or by inducing. This offence would not be made out once the abductee has clearly stated that she was in love with the accused and that she left her home on account of the disturbing circumstances at her parental home as the said relationship was not acceptable to her father and that she married the accused on her own free will without any influence being exercised by the accused".*

Here also, facts are almost identical. Victim in her evidence has not stated that there was any taking away against her will or wish. Rather, she deposed that she, on her own, went with him to Pune. She further deposed that during stay of seven days, accused had intercourse to which she had consented. Taking her such testimony into consideration, it is unsafe to apply the said charge.

13. Similarly, though there is charge of Section 376 IPC, in view of above testimony of victim, and here, when prosecution has not proved that at the time of sexual intercourse which was by her consent, she was below 18 years of age, charge under Section 376 IPC also collapses.

14. Perused the judgment under challenge. Learned trial Judge has apparently relied on mere school leaving certificate, which has no legal sanctity. Proof about age which is repeatedly insisted by Hon'ble Apex Court, i.e. birth certificate or school admission extract of the first school, not being available, consideration of Exhibit 27 was erroneous for determination of age. Even learned trial Judge failed to appreciate that, victim expressed her consent and admitted about she, on her own, accompanying him. Offences under Sections 363 and 366 were also not made out. Resultantly, the conclusion drawn being in absence of essential ingredients and contrary to law, interference at the hands of this Court is called for as fundamental burden of proving the case beyond reasonable doubt is not discharged by prosecution. Hence, I proceed to pass the following order :

ORDER

I. The appeal is allowed.

II. The conviction awarded to the appellant Ramesh s/o Narayan Rathod by learned Sessions Judge, Latur in Sessions Case No. 35 of 2003 under Sections 363, 366, 376 of IPC on 08.12.2003 stands quashed and set aside.

III. The appellant stands acquitted of the offence punishable under Sections 363, 366, 376 of IPC.

IV. The bail bonds of the appellant stand cancelled.

V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.

[ABHAY S. WAGHWASE, J.]

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Case Brief & MCQs on "Ramesh S/O Narayan Rathod v. State of Maharashtra" (2024:BHC-AUG:25876) is available in the eBook:

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