STATE OF MAHARASHTRA

v.

GAJANAN @ HEMANT JANARDHAN WANKHEDE

(Criminal Appeal No. 492 of 2001)

JULY 9, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Penal Code, 1860 – ss.363, 366 and 376 – Conviction and sentence under – Set aside by High Court in appeal, on ground that there was consent of the victim girl and she was more than 16 years of age – Held: Conclusion of High Court about the date of birth of the victim was presumptuous – There was no analysis of the evidence on record and abrupt conclusions, mostly based on surmises, were arrived at by the High Court – Accused directed to serve the remainder sentence.

The Trial Court convicted Respondent under ss. 363, 366 and 376 of the IPC and sentenced him to undergo RI for 5, 4 and 3 years respectively for the three offences. The victim girl was educated upto 7th standard in a Municipal school. In the school leaving certificate, her date of birth was indicated as 4-6-1976 and the incident of her kidnapping by Respondent allegedly took place on 21-4-1991.

The High Court, however, acquitted Respondent holding that there was consent of the victim girl and she was more than 16 years of age. The High Court held that since the medical evidence showed that the age of the girl was above 14 years and below 16 years with an error margin of one year, the school leaving certificate and the school register were of no consequence.

In appeal to this Court, it was submitted by the State that the conclusion of the High Court about the date of birth of the victim was presumptuous.

A Allowing the appeal, the Court

HELD:1.1. The High Court held that the correct date of birth is not recorded and only the school leaving certificate indicated that the date of birth of the victim was 4.6.1976. The evidence of the witnesses indicated that the B entry was made on the basis of the horoscope. The High Court held that since the horoscope was not produced the prosecution has failed to establish its case. No reason has been indicated by the High Court to discard the documentary evidence produced i.e. school leaving cer- C tificate and the school register. The Headmaster of the school also deposed and produced the records before the trial Court. The High Court held that the entry in the school register was not in the handwriting of the Headmaster and he could not have deposed about the date of D birth. There was no basis for the High Court to conclude that the entry cannot be taken to be above suspicion. [Para 5] [546-G,H; 547-A,B & C]

1.2. On the basis of the evidence of the Headmaster and the original school leaving certificate and the school E register which were produced, the High Court came to abrupt conclusion that normally for various reasons the guardians understate the age of their children at the time of admission in the school. There was no material or basis for coming to this conclusion. The High Court in the F absence of any evidence to the contrary should not have come to hold that the date of birth of the prosecutrix was not established and the school leaving certificate and the school register are not conclusive. No question was put to the victim in cross examination about the date of birth. G The High Court also noted that no document was produced at the time of admission and a horoscope was purportedly produced. There is no requirement that at the time of admission documents are to be produced as regards the age of the student. Practically, there was no H analysis of the evidence on record and abrupt conclu-

sions, mostly based on surmises, were arrived at. The inevitable conclusion is that the judgment of the High Court is unsustainable and deserves to be set aside. The Respondent shall surrender to custody to serve the remainder of the sentences. [Para 5] [547-C,D,E,F & G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 492 of 2001

From the final Judgment and Order dated 30.3.2000 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Crl. Appeal No. 355 of 1994

Ravindra Keshavrao Adsure for the Appellant.

Manish Patale and V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of a learned Single Judge of the Bombay High Court, Nagpur Bench directing acquittal of the respondent by setting aside the conviction as recorded by the learned 2nd Additional Sessions Judge, Amravati. The respondent was convicted for offence punishable under Sections 363, 366 and 376 of the Indian Penal Code, 1860 (in short the 'IPC') and was sentenced to undergo RI for 5 years, 4 years and 3 years respectively for the three offences alongwith fine and default stipulation.

2. Background facts in a nutshell are as follows:

Prosecutrix, who is the daughter of complainant Ambaprasad Mishra, was residing with the family in Mangilal plots, Amravati. The accused-respondent was also the resident of the same locality. The prosecutrix was educated upto 7th standard and she had taken her education in Municipal School No.5 at Amravati. Her date of birth recorded in official documents was 4.6.1976 and the incident of kidnapping her by the accused took place on 21.4.1991. As such she was aged 14 years, 10 months and 17 days at the time of the incident. On 21.4.1991,

A the accused sent a message to prosecutrix through one Sachin and called her to come with a bag at a place near her school. Accordingly, the prosecutrix went at that place. Then the accused, prosecutrix and Sachin went by an autorickshaw to Chinchfail area of Amravati where the grandmother of the accused was B residing. They reached there at about 1.00 p.m. The accused took his suitcase. Then the accused and prosecutrix who were accompanied by Sachin, arrived by an autorickshaw at Badnera Railway station. Sachin went back to Amravati from Badnera Railway Station and the accused and prosecutrix arrived at C Nagpur by train. They reached Nagpur at about 5.00 p.m. Therefrom they went to Jhansi. They reached Jhansi early in the morning, i.e. at about 4.00 to 5.00 a.m. At Jhansi, they went to the house of the sister of the accused namely Lata. They stayed in one separate room in the house of accused's sister for about 8 D to 10 days. During this period, they used to sleep in that room and the accused practically on every night performed sexual intercourse with prosecutrix. Then from Jhansi, the accused and prosecutrix arrived at Bichona and stayed there in the house of one Rajput for about 3-4 days and the accused performed sexual intercourse with the prosecutrix twice. Then from Bichona, both E of them came to Mundai. They resided at Mundai in the house of one Narmadaprasad for about one and half months. From Mundai, the accused and prosecutrix arrived at Chinchkhed via Nagpur and Amravati and stayed in the house of the sister of the accused for about 4-5 days. Again from Chinchkhed, they F went to Nagpur and stayed in the house of one friend of the accused for about 20 days. The accused was working as a labourer during this period. The accused and the prosecutrix then again came back to Chinchkhed, stayed there for one day and then went to Katsoor. They stayed at Katsoor at the house G of maternal aunt of the accused for about 4-5 days. Then they came to Paratwada and therefrom went to village Talegaon where they stayed with the aunt of the accused. Then from Talegaon, they went to Delhi. But since the address of the person within whom they were going to stay at that place was not H available, they returned back to Talegaon. During all these days,

the accused performed sexual intercourse with the prosecutrix. While at Talegaon, the father of the prosecutrix and Rajapeth (Amravati) Police arrived there. The statement of the prosecutrix was recorded and she was taken back.

Meanwhile, immediately on the next day of the occurrence, i.e. 22.4.1991, the father of the prosecutrix on coming to know the fact about kidnapping his daughter by the accused, had lodged the report in Police Station Rajapeth, Amravati, on the strength of which the offence under Sections 363 and 366 IPC was registered as Crime No.184 of 1991. Then on 28.8.1991, the prosecutrix and the accused were traced at Talegaon and accused was arrested. Prosecutrix was referred to Women's Hospital, Amravati, for her medical examination. The Medical Officer concerned examined her and found that her hymen was ruptured, she was habituated to sexual intercourse and she was carrying pregnancy of 4 to 6 weeks. On arrest of the accused, he was also referred for medical examination and the Medical Officer concerned opined that he was capable of committing sexual intercourse. The ossification test of the girl was also carried out and the opinion of the concerned Medical Officer was that the girl was aged about 14 to 16 years. The radiological examination of the accused was also performed wherein it was found that he was aged about 20 years. The necessary investigation was conducted and on completion of the same the accused stood charge sheeted for the offences punishable under Sections 363, 366 and 376 IPC.

The case was committed to the Court of Session. Since the respondent pleaded innocence and false implication, the trial was held.

The defence of the accused as it is revealed from his examination under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') is of total denial. He denied to have taken prosecutrix Sharmila and to have committed sexual intercourse with her. It is the contention of the accused that prosecutrix had love affairs with him and her parents came to know

about the same. They were about to perform her marriage forcibly with somebody else. They did not like the accused as he belonged to inferior caste, whereas they were belonging to superior caste. So, they involved the accused falsely. Alternatively, it was pleaded that whatever was done had consent of the prosecutrix.

The trial Court found that the prosecutrix was aged about 16 years and, therefore, the consent of the prosecutrix was of no consequence. The High Court held that there was consent and additionally, the girl was more than 16 years of age. With reference to the evidence of a doctor (PW-9) it was held that since the medical evidence shows that the age of the girl was above 14 years and below 16 years with an error margin of one year, the school leaving certificate and the school register were of no consequence. Accordingly, it directed acquittal as noted above.

3. Learned counsel for the appellant-State submitted that the conclusions of the High Court are totally erroneous. The High Court came to presumptuous conclusion about the date of birth of the victim.

4. Learned counsel for the respondent on the other hand submitted that the medical evidence clearly rules out the authenticity of the documentary evidence and in any event the order of acquittal as has been passed and the view of the learned Single Judge cannot be termed as perverse.

5. Undisputedly, the school records revealed the date of birth of the victim to be 4.6.1976. This was the position as indicated in the school leaving certificate (Exh.25) and the school register. The High Court noted that in the school register the date of birth was indicated to be 4.6.1976. It also noticed that the father of the victim stated that the girl was 14 years old. The High Court held that the correct date of birth is not recorded and only the school leaving certificate indicated that the date of birth of the victim was 4.6.1976. The evidence of the witnesses

indicated that the entry was made on the basis of the horoscope. The High Court held that since the horoscope was not produced the prosecution has failed to establish its case. No reason has been indicated by the High Court to discard the documentary evidence produced i.e. school leaving certificate and the school register. The Headmaster of the school also deposed and produced the records before the trial Court. The High Court held that the entry in the school register was not in the handwriting of the Headmaster and he could not have deposed about the date of birth. There was no basis for the High Court to conclude that the entry cannot be taken to be above suspicion. On the basis of the evidence of the Headmaster and the original school leaving certificate and the school register which were produced the High Court came to abrupt conclusion that normally for various reasons the guardians to understate the age of their children at the time of admission in the school. There was no material or basis for coming to this conclusion. The High Court in the absence of any evidence to the contrary should not have come to hold that the date of birth of the prosecutrix was not established and the school leaving certificate and the school register are not conclusive. Interestingly, no question was put to the victim in cross examination about the date of birth. The High Court also noted that no document was produced at the time of admission and a horoscope was purportedly produced. There is no requirement that at the time of admission documents are to be produced as regards the age of the student. Practically, there was no analysis of the evidence on record and abrupt conclusions, mostly based on surmises, were arrived at. The inevitable conclusion is that the judgment of the High Court is unsustainable, deserves to be set aside which we direct. The respondent shall surrender to custody to serve the remainder of the sentences.

6. The appeal is allowed.

B.B.B. Appeal allowed.