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Bharat Vs. State of Maharashtra

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Court : Mumbai Nagpur

Decided On : Feb-16-2015

Judge : S.B. Shukre

Appeal No. : Criminal Appeal No. 123 of 1999

Appellant : Bharat

Respondent : State of Maharashtra

Advocate for Pet/Ap. : Shri. D.A. Sonwane

Judgement :

Oral Judgment :

1. This appeal is preferred against the judgment and order passed on 06.4.1999 in Sessions Trial No. 29 of 1992, thereby convicting the appellant for the offence punishable under Section 363 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default to suffer R.I. for three months.

2. Briefly stated, facts of the case are as under:

(a) The incident, in this case, had taken place in the early morning of 09.11.1991. At that time, the prosecutrix was residing with her parents and brothers at village Yermal. The appellant was also residing in the same village. Since he had

developed love affair with the prosecutrix, it was decided by them that he would come to her house in the morning of 9.11.1991 and take her to Adilabad. As per the plan, the appellant arrived outside the house of the prosecutrix and made a sound call in the language already decided by the two. The prosecutrix responded. She came outside the house and started going along with the appellant.

(b) It is alleged that the appellant took the prosecutrix to some agricultural field where he had sexual intercourse with her. Then the appellant took the prosecutrix to village Tivsala where both, the appellant and the proseuctrix, stayed at the house of maternal uncle of the appellant. There also, it is alleged, the appellant had sexual intercourse with the prosecutrix. Then, the appellant took the prosecutrix to Akola Bajar and stayed there along with her in the house of his cousin for some time. Then the appellant took the prosecutrix to village Parva, where also both of them stayed in the house of cousin of the appellant.

(c) On the next day, the appellant took the prosecutrix on foot to Adilabad and at Adilabad both of them worked as labourers in one Ginning Factory. Both of them stayed in a hut provided by the Ginning Factory where also the appellant used to perform sexual intercourse with the prosecutrix, as alleged. Some time after, the appellant brought the prosecutrix back to village Yermal and kept her in his house.

(d) After taking away of the prosecutrix by the appellant, a written report had been lodged by the brother of the prosecutrix. As the parents of the prosecutrix learnt about the return of the prosecutrix and staying in the house of brother of the appellant, the brother of the prosecutrix went to the police station and brought police personnel along with him to the house of the appellant. The appellant and the prosecutrix, both, were taken to the police station. Statement of prosecutrix was recorded and offences punishable under Sections 363 and 366 of Indian Penal Code were registered against the appellant. Medical examinations of both, appellant and the prosecutrix, were got conducted. Spot panchanama was prepared. Statements of witnesses were recorded. After completion of investigation, charge-sheet was filed against the appellant.

3. Charge under Sections 363, 366 and 376 of Indian Penal Code was framed against the appellant, to which he pleaded not guilty and, therefore, was tried by

the learned Additional Sessions Judge.

4. On merits of the case, the learned additional Sessions Judge found that offences under Sections 366 and 376 of Indian Penal Code were not proved but found that offence under Section 363 of Indian Penal Code was proved. Therefore, by the judgment and order dated 06.4.1999 the learned Additional Sessions Judge convicted and sentenced the appellant for the offence punishable under Section 363 of Indian Penal Code by awarding sentence of rigorous imprisonment for one year and also fine of Rs.1,000/-, together with default sentence of three months' rigorous imprisonment. Not satisfied with the same, the appellant is before this Court in this appeal.

5. I have heard Shri D.A. Sonwane, learned counsel for the appellant and Shri Bangadkar, learned A.P.P., for the State. I have carefully gone through the judgment and order and also the record of the case.

6. Learned counsel for the appellant submits that in this case no evidence in the shape of age of prosecutrix has been brought on record by the prosecution and the learned Additional Sessions Judge has, on the basis of surmises, wrongly concluded that the age of the prosecutrix was 13 years, well below the legal age of 18 years, as envisaged under Section 361 of Indian Penal Code. He, therefore, submits that the appellant deserves to be acquitted of the offence punishable under Section 363 of Indian Penal Code.

7. On the other hand, learned A.P.P. submits that the learned Additional Sessions Judge has rightly considered the evidence of P.W.8 Raju Jadhav, who has issued the certificate (Ex.53) showing the date of birth of prosecutrix as 05.9.1976, together with the medical evidence as well as evidence of prosecutrix P.W.3 and brother of the prosecutrix P.W.2 Yuvraj and, as such, it cannot be said that the conclusion reached in this case by the learned Additional Sessions Judge is not arising from the evidence available on record.

8. On perusal of the impugned judgment and order and evidence available on record, I find that there is considerable force in the argument of learned counsel for the appellant and no merit in the argument of learned A.P.P.

9. It is seen from the impugned judgment and order that the learned Additional Sessions Judge has found that the prosecutrix was well below the legal age of 18 years, as envisaged under Section 361 of Indian Penal Code, by relying on the evidence- certificate issued vide Ex.53 showing the date of birth of prosecutrix as 5.9.1976 together with the medical certificate vide Ex.25 issued by P.W.7 Dr. Megha and the evidence of the prosecutrix P.W.3 Shobha and also the evidence of her brother P.W.2 Yuvraj, albeit wrongly ignoring the well settled principles of law.

10. It is well settled that in order to prove the date of birth of a person from the school certificate, entries taken in the school register must also be proved, especially when it is an admitted fact that the school certificate is issued on the basis of entries in the school register.

In this case, it is an admitted fact that the school certificate (Ex.53) has been issued by P.W.8 Raju Jadhav, the school Head Master, disclosing the date of birth of prosecutrix as 5.9.1976 on the basis of entries taken in the school register. It is also an admitted fact that P.W.8 Raju Jadhav was not present at the time of admission of prosecutrix to his school. It is also seen that the school register was never produced in evidence before the Court by the prosecution. When the entries in the school register were the basis for issuance of certificate vide Ex.53, it was incumbent upon the prosecution to have produced in evidence the extract of the entries from the school register and also to have produced the school register for perusal of the Court. Neither the extract of the school entries have been proved in evidence nor the school register was produced before the Court for its verification during the course of evidence of P.W.8 Raju Jadhav. P.W.8 Raju, admittedly, did not have any personal knowledge about the date of birth of the prosecutrix, or what was stated by her father or mother while admitting the prosecutrix in the school. Such failure of the prosecution to produce before the Court the most relevant evidence has led to non-proving of the school certificate (Ex.53) in accordance with law. Therefore, the contents of Ex.53 cannot be read in evidence and ought not to have been read in evidence by the learned Additional Sessions Judge. On this ground alone, I find that the conclusion reached by the learned Additional Sessions Judge is not sustainable in law and is the one as not arising

out of the evidence available on record.

11. In the case of medical evidence, certificate at Ex.25, issued by P.W.7 Dr.Megha, I find that in substantive evidence before the Court, she has no where stated about the age of the prosecutrix. It is only her medical certificate (Ex.25) which discloses her opinion as regards the age of the prosecutrix to be in the range of 14-16 years. But, in order to enable the Court to place reliance upon such an opinion, Dr.Megha ought to have stated before the Court as to what were the factors and the characteristics which made her to form an opinion about the age of the prosecutrix. In fact, in her oral evidence before the Court, this witness has no where stated anything about the age of the prosecutrix or her examining the prosecutrix from the view point of ascertaining her age nor has she said anything about particular physical features of prosecutrix which made her to writ in certificate (Ex.25), age of the prosecutrix. Therefore, no importance could have and ought to have been attached to such medical evidence.

12. No doubt, P.W.3 Shobha in her evidence before the Court has stated that on the date of her evidence, which was 23.2.1999, her age was about 22 years and that her such assertion has not been denied in any manner by the appellant. It is also a fact that the assertion of brother of prosecutrix, P.W.2 Yuvraj, before the Court that the prosecutrix was younger than him by about 4-5 years has not been denied in any manner by the appellant. But, it cannot be forgotten that evidence of a person about his or her own age is hear-say evidence. Same applies to the evidence of a sibling who is hardly 4 or 5 years old when his brother or sister is born as at this stage such a person does not ordinarily understand concept of time and calender and would know about date of birth of other sibling from his parents. Therefore, in such cases, It is only the evidence of the father or mother as regards the date of birth of a person which becomes relevant and admissible in law. It would then follow that something which is basically not admissible in law would not become admissible in law only because it has not been disputed or challenged by the other side. In this case, the father or mother of the prosecutrix has not been examined by the prosecution. Thus, there was no evidence of either of the parents as regards date of birth of the prosecutrix. If the basic evidence was absent, I do not understand as to how the evidence of the prosecutrix or her brother who was

about 4 to 5 years old at the time of her birth as regards her date of birth could have become admissible. The learned Additional Sessions Judge has not at all considered this legal aspect of the case and, therefore, has erroneously considered the evidence of the prosecutrix about her own age and also the evidence of her brother, who says that he was hardly 4-5 years older than the prosecutrix. It is a different matter if the age difference between the two siblings is of at least 7-8 years, as by the time one attains the age of 7 or 8 years, one is in a position to understand the concept of the calender and thus is capable of gaining personal knowledge about various events including births and deaths in the family.

13. In the circumstances, I find that the age of the prosecutrix in this case has not been proved in accordance with law. Then, what remains in this case is, as to whether or not by her own conduct, the prosecutrix displayed such attributes as to make one believe that she had attained age of sufficient maturity to understand the consequences of joining the company of the appellant. In this case, from the evidence of the prosecutrix, particularly the admissions given by her in the cross-examination that she herself had left the house and met the appellant at about 4 a.m. on 9.11.1991 outside the house and also the fact that although the prosecutrix was taken from one place to another by the appellant where she had sufficient opportunity to escape from the clutches of the appellant, she did not avail of those opportunities, would together show that the prosecutrix had voluntarily joined the company of the appellant and had attained sufficient maturity to understand the consequences of her going alongwith the appellant and voluntarily staying together with him. Therefore, I am of the view that the offence of kidnapping or taking away of the prosecutrix, who was below the age of 18 years, from the lawful guardianship of her parents is not proved beyond reasonable doubt by the prosecution and the benefit of doubt deserves to be given to the appellant. The learned Additional Sessions Judge having not considered the material aspect of the case has committed serious error of law and, therefore, interference in the findings recorded by the trial Court is necessary. In the result, I am of the view that the appeal deserves to be allowed.

14. Accordingly, the appeal is allowed. Impugned judgment and order are hereby quashed and set aside. Appellant is acquitted of the offence punishable under

Section 363 of Indian penal Code and is set free. Fine amount be refunded to him. Bail bonds of the appellant stand discharged.

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