

CASE NO.:
Appeal (crl.) 1112-1113 of 1999

PETITIONER:
Vishnu @ Undrya

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 24/11/2005

BENCH:
H.K. SEMA & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

H.K. SEMA, J

The sole appellant was put to trial under Section 376/366 IPC. He was convicted by the Trial Court and sentenced to two years R.I. on each count. He was also directed to pay a fine of Rs. 1000/- and in default further sentence of 3 months R.I. Aggrieved thereby, two appeals were preferred before the High Court. Appeal No. 147/84 was preferred by the accused against his conviction. Appeal No. 356/84 was preferred by the State for enhancement of the sentence. The High Court, by a common order, dismissed the appeal filed by the accused and allowed the appeal filed by the State. The sentence of the appellant was enhanced to 5 years R.I. and a fine of Rs. 1000/- and in default further R.I. for 3 months. Aggrieved thereby, the present appeals have been filed by special leave.

The factual matrix may be noted briefly:

The prosecutrix \026 Kumari Pushpa at the relevant time was residing with her parents Pandurang \026 PW-1 and Vimal \026 PW-13 at Khar Danda, Mumbai. The accused was known to the prosecutrix as they were residing in the same locality. The accused was also a friend of the maternal uncle of the prosecutrix. She used to visit her maternal uncle's house where she used to meet the accused. Pandurang, father of the prosecutrix was admitted at K.E.M. Hospital for treatment of his eyes. The prosecutrix used to take food and tea to the hospital for her father.

On 10th July, 1980, the prosecutrix had gone to the hospital at about 11.00 A.M. carrying food and tea for her father. She left the hospital at about 3.30 P.M. While she was coming out of the gate of the K.E.M. hospital, the accused who was a taxi driver met her at the gate and inquired as to where she was going. The prosecutrix told the accused that she was on her way to her residence. The accused told her that he had his own taxi and he would drop her at her residence at Danda. Upon such offer, the prosecutrix got into the taxi. When the taxi came to the Linking Road Junction, the accused told her that his wife was admitted in Nanawati Hospital and he would go and see his wife in the hospital and thereafter he would drop her at her residence. The accused then took the taxi to a small hotel representing that it was Nanawati Hospital. The accused took her inside the room of the hotel, bolted the room from inside and committed rape on her by threatening that in case of her shouting, she would be finished. Both of them came out of the hotel room and the accused dropped her home at 5.45 P.M. in his own taxi.

The prosecutrix reached home bleeding profusely from her private parts. After half an hour, she became unconscious. Her mother Vimal \026 PW-13 and her brother Eknath took her in a taxi to Bhabha Hospital. She was examined by Dr. Dilip Chaniary \026 PW-12 of Bhabha Hospital. After she regained consciousness at about 10.00 P.M. she narrated the incident to her mother that she was raped at about 5 P.M. and told that she was bleeding from her vagina since 5.30 P.M.

PW-15, S.I. Bagal, who was attached to Bandra Police Station was

intimated about the incident on telephone. PW-15, alongwith a Police Constable, reached Bhabha Hospital for inquiry. He contacted the prosecutrix in the ward. He also questioned her about the incident and recorded her statement. He also recorded the statements of her mother Vimal and brother Eknath. He further made inquiry about the age of the girl from the brother and mother of the prosecutrix. Thereafter, he went to the school where she studied last and collected the school leaving certificate from Khar Upper Municipal School on 11th July, 1980. PW-15 did not register any case presumably thinking that the age recorded in the school leaving certificate was more than 16 years and she was a consenting party to sex. He was of the view that there was not enough material to register a case. He also stated that he called the accused for further inquiry on 3-4 occasions but did not think it necessary to register the offence or to carry further investigations. The conduct of PW-15, S.I. Bagal has been commented upon and deprecated by both the Trial Court and the High Court, which we may refer at an appropriate stage, if need be.

May be for any reason, best known to him, PW-15, S.I. Bagal did not register the offence, but we are shocked to note that in a grievous offence like rape being reported to the police, the concerned police officer did not register the case despite the fact that the prosecutrix had categorically stated that the accused had forcible sexual intercourse with her which no doubt would lead to the losing of confidence of the public in the police establishment.

When the matter stood thus, an unexpected development had taken place. PW-5, Kashinath, a friend of the father of the prosecutrix informed Pandurang (PW-1) in the K.E.M. Hospital about the incident. He was shocked to hear the same and after confirming the same from his wife Vimal and daughter Pushpa, against the medical advice, he got himself discharged from the hospital on 9th September, 1980 and made an application dated 23rd September, 1980 to the Commissioner of Police, copies of which were also sent to the Prime Minister of India and the Chief Minister of the State. After receiving the application dated 23rd September, 1980, the Commissioner of Police forwarded the papers to A.C.P. Rodrigues who took away the investigations from S.I. Bagal and directed PW-14, S.I. Parab to re-investigate the matter.

During the course of investigation, S.I. Parab recorded the statements of the witnesses including the prosecutrix and her parents and collected relevant documents. It is revealed from the documents collected by him that Pushpa's (prosecutrix) date of birth was 29th November, 1964 and she was below 16 years of age at the time of commission of offence on 10.7.1980. The accused was arrested on 3rd November, 1980 and during interrogation, the accused took them to the Marwadi hotel at Juhu where the prosecutrix was taken by him. The panchanama was drawn vide Exh. 7. After close of the investigation, a prima facie case was established and a chargesheet against the accused under Sections 366/376 IPC and Section 57 of the Bombay Children Act was filed before the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Bombay. Thereafter, the case was committed to Sessions. Before the Sessions Court, the prosecution examined as many as 14 witnesses and led documentary evidence with regard to the establishment of the age of the prosecutrix and after the conclusion of the trial, the accused was convicted and sentenced as stated above.

We have heard Mr. U. U. Lalit, learned senior counsel for the appellant and Mr. Sushil Karanjkar, learned counsel for the respondent at length.

Before us the learned Senior counsel for the appellant strenuously urged that there are two date of births of the prosecutrix, one \026 29.11.1964 (recorded in the date of birth register of the Bombay Greater Municipal Corporation and register of Kashibai Hospital, Santa Cruz, Bombay, where Pushpa was born); and second \026 29.6.1963 (the date of birth recorded in the school leaving certificate of Khar Upper Municipal School) which have created a doubt and are capable of two opinions \026 one in favour of the accused and the other against the accused; the one in favour of the accused should be accepted and the accused be acquitted by giving him the benefit of doubt. He further contended that since the sexual intercourse is consensual, therefore, unless it is established that the prosecutrix is below the age of 16

years, the accused is not liable to be punished in view of the definition of 'rape' under Section 375 of IPC namely, clause sixthly. This submission deserves outright rejection.

The question whether the date of birth of the prosecutrix is 29th November, 1964 or 29th June, 1963 is no more in controversy.

The date of birth of the prosecutrix, as of 29.11.1964, has been recorded concurrently by both the Trial Court and the High Court on consideration of the evidence of PW-1, Pandurang, father of the prosecutrix and PW-13, Vimal, mother of the prosecutrix, corroborated by the age of the prosecutrix recorded in the date of birth register of Greater Bombay Municipal Corporation and the register of Kashibai Hospital, Santa Cruz, where the prosecutrix was born. The evidence of PW-1 and PW-13, father and mother of the prosecutrix supported by contemporaneous documents/registers produced by the prosecution like date of birth register in Bombay Municipal and the date of birth register in the hospital where the prosecutrix was born and the evidence of the doctor clearly establish that the prosecutrix was born on 29.11.1964. Therefore, this question need not detain us any longer in view of the observations of this Court in the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* AIR 1983 Supreme Court 753, this Court held at para 5 page SC- 755:

"A concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded."

The present is not a case of such a nature which would warrant our interference. That apart, what was recorded by the High Court is worthy to be noted. In paragraph 13, the High Court has noted as under:

"At the outset, it is required to be noted that the finding recorded by the trial court that Pushpa was less than 16 years of age on the date of the commission of the offence is not at all challenged by Mr. Samant."

Noticing the aforesaid observation of the High Court, this Court while issuing notice on 19.7.99, noted as under:

"Learned counsel for the petitioner contends that even though the counsel for the petitioner in the High Court did not challenge the age shown in the Birth Register, there are materials for indicating that the said date cannot be accepted as a correct one. He invited our attention to the date of birth shown in the School Leaving Certificate. According to the counsel if that is to be given credence the prosecutrix would be far above the age of 16 years on the date of occurrence. Question of consent will very much depend upon the exact date of birth of the prosecutrix. In the light of this we feel it necessary to examine the record."

(emphasis supplied)

It is because of that observation we allowed the learned counsel for the appellant to make submissions on the question of date of birth. We have also perused the entire records.

The school certificate which has been relied upon by the accused is marked Exh. 37, the translated copy of which reads:

"Khar-Danda Higher Secondary Marathi School

Birth date of ex-student of said school \026 Pushpala

Pandurang Satrange, as per school Register is twenty ninth June, Nineteen Sixty-three \026 29.6.1963.

Submitted dt. 11.7.80.

Sd/-
For Principal

Khar Danda Higher
Secondary Marathi
School."

On a bare perusal of the certificate, it is noticed that it is not an authenticated copy and no one has been examined to prove the age of the prosecutrix recorded in the school certificate.

PW-1, Pandurang is the father of the prosecutrix. He has stated that his daughter Pushpa (prosecutrix) was born on 29.11.1964. He has also stated that Pushpa was born at Kashibai Hospital, Santa Cruz, Bombay. This witness was subjected to lengthy cross-examination but his statement that the prosecutrix was born on 29.11.1964 remained unimpeached. In fact, in the cross-examination, this witness clarified that the date of birth given in the school was incorrect and he further clarified that the correct date of birth of Pushpa is 29.11.1964. It is a common knowledge that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. Therefore, we do not see any infirmity in the statement of the witness, who is the father of the prosecutrix, stating that the prosecutrix was born on 29.11.1964.

PW-13, Vimal is the mother of the prosecutrix. She has also stated that her daughter, Pushpa (prosecutrix) was born in Kashibai Hospital, Santa Cruz, Bombay on 29.11.1964. To prove this, the prosecution has examined Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santacruz (West), Mumbai. He has produced the registers for the year 1964. He has also produced the entry at Sr. No. 293, Exh. 18. The entry shows that Vimal \026 PW.13 gave birth to a female child on 29th November, 1964. The prosecution has also produced a Certificate of Birth Registry of Municipal Corporation of Greater Bombay which shows the registration of a female child of Pandurang \026 PW.1 and Vimal \026 PW-13 and the date of birth is shown as 29.11.1964. To prove this the prosecution has produced on record the birth register Book No. 24 of Municipal Corporation of Greater Bombay showing entries from 4th November, 1964 to 5th February, 1965. The entry at Sr. No. 542 dated 16th January, 1965 is in respect of the birth of the female child to Vimal and the birth date is shown as 29th November, 1964. These two unimpeachable documents clearly corroborate the statements of PW.1 and PW.13 in all material particulars that the prosecutrix was born on 29th November, 1964. Men may lie but the documents do not. These two unimpeachable documents clearly establish the fact that PW.4, Pushpa was born on 29th November, 1964. Therefore, she was below 16 years of age on 10.7.1980 and her consent, if any, is immaterial under clause sixthly of the definition of 'rape' under Section 375 IPC.

Mr. Lalit referred us to the evidence of Dr. Bhimrao \026 PW-10. Dr. Bhimrao was the medical officer, Police Hospital Nagpada, before whom the prosecutrix was produced on 3.11.80 for medical examination. According to him, she had fourteen teeth (7/7) in upper jaw and thirteen teeth in lower jaw. The doctor opined, among others, that her hymen showed old healed tears at 3-9 O'clock position. For the determination of the age of the prosecutrix, PW-10. - Dr. Bhimrao has stated as under:
"I x-rayed for ossification test. I took her x-rays of wrist, elbows and shoulder joint. Elbow joint is united which unite at the age of 13/14 years. The wrist joint is united which unites at the age of 16/17 yrs. The shoulder joint is united which unites at the age of 18 years. From physical findings and ossification test and secondary sex characteristics I am of the opinion that the age of the girl Pushpa was 18-19 years with error of margin 6 months on either side. From the finding of internal examination of external genitals I am of the opinion that the said girl

was subjected to sexual intercourse. Notes of examination prepared by me. It bears my signature and also of Dr. Gawane."

It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the medical officer is to assist the court as he is not a witness of fact and the evidence given by the medical officer is really of an advisory character and not binding on the witness of fact.

In the case of Madan Gopal Kakkad v. Naval Dubey and Anr. (1992) 3 SCC 204 this Court has considered a similar question and pointed out in paragraph 34 at page SCC 221 as under:

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

We are of the opinion that this contention of the counsel for the appellant will be of no assistance in the face of evidence of fact from the mouth of PW-1 father and PW-13 mother, well corroborated by the register of the date of birth of Bombay Greater Municipal Corporation and the evidence of Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santa Cruz (West), Mumbai, produced by him which shows that PW-4 Pushpa was born on 29.11.64.

In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.64, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school. Apart from this, as noticed earlier, the school certificate collected by PW-15 S.I. Bagal was not an authenticated document. No body was produced to prove the date of birth recorded in the school certificate. The date of birth recorded in the school certificate as 29.6.63 is, therefore, belied by the unimpeachable evidence of PWs.- 1 & 13 and contemporaneous documents like date of birth register of Greater Bombay Municipal Corporation and the register of the Nursing Home where the prosecutrix was born and proved by Dr. Shashikant Awasare, as noted above.

Besides aforesaid, looking into the statement of PW-4 Pushpa (prosecutrix), we are clearly of the view that the prosecutrix had been

ravished sexually by force and against her wishes. This is what the prosecutrix stated before the Court:

"I know accused Vishnu who is sitting in the dock.

Accused is residing in our locality. Accused used to visit my maternal uncle's place. P.W.3 Tulsidas is my maternal uncle. Two or three months prior to the incident my father was admitted in K.E.M. Hospital for the treatment of his eyes. I used to go to see my father at K.E.M. Hospital. I used to go to serve food and tea to my father at hospital. On 10/7/80 I reached the hospital at about 11 a.m. I served my father food and tea and I left hospital at about 3.30 p.m. Then I came to the gate of K.E.M. Hospital. Accused met me at gate. Accused asked me to where I was going. I told him I was going home. Then accused represented to me that he had got his own taxi and he also further represented that he would leave me at my residence at Danda. Then I sat with him in his taxi. We both were alone in the taxi. Accused was driving the taxi. We came to Linking Road Junction that time he was taking the taxi towards other side of Danda. I told him I was getting late then he represented to me that as his wife (my aunty) was in Nanawati Hospital, he would see her and drop me at my residence. I do not know the name of the wife of the accused. I refused to accompany him in the hospital, he told me that within 5 minutes he would leave me at my residence. I requested him to first drop me at Khar Danda. Accused drove taxi towards Juhu side.

Accused stopped the taxi near on chawl and represented to me that it was Nanawati Hospital. I also felt that it was hospital so I got down. Then he took me in one room. He closed the door of that room. He threatened me to finish if I shout. Then he made me lie down on the cot. He removed my skirt and underwear and had forcible sexual intercourse with me. He put his private part in my private part forcibly. He had a sexual intercourse with me against my consent. Then we came out of that hotel from that room. Then he dropped me at my residence at about 5.45 p.m. in his taxi."

This witness was subjected to lengthy cross-examination. The trend of the entire cross-examination is on the line of consensual sex, which has been denied by the prosecutrix.

The accused in Section 313 Cr.P.C. statement has completely denied that he had any sexual intercourse with the prosecutrix. Question No. 19 (page 154 of original record) was put to him about the statement of the prosecutrix regarding forcible intercourse with her on the fateful day, to which he replied, "This is false". Question No. 64 (page 167 of original record) was put to him as to whether he wished to say anything more in his defence, to which he replied, "I am innocent and falsely involved in this case." How he was falsely implicated has not been explained.

The statement of the prosecutrix, in our view, is quite natural, inspires confidence and merits acceptance. In the traditional non-permissive bounds of society of India, no girl or woman of self respect and dignity would depose falsely implicating somebody of ravishing her chastity by sacrificing and jeopardizing her future prospect of getting married with suitable match. Not only she would be sacrificing her future prospect of getting married and having family life, but also would invite the wrath of being ostracized and outcast from the society she belongs to and also from her family circle. From the statement of the prosecutrix, it is revealed that the accused induced her to a hotel by creating an impression that his wife was admitted in the hospital and that he would see her first and then drop the prosecutrix at her residence whereas, in fact, she was not admitted in the hospital. On the pretext of going to Nanawati hospital, he took her to a hotel, took her inside

a room, closed the door of the room, threatened her to finish her if she shouted and then forcibly ravished her sexually. In our view, a clear case of rape, as defined under Section 375 clause thirdly of IPC has been established against the accused. It is now a well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence.

We now say something about PW-15, S.I. Bagal, who refused to register an offence and on whom both the Trial Court and the High Court have commented, and in our view correctly. The Trial Court in paragraph 34 of the Judgment observed as under:

"It is a pathetic situation, when the citizen is confronted with the dishonest police officer. I am constrained to observe that the investigation done by S.I. Bagal P.W.15, is not only suspicious but also dishonest and out and out in favour of the accused. I am making this observation with responsibility. I have scrutinized carefully the 3 statements recorded by S.I. Bagal they are very cryptic and favourable to the accused. He did not care to ascertain the correct age of the victim girl, in a kidnapping and rape case. He did not register an offence against the accused. I fail to understand as to what interrogation of the accused he has done. He has obtained the signature on the statement of P.W.4 Pushpa and Eknath and right hand thumb impression on the statement of Smt. Vimal for what reason, I do not understand, on three statements. At least he could have registered the offence for kidnapping after taking extract of birth from the school. If he wanted to ascertain the correct date from her father Pandurang and he was aware that P.W.1 Pandurang was in K.E.M. Hospital and he wanted to obtain Hospital record, but he never cared to visit K.E.M. Hospital and to record the statement of Pandurang. He was trying to shift the burden on the Senior P.I. Sharma. Merely, he had produced these three statements in a routine manner before P.I. Sharma, on the next day. There is no guarantee that he had faithfully recorded statements of all these three witnesses. The reading of the three statements clearly indicates that those are completely in favour of the accused. The entire conduct of S.I. Bagal in the investigation has a smell of suspicion and dishonesty."

The High Court also observed about the conduct of PW-15, S.I. Bagal as under:

"In the present case, the investigation conducted by S.I. Bagal was completely defective and casual. He has not even registered the offence. The learned trial Judge has observed that the attitude of S.I. Bagal was completely dishonest and partial to the accused. On closer scrutiny of the record, we are inclined to agree with the observations of the learned Judge. We have reason to believe that S.I. Bagal deliberately refused to register the offence in order to help the accused at the costs of the prosecutrix. But despite this deficiency, the prosecution has successfully proved the offence of rape. We have, therefore, no hesitation in confirming the conviction recorded by the trial court under Section 376 of the IPC."

In the facts and circumstances of this case, the comments made by the Trial Court and the High Court about the manner in which S.I. Bagal conducted the first investigation are well justified.

In the premises aforesaid, we see no infirmity in the well-merited concurrent findings recorded by two courts below. The appeals are dismissed. The appellant is on bail. His bail bonds and surety stand cancelled. He is directed to be taken into custody forthwith to serve out the

remaining part of sentence. Compliance report should be sent to this Court within one month.

JUDIS