



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.211 OF 2001

The State of Maharashtra ... Appellants

Vs.

Hemant Ashokkumar Mittal
 R/o. 164/2, Lohgaon, Pune. ... Respondent/
 (Orig. Accused)

ALONG WITH
CRIMINAL APPEAL NO.215 OF 2001

The State of Maharashtra ... Appellants

Vs.

Hemant Ashokkumar Mittal
 R/o. 164/2, Lohgaon, Pune. ... Respondent
 (Orig. Accused)

ALONG WITH
CRIMINAL APPEAL NO.918 OF 2000

Hemant Ashokkumar Mittal
 R/o. 164/2, Lohgaon, Pune. ... Appellant
 (Orig. Accused)

Vs.

The State of Maharashtra ... Respondent

...

Ms. A.S. Pai, A.P.P. for the State.

Mr. Abhishek R. Avachat for the Accused.

AJN

**CORAM: PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.**

DATED : 22nd AUGUST, 2019.

ORAL JUDGMENT:- [Per: Shri Pradeep Nandrajog, C.J.]

1. Charged for having committed offences punishable under Sections 363, 366-A and 376 IPC, the Accused has been acquitted for the offence punishable under Section 376 IPC and convicted for the offence punishable under Section 363 and Section 366-A IPC. He has been sentenced to undergo rigorous imprisonment for a period of one year and pay fine in sum of ₹ 200/-, in default, to undergo simple imprisonment for 15 days for the offence under Section 363 and to undergo rigorous imprisonment for a period of one year and pay fine in sum of ₹ 200/-, in default, to undergo simple imprisonment for a period of 15 days for the offence under Section 366-A IPC.

2. Vide Criminal Appeal No.211 of 2001, the State seeks enhancement of the sentence imposed on the Accused for his conviction for offence punishable under Sections 363 and 366-A IPC. Vide Appeal No.215 of 2001, the State seeks conviction of the Accused for the offence punishable under Section 376 IPC. Vide Criminal Appeal No.918 of 2000, the Accused seeks his acquittal.

3. We have heard learned counsel for the parties and have perused the trial court record.

AJN

4. Obviously everything would turn on the testimony of the prosecutrix, who has been examined as PW-2, for the reasons in Appeal, learned counsel for the accused relies upon the celebrated decision of the Supreme Court reported in AIR 1965 SC 942 *S. Varadarajan v. State of Madras & Anr.* It was a case of love affair between the Accused and the prosecutrix, who was a minor. She had accompanied the accused smitten by love. With reference to the word 'takes' in Section 361 IPC, which defines kidnapping from lawful guardianship, the Supreme Court held that in such cases, there would be no enticement and thus where love leads the girl to run away from her parental house would not attract the offence of kidnapping from lawful guardianship.

5. The testimony of the prosecutrix is to the effect that she was a student of 9th standard in Air Force School. Two boys named Hemant Shinde and Amit Patil would try to woo her. She informed her father, who told her not to worry. The Accused met her in January, 1997. He started threatening her to have friendship with her. Initially she avoided but later on responded to his calls. On the fatal day when she eloped with the Accused on 27th August, 1997, when her brother was asleep, as told by the Accused, she threw a bag containing her clothes outside the compound wall of the house and took ₹ 600/- with her. The Accused was waiting in an auto-rickshaw outside her house and took her to the Bus Stand in Pune. They proceeded to Shirdi and spent a night in the lodge. They visited Sai Temple the next day and returned to the lodge. The accused brought food. They took meals and shifted to another lodge.

AJN

A boy named Gorakhnath informed that he would provide a job and living accommodation. On 29th August, 1997, accompanied by Gorakhnath she and the Accused left the lodge. They hired cycles. They reached a farm where sugarcane was grown. Gorakhnath informed them that there was a possibility of police visiting and they left the farm. Taking meals at a Dhaba they stayed in Jangli Maharaj Ashram. From there they shifted to a lodge. In the lodge, the Accused forced her to remove her clothes and had sex with her. On 31st August, 1997, after the breakfast, they left the lodge to visit a temple and on return she found her mother and relatives, who took her to Pune. She was examined on 02nd September, 1997 by the doctor.

6. The reasons to acquit the Accused for the offence punishable under Section 376 IPC is the fact that during cross-examination, she was confronted with her statement recorded by the Investigating Officer under Section 161 Cr.P.C. in which she had not stated that on the intervening night of 30th and 31st August, 1997, the Accused had forcible sexual intercourse with her.

7. As deposed to by the prosecutrix, she was examined by Dr. Kavita, PW-3, a Medical Practitioner on 02nd September, 1997, who gave the report (Ex-23) and as deposed to by the witness and as recorded in Ex-23, the hymn was found torn with inflammation and tenderness, suggesting sexual intercourse in the recent past.

8. This aspect has obviously been overlooked by the Court of

AJN

Sessions.

9. The testimony of the prosecutrix and her statement recorded under Section 161 Cr.P.C. have to be evaluated by the Court in the context of a young girl eloping with a boy, with whom she was in love. Trapped by police when her parents lodged the complaint she had a feeling of love and affection for the boy and caught hands down would only state to the police facts of her running away with the boy *sans* such acts committed by them which would attract penal laws. The pressure of the parents versus the love for the boy would make her speak half truth. But when her custody was restored to the parent and as time passed by, she deposed the full truth.

10. Therefore, it has to be held that the Accused had sex with the prosecutrix with her consent, which would be irrelevant and has to be ignored for the reasons at the time of the incident the age of the prosecutrix was 14 years.

11. This will require Criminal Appeal No.215 of 2001 filed by the State to be allowed. Acquittal of the accused for offence under Section 376 IPC is liable to be set aside and he is liable to be convicted for the offence punishable under Section 376 IPC. But at the same time, keeping in view the decision of the Supreme Court in S. Varadarajan, (supra), the Accused would be entitled to be acquitted for the offence punishable under Sections 363 and 366-A IPC.

AJN

12. At the time when the Accused and the prosecutrix were in love and did the act which, to the misfortune of the Accused, attracted the penal laws, his age was 16 years and 2 months. The Juvenile Justice (Care and Protection of Children) Act, 2010 followed by the Act of 2015 had not come into force. Under the two Acts, the age of juvenility was enhanced from 16 years to 18 years. In the decision reported as (2009) 13 SCC 211 Hari Ram vs. State of Rajasthan & Anr., even in pending matters before the Trial Court or in the Appeal, the benefit of the said Acts has to be accorded to the Accused and thus deciding the three appeals today, it would be our duty to extend the benefit of Juvenile Justice Act, 2010 and 2015 to the Accused. As per clause (g) of sub-section (1) of Section 18 of the Juvenile Justice Act, the Accused can, at best, be directed to be sent to the Special Home for such period not exceeding three years so that the Accused can be reformed. It would be futile, therefore, to pass an order as contemplated by law for the reasons as of the year 2019, the age of the Accused is 38 years.

13. Thus, Criminal Appeal No.211 of 2001 filed by the State is dismissed. Criminal Appeal No.918 of 2000 filed by the accused is allowed. His conviction and sentence imposed for the offences punishable under Sections 363 and 366-A IPC are set aside. Criminal Appeal No.215 of 2001 filed by the State is allowed by setting aside the acquittal of the Accused for the offence punishable under Section 376 IPC. He is convicted for the said offence but we impose no sentence and do not direct the Accused to be sent to a Special Home to be kept for any

AJN

period inasmuch since the object of law is to reform a juvenile accused. As of today the accused is no longer a juvenile but the dichotomy would remain. His conviction will have to be treated with reference to the fact that he was a juvenile when the offence was committed. Thus, no sentence is imposed upon him for the said offence. The three appeals are disposed of.

(SMT. BHARATI H. DANGRE, J.)

(CHIEF JUSTICE)

AJN