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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 115 of 2013.
IN
SESSIONS CASE No. 147 of 2009.

Siddhivinayak Moreshwar Gawade,]
age about 26 years, Having address at]
Yusuf Teli Chawl, Room No.2, Lokmanya]
Tilak Nagar, Poisar Gymkhana, Borsa Road,
Kandivali West, Mumbai 400 067]
in judicial custody at Kolhapur]
Central Jail.]..APPELLANT.
(Orig. Accused)

Versus.

State of Maharashtra]
At the instance of Malad]..RESPONDENT.
Police Station, CR No. 274/2009](Orig. Complainant)

Mr M.M. Khokawala a/with Ms Megha Puralkar for the
Appellant.
Mrs P.P. Bhosale APP for the State.

CORAM : A.R.JOSHI, J

DATE : 17th JUNE, 2015

ORAL JUDGMENT

1) Heard rival arguments on this appeal which is taken
up for final hearing as the application for bail during the

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pendency of the appeal was rejected by this Court when the appeal was admitted.

2) Present appellant was convicted for offence under sections 363, 365 and 376 of IPC. For the first two counts, he was sentenced to suffer RI for seven years each and to pay a fine of Rs.5000/- each. For the third count, he was sentenced to suffer RI for ten years and to pay a fine of Rs.5000/-. Being aggrieved by the said judgment and order passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No. 147 of 2009 passed on 17th December, 2012, the appellant has preferred this appeal.

3) The case of the prosecution, in nut-shell, can be mentioned in order to have proper perspective of the matter and to decide the appeal in the light of the evidence brought before the trial Court as under:

4) The case of the prosecution is that the prosecutrix, then aged about 17/18 years and who was a college going girl, was taken from her college premises by the present appellant and his other 2/3 friends. She was taken in a Qualis vehicle in

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the afternoon of 3/7/2009 and was taken to Sawantwadi at the native place of the present appellant where she was compelled to stay in an isolated room away from the main house and on the night there was sexual assault and forcible sexual intercourse on her without her consent and against her will. On the next day, the prosecutrix pretended to go for easing herself and that time she got the opportunity to flee away from the place and could manage to catch one ST bus and could reach Sawantwadi Railway Station. At the railway station the prosecutrix initially thought of returning back to Mumbai where she was staying and from where she was taken by the appellant. However, after knowing that the train for going to Mumbai was late on that evening she thought it fit to inform the incident occurred with her to one lady constable, then present at the platform. She narrated the incident to the said lady police constable. Thereafter, the constable took prosecutrix to the police station and necessary information and messages were passed on to Malad, Mumbai where by that time Malad police were already seized of the complaint lodged by the father of the

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victim regarding missing of his daughter. It is also the case of the prosecution that the present appellant then happened to be at the Sawantwadi Railway Station platform in search of the prosecutrix and he was identified by the police and was apprehended. The prosecutrix and the appellant were brought to Mumbai by Malad Police party, accompanied by the complainant, father of the prosecutrix who had reached Sawantwadi on receiving the information.

5) It is also the case of the prosecution that prior to coming to Mumbai the spot panchnama was conducted regarding the incident of forcible sexual intercourse, as disclosed by the prosecutrix and during the said panchnama the blood stained bed-sheets were seized.

6) The investigation was carried out by Malad Police Station and on completion of investigation and after obtaining reports of CA and after getting the prosecutrix and the present appellant medically examined and on obtaining their medical certificates, a charge-sheet was filed and the relevant charges were framed. At this juncture, it must be mentioned that the

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charge was framed by the Assistant Sessions Judge on 19th March, 2010. Thereafter, the matter was started for recording of evidence. Though the evidence of PW 1 was over on 23rd August, 2010 recorded by Ad hoc Additional Sessions Judge, subsequently the examination-in-chief of PW 2, prosecutrix was recorded by 3rd Ad hoc Assistant Sessions Judge, Dindoshi, Mumbai on 26th September, 2011. But, thereafter, cross-examination of PW 2 and evidence of other witnesses was recorded by Additional Sessions Judge. These details are mentioned regarding intermittent recording of evidence of PW 2 by Assistant Sessions Judge for the reason that during the arguments learned counsel for the appellant submitted that even the recording of the evidence by the Assistant Sessions Judge in the matter of offences which attract the punishment for more than ten years or life imprisonment is not contemplated by the Cr.P.C. and in fact it vitiates the trial and it is specified in the provisions of section 28 of Cr.P.C. This aspect shall be dealt in detail appropriately hereunder :

7) During the trial, total six witnesses were examined.

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PW 1 Hitesh Trivedi is the first informant, father of the prosecutrix. Though the opportunities were given for his cross-examination, he was not cross-examined and his evidence as to lodging of the missing complaint and subsequently lodging of the FIR against the present appellant remained unchallenged. The main substantive evidence is that of PW 2 prosecutrix and much reliance was placed by the trial Court on her evidence coming to the conclusion of establishment of the charges against the appellant. PW 3 is the panch witness so far as the recovery of bed-sheets from the house of the appellant at Sawantwadi. However, this pancha has turned hostile and did not support the case of the prosecution and it is not certain from his evidence that whether one bed-sheet or two bed-sheets were seized under the said panchnama. PW 4 Dr Baban Shinde is doctor from Nagpada Police Hospital, Mumbai. His evidence is also scrutinized and discussed by the trial Court in detail and holding it corroborating to the version of prosecutrix on major aspects. PW 5 Vitthal Nagare is the pancha from Sawantwadi regarding physical examination of the prosecutrix and the accused and

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arrest of the accused. The last prosecution witness is the Investigating Officer PW 6.

8) The substantive evidence of PW 2 is to the effect that she was taken from the gate of her college on the relevant date in the afternoon by the present appellant while she was talking on mobile telephone with her mother. She was taken and dragged in the motor vehicle and thereafter taken to Sawantwadi all along during the travel without apparently there being any halt as mentioned by the prosecutrix. Her evidence further suggests that for ten to twelve hours there was travel and till reaching Sawantwadi house of the appellant, they were in the same vehicle. In fact, this aspect was much emphasized by the learned counsel on behalf of the appellant to submit that it is a falsity, inasmuch as history given to the doctor PW 4 speak differently. At this juncture, it must be mentioned that according to Dr Baban Shinde, PW 4 prosecutrix gave history that there was forcible intercourse on her but initially she was taken in a vehicle till Ratnagiri and thereafter she was taken to Sawantwadi in the train. This aspect shall also be dealt in detail

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at the appropriate place. The substantive evidence of the prosecutrix is also to the effect that after taking her to the parental house of the appellant she was introduced to his relatives and then she was compelled to stay in one isolated room and on the night there was forcible sexual intercourse on her by the appellant. On next day, on the pretext of going to nature's call or for easing herself she could manage to escape and report the matter to the police constable subsequently met on the platform of Sawantwadi Railway Station. It must be said that the trial Court had accepted her evidence though there were certain anomalies brought on record and which are also brought by to the learned counsel for the appellant to the notice of this Court during the arguments in the present appeal. Apart from the substantive evidence of PW 2 the medical evidence of PW 4 Dr Baban Shinde is of much importance and it has also been dealt in detail by the trial Court. For the sake of ready reference, the injuries observed by PW 4 Dr Baban Shinde on external examination and also on internal examination of the prosecutrix are reproduced hereunder;

- “I) One linear abrasion, 3 cms in length over right forearm.
- II) Anterior aspect upper 1/3rd portion.
- III) Vertical in direction. Scab brownish black in colour and fallen at some places at periphery.
- IV) Age of injury four to five days back.
- 2. Multiple abrasion over left wrist anterior aspect curve and mixed with each other about 8 to 10 in number in different directions measuring about 0.5 cm to 1.5 cm in length. Brown black in colour and scab fallen at some places.
- 3. Probable cause of injury No. 1 hard and pointed object or human finger nails.
- 4. Probable cause of injury No.2 human finger nails.
- 5. On my internal examination injury on private part breast, I found injury on breast.
- I) Human teeth bite marks over upper and medial quadrant of right breast oval in shape. Horizontal placed. Distinct teeth marks seen. Teeth mark are 11 in number six in upper side and five in lower side. 0.2 to 0.4 cms in length and 0.2 to 0.2 cm in width. Brown in colour, slight tender on pressure.
- II) Linear abrasion over upper and lateral quadrant in right breast. 2.5 cm in length obliquely placed. Brown in colour. Age of injury 3 to 4 days.

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6. On local examination hymn was torn position of tears 3.5.8 clock position. Age of tears was old heal. Admits two fingers. Vaginal smear and blood for grouping.
7. I have also carried out ossification test to determine the age of the prosecutrix. I obtained the x-rays of elbow, wrists, knee and shoulders. X-ray number was 2520 dated 8.3.2009. On examination of x rays I ascertained the age of prosecutrix as 17 to 18 error of six month. Accordingly I prepared the notes and issued the certificate. Now the said certificate is shown to me. It bear my signature. Contents are true and correct. It is at Exh.21. (The said certificate is in 3 pages. I recorded the history.)”

9) Dr Shinde PW 4 has also examined the appellant who was brought by Malad Police. However, there were no any injuries found on the body of the appellant and there was usual local examination. However, the blood and pubic hairs were collected for grouping. However, it is specifically opined by the doctor that on his examination nothing has been found to suggest that the appellant was impotent. Accordingly, PW 4 prepared examination notes and gave certificates. It is apparent that the trial Court mainly believed the substantive evidence of

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prosecutrix (PW 2), coupled with the evidence of PW 4 Dr Shinde and the contents of the medical certificate of the victim girl. The factual admitted position that the girl was born on 6th February, 1992 and at the time of kidnapping she was aged between 17 to 18 years is almost admitted position. As such girl was on the border line of majority.

10) During the course of argument various points were raised by the learned counsel for the appellant. Firstly, it is submitted that there was no compulsion on the prosecutrix to leave her parents home and to come with the appellant for the reason that she was in fact in love with the appellant and on her own had accompanied him/accused from the gate of the college. Secondly, it is mentioned that the story given by the prosecutrix that all along in the vehicle she was taken from Mumbai to Sawantwadi non-stop is unbelievable story when according to PW 4 Dr Shinde in the history given by the prosecutrix, it is mentioned that she had travelled by train from Ratnagiri to Sawantwadi. By pointing out this, it is argued that the prosecutrix is not coming with the true and correct version of

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the events and moreover she was in fact the consenting party for leaving Mumbai. Though this argument was advanced as mentioned above it is also argued on behalf of the appellant that in fact he had not taken her to any place much less to Sawantwadi and the entire case of the prosecution is denied. To substantiate this argument, it is submitted that there is no independent witness examined by the prosecution either so far as the travel in the vehicle from Mumbai to Sawantwadi or of the relatives, parents of the appellant from Sawantwadi. On this aspect, learned APP stated that the statements of the appellants and other relatives including sister of the appellant were recorded during the investigation. Though it is so mentioned by the learned APP, the fact remains that no such evidence was brought before the Court and this Court now cannot come to the conclusion that their statements were to the particular effect. Moreover, the fact remains that though the prosecution has not examined any such witness. At least there could have been an examination by way of defence witnesses, when a specific plea is taken by the appellant as to denial of all events and even

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taking the victim to Sawantwadi at his place. While mentioning this, it must be said that this Court is aware of the situation that the accused is not supposed to prove his innocence and firstly the prosecution has to establish its case beyond reasonable doubt. But still on special circumstance, if a particular stand is taken by the accused then at least on preponderance of probabilities such evidence is required to be brought before the Court by the accused but in the present matter though it is argued as to denial of all the events, no such opportunity is sought by the appellant to examine his relative to negate the case of the prosecution as to taking the victim to Sawantwadi.

11) Also it is argued on behalf of the appellant that there is no evidence from any police officer of Sawantwadi police station, much less the evidence of the police constable to whom allegedly the prosecutrix narrated the story after her escape from the house at Sawantwadi. According to the appellant, this itself shows that no true and correct story is coming before the Court.

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12) It is also argued that so far as external injuries are concerned allegedly sustained by the prosecutrix, there was a scope for the panch witness PW 5 to observe such injuries so as to corroborate the version of PW 2. It is brought to the notice of this Court by pointing out towards the substantive evidence of PW 5 that except the linear abrasion on the elbow of the girl the pancha did not notice any other injuries, though according to the medical certificate there were other injuries like linear abrasions on the wrist and they were eight or ten in number. By pointing out this, it is again submitted that the story as told by the prosecutrix cannot be accepted.

13) As argued and brought to the notice of this Court by the leaned counsel for the appellant-accused definitely there appear to be some discrepancies on the minor aspects of the case of the prosecution and first one being the entire travel by vehicle from Mumbai to Sawantwadi as stated by the victim woman. This is so, as in the substantive evidence of PW 4 Dr Baban Shinde, according to him, the prosecutrix gave the history as to her travel from Ratnagiri to Sawantwadi by train.

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Though apparently this is so in the opinion of this Court, this variance will not go to the root of the matter and cannot be taken as the falsehood of the entire case of the prosecution. This is for the simple reason that gist of the offence is kidnapping a minor girl from her lawful guardianship and taking away her for committing an offence the main offence is that of committing forcible sexual intercourse against the will and without consent of a minor girl. In the opinion of the trial Court and also rightly held by it, it must be said that the variance in the case of the prosecution as to actual travel from Mumbai to Sawantwadi is not of such value to negate the case of the prosecution when the medical evidence is corroborating the version of the prosecutrix as to forcible sexual intercourse. PW 4 has specifically answered that the girl was subjected to sexual intercourse a week earlier and there were injuries on her private parts which were healed and there was tear of her hymn. This is a positive evidence regarding the commission of the offence punishable under Section 376 and in no way the substantive evidence of the prosecutrix as deviated from this factual position. Needless to

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mention that the evidence required to establish the guilt of an accused is to reach that standard that it should be beyond reasonable doubt. In other words, there cannot be hundred per cent proof for the commission of an offence but the evidence must be beyond reasonable doubt. When in such a matter of accepting the evidence of the prosecutrix in a rape case and apparently corroborated by the medical evidence, the ingredients of the offence are brought before the Court, then, in that event, it cannot be said that probably the accused had not committed said offence.

14) On the argument as to recording of the evidence by the Assistant Sessions Judge, of PW 2 prosecutrix in examination-in-chief, the leaned Counsel submitted that the evidence was required to be taken by the Sessions Judge or Additional Sessions Judge and not by Assistant Sessions Judge. By taking shelter of the provisions of Section 28 of Cr.P.C. the leaned Counsel for the appellant further submitted that such recording of evidence at least for one witness, by Assistant Sessions judge is not according to the legal provisions and as

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such the trial vitiates, further argued. This submission cannot be accepted for the simple reason that section 28 of Cr.P.C. does not mandate anything recording of the evidence by particular class of Sessions Court in the matter of offences which are triable by the Sessions Court. Section 28 makes only distinction regarding which class of Judges can pass sentence for different quantum.

The sub-section 3 of Section 28 reads thus :-

“Section 28. (3):- An Assistant Sessions Judge may pass any sentence authorized by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.”

15) As such considering the evidence of prosecutrix and the Medical Officer PW 4 Dr Baban Shinde, in the opinion of this Court, there is nothing to hold that the prosecution has failed to establish the charges levelled against the appellant/accused and that there is a room to interfere in the conviction of the accused. Now, this leads this Court to consider whether there can be lesser punishment under Section 376, less than seven years as lastly argued on behalf of the appellant. On this aspect, considering the circumstances, the age of the

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appellant and specific circumstances as to at-least there was some acquaintance of the prosecutrix with the appellant as he was not stranger to her and some variance in her evidence regarding entire travel all along from Mumbai to Sawantwadi by some vehicle, in the opinion of this Court, the quantum of punishment for the offence under Section 376 of IPC can be altered to a suitable extent so as to meet the ends of justice. So far as the offence punishable under Section 376 of IPC is concerned the minimum punishment is seven years and there is nothing mentioned in the said section or anywhere in the Act that for a special reason to be recorded punishment less than seven years can be awarded. Considering the above, the present appeal is partly allowed.

: ORDER :

- 1) Criminal Appeal No. 115 of 2013 is partly allowed;
- 2) The conviction of the appellant-accused punishable under sections 363, 365 and 376 of IPC is maintained;

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- 3) So far as the sentence passed for offence punishable under sections 363 and 365 of IPC is concerned, the same is also maintained. However, the sentence for the offence punishable under Section 376 of IPC is reduced from ten years rigorous imprisonment (RI) to seven years RI and in default sentence in the event of non-payment of fine of Rs. 5000/- (Rupees Five Thousand), is reduced from two years to three months;
- 4) Office to communicate this order to the appellant through jail authority concerned;
- 5) The appeal is accordingly disposed of.

(A.R.JOSHI, J.)