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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.987 OF 2011.

Mukesh @ Avinash Suresh Balai	]
age: 24 years, Occn. Service	]
r/o Gourav Complex,	]
Phase II, Building No.1, Flat No.3,	]
Silvassa, D & N.H.	]... Appellant
Permanent address of Bhiloda	]Orig. Accused.
Police Thana Sagoda,	]
Dist: Dungarpur, Rajasthan	]

V/s.

Union Territory	]
Administration of Daman & Diu,	].... Respondent
and anr	]

Ms. Sarojini Upadhyay, appointed advocate for Appellant.

Mr. D. A. Nalavade, for Union Territory,

Mrs. Sangeet D. Shinde, , A.P.P., for the Respondent-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 21ST APRIL, 2015.

ORAL JUDGMENT :

1. The appellant, who stands convicted by the Sessions Judge, Dadra Nagar Haveli, Silvassa, by judgment dated 18.6.2001, in Sessions

Case No.6 of 2010, for the offence punishable under Section 363 and 506(II) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of two years for each of the offence with fine of Rs.500/- each; in default of payment of fine further rigorous imprisonment for one month each, by this appeal, challenges his conviction and sentence.

2. Brief facts, as are necessary, for the decision of this appeal can be stated thus :-

P.W.3 the prosecutrix (*the name deliberately withheld to protect her identity*), at the time of incident in the year 2009, was studying in XIth Std., and was around the age of 16 years. She was also attending Computer Class, which was in between 3.00 p.m. to 4.00 p.m. She became acquainted with the appellant as he was also attending Computer Class in the same batch. On 2nd August, 2009, as usual she went to attend the Computer Class. However, being Sunday, it was holiday, hence she left the class and started returning home on her bike. Outside the class, she met the appellant. The appellant, on the pretext that it was his birth-day, offered her one chocolate. After consuming the same, she started feeling giddiness and uneasy. Then the appellant took

her on her Aactiva bike to Surat. From there, she was taken to Ahmedabad and to Naroda to the house of his brother -original accused No. 2 Jagdish. There the prosecutrix was subjected to repeated sexual intercourse at the hands of appellant. The original accused Nos 2 & 3 abetted the appellant in commission of such sexual acts.

3. Ultimately the prosecutrix was rescued by her father P.W.2 Chaniabhai, with the help of police, on 8th August, 2009. She was brought to Silvassa, where her complaint Exh.20 came to be recorded and on her complaint C.R.No.207 of 2009 came to be registered against the appellant and two others, for the offences punishable under Sections 363, 376 and 506(2) of the Indian penal Code. The prosecutrix was referred for her medical examination to Civil Hospital at Silvassa, where P.W.1 Dr. Smt.Amit Patel, on her examination issued medical certificate vide Exh.16 stating that there was evidence of prosecutrix being subjected to sexual intercourse. During the course of investigation, P.W.8 Jyoti Patel made spot panchnama, recorded statement of witnesses, arrested the appellant and other co-accused and further to completion of investigation of case, filed chargesheet in the Court.

4. On the case being committed to the Sessions Court, the trial

Court framed charge against the appellant and co-accused vide exh.2. The appellant pleaded not guilty and claimed trial.

5. In support of its case, the prosecution examined 8 witnesses and on appreciation of their evidence, the trial Court held the appellant guilty for the offence punishable under Section 363 and 506 (2) of the IPC and sentenced him as aforesaid; while acquitting the appellant for the offence punishable under Section 376 of the Indian Penal Code. By the said judgment the trial Court also acquitted accused Nos 2 & 3 of the offences punishable under Section 376 read with 109 of the IPC.

6. This judgment of the trial Court is being assailed in this appeal by learned counsel for the appellant Ms. Sarojini Upadhyay,. She submitted that the evidence on record clearly indicates that the prosecutrix and the appellant were knowing each other fairly well and prosecutrix has left with the appellant of her own accord. According to learned counsel for appellant, it is the case of elopement and not of appellant taking away or enticing the prosecutrix in any way. In the light of subsequent conduct of the prosecutrix, it is also urged that the case of prosecution that she was threatened cannot be held to be positively established.

7. Per contra, learned Public Prosecutor Shri D.A.Nalawade, for Union Territory of Daman and Diu, has supported the judgment of the trial Court, by pointing out that at the time of incident, the age of prosecutrix was hardly 16 years. Hence the prosecutrix being minor, according to him the question of her consent does not arise. It is the appellant, who has taken her away without the consent of her lawful guardian, namely P.W.2 Chaniabhai, the father of prosecutrix and therefore the offence of kidnapping, according to him, is clearly established in the case. He has further submitted that, only because of the threats given by the appellant, the prosecutrix could not escape from the clutches of the appellant and therefore, charge under Section 506 (2) is also proved.

8. In my considered view, in order to appreciate the rival submissions advanced by learned counsel for the appellant and learned APP, it would be useful to refer to the evidence on record, especially the evidence of prosecutrix herself, as she is star witness for prosecution.

9. The evidence of P.W. 3 the prosecutrix goes to reveal that her date of birth is 13.7.1999. Her father P.W.2 Chaniabhai has also deposed about her date of birth as 13.7.1999. Her original birth certificate Exh.21 is

produced on record. Prosecution has also examined P.W.7 Umesh Vyas, the Statistical Officer, who has proved the entry Exh.44 in the Birth register which also proves the birth date of prosecutrix as 13.7.1999. There is absolutely no cross examination of the prosecutrix on the aspect of her birth date and her age at the time of incident. The incident has taken place on 2nd August, 2009. Hence it necessarily follows that on the date of incident she was 15 years and 20 days only, thus, below the age of 18 years; hence a minor who cannot be taken away from the custody of her lawful guardians without their consent.

10. Further evidence of prosecutrix reveals that on 2nd August, 2009, while she was returning home on her Activa bike, the appellant met her outside the Computer Class and told her that it was his birth day. He offered one chocolate on that pretext. When she consumed the chocolate, she started suffering from giddiness and was feeling uneasy. She told the appellant that she would like to return to the house. However, the appellant assured that he will take her to her house. Then the appellant insisted on her to sit on the bike. Though she initially resisted, even then he made her sit on the pillion seat of the bike and drove on said bike to some far away place. When she called upon the appellant to take her to her house, the appellant threatened her with dire

consequences and then took her to Surat. From there she was taken to Ahmedabad and then to Naroda to the house of his brother Jagdish. After reaching at Naroda, when the prosecutrix told the appellant that she wants to return to her house, the appellant scolded her. He was not allowing her to talk on telephone with her father.

11. This evidence of prosecutrix, as regards the offence under Section 363 and 506 of IPC, has remained unshattered on record despite her extensive cross examination. Her evidence, therefore, goes to prove that she was taken away by the appellant against her wish and without her consent under the threat of killing her. Nothing is brought on record in her cross examination to indicate that she has left the house of her parents and accompanied the appellant on her own accord.

12. The evidence of her father P.W.2 Chaniabhai also goes to reveal that on the date of incident as the prosecutrix did not return to the house from the tuition class, he took her search at various places and on 3rd August, 2009 he lodged missing report Exh.19 at Silvassa Police Station. In further enquiry he came to know that the appellant was also missing and he has also left Silvassa. Therefore, he contacted the appellant on phone. The appellant told him that the prosecutrix was with

him. Hence he called the appellant to connect the prosecutrix in order to talk him with her. However, the prosecutrix started weeping and could not talk with him. P.W.2 Chaniabhai, therefore, requested the appellant to give his location, but the appellant told him that he was in Punjab. Hence subsequently P.W.2 Chniabhai has lodged complaint against the appellant. Thereafter, the appellant and the prosecutrix were traced by police in the house of appellant's brother Jagdish at Naroda, from where they were brought to the police station. This evidence of P.W.2 Chaniabhai, the father of the prosecutrix thus goes to establish that the appellant had taken the prosecutrix with him without his consent.

13. Though the appellant has tried to raise defence that it was a case of elopement, there is absolutely no iota of material brought on record even through the cross examination of prosecutrix and her father P.W. 2 Chaniabhai to prove that the prosecutrix has of her own accord accompanied him for going to Surat or she has attained sufficient majority to take her own decisions. In such situation since it is proved that at the time of incident the prosecutrix was minor and she was taken away from the lawful guardianship of her parents without their consent that too under the threats, offences punishable under Sections 363 and 506 (II) are made out and proved against the appellant.

14. The appeal, hence holds no merits and consequently stands dismissed. As the appellant has already undergone the entire sentence of imprisonment and fine, as imposed by the trial Court, in view of the report of the Superintendent, Sub Jail Daman no further orders are required.

15. The fees payable to the learned counsel appointed to represent the appellant in this appeal, are quantified at Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.]