

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.1143 OF 2012**

**JAYANT SHIVAJI ANKUSH )...APPELLANT**

**V/s.**

**THE STATE OF MAHARASHTRA )...RESPONDENT**

Mr.Vikas Shivarkar i/b. Mr.Yogesh Pawar, Advocate for the Appellant.

Mr.D.P.Adsule, APP for the Respondent - State.

**CORAM : ABHAY M. THIPSAY, J.**

**DATE : 4<sup>th</sup> SEPTEMBER 2015.**

**ORAL JUDGMENT :**

1            This appeal is directed against the judgment and order delivered by the Additional Sessions Judge, Pune, convicting the appellant who was an accused in Sessions Case No.209 of 2011, of offences punishable under Sections 363 and 376 of the Indian Penal Code (IPC). The learned Additional Sessions Judge

sentenced the appellant to suffer Rigorous Imprisonment for 3 years and to pay a fine of Rs.1,000/- with respect to the offence punishable under Section 363 of the IPC and to suffer Rigorous Imprisonment for 5 years and to pay a fine of Rs.1,000/- with respect to the offence punishable under Section 376 of the IPC. The appellant was also charged of having committed an offence punishable under Section 366A of the IPC but the learned Additional Sessions Judge acquitted him of the said charge. Being aggrieved by his conviction and the sentences imposed upon him, the appellant has approached this court by filing the present appeal.

2            I have heard Mr.Vikas Shivarkar, the learned counsel for the appellant. I have heard Mr.D.P.Adsule, the learned APP for the State.

3            The learned counsel for the appellant submitted that the case of the prosecution itself was that the appellant and the prosecutrix were in love, and that, the act of sexual intercourse

had admittedly taken place with the consent of the prosecutrix. He, however, submitted that the appellant was held guilty of an offence punishable under Section 376 of the IPC only because the prosecutrix was, at the material time, below 16 years of age. He submitted that, though according to him there was no satisfactory evidence of the age of the prosecutrix being less than 16 years at the material time, in as much as, no ossification test was performed, he would not raise that issue and would only seek reduction of the substantive sentence that has been imposed upon the appellant in respect of the offence punishable under Section 376 of the IPC.

4           In view of this concession made by the learned counsel for the appellant, the matter is examined and heard only for the purposes of considering the quantum of sentence which should be imposed upon the appellant.

5           Before proceeding further, however, it needs to be mentioned that better evidence about the age of the prosecutrix

was certainly expected in the instant case. None of her parents were examined during the trial as witnesses. The date of birth of the prosecutrix was given by the prosecutrix herself, which obviously would be worthless. A person would not know his or her date of birth and when a person gives such date of birth, it is obviously based on what such person would learn from his or her parents. Thus, the proper source regarding the knowledge as to the date of birth of the prosecutrix would be her parents, who were not examined. Further, no ossification test, which is medically held to be reliable for ascertaining the age, was performed. The conclusion, about the age of the prosecutrix being less than 16 years at the material time, has been arrived at only on the basis of the entries in the school register. It is settled legal position that such entries, though admissible, would ordinarily not have much evidential value, particularly when the parents, who could be the source of the entries, are not examined. Anyway, since this issue has not been stretched any further, it is not necessary to discuss the same.

6           Indeed, it appears that the appellant and the prosecutrix were in love, and that, the prosecutrix was a consenting party to what was happening. Her evidence shows that the prosecutrix and the appellant used to reside in the same locality, knew each other and used to talk with each other. The prosecutrix categorically states that then they fell in love with each other and that they used to meet frequently. That, on one day, the appellant asked the prosecutrix to accompany him for outing, to which she readily agreed and then both of them went to Saswad on his motorcycle. They both stopped at a lodge where the appellant booked a room and in the room the appellant had sexual intercourse with the prosecutrix with her consent.

7           About fifteen days after this incident, the appellant and the prosecutrix again went to the same lodge, again booked a room and had sexual intercourse. Unfortunately for the appellant, the uncle of the prosecutrix Tarachand Kundan (PW3) had seen the prosecutrix going on a motorcycle as a pillion rider and had

carried out chase, and made enquiries to find out where she was going. He called his friend and they both took search in the nearby hotels and lodges. When he noticed the motorcycle of the appellant parked near one hotel, they went inside, went to the room, knocked it, when the prosecutrix herself opened the door. Thus, when the prosecutrix and the appellant were caught in the room, the matter was reported to the parents of the prosecutrix. The prosecutrix and the appellant both had told her parents that they wanted to marry each other, but apparently, the mother of the appellant was not ready for the marriage. It is, thereafter, that a report was lodged by the prosecutrix with the police.

8           The medical examination of the prosecutrix showed that she was habituated to sexual intercourse.

9           It is not necessary to examine the other evidence that was adduced during the trial except observing that the parents of the prosecutrix did not step into the witness box.

10           The learned Additional Sessions Judge has categorically come to the conclusion that the prosecutrix was a consenting party and held the appellant guilty of an offence punishable under Section 376 of the IPC, only on the basis that the prosecutrix was below 16 years of age at the material time. The learned Additional Sessions Judge thought that there were special and adequate reasons for imposing a sentence less than the one prescribed as minimum by the Statute, and therefore, imposed a sentence only of Rigorous Imprisonment for 5 years instead of sentence of imprisonment for 7 years which has been prescribed as minimum which could be cut down only for special and adequate reasons.

11           The learned counsel for the appellant submitted that, when the Additional Sessions Judge had come to the conclusion that there were special and adequate reasons for imposing a sentence less than the one prescribed as minimum by Section 376 of the IPC, and that the appellant could be given the benefit of the

proviso to Section 376 of the IPC [as it stood before its substitution by the Criminal law (Amendment Act 2013)], then, even the sentence of Rigorous Imprisonment for 5 years was, rather, harsh. In support of his submission, he placed reliance on a decision of the Supreme court in the case of State of Chattisgarh vs. Lekhram (2006) 5 Supreme Court Cases 736, and pointed out under similar circumstances, the accused in the said case was imposed only the sentence already undergone, which was of about 1½ years. I have heard the learned APP in this regard. According to him, the observations made by Their Lordships of the Supreme court of India in the aforesaid case of Lekhram (supra) would not apply to the present case, as in that case, there was considerable gap between the incident and the date on which the judgment of the Supreme court came to be delivered. Though this appears to be correct, that was not the only factor on the basis of which Their Lordships had taken a lenient view of the matter.

12           If the facts of this case are carefully considered, it becomes clear that not only the prosecutrix was a consenting party, but even her parents were ready to have her married to the appellant. At the cost of repetition, it must be observed that the parents of the prosecutrix did not step into the witness box, which is significant. As aforesaid, the case came to be reported to the parents, as the uncle of the prosecutrix, on noticing her going on a motorcycle as a pillion rider, followed up the matter, found her in a room of a lodge with the appellant and brought the matter to the notice of the parents of the prosecutrix.

13           After carefully considering the facts of the case, in my opinion, the learned Additional Sessions Judge was right in imposing a sentence of less than 7 years to the appellant. However, I am of the opinion that, in the facts and circumstances of the case, even the sentence of Rigorous Imprisonment for 5 years is somewhat harsh, and that, it should be further reduced.

14           In the result, the appeal is partly allowed.

15           The order of conviction of the appellant with respect to the offence punishable under Section 363 of the IPC and Section 376 of the IPC is maintained.

              However, the substantive sentence imposed upon the appellant with respect to the offence punishable under Section 376 of the IPC is reduced to Rigorous Imprisonment for a period of 3 years.

16           The appeal is disposed of in the aforesaid terms.

**(ABHAY M. THIPSAY, J.)**