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

CRIMINAL APPEAL NO.1152 OF 2012

Manas Ravindra Mohanti	]	
age: 30 years, Occn. Cook	]	
r/o Laxmi Chawl	]	
Nehru Nagar, Near Hanuman Mandir	]	... <u>Appellant</u>
and Mithibai College, Vile Parle (W)	]	Ori. Accused.
Mumbai	]	
	]	
Presently lodged in Kalamba Jail,	]	
Kolhapur	]	

V/s.

The State of Maharashtra	]	
at the instance of Oshiwara	]	 Respondent
Police Station, Mumbai	]	

Mr. Keshav Chavan and Shri Ankush Dhokle, for Appellant.
Ms. R.M. Gadhvi, A.P.P., for the Respondent-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 30th JUNE, 2015.

ORAL JUDGMENT :

1. By this appeal, the appellant who is original accused in Sessions Case No.268 of 2012, has challenged his conviction under Section 376 of the Indian penal Code, by the

learned Additional Sessions Judge, Mumbai. By the impugned judgment, the appellant is sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.5,000/- in default to suffer further rigorous imprisonment for six months.

2. The facts, as are necessary, for deciding this appeal, may be stated thus :-

The prosecutrix in this case is a young girl hailing from a village in Orissa (her name is withheld to protect her identity). In May, 2011, she had come to Mumbai alongwith her maternal aunt Gurubari, in search of work as maid servant and started staying in the house of the appellant. After 3 to 4 days, her aunt returned to the native place keeping the prosecutrix in the house of the appellant. During her stay in the house of appellant, appellant had forcible sexual intercourse with her on multiple occasions. Ultimately the appellant left home and then having nowhere to go, the prosecutrix was found at Elphinston Railway Station. From there, the police took her to Dongri Bal Sudhar Gruha. There Superintendent Mrs. Sunita informed the police. Then P.W.5 ASI Ishte recorded the complaint of the prosecutrix vide

Exh.12.

3. On her complaint C.R. No.512 of 2011 came to be registered against the appellant at Oshiwara Police Station. During the course of investigation, P.W.4 PI Sunayana Nate arrested the appellant on 3.1.2012 from Jogeshwari. She carried the spot panchnama Exh.14 in the room of P.W.2 Khatija Abdul Sattar. As a part of further investigation, she recorded the statements of witnesses, sent the prosecutrix for her medical examination and seized the clothes of the appellant. The medical samples were sent to Chemical Analyzer vide requisition Exh.22 dated 10th January,2012. Further to completion of investigation, she filed chargesheet in the Court against the appellant.

4. On committal of the case to the Sessions Court, the trial Court framed charge against appellant vide exh.3. The appellant pleaded not guilty and claimed trial raising defence of false implication with specific plea that in order to pressurize him to marry with her, the prosecutrix has filed false case against him.

5. In support of its case, the prosecution has examined five witnesses and on appreciation of their evidence the trial Court has convicted and sentenced the appellant as aforesaid.

6. This judgment of the trial Court is being challenged in this appeal by the learned counsel for the appellant whereas supported by the learned APP.

7. The entire case of prosecution rests on the evidence of P.W.1 prosecutrix. This being a case of sexual offence, if the testimony of prosecutrix is found to be consistent, reliable and inspiring confidence in the judicial mind, then as per settled position of law, the conviction can rest on her sole testimony. In the instant case the evidence of prosecutrix goes to reflect that in May, 2011, she had come from her native place in Orissa to Mumbai alongwith her maternal aunt. She was brought to Mumbai to work as maid servant. She was taken to a room at Jogeshwari where she was residing alongwith the aunt and the appellant. After few days, her aunt returned to Orissa. However, prosecutrix was kept with the appellant. It is her evidence that during this

period of stay, the appellant had forcible sexual intercourse with her on several occasions. He had maintained his relations with her for two months, giving her assurances that he will marry with her. However, subsequently the appellant left her alone in Mumbai with one Rahil and his wife. She then took search of the appellant, but it was of no use. Thereafter as deposed by prosecutrix, she was found at Elphinston Road railway station, then she was sent to Dongri Bal Sudhar Gruha; where her complaint came to be recorded vide Exh.12.

8. In her cross-examination, some omissions are elicited and also some contradictions are brought out to the effect that in her complaint she has not stated that the accused had torn her clothes and raped her. The omission is also elicited to the effect that in her complaint she has not stated that the accused had promised to marry her. It is also brought on record that after appellant left her, she went to Delhi, stayed there for 10 days with her aunt, then she also for some days went to reside at her native place. Thereafter again she came to Mumbai and then complaint was lodged.

9. On the basis of these omissions, and admissions

given by her in the cross-examination, an attempt is made by learned counsel for the appellant to submit that in this case there is not only delay of more than 2 to 3 months in lodging complaint, but the said delay is also not explained. It is also raising a doubt about veracity of prosecution case considering the conduct of the prosecutrix. It is urged that the prosecutrix has admitted in her cross-examination that there are rooms near the room in which she was residing. Further she has admitted that she was going to market alone and hence it is urged that she had ample opportunity to disclose about the alleged incident either to neighbours or to communicate her parents at native place. However, the fact that she has not done so, creates doubt about the veracity of the prosecution case.

10. Further it is urged that the prosecutrix has in her evidence before the Court stated her age to be 17 years and therefore, she was a major person. In the absence of any birth certificate or the school leaving certificate produced on record about her age, it has to be held that she was not minor and in such situation from the evidence on record it can definitely be held that whatever sexual relations, if any, the appellant had

with her, they were consensual and therefore, the offence under Section 376 of IPC is not made out.

11. At this stage, before adverting to these submissions advanced by learned counsel for the appellant, it would be worthwhile to refer to other evidence on record namely of P.W.3 Dr. Kiran Kalyankar, who has examined the prosecutrix on 5.1.2012 in Nagpada Police Hospital. As per her evidence the prosecutrix has given history of multiple repeated sexual contacts with the appellant for six months. The prosecutrix has also stated before her that she was brought to Mumbai from Orissa for doing the work of maid servant and after six months the appellant left the house without any intimation to her. On clinical examination of the prosecutrix, P.W. 3 Dr. Kalyankar found that her hymen was torn completely. There were only few tags of hymen as a remnants. The age of tears was healed. Hymeneal orifice admitted two fingers with ease. This evidence of P.W.3 Dr. Kalyankar supports the evidence of prosecutrix that she was subjected to repeated sexual intercourse.

12. The material part of evidence of P.W.3 Dr.

Kalyankar, is about age determination of the prosecutrix. She has deposed that radiological examination and ossification test of prosecutrix was conducted and on the basis of the same according to her opinion the age of prosecutrix on the date of examination was 15 to 16 years. She has issued certificate accordingly vide exh.18. Thus, the evidence of P.W.3 Dr. Kalyankar reveals that on the date of examination i.e. on 5.1.2012, the age of prosecutrix was between 15 to 16 years and hence below the age of 16 years. Even if the submission advanced by learned counsel for appellant is accepted that the benefit of margin of error of one year is required to be extended to the appellant, even then in the instant case, it has to be kept in mind that the incident has taken place about more than 6 months before her examination by the Doctor and hence it has to be held that on the date of incident, she was below the age of 16 years.

13. For the sake of argument, even if it is assumed that she was above the age of 16 years, in that case also the burden to prove that she was consenting party to the sexual intercourse with the appellant lies definitely on the appellant. Section 114-A of the Evidence Act is very much clear to that

effect. Once the prosecutrix comes before the Court and states on oath that sexual intercourse had taken place without her consent, then it is for the accused to prove consent on her part. Here in the present case the prosecutrix has categorically deposed that she was subjected to sexual intercourse forcibly and against her consent. In such situation, nothing is brought on record by the appellant to prove that she was consenting party to the sexual intercourse. Therefore, it has to be held that whatever sexual intercourse to which prosecutrix was subjected was against her will and without her consent.

14. Now coming to the delay in lodging of the complaint, the trial Court has rightly considered the fact that the prosecutrix is a young girl, who was at the most on the threshold of majority. Her native place is a small village in Orissa. She was coming to Mumbai for the first time with her aunt. She was not knowing anything or anyone in Mumbai except appellant and her aunt. Both of them had betrayed her faith. She was found in helpless condition at the railway platform by police and thereafter complaint came to be recorded. In these facts of the case, it cannot be said that the delay on

her part is fatal to throw her case out of Court. Her evidence has to be appreciated in the back-drop of the facts and circumstances in which she was placed. The Court has to be sensitive to the trauma to which she was subjected and if in that background her evidence and the delay is considered, then it cannot be said that it will cast any doubt as to credibility of her evidence.

15. As regards submission that she had been to Delhi and also to her native place and even then she had not disclosed about the incident to her aunt or even to parents or to the persons residing nearby, again the same reasoning as aforesaid applies. A rural girl will not disclose about such incident of sexual offence, to everyone with whom she comes in contact. It also becomes difficult to accept that she will implicate the appellant falsely. If she wanted to do so, immediately after the appellant left her, she would have gone to the police station and lodged the complaint, which is not case here.

16. Learned counsel for the appellant has relied upon three authorities, first is that of our High Court, in **Manesh**

Madhusudan Kotiyan -vs- The State of Maharashtra and anr, 2014 ALL MR (Cri) 4693, second is also of Division bench of this Court in **Ms. Reshma Ashok Jadhav -vs- State of Maharashtra and anr, 2014 ALL MR (CRI) 4724**, and the third is of Apex Court in **Uday -vs- State of Karnataka, (2003) 4 Supreme Court Cases 46**.

17. However, facts of these three authorities are different from the facts of present case. For example, in the first authority of *Manesh* (supra) the evidence or prosecutrix clearly disclosed that accused had promised to marry her. She has also not expressed any coercion on the part of accused, instead she has stated that accused had lured her and they had sexual intercourse. Thereafter they both returned to their respective houses. In view of these admissions on her part it was held that charge under Section 376 of IPC will not be attracted.

18. In the second case of *Ms Reshma* (supra), it was found that at the time of alleged first sexual intercourse, victim girl was above the age of 18 years and free consent was given by her for sexual intercourse. Complaint was filed

only after complaint of accused that the prosecutrix was demanding Rs.2 lacs from him.

19. In the third case of *Uday* (supra), it was noticed that prosecutrix was deeply in love with the accused and accused had promised that he would marry her on a latter date. She continued to meet the accused and had sexual relations with him.

20. In the light of these facts, in all these three authorities it was held that charge under Section 376 of IPC was not attracted. As against it, in the present case absolutely no material is elicited in the cross-examination of prosecutrix to reveal that either she was in love with the accused or had sexual intercourse with him was with free consent, without there being any force or coercion. Moreover, in the present case at the time of incident, the age of prosecutrix is found to be below 16 years. Hence in the light of these differentiating facts, from the evidence on record, it can definitely be said that sexual intercourse with prosecutrix was against her will and without her consent. Hence the trial Court has rightly held the guilt of the appellant to be proved beyond

reasonable doubt for the offence punishable under section 376 of IPC. The appeal holds no merit, hence stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]