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

**CRIMINAL APPEAL NO.830 OF 2012
(THROUGH JAIL)
WITH
CRIMINAL APPLICATION NO.1068 OF 2014**

Sandesh Sahadeo Bhatre
Age 27 years, Currently at
Kolhapur Central Prison, Kalamba,
Kolhapur – 416 007
(Con.No.C5434).

...Appellant
(Orig. Accused)

Versus

The State of Maharashtra
(Through Shriwardhan Police Station,
District – Raigad in C.R. No.18/2011)

...Respondent
(Orig. Complainant)

Mr.Irfan A. Shaikh, Appointed Advocate for the Appellant.
Mr.S.V.Gavand, A.P.P for the Respondent-State

***CORAM : REVATI MOHITE DERE, J.
DATE : 23rd DECEMBER, 2016***

ORAL JUDGMENT :

1. This appeal is directed against the impugned the Judgment and Order dated 9th May, 2012, passed by the learned Additional Sessions Judge, Mangaon, District – Raigad, in Sessions Case No.41 of 2011,

convicting and sentencing the appellant as under;

- for the offence punishable under Section 376 of the Indian Penal Code, to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/-, in default of payment of fine, to suffer further rigorous imprisonment for 1 year;

By way of compensation under Section 357 of Code of Criminal Procedure, the appellant was directed to pay by Money Order an amount of Rs.1000/- per month to the victim, for the livelihood of the newly born child from the date of the Judgment.

2. Brief facts;

The prosecutrix, at the time of the incident was 14 years old, whereas, the appellant was about 27 years. According to the prosecutrix, the appellant during the period i.e. January 2011 to April 2011 took advantage of the fact, that she was alone at home, and committed forcible sexual intercourse with her, by threatening her. She has stated that because of the said threats, she did not disclose the same to any person. She has stated that as she had missed her periods, her sister took her to a private hospital at Jasavali, where the doctor after taking her urine sample opined that she

was 4 months pregnant. The prosecutrix on learning of her pregnancy, disclosed the incident to her sister and thereafter lodged a complaint with the Shriwardhan Police Station. Pursuant to the registration of the FIR, the appellant was arrested, spot panchanama was drawn, medical certificate was collected, statement of witnesses were recorded, clothes of appellant and the prosecutrix were seized and articles were sent to the C.A for analysis. A DNA test was also conducted and on receipt of the result, charge-sheet was filed as against the appellant in the Court of the learned Judicial Magistrate First Class, Shriwardhan. The case being sessions triable was committed to the Court of Sessions.

The appellant pleaded not guilty and claimed to be tried. The defence of the appellant was of denial and false implication.

The prosecution in support of its case examined 9 witnesses, PW.1 – Dilip Gopal Chandorkar, a member of the Tanta Mukti Samiti; PW.2-the prosecutrix, PW.3- sister of the prosecutrix; PW.4 – Pandurang Baburao Satpure, Head Master of the School, where the prosecutrix was studying ; PW.5-Daulat Banu Saheblal Sarakwat, a retired nurse of PHC, who examined the victim ; PW.6-Suresh Yashwant Sonavane, Tahasildar, Shriwardhan, PW.7–Sanjay Tukaram Jadhav, PSO, Shriwardhan, who

registered the complaint, pursuant to which, C.R.No.18 of 2011 came to be registered. PW.8–Dr.Madhukar Digambar Dhavale, Medical Superintendent, Jasavali PHC, and PW.9- PSI Prakash Balkrishna Bhagwat, the Investigating Officer.

The learned Sessions Judge, Mangaon, Raigad, after hearing the parties was pleased to convict and sentence the appellant as stated hereinabove in para 1 of the Judgment.

3. As Mr.A.G.Toraskar, appointed Advocate for the appellant was out of India and was unable to appear in the aforesaid appeal, Mr.Irfan A. Shaikh, was appointed to espouse the cause of the appellant in the aforesaid case.

4. Mr.Shaikh, learned appointed counsel for the appellant, submitted that the appellant has been falsely implicated in the said case. He submitted that no radiology or ossification tests were done to show that the prosecutrix was a minor. He submitted that the prosecution had failed to prove that the prosecutrix was below 16 years of age at the relevant time and that no documents were produced in support of the same. He submitted

that considering the facts of this case and the conduct of the prosecutrix, the possibility of consensual relations cannot be overlooked. He submitted that even the DNA report cannot be relied upon, as the concerned witness was not examined and as the report was only filed.

5. Mr.Gavand, learned APP supported the impugned Judgment and Order. He submitted that the appellant has rightly been convicted and sentenced for the alleged offences and that no interference was warranted in the same. He submitted that the prosecution had proved the age of the prosecutrix, that she was 14 years of age, at the relevant time. He submitted that infact, a perusal of the cross examination of the prosecutrix shows that there is no cross examination on this aspect i.e. with regard to her age. He submitted that the prosecution had proved the age of the prosecutrix i.e. she was a minor at the relevant time, by examining PW.4 – Pandurang Baburao Satpure, Head Master of the School – Galsure Vidya Mandir, Tal. Shriwardhan. He submitted that the register produced by the said witness was a public document maintained in the regular course of duty and as such credence can be given to the said document. He relied on Exhibit – 19 i.e. General School Admission Register in support of his

submission. He submitted that once it is proved that prosecutrix was a minor at the time of the incident, then consent becomes immaterial. He further relied on the DNA report which shows that the appellant was the father of the child. He submitted that considering the overwhelming material, no interference was warranted in the impugned Judgment and Order.

6. Perused the papers with the assistance of the learned appointed advocate and the learned APP.

7. Considering the defence raised by Mr. Shaikh, learned appointed advocate for the appellant, it is necessary to first consider, whether the prosecution has proved that the prosecutrix was a minor, at the time of the relevant time.

8. The evidence of PW.2 i.e. the prosecutrix (name withheld) shows that at the time of her deposition, she was about 15 years of age. Considering that she was a minor, the learned Judge had a dialogue with her to find out, whether she was able to understand the questions and after

being satisfied, proceeded to record her evidence. PW.2 has stated that her father expired two years prior to the incident and her mother expired one year prior to the incident, and that she was residing with her elder sister i.e. PW.3 and brother, at the relevant time. She has stated that her elder sister i.e. PW.3 was doing domestic work and that her brother was deaf and dumb. She has stated that she was constrained to leave her education, after her father expired, and thus starting helping her sister in her work. According to the prosecutrix, she knew the appellant as he was her neighbour. She has stated that the incident took place in January, 2011 when she was alone in the house. She has stated that the appellant came to the house in the afternoon, spoke to her for some time; thereafter, closed the door; undressed himself and after threatening her had sexual intercourse with her. She has stated that though she started shouting, as it was raining, nobody heard her shouts and hence, none came to her rescue. She has stated that the appellant threatened her with dire consequences i.e. he will kill her if she disclosed the incident to anyone. She has further stated that the appellant, taking advantage of the fact that she was alone at home, would enter the house and commit sexual intercourse with her and that the said act took place about 12 to 15 times. She has stated that she had not

disclosed the said incident to any person because of the threats. She has stated that in April, 2011, as she had missed her periods, her sister took her to a private doctor at Jasavali, who advised her to give her urine sample for testing. After the said test was done, the doctor opined that she was 4 months pregnant. Pursuant thereto, she (prosecutrix) lodged a complaint with the police, which is at Exhibit 15. PW.2 has stated that thereafter, she delivered a child in the J.J. Hospital at Mumbai. She has identified the appellant as being the person who sexually assaulted her. She has also stated that she had taken her education in Galsure Vidya Mandir. The said witness was cross-examined. Several suggestions were put to her, however, the same were denied by her. There is an omission also which was brought on record with regard to the threats allegedly given by the appellant to kill her by 'knife'. With regard to her age, the only question that was put in the cross-examination, was answered by PW.2 as under :

“It is not true that presently I am 18 years old.”

9. It is pertinent to note, that no question was put in the cross-examination to show that the prosecutrix was above 16 years of age at the relevant time i.e. at the time of the alleged incident. Infact, PW.2, has

categorically deposed her age as being 15 years, at the time of recording of her evidence. The same has also not been challenged by the appellant. The prosecutrix has categorically denied the suggestion that she was a consenting party to the said act. The statement of PW.2 i.e. the prosecutrix appears to be credible and reliable, unshaken in the cross-examination.

10. The said evidence of PW.2 i.e. prosecutrix is corroborated by the evidence of PW.3 i.e. prosecutrix's elder sister. According to PW.3, in May, 2011, her sister complained to her, about having missed her periods, pursuant to which, she took her to a doctor at Jasavali, who disclosed that her sister was 4 month's pregnant. She has stated that when she questioned her sister about the same, she disclosed that the appellant had committed forcible sexual intercourse with her and had threatened her not to disclose the same to anyone. According to PW.3 she narrated the said incident to the elders in the village, pursuant to which, a meeting was called for, where the appellant admitted that he had got the prosecutrix pregnant. In the cross-examination, certain suggestions were put to the said witness, however, the same were denied by her. She has admitted that from May, 2011 to 25th June, 2011, no complaint was lodged against the appellant, however,

nothing turns on the said admission, as the same is a matter of record. She has denied the suggestion that her sister was a consenting party to the act.

11. The evidence of PW.1 – Dilip Gopal Chandorkar shows that a meeting was called for at the request of the prosecutrix's elder sister i.e. PW.3 in May, 2011. He has stated that in the said meeting, the members of the Settlement Committee, he himself, the prosecutrix, her sister and the appellant were present. He has stated that the prosecutrix narrated in the said meeting that the appellant had sexually assaulted her and that she was pregnant. He has further stated that the appellant had confessed to his guilt and that the meeting concluded without a solution and that the Committee asked the prosecutrix to take appropriate action. Several suggestions were put to the said witness, that it was the prosecutrix, who used to call the appellant home; that the appellant had not confessed of his relations with the prosecutrix; that there was no talk of their marriage in the meeting, which suggestions were denied by him. It is pertinent to note, that no question was put to the said witness with regard to the age of the prosecutrix.

12. The prosecution in order to prove the age of the prosecutrix, examined PW.4 – Pandurang Baburao Satpure, Head Master of the School – Galsure Vidya Mandir, Tal. Shriwardhan. According to PW.4 – Pandurang, on 18th July, 2007, the prosecutrix was admitted in the 5th standard in the said school. He has stated that prior thereto, the prosecutrix was studying in the Raigad Zilla Parishad School of Ranavali, Taluka – Shriwardhan, upto 4th standard. He has stated that the prosecutrix was admitted on the basis of the school leaving certificate which was issued by the Raigad Zilla Parishad, wherein her date of birth in the said certificate was stated to be 20th September, 1997. He has stated that based on the said certificate, the prosecutrix's date of birth was noted in the General School Admission Register. PW.4 has produced the school leaving certificate which was issued by the Raigad Zilla Parishad and has also placed on record, the extract of the General School Admission Register of the page, where the said entry was made at serial number 3893. He has further stated that the prosecutrix was in the school till 30th September, 2009 and that when she was in the 6th standard, she was removed from the school, as she was regularly absent from school. He has stated that when she as in the 5th standard, she was never declared unsuccessful in the examination. After

examining the original entries and on comparing with the copies that it is true and correct, the original documents were returned to the said witness. PW.4 has stated that he had issued a letter to the police, on the basis of the General School Admission Register, stating the age of the victim girl and that the said letter bears his signature and the contents therein, are true and correct. The said letter is at Exhibit – 20.

13. A suggestion was made to the said witness, which was denied by him, that it was not true that as per the school record, the victim girl had not successfully cleared the 5th standard examination. He also denied the suggestion that the date of birth mentioned in the General School Admission Register is incorrect and that he had wrongly issued the certificate.

14. A perusal of the General School Admission Register, which is at Exhibit – 19 shows that the name of the prosecutrix is at serial number 3893. There are entries of students prior to the said serial number and thereafter. The entries on the said page are of the year 2007. The said document appears to be genuine and cannot be said to be fabricated.

15. PW.5-Daulat Banu Saheblal Sarakwat, was a nurse working in the PHC at the relevant time, when the victim girl was brought to her for examination. She has stated that in May, 2011, PW.2 - prosecutrix and PW.3 – prosecutrix's sister had visited her and narrated that the victim girl had missed her periods. She has stated that her urine was sent for examination and it was confirmed that the victim girl was 3 to 4 months pregnant. Accordingly PW.5 advised the victim girl to visit a gynecologist for further examination.

16. PW.6 – Suresh Yashwant Sonavane, was working as Tahasildar, Shriwardhan, at the relevant time. He has stated that on 5th March, 2012, he had issued a certificate under his signature dated 9th March, 2012 stating that the victim girl was born on 20th September, 1997. The said certificate by the said witness is at Exhibit – 27. It appears that the certificate issued by the said witness, is on the basis of an application preferred by the PW.3 – i.e. victim's sister. It appears that no enquiry was made by the said witness to verify the age of the victim girl, but, was merely issued on request. It also appears that the said witness had verified the entry of birth of the said victim girl and hence no reliance can be placed

on the said witness.

17. PW.7 – Sanjay Tukaram Jadhav, is the ASI who was working as PSO at Shriwardhan at the relevant time. According to PW.7, he registered the complaint, pursuant to which, C.R.No.18 of 2011 came to be registered. The investigation was thereafter handed over by the said witness to PW.9 – PSI Prakash Balkrishna Bhagwat. Although, a suggestion was made to the said witness that the victim girl's statement was recorded in the presence of her sister, the same has been denied by him. He has stated that no doubt the victim girl's sister was present in the police station but while recording the victim's statement, she was not present.

18. PW.8 – Dr.Madhukar Digambar Dhavale was the medical officer at RH Jasavali, Shriwardhan, District Raigad, at the relevant time. He has stated that the victim girl had visited him on 25th June, 2011 at 2.00 p.m., with a requisition. He has stated that the said girl was a victim of sexual offence and on seeing her physical appearance she was found to be 14 to 15 years of age. He has stated that victim had developed all signs of puberty in the form of breasts, pubic hair etc. On examination, he found

that the victim was pregnant i.e. 7.5 months pregnant. He has stated that for confirming the age of the victim, he referred her to a radiologist, Alibag and gave a letter to the radiologist. He has stated that he noted the observations in the medical papers and handed over the same to the police.

19. PW.8 – Dr.Madhukar Dhavale, has further stated that he noted the findings in the MLC Register and issued the Certificate, which is at Exhibit – 31. He has stated that on the basis of the letter sent to the radiologist by him, the radiologist gave his report and findings. He has stated that after examining the victim girl on 27th June, 2011, she was found to be single live fetter, aged 26 weeks pregnancy. The said report of the radiologist was placed on record, which is at Exhibit – 32. It is stated that thereafter he collected the blood sample of the appellant for DNA profile and sent it to the CA. He has further stated that the DNA profile of the victim girl and newly born child was collected for determining the paternity of the child.

20. The prosecution examined Prakash Balkrishna Bhagwat, PSI attached to the Shriwardhan Police Station, as PW.9. He has stated that

after the C.R was registered, he carried out the investigation by preparing the spot panchanama, obtained the school leaving certificate and other necessary documents to prove the age of the victim girl, sent the DNA samples for profile etc. He has denied the suggestion that the victim girl was above 18 years of age, on the day of the incident.

21. From the evidence adduced by the prosecution, it can safely be concluded that the prosecution had proved that the prosecutrix, was 14 to 15 years old, at the relevant time. The prosecution has also proved that the prosecutrix's date of birth was 20th September, 1997. The incident of sexual assault had taken place 12 to 15 times, during the period from January 2011 to April 2011. The prosecutrix has deposed that she was aged 15 years, at the time of recording of her evidence i.e. in February, 2012. The said evidence has gone unchallenged. The DNA report also reveals that the appellant was the father of the child born to the victim girl. The prosecutrix evidence is corroborated by PW.3- her sister, the medical evidence and the evidence of PW.4 – Pandurang Satpure, Head Master of the School – Galsure Vidya Mandir, Tal. Shriwardhan. PW.4 has produced the General School Admission Register, wherein the entry at serial no.3893

shows, the victim's date of birth as 20th September, 1997. All the entries on the said page are of the year 2007. The said entry was made on the basis of the School Leaving Certificate issued by the victim's earlier School i.e. Raigad Zilla Parishad. The school record reveals that the date of birth of the victim girl was on 20th September, 1997. The Head Master had deposed and produced the said record before the Court. On the basis of the said evidence of the Head Master and on the basis of the documents adduced i.e. the school leaving certificate and the General School Admission Register, it can be safely concluded that the date of birth of the victim girl was 20th September, 1997. In the present case, the victim girl's parents could not be examined as they had expired prior to the incident. It is also pertinent to note, that the appellant in his 313 statement, has neither stated that the prosecutrix was not a minor or that it was a case of consent. The appellant's case essentially is of denial and false implication. Considering the evidence on record, it is evident that the prosecutrix was a minor, at the relevant time.

22. Infact a perusal of the evidence of the victim girl shows that no specific question was put to her with regard to her date of birth. The

victim girl had specifically deposed that she was 15 years at the time of recording of her evidence and that the incident had taken place 1 year prior i.e. January, 2011. However, there is no cross examination on the said point. Since the prosecutrix was a minor, the question of consent does not arise. Even otherwise, it does not appear to be a case of consent.

23. Considering the material on record, it can safely be inferred that the victim girl was a minor at the relevant time.

24. Taking into consideration the evidence on record, no interference is warranted in the impugned Judgment and Order.

25. The appeal is, therefore, dismissed and is accordingly disposed of.

26. In view of the aforesaid, Criminal Application No.1068 of 2014, does not survive and the same is also disposed of.

27. The Court expresses a word of gratitude for the able assistance rendered by the Advocate Appointed for the Appellant. The High Court Legal Services Committee to pay the legal fees to Mr.Irfan A. Shaikh, Advocate Appointed for the Appellant, as per Rules.

28. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.