

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL REVISION APPLICATION NO.492 OF 2012
WITH
CRIMINAL APPLICATION NO1791 OF 2012
IN
CRIMINAL REVISION APPLICATION NO.492 OF 2012**

MOHAMMAD ADIL HAROON ANSARI)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Dinesh Tiwari a/w. Swapnil Ambure, Mikhail Dey, Raghavendra Mehrotra, Advocate for the Applicant.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : P N. DESHMUKH, J.

**DATE : 25th AUGUST 2016 &
26th AUGUST 2016.**

ORAL JUDGMENT :

1 This revision takes exception to judgment dated 30th May 2012 passed by Additional Sessions Judge, Greater Bombay, Mumbai, thereby dismissing Criminal Appeal No.116 of 2012 decided by the

Learned Assistant Sessions Judge, Mumbai, in Sessions Case No.656 of 2011 whereby applicant came to be convicted for the offences punishable under Section 363, 376 and 354 of the IPC and is sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1,000/- for the offence punishable under Section 363 of IPC, to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/- for the offence punishable under Section 376 of IPC, to suffer rigorous imprisonment for 1 year and to pay a fine of Rs.1,000/- for the offence punishable under Section 354 of IPC. All the sentences are directed to run concurrently.

2 In brief, it is the case of prosecution that on 1st April 2011 to 4th April 2011 applicant forcibly took prosecutrix, who is a minor girl aged 13 years, from the custody of her parents to his house and subjected her to rape. The victim girl narrated the incident of rape to her mother on 6th April 2011, who lodged report with BKC Police Station, on the strength of which, Crime No.52 of 2011 came to be registered and was investigated by PW7 Sanjay Patil, attached to said police station, who on registering FIR Exhibit 18, seized the clothes of prosecutrix under panchnama Exhibit 12, drew spot panchnama, being a mezzanine floor in the house of applicant as pointed out by

prosecutrix and from the spot had seized one mat and one bed-sheet. The panchnama is at Exhibit 14. The prosecutrix was taken to Nagpada Police Hospital for her medical examination. Applicant came to be arrested on the following day i.e. on 7th April 2011 at 1.45 a.m. and his clothes being jeans, T-Shirt and underwear came to be seized under panchnama Exhibit 22. Applicant was referred for his medical examination. On recording statement of witnesses, seized muddemal articles being bed-sheet, mat, clothes of prosecutrix as well as that of applicant came to be forwarded for its analysis to C.A. under forwarding letter Exhibit 33. Birth certificate of prosecutrix is collected as per Exhibit 28. On receipt of C.A.'s report Exhibits 25, 26 and 27, charge-sheet came to be filed before the learned trial court being court of learned Additional Chief Metropolitan Magistrate, Bandra. In the course of time, case came to be committed to the court of Sessions for trial.

Initially, Charge was framed against applicant at Exhibit 5 for the offences punishable under Sections 366A and 376 of IPC. However, said Charge was subsequently altered and was framed under Sections 363, 376 and 354 of IPC, to which he denied and claimed to be tried.

3 To establish the charge leveled against the applicant, prosecution has in all examined seven witnesses and has commenced its evidence by examining PW1 Mohd. Mansoori – the panch witness, who has established seizure of clothes of prosecutrix and had identified the same at Articles 1 to 5 and articles seized from the spot at Articles 7 and 8, PW2 Farida – the complainant, who is mother of the victim girl who has proved her report at Exhibit 18 and identified the clothes of prosecutrix Articles 1 to 5, PW3 Vaibhav Salvi – panch witness on seizure of clothes of applicant, however, he did not supported the case of prosecution, PW4 – the prosecutrix, PW5 Dr.Abasaheb Chawan, Medical Officer, who had examined the prosecutrix and had issued Medical Certificate Exhibit 44, and had also medically examined applicant and issued Medical Certificate Exhibit 30, PW6 Kisan Shelke and PW7 Sanjay Patil – both Investigating Officers.

Statement of applicant under Section 313 of Code of Criminal Procedure came to be recorded wherein he denied entire case put forth by prosecution. Applicant did not examine any witness in support of his case. It is the case of applicant that he is falsely implicated due to previous enmity between him and family members of prosecutrix on the count of garbage being thrown near his garage, prior to the incident.

4 Heard learned counsel for both sides. Learned counsel for applicant had submitted that even if case of prosecution with regards to age of prosecutrix to be minor is accepted as it is, there is nothing to establish involvement of applicant as from the evidence of prosecutrix it cannot be said that on the given dates as alleged by her, she was sexually exploited. It is also contended that though it is the case as set out by prosecution and reveals from the evidence of prosecutrix that she was forcibly removed by applicant to his house, said evidence cannot be relied upon as there are no other injuries found on the person of prosecutrix nor there are any independent witnesses examined during the course of investigation to substantiate this case of applicant forcibly removing prosecutrix from her house to the house of applicant. It is also contended that even according to the medical evidence there are no injuries found on the person, nor it is the case of prosecutrix that inspite of her resistance she was subjected to rape.

By referring to the evidence of prosecutrix together with C.A.Report it is submitted that evidence of prosecutrix does not stand for any reason as C.A.Report do not establish that any blood stains were found on the underwear or clothes of prosecutrix though it is her case that having been subjected to sexual assault, she had sustained bleeding from her private part. It is also submitted that case of

prosecution of prosecutrix having been illegally detained in the house of applicant from 4th April 2011 to 6th April 2011 does not stand for any reason, in view of the fact that there is absolutely no evidence to establish that prosecutrix during this period was detained in the house of applicant. It is also pointed out from the evidence of complainant that when she met prosecutrix on 2nd April 2011, she did not find prosecutrix to be mentally disturbed in any manner, but had infact stated that she was cool and not angry. In the line of above submissions, it is thus submitted that even if prosecutrix is minor, no incident of rape much less forcible rape by applicant upon prosecutrix can said to be established.

Learned counsel in support of submissions as aforesaid, has relied upon following three authorities :

- 1) **Zindar Ali Sheikh vs. State of West Bengal & Anr.**
reported in (2009) 3 SCC 761.
- 2) **Sadashiv Ramrao Hadbe vs. State of Maharashtra & Anr.** reported in MANU/SC/0607/2006.
- 3) **Dilip and Anr. vs. State of Madhya Pradesh**
reported in MANU/SC/0678/2001.

It is, thus, contended that revision application be allowed acquitting applicant of all the charges leveled against him.

5 As against this, learned APP submitted that in view of admitted fact of prosecutrix being minor, from the evidence on record involvement of applicant can said to have been fully established as according to the evidence of prosecutrix and of her mother, it is established that applicant against the wish of prosecutrix, forcibly took her to his house on two occasions and sexually exploited her against her wish. It is submitted that evidence of prosecutrix is fully corroborated by ample other evidence on record and has thus supported the impugned judgment and has prayed that revision application be dismissed.

Learned APP in support of his submissions has relied upon following authorities :

- 1) **State of Uttar Pradesh vs. Chhotey Lal** reported in
(2011) 2 SCC 550
- 2) **Parhlad and Anr. vs. State of Haryana** reported in
2015 8 SCC 688

6 Having considering submissions as aforesaid, on perusal of evidence of complainant PW2 Farida, she has stated that at the time of incident, prosecutrix was 12 years old, studying in 6th Standard, having no inclination towards studies, for which she was often scolded, when

she used to get angry and leave the house. She further stated that on 1st April 2011 she had scolded prosecutrix at around 7 p.m. on the count of studies, and thereafter she went to sleep and when she got up in the morning, she did not find prosecutrix in the house. She, therefore, searched for her. After half an hour, prosecutrix arrived in the house. On inquiry, she disclosed that she had gone to the house of her grandmother and then stated that she had gone in the garden. Since prosecutrix was not giving satisfactory answers, on the request of her mother, father of prosecutrix went to the house of grandmother to verify if she was there in their house in the night. On his reaching back, he informed complainant that prosecutrix was not in the house of her grandmother. From further evidence of PW2 Farida, it has come on record that thereafter on 4th April 2011, father of prosecutrix again started inquiring her with regards to her stay in the night intervening 1st April 2011 and 2nd April 2011, to which she refused to disclose anything and was again found missing from the house after 7 p.m., when she was lastly found sitting outside the house for some time. As prosecutrix did not return home even on 5th April 2011, her father lodged missing complaint with BKC Police Station.

PW2 Farida - complainant has further stated that on 6th April 2011, at 2.00 p.m., one unknown lady by name Bismilla had

contacted her and informed that prosecutrix was with applicant residing in Room No.210, Ambedkar Nagar Slums, Bharat Nagar, Bandra (East), Mumbai, upon which complainant stated to Bismilla that she had already lodged missing complaint, and as per her further evidence, on the same day at 6.00 p.m., prosecutrix met her in BKC Police Station, where complainant claims to have inquired from prosecutrix as to where she was, upon which she informed that applicant had taken her to his house and on the mezzanine floor made her to sleep on mat and had forcibly removed her clothes and had sexual intercourse with her. Complainant further stated that prosecutrix had noticed blood oozing from her private parts and also claims to have received information from the prosecutrix about vaginal injuries sustained by her. On receiving information from the prosecutrix as aforesaid, complainant informed said facts to the police officer, who got it typed and on the basis of same, registered the crime.

PW2 Farida - complainant has thereafter deposed about her identifying clothes of prosecutrix being one light pink coloured kameez, one light blue coloured salwar, one light blue coloured dupatta, red coloured underwear and white coloured sanitary pad – Article 5 Collectively.

7 On considering evidence of complainant as aforesaid, it is material to note that prosecutrix, as per her mother's evidence, though was studying in 6th Standard, had no inclination towards her studies and on that count was often scolded by her mother, upon which she used to get angry and in anger used to leave her house. Another material point which needs consideration from the evidence of complainant is that prosecutrix inspite of leaving house on 1st April 2011 after 7.00 p.m. in the presence of her parents, and not returning back to house throughout the night, did not disclosed about her whereabouts in the night intervening 1st April 2011 and 2nd April 2011, to anyone and inspite of her father inquiring her whereabouts even on 4th April 2011, when at about 7 pm, she was sitting outside the house for some time and was thereafter found missing from the house, till she was seen by her mother in BKC Police station on 6th April 2011 at 6.00 p.m., where prosecutrix is stated to have disclosed to her mother that from 4th April 2011 she was in the house of applicant, where she was subjected to sexual assault. In her entire evidence as aforesaid, complainant has nowhere stated that prosecutrix was taken by applicant forcibly. Though she at one place had deposed that applicant used to pass from in front of their house, which is situated in a lane, and was throwing chits containing his mobile number towards

prosecutrix, there is no investigation carried out on this aspect. Similarly, it is even no case of prosecution that during the course of investigation any such chit containing mobile number as deposed was seized or was produced by the complainant or prosecutrix before the Investigating Officer.

With reference to the evidence of complainant as aforesaid, in her cross examination she has admitted that her house is situated in a chawl having other houses situated in a row facing to each other at a distance of two to three feet situated at Bharat Nagar. She further admitted that prosecutrix returned back to her house on 2nd April 2011 in the morning. She appeared to be cool and not angry. From her evidence it appears that this was not first time that prosecutrix was missing from the house, but had left the house earlier also, as complainant had admitted that on 4th April 2011, even after searching for her daughter at the house of her relatives, as she did not find her, she did not took any steps on that day, thinking that her daughter would come back home as usual. In view of complainant's evidence that prosecutrix at the time of incident and even prior to that had left her house without intimating her parents, and as such complainant did not found anything unusual, when she did not notice her daughter in the house on 4th April 2011. In the background of above discussed

evidence, further evidence of complainant, creates reasonable doubt when she appears to have materially improved her version about her watching applicant while passing in front of their house and knowing him by face, though she did not claim to know him by his name, when complainant has admitted that she has not stated so in her report.

Similarly, complainant further appears to have improved her version when she claims to have stated before police that the prosecutrix was subjected to rape on 1st April 2011 and further claims to have knowledge of said fact from prosecutrix and stated about her having sustained bleeding injuries to her vagina in the police station as PW7 Sanjay Patil – Investigating Officer, who has recorded her statement, in clear terms admitted that complainant had not stated before him that incident of rape took place on 1st April 2011 or that complainant was informed by prosecutrix about her sustaining injuries to her vagina or even prosecutrix stating said fact to her mother in the police station. Complainant as such appears to have materially improved her version so as to suit the case of prosecution.

8 In the background of evidence of complainant as aforesaid, on perusal of evidence of prosecutrix, she has stated that on 1st April 2011 she was scolded by her mother on count of studies and therefore

was sitting outside the house when she was forcibly taken by applicant to his house where she claims to be sexually assaulted by applicant against her wish, on mat which was laid on the mezzanine floor. She states that due to sexual intercourse, she started bleeding from her private part upon which she therefore kept one napkin and put on her clothes and remained in the house of applicant for the whole night. Her evidence further reveals that in the morning at 7.00 a.m. she went back to her house and falsely stated to her mother that she was at the house of grandmother, claiming that applicant had threatened her not to disclose about the incident.

9 Her evidence further reveals that on 4th April 2011 as her father again inquired as to where she was in the night of 1st April 2011 and was scolded by him, she again went out of the house and on this day also claims to have been forcibly taken by applicant to his house by pulling her hand and again repeated the same story and claims that though applicant attempted to sexually exploit her by sleeping over her person, as she had already sustained injury to her private part, he after outraging her modesty, got up from her person. As such, according to prosecutrix, no sexual intercourse was committed by applicant on that day.

10 Prosecutrix has further stated that on 6th April 2011, mother of applicant took her to her house. However, as there was lock to her house, took her to BKC Police station, where mother of prosecutrix was present, to whom she narrated the incident and thus report came to be lodged. She has further deposed about police forwarding her for her medical examination and also seizure of her clothes by police.

11 In the background of specific case of applicant of his false implication, due to strained relations between him and the family members of prosecutrix on the count of their throwing garbage in front of his garage, it is necessary to minutely scrutinize the evidence of prosecutrix, before same is acted upon. On considering the same, it reveals that, though prosecutrix has denied that, as she was fed up of studies and as her teacher and parents used to scold her on the count of her not studying and going to school, she used to get angry and leave her house, and used to hide herself somewhere. On being confronted with the portion marked as "A" in her statement at Exhibit 35, duly proved by PW7 Sanjay Patil, the Investigating Officer, who has recorded the same, it is established that such facts are stated by prosecutrix in her statement made to police. Thus, it is found that prosecutrix though

is minor, is not deposing true facts and is found in the habit of speaking lies.

12 PW7 Sanjay Patil has specifically admitted that he has recorded statement of prosecutrix as stated by her and has proved “Portion A” at Exhibit 35. With reference to case of prosecution, of prosecutrix being forcibly taken by applicant, from the evidence of prosecutrix it has come on record that her house is situated in the row of houses having six houses in front of her and all the houses are in lane facing to each other. Judicial note of such fact therefore can be taken that house of prosecutrix is located in a busy locality. All the houses are stated to have one public toilet. The houses are situated in front of each other at a distance of 3 to 4 feet. In that view of the matter, if applicant at night had forcibly removed the minor girl from her house, there has to be some other neighbouring resident who can witness such incident, however, admittedly, except for sole evidence of prosecutrix, no such evidence is on record. In that view of the matter, evidence of prosecutrix, of applicant having pressed her mouth, forcibly took her from her house to his house in the night hours, does not appear to be convincing as considering the congestion of houses, even her evidence about nobody else being present near her house at that

time, also does not appear to be reliable. Evidence of prosecutrix as above is even otherwise not clear with regards to time of incident, as at one place she states that she was forcibly taken at 10.00 p.m. and also states that she was forcibly taken at 1 a.m., while according to evidence of PW2 Farida – mother of prosecutrix, after she scolded prosecutrix on 1st April 2011 on the count of studies, she left the house after 7.00 p.m. and inspite of her search was not found. As such, there is even no satisfactory evidence led by prosecution with regard to above aspect or on the point of whereabouts of prosecutrix from 7.00 p.m. to 10.00 p.m.

13 Similarly, it has come in the evidence of prosecutrix that she did not resist applicant when he was removing her clothes and has further admitted that she had not stated in her statement before the police that as applicant threatened her, she did not disclose about the incident to her mother and had stated that she had gone to the house of her grandmother. She further admits to have not stated before police that applicant had forcibly taken her to his house by catching her hand as she was not willing to accompany him. In view of admissions as aforesaid, thus, the minor girl appears to be smart enough to materially improve her version so as to suit the case of prosecution.

14 Though prosecutrix claims to have stated in her statement before police that applicant on 4th April 2011 had forcibly taken her from her house against her wish, and that on applicant's taking her to his house, slept on her person on removing her clothes and further claims to have stated that applicant kept her in his house till 6th April 2011 and that mother of applicant after inquiring her address reached her to her house, however as there was lock to her house, she was brought to BKC Police station, where prosecutrix met her mother to whom she narrated the incident, neither of these facts appear to have been stated by her in her statement before police, as in his further evidence, PW7 Sanjay Patil, Investigating Officer, has deposed that prosecutrix had not stated that applicant had forcibly taken her to his house on the first occasion nor on 4th April 2011, by catching her hand and pulling her against her wish, or that, had removed her clothes and as there was injury sustained to her private part had slept on her person and left her. He further admits that prosecutrix has not stated that she was kept by applicant in his house up to 6th April 2011, nor has stated that mother of applicant had inquired of her address to reach her to her house, however, as it was locked, took her to BKC Police station where she met her mother. In view of evidence as discussed above, evidence of prosecutrix itself does not inspire confidence to be

acted upon as she has materially improved her case as aforesaid, falsely involving applicant. In the circumstances, the probable case put forth on behalf of applicant, appears to be more reasonable and as such, there appears to be much substance when it is suggested to prosecutrix that due to her family members throwing garbage near applicant's garage, instead of being thrown in the garbage box by Sayal – sister of prosecutrix, there used to be daily quarrels between them and thus prosecutrix falsely implicated applicant in this case, though she had denied said suggestion put to her.

15 Even otherwise, evidence of prosecutrix as well as that of her mother does not appear to be reliable for want of medical evidence, as from evidence of PW5 Dr.Abasaheb Chavan, who on 6th April 2011, had examined prosecutrix at 11.00 p.m. at Nagpada Police Hospital, had stated that there were no external injuries on her person and found hymen tear in 3, 7, and 9 O’Clock position, which was old tear and healed. Having no external injuries found on the person of prosecutrix, case of prosecution of applicant forcibly removing prosecutrix from her house is also falsified. Infact, from the evidence of doctor, case of prosecution is further doubted when according to him, prosecutrix has given history of sexual intercourse on her by applicant on 2nd April

2011 and 3rd April 2011 without her consent, which infact is no case of prosecution, as according to its case, prosecutrix after leaving her house on 1st April had returned back to her home in the early morning on 2nd April 2011, when according to her mother's evidence, she was cool and not angry at all, and thereafter was further found missing from 4th April 2011 and was given in the custody of her mother on 6th April 2011. In that view of the matter, history given by prosecutrix of her being subjected to intercourse on 2nd April 2011 and 3rd April 2011 does not stand for any reason. Similarly, though from further evidence of Medical Officer it has come on record that prosecutrix was exposed to sexual intercourse, same according to the history given by prosecutrix, since was on 2nd April 2011 and/or 3rd April 2011, it cannot involve applicant as according to case of prosecution on both these days, she was in her house.

16 So also from the evidence of PW1 Mohd. Mansoori, who has acted as witness on spot panchnama in respect of spot situated on the mezzanine floor in the house of applicant, wherefrom Article 7 one mat and Article 8 bed-sheet came to be seized under panchnama Exhibit 14 and has deposed of seizure of Articles 1 to 5 being clothes of prosecutrix in the form of one light pink coloured kameez, one light

blue coloured salwar, one light blue coloured dupatta, red coloured underwear and white coloured sanitary pad as well as Article 6 Collectively clothes of applicant being jeans, T-Shirt and underwear, seized on 6th April 2011 and forwarded for its analysis to Forensic Science Laboratory establish that except for finding blood on pad (sanitary pad found in the nicker of prosecutrix) none of the above articles were found having blood or semen stains. In that view of the matter, apart from having no medical evidence, there is no corroboration to the evidence of prosecutrix, even from the Forensic Lab Report, which could establish involvement of applicant.

17 Having considered above discussed evidence, though prosecutrix appears to be minor, prosecution is found to have even failed to establish the incident of rape as alleged, to have taken place on her, much less establishing involvement of applicant therein.

18 In the case of **Sadashiv Hadbe referred supra** it is laid down that, when evidence of prosecutrix is not supported by medical evidence or by scientific evidence produced in the case having absence of injuries on the victim of person, case of prosecution is doubtful and applicant is entitled for benefit of doubt.

19 Similarly, in case of Dilip & Another referred supra referring to law laid down in the case of State of Himachal Pradesh vs. Gian Chand 2001 Cri.L.J. 2548, it is reiterated as follows :

“conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on.”

Having considering facts of the case in hand, observation in both the two authorities referred above, can usefully be made in the present revision application in favour of applicant.

20 Case of Parhlad and Anr. referred supra relied by prosecution refers to consent of a minor in a rape case. However, as aforesaid, in the case in hand since fact of rape itself is not established by prosecution beyond reasonable doubt, question of consent does not arise at all, inspite of prosecutrix being found to be minor.

21 Prosecution though has further relied upon case of **State of Uttar Pradesh vs. Chhotey Lal**. Same is on the point of considering leniency while imposing sentence in a rape case, observing that rape being a heinous crime, suitable punishment be imposed upon the crime doer. However, same cannot be applied in the case in hand as no case is proved against the applicant.

22 Same authority is also relied by prosecution for relying upon the contradiction and inconsistencies in the case of prosecution. However, the contradiction as referred above as cannot be said to be minor contradictions or inconsistencies, but as prosecutrix is found to have materially improved her version, law relied cannot be made use of in favour of prosecution in any manner.

23 On considering entire evidence, as there appears serious doubts in the case of prosecution and as prosecution is found to have miserably failed to establish involvement of applicant in the act of rape, and as infact has even failed to establish that on the material dates, prosecutrix was subjected to sexual intercourse, revision application is liable to be allowed. In the given circumstances, applicant is entitled for benefit of doubt. Hence, following order is passed :

ORDER

- i) Revision application is allowed.
- ii) The conviction and sentence imposed upon applicant by learned Assistant Sessions Judge, Mumbai, in Sessions Case No.656 of 2011, is set aside.
- iii) Applicant be released forthwith, if he is not required in any other case.
- iv) As revision application is allowed, Bail Application No.1791 of 2012 is rendered infructuous and disposed off accordingly.

(P. N. DESHMUKH, J.)