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

**CRIMINAL APPEAL NO.1131 OF 2015
WITH
CRIMINAL APPLICATION NO.1451 OF 2015
(Through Jail)**

Ajit Maruti @Papa Bhosale,
C/6393, Age – 21 years,
Occ. - Labour,
R/o.Lakhanaur Tq.Chikkodi,
District Belgaum, Karnataka State,
Convict Presently Lodged at
K.C.P Kalamba, Kolhapur.

...Appellant

Versus

The State of Maharashtra
(At the instance of Kagal Police Station)

...Respondent

Mr.Satyavrat Joshi, Appointed Advocate for the Appellant.

Ms.P.P.Shinde, A.P.P for the Respondent-State.

***CORAM : REVATI MOHITE DERE, J.
DATE : 9th AUGUST, 2016***

ORAL JUDGMENT:

1. By this appeal, the appellant has impugned the Judgment and Order dated 7th August, 2015, passed by the Learned Special Judge, Kolhapur, in Sessions Case No.21 of 2014, convicting and sentencing him

for the offences stated hereinunder:-

- for the offence punishable under Section 363 of the Indian Penal Code, to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default to suffer rigorous imprisonment for 1 year;
- for the offence punishable under Section 376 of the Indian Penal Code, to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default to suffer rigorous imprisonment for 1 year;
- for the offence punishable under Section 4 of Protection of Children from Sexual Offences Act, 2012, to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default to suffer rigorous imprisonment for 1 year;

All the said sentences were directed to run concurrently.

2. A few facts as are necessary to decide the aforesaid Appeal are as under:-

The complainant is one Sadashiv (PW.2), the uncle of the prosecutrix. According to the complainant, the prosecutrix had gone for a gathering on 17th January, 2014, at about 7.00 p.m. He has stated that as the prosecutrix did not return home, they searched for her and were informed

by the prosecutrix's friend – Chakuli@ Sujata, that she had seen the prosecutrix with the appellant. Pursuant to the said information, the complainant lodged a complaint with the Kagal Police Station, as against the appellant, for the alleged offence punishable under Section 363 of the Indian Penal Code. The appellant and the prosecutrix were found after two days. After the statement of the prosecutrix was recorded, Section 376 of the Indian Penal Code and Section 4 of Protection of Children from Sexual Offences Act, 2012 came to be added. According to the prosecution, the appellant had enticed the prosecutrix and taken her with him and had committed forcible sexual intercourse with her. The prosecutrix was sent for medical examination to the CPR Hospital, Kolhapur. After investigation, charge-sheet was filed and the case was committed to the Court of Sessions, as the offences alleged were sessions triable.

The appellant pleaded not guilty and claimed to be tried.

3. The prosecution in support of its case examined 10 witnesses, PW.1 – Dinkar Sakharam Jadhav, the owner of the jaggery house, with whom the appellant was working; PW.2 – Sadashiv, the complainant and uncle of the prosecutrix; PW.3 – the prosecutrix herself; PW.4 – Sujata,

prosecutrix's friend; PW.5 – Ajit Shahaji Khopkar, panch to the spot panchanama; PW.6 – Ketan Chandrakant Dalvi, panch to the blanket and motorcycle recovered at the instance of the appellant, as well as panch to the place of the incident, shown by the appellant; PW.7 – Dr.Ranjeet Shivajirao Jadhav, the medical officer of CPR Hospital, Kolhapur, who examined the prosecutrix; PW.8 – Dr.Rahul Ramesh Kurane, who conducted the clinical examination of the prosecutrix; PW.9 – Shamrao Bhauso Sadolkar, retired Head Master of the School, to prove the age of the prosecutrix and the School Leaving Certificate and PW.10 – PSI Khandu Dhondiba Shinde, the investigating officer. The appellant in support of his defence examined Shivaji Parsu Kamble, the Gram Sevak, who produced the birth certificate of the prosecutrix. After hearing the parties, the learned Special Judge was pleased to convict and sentence the appellant as aforesaid in para 1.

4. Mr.Joshi, learned counsel for the appellant submitted that the prosecution had failed to establish the fact, that the prosecutrix was a minor, aged 13 years at the relevant time. He submitted that there was no evidence to show that the appellant had knowledge and was aware that the

prosecutrix was below 18 years of age. He relied on the evidence of PW.8 – Dr.Rahul Ramesh Kurane, in particular para 7 of his evidence to show, that there was no evidence of recent sexual intercourse or otherwise which opinion was given after the prosecutrix was medically examined. He submitted that the evidence of PW.9 – Shamrao Bhauso Sadolkar i.e. retired Head Master shows that he had no personal knowledge of the prosecutrix's age. He relied on certain admission given by the said witness in his cross examination.

5. According to the learned counsel for the appellant, the prosecution has failed to establish the age of the prosecutrix, that she was a minor, aged 13 years, at the relevant time. He submitted that the appellant had examined defence witness DW.1- Shivaji Parsu Kamble to bring on record the birth certificate of the prosecutrix. He submitted that the evidence of the said witness shows that the age of the victim girl was not mentioned in the birth certificate. He further submitted that the evidence of the prosecutrix shows that she had gone on her own accord, with the appellant and hence no offence as alleged under Sections 363, 376 of the Indian Penal Code or Section 4 of the Protection of Children from Sexual

Offences Act, was disclosed. He submits that infact, no such incident as alleged had taken place. He submitted that a perusal of the medical evidence shows that the prosecutrix was habituated to sexual intercourse and therefore, the prosecution had not proved beyond reasonable doubt that the appellant had committed the alleged offences. He relied on Judgments in the case of *Birad Mal Singhvi v/s Anand Purohit*¹; *S.Varadarajan v/s State of Madras*,²; *Narender Kumar v/s State (NCT of Delhi)*³; *Anil Raghunath Dhiwar v/s The State of Maharashtra*⁴; and *State of Madhya Pradesh v/s Munna @Shambhoo Nath*⁵ in support of his submission, to show that the documents relied upon by the prosecution, with regard to the prosecutrix age, cannot be accepted, considering the probative value of the said documents.

6. Learned APP supported the impugned Judgment and Order. She submitted that the appellant has rightly been convicted for the offences and no interference whatsoever was warranted. She submitted that the prosecution has proved that the prosecutrix was a minor, around 13

1 AIR 1988 SC 1796

2 AIR 1965, SC 942 (V 52 C 150)

3 (2012) 7 SCC 171

4 Criminal Appeal No.1012 of 2015, decided on 2nd April, 2016.

5 Criminal Appeal No.658 of 2011, decided on 18th September, 2015.

years of age, at the relevant time on the basis of oral as well as documentary evidence and that there is no reason to disbelieve the same. She submitted that even though the facts disclose, that the prosecutrix had gone with the appellant, consent is immaterial, considering that she was a minor, aged 13 years. Learned APP also relied on the Judgments of the Apex Court, *in the case of State of Madhya Pradesh v/s Ajab Singh*⁶; and *State of Madhya Pradesh v/s Anoop Singh*⁷, to show that the documents relied upon by the prosecution had evidentiary value. She submitted that the evidence of the prosecutrix coupled with the medical evidence was sufficient to show the appellant's complicity in the said crime.

7. The prosecution examined PW.1 – Dinkar Sakharam Jadhav, to show that the appellant was working in his Jaggery Unit, for about one year prior to the date of the incident. He has stated that on 14th January, 2014, the appellant took a sum of Rs.1,000/- from him and went to his village. He had stated that on 17th January, 2014, the appellant came back to the Village and that he had seen him on that day at about 12.00 noon. The said witness was cross-examined at length. He has stated in his cross-

6 (2016) 1 SCC (Cri) 622

7 (2015) 7 SCC 773

examination that he had maintained a list of names of the persons working with him and the money advanced to them; however, there was no document signed by the persons to whom money was advanced; that he did not know the full name of the appellant; and that he had not given any document to the police to show that an amount of Rs.1,000/- was advanced by him to the appellant. The said witness has denied the suggestion that he was deposing falsely at the instance of the police.

8. PW.2 – Sadashiv is the uncle of the prosecutrix and the complainant. He has stated that at about 5 to 6 years prior, the parents of the prosecutrix had expired and that he was looking after the prosecutrix. He had stated that the prosecutrix had studied upto Standard 7th and that her date of birth was on a 5th day in 2001, but, he was unable to tell the month. He has stated that there was a School gathering on 17th January, 2014 and that the prosecutrix had gone for the said gathering at about 7.00 p.m. He has further stated that as the prosecutrix did not return home till about 9.30 p.m., he started making enquiries and started searching for her. He has stated that he asked the prosecutrix's friend – Sujata about the prosecutrix's whereabouts, pursuant to which she disclosed that she had seen the

prosecutrix at about 7.00 p.m., with the appellant. He has stated that Sujata did not know where the prosecutrix had gone thereafter. Pursuant to said information, PW.2 – Sadashiv lodged a complaint with the Kagal Police Station, as against the appellant, alleging an offence punishable under Section 363 of the Indian Penal Code. He has identified the complaint lodged by him, which is at Exhibit – 17. He has stated that after 2 days, the police found the prosecutrix with the appellant and that the police handed over the prosecutrix to him.

9. PW.2 – Sadashiv, in his cross examination has admitted that the prosecutrix's sister was about 5 years older to her and that he was not aware of her birth date; and that he did not know in which school the gathering was. He has denied the suggestion that he learnt the name of the appellant from the police. He has also admitted that he was not aware of the exact date of birth of the prosecutrix till the school certificate was received. He has admitted that on the basis of the school leaving certificate, he has given the prosecutrix's date of birth. He as denied the suggestion that he had falsely implicated the appellant and was falsely deposing against him.

10. The prosecutrix was examined as PW.3. At the time of the deposing and giving evidence, the prosecutrix has given her age as 15 years. She has in her evidence stated that she was living with her uncle, Sadashiv (PW.2) after the demise of her parents, 4 years prior. She has stated that she has a sister, who is married. She has deposed that she has passed 7th standard and that her date of birth is 5th November, 2001. She has identified the appellant and has stated that he was working in a Jaggery Unit. She has further stated that about 1 year prior, when she was standing outside her house, the appellant gave her a chocolate and left from the said place. She has stated that the appellant would meet her on and off and that the incident took place on 17th January, 2014. She has deposed that she had gone for a gathering at the English Medium School at about 7.00 p.m., when the appellant came there and told her that they should run away and get married. According to the prosecutrix, she agreed and hence at about 9.00 p.m. the appellant came and they both left on a motorcycle for the appellant's house at Lakhamapur, Karnataka. She has stated that as the door of the house was locked, they went to Nagaon, where the cousin of the appellant was residing. She has stated that the appellant's brother-in-law asked him, about her, pursuant to which the appellant disclosed her name

and told him that they had run away, as they wanted to get married. She has stated that the appellant's brother-in-law gave them a room to stay. According to the prosecutrix, the appellant after disclosing to her, that they were getting married, forced himself on her and had sexual intercourse with her. She has further stated that on the next day, she and appellant went to his aunt's house, at Village Songe. She has stated that the appellant's aunt asked the appellant, about her, pursuant to which he disclosed her name and stated that they were going to get married. According to the prosecutrix, the appellant's aunt got angry and asked both of them to leave the house, pursuant to which, they both went to Murgud S.T. Stand, where they spend the night. She has stated that thereafter, on the next day, they went to appellant's maternal aunt's house at Aknoor, but as the house was locked, they again went to Lakhamapur (appellant's house), where the appellant's parents were present in the house. She has stated that the appellant's parents asked him about her and on learning the details, asked them to leave the house, pursuant to which, they came to Nipani S.T. Stand, from where they were apprehended and taken to Kagal Police Station. She has stated that she was sent to the CPR Hospital, Kolhapur, for her medical examination. She has identified the clothes worn by her, at the

relevant time as well as the clothes worn by the appellant.

11. In the cross-examination the prosecutrix has admitted that she had 2 more sisters and that her one sister was married, when she was in the 7th Standard; that she can read and write and can sign her name in English; and that at the time of her sister's wedding, she was in the 6th Standard. She has stated that she knew one Parubai Kamble and her daughter – Varsha and that Parubai Kamble was from Lakhamapur. She has admitted that she knew what love and marriage were; and that she had gone for a gathering on 17th January, 2014, however, she did not know the name of the said School. She has stated that on the said day at 7.00 p.m., she had gone for a gathering with her friend - Varsha. She has denied the suggestion that there was no such gathering which took place on 17th January, 2014. She has stated that she did not know the day on which the chocolate was given to her by the appellant and as to when she was standing outside the house. Certain suggestions were put to the said witness that there was animosity between Parubai Kamble, who was the appellant's aunt, however, nothing much turns on the same. The prosecutrix has denied the suggestion that she was falsely deposing that the appellant had committed forcible sexual

intercourse with her and that a false case was lodged against the appellant.

12. It is pertinent to note that there is absolutely no cross-examination, with regard to the age deposed to, by the prosecutrix. She has stated in her cross-examination that she does not understand as to what is meant by 'Zabardasti', however, she had denied that she was falsely implicating the appellant.

13. PW.4 – Sujata, a friend of the prosecutrix was examined on the point of kidnapping of the prosecutrix by the appellant. However, PW.4 was declared hostile, hence, her evidence is not of much assistance.

14. PW.5 – Ajit Shahaji Khopkar, is the panch to the spot panchanama as well as to the clothes of the appellant and the prosecutrix. He has proved the panchanamas, which are at Exhibits - 23, 24 and 25 respectively. Although the said witness was cross-examined, there is nothing which has come on record, so as to discredit his testimony.

15. PW.6 is Ketan Chandrakant Dalvi, panch to the blanket and

motorcycle discovered at the instance of the appellant, as well as place of the incident which was shown by the appellant. He has deposed that on 21st January, 2014, he was called at the Kagal Police Station and that another panch PW.5 – Ajit Shahaji Khopkar and the appellant were also present in the police station. He has stated that the appellant made a statement that he will show the place where the incident took place, pursuant to which, he alongwith another panch PW.5 – Ajit Shahaji Khopkar, appellant and the police went to the place, where the alleged offence took place and the appellant showed the spot where the incident had taken place. The said panchanama was exhibited at Exhibit – 28. Certain suggestions were put to the said witness, that no such disclosure statement was made by the appellant and that the appellant had not shown the spot, however, the said suggestions were denied by the said witness.

16. PW.7 – Dr.Ranjeet Shivajirao Jadhav was the medical officer who was attached to the CPR Hospital, Kolhapur at the relevant time. He has stated that on 20th January, 2014, he was on duty at the CPR Hospital, Kolhapur, as a Causality Medical Officer. He has stated that on the said day one lady Police Naik had brought the victim girl, aged 13 years for

medical examination, as she was referred from the Rural Hospital, Kagal. He has stated that he had noted the history narrated by the victim girl as well as of the sister who had accompanied her. He has stated that the victim girl disclosed that she was in love with the appellant for 3 months and had left with him on 17th January, 2014 and had sexual intercourse with him on 18th January, 2014. Pursuant, to the said history given, PW.7 – Dr.Jadhav, conducted the general examination of the prosecutrix, in the presence of the lady Police Naik. He has stated that thereafter, he called the Gynecologist, Dr.Kurane, who conducted the gynecological examination of the prosecutrix and prepared a confidential form, which was signed by him and Dr.Kurane. He has identified the signatures appearing on the confidential form.

17. PW.8 – Dr.Rahul Ramesh Kurane, was attached to the CPR Hospital at Kolhapur, at the relevant time. He has stated that he received a call from the Causality Medical Officer on 20th January, 2014, pursuant to which he attended the said call at 5.30 p.m. He has stated that he recorded the history narrated by the victim girl and thereafter, conducted her general as well as gynecological examination. He has stated that after conducting

her examination, he did not find any external injury over the perineum and her private part and after examination of her vagina, found that her hymen was not intact and that the PV admitted 2 fingers. Accordingly, PW.8 – Dr.Kurane, prepared the confidential form in writing. The said confidential form was exhibited at Exhibit – 34. He has identified his signature as it appears on the said form as well as the contents stated therein. It has come in the cross-examination of the said witness, that when he examined the victim girl he had taken the history from her, pursuant to which, he examined her and on the basis of his examination, he had opined that the victim girl's hymen was not intact. The said witness has stated that he could not however, definitely state whether it was because of recent sexual intercourse, or otherwise. He has stated that he had taken the history, as was disclosed by the victim girl, with regard to the incident which took place on 17th January, 2014. He has denied the suggestion that he had noted the age of the victim girl on the basis of the notes already taken by another Doctor.

18. The prosecution examined Shamrao Bhauso Sadolkar, retired Head Master of the School, where the prosecutrix was studying as PW.9. The said witness has stated that he was working as a Head Master of the

said school from 2006 to 2011 and that the said School was from Standard I to Standard VII. He has stated that at the time of the admission of the students, there is a General Register which is maintained containing all the information; that he had brought the General Register maintained by the School from 1995 to 2013; and that the prosecutrix had joined the school in the 1st Standard on 2nd July, 2007. He has further deposed that as per the Register and noting made, the date of birth of the prosecutrix was 5th November, 2001. He has stated that in December, 2008, the prosecutrix left school. PW.9 had further stated that again in 2009, the prosecutrix joined school in the 3rd Standard and showed the entries made in the said register. He has deposed that the prosecutrix was in the school till 7th Standard i.e. 16th June, 2014. PW.9 has produced the General Register and entries pertaining to the same. The said entries have been exhibited vide Exhibits – 38 and 39. He has stated that the School Leaving Certificate issued by him dated 23rd November, 2009 has been signed by him and bears the stamp of the school. He has stated that the said certificate being Exhibit – 40 has been issued by him, on the basis of the entries made by him in the General Register.

19. In his cross-examination, PW.9 he has stated that Exhibit – 40 is not handwritten by him and that there is no outward number on the said document. He has also admitted that there is no reference on the said Exhibit – 40, as to on whose instance, the said document was issued. He has however stated that the said document was prepared by a teacher and that he had signed the said document, which is at Exhibit – 40. He has stated that he had no personal knowledge about the date of birth of the victim girl and that he had issued the said certificate on the basis of the entries made in the Register.

20. PW.10 is PSI Khandu Dhondiba Shinde, the Investigating Officer who conducted the investigation in the said case.

21. Perused the papers with the assistance of the learned counsel for the appellant and the learned APP. The first question that arises for consideration is whether the prosecution has proved that the prosecutrix was a minor? It may be noted, that the case of the appellant is that of denial and false implication. The prosecution has relied on a document i.e. bonafide certificate, which is at Exhibit – 40, issued by PW.9 – Shamrao

Bhauso Sadolkar, the Head Master of the School, where the prosecutrix was studying. The said document discloses the date of birth of the prosecutrix as 5th November, 2001. According to the prosecution, the prosecutrix was 12 years and 2 months at the time of the incident. PW.9 – Shamrao who issued the said certificate at Exhibit – 40, has identified his signature on the said document and on the basis of the General Register of the School and the entries made therein, has stated prosecutrix's date of birth. It is pertinent to note, that in the present case, the parents of the prosecutrix were no more and therefore, the question of them being examined did not arise. According to the entry in the General Register, the said information was narrated by the prosecutrix's mother who admittedly is no more. According to the PW.9 – Shamrao, the prosecutrix joined the school in 2007, left the school in 2008 and again took admission in 2009 and continued upto 2014. The said witness has produced on record the entries in the General Register at Serial No.1841. The said document which is produced by PW.9 – Shamrao is the Register, which is maintained by the School, in the routine course of its business. Although, the said witness was cross-examined at length, it is pertinent to note, that his evidence with regard to the General Register produced by him has not

been questioned. Apart from the same, the entries made in the School Register are made on the basis of the information given by the parents. As noted earlier, the mother who gave the said information could not be examined as she had expired. Apart from the aforesaid, the prosecutrix in her evidence has specifically deposed that she was about 13 years of age at the relevant time. The said evidence has also not been challenged by the appellant in the cross-examination nor any suggestion has been made to the prosecutrix to suggest to the contrary. Similarly, the medical evidence also shows that the Doctors have categorically deposed that the victim girl had given her age as 13 years. The medical certificate also shows that the age of the prosecutrix was 13 years at the relevant time. There is also no cross-examination on this aspect by the appellant. Thus, the prosecution has proved that the prosecutrix was a minor, aged 13 years, at the relevant time.

22. A perusal of the prosecutrix's evidence shows that the appellant had committed forcible sexual intercourse on her. In any event, once it is established that the prosecutrix was a minor, aged 13 years, consent becomes immaterial. The medical evidence also corroborates the prosecutrix's evidence of recent sexual intercourse.

23. The learned trial Judge has rightly analyzed the evidence on record and thereafter convicted the appellant. No infirmity can be found in the impugned Judgment and Order. Hence, the Appeal is dismissed and disposed of as such.

24. In view of the aforesaid, Criminal Application No.1451 of 2015 does not survive and the same is also disposed of.

25. The Court expresses a word of gratitude for the able assistance rendered by Mr.Satyavrat Joshi, Appointed Advocate for the Appellant.

REVATI MOHITE DERE, J.