

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

CRIMINAL APPEAL NO. 752 OF 2013

Deepak Ramchandra Koli
Madala Pada, Near Harbadevi
Temple, Madh Marve Road,
Malad (W).Mumbai. ...Appellant

Versus

The State of Maharashtra and anr. ...Respondents

Ms.Nasreen S.K.Ayubi appointed for the appellant

Mr. V.V. Gangurde, APP for the State/respondents.

CORAM: A.M. BADAR, J.
DATED: 17th JANUARY 2018

ORAL JUDGMENT :-

1. The appellant, who was arrested on 3.9.2011 in the crime in question had sent applications bearing No.721 of 2016 and 31 of 2018 contending that he is languishing in the jail without his appeal is being heard by this Court. The appellant by these applications communicated to this Court that he is unable to avail a lawyer to prosecute his appeal and in desperation submitted that he wants to

withdraw the appeal. That is how Miss. Nasreen S.K. Ayubi, the learned advocate on the Panel of Legal Aid came to be appointed to represent the appellant/accused and as the appellant/accused had undergone more than 6 years of rigorous imprisonment, on request of parties his appeal is taken up for final hearing.

2. By this appeal the appellant/accused has challenged the judgment and order dated 30th March 2013 passed by the learned Additional Sessions Judge Boriwali Division, Dindoshi, Mumbai in Sessions Case No.202 of 2011 thereby convicting the appellant/accused of the offences punishable under Sections 376(2) of the Indian Penal Code as well as under Section 506(i) of the Indian Penal Code. For the offence punishable under Section 376(2) of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from directing him to pay fine of Rs.10,000/- and in default to undergo further rigorous imprisonment for two years. For the offence punishable under Section 506(i) of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for one year apart from

imposition of fine of Rs.3,000/- and in default, directing him to undergo rigorous imprisonment for two months.

3. Case of the prosecution in brief is thus:-

The prosecutrix PW-1 is r/w of Chembur, Koliwada, Bandra (W), Mumbai. She was student of 10th Standard taking education in St. Joseph School, Hill Road ,Bandra(W). Her date of birth is 2.7.1995. Ramchandra Koli is maternal grand father of the prosecutrix/PW-1. Ramchandra Koli was residing at Madh Koliwada, Malad(W), Mumbai. The appellant/accused is maternal uncle of the prosecutrix/PW-1. He was also residing at Madh island.

4. On 8.5.2011, the prosecutrix/PW-1 had been to the house of her maternal aunts house. There was engagement ceremony of Krishna Koli and therefore, the prosecutrix was in the house of her maternal aunt named Mohini from 8.5.2011. On 12.5.2011, maternal aunt named Mohini had left the house for purchasing fish. The prosecutrix /PW-1 alongwith minor daughter of Mohini were alone in the house of Mohini. At about 8.00 a.m. in the morning,

the appellant/accused came to the house of Mohini where the prosecutrix/PW-1 was staying. According to the prosecution case, the appellant/accused tied both hands of the prosecutrix, gagged her mouth by means of handkerchief and made her lie on the mattress. She was then denuded by the appellant/accused. Subsequently, the appellant/accused committed rape on her. After committing forcible sexual intercourse on her by the appellant/accused, he threatened the prosecutrix that if she indulged in shouting, she will be killed. Thereafter, the appellant/accused again committed forcible sexual intercourse with the prosecutrix and threatened her that if she dares to lodge the complaint, he will kill her as well as her mother.

5. As the prosecutrix missed her periods in 3rd week of August 2011, her mother took her to Dr. Gokhale. Said Doctor then informed her mother that the prosecutrix is carrying pregnancy of four months duration. The mother of the prosecutrix then took her to the KEM hospital. The prosecutrix lodged report Exh.9 against the appellant/accused. Her fetus was then aborted at the KEM hospital.

6. On the basis of report lodged by the prosecutrix/PW-1 crime No. 319 of 2011 for the offence punishable under Section 376, 506(II) of the Indian Penal Code came to be registered against the appellant/accused. The investigating officer collected the samples of blood of the prosecutrix as well as the appellant/accused. He had also seized abortus in sealed condition. Samples of blood cells and seized abortus were sent for DNA examination of the Regional Forensic laboratory at Kalina. Statement of witnesses came to be recorded. The certificate regarding date of birth of the prosecutrix came to be seized. On completion of routine investigation, the appellant/accused came to be chargesheeted.
7. The appellant/accused pleaded not guilty to the charges framed and explained to him and claimed for trial. In order to bring home the guilt to the accused, the prosecution has examined in all four witnesses. The prosecutrix was examined as PW-1. Assistant Director of the Forensic Science Laboratory, Kalina namely, Shrikat Hanumant Lade is examined as PW-2. His report in respect of DNA

profile is at Exh.18. PSI Raghunath Ghughe who had recorded the FIR of the prosecutrix is examined as PW-3 . Exh.9 is the report lodged by the prosecutrix and Exh.10 is the FIR in printed form. Investigating officer Fuldas Yadav Bhoye is examined as PW-4.

8. In exercise of powers under Section 311 of the Code of Criminal Procedure, Asha Mahesh Adwani, Medical Officer attached to Bombay Municipal Corporation of Greater Mumbai, came to be examined as Court witness No.1. She proved extract of birth register Exh.27.
9. The defence of the appellant/accused was that of total denial however, he did not enter in defence. According to the defence version, the appellant/accused and the prosecutrix were having affair and the appellant/accused had promised to marry the prosecutrix. However, in the meanwhile, the appellant/accused came to be arrested. In his statement under Section 313 of the Code of Criminal Procedure, the appellant/accused has stated so in answer to

question No.16 and also shown willingness to marry the prosecutrix even at that time.

10. After hearing the parties, by the impugned judgment and order the learned Trial Court, came to the conclusion that the prosecutrix has proved the fact that the appellant/accused had committed rape on the prosecutrix/PW-1 and her consent, if any, is of no consequence as she was below 16 years of age. The learned Trial Court however, concluded that the appellant/accused had criminally intimidated the prosecutrix by threatening to kill her as well as her mother. That is how appellant/accused came to be convicted and sentenced as indicated in the opening para of this judgment.

11. I have heard Ms. Nasreen Auyubi the learned advocate appearing for the appellant/accused. She argued that the entire story of the prosecution is inherently improbable. The learned advocate argued that it is not possible for any adult man to tie both hands of an adult woman and then commit rape on her by denuding her. The learned advocate further argued that the tone and tenor of

evidence of prosecutrix goes to show that she was in love relations with the appellant/accused. It seems the appellant/accused, never applied any force nor misrepresented the prosecutrix in any manner. Therefore, in submission of the learned advocate for the appellant/accused, no offences as alleged are proved. In the alternative, the learned advocate for the appellant/accused argued that sentence imposed on the appellant/accused is too harsh. The incident allegedly took place in the year 2011 and the normal sentence for such type of offence at the relevant time was seven years.

12. Per contra, the learned APP supported the impugned judgment and order of conviction and resultant sentence by submitting that the prosecutrix was minor at the relevant time and the DNA report fortified the case of the prosecutrix against the appellant/accused. Evidence of the prosecution is clear and cogent. Hence according to the learned APP the appeal deserves to be dismissed.

13. I have carefully considered the rival submissions and also perused the record and proceedings, deposition of prosecution witnesses, the Court witness and documentary evidence. It is the case of the prosecution that the prosecutrix/PW-1 is a niece of the appellant/accused Deepak and he is her maternal uncle. As the prosecutrix was minor at the time of commission of the alleged offence her consent is of no consequence. Therefore, let us at the outset examine whether the prosecution has proved with cogent evidence that the prosecutrix at the time of alleged commission of the offence i.e. on 12.5.2011 was below 16 years of age. In order to prove age of the prosecutrix/PW-1, the prosecution has relied on evidence of prosecutrix/PW-1 as well as that of PW-4 Fuldás Bhoje, investigating officer. The prosecutrix has deposed her date of birth as 2.7.1995. This evidence is not at all challenged in the cross-examination. On the contrary in his statement under Section 313 of the Code of Criminal Procedure, the appellant/accused in answer to question No.2 has admitted the fact that date of birth of the prosecutrix/PW-1 is 2.7.1995 and at the time of the incident, prosecutrix was studying in 10th Standard at St. Joseph School, Hill

road, Bandra (W). In cross- examination of PW-4 Fuldass Bhoye, Police Inspector the defence has brought on record that the Investigator has collected certificate in respect of date of birth of the prosecutrix and upon being referred to the Investigator this certificate is marked as Exh.25.

14. Asha Mahesh Adwani had brought original birth and death register in the Court and produced extract thereof which on due prove thereof is marked as Exh.27. This extract of the register maintained in the register of Birth and Death duly corroborates version of the prosecutrix/PW-1 to the effect that her date of birth is 2.7.1995.

15. Register under the provisions of the Registration of Birth and Death Act 1969 is maintained in official course of business and the same is provided for as per provisions of Section 7 of the said Act. As provided by section 8 it is the duty of head of the house to report the birth occurring in his residential house. Section 17(2) of the Registration of Birth and Death Act 1969 provides that all

extracts regarding the birth or death supplied of any person shall be certified by the Registrar or other authorised officer and such extract shall be admissible in the evidence as per the provisions of Section 76 of the Evidence Act. Section 76 of the Indian Evidence Act deals with certified copies of public documents. The extract so given is considered as certified copy of a public document and section 79 of the Evidence Act provides for presumption as to genuineness of such certified copy. Thus, the extract so issued does not even required any formal proof, as Section 77 of the Evidence Act provides that certified copies of public documents may be produced in proof of the contents of the public document. In the case in hand, evidence of Asha Adwani proves the contents of birth and death register maintained as per the statute and the same is corroborating the version of the prosecutrix/PW-1 that her date of birth is 2.7.1995. Rather it is undisputed position. The incident in question took place on 12.5.2011. As such the prosecutrix/PW-1 was 15 years 11 months and 10 days old at the time of the alleged incident.

16. Now let us examine whether the prosecution has established that the appellant/accused had committed sexual intercourse with the prosecutrix/PW-1 and as she was below 16 years of age at that time, her consent becomes irrelevant. It is in the evidence of PW-1 that on 8.5.2011, she had been to the residential house of her maternal uncle as there was engagement ceremony of her maternal uncle Krishna. She deposed that the appellant/accused is also her maternal uncle. The prosecutrix further deposed that on 12.5.2011 when she was at her maternal aunts house, when her maternal aunt was not at the home, the appellant/accused came, he tied her hands, gagged her mouth by hands, pushed her on the bed, denuded her and committed rape on her. She stated that the appellant/accused had committed sexual intercourse with her at that time on that occasion for four to five times. When she told him that she will disclose this fact to her mother, the appellant/accused threatened her that he will kill her as well as her mother. The prosecutrix further deposed that after engagement ceremony she returned to her house at Bandra. As she missed her periods, her mother took her to the doctor, who informed her that she is

pregnant. She was then admitted to KEM hospital and hospital authorities directed her to file a complaint. Her fetus was aborted. She lodged report Exh.9. In cross-examination, the prosecutrix denied the suggestions that sexual intercourse in between her and the appellant/accused took place with her consent and that she had been to Madh island beach with the appellant/accused on two occasions before the incident. She denied that there was intimate relationship between her and the appellant/accused and they used to meet regularly.

17. Cross-examination of the prosecutrix/PW-1 has not shaken her version regarding sexual intercourse by the appellant/accused with her on 12.5.2011. However, it is seen from the evidence of the prosecutrix that the appellant/accused is maternal uncle and she used to visit Madh island where the appellant/accused used to reside frequently during her vacations. The prosecutrix in her chief-examination itself has stated that the appellant/accused used to visit her house at Bandra occasionally. It is thus, clear that the prosecutrix was well acquainted with the appellant/accused. Her

evidence shows that the appellant/accused is her maternal uncle. The FIR(Exh.9) lodged by the prosecutrix shows that both hands of the prosecutrix were tied at back side and then she was pushed on the bed for committing sexual intercourse. The prosecutrix/PW-1 at the relevant time was just below 16 years of age. She stated in her chief-examination itself that on 12.5.2011, the appellant/accused had committed sexual intercourse with her for 4-5 times. The incident as such must have lasted for fairly large period. She claimed that the appellant/accused had even gagged her mouth by means of handkerchief. There is serious doubt as to whether a single person can overpower a woman to such extent by tying her hands at back side gagging her mouth and then committing sexual intercourse with her repeatedly. Be that as it may, it is seen that, though the appellant/accused was closely related to the prosecutrix, the prosecutrix had not chosen to disclose this incidence to her mother even after her return from Madh island to Bandra to her own house. For a period of four months the prosecutrix kept mum. She disclosed the incident when she was admitted to KEM hospital for

abortion of her fetus as she was carrying pregnancy for four months duration.

18. The fetus/abortus was sent by PW-4 Fuldas Bhoje, Police Inspector to Forensic Science Laboratory at Kalina, where it was examined for DNA profile by PW-2 Shrikant Lade, Assistant Director, Forensic Laboratory , Kalina, Mumbai. It is seen that sample of blood of the appellant/accused as well as that of the prosecutrix came to be collected and forwarded to the Forensic Laboratory by covering letter dated 13.9.2011. Evidence of PW-2 Shrikant Lade, Assistant Director, shows that he extracted DNA of abortus and the blood samples of the prosecutrix as well as of the appellant/accused. The DNA came to be extracted from those samples and was amplified at 15 STR locus. After amplification of DNA profile of the abortus and blood samples, the profiles were analysed and PW-2 Shrikant Lade came to the conclusion that the prosecutrix as well as the applicant/accused are biological parents of the abortus. There is no material in cross-examination of PW-2 Shrikant Lade to disbelieve his version. Evidence of PW-2 Shrikant

Lade, Assistant Director as well as report of DNA profile at Exh.18 thus unerringly points out that the appellant/accused had sexual intercourse with the prosecutrix which resulted in conceiving the prosecutrix.

19. It is thus clear from this evidence adduced by the prosecution that the appellant/accused had committed sexual intercourse with the prosecutrix who at the relevant time was below 16 years of age. The incident in question took place on 12.5.2011 and as such at that time, the prosecutrix was minor by 20 days. Therefore, her consent, if any, is irrelevant.

20. With this evidence, the prosecution has certainly proved the offence punishable under Section 376(2) of the Indian Penal Code as the rape was committed on the prosecutrix when she was under 16 years of age. Minimum punishment prescribed for this offence is rigorous imprisonment for 10 years. As such no infirmity can be found even in punishment imposed on the appellant/accused for the said offence.

21. The learned trial Court has convicted the appellant/accused for the offence punishable under Section 506(i) of the Indian Penal Code by holding that the appellant/accused criminally intimidated the prosecutrix after commission of rape on her by threatening to kill her as well as her mother. Evidence adduced on this aspect by the prosecutrix does not appear to be probable and acceptable. The appellant/accused is her near relative and she was well acquainted with the appellant/accused. He used to visit Madh island where, the prosecutrix/PW-1 used to reside. The prosecutrix/PW-1 maintained silence about the incident even after returning to her house. Mother of the prosecutrix is sister of the appellant/accused. The prosecutrix could have very well disclosed the incident to her mother. She had not done so. Evidence regarding the alleged threatening by the appellant/accused to the prosecutrix seems to be totally improbable and unworthy of credit. The same appears to be out of instinct of self preservation. Hence, conviction of the appellant/accused for the offence punishable under Section 506(i)

of the Indian Penal Code and the resultant sentence can not be justified. In the result, the following order:-

ORDER

- i) The appeal is partly allowed.

- ii) The conviction as well as the resultant sentence imposed on the appellant/accused for the offence punishable under Section 376(2) of the Indian Penal Code is maintained. However, the appellant/accused is acquitted of the offence punishable under Section 506(i) of the Indian Penal Code.

- iii) Fine amount, if any paid by him for the offence punishable under Section 506(i) of the Indian Penal Code be refunded to him.

(A.M. BADAR, J)