

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1011 OF 2013

Shri.Sachin Ramnaresh Varma,
Aged 28 years, Occupation – Service,
Resident of Krishna Society,
Plot No.606, D-4, Charkop,
Sector – 6, Kandivali (W),
Mumbai

... **Appellant**

V/s.
The State of Maharashtra,
(At the instance of Borivali
Police Station in C.C.No.2603028/
PW/2011 C.W.No.367/2011)

... **Respondent**

.....

Ms.Nasreen S.K.Ayubi, Appointed Advocate for the Appellant.

Ms.Anamika Malhotra, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 19th APRIL 2018.

P.C. :

1 The appellant/accused, by this appeal, is challenging the Judgment and Order dated 25/02/2013 passed by the learned Additional Sessions Judge, Greater Bombay, Mumbai in Sessions Case no.16 of 2012 thereby convicting the appellant/accused of offences punishable under Sections 376 and 506(II) of the Indian

Penal Code. For the offence punishable under Section 376 of the IPC, the appellant/accused is sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine of Rs.5,000/- and default sentence of rigorous imprisonment for one year. For the offence punishable under Section 506(II) of the IPC, he has been sentenced to suffer rigorous imprisonment for one year apart from imposition of fine of Rs.5,000/- and default sentence of rigorous imprisonment for six months.

2 Briefly stated, case of the prosecution is that :

- (a) The prosecutrix/P.W.No.1 used to reside in a hut on Plot No.324-344 of Gorai, Borivali in Mumbai along with her mother. Her father had deserted her mother since last three years. The prosecutrix/P.W.No.1 was taking education in M.H.Chougule High school at the time of the incident.
- (b) The appellant/accused used to work at a firm named Shanti Caterers, which was doing business of catering in the vicinity of the house of the prosecutrix/P.W.No.1. As the prosecutrix/P.W.No.1 used to visit Shanti Caterers for fetching water, she was acquainted with the appellant/accused.
- (c) The incident in question took place on 17/05/2011. The mother of the prosecutrix had gone for attending her work.

As there was holiday to the school, the prosecutrix was all alone in her house. In the morning hours of 17/05/2011, the appellant/accused along with his friends visited house of the prosecutrix/P.W.No.1 and asked her as to where her mother had gone. The prosecutrix/P.W.No.1 informed him that her mother had gone to attend the work and she will be returning late in night. Thereafter, the appellant/accused and his friend left. Thereafter, at about 7.00 p.m. of 17/05/2011 when the prosecutrix/P.W.No.1 was cooking food at her house, the appellant/accused came to her house. He started talking with the prosecutrix/P.W.No.1 and during the course of that talks, he insisted her to play a game with him. Thereafter, the appellant/accused made her to lie on the ground, threatened her and removed her clothes. The appellant/accused then committed forcible sexual intercourse with the prosecutrix/P.W.No.1, who was minor female child. The appellant/accused left the house of the prosecutrix/P.W.No.1 by threatening her that if the incident is disclosed to her mother, he will kill her as well as her mother.

- (d) According to the prosecution case, mother of the prosecutrix/P.W.No.1 returned late in night on 17/05/2011 and because of threats given by the appellant/accused, the prosecutrix has not disclosed the incident to her. Thereafter, the prosecutrix/P.W.No.1 became pregnant. Her mother,

therefore, inquired and the prosecutrix disclosed her that the appellant/accused had committed rape on her. Thereafter, on 13/09/2011, the prosecutrix/P.W.No.1 lodged report (Exhibit 14) against the appellant/accused.

- (e) With passage of time, the prosecutrix delivered a male child. The appellant/accused came to be arrested during the course of investigation. Sample of his blood so also sample of blood of the prosecutrix and her son came to be collected by Investigating Officer P.W.No.4 Shyam Parulekar, Police Inspector of Borivali Police Station. He also recorded statements of witnesses, collected documents regarding age of the prosecutrix and on completion of investigation has filed charge-sheet against the appellant/accused.
- (f) The learned trial Court framed the charge for the offences punishable under Sections 376 and 506 of the IPC against the appellant/accused. He pleaded not guilty and claimed trial.
- (g) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all five witnesses. The prosecutrix came to be examined as P.W.No.1 and the report lodged by her is at Exhibit 14. Nanda Kamble, Principal of M.H.Chougule High school came to be examined as P.W.No.2. Exhibit 28 is the certificate regarding date of birth of the

prosecutrix issued by the said school. Dr.Abasaheb Chavan, Medical Officer of Nagapada Hospital is examined as P.W.No.3. Exhibit 30 is the Medico Legal Certificate issued by this witness upon examination of the prosecutrix. Investigating Officer Shyam Parulekar, Police Inspector of Borivali Police Station is examined as P.W.No.4. Manoj Nakti, teacher working with Guruvarya Balaram Patil High school, Navi Mumbai is examined as P.W.No.5. He proved School Leaving Certificate (Exhibit 12) issued by the said school, so also the affidavit at Exhibit 41 sworn by the mother of the prosecutrix/P.W.No.1.

- (h) Defence of the appellant/accused was that of total denial. He, however, did not enter in the defence.
- (i) After hearing the parties, by the impugned Judgment and Order dated 25/02/2013, the appellant/accused came to be convicted of the offences punishable under Sections 376 and 506(II) of the IPC. He has been sentenced as indicated in the opening paragraph of this Judgment.

3 I heard Ms.Ayubi, the learned Advocate appointed to represent the appellant/accused at the cost of the State. She argued that evidence of the prosecutrix/P.W.No.1 is unworthy of credit. Her evidence is not free from doubts. Her cross-

examination reveals that the appellant/accused was on visiting terms with the prosecutrix/P.W.No.1 as well as her mother. The prosecutrix/P.W.No.1 is not proved to be below the consenting age by the prosecution. Her date of birth recorded in the school record is not substantiated by the evidence of the person, who has admitted the prosecutrix in the school. Mother of the prosecutrix is also not examined by the prosecution to prove the age of the prosecutrix. Therefore, the appellant/accused is entitled for benefit of doubts.

4 The learned Additional Public Prosecutor supported the impugned Judgment and Order by contending that the prosecution has adduced evidence of P.W.No.5 Manoj Nakti, in-charge Principal of Balaram Patil High school, where the prosecutrix has taken admission as a fresh student. At that time, mother of the prosecutrix had sworn an affidavit disclosing the date of birth of the prosecutrix, as the prosecutrix was born in the house itself. The same date of birth of the prosecutrix was then carried in the other school, where the prosecutrix was taking education at the time of the incident in question. Record of both these schools shows date of birth of prosecutrix as 22/08/1998 and, therefore, in submission of the learned APP, the prosecution has proved the age of prosecutrix beyond all reasonable doubts. For substantiating this contention, the learned APP has relied on Judgment of the Honourable Apex Court in the matter of *Jarnail*

*Singh v. State of Haryana*¹ as well as the Judgment of this Court (Aurangabad Bench) in the matter of *Bhagwan s/o. Laxman Rakshe v. State of Maharashtra*². The learned APP further argued that evidence of the prosecutrix is corroborated by the forensic evidence in the nature of DNA report and medical evidence is also corroborating her version. Therefore, according to the learned APP, the appeal deserves to be dismissed.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence adduced by the prosecution.

6 Though the defence has set up the theory of total denial, at the same time, theory of consent is also sought to be raised while cross-examining the prosecutrix/P.W.No.1 by the defence. Let us, therefore, examine what is in the evidence of the prosecutrix. The prosecutrix/P.W.No.1 was dependent on her mother, as her father had deserted her mother three years prior to the incident in question. She, therefore, was residing with her mother in a hut at Gorai in Mumbai. Her evidence reveals that the appellant/accused used to work with Shanti Caterers, which was located opposite to her hut. Evidence of prosecutrix shows that she was acquainted with the appellant/accused since last one and half years as she used to fetch water from Shanti Caterers for

1 2013 ALL MR (Cri.) 2946 (S.C.)

2 2016 ALL MR (Cri.) 4414

domestic use. The prosecutrix/P.W.No.1 deposed that on 17/05/2011, her mother had gone out for work and her school was closed on account of Buddha Pournima. At about 8.00 a.m., the appellant/accused ascertained the fact that her mother will be returning late in the night. The prosecutrix stated that at about 7.00 p.m of that day, the appellant/accused came to her house when she was cooking food and started instigating her to play a game with her by saying that she will enjoy that game. He started touching her inappropriately and then denuded her, made her lie on the ground and then committed forcible sexual intercourse with her. He then threatened her that if she raises voice then he will kill her as well as her mother. Then, as per version of the prosecutrix, the appellant/accused left her house. Her mother then returned at about 10.30 p.m. But, she was already slept by that time. As she was frightened because of threatening of the appellant/accused, she had not narrated the incident to her mother.

7 The prosecutrix/P.W.No.1 further deposed that subsequent to the incident, she missed her periods and upon noting this fact, her mother questioned her and took her to the Mangalmurti Hospital, where it was revealed that she was carrying pregnancy of seven months duration. Then, as per version of the prosecutrix/P.W.No.1, she disclosed the incident to her mother and then the report (Exhibit 14) came to be lodged by her on

13/09/2011. She was then lodged at 'Asha Sadan Child Care Center' by the police and she delivered a baby boy at the J.J.Hospital, Mumbai.

8 The prosecutrix/P.W.No.1 deposed that her date of birth is 22/08/1998 and she was taking education in 4th Standard at the High school at Gorai.

9 In cross-examination of the prosecutrix/P.W.No.1, her version about sexual intercourse by the appellant/accused with her is not at all challenged. On the contrary, it was suggested to the prosecutrix/P.W.No.1 that as mother of prosecutrix had settled the marriage of the prosecutrix with the appellant/accused, they had sexual intercourse. It is also elicited from the cross-examination of prosecutrix that on one occasion, the prosecutrix along with her mother accompanied the appellant/accused for watching a movie and then the appellant/accused slept at the house of prosecutrix. It is further revealed from cross-examination of the prosecutrix that the appellant/accused used to come to her house with tiffin and he used to share bond with the family of the prosecutrix. They were going for watching immersion procession of Lord Ganesh. The appellant/accused was taking mother of the prosecutrix to the Hospital in case of her illness and, he used to call the prosecutrix even after shifting of their residence to some other place. Thus, this material on record indicates that the

prosecutrix was having cordial relations with the appellant/accused indicating that the sexual intercourse with her by the appellant/accused may be the outcome of her consent to that act. However, perusal of entire cross-examination of the prosecutrix does not reflect any material to discard her evidence regarding sexual intercourse by the appellant/accused with her at her own house on 17/05/2011. Therefore, there is no reason to disbelieve version of the prosecutrix so far as the incident of forcible intercourse on her by the appellant/accused.

10 If corroboration to the version of the prosecutrix is still needed, then it can be found in the form of the DNA report at Exhibit 20. Evidence of P.W.No.4 Shyam Parulekar, Police Inspector of Borivali Police Station shows that after arrest of the appellant/accused, he had collected blood sample of the appellant/accused. Evidence of this witness shows that in similar fashion, he had collected samples of blood of the prosecutrix as well as her baby boy and those were sent for forensic examination. The DNA report at Exhibit 20 shows that upon examining the samples, the Analyzer concluded that the appellant/accused as well as the prosecutrix are biological parents of the baby boy delivered by the prosecutrix/P.W.No.1. Thus, forensic evidence corroborated version of the prosecutrix that the appellant/accused had indulged in sexual intercourse with her.

11 Now, let us examine whether the sexual relations established by the appellant/accused with the prosecutrix amounts to the offence of rape. For that purpose, the prosecution is relying on age of the prosecutrix in order to render her consent, if any, inconsequential. Section 375 of the Indian Penal Code, which defines the offence of rape, makes it clear that sexual intercourse by a man with a woman with or without her consent amounts to rape, when such woman is under 16 years of age. The offence alleged by the prosecution in this case took place on 17/05/2011 and as such, will be governed by the definition of the term 'rape' found in Section 375 of the IPC prior to coming into effect the Criminal Law (Amendment) Act, 2013.

12 In order to establish age of the prosecutrix, the prosecution has relied on evidence of P.W.No.5 Manoj Nakti, in-charge Principal of Balaram Patil High school, Navi Mumbai, where the prosecutrix was firstly admitted for schooling. Evidence of this witness shows that in the year 2004, the prosecutrix was admitted to his school and at the time of her admission, her mother had tendered the affidavit (Exhibit 41) before the School Authority reflecting date of birth of the prosecutrix. That is how, as per version of P.W.No.5 Manoj Nakti, in-charge Principal of Balaram Patil High School, Navi Mumbai, date of birth of prosecutrix came to be recorded in the record of the school as 22/08/1998. Perusal of the affidavit at Exhibit 41 sworn by

mother of the prosecutrix, way back in the year 2004, reveals that the prosecutrix was born in her house on 22nd August 1998. This evidence is *ante litem motam* in nature. P.W.No.5 Manoj Nakti has duly proved Certificate at Exhibit 12 issued by the School reflecting date of birth of the prosecutrix as 22/08/1998. The very same date was carried as her birth date in the next school, where the prosecutrix was subsequently admitted for schooling. This fact is proved by the prosecution through evidence of P.W.No.2 Nanda Kamble, Principal of M.H.Chougule High School, Gorai, where the prosecutrix was admitted in 3rd Standard upon transfer from Balaram Patil High School, Navi Mumbai. Certificate (Exhibit 28) issued by this school also reflects the same date of birth of the prosecutrix. From cross-examination of this witness, it is brought on record that the mother of the prosecutrix has not produced Birth Certificate of the prosecutrix to the School Authorities. However, the fact remains that the prosecutrix was born in the house and her mother, much prior to the incident in question, had sworn an affidavit regarding her date of birth, which is reflected in official documents. This evidence in respect of date of birth of the prosecutrix, in absence of any contrary evidence, needs to be accepted.

13 In the matter of ***Jarnail Singh*** (*supra*), the Honourable Supreme Court has given the guidelines as to how age of child, which is victim of the crime needs to be determined and has held

that the Court can take aid of Rule 12 of the Juvenile Justice Rules, 2007. The relevant observations can be found in paragraph 20 of this Judgment. After reproducing said Rule 12 of the Juvenile Justice Rules, 2007, it is held thus by the Honourable Apex Court :

“12.....Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of

the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

14 In the wake of these observations of the Honourable Apex Court, in the instant case age of the prosecutrix needs to be determined on the basis of her Birth Certificate issued by the School in terms of provisions of Rule 12 of the Juvenile Justice Rules, 2007. The date of birth reflected in Birth Certificate issued by Schools of the prosecutrix, which are at Exhibits 12 and 28, is 22/08/1998. The incident in question took place on 17/05/2011. As such, at the time of the incident, the prosecutrix was certainly below 16 years of age. Thus, her consent, if any, to the sexual intercourse by the appellant/accused is wholly immaterial. The prosecution, as such, has made out the offence punishable under Section 376 of the IPC against the appellant/accused. Similarly,

considering evidence of prosecutrix in respect of threats extended by the appellant/accused at the time of the incident, the offence punishable under Section 506(II) of the IPC is also made out. Resultantly, the appeal is devoid of merits and, as such, the Order :

ORDER

- (i) The appeal is dismissed.

(A.M.BADAR J.)

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