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

CRIMINAL APPLICATION NO.1265 OF 2017

Pramod Barku Tambe @Pamu Kaka
Aged 26 years,
Residing at Room No.45,
Om Saikrupa Chawl, Ganesh Nagar,
Behraumbaug, Jogeshwari West,
Mumbai

...Applicant

Versus

The State of Maharashtra
At the instance of Senior Inspector of Police,
Oshiwara Police Station,
C.R.No.38 of 2013.

...Respondent

Mr.Rahul Arote, for the Applicant.

Mr.H.J.Dedhia, A.P.P for the Respondent-State.

Ms.Lata R. Chheda Chief Public Prosecutor a/w Ms.R.S.Kanojia.

CORAM : REVATI MOHITE DERE, J.

DATE : 17th JANUARY, 2018

ORAL ORDER :

1. Heard learned Counsel for the parties.
2. Rule. Rule is made returnable forthwith with the consent of

the parties and is taken up for final disposal. Learned APP waives service on behalf of Respondent – State.

3. By this application, the applicant has impugned the order dated 13th November, 2017, passed by the learned Additional Sessions Judge, Greater Mumbai, only to the extent, that it overrules the objection raised by the Advocate for the applicant.

4. Learned Counsel for the applicant submits that the learned Judge could not have recorded the evidence of PW 6, with respect to what the victim had stated to her, being hearsay evidence. He submits that the learned Special Public Prosecutor despite objections asked questions to PW 6, pursuant to which PW 6 stated as under:-

“Whatever victim stated to me I summarized that, victim stated in absence of her mother accused who is her real uncle to whom she called Pamu kaka, removing her nicker put finger in her urinal and moved his pennies on her body. Therefore she doesn't like Pramod kaka.”

5. Learned Counsel for the applicant submitted that when he objected to the recording of the aforesaid evidence stating, that the said evidence was inadmissible and could not be deferred, the said objection was overruled by the learned Judge.

6. Learned APP very fairly states that the aforesaid recording, mentioned in paragraph 4 above, could not have been recorded.

7. Perused the papers including the objection raised by the learned Advocate for the applicant, which was overruled by the learned Judge vide order dated 13th November, 2017. The applicant is facing prosecution in connection with the offences punishable under Sections 376 of the Indian Penal Code and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act. The complainant is the mother of the victim girl. According to the complainant, on 28th January, 2013, when she had taken her daughter, aged 5 years for a bath, she noticed swelling and discharge on her private part and on enquiry, her daughter disclosed that the applicant had forcible sexual intercourse with her. Pursuant thereto, the complainant took her daughter to the Hospital and thereafter lodged a

complaint. After investigation, charge-sheet was filed. After the case was committed to the Court of Sessions, charge was framed against the applicant and recording of the evidence of witnesses commenced i.e. examination of the complainant, victim girl etc. PW 6 – Sunaina Naik, attached to Oshiwara Police Station, as P.I., was sought to be examined by the prosecution, as she had recorded the statement of the victim girl at the Hospital, during which time she deposed what was stated to her by the victim. The statement of Sunaina Naik (PW 6), was recorded during investigation under Section 161 Cr.PC. The learned Advocate for the applicant took objection to the recording of the same, as the statement of the victim girl was recorded by PW 6, was hit by Section 162 of Code of Criminal Procedure. The said objection was overruled by the learned Judge. The victim girl who had given her statement to Sunaina Naik has already been examined in the said case as PW 2. Having regard to the provisions of the Evidence Act, the evidence as quoted in paragraph 4 above, could not have been recorded. The objection raised by the Applicant's advocate was valid.

8. Considering the aforesaid, the order overruling objection of the applicant is quashed and set aside.
9. In view of the aforesaid, the evidence as quoted in paragraph 4 above, shall not be read in evidence.
10. Rule is made absolute in above terms.
11. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.