

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 39 OF 2017

Dilip Pandurang Salve
Age 24 yrs. Occ. Nil.,
r/o Ambit, Tq. Akole,
Dist. Ahmednagar

... Appellant

Versus

1. The State of Maharashtra

2. Pushpa Nandu Dhindale
Age 20 years, Occu. Nil.,
R/o. Ambit, Tq. Akole,
Dist. Ahmednagar

... Respondents.

....

Mr. R. K. Temkar, Advocate for appellant.

Mr. Y. G. Gurjathi, APP for respondent No.1-State.

....

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : 24th JULY, 2019

ORAL JUDGMENT :-

1. The appellant herein is convicted for the offence punishable under Sections 5(j)(i)(1) of the Protection of Children from Sexual Offences Act, 2012 and also for the offence punishable under Section 376(2)(n) of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 10 years and to pay fine of Rs.5000/- (Rupees Five Thousand only) on each count, in default, Rigorous Imprisonment for six months by Additional Sessions Judge, Sangamner

in Sessions Case No. 28 of 2014 vide judgment and order dated 11.08.2016. Hence, this appeal.

2. Such of the facts necessary for the decision of this appeal are as follows :

Miss "X", the daughter of PW-1 – Nandu Shankar Dhindale, was acquainted with the present appellant. She was about 15 years and 2 months old at the relevant time and the appellant was about 22 years old. They live in the same village. On 29.10.2013, Miss "X" had been to answer nature's call in the middle of the night and thereafter she had not returned home. PW-1 had lodged missing report on 29.10.2013. It was registered as Missing Report No.25 of 2013. PW-1 had specifically mentioned in the missing report that Salve family are his neighbours and that they have two sons i.e. Arun and Dilip. It appears that the police had received a secret information that the victim was in Pune in the company of the present appellant. They were apprehended and brought back by Rajur Police Station to Akole Police Station. Thereafter, she was examined and it had transpired that she was carrying pregnancy of 10 weeks. Needless to say that DNA had matched with the present appellant and he was found to be the biological father of the foetus after she had undergone medical examination.

3. On 15.03.2014 the victim had lodged FIR at Rajur police station, alleging therein that prior to 29.10.2013 the appellant herein had expressed his love for her. That the appellant was already married to another girl in the year 2012. However, his wife was not residing with him from one year. The victim was knowing the said fact. Thereafter, they had been to village Nimgaon Mhalunge, Taluka Shirur, Dist. Pune to the house of one Dattatraya Ramchandra Bhoomkar, who had constructed rooms for the labours. They had sexual intercourse. She resided with the appellant from 29.10.2013 to 15.03.2014. She had not attained majority. The appellant and victim decided that they would get married after accumulation of sufficient money. The appellant apprised her that in the eventuality she returned back home, their parents would not allow her to get married. On the basis of the said report, Crime No.I-14/2014 was registered at Rajur Police Station against the appellant for the offence punishable under Section 363, 366-A and 376 of Indian Penal Code and under Sections 4 and 5 of the Protection of Children from Sexual Offences Act, 2012.

4. After due investigation, charge-sheet was filed. The case was committed to the Court of Sessions at Ahmednagar and registered as Sessions Case No.28 of 2014. The prosecution has examined as

many as 11 witnesses to bring home the guilt of the appellant. The case rests on the evidence of PW-1 and PW-2.

5. PW-3 is the Panch for seizure of clothes. PW-4 is Mr. Fatangare (ASI) of Rajur Police Station, who had recorded missing report, PW-5 is Dr. Kamble, Medical Officer at Rural Hospital, Rajur, PW-6 is Dr. Solat, Medical Officer at District Hospital, Ahmednagar, PW-7 is Mr. Bhangre, Head Master of the school, PW-8 Mr. Rameshwar, is Police Constable, PW-9 is Dr. Ayesha, the Gynecologist, who had terminated her pregnancy, PW-10 is Mr. Shrikant, is officer of the forensic lab, who had proved the DNA report and PW-11 is Mr. Patil who is the Investigating Officer. Since it is admitted that the victim was living with the appellant for almost four months and that she had conceived pregnancy and on 15.03.2014 she was carrying pregnancy of about 10 weeks. The said admitted facts deserve no discussion.

6. PW-1 Nandu Shankar Dhindale has deposed before the Court that the appellant was residing adjacent to his house. That he has admitted before the Court that on 29.10.2013 when they woke up in the morning, they could not find their daughter in the house. Therefore, he searched for her and then lodged missing report. He had naturally searched for the appellant who was also missing from the village and thereafter, he inquired with the family members of the

appellant and at that time his family members had disclosed that the appellant had left for Pune for doing some work. Thereafter, the police from Rajur Police Station had informed him that his daughter was found in the company of the appellant. His daughter had returned on 14.03.2014 at Rajur Police Station. It is pertinent to note that in the cross examination the father of the victim - PW-1 has categorically admitted that he belongs to Koli community, whereas the appellant belongs to Hindu Mahar community. He deposed that he disapproved of his daughter chitchatting with the appellant. On every occasion, he had tried to convince his daughter not to talk with the accused, but there was no change in her behaviour. It is for this reason that six months prior to the incident, they had left the village and were residing in the agricultural land where she could not meet anyone. However, to his utter dismay, his daughter continued to talk with the appellant and therefore he was constrained to even assault his daughter on a few occasions. He also admitted in the cross examination that after she returned, she got married and at the time when their deposition was being recorded, she was a mother of four month's child.

7. PW-2, the victim has deposed before the Court in consonance with the FIR. She has denied that she loved the appellant, however, she has admitted that when they were living together at

village Nimgaon Mhalunge, she also used to go for work as agricultural labour during the day and at night they used to sleep together. According to her, the appellant used to commit sexual intercourse against her wish. Her date of birth is 02.08.1998. In the cross examination, she has admitted that she used to chitchat with the appellant. They used to talk with each other. She has denied that her father did not like her association with the appellant. In the cross examination she has also admitted that while they were residing together, they used to visit the weekly market of village Talegaon together. She has also admitted that while she was residing at village Limgaon Mhalunge, she did not try to contact her father or the husband of her sister. She has four other sisters. It is an admitted position that the appellant had not refused to marry the victim, but he had told her that they must accumulate money to live comfortably. In any case, it is true that the victim was less than 18 years old on 29.10.2013. She had not attained majority. However, it can be safely inferred that she had attained the age of understanding. On several occasions she had been convinced by her parents that she should not associate with the present appellant, so much so that they had abandoned their house in the village and had started residing in the agricultural land. The whole purpose was to keep their daughter away from the present appellant.

8. The Hon'ble Apex Court in the case of Varadrajan Vs. State of Madras¹ has held as follows:

“There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

In the present case, by no stretch of imagination, it can be said that the victim was induced by the appellant to leave the house of her parent. In fact, she had voluntarily left the house of her parent.

9. The Hon'ble Apex Court further held that, “no doubt, the part played by the accused could be regarded as facilitating the

¹ AIR 1965 SC 942

fulfillment of the intention of the girl. But, that part falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

10. With these observations, it cannot be said that the appellant has committed offence punishable under Section 363 or 366-A of Indian Penal Code. In this background the appellant stands acquitted of the charges under Section 363 and 366 of the Indian Penal. The question is as to whether the appellant has committed an offence punishable under Section 376 of Indian Penal Code.

11. The learned APP vehemently submitted that in fact, the consent of the victim cannot be taken into consideration as the victim was less than 18 years old at the time of incident. There is a statutory mandate that it has to be held that she was subjected to sexual assault against her wish.

12. If this submission is to be accepted, the conduct of the victim has to be appreciated. Even before 29.10.2013, all the attempts of her father had failed to keep her away from the appellant. Even when she was living with the appellant for five months, she was voluntarily going for agricultural work during the day. She has candidly admitted that she had made no attempts to call her father or the

husband of her sister or anyone else. This attempt itself would show that she was not being detained by the appellant and that she had chosen to live with him and continued to live with him happily. It can be held that she had attained the age of understanding. She was fully aware that the appellant was married, but his wife had abandoned him, therefore he continued with the association of victim. She intended to marry him and therefore she had even expressed that they should get married at the earliest. However, the appellant who was hardly 22 years of age was also of the opinion that they shall accumulate sufficient funds to be able to live comfortably. There was no denial, as such. Hence, these would be special circumstances in which a lenient view needs to be taken.

13. It is true that the appellant had knowledge that the victim was less than 18 years old and therefore waited to get married. The law requires that for awarding punishment less than 7 years, there are to be special reasons. The appellant deserves to be acquitted of the offence punishable under Sections 363 and 366-A of Indian Penal Code. In the aforesaid circumstances, the appellant is entitled to be enlarged upon serving the sentence already undergone. Hence, the following order :

ORDER

- (i) The appeal is partly allowed.
- (ii) The appellant is convicted for the offence punishable under Section 376 of Indian Penal Code and is sentenced to the period already undergone which is more than 5 years of rigorous imprisonment.
- (iii) The appellant is acquitted of the offence punishable under Sections 363 and 366-A of Indian Penal Code.
- (iv) The sentence of fine for offence punishable under Section 376 of Indian Penal Code is maintained.
- (v) The appellant be released forthwith if not required in any other case.
- (vi) The appeal is disposed of.

[SMT. SADHANA S. JDHAV, J.]

SMS