

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.681 OF 2015

NARSI RATANSI KATIRA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Rahul Arote, Advocate for the Appellant.

Ms.P.N.Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 22nd FEBRUARY 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/accused no.1 is challenging the judgment and order dated 15th May 2015 passed by the learned Additional Sessions Judge, Mumbai, in Sessions Case No.405 of 2012, thereby convicting him of offences punishable under Sections 292(2)(a) and 376 of the Indian Penal Code. On the first count, he is sentenced to suffer rigorous

imprisonment for 2 years apart from imposition of fine of Rs.2,000/- and default sentence of rigorous imprisonment for 2 months. On the second count, he is sentenced to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.10,000/- and default sentence of rigorous imprisonment for 6 months. The appellant/accused no.1 is also directed to pay compensation amounting to Rs.50,000/- to both victim girls viz. PW1 and PW2.

2 Facts, in brief, leading to the prosecution of the appellant/accused no.1, can be summarized thus :

- (a) Alleged victims of the crime in question are two real sisters, who used to reside with their parents in Mulund area of Mumbai. They are examined by the prosecution as PW1 and PW2 respectively. At the time of the alleged incident, they both were below 16 years of age and were taking school education. Both of them were friends of one Darshana Shah. Through Darshana Shah they got acquainted with the appellant/accused no.1. The appellant/accused no.1 was

having office at the flat and he was doing business of Compact discs. After getting acquainted with the alleged victims, the appellant/accused no.1 used to call them for work at his office. They were asked to paste labels on the Compact discs. The appellant/accused no.1 used to give payment of Rs.100/- to Rs.200/- intermittently to the victims.

- (b) According to the prosecution case, initially the appellant/accused no.1 had committed rape on the elder sister i.e. PW2. He had video-graphed the act and then continued to molest her from time to time. Thereafter, by disclosing to the younger sister i.e. PW1 that he had video-graphed act of committing sexual intercourse with her elder sister and by threatening to publish the video recording of that act, the appellant/accused no.1 committed rape on the younger sister i.e. PW1. Thereafter, the appellant/accused no.1 continued to commit rape the younger sister i.e. PW1 also time and again, by calling her to his flat, which he was

using as office. It is case of prosecution that accused no.2 Heena used to help the appellant/accused no.1 in all these activities. The appellant/accused no.1 had even brought a hookah and he used to call the victims for smoking hookah at his office.

- (c) It is case of prosecution that PW6 Ramakant Tiwari – the First Informant got information of ill-deeds of appellant/accused no.1 through accused no.2 Heena Sharma. He, therefore, laid a trap on 18th November 2011. On that day, the appellant/accused no.1 was with the PW1. Accused no.2 Heena gave this information to PW6 Ramakant Tiwari. Along with his associates, PW6 Ramakant Tiwari then entered in the flat of the appellant/accused no.1 and noticed the appellant/accused no.1 committing rape on the PW1. He had video-graphed the incident of rape at the flat of the appellant/accused no.1. Then, PW6 Ramakant Tiwari insisted the appellant/accused no.1 to hand over the Compact disc.

- (d) On 19th November 2011, PW6 Ramakant Tiwari lodged the First Information Report (FIR) against the appellant/accused no.1 which has resulted in registration of Crime No.421 of 2011 with Police Station Mulund, Mumbai. PW6 Ramakant Tiwari then produced two Compact discs which came to be seized vide Panchnama Exhibit 78 by police in presence of PW4 Shailesh Soneji. Deepak, who had accompanied PW6 Ramakant Tiwari to the flat of the appellant/accused no.1 had also produced two Compact discs on 21st November 2011 before the police in presence of PW3 Jitendra Shah and those came to be seized vide Panchnama Exhibit 75. The appellant/accused no.1 came to be arrested. Spot Panchnama came to be prepared. Statement of the victims of the crime in question came to be recorded. Articles such as camera, handy-cam, cables etc. were seized at the instance of the appellant/accused no.1. After completion of routine investigation, the appellant/accused no.1 along with co-accused Heena Sharma came to be charge-sheeted.

- (e) The learned trial court framed Charge for offences punishable under Sections 292(2)(a) and 376 of the Indian Penal Code against the appellant/accused no.1. Charge for the offence punishable under Sections 109 read with 376 and 292(2)(a) of the Indian Penal Code came to be framed against accused no.2 Heena Sharma. In addition, the Charge for the offence punishable under Section 25 of the Juvenile Justice (Care and Protection of Children) Act, 2000, came to be framed against the appellant/accused no.1. They pleaded not guilty and claimed trial.
- (f) In order to bring home guilt to the appellant/accused no.1 and co-accused, the prosecution has examined in all eighteen witnesses. Defence of the appellant/accused no.1 was that of total denial. He, however, accepted the fact that the PW1 was knowing Darshana Shah, and that, PW6 Ramakant Tiwari and others entered in the hall of his flat and saw accused no.2 Heena Sharma sitting near the door.

The appellant/accused no.1 accepted the fact that he as well as the PW1 were found naked at that time.

- (g) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused no.1 of offences punishable under Sections 292(2)(a) and 376 of the Indian Penal Code. He was accordingly sentenced as indicated in the opening paragraph of this judgment.

3 I have heard the learned counsel appearing for the appellant/accused no.1. He vehemently argued that the conduct of the alleged victims of the crime in question shows that both of them were consenting party and the prosecution has failed to prove their age by adducing clear and cogent evidence. Therefore, it cannot be said that both of them were not of consenting age. Therefore, the learned trial court ought not to have convicted the appellant/accused no.1 of the offence punishable under Section 376 of the Indian Penal Code. Similarly,

the learned counsel further argued that there is no iota of evidence on record to hold that the appellant/accused no.1 was in possession of obscene Compact discs for the purpose of sale, hire, distribution, public, exhibition or circulation, and therefore, he ought not to have been convicted of the offence punishable under Section 292(2)(a) of the Indian Penal Code.

4 The learned APP supported the impugned judgment and order by contending that the prosecution has proved the fact that the victims of the crime in question were below 16 years of age, at the time of the incident in question, and as such, it cannot be said that they were consenting party to the act of the appellant/accused no.1. It is further argued that evidence of the victims is duly corroborated by medical evidence adduced on record. The learned APP further argued that the appellant/accused no.1 was in possession of obscene Compact Discs, and therefore, he is rightly convicted by the learned trial court for the offence punishable under Section 292(2)(a) of the Indian Penal Code.

5 I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence.

6 In the case in hand, the PW1 and PW2 are the alleged victims of the crime in question. Their evidence shows that they got acquainted with the appellant/accused no.1 through their friend Darshana Shah. Evidence of both these witnesses goes to show that the incident took place in the year 2011, and at that time, they were taking school education. The PW2 is the elder sister. As per her version, as on one occasion the appellant/accused no.1 came to the house of her friend Darshana Shah, she became acquainted with him. She deposed that, thereafter, the appellant/accused no.1 requested her to do job for him and as her father permitted to do job, she started working at the office of the appellant/accused no.1, as and when time permitted, for pasting stickers on the Compact Discs. The PW2 deposed that on one occasion, when the appellant/accused no.1 was all alone at his flat, he committed forcible sexual intercourse

on her and then gave her an amount of Rs.40/-. This witness further stated that, thereafter also the appellant/accused no.1 used to commit forcible sexual intercourse with her and on one occasion, he had video-graphed the said act, but promised to delete it. This witness further disclosed that along with her other friends, she used to visit the office of the appellant/accused no.1 for smoking hookah. She identified the appellant/accused no.1 while in the witness box. Her cross-examination reveals that at the time of recording of her statement, the police had beaten her, but she further stated that her statement was recorded as per her say. She was suggested in the cross-examination that after first intercourse with her, the appellant/accused no.1 had sexual intercourse with her after ten to fifteen days. This witness accepted this fact. Thus, what is stated by the PW2 in her chief-examination is cemented in her cross-examination by the defence.

7 As per version of the PW1, she got acquainted with the appellant/accused no.1, when she used to visit chowpatty for eating bhel. As per her version, on the request of the

appellant/accused no.1, she started working with him for affixing stickers on the Compact Discs. She stated that she used to get an amount of Rs.100/- to Rs.200/- intermittently for this work. Further evidence of the PW1 shows that on one occasion, the appellant/accused no.1 told her that he is having obscene Compact Disc of her sister and he would post it on the facebook. With this, the appellant/accused no.1 committed rape on her. As per version of the PW1, thereafter also, the appellant/accused no.1 used to call her to his flat and on one occasion he had shown the obscene Compact Disc of her sister to her. The PW1 deposed that the appellant/accused no.1 had forced her to have sexual intercourse with him on six to seven occasions. On some occasions, it was in presence of co-accused Heena.

8 So far as the incident of raiding the flat of the appellant/accused no.1 is concerned, the PW1 deposed that in response to call of the appellant/accused no.1, she went to his flat. The appellant/accused no.1 then denuded her, and at that time, PW6 Ramakant Tiwari and others entered in the flat with

cameras in their hands. The PW1 further deposed that the appellant/accused no.1 then gave money and ornaments to PW6 Ramakant Tiwari. She further stated that PW6 Ramakant Tiwari put all the cassettes in a bag.

9 From cross-examination of this witness, it is elicited by the defence that she used to be in company of the appellant/accused no.1 on every Sunday and she used to do the work of pasting stickers on the Compact Discs. She was getting an amount of Rs.100/- to Rs.150/- from the appellant/accused no.1 for this work. It is further elicited from the cross-examination of the PW1 that she, along with others, used to visit the flat of the appellant/accused no.1 for smoking hookah. The defence has further brought on record from cross-examination of the PW1 that on 17th November 2011 the appellant/accused no.1 had sexual intercourse with her but the act was not complete. This was because PW6 Ramakant Tiwari entered in the office of the appellant/accused no.1. She also admitted that at the police station, lady police constable had beaten her.

10 Evidence of the PW1 and PW2, as such, shows that their version regarding sexual intercourse by the appellant/accused no.1 with them is not shattered in the cross-examination. On the contrary, from cross-examination of these witnesses, the defence has brought on record the fact that the appellant/accused no.1 was having sexual intercourse with both of them. Even on the day of raiding his flat by PW6 Ramakant Tiwari, the appellant/accused no.1 was having sexual intercourse with the PW1.

11 Now let us examine whether the sexual intercourse by the appellant/accused no.1 with the PW1 and PW2 amounts to rape, as evidence of both these witnesses indicates that, despite suffering the incident of rape on them by the appellant/accused no.1 on first occasion, they both continued to visit flat of the appellant/accused no.1 time and again, for indulging in such acts. The prosecution has placed on record Birth Certificate Exhibit 95, which shows that date of birth of the PW1 is 20th October 1997.

Similarly, the Birth Certificate at Exhibit 96 shows that date of birth of the PW2 is 30th December 1994. These certificates are issued as per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. As per Section 17 of the said Act, these certificates can be read in evidence for determining age of the concerned person. The incident in question took place in the year 2011. As such, at the time of the incident in question, the PW1 was certainly below 16 years of age. However, the PW2 does not appear to be below 16 years of age, at the time of the alleged incident, which took place in the year 2011. As per the law applicable at the time of commission of the offence, sexual intercourse by a man with a woman, with or without her consent, when she was under 16 years of age, amounts to rape. Therefore, even if it is assumed that the PW2 had crossed the age of consent, the prosecution has certainly established that the PW1 had not attained the age of consent i.e. 16 years, at the time of the commission of sexual intercourse on her by the appellant/accused no.1.

12 The victims were sent for medical examination during the course of investigation and PW14 Dr.Suchita Phad had examined them on 19th November 2011. This Medical Officer noticed that hymen of the PW2 was having old healed tears. So far as the PW1 is concerned, PW14 Dr.Suchita Phad had noticed that she had old healed torn hymen. Thus, medical evidence is supporting case of the prosecution that the appellant/accused no.1 had committed sexual intercourse with the PW1 and PW2. As the PW1 was below 16 years of age, at the time of commission of sexual intercourse on her by the appellant/accused no.1, the prosecution has successfully proved the offence punishable under Section 376 of the Indian Penal Code against the appellant/accused no.1.

13 During the course of investigation, vide Panchnamas at Exhibits 75 and 78, in all four Compact Discs came to be seized by the prosecution in presence of PW3 Jitendra Shah and PW4 Shailesh Soneji. Evidence of both these witnesses shows that

contents of all these Compact Discs were obscene, lascivious and appealing to the prurient interest. Those Compact Discs were seized from PW6 Ramakant Tiwari and his associate Deepak. Evidence of PW6 Ramakant Tiwari shows that he had taken the Compact Discs from the appellant/accused no.1. Thus, the appellant/accused no.1 is proved to be in possession of the Compact Discs containing lascivious material. However, for proving the offence punishable under Section 292(2)(a) of the Indian Penal Code, the prosecution is required to prove the fact that obscene or lascivious material is manufactured or possessed by the accused for the purpose of selling, hiring, distributing, circulating or exhibiting publicly. There is no evidence on record to show that the Compact Discs were possessed by the appellant/accused no.1 for the purpose mentioned in clause (a) of sub-section (2) of Section 292 of the Indian Penal Code. Therefore, the appellant/accused no.1 cannot be convicted for the said offence.

14 In the result, the following order :

ORDER

- i) The appeal is partly allowed.
- ii) Conviction and resultant sentence of the appellant/accused no.1 for the offence punishable under Section 376 of the Indian Penal Code is maintained.
- iii) However, conviction and resultant sentence of the appellant/accused no.1 for the offence punishable under Section 292(2)(a) of the Indian Penal Code is quashed and set aside.
- iv) The appellant/accused no.1 is acquitted of the offence punishable under Section 292(2)(a) of the Indian Penal Code.
- v) The appeal stands disposed off accordingly.

(A. M. BADAR, J.)