

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 808 OF 2014
(THROUGH JAIL)**

Manojkumar Satnarayan Paswan @ Gabbar

Age: Adult, Occu:-Driver,

R/o. Mracho Pada, Unit No. 30,

Aarey Colony, Goregaon (E),

Mumbai – 400 065

(Presently detained at Nashik Road
Central Jail)

...Appellant
(Ori. Accused)

Versus

The State of Maharashtra
(Through Aarey Police Station
in CR No. 47/2012)

...Respondent
(Ori.Complainant)

Mr. Veerdhawal Deshmukh, *amicus curiae* for the Appellant

Mr. V. V. Gangurde, A.P.P for the Respondent-State

CORAM : REVATI MOHITE DERE, J.
MONDAY. 1st APRIL 2019

ORAL JUDGMENT :

1 By this appeal, the appellant has impugned the judgment and order dated 8th May 2014 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No. 117 of 2012, convicting and sentencing him as under :

- for the offence punishable under Section 376 of the Indian Penal Code ('IPC') to suffer RI for 10 years and to pay fine of Rs. 5,000/-, in default, to suffer further RI for 6 months;
- for the offence punishable under Section 363 of the IPC to suffer RI for 3 years and to pay fine of Rs. 5,000/-, in default, to suffer further RI for 6 months;
- for the offence punishable under Section 366 of the IPC to suffer RI for 3 years and to pay fine of Rs. 5,000/-, in default, to suffer further RI for 6 months;

The aforesaid sentences were directed to run concurrently.

Out of the fine amount, Rs. 10,000/- was directed to be paid to the prosecutrix as compensation under Section 357(2) of the Code of Criminal Procedure.

2 At the outset, it may be noted that the aforesaid appeal was listed for final disposal on more than 3 to 4 occasions, however, the learned counsel for the appellant took time and assured that he would work out the matter today. The appellant is languishing in jail and hence, considering the same, today Mr. Veerdhawal Deshmukh was requested to appear as *amicus curiae* to assist the Court and to espouse the cause of the appellant. Mr. Deshmukh has graciously accepted the request.

3 The prosecution case is as under :

On 11th April 2012, PW 2 (prosecutrix) was kidnapped by the appellant, when she went to school. Thereafter, the appellant took her to a room, where he had forcible sexual intercourse with her and thereafter left her alone in the room and went away. PW 2 (prosecutrix) left the room and went to Goregaon Checknaka, where she called her father PW 1 and informed him about the incident, pursuant to which, PW 1 lodged a police complaint/FIR with the Aarey Police Station. Pursuant to the FIR, the statement of PW 2

(prosecutrix) was recorded; clothes of the PW 2 (prosecutrix) were seized; appellant was arrested on 13th April 2012; his clothes were recovered at his instance; certain articles were seized from the spot i.e. the room where the appellant was residing i.e. bed-sheet, container with articles of PW 2 like her hairpins, lipstick, bindi, school uniform, school books, etc. After investigation, charge-sheet was filed as against the appellant in the Court of the learned Judicial Magistrate, Borivali, Mumbai. Since, Section 376 was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions for trial.

Learned Sessions Judge framed charge as against the appellant, to which, the appellant pleaded not guilty and claimed to be tried.

The prosecution, in support of its case, examined 9 witnesses i.e. PW 1- Dharishan Gupta (complainant-father of PW 2-prosecutrix); PW 2 (prosecutrix), who at the relevant time, was about 13 years of age; PW 3-Ramkailash Yadav (panch to the recovery of clothes of the appellant and seizure of articles from the room, where

the appellant was residing); PW 4-Mehrunisa Shaikh (panch to the seizure of clothes of the prosecutrix); PW 5-Rakesh Yadav (the owner of the room, where the appellant was residing and from where articles were seized); PW 6-Dr. Pratap Anand (who examined the prosecutrix as well as the appellant); PW 7-Ramashankar Yadav (School teacher, who produced the School Register to prove the age of the prosecutrix i.e. date of birth); PW 8-Dattatray Desai (Investigating Officer) and PW 9-Girish Anavkar (Investigating Officer).

The defence of the appellant was of denial and false implication. According to the appellant, he was having an affair with the prosecutrix and that the prosecutrix had left the house on her own accord.

4 Mr. Deshmukh, learned *amicus curiae* submitted that the appellant has been falsely implicated in the said case; that the prosecution has failed to prove the age of the prosecutrix, that she was 13 years of age at the relevant time; that the evidence on record shows that PW 2 knew the appellant and that she went with the appellant on

her own accord; and that there are several omissions that have come on record in the evidence of PW 2.

5 Learned A.P.P supported the impugned judgment and order. He submitted that no interference was warranted in the same.

6 Heard learned *amicus curiae* and the learned A.P.P at length and with their assistance, perused the evidence and the documents on record. At the outset, it is pertinent to note that the appellant has not disputed the finding of articles i.e. article No.10 (plastic container, having ear rings, finger rings, bangles, etc.), article 11 (school uniform), article 12 (Geography book) and article 13 (one metal watch), which were seized from the appellant's room after his arrest. The appellant has also not disputed the evidence that has come on record of the panch (PW 3) that he led both the panchas and the police and showed his residential house in the chawl, from which police seized mattress (article 8), Chaddar (article 9), plastic tin, containing hairpins, lipstick, sindoor, hairband (article 10), school uniform (article 11), geography book (article 12), metal watch (article

13), nicker (article 14). The appellant has also not disputed in his 313 statement that PW 5-Rakesh Yadav (owner of the room) had given him the said room on rental basis and that he was staying in the said room; the appellant has also not disputed that he was referred for medical examination after his arrest and that blue colour jeans pant (article 6) and green colour full shirt (article 7) were seized under a panchanama.

7 A perusal of the evidence of PW 2 (prosecutrix) shows that at the time of the incident, she was about 12 years and 11 months and was studying in the 7th standard. She has stated that the appellant was residing near her house and was a rickshaw driver; that the appellant used to drop her, her brother and sister to school in the auto rickshaw; that in the absence of her parents, the appellant would enter their house and would have physical relations with her against her consent. PW 2 has stated that on 11th April 2012, after her last paper, when she was standing on the ground near Unit No. 29, the appellant came there and asked her to come with him; that he forced her to sit in the auto rickshaw and took her to Nallasopara in one house, where he

had physical relations with her; that he left her in the room and did not return; that thereafter, she came to Nallasopara and boarded the train and came to Borivali, stayed on the Borivali platform for the night and thereafter came to Goregaon checknaka on the next day and called her father (PW 1) to come to the said checknaka; that her father came with the police and took her to the police station. After PW 2's statement was recorded, she was referred for medical examination. PW 2 also handed over her clothes to the police. During her evidence, she identified the clothes which she had worn and other seized articles belonging to her. She has further given her date of birth as 18th May 1999. She has also identified the appellant.

8 The said evidence of the prosecutrix is corroborated by of PW 1 i.e. complainant and father of the prosecutrix. PW 1 has given the date of birth of PW 2 as 18th May 1999 and has stated that she was born in Laxmipur in District Kushi Nagar, Uttar Pradesh. He has further stated that the incident had taken place on 11th April 2012, when his daughter PW 2 did not return home, pursuant to which, he lodged a missing complaint. He has further stated that after meeting

Mushtaque, he learnt that the appellant has kidnapped his daughter and therefore, he lodged a case of kidnapping as against the appellant on 13th April 2012 (Exhibit 18). He has further stated that after three days, his daughter (PW 2) called and disclosed that she was at Goregaon checknaka, pursuant to which, he along with the police went to Goregaon checknaka and brought her to the police station.

9 The evidence of PW 1 and PW 2 that the prosecutrix was taken by the appellant to his room at Nallasopara has also not been disputed by the appellant. As noted earlier, the appellant has admitted the articles that were found in his room as well as the fact, that he had taken the room on rent from PW 5 and hence, it is not necessary to spell out the evidence that has come on record of PW 3 (panch) and PW 5 (the owner of the room, where the appellant was residing).

10 The medical evidence that has come on record also corroborates the evidence of PW 2 and PW 1. According to PW 6-Dr. Pratap Anand, on 14th April 2012, the prosecutrix and the appellant were referred for medical examination to him. He has stated in his

evidence that during examination, he found no external injury on PW 2; that the type of hymen was fimbriated and in a torned condition; that the position of tears was 3, 6, 9 O'clock position; that the age of tears was old healed, hymenal orifices admits two fingers. He has further stated that he carried out ossification test and on examination of X-ray, found the age of the prosecutrix to be between 15 to 16 years with error of 6 months on either side. He has produced the medical certificate on record (Exhibit 36).

11 As noted earlier, the defence of the appellant is that the prosecutrix had gone on her own accord with the prosecutrix and as such, it was a case of consent. The said defence of the appellant is noted only to be rejected. PW 2 (prosecutrix) and PW 1 (complainant) have, in their evidence clearly stated that the prosecutrix was born on 18th May 2019 and as such, her age was 12 years 11 months at the relevant time. It is pertinent to note that there is no cross-examination by the appellant of the said witnesses on this aspect i.e. with respect to the age that has come on record. Thus, the evidence with regard to the age of the prosecutrix has practically gone unchallenged. Infact, no

reason has come on record to show that either PW 1 or PW 2 had any reason to contrive and confabulate a false case against the appellant.

12 The prosecution has also examined PW 7 – Ramshankar Yadav to prove the date of birth of the prosecutrix. PW 7 is the teacher who was working in the said school, where the prosecutrix was staying. He has stated that as per their record, the date of birth as per General Register is 18th May 1999. He has produced the General Register to show the entry at Serial No. 6479. The said extract of the Register is marked as Exhibit 42. He has also produced the original bonafide certificate, which bears the signature of the head mistress of the school Smt. Vidya Rajput. She has identified her signature on the said document i.e. Exhibit 43. There is hardly any cross to discredit or disbelieve PW 7, with regard to the date of birth of the prosecutrix. PW 6-Dr. Pratap Anand, after conducting the ossification test, has stated that the age of the prosecutrix was between 15 and 16 with a margin of 6 months on either side. Thus, his evidence also shows that the prosecutrix (PW 2) was below 18 years of age at the relevant time. Hence, the question of consent does not arise. The appellant, aged 22

years, a rickshaw driver, used to take the prosecutrix and her brother and sister to school. The appellant has taken advantage of the prosecutrix aged around 12 years, by sexually exploiting her.

13 Considering the evidence on record, no infirmity can be found in the impugned judgment and order dated 8th May 2014 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No. 117 of 2012. Accordingly, the appeal is dismissed.

14 I would like to record a word of appreciation for the able assistance provided and the efforts taken by Mr. Veerdhawal Deshmukh, the learned *amicus curiae* in conducting the appeal.

15 High Court Legal Aid Services Committee to award fees of the learned *amicus curiae* as per Rules.

REVATI MOHITE DERE, J.