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

CRIMINAL APPEAL NO. 399 OF 2016

Ramjan Mohammad Ghudubhai ..Appellant

V/s.

The State of Maharashtra ..Respondent

Mr. Jayant Bardeskar for the Appellant.

Mr. R.M. Pethe, APP for the Respondent/State.

CORAM : C.V. BHADANG, J.

**RESERVED ON : 4 DECEMBER 2021
PRONOUNCED ON : 23 DECEMBER 2021**

JUDGMENT

1. By this Appeal, the Appellant-accused is challenging the Judgment and Order dated 20.05.2016 passed by the learned Special Court at Kolhapur in Special (POCSO) Case No. 40 of 2013. By the impugned Judgment, the Appellant has been convicted for the offence punishable under Section 363, 366, 376(2)(i) and Section 506 of IPC and Section 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 ('the said Act'). For the offence under Section 376(2)(i) of IPC, the Appellant has been sentenced to suffer rigorous imprisonment for ten years with fine. No separate sentence has been awarded for the offence under Section 3 read with Section 4 of the said Act, in

view of the provisions of Section 42 of the said Act. For the offence under section 363, the Appellant is sentenced to suffer rigorous imprisonment for three years with fine and under Section 366, he has been sentenced to suffer rigorous imprisonment for five years with fine. Lastly, for the offence punishable under Section 506 of IPC, the Appellant is sentenced to suffer rigorous imprisonment for one year with fine. The substantive sentences have been directed to run concurrently.

2. The prosecution case may be briefly stated thus:

In the year 2013, the victim PW-2 was studying in 9th standard in Janata Madhyamik Vidyalay at Hupari. Her date of birth is 27.07.1999. On 13.08.2013, PW-2 did not attend the school. At about 11.15 a.m., she had gone to Bank of India, Hupari for withdrawing the scholarship amount. However, she was told to come on the next day and hence she decided to go to school. It is the material prosecution case, that when she was proceeding to school, she met the Appellant, who was known to her as the Appellant was residing in her neighborhood. The Appellant had come in a Maruti car and asked her to sit in the car saying that he will drop her to the school. As PW-2 was knowing the Appellant, she boarded the car. The Appellant took the car to five star MIDC at Kagal and parked the car at some distance from the main road and asked PW-2 to occupy the rear seat. The Appellant is then alleged to have gagged PW-2 and had forcible

sexual intercourse with her on the rear seat of the car. The Appellant then dropped PW-2 near the girl's high school at Hupri, threatening her not to disclose the incident to anybody else at the risk of she and her parents getting killed. PW-2 narrated the incident to her mother and other family members after they returned home, whereupon, PW-1 who is the mother of PW-2 lodged the report with Police Station Hupri upon which the offence came to be registered against the Appellant under the relevant sections.

3. During the course of investigation, the Appellant came to be arrested. The Appellant and PW-2 were referred for medical examination. It may be mentioned that the Appellant is married having children. The Investigating Officer conducted the seizure of the clothes of the Appellant and PW-2 which were sent for the report of the Chemical Analiser. The statements of the witnesses came to be recorded and after completion of the investigation, a chargesheet was filed.

4. The learned Special Judge, framed charge against the Appellant for the offence punishable under Section 363, 366(A), 376 and 506 part II of IPC and section 4 of the said Act. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence as elicited from the nature of the cross-examination and the statement under Section 313 of Cr.P.C. appears to be two pronged. According to the Appellant, there

was a dispute between his family and family of PW-2 on account of a lane intervening between their houses. It was also claimed that PW-2 had a one sided love affair with the Appellant and inspite of the Appellant trying to dissuade PW-2 from any such relationship, she continued to pester the Appellant and on account of his refusal, he has been falsely implicated.

5. At the trial, the prosecution examined in all eleven witnesses and produced the record of the investigation. The Appellant did not lead any evidence in defence.

6. The learned Special Judge by the impugned Judgment has found the Appellant guilty. Hence, this Appeal.

7. I have heard Mr. Bardeskar, the learned counsel for the Appellant and Mr. Pethe, the learned APP for the Respondent/State. With the assistance of the learned counsel for the parties, I have gone through the record.

8. It is submitted by the learned counsel for the Appellant that the prosecution story is highly improbable. The learned counsel for the Appellant has taken me through the evidence of PW-2 in order to point out, that it is improbable that the Appellant would pick-up PW-2 in a car, in broad day light, travel to MIDC at Kagal which according to PW-2 took about half an

hour and then would sexually abuse her in the car and also in broad day light at about 2 to 2.30 p.m. It is submitted that at no point of time PW-2 had raised any alarm to secure help from passers by. It is submitted that PW-2 also claims to have made an attempt to flee from the spot after she was allegedly asked by the Appellant to occupy rear seat and she also claims to have offered resistance by scratching the Appellant. However, the medical evidence does not support any such case. It is submitted that in this case the uncorroborated testimony of PW-2 cannot be accepted or relied upon. For this purpose, reliance is placed on the decision of the Supreme Court in *Muthuramalingam and others v/s. State represented by Inspector of Police*¹, *Dinesh Jaiswal v/s. State of Madhya Pradesh*², *Koppula Venkat Rao v/s. State of A.P.*³, *Phool Singh v/s. The State of Madhya Pradesh*⁴, *The State of Haryana & Ors v/s. Raj Kumar @ Bittu*⁵, *State of Madhya Pradesh v/s. Mahendra alias Golu*⁶, and decision of this Court in *State of Maharashtra v/s. Arun Gopalrao Verulkar*⁷, *Sandeep Janaji Konde v/s. The State of Maharashtra*⁸, *Jagan s/o Rangu Thakre v/s. State of Maharashtra*⁹, *Niranjan s/o Vishnu Chavan v/s. The State of Maharashtra*¹⁰.

1 (2016) 8 SCC 313
 2 (2010) 3 SCC 232
 3 (2004) 3 SCC 602
 4 2021(14) SCALE 444
 5 2021(9) SCC 292
 6 2021(4) RCR (Cr) 613
 7 2016 ALL MR (Cri) 126
 8 2016 ALL MR (Cri) 1433
 9 2015 ALL MR (Cri) 105
 10 2016 ALL MR (Cri) 1464

9. The learned counsel has also referred to the evidence of PW-10 Dr. Ranjit Jadhav in order to submit that PW-10 had not examined the victim as she was examined by the Gynecologist Dr. Ashwini Gaddikari, who was not examined as a witness by the prosecution. He, therefore, submitted that no reliance can be placed on the medical evidence. The learned counsel has also referred to the nature of the seizure made and the evidence as to the Chemical Analyser's report to submit that there is no corroboration forthcoming to the evidence of PW-2. It is submitted that in any event, there is no evidence to show that PW-2 was forcibly taken or induced to accompany the Appellant and thus, the learned Special Judge was in error in holding the Appellant guilty.

10. The learned APP has supported the impugned judgment. It is submitted that the evidence of PW-2 is natural and one inspiring confidence. In the submission of the learned APP, the conviction can be based on the uncorroborated testimony of the prosecutrix if the evidence is found to be acceptable. The learned APP has submitted that the Appellant was known to PW-2 as he was a neighbour and therefore, there was nothing unusual in PW-2 agreeing to accompany the Appellant in the car when the Appellant had professed that she will be dropped at the school.

11. I have given my anxious consideration to the circumstances and the submissions made.

Whether the victim is a child:

12. PW-1 who is the mother of the victim has stated in her evidence that the date of birth of PW-2 was 27.07.1999 and in the year 2013 she was studying in 9th standard. In support of the same, she has produced a school leaving certificate and bonafide certificate Exh.34-A from Janata Madhyamik & Art's Commerce and Science Junior College. PW-7 Dattatray Patil, is the class teacher of PW-2. He states that on a requisition from Investigating Agency, he had furnished a true copy of the attendance sheet for the month of August 2013/(Ex.____) The prosecution has also produced a birth certificate from Kagal Municipal Council (Exh. 53) which shows the date of birth of PW-2 as 27.07.1999. The prosecution has also attempted to get ossification test of PW-2 done and certificate at Exh. 66 records that on the basis of the opinion of radiologist Dr. Deepak Kumbhar, the bony age of PW-2 was between 14 to 16 years.

The evidence as to the age of PW-2 has been criticised on behalf of the Appellant. The learned counsel for the Appellant pointed out that PW-2 has stated that she was born at Hupri. However, the birth certificate from Kagal Municipal Council shows that that she was born at Kagal. The learned Special Judge has dealt with this aspect and has observed that cross-examination on any such discrepancy and the place of birth of PW-2 has to be with PW-1 who was the mother and who was in a better position to state about the place of birth of PW-2. In my considered view,

any such discrepancy is not significant in the present case. The evidence in the form of the school leaving certificate/bonafide certificate and the birth certificate from Kagal Municipal Council coupled with oral evidence of PW-1 are sufficient to hold that the date of birth of PW-2 was 27.07.1999. In the face of such documentary evidence available, it is neither necessary, nor appropriate to go to the evidence of ossification test. The Supreme Court in the case of Jarnail Singh v/s. State of Haryana¹¹ has held that even in respect of the victims of an offence, the age of the child could be determined in accordance with Rule 12 of 2007 Rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2000. Incidentally Rule 12 now corresponds to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Rule 12 of the Act envisages a preference in the matter of determination of the age and the evidence in support thereof. The matriculation or the equivalent certificate issued by the school and thereafter, the school record where the child was first admitted, takes precedence over the ossification test. The Supreme Court in the said case, which also incidentally involved an offence under Section 376 of IPC has held that it is only in the absence of the evidence of matriculation or the equivalent certificate or from the first school attended by the child that the evidence of ossification test can be considered.

¹¹ 2013 AIR (SC) 3467

13. In my view, the oral evidence of PW-1 coupled with documentary evidence as referred above, is sufficient to establish the date of birth of the victim and thus, in August 2013 i.e. at the time of incident, the victim was a little over 14 years of age and was a 'child' within the meaning of Section 2 (d) of the said Act.

Spot of Incident:

14. According to PW-2 she was picked up by the Appellant in a Maruti car at some distance from her school on the pretext of being dropped at the school. The incident of sexual abused happened in the Maruti car, in which PW-2 was taken by the Appellant to MIDC at Kagal. The spot where Maruti car was parked in MIDC was shown by PW-2 and spot panchnama was drawn in the presence of panchas. PW-3 Ajit Sutar is a spot pancha and the spot panchnama is at Exh.41. The evidence shows that the car was parked at the time of the incident in plot No. B-14, which is an open plot in MIDC. The said plot is bounded to the east by a tar road and on the west at a short distance there was a house of one Prakash Lohar and surrounded by the open place of MIDC. It can thus be seen that the spot was fairly in a locality which was near a public road as well as residential house of Prakash Lohar.

Oral Evidence as to the incident:

15. PW-2 has stated that Appellant had intercepted her after coming in Maruti car on the pretext of being dropped in the school. In the morning, on the day of incident, PW-2 had left with her cousin brother to Bank of India for withdrawing the scholarship amount. She states that her cousin brother went to Doctor as he was not feeling well and in the Bank, she was told to come on the next day. She had therefore, decided to go to school when she was picked up by the Appellant and then carried to MIDC, Kagal in the Maruti car. This entire incident is alleged to have happened in broad day light i.e. between 11.45 to 14.00 hrs. She states that the Appellant parked the car at some distance from the road, then asked her to occupy the rear seat and after which she was sexually abused. After this incident, she continued to accompany the Appellant when she was dropped by the Appellant near the girl's High School after which she went to her house and after her parents came back, the incident was narrated to them and the other family members.

16. The learned counsel for the Appellant has strenuously urged that there was a one sided love affair between victim and the Appellant and in spite of the Appellant trying to dissuade PW-2 from any such relationship, as he was married, the victim continued to pester him. He, therefore, alternatively submitted that this is a case of the victim being a consenting party. This

submission was coupled with contention that the age not being proved, the aspect of consensual relationship would be relevant.

17. I have considered the evidence in the context and the submissions made. There are circumstances to indicate that PW-2 was a consenting party and she had accompanied the Appellant without any resistance. It is necessary to note that according to PW-2 it took about half an hour for them to reach MIDC, Kagal and for all this period the Appellant and the victim had traveled in Maruti car in broad day light. Even the spot of incident where Maruti car was parked as noticed earlier there was a tar road in the MIDC and the house of Prakash Lohar. Although, PW-2 had stated that she had tried to flee after she was asked to occupy the rear seat and also offered resistance and scratched the Appellant, there is no medical evidence to support any such incident. It is further significant to note that the prosecution had relied upon a letter Article 'A' purportedly written by PW-2 to the Appellant claiming that it was PW-2 who was involved with the Appellant in a one sided love affair.

18. The medical examination report Exh.65 shows that medical history was given by PW-1 i.e. mother of victim stating that the victim had an affair with the Appellant. Thus, considering the over all circumstances, in all probability the victim had willingly accompanied the Appellant on the date of the incident. although,

she had left for going to Bank and attending the school in a school uniform. After holding so, I would hasten to add that once the victim is held to be a child, any such consensual aspect will not be relevant for deciding the issue about commission of an offence under Section 376 of IPC as PW-2 had not attained the age of consent and was a child. A careful perusal of the evidence of PW-2 however leaves no manner of doubt that the Appellant had asked P.W.-2 to accompany him and she had accompanied the Appellant to MIDC, Kagal, where there was an attempt to sexually abuse PW-2 by the Appellant. The evidence of PW-10 is relevant for this purpose.

19. PW-10 Dr. Ranjeet Jadhav was working as a Medical Officer of CPR Hospital, Kolhapur. On 15.08.2013, he was working in casualty department when PW-2 was taken to him for examination by the police and for securing samples. PW-10 obtained the consent of her mother and carried out general physical examination of the victim after securing her blood sample. PW-10 claims that the victim was then referred for further examination to gynecologist Dr. Ashwini Gaddikari. Incidentally, Dr. Gaddikari could not be examined, as in the meantime she had relocated to Dubai. However, PW-10 claims that he knows signature of Dr. Gaddikari as he had worked with her and has identified the signature of Dr. Gaddikari on Exh. 65 to which a reference is already made. The evidence of PW-2

shows that she had attained puberty when she was in 7th standard and on 13.08.2013, it was the fourth day of her menstrual cycle. The report Exh. 65 shows that there were no bruises or abrasion or scratch to the labia majora and labia minora. It also shows that there was no bleeding or injury to the foruchette or the perineun and except the menstrual bleeding there were no other significant notings. It also shows an old healed scar at 6 o'clock position to the hymen. The Medical Officer had reserved the opinion pending the report of the Chemical Analyzer.

PW-10 has admitted that there is no final opinion given by CPR Hospital as to whether the victim was sexually assaulted or not. It can thus be seen that the medical evidence does not support the case of PW-2 that she was subjected to forcible sexual intercourse. In my considered view this is a case where in all probability, the Appellant had fallen short of the actual commission of sexual intercourse with PW-2. In my considered view, this would be a case where the Appellant can be found guilty of attempt to rape i.e. an offence under Section 376 read with Section 511 of IPC.

20. It is now well settled that the victim of a sexual offence is not an accomplice and therefore, there is no Rule of law or of prudence which requires the evidence of prosecutrix being corroborated in order to place reliance on the said evidence. It is

settled that even uncorroborated testimony of the prosecutrix can be accepted and acted upon provided the evidence is found to be cogent and natural and one inspiring confidence and on which implicit reliance can be placed. It is only when the Court in order to satisfy its judicial conscience that it would look for corroboration by direct evidence or otherwise to the testimony of the prosecutrix. The question would obviously be one of fact. The decision on which the reliance is placed on behalf of the Appellant turned on their own facts.

21. In Dinesh Jaiswal (*supra*) the prosecutrix was a married woman and there was no medical evidence to confirm the factum of rape. Even her husband, who had accompanied her to police station to lodge report was not examined. There were certain other infirmities found by the Supreme Court in the evidence of prosecutrix in which case the evidence was disbelieved.

22. In Koppula Venkat Rao (*supra*) the Supreme Court has held that penetration and not ejaculation is the *sine qua non* of offence of rape and in the absence of evidence of penetration, the accused was liable to be convicted for attempt to commit rape. It is not necessary to multiply authorities on the point.

23. In Aurn Gopalrao Verulkar (*supra*) there was no medical evidence to lend support to the assertion of the victim girl who

was aged 13 years and entire story of rape was by way of omission and hence, the evidence was disbelieved.

24. The Special Court has not awarded any separate sentence for the offence under Section 3 which is punishable under Section 4 of the said Act in view of Section 42 of the said Act.

25. Coming to the conviction under Section 363 and 366 of IPC, the offence of kidnapping from lawful guardianship has been defined under Section 361 of IPC. Under the said Section whoever “takes” or “entices” any minor under 18 years of age, if a female, without consent of said guardian, is said to have kidnapped such minor or person from lawful guardianship. A useful reference in this regard can be made to the decision of the Supreme Court in *S. Vardarajan v/s. State of Madras*¹² That was also a case where on fact it was found that the girl who was on the verge of attaining majority had voluntarily accompanied the Appellant to the Registrar’s office for registering a marriage agreement. The Supreme Court found that this was on the girl’s insistence on marrying him and therefore, it was held that there was no ‘taking’, within the meaning of Section 361 of IPC.

26. I have already held that there are circumstances to show that PW-2 had in all probability voluntarily accompanied the Appellant and there is no reason for failure on her part to raise

¹² AIR 1965 Supreme Court 942

any alarm or to seek help from the passers by when she with the Appellant traveled in Maruti car to Kagal MIDC for about half an hour during the day time and also that even after the incident, she accompanied the Appellant when she was dropped back. Thus in my considered view, PW-2 who had attained 14 years of age, and had attained puberty and age of understanding, there was no 'taking' or enticing by the Appellant as held by the Supreme Court in the case of S. Varadarajan. For the same reason any threat as held out as contemplated under Section 506 part II of IPC is also ruled out. Thus, in my considered view, the Appellant is entitled to be acquitted for the offence under Section 363, 366 and 506 part II of IPC. The Appellant however is liable to be convicted for the offence punishable under Section 376 read with Section 511 of IPC and Section 4 read with Section 18 of the said Act. Both Section 511 of IPC and Section 18 of the said Act, which deal with punishment for attempt to commit an offence prescribe a maximum sentence which may extend to one-half of the imprisonment for life or as the case may be, one-half of the longest term of imprisonment provided for the offence or with fine or both. The offence under Section 376 (2)(i) (as it stood then, prior to its amendment by Act No. 22 of 2018 w.e.f. 22.04.2018) invites a punishment of not less than 10 years but which may extend to imprisonment for life. Considering the fact that the imprisonment for life, with remission, would be

imprisonment for 14 years, I find that the Appellant can be sentenced to suffer rigorous imprisonment for 7 years with fine.

27. Hence, the following order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) The conviction of the Appellant for the offence punishable under Section 363, 366, 506 Part II of IPC is hereby set aside.
- (iii) The conviction of the Appellant for the offence punishable under Section 376 (2)(i) of IPC read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 is hereby modified to one under Section 376 read with Section 511 of IPC and Section 4 read with Section 18 of the Protection of Children from Sexual Offences Act, 2012.
- (iv) The Appellant is sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.20,000/- and in default there of to undergo simple imprisonment for 3 months.
- (v) The Appellant shall be entitled to set off as against the period of imprisonment already undergone.
- (vi) The Appeal is disposed of in the aforesaid terms.

(C.V. BHADANG, J.)