

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

**CRIMINAL APPEAL NO. 1005 OF 2017
WITH
INTERIM APPLICATION NO. 14 OF 2021**

Mr. Sayyad Chand Agasapure
Aged about 28 years old,
Occ: Student,
R/o. A/P. Kazi Kanbas,
Tal. Akkalkot, Dist. Solapur,
At present R/o. New Paccha Peth,
Solapur-413 005.

...Appellant

Versus

1. The State of Maharashtra
At the instance of Sr. PI and
then IO Mr. Tukaram Vitthal Chavan,
Jail Road Police Station, Solapur.

2. Ms. X (minor)

...Respondents

Mr. Deepak Natu i/b N. Deepak & Co. Advocate for the
Appellant/Applicant.
Mr. S. V. Gavand, A.P.P for the Respondent–State.

CORAM : REVATI MOHITE DERE, J.

DATE : 18TH FEBRUARY 2021

JUDGMENT

1. By this appeal, the appellant has impugned the judgment and order dated 4th August 2017 passed by the Learned Additional Sessions Judge, Solapur, in Sessions Case No. 185 of 2016, by which the appellant was

convicted and sentenced as under:-

- for the offence punishable under Section 376 (2)(i)(n) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012, to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine, to undergo further simple imprisonment for one year;
- out of the said amount of fine, an amount of Rs. 3,000/- was directed to be paid to the victim as compensation.

2. The prosecution case in brief is as under:-

The prosecutrix, a minor girl, aged 13 years (hereinafter referred to as 'X'), was residing at Solapur with her mother in her maternal uncle's house, at the relevant time. The complainant (PW-2), the father of 'X', was residing at Osmanabad and would come to Solapur to meet his wife and children including 'X'. According to the complainant (PW-2), when he visited Solapur on 10th March 2016, to meet his wife and children, 'X' complained of stomach ache, pursuant to which, he bought medicines from a chemist and gave it to her. After taking medicines 'X's pain subsided. However, again on 12th March 2016, 'X' complained of stomach ache, pursuant to which, PW-2 (Complainant) and his wife took 'X' to the Civil Hospital, at Solapur. On examination, 'X' was found to be pregnant. On

inquiry with 'X', she disclosed that the appellant had sexually assaulted her on 4-5 occasions, in her maternal uncle's house. PW-2 informed the said fact, to his brother-in-law. The complainant (PW-2) also informed this to the doctor, on the basis of which M.L.C. was registered.

Thereafter, the complainant lodged an FIR/Complaint with the Ashok Chowk Police Chowki, Solapur, which was registered vide CR No. 117 of 2016, as against the appellant alleging offences punishable under Section 376 of the Indian Penal Code and under Sections 3 and 4 of the Protection Of Children From Sexual Offences Act, 2012. After investigation chargesheet was filed as against the appellant, in the Special Court. Charges were framed against the accused, to which he pleaded not guilty and claimed to be tried. The defence of the appellant was of denial and false implication.

The prosecution in support of its case, examined four witnesses;

PW-1 – The prosecutrix ('X'); PW-2 -Complainant (Father of 'X'); PW-3 Madhura Pundalik Bhaskar, PSI, attached to Ashok Chowk Police Chowky, Solapur, at the relevant time; and PW-4 – Manmath Ramchandra Ukarande, Head Master of School, where 'X' was studying.

The Trial Court after considering the evidence on record, convicted and sentenced the appellant as stated aforesaid in paragraph 1.

3. Mr. Natu, learned Counsel for the appellant submitted that the allegations as against the appellant are false and baseless. He submitted that the prosecution had failed to prove that 'X' was a minor, at the time of alleged incident. He submitted that even the DNA report (Exh.47) cannot be relied upon, as the same has not been proved by the prosecution. Learned counsel submits that as PW-1 (Prosecutrix) and PW-2 (Complainant) have turned hostile, the prosecution has failed to prove its case beyond reasonable doubt as against the appellant and as such the appellant's conviction cannot be sustained. Learned counsel has tendered written submissions in support of his submissions.

4. Learned APP supported the impugned judgment and order of conviction and sentence. He submitted that the evidence on record clearly shows the complicity of the appellant in the alleged crime. He submitted that the appellant had under Section 294 Cr. P. C. admitted the spot panchanama and the map (Exh.13); the appellant's own medical reports (Exh.14); the medical reports of 'X' (Exh.15) and CA reports (Exh.16), thus clearly pointing to his complicity in the crime. As far as the DNA report is concerned, learned APP submits that the same has been duly proved by the prosecution and that the said report clearly establishes that the appellant was the father of the child.

5. With the assistance of learned counsel for the parties, perused the papers. As noted earlier, the prosecution has examined four witnesses in support of its case. Both, PW-1 'X' and PW-2-father of 'X' resiled from their statements and were declared hostile by the prosecution.

6. PW-1 'X' in her examination-in-chief has stated that she was residing with her maternal uncle and aunt and was 13 years of age, at the relevant time. She has stated that she knew the appellant as he was her cousin brother. According to 'X', he had not done anything to her. As the said witness-'X' did not support her oral statement made before the police, learned APP declared her hostile. Accordingly, the prosecutor was permitted to put questions to the said witness in the nature of cross-examination. In her cross-examination by the learned APP, 'X' denied stating before the police, that the appellant had forced her on 4-5 occasions; that she had disclosed to her mother about the pain in her abdomen; and, that she was taken for medical examination by the police. When portion marked in Article 'A' in her statement was read over to her, PW-1'X', denied having stated so before the police. As far as her statement under Section 164 of Cr. P. C., recorded by the Magistrate is concerned, 'X' was shown her statement. Although 'X' admitted her signature on it, she has stated that it was not recorded as per her say. PW-1 in her cross-examination by the

appellant's counsel, has admitted that she was 18 years at the relevant time and that it was true, that the relations with the appellant were consensual. No doubt, 'X' turned hostile, however, there is no suggestion to 'X' s evidence in her chief, that she was not 13 years of age at the relevant time, by the advocate for the appellant. Hence, the said evidence has gone unchallenged. Infact, the defence of the appellant seems to be that PW-1-'X' was a major i.e. 18 years at the relevant time and that the relations between them were consensual.

7. PW-2 - 'X's father (complainant) also turned hostile. PW-2 in his examination-in-chief has stated that he was residing at Osmanabad and that 'X' is his daughter. He has stated that at the time of the incident 'X' was 10 years old and was studying. He has stated that he cannot tell her date of birth. He has further stated that his wife informed him that 'X' was having stomach pain and hence, he asked her to take 'X' to the doctor. He has stated that on examination, the doctor revealed that 'X' was pregnant; that on inquiry from her, as to who was responsible for the same, she did not disclose the name. PW-2 denied that 'X' told him that the appellant had sexually assaulted her. As PW-2 resiled from his statement given to the police, he was declared hostile and was permitted to put questions in the nature of cross-examination to the said witness. In the cross-examination by

the prosecutor, PW-2 admitted of having lodged a complaint before the police on 12th March 2016 and also admitted his signature on the said complaint/FIR, PW-2, however, denied knowing anything about its contents. PW-2 denied knowing anything about the portion marked Article 'A' in his complaint. PW-2 although has admitted that his statement was recorded by the Magistrate and that it bears his signature, has stated, that he did not know anything about it. There is no cross-examination of the said witness, by the appellant's advocate, much less, any cross-examination with respect to the age deposed to by PW-2 in his examination-in-chief i.e. that 'X' was 10 years, at the relevant time.

8. The contradiction in the evidence of these witnesses has been proved by PW-3 PSI Madhura Bhaskar, the Investigating Officer.

9. The moot question that, therefore arises is, whether despite the two key witnesses having turned hostile, can their evidence, to the extent, that it supports the prosecution, be relied upon?

10. The Apex Court in the case of **Koli Lakhmanbhai Chanabhai Vs. State of Gujarat reported in (1999) 8 SCC 624** has in paragraph 5 observed as under :-

*“5. From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of PW 7 who was cross-examined by the prosecution. **It is settled law that evidence of a hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence (Bhagwan Singh v. State of Haryana and Sat Paul v. Delhi Admn.).....** ”. (emphasis supplied)*

11. Thus, there is no legal impediment, in relying on the evidence of witness, to the extent that it supports the prosecution case. Merely because a witness turns hostile, his/her entire evidence does not get effaced. The evidentiary value of a witness who has turned hostile will have to be weighed and assessed depending on the fact situation in every case and the nature of evidence adduced on record. As far as the evidence of PW-1 and PW-2 is concerned, although the said witnesses were declared hostile, their evidence with respect to the age of PW-1 ‘X’, that she was 10/13 years, has gone unchallenged and that ‘X’ was pregnant has not been disputed. PW-1 ‘X’ and PW-2 ‘X’s father did not support the prosecution case for obvious reasons i.e. to save the appellant as he was ‘X’s cousin. However, the fact remains, that despite PW-1 and PW-2 having turned hostile, their evidence with respect to ‘X’s age at the relevant time has gone unchallenged. There

is absolutely no cross-examination on this aspect by the appellant. The fact that the said two witnesses have resiled from their statements or have turned hostile, by itself would not efface the cogent evidence that has come on record to show that 'X' was a minor at the relevant time. A criminal trial is but a quest for truth and dispensation of justice in a criminal trial is a serious matter. Presumption of innocence will have to be balanced with the rights of the victim and above all the societal interest for preservation of the rule of law.

12. The aforesaid evidence of the two witnesses, with respect to 'X's age is duly corroborated by other cogent and reliable evidence on record. It is pertinent to note that the appellant has admitted the medical report of the victim (Exh.15) under Section 294 of the Cr. P. C. Having admitted the said medical report (Exh.15), there can be no impediment to read the contents therein, as evidence. In column (II) of the medical report of 'X' (Exh.15) History/Details of alleged sexual assault are stated as under:-

“As per history narrated by her mother, victim is 12 years. 'X' (name withhold) studying in seventh, knows the accused who is 25 years student Sayyad Chand Aksapure, who has abused to her. Victim had 2-3 episodes of sexual intercourse. Last was 2 months back. No use of contraception, victim voided changed clothes and bathed

and was not under influence of alcohol/sedation. Sexual intercourse were forcefully, against will of victim”.

In Column (III) (a) History of menarche/menopause, it is mentioned as 11 years. In Column (VI) (f) Hymen injury is shown to be present and position of tears is stated to be at 6x11x12 O’Clock.

13. The appellant having admitted the medical certificate of ‘X’ under Section 294 of Cr. P. C., offers corroboration to PW-1 and PW-2’s evidence that ‘X’ was a minor. It may be noted, that the object of Section 294 of Cr. P. C. is to accelerate pace of trial by avoiding waste of time by the parties in recording unnecessary evidence. Where genuineness of any document is admitted or its factual proof is dispensed with, the same may be read in evidence. It is well settled that the endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application with which same is filed, is sufficient compliance of Section 294 of Cr. P. C. and that in case it is admitted, it need not be formally proved, and can be read in evidence. In the present case, the prosecution filed an application setting out the list of documents, from serial no. 1 to serial no.8 on 16th August 2016. On the said application (Exh.9) the defence counsel made the said endorsement “Documents at serial Nos. 1,2,3,4, only are admitted and may be exhibited”. The document

at serial no.1 is the spot panchanama and map; at serial no. 2-medical reports of the accused; at serial no. 3- medical reports of the victim and at serial no. 4-CA letter.

14. Thus, the medical report of the victim, which is admitted by the appellant also shows that 'X' was 11 years of age at the relevant time i.e. a minor and that she was sexually assaulted by the appellant. As 'X' was pregnant, her fetus was aborted. The DNA report (Exh.47 Colly) shows that the appellant was the father of the fetus.

15. The DNA profiles of the appellant and PW-1 matched the product of conception i.e. fetus which was aborted. The opinion given in the DNA Report (Exh.47) shows that 'X' and the appellant are concluded to be biological parents of product of conception of 'X'. The DNA report (Exh.47) was tendered by the prosecution under an application, pursuant to which it was exhibited. Under Section 293 (4) of Cr. P. C, the Court can accept the documents issued by any of the six officers enumerated therein as valid evidence without examining the author of the documents. The said DNA report is issued by the Assistant Chemical Analyzer, Regional Forensic Science Laboratory, Pune. The said report is covered under sub-Section (4) to Section 293 of Cr. P.C. (Reference-State of H.P. Vs. Mast

Ram (2004) 8 SCC 660). There is also no cross of PW-3-PSI Madhura Bhaskar, who had sent the products to FSL for DNA analysis after MTP was done, to show that there was any possibility of the articles/products being tampered with.

16. It is also pertinent to note that the defence of the appellant in his 313 statement is that a false case was lodged to harass him, which defence is contrary to what was suggested to PW-1 'X' in her cross i.e. that 'X' was 18 years and the relations between them were consensual. Thus, the false explanation is an additional circumstance as against the appellant.

17. In conclusion, part evidence of PW-1 and PW-2 can be relied upon with respect to 'X's age, as the same has gone unchallenged, despite the said witnesses having turned hostile, coupled with the admission of medical certificate of 'X', under Section 294 of Cr.P.C. and the DNA Report. Thus, the conviction of the appellant cannot be faulted.

18. Accordingly, the Appeal stands dismissed.

19. In view the disposal of the appeal, interim application no. 14 of 2021 does not survive. Hence, the same is also disposed of.

REVATI MOHITE DERE, J.