

nsc.

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

CRIMINAL APPEAL NO.1141 OF 2015

Sanjay Popat Aghane

Age. 20 years. Occ.

R/o. Manegaon Phata,

Sinnar, Tal. Sinnar,

District Nashik

(presently at Nashik Road Central Prison)

...Appellant

(Original Accused)

Versus

1. The State of Maharashtra
To be served through
A.P.P. High Court Bombay

2. Rohini Balu Hande
Age : 19 years, Occ: Nil.
R/o: Indiranagar, Vavi,
Tal: Sinnar, District – Nashik.

...Respondents

Ms. Avanti Inamdar i/b Mr. R. N. Gite, for the Appellant.

Mr. S. V. Gavand, A.P.P for the Respondent – State.

CORAM : REVATI MOHITE DERE, J.

DATE : 15th MARCH, 2021

ORAL JUDGMENT :

1. The appellant vide Judgment and Order dated 29th October 2015, passed by the learned Additional Sessions Judge, Nashik in Sessions

Case No.232 of 2014, has been convicted and sentenced, as under:-

- for the offence punishable under Section 376(2)(i) of the Indian Penal Code, to suffer rigorous imprisonment for 10 years and to pay fine of Rs.20,000/-, in default of payment of fine, to suffer further rigorous imprisonment for 3 years;
- No separate punishment is awarded to the appellant under Section 4 of the Protection of Children from Sexual Offences Act;
- If the fine amount of Rs.20,000/- is deposited, out of the said fine amount, an amount of Rs.15,000/- was directed to be paid to the victim girl as compensation under Section 357(2) of the Code of Criminal Procedure.

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

'X' – prosecutrix (PW 1), a minor at the relevant time (between 14 – 15 years) was residing with her grandparents, as her parents had performed 2nd marriage. 'X' would accompany Tarabai Aghane, who was residing near her grandmother's house to the agricultural field, for assisting Tarabai. The appellant is the grandson of Tarabai and as such 'X' was acquainted with him. One day when 'X' was resting from work, she went to sleep in the appellant's house. It is alleged that the appellant entered the house, latched the door from inside and sexually assaulted her; that though 'X' resisted the act, the appellant threatened her not to disclose the same or

he would assault her; the appellant is also alleged to have told 'X' that he would marry her; and that 'X' had disclosed the said fact, to Tarabai and her maternal aunt. Thereafter, on 4 – 5 occasions, the appellant is alleged to have sexually assaulted 'X', as a result of which she had pain in her abdomen. As 'X' refused to stay with her grandmother, her grandmother called her mother to Sinnar. When 'X' disclosed to her mother that she had missed her menstrual cycle, her mother took her to a private hospital at Sinnar, where the doctor disclosed that 'X' was 4 month's pregnant, pursuant to which, 'X' told her mother, that the appellant had sexually assaulted her. Thereafter, 'X' lodged a complaint in the police station, alleging offences punishable under Section 376(2)(i) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act. The statement of 'X' was also recorded under Section 164 of Code of Criminal Procedure. 'X' delivered a male child, pursuant to which the DNA sample of the newly born child as well as that of the appellant and 'X' were taken, and sent for chemical analysis.

After completion of investigation, charge-sheet was filed as against the appellant in the Court of the learned Special Judge, Nashik.

Charges were framed as against the appellant, to which he pleaded not guilty and claimed to be tried.

The prosecution in support of its case, examined as many as 6

witnesses i.e. PW 1 - prosecutrix; PW 2 – Sunil Anna Bhambad, the Police Constable who carried the articles to the Chemical Analyst; PW 3 – Dr. Abhijit Shashikant Sarode, Medical Officer, who examined 'X'; PW 4 – Ganesh Balasaheb Londhe, panch to the spot panchanama; PW 5 - Deepak Vasant Bhatjire, Clerk of Sinnar Municipal Council, who produced the Birth Certificate of 'X', to show that 'X' was a minor and PW 6 – Haridas Mahadeo Dole, the Investigating Officer.

The defence of the appellant was that of denial and false implication on one hand and also of consent on the other.

The learned Additional Sessions Judge, Nashik, after hearing the parties and after considering the evidence on record, convicted and sentenced the appellant, as stated aforesaid in Para 1.

3. Learned Counsel for the appellant submits that the allegations as against the appellant are false and baseless. She submits that the prosecution had not proved that 'X' was a minor, at the time of the alleged incident. She submits that the relations between the appellant and 'X' were consensual and that they were living together as husband and wife and that the appellant was ready to marry 'X' then and even today.

4. Learned APP supported the impugned judgment and order of conviction and sentence and submitted that no interference was warranted in the same. He submitted that the prosecution had proved that 'X' was a minor at the relevant time by producing 'X's' birth certificate. He submitted that the said birth certificate has been proved under Section 17(2) of the Registration of Births and Deaths Act, 1969 r/w Section 35 of the Evidence Act. He submitted that the DNA report clearly shows that the appellant is the father of the child.

5. Heard the submissions advanced by the learned counsel for the parties and with their assistance, perused the papers i.e. the evidence and the documents.

6. The first question that arises for consideration is whether the prosecution has proved that 'X' was a minor at the time of the alleged incident ? PW 1 – 'X' in her evidence has stated that her date of birth is 28th November 1998. She has stated that at the relevant time, she was residing with her grandparents as her father and mother had performed their 2nd marriage. PW 1 has further stated that one Tarabai was residing near her grandmother's house and that she would take her to the agricultural field for agricultural operations; that the appellant is the grandson of Tarabai; that

the appellant would come to their house and that she was acquainted with him; that one day when she was working in the field, she took a break from work for taking her meal; that after taking meal, she slept in the appellant's house, which was situated in the agricultural field; that while she was sleeping, the appellant entered the house, latched the door from inside, removed her clothes forcibly and sexually assaulted her; that she resisted the said act, but the appellant threatened her not to disclose the said incident or he would assault her; and that she should not be scared as he would marry her. PW 1 has stated that as her clothes were torn, she disclosed the said incident to Tarabai and her maternal aunt, after which, she returned home. She has stated that she did not disclose the said incident to her grandmother, as the appellant had threatened her. She has stated that as she had pain in her abdomen, she disclosed the same to the appellant, who told her not to be scared. According to the PW 1, the appellant thereafter sexually assaulted her on 4 – 5 occasions. She has stated that as she was sexually assaulted by the appellant, she refused to stay with her grandmother, pursuant to which, her mother came to Sinnar, to take her back. PW 1 has stated that she disclosed to her mother that she had missed her periods, pursuant to which, her mother took her to a private hospital at Sinnar, where after examination, the doctor revealed that she was 4 month's pregnant. PW 1 has stated that she disclosed to her mother that the

appellant had sexually assaulted her, after which her mother took her to the house of Tarabai and requested Tarabai to perform marriage of her daughter with the appellant, however, the appellant and Tarabai declined for the same. Thereafter, 'X' approached Sinnar Police Station and lodged an FIR. She has stated that her medical examination was done and even her 164 statement was recorded as per her narration. She has identified the appellant.

7. Nothing material has been elicited in the cross-examination of PW 1, so as to disbelieve her testimony. 'X' has admitted in her cross-examination that she had watched movie on two occasions with the appellant and that the appellant had promised marriage and that they were residing together as husband and wife. It was suggested to 'X' that she was acquainted with some other boys and that she had physical relations with them, however, the said suggestions were denied by her. 'X' had categorically stated that except the appellant, she never had any physical relations with any other person. She has also denied the suggestion that the birth certificate produced by the prosecution was the birth certificate of her younger sister. She has admitted in her cross-examination that her birth date is 11th November, 1998. PW 1 has in her cross-examination denied that she was 19 years of age at the relevant time. She has denied the

suggestion that the incidents of sexual intercourse were with her consent. The said evidence of PW 1 with respect to the fact, that 'X' was a minor has been duly corroborated by PW 5 - Deepak Bhatjire.

8. PW 5 – Deepak Bhatjire, in his evidence stated that he was serving as a Junior Clerk in Sinnar Municipal Council; that he was assigned with the work of birth and death registration; that the birth date of the victim girl is registered with the Municipal Council and that they had received the said information regarding the birth from the Sinnar Municipal Council Hospital. He has stated that the prosecutrix's mother's as well as the father's name is mentioned in the certificate. PW 5 – Deepak has produced the original birth and death register in which there is an entry regarding birth of 'X' at serial number '1635'. He has further stated that there office had received the birth format maintained in the Civil Hospital on 28th November 1998. He has stated that the birth date of the victim girl is 28th November 1998. The said witness produced the original birth certificate bearing the signature of the Chief Officer of the Municipal Council. He has stated that the entries in the birth certificate are true and correct, as per the record. Accordingly, the birth certificate was marked as Exhibit – 41 and the entry in the register as Exhibit – 42. Nothing significant is brought in the cross-examination of the said witness to

disbelieve his evidence with respect to the entry made in the Birth and Death register of Sinnar Municipal Council.

9. The prosecution has therefore clearly established that 'X' was a minor at the time of the incident of sexual assault on her i.e. between 14 – 15 years, at the relevant time. Therefore, the question of consent would not arise, considering the fact, that 'X' was a minor.

10. The aforesaid evidence is duly corroborated by PW 3 – Dr. Abhijit Sarode. PW 3 – Dr. Sarode has stated that 'X' was referred to him on 12th June, 2014 and that the sonography report disclosed that she was 32 weeks pregnant. PW 3 – Dr. Sarode has produced the said sonography report as well as the medical case papers of 'X'. He has stated that during her examination, it was revealed that 'X' was 32 weeks pregnant and accordingly he issued a certificate which is at Exhibit – 32.

11. Nothing material is brought in the cross-examination of the said witness except a suggestion that it is not correct that 'X' was not pregnant. The fact that 'X' was 32 weeks pregnant and subsequently delivered a male child has also been brought on record. The DNA report, which is at Exhibit – 49 clearly shows that the appellant and 'X' are the

biological parents of the male child.

12. Although, learned counsel for the appellant assiduously submitted that 'X' being a major, it is a case of consent and that having regard to the evidence on record, the sentence may be reduced to the period undergone, the evidence on record is to the contrary. The prosecution has proved that 'X' was a minor at the relevant time and therefore the question of consent does not arise. It is also pertinent to note that the minimum sentence for the offence punishable under Section 376(2)(i) is 10 years and that there is no discretion vested in the Court to award a sentence less than the minimum.

13. The evidence of the prosecutrix is cogent and inspires confidence. Coupled with the said evidence, the evidence of PW 5 - Deepak shows that 'X' was a minor; and the DNA report, which clearly shows that the appellant is the father of the child. Thus, the prosecution has clearly proved its case beyond reasonable doubt.

14. Infact, the defence of the appellant on the one hand is of false implication under Section 313 of Code of Criminal Procedure, which defence is contrary to the suggestions given in the cross-examination i.e. of

consent. Thus, the appellant has not also discharged the burden cast on him under Section 29 of the Protection of Children from Sexual Offences Act.

15. Considering the aforesaid, there is no merit in the appeal. The appeal stands dismissed.

16. It is pertinent to note that the trial Court has awarded compensation to 'X' only under Section 357(2) of the Code of Criminal Procedure.

17. Accordingly, in addition to what is directed to be given to 'X', the case of 'X' is referred to the District Legal Services Authority, Nashik, who will determine the compensation and award appropriate compensation to 'X', under Section 357-A of Code of Criminal Procedure, if not awarded.

18. District Legal Services Authority, Nashik is requested to complete the entire exercise within six months of receipt of this judgment.

19. Registry to communicate the aforesaid judgment forthwith to District Legal Services Authority, Nashik, for complying with the same.

REVATI MOHITE DERE, J.