

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

CRIMINAL APPEAL NO. 426 OF 2022

Mithun @ Dabya Raju More

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

**WITH
INTERIM APPLICATION NO. 1334 OF 2022
IN
CRIMINAL APPEAL NO. 426 OF 2022**

Ms. Tripty Kapadia (Appointed Advocate) for Appellant.
Smt. J. S. Lohokare, APP for State/Respondent No.1.
Mr. Nitesh J. Mohite, for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 5th SEPTEMBER 2022**

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 22/12/2021 passed by learned Additional Sessions Judge, Pune, in Special Case (POCSO) No.165 of 2017. By the impugned Judgment and order the Appellant was convicted and sentenced as follows:

- i) The Appellant was convicted for commission of offence punishable U/s.363 of IPC. He was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for 3 months.
- ii) He was convicted for commission of offence punishable U/s.376(2)(i) of IPC and he was sentenced to suffer R.I. for 10 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for 6 months.
- iii) Though, he was also convicted for commission of offence punishable U/s.4 r/w. Section 3 of the Protection of Children from Sexual Offences Act (for short 'POCSO'), no separate sentence was imposed on him.
- iv) The Appellant, however, was acquitted from the Charges of commission of offences punishable U/s.366-A and 506 of IPC, as well as, U/s.7 r/w. 8

of POCSO.

All the substantive sentences were directed to run concurrently. He was granted set off U/s.428 of Cr.p.c.

2. The prosecution case is that, the victim was about 14 years old in December 2016. Her date of birth was 24/01/2002. She was knowing the Appellant. The Appellant took her forcibly on his motorcycle on 05/12/2016. She was taken to various places viz. Undri, Jejuri etc. He established physical relations with her during that period. On 11/12/2016, she was left at Kharadi. She called her father telephonically. Her parents took her home and then all of them went to the police station. Her supplementary statement was recorded. When the victim had gone missing, her mother had lodged C.R.No.570 of 2016 at Wanwadi police station U/s.363 of IPC against an unknown person. After the victim's statement was recorded, Section 376 of I.P.C. and Section 3 r/w. Section 4 of POCSO were added. The investigation was carried out. The Appellant was arrested on 22/01/2017. His motorcycle

was seized on 29/01/2017. The spot panchanama of various places where the victim was taken was conducted. The clothes of the victim and the Appellant were seized and sent for Chemical Analysis. At the conclusion of the investigation, charge-sheet was filed and the case was committed before the Special Court.

3. During trial, the prosecution examined the victim, her mother, pancha for spot panchanama, Medical Officer and the Investigating Officer. After recording prosecution evidence, statement of the Appellant was recorded U/s.313 of the Cr.p.c. His case was of total denial. Learned Judge, believed the evidence of the victim, as well as, other evidence produced by the prosecution and convicted the Appellant, as mentioned earlier.

4. Heard Ms. Tripty Kapadia, learned Appointed Advocate for the Appellant, Smt. J. S. Lohokare, learned APP for the State/Respondent No.1 and Mr. Nitesh Mohite, learned counsel for the Respondent No.2.

5. The prosecution case based heavily on the deposition of the victim who is examined as PW-2. She has deposed that, in the

year 2016 she was residing with her family at Hadapsar. She was studying in 9th standard. She knew the Appellant; he was residing near their house. One neighbour had introduced the Appellant to the victim. Thereafter both of them used to talk regularly on phone. Her father came to know about it. He took away the mobile phone from her. After a few days the victim met the Appellant at his relative's place at Handewadi. When her mother came to know about it, the victim was sent to the house of her Aunt at Ram Tekdi. Thereafter, she did not meet the Appellant for about 2 months.

6. On 04/12/2016, the Appellant came in the area of Ram Tekdi. They met there and the Appellant suggested that they should elope. The victim refused. On 05/12/2016, she had gone to flour mill. The appellant followed her. It is her case that the Appellant took her forcibly on his motorcycle to Undri. On the next day he took her to a farm house at Jejuri. There he had forcible sexual intercourse with her. On the next day, he took her to his relative's house at Handewadi. They stayed together for 2-3 days. Then he took her to village Rashin, but nobody allowed them to

stay there. Therefore, the Appellant took a room on rent in another village. They started residing there. At that time the Appellant had sexual intercourse with her. On 12/12/2016, the Appellant and the victim went to the Appellant's Aunt's house at Nagar, but his Aunt told him to drop the victim to her house. The Appellant then brought the victim to Kharadi at 7.30p.m. on 12/12/2016 and left her there. She then called her father from a mobile phone of a stranger. She narrated the incident to her parents. They went to the police chowky. Her statement was recorded by the police. She was referred to Sassoon Hospital, Pune for medical examination. Her clothes were seized.

In the cross-examination, she deposed that her parents had made their displeasure known to the Appellant about his constant talking on phone with the victim. She admitted that, when the Appellant took her forcibly on his motorcycle, she did not raise any shouts. She clarified that, when her statement was recorded by the police on 12/12/2016, she was frightened. She deposed that the appellant did not commit sexual intercourse on 05/12/2016 and on 10/12/2016 also he did not commit any act

with her. She had not told anybody that the Appellant had forcibly taken her away, however, she voluntarily deposed that the Appellant had threatened her with dire consequences and, therefore, she could not tell that fact to anybody. Her further statement was recorded on 01/04/2017. In that statement, she had mentioned that, on 06/12/2016 and 12/12/2016 the Appellant had committed forcible sexual intercourse with her; though, in her statement dated 12/12/2016 she had stated that, on 05/12/2016 and on 10/12/2016 the Appellant had not established any physical relations with her. She denied the suggestion that, getting fed up with the quarrels in her family she had left the house of her Aunt and that the Appellant had not taken her away. She denied the suggestion that, at the instance of her parents, she was giving false evidence.

7. PW-1 was mother of the victim. She has deposed that, in 2016 the victim was in 9th standard, but she was not attending the school regularly. Therefore, PW-1 had sent the victim to PW-1's sister-in-law's house at Ram Tekdi. On 05/12/2016, her sister in law informed her telephonically that the victim was not found.

They took search of the victim and then lodged a report at Wanwadi police station about her missing. The report was registered U/s.363 of IPC vide C.R.No.570 of 2016 against an unknown person. The report and the F.I.R. proforma are produced on record at Exhibit 18 and 19. On 12/12/2016, the victim made a phone call to PW-1's husband. They went to Kharadi and brought the victim back to their house. The victim was frightened. When she became comfortable, they made inquiries with her. She narrated the incident. She told her story to her parents, then she was taken to the police station. The police recorded her statement. She was sent for medical examination. The PW-1 produced birth certificate of the victim which is produced on record at Exhibit 20. The birth certificate mentions the date of birth of the victim as 24/01/2002. Thus, at the time of incident i.e. from 05/12/2016 to 12/12/2016 the victim was about 14 years and 10 months old.

In the cross-examination of PW-2 she admitted that her husband did not like the victim talking with the Appellant and because of that there was quarrel between the Appellant and PW-2's husband. She denied the suggestion that, there was monetary

dispute between the Appellant and her husband. She admitted that the victim had not told anybody at Undri, Saswad and Jejuri that she was taken away by the Appellant. Nobody had informed them that the victim was taken on the motorcycle. PW-2 has deposed that, after 12/12/2016 the victim was not called to the police station. But her statement was recorded U/s.164 of Cr.p.c.

8. PW-3 Rajashree Dahale was a pancha for spot panchanama. She has deposed that, on 01/04/2017 spot panchanama was carried out at the instance of victim at Undri and Jejuri. There is nothing much useful for the prosecution, in her evidence.

9. PW-4 Varsharani Ghate, P.S.I. had conducted the investigation. She has deposed about registration of the F.I.R., arrest of accused, seizure of motorcycle, collection of birth certificate, seizure of clothes, blood samples etc., sending them to Chemical Analyser and receiving C.A. reports. She admitted that, she had not recorded the statements of the persons who were residing in the area where the victim was taken by the Appellant.

The C.A. reports are produced on record at Exhibit 31 to 34, however, none of the C.A. reports is incriminating. They do not take the prosecution case any further.

10. PW-5 Dr. Arun Ambadkar had examined the victim on 13/12/2016. The history was given by the victim that, on 11/12/2016 the Appellant had committed sexual intercourse with her. The medical examination showed that, there was no injury on the body, however, there was tear to the hymen. As per the opinion of the medical team, from the history and clinical examination there was vaginal penetration with no fresh injury and no other physical injuries. The medical papers were produced on record at Exhibit 39.

This, in short, was the evidence led by the prosecution.

11. The statement of the Appellant was recorded U/s.313 of Cr.p.c. However, except denying the allegations, he had not taken any defence. After considering this evidence and after hearing the parties, learned Judge convicted and sentenced the Appellant, as mentioned earlier.

12. Learned counsel for the Appellant submitted that, it was a consensual relationship, as admitted by the victim herself. Her parents did not like their relationship and therefore, the appellant was falsely implicated. There was contradiction between the two statements given by the victim as is mentioned in her cross-examination. She submitted that, considering the consensual relationship, if the offence is said to be proved, leniency be shown in sentencing the Appellant.

13. Learned counsel for the Respondent No.2, as well as, learned APP submitted that, the prosecution has sufficiently proved its case. There is no reason to disbelieve the victim. Her evidence is corroborated by the medical evidence. Though, C.A. reports do not indicate anything, her medical examination supports the prosecution case. They submitted that, since the minimum sentence is imposed, there is no scope for reducing it.

14. I have considered these submissions. The victim i.e. PW-2 has given her deposition clearly. Her evidence appears to be honest. It does appear that the victim had accompanied the

Appellant to various places and she had not raised any shouts, but that will not help the defence case because the prosecution has proved that the victim was a minor; she was below 18 years of age. At the time of incident, she was 14 years and 10 months old. The birth certificate is produced on record at Exhibit 20. It was extracted from the Pune Municipal Corporation. The birth was registered on 25/01/2022. Thus, it is a contemporaneous public record and there is no reason to doubt it.

15. The prosecution has established that, date of birth of the victim was 24/01/2002. The incident had occurred between 5/12/2016 to 12/12/2016. Therefore, even if it is assumed that there was consent, the act would fall squarely within the meaning of Section 375 of IPC, and in particular, within a category '*Sixthly*'. The act of Appellant falls within the meaning of Section 376(2)(i) of IPC. Though, sub clause (i) of Section 376(2) of I.P.C. is repealed today, at the time of offence it was in existence and it was punishable with Rigorous imprisonment which could not be less than 10 years, but which could extend to imprisonment for life. In this case, the victim was below 16 years of age. Therefore, offence

punishable U/s.376(2)(i) of IPC, as it existed then, is clearly established.

16. So far as, quality of evidence is concerned, the evidence of PW-2 is supported by her medical examination. The opinion of the medical team is reproduced herein above which supports her case. Apart from that, PW-1's evidence also shows that the victim had gone missing from 05/12/2016 to 12/12/2016. During that period, according to PW-2, she was with the Appellant. She was taken to various places and she was subjected to sexual intercourse. Though, no other independent witness is examined, the evidence of PW-2 is sufficient to prove the incident alleged by the prosecution. There is hardly any contradiction between her statements. In any case, she had explained that, when the statement was recorded on 12/12/2016, she was in a frightened state of mind because of threats given by the Appellant. The conduct of the Appellant also shows that, after all this he had simply left the victim at Kharadi. Therefore, his intentions were also not honest. In any case, the consent of the victim in this case is immaterial. Even otherwise, PW-2's specific case is that, she had

refused to elope with the Appellant and yet he forced her to go with him on his motorcycle. He had also threatened her not to disclose to anybody that she was taken away forcibly, therefore, she could not tell this fact to anybody. The victim had given honest answers to all the questions and, therefore, there is no reason to doubt her evidence. Thus, prosecution has established its case beyond reasonable doubt. The minimum possible sentence was imposed on the Appellant. There is no scope to reduce the sentence further. Therefore, the impugned Judgment and order of the trial Court need not be interfered with.

17. The Appeal, therefore, is dismissed.

18. With disposal of the Appeal, nothing survives in Interim Application No.1334 of 2022, it is accordingly disposed of.

(SARANG V. KOTWAL, J.)