

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

CRIMINAL APPEAL NO. 468 OF 2017

Navnath Nivrutti Gangode

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Shushan Mhatre (Appointed Advocate) for Appellant.
Mr. R. M. Pethe, APP for State/Respondent No.1.
Ms. B. Sharda (Appointed Advocate) for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 30th AUGUST 2022**

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 19/04/2017 passed by learned Additional Sessions Judge, Nashik, in Sessions Case No.120 of 2015. There were two accused. The Appellant was the accused No.1. He along with his co-accused was convicted for commission of offence punishable U/s.376(2)(i) of I.P.C. and was sentenced to suffer R.I. for 10 years and to pay a

fine of Rs.10000/- and in default of payment of fine to suffer R.I. for 6 months. Though, he was also convicted for offence punishable U/s.4 of the Protection of Children from Sexual Offences Act (for short 'POCSO'), no separate punishment was awarded. The fine amount was directed to be paid to the victim if fine was paid by the appellant. He was given benefit of set off U/s.428 of the Cr.p.c.

2. The prosecution case is that, the victim was about 13 years of age at the time of incidents from January 2015 onwards. Her date of birth was 30/07/2001. The Appellant was her neighbour. They had developed love relationship, but he forced the victim to have sexual intercourse. This was repeated on few occasions. The Accused No.2 came to know about it. He took advantage of it. He also threatened the victim and established physical relations against her wish. She became pregnant. Mother of the victim came to know the fact of her pregnancy and thereafter this F.I.R. was lodged against both the accused including the present Appellant. The victim gave birth to a male child. The D.N.A. samples were taken. The D.N.A. of the child matched with

the victim and the accused No.2. In the meantime, both accused were arrested. The statements of the witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. The case was committed to the court of Sessions. During trial, the prosecution examined 5 witnesses including the victim, her mother, the pancha witness, the Medical Officer and the Investigating Officer. The defence examined one witness who was the Gram Sevak of Dhakambe Gram Panchayat, in connection with birth certificate of the victim. At the conclusion of the trial, the learned Judge believed the evidence of the victim. The age of the victim was below 18 years of age. Learned Judge convicted and sentenced the Appellant as mentioned earlier.

3. The main evidence of the prosecution case is in the form of the victim's deposition. She was examined as PW-1. She has deposed that her date of birth was 30/07/2001. She has studied upto 8th standard. She was admitted to Zilla Parishad Primary School, Dhakambe. She was residing with her parents at village Dhakambe. She was residing in that village since her birth. She knew both the accused i.e. the Appellant and his co-accused. Both

of them were residing near her house. There were friendly relations between the victim and the Appellant. She has deposed that, they developed love relationship. In the month of January 2014, the Appellant came to her house at around 9.00 to 10.00a.m. He told her that, he loved her and wanted to marry her. He told her that, he wanted to establish physical relations with her. It is her case that, he had forcible sexual intercourse with her. On one occasion, in the month of June 2014, when the Appellant was leaving the victim's house, the accused No.2 saw him. He approached the victim and told her that, he was aware of the relationship between the Appellant and the victim. He threatened the victim that he would disclose it to her parents, and on that threat, had sexual intercourse with the victim. Being under pressure, the victim did not tell this to anybody. Because of this, she got pregnant. She was not keeping good health, therefore, she was taken to a Doctor. That time, the Doctor told her and her parents that the victim was four months pregnant. Her parents made inquiry with the victim. She told them that the Appellant and accused No.2 had forcible sexual intercourse with her. Her

parents went to the house of the appellant. He flatly denied anything to do with her pregnancy and refused to marry her. Then her parents went to the house of the accused No.2. He also refused to marry her and denied any connection with the victim's pregnancy. After that, the victim lodged an F.I.R. at Dindori police station vide C.R.No.21 of 2015 on 03/02/2015. The F.I.R. is produced on record at Exhibit 17. She identified both the accused in the Court. After registration of F.I.R., the victim was sent for medical examination. She deposed that, she delivered a male child and that child was given to Adhar Ashram.

In the cross-examination she admitted that, she did not tell anybody that she was sexually assaulted in January 2014. She had not mentioned in her F.I.R. that, she was having love affair with the Appellant. She admitted that, they visited the Appellant's house under the belief that the child was of the Appellant. She also admitted that, if the Appellant had shown his willingness to marry her, she would not have lodged her F.I.R. She had not disclosed to the Doctor as to who was the father of her child. She had not mentioned in the F.I.R. that the Appellant established 'forcible'

physical relations with her.

4. PW-2 is the mother of the victim. She has deposed that, she could not tell the date of birth of the victim. One day her daughter-victim told her that she was having headache. PW-2 then took her to a Doctor who examined the victim and told them that the victim was pregnant. PW-2 then made inquiries with the victim. That time the victim disclosed that the Appellant and the accused No.2 had sexually assaulted her. After that, PW-2 went to the house of both the accused. They denied the incidents. Then they approached the police and lodged F.I.R.

In the cross-examination she admitted that the victim was born at Nalegaon, Taluka Dindori. Dhakambe and Nalegaon were two different villages. The victim had not told her about her pregnancy while going to meet their Doctor and while returning after meeting the doctor. She admitted that, if the appellant had shown his willingness to marry the victim, then they would not have lodged the F.I.R. On behalf of accused No.2, it was suggested to her that the accused No.2 had paid hospital bill for her husband.

He was demanding his money but to avoid making payment this F.I.R. was lodged.

5. PW-3 Tanaji Dabhade was a pancha for spot panchanama and panchanama for seizure of clothes of the victim and the accused. His evidence is not of much importance.

6. PW-4 Yogesh Mohite, P.S.I. had conducted the investigation. He has deposed that, on 03/02/2015, he arrested the Appellant. He was also referred for medical examination. On 10/02/2015, he arrested the accused No.2. He obtained the blood samples of both the accused and the victim for sending them for chemical analysis. The victim's statement was recorded U/s.164 of Cr.p.c. He obtained birth certificate and school leaving certificate of the victim. On 29/04/2015, he filed the charge-sheet. On 11/08/2015, the blood samples of the victim and her newly born child were sent to Forensic Lab, Kalina. The D.N.A. report was received on 11/02/2016. From the D.N.A. report it was revealed that, accused No.2 was the biological father of the child delivered by the victim. The D.N.A. report is produced on record along with

other C. A. reports. His cross-examination was hardly of any consequence. Apart from the D.N.A. report, other C.A. reports are also not very material.

7. PW-5 Dr. Manisha Ugale was attached to Civil Hospital, Nashik at the relevant time. On 03/02/2015, she carried out medical examination of the victim. She found that the victim was pregnant for about 18 to 20 weeks. Thus, sexual act was established, but the victim's examination was not consistent with 'recent' sexual intercourse.

In the cross-examination she admitted that, she had not carried any ossification test or radiological test to ascertain the age of the victim. The medical report is produced on record at Exhibit 55. The opinion mentions thus:

"presence of pregnancy tells that sexual act had taken place in the past though it is not consistent with recent sexual intercourse."

With this evidence, the prosecution closed its evidence.

8. The Appellant's and his co-accused's statements U/s.313

of Cr.p.c. were recorded on 01/02/2017. The Appellant had taken a stand that, false case was filed against him. After that, an application was made on behalf of the Appellant on 18/02/2017 U/s.311 of Cr.p.c. calling for the relevant documents from Gram Panchayat Dhakambe, and Gram Panchayat, Nalegaon and also the documents to show that the samples were preserved properly. Learned Judge vide the order dated 18/02/2017 allowed that application and ordered that record regarding entry of birth date of the victim from Gram Panchayat Dhakambe be called. Similarly, Gram Panchayat Nalegaon was directed to inform the trial Court in writing whether the date of birth of the victim was entered in the record. The Police Inspector, Dindori police station was directed to produce Malkhana register in respect of this offence.

9. After this order, deposition of DW-1 Ramesh Raat was recorded. His examination in chief was conducted on behalf of the Appellant. He deposed that, he was serving as Gram Sevak in Dhakambe Gram Panchayat. As a part of his duty he has to register date of birth entry on the basis of information given by the relevant persons. Those entries are taken only regarding the child

born in the village, however, he deposed that, he was not in the service in the year 2001. The signature and the thumb impression of the informant was required to be obtained on the entry. As far as register having entry regarding the victim is concerned, there is no such thumb impression. The entry was taken only on the basis of oral information. Village Nalegaon was 20 to 25 kms. away from Dhakambe. Both villages were having different Gram Panchayats.

In the cross-examination conducted by learned APP, he produced the birth certificate which was prepared as per the original record. The birth certificate is produced on record at Exhibit 65. This certificate mentions that the date of birth of the victim was 30/07/2001. It was registered on 01/08/2001 at Entry No.23. The place of birth was mentioned as Dhakambe. The names of the victim's parents were also mentioned. Apart from that, the certificate issued by Nalegaon Gram Panchayat was produced on record at Exhibit 62. It was mentioned in the certificate that, there was no entry regarding birth of the victim in their village.

10. This was the evidence before the trial Court.

11. Learned counsel for the Appellant submitted that the victim's deposition shows that, it was a consensual love affair. The prosecution has failed to prove that the victim was below eighteen years of age and, therefore, no offence is made out at all against the Appellant. He further submitted that the evidence shows that only after the Appellant had refused to marry her, this F.I.R. is lodged. In fact, the victim and her mother have admitted that, if the Appellant had agreed to marry the victim, they would not have lodged this F.I.R. There are no witnesses who had seen the victim and the Appellant together or had seen the Appellant entering the victim's house. The D.N.A. report is not incriminating against the Appellant. It clearly shows that the accused No.2 was involved. There is substantial delay in registering the F.I.R. The allegations are that, the offence had taken place between January 2014 to June 2014, as far as, the Appellant is concerned; and the F.I.R. is lodged on 03/02/2015. In the meantime, the victim had not made any grievance against the Appellant before anybody.

12. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that the victim was under pressure

and she did not lodge the F.I.R. because of the fear. Only after the fact of her pregnancy came to light, she had approached the police. That did not mean that the offence had not taken place. The fact of pregnancy and the victim delivering a child cannot be denied. The victim was below 18 years of age, as it is proved by the birth certificate, therefore, the offence is made out. The victim's deposition is trustworthy and, therefore, no benefit of doubt can be given to the Appellant.

13. I have considered these submissions. Since the victim has admitted that there was a love affair, the issue of her age has importance. In that context, as mentioned earlier, DW-1 has produced the birth certificate showing her date of birth as 30/07/2001. If that date of birth is taken into consideration, at the time of offence between January 2014 to June 2014 she was hardly 13 years of age, therefore, her consent or love affair will not have any importance. So far as, birth certificate produced by DW-1 on record at Exhibit 65 is concerned, it mentions the names of the parents, as well as, name of the victim herself. It is based on the entry taken on 01/08/2001 i.e. immediately within a couple of

days from the date of birth of the victim on 30/07/2001. It cannot be observed that, this entry is false. It is based on the contemporaneous record. Significantly it is not the case of defence that the victim has any other sister whose birth could have been entered vide that entry. The certificate from Nalegaon Gram Panchayat mentions that, there was no entry anywhere regarding birth of the victim. Therefore, PW-2's evidence that the victim was born in Nalegaon, cannot be accepted. Contemporaneous record in the form of public document shows that the victim was born at Dhakambe on 30/07/2001. Therefore, on the date of incidents the victim was a minor and, therefore, her consent is immaterial. Therefore, it is immaterial whether the Appellant had established forcible sexual intercourse or it was with her consent. The offence U/s.376(2)(i) of IPC is made out. Though, it is true that the D.N.A. report shows that the accused No.2 was the biological father, but that does not mean that the Appellant had not established physical relations with the victim in the past. The victim's deposition is trustworthy. She has given specific answers. She has even admitted that both accused refused to marry her. She has admitted her love

affair with the Appellant. She has also admitted that, if the Appellant had agreed to marry her, she would not have lodged this F.I.R. In fact, the PW-1 had no reason to implicate the Appellant falsely when it is proved subsequently that the accused No.2 was the biological father of her child. Her grievance against the accused No.2 is more serious. She has deposed that, he had taken advantage of having knowledge about the relations between the Appellant and the victim and had forced her to have physical relations with him. The overall effect of her deposition is that she appears to be a truthful witness and there is no reason to disbelieve her. The victim had got pregnant and thus, she was subjected to sexual intercourse before she attained majority. This is sufficiently proved by the prosecution. Her evidence shows that, even the Appellant had established physical relations with her. All the ingredients of the offences charged against the Appellant are established through her evidence. The trial Court had imposed minimum sentence U/s.376(2)(i) of IPC as it existed on the date of offence. Therefore, there is no scope to interfere with the minimum sentence imposed on the Appellant. In this view of the

matter, there is no reason to interfere with the impugned Judgment and order.

14. The Appeal is, therefore, dismissed.

(SARANG V. KOTWAL, J.)