

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

**CRIMINAL APPEAL NO. 634 OF 2017**

1. Mohd. Imran Mohsinben Ali  
2. Kamrunisabegam Mohsinben Ali ..Appellants

Versus

The State of Maharashtra & Anr. ..Respondents

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Ms. Manisha Jagtap a/w. Shubham Gade a/w. Mayuresh Ingale for Appellants.

Smt. Veera Shinde, APP for State/Respondent No.1.

Mr. Veerdhawal Deshmukh, Appointed Advocate for Respondent No.2.

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**CORAM : SARANG V. KOTWAL, J.**

**DATE : 19<sup>th</sup> AUGUST 2022**

**JUDGMENT :**

1. The Appellants have challenged the Judgment and order dated 15/07/2017 passed by the Designated Court under Protection of Children from Sexual Offences Act, 2012, Greater Bombay, in POCSO Case No.1136 of 2013. The Appellant No.1 was original accused No.1. The Appellant No.2 was original accused No.2. The Appellant No.2 is mother of accused No.1. The Appellant No.1 was convicted for commission of offence

punishable U/s.363, 366 and 376 of I.P.C. r/w. Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'). He was sentenced to suffer R.I. for 7 years and to pay a fine of Rs.50000/- and in default of payment of fine to suffer R.I. for six months. The Appellant No.2 was convicted for commission of offence punishable U/s.363 of IPC and was sentenced to suffer R.I. for one year and to pay a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for two months. The Appellant No.2 was acquitted from the charges of commission of offence punishable U/s.109 of IPC and Section 17 of POCSO Act. Out of the fine amount, Rs.15,000/- was directed to be paid to the victim. The benefit of set off U/s.428 of Cr.p.c. was extended to both the appellants.

2. The record shows that the appellant No.1 has already completed his sentence and he was released on 19/06/2020.

3. Heard Ms. Manisha Jagtap, learned counsel for the appellants, Smt. Veera Shinde, learned APP for the State/Respondent No.1 and Shri. Veerdhawal Deshmukh, learned

counsel for the Respondent No.2.

4. The prosecution case is that the victim in this case was about 12 and half years of age at the time of lodging of F.I.R. She was having love affair with the Appellant No.1. In the month of September 2013 they had established physical relations. The Appellant No.1 told about their affair to the Appellant No.2, who in turn, approached the victim's mother and put-forth a proposal of marriage after the victim attained majority. However, the victim's mother refused. It is the prosecution case that, on 10/10/2013 the Appellant No.1 and the victim eloped and went to West Bengal which was the native place of the Appellant No.1 and 2. The Appellant No.1 and the victim stayed there for 4 to 5 days. On 15/10/2013, police came there and took the Appellant No.1 and the victim back to Mumbai. This was done pursuant to investigation carried out in C.R.No.271 of 2013 registered at Sahar police station under section 363 and 366 of IPC. The F.I.R. was lodged by the victim's mother at about 12.05a.m. on 11/10/2013. During investigation, both appellants were arrested. The statements of victim and other witnesses were recorded. The

victim was sent for medical examination and at the conclusion of investigation, charge-sheet was filed. The case was committed to the Special Court. During trial, the prosecution examined eight witnesses and at the conclusion of the trial, the Appellants were convicted and sentenced as mentioned earlier. The main witnesses for the prosecution were the victim, her mother, the Medical Officer, the Head of School where the victim studied and the Investigating Officer.

5. Learned trial Judge relied on the evidence of these witnesses and convicted both the appellants. As far as, the Appellant No.2 is concerned, learned Judge also relied on the statement of the victim recorded U/s.164 of Cr.p.c. in reaching the conclusion that the Appellant No.2 had helped the Appellant No.1 in abducting her to West Bengal.

6. Learned counsel for the Appellant submitted that, even as per the prosecution case, it was a consensual relationship. The age of the victim was not established by cogent material and, therefore, both the appellants should be acquitted. According to

learned counsel for the Appellants, in any case, the Appellant No.2 has not played any role and the prosecution has not proved the offence against her.

7. Learned counsel for the Respondent No.2/victim, as well as, learned APP, on the other hand submitted that, there is no reason to disbelieve the evidence of the victim and her mother. Apart from that, there are corroborative pieces of evidence supporting their evidence. The date of birth of the victim is properly established through the evidence of school record. Even the role of the Appellant No.2 is deposed by material witnesses, therefore, conviction and sentence should be maintained.

8. The main witness in this case, obviously, is the victim herself. She is examined as P.W.1. She has stated that, she had four brothers and one sister. Her father was driving auto rickshaw for livelihood. Her mother was working as a maid servant. Her date of birth was 02/01/2001. In the year 2013 she was studying in 8<sup>th</sup> standard in a school at Sakinaka, Mumbai. She used to go to school at 6.30a.m. and used to return at 12.45p.m. She has

deposed that, the Appellant No.1 was her friend. She knew him since three years before the incident. He was residing in the neighbourhood. She along with her friends used to go to his house. At that time, the Appellant No.2 was at her native place. She has deposed that the Appellant No.1 established physical relations on 2-3 occasions with her in his house. He told about this to the Appellant No.2. The Appellant No.2 brought a pregnancy testing kit, but the PW-1's test was negative. The appellant No.1 had consumed phenyl. The Appellant No.2, therefore, came to PW-1's house and told her mother that the Appellant No.1 and PW-1 were having love affair and that both families should perform their marriage. PW-1's mother refused. The Appellant No.2 insisted for their marriage, but PW-1's mother was firm in her refusal. PW-1 has further deposed that the Appellant No.2 told her mother that, they had booked tickets for Kolkata. PW-1's mother told her that, she would not sent PW-1 with them. On the next day, the Appellant No.2 and her husband left for Kolkata. PW-1 has further deposed that on 10/10/2013, the Appellant No.1 booked the tickets for Kolkata for himself and PW-1. The PW-1 eloped with

him. They started from Kurla railway station. They changed many trains and reached Kolkata. She went to the house of the Appellant No.1's grand-mother. In the meantime, the Appellant No.2 had called the Appellant No.1 asking for their whereabouts. At that time, the Appellant No.1 had told her that, they were coming to Kolkata. The Appellant No.1 and PW-1 stayed with Appellant No.1's grand-mother for two days. On 15/10/2013, police from Mumbai came there and took them to the Court and then they were brought to Mumbai on 18/10/2013. On that day, her statement was recorded. Her clothes were seized. She was sent for medical examination on 19/10/2013. Her statement was recorded U/s.164 of the Cr.p.c. PW-1 was shown her School Leaving Certificate.

In the cross-examination, she accepted that, before giving her deposition in the Court, the police had readover her statement to her and she was told to depose as per the statement. She was asked about certain omissions from her police statement and the statement recorded U/s.164 of Cr.p.c. But the omissions are not of much significance. She agreed that, when the Appellant

No.1 took her with him, she did not raise any shouts. She did not know the address of the Appellant No.1's house. She has explained that, under the pressure of her parents she had lodged complaint against the accused and at the instance of her mother she had given her statement to the police.

9. PW-2 is mother of PW-1. She has deposed that, on 02/10/2013 the Appellant No.2 approached her. PW-2's husband had gone to Bengaluru. The Appellant No.2 told her about love affair between the Appellant No.1 and PW-1 and that the Appellant No.2 wanted to perform their marriage. PW-2 has deposed that, she had refused. She also deposed that the Appellant No.1 had consumed phenyl and, therefore, on that day the Appellant No.2 had approached her with a proposal of marriage. The Appellant No.2 told her that, they could wait for 3 to 4 years. She told the PW-2 that, they had booked tickets for Kolkata and they had also booked ticket for PW-1, but again PW-2 refused. Her neighbours also tried to convince the Appellant No.2. After that, the appellants left.

10. On 10/10/2013, PW-1 had left for school, but she had not returned. PW-2 then suspected that the appellants must have taken PW-1 to Kolkata. PW-2 approached the police and gave her F.I.R., which was registered U/s.363 and 366 of IPC. The F.I.R. is produced on record at Exhibit 40. It was registered at Sahar police station vide C.R.No.271 of 2013. She has further deposed that, PW-1 returned on 18/10/2013 with police and Appellant No.1.

In the cross-examination, she accepted that the police had read-over her statement to her in the Court. She also accepted that, in her F.I.R. she had not mentioned the Appellant No.2 as one of the suspects. She had not informed the police between 02/10/2013 to 11/10/2013 i.e. from the date when the Appellant No.2 had approached her and the date on which the victim had eloped with the Appellant No.1. The documents regarding victim's age were produced by this witness at Exhibit 45. The documents were the School Leaving Certificate and the Aadhar Card. Both these documents show the victim's date of birth as 02/01/2001.

11. PW-3 Mangila Prajapati was the owner of a medical

shop. In October 2013, the Appellant No.2 had purchased pregnancy testing kit from his shop.

In the cross-examination, he admitted that, he has not told the police as to when the Appellant No.2 had purchased the pregnancy testing kit and he did not have any proof of such purchase. His statement was recorded belatedly on 27/10/2013. Even this witness was read-over his police statement before his deposition.

12. PW-4 Dr. Ashok Aanand was the H.O.D. of Gynecology at Grant Medical college. He had examined the victim along with Dr. Kiran Yadav on 19/10/2013. He has deposed that, victim's hymen was torn and based on that, he opined that sexual intercourse could not be ruled out. He admitted that, during interaction with the victim, it was revealed that, it was a case of love affair. The medical papers are produced on record at Exhibit 48.

13. PW-5 Mohan Waghmare, P.I. was the police officer who had filed the charge-sheet.

14. PW-6 Bhagwan Khare, P.S.I. had carried out major part of

the investigation. He had arrested the Appellant No.1 on 16/10/2013 at West Bengal. The victim and the Appellant No.1 were brought to Mumbai in October 2013 by him. He has deposed that, train tickets were recovered at the instance of Appellant No.1.

In the cross-examination, he was asked questions as to why F.I.R. was not immediately sent to the Magistrate. He has produced the panchanama showing recovery of tickets, but contrary to his deposition, panchanama mentions that the tickets were produced by the Appellant No.2. Those tickets do not bear reservation in the name of a particular person. The panchamama is produced at Exhibit 55.

15. PW-7 P.S.I. Padma Aalgundi had recorded statement of the victim.

16. PW-8 Ram Motilala was the in-charge Head Master of B.M.C. School. He produced the School record showing the date of birth entered in the register. The date of birth was mentioned as 02/01/2001.

This is the evidence led by the prosecution.

17. So far as, age of the victim is concerned, there is sufficient material on record in the form of documentary evidence produced by mother of the victim, as well as, by PW-8. There is no reason to doubt this documentary evidence, which was maintained during the course of business. The date of birth of the victim was 02/01/2001 and the incident had taken place since September 2013 to October 2013. At that time, she was below 18 years of age. That fact is established. Therefore, though, it is submitted that the relationship was consensual, but even if the Appellant No.1 had established physical relations with her consent, her consent is immaterial and the offence charged against him is proved. The fact of establishing physical relations is deposed by the victim-PW-1 herself. There is no reason, whatsoever, to doubt her version. Her case was consistently that, there was consensual relationship which had resulted in the Appellant No.1's establishing physical relations on few occasions in and around September 2013. Though, the medical evidence does not reveal much, there is no reason to doubt PW-1's version in that behalf. There is nothing in her cross-examination which would suggest that, she was not

telling the truth. Her deposition to that extent is corroborated by her statement recorded U/s.164 of Cr.p.c. The victim's love affair with the Appellant No.1 is consistently deposed by PW-1 herself and her mother PW-2. The fact of sexual intercourse is also corroborated by the evidence of PW-3 who has deposed that the Appellant No.2 had bought a pregnancy testing kit. The victim's case is that, after the Appellant No.1 told the Appellant No.2 about relationship between PW-1 and the Appellant No.1, the Appellant No.2 had bought that kit and had performed the test; which was negative. All these factors do show that, there was physical contact between the Appellant No.1 and PW-1. Thus, as PW-1 was below 18 years of age, her consent is absolutely immaterial and the offence charged against the Appellant No.1 stands proved against him.

18. As far as, Appellant No.2 is concerned, she is convicted only for commission of offence punishable U/s.363 of IPC. The evidence shows that the Appellant No.1 had consumed phenyl and the Appellant No.2 being a helpless mother had to approach PW-2 with a proposal of marriage. In that situation, her conduct was

natural. The question is whether she had helped the appellant No.1 in taking PW-1 to West Bengal. In that behalf the deposition of PW-1 is important. She has specifically stated that when the Appellant No.1 had established physical relations, the Appellant No.2 was residing at her native place in West Bengal. After the Appellant No.1 told the Appellant No.2 about his love affair, she approached PW-2 and put-forth proposal for marriage. After PW-2 had refused, she had come back. PW-1 has specifically stated that, after this, the Appellant No.2 had left for West Bengal with her husband. That was somewhere around 03/10/2013. After all this, the Appellant No.1 suggested to the PW-1 that they should elope together to West Bengal and they in fact, went by different trains to West Bengal starting from Kurla railway station on 10/10/2013. In this, the Appellant No.2 has not played any role. Even after reaching Kolkata, the couple had stayed at the house of Appellant No.1's grand-mother. In her deposition, the PW-1 has nowhere stated that the Appellant No.2 had in any manner helped the Appellant No.1 in taking the PW-1 to Kolkata. Only on one occasion she had made an inquiry regarding their whereabouts.

But she had not taken any active part in the Appellant No.1 taking away the victim to Kolkata. The prosecution has not brought on record any contradiction by putting a specific question to PW-1 about her version in her statement recorded U/s.164 of Cr.p.c. Therefore, reading only deposition of PW-1, it does not show that the Appellant No.2 had played any role in taking away PW-1 to West Bengal. The evidence of prosecution in that behalf falls short of establishing the case against the Appellant No.2 beyond reasonable doubt. To that extent, benefit of doubt must go to the Appellant No.2. The Appellant No.2 was acquitted from the allegation of commission of offence punishable U/s.109 of IPC and U/s.17 of POCSO. This also is significant. This also means that she had not helped the Appellant No.1. No further charge was specifically framed against the Appellant No.2 under POCSO.

19. Considering the above discussion, following order is passed:

### ORDER

- i) The Appeal on behalf of the Appellant No.1

Mohd. Imran Mohsinben Ali is dismissed.

ii) The Appeal on behalf of the Appellant No.2

Kamrunisabegam Mohsinben Ali is allowed.

iii) The Appellant No.2 is acquitted of all the

Charges framed against her.

**(SARANG V. KOTWAL, J.)**