

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

CRIMINAL APPEAL NO.1218 OF 2018

Santosh Sahebrao Sabale
Adult, Indian inhabitant, aged about 35
Residing at Room No.11
Swami Nityam Nagar, Bandra Reclamation
Bandra (W), Mumbai 400 050
at present lodged at Yerwada Jail Appellant

versus

The State of Maharashtra
(at the instance of
Bandra police station) Respondent

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- Mr. Shashikant P. Chaudhari (Appointed Advocate) for Appellant.
- Smt. M. R. Tidke, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 19th OCTOBER, 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 19/07/2017 passed by the learned Judge under POCSO Act, Greater Mumbai, in POCSO Case No.123 of 2014. By the impugned Judgment and Order the Appellant was convicted for commission of offence punishable u/s 376 and 506 (2) of the

Indian Penal Code and u/s 4 of the Protection of Children from Sexual Offences Act, 2012. He was sentenced to suffer rigorous imprisonment of 7 years and to pay a fine of Rs.25,000/- and in default to suffer rigorous imprisonment for six months. Out of the fine Rs.15,000/- were directed to be paid to the victim by way of compensation. The Appellant was given benefit of set off u/s 428 of Cr.P.C.

2. The prosecution case is that P.W.2 was working as a maid in the house of her employer. The Appellant was given job of painting the house about 10 days prior to the incident. The incident is dated 03/12/2013. On that day, in the morning when no one was in the house, the Appellant committed rape on P.W.2. She somehow got herself rescued and locked the Appellant inside the room. Her employer's wife came home and she came to know about the incident. Thereafter the police were informed and C.R.No.640 of 2013 was registered at Bandra police station. The Appellant was arrested on the same day. The clothes of the victim and the Appellant were seized. Both of them were sent

for medical examination. The Appellant's blood sample was collected. The Appellant's blood sample was collected. The articles were sent for DNA analysis and chemical analysis. The spot panchanama was carried out and the bedsheet from the bed was seized. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Special Court.

3. During trial, the prosecution examined 9 witnesses including the victim herself, her father, her employer, the Panchas, the Medical Officer and the police officers. The defence of the Appellant was of total denial. In examination u/s 313 of Cr.P.C. he produced the documents obtained under R.T.I. Act to raise doubt regarding the age of the victim. According to the prosecution case, her date of birth was 15/08/1996 and therefore on the date of incident she was below 17 years of age. But from the documents produced on record which were obtained under the RTI Act there was another birth date in the school record i.e. on 01/06/1997. Learned Judge believed the

evidence of the prosecutrix. He observed that considering both the dates of birth in any case the victim was a minor and therefore all the offences were made out against the Appellant.

4. Heard Mr. Shashikant P. Chaudhari, learned counsel for the Appellant and Smt. M. R. Tidke, learned APP for the State.

5. In this case, the evidence of the victim is important. She is examined as P.W.2. She has deposed that she was residing at her native place with her parents and siblings. She came to reside in the house of her employer and started working as a maid servant. Before the incident she had come to stay there about one year ago. At the of time of incident, painting work was going on in the house. On the date of incident only the Appellant was present in the house besides the victim. The other painter was not present. The owner had gone to his hotel. He was a hotel manager. His wife had gone out to purchase vegetables. P.W.2 was working in the kitchen. Suddenly the Appellant came from behind. He caught her and pulled her. He took her to the bedroom. He then committed rape on her. P.W.2

tried to resist. She objected. She came out of bedroom and locked him inside the bedroom. She was crying. Around at that time her employer's wife returned home. She made enquiries. She then informed her husband. He came home and then her employer and his wife took the victim and the Appellant to the police station. Then FIR was lodged. It is produced on record at Ex.20 vide C.R.No.640/2013 as mentioned earlier. She was sent for medical examination. Her clothes were seized. She produced her birth certificate at the time of recording her supplementary statement. Her statement u/s 164 of Cr.P.C. was also recorded.

In the cross-examination she has deposed that she had left the school in the 4th standard and thereafter she had not taken admission in any school. She admitted that she had told her employer that her age was 20 years. Painting work had started 10 days prior to the incident. She denied the suggestion that she herself instigated to keep physical relations and when her employer's wife discovered their relations, she made false allegations against the Appellant. P.W.2 denied this suggestion specifically.

6. P.W.3 was father of the P.W.2. His evidence is not much relevant. He has deposed as to how P.W.2 started working with her employer and he further deposed that on the date of incident P.W.2's employer informed him telephonically about the incident. He deposed that he was an illiterate person and therefore he had wrongly given age of his daughter as 21 years. He procured school leaving certificate and produced it before the police. He admitted that he did not have any other birth proof except school leaving certificate of P.W.2 to show her age.
7. P.W.4 was the employer of P.W.2. He has deposed that his building's watchman introduced him with the Appellant for painting work. There were two persons doing that painting job. On the date of the incident the Appellant alone had come to work at about 10.00 a.m. P.W.4 was a hotel manager in a hotel at Matunga. He had left for work. He received a phone call from his wife informing him about the incident. Then he took the victim and the Appellant to the police station.

In the cross-examination he admitted that when P.W.2 started working with the him, her father had told him her age was 21 years. On the date of incident almost the entire work of painting was completed and only final touches were remaining.

8. P.W.1 Sahida Zahir Alam Shaikh was a Pancha for seizure of clothes and P.W.5 Sayyed Ismal Sayyed Jalal was a Pancha for seizure of accused's clothes. Their evidence has not really been challenged.

9. P.W.7 Mohd. Ayub Mehbook Khan was a Pancha for spot panchanama in whose presence P.W.2 had shown the spot of incident. At that time the bedsheet was seized.

10. P.W.6 Dr. Ravindra Nagram Chavan, is an important witness. He has deposed that on 03/12/2013 at about 09.15 p.m. P.W.2 was brought for medical examination. He found that her hymen was torn. There was single tear at 6 o'clock position.

It was fresh and bleeding on touch. He carried out ossification test on P.W.2 and found that she was 15-16 years of age. He prepared a report. According to him penetrative sexual assault was committed on the victim. He also examined the Appellant on the same day. In his opinion there was nothing to suggest that the Appellant was impotent. He collected blood sample for D.N.A. testing.

In the cross-examination he admitted that he did not find any injury on the body of the victim.

11. The D.N.A. report is produced on record, which shows that the semen and blood detected on Salwar of the victim and the blood sample of the accused matched. Thus, the D.N.A. report is a clinching evidence against the Appellant as far as commission of act is concerned.

12. P.W.8 PSI Hanumant Jyotiram Humbe, had recorded the statement of the victim which was treated as an FIR. He

registered the crime u/s 376 and 506 of the IPC. He seized the clothes of the victim. He arrested the Appellant. He seized the Appellant's clothes.

13. P.W.9 API Asha Vishwanath Korke had carried out further investigation. P.W.2's School Leaving Certificate was produced by P.W.3. It was produced on record through the evidence of this witness at Ex.39. She had sent all the articles for C.A. examination. She had recorded statement of victim u/s 164 of Cr.P.C. This witness had filed the charge-sheet against the Appellant.

14. The School Leaving Certificate at Ex.39 shows the date of birth of the victim as 15/08/1996. The defence had filed an application below Ex.42 to produce documents through R.T.I. Act to show that the date of birth was not proved.

15. Learned counsel for the Appellant submitted that the most important witness in this case was wife of the employer

and she is not examined. Therefore adverse inference needs to be drawn. The spot panchanama did not show any damage caused to the property which also suggests that there was no force used on the victim when the incident had taken place. If it is held that the victim was major, then defence case that it could be a case of consent, may be taken into consideration. He further submitted that admittedly there were two painters on the job. The second one is not examined. He submitted that the father of P.W.2 had told P.W.3 that her age was 21 years at the time when P.W.2 started working with him. There was sufficient doubt created against the prosecution case and therefore the Appellant deserves to be acquitted.

16. Learned APP on the other hand submitted that the age of the victim is proved through the School Leaving Certificate. It is prepared on the basis of record maintained with the school and there is no reason to doubt it. She further submitted that it is a not case of consent in any case. The victim P.W.2 had resisted the Appellant. She had locked the Appellant in the bedroom.

This suggests that there was no consent. She submitted that the D.N.A. report is against the Appellant and this is a very strong circumstance.

17. I have considered these submissions. As far as evidence of P.W.12 is concerned, I do not see any infirmity in the evidence. She is a truthful witness. She has narrated the incident in detail. It is not a case of consent. The victim and the Appellant were alone in the house. There was no way that the employer's wife would have come to know about the incident, unless the victim had complained to her. The victim had locked the Appellant inside the room and therefore he could be taken to the police station. Thus, P.W.2's deposition is supported by the attending circumstances. Apart from that, the D.N.A. Report is most important. The blood stains and the semen stains found on the clothes of the victim matched with the blood sample of the Appellant, as per the D.N.A. report. Therefore there is no doubt that the incident had taken place and there is no reason to disbelieve P.W.2 that it was against her wish and consent. In any

case, the prosecution has successfully proved that she was a minor. Her date of birth in the school leaving certificate was mentioned as 15/08/1996 and the incident had taken place on 13/12/2013. An attempt was made by the defence to show that the date of birth was doubtful. Learned Judge has discussed this aspect in paragraph No.31 of his judgment. It was argued that Grampanchayat Dhanivari where the P.W.2 was born, did not have registration about her birth. She was studying in a Government School and the original record of the school was not available. In the year 2008 the school had shifted to another building and in 2009 due to storm in rainy season all the documents in the school were destroyed. There were two entries as per the General Register. Her date of birth was 15/08/1996 at entry No.864 and as per entry No.993 her date of birth was 01/06/1997. Though there are two different dates of birth, in any case, both these dates show that she was a minor. There is no reason to doubt the school record. P.W.6 had conducted ossification test, which also mentions that her age was between 15 to 16 years. In this view of the matter, the prosecution has

successfully proved that she was a minor and the incident had taken place as deposed by her. Since P.W.2's evidence is reliable, there was no necessity to examine any other witness including the wife of her employer. The evidence of P.W.6 also shows that the injury to P.W.2's hymen was fresh and bleeding. Thus all these circumstances and the evidence show that the prosecution has proved its case beyond reasonable doubt. The Appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)