

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

CRIMINAL APPEAL NO. 1051 OF 2018

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Ayub Kasim Patel

..Appellant

V/s.

The State of Maharashtra

..Respondent

Mr. Vikas Shivarkar for the Appellant.

Mr. A.R. Kapadnis, APP for the Respondent/State.

CORAM : C.V. BHADANG, J.

RESERVED ON : 15 NOVEMBER 2021

PRONOUNCED ON : 5 APRIL 2022

:JUDGMENT:

1. By this Appeal, the Appellant (accused No.1) is challenging the Judgment and Order dated 11.07.2018 passed by the learned Sessions Judge at Pune in Sessions Case No. 555 of 2012. By the impugned Judgment, the Appellant has been convicted for the offence punishable under Section 376(2)(h), 342, 323, 384, 504, 506 of IPC.

For the offence punishable under Section 376(2) of IPC, the Applicant has been sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- and in default to suffer further rigorous imprisonment for two months. For the offence punishable under Section 342, the

Applicant has been sentenced to suffer rigorous imprisonment for six months with fine and for the offence punishable under Section 323, 384, 504 and 506 of IPC, he has been sentenced to suffer rigorous imprisonment for three months with fine on each count. The learned Sessions Judge however has acquitted the Appellant from the offence punishable under Section 354 of IPC. The co-accused Rehana Ayub Patel, who is wife of the Appellant has been acquitted of all the offences as charged.

2. The prosecution case may be briefly stated thus:

That the prosecutrix PW-4, at the relevant time was a girl aged about 13 years. She along with PW-1 Laxmi Waghela, PW-2 Noori Ghodke and PW-3 Ruksana Yadav were rag pickers. On 22.06.2012 at about 2.30 p.m., the prosecutrix along with PW-1 to PW-3 had gone to Indrayani Colony at Talegaon Dabhade for collecting scrap. According to the prosecutrix, she had noticed an iron plate lying near a house under construction near Samaj Mandir at Talegaon Dabhade. She picked the iron plate, which was noticed by the Appellant who was present in the said house under construction. According to PW-4, they were storing the scrap collected in a gunny bag kept near Syndicate Bank. She claims that while she was going to keep the iron plate near Syndicate Bank, the Appellant followed her and assaulted her claiming that she along with her friends had committed theft of about 100 iron plates. He brought the prosecutrix back to the

construction site, when she found that PW-1 to PW-3 were confined by the Appellant in a room at the construction site. The Appellant pushed the prosecutrix in the said room, locked the door.

3. The accused No.2 i.e. wife of the Appellant was sitting outside the room, where the girls were confined and keeping a watch on them. However, PW-2 Noori Ghodke managed to bend the door which was of tin sheet and could rescue herself as she fled from the spot. However, when the prosecutrix and PW-1 and PW-3 were also trying to flee, the Appellant came there and assaulted them. The Appellant and his son went in search of PW-2 Noori.

4. It is claimed that at about 7.00 pm, the Appellant brought one red colour Tempo and carried the prosecutrix along with PW-1 and PW-3 to a bungalow under construction at village Varale and confined three of them on the second floor of the bungalow in one room by putting lock on the same. After about one hour, the Appellant came there along with some eatables and a water bottle and gave it to the girls and tried to molest PW-3 Ruksana Yadav. On her raising alarm, the Appellant left her.

5. It is the material prosecution case that at about 2.00 am to 3.00 am, the Appellant again came to the room and had forcible sexual intercourse with the prosecutrix in the presence of PW-1

and PW-3. While leaving the place, the Appellant threatened them not to disclose the incident to anybody.

6. The following morning, the prosecutrix and other girls raised alarm, when some neighbourers came there and gave them water. It is at this point of time, the Appellant also came there and on upon inquiry by the neigbours, informed them that the prosecutrix and other girls had committed theft of iron plates worth Rs. 2 lakhs. After this, the husband of PW-1 Laxmi Waghela came there and gave Rs.1,500/- to the Appellant after which they were rescued. The incident was informed to the husband of PW-1 who inturn disclosed the same to one Ganya alias Ganesh More and his wife Asha who had brought-up the prosecutrix since her childhood. After this Ganesh More lodged the report, on the basis of which, an offence came to be registered and after investigation, a chargesheet is filed which was committed to the Court of Sessions. According to the prosecution, Rehana Patel (accused No.2), who is wife of the Appellant also assisted the Appellant in confining the girls and their sexual abuse.

7. The learned Sessions Judge framed charge against the Appellant and the co-accused for the aforesaid offence. The Appellant and the co-accused pleaded not guilty to the charge and claimed to be tried. The defence is of total denial and false

implication. According to the Appellant, the prosecutrix and her friends were indulging in theft of the building material on the pretext of collecting scrap. As the Appellant had taken objection for the same, he has been falsely implicated.

8. At the trial, the prosecution examined as many as 26 witnesses and produced the record of investigation. The Appellant did not lead any evidence in defence.

9. The learned Sessions Judge has found the Appellant guilty as aforesaid. Hence, this Appeal.

10. I have heard the learned counsel for the Appellant and the learned APP. With the assistance of the learned counsel for the parties, I have gone through the record.

11. It is submitted by the learned counsel for the Appellant that the learned Sessions Judge has failed to properly appreciate the evidence. The learned counsel has taken me through the prosecution evidence and particularly that of PW-1 to PW-4 in order to submit that the incident as narrated is improbable. It is submitted that the prosecutrix and other girls were residents of the same area and it has come on record that the bungalow where the incident is alleged to have happened was adjacent to a public road, where there was traffic.

12. It is pointed out that neither the prosecutrix nor other girls raised any alarm to seek help from the neighbours or the passers by which itself makes their evidence improbable. The learned counsel also made submission based on the evidence of PW-1, PW-3 and PW-4, which in the submission of the learned counsel is discrepant. It is submitted that the learned Sessions Judge ought to have accepted the defence of the Appellant which according to the learned counsel is probable. It is submitted that the Appellant is a labour contractor and the prosecutrix and the other girls were scrap/rag pickers in the area and as the Appellant had taken objection to the prosecutrix and other girls committed theft of the building material that he has been falsely implicated. It is submitted that PW-3 Ruksana has not supported the prosecution case and has turned hostile. The prosecution has not examined the complainant Ganesh More, who has lodged the report. It is pointed out that the prosecutrix herself nor other girls who were allegedly present have reported the matter to the police. It is submitted that the medical certificates Exhibits 98, 99 and 100 do not set out the history of the incident which also renders the prosecution evidence improbable and not trustworthy. The learned Counsel has also taken objection to the age of the prosecutrix. It is pointed out that no school leaving certificate or birth certificate of the prosecutrix is produced on record and in the FIR Exh. 124 her age is shown to be 14 years. The learned counsel pointed out that the Sessions Judge was in

error in holding that the school leaving certificate may not be available as the prosecutrix being a rag picker might not have been admitted to the school. Thus, in the submission of the learned counsel the conviction of the Appellant cannot be sustained and deserved to be set aside.

13. The learned APP has supported the impugned Judgment. It is submitted that there is consistent evidence of PW-1 and PW-4 on the point of these witnesses being confined in the room at the construction site initially where the prosecutrix had picked up an iron plate and subsequently in the bungalow under construction at village Varale where the incident had happened. It is submitted that the evidence cannot be discarded on the basis of some minor discrepancies which do not go to the root of the matter or the veracity of the witnesses. It is submitted that even uncorroborated testimony of the prosecutrix can be accepted and can form the basis of the conviction if the evidence inspires confidence. It is submitted that this is a case where the evidence of the prosecutrix is corroborated in material particulars by PW-1 and other evidence including medical evidence. It is submitted that non examination of Ganesh More in such circumstances, would not be material particularly when the first informant is not the eye witness to the incident and had merely reported the matter to the police. It is submitted that the Sessions Judge after properly appreciating the evidence has found the Appellant

guilty. Insofar as the age of the prosecutrix is concerned, it is submitted that the alleged discrepancy between the age as stated to be 13 years and 14 years in the FIR is not such so as to warrant the evidence being discarded. The learned APP pointed out that this is not a case where there is any charge under the Protection of Children from Sexual Offences Act, 2012 ('the Act of 2012') inasmuch as the said Act has come into force subsequent to the date of the incident. It is pointed out that PW-1 Laxmi Waghela has stated that she was carrying a pregnancy of 7 months on the date of incident. In short according to the learned APP, the evidence of PW-4 having been corroborated in material particulars by PW-1 is sufficient to base the conviction and no case for interference is made out.

14. I have carefully considered the rival circumstances and the submissions made. At the outset, it may be mentioned that the incident is alleged to have happened on 22.06.2012. While the Act of 2012 came into force on 14.11.2012. It is in these circumstances, that there was no prosecution or charge under the said Act. This is only to put the record straight. The contention based on the absence of any proof as to the age also, to my mind cannot be accepted. PW-4 was examined before the learned Sessions Judge on 29.10.2013 where she has given her age as 14 years. This is not a case where the age of the prosecutrix is shown to be marginally lower than the age of attaining majority i.e. 18 years. There is a substantial difference and discrepancy between

the age as 13 and 14 years in my considered view would not be material.

15. The charge as framed against the Appellant is under Section 376, 354, 384, 342, 323, 504 and 506 of IPC. As noticed earlier, the learned Sessions Judge has convicted the Appellant for the principal offence under Section 376 (2)(h) of IPC and Section 342, 323, 384, 504 and 506 of IPC.

16. Coming to the prosecution case, we have the evidence of PW-1 and PW-4, PW-4 being the prosecutrix. With the assistance of the learned counsel for the parties, I have carefully gone through their evidence and I do not find any reason to discard the same. PW-2 Noori had also accompanied PW-1, PW-3 and PW-4 initially and was allegedly confined in the bungalow and had managed to escape. Subsequent to this, PW-1, PW-3 and PW-4 were carried in a tempo to another bungalow under construction at village Varale, where the incident is alleged to have happened. Thus, PW-2 Noori cannot be said to be a witness to the actual incident of sexual abuse of PW-4 in the under construction bungalow at Varale. However, the evidence of PW-1 is sufficient to lead necessary corroboration and credence to the evidence of PW-4. The learned counsel for the Appellant had made submission about the improbability of their evidence which in my considered view cannot be accepted. It is necessary to note that the evidence of any such witness has to be appreciated on the

basis of broad probabilities and human conduct. Admittedly, the prosecutrix and the other girls accompanying her were rag pickers. The prosecutrix had picked up an iron plate, initially at the bungalow under construction where the Appellant had noticed the same and had assaulted the prosecutrix and the other girls after which they were confined in a room. According to the witnesses, the Appellant was alleging that the prosecutrix and other girls were indulging in theft of the building/construction material. Therefore, they had no reason to apprehend any assault or sexual abuse after they were carried to another bungalow at village Varale. Thus, in my considered view the absence of any alarm raised by the prosecutrix and other girls with the driver of the tempo who has been examined as PW-11 would not be material. It is necessary to note that the prosecutrix and other girls being under an allegation of committing theft might be under certain pressure and had not raised any alarm. However, the subsequent evidence of these witnesses on the point of the sexual abuse of PW-4, in my view is sufficient to establish the same.

17. The contention on behalf of the Appellant that there was no medical history given at the time of examination also cannot be accepted. The evidence of PW-15 Dr. Shruti Gadekar who had examined the prosecutrix PW-4 is relevant for the purpose. The evidence of PW-15 along with medical report Exh.77 shows

that there was a history of attempted sexual intercourse given. The evidence of PW-15 along with Exh.77 shows that from clinical examination PW-4 was habituated to repetitive penetrative sexual vaginal intercourse.

Even assuming that PW-4 was habituated to repetitive penetrative sexual vaginal intercourse, is not sufficient to discard her evidence about actual occurrence as stated by her.

18. I have carefully gone through the judgment of the learned Sessions Judge and I do not find any reason to interfere with the finding of guilt as recorded. However, it is necessary to note that learned Sessions Judge has found the Appellant guilty for the offence under Section 376(2) (h) of the IPC apart from other sections as set out above. Section 376 (2)(h) envisages an offence of committing rape on a woman knowing her to be pregnant. In this case, PW-4 is not alleged to have been pregnant at the time of incident. PW-1 Laxmi Wagela claims to be carrying a pregnancy of seven months at the time of the incident.

19. Section 376(1) as it stood on the date of incident (prior to its amendment in the year 2013 and 2018) provides a minimum sentence of seven years and not ten years as has been introduced in the amended provisions. In such circumstances, the conviction deserves to be modified to one under Section 376(1) of IPC and

the sentence can be modified to seven years of rigorous imprisonment. To that extent the appeal deserves to be allowed partly.

20. Hence, the following order.

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The conviction of the Appellant for the offence punishable under Section 376(2)(h), is modified to one Section 376(1) of IPC.
- (iii) The Appellant is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- and in default, to suffer further simple imprisonment for two months for the offence punishable under Section 376(1) of IPC.
- (iv) The conviction and sentence awarded to the Appellant under Section 342, 323, 384, 504 and 506 of IPC, is hereby confirmed.
- (v) The Criminal Appeal is disposed of, in the aforesaid terms.

(C.V. BHADANG, J.)