

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 278 OF 2024
WITH
INTERIM APPLICATION NO. 1227 OF 2024

Datta Mahadev Suryawanshi)
Aged 25 years, Occ. Service)
Residing at : R.No.439, Chawl No. 18,)
Scotars Colony, Gate No.7, Malavani,) Appellant/
Malad West, Mum. 95) Original
(Presently in Thane Jail))... Accused

Versus

1 State of Maharashtra)
2 XYZ)
Residing at : Mustafa Chawl, Near House of)
Mehrun, Azmi Nagar, Malwani, Malad West 64)... Respondents

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Mr. Amarjeet H. Yadav, Advocate for the Appellant.
Smt. Sangeeta D. Shinde, APP for Respondent No.1 – State.
Mr. Maitreya Shukla, Appointed Advocate from Legal Aid – for Respondent No.2.

CORAM : SHIVKUMAR DIGE, J.

DATED : 24th OCTOBER, 2024.

JUDGMENT :

1. The appellant has preferred this appeal against the Judgment and Order passed by the learned Sessions Judge in Pocso Special Case No. 07 of 2018.

2. The appellant has been convicted under Section 363 of Indian Penal Code, 1860 (for short “IPC”) and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.50/- in default to suffer simple imprisonment for 2 days.

3. The appellant is convicted under Section 376(2)(n) of IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50/- in default to suffer simple imprisonment for two days.
4. The appellant is convicted under Section 506(II) of IPC and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.50/- in default to suffer simple imprisonment for two days.
5. The appellant is convicted under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.50/- in default to suffer simple imprisonment for two days.
6. The appellant is convicted under Section 8 of POCSO Act and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.50/- in default to suffer simple imprisonment for two days. All the sentences shall run concurrently.
7. It is prosecution's case that on 06.06.2017 the appellant kidnapped the victim and took her at Rajasthan. The appellant kept the victim for around one month with him. During that period, he threatened victim and sexually assaulted her many times.
8. It is contention of learned counsel for the appellant that prosecution failed to prove case against the appellant beyond reasonable doubt. The appellant has been falsely implicated in this case. Though prosecution

states that, at the time of incident, victim was 13-14 years old but her age proof was not produced before the learned Special Court. Her school leaving certificate was produced before the Special Court, but headmaster of the said school was not examined to prove it. Hence age of the victim has not been proved. Learned counsel further submitted that during one month's period, victim did not complaint to anyone. The appellant had brought her back to Mumbai to meet her parents. Learned counsel further submitted that to prove the sexual assault on victim, Medical Officer is not examined though she was sent for medical examination, but these facts are not considered by the Special Court. Learned counsel further submitted that to prove the age of the victim, X-Ray was done by the doctor but report of it was not produced before the Special Court. School leaving certificate of the victim to prove her birthdate was produced after five years 4 months, of registration of the FIR. The offence was registered against the appellant on 06.06.2017 but till deposition of the victim before the Court i.e. 06.10.2022 victim never told about her birth date or her age. Mere on surmises and conjunctures, learned Special Court has convicted the appellant which is erroneous, hence requested to allow the appeal.

9. It is contention of learned APP for the State along with learned counsel for respondent No.2 that appellant kidnapped the victim who was around 13 years old. He took her at various places and sexually assaulted

her. Offence was registered against the appellant. On the statement of victim, as she stated that the appellant had kidnapped her and sexually assaulted her. The prosecution has proved the case beyond reasonable doubt against the appellant. Accordingly, he has been convicted. No interference is required in it and requested to dismiss the appeal.

10. I have heard all learned counsel. Perused the impugned Judgment and Order and evidence produced on record. To prove its case prosecution has examined the victim, as PW-2. She has stated that on 06.06.2017, the appellant held her hand and forced her to sit in auto rickshaw. When she tried to shout, the appellant put his hand on her mouth and threatened to kill her. Appellant took her at some place, it was dark night. Thereafter appellant took her by bus to Rajasthan, there the appellant worked in company. During that period the appellant sexually assaulted her. In the absence of the appellant she made phone call to her father, her father and wife of the appellant persuaded the appellant to bring her to home thereafter the appellant brought the victim to Mumbai. In cross examination, this witness admitted that when she was traveling with the appellant, there was crowd at every place and she has not stated her birth date to the police and the Magistrate who recorded her statement under Section 164 of Code of Criminal Procedure.

11. The prosecution has examined PW-1 Mohd. Israfil Isha Ansari at

Exhibit-37, father of the victim. He has stated that at the time of incident her daughter was 13-14 years old. He further stated that he received phone call from his daughter on 06.07.2017 wherein she told that the appellant took her forcibly to Rajasthan. On 07.07.2017 his daughter came with the appellant to Mumbai. Thereafter, complaint was lodged against the appellant. PW-3 Rahul Kodpe at Exhibit-50 has stated that he has registered the crime against the appellant on the complaint of first informant. PW-4 Dr. Sushil Kamble, Medical Officer, who examined the appellant has stated that appellant was capable of doing sex. PW-5 Laxman Shinde is the Investigating Officer, he has stated that he arrested the appellant on 18.08.2017. In cross examination he admitted that the statement of victim was recorded on 16.12.2017. He has not given reason for delay in recording the statement of victim. Considering the evidence of prosecution witnesses, the learned Special Court has convicted the appellant. The prosecution's case revolves around the statement of the victim. Though victim has stated that at the time of incident her age was 13-14 years but prosecution has not proved the age of the victim. After registering the FIR against the appellant in the year 2017, the school leaving certificate of the victim was produced before the Special Court in the year 2022 i.e. after 5 years of incident. That too no witness is examined to prove the said certificate. So prosecution failed to prove the

birth date of the victim. There is allegation against the appellant of sexual assault on the victim. It appears from the record that victim was sent for medical examination but the concerned doctor has not been examined to prove the sexual assault on the victim.

12. It is contention of learned APP that mere statement of the victim is sufficient to prove the sexual assault as she was below 18 years of age. In my view, admittedly victim was stating she was with the appellant for one month in that period she was sexually assaulted. The prosecution has not examined the doctor who examined the victim. So it is not proved that the victim was sexually assaulted by the appellant, nor her School Leaving Certificate was produced to prove the age of the victim. Prosecution failed to prove case against the appellant beyond reasonable doubt. But this fact is not considered by the learned Special Court. The appellant is entitled for benefit of doubt and I pass following order.

ORDER

- (i) The appeal is allowed.
- (ii) The appellant is acquitted of the offence, with which he is charged. The appellant be set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.
- (iii) The Judgment and Order dated 13.04.2023 passed by the

Additional Sessions Judge, Borivali Division, Dindoshi, Mumbai in Pocso Special Case No. 07 of 2018 is quashed and set aside.

(iv) Appellant be acquitted from the jail if not involved in other case.

13. The appeal is disposed of. In view of disposal of appeal, pending applications, if any also disposed of.

(SHIVKUMAR DIGE, J.)

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by SONALI
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