

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

CRIMINAL APPEAL NO. 648 OF 2024

Surendra @ Ajay Rajaram Nishad	..Appellant
Versus	
The State of Maharashtra & Anr.	..Respondents

**WITH
INTERIM APPLICATION NO. 2890 OF 2025
IN
CRIMINAL APPEAL NO. 648 OF 2024**

Ms. Rashmi R. Bhandarkar a/w. Mr. Rajendra P. Tajane for Appellant.

Ms. Ranjana D. Humane, APP for State/Respondent.

Mr. Onkar A. Mane for the Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 31 JULY 2025**

JUDGMENT:

1. The Appellant has challenged the Judgment and order dated 03.05.2024 passed by the learned Additional Sessions Judge and Special Judge, Kalyan, in Atrocity Special Case No.188 of 2020. The Appellant was convicted and sentenced as follows:

- i) He was convicted for commission of the offence punishable U/s.376(3) of the I.P.C. and was sentenced to suffer R.I. for 20 years and to pay fine of Rs.20000/- and in default to suffer S.I. for one year.

- ii) He was convicted for commission of the offence punishable U/s.363 of the I.P.C. and was sentenced to suffer R.I. for three years and to pay fine of Rs.3000/- and in default to suffer S.I. for one month.
- iii) He was convicted for commission of the offence punishable U/s.366 of the I.P.C. and was sentenced to suffer R.I. for seven years and to pay fine of Rs.7000/- and in default to suffer S.I. for three months.
- iv) He was convicted for commission of the offence punishable U/s.354 of the I.P.C. and was sentenced to suffer R.I. for two years and to pay fine of Rs.2000/- and in default to suffer S.I. for twenty days.
- v) He was convicted for commission of the offence punishable U/s.342 of the I.P.C. and was sentenced to suffer R.I. for three months and to pay fine of Rs.300/- and in default to suffer S.I. for ten days.

All the substantive sentences were directed to run concurrently. No separate punishment was imposed for the offences punishable under sections 4 and 8 of the Protection of Children from Sexual Offence Act (for short 'POCSO Act'), in view of Section 42 of the POCSO Act. He was granted set off for the period which he had undergone as an under-trial prisoner. Out of the fine amount of Rs.32,300/-, the amount of Rs.25000/- was directed to be paid to the victim as compensation.

2. Heard Ms. Rashmi Bhandarkar, learned counsel for the Appellant, Ms. Ranjana Humane, learned APP for the State and Mr. Onkar Mane, learned counsel for the Respondent No.2.

3. At the outset, learned counsel for the appellant submitted that, she was pressing this appeal for remanding back the matter for *de novo* trial. She relied on the circumstances and some documents to support her contentions. According to her, there was failure of justice and, therefore, the trial needed to be conducted *de novo*.

4. I have considered the evidence on record and the documents relied on by the learned counsel for the Appellant from that perspective. I have also heard the learned counsel appointed for the Respondent No.2 and the learned APP for the State. I have perused the record and proceedings sent by the trial Court before this Court. The Appellant was 22 years of age at the time of framing of the charges.

5. The prosecution case is that the date of birth of the victim was 23.07.2007. The incident took place on 04.08.2020 and

thus, she was below 18 years of age at that time. The F.I.R. was lodged by the victim's father on 04.08.2020 at Vishnu Nagar police station. It is mentioned in the F.I.R. that on 04.08.2020 at about 4:15p.m. the victim left the house on the pretext of throwing garbage. But she did not return. Her family members tried to search for her. But she was not found and, therefore, the F.I.R. was lodged against an unknown person for abducting the victim. On 15.08.2020, the informant was told by the officer of Vishnu Nagar police station that the victim was found and she was being brought to the police station. The informant went to the police station. The victim was given in the parents' custody. She informed them that the Appellant had taken her to his room in a slum area. He had kept her in confinement for about ten days and had repeatedly established physical relations with her. The Appellant was arrested on 15.08.2020 and since then he is in custody. The investigation was carried out, the statements of the witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed. The case was tried before the learned Special Judge.

6. The prosecution examined four witnesses including the

victim, her father, the Medical Officer and the Investigating officer. The defence of the Appellant was of total denial. The learned Judge relied on the prosecution evidence and convicted and sentenced the Appellant as mentioned earlier.

7. Before referring to the arguments advanced by all the learned counsel, briefly, the evidence can be referred to as follows:

PW-2 was the victim. She deposed that, at the time of the incident, she was studying in the 8th standard. Her date of birth was 23.07.2007. She was born in their village. She knew the Appellant because he was residing in her area in his maternal aunt's house. The Appellant used to visit the victim's house. He used to tell PW-2 that he liked her and that he wanted to marry her. He used to call her to meet him, but she used to refuse. After a few days, the Appellant went to reside at Thane. On 04.08.2020, the Appellant called PW-2 telephonically and asked her to meet him. She went to meet him on the pretext of throwing garbage. The Appellant told PW-2 that it was his cousin's birthday and that they should go together to purchase a gift for his cousin. He took

PW-2 to Kalwa in his room in a slum area. He confined her there. He beat her. She resisted his advances. On 07.08.2020, he committed forcible sexual intercourse with her. He kept her there for about 4 to 5 days. He threatened to kill her and her parents. He used to tell her that he would force her into prostitution. The police rescued the victim and took her to a hospital at Kalyan for medical examination. She showed the spot where the incident had taken place. She identified her clothes produced in the Court which were seized at the time of the investigation.

Her cross-examination is mostly in the nature of suggestions; which she has denied. There is hardly any effective cross-examination of this important witness.

8. At this stage, it is necessary to refer to her statement recorded U/s.164 of the Cr.P.C. Though, contradictions and omissions from this statement are not brought on record by the learned counsel for the Appellant during trial, however, the learned counsel appearing for the Appellant before this Court strongly submitted that the statement recorded U/s.164 of the

Cr.P.C. is vastly different from her deposition, and it was absolutely necessary to bring these contradictions on record through effective cross-examination. Her first and foremost contention is that, since these contradictions were not brought on record, it has caused miscarriage of justice. To appreciate this submission, it is necessary to refer to the statement recorded U/s.164 of the Cr.P.C. In that statement, the victim has stated that, she was knowing the Appellant as he was residing in the same chawl. They used to talk with each other. On 04.08.2020, she had gone out to dump garbage. At that time, the Appellant met her and told her that he wanted to buy a gift for his cousin. He took her in a rickshaw to Kalwa. He took her to a rented room. His Aunt told him that PW-2's father had lodged an F.I.R. He got scared and told PW-2 to tell her family telephonically that she had left for Pune. She, therefore, called her family telephonically and told them that she had left for Pune. The Appellant himself sent a message through her mobile phone on her father's mobile phone. She further stated in that statement that the Appellant used to beat her, he used to put something in her tea because of which she used to lose her

consciousness. When she used to wake up, there used to be pain throughout her body. When she used to ask the appellant whether he had done something, he used to tell her to keep quiet. He used to threaten her. Whenever, the Appellant's aunt used to tell him about the F.I.R., he used to harass PW-2. He kept the victim with him for about ten days. Then the police rescued her and brought her to Kalwa police station. The Appellant used to threaten her that, he would take her to Punjab and that he would sell her. The importance of this statement is that there is no specific allegation of forcible sexual intercourse. There is only some vague reference to the allegation that he used to put something in her tea and make her unconscious and when she would wake up there used to be body ache. But there are no direct allegations of forcible sexual intercourse; as she had made in her deposition. This aspect is definitely important. Therefore, it was necessary that this contradiction should have been brought on record. Ultimately, the appreciation of effect of this contradiction would have been within the function of the Court, but the least that was expected from the defence side was to bring this contradiction on record. This was

not done.

9. The other important witness was PW-1 who was father of the victim. He has deposed about lodging of the F.I.R. that his daughter was missing from his house. Beyond that, his evidence is not of much importance. He has proved the F.I.R. produced on record at Exhibit-8.

10. PW-3 Dr. Sadiya Pinjari had examined PW-2-the victim medically on 15.08.2020. On her examination, she found old burn marks on her right breast. There were bruises on both the sides of the neck. There were two hymenal tag torn and according to her, in the case of repeated sexual assault, two hymenal tag tear at 6'O clock position could occur.

In the cross-examination, she accepted that there was no external injury on the victim. Apart from that, there was no cross-examination except giving some suggestions.

11. PW-4 was the I.O., API Ganesh Vadane. He has deposed about the investigation carried out by him and about the recording of statement of the witnesses U/s.164 of the Cr.P.C. His evidence is

of limited value.

12. Learned counsel for the Appellant submitted that, apart from the discrepancy in PW-2-Victim's deposition and her statement recorded U/s.164 of the Cr.PC., there was a discrepancy in respect of the birth certificate of the victim. It was produced on record at Exhibit-14. Since it was a case under the POCSO Act, it was important that there should have been serious challenge to her date of birth. Instead, the learned counsel for the Appellant in the Trial Court had admitted that birth certificate. Learned counsel before this Court submitted that the matter does not rest there, because, there was one more document purporting to be the birth certificate on the record of the Trial Court. It was also issued on the same date i.e. on 23.07.2007 and there was material discrepancy in both these documents. There was overwriting in both the documents and a bare look at those two documents would reveal that there was something wrong with those documents and they could not have been relied on. Instead of challenging those documents, the defence counsel had admitted those documents. Learned counsel submitted that, all these

important discrepancies should be looked into in the background of the fact that the appellant wanted to change his advocate and in fact, he had filed an application before the Trial Court for permitting him to change his advocate. The Appellant was in custody. He had sent an application through jail for permitting him to appoint another advocate. Significantly, that application was allowed vide the order dated 05.10.2023. She submitted that, after the said application was allowed, the appellant was never produced before the trial Court till his statement was recorded U/s.313 of the Cr.PC. Therefore, he could not make any arrangement to engage another advocate who could have cross-examined the witnesses. She further submitted that the appellant had already sent this application through jail on 16.08.2023, but it was not sent to the trial Court urgently and ultimately it was allowed only on 05.10.2023. The evidence of PW-1 was recorded on 08.08.2023 and that of PW-2 was also recorded on 08.08.2023. After that, immediately, the Appellant had sent this application. It was allowed on 05.10.2023, as mentioned earlier. After that date, two more witnesses were examined by the prosecution. But the

Appellant was deprived of an opportunity to cross-examine them through a different advocate. He was also deprived of an opportunity to recall the first two witnesses for further cross-examination.

13. Learned counsel appearing for the Respondent No.2 submitted that the statement of the victim recorded U/s.164 of the Cr.P.C. itself indicates that there was forcible sexual intercourse, though, she has not stated so in the same words, but there was clear indication that it was indicated in her statement.

14. Learned APP submitted that the appellant was produced before the trial Court while recording his statement U/s.313 of the Cr.P.C. At that time, he could have reminded the Court of his request to appoint a different advocate. But at that time, he had not raised any objection. After that, the arguments were advanced by his advocate. Therefore, it cannot be said that a fair opportunity was denied to him in respect of his trial.

15. I have considered these submissions. This is a peculiar case in which a specific prayer is made for remanding the matter

for *de novo* trial. Therefore, I have considered the submissions made by all the parties from that point of view. In this case, the sentence imposed on the Appellant is R.I. for 20 years. He himself was 22 years of age at the time of commission of the alleged offence. The offence is very serious and the consequences are serious too. Therefore, it is not even debatable that a fair opportunity to the Appellant is needed to be afforded at the trial stage. In the background, as discussed above, it is necessary to see whether there was failure of justice in this particular case. The deposition of PW-2 is already reproduced herein above and the statement given by her U/s.164 of the Cr.P.C. before the learned Magistrate is also referred to herein above. Though, the learned counsel for the Respondent No.2 submitted that there are indications of indirect references to forcible sexual intercourse, from the statement recorded U/s.164 of the Cr.P.C. it can be seen that there is nowhere specific mention of forcible sexual intercourse. In the present case, it was the main fact in issue and, therefore, since there was an important variance and contradiction between PW-2's deposition and her statement before the learned

Magistrate, recorded U/s.164 of the Cr.P.C., it was absolutely imperative that the contradiction in her statement U/s.164 of the Cr.P.C. touching the main issue of forcible sexual intercourse should have been brought on record by inviting the attention of PW-2 to that contradictory portion and seeking her explanation about that contradiction. This was the least that was expected from the defence counsel in the Trial Court. This was not done and it has definitely occasioned a failure of justice. The stories deposed in the examination in chief and stated in the statement U/s.164 of the Cr.P.C. are materially different. Her deposition does not mention her story about PW-2 calling her family and telling them that she was going to Pune. There is no reference in her deposition regarding the Appellant's aunt telling him about the registration of an F.I.R. against the Appellant. All these facts were also important which were not deposed in the examination in chief. All these material discrepancies ought to have been produced on record during trial. But it was not done.

16. The second important issue is about the birth certificate of the victim. One of the birth certificates is produced on record at

Exhibit-14. It was admitted in evidence by the learned counsel for the Appellant before the Trial Court on 08.08.2023. The Appellant in his Appeal Memo has annexed a copy of Exhibit-14 at page-47. Interestingly, the Appellant has also annexed another copy of birth certificate at page-48 of this Appeal memo. Even that document bears an endorsement of the learned counsel for the Appellant mentioning that the said document was also admitted. However, no exhibit number is given to that document. Learned counsel for the Appellant submitted that, that second document which was not exhibited and which is at page-48 of the Appeal memo, is the certified copy obtained from the record of the trial Court. Comparison of both these documents show that purportedly both of them were issued on 23.07.2007 by the same authority. It was issued at Uttar Pradesh by the Registrar (Birth) District Office at Ambedkar Nagar, U.P. There is overwriting in both these documents and they bear the same number 377. If both these documents were issued by the same authority on the same date, it is difficult to understand as to why there are discrepancies and overwriting in both these documents. These

discrepancies, at least, should have been brought on record. But, one of those documents was simply admitted by the learned defence counsel and it was exhibited. This is another important issue in this case which has caused serious prejudice to the Appellant. In the present case, this assumes importance because the Appellant had immediately written a letter through jail expressing his desire to change his advocate and, in fact, that application was allowed. The said application is reflected in the roznama at Exhibit-23. It was allowed on 05.10.2023. A copy of that application and the order passed thereon is annexed at page-71 to the Appeal memo by the learned counsel for the Appellant. The important feature in this application is that the Appellant had given this application immediately to the Jailor, Kalyan District Prison on 16.08.2023. Therefore, on his part he had acted immediately, but the order was passed by the Trial Court allowing that application only on 05.10.2023. By that time, even PW-3 Dr. Sadiya was examined. Only PW-4 I.O. Ganesh was examined subsequently on 10.10.2023.

17. Learned counsel for the Respondent No.2, as well as, the

learned APP submitted that, nothing stopped the appellant from appointing a different advocate once that application was allowed. However, in that context, as rightly submitted by the learned counsel for the appellant, it needs to be taken into account that the Appellant was never produced from Jail after 05.10.2023 when the application was allowed till his statement was recorded U/s.313 of the Cr.P.C. on 20.01.2024. Therefore, I find substance in the submission of the learned counsel for the Appellant that, he could not engage another advocate or could not seek assistance of a legal aid counsel because he was never produced in the Court. Every time the trial was conducted, the appellant was joined in the trial through video conferencing. The Appellant is from a poor financial background. He is not a resident of Maharashtra. His family consists of a single mother. She is illiterate and, therefore, there was practical difficulty. The submissions made by the learned counsel for the Appellant will have to be taken into consideration seriously. The Appellant was not given a fair chance to defend his case through a different Advocate of his own choice or through a legal aid counsel. He was not even produced in the Court to enable

him to make such an arrangement. It was difficult for him to take further steps between the period when his application for engaging another advocate was allowed and the time when his statement U/s.313 of the Cr.PC. was recorded.

18. As a result of the above discussion, I am of the opinion that there was failure of justice in this case as the trial was not conducted by giving a fair opportunity to the Appellant to defend himself. As a result, he is sentenced to suffer R.I. for 20 years which is a very serious consequence. Therefore, in the interest of justice, I am inclined to remand the matter back for *de novo* trial to afford a fair opportunity to the Appellant to defend himself. Though, in this case, PW-2 - the victim will have to again attend the Court, but it is necessary in the interest of justice considering the serious consequence which follows from these allegations. However, it is expected that her evidence is recorded as early as possible. Learned counsel for the Appellant has rightly submitted that this Court can exercise the powers U/s.386(b)(i) of the Cr.PC. She has rightly submitted that this is a fit case in which this power is required to be exercised.

19. Hence, the following order:

O R D E R

- i) The Judgment and order dated 03.05.2024 passed by the learned Additional Sessions Judge and Special Judge, Kalyan, in Atrocity Special Case No.188 of 2020, convicting and sentencing the Appellant is set aside.
- ii) Atrocity Special Case No.188 of 2020 is remanded back on the file of the learned Additional Sessions Judge and Special Judge, Kalyan for *de novo* trial.
- iii) The evidence of all the prosecution witnesses shall be recorded afresh. The prosecution would be at liberty to examine other witnesses, if felt necessary.
- iv) Similarly, the Appellant shall also have an opportunity to lead defence evidence if felt necessary.
- v) The Appellant is in custody, he shall remain in custody till the conclusion of the trial. However, efforts would be made by the Trial Court to conclude the Trial within a period of six months from today.

- vi) The Appeal is disposed of in the aforesaid terms.
- vii) With disposal of the Appeal, the connected interim application is also disposed of.
- viii) The record and proceedings to be sent back to the Trial Court urgently.
- ix) The learned Trial Judge shall not be influenced by any of the observations made by this Court in this order when he decides the trial.

(SARANG V. KOTWAL, J.)