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**(2015) 07 BOM CK 0012**

**In the Bombay High Court**

**Case No :** Criminal Appeal No. 43 of 2015 and Criminal Application No. 395 of 2015 in Criminal Appeal No. 43 of 2015

Shankar Chandu Khavdiya

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 16-07-2015

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 376

**Citation :** (2015) 07 BOM CK 0012

**Hon'ble Judges :** A.R. Joshi, J

**Bench :** Single Bench

**Advocate :** Ravindra Shetty, for the Appellant; A.R. Patil, APP, Advocates for the Respondent

**Final Decision :** Allowed

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**Judgement**

A.R. Joshi, J—Heard rival arguments on this appeal preferred by the appellant challenging the judgment and order of conviction passed by the Additional Sessions Judge, Greater Bombay dated 10.12.2014 in Sessions Case No. 138 of 2012.

2. By the impugned judgment and order the present appellant was convicted for the offence punishable under Section 376 of IPC and is sentenced to suffer RI for three years and to pay fine of Rs. 5000/- and in default of payment of fine to suffer further RI for six months. During the trial, the appellant was on bail and his bail was cancelled and he was taken in custody, but, as the trial Court awarded three years punishment he was granted bail till filing of the appeal.

3. Certain circumstances, which occurred at the time of filing of the appeal and admission of the same by this Court, are required to be mentioned in order to have proper perspective of the case and in order to ascertain the involvement of the appellant in the offence alleged. The appeal was initially taken before the High Court and it was admitted on 22.1.2015. That time, directions were given to

issue a notice for enhancement of sentence. This was on account of the sentence imposed on the appellant of only three years by the trial Court though apparently according to the trial Court the offence under Section 376 of IPC was proved. Needless to mention that the minimum punishment of seven years is prescribed for the offence punishable under Section 376 of IPC and there is nothing in the law that a lesser punishment can be imposed in any special circumstances, than the minimum. Prior to the amendment there was such a situation for lesser punishment on special reasons but it is not so now. Whatever it may be, this Court has given directions to issue notice for enhancement of the punishment.

4. Without much going into the details as to the events happened, suffice it to say that the present appellant was taken in custody by the non-bailable warrant issued by this Court and presently he is in custody.

5. Earlier two bail applications were preferred - one on medical ground for bail and another application for bail on merits. Again without much going into the details, suffice it to say that on earlier dates of hearing during the pendency of the said bail applications, an application for bail on medical grounds was withdrawn and the matter was posted for hearing on the bail application on merits. As such, under this premise the present matter has appeared before this Court today for hearing the bail application on merits. However, by this time it was ascertained by the Court that instead of hearing the application for bail and keeping the matter pending for years together, it would be better in the interest of justice that the present entire appeal is required to be disposed of by hearing and as such today rival arguments are heard at length. The substantive evidence of total eight prosecution witnesses is scanned with the able assistance of learned APP. The arguments advanced on behalf of the learned Counsel for the applicant were also heard at length. Specifically the medical examination report given by PW-1 Doctor is perused by the Court. This is an important aspect as to the determination of the age of the victim. This aspect shall be dealt in detail hereunder at the appropriate place.

6. The case of the prosecution in nutshell is that the victim girl PW-2 was residing with her parents in a slum area in one room. She had three other sisters and one brother. Apparently she was of 14 to 15 years of age according to the case of prosecution. Initially her marriage was engaged with the brother of the present appellant, but, it was not materialized and the brother of the appellant married some other girl. Apparently it was on account of the steps taken by the present appellant as according to the appellant the prosecutrix PW-2 girl was not of good character. Also according to the case of prosecution the actual incident of forcible sexual intercourse by the appellant on the victim girl (PW-2) occurred on the night between 28th and 29th October, 2011. The spot of incident is a small room in which the victim girl, along with her parents and other family members and her sister and brother, was residing. According to the case of prosecution and also as per the substantive evidence of prosecutrix PW-2 that was the day of "Bhaubeej" and on that count the present appellant and his wife i.e. the elder

sister of the prosecutrix, along with their children had been to the house of the prosecutrix. On that night, after meals and after watching TV the prosecutrix, her sister i.e. wife of the appellant, five children of the appellant and also the appellant slept in the same room and father and other sisters of the prosecutrix slept outside the said room. This factual position brought on record by the prosecutrix herself is of much significance in order to ascertain whether there was such an act committed by the appellant of having forcible sexual intercourse in the crowded room in which total nine persons were sleeping and that also at the night hours of 1:30 a.m. to 2:00 a.m.. According to PW-2 prosecutrix on the night the appellant woke her up when all were sleeping in the room and he pressed a pillow on her face apparently to prevent her from making any shouts. Further he removed his clothes and also removed the clothes of the prosecutrix and had forcible sexual intercourse with her. According to the girl initially she could not resist but after the act she took steps and kicked her sister i.e. wife of the appellant, sleeping by the side. Due to this impact, the sister awakened and she noticed the incident and also slapped the appellant and thereafter the appellant ran away. According to PW-2 prosecutrix she narrated regarding forcible sexual intercourse on her by the appellant i.e. husband of her own sister and thereafter they went to the police station on the next day morning but only NC was lodged. However, subsequently at 3:00 p.m. on 29th October, 2011 First Information Report was lodged and on the strength of which the offence was registered against the appellant under Section 376 of IPC.

7. During investigation, spot panchnama was conducted. PW-7 is one of the spot panch. Thereafter according to the case of prosecution the appellant was put under arrest and he allegedly made a statement to produce the clothes he was then wearing at the time of the incident. According to the prosecution under the panchnama those clothes were seized from the house of his brother. PW-5 is one of those panch witnesses. However, at this juncture it must be mentioned that said PW-5 did not support the case of prosecution in any manner and had turned hostile inasmuch as according to this panch nothing happened as to any memorandum statement made by the appellant and production of any clothes, much less seizure of said clothes in his presence. The clothes of the victim and also one curtain cloth were collected during the spot panchnama and subsequently the leggings were produced by the victim in another panchnama. The clothes were sent for Chemical Analysis and after completion of investigation the charge-sheet was filed. The matter was taken before the Sessions Court at Mumbai and during the trial eight witnesses were examined and the appellant was convicted for the offence punishable under Section 376 of IPC. Though the trial Court held establishment of the offence punishable under Section 376 of IPC, it convicted and sentenced the appellant to undergo the imprisonment of three years though the mandate of law says that minimum seven years imprisonment is required to be awarded. As mentioned earlier, there is nothing in the Code as to on any special circumstances or by giving special reasons the minimum sentence can be awarded. Apparently this prompted this Court to issue

a notice of enhancement. Now this issue is also required to be dealt with while deciding the present appeal and the question of enhancement will arise only after this Court comes to the conclusion that the offence punishable under Section 376 of IPC has been established.

8. On behalf of the prosecution, total eight witnesses were examined, but, out of them only important evidence is of PW-1 Dr. Baban Shinde and of PW-2 the victim girl.

9. There is substantive evidence of PW-3 Kanhya Rajput brother of the victim girl, but, it is not supporting the case of prosecution in any manner as according to him he did not notice anything on the relevant night as to happening of event of forcible sexual intercourse on his own sister in their own house, at the hands of the appellant i.e. his brother-in-law i.e. husband of his another sister.

10. PW-4 is the Headmistress of the School where the victim girl had taken education upto 2nd standard and thereafter she left the school. PW-5 is the panch witness who has turned hostile, as mentioned earlier, regarding alleged memorandum statement of the appellant. PW-6 is the Police Officer who recorded the First Information Report on the complaint of the victim and also carried out part of the investigation by conducting panchnamas. PW-7 is the spot pancha. His substantive evidence is of much significance inasmuch as admittedly no pillow was recovered during the spot panchnama except recovery of clothes of the prosecutrix and one bed-sheet. The significance of not recovering the pillow lies in the fact that according to PW-2 the prosecutrix, during the incident the appellant had gagged her mouth by pressing the pillow on her face. During the cross-examination she has stated that due to the pressing of the pillow, there was bleeding from the nostrils and from her ears. However, the medical certificate which was given by doctor PW-1 did not indicate any such injury or oozing of blood from the nostrils or from the ears. PW-8 is the Investigating Officer who after obtaining the medical certificates and CA reports which are apparently non-incriminating, filed charge-sheet on the conclusion of investigation.

11. Out of the evidence of the above witnesses the only evidence which is of much importance is that of PW-2 the prosecutrix coupled with the evidence of doctor PW-1. At this juncture, it must be mentioned that so far as the age of the victim is concerned, according to the prosecution she was 14 to 15 years of age and as such it was the sexual assault on a child. However, the medical certificate show, as fortified by the medical certificate issued by the doctor, that after clinical and radiological examination of the victim girl, her age was ascertained as 16 to 17 years with margin of error of six months. Other observations from the medical certificate are of much importance in order to ascertain whether there was forcible sexual intercourse on the relevant night. In the medical certificate it is specifically mentioned that the position of the tears was "3, 6 and 9 O'Clock" and the age of the tears was "old healed" and hymenal Orifice admits two fingers. There were no injuries to the perineum. So also there were no injuries

on the private parts / breasts. History of menarche was two years back and L.M.P. was on 2.10.2011. The substantive evidence of PW-1 doctor indicates two major things : (1) age of victim as 16 to 17 years and she was averagely built and (2) there were no injuries on her private parts including any other parts of the body, such as breasts. Again at this juncture it must be mentioned that if the substantive evidence of the prosecutrix is accepted as to oozing of blood from her nostrils and ears by way of pressing of the pillow, still no such injuries or any such diagnosis was done by the Medical Officer.

12. During the arguments it is brought to the notice of this Court that there was apparent motive for the girl to falsely implicate the appellant as her marriage which was earlier arranged with the brother of the appellant could not be performed and apparently the present appellant was instrumental to it. It is further brought to the notice of this Court that by pointing towards the substantive evidence of DW-1, the wife of the appellant that her evidence is fully supporting the plea of the appellant of his innocence, inasmuch as according to DW-1 on the night of 28th and 29th October, 2011 no such incident occurred but there used to be earlier quarrels between the prosecutrix (her sister) and the present appellant (her husband) and on those quarrels at times the victim girl was assaulted and was admitted in the hospital. According to DW-1, her sister i.e. the prosecutrix was of doubtful character and due to this her engagement with brother of the appellant was broken and brother of the appellant married another girl. Apparently this was the reason for false implication, further argued on behalf of the appellant.

13. The above argument of the appellant is required to be tested on the fact situation narrated by the prosecutrix herself and mainly the circumstances under which the alleged act was committed. Apparently it is highly improbable that in presence of five children and own wife, a man will commit forcible sexual assault on a girl aged about 16 to 17 years that also knowing that his own father-in-law and other relatives are sleeping just outside the room. Moreover, it is difficult to appreciate as to a girl able bodied is unable to resist such a sexual assault without it being noticed by anybody else sleeping just next to her in the same room.

14. Another mitigating circumstance to the case of prosecution is non-recovery of pillow and no injuries and no apparent diagnosis by the medical officer as to oozing of blood from the nostril and ears.

15. During the arguments on the aspect as to the age, the learned APP placed much reliance on the substantive evidence of PW-4 the Headmistress of the school, who had brought the admission register of the school. According to the school record in the admission register the date of birth of the girl is mentioned as 9.7.1997. As such, if that date is taken as correct then on the date of the incident the girl was about 14 years of age. Though it is the argument before the Court by learned APP for the State, the medical evidence brought by PW-1 cannot be overlooked. In fact, when there is conflict between the medical

evidence and the other testimony of any witness, then, the medical evidence shall prevail if it inspires confidence when the opinion of an expert doctor is based on clinical and other radiological tests. In this matter x-ray of wrist, elbow, knee and shoulder was taken and the X-ray number is No.R-4004 dated 29.10.2011 i.e. taken on the same day of the examination of the girl. On the basis of this radiological examination, the age is mentioned by the doctor as 16 to 17 years and it is required to be accepted over the evidence of PW-4 when she herself admitted that she is not aware as to who gave the birth date and who entered the birth date in the school register. Though she stated that their school issued the school leaving certificate and which also show the same birth date, a reasonable doubt is created as to the authenticity of the birth date when it was first entered in the school record. In that event, the age as ascertained by the doctor, is required to be accepted and so far as the actual incident is concerned earlier it is mentioned that only available evidence of the prosecutrix (PW-2) is devoid of that merit which is required to establish the offence punishable under Section 376 of IPC, beyond reasonable doubt.

16. Apart from the above, the other circumstance is required to be mentioned as to affidavits prepared by the prosecutrix herself and her father at the time of hearing of the application for bail before the trial Court. Said affidavits were drafted by one Advocate who was also examined during the trial as DW-2. Both the affidavits are to the extent that no such incident of forcible sexual intercourse has occurred and because of the dispute between the wife of the appellant and appellant himself, a complaint was lodged with Dahisar Police Station. Even in the affidavit sworn by father of the victim girl, he gave the birth date 31.12.1992. Though this was the evidence brought before the Court apparently the trial Court overlooked it and by believing the testimony of PW-2 convicted the accused for the offence punishable under Section 376 of IPC.

17. Considering the analysis of the substantive evidence, as detailed above, and considering the own case as narrated by PW-2 prosecutrix herself and looking the said evidence in juxtaposition of the substantive evidence of DW-1 and the defence raised on behalf of the appellant, in the opinion of this Court it is to be said that the trial Court had committed an error in coming to the conclusion as to the establishment of the offence of rape, against the appellant. In this view of the matter, in the opinion of this Court, this is a case in which the present appeal is required to be allowed and in that event the earlier directions of issuance of notice for enhancement of the punishment are required to be withdrawn. Hence the order :

**:: O R D E R ::**

i. Criminal Appeal No. 43 of 2015 is allowed.

ii. The impugned judgment and order dated 10.12.2014 passed by the learned Additional Sessions Judge, Greater Bombay, in Sessions Case No. 138 of 2012 is quashed and set aside. The appellant/accused is acquitted of the offence

punishable under Section 376 of I.P.C.. The notice of enhancement is withdrawn.

iii. The appellant/accused shall be released from jail custody if not required in any other matter;

iv. If the fine amount is already paid, the same shall be returned to the appellant;

v. Criminal Appeal is disposed of accordingly. Bail application is also disposed of.