

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.196 OF 2014

Bhaskar s/o Chhagan More,
Age-25 years, Occu:Labour,
R/o-Priyadarshini Nagar,
Near Water Tank, Nagao Bari,
Deopur, Dhule.

...APPELLANT
(Ori. Accused)

VERSUS

The State of Maharashtra,
Through Police Station Officer,
Police Station Deopur,
Dhule, Tq. & Dist-Dhule.

...RESPONDENT

...
Mr. P.S. Paranjape Advocate for Appellant.
Mr. R.V. Dasalkar, A.P.P. for Respondent.
...

CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 11TH JULY, 2016.

DATE OF PRONOUNCING JUDGMENT: 25TH JULY, 2016.

JUDGMENT :

1. This Jail Appeal by the Appellant -

accused (hereafter referred as "accused") is against his conviction and sentence under Section 363, 366, 376 of the Indian Penal Code, 1860 ("IPC" in brief). For Sections 363 and 366 of IPC, he has been sentenced to suffer rigorous imprisonment for five years and fine of Rs.1000/- and in default to suffer further simple imprisonment for one month, on each count. For Section 376 of IPC, he has been sentenced to suffer rigorous imprisonment for seven years and fine of Rs.2000/- and in default to suffer further simple imprisonment for two months. The sentences have been directed to run concurrently. The Judgment of conviction and sentence was passed by Additional Sessions Judge, Dhule on 10th February 2014 in Sessions Case No.223 of 2012.

2. Briefly stated, the case of prosecution is as follows:-

A). On 8th September 2012 the mother of prosecutrix filed F.I.R. No.114 of 2012 at Deopur

Police Station, Dhule. I will refer to the prosecutrix (PW-2) as "victim" and the complainant - mother of the victim (PW-1) as "complainant" to keep their identity concealed.

B). The complainant, mother of the victim reported that she is resident of Priyadarshaninagar at Nagaonbari, Deopur, Dhule. Complaint gives details giving name of her husband and other two daughters who are married. She stated that she was living at the concerned place along with her husband, victim and son. It was claimed that they do labour work. The victim was studying in 9th standard but was irregular in school. She also used to go for labour work. On 7th September 2012, the complainant and her husband had gone for work and son had gone to school. Victim was alone at home. Complainant returned in the evening at about 5.00 p.m. and noticed that door of the house was only pushed. When she looked inside, the victim was not there. Inquiries were made in the neighbour-hood for the

victim but the neighbours did not know. Victim was searched at the bus stand, railway station, temples, village market and bye-lanes but she was not found. On 8th September 2012 at about 1.40 p.m. phone call was received on Mobile of the complainant. (She has given her Mobile number and that of the coin box from where the phone call came.) The phone call had come from accused Bhaskar Chhagan More who was living in the neighbour-hood. Accused addressed complainant as aunt and gave his name and said that the victim was with him. Complainant asked where they were and he said that they were at Gurudwara. Complainant asked to speak to the victim and then the victim came on the line. Victim told complainant that she should come to take her and that the accused had brought the victim after consuming liquor. Complainant asked the victim to stay there and she is coming immediately. So saying, the complainant along with her son, went to Gurudwara but they were not found. Complainant called back the number from where the phone call

had come and came to know that it was number of some Ganesh Pan Center at J.B. road. Complainant immediately went in that area and searched for the victim but the accused and victim were not found. Complainant then went to the house of mother of accused and asked the mother and sisters of accused for the mobile number of the accused and where he was. Complainant told them that the accused has kidnapped her daughter. Those persons claimed that they had nothing to do with the accused and did not speak properly to the complainant. Thus, the complaint was filed claiming that the accused has enticed her minor daughter aged 16 years with the promise of marriage and has kidnapped her.

C). The offence was registered and the investigation was handed over to then A.S.I. Bhagwan Salave (PW-4), who went and did spot panchnama (Exhibit 16) from where the victim had gone missing. Statements of witnesses were recorded.

D). In the investigation, it transpired that the accused had kidnapped and taken the victim and kept her at the place of one Indubai Gaikwad at Jamnagiri Bhilhati, Sakri Road, Dhule and that he had committed rape on her on 8th September 2012 and 9th September 2012. The victim was recovered after police searched the said house of Indubai Gaikwad.

E). The further investigation was taken over by A.P.I. Vijay Mistry (PW-3). He did the spot panchnama vide Exhibit 21, of the house of Indubai Gaikwad where the victim had been kept. The clothes of the victim as well as the accused were seized vide panchnamas (Exhibit 19 and 20).

F). When the victim was recovered on 10th September 2012, she was got examined at the Government Hospital and certificate (Exhibit 23) was obtained. In the medical examination, the doctor inter-alia found that her hymen was torn

and that victim was habituated to penetrative sexual intercourse. The accused was arrested on 10th September 2012 and he was also got medically examined (Exhibit 24). *Bona fide* certificate (Exhibit 15) regarding age of the victim from her school was collected. The blood samples of the victim, accused, their clothes and other samples like pubic hairs, nails, etc. were sent to C.A. and the C.A. reports were obtained (Exhibit 25 to 27).

3. After investigation, charge-sheet came to be filed and accused has been tried. Prosecution brought on record evidence of four witnesses. Prosecution filed application under Section 294 of the Code of Criminal Procedure, 1973 ("Cr.P.C." in brief) vide Exhibit 5 in the trial Court enlisting 11 documents and calling upon the defence to admit or deny the genuineness of said documents. In response, the counsel for accused endorsed on the concerned documents themselves, no objections of the accused to exhibit the

documents. Consequently the documents were exhibited and even in oral evidence were referred. They were not challenged or denied in cross-examination regarding their genuineness.

4. In the trial Court, defence taken by the accused is that of denial. The trial Court considered the evidence brought on record and after hearing both sides, for reasons recorded in the Judgment convicted and sentenced the accused as mentioned above.

5. Although the accused admitted virtually all the documents in the trial Court and did not dispute their genuineness, his counsel, at the time of Appeal, has referred to Section 294 of Cr.P.C. and relying on sub-Section (2) of Section 294 of Cr.P.C., claimed that the list of documents has to be in such form as may be prescribed by the State Government. The learned counsel without demonstrating that the State Government has prescribed any form for listing the documents

which are to be tendered for admission or denial under Section 294(1) of the Cr.P.C., relied on Chapter VI Para 32 of the Criminal Manual to argue that the format prescribed therein was not followed in application Exhibit 5 which was filed before the trial Court. According to him, the admission or denial of the documents was also required to be endorsed on the said list. The counsel has relied on the Division Bench Judgment of this Court in the case of **State of Maharashtra vs. Ajay Dayaram Gopnarayan, reported in 2014(2) Bom. C.R. (Cri.) 40**. Considering the observations in the concerned Judgment, at the time of arguments, one of the option appeared to remand the matter. If the prosecution and trial Court were not careful on technicalities, even the accused had made the prosecution believe that he was not objecting to the genuineness and correctness of the documents which his own counsel was admitting. However, the matter has been further argued by the counsel for Appellant-accused and A.P.P. in order to see if there was

even otherwise sufficient and reliable evidence in the matter. The accused has been in custody since 10th September 2012 when he was arrested and as such it would be necessary to see if for technical reasons, the matter should be remanded or it may be considered if even otherwise sufficient evidence is available to dispose the Appeal on merits, one way or the other.

6. The learned counsel for the Appellant - accused submitted that the evidence of the victim rather shows that if the accused had taken her away, she did not resist or make any efforts to escape or shout or inform anybody. According to him, even when the victim had opportunity to run away, she did not run away. Thus, according to the counsel, her evidence is not reliable. It is argued by him that the *bona fide* certificate of age admitted in the trial Court, is required to be ignored as the document was not duly proved. It is stated that the prosecution did not prove that the

victim was under 16 years of age at the relevant time. It has been argued that although the victim claimed that on 8th and 9th September 2012 forcible intercourse was committed on her 2-4 times, her medical certificate showed that she was habituated to penetrative intercourse. The counsel submitted that the oral evidence of the victim and her mother deserves to be discarded and accused should be acquitted. The complainant also did not file report to police station on 7th September 2012 itself when the victim is said to have gone missing. According to the counsel, there is evidence to show that the victim was beaten by her father under influence of liquor on 7th September 2012 and thus according to him, the victim ran away and false case is filed against the accused.

7. Per contra, learned A.P.P. submitted that the evidence of the victim sufficiently shows as to how she was beaten and forced to sit in auto rickshaw and forcibly taken from place to place. The victim did try to send message to her mother

through the auto rickshaw driver but the accused did not let her give the mobile number. The learned A.P.P. submitted that the victim in her oral evidence, stated regarding her date of birth and even tendered her *bona fide* certificate from the school. All this evidence of the victim regarding her age was not challenged in the cross-examination. According to the A.P.P., even if the document regarding age is to be ignored, when the evidence of the victim, who was taking education and gave specific date of her birth, was not challenged there is no reason to not accept that the victim was minor at the time of incident. According to the A.P.P. looking to the evidence of complainant PW-1 and the victim PW-2 and their cross-examination, the incident is hardly denied. Rather cross-examination brought on record further details and showed that the witnesses are reliable.

8. The evidence of the complainant PW-1 and the victim PW-2 shows that they were residing at

Nagaonbari. In the house, there was also husband of the complainant and the younger son residing with these two witnesses. Evidence of these witnesses shows that the victim was at the concerned time studying in 9th standard in high school. On the day of incident, the parents had gone for work and the younger brother of the victim was at school and victim was alone at home. It seems that she was not regular in school and also used to do labour work. The evidence of complainant shows that her husband was addicted to liquor and was not going to work regularly. On the day of incident, however, he had gone for work. The complainant is from Mahar community and the accused appears to be Adiwasi. The cross-examination of these witnesses shows that they were residing in row-houses and in one of the house the accused along with his mother and sisters was residing. The accused was known to the complainant and the victim.

9. Cross-examination of the complainant has

brought on record that one or two days prior to the incident, the accused had come to the house of complainant for match box. He had come under influence of liquor. The complainant felt angry because of such behaviour of the accused. The cross-examination shows that one year prior to the incident, the accused had also quarreled with them because the complainant had pointed out the house of the accused to some body. The cross-examination brought on record that six months before incident also in the night the accused had gone to the house of the complainant asking for water when he was under influence of liquor. The cross examiner further brought on record that the accused used to sing songs after seeing the victim and her sisters. Of course the complainant admitted that before the incident she had not complained to the police against the accused for such behaviour, but the complainant added that she had informed the mother and sister of the accused about his behaviour. The evidence of victim also shows that she was knowing Kalpana and Soni, the sisters of

the accused and thus she was knowing the accused also. She deposed that on 6th September 2012 in the afternoon the accused had come to their house asking for match box and at that time he was under influence of heavy dose of liquor. She says that she gave him the match box. According to her, she disclosed this incident to her parents and also told it to the mother of the accused. She deposed that she told the mother of the accused that she should not send the accused to their house, however if she wants something she can take. The mother of accused assured that the accused would not come to their house. In the cross-examination regarding the incident of 6th September 2012, the cross-examiner for accused brought on record details that the incident took place at 12.00 noon when the accused went asking for match box. Victim stated that she was alone at house. She denied that she and accused had any chitchat.

10. As regards the incident of 7th September 2012, the complainant has deposed that she and her

husband went out to work and her son had gone to school and victim was alone. According to her, she returned at about 5.00 p.m. and did not find the victim at home. Her evidence shows that she made inquiries in the neighbour-hood and searched for the victim but the victim was not found. The cross-examination of complainant shows that at the concerned time she was serving at Chaitanya Hospital, Deopur. It appears that she was working as nurse. At one point she accepted in the cross-examination that she did not search for the victim at the place of her relatives. However, she added that her husband had gone to their relative at Nagaon. She accepted that on 7th September 2012 they did not file complaint to the police.

11. The evidence of victim shows that on 7th September 2012 her father came back home after consuming liquor. He again wanted to go to consume liquor but she opposed him. Her evidence is that thereafter her father started beating her. It appears that some friend of the father was there

who tried to control the father. Victim deposed that after she was thus beaten, she went to backside lane of their house to make phone call to her mother from coin box installed at a grocery shop. Her evidence shows that she could not get connected and started proceeding towards her house. Her evidence shows that at such time the accused came from behind and caught hold of her hand. She deposed that she slapped the accused and in retaliation accused gave her 2-3 slaps and started questioning her that when he loves her why is she getting beaten up from him. Victim deposed that accused told her that he wanted to perform marriage with her and if she was also ready. Her evidence is that then she told the accused that he should say what he wants, to her parents. Accused claimed to be in love with her and not with her parents. The evidence is that the victim asked the accused to release her hand but he claimed that if he was to release her hand he would not have held it. Victim deposed that the accused then threatened her that he would beat her father and

also kidnap her brother. So saying, the victim deposed that, the accused took her towards Chouphuli by one rickshaw. Her evidence is that he took her to the place of one so-called aunt. It seems that after stopping the rickshaw near the house of the said aunt, accused went inside, at which time the victim started talking to the rickshaw driver to give him phone number of her parents and the accused in the meanwhile came back and took her inside the house threatening that she should not disclose to anybody and should not shout else he would kidnap her brother. Victim deposed that the said aunt asked about her and the accused told that he had brought her, where-after the said aunt drove away the accused and the victim from her house. Victim has then deposed that they again boarded the said rickshaw and then the accused took her to the place of his maternal sister. Her evidence is that when they were on the way, the victim told the accused that he may go to his maternal sister but drop her there itself. Her evidence is that the accused then started abusing

her and she started weeping. When the rickshaw driver started seeing towards them, the accused appears to have told the rickshaw driver to see in front and drive. The victim further deposed that accused stopped the rickshaw near Mahadeo Temple where they both got down and the accused took her to the house of his sister. Victim has deposed that the sister of accused asked him about the victim and the accused told his sister not to ask anything and he would disclose later on. Victim deposed that at such time the accused had already consumed liquor. When the sister of accused tried to talk with victim, the accused did not allow her to speak with the victim. The evidence shows that the accused stayed at the house of such sister of his along with victim. According to the victim in that night of 7th September 2012, the accused slept in the back side room while she slept with the sister of the accused.

12. Regarding this evidence of victim of incident dated 7th September 2012, the cross-

examiner put her various questions. She was asked in cross-examination and stated that her father was habituated to liquor. She stated that her father never quarreled with her and her mother but on 7th September 2012 the father did quarrel with her and when she asked him not to go out for drinking liquor, he did beat her. The cross-examination shows that she went to make phone call as she wanted to inform her mother about the father having consumed liquor. In the cross-examination it is got confirmed that firstly victim slapped the accused and then he slapped her and that such incident took place at about 1.00 - 1.30 p.m. She affirmed that when the accused caught her hand, she got annoyed. She accepted that she did not shout. She stated that she did not shout as the accused had given threats to her. She denied that she voluntarily boarded the rickshaw. She claimed that accused made her to board the rickshaw. Her cross-examination shows that she was taken to Malhar Nagar where they reached in 15 - 20 minutes at the place of so-

called aunt. The cross-examination makes it clear that when she was giving phone number of her mother to the rickshaw driver, the accused came there and told her that she should not give phone number to anybody and she should not shout.

13. Thus, the examination-in-chief of the victim read with the cross-examination with regard to incident dated 7th September 2012 shows that she is not shattered with regard to her evidence that the accused slapped the victim and forcibly took her in auto rickshaw giving her various threats and although she tried to give phone number to the rickshaw driver, she was not successful. There is no denial to the part of her evidence that when the accused took the victim to the said sister, the said sister drove them away and thereafter the accused took her to the place of his maternal sister and inspite of she asking to be dropped on the way, the accused did not listen and abused her and when she was crying, asked the rickshaw driver to proceed seeing in

front only and took her to the place of his maternal sister. The evidence shows how accused was drunk and aggressive and beat victim and forcibly took her.

14. The victim has then deposed that on 8th September 2012 at about 10.00 a.m. the mother and sister of accused came there at the place of the maternal sister of accused. According to victim they asked the victim that she was complaining about the accused on 6th September 2012, then how she came with the accused. Victim has deposed that she responded by telling the mother and sister that the accused had brought her forcibly holding her hand. It appears that the mother and sister of the accused told the maternal sister of accused that they had come to take victim and accused and that they would be going to Nagaon-bari. Her evidence is that after this they come out of the house of said maternal sister. Evidence of victim shows that mid-way however, the mother and sister of accused went away towards Nagaon-bari leaving

them. Thereafter the accused took her by Jamnagiri road on foot to the house of one Nana Gaikwad. The cross-examination of the victim brought further details on record that mother of the accused when she had come told the victim to reside there as her parents do not know. She deposed that she did not accept such suggestion. She claimed that she asked the mother of accused to take her to her parents. The cross-examination shows that they had come to Khol Galli and there after the mother and sister left them there and went away. Her evidence shows that from there they walked for 30 minutes towards Jamnagiri. The cross-examination shows that the accused told the victim at that time that he was taking her to the place of his aunt. The examination-in-chief of victim shows that the mother of said Nana Gaikwad asked accused about the victim and he claimed that they are having love affair. According to the victim the mother of said Nana Gaikwad then let them stay there. They were given a room. The victim deposed that she and accused had slept there and at about 10.00 p.m.

the accused committed sexual intercourse with her twice.

15. The above evidence of the victim shows that on 8th September 2012 the accused had shifted the victim from the place of his maternal sister and taken her to Jamnagiri to the place of one Nana Gaikwad. Although the evidence of the victim does not refer to the accused making phone call to the complainant on this date, there is evidence of the complainant that at about 1.40 p.m. of 8th September 2012 she received phone call from the accused claiming that the victim was with him and he told the mother that they were at Gurudwara. The complainant claimed that she even talked with the victim who claimed that accused had brought her under the influence of liquor and she asked the complainant to take her. The evidence of complainant is that she asked the victim to stop there at the Gurudwara and she went there along with her son but they were not found. The evidence of complainant corroborates the F.I.R. that

thereafter she called back the number from which she had received the phone call and came to know that it was some Pan Center at J.B. Road. Complainant deposed that she went there and searched the victim and accused but they were not found and questioned the mother and sister of the accused, but could not succeed and ultimately filed F.I.R. Exhibit 13. The complainant has proved the F.I.R. Exhibit 13. The evidence of victim is no doubt silent about any such phone call made by the accused and she talking with her mother on 8th September 2012. However, there is no reason to doubt the complainant that she did receive such phone call as in the same evening she did file the F.I.R. Exhibit 13 giving specific phone numbers and details and claiming that the accused has enticed her minor daughter on the plea of marriage and taken her away and thus kidnapped her.

16. The evidence of victim shows that on 9th September 2012, at the place of Nana Gaikwad, the

said aunt of accused went to field and the accused had also gone for work and both of them came back in the evening. The victim deposed that the accused told her that he is not getting work and after getting work he would perform marriage. The said aunt also appears to have told the victim to stay there. The evidence of victim further shows that in the night of 9th September 2012 also the accused twice committed sexual intercourse with her. In the cross-examination of the victim in para 5 it was brought on record that the statement of victim was recorded on 10th September 2012 as well as on 12th September 2012. The cross-examiner subsequently brought on record that in her statement dated 10th September 2012 why she had stated that no intercourse was committed on her in the night of 8th September 2012 and that it was committed only two times in the night of 9th September 2012. The victim replied that when her statement was first recorded on 10th September 2012, she got frightened and so did not say that accused committed sexual intercourse with her on

8th September 2012 and stated that it was committed twice only in the night of 9th September 2012. Thus omission or contradiction is only to the effect that in her statement to police on 10th September 2012 she had stated that no intercourse was committed in the night of 8th September 2012 and that she had stated that it was committed only in the night of 9th September 2012. She corrected herself in the statement dated 12th September 2012. The fact remains that soon after this victim was searched out by the police she had given statements giving the details as to how she was kidnapped, threatened, beaten, forcibly taken and how sexual intercourse was committed with her. Even if benefit was to be given for 8th September 2012, the evidence still stands that in the night of 9th September 2012 forcible intercourse was committed.

17. The evidence of victim then discloses that on 10th September 2012 she started weeping remembering her mother and asked the said aunt to

take her to her mother. She was then asked to take bath and that she would be then taken. The accused had already left the house according to the victim. She deposed that she took bath and was preparing Chapatis at which time the police reached there and took her to police station where her mother was waiting. The cross-examiner confirmed that the police had reached at 10.00 - 11.00 a.m. and in 10 - 20 minutes she was taken to the police station.

18. If the evidence of the victim in examination-in-chief as well as in cross-examination is perused, as discussed above, graphic details of the incident came on record. The cross-examiner also asked so many details and the victim has correctly stated about the same. After taking details also, the cross-examiner has not brought any contradictions or omissions on record other than her statement that on 10th September 2012 in her police statement she stated that sexual intercourse was not committed on 8th

September 2012 but that it was committed on 9th September 2012. Even for this, the victim rather gives explanation that she had got frightened and so made such statement. At the fag end of the cross-examination, the cross-examiner suggested to her that because her father beat, she went away to her relatives in anger and that accused was not with her and that he did not commit sexual intercourse with her. Victim denied such suggestions. There is hardly or no reason why the victim should depose against the accused. The defence that on earlier occasions the victim had expressed her displeasure of the accused coming to her place after having consumed liquor or that some months earlier there was some quarrel, would be no reason for the victim to falsely implicate the accused with such serious charge of accused kidnapping her and forcibly committing rape. The victim was young girl. Her two sisters were already married. It is unthinkable that the complainant would take risk of the marriage prospects of her daughter by falsely making such

allegations.

19. The victim in her examination-in-chief deposed that her date of birth is 17th October 1996. In Para 4 of her evidence she further deposed that she has filed her *bona fide* certificate. She tendered the document in evidence and it was marked Exhibit 15. The accused also at that time, appears to have admitted the document and no objection on this count was recorded on the document. This evidence of the victim giving specific date of her birth is not denied in the cross-examination. She claimed in her examination-in-chief that at the time of incident she was under 16 years of age. Even this has not been denied. The victim was taking education and had brought the *bona fide* certificate Exhibit 15 from her school record and tendered it in her evidence. The document was marked Exhibit and not objected to by the accused. Looking to the fact that the oral evidence of the victim regarding specific date of her birth and her claim that she was

under 16 years of age is not at all questioned in the cross-examination, there is no reason to discard such oral evidence of the victim. It cannot be said to be baseless. The incident took place on 7th September 2012. Looking to the date of birth, she was under 16 years of age is clear from the evidence brought by the prosecution.

20. Looking to the fact that the victim was minor, even if on 9th September 2012 when the accused and the said aunt were away and the victim did not run away, that would not make any difference. It appears that the accused did succeed in making the victim believe that he would marry her. The evidence of victim read as a whole, shows that the victim, minor girl was forcibly taken away and beaten and threatened by the accused and raped and after some time it appears that she was made to believe that the accused would be marrying with her. The consent of the minor would be irrelevant. Even otherwise there is ample evidence that the accused beat and forcibly

took away the victim and forcibly committed sexual intercourse on her.

21. In the evidence of PW-4 A.S.I. Bhagwan, he proved spot panchnama Exhibit 16 which was of the house of the victim. PW-3 A.P.I. Vijay Mistry proved spot panchnama Exhibit 21 which was the house of Indubai Gaikwad where the victim appears to have resided for two days. These police witnesses were not questioned regarding genuineness of such panchnamas drawn by them. The other evidence is regarding seizure of clothes of the victim, the accused and sending them to the C.A. Looking to the time lag, and the evidence showing that the victim had taken bath, nothing appears to have been found in the C.A. reports which could be said to be incriminating. However, ignoring these documents, there is acceptable evidence of the victim and her mother.

22. I have gone through the Judgment of the trial Court. Trial Court found that the evidence

of the victim and complainant was acceptable and convicted and sentenced the accused. For reasons discussed above, I do not find any reason to interfere with the Judgment of conviction and sentence recorded by the trial Court. The evidence on record as discussed is appealing. There is no substance in the Appeal.

23. The Criminal Appeal is dismissed.

[A.I.S. CHEEMA, J.]

asb/JUL16