

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.414 OF 2011**

Mr. Santosh Suresh Modi	)...Appellant/
Age: 40 years, Occupation: Rickshaw	Original Accd.No.1
Driver, Residing at 32 Sadar Bazar,	
Satara	
(Presently lodged at Kholapur Police Station)	
V/s.	
State Of Maharashtra	
(Through Satara City Police Station	
in CR No.338/07)	)...Respondent

Mr. Abdul Millwala, Advocate for the Appellant.

Mr. S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 2nd MARCH, 2017.

ORAL JUDGMENT :

By this appeal, the Appellant/Original Accused No.1 is challenging the judgment and order dated 29.11.2010 passed by the learned Additional Sessions Judge, Satara in Sessions Case No.80 of 2008 thereby convicting the Appellant/Original Accused No.1 of the offence punishable under Sections 363, 366A, 376, 323, 504 and 506 of IPC. For the offence punishable under Section 363 of IPC, the Appellant/Original Accused No.1 is sentenced to

suffer RI for 7 years and to pay fine of Rs.500/- , in default, to suffer SI for three months. For the offence punishable under Section 366-A of IPC, the Appellant/Original Accused No.1 is sentenced to suffer RI for 10 years and to pay fine of Rs.500/-, in default, to suffer SI for 3 months. For the offence punishable under Section 376 of IPC, the Appellant/Original Accused No.1 is sentenced to suffer SI for 10 years and to pay fine of Rs.500/-, in default, to suffer SI for 3 months. For the offence punishable under Section 323 of IPC, he has been sentenced to suffer SI for 6 months and to pay fine of Rs.500/-, in default, to suffer SI for 3 months. For the offence punishable under Section 504 of IPC, the Appellant/Original Accused No.1 is sentenced to suffer SI for 1 year and to pay fine of Rs.500/-, in default, to suffer SI for 3 months. For the offence punishable under Section 506 of IPC, he is sentenced to suffer SI for 1 year and to pay fine of Rs.500/-, in default, to suffer SI for 3 months.

2 Briefly stated facts leading to the prosecution of the Appellant/Original Accused No.1 projected from police report are thus:

a) Informant Ravindra (P.W.1) is father of the prosecutrix who is examined by the prosecution as P.W.4. The informant was residing with the prosecutrix at Sadar Bazar area of Satara. The Prosecutrix was 14 years and 7 months old at the time of commission of alleged offence. Her date of birth is 19.1.1993. She was taking education in 10th standard at Girl's School at Satara. The Appellant/Original Accused No.1 is also stated to be resident of Sadar Bazar area of Satara and was on visiting terms with the father of the prosecutrix.

b) According to the prosecution case, on 21.6.2007 prosecutrix left her house for the school but she did not return. Her father P.W.1-Ravindra Dinkar Jagtap then lodged missing report on 22.7.2007 with Satara City Police Station. Subsequently, P.W.4-Prosecutrix was traced out on 26.7.2007 and thereupon P.W.1-Ravindra Jagtap lodged report to police on 27.7.2007 which resulted in registration of Crime No.338 of 2007 for the offence punishable under Sections 363, 366A, 376, 323, 504 and 506 of IPC with Satara City Police Station, Satara.

c) It is the case of the prosecution that on 21.6.2007 at about 11.45 a.m., the Appellant/Original Accused No.1 kidnapped prosecutrix and took her to various places for the period from 21.6.2007 to 26.7.2007. During this period, he has committed forcible sexual intercourse with the prosecutrix. He sold her earrings to goldsmith and purchased Mangalsutra of bentex metal.

d) After routine investigation, ultimately,

Appellant/Original Accused No.1 along with co-accused were chargesheeted. On committal, charge at Exhibit 13 was framed and explained to accused persons to which they pleaded not guilty and claimed trial. Their defence is of total denial.

e) In order to bring home the charge to the Appellant/Original Accused No.1, prosecution has examined in all 13 witnesses including the informant as well as the prosecutrix. After hearing the parties, by the impugned judgment and order, the learned trial Court was pleased to convict the Appellant/Original Accused No.1 and he was accordingly sentenced as indicated in opening paragraph of this judgment.

3 I have heard the learned advocate appearing for the Appellant/Original Accused No.1 at considerable length. By taking me through the evidence of all prosecution witnesses, the learned advocate for the Appellant/Original Accused No.1 vehemently argued that the prosecutrix was having an affair with her maternal uncle named Sandip Haral and the Appellant/Original Accused No.1 was objecting to her affair with said Sandip Haral. Therefore, he is falsely implicated in the crime in question. The Prosecutrix is not even residing with her parents after the incident. No independent witnesses are examined to show that the prosecutrix was in company with the Appellant/Original Accused No.1 during all this period from 21.6.2007 to 26.7.2007. She was having ample opportunities to raise alarm to extricate herself from the clutches of the Appellant/Original Accused No.1. However, this

was not done by the prosecutrix. This according to the learned advocate for the Appellant/Original Accused No.1 implies that prosecutrix was not in company of the Appellant/Original Accused No.1. The learned advocate further argued that though the prosecutrix went missing from 21.6.2007, her father never bothered to file missing report till 27.7.2007. Such report allegedly filed on 27.7.2007 is also not brought on record. The Appellant/Original Accused No.1 was not even arrested on 26.7.2007. The delay in lodging missing report as well as inaction on the part of father of the prosecutrix shows that case of prosecution is false. When the missing girl was ultimately traced out even station diary entry of that event was not taken on record of the police station. It is further argued that ossification test of the prosecutrix was not conducted to determine her bony age. Evidence regarding her date of birth is false as prosecutrix had failed in several standards. The Investigating Officer has not visited Village named Vita in order to ascertain whether the entry regarding the date of birth of the prosecutrix was correct or not. It is further argued that evidence of other witnesses examined by the prosecution is also discrepant.

4 The learned APP supported the impugned judgment and order by stating that there cannot be any iota of doubt to suspect evidence regarding age of the prosecutrix. He further argued that as the prosecutrix was below 18 years of age so far as offence punishable under Section 363 of IPC is concerned and

below 16 years of age so far as the offence punishable under Section 376 is concerned. Offences alleged are correctly held to be proved by the learned trial Court.

5 I have considered the rival submissions and also perused Records and proceedings including deposition of witnesses as well as documentary evidence.

6 It is the case of the prosecution that the Appellant/Original Accused No.1 kidnapped minor prosecutrix, i.e. P.W.4 from the lawful guardianship of her father P.W.1- Ravindra Jagtap on 21.6.2007 with an intention that she may be forced or seduced to illicit intercourse with him and then she was raped by the Appellant/Original Accused No.1 at various places. The Appellant/Original Accused No.1 is also charged with an accusation that he intentionally insulted and provoked the informant as well as prosecutrix in order to cause breach of public peace so also caused their criminal intimidation by threatening the prosecutrix with an injury to her person in order to create alarm.

7 Considering the nature of the charge, fate of the prosecution case to a large extent hinges on the testimony of the prosecutrix. In catena of judgments rendered by the Hon'ble Apex Court, principles of appreciation of evidence of the victim of rape case are enunciated. In the matter of **Bharwada Bhoginbhai Hirjibhai v. State of Gujarath** reported in **AIR 1983 Supreme Court 753(1)** and particularly in paragraph 10, the Hon'ble Apex Court has observed thus:

“Without the fear of making too wide a statement or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) it would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought in to controversy. (10) The parents of an unmarried girl as also the

husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.”

In the matter of **Sheikh Zakir v. State of Bihar** reported in **AIR 1983 Supreme Court 911**, after considering several judgments, these are the observations of the Hon'ble Apex Court:

“9. Even though a victim of rape cannot be treated as an accomplice, on account of a long time of judicial decisions rendered in our country over a number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration. (Vide *Rameshwar v. State of Rajasthan*, 1952 SCR 377 : (AIR 1952 SC 54) : *Gurucharan Singh v. State of Haryana*, (1973) 2 SCR 197 : (AIR 1972 SC 2661) and *Krishan Lal v. State of Haryana*, (1980) 3 SCR 305 : (AIR 1980 SC 1252). It is accepted by the Indian Courts that the rule of corroboration in such cases ought to be as enunciated by Lord Reading C. J. in *King v. Baskerville*, (1916) 2 KB 658. Where the case is tried with the aid of a jury as in England

it is necessary that a Judge should draw the attention of the jury to the above rule of practice regarding corroboration wherever such corroborating is needed. But where a case is tried by a Judge alone, as it is now being done in India, there must be an indication in the course of the Judgment that the Judge had this rule in his mind when he prepared the Judgment and if in a given case the Judge finds that there is no need for such corroboration he should give reasons for dispensing with the necessity for such corroboration. But if a conviction is based on the evidence of the prosecutrix without any corroboration it will not be illegal on that sole ground. In the case of a grown up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both.”

8 In other words, evidence of the victim of sexual offences always stand on higher pedestal than that of the injured witness. Victim of such offence suffers not only physical injury but also psychological trauma, which continues till the end of her life. Keeping in mind these

principles of assessment of evidence of the victim of the rape case, let us examine whether evidence of the prosecutrix can be relied and whether the same can be accepted to base conviction for the alleged offence.

9 It is the case of prosecution that at the time of alleged offence, the prosecutrix was a minor and had not even attained the consenting age. The offence is committed allegedly from 21.6.2007 to 26.7.2007. At the relevant time so far as the offence punishable under Section 363 of the IPC is concerned, age of the victim is required to be proved to be below 18 years whereas for the offence punishable under Section 376 of the IPC is concerned, age of the victim in order to bring a case under Clause Sixthly of Section 375 of IPC must be proved to be below 16 years.

10 In the case in hand, at the outset, one will have to determine whether prosecutrix was below 16 years of age so far as the offence punishable under Section 376 of IPC is concerned and whether she was below 18 years of age so far as the offence punishable under Section 363 of IPC is concerned. The prosecution, in order to prove age of the prosecutrix, i.e. P.W.4 is heavily relying upon the certificate of her birth issued by the Municipal Council, Vita which is at Exhibit 74. This certificate is proved by the prosecution through the evidence of Investigating Officer P.W.13-Rajesh Devidas Naik. His evidence is criticized by the learned defence counsel by arguing that supplementary statement of the father of the prosecutrix namely, P.W.1-Ravindra Jagtap was not recorded nor the Investigator had visited Vita village for verifying genuineness of this certificate.

11 Perusal of the certificate at Exhibit 74 issued by Vita

Municipal Council shows that prosecutrix was born to P.W.1-Ravindra Jagtap on 19.1.1993. This certificate was issued on 25.5.1995. Certificate at Exhibit 74 is issued by the Registrar acting under the provisions of Registration of Birth and Death Act, 1969. Section 7 of the said Act deals with appointment of Registrars for each local area comprising the area within the jurisdiction of a municipality, panchayat or other local authority. It is the duty of the Registrar to register every birth and every death which takes place in his jurisdiction. This act mandates that the Registrar should discharge his duties carefully. Section 8 of this Act mandates each head of the house to report birth in the family to the Registrar. This Act provides for his maintenance of register for recording birth and death within the local area. In pursuant to the provisions of Registration of Births and Deaths Act, 1969, certificate at Exhibit 74 came to be issued by the Registrar as per provisions of Sections 12 as well as 17 of the said Act. The certificate at Exhibit 74 as such is issued by the Public Officer and it is a document forming the record of the acts of the Public Officer and therefore the same is a public document within the meaning of the said term as per provisions of Section 74 of the Indian Evidence Act, 1872. As such the Birth Certificate of the prosecutrix at Exhibit 74 being the original certificate and a public document, no formal proof thereof is required.

12 At this juncture, it is apposite to look into provisions of Section 35 of the Indian Evidence Act, 1872. Bare perusal of this provision makes it clear that if entry is made by public servant in official book in discharge of his official duty then such entry becomes relevant fact and admissible in evidence. It is well settled that certified

copy of the entry in the birth register maintained by official in discharge of his official duty is admissible under Section 35 of the Indian Evidence Act, 1872 and it is not even necessary to examine officer who records such entry. Valuable reference in this regard can be made to the case of **Harpal Singh & Anr. v. State of Himachal Pradesh** reported in **AIR 1981 SC 361**. In this view of the matter, certificate at Exhibit 74 which was issued long back in the year 1995 reflecting the date of birth of the prosecutrix as 19.1.1993 is relevant and as it is in the nature of *anti litem motam*, it carries great weight in determining age of the prosecutrix.

13 It is in the evidence of P.W.1-Ravindra Jagtap that the prosecutrix P.W.4 was born on 19.1.1993. Similarly, the prosecutrix (P.W.4) in her evidence has deposed that her date of birth is 19.1.1993. Except suggestions, which are denied by both these witnesses, there is nothing on record to disbelieve this date of birth of the prosecutrix which is gaining corroboration from entry in the register maintained as per the provisions of the Registration of Births and Deaths Act, 1969. The Prosecutrix might have failed in several standards but that by itself is not sufficient to infer that her recorded date of birth is incorrect. Therefore, I hold that the learned trial Court has correctly recorded finding that the date of birth of the prosecutrix is 19.1.1993 and as such, at the time of alleged offence, she was below 18 years so far as the offence punishable under Section 363 of IPC is concerned and below 16 years of age so far as the offence punishable under Section 376 of IPC is concerned.

14 Now let us examine whether evidence of P.W.4- the Prosecutrix can be relied upon for holding that offences alleged against

the Appellant/Original Accused No.1 are proved. It is in the evidence of P.W.4- the Prosecutrix that at the time of incident, i.e. on 21.6.2007 she was proceeding towards her school and at about 11.30 a.m. the Appellant/Original Accused No.1 came near school and asked her to accompany him. The Appellant/Original Accused No.1 expressed his love towards her but despite her refusal, by threatening her he lifted her and made her to sit in the auto-rickshaw . As per version of the prosecutrix, she was then taken by the Appellant/Original Accused No.1 to Saidapur area, Sadar Bazar area and then to his house at Sadar Bazar area. Thereafter, as per her version while undertaking the return journey, the friend of her father saw her in the company of the Appellant/Original Accused No.1 and, therefore, she did not return to her house. The Prosecutrix stated that it was the Appellant/Original Accused No.1 who told her that her parents will beat her. Thereafter, as seen from the evidence of the prosecutrix, the couple moved in the auto-rickshaw in Genda Mal area and took shelter in the house of P.W.9- Hari Kakade at Koyna Society. There as per version of prosecutrix, she came to be raped by the Appellant/Original Accused No.1. As per version of the prosecutrix then on 24.6.2007 they went to Nagthane on motor-cycle. There they resided at the house of Baburao for two days. Thereafter, as per version of prosecutrix, she and the Appellant/Original Accused No.1 resided along with Balu Dethake. There also Appellant/Original Accused No.1 committed rape on her. She was then taken to the house of her grand-mother Sanglikar. Thereafter she was taken to Belgaum. The prosecutrix then was taken to the house of Balu Dethake and then they returned to Jadhavwadi. The Prosecutrix stated that on 26.7.2007 the police came and had

taken them. She stated that then she disclosed the incident to her parents.

15 It is seen from the evidence of the prosecutrix and particularly from the cross-examination of the prosecutrix that she was in the company of the Appellant/Original Accused No.1 roaming with him at various places and staying with him at different houses. Her cross-examination reveals that she came in contact with several persons during that period from 21.6.2007 to 26.7.2007. She had even visited the house of her grand-mother in the company of the Appellant/Original Accused No.1. Other houses where she stayed were also under occupation of other persons. The Prosecutrix had stated that she was taken from the populous area where lot of students and policemen were present. In such situation, it is seen that the prosecutrix was having tons of opportunities to raise alarm and to protest act of the Appellant/Original Accused No.1 however, this did not happen. The Prosecutrix never complained against the Appellant/Original Accused No.1 during this period. It is, thus, clear that evidence of the prosecutrix that she was forcibly taken by the Appellant/Original Accused No.1 cannot be accepted. At the same time, it is seen from the evidence of the prosecutrix that the Appellant/Original Accused No.1 used to come to her house and to draw her attention, he used to blow horn of his auto-rickshaw. It is also seen from the evidence of the prosecutrix that at the time of taking her on 21.6.2007, the Appellant/Original Accused No.1 had expressed and declared his love towards the prosecutrix. It is thus clear that whatever was happening between the couple, was happening with consent of the prosecutrix. Even if embellishment, which are added by the prosecutrix

to her version might be due to fear of her parents or because of fear of attachment of stigma by the society; is ignored from her version, her version to the extent that she was in the company of the Appellant/Original Accused No.1 and he had subjected her to sexual intercourse with her cannot be rejected.

16 It is well settled that in the case relating to sexual offences, evidence of the prosecutrix if found trustworthy, does not require any further corroboration. Still let us examine whether evidence of the prosecutrix is gaining corroboration from other evidence adduced by the prosecution. PW.12-Suresh Krishna Daund is the Police Head Constable attached to the Satara City Police Station. His evidence shows that on 26.7.2007 his superior officer had directed him to go to Jadhavwadi and apprehend the Appellant/Original Accused No.1 as well as the missing girl. It is in the evidence of PW.12-Suresh Daund that he along with his colleagues went to Jadhavwadi and from inside the hut, they traced the prosecutrix, i.e. PW.4 while in the company of the Appellant/Original Accused No.1. PW.12-Suresh Daund deposed that he took both of them to Satara City Police Station on 26.7.2007. This witness has duly identified the Appellant/Original Accused No.1 while in dock. Though evidence of this witness is sought to criticize by arguing that there is no station diary of leaving premises of the police station for tracing out missing girl, it is not the rule of law that for such minor discrepancy, entire evidence of the witness should be discarded. Evidence of PW.12-Suresh Daund shows that ultimately missing girl was found in the company of the Appellant/Original Accused No.1 on 26.7.2007. This implies that prosecutrix is witness of truth so far as her version regarding being in the company of the Appellant/Original

Accused No.1 on 26.7.2007 is concerned as well as regarding events happened during this period.

17 PW.9-Hari Gangaram Kakade is the landlord having three rooms. His evidence shows that he used to let out his rooms on rent. It is in the evidence of PW.9-Hari Kakade that on 21.6.2007 at about 8.30 a.m. he had allotted room to the Appellant/Original Accused No.1 on rent. At that time, Appellant/Original Accused No.1 was in the company of a girl. This witness deposed that couple stayed in his rented room upto 24.6.2007. This evidence of PW.9-Hari Kakade is perfectly in tune with the evidence of PW.4-Prosecutrix who in unison deposed that she along with the Appellant/Original Accused No.1 stayed at the house of one Kakade for the period from 21.6.2007 to 24.6.2007.

18 PW.10-Kiran Ganpati Dhole is Goldsmith having a shop at Nagthane. His evidence shows that on 20.6.2007, the Appellant/Original Accused No.1 had sold ear-rings to him during his visit to shop with one Babasaheb Mohite. This evidence also corroborates version of the prosecutrix that the Appellant/Original Accused No.1 sold her ear-rings for purchase of mangalsutra for her.

19 It is thus, clear that evidence of the prosecutrix regarding her being in the company of the Appellant/Original Accused No.1 from 21.6.2007 to 26.7.2007 is gaining overwhelming corroboration from the evidence adduced by the prosecution on record.

20 The prosecution has examined the medical officer who has examined prosecutrix after she was traced out on 26.7.2007. PW.11-Sandip Ulhas Aathavale, Medical Officer attached to the Civil Hospital, Satara has proved the previous statement of the prosecutrix made to

him soon after the incident which is admissible in evidence under Section 157 of the Indian Evidence Act, 1872. According to PW.11-Sandip Aathavale, the prosecutrix on 27.7.2007 had informed him that there was sexual intercourse with her and last such intercourse took place before three days. This previous statement of the prosecutrix made soon after the incident is relevant and corroborating her version. As per evidence of PW.11-Sandip Aathavale, the prosecutrix was examined by Dr. Nalawade and this witness has proved report of the medical examination at Exhibit 60. Multiple abrasions on right wrist joint dorsal aspect found on the person of PW.4, i.e. the prosecutrix corroborates her version regarding the offence punishable under Section 323 of the IPC. It is seen from the report of medical examination of the prosecutrix that she was having old hymenal tear and she was found to be habitual to intercourse. This finding in the medical examination of the prosecutrix duly supports and corroborates her version regarding sexual intercourse with her by the Appellant/Original Accused No.1. Apart from this, there is forensic evidence on record which supports the case of the prosecution.

21 In the light of foregoing discussion, I do not find any infirmity in the impugned judgment and order of conviction. The Prosecutrix being below age 16 years, her consent is immaterial. She had not attained the consenting age when she was in the company of the Appellant/Original Accused No.1 for the period from 21.6.2007 to 26.7.2007. The Appellant/Original Accused No.1 had taken her from the custody of her lawful guardians on 21.6.2007 when the prosecutrix was below 18 years of age and as such, the trial Court has rightly concluded that prosecutrix came to be kidnapped for forcing or

seducing her to have illicit sexual intercourse by the Appellant/Original Accused No.1. Considering the nature of proved offences, I do not see any infirmity in the quantum of punishment inflicted on the Appellant/Original Accused No.1 by the learned trial Court.

22 In the result, appeal fails and, therefore, the order:

(1) The appeal is dismissed.

(A. M. BADAR, J.)