

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.649 OF 2015

1. Madan Ankush Daware,
Age 20 years, Occu.Education.

2. Sanket Dadabhau Sarode,
Aged about 20 years,
Occu.-Education,

Both R/at Village-Chandus,(Koregaon Shiv),
Taluka – Khed, Dist.- Pune.

(and at present in judicial custody and
lodged at Yerwada Central Prison, Pune.)

... **Appellants**

V/s.

The State of Maharashtra

... **Respondent**

WITH

CRIMINAL APPLICATION NO.191 OF 2018

IN

CRIMINAL APPEAL NO.649 OF 2015

Sanket Dadabhau Sarode

... **Applicant**

In the Matter in Between :

Madan Ankush Daware & Anr.

... **Appellants**

V/s.

The State of Maharashtra

... **Respondent**

.....

Mr.Daulat G. Khamkar, Advocate for the Appellant/Applicant.

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

....

CORAM : A.M.BADAR J.

DATED : 21th FEBRUARY 2018.

ORAL JUDGMENT :

1 The appellant/accused No.2 Sanket Dadabhau Sarode sent a letter dated 15/01/2018 through jail addressed to the Honourable the Chief Justice informing that he wants to withdraw appeal filed by him. The said letter came to be registered as Criminal Application No.191 of 2018. When the said application came up for hearing, Shri.D.G.Khamkar, the learned Advocate appearing for the appellants/accused submitted that the said application was moved out of frustration as both appellants are undergoing jail sentence right from the year 2012 and their appeal is not listed for hearing. The learned Advocate for the appellants/accused submitted that the appeal be heard finally and the learned Additional Public Prosecutor has also expressed that as both appellants are undergoing jail sentence for more than five years, the appeal needs to be heard forthwith. That is how, the appeal is taken up for final hearing forthwith.

2 Appellants/accused Nos.1 and 2 by this appeal is challenging their conviction for the offence punishable under Section 376(2)(g) read with Section 34 of the Indian Penal Code so also for the offence punishable under Section 506 read with Section 34 of the IPC recorded by the learned Additional Sessions Judge, Pune by the impugned Judgment and Order dated

23/08/2012 passed in Sessions Case No.140 of 2012. For the offence punishable under Section 376(2)(g) read with Section 34 of the IPC, both appellants/accused are sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine of Rs.5,000/- and default sentence of simple imprisonment for three months. For the offence punishable under Section 506 read with Section 34 of the IPC, they both are sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.2000/- and in default to undergo simple imprisonment for one month. The learned trial Court directed that substantive sentences shall run concurrently.

3 Facts leading to the prosecution of the appellants/accused can be summarized thus :

- (a) P.W.No.1 Padmanabh is an agriculturist by occupation having agricultural land at village Chandus in Khed Taluka of Pune District. He along with his family comprising of a wife, two daughters and a son used to reside in their agricultural field itself at village Chandus. His 15 ½ years old daughter is the alleged victim of the crime in question. As she was mentally retarded child, she quit her normal school education and was admitted to the Special School located at Kanhephata in the year 2008. However, after taking education at that school for two years, she left that school and started residing at her

house along with her parents at village Chandus.

- (b) The prosecutrix/P.W.No.2 used to take she-goats for grazing in the morning hours in between 10.00 a.m. to 12.00 noon and in the evening in between 2.30 p.m. to 5.30 p.m. After taking those she-goats to Bhima river for providing water to them, prosecutrix/P.W.No.2 used to return to her house located in the agricultural field at about 5.30 p.m. on each day.
- (c) According to the prosecution case, Dadabhau Sarode is the owner of the agricultural land abutting the agricultural field of P.W.No.1 Padmanabh. Appellant/accused No.1 Sanket Sarode is his son.
- (d) It is case of the prosecution that on 19/08/2011, as usual, the prosecutrix/P.W.No.2 took her she-goats for grazing at about 2.30 p.m. When she was returning to her house after providing water to her she-goats, both appellants/accused accosted her, dragged her beneath the tree. Thereafter, appellant/accused No.1 Madan Daware committed rape on her. Subsequently, appellant/accused No.2 Sanket Sarode had also committed rape on her. They threatened her not to disclose the incident to anybody at her house or else they will murder her by constricting her neck. The prosecutrix/

P.W.No.2 further averred that even eight days prior to this incident, both appellants/accused had committed rape on the prosecutrix/P.W.No.2. After this incident of gang rape on her as she was threatened by the appellants/accused, the prosecutrix/P.W.No.2 was frightened and she hide herself in the bushes.

- (e) As the prosecutrix/P.W.No.2 did not return to her house, her father P.W.No.1 Padmanabh along with his son started searching her. Initially, search of the prosecutrix/P.W.No.2 did not yield any result, but at that time, P.W.No.1 Padmanabh had seen both accused persons in the vicinity. He, therefore, again searched for the prosecutrix/P.W.No.2 and ultimately, found her to be sleeping beneath the *neem* tree. She was then brought to her home. P.W.No.1 Padmanabh noticed that the prosecutrix/P.W.No.2 is in frightened condition. Upon being questioned, the prosecutrix/P.W.No.2 then informed him that both the appellants/accused committed rape on her.
- (f) On 20/08/2011 i.e. on the next day of the incident, P.W.No.1 Padmanabh approached Police Station and lodged report (Exhibit 18) against the appellants/accused. The said report was recorded by P.W.No.10 Chandrahas Shelar, ASI and accordingly, Crime No.129 of 2011 for the offence punishable

under Section 376(2)(g) of the IPC came to be recorded against the present appellants/accused.

- (g) The prosecutrix/P.W.No.2 was then medically examined. Both appellants/accused were arrested. Clothes of the prosecutrix as well as that of the appellants/accused came to be seized. Samples of blood and semen of the appellants/accused came to be collected. Spot panchanama was drawn. Statements of witnesses were recorded and after completion of routine investigation, the appellants/accused were charge-sheeted for the offences punishable under Sections 376(2)(g) and 506 read with Section 34 of the IPC.
- (h) The learned trial Court framed charges against the appellants/accused and explained the same to them. They abjured the guilt and claimed trial.
- (i) In order to bring home the guilt to the appellants/accused, the prosecution has examined in all 11 witnesses. The defence of the appellants/accused is that of total denial. According to them, they are falsely implicated in the crime in question. It is the case of the defence that P.W.No.1 Padmanabh and father of appellant/accused No.2 Sanket Sarode are having agricultural lands having common boundary. When the Officers came to measure the field of

father of appellant/accused No.2 Sanket Sarode, the appellant /accused No.1 Madan Daware was helping them in the measurement. Similarly, appellant/accused No.1 Madan Daware was helping appellant/accused No.2 Sanket Sarode and his father Dadabhau in selling out the land. At the time of measurement of the field, P.W.No.1 Padmanabh had beaten appellant/accused No.1 for these reasons. Appellants/accused are falsely implicated in the crime in question by P.W.No.1 Padmanabh.

- (j) The learned trial Court after hearing the parties by the impugned Judgment and Order dated 23/08/2012 was pleased to convict the appellants/accused for offences punishable under Sections 376(2)(g) and 506 read with Section 34 of the IPC. They are accordingly, sentenced as indicated in opening paragraph of this Judgment.

4 I heard Shri.Khamkar, the learned Advocate appearing for the appellants/accused. He argued that evidence of the prosecutrix/P.W.No.2 in respect of applying a thing like balloon to their penis by the appellants/accused is coming on record by way of omission. Similarly, her evidence that the appellants/accused had threatened her not to leave the place unless they leave that place and that the appellant/accused No.1 Madan Daware had sent the appellant/accused No.2 Sanket Sarode subsequently, has

come on record by way of omissions. The learned Advocate further argued that the prosecutrix/P.W.No.2 was examined by P.W.No.5 Dr.Suvarna Rathod immediately on the next day of the incident i.e. on 20/08/2011. Her behaviour was found to be normal. The Medical Officer has not given age of the injuries. There were no injuries on the private parts of the victim. Therefore, the victim had not suffered any sexual assault. The learned Advocate further argued that nail clippings of the appellants/accused were not collected. The medical evidence is not supporting the case of the prosecution.

5 The learned Advocate drew my attention to the reports of chemical analysis placed on record at Exhibit Nos.68,69,70 and 71 and argued that the forensic evidence is not supporting the case of the prosecution. The learned Advocate further argued that both the appellants/accused were examined medically by P.W.No.9 Dr.Amol Khadke. This Medical Officer did not notice any injury on person of the appellants/accused. Non-finding of injuries on the person of the appellants/accused suggest that no such incident, as alleged by the prosecutrix/P.W.No.2 took place. The learned Advocate submitted that otherwise the prosecutrix resisted and this must have caused injury marks. In absence of injuries on persons of the appellants/accused, the case of the prosecution becomes suspect.

6 The learned Advocate for the appellants further argued that panch witnesses have not supported the case of the prosecution. He further argued that cross-examination of the prosecution witnesses so also statements of accused persons recorded under Section 313 of the Code of Criminal Procedure shows that at the time of measurement of the field of father of the appellant/accused No.2, P.W.No.1 Padmanabh had assaulted the appellant/accused No.1 Madan. Appellant/accused No.1 Madan was helping appellant/ accused No.2 Sanket in measurement of the field. He was also helping them for selling the agricultural land and out of grudge, P.W.No.1 Padmanabh has falsely implicated both the appellants/ accused in the crime in question.

7 The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction by contending that the evidence of the prosecutrix/P.W.No.2 is fully corroborated by the other evidence available on record including that of her father P.W.No.1 Padmanabh. The learned Additional Public Prosecutor, therefore, supported the impugned Judgment and Order of conviction and resultant sentence.

8 I have carefully considered the rival submissions and also perused the Record and Proceedings including depositions of prosecution witnesses and documentary evidence placed on record.

9 In the case in hand, the prosecution is alleging gang rape on the prosecutrix/P.W.No.2 by the appellants/accused. The prosecution is further alleging that the prosecutrix/P.W.No.2 is a mentally retarded minor female victim of the sexual offence. By now, it is well settled that conviction on a charge of rape on the basis of uncorroborated testimony of the prosecutrix is perfectly legal if her evidence inspires confidence about its truthfulness. In the matter of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*¹ in paragraph 9 of its Judgment, the Honourable Apex Court has held thus :

“9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach

1 *AIR 1983 SC 753*

made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :-

- (1) The female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure.
- (2) She may be suffering from psychological neurosis and may see an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.
- (3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge

against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.”

10 Similarly, in paragraph 10 of its Judgment in the matter of ***Bharwada Bhoginbhai Hirjibahai*** (*supra*) the Honourable Apex Court has held that :

“10.... 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 into controversy.
- (10)The parents of an unmarried girl as also the husband and members of the husbands' 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.”

Keeping in mind these observations of the Honourable Apex Court, let us examine the case in hand.

11 Undisputedly, agricultural land owned by father of the appellant/accused No.2 Sanket Sarode is abutting the agricultural field of P.W.No.1 Padmanabh at village Chandus in Pune District. The defence has not disputed the fact that P.W.No.1 Padmanabh along with family members including prosecutrix/P.W.No.2 were residing in the agricultural land owned by P.W.No.1 Padmanabh at village Chandus. From cross-examination of P.W.No.1 Padmanabh the fact has elicited by the defence that bed of Bhima river is at a distance of 1000 feet from the house of P.W.No.1 Padmanabh and that the prosecutrix/P.W.No.2 was going for grazing the she-goats, she being a physically able bodied person. On this backdrop, let us, at the outset, consider what P.W.No.7 Tukaram Kasavi, teacher working at Z.P.School where the prosecutrix/P.W.No.2 used to study, has deposed before the Court. Evidence of this witness shows that the prosecutrix/P.W.No.2 was admitted to Z.P.School at Koregaon on 19/07/2001 in 1st Standard and at the time of her admission to the school, her father had filled the application in prescribed proforma (Exhibit 46). The date

of birth of the prosecutrix/P.W.No.2 was reported as 24/02/1996 to the said school and the same was recorded in General Register (Exhibit 45). Her father P.W.No.1 Padmanabh had reported date of birth of the prosecutrix/P.W.No.2 to the school by submitting the written application (Exhibit 46).

12 P.W.No.7 Tukaram Kasavi teacher of Z.P.School further averred that P.W.No.1 Padmanabh on 04/08/2007 submitted an application (Exhibit 48) to the School informing that the prosecutrix/P.W.No.2 is not capable to study and, therefore, he decided to admit her to the School meant for mentally retarded children at Kanhephata. P.W.No.7 Tukaram Kasavi deposed that on written request application (Exhibit 48) of P.W.No.1 Padmanabh, name of the prosecutrix/P.W.No.2 came to be removed from the school and School Leaving Certificate (Exhibit 44) came to be issued. Cross-examination of this witness shows that the Z.P.School where the prosecutrix/P.W.No.2 was taking education was not for mentally retarded children. Except this, there is nothing in cross-examination of this witness to doubt his version.

13 Evidence of P.W.No.7 Tukaram Kasavi – teacher at Z.P.School, Koregaon thus makes it clear that from the year 2001 to 2007, the prosecutrix/P.W.No.2 took primary school education at the Z.P.School and as her father, upon her medical examination

found the prosecutrix/P.W.No.2 as mentally retarded child, he wanted to admit her to the school meant for special children at Kanhephata. That is how the application dated 04/08/2007 (Exhibit 48) came to be moved by P.W.No.1 Padmanabh and School Leaving Certificate of prosecutrix/P.W.No.2 (Exhibit 44) came to be obtained. The School Leaving Certificate (Exhibit 44) goes to show that for admitting the prosecutrix/P.W.No.2 in Saibaba Seva Dham, Maval, District Pune – a school for children in need of special care, name of the prosecutrix/P.W.No.2 came to be deleted from the roll of Z.P.School at Koregaon. This evidence thus makes it clear that in the year 2007 itself P.W.No.1 Padmanabh came to know that the prosecutrix/P.W.No.2 is a mentally retarded child and needed special education. This evidence is *ante litem motam* and there is no reason to disbelieve the same.

14 On this backdrop, it is in evidence of P.W.No.1 Padmanabh that his daughter prosecutrix/P.W.No.2 was born on 24/02/1996 and she took school education at Z.P.School at Koregaon and then as her I.Q. was found to be below average, she was admitted to the special school at Kanhephata in the year 2008. P.W.No.1 Padmanabh further deposed that performance of the prosecutrix/P.W.No.2 was not satisfactory in the school at Kanhephata and, therefore, after two years she was withdrawn from that school and then started residing with him from May

2010. P.W.No.1 Padmanabh has candidly accepted the fact that he has not narrated the police that the I.Q. test of the prosecutrix/P.W.No.2 was done and she was found to be below average. However, this omission is inconsequential because evidence of P.W.No.7 Tukaram Kasavi – teacher of the Z.P.School coupled with contemporaneous documentary evidence is clear on this aspect. That apart, the FIR at Exhibit 18 lodged by P.W.No.1 Padmanabh contains clear recital that the prosecutrix/P.W.No.2 is mentally retarded child, who took initial school education at Z.P.School at Koregaon, but as she was not showing academic progress and as she was found to be mentally retarded by the Doctor from Sassoon Hospital, Pune, she was admitted to Jaikisan Special Square of Kanhephata meant for mentally retarded children in the year 2008. The Certificate at Exhibit 75 issued by the Medical Board of Sassoon General Hospital, Pune shows that the prosecutrix/P.W.No.2 is suffering from mental retardation and had 50% disability. This voluminous evidence requires me to conclude that the prosecutrix/P.W.No.2 is a person suffering from mentally retardation. This fact will have to be kept in mind while assessing her oral evidence.

15 Now, let us see what the prosecutrix/P.W.No.2 has deposed about the incident in question. It is in her evidence that as the appellants/accused used to reside near her house, she was knowing both of them. The prosecutrix/P.W.No.2 deposed that

after providing water to her she-goats, she was returning to her house and at that time she was accosted by both appellants/accused Madan and Sanket. They brought her beneath the tree. The prosecutrix deposed that appellant/accused Madan pushed her at the ground, took out her salwar, applied a thing like balloon to his penis and committed sexual intercourse with her. He then sent appellant/accused No.2 Sanket, who also committed sexual intercourse with her in similar manner. The prosecutrix further deposed that both appellants/accused told her that she should not go from that place unless and until they leave that place. They threatened her not to disclose the incident in the house or they will constrict her neck and would kill her. The prosecutrix further deposed that prior to this incident before ten years back, both the appellants/accused have done similar act by putting similar thing like balloon on their penis and had sexual intercourse with her. She then further stated that then her father came searching her. She disclosed the incident to her parents in the night and on the next day, they went to the Police Station.

16 Cross-examination of the prosecutrix/P.W.No.2 shows that her family is owner of eight she-goats and some animals. She was taking she-goats for grazing in the agricultural land owned by the family. Other peoples also used to go for providing water to their animals. The prosecutrix further admitted that the agricultural land owned by the father of the appellant/accused

Sanket Sarode is adjacent to the agricultural land owned by her family and that there is hand-pump in the agricultural land of Dadabhau. People used to gather there for taking water. The prosecutrix in her cross-examination admitted that near the tree there were shrubs. She was beneath the tree for five to ten minutes. In cross-examination, the prosecutrix stated that the incident took place at the time of Rakshabandhan festival. She stated that when she used to collect fire wood she used to suffer injuries in the form of scratches on her body.

17 In cross-examination of the prosecutrix/P.W.No.2 an attempt was made to elicit from her evidence to the effect that putting a thing like balloon to the penis by accused No.1 Madan, sending accused No.2 Sanket by accused No.1 Madan, threats of the accused persons that the prosecutrix should not leave the place unless they leave that place are coming on record by way of omissions. However, the prosecutrix has candidly stated that she did narrated all these facts to the police while recording her statement. P.W.No.11 Amar Desai, Senior P.I., who investigated the crime in question, had recorded statement of the prosecutrix/P.W.No.2. Though he is cross-examined at length by the defence, this part of evidence of the prosecutrix is not shown to have been coming on record by way of omissions from the version of P.W.No.11 Amar Desai, Senior P.I.. In fact, attention of the prosecutrix/P.W.No.2 was never drawn to her police statement

in order to confront her with her version before the police. Section 145 of the Evidence Act mandate that when it is intended to contradict the witness by the writing in respect of previous statement made by the witness, then attention of the witness must be drawn to such writing. Similarly, if omissions are required to be proved then also attention of the witness is required to be drawn to the previous statement of such witness and then the investigator is required to be questioned as to whether the witness had stated before him the facts which the witness is stating before the Court. This exercise is not done in the case in hand and as such, it cannot be said that these facts are coming on record by way of either contradictions or omissions. Even otherwise, what is relevant is the act of forcible sexual intercourse. Whether it was done by applying a condom or without application thereof is of no consequence. Therefore, such inconsequential aspects are required to be ignored as evidence of the victim of such offence is required to be considered in broader probabilities of the prosecution case. As stated in foregoing paragraphs, the prosecutrix is a mentally retarded child and her evidence as such cannot be rejected on such trivial discrepancies.

18 Though it is not necessary that version of the prosecutrix/P.W.No.2 needs to be corroborated with independent evidence, let us examine whether other evidence adduced by the prosecution is corroborating her version. P.W.No.1 Padmanabh is

father of the prosecutrix. His evidence shows that on 19/08/2001, the prosecutrix left the house at 2.30 p.m. for grazing she-goats, but she did not return at usual time at 5.30 p.m. This witness deposed about search of the prosecutrix undertaken by him along with his son Sagar which yielded no positive result. Then this witness has stated that after 7.00 p.m. he himself and his son Sagar again undertook search of the prosecutrix and found her lying under a *neem* tree in frightened condition. She was taken back to the house where, as per version of P.W.No.1 Padmanabh she has disclosed the incident to him as well as his wife. As per statement of this witness, the prosecutrix had disclosed him in a frightened condition that accused No.1 Madan dragged her below tree, removed her salwar and committed sexual intercourse with her and thereafter accused No.2 Sanket had also committed sexual intercourse with her. This witness has further stated that the prosecutrix/P.W.No.2 had narrated them that eight days prior to this incident, both appellants/accused had committed sexual intercourse with her.

19 Section 157 of the Evidence Act deals with proof of the former statement of witness to corroborate later testimony of the witness in respect of the same fact. In the case in hand, soon after the incident, when her mind was unpolluted by outside forces, the prosecutrix/P.W.No.2 made a statement to her parents that the appellants/accused had committed forcible sexual intercourse on her and they had also indulged in the same act with her eight days

prior to the incident. This proved former statement of the prosecutrix/P.W.No.2 fully corroborates her version in respect of facts deposed to by her before the Court.

20 The prosecutrix/P.W.No.2 on lodging the FIR by her father P.W.No.1 Padmanabh was immediately sent to the Sassoon Hospital, Pune on 20/08/2011 for the medial treatment. There she was examined by P.W.No.5 Dr.Suvarna Rathod. Evidence of P.W.No.5 Dr.Suvarna Rathod also comprises of former statement made to her by prosecutrix/P.W.No.2 in respect of incident in question. As per version of P.W.No.5 Dr.Suvarna Rathod, the prosecutrix/P.W.No.2 had informed her that on 19/08/2011 when the prosecutrix had taken sheeps for grazing at the bank of Bhama river, Madan Daware and Sanket Sarode pulled her and committed forceful sexual intercourse with her. Exhibit 33 is the report of examination of the prosecutrix/P.W.No.2 made by P.W.No.5 Dr.Suvarna Rathod. This report contains contemporaneous recording of the history given to P.W.No.5 Dr.Suvarna Rathod. The report Exhibit 33 shows that the history given was that of rape on the prosecutrix by both appellants/accused. This evidence of P.W.No.5 Dr.Suvarna Rathod is gaining corroboration from the contemporaneous record and the fact of non-mentioning the name of the person giving history is of no consequence because version of P.W.No.5 Dr.Suvarna Rathod is very clear on this aspect.

21 Evidence of P.W.No.5 Dr.Suvarna Rathod shows that she had noticed following injuries on body of the prosecutrix :

1. 2 x 0.5 cm. and 1 x 0.5 cm. superficial abrasions present at the level of xiphisternum on the left side.
2. 3 x 0.2 cm. superficial abrasion present inclined obliquely on left breast inframammary region.
3. 1.5 x 0.5 cm. superficial abrasion 2 cm. medial to inner scapular border or right scapula.
4. 7 0.5 cm. superficial abrasion on lateral aspect of right thigh.
5. 4 x 0.5 cm. superficial abrasion on lateral aspect of left thigh.

22 Upon examination of genitals of the prosecutrix, P.W.No.5 Dr.Suvarna Rathod found her hymen to be torn at a multiple sites with old healed tear. With this findings of the medical examination of the prosecutrix, P.W.No.5 Dr.Suvarna Rathod opined that the findings are suggestive of penetrative sexual vaginal intercourse with the prosecutrix.

23 Cross-examination of P.W.No.5 Dr.Suvarna Rathod shows that hymenal tear was not red and it was not bleeding. She

further admitted that the injuries noted on the person of the prosecutrix may be possible by climbing on the tree or passing through the thorny shrubs. This medical officer further admitted that there are various reasons for hymenal tear and such tear can be healed in five to seven days.

24 I have already stated in foregoing paragraphs that the prosecutrix is seen to have been suffering from mental retardation which has caused her 50% disability as seen from the medical certificate. Her evidence is required to be assessed by keeping in mind this fact and, therefore, answers given by her while in the witness box are required to be construed accordingly. The prosecutrix is very specific about commission of forcible sexual intercourse with her even prior to the subject incident which took place on 19/08/2011. While in the witness box, she has stated that such incident took place prior to ten years. This sentence will have to be construed properly as soon after the incident, the prosecutrix had narrated to her parents that such previous incident took place prior to eight days of the subject incident. In any case, evidence of prosecutrix shows that prior to subject incident, she was raped even on earlier occasion by the appellants/accused. In this view of the matter, finding of old healed tears of hymen of the prosecutrix are of no avail to the defence. Similarly, it is not possible to conclude that external injuries in the nature of abrasion found on body of the prosecutrix are attributable to climbing on

trees or travelling through the shrubs, when she has categorically deposed that by causing her fall on the surface of land, she was raped by both the appellants/accused. The injuries found on body of the prosecutrix are certainly referable to such act of her molestation by the appellant/accused. Non-mentioning of age of such superficial abrasion is of no consequence because such type of abrasion heals within a short span of time. Finding them on the body of the prosecutrix within 24 hours of the incident duly corroborates her version about sexual assault on her by the appellant/accused, as deposed to by her.

25 Evidence of P.W.No.1 Padmanabh shows that when he undertook search of the prosecutrix after 5.30 p.m., he saw the appellant/accused No.1 Madan Daware going towards bed of the river and subsequently, he saw both accused persons standing near the electric motor pump panel box in the field of father of the appellant/accused No.2 Sanket Sarode. Thus, it is seen that both the appellants/accused were very much present near the place of occurrence at or about the time of the incident.

26 An attempt is made to demonstrate that because of dispute over the measurement of the agricultural field and the incident allegedly took place at the time of measurement of field of father of the appellant/accused No.2 Sanket Sarode, the accused persons are falsely implicated in the crime in question.

Except bare suggestions and statements of the accused recorded under Section 313 of the Code of Criminal Procedure, there is no evidence on this aspect. In the case in hand, the prosecutrix is a young girl suffering from mental retardation. In Indian setting, it is hard to believe that father of such girl would concoct a story and would falsely implicate the appellants/accused in such type of crime particularly when the motive to implicate them falsely is not at all probalilized from cross-examination of all prosecution witnesses. Therefore, the theory of false implication of the appellant/accused at the hands of P.W.No.1 Padmanabh is worth consideration

27 When evidence of prosecutrix/P.W.No.2 is gaining corroboration from other evidence available on record, non-availability of positive forensic evidence is of no avail to the defence. It cannot be construed as throwing shadow of doubt on the prosecution case.

28 In the wake of foregoing discussion, even after re-appreciation of the entire evidence adduced by the prosecution, I am unable to find any infirmity in conviction of the appellants/accused for the offence of gang rape on the prosecutrix as the evidence of the prosecution unerringly points out that the prosecutrix/P.W.No.2 was raped by both the appellants/accused in furtherance of their common intention and subsequently, she was

intimidated by them by threatening her that she would be killed by constricting her neck if the incident is disclosed to inmates of her house. Similarly, the minimum prescribed sentence was awarded to the appellants/accused for the proved offences and as such, no infirmity in the sentence awarded to the appellants/accused is found. Resultantly, the appeal fails and, therefore, the Order :

- (i) The appeal is dismissed. Consequentially, the Criminal Application bearing No.191 of 2018 also stands disposed of.

(A.M.BADAR J.)