

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.431 OF 2018

GIRISH PURUSHOTTAM GUMASTE)
Age 45 years, Occupation: Driver)
residing at :Bramhanpuri, Miraj,)
Tal: Miraj, Dist-Sangli)
(At present Central Jail, Kalamba)
at Kolhapur) **)...APPELLANT**

V/s.

STATE OF MAHARASHTRA)
(Through P.I.Miraj City Police)
Station, Miraj, Dist. Sangli)
being represented by office of)
Public Prosecutor, High Court,)
Mumbai. **)....RESPONDENT.**

Mrs. Savita A. Prabhune, Advocate for Appellant.

Mr.Vinod Chate, APP for State.

CORAM : A. M. BADAR, J.

DATE : 19th SEPTEMBER, 2019.

ORAL JUDGMENT :

1 By this appeal, the appellant/convicted accused, is challenging judgment and order dated 29th December 2017, passed by the learned Special Judge and Additional Sessions

Judge, Sangli, in Special Case (Protection of Children from Sexual Offences Act) No.193/2015 thereby convicting him of offences punishable under Sections 4 and 8 of (Protection of Children from Sexual Offences Act) as well as under Section 341, 452 and 506 of the Indian Penal Code. For the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, the accused is sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.20,000/-, in default of payment of fine, to suffer simple imprisonment for one month. For the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, the accused is sentenced to suffer rigorous imprisonment for 3 years. For the offence punishable under Section 341 of the Indian Penal Code, the accused is sentenced to suffer rigorous imprisonment for one month. For the offence punishable under Section 452 of the Indian Penal Code, the accused is sentenced to suffer rigorous imprisonment for one year. For the offence punishable under Section 506 of the Indian Penal Code, the accused is sentenced to suffer rigorous imprisonment for six months. The trial court directed that the substantive sentences

shall run concurrently.

2 Facts in brief, leading to the prosecution as well resultant conviction of appellant/convicted accused can be summarized thus:

- (a) Victim of the crime in question, is a minor female child who was aged 13 years and 9 months at the time of incidents in question, which took place on 04th August 2015 and 5th August 2015. She is examined as PW1 by the prosecution. According to the prosecution, the victim female child PW1 alongwith her mother PW2 Ranjana Jadhav and her father were residing at Miraj in District Sangli. Her Uncle Gajanan, Aunt Anjana alongwith their family members and grand-mother of the victim female child/PW1 were residing nearby her house. The appellant/convicted accused alongwith wife Girija and their daughters was residing behind the house of the victim female child/PW1 at Sangli. Brother of the victim female child/PW1 died of cancer and she was also suffering from cancer. Her father used to work

in the night shift at Company named 'Sahyadri Starch' at MIDC area. Family of the victim/minor female child was having cordial relation with the family of appellant/convicted accused. Wife of the appellant/convicted accused was very good friend of PW2 Ranjana.

- (b) On 4th August 2015, father of PW2 Ranjana, arranged religious function in a field at village Bedag. The appellant/convicted accused was also invited for that function followed by the dinner. He came for that function which was also attended by the victim female child/PW1, her mother PW2 Ranjana and their family members. At about 8.00 pm of 4th August 2015, appellant/convicted accused took victim female child/PW1 with him on the pretext of help in turning his motor car of Maruti 800 make. The victim female child/PW1, then returned after 15 minutes and joined the company of her mother.

- (c) According to the prosecution case, when the victim female

child/PW1 was taken by the appellant/convicted accused for helping him, he had sexually assaulted her by lifting her T-shirt, pressing her breast, kissing as well as biting her.

- (d) According to the prosecution case, in the morning hours of 5th August 2015, when her mother was washing clothes, the appellant/convicted accused came to the house of the victim female child/PW1 and again sexually assaulted her by hugging and pressing her breast. It is the case of the prosecution that, the victim female child/PW1 was subjected to penetrative sexual assault by appellant/convicted accused at about 8.45 p.m. of 5th January 2015 in her house. On that day, her mother had gone to the Hospital as their relative delivered a baby. Father of the victim female child/PW1, as usual had gone to attend his work in the night shift, by instructing the victim female child/PW1 to go for sleeping at the house of her grand mother. The victim female child/PW1 opened the door of her house at about 8.45 pm for going to the house of her grand mother. At that

time, the appellant/convicted accused came, pushed her inside the house, switched off the electricity and made her to lie in prone position. He then, undressed the victim female child/PW1, rubbed penis on her buttocks and thereafter committed penetrative sexual assault on her. He then threatened her with consequence of her death if the incident is disclosed to anybody. The victim female child/PW1 got frightened and went to the house of her grand-mother for sleeping.

- (e) It is the case of the prosecution that, in the morning hours of 6th August 2015, the victim female child/PW1 disclosed the incident to her friend named Akshada. In the lunch recess she again disclosed the incident to her friend Akshada and PW6 Kavita Sunil Nannikar. Both of them then advised the victim female child/PW1 to disclose the incident to her mother. In the night hours of 6th August 2015, victim female child/PW1 mustered courage and disclosed the incident to her mother. There were no male members either in her

house or in the house of her Uncle. Hence, her mother, PW2 Ranjana disclosed the incident to Anjana-Aunt of the victim female child/PW1. She also disclosed the incident telephonically to maternal Aunt of victim female child/PW1. They then went to Village Haripur at the parental house of PW2 Ranjana. The incident was disclosed to parental relatives of PW2 Ranjana. On the next day, i.e. on 7th August 2015, PW2 then lodged report of incident to the Police Station, Miraj City, Miraj which resulted in registration of crime number 180/2015 against appellant/accused. The wheels of investigation were then set in motion.

- (f) The victim female child/PW1 was then sent for medical examination at the Civil Hospital, Miraj where she was examined by PW 8 Dr.Aarti Aapte. The Investigator visited the spots of incidence i.e. the agricultural field and the house of the victim female child/PW1. Spot Panchnamas were drawn. Routine investigation followed. On conclusion

of investigation, appellant/convicted accused came to be chargesheeted.

- (g) The learned trial court framed and explained the Charge to the appellant/convicted accused. He pleaded not guilty and claimed to be tried.
- (h) In order to bring home guilt of the accused, prosecution has examined in all 10 witnesses. Defence of the appellant/convicted accused is of false implication. According to the defence, heavy expenses were incurred by the parents of the appellant/convicted accused on medical treatment of her deceased brother as well as medical treatment of victim female child/PW1 herself. The appellant/convicted accused had given amount of Rs.2 lakhs to the family of victim female child/PW1 and in order to avoid repayment of that amount, he is falsely implicated in the crime in question. It is also the defence of the appellant/convicted accused that, he is suffering from the

AIDS and had he committed penetrative sexual assault on the victim female child/PW1 , she would have also suffered from the AIDS. The fact that, the victim female child/PW1 is not suffering from AIDS falsifies the theory of prosecution. To propound this defence, the appellant/convicted accused has examined Dr.Amit Laxman Bhosale as DW1.

- (i) After hearing the parties, by the impugned judgment and order, the learned trial court came to the conclusion that appellant/convicted accused had committed sexual assault on victim on 4th August 2015, and thereafter on 5th August 2015. He then, committed house trespass with intention to commit offence, wrongfully confined the victim and by criminally intimidating her, committed penetrative sexual assault on her. That is how he came to be convicted and sentenced as indicated in opening para of the judgment.

3 I have heard the learned counsel appearing for appellant/convicted accused. She vehemently argued that the incident was narrated by the victim female child/PW1 to her

friend Akshada but said Akshada is not examined by the prosecution. It is further argued that, cross examination of the victim female child/PW1 shows that, she was with her other and relatives throughout in the programme at the field at Village Bedag. Therefore, her evidence that, appellant/convicted accused had committed sexual assault on her, can not be believed. The learned counsel further argued that though the victim female child /PW1, in her cross examination has stated that she did not suffer bleeding after the incident, the history given by her and recorded by PW8 Dr.Aarti Apte shows that the victim suffered bleeding. In submission of learned counsel for appellant/convicted accused, medical evidence is not supporting case of the prosecution. The hymen of the victim female child/PW1 was found intact. Thus, the evidence of victim female child/PW1 is unreliable. The learned counsel further argued that appellant/convicted accused is suffering from AIDS as seen from the evidence of defence witness and this aspect belies the case of the prosecution. It is also argued that, sentence imposed is disproportionate to the offences held to be proved by the learned trial court and therefore,

alternatively, it is argued that, sentences imposed needs to be reduced.

4 The learned APP supported the impugned Judgment and argued that the evidence of victim female child/PW1 is clear, cogent and trustworthy. He argued that there was no reason with the victim female child/PW1 or her mother to falsely implicate the appellant/convicted accused in the crime in question. The learned APP argued that discretion in awarding punishment is properly exercised by the learned trial court by keeping factual background of the case in mind. Therefore, the appeal deserves to be dismissed.

5 I have considered the submissions so advanced and perused the record and proceeding, including oral as well as documentary evidence.

6 Undisputedly, house of the appellant/convicted accused was situated behind the house of victim female child/PW1. It is not in dispute that her father used to work in the night shift in a factory “Sahyadri Starch” situated at MIDC. The defence has also not disputed that near house of the victim female child/PW1, house of her uncle Gajanan and aunt Anjana is situated where her grandmother used to reside. So far as age of the victim female child/PW1 is concerned, oral evidence of her mother PW2 Ranjana on this aspect went unchallenged. PW2 Ranjana has deposed that the victim female child/PW1 was born on 12th November 2001. Birth Certificate of the victim female child/PW1 issued by the Registrar under the Registration of Births and Deaths Act, 1969, is at Exhibit 41. This Birth Certificate also shows that the victim female child/PW1 was born on 12th November 2001 and the alleged incident took place on 4th August 2015 and 5th August 2015. As such, at the time of the alleged offence, the victim female child/PW1 was 13 years and 9 months old. By cross-examining the victim female child/PW1 and her mother, the defence has brought on record that brother of the

victim female child/PW1 died of cancer. She is also suffering from cancer and taking treatment of the ailment. With this undisputed position emerging on record, let us assess evidence of the victim female child/PW1 in order to ascertain whether she is witness of truth and her testimony can be relied upon for basing conviction.

7 By now it is well settled that no corroboration is required to the testimony of the victim of a rape for basing conviction. Evidence of victim of sexual assault stands on higher pedestal than evidence of an injured witness and to an extent, it is more reliable than evidence of an injured witness. A female child subjected to sexual assault is not an accomplice to the crime but is a victim of lust of the accused. Similarly, it is also well settled that testimony of child witness cannot be rejected merely because a witness is a child. Such evidence needs deeper scrutiny as children are prone to tutoring but if ultimately evidence of a child witness is found truthful and reliable, then it can be acted upon. In the case in hand also, the victim of the crime is a minor female child aged about 13 years and 9 months. Her evidence, as such,

assumes utmost importance for inferring guilt of the appellant/convicted accused. Prior to adverting to her evidence, it needs to be put on record that from cross-examination of PW2 Ranjana – who happens to be mother of the victim female child, it is brought on record that family of the victim female child/PW1 and that of the appellant/convicted accused, were having thick relations. Wife of the appellant/convicted accused was a very good friend of PW2 Ranjana, who is mother of the victim female child/PW1. They both used to go to the market together, used to purchase articles and vegetables together. One of them used to bear expenses of such purchases. It is also elicited from cross-examination of PW2 Ranjana that whenever she used to offer money, she used to hand over the same to the wife of the appellant/convicted accused. Her gold as well as ATM card was also used to be in custody of wife of the appellant/convicted accused. This factual position brought on record from cross-examination of mother of the victim female child/PW1 will have to be kept in mind while assessing evidence of the victim female child/PW1 as well as her mother.

8 Overall scrutiny of evidence of the victim female child/PW1, who at the relevant time, was below 14 years of age, shows that in a very natural way she deposed in respect of the incidents which took place on 4th August 2015 and 5th August 2015. Her evidence needs to be appreciated in the light of admitted position emerging on record. As stated by her, on 4th August 2015, she as well as her parents attended religious function followed by dinner in the agricultural field of Bedag arranged by her maternal grandfather. She stated that the appellant/convicted accused came there in a Maruti car and told her to help him in turning the car. She, therefore, sat on the back side of the car and helped him in turning the car. As testified by her, thereafter, the appellant/convicted accused sat beside her, pressed her breast after lifting her T-Shirt, kissed her and took bite. She got frightened because of this incident. Except suggestions denying the statements made by the victim female child/PW1 in her chief-examination, nothing more could be elicited on this aspect by the defence. The victim female child/PW1 stated that the function at

the agricultural field was attended by two hundred to two hundred and fifty people and after reaching the agricultural field till leaving for the house, she was with her mother and meeting her relatives. This half hearted cross-examination cannot be construed to mean that the appellant/convicted accused had not ever taken her to the car. No further questions were put to the victim female child/PW1 in that regard. Similarly, this incident took place after 8 p.m. in the agricultural field and precisely inside the car of the appellant/ convicted accused, who happened to be close to the family members of the victim female child/PW1. As such, presence of two hundred to two hundred fifty persons in the agricultural field has no consequence in the matter. The incident took place inside the motor car of the appellant/convicted accused, in the night hours, in the agricultural field, where chance of availability of electric light is nil.

9 The incident dated 4th August 2015 of sexual assault on the victim female child/PW1 gains corroboration from evidence of her mother PW2 Ranjana, who has categorically

stated that after 8 p.m., the appellant/convicted accused took the victim female child/PW1 with him for helping him in turning his car. PW2 Ranjana stated that within fifteen minutes her daughter came back. This version of the mother withstood the test of cross-examination and she is fully corroborating the version of the victim female child/PW1. As such, the prosecution has successfully proved the sexual assault on the victim female child/PW1 in the night hours of 4th August 2015, at the agricultural field at Bedag.

10 Though the victim female child/PW1 had asserted about one more sexual assault on her by the appellant/convicted accused, at about 7.30 a.m. of 5th August 2015, the learned trial court has held that this incident is not proved by the prosecution. The prosecution has not challenged this finding. As such, it is not necessary to go into the said aspect in this appeal.

11 Penetrative sexual assault on the victim female child/PW1 allegedly took place at her own house in the evening hours of 5th August 2015. Version of the victim female child/PW1

so also that of her mother PW2 Ranjana unerringly points out that PW2 Ranjana had left the house at 4.00 p.m. of that day because her niece Mayuri delivered a baby at Bharti Hospital of Miraj. She returned back to her house on the next day i.e. on 6th August 2015. Evidence of the victim female child/PW1 shows that her father had left for his work at Sahyadri Starch factory in the evening for attending the night shift. Except her parents, after death of her brother, there was nobody else in the house. The victim female child/PW1, as such, was all alone in her house in the evening hours of 5th August 2015.

12 On this backdrop, the victim female child/PW1 testified that after returning from the tuition class to her house, she changed her clothes and was about to leave the house at about 8.45 p.m. of 5th August 2015, for going to her grandmother for sleeping. This, according to her, was on instructions of her father, as there was nobody in the house. Evidence of PW2 Ranjana shows that grandmother of the victim female child/PW1 was residing along with Gajanan and his wife Anjana, who happen

to be uncle and aunt of the victim female child/PW1. The incident of penetrative sexual assault is vividly described by the victim female child/PW1. As per her version, when she opened the door of her house for going to the house of her grandmother, the appellant/convicted accused entered in her house, pushed her inside, switched off the electricity and made her to lie in the prone position. She deposed that she was denuded by the appellant/convicted accused, who also took off his own clothes. Then, he rubbed his penis on her buttocks. Thereafter, as stated by the victim female child/PW1, the appellant/convicted accused inserted his penis in her vagina. He pressed her breast and kissed her. After completion of the act, he threatened to kill her, if she dared to disclose the incident to anybody else.

13 The victim female child/PW1 then disclosed what happened subsequent to this penetrative sexual assault. She went to her grandmother's house in frightened condition. On the next day, she went to the tuition class and thereafter to school. In the morning hours, as stated by the victim female child/PW1, she

disclosed the incident to her friend Akshada and thereafter, in the afternoon, she again disclosed the incident to Akshada as well as to her another friend PW6 Kavita Nannikar. This happened in the lunch break. The victim female child/PW1 stated that both of her friends then advised her to disclose the incident to her mother, but she told them that her mother takes tension. The way in which she disclosed the incident to her mother is worth reproduction. The victim female child/PW1 stated that in the night hours of 6th August 2015, she hugged her mother and told the incident to her, while crying. This is most natural conduct of a minor female child who suffered trauma of penetrative sexual assault. Her father was not there. Her mother disclosed this incident to her aunt Anjana. Both of them were confused and therefore, they all went to the house of her maternal aunt at Haripur.

14 On this aspect, version of the victim female child/PW1 is gaining full corroboration from her mother PW2 Ranjana. As

stated by PW2 Ranjana, when she was preparing bed in the night of 6th August 2015, her daughter told her that she wanted to tell her something, provided she should not be scolded. On getting assurance from her mother, the victim female child/PW1 disclosed the incident which took place, to her mother. PW2 Ranjana, in her evidence, has narrated the actual disclosure made to her by her minor female child i.e. PW1. Evidence of PW2 Ranjana shows that her daughter disclosed to her about the sexual assault on her by the appellant/convicted accused, made on 4th August 2015 and the penetrative sexual assault on 5th August 2015. PW2 Ranjana deposed that then she disclosed the matter to her sister-in-law Anjana. Thereafter, she called her brother telephonically and informed the incident to her brother's wife. Then, they all went to Haripur at her parental house and then, as stated by PW2 Ranjana, she disclosed the incident to her parental relatives. This has ultimately ended in lodging the FIR by PW2 Ranjana on 6th August 2015 with Miraj City Police Station, Miraj. The FIR at Exhibit 31 lodged by PW2 Ranjana is fully corroborating her version in this regard.

15 Now let us examine whether evidence of the victim female child/PW1 and her mother was shattered in the cross-examination or it withstood the test of cross-examination. As stated in foregoing paragraphs, cross-examination of PW2 Ranjana shows that her family spent considerable amount on medical treatment of their son who died of cancer. PW2 Ranjana also admitted in her cross-examination that the victim female child/PW1 is undergoing chemotherapy at Mahatma Gandhi hospital at Miraj, right since her education in 7th Standard. However, expenses of chemotherapy of the victim female child/PW1 were taken care of by Rajiv Gandhi Health Scheme of the State. It was suggested to her that the appellant/convicted accused paid an amount of Rs.2 lakh and according to the defence, for avoiding repayment of this amount, the appellant/convicted accused is falsely implicated. These suggestions are denied. Cross-examination of PW2 Ranjana itself shows that the appellant/convicted accused was working as a driver in the school run by Sanjay Ghodawat group. It is not

pointed out to PW2 Ranjana as to when such amount was given to the family of the victim female child/PW1 by the appellant/convicted accused and what was the other source of earning of the appellant/convicted accused apart from his meager salary, which he might have been earning from his private employer while working as a driver. It was not pointed out as to whether such huge amount was transferred in bank account or was paid in cash. Hence, with such half hearted cross-examination, it cannot be inferred that monetary dispute may be the cause for lodging a false report. In Indian setting, such contingency is unheard of. Ultimately, suffering of penetrative sexual assault by a child in the family creates a stigma not only on the child but also on the family of such victim. It ruins future of the victim of such offence and as such there is reluctance on the part of the parents to report such incident. Therefore, it cannot stand to reason that parents of the victim female child/PW1 would falsely implicate the appellant/convicted accused in such heinous crime by putting future of their minor daughter at stake.

16 It is further seen from cross-examination of PW2 Ranjana that both families were sharing very cordial relations. Entire savings of PW2 Ranjana were used to be with the wife of the appellant/convicted accused. Gold of the family so also ATM card of the family of the victim female child/PW1 was used to be with the wife of the appellant/convicted accused. Had there been financial dispute between the parties, such trust would not have been reposed by the family of the victim female child/PW1 on the family of the appellant/convicted accused. Therefore, defence of false implication does not hold any water.

17 Now comes the medical evidence. On this aspect law is very clear. It is a settled legal position that the medical evidence is also a corroborative piece of evidence but where the medical evidence does not support the otherwise clinching and trustworthy ocular evidence of any material witness then, the testimony of such ocular evidence will prevail on the medical opinion and not vice versa. In the case of [Ranjit Hazarika v. State of Assam](#)¹, the opinion of the doctor was that no rape appeared to

1 (1998) 8 SCC 635

have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw over board an otherwise cogent and trustworthy evidence of the prosecutrix.

18 The Honourable Apex Court in **B.C.Deva v. State of Karnataka**², inspite of the fact that no injuries were found on person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Honourable Apex Court upheld the conviction of the accused. The Court observed that :

“18 The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

2 (2007) 12 SCC 122

19 The victim female child/PW1 was examined by PW8 Dr.Arati Apate at the Civil Hospital, Miraj. This Medical Officer had questioned the victim female child/PW1 for noting down the history. The victim female child/PW1 has stated to his Medical Officer about the sexual assault on her by the appellant/convicted accused. PW8 Dr.Arati Apate has stated in her evidence that the victim female child/PW1 disclosed to her that she suffered PV bleeding after the incident. This, according to the learned defence counsel, is contrary to the version of the victim female child/PW1. This minor inconsistency cannot be used to jettison version of the victim female child/PW1 in respect of the incident. PW8 Dr.Arati Apate had made record of history given by the victim female child/PW1 in Medico Legal Case papers at Exhibit 64. Column (II) on page 2 of the Medical Legal Case papers nowhere shows that the victim female child/PW1 had given history of per vaginal bleeding to this Medical Officer. As such, no overbearing importance can be given to this aspect even otherwise.

20 PW8 Dr.Arati Apate had not noticed any external or internal injuries either on private parts or body of the victim female child/PW1. Sexual assault was that of 4th August 2015 whereas the victim female child/PW1 was examined at 3.15 p.m. of 7th August 2015. As such, it is not expected to have evidence of sexual assault with passage of such time. So far as penetrative sexual assault is concerned, provisions of Section 3 of the POCSO Act need to be kept in mind. Penetrating penis to any extent into the vagina constitutes the offence of penetrative sexual assault. Slightest penetration can make out this offence and on that aspect, testimony of the victim female child/PW1 is fully trustworthy. As such, ocular evidence coming on record from the mouth of the victim female child/PW1 prevails over the medical evidence.

21 Careful scrutiny of evidence of the victim female child/PW1 so also that of her mother PW2 Ranjana makes it clear that there was no tutoring to the victim female child/PW1. Such is not even the defence of the appellant/convicted accused. Cross-

examination of the victim female child/PW1 does not suggest that she was tutored by anybody to depose against the appellant/convicted accused. Her family was not having any axe to grind against the appellant/convicted accused.

22 It is argued that first recital of the incident in question by the victim female child/PW1 was to her nearest friend Akshada. However, she is not examined by the prosecution and therefore, case of the prosecution is unreliable. Non-examination of the material witness assumes importance only when available evidence produced before the court is insufficient and untrustworthy. To make such argument, it is required to be seen whether evidence adduced by the prosecution is trustworthy. If the same is worthy of reliance, then such testimony has to be accepted and acted upon though there may be other witnesses available, who could also have been examined but were not examined. If available evidence suffers from infirmity and cannot be accepted in absence of other evidence which though available has been withheld from the court, then question of drawing

inference against the prosecution may arise. Such is not the case in hand.

23 In this view of the matter, for the reasons stated in foregoing paragraphs, I am of the considered view that the prosecution has established sexual assault as well as penetrative sexual assault by the appellant/convicted accused on the victim female child/PW1. The penetrative sexual assault on her was committed in the night hours of 5th August 2015 by trespassing her house with an intention to commit the offence and after wrongfully restraining her by the appellant/convicted accused. She was criminally intimidated by the appellant/convicted accused by extending a threat that she should not disclose the incident to anybody else. Hence, no infirmity can be found in the impugned judgment and order of conviction.

24 The learned counsel for the appellant/convicted accused vehemently argued that the sentence imposed on the appellant/convicted accused is disproportionate and is excessive. While imposing punishment, the Court is required to keep due

regard to all attending circumstances in which the offence took place. The degree of criminality shown while committing the crime is a relevant factor. The punishment is required to be proportionate and commensurate with the gravity as well as nature of crime and the manner in which the offence is committed by the accused. The appellant/convicted accused is suffering from AIDS as seen from the evidence of DW1 Dr.Amit Bhosale. The document at Exhibit 95 proved by this witness shows that the appellant/convicted accused is taking treatment for AIDS from the year 2014. Thus, he was well aware of the fact that he is suffering from a fatal contagious disease. Still, this fact did not deter him from committing the offence of penetrative sexual assault on the victim female child/PW1. By taking advantage of this fact, one may argue that the prosecution has not established that the victim female child/PW1, after penetrative sexual assault by the appellant/ convicted accused, has contracted AIDS. This argument needs to be rejected as the victim female child/PW1 was not subjected to the serological examination for detecting whether she had suffered the HIV after the penetrative sexual assault. Suffice

to state that, with such highly infectious condition, the appellant/convicted accused committed crime of penetrative sexual assault on the female child of less than 14 years of age. This mode and manner in which the offence was committed, does not allow me to hold that the learned trial court erred in exercising its discretion while imposing the punishment on the appellant/convicted accused.

25 In the light of foregoing discussion, the appeal is devoid of merits and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)