

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.201 OF 2016

TUKARAM DEVARAM GAWADE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Tejas Hilage, Appointed Advocate for the Appellant.

Mr.Amit Palkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

**DATE : RESERVED ON 26th AUGUST 2019
PRONOUNCED ON 27th AUGUST 2019**

JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 30th July 2014 passed by the learned Additional Sessions Judge, Khed – Rajgurunagar, District Pune, in Sessions Case No.146 of 2014 (old Sessions Case No.189 of 2012) thereby convicting him of offences punishable under Sections 376, 366 and 506 of the Indian Penal Code. For the

offence punishable under Section 376 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from imposition of fine of Rs.10,000/- and default sentence of rigorous imprisonment for 1 year. For the offence punishable under Section 366 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.5,000/- and default sentence of rigorous imprisonment for 1 year. For the offence punishable under Section 506 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 2 years apart from direction to pay fine of Rs.2,000/- and in default to undergo further rigorous imprisonment for 3 months. The learned trial court had directed that the substantive sentences shall run concurrently.

2 Facts, in brief, leading to the prosecution and resultant conviction of the appellant/accused are thus :

(a) The victim of the crime in question, who is examined as PW1 by the prosecution, is a school going girl taking

education in 6th Standard at Guruvarya R.P.Sabnis School of Narayangaon, at the relevant time. She was born on 2nd September 1999. The appellant/accused was known to her family and he used to visit her house frequently. The incident allegedly took place on 29th February 2012. On that day, victim minor female child along with her brother Vinod and her friend PW4 Nikita were going to school. At about 10.00 a.m. of 29th February 2012, they reached at the gate of their school and found the appellant/accused standing near the gate of that school. He caught hold of hand of the PW1/victim minor female child and started pulling her towards highway by threatening to kill her. By jeep she was taken to Village Alephata and from there by walk she was taken to the interior side. The appellant/accused took one dress from two girls who were found working in the field. Thereafter, by taking the victim minor female child in the bushes, the appellant/accused committed forcible sexual intercourse with her, after threatening to kill her. She was, then, taken to one village on the next day i.e.

1st March 2012. She was kept in one house in that village. She was given another set of clothes to wear. In the evening hours of 1st March 2012, parents of the victim minor female child including her father PW5 Bhima traced the victim minor female child. The appellant/accused ran away from that place. The victim minor female child then disclosed the incident of commission of rape on her, two or three days thereafter. Her father PW5 Bhima then lodged report of the incident to Police Station Akole, Taluka Akole on 7th March 2012. As the alleged offence took place within territorial jurisdiction of Police Station Narayangaon, the said report was transferred to Police Station Narayangaon where Crime No.73 of 2012 for offences punishable under Sections 376, 363 and 506 of the Indian Penal Code came to be registered. PW1/victim minor female child was sent for medical examination to Rural Hospital, Akole, where she was examined by PW7 Dr.Jayashree Nangare. After conducting routine investigation, the appellant/accused came to be charge-sheeted.

- (b) The learned trial court framed and explained the Charge for offences punishable under Sections 366, 376 and 506 of the Indian Penal Code to the appellant/accused. He pleaded not guilty and claimed trial.
- (c) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all eight witnesses. The victim minor female child is examined as PW1. Head Master Suryankant Chinchwade is examined as PW2. Exhibits 31 to 33 are extracts of General Register of the school reflecting date of birth of the victim minor female child. Panch witness Suresh Kedar is examined as PW3. Exhibit 35 is the Seizure Panchnama of seizure of clothes of the victim minor female child. Nikita Auti – friend of the PW1/victim minor female child is examined as PW4. Father of the PW1/victim minor female child namely Bhima is examined as PW5. Police Head Constable Sudam Fatangare attached to Police Station Akole is examined as PW6. Medical Officer Dr.Jayashree Nangare is examined as PW7. Reports of

medical examination of the PW1/victim minor female child are at Exhibits 50 to 52. Investigating Officer Shankar Avtade, Police Inspector of Police Station Narayangaon is examined as PW8.

- (d) The defence of the appellant/accused was that of total denial. However, he did not enter in the defence. After hearing the parties, the learned trial court, by the impugned judgment and order was pleased to convict the appellant/accused and sentenced him, as indicated in the opening paragraph of this judgment.

3 I have heard the learned counsel appearing for the appellant/accused. He argued that the testimony of the victim of the crime in question as well as her friend PW4 Nikita is not at all satisfactory. The victim minor female child is alleged to be kidnapped from populous area i.e. gate of the school and it is strange to note that nobody intervened or came to the rescue of the victim minor female child though she was accompanied by her

friend Nikita as well as brother Vinod. It is further argued that age of the victim minor female child is not proved by the prosecution and Medical Officer is not supporting the case of the prosecution. Therefore, according to the learned counsel, the appellant/accused is entitled for acquittal.

4 The learned APP supported the impugned judgment and order of conviction and the resultant sentence.

5 I have considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

6 So far as age of the PW1/victim minor female child is concerned, her oral evidence to the effect that her date of birth is 2nd September 1999 is not at all challenged by the defence in her cross-examination. PW2 Suryakant Chinchwade, Head Master of the school where the PW1/victim minor female child was taking education has candidly deposed that the date of birth of the PW1/victim minor female child is 2nd September 1999, as per

record in the General Register of the school. The extracts of the General Register maintained by the school where the PW1/victim minor female child had taken education are at Exhibits 31, 32 and 33. This evidence regarding age of the PW1/victim minor female child cannot be doubted as the same is not shattered in the cross-examination. Similarly, the fact that the PW1/victim minor female child was taking education in 6th Standard on the date of commission of offence i.e. on 29th February 2012, is also not disputed by the appellant/accused. Cumulative effect of this evidence makes it clear that on the date of the alleged offence i.e. on 29th February 2012, the PW1/victim minor female child was not even 16 years of her age. As such, even if it is assumed that she had consented for the act and had voluntarily accompanied the appellant/accused, the same is of no consequence. Therefore, suggestions in the cross-examination of the PW1/victim minor female child that she herself, on her own accord, accompanied the appellant/accused, is of no avail to the defence.

7 Evidence of the PW1/victim minor female child unerringly points out that on 29th February 2012 when she, accompanied by her brother Vinod and her friend PW4 Nikita, reached near the gate of the school, the appellant/accused caught hold of her hand, dragged her and under the threat, took her to Village Alephata in jeep. It is further in evidence of the PW1/victim minor female child that she was taken to a secluded area by the appellant/accused and at that place he committed forcible sexual intercourse with her. The PW1/victim minor female child has categorically deposed that this act was performed by the appellant/accused by threatening to kill her. It is further stated by her that on the next day i.e. on 1st March 2012, she was taken by the appellant/accused in one village and was kept in one house, where a lady was present. She was given another set of clothes at that place. She claimed to have been traced by her father in the evening hours of 1st March 2012.

8 Evidence of the PW1/victim minor female child is gaining corroboration from evidence of her friend PW4 Nikita, who has deposed that on 29th February 2012, when she, along with the PW1/victim minor female child and her brother Vinod, reached at the gate of the school, the appellant/accused kidnapped the PW1/victim minor female child by dragging her by catching hold of her hand. Evidence of PW4 Nikita further shows that when the appellant/accused had kidnapped the PW1/victim minor female child, her brother Vinod immediately rushed back to his house. Conduct of PW4 Nikita in not disclosing the incident to anybody is not sufficient to cast any shadow of doubt on her evidence because as per her version, Vinod had rushed back to his house, immediately after the incident. She has also stated that she was under fear and therefore, did not disclose the incident to anybody.

9 Evidence of PW5 Bhima makes it clear that at about 10.00 a.m. of 29th February 2012, his son returned to his house and told him that the appellant/accused had taken the

PW1/victim minor female child. PW5 Bhima had testified that then he immediately started searching his daughter and on 1st March 2012 found her in the house of one Devram Gavade in company of the appellant/accused. After coming to know about the incident, PW5 Bhima lodged report Exhibit 39 with Police Station Akole, which ultimately resulted in registration of the crime against the appellant/accused.

10 There is some delay in lodging the First Information Report (FIR) against the appellant/accused. Delay is caused because the PW1/victim minor female child had not disclosed the incident of commission of rape on her by the appellant/accused. Her evidence makes it clear that as she was under fear because of the happening of the incident, she did not disclose this fact to her parents. This is normal conduct of a minor female child, who happened to be kidnapped. Out of feeling of guilty and shame, she had not disclosed the incident of commission of rape, to her father. Therefore, her father PW5 Bhima, did not take any further action up to 7th March 2012. Evidence of PW5 Bhima is also clear

on this aspect. Ultimately, it was a matter of honour of family and this witness has clarified that because of shock he was unable to understand what is to be done. This, according to him, was the reason for delay in lodging the FIR. With this evidence on record, I am of the considered opinion that delay in lodging the FIR is properly explained by the prosecution and as such, on that count, case of the prosecution cannot be doubted.

11 The PW1/victim minor female child was examined by PW7 Dr.Jayashree Nangare on 7th March 2012, at Rural Hospital, Akole. This Medical Officer found the hymen of the PW1/victim minor female child perforated. However, because of delay in examination, this Medical Officer found no evidence of any recent sexual intercourse with the PW1/victim minor female child. It is well settled that for making out the offence of commission of rape, availability of positive medical opinion is not sine-qua-non. Perforation of hymen is corroborating the version of the PW1/victim minor female child that she was subjected to rape by the appellant/accused on 29th February 2012.

12 Clothes of the PW1/victim minor female child were found in the house where she was kept by the appellant/accused on 1st March 2012. Those came to be seized in presence of PW3 Suresh Kedar vide Seizure Panchnama Exhibit 35. Seized skirt of the PW1/victim minor female child was found to be containing stain of semen on it in the chemical analysis thereof. Thus, the forensic evidence is also supporting the case of the prosecution.

13 It is, thus, clear from the evidence adduced by the prosecution that on 29th February 2012, the appellant/accused kidnapped the PW1/victim minor female child, who, at the relevant time, was below 16 years of age, with intent that she should be compelled or forced to illicit intercourse with him and accordingly, the appellant/accused had committed rape on her. Evidence on record shows that the appellant/accused had intimidated the PW1/victim minor female child in order to prohibit her from raising any shout or to offer resistance to the appellant/accused. Thus, no infirmity can be found in the impugned judgment and order of conviction, so also the resultant

sentence. The appeal, as such, is devoid of merit, and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)