

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.698 OF 1996

1. Amrish Tara Dhale
(Abated vide order dated 04.03.2020)
 2. Sou. Indubai Daulat Dhale
Both R/o Kurundwad, Tal. Shirol
Dist. Kolhapur
- ... Appellants**

Versus

The State of Maharashtra

... Respondent

.....

Mr. S. A. Ingawale, Advocate for the Appellants.
Mr. Y. Y. Dabake, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 4th AUGUST, 2021.

PER COURT:

1. The appellants were convicted for the offence under Section 363 of Indian Penal Code (for short “IPC”) and sentenced to suffer rigorous imprisonment for five years. The appellants were convicted for the offence under Section 366-A of IPC and sentenced to suffer rigorous imprisonment for seven years. The appellant No.1 was convicted for the offence under Section 376 of IPC and sentenced to suffer imprisonment for seven years. The appellant No.2 was convicted for the offence under Section 376 r/w Section 109 of IPC and sentenced to suffer rigorous imprisonment for seven

years. The appellant No.1 had also preferred separate appeal viz. Criminal Appeal No.358 of 1999, challenging the impugned Judgment and order convicting him. Criminal Appeal No.358 of 1999 was disposed of as abated in view of death of Appellant Amrish Tarachand Dhale vide order dated 13th November, 2019. Vide order dated 4th March, 2020, Criminal Appeal No.698 of 1996 was abated against the appellant Amrish Tarachand Dhale. Amrish Tarachand Dhale, Daulat Tarachand Dhale and Indubai Daulat Dhale were tried before the Court of IVth Additional Sessions Judge, Kolhapur for offences under Sections 363, 366-A and 376 of IPC. The accused No.2 Daulat Tarachand Dhale was acquitted.

2. The brief facts of the prosecution case are as follows :-
 - a) Complainant Babita Sudam Gaikwad is the resident of Kurundwad, Taluka Shirol. Her husband is serving in armed forces. The prosecutrix is the daughter of complainant.
 - b) In – 1994 prosecutrix was taking education in New English School. There was love affair between the victim and Amrish (accused No.1). Complainant came to know about love affair between them from a chit found in the school bag of the victim. Complainant took the victim to the house of her brother at Kumbhoj.

c) Within the span of 15 days, marriage of victim was performed with Anil Dattu Pakhare from Dudhgaon. The victim was at the house of her husband for 15 days. Thereafter, she disappeared from the matrimonial home. Husband of victim visited house of complainant to check whereabouts of victim. Search was conducted. Missing report was filed by the husband of the victim with Sangli Police Station. After about 25 days victim came to the house of her mother at Kurundwad and on inquiry she told that she had been to Pune with Amrish (accused No.1). Thereafter, the complainant and victim visited Sangli Police Station and informed them about the visit of victim. While returning from Police Station they visited house of victim's uncle at Shirol. They halted there. On the next day in the afternoon victim left the house of her uncle without informing anybody. Search was conducted but victim could not found. Missing report was filed with Shirol Police Station on 13th August, 1994.

d) Complainant came to know that accused had kidnapped her daughter and hence the complaint was lodged with Shirol Police Station on 7th September, 1994. First Information Report (for short "FIR") was registered vide C.R. No.84 of 1994 for offences under Sections 363, 366-A r/w

Section 34 of IPC.

e) Investigation was conducted. Statements of witnesses were recorded. chit i.e. love letter was found in the school bag of victim girl. Victim was traced. Panchanama of the premises where she was found was recorded. Clothes of the victim were seized under panchanama. Statements of witnesses were recorded. Victim was sent to civil hospital for medical examination. Accused No.2 was arrested on 29th October, 1994. Accused No.1 was arrested on 31st October, 1994. Accused No.1 was sent for medical examination and for taking samples of blood and semen. Ornaments were seized. Clothes and samples of blood and semen of accused No.1 were sent to C.A. Victim was sent to Bal Sudhar Grah as she refused to go to her parents house. Charge-sheet was filed. Case was committed to the court of Sessions.

f) Charge was framed against the accused vide order dated 27th June, 1996 for offences under Section 363 r/w Section 34 of IPC, 366-A r/w Section 34 of IPC, Section 376 r/w 34 of IPC and Section 376 of IPC.

3. Prosecution has examined 25 witnesses. Statements of the accused were recorded under Sections 313 of Cr.P.C.

4. PW-1 – Babita Gaikwad is the mother of victim. She is the complainant. She has lodged the complaint dated 13th August, 1994 (Exh.15). She also lodged the complaint dated 7th September, 1994 (Exh.16). PW-2 – Suman Gaikwad is the aunt of the victim. PW-3 Bhausahab Tatoba Nandikurle. He acted as panch witness in relation to production of ornaments of the person of victim. PW-4 - Dinkar Sutar is the panch witness in relation to the clothes of the victim. PW-5 Sadu Dadu Solage is panch witness relating to clothes of the victim. PW-6 – Dattatray Pakhare is the father-in-law of victim. PW-7 - Ravindra Gaikwad is the friend of accused No.1 PW-8 – Mangal Badame. She has provided room on rental basis to the victim and accused No.1. PW-9 – Shevanti Jadhav is the neighbour of PW-8. PW-10 – Mangal Hirave is the relative of accused. PW-11 – Dr. Govind Lad is the Medical Officer at Public Health Centre Shirol. Accused No.1 was sent to him for taking samples of his blood and semen. PW-12 Shashikala Ravsaheb Chougule is the head-mistress of the school. PW-13 – Kamal Sawant is the neighbour of Saguna Kamble. PW-14 – Saguna Kamble is the relative of accused. PW-15 Milind Babu Kamble is the relative of accused. PW-16 – Vilas Nirmale gave lift to the accused. PW-17 – Girmal Kumbhar sold Mangalsutra to accused No.1. PW-18 is the victim girl. PW-19 Sadhna Narkar is the Medical Officer. She had

examined the victim. PW-20 – Murlidhar Sutar is the head-master of the school. PW-21 Dr. Vivek Choudhary had conducted radiology test of the victim. PW-22 Maruti Gaikwad had produced the admission register of the school. PW-23 – Ranjit Dhure is the Police Inspector. He conducted investigation. PW-24 – Dr. Dinkar Kamble. He had examined the victim. PW-25 – Babasaheb Bandu Shekh was head constable at relevant time. He recorded the police complaint.

5. After recording the evidence of the aforesaid witnesses, the learned Sessions Judge again framed the charge on 6th November, 1996 against all the three accused for offences under Sections 363 r/w Section 34, 366 r/w section 34 and 376 r/w Section 109 of IPC. Immediately thereafter, the trial Court vide Judgment and order dated 27th November, 1996 convicted the accused Nos. 1 & 3 for the aforesaid offences.

6. Learned Advocate for the appellant Mr. Ingawale submitted that there is no evidence to convict the appellant Indubai Daulat Dhale (accused No.3). The trial Court has committed an error in convicting her. The Judgment is contrary to the evidence on record. The complainant has never stated in her evidence that her daughter is kidnapped by the accused. No case was established under Section 376 of IPC. The victim came to her house after 25

days. Hence, the complaint was filed on the basis of information provided to the complainant. However, the victim has denied that the accused had kidnapped her. The offences under Sections 363, 366 & 376 were not made out. The victim had admitted that her parents had performed marriage of victim against her will. The trial Court has not appreciated the evidence of Milind Kamble and Saguna Kamble. There is no evidence of kidnapping victim. There is no direct evidence of taking away the victim from the custody of guardian. No evidence was put forth in respect of first missing report lodged with Sangli Police Station. The prosecution has failed to prove the offence under Section 376 of IPC. The evidence of Medical Officer does not specifically opine that the victim was subjected to sexual intercourse. There is no evidence that the accused No.1 had subjected the victim to sexual intercourse.

7. Learned APP submitted that the victim was minor. Complaint was lodged by PW-1. The victim was in love with the accused No.1. She left the house. She was enticed by accused No.3 and other accused and kidnapped her from lawful guardianship. Evidence on record disclose that the victim was in company with the appellant/accused No.3. The victim has stayed with accused No.1. There is evidence to infer that there was sexual intercourse between accused No.1 and the victim.

8. Charge was framed against accused on 27th June, 1996. As per the said charge accused Nos. 1 to 3 had kidnapped the victim under 16 years of age from lawful guardianship of her mother on 12th August, 1994 and committed offence under Section 363 r/w Section 34 of IPC. The accused Nos. 1 to 3 enticed the victim to go from her parental house from Kurundwad, Shirol with intent that the victim may be forced to illicit intercourse with accused No.1 and thereby committed offence under Section 366-A of IPC r/w Section 34 of IPC. In furtherance of common intention accused Nos. 1 to 3 committed rape on the victim and thereby committed offence under Section 376 r/w Section 34 of IPC. The accused No.1 committed rape on the victim and thereby committed offence under Section 376 of IPC.

9. PW-1 Babita Gaikwad is the mother of victim. She has deposed that there was love affair between victim and accused No.1. chit was found in the school bag of victim. The complainant took the victim to the house of her brother at Kumbhoj and within 15 days, marriage of victim was performed with Anil Pakhare of Dudhgaon. Thereafter, the victim stayed with her husband for 15 days. After 15 days her son-in-law came to her house and enquired about victim, since she has left his house. She could not be traced. Missing report was filed with Shirol Police Station. The victim

returned after 25 days. She disclosed that accused No.1 had enticed her and took her to Pune. She also stated that accused No.2 had left her at the house of mother. Accused No.3 was along with her when she was left at the house of mother. All the accused had taken her to Pune. The ornaments given to the victim were not found on her person. The victim disclosed that the ornaments were sold by the accused. They went to Rural Police Station. The complainant and the victim halted at Shirol. The victim again ran away from the house. The complaint was lodged with Shirol Police Station. (Exh.16). The victim was brought to the Police Station after one month. Accused No.1 was also at Police Station. PW-1 produced the chit found in bag of victim (Exh.17). Article-5 mohanmal is not given by PW-1 to victim at the time of marriage. She identified the ring. In the cross examination she deposed that the victim was not ready to marry Anil as she wanted to pursue her education. At the time of lodging complaint she had stated to the Police that golden mohanmal, golden ear rings and paijan were given by her at the time of marriage to her daughter. The said fact is not appearing in her complaint.

10. PW-2 – Suman Gaikwad is the aunt of the victim. She stated that her nephew told her that Ravindra Gaikwad, and Amrish Dhale (Accused No.1) are moving around her house when

victim was residing. Husband of victim had visited her house and informed that the victim had left his house. After return of victim to house of PW-1, she came to her house along with PW-1, while returning from Sangli. Husband of victim was with them.

11. PW-3 – Bhausaheb Nandikurle is the panch witness for production of ornaments of victim. He stated that one woman namely Sawant produced ornaments. Panchanama was recorded. Bormal and rings were seized. Panchanama was not read over to them. In cross examination he stated that Shirol Police told him to sign and he signed on those papers. He does not remember whether contents of panchanama were read over to him. Panchanama dated 4th November, 1994 was marked as Exh.20.

12. PW-4 – Dinkar Sutar is the panch witness for recovery of clothes of the victim and place/room where victim was residing with accused No.1. He did not support prosecution. PW-5 – Sadu Solage is the panch witness for clothes of the victim and place where victim stayed with accused No.1 on rental basis. He was declared hostile. Panchanama was Exh.67.

13. PW-6 – Dattatray Pakhare is the father-in-law of victim. According to him marriage of his son Anil was performed with the victim on 18th June, 1994. Victim stayed in their house for

9 days and thereafter, she went to her uncle's house of Kumbhoj. His elder son brought victim to his house. On the same day one girl, who was friend of victim along with one person came to his house and enquired about victim. She told that she was in need of room. He identified accused Nos. 2 & 3 as the persons who visited his house. Friend of victim along with one person came to his house and inquired about victim. The girl stated that she is need of room premises. On the next day victim came to his house. The women again returned to the house. Victim went to the latrine. She did not return. She was not in latrine. Search was conducted in village. She was not found. When victim left the house she was wearing golden Bormal of 6 grams, gold ear rings on her person. After 15 days Sangli Police informed that she was found.

14. PW-7 Ravindra Gaikwad was allegedly friend of accused No.1. He deposed that he do not know victim. On 11th July, 1994 Rajaram Gaikwad did not visit him for inquiry. He was declared hostile. He was cross examined by APP.

15. PW-8 – Mangal Badame stated that she do not know Surekha Kamble and her mother. She is not giving rooms on rent. She do not know accused No.1. She is not giving room on rent. On 20th August, 1994, nobody came to her in search of room. She was

declared hostile and cross examined by prosecution.

16. PW-9 – Shevanti Jadhav has stated that nobody was residing in the house of Mangal Badame on rent. She do not know whether Mangal Badame is giving rooms on rent. She do not know accused No.1 and victim. She was declared hostile.

17. PW-10 – Mangal Hirve did not support the prosecution case. She was declared hostile.

18. PW-11 – Dr. Govind Lad is the Medical Officer at Public Health Centre, Shirol. Accused No.1 was sent to him for taking sample of his blood and semen. He took samples for sending it to C.A.

19. PW-12 – Shashikala Chougule is the head-mistress of New English School for girls at Kurundwad. She produced register of school. She stated that victim took admission in her school on 8th June, 1992. Her date of birth is mentioned in the register. The date is mentioned on the basis of certificate issued by previous school. The school leaving certificate bears her signature.

20. PW-13 – Kamal Sawant has stated some guests had visited the house of Sagunabai. There were two ladies and one male. Accused No.3 was one of them. Accused No.1 was also with them. The victim was also with them. She saw accused No.3 for

2-3 days in house of Sagunabai. Other two guests stayed at the house of Saguna for a month. Their names were Amarsinh and Sujata. Amarsinh and Sujata resided at house of Milind Kamble in village. She purchased ornaments from Sagunabai. She produced the ornaments Bormal and ring before the police. Victim used to visit her house. She had told that Amarish is her husband. She married him with her free will and she is in love with him. They married without consent of her parents and left the house and came to Mumbai. She identified the girl, who accompanied accused Nos.1 and 3.

21. PW-14 is Saguna Kamble. She deposed that Indubai is her distant relative. Indubai along with one boy and girl came to her. After Milind Kamble came they went to his house. Indubai stayed for two days at Kambles' house and others stayed for one month with Milind Kamble. The ornaments were sold to Kamal Sawant. In the cross examination she stated that prior to incidents Indubai and accused No.1 did not come to her.

22. PW- 15 – Milind Kamble has deposed that accused No.3 resided for one day in his room. Accused No.1 and victim stayed in his room as husband and wife.

23. PW-16 – Vilas Nirmale stated that accused No.1 requested him to drop him at Karad by his vehicle. He dropped accused Nos.1 and 3 and victim at Sangli S.T. stand.

24. PW-17 – Girmal Kumbhar is the shop owner. Accused No.1 had been to his shop. Accused No.1 had inquired with him about Mangalsutra. He sold Mangalsutra to accused No.1. In the cross examination he stated that several visitors visited his shop. He does not know all the customers.

25. PW-18 – is the victim. She deposed that she was studying in New English School, Kurundwad. She does not know Amarish Dhale. She was ill treated at the house of her husband. Her marriage was performed against her will. She resided at the house of her husband for a week. After marriage she was resided at her house of mother for 5 days. Her father used to ill treat her. She was ill treated at the house of her husband on the count of work and on the count of bringing some articles from father's house. She was not having any love affair with anybody. She did not send love letters to anybody and nobody was sending love letters to her. No chit was found in her bag. During her stay at the house of her husband she never went anywhere alone. She do not know the accused sitting before the Court. In the cross examination by

prosecution after she was declared hostile, she stated that it is not true that she had love affair with accused No.1 and she used to exchange letters. It is not true that accused No.3 had helped her in exchanging love letters. She denied that there was sexual intercourse between her and accused No.1 and accused Nos. 2 and 3 were encouraging and assisting them. The ornaments which were given to her at the time of marriage were taken by her husband. All the suggestions and averments in her alleged statement recorded by Police were denied by her. She gave her date of birth as 30th August, 1978.

26. PW-19 – Sadhana Narkar has deposed that the victim was sent by Shirol Police Station to Sangli General Hospital. She recorded the history and admitted the victim in the hospital and sent her for gynecological examination to Dr. Kamble, who examined her. She produced medical report. The report indicated that victim was habituated to sexual intercourse. The victim was sent for radiological test for age determination. It was conducted by Dr. Chaudhari. In the cross examination she stated that there is no opinion in certificate issued by her.

27. PW-20 – Murlidhar Sutar is the teacher at Sane Guruji Vidyalaya, Kurundwad. According to him on 12th June, 1989 Sujata

Gaikwad has taken admission in his school in 5th Std. She came to school from Kanya Vidya Mandir, Kurundwad. In the register her date of birth is mentioned as 5th June, 1980. The admission was given to her on the basis of certificate issued by Kanya Vidya Mandir. He produced the register of school. School leaving certificate was produced.

28. PW-21 – Dr. Vivek Chaudhary is the Medical Officer. Victim was referred to him for radiological examination. Radiological bony age of victim was as 16 to 17 years. In cross examination he stated that bony age can vary by six month either less or more.

29. PW-22 – Maruti Gaikwad is serving in school. He brought admission register of Kanya Shala Kurundwad. The victim was in the said school. Since 1st to 4th standard. There is entry in the name of Sujata Sudam Gaikwad. He identified school leaving certificate issued by school.

30. PW-23- Ranjit Dhure was attached to Shirol Police Station. He conducted investigation. He stated that victim was found at Solage Mala on 29th October, 1994. He recorded statements of victim and other witnesses. In the cross examination he deposed that he had not collected papers from Sangli Police

Station about missing report of Sujata.

31. PW-24 – Dr. Dinkar Kamble is the Medical Officer, who examined the victim. He deposed that he had examined the victim. She was referred for examination on 29th October, 1994. There was no injury to genital organ. External genital i.e. libia majora and libia minora were normal. She was regularly menstruating. There is old hymenital tear. She was habitual for intercourse.

32. PW-25 – Babasaheb Shekh was serving as head constable at Shirol Police Station. He stated that missing report was filed with Shirol Police Station. (Exh.15). On 7th September, 1994 Babita Gaikwad filed complaint of kidnapping of her daughter. C.R. No. 84 of 1994 was registered. He recorded spot panchanama and statements of witnesses. Then investigation was handed over to API Dhuri. Thereafter, again he took over investigation. Accused No.3 was arrested on 2nd November, 1994. He seized ornaments. Victim was not willing to go to her parents house. She was sent to Bal Sudhar Graha. Before filing missing report at Shirol Police Station, missing report was filed at Sangli Police Station. The papers of said missing report were demanded but not given to him. Complainant did not state while filing complaint that she had given Mohanmal, Ear rings and Paijan to her daughter.

33. The appellant was arraigned as accused No.3. Accused No.2 was acquitted and accused No.1 has passed away. There is no evidence that the victim was enticed from the lawful guardianship of the complainant. It is not established that the victim was subjected to sexual intercourse by accused No.1 and that accused No.3 has aided and abetted her in commission of the said offence. There is no evidence to establish the charge under Section 363 of IPC and 366-A of IPC. Most of the witnesses have not supported the prosecution case. There is no cogent evidence to establish that the appellant/accused No.3 was involved in kidnapping the victim or subjecting her to kidnapping for the purpose of forcing her to under illicit sexual intercourse with accused No.1. The medical officer have not given opinion that accused No.1 had subjected the victim to sexual intercourse. Although the victim was minor, she was forced to marry with Anil Pakhare by the complainant and her brother. She had stayed for sometime in the house of her husband. It cannot be inferred that she was subjected to sexual intercourse by accused No.1.

34. The charge was framed on 27th June, 1996 that on 12th August, 1994, at about 3.15 p.m. The victim girl below age of 16 was kidnapped from lawful guardianship of her mother Babita Gaikwad while the victim was in the house of Rajaram Laxman

Gaikwad, in furtherance of common intention by the accused and committed offence under Section 363 r/w Section 34 of IPC. On 12th August, 1994 in furtherance of common intention the accused induced victim under age of eighteen years to go from her parental house from Kurundwad, Shirol to force victim to illicit intercourse with accused No.1 and committed offence under Section 366-A of IPC. On 12th August, 1994 in furtherance of common intention victim was raped and committed offence under Section 376 r/w Section 34 of IPC. Accused No.1 committed rape on victim and committed offence under Section 376 of IPC. After recording evidence of 25 witnesses, the trial Court by order dated 6th November, 1996 altered the charge. As per new charge, on 10th July, 1994 and 12th August, 1994, victim was kidnapped from lawful guardianship of her husband from village Dudhgaon, Dist. Sangli and lawful guardianship of victim's uncle Rajaram Gaikwad and mother Babita Gaikwad and committed offence under Section 363 r/w Section 34 IPC. Thus, new charge of kidnapping from lawful guardianship of victim's husband from Sangli and from victim's uncle at Shirol was framed. In furtherance of common intention, the accused induced victim, a girl under age of 18 years to go from husbands house from village Dudhgaon, Sangli and house of her uncle at Shirol and may be forced to illicit intercourse

with accused No.1 and committed offence under Section 366-A of IPC. Inducement to go from house of victim's husband is altered charge. Accused No.1 prior to kidnapping victim and at Kurla, Mumbai and Ichalkaranji on numerous occasions after kidnapping committed rape on victim and accused Nos.2 and 3 abetted the commission of offence under Section 376 of IPC and 109 r/w Section 376 of IPC. The time and place of incident are altered. On 6th November, 1996 pursis was filed by accused for no cross witnesses. (Exh.109).

35. Complainant (PW-1) is the mother of victim (PW-18). The prosecution case stems from the fact that victim and accused No.1 were having love affair. Complainant found chit in school bag of victim. PW-1 took victim to the house of her brother and within 15 days marriage of victim was performed with Anil Dattu Pakhare of Dudhgaon. It is pertinent to note that it is the case of the prosecution that victim was minor and thus marriage was performed while she was minor, victim went to house of husband. After 15 days Anil Pakhare came to PW-1 and told that victim has left his house. She could not be traced. Complaint was filed by Parents of Anil Pakhare at Sangli that victim is missing. Victim returned to PW-1 and she told that she had been to Pune with accused No.1. PW-1 took victim to Sangli Rural Police Station.

Victim's statement was recorded and her custody was handed over to PW-1. They returned to house of brother of PW-1, Rajaram Gaikwad on 11th August, 1994. Victim again left house on 12th August, 1994. PW-1 lodged complaint with Shirol Police Station on 13th August, 1994 (Exh.15). She again went missing from house of her uncle Rajaram Gaikwad. PW-1 lodged complaint with Shirol Police Station on 7th September, 1994. Offences were registered under Sections 363, 366(A) r/w Section 34 of IPC. After one month victim was brought by Police. Accused No.1 was also at Police Station.

36. PW-1 has not disclosed the age or date of birth of victim in her evidence. In her complaint dated 13th August, 1994 (Exh.15) age of victim is not mentioned. In complaint dated 7th September, 1994, (Exh.16) it is stated that victim's age is 15 years. PW-18 (victim) has given her date of birth as 30th August, 1978. Prosecution has examined PW-12, PW-20 and PW-22 to prove age of victim. PW-12 is serving in New English School from 1989. Victim took admission in her school on 8th June, 1992. Date of birth is mentioned in register as 5th June, 1980. The date is mentioned on the basis of certificate issued by previous school. School leaving certificate was produced. The date of birth mentioned in said certificate is 5th June, 1980. Thus, date of birth is on the basis of

certificate by previous school. Birth certificate was not produced. Document relating to birth provided by previous school is not known. PW-20 is serving as teacher in Sane Guruji Vidyalyaya, Kurundwad. According to him victim took admission in his school on 12th June, 1989. She came to his school from Kanya Vidya Mandir at Kurundwad. Her date of birth mentioned in register is 5th June, 1980. The admission was given on the basis of certificate issued by Kanya Vidya Mandir. He produced register and school leaving certificate of Kanya Vidya Mandir. Birth certificate was not produced PW-11 is serving at Kanya Shala.

37. To establish the charge under Section 363 of IPC or 366-A of IPC, the age of victim is relevant factor.

38. PW-2 is the wife of complainant's brother Rajaram Gaikwad. The amended charge is that victim was kidnapped from house of Rajaram Gaikwad. The evidence of PW-2 discloses that her nephew told her that accused No.1 and Ravindra Gaikwad were moving around her house when victim was residing with them. The above version is hearsay. The prosecution has not examined Rajaram Gaikwad. Ravindra Gaikwad (PW-6) was examined but did not support prosecution case. He produced register. Date of birth was shown 5th June, 1980. He produced school leaving

certificate issued by his school. On what basis the date of birth of victim was shown as 5th June, 1980 is not clarified. During his cross examination he stated that for taking admission in school birth certificate must be produced. He produced document as birth certificate given by parents. However, further clarified that it is not birth certificate but a form for admission in school. Thus, none of the witness has produced birth certificate.

39. PW-6 Dattatray Pakhare is the father-in-law of victim. Marriage of victim was performed with his son Anil Pakhare. PW-1 has stated that Anil came in search of victim. He had been to Sangli Rural Police Station. He has not been examined by prosecution. PW-6 has not disclosed that two persons visited. He deposed that two persons visited his house under pretext of searching rental premises and thereafter victim disappeared. He also referred to bormal and ear rings given to victim. He has identified accused Nos.2 and 3 as person, who visited his house. He has not stated that there was any identification parade to identify accused during investigation. It is pertinent to note that after victim was missing Anil Pakhare met PW-1 to enquire about her, he did not disclose the aforesaid facts to PW-1. The version of PW-6 is after thought.

40. PW-8 Mangal was declared hostile. She did not identify accused No.1 She do not know Surekha Kamble. On 20th August, 1994 nobody came to her in search of room. She was cross examined by APP. PW-9 Shevanti Jadhav denied that PW-8 has four rooms and that she gives room or rent. Nobody was residing in house of Mangal Badame (PW-8). She do not know accused No.1 and victim. PW-10 Mangal Hirve did not support case of prosecution. She was declared hostile. She denied that accused Nos. 1 & 2 are related to her. These witnesses were examined to show that accused and victim were staying together in room premises of witnesses. Kamal Sawant (PW-13) is resident of Kurla. PW-14 Saguna is her neighbour. According to her some guests had visited PW-14. Since Saguna was not in house, the guests were made to sit in her house. Accused No.3 and accused No.1 were the guests. She saw accused No.3 at house of PW-14 for 3 days. Two others resided at house of PW-14 for month. She disclosed names of guests as Amarish and Sujata. Thereafter they resided at house of Milind Kamble. She also referred to transaction of ornaments. Whereas, PW-14 Saguna Kamble stated that accused No.1 and 3 and one girl visited her. Accused No.3 was residing for two days at house of Milind and others resided at house of Milind Kamble for one month. Thus, there is contradiction in the evidence of PW-13

and PW-14. PW-15 Milind Kamble stated that guests of PW-14 stayed in his room for a month. They were residing as husband and wife. He identified victim girl having stayed with accused No.1. She was unknown to him. Identification is for the first time in Court.

41. PW-18 is the victim girl. She denied having affair with accused No.1. Her father used to ill treat her. She was ill treated at Matrimonial home. She has denied that there was physical relationship between her and accused No.1. She was cross examined by prosecution. She gave her date of birth as 30th August, 1978. Thus, this witness has not supported prosecution case.

42. PW-3 Panch witness for Seizure of Bormal and Ear Rings stated that Panchanama was not read over to him. He do not remember whether he signed the panchanama. Subsequently, he stated that panchanama was read over to him. Shirol Police told him to sign and hence he signed those papers. He do not remember whether contents of panchanama were read over to him. It is difficult to believe evidence of such witness. PW-4 and PW-5 were the panch witnesses for recovery of clothes of victim. Both were declared hostile.

43. PW-19 Sadhana Narkar is the Medical Officer. On 29th October, 1994 victim was sent for Medical examination. She was sent for gynecologist for examination. She was examined by Dr. D.B. Kamble. She was also sent for radiological test. Certificate issued by her do not express any opinion. PW-21 Dr. Chowdhary conducted Radiological test for bony age. According to him bony age of victim is 16 to 17 years. PW-24 Dr. Kamble had examined victim. He stated that there was no injury to genital organ. Victim is regularly menstruating. There was old hymenital tear.

44. The CA report Exh.89 regarding clothes of victim, mentions that no semen was detected. Blood was detected. Blood group is inconclusive. C.A. report Exh.90 relates to blood and pubic hair, vaginal smear, nail clipping. No blood was detected. No semen was detected. Blood group could not be determined. C.A. report Exh.91 relates to semen of accused No.1 Blood group could not be determined and results are inconclusive. C.A. report Exh.92 regarding blood of accused No.1, the blood group is "O".

45. The accused No.1 has expired. The appellant is charged for aforesaid offences. There is doubt about age of victim. The victim did not support case of prosecution. It is not established that appellant had taken or enticed minor under 16 years of age

from lawful guardianship. Charge under Section 366-A is also not proved. The offence under Section 376 of IPC has not been proved. The evidence of witnesses does not inspire confidence. The appellant cannot be convicted for aiding and abetting the co-accused for commission of offence of rape as there is no evidence to support the allegations. Hence, the conviction has to be set aside and appellant deserves to be acquitted.

46. Hence, I pass the following order :-

ORDER

- (i) Criminal Appeal No. 698 of 1996 is allowed;
- (ii) The impugned judgment and order dated 27th November, 1996, passed by the Court of IVth Additional Sessions Judge, Kolhapur in Sessions Case No.155 of 1995 convicting the appellant for offence under Section 363 of IPC, 366-A of IPC and 109 read with Section 376 of IPC is set aside and the appellant is acquitted of all the charges.
- iii) Appeal stands disposed of accordingly.

(PRAKASH D. NAIK, J.)