

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1549 OF 2018

Babalu Prakash Gaikwad

.... Appellant

Versus

The State of Maharashtra & Anr.

.... Respondents

.....

WITH

INTERIM APPLICATION NO.2581 OF 2021

IN

CRIMINAL APPEAL NO.1549 OF 2018

.....

Mr. Prashant V. Nayak, Advocate (appointed) for the Appellant.

Smt. M.R. Tidke, APP, for Respondent No.1-State.

Ms. Rebecca Gonsalvez, Advocate (appointed) for Respondent No.2.

.....

CORAM : SARANG V. KOTWAL, J.

DATE : 09th DECEMBER, 2022

ORAL JUDGMENT

1. The appellant has challenged the judgment and order dated 29.9.2018 passed by the Additional Sessions Judge, Pune in Special POCSO Case No.83/2014.

2. At the conclusion of the trial, the appellant was convicted and sentenced as under :

i) The Appellant was convicted for commission of offence punishable under Section 342 of the I.P.C. and was sentenced to suffer R.I. for one year and to pay a fine of Rs.1000/- and in default of payment of fine to suffer R.I. for three months.

ii) The Appellant was convicted for commission of offence punishable under Section 366-A of the I.P.C. and was sentenced to suffer R.I. for five years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer R.I. for six months.

iii) The Appellant was convicted for commission of offence punishable under Section 376(2) (i) of the I.P.C. and was sentenced to suffer R.I. for Ten years

and to pay a fine of Rs.50000/- and in default of payment of fine to suffer R.I. for one year.

iv) All the sentences were directed to run concurrently. The Appellant was given set off U/s.428 of the Cr.p.c.

. There were other three accused in the trial. The appellant was the Accused No.4. The other accused were acquitted from all the charges.

3. The prosecution case is that the victim in this case was about 13 years of age. Her date of birth was 11.3.2000. The incident is dated 17.1.2014. According to the prosecution case, in the evening on that date, the victim was going for her tuition class. On the way, she was stopped by the accused No.1. He forcibly made her sit on his motorcycle. She was first taken to his house and then she was dropped midway. Accused No.1

told the victim that she would be dropped to her house by the appellant. The prosecution case further is that the appellant instead of dropping her to her house, took her to a different place in village Dighi. He took her to a room and he kept her there throughout the night. During that period he committed rape on her. On the next day morning, the victim was found by the police officer and her maternal uncle. The police and her relatives were searching for her because her father had lodged a complaint regarding her missing in the late evening on 17.1.2014. After she was found alone on the road, she was taken back to her house. In the meantime, the father of the victim had expressed suspicion against the accused No.1 Nagesh and, therefore, FIR under Section 363 of IPC was lodged vide C.R. No.23/2014 at Vishrantwadi police station. Initially for a couple of days the victim did not narrate the incident in detail as she was frightened, but, on 21.1.2014 she narrated the incident to her family. Therefore, her father took her to police station and her statement was recorded. She informed about the acts

committed by the appellant. Her statement was recorded. She was sent for medical examination. The appellant was arrested on 22.1.2014. Section 376 of IPC was added and the investigation was carried out. During investigation, the appellant took the pancha and the police officers to the spot of incident. He also showed the spot where his motorcycle was parked. The police continued with their investigation. They recorded the statements of the witnesses. The clothes of the victim as well as those of the appellant were seized. The articles were sent for chemical analysis. At the conclusion of the investigation, the charge-sheet was filed and the case was committed before the Special Court.

4. During trial, the prosecution examined 12 witnesses, including the victim, her father, the victim's friend, the Clerk from her school where she was studying, the panchas, Naib Tahsildar who had conducted the test identification parade where she had identified the appellant, and the investigating

officers. The defence of the appellant was of total denial. At the conclusion of the trial, the learned Judge believed the prosecution case in respect of the acts committed by the Appellant and he was convicted and sentenced as mentioned earlier. However, it was held that the offence against the accused Nos.1, 2 & 3 was not proved. There was hardly any evidence against the appellant No.2 i.e. Nagesh's father. Similarly, even the accused No.3 was not aware about the intention of the accused No.4. As far as the accused No.1 Nagesh is concerned, the learned Judge observed that there was nothing to show that the victim was forced to go with him. Considering these aspects, the accused Nos.1, 2 and 3 were acquitted. However, learned Judge believed the prosecution case, more particularly the evidence of the victim and the medical evidence to reach the conclusion of guilt against the appellant and then convicted and sentenced the appellant as mentioned earlier.

5. The most important witness in this case is the victim herself. She was examined as PW-4. She has deposed that her date of birth is 11.3.2000. In the year 2014, she was studying in the 8th standard. After school hours, she used to attend a private tuition class between 6.00 p.m. to 8.00 p.m. She used to go to her classes by walking. On 17.1.2014, she along with her friend was going to attend the tuition class. Accused No.1 Nagesh came there on the motorcycle at about 5.45p.m. She was knowing him. He asked PW-4 to accompany him on his motorcycle. She refused, but, then he forced her to sit on his motorcycle. Nagesh then took PW-4 to the house of his aunt. Then he took her to his sister's house. He introduced PW-4 as his friend. Nagsh told PW-4 that he would drop her near the tuition class. By that time, the tuition class was to get over. However, he did not do so. Instead, he took her to a construction site near his house. The appellant was present there. The accused No.1 told the appellant to take PW-4 to her house. She sat on the motorcycle of the appellant. Instead of taking her to

her house, he took her towards village Dighi. He had tied her mouth with her stole. He took her to one room. The accused No.3 Bharat was told by him to get some food and liquor bottle. PW-1 identified all the accused including the appellant in the Court. After the accused No.3 brought food and liquor, he ate the food and drank liquor. He started smoking cigarette. PW-4 got frightened. Then the appellant committed rape on her. On the next day, the appellant left the room. He had latched the room from outside. After a couple of hours, the accused No.3 came there and took her on his motorcycle. He dropped her near a bus-stop at Wadi. She waited there till 2.00 p.m. and then started going to the house of her friend, who was staying in Tingare Nagar. PW-4 tried to contact her father telephonically using her friend's phone but she could not contact him. In the meantime, she spoke with another friend telephonically. That friend told PW-4 that her family members were searching for her. Therefore, she started going towards her house. She was not feeling well. After some time, one policeman and her

maternal uncle saw her. Both of them then took her to her house. She was tired and scared. She did not tell anything to her parents at that time. But on the next day she told about the incident to her parents. Then they went to the police station. There her statement was recorded. She was referred for medical examination to Sassoon Hospital. She narrated the history before the Medical Officer. Her statement was recorded under Section 164 of Cr.P.C. It was produced on record at Exhibit-76. After a few days, she was still suffering from pain and, therefore, she was again taken to the hospital. After few days, she was taken to Yerwada Central Prison for participating in a test identification parade. At that time, she identified the appellant. Her clothes, which she was wearing at the time of incident were handed over to the police.

In the cross-examination, she stated that she was taken by the appellant on his motorcycle at around 9.30 to 9.45 p.m. She denied the suggestion that because of darkness she

could not see the face of the person who had dropped her. She also deposed that she accompanied the appellant because he had promised her to take her to her house. When she was not taken to her house, she did not raise shouts and did not seek help because she did not feel it necessary. The appellant had assured her that she would be taken to her house. After the incident , on the next day she was brought to Vishrantwadi bus-stop at about 6.00 p.m. by the appellant's friend. She had reached her house at around 3.30 p.m. She had told her father about the incident on 21.1.2014 and on that day her statement was recorded. She denied the suggestion that since she had left with the accused No.1 voluntarily and since she was seen by others, she concocted a false story to save herself. In her cross-examination, two minor contradictions from her police statement were put to her. These two contradictions were ultimately proved through the evidence of investigating officer who had recorded her statement. Those portions are marked as Exhibits-171 and 172.

Those were regarding the spot where the accused No.1 had left her.

6. PW-1 was the father of the victim. He has deposed about the victim not returning home till 7.45 p.m. He alongwith his wife had gone to the tuition class but he came to know that the victim had not attended the tuition class on that day at all. He met the victim's friend who had accompanied her. She, in turn, informed them that one boy had taken her on a motorcycle. PW-1 suspected that the said boy was the accused No.1. He went to his house and made enquiries. He told PW-1 that he had left the victim near the tuition class itself. PW-1 again went near the tuition class but the victim was not found and, therefore, he went to Alandi Road Police Chowki and lodged a report that his daughter was missing. That report is produced on record at Exhibit-34. On the next day, he went to the police chowki and gave his statement expressing suspicion against the accused Nos.1 & 2. Based on this grievance, the FIR

was registered. The victim was found on 18.1.2014. She was brought back. For couple of days, the victim did not narrate the incident. But when she told them about the incident they took her to police station. Her statement was recorded. She was referred for medical examination. Her statement was recorded under Section 164 of Cr.P.C. After that she had also attended the test identification parade. According to PW-1, the victim's date of birth was 11.3.2000. He had handed over birth certificate of the school with the police.

In the cross-examination, he stated that the accused No.1's house was about 300 meters from his own house. The victim was born at village Wagla, Taluka – Parli. The tuition class was about 300 to 400 meters away from his house.

7. PW-10 was the victim's friend who had accompanied her when she was going to attend her tuition class. She did not support the prosecution case and was declared

hostile but her contradictory portion from her statement recorded by police was put to her where she had stated about the accused No.1 taking away the victim forcibly.

8. PW-2 Lata Hasurkar was a pancha for different panchnamas. In her presence, the clothes of the victim were produced. The victim showed the spot from where she was taken away and according to her the appellant had shown the spot where he had taken the victim. However, she did not identify the appellant specifically in the court.

9. PW-3 Shelar was friend of the victim's father and he had seen the victim and the accused No.1 together on 17.1.2014 at about 5.30 p.m.

10. PW-5 is another important witness. She was working as a Clerk with the school in which the victim was

studying. Her evidence is important. She has deposed as follows:

It was her duty to maintain General Admission Register. She used to get admission forms filled from the parents. She used to obtain original birth certificates. On 30.5.2016, PW-1 had handed over admission form for PW-4. In that, the victim's date of birth was mentioned as 11.3.2000. He also handed over one certificate issued by Village Development Officer, Grampanchayat Waghe, Taluka- Parli Vajinath, District – Beed certifying that the date of birth of PW-1 was 11.3.2000. Accordingly this witness made an entry at Sr. No.4612 in the general admission register maintained by the school. That entry was taken on 1.6.2006. This witness produced the original application for admission. The attested copy is produced on record at Exhibit-92. She had brought the original certificate issued by the Village Development Officer, Grampanchayat at Waghai. It was produced on record. These two documents were

produced on record at Exhibits-93 & 94. The attested true copy showing the entry at Sr. No.4612 was produced on record at Exhibit-95. She identified the handwriting of the person who had actually written that particular entry in the register. Though she was cross-examined, nothing much of any significance could be elicited through her cross examination.

11. PW-6 Dilip Bandal was a Naib Tahsildar. He had conducted the test identification parade on 22.4.2014. The victim had attended it and had identified the appellant in the parade. There were six dummies arranged for the parade who stood in one line. The appellant took his place at the third position who was identified by the victim. The memorandum of the test identification is produced on record at Exhibit-102.

12. PW-7 Dr. Swati Kagane was another important witness. She had conducted the victim's medical examination on 22.1.2014. She had recorded the history as given by the

victim. On examination, she found that she did not find injury on her person. However, the victim's hymen was torn at 6'O'clock position. There was bleeding through cervical OS. The bleeding was present through vagina. She collected the samples. According to her, from history and medical examination there was evidence of penetrative sexual vaginal intercourse. There is a noting by the learned trial Judge that in spite of giving sufficient opportunity to learned counsel for the accused, none of the learned counsel, including learned Advocate for the accused No.4 came before the Court for conducting cross-examination of this particular witness. Therefore, her evidence has remained unchallenged.

13. PW-8 Honaji Gagare, Police Head Constable, was carrier of the articles to the CA office.

14. PW-9 Pravin Dale was a photographer who had taken photographs of the spot and the motorcycle.

15. PW-11 Mangesh Jagtap, API had investigated the complaint regarding missing of the victim. He had registered the FIR, which is produced on record at Exhibit-35. He had seen the victim on the road on the next day. He had filed a report at Exhibit-153 for adding Section 376 of IPC and the provisions of the POCSO Act. The contradictions in the statement of the victim were proved through his evidence at Exhibits-171 and 172 as discussed earlier.

16. PW-12 Prashant Ahir, A.P. I. had completed the investigation and had filed the charge-sheet.

17. Learned counsel for the appellant submitted that the appellant was also convicted under Section 366-A of IPC. Charge under this section is not framed against the appellant. The ingredients of that section are totally different and, therefore, the conviction cannot be based under Section 366-A of IPC against the appellant. He further submitted that the age

of the victim is seriously disputed. The evidence of PW-5 is not acceptable. The father himself has not produced any birth certificate. Similarly the exhibits brought on record through this witness are not the actual documents maintained by her, and, therefore, there is serious dispute about the age of the victim. The Village Development Officer who had given the certificate regarding her date of birth is not examined, which is a serious lacuna. He further submitted that there is no other evidence to show that the victim was below 18 years of age.

18. Learned counsel for the appellant further submitted that the medical evidence does not corroborate the evidence of the victim. There were no injuries and there no signs of forcible sexual intercourse. He further submitted that the version of the victim is not believable. She had not raised any shouts and had not sought help from others throughout her journey from the spot from where she was taken away till the room in village Dighi. This conduct is unusual and does not

support the prosecution case. He further emphasized the fact that the other three accused are acquitted and to that extent her version is not believed by the trial Court. He, therefore, submitted that benefit should also be given to the appellant. He further submitted that apart from these aspects, the identity of the offender is seriously disputed. The victim was not knowing the person who had committed rape and in this particular case the prosecution has not established identity of the appellant beyond reasonable doubt. The procedure for conducting test identification parade is not proper. PW-6 had not even ascertained from the victim about the nature of offence. This is another serious lacuna according to him.

19. Learned APP as well as learned counsel for the respondent No.2 opposed these submissions. According to them, the victim is a truthful witness and there is no reason to disbelieve her. The evidence of PW-5 is important and there is

absolutely nothing wrong with that evidence. All the documents are produced on record.

20. Learned counsel for the respondent No.2 relied on the judgment of the Hon'ble Supreme Court in the case of *Jarnail Singh Versus State of Haryana*¹ to contend that the age of the victim can be determined on the basis of school record and in this particular case the entire school record showing her date of birth is brought on record. They are admissible documents. This record was prepared in the year 2006 itself. Therefore, there is no scope to argue that it is a manipulated record.

21. She further submitted that not only the medical certificate but the CA reports also show that the victim had suffered injuries. The medical evidence has remained unchallenged. The CA certificates show that there was blood

1 (2013) 7 Supreme Court Cases 263

found on the vaginal swab of the victim. The medical report shows that there was bleeding present and, therefore, the medical evidence is supporting her ocular evidence. She further submitted that the test identification parade is properly conducted and PW-6 has described the procedure and precautions followed while conducting the test identification parade. She submitted that the victim was subjected to this brutal offence. The appellant was with her throughout the night and, therefore, she could not have forgotten his face. She also identified him in the Court. Therefore, there is no reason to disbelieve her or the evidence of identification of the appellant.

22. I have considered these submissions. As far as age of the victim is concerned, I do not find any infirmity whatsoever in the evidence of PW-5. She has produced the school record based on the admission form and the certificate issued by the Village Development Officer of the village where the victim was born. All these documents were maintained in the ordinary

course of business. The entries were made in the year 2006 itself. They are certainly not manipulated entries. The source of information is also beyond reasonable doubt. PW-5 has identified the handwriting of the person who had taken the entry. She has identified attestation of all the documents. She herself had accepted the admission form from PW-1. Thus, her evidence is conclusive to prove that the date of birth of the victim was 11.3.2000. Therefore, on the date of incident i.e. on 17.1.2014 she was below 14 years of age.

23. Though the learned Judge has given benefit of doubt in acquitting the accused Nos.1, 2 & 3, the same reasoning cannot be extended in favour of the appellant. The prosecution case can be separated in two different parts. In the first part of the incident Accused No.1 Nagesh had taken the victim on his motorcycle and had dropped her near a construction site. Whether she had accompanied accused No.1 Nagesh willingly or whether he had forced her to come with him

is a question which is concluded by the learned trial Judge by giving acceptable reasons. However, just because that part of the story favoured the accused No.1, it would not mean that the victim's version in respect of the part played by the appellant was false. The main offence started in the second part after the accused No.1 had dropped the victim near the construction site. At that time the appellant had offered to drop her to her house and instead of taking her to her house she was taken to a different place and she was kept confined in a room till the next day morning. In the meantime, he committed rape on her. That part of the incident is sufficiently established by the prosecution through the evidence of PW-4 the victim herself. Her evidence is supported by the medical evidence as rightly submitted by learned counsel for the respondent No.2 and learned APP. The CA certificates also support the prosecution case that she had suffered bleeding because of this act. The medical evidence has remained unchallenged. The appellant was given sufficient opportunity to challenge that part of the evidence. However, it

was not challenged and, therefore, there is no reason to disbelieve the medical evidence.

24. As far as the evidence of PW-6 Naib Tahsildar is concerned, again I do not find any infirmity in his evidence. The procedure was properly followed and the victim had identified the appellant in the parade. Even otherwise, as rightly submitted by learned counsel for the respondent No.2, the victim was not likely to forget his face. She had identified the appellant in the Court as well, and has firmly stated that he was the person who committed rape on her during that night.

25. However, I am inclined to agree with learned counsel for the appellant that the conviction cannot be sustained as far as the offence under Section 366-A of IPC is concerned. First of all, a specific charge under Section 366-A of IPC was not framed against the appellant. Even otherwise the charge under Section 366 was framed only against the accused Nos.1 & 2.

The ingredients of the offence under Sections 366 and 366A of IPC are distinct from the other offences under which the appellant is convicted and sentenced. To that extent, the appellant's conviction and sentence under Section 366-A of IPC will have to be set aside. Instead the appellant is required to be convicted under Section 363 of IPC. The charge was already framed under Section 363 read with 34 of IPC against the appellant and accused Nos.1 & 2. At the same time, the sentence for five years R.I. can be imposed on him for conviction under Section 363 of IPC. Hence, the following order :

:: O R D E R ::

- i. Criminal Appeal is partly allowed..
- ii. The conviction and sentenced recorded by the Additional Sessions Judge, Pune vide judgment and order dated 29.9.2018 in Special POCSO Case No.83/2014 under Sections 342, 376(2)(i) and under Sections 3 & 4 of the POCSO Act are maintained.

- iii. The conviction and sentence recorded against the appellant under Section 366-A of IPC are set aside. Instead the appellant is convicted under Section 363 of IPC and is sentenced to suffer RI for five years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer RI for six months.
- iv. All the substantive sentences against the appellant are directed to run concurrently.
- v. The appellant is entitled to get set off under Section 428 of Cr.P.C.
- vi. The rest of the clauses in the operative part of the impugned judgment and order are maintained as they are.
- vii. The appeal is accordingly disposed of. With disposal of the appeal, nothing survives in the accompanying Interim Application and it is also disposed of.

(SARANG V. KOTWAL, J.)

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by
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