

(2014) 12 GUJ CK 0131
In the Gujarat High Court

Case No : Criminal Appeal Nos. 416 and 414 of 1996

Rashmibhai Himmatlal Dave and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 24-12-2014

Acts Referred:

Constitution of India, 1950 — Article 21 — Criminal Procedure Code, 1973 (CrPC) -
Section 313 — Evidence Act, 1872 - Section 114, 118, 129, 146, 5 — Penal Code,
1860 (IPC) - Section 114, 363, 366, 375, 376

Citation : (2015) 2 GLR 1296

Hon'ble Judges : Z.K. Saiyed, J.

Bench : Single Bench

Advocate : Atul H. Mehta and B.N. Doctor, for the Appellant; Hardik S. Soni, APP, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J. By way of present Appeals, the appellants challenge the judgment and order dated 30-5-1996 passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No. 186 of 1993, whereby the learned Sessions Judge has convicted the appellants - accused persons for offences punishable under Sees. 363, 376 and 366 of the Indian Penal Code. The learned Sessions Judge ordered the appellant-accused No. 1 (Criminal Appeal No. 414 of 1996) to undergo sentence for a period of seven years rigorous imprisonment for the offence punishable under Sec. 363 of the Indian Penal Code and to pay fine amount of Rs. 1,000/-, in default of payment of fine, further simple imprisonment of one year. The appellant No. 1 (Criminal Appeal No. 416 of 1996) (original accused No. 2) was ordered to undergo sentence for a period of 10 years rigorous imprisonment and to pay a fine of Rs. 1,000/-, in default of payment of fine, simple imprisonment for one year, for the offence punishable under Sec. 376 of the Indian Penal Code. The appellant Nos. 2 to 4 (Criminal Appeal No. 416 of 1996) were ordered to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs. 1,000/- and in default of payment of

fine, further simple imprisonment of one year, for the offence punishable under Sees. 366 and 114 of the Indian Penal Code. Here in this case, the accused-Babubhai has expired. Therefore, the appeal is abetted qua the said accused. Short facts of the case of the prosecution are such that on 25-11-1991, the complainant Jubedaben Vajesinh Rana lodged complaint with Jawaharnagar Police Station, Dist. Baroda, stating that on 5-11-1991, her daughter Hasina aged 16 years, had gone to fetch water at the public tap situated near Refinery Cross Road, at about 5-30 in the morning and same day was "Kalichaudash day". The daughter Hasina did not return for considerable time, the complainant went to make inquiry and she did not find her near the tap. At that time, she noticed light switched on at the house of original accused No. 1-Dilipsinh, and therefore, she went there. The said house was closed on front side, therefore, she went on the back side and peeped into the house through the window, where she saw three persons colouring the wall and she noticed that her daughter was there. Therefore, she entered into the house through back door and scolded her daughter as to why she did come there. There were four persons in the house. She got scared and went out. In the meanwhile, she saw that the original accused-Dilipsinh going away on the scooter and her daughter Hasina was sitting on the pillion seat. As per the complainant, she made search for her daughter for a considerable long time at several places like Bajva, bus stand etc. but she did not find her, and so ultimately, she was compelled to file the complaint. According to the complainant, she did not approach the police immediately because she felt that it might harm the reputation of the family and her daughter Hasina. After filing of the complaint, the police started investigation and arrested the accused No. 1, but Hasina could not be found.

1.1. As per the case of the prosecution, on that day of "Kalichaudas" the accused-Dilipsinh took the daughter of the complainant at the house of accused-Rashmibhai Himmatlal Dave at Gujarat Refinery Quarters and told the victim to stay with accused-Rashmibhai and said accused would buy her a car and bungalow and keep her nicely. It is also the case of the prosecution that the other accused were present in the house and the accused committed rape on victim on that day. Thereafter, the said appellant took victim to another quarter situated at Refinery township and she was made to stay for a day. On the next day, the victim was taken to the S.T. Bus stand at Baroda under the threats of being killed and from Baroda, the appellants i.e. accused-Anitaben Babubhai and Manishaben Rashmibhai took the victim to Bhavnagar and then she was taken to the house of appellant-accused Rashmibhai's father and she was made to stay there for one and half months. Thereafter, the accused brought her from Bhavnagar to village Sunav in the S.T. Bus and at Sunav, she was made to stay at the house of father of accused Anitaben, where the victim was not allowed to move out of the house. It is further case of the prosecution that thereafter, the accused i.e. appellant Nos. 1, 3 and 4 (Criminal Appeal No. 416 of 1996) brought the victim to Balva at the house of brother of the accused-Rashmibhai, where she was made to stay for about 3 months. Subsequently, the accused took the

victim to Indore at the house of accused-Anitaben's sister, where she had stayed for one month, and thereafter, the victim was again brought to village Sunav at the place of father of accused-Rashmibhai, where the victim had stayed for period of a week.

1.2. As per the case of the prosecution, thereafter, the appellant Nos. 1, 3 and 4 (Criminal Appeal No. 416 of 1996) brought her back to residential quarter of accused-Rashmibhai, where she was kept for a month. According to the case of the prosecution, during that period of one month, the appellant No. 1-Rashmibhai committed rape on the victim and at that time, the accused-Anitaben and Manishaben caught the victim with a view to facilitate the accused-Rashmibhai. As per the case of the prosecution, the accused-Rashmibhai tried to take the victim on scooter to Dakor after committing rape and when they reached near Vasan, the mother of the victim saw them and she asked the victim by waving hand as where she was going. After travelling at some distance, the victim Hasina asked the appellant No. 1-Rashmibhai for stopping the scooter, as she wanted to answer nature's call. Therefore, the accused-Rashmibhai stopped the scooter near the temple of Mahadev at Atlavadi, where the victim got down from the scooter and went for answering the nature's call. After sometime, as the victim did not return, the said accused-Rashmibhai followed her. In the meanwhile, mother of victim reached the place in rickshaw and started shouting for help. According to the case of the prosecution, on hearing the shouts of mother of the victim, the people gathered and caught the said accused. Thereafter, the mother of the victim took the victim at Jawaharnagar Police Station and informed the police that the said accused-Rashmibhai was at village Atlavadi. Thereafter, said accused was arrested and then all the accused were also arrested. Thereafter, the statements of mother Jubedaben and her daughter victim Hasina were recorded and the police started investigation, and thereafter, accused persons were arrested, and thereafter, charge-sheet was filed against the accused before the learned Judicial Magistrate, First Class, Baroda, who in turn committed the case to the Court of Sessions as the same was exclusively triable by the Court of Sessions. The accused pleaded not guilty to the charge and claimed to be tried. The main defence of the accused was that they were falsely implicated in alleged offence.

1.3. To prove the case against the accused, the prosecution examined following witnesses:

1.4. The prosecution has also produced documentary evidence, which are as under:

1.5. Thereafter, statements under Sec. 313 of the Code of Criminal Procedure were recorded, wherein the accused stated that they are innocent and they have not committed alleged offence and the evidence are not reliable, acceptable and trustworthy. After hearing at length and on perusal of the evidence on record, the learned Sessions Judge observed that the prosecution has proved the case against the accused beyond reasonable doubt, and therefore, learned Sessions

Judge pass the order of conviction as stated hereinabove.

2. Heard learned Advocates Mr. Doctor, Mr. Atul Mehta, Mr. Manav Mehta for the appellants in Criminal Appeal No. 416 of 1996 and learned Advocate Mr. M.J. Buddhbhatti for learned Advocate Mr. Adhvaryu for the appellant in Criminal Appeal No. 414 of 1996.

3. Learned Advocate Mr. Mehta for the appellants read the charge at Exh. 6 and submitted that for proving the allegations levelled in the charge, the prosecution has examined only two material witnesses for the alleged offences of kidnapping and rape and they are: (1) complainant Jubedaben, mother of the victim, and (2) victim herself but there is no any independent witness examined by the prosecution. He read the oral evidence of P.W. 1 - complainant-Jubedaben at Exh. 31, she is mother of victim and submitted that as per the complainant which was lodged by herself, in which the age of the victim is stated as 15 years and in her evidence, she stated that the victim was aged about 15 to 16 years at the time of incident, therefore, evidence of the complainant is not acceptable on this count only because the exact age of the victim is required to be taken into consideration for the proving alleged offences against the accused persons. He further submitted that so-called incident was taken place on 5-11-1991, and thereafter, after 21 days, the complaint is filed, therefore, as per his submission, the complaint is filed at belated stage and the prosecution has not explained about such delay in filing the complaint, and therefore, the same is fatal the case of the prosecution. He also submitted that the accused-Dilipsinh is simply owner of the garage and his name was wrongly implicated in the commission of the alleged offence. He further submitted that it is prima facie established that the story narrated by the complainant in the complaint is false, concocted and as per his submission, the learned Sessions Judge, while passing the judgment and order of conviction, has not considered the provisions of law and has not accepted the defence made out by the accused and learned Sessions Judge has wrongly believed the story of the prosecution and committed grave error by passing impugned judgment and order of conviction. He further submitted that the Head-master of the school, in which the victim studied, is examined as P.W. 3 at Exhibit 8, Bhailalbai Motibhai Mistri and submitted that as per the evidence of this witness, this witness has no personal knowledge regarding the age of the victim and he only stated the age of the victim from the School Leaving Certificate, which was prepared on the basis of general register of the school. Therefore, as per his submission, the exact age of the victim is not proved by the prosecution.

4. Learned Advocate Mr. Mehta further submitted that the victim knew the accused and they always talked with each other being good friends and victim had gone with accused on her own volition and will. He further submitted that as per the say of the P.W. 1 complainant, she saw the victim in the house of accused, and therefore, she shouted as there were four persons in the house and on hearing her shout, the persons namely Dahyabhai and Bachubhai came there

and the victim was called out by complainant, but the victim was proceeded with accused on scooter. As per his submission, the story narrated by the complainant is not believable and also not reliable and trustworthy because before the mother, how the victim could run away with the accused on the scooter and the complainant and aforesaid persons, if they tried, would catch the victim and accused. Therefore, he submitted that this version is not acceptable and the complainant narrated false story in her evidence. He further argued that the prosecution has not produced any cogent evidence about the relationship between the accused Nos. 1 and 2 and even they have talked on the said issue for kidnapping the victim. He also submitted that with a view to only give support to the case, the complainant gave such wording that the accused No. 1-Dilipsinh told the victim that accused No. 2-Rashmibhai would give her car and bungalow and he will keep her nicely. He submitted that this is not probable story of the prosecution and when there was no relation of the accused No. 2 with the accused No. 1 then that story as narrated, can be said as concocted one. He submitted that the victim went with the accused on scooter on her own wish and will. He further stated that as per the evidence of victim, in presence of the wife of the accused No. 2, the victim was raped by the accused No. 1. He submitted that it is not possible that in the presence of the wife, the accused committed rape upon another lady and the house was of two rooms and how the victim was taken away by the accused in second room and no wife can permit her husband to commit rape on other lady in her presence. He submitted that it is not the case of the prosecution that the victim resisted the said act committed by the accused and there was no injury found from the body of the victim, therefore, version of the complainant is not acceptable at all, and it is a case of sole consent of the victim. He further submitted that as per the say of the victim, she was brought to the house of one Parmar, who was known to her. Even before him, she has never disclosed that the accused No. 2 committed rape on her. Learned Advocate Mr. Mehta further submitted that the said Parmar, who is an independent witness, was not examined by the prosecution. He further submitted that the father of the victim was not examined and even the father of the victim was not brought into the picture of the entire incident or even at the time of trial, by the prosecution. From the story of the prosecution, it appears that the victim had good chance to say about the rape to the said Parmar, but victim did not tell anything to Parmar. He further submitted that as per the case of the prosecution, the victim went to Bhavnagar with the female accused and at that time, the victim, if wanted, would have told to the other passengers, who were travelling in the bus and she had chance to escape from the custody of the accused. He further submitted that the victim stayed one and half months, so even during that period, she has never disclosed before anyone about such incident and even she has not made any attempt to escape. He further stated that as per the story of the prosecution, the victim was brought at village Sunav, where she stayed for two months and then she was brought to Balva village, where she stayed for three months, but she has not disclosed anything before anyone or made attempt to escape from the accused. He further submitted that even the driving

of car by the driver for about 18 hours constantly is not possible for any person and not believable story and said driver was not examined by the prosecution as an independent witness, learned Advocate Mr. Mehta further submitted that the version of victim that at the place of accused No. 2, the victim stayed for a period one month, and also during that period, she was repeatedly raped by the accused No. 2, creates suspicion because before the wife of the accused No. 2, how the accused committed rape on other lady i.e. victim which can happen in our country. He further submitted that prima facie, the prosecution has not established the case against the accused persons.

5. Learned Advocate Mr. Mehta read Sec. 363 of the Indian Penal Code and submitted that there must be some evidence for consideration of the main ingredient of Section. But when the same is not established on record, then it is to be considered that the appellants are wrongly convicted by the learned Sessions Judge.

6. Learned Advocate Mr. Mehta further submitted that overall, the prosecution has not produced any evidence to prove the case against the accused about sexual intercourse made by the accused No. 2. Section 363 of the Indian Penal Code come into play because intention and knowledge are required to be proved and offence under Sec. 366 of the Indian Penal Code cannot be said to be proved without any cogent evidence. Learned Advocate Mr. Mehta further stated that the victim was forcefully taken away to Dakor for the purpose of sale the victim, but from the evidence of witness that is not proved beyond reasonable doubt by the prosecution. Even the inducement made by the accused is not proved by any corroborating piece of evidence. He also submitted that the owner of the scooter was not examined and even same was not investigated about the ownership of the scooter. He further stated that other persons were present, but they were not examined as independent witness. He also submitted that the F.I.R. which was lodged after 21 days and same was not explained properly. He further submitted that the incident was occurred on 5-11-1991, but the complaint was filed after 21 days by saying that question of reputation of the family, but in such serious situation, the complaint was to be filed immediately, as per the story narrated by the complainant, but the complainant could not consider the same as serious and after long period of 21 days from the incident, the complaint was filed against the accused. Therefore, the complaint can be said to be bogus one. He also submitted that the evidence of the mother of the victim and victim herself are totally bogus and not reliable and there are so many contradictions between the evidence of both these witnesses.

7. In support of his submissions, learned Advocate Mr. Mehta placed reliance on the case of Satpal Singh Vs. State of Haryana, , more particularly Paras 28 and 29 and submitted that original general register is not produced on record, so it cannot be held with certainty that the prosecutrix was minor. He further relied upon another decision of the Hon"ble Apex Court in the case of Joshna Gouda Vs. Brundaban Gouda and Another, and submitted that it is duty of the prosecution

to prove the age of the victim. Here in this case, the age of the victim is not proved, and therefore, the judgment and order of conviction is required to be quashed and set aside, because in absence of any evidence regarding the age of the victim, the victim cannot be considered as minor. He further relied on the decision delivered by Division Bench of this Court in Criminal Appeal No. 235 of 2006 (DB) and allied matters and drew the attention to the observations made by this Court and submitted that the ratio Laid down in that case, is applicable to the present case and judgment and order of conviction is required to be quashed and set aside. Learned Advocate Mr. Mehta has also relied upon the decision in the case of Gabbu Vs. State of M.P., more particularly Para 11 and submitted that the prosecution has not proved the abduction for the purposes as mentioned in Sec. 366 of the Indian Penal Code.

8. Learned Advocate Mr. Mehta therefore, submitted that in light of the above referred decision, and in the absence of any cogent, evidence and especially, in absence of particular age of the victim, the impugned judgment and order of conviction passed by the learned Sessions Judge is required to be set aside by allowing present Appeal.

9. Learned Advocate Mr. B.N. Doctor submitted that no cogent evidence is produced against the accused. He further submitted that for the age of victim, the birth date of the victim is not proved as per the provisions of the Evidence Act. He further submitted that the birth certificate and School Leaving Certificate are produced, but the maker of entry, which was made in general register is not examined by the prosecution for the purpose that on which basis, such entry of birth was made in the register by said maker. He further submitted that the prosecution has not produced original general register on record, so it can be said that birth certificate is not proper and just and it is not disclosed the date of birth of the victim. It is admitted by the mother of the victim that she never went to the school with document of birth for admission of the victim. The mother of the victim also stated that said entry in birth register was not entered by her or her husband. Learned Advocate further stated that the school Head-master is not in a position to say that from which document, the date, which was entered in the School Leaving Certificate. He therefore, submitted that birth date of victim is not proved by the prosecution and in this regard, he submitted it is not established as per the Secs. 5 and 6 of the Evidence Act and so, the birth certificate cannot be said to be proved properly. He also referred the provisions of Secs. 77 and 78 of the Evidence Act and submitted that the prosecution could not prove that the victim was minor at the time of incident. Learned Advocate Mr. Doctor further submitted that birth certificate of the victim is not proved beyond reasonable doubt by the prosecution and also there is no independent witness is examined for proving such fact of birth date of the victim, and therefore, the judgment and order of conviction passed by the learned Sessions Judge is not just and proper and same is erroneous and same is required to be quashed and set aside by allowing the Appeal.

10. Learned Advocate Mr. Doctor in support of his submissions, relied upon the decision rendered by the Hon"ble Supreme Court in Criminal Appeal No. 2308 of 2009 in the case of Sunil Vs. State of Haryana, and submitted that in light of the observations made by the Hon"ble Supreme Court, it is required to be considered by this Court that birth date of the prosecutrix is not proved beyond reasonable doubt, so benefit of doubt may be given to the accused. He further submitted that for the purpose of verification of the age of the victim, no evidence was produced. Here, in the present case, it is true that ossification test was not called for by the Investigating Officer. He lastly submitted that the Appeal of the appellants is required to be allowed by quashing and setting aside the impugned judgment and order of conviction passed by the learned Sessions Judge.

11. Learned A.P.P. Mr. Soni for the State read the charge and submitted that the accused Nos. 1 and 2 have actively participated in the commission of the offence and other co-accused abetted them in the alleged offence. He further submitted that the accused No. 1 was known to the victim and her family and under temptation, the victim was joined with the accused No. 1, and thereafter, she was handed over to the accused No. 2. He further submitted that the victim was convinced by the accused No. 1 by saying that the accused No. 2 would give her car and bungalow and keep her nicely, and therefore, victim, a poor girl has never enjoyed the same in dream also, ready to move for such dream of car and bungalow due to temptation made by the accused No. 2 through the accused No. 1. Therefore, the accused No. 2 committed rape on the victim. He further submitted that as per the argument of learned Advocate Mr. Mehta, this is a case of consent. In this regard, learned A.P.P. has read the contents of birth certificate and cross-examination made by the accused and stated that the contents of the birth certificate was never challenged by the accused, so prima facie, it is established that the at the time of incident, the victim was minor below 16 year, and therefore, question of consent does not arise. He further submitted that the victim was brought to the house of one Parmar and as per the submission of learned Advocate Mr. Mehta that before said Parmar, the victim has not disclosed anything about the role in the commission of the offence on the part of the accused, but at that stage, the accused No. 1 made temptation to the victim, and therefore, perhaps, the victim could not utter anything before said Parmar. He further submitted that the victim was brought by other co-accused to different place and even on that place, the victim has not disclosed anything that she was kidnapped and raped by the accused No. 2. Learned A.P.P. replied that the disclosure of anything by the victim, cannot be fatal to the case of the prosecution. He further submitted that for the date of birth, he read the evidence of Head-master of school and also evidence of victim and her mother and submitted that in light of examination of the two material witnesses, the prosecution has proved the case that the victim was minor at the time of incident, and therefore, the accused committed alleged offence which is very serious in nature. He read the judgment and order of learned Sessions Judge and submitted that prime facie it is established that the learned Sessions Judge has

not committed any error in passing the judgment and order of conviction for the alleged offence punishable under Secs. 363, 366 and 376 of the Indian Penal Code. He further submitted that at the time of rape committed by the accused No. 2 upon the victim, the female accused were present and both abetted the accused in committing sexual intercourse with the victim, and therefore, learned Sessions Judge has rightly framed the charge against the other co-accused i.e. lady co-accused. He further submitted the medical certificate is exhibited document at Exh. 38 and the accused never insisted to cross-examine the expert witness. He read the Para 19 of the judgment and submitted that the learned Sessions Judge has rightly observed that victim was below 16 year old, and therefore, the question of consent does not arise.

12. Learned A.P.P. has placed reliance on the decision of this Court in the case of Shri Dhulabhai Manibhai Patel Vs. The State of Gujarat, , and submitted that Division Bench of this Court has observed that the conviction can be based on an uncorroborated evidence of prosecutrix. The evidence of prosecutrix as to sexual intercourse not corroborated by the medical evidence and conviction was confirmed by the Division Bench. He further read Para 11 of the judgment and submitted that even conduct of the victim cannot be considered as unnatural in connection that she did not shout for help and it would not render her evidence untrustworthy or doubtful.

13. Learned A.P.P. Mr. Soni further relied on the decision in the case of Ganga Singh Vs. State of Madhya Pradesh, , more particularly Para 13, with regard to the doubt the veracity of the evidence and he has drawn attention to the provisions of Sec. 146 of the Evidence Act. He reads Head Note A, which is as under:

"A. Evidence Act, 1872 - Sec. 146 - Questions lawful in cross-examination - Scope of - Reiterated, any question can be put to test veracity of witness - Hence, absence of evidence in testimony of witness on issues not raised in cross-examination, held, not automatically vitiative of any testimony of such, witness - Hence, in absence of any question put to prosecutrix (P.W. 5) in her cross-examination with regard to the seizure of blouse, dhoti and broken bangles in her presence, omission of this fact from P.W. 5's evidence is no ground to doubt the veracity of her evidence - Penal Code, 1860 - Sec. 376."

13A. Learned A.P.P. Mr. Soni submitted that in view of the above position, the Appeal is required to be dismissed as learned Sessions Judge has rightly convicted the accused for the offences as alleged, which are very well proved by the prosecution.

14. Heard both the parties and perused the record of the case. I have also minutely perused the impugned judgment and order of conviction passed by the learned Sessions Judge.

15. Now, for the purpose of discussion as per the provisions of Secs. 363 and 366 of the Indian Penal Code, legal guardianship of victim is having with his

mother, who is examined as P.W. 1 at Exh. 24, has fully supported the complaint which she has lodged against the accused. As per her evidence, the victim, her daughter when did not come back for a considerable time, she tried to verify at the place, where her daughter went and at that time, she found the light of the accused-Dilipsinh switched on, and therefore, she entered from the back portion of the house, where she had seen three persons, who made colour work and she had seen her daughter there, therefore, she entered into the house. As per her evidence, there were four male members and due to fear, the mother of the victim came out from the house. Upon her shouting, two or three persons were gathered there, and therefore, said accused-Dilipsinh went away on scooter taking the victim with him under the force and pressure, without her consent and wish. Such fact is very well corroborating with the complaint at Exh. 31 as she has disclosed the said fact in her evidence as narrated in the complaint.

16. Now, as per the provisions Sec. 363 of the Indian Penal Code, ingredients of kidnapping of minor from the lawful guardianship are proved against the accused, as the accused took away the victim. The defence has never bothered to put proper defence through cross-examination of the mother of the victim about the consent of the victim. Now, in support of evidence of P.W. 2 victim herself, she disclosed the same fact as averred by her mother in the evidence and she further disclosed that the accused told her that the accused-Rashmibhai would give her car and bungalow and keep her nicely. The prosecutrix herself on her own proved the age because from the evidence, it appears that she was tempted by accused-Dilipsinh by saying about giving car and bungalow from the accused-Rashmibhai.

17. I have minutely perused the evidence of both the material witnesses i.e. victim and her mother as well as Head-master of school, where the victim was admitted for study purpose. Therefore, it appears that the ingredients of Sec. 363 of the Indian Penal Code are proved beyond reasonable doubt. Now, further the evidence of the victim reveals that the accused-Rashmibhai forcefully committed rape on her frequently. She also disclosed in her evidence that she was taken from one place to another, where she was raped continuously, and therefore, the ingredients of Secs. 363 and 366 of the Indian Penal Code are proved very well against the accused. For proving the offence punishable under Sec. 366 of the Indian Penal Code, the victim is only witness, who can disclose the act committed by the accused. The submissions of learned Advocate Mr. Mehta that in absence of medical certificate and also corroborative piece of circumstantial evidence, the case of the prosecution cannot be said to be proved against the accused persons. But it is discussed at length as above and victim has also disclosed on oath that she was raped continuously with the help of other co-accused, and therefore, the aspects of intention, knowledge on the part of the accused are proved because the accused-Dilipsinh took away the victim and handed over to the accused-Rashmibhai and the accused wanted to sell the victim. In this regard, the provisions of Sec. 114 of the Evidence Act is required to be taken into consideration and as per the provision, the victim states before

the Court that she did not give consent, the Court shall presume that she did not consent. This Court has also perused the provisions of Sec. 375 of the Indian Penal Code, wherein the definition of rape is prescribed, and here, in the present case, the accused committed "Rape" upon the victim against consent and will of the victim. Therefore, it can be said that the accused have actively participated in the commission of the offence as alleged.

18. Now, so far as the aspect of age of the victim is concerned, the age of victim was 16 years at the time of incident, which is proved by the evidence of mother of the victim, victim herself and Head-master of school. As an independent witness i.e. Head-master of School, P.W. 3-Bhailalbai Motibhai Mistri examined at Exh. 28, who has disclosed in his evidence that the victim was studying in his school and in the School Leaving Certificate of the victim, he made his signature as Head-master of the school. He also disclosed that the birth date of the victim is 20-6-1976 and same was entered on the basis of general register maintained by the public servant. The name of the victim was stated at Sr. No. 4401 in the general register and Jubedaben, mother of the victim, has stated the said birth date of the victim before him, and therefore, same is entered in the records of the school. Therefore, there is no question about the consent as the victim was minor at the time of the incident and the same is proved by oral as well as documentary evidence. Therefore, it can be said that the accused induced the victim for giving car, bungalow etc. and under the said temptation, the victim was raped by the accused. Hence, the accused committed heinous crime upon the victim by taking the victim from one place to another and she was raped frequently and lastly, even the accused intended to sell the victim.

19. So far as the age of the victim is concerned, I have scrutinized carefully the School Leaving Certificate of the victim, which reflects the date of admission in the school as on 31-7-1984 and date of leaving the school is 7-8-1987 and the School Leaving Certificate issued on 23-11-1991 and the date of complaint is 25-11-1991 and birth date of victim is 20-6-1976. Therefore, it is believable that the victim was minor at the time of incident. For ascertaining the age factor of the victim, the Rules 128 and 130 of the Bombay Primary Education Rules, 1949 are required to be referred and same are as under:

"Section 129 : Admission of pupils:

(1) No approved school shall admit-

(a) a child who has not completed the 5th year of age on the date of admission;

(b) children suffering from any infectious or contagious disease: and

(c) any child after the lapse of two months from the beginning of the school year except with the special permission of the Administrative Officer.

(2) A pupil shall pay the fees, if any, for the month in which he is admitted irrespective of the date of admission.

Rule 130 : Age Certificate: Every child seeking admission for the first time into an approved school shall produce a certificate of age signed by its parent. In the case of illiterate parents, the certificates shall bear their thumb impression attested by a literate person other than a teacher of the school to which the child seeks admission. The date of birth given in this certificate shall be entered in the School (General) Register. No subsequent change or alteration therein shall be made except with the sanction of the School Board Chairman. In the case of transfer of pupils from one place to another, the age given in the leaving certificate shall be entered in the register of the new school."

20. In view of the above provisions of Rules, this Court has no doubt about the birth date of the victim as stated in the School Leaving Certificate because the same is as per Rules and same is proved through the oral evidence of the Head-master of the school and in absence of any material to throw doubt about the entries in the school certificate, it cannot be brushed aside merely on the surmises. The documentary evidence viz. school record and School Leaving Certificate and the oral evidence of Head-master of the school and other evidence prove the victim as minor, the Court would not be justified in holding the victim major on the mere presumption that the guardians understate the age of the child at the time of admission.

21. So far as the factor of delay in filing the F.I.R. is concerned, in such kind of case, where the question honour and reputation of the family is involved, the complaint is lodged after sometime, means the person cannot lodge the complaint immediately after the incident. Here, in the present case, the date of incident is 5-11-1991 on that day, the victim was kidnapped by the accused from the guardianship of the mother, and thereafter, the accused took away the victim at different places, where the accused-Rashmibhai committed rape on her and lastly on 25-11-1991, the said accused after committing rape on the victim, proceeded to Dakor and on way to Dakor, the complainant saw the victim on the scooter with the said accused. Therefore, she chased her by auto-rickshaw and at village Anklawadi, the scooter was stopped by accused as the victim wanted to give answer for nature's call and at that time, the mother of the victim met the victim, and thereafter, the complaint was lodged against the accused. A person could not file complaint in such type of cases, where the question of honour and reputation of the family is involved. Therefore, the submission with regard to the delay in filing the complaint is not acceptable at this stage by this Court and in rape case, the delay in lodging F.I.R. is not fatal to the case of the prosecution.

22. In the case of Harpal Singh and Another Vs. State of Himachal Pradesh, , it is observed that as honour of family was involved, its members had to decide whether to take the matter to the Court or not. Therefore, in rape case, the delay of some days is reasonable.

23. This Court also discussed in detail about the evidence of the material witnesses as above and this Court has also perused the medical report at Exh. 38 and medical opinion at Exh. 39 of the victim. It is clearly established that the

victim was raped and the victim herself deposed that the accused committed rape on her. Here, so far as this issue is concerned, I am in total agreement with the reasoning recorded by the learned Sessions Judge that the victim cannot involve any innocent person in such type of act and the defence has not controverted this issue as stated by the victim in her evidence. Therefore, this Court is not going into detail on this issue, the learned Sessions Judge has heard and discussed on this issue in detail and the version of the victim is proved by circumstantial evidence. Therefore, this Court has no reason to disbelieve the reasons recorded by the learned Sessions Judge in the impugned judgment and order.

24. Therefore, in view of the above, it is established fact that the accused in collusion with each other, victimized poor minor girl and put the victim for a lifetime to live in a critical condition, without self-respect. In the traditional non-permissive bounds of society of India, no girl or woman of self-respect and dignity would depose falsely implicating somebody of ravishing her chastity by sacrificing and jeopardizing her future prospect of getting married with suitable match. Not only she would be sacrificing her future prospect of getting married and having family life, but also would invite the wrath of being ostracized and outcast from the society she belongs to and also from her family circle. It is not the law that in every case, version of the prosecutrix must be corroborated in material particulars by independent evidence on record. The rape is an offence which is violative of fundamental right of a person guaranteed under Art. 21 of the Constitution of India. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a female. It is serious blow to victim's honour and offends her self-esteem and dignity and it degrades and humiliates the victim and where the victim is helpless innocent child or a minor, it leaves behind a traumatic experience.

25. The Court cannot cling to a fossil formula and insist upon corroboration even if taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In the case of *State of Punjab Vs. Gurmit Singh and Others*, , the Hon'ble Supreme Court has observed as under:

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Sec. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Sec. 114 which

requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix , it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the Court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence."

26. Learned Advocate Mr. Mehta relied upon the case of Satpal Singh Vs. State of Haryana, , for the issue of birth date, but in that case, no evidence is produced showing the date of birth of the prosecutrix and there is doubt about the certainty of birth date. Here, in the present case, the birth date is clearly established by the School Leaving Certificate and oral evidence of the mother of the victim, victim herself and Head-master. Even from the complaint the age is very well proved, and therefore, it is established that the victim was minor at the time of incident, and therefore, the case cited by learned Advocate Mr. Mehta is not helpful to the accused. Another case of Joshna Gauda (supra) relied by the learned Advocate in light of the evidence for age, which is case of contesting the election. I have minutely perused the said case, but looking to the facts of that case, it appears that same is totally different to the facts of the present case. Learned Advocate Mr. Mehta further relied upon the decision rendered by this Court in Criminal Appeal No. 235 of 2006 and from that case, it appears that the prosecutrix was of above 18 years at the time of incident and delay in filing F.I.R. in such kind of case is not the ground to come out from the offence. So far as decision relied upon by the learned Advocate Mr. Mehta in the case of Gabbu (supra), the same is on different footing and same is not applicable to the present case. Learned Advocate Mr. Mehta also relied upon the decision of Gabbu (supra), but the said facts are not applicable to the facts of the present case, because in the present case, the rape was committed by the accused upon minor victim.

27. So far as the issue of birth date of minor victim, learned Advocate Mr. Doctor relied upon the decision of Sunil (supra), but in that case, the prosecutrix was not able to give her exact birth date and she had given approximately birth date and the School Leaving Certificate is also doubtful. Herein present case, School Leaving Certificate is established by the oral evidence of Head-master and age is proved by the cogent documentary evidence as well as oral evidence of the victim and her mother.

28. So far as the submission of learned Advocate Mr. Doctor about the ossification test of the victim is concerned, as per seeded law, in absence of ossification test, the act of rape cannot be ignored and even if, ossification test is

carried out, the evidence of that Medical Officer is only of the advisory character and nothing binding on the witness of fact.

29. In view of the aforesaid discussion and facts and circumstances of the case, learned Sessions Judge has rightly convicted the accused-persons for the alleged offence and this Court is not inclined to interfere with the same. Hence, the Appeals are dismissed.

30. Considering the facts and circumstances of the case, the Criminal Appeals are dismissed and the judgment and order dated 30-5-1996 passed by the learned Additional Sessions Judge, Vadodara, in Sessions Case No. 186 of 1993 is hereby confirmed. The appellants are now on bail, hence, their bail-bonds shall stand cancelled. The appellants shall surrender to concerned Jail Authority within a period of four weeks time from today. Record and Proceedings to be sent back to the concerned trial Court forthwith.