

Code (IPC). The learned Additional Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment for 10 years and to pay a fine of Rs.10,000/- with respect to the offence punishable under Section 376 of the IPC, and to suffer Rigorous Imprisonment for 1 year and to pay a fine of Rs.2,000/- with respect to the offence punishable under Section 506 (Part I) of the IPC. Being aggrieved by his conviction and the sentences imposed upon him, the appellant has approached this court by filing the present appeal.

2 I have heard Shri K.M.Mhatre, the learned counsel for the appellant. I have heard Shri A.R.Patil, the learned APP for the State. I have gone through the entire evidence adduced during the trial. I have gone through the impugned judgment.

3 The appellant is alleged to have raped the younger sister of his wife. The prosecution case, in brief, is that, the sister of the prosecutrix got married to the appellant on 5th October 2010. That, as the appellant had no place to stay, he started residing with his wife in the house of his in-laws. While staying

there, the appellant used to wake the victim up in the night, take her to gallery, and used to have sexual intercourse with her. According to the victim, she never consented for such an act, but the appellant would forcibly have intercourse with her. The victim did not disclose the incidents to any of her family members as she was scared of the appellant and as the appellant had threatened to the victim that he would divorce her sister.

After a few months, the appellant and the sister of the victim went to reside at Govandi. The mother of the victim went to a Darga at Gujarat. The victim's father once went to their village for some work. The mother of the victim, had, in that situation, instructed the victim to go to her sister's house, i.e. the house of the appellant and the victim did accordingly. The brother of the victim had also accompanied her. While the victim was staying with the appellant, in the house of the appellant, the appellant again raped her on a number of occasions. The victim had some quarrel with her sister, and the sister of the victim had asked her to leave the house. Apparently, the victim was searching for a job and had found some work in a house at

Byculla. The victim then started residing in the house of her employer. However, once the victim's brother telephoned her and called her to her sister's house, i.e., the appellant's house. The victim refused, but the sister telephoned at the place where the victim was working, and the employer of the victim then asked her to go back. This is how the victim was forced to go back to her sister's house. The victim, however, did not like to stay there and went back to her employer's house at Byculla. The sister of the victim, however, called the victim back by telling that Noor – son of victim's sister – was not well. The victim went to her sister's house, and found that a false reason had been given by her sister to call her back. The victim continued to stay with her sister, as she had already lost her job. With the acquaintance of one Rubina, who was doing a course of beauty parlour, the victim started going to beauty parlour. She came in contact with a social worker – Bhavna Kamble (PW3). The victim told Bhavna that she wanted to stay in hostel, whereafter, Bhavna took her to Children's Home. The victim narrated what had happened to her, to one Sunita Madam, who was a Probation Officer attached to the

Children's Home. Sunita Madam then called the police, enquiries were made, and a case of offence punishable under Section 376 of the IPC and Section 506 (Part I) of the IPC was registered. The appellant came to be arrested. He was prosecuted, convicted, and sentenced, as aforesaid.

4 Totally six witnesses were examined during the trial. The first is the victim herself. The second witness is Dr.Baban Shinde, who had carried out medical examination of the victim. The report given by him was tendered in evidence (Exhibit 15). The third witness is, as aforesaid, Smt.Bhavna Kamble – social worker – who had come in contact with the victim. The fourth witness P.S.I. Kalpana Sawant is the one who had recorded the statement of the victim, which was treated as First Information Report (FIR) (Exhibit 10) and on the basis of which, a crime report being C.R.No.34 of 2012 was registered. The fifth witness is also a policeman – P.I. Nandkumar Shirke, who was attached to Sewree Police Station at the material time, and who had, after carrying out investigation into the matter, filed a charge-sheet

against the appellant. The sixth and the last witness is one Khan Mohd. Javed Moazzam Ali, in-charge Head Master in S.S.Reynolds Municipal Urdu Secondary School, where the victim, at the material time, was staying. This witness was examined to prove the date of birth of the victim. Through him, a 'bonafide certificate' issued by Madanpura Vocational Municipal Urdu School, where the victim was initially studying, was produced. According to this witness, the date of birth of the victim was 4th March 1995, which he has stated on the basis of the certificate issued by the said Madanpura Vocational Municipal Urdu School, which was available in his school.

5 I have carefully gone through the evidence of the victim. There is nothing improbable or unbelievable in her evidence. It does not seem to be suffering from any infirmities. I find that the victim's evidence can be safely relied upon. There is nothing in her cross-examination which would make the court doubt the truth of her version.

6 The evidence of Dr.Baban Shinde, together with report of the examination of the victim, as submitted by him, leaves no manner of doubt that the hymen of the victim was torn, that the tears were old and healed, and that the victim was habituated to sexual intercourse. Dr.Baban Shinde had also carried out Ossification test and had come to the conclusion that the age of the victim was about 15 to 16 years.

7 The evidence of Smt.Bhavna shows that the victim would come to the classes conducted by her along with one Rubina, and that, she used to teach the victim also, but the victim would 'sit quiet.' What the witness wanted to convey and has conveyed to the court is that there was something in the behaviour of the victim which was not normal and probably indicative of depression. It is when Smt.Bhavna made enquiries with the victim, that the victim revealed her story to her. Smt.Bhavna has then stated about her having taken the victim to Dongri Shelter Home and the victim thereafter narrating about the acts of the appellant.

8 The learned counsel for the appellant contended that the version of the victim cannot be relied upon, and that, it was highly unlikely that the appellant would be able to perform such acts against the will of the victim in a small room, which was occupied by several other persons. He also submitted that there was no satisfactory evidence of the age of the victim, and that, considering the *margin of error* in fixing the age by the Ossification test, it was not possible to hold that the victim, at the material time, was below 16 years of age. It was also submitted that there were no signs of any violence on the body of the victim, and that, therefore, merely because the victim stated so, the appellant cannot be held to be guilty of rape.

9 As regards the age of the victim, indeed there is some force in the contention advanced by the learned counsel for the appellant. Interestingly, neither the father nor the mother of the victim, who could have stated about the date of birth of the victim, was examined during the trial. The age was sought to be established only on the basis of the Ossification test and the birth

certificate produced by Khan Mohd. Javed Moazzam Ali (PW6). I have carefully gone through the evidence of this witness. I find that the source, on the basis of which the relevant entry recording the date of birth of the victim was made, has not been disclosed in his evidence. His evidence also does not disclose the manner in which the record relating to the date of birth of students was being maintained in the school. In the absence of any information about the manner in which the relevant record was being maintained, and the source on the basis of which the relevant entry came to be made, it would be hazardous to place reliance on this evidence to hold that the victim was, at the material time, below 16 years of age. Similarly, Dr.Baban Shinde has conceded in the cross-examination that while determining the age on the basis of Ossification test, a variation of two years would be possible.

10 The learned Additional Sessions Judge has held that, that the victim was below 16 years of age at the material time, had not been satisfactorily established. This aspect would be material as, had the victim been below 16 years of age, the question of her

being a consenting party, would not have arisen in determining the guilt of the appellant. However, as aforesaid, this point has been held in favour of the appellant, that is, it has been held that the fact that the victim was below 16 years of age at the material time, was not satisfactorily proved. This conclusion, arrived at by the learned Additional Sessions Judge, does not seem to be suffering from any error.

11 Though it is not possible to hold that the victim was certainly below 16 years of age at the material time, it is also not possible to come to a conclusion that the victim was, possibly, a consenting party to the acts of intercourse.

12 All the contentions raised before this court were raised before the trial court also by the learned counsel for the appellant, and in my opinion, the learned Additional Sessions Judge has dealt with those contentions properly. The appreciation of evidence, as done by the learned Additional Sessions Judge, does not seem to be suffering from any error.

13 The conclusion arrived at by the learned Additional Sessions Judge, therefore, appears to be sound and correct.

14 It may only be briefly observed that, that the room that was being occupied by the appellant and the victim was too small, and that, when there were other persons residing in that room, the appellant would not have been able to commit the act of sexual intercourse with the victim, does not appeal to me. Infact, it appears that the appellant was doing such acts regardless of the consequences and without being afraid of the consequences. Infact, the appellant appeared to be in such a position that nothing serious would happen to him, even if such acts would be disclosed to his wife and other members of his wife's family. The evidence indicates that even the wife of the appellant was aware of what the appellant was doing, but she could not do anything to prevent the same. This appears from the evidence of PW3 Bhavna. As the wife of the appellant has not been examined, even if the matter is left at that without arriving at any conclusion in

that regard, the fact remains that the version of the victim cannot be disbelieved on the basis of the contentions raised by the learned counsel for the appellant. The learned Additional Sessions Judge, in that regard, has observed that the victim was quite helpless in the situation and had no other alternative but to suffer the wrongs silently. It cannot be overlooked that the victim did not even have an inclination to report the matter to the police, and it is only after coming in contact with Bhavna, who took her to Children's Home, that the incidents came to light. Thus, the victim cannot be attributed with any motive, for falsely implicating the appellant.

15 The medical evidence leaves no manner of doubt that the victim had, had repeated acts of sexual intercourse. According to the victim, she had had sexual intercourse with the appellant on a number of occasions, and that, she was not a consenting party to any of the said acts.

16 Upon considering the evidence adduced during the trial, there seems to be no reason to doubt the version of the victim. In my opinion, the order of conviction of the appellant, as recorded by the learned Additional Sessions Judge, is proper and legal, warranting no interference.

17 The learned counsel for the appellant, however, urged that the sentences imposed upon the appellant be reduced. He submitted that at the material time, the minimum sentence that was required to be imposed for an offence punishable under Section 376 of the IPC, was only 7 years, and that the case being not of any brutal act of rape, it would be sufficient to award the sentence prescribed as minimum, to the appellant.

18 After carefully considering the matter from all angles, after hearing the learned APP, and after considering the circumstances in which the alleged offences were committed and the reaction of the victim towards the offence, I think it proper to reduce the sentence imposed by the learned Additional Sessions

Judge in respect of the offence punishable under Section 376 of the IPC.

19 It is accordingly ordered that the substantive sentence of Rigorous Imprisonment for 10 years imposed by the learned Additional Sessions Judge with respect to the offence punishable under Section 376 of the IPC shall be reduced to a period of Rigorous Imprisonment for 8 years.

20 Subject to the reduction in the substantive sentence, as aforesaid, the appeal is dismissed.

(ABHAY M. THIPSAY, J.)