

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Appeal No. 0300 of 2017

District : Aurangabad

Santosh s/o. Raising Chavan,
Age : 31 years,
Occupation : Private service,
R/o. Rani Unchegaon,
Taluka Ghansavangi,
District Jalna,
at present in
Harsul Central Jail,
Aurangabad.

.. Appellant
(Original
accused
no.01)

versus

1. The State of Maharashtra,
Through Police Station
Incharge,
Begumpura,
Taluka & Dist. Aurangabad.
2. "X"
(Prosecutrix -
Original complainant)

.. Respondents

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Mr. N.K. Kakade, Advocate, for the appellant.

*Mr. S.P. Sonpawale, Additional Public Prosecutor,
for respondent no.01.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 26th July 2018**

**Date of pronouncing
the judgment : 06th October 2018**

JUDGMENT :

01. Present appeal has been filed by the original accused challenging his conviction by Special Judge (Additional Sessions Judge-7), Aurangabad, in Sessions Case No. 308 of 2011 on 27-06-2017 for the offence punishable under Sec. 376 of Indian Penal Code and Sec. 3 (1) (x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act [For short, "Atrocities Act"].

02. Prosecution has come with a case that Prosecutrix was aged 24. She was working as Salesgirl for a detergent company. She was dealing in Marketing. She was residing with other salesgirls in Shaktinagar, behind Hotel Devapriya. She used to go to CIDCO area in connection with her work. Thereafter she has left that job. She had gone to CIDCO area in connection with marketing of products, about a year prior to 05.09.2010. She met a person near CIDCO Bus stand. That man took her to his house near Harsul Jail Quarter under the guise of purchasing the products. He did not purchase anything. However, he demanded sexual favour to her. She refused but he had sexual intercourse with her by giving threat to kill, as well as by giving promise to marry and maintain her. Thereafter, on many occasions he used to take her to his Harsul Quarter and used to have forcible sexual intercourse with her. He used to give promise to marry

every time and was avoiding on one or the other pretext. He had exploited her sexually since year prior to July 2010. Thereafter she became pregnant. She had told this fact to her mother. Prosecutrix and her mother went to the house of accused and his father at Harsul Quarter. She disclosed that she is pregnant from accused and asked him to marry with her. Accused told that she is Maang by caste, which is inferior and he has no intention to marry with her. Accused and his father had then assaulted by fist blows to prosecutrix and her mother and abused them in filthy language. They were threatened not to come again and not to make any complaint with police. Thereafter Prosecutrix went to police station Begampura and lodged First Information Report (FIR) on 05-09-2010. On the basis of said FIR, crime vide C. R. No. 120 of 2010 came to be registered and investigation was undertaken.

03. Prosecutrix was sent for medical examination. *Panchanama* of the spot was executed. Statements of the witnesses were recorded. Accused persons came to be arrested. Medical examination of accused No. 1 was conducted. Samples were collected. Clothes were seized. Muddemal articles were sent for chemical analysis. After collecting certificate of caste and medical examination, charge-sheet was filed. During the pendency of the trial, prosecutrix gave birth to a child. The DNA test has been done after obtaining samples.

04. Both the accused remained present before the Special Judge. Charge came to be framed against them. They pleaded not guilty. Trial has been conducted. Prosecution has examined 7 witnesses to support its story. After considering the evidence on record and hearing both sides, the learned Trial Judge has held accused No. 1 guilty of committing offence punishable under Sec. 376 of Indian Penal Code. He has been sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.2,000/- i/d. to suffer simple imprisonment for one month for the said offence. Accused No. 1 has been further held guilty of committing offence punishable under Sec. 3 (1) (x) of Atrocities Act and has been sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 1,000/- i/d. to suffer simple imprisonment for one month. He has also been directed to pay compensation of Rs.1,00,000/- under Sec. 357 of Code of Criminal Procedure to the prosecutrix and the male issue. Hence, this appeal by original accused No. 1.

05. It will not be out of place to mention here that accused No. 1 is acquitted of the offence punishable under Sec. 323, 504, 506 r/w. 34 of Indian Penal Code. Accused No. 2 has been acquitted of the offence punishable under Sec. 323, 504, 506 r/w. 34 of Indian Penal Code as well as Sec. 3 (1) (x) of Atrocities Act. Prosecution has not filed any appeal

against the said acquittal.

06. Heard learned Advocate Shri. N. K. Kakade for appellant / accused No. 1 and learned A. P. P. Shri. S. P. Sonpawale for Prosecution. In spite of efforts, respondent No. 2 could not be served, as she has left the address given in the FIR. Perused the record and proceeding.

07. It has been submitted on behalf of appellant that the prosecutrix was major and therefore, it can be presumed that she was knowing the consequences of her acts. FIR Exhibit 15 shows that she came to know accused on bus stand and she alleges that she was taken to Harsul quarter under the pretext of purchasing products. There is no evidence adduced by prosecution that prosecutrix was serving with a company on the day of alleged incident. She further says that accused did not buy anything, but had sexual intercourse with her under the pretext of marriage. FIR gives an impression that accused and prosecutrix were not knowing each other prior to that day. Under the said circumstance, whether prosecutrix would have gone along with accused at a far distance and then would keep mum for so many days on the alleged promise to marry? Prosecutrix had lodged a written complaint earlier on 17-08-2010, which is at Exhibit 16. In that complaint, she has stated that there was love affair between her and accused. There is vast difference

between the contents of Exhibits 15 and 16. This shows the conduct on the part of informant. Further, it is to be noted that prosecutrix and her mother had created a scene in front of house of accused persons. This fact has been brought on record. This fact shows that informant has lodged the FIR with ulterior motive. She had not disclosed caste in FIR. How accused No. 2 would have come to know about the caste of prosecutrix? Prosecution has not examined any person who had seen prosecutrix visiting the house of accused.

08. It has been further submitted on behalf of appellant that PW 2, mother of the informant, has supported prosecution but her testimony on the point of alleged rape is hearsay. PW 3 Raosaheb Sable is neither helpful to prosecution nor to the accused. PW 4 Gulabkhan Vajirkhan is the *panch* in whose presence clothes of the accused came to seized. PW 5 Shantabai Navgire and PW 6 Sheshrao Rathod have turned hostile. PW 7 Sandip Bhajibhakre is the Investigating Officer. If the prosecution evidence is considered, it emerges that there was love affair between informant and accused since 2 years prior to FIR. She had not lodged any complaint about the acts allegedly done earlier. FIR came to be lodged only when accused No. 1 had refused to marry. No doubt, she became pregnant and delivered a male child. The DNA report says that accused is the father of the child. However, only on

the basis of DNA report, accused can not be convicted. Here in this case, prosecutrix is the consenting party. It has been further argued that as regards the accused No. 2 is concerned, the learned Trial Court had rightly acquitted him. The charge under Atrocities Act was same as regards accused No. 1 and 2. Therefore, when accused No. 2 has been acquitted from those charges; how accused No. 1 could have been convicted? The learned Trial Court has failed to consider difference between "Rape and Consensual Sex".

09. Learned Advocate for appellant has relied on the decision in **Abdul Salam v/s. State of M. P. [2006 CRI. L. J. 4734] (MP HC)**; wherein facts and circumstances proved that prosecutrix aged about 18 years was a consenting party to the alleged act of sexual intercourse by accused. It was held that her consent was not obtained by putting her in fear of death or hurt. Further reliance has been placed on the decision of this Court, bench at Nagpur in **Anwar Khan Iqbal Khan v/s. State of Maharashtra [2010 CRI. L. J. 3597]** wherein there were series of sexual acts between prosecutrix and accused within a span of two years. Prosecutrix had gone on her own to meet accused at various places and hotel rooms. If those acts were forcible, then it would not have gone unnoticed by persons around. It is not the case of the prosecution that since beginning promise to marry was a hoax and was made without intention. Therefore, the version of

the prosecutrix that at all places the accused had committed forcible sexual intercourse with her, is not inspiring confidence. She was a consenting party. Accused came to be acquitted. Further reliance has been placed on the decision in **Uday v/s. State of Karnataka [2003 CRI. L. J. 1539]** wherein prosecutrix had stated that she had given consent under 'misconception of fact'. She had the knowledge that the caste of the accused is different from her and the marriage will be opposed. She started cohabiting with accused and then became pregnant. The consent given by her can not be said to be given under 'misconception of fact'. In **Deepal Gulati v/s. State of Haryana [AIR 2013 SC 2071]** the difference between rape and consensual sex has been clarified.

10. Learned Advocate for appellant has submitted that the prosecutrix in this case was also a consenting party and therefore, conviction awarded to the accused / appellant deserves to be set aside.

11. Per contra, learned A. P. P. has submitted that informant has given all the details as to how she came in contact with accused and under which circumstance she was taken to his house in FIR Exhibit 15. She has deposed to that effect and has also stated that under the pretext of purchasing products from prosecutrix, accused had taken her to his house. He had forcible sexual intercourse with her. Accused had

given promise to marry. Each time the accused had given her promise and prosecutrix believed in what he said. Since beginning the accused had no intention to marry. He exploited the informant sexually and refused to marry with her. Her 'consent' was not voluntary. She can not be termed as consenting party under the said facts. She became pregnant and therefore, asked accused to marry her. She has given birth to a male child during the pendency of trial. The DNA test was conducted and the report of the expert would show that accused is the father and informant is the mother of the child. The said test report clearly show that there was sexual intercourse between them. Accused persons were knowing the caste of the informant and therefore, it was not mentioned in the FIR. She is member of Scheduled Caste and therefore, accused No. 1 has been rightly convicted under Atrocities Act also. A well reasoned order has been passed and therefore, there is no necessity to interfere with the same.

12. Learned A. P. P. Has relied on the decision in ***State of U. P. V/s. Naushad [Criminal Appeal No. 1949 of 2013]*** decided on 19-11-2013 by Hon'ble Supreme Court]; wherein it was proved that the consent of the prosecutrix was obtained under misconception of fact.

13. At the outset, a fact is required to be noted that age of the prosecutrix was 24 years when she lodged the FIR. The occurrence of the incident was

around 1 year prior to FIR. She was staying alone at Aurangabad and she was serving in marketing department of a Company at that time. That means she was independent and it can be presumed that she was having knowledge as to what she is good or bad to her. In other words, she had sufficient maturity. PW 1 is the prosecutrix. She has deposed as per her FIR Exhibit 15. It is to be noted from the contents of the FIR itself (which has been confirmed in her examination-in-chief) that she does not claim that she was knowing accused prior to the day on which she met him on CIDCO bus stop. She has stated that after she met that man on bus stop, she went with him at Harsul on the representation that he will purchase the detergent powder at his quarter. Surprising fact is that she was selling detergent door to door. That means she would not have large quantity with her. She does not claim that said man gave her impression that he will purchase detergent in large quantity. She does not claim that she tried to enquire with him as to how much quantity he require and why she should go with him. It is impossible that without any such basic inquiry, she would have gone with him.

14. PW 1 has further deposed that even after going to the house of said person, he did not purchase detergent, but demanded sexual favour to him, which she refused. Then the said person promised her to marry and then threatened her. He had then committed

rape on her. She does not say that she had resisted him in any manner. What threat was given, where exactly she was in the house, whether there was anybody in the house, etc. is not disclosed. She has not stated that after taking her inside the house, the said person had latched the door. She is also silent on what conversation took place between them, immediately after entering the house. There is no explanation about why she should allow the person to close the door of the house, if at all it was closed. When she would have realized that the person is not in a mood to purchase detergent, why she had not left the house? Even after that person had allegedly demanded sexual favour to her and she had refused it, why she should remain in the house and why she had not attempted to come out of the house? According to PW 1, the said person had promised her to marry first. When she was not knowing the person including his name, his background, regarding his family, etc who she would have believed in his statement? She has not stated as to what was her reaction after that person promised her to marry. She has not stated what was the threat given to her. At the cost of repetition, it can be seen that she has not given place of alleged rape inside the house. Her subsequent conduct on that day is also required to be seen. If everything had taken place without her consent, then why she did not lodge complaint on that day itself or within a reasonable period from that day. No reason has been assigned for

the same. When so many questions have been left unanswered, it is hard to believe such prosecutrix on the point of rape. The FIR Exhibit 15 as well as the testimony of PW 1 gives an impression that she has not given true facts or she was hiding certain facts. She has left missing links. The difference between consensual sex and rape elaborated in **Deepak Gulati's** case (supra) is definitely required to be considered. It has been observed that, "Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-

representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives". Here in this case, prosecutrix does not say that she believed in the promise to marry given by accused on that day.

15. She has further deposed that thereafter time to time, accused was taking her to his quarter under threats and committing rape on her. First and the foremost question is that when both of them were unknown to each other, how accused had established contact with her on subsequent occasions? She has not stated that on that day itself accused had taken her address from her, with her mobile number, etc. If the said statement of prosecutrix is to be believed then each time when such act was allegedly done by accused, she had a right to lodge complaint. She has not explained as to why she had not lodged it. All the time she is stated to have not given consent. Then why she was going with him or responding to the call of the accused? Which kind of threats were given by accused has not been again explained. Only vague statement to that effect is made. At another breath

she has deposed that accused was promising her to perform marriage with her. She does not say whether each time she believed in his so called promises? She has not stated that since promise to marry was given, and she believed, though initially she had not consented, she kept relations with accused. She does not say that at some point of time she had tried to gather details about accused and his family and also told her details. She has not stated that after the alleged act was done, she wanted to marry accused. If she had no intention to marry with him, why she was responding to him? She has stated that accused committed rape on her till July 2010. According to her, first act was done in September 2009 (One year prior to 05-09-2010). That means she allowed the accused to commit rape on her for a period of 8-9 months. She has not stated that accused used to give threat each time the act was done that she should not disclose it to anybody and therefore she kept quiet. Therefore, when there was no hurdle for her to lodge a report with Police, she has not approached any authority. There is no explanation to that effect in her testimony. Again the impression is created that she is not telling a true story. It could not have been a natural conduct of a lady under such circumstance.

16. PW 1 has deposed that she disclosed all the facts to her mother only after she became pregnant. PW

2 is the mother of the prosecutrix. She has also stated that her daughter had disclosed about rape after she became pregnant. Therefore, the part of her testimony prior to her knowledge can not be considered.

17. There is no dispute about the fact that prosecutrix is member of Scheduled Caste. However, PW 1 has not stated that she had disclosed her caste to accused prior to July 2010. Accused should know her caste before the incident and then only there can be a case under Atrocities Act. Both the witnesses have stated about the incident in July 2010 which allegedly took place in front of quarter of accused No. 2. It is to be noted that the learned Additional Sessions Judge has acquitted accused No. 2 from the charges of Atrocities Act regarding the incident on that day. Both the witnesses have deposed that both the accused had uttered the same words and did similar acts. Then rightly the question is asked by learned Advocate for appellant that how and under what circumstance accused No. 1 can be held responsible. Accused No. 1 ought to have been acquitted under those charges on the ground of parity. Prosecutrix has not come with a case that accused No. 1 had knowledge about her caste and therefore, had decided to ravish her and sexually exploit her.

18. It appears that what has prompted learned

Trial Court is the positive report of DNA. No doubt, the result of DNA showed that the prosecutrix and accused No. 1 are the biological parents of the child born to prosecutrix. However, the said report *ipso facto* does not presume that prosecutrix would have been raped. Prosecution should rule out the possibility of consensual sex in this case. Prosecutrix has tried to blow hot and cold at the same time by saying at one hand that she was raped i.e. had not given consent for sexual intercourse and at another breath tries to say that her consent was obtained by giving promise to marry. She is not using the words 'false promise to marry'. She has not stated that her consent was obtained by misconception. Offence under Sec. 376 of Indian Penal Code can not be proved when there are these two set of theories. Therefore, the ratio laid down in **State of U. P. V/s. Naushad** (supra) will not come to the help of prosecution. Whether 'consent' is freely given or obtained by putting a victim in fear will depend on facts of each case. Here in this case, prosecution has failed to prove that prosecutrix had not given consent for the sexual intercourse. There is inordinate unexplained delay in lodging FIR. It goes to the root of the matter. Further, even after the alleged incident in July 2010, when it was clear to prosecutrix that accused will not perform marriage with her; why she did not approach Police immediately. F. I. R. Exhibit 15 has been filed on 05-09-2010.

Thus, already there was delay in lodging the report regarding rape, and then further delay has been caused in respect of Atrocities Act also.

19. There is no necessity to discuss other evidence on record. An accused can be convicted for the offence punishable under Section 376 of Indian Penal Code on the basis of sole testimony of prosecutrix. However, in this case the evidence of prosecutrix does not inspire confidence. Ingredients of the offence under which the learned Trial Court has convicted the accused No. 1 / present appellant are not attracted at all. The case has not been proved by the prosecution beyond reasonable doubt. Learned Trial Court has not taken into consideration all the above reasons. Therefore, the conviction deserves to be set aside by allowing the appeal.

20. Learned Trial Court has granted compensation of Rs. 1,00,000/- to the prosecutrix and the male child under Section 357 of Code of Criminal Procedure. Since the appeal deserves to be allowed, the order of payment of compensation is also required to be set aside. Another point as to why this order of compensation is not sustainable is that, the learned Trial Judge has not clarified as to whether the said order is passed under Section 357 (1) of Code of Criminal Procedure or under Section 357 (3) of Code of Criminal Procedure. There is difference between these

two provisions. When compensation is to be awarded under Section 357 (1) of the Code, then it should be out of the fine amount only. If the compensation is to be awarded under Section 357 (3), then the fine should not be 'the part of sentence'. Hon'ble Apex Court in ***Dilip S. Dahanukar v/s. Kotak Mahindra Co. Ltd. And Anr., [(2007) 6 SCC 528]***, has differentiated between fine and compensation. It has been observed that "the distinction between Sub-Sections (1) and (3) of Section 357 is apparent. Sub-section (1) provides for application of an amount of fine while imposing a sentence of which fine forms a part; whereas Sub-Section (3) calls for a situation where a Court imposes a sentence of which fine does not form a part of the sentence". Further it has been observed that, "We must, however, observe that there exists a distinction between fine and compensation, although, in a way it seeks to achieve the same purpose. An amount of compensation can be directed to be recovered as a 'fine' but the legal fiction raised in relation to recovery of fine only, it is in that sense 'fine' stands on a higher footing than compensation awarded by the Court."

21. Here in this case, while convicting accused No. 1 under both the sections, the learned Trial Court has awarded fine of Rs.2,000 and Rs. 1,000/- respectively. That means the fine was part of the sentence awarded under those sections. If the

compensation could have been awarded under Section 357 (1) of the Code, then it ought to have been out of the said amount of fine. When the compensation has been awarded to the tune of Rs.1,00,000/- then fine ought not to have been awarded. On this count also the said order of payment of compensation is not sustainable. If there are any rights to the said male child of accused No. 1, then they can be exercised by any set of legal mode.

22. For the above-said reasons following order is passed.

ORDER

1. Appeal is hereby allowed.
2. Conviction awarded to the appellant Santosh Raysing Chavan in Sessions Case No. 308 of 2011 on 27-06-2017 by Special Judge (Additional Sessions Judge-7), Aurangabad, for the offence punishable under Section 376 of Indian Penal Code and Section 3 (1) (x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is hereby set aside.
3. Appellant be set at liberty if not required in any other case.

4. The order of payment of compensation to the prosecutrix and her male child is also hereby set aside.
5. It is clarified that the rest of the order passed by the learned Trial Court is hereby maintained.
6. Appellant to execute bond of Rs.15,000/- with surety of like amount in view of Section 437A of Code of Criminal Procedure, before his release. Duration of his bond would be for six months from the date of execution.

(Smt. Vibha Kankanwadi)
JUDGE

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Govindrao
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