

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.134 OF 2015

RAFIQ MOHAMMED SHAIKH

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Umesh V. Mohite, Advocate for the Appellant.

Ms. Anamika Malhotra, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 18th APRIL 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 8th July 2014 passed by the learned Additional Sessions Judge, Greater Bombay, Mumbai, in Sessions Case No.189 of 2013, thereby convicting the appellant/accused of offences punishable under Sections 376, 506-II and 417 of the Indian Penal Code. For the offence punishable under Section 376

of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.1,000/- and default sentence rigorous imprisonment for 2 months. For the offence punishable under Section 506-II of the Indian Penal Code, he has been sentenced to suffer rigorous imprisonment for 6 months apart from payment of fine of Rs.200/- and default sentence of rigorous imprisonment for 15 days. For the offence punishable under Section 417 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.500/- and in default to undergo further rigorous imprisonment for 1 month.

2 Facts leading to the prosecution of the appellant/accused are thus :

- (a) The prosecutrix/PW1, at the relevant time, was a minor female of about 14 years of age. She was residing with her aunt namely Kalavati Kale. The appellant/accused is neighbour of her parents, who used to reside at Gaikwad

Chawl, Jai Bhim Nagar, Ductline Road, Bhandup. The prosecutrix/PW1 became acquainted with the appellant/accused Rafiq Shaikh as he used to visit her parental house. Her friend Rani had given cell phone number of the prosecutrix/PW1 to the appellant/accused. Long acquaintance of the prosecutrix/PW1 with the appellant/accused Rafiq Shaikh ultimately culminated into love affair between them.

- (b) According to the prosecution case, on 18th September 2012, the appellant/accused called the prosecutrix/PW1 near Sai Baba Temple, Bhandup. He made her to sit in the tempo parked near the temple. After some intimate talks with her, according to the prosecutrix/PW1, the appellant/accused had committed forcible sexual intercourse with her by telling her that he will marry her.
- (c) According to the prosecution case, the prosecutrix/PW1 was again called by the appellant/accused on 19th September

2012. She was threatened that if she failed to come, she would be killed. Then, the appellant/accused took the prosecutrix/PW1 to Gaikwad Chawl at about 11.30 p.m. She was made to sit in the rickshaw of Baban parked at Ductline Road. Again by alluring her with a promise to marry, the appellant/accused committed forcible sexual intercourse with her. It is, further averred that, on 21st September 2012, the appellant/accused again called the prosecutrix/PW1 to meet him at 10.30 p.m. near Sai Baba temple of Bhandup. She was then made to sit in the parked tempo belonging to a person named Bhau, where the appellant/accused committed rape on her.

- (d) According to the prosecution, the prosecutrix/PW1 was again raped by the appellant/accused on 27th September 2012 by calling her in the night hours in the rickshaw of Baban, parked at Gaikwad chawl of Bhandup. It is averred that when they both were alighting from that rickshaw, at about 11.00 p.m. of 27th September 2012, PW3 Baban

Sonawane had seen them. Then, mother of the prosecutrix/PW1 also came on the spot. The appellant/accused ran away. Mother of the prosecutrix/PW1 namely PW2 Indu questioned the prosecutrix/PW1, where upon the prosecutrix/PW1 disclosed to her that she has love relation with the appellant/accused. PW2 Indu then called the appellant/accused from the cell phone, but appellant/accused Rafiq refused to accept the fact that he has love relation with the prosecutrix/PW1.

- (e) According to the prosecution case, thereafter the appellant/accused refused to marry the prosecutrix/PW1 and therefore, she disclosed this fact to her mother on 12th October 2012. Then the report (Exhibit 15) against the appellant/accused came to be lodged at Mulund Police Station by the prosecutrix and it came to be recorded by PW7 Anil Jaikar, Police Sub-Inspector. It was then sent to Bhandup Police Station where PW8 Manohar Vichare, Police Inspector, registered Crime No.459 of 2012

for offences punishable under Sections 376 and 506(II) of the Indian Penal Code against the appellant/accused.

- (f) The prosecutrix/PW1 was then sent for medical examination. She came to be examined by PW6 Dr.Baban Shinde at Nagpada Hospital. She was also subjected to Ossification test. The appellant/accused came to be arrested. Statement of witnesses came to be recorded. Certificate of date of birth of the prosecutrix/PW1 was collected. Clothes of the prosecutrix/PW1 were also seized. Seized articles were sent for chemical analysis and on completion of investigation, the appellant/accused came to be charge-sheeted.
- (g) The learned trial court framed Charge for offences punishable under Sections 376, 506(II) as well as under Section 417 read with 420 of the Indian Penal Code against the appellant/accused. He abjured guilt and claimed trial. In order to bring home the guilt to the appellant/accused, the

prosecution has examined in all eight witnesses. The prosecutrix is examined as PW1. The report lodged by her is at Exhibit 15. Her mother Indu is examined as PW2. Baban Sonawane and Santosh Kale, who are residents of Gaikwad chawl of Bhandup and who had seen the couple together in the autorickshaw are examined respectively as PW3 and PW4. The Sub-Registrar under Registration of Births and Deaths Act, 1969, namely Dr.Rucheera Dey is examined as PW5. Exhibit 26 is the Certificate of Birth of the prosecutrix/PW1 whereas Exhibit 27 is the extract of Birth Register. Dr.Baban Shinde, Medical Officer of Nagpada Hospital is examined as PW6. Exhibit 29 is the report of medical examination of the prosecutrix/PW1 as well as that of her ossification test. Anil Jaikar, Police Sub-Inspector of Mulund Police Station, is examined as PW7 whereas Investigating Officer Manohar Vichare, Police Inspector, is examined as PW8.

(h) Defence of the appellant/accused was that of total denial.

However, he did not enter in defence. Upon hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused and sentenced him as indicated in the opening paragraph of this judgment.

3 I have heard the learned advocate for the appellant/accused at sufficient length of time. He argued that evidence of the prosecution is inherently improbable and unacceptable as allegations are to the effect that the prosecutrix/PW1 was raped in the busy locality of Mumbai in a parked vehicle. That is not possible. The prosecutrix/PW1 has not raised any hue and cry. The learned advocate further argued that the medical evidence so also the forensic evidence is not supporting the case of the prosecution. It is further argued that the prosecutrix/PW1, so also her mother, are habitual in lodging similar reports of sexual offence against various persons. The learned advocate submitted that soon after conviction of the appellant/accused in the instant case, the prosecutrix/PW1 had lodged a report against a person

named Dr.Jayesh Katira and alleged that the said doctor had committed forcible sexual intercourse with her on 5th September 2014 in the car by threatening her that he would upload her nude photographs on social networking sites. The learned advocate for the appellant/accused drew my attention to the order dated 10th December 2014 passed by the Designated court under Protection of Children from Sexual Offences Act, 2012, in Sessions Case No.481 of 2014 to buttress this contention and submitted that vide this order, said Dr.Jayesh Katira came to be released on bail and that the said order contained reference to the case against the present appellant/accused.

4 The learned APP supported the impugned judgment and order of conviction as well as resultant sentence, by contending that evidence of the prosecutrix/PW1, who at the relevant time was proved to be below 16 years of age, is believable and it demonstrates commission of rape by the appellant/accused on her.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including the oral as well as documentary evidence. The First Information report (FIR) in this case came to be lodged on 13th October 2012 by the prosecutrix/PW1, though according to the prosecution case, mother of the prosecutrix/PW1 namely PW2 Indu had seen the prosecutrix/PW1 in the company of the appellant/accused on 27th September 2012 in night hours. The delay in lodging the FIR, according to the learned advocate for the appellant/accused, is fatal to the case of the prosecution. In the matter of **State of Himachal Pradesh vs. Shree Kant Shekari**¹ it is held thus in paragraph 18 :

“18 The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the Court on guard to search for and consider if any

1 2004 ALL MR (Cri) 3145 (S.C.)

explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle. These aspects were highlighted in **Tulshidas Kanolkar v. State of Goa [2003 (8) SCC 590].**”

6 Similarly, in the matter of **State of Maharashtra vs. Chandraprakash Kewalchand Jain**², the Honourable Apex Court has held thus :

“A prosecutrix of a sex-offence cannot be put on part 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

2 1990 SCC 5501

corroborated in material particulars. She is undoubtedly a competent witness under Section 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 leveled 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 Section 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 on 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.”

7 At this juncture, it is apposite to quote observations of the Honourable Apex Court found in paragraph 10 of the judgment in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**³ which demonstrates that are several reasons for approaching the law and enforcement agencies belatedly in the cases of sexual offence. It reads thus :

“Without the fear of making too wide a statement or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one

3 AIR 1983 SUPREME COURT 753(1)

conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :-

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought in to controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent.

(12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.”

8 It is, thus, clear that, mere delay in lodging the report in sexual offences cannot be used as a ritualistic formula to jettison the case of the prosecution. It is duty of the court to examine the evidence adduced by the prosecution in broader probabilities and by ascertaining whether there are circumstances on record which justify the delay in lodging the report.

9 One may argue that in the case in hand, evidence of the prosecutrix/PW1 is uncorroborated and therefore, for want of corroborative pieces of evidence, the prosecution case must fail. At this juncture, therefore, it is relevant to quote observations of the Honourable Apex Court in the matter of **Radhu Vs. State of M. P.**⁴ wherein in paragraph 5 it is held thus :

“5 It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and

4 2007 CRI.L.J. 4704

contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape' if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrist, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend

ultimately on the facts and circumstances of each case.”

10 Keeping in mind this law regarding appreciation of evidence of the prosecution in cases of sexual offences, let us examine the evidence adduced by the prosecution in order to ascertain whether she is a witness of truth. While appreciating her version, one will have to keep in mind the fact that in such cases, the witness may go on adding embellishments to her version, perhaps with the fear that her testimony may be rejected by the court. The court, however, is not expected to disbelieve evidence of such witness altogether, if such witness is otherwise found to be trustworthy.

11 It is in evidence of the prosecutrix/PW1 that on 12th September 2012, she met the appellant/accused for the first time and then her friend Rani gave her cell phone number to the appellant/accused. The prosecutrix/PW1 deposed that thereafter, on 18th September 2012, at about 8.30 p.m., she met the appellant/accused at Ductline Road and they both sat in a tempo

parked near the temple. Thereafter, the appellant/accused, as per version of the prosecutrix/PW1, stated that he would marry her and committed sexual intercourse with her. She was with the appellant/accused till 5.00 a.m. The next incident of sexual intercourse by the appellant/accused with her is deposed by the prosecutrix/PW1 by stating that on 19th September 2012, she was taken to Gaikwad chawl area by the appellant/accused and then he committed sexual intercourse with her in the rickshaw of Baban. As per her version, on 21st September 2012, the appellant/accused committed sexual intercourse with her in the parked tempo and thereafter, on 27th September 2012, similar such incident took place in the rickshaw of Baban. The prosecutrix/PW1 further deposed that thereafter, Baban saw both of them and her mother also came on the spot and questioned her. Her mother, then, telephonically contacted the appellant/accused but he refused to endorse the fact that he loves the prosecutrix/PW1. The prosecutrix/PW1 then stated that she disclosed about her sexual relations with the appellant/accused to her mother. Her mother, thereafter, disclosed the incident to

father of the prosecutrix/PW1 and thereafter, she lodged report Exhibit 15 on 13th October 2012.

12 The tone and tenor of evidence of the prosecutrix/PW1 regarding the incidents of sexual intercourse with the appellant/accused demonstrates consensual sex by her with the appellant/accused. She stated that she had submitted herself to the appellant/accused as he assured to marry her. In entire cross-examination of the prosecutrix/PW1, this evidence of the prosecutrix/PW1 in respect of sexual intercourse between the couple is not shattered at all. It is attempted to demonstrate from the cross-examination that many people and vehicles move around in the area where such incidents took place. However, it is seen that, such incidents which the prosecutrix/PW1 had described, took place inside the parked vehicle and that too, at night hours, and merely because there was movement of people and vehicles in that area, one cannot disbelieve the version of the prosecutrix/PW1 regarding sexual intercourse with her by the appellant/accused. The prosecutrix/PW1 has not claimed that

what was going on with her was against her wish and that she was protesting such incident by making hue and cry and by seeking help of the passersby. On the contrary, her evidence shows that she was accepting what was coming in her way, and therefore, there was no likelihood that such an encounter invited attention of the residents of the locality. Hence, I see no merit in contention of the learned advocate for the appellant/accused that evidence of the prosecutrix/PW1 is inherently improbable. The cross-examination of the prosecutrix/PW1 is not indicating any reason for the prosecutrix/PW1 to implicate the appellant/accused falsely in the crime in question and she had no axe to grind against the appellant/accused by his false implication in the crime in question. On the contrary, it is seen from evidence of the prosecution that she was having love affair with the appellant/accused, which had ultimately resulted in sexual relationship between both of them.

13 Evidence of PW2 Indu, who is mother of the prosecutrix/PW1 makes it clear that the prosecutrix/PW1 was

residing with her sister at Mulund, whereas, she herself was residing in Jai Bhim Nagar, Ductline Road, Bhandup, Mumbai. PW2 Indu has stated that on 27th September 2012, she had seen the prosecutrix/PW1 in the rickshaw of Baban and she telephonically contacted the appellant/accused. Her version reveals that her daughter i.e. the prosecutrix/PW1 has disclosed that on the pretext of marrying her, the appellant/accused had committed sexual intercourse with her. Evidence of PW2 Indu makes it clear that, ultimately, on 12th October 2012, it was revealed that the appellant/accused though promised, was not marrying the prosecutrix/PW1, and hence, the report Exhibit 15 came to be lodged on 13th October 2012. This explains the delay in lodging the FIR despite the fact that mother of the prosecutrix/PW1 came to know about the fact on 27th September 2012. The reason for delay is genuine in Indian setting and therefore, the delay of about 16 days is not fatal to the prosecution case.

14 PW3 Baban Sonawane and PW4 Santosh Kale had claimed to have seen the prosecutrix/PW1 in company of the appellant/accused in the vehicle in night hours but they have failed to support the case of the prosecution.

15 The prosecutrix/PW1 came to be medically examined on 15th October 2012 by PW6 Dr.Baban Shinde and evidence of this witness, which is supported by contemporaneous medical report Exhibit 29 shows that during the course of medical examination of the prosecutrix/PW1, it was found that her hymen was having tears at 3, 6 and 9 O'Clock positions. This indicates that the prosecutrix/PW1 had indulged in sexual intercourse as stated by her during the course of her evidence, and therefore, this medical evidence corroborates the version of the prosecutrix/PW1. Evidence of PW6 Dr.Baban Shinde, so also Medical Report at Exhibit 29 prepared by him at the time of examination of the prosecutrix/PW1, proves former statement of the prosecutrix/PW1 that the appellant/accused had indulged in

sexual intercourse with her on promise to marry her. This evidence is, therefore, admissible under Section 157 of the Evidence Act and corroborates the version of the prosecutrix/PW1. Similarly, even PW2 Indu has deposed about former statement of the prosecutrix/PW1 regarding sexual intercourse by the appellant/accused with her and same is also reliable.

16 In the light of foregoing discussion, it needs to be held that the appellant/accused had committed sexual intercourse with the prosecutrix/PW1 for the period from 18th September 2012 to 27th September 2012.

17 The question which falls for consideration is whether the sexual intercourse between the appellant/accused and the prosecutrix/PW1 amounts to rape, so also whether such sexual intercourse amounts to cheating the prosecutrix/PW1 on false promise to marry her. The learned trial court has held that both these offences stand proved in the light of evidence of the prosecutrix/PW1. Section 415 of the Indian Penal Code defines

the offence of cheating. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. The prosecutrix/PW1 in her FIR has clearly stated that she was having love relation with the appellant/accused from 13th September 2012. Perusal of her evidence shows that the first sexual intercourse between the couple took place on 18th September 2012. The prosecutrix/PW1 has stated that, at that time, the appellant/accused reiterated his love towards her and said that he would marry her and then the couple had sexual intercourse. Charge under Section 417 of the Indian Penal Code rests upon representation which is false. For proving this charge of cheating, it is not sufficient to prove that a false representation had been made but it is further necessary to prove that such representation was false to the knowledge of the accused when it was made. If both parties agree to a particular course of action and one of them thereafter changes the course, it does not amount to cheating. In the case in hand, there is no evidence to demonstrate that the representation made by the appellant/accused was false to his knowledge when it was made

by him. Therefore, the Charge under Section 417 of the Indian Penal Code must fail.

18 Now let us examine whether the appellant/accused had committed rape on the prosecutrix/PW1. The offence took place from 18th September 2012 to 27th September 2012, and therefore, the definition of the offence of rape under Section 375 of the Indian Penal Code as it stood prior to substitution by the Criminal Law (Amendment) Act, 2013, will have to be taken into consideration. Clause Sixthly of Section 375 of the Indian Penal Code makes it clear that sexual intercourse with a woman with or without her consent when she is under 16 years of age amounts to rape. In the case in hand, the prosecutrix/PW1 has deposed that her date of birth is 6th February 1998. However, oral evidence is hardly sufficient to prove age of a person. Therefore, the prosecution in this case has examined the Sub-Registrar under the Registration of Births and Deaths Act, 1969. It is in evidence of PW5 Dr.Rucheera Dey, Sub-Registrar under the said Act that she issued Birth Certificate of the prosecutrix/PW1 (Exhibit 26) as per

the record maintained by the Office and as per that record, date of birth of the prosecutrix/PW1 is 6th February 1998. This witness proved the certificate Exhibit 26 issued by her in the capacity of the Sub-Registrar under Sections 12 and 17 of the Registration of Births and Deaths Act, 1969, as well as under Rules 8 and 13 of the Maharashtra Registration of Births and Deaths Rules, 2000. PW5 Dr.Rucheera Dey had also produced the Birth Register maintained under the Registration of Births and Deaths Act, 1969, and had placed on record the verified copy of the relevant page of that Register which is marked at Exhibit 27. Thus, the Birth Register maintained under the said Act also demonstrates that the date of birth of the prosecutrix/PW1 is 6th February 1998.

19 Section 7 of the Registration of Births and Deaths Act, 1969, deals with appointment of Registrar in each local area. It is duty of the Registrar to register every birth and every death which takes place in its jurisdiction. The Act mandates that the Registrar should discharge his duties carefully. Section 8 of the Registration of Births and Deaths Act, 1969, casts duty on the

hospital as well as head of the family to report birth to the Registrar. Section 16 of the Registration of Births and Deaths Act, 1969, requires maintenance of Register in the prescribed form and Section 17 deals with search of Births and Death Register. Sub-section (2) of this Section provides that the extract given under this Section shall be certified by the Registrar and shall be admissible in evidence for the purpose of proving the birth or death to which the entry in the relevant Register relates. In the case in hand, the entry in the Birth Register maintained in the official course of business by the Registering Authority under the provisions of Registration of Births and Deaths Act, 1969, shows that the prosecutrix/PW1 was born on 6th February 1998, and as such, at the time of the incidents of sexual intercourse with her, she was 14 years and few days old. She was, therefore, below 16 years of age when the incidents of sexual intercourse with her by the appellant/accused took place. hence, the offence of rape punishable under Section 376 of the Indian Penal Code is made out by the prosecution.

20 The appellant/accused is also convicted for the offence punishable under Section 506(II) of the Indian Penal Code by the learned trial court. Section 506 deals with punishment for criminal intimidation. Section 503 of the Indian Penal Code defines the offence of criminal intimidation. Threatening another with injury to her person, reputation or property with intention to cause alarm to that person or to cause that person to do any act which he is not legally bound to do or omit to do such act which he is legally entitled to do, amounts to criminal intimidation. Evidence on record does not indicate that by threatening to the prosecutrix/PW1, she was made to submit her chastity to the appellant/accused. On the contrary, even according to the prosecution case projected from the FIR, the sexual intercourse was consensual in nature falling out of love relations between the parties. Hence, the prosecution has failed to make out the offence punishable under Section 506 of the Indian Penal Code.

21 For the offence punishable under Section 376 of the Indian Penal Code which is held to be proved against the

appellant/accused, the learned trial court has imposed punishment of rigorous imprisonment for 10 years apart from payment of fine of Rs.1,000/- and default sentence of rigorous imprisonment for 2 months. The question is whether the quantum of sentence so imposed is justified.

22 Let us now examine whether the consequent sentence is proper. It is well settled that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing court are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with the gravity and nature of the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of the objects of the criminal justice system is to rehabilitate the transgressors and the criminals.

23 Prior to substitution by the Criminal Law (Amendment) Act, 2013, the offence of rape was punishable with imprisonment of either description for a term which shall not be less than 7 years but which may be for life or a term which may extend to 10 years apart from fine. Sub-section (2) of Section 376 of the Indian Penal Code, however, was prescribing the punishment of rigorous imprisonment for a term which shall not be less than 10 years but which may be for life, apart from imposition of fine. The case in hand is not falling in sub-section (2) of Section 376 of the Indian Penal Code, as it stood prior to amendment in the year 2013.

24 Case of the prosecutrix/PW1 projected from the FIR shows that the prosecutrix/PW1 was in love with the appellant/accused. The record shows that the appellant/accused was also a young person of 22 years of age. He was not proved to have threatened the prosecutrix/PW1 in any manner or had applied force on her for indulging in sexual relations with her. Such relations were undoubtedly consensual in nature but

punishable because the prosecutrix/PW1 at the relevant time was more than 14 years of age but less than 16 years of age.

25 In the matter of State of Himachal Pradesh vs. Mange Ram⁵ the evidence on record was showing that the prosecutrix was below 16 years of age. It is held thus in paragraph 16 by the Honourable Apex Court while sentencing the accused in that case :

“16 In view of the foregoing conclusions, we reverse the findings of the learned Sessions Judge which was confirmed by learned Single Judge and find that the accused is guilty of the offence punishable under Section 376 I.P.C. As regards the sentence, we take a lenient view for the reason that the prosecutrix and accused are related. They were both teenagers with an age difference of about 2-3 years. Both were immature and young. Evidence indicates no marks of violence at all on any part of the body of the prosecutrix. The incident happened in 1993. After the acquittal by passage of time, the members of the two families must have buried their hatchet if any arisen on account of this incident. The

5 2000 CRI.L.J. 4027

learned Counsel for the respondent argued that a further order for custodial sentence at this distance of time may cause rupture to social harmony in the village life and may only help to rekindle the flames of anger which have been smouldering for so long between near relatives. Having regard to all these matters, we hold that sentence already undergone by the accused would be sufficient to meet the ends of justice, and we do accordingly.”

26 In the matter of Zindar Ali SK vs. State of West Bengal and Another⁶ there was no love affair between the prosecutrix and the accused but the accused was after the prosecutrix requesting her to marry him and ultimately committed forcible sexual intercourse with the prosecutrix. While dealing with quantum of sentence, following are the observations of the Honourable Apex Court in paragraph 15 of the judgment :

“15 This takes us to the last argument about the quantum of sentence. The Courts below have awarded 10 years of imprisonment and a fine of Rs.5,000. In our opinion, considering the fact that the incident took place about 6 years back and the

6 2009 CRI.L.J. 1324

fact that the accused is behind the bars for last about 5 years, as also poverty on the part of the accused, we feel that the sentence already suffered would be sufficient. The sentence of fine is however, confirmed. Fine, if recovered shall be paid to the Prosecutrix. She shall be intimated by sending notice to her. We, accordingly, modify the sentence. The appeal is disposed of with this modification.”

27 In the matter of **Phul Singh vs. State of Haryana**⁷, the accused was aged about 22 years and was not a habitual offender. He was found guilty of the offence punishable under Section 376 of the Indian Penal Code. While dealing with quantum of sentence, following are the observations of the Honourable Apex Court found in paragraphs 7 and 8 of the judgment :

“7 He is a youth barely 22 with no criminal antecedents save this offence. He has a young wife and a farm to look after. Given correctional courses through meditational therapy and other measures, his erotic aberration may wither away. A man like the appellant has a reasonable prospect of shaping into a balanced person, given propitious social environs, curative and congenial work and

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techniques of internal stress release or of reformatory self expression.”

“8 In this background, we regard a four year term of rigorous imprisonment more hardening than habilitative, even though we deplore the sex violence the young appellant has inflicted on his cousin's wife snatching a tricky opportunity. Even so, the incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction and reduce the sentence to rigorous imprisonment for two years. We wish to emphasise that the special circumstances of this case constrain us to relent a little on principle because the restorative approach to sentencing has been jettisoned by the courts below.”

28 Lastly, in the matter of **State of Rajasthan vs. N.K. (Accused)**⁸ the Honourable Apex Court has observed thus while deciding the quantum of sentence for the offence punishable under Section 376 of the Indian Penal Code.

“19 Now remains the question of sentence. The incident is of the year 1993. The accused was taken

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into custody by the police on 3.11.1993. He was not allowed bail. During the trial as also during the hearing of the appeal by the High Court he remained in jail. It is only on 11.10.1995 when the High Court acquitted him of the charge that he was released from jail. Thus he had remained in jail for a little less than two years. Taking into consideration the period of remission for which he would have been entitled and the time which has elapsed from the date of commission of the offence, we are of the opinion that the accused-respondent need not now be sent to jail. It would meet the end of justice if he is sentenced to undergo imprisonment for the period already undergone by him and to a fine of Rs.2000/- with further simple imprisonment of one year and nine months in default of payment of fine as passed by the Trial Court. The appellant is allowed time till 1st May, 2000 for payment of fine. The accused-respondent is on bail. The bail bonds shall stand discharged on payment of fine as directed. Ordered accordingly.”

29 In the case in hand also the appellant/accused was 22 years of age when the incidents took place and there is nothing on

record to show that he is a habitual offender or criminal. The incidents of sexual intercourse between the prosecutrix/PW1 and the appellant/accused are held to be consensual in nature. The appellant/accused was arrested on 7th November 2012 and since then he is undergoing the jail sentence imposed on him after convicting him. Therefore, in the light of the observations in the foregoing paragraphs, I am of the considered opinion that imposition of sentence of 7 years of rigorous imprisonment with some fine will meet the interest of justice. Hence, the following order :

ORDER

- i) The appeal is partly allowed.
- ii) Conviction as well as resultant sentence imposed on the appellant/accused for the offence punishable under Section 506(II) and 417 of the Indian Penal Code is quashed and set aside. The appellant/accused is acquitted of offences punishable under Sections 506(II) and 417 of the Indian Penal Code.

- iii) Conviction of the appellant/accused for the offence punishable under Section 376 of the Indian Penal Code is maintained. However, sentence imposed on this count is altered to rigorous imprisonment for 7 years apart from fine of Rs.1,000/- and default sentence of rigorous imprisonment of 2 months in absence of payment of fine.
- iv) The appeal stands disposed of accordingly.

(A. M. BADAR, J.)