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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.350 OF 2014

Sunil Kashinath Shelke,
Indian Inhabitant, Age : 19 years,
Residing at : Vill. Bandhan,
Deherje – Gonpada, Tal. Vikramgad,
District – Thane.
(At present in Central Jail, Thane)

...Appellant
(Orig. Accused No.1)

Versus

The State of Maharashtra
(Through Vikramgad Police Station)

...Respondent
(Orig. Complainant)

Mr.Karma Vivan, as *Amicus Curiae*.

Ms.P.P.Shinde, A.P.P. for the Respondent - State.

CORAM : REVATI MOHITE DERE, J.

DATE : 24th APRIL, 2019

ORAL JUDGMENT :

1. The Appellant vide Judgment and Order dated 13th February, 2014, passed by learned District Judge – 5 and Additional Sessions Judge, Thane, in Sessions Case No.41 of 2010, has been convicted and sentenced as under:-

- for the offence punishable under Section 376 of the Indian Penal

Code to suffer rigorous imprisonment for 7 years and to pay fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for 3 months.

- The Appellant was however acquitted of the offences punishable under Sections 366A, 341, 504, 506 r/w 34 of the Indian Penal Code.

2. According to the prosecutrix (PW1), on 10th March, 2009, i.e. on the Holi day, at around 9.00 p.m. PW2 (a friend of the prosecutrix) came to her house to play holi; that at around 10.00 p.m. when she was playing holi in her pada, 3 accused including the appellant dragged her to the river, which was approximately 10 minutes walking distance; that the appellant raped her at the said spot; that thereafter, the appellant held her; that in the morning she removed the appellant's hand and returned home, after he fell asleep. According to the prosecutrix, her relatives were looking for her for the whole night and that on her return, she informed the incident to her parents and to the villagers and that there was some settlement that took place in writing. She has stated that as the appellant refused to marry her, she lodged a complaint, as against the appellant for the offences punishable under Sections 366A, 376(2)(g), 341, 504, 506 r/w 34 etc., of the Indian Penal Code. During investigation, the appellant and

other two co-accused came to be arrested. The clothes of the prosecutrix were seized under a panchanama and after investigation, charge-sheet was filed as against the accused including the appellant in the Court of learned Judicial Magistrate First Class. Since the offence under Section 376(2)(g) of I.P.C. was triable by the Court of Sessions, the case was committed to the Court of Sessions, for trial.

Charge was framed, as against the accused including the appellant for the aforesaid offences, to which the appellant pleaded not guilty and claimed to be tried.

The prosecution in support of his case examined 6 witnesses. PW1 – the prosecutrix; PW2 – a friend of the prosecutrix (hostile); PW3 – Rama Ravte, a villager, who was a signatory to the Settlement Deed (Exhibit – 18) (hostile); PW4 – Dr.Anil Gavanda, Medical Officer who examined the prosecutrix; PW5 – Ankush Gade, Head Master of the School and PW6 – P.S.I. Vasantrao Jadhav, Investigating Officer.

The defence of the appellant was that of total denial and false implication.

The learned District Judge – 5 and Additional Sessions Judge, Thane, after considering the evidence on record, vide Judgment and Order

dated 13th February, 2014 convicted and sentenced the appellant, as mentioned in paragraph 1 of this Judgment.

3. Mr.Vivan, learned *Amicus Curiae* submitted that the prosecution had miserably failed to prove that the prosecutrix was a minor, below 16 years at the time of the alleged incident. He further submits that the medical injuries do not corroborate the allegations of rape; that the prosecutrix had not spelt out the nature of the act of “rape” in order for it to constitute an offence; that the Settlement Deed does not show that the appellant had raped her, but it only shows that they were together through the night. He submits that on the basis of this evidence, conviction of the appellant cannot be sustained.

4. Learned APP supported the impugned Judgment and Order of conviction and sentence and submitted that no interference was warranted in the same.

5. Heard learned counsel for the parties and perused the papers with the assistance of the learned counsel.

6. At the outset, it is pertinent to note that the appellant was facing trial under the old Section 376 of the Indian Penal Code, prior to the Criminal Law (Amendment), 2013. 'Rape' as defined in Section 375 of the Indian Penal Code, as it stood, prior to the Amendment of 2013, read thus:-

375. Rape. — A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First. — Against her will.

Secondly. — Without her consent.

Thirdly. — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly. — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. — With or without her consent, when she is **under sixteen years** of age.

Explanation. — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

(emphasis supplied)

The punishment for Rape under Section 376(1) of the Indian Penal Code, as it stood prior to the Criminal Law (Amendment), 2013, with which this Court is concerned, is reproduced hereinunder:-

376. Punishment for rape — (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

7. First and foremost, it is necessary to consider whether the prosecution has proved that the prosecutrix was below 16 years of age, at the relevant time, when the incident took place. The evidence of the prosecutrix (PW1) shows that she was unable to state her date of birth, however had stated that in 2009 she was approximately 15 years age. She has reiterated in her cross-examination that she is not in a position to remember her date of birth. The evidence of PW4 – Dr.Gavanda, the

medical officer who examined the prosecutrix shows that the prosecutrix had developed permanent teeth and second molar was present and that Molar teeth crops up at the age of 16 to 18. PW4 – Dr.Gavanda has also admitted in his cross-examination that the girl could be 17 ½ years at the time of the incident relying upon Parekh's Modi's medical jurisprudence. Although, PW5 – Ankush Gade, the Head Master of the School was examined to prove the date of birth of the prosecutrix as 28th July, 1994, the said evidence is shaky and cannot be relied upon. It is pertinent to note that PW5 – Ankush Gade was the Head Master of the 2nd School of the prosecutrix, where the prosecutrix had studied for 3 years. The said witness has stated that as disclosed he had made an entry in the Register stating the prosecutrix's date of birth as 28th July, 1994. He has stated that as the prosecutrix was continuously remaining absent her name was deleted from the School record. Although, the said witness has stated that he had entered the date of birth based on the previous School Leaving Certificate of the earlier School, the said School Leaving Certificate of the previous School was admittedly not produced on record. Neither the parents or any other witness have been examined by the prosecution to show that the prosecutrix was a minor at the time of the alleged incident i.e. below 16

years of age. The evidence infact appears to be otherwise, that the prosecutrix was above 16 years of age. PW4 – Dr.Gavanda's evidence also supports the same.

8. Now, coming to the alleged incident of 10th March, 2009, the prosecutrix has stated that they were celebrating holi on the said day and that at about 10.00 p.m., she had gone to play Holi in the pada, when three accused including the appellant dragged her towards the river by name Deharje, which is approximately 10 minutes walking distance from the place; that the appellate raped her after removing her clothes ; that the appellant held her; that she removed his hand and came home in the morning after he fell asleep; that her relatives were searching for her for the whole night; that she informed the incident to her parents and that her family members and villagers gathered; that there was a settlement and some writing was done, however, inspite of that, the appellant abused her and therefore she approached the police station and lodged a complaint/FIR (Exhibit – 17). Legally, there is no impediment in convicting an accused based on the sole testimony of the prosecutrix, however, what is required to be seen is, whether the testimony of the prosecutrix inspires confidence and

is trustworthy and reliable. In the present case, according to the prosecution, she was dragged by three persons including the appellant towards the river which was at the distance of 10 minutes by walk from the place where she was dragged. Admittedly, the prosecutrix had not suffered any injury on her person. The same has been admitted by her in her cross-examination. PW4 – Dr.Anil Gavanda also has specifically noted that he did not find any injuries on the prosecutrix. According to the prosecutrix, PW2 (a friend of the prosecutrix) had come to her house and had taken her alongwith her to the pada. PW2 has specifically denied the same. As far as the evidence of rape is concerned, although, the prosecutrix has stated that she was raped after removing her clothes, admittedly, no details have been mentioned. In the facts, having regard to the evidence on record, what was understood by the prosecutrix as rape, may not have the same connotation of 'rape' as defined in Section 375 of the I.P.C. (old Section) PW4 – Dr.Anil Gavanda, the Medical Officer who examined the prosecutrix, in the column of 'History of alleged rape/kidnapping given by victim in her own words' has mentioned “Not specified”. In the column of 'Injuries on her private parts/breasts' it is stated as “Not Detected”. Although, in the Type of Hymen, it is mentioned as torn, in the column of the 'Position of Tear', it is

stated as “Not detected”, the Age of Tear is also not mentioned. As far as the document is concerned i.e. the Settlement Deed (Exhibit – 18), there is nothing in this document, which indicates that the appellant had raped the prosecutrix. All that the said document suggests is that the prosecutrix was with the appellant during the said night, which the appellant accepted and paid a fine of Rs.1,051/-. Thus, there is nothing in the Settlement Deed to even remotely suggests, that the appellant had raped the prosecutrix. At the highest, all that it suggests is, that they were out during the said night. Infact, the witness i.e. PW3 – Rama Ravte, who was a signatory to the said document i.e. Settlement Deed, has also turned hostile and has not supported the prosecution case. PW3 – Rama Ravte does not mention about the contents of the said document or appellant committing rape on the prosecutrix. The prosecutrix’s father, who had signed the document at Exhibit – 18 has not been examined, for reasons best known. Infact, PW3 – Rama Ravte's evidence suggests that on 11th March, 2009, the prosecutrix’s father had called him and had informed him that the appellant and his parents had come to see his daughter who was of a marriageable age, pursuant to which, he went to his house. He has stated that the appellant had stated that he was ready to marry the prosecutrix,

pursuant to which, the document at Exhibit – 18 was executed. PW3 – Rama Ravte in his cross examination has accepted that it was true that the appellant was intending to marry the prosecutrix prior to Holi and that the entire village knew about the said proposal. In the facts, there is some delay in lodging of the FIR, inasmuch as, the incident is alleged to have taken place on 10th March, 2009, whereas the FIR was lodged on 10th April, 2009. Delay *per se* in lodging the FIR, in cases of rape may not be fatal, however, the same would depend on the facts of each case. The evidence on record suggests that the appellant and PW1 (prosecutrix) were out together that night and that prior to the incident, there were talks of their marriage and the same was known to the villagers. In this background, having regard to the evidence, the possibility of the appellant being falsely implicated for rape, cannot be ruled out, as the marriage did not materialize.

9. Considering the overall evidence that has come on record, as stated aforesaid, it is difficult to place reliance on the sole testimony of the prosecutrix, in the peculiar facts of this case. There is no corroboration to her testimony. Having regard to the evidence on record, the appellant is entitled to benefit of doubt. Accordingly, the following order is passed:-

ORDER

- i) The Appeal is allowed;
- ii) The Judgment and Order dated 13th February, 2014, passed by learned District Judge – 5 and Additional Sessions Judge, Thane, in Sessions Case No.41 of 2010, convicting and sentencing the appellant is quashed and set aside;
- iii) The Appellant is acquitted of the offences, with which he is charged. The Appellant be released forthwith, if not required in any other case. Fine amounts, if paid, be refunded to the Appellant.

10. I would like to record a word of appreciation for the able assistance provided and the efforts taken by Mr.Karma Vivan, as an *Amicus Curiae*, in conducting the appeal. High Court Legal Services Committee to award fees of the learned *Amicus Curiae*, as per Rules.

REVATI MOHITE DERE, J.