

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

**CRIMINAL APPEAL NO.996 OF 2017  
WITH  
CRIMINAL APPLICATION NO.1071 OF 2018  
WITH  
INTERIM APPLICATION NO.608 OF 2019  
WITH  
CRIMINAL APPLICATION NO.1328 OF 2019  
WITH  
CRIMINAL APPLICATION NO.1233 OF 2017**

Abhijit @ Rohit Chandrakant Pawar,  
Age : 22 years,  
Now at K.C.P. Kalamba- 416 007.

...Appellant

versus

The State of Maharashtra

...Respondent

**WITH  
CRIMINAL APPEAL NO.655 OF 2016  
WITH  
INTERIM APPLICATION NO.4652 OF 2022**

Pravin @ Khanna Pavlas Waidande,  
Age : 27 years, Occ. : Self Employed,  
R/o.Peth, Tal.Walwa, District Sangli.  
(At present Kolhapur Central Prison, Kalamba)

...Appellant

versus

The State of Maharashtra

...Respondent

....

Mr.Sachin Chavan i/by Mr.Devidas J. Jadhav, Advocate for Appellant in  
Appeal No.996 of 2017.

Ms.Nasreen Ayubi with Mrs.Megha Bajoria, Advocate for Appellant in  
Appeal No.655 of 2016.

Ms.PN.Dabholkar, APP, for the Respondent - State.

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**CORAM** : **PRAKASH D. NAIK, J.**  
**DATE OF RESERVING JUDGMENT** : **7<sup>th</sup> JUNE 2023**  
**DATE OF PRONOUNCING JUDGMENT** : **5<sup>th</sup> JANUARY 2024.**

**JUDGMENT :**

1. The Appellants were charged for offences punishable under Sections 363, 366-A, 342, 376(d), 506 read with Section 34 of Indian Penal Code (for short “IPC”).

2. Vide Judgment and order dated 23.08.2016 passed by the learned District Judge-1 & Additional Sessions Judge, Islampur in Sessions Case No.30 of 2015 Appellants were convicted for offences under Sections 376(D), 363, 366-A, 342, 323 & 506 read with Section 34 of IPC. For conviction under Section 376(d) of IPC the Appellants were sentenced to suffer rigorous imprisonment for 20 years and to pay fine of Rs.5,000/- each. No separate sentence was given for offences under Sections 363, 366-A, 342, 323 and 506 of IPC. The Appellants were acquitted of the offences under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”).

3. The case of the prosecution is as follows:

i) The victim girl aged 15 years is resident of Peth Bhimnagar, Taluka Walwa, District Sangli. The Appellants

and the third accused (Juvenile in Conflict with Law) were the residents of Bhimnagar, Peth.

ii) On 20.03.2015 at about 8.45 p.m. the victim had visited medical shop for purchasing medicine for her married sister Pooja, who had visited her house. She purchased medicine from medical shop. While she was returning home, the accused No.1- Abhijit @ Rohit Chandrakant Pawar came towards her on motorcycle and offered her lift on motorcycle upto her house. Victim told him that there is street light and persons were available on the road and she had no fear to go to her house. Accused No.2 spoke to someone. Within short time, Pravin @ Khanna Waidande (Accused No.1) came there. It was around 9.00 p.m. Accused No.1 caught the victim near her waist and lifted her on motorcycle of Accused No.2. He sat on the backside of motorcycle. He pressed her mouth. She was taken in a field. She was subjected to sexual intercourse by the accused.

iii) The victim was thereafter taken on motorcycle upto Samaj Mandir. She was threatened that if she informs anybody about the incident she and her family members would be killed. The victim did not narrate the incident to any family members.

iv) Due to pain in her private part, she narrated the incident to her friend and informed her that the accused had forcible sexual intercourse with her. Victim's friend narrated the incident to her mother. The victim also narrated the incident to her mother. Complaint was lodged with the Police on 17.04.2015. Crime No.89 of 2015 was registered. Investigation was conducted. Charge-sheet was filed.

4. Charge was framed for offences under Sections 363, 366-A, 342, 376(D), 323, 506 r/w Section 34 of IPC and Section 6 of the POCSO Act.

5. Prosecution examined 10 witnesses. PW-1 Ganesh Shivajirao Patil is the panch witness for spot panchanama. PW-2 Kajal Mohan Waidande is friend of victim girl. PW-3 is victim girl. PW-4 Rafik Nashir Inamdar is the panch witness to the memorandum statement made by the accused. PW-5 Dr. Prakash Mahadeo More is the Medical Officer. He examined the accused. PW-6 Dr. Vishnu Shankar Shinde is the Medical Officer. He examined victim girl. PW-7 Pralhad Pandurang Mali is the panch witness for seizure of motorcycle. PW-8 Shamrao Vitthal Teware is the panch witness for recovery of clothes. PW-9 Dadasaheb Dinkar Mane is panch witness for seizure of clothes of victim girl. PW-10 Sanjay Dinkar Patil is the Investigation Officer.

6. The trial Court relied upon the evidence of the victim and other witnesses and gave a finding that the accused had committed the offence of rape. However, the Court opined that the prosecution has failed to prove the case beyond reasonable doubt that the victim was minor at the time of incident. Both the accused were acquitted for offence under Section 6 of the POCSO Act. While giving such finding, it was observed that as per victim's version her date of birth is 27.10.1999. Incident took place on 20.03.2015. Birth extract of victim issued by Municipal Corporation was filed on record on 06.08.2016. On perusal of birth extract it appears that victim's father Sunil Shripati Babar is resident of Peth, however, name as Sunil Bhagwan Babar, resident of Gowandi, Mumbai is mentioned in the certificate. Investigating Officer is unable to mention how this document is produced on record, competent person from Municipal Corporation is not examined to prove this document. Thus, birth certificate relied upon by the prosecution is doubtful.

7. Learned Advocate Mr. Sachin Chavan appearing for the Appellant in Criminal Appeal No.996 of 2017 submitted as under:

- i) There is delay in lodging the First Information Report (for short "FIR").

- ii) The allegations of kidnapping is false.
- iii) There is no evidence of protest by victim.
- iv) Four person cannot travel on motorcycle and hence theory of the victim that she was made to sit on motorcycle by three persons and taken to the place of incident is unbelievable. There is no independent evidence to support the prosecution case.
- v) The shop keeper from where the victim had purchased medicine has not been examined. The mother and aunt of the victim were not examined.
- vi) Age of the victim is not proved.
- vii) The appellants are acquitted for offence under Section 6 of the POCSO Act.
- viii) C.A. Report do not support the prosecution case. Medical evidence does not corroborate the version of victim. There were no injuries on the person and private part of the victim. There is reference of old tear. Age of old tear is not disclosed. Although the victim refers to injury, there is no evidence of injuries on the person of the victim. The Appellants are falsely implicated in this case. No semen was found on the clothes. Recovery of articles is doubtful.

Conviction relied upon by the prosecution is hit by Section 26 of the of the Evidence Act.

8. Learned Advocate Ms.Nasreen Ayubi and Mrs.Megha Bajoria, appearing for the Appellant in Criminal Appeal No.655 of 2016 adopted the submissions of the Advocate for the Appellant appearing in the other Appeal. It is submitted that the Appellant is falsely implicated in this case. There was dispute between the parties. The prosecution has failed to prove that the victim was minor. Delay in lodging FIR has not been explained. It is not established that the victim was subjected to forcible sexual intercourse. It is difficult to believe that victim was forced to sit on the motorcycle and kidnapped from the road. The prosecution case suffers from serious discrepancies and benefit of doubt ought to be given to the accused.

9. Learned Advocate Mr. Sachin Chavan has relied upon following decisions:

- i) **Dola Alias Dolagobinda Pradhan and Another V/s. State of Odisha<sup>1</sup>.**
- ii) **Lalliram & Anr V/s. State of Madhya Pradesh<sup>2</sup>.**
- iii) **Sham Singh V/s. State of Haryana<sup>3</sup>.**

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<sup>1</sup> (2018) 18 SCC 695

<sup>2</sup> (2008) 10 SCC 69

<sup>3</sup> (2018) SCC 34

- iv) **Santosh Prasad Alias Santosh Kumar Vs. State of Bihar<sup>4</sup>.**
- v) **Vijayan V/s. State of Kerala<sup>5</sup>.**

10. Learned A.P.P. submitted that this is a case of gang rape. Delay is not fatal. The victim was subjected to forcible sexual intercourse by accused. She was under fear. She was threatened. After suffering from pain, information was given to her friend, who disclosed it to the mother of victim. The evidence of victim is sufficient to establish the charge against the accused. Her version inspires confidence. Corroboration of the version of victim is not required by any other evidence. Evidence of PW-1, PW-2, PW-7 & PW-10 is vital and important. The victim has narrated the incident of sexual assault in detail. Her version does not create any doubt. Her testimony inspires confidence.

11. Learned A.P.P. Ms.PN.Dabholkar has relied upon following decisions:

- i) **Aslam V/s. State of Uttar Pradesh<sup>6</sup>.**
- ii) **Raghvendra Kumar Vs. Prabal Kumar and Others<sup>7</sup>.**
- iii) **State of Uttar Pradesh V/s. Chhotey Lal<sup>8</sup>.**

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4 (2020) 3 SCC 443

5 (2008) 14 SCC 763

6 (2014) 13 SCC 350

7 (2014) 13 SCC 354

8 (2011) 2 SCC 550

iv) **Dola alias Dolagobinda Pradhan and Anr. V/s. State of Odisha<sup>9</sup>.**

12. Since the prosecution has not been able to prove that the victim was minor at the time of alleged incident, the trial Court has acquitted the accused for offence under Section 6 of the POCSO Act. Thus, the question which falls for consideration as to whether the prosecution has proved its case beyond doubt in respect to the offences for which the Appellants are convicted.

13. PW-1 Ganesh Shivajirao Patil had acted as panch witness for spot panchanama. Shamrao Teware was the other panch witness. According to him the victim girl pointed out place on road from where she was kidnapped. She also pointed out the spot where she was subjected to sexual assault. Pieces of bangle and one nicker was found at the spot. The victim has admitted that the articles belong to her. In the cross examination he stated that complaint was read over to him and the other panch at the time of preparing panchanama. The victim did not narrate anything before them. Roads are crowded during Yatra period. Mankeshwar and Khandoba Yatra were in February – 2015.

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<sup>9</sup> (2018) 18 SCC 695

14. PW-2 Kajal Mohan Waidande is the friend of victim girl. She deposed that the victim had disclosed her that during the period of Yatra she had gone to the shop for purchasing medicine for her sister Pooja. Accused No.2 came there on motorcycle. He told her that he would give her lift upto house. She told him that she does not have fear and she will go alone to her house by road. At that time accused No.1 and Sagar came there. She was made to sit on motorcycle and taken to field Mankeshwar temple. She was subjected to sexual intercourse by the accused. The accused had threatened to kill her and family members. Her mother called her sister from Mumbai. Parents of the victim are illiterate. Complaint was given about the incident. Statement was recorded. In the cross examination she stated that Mankeshwar temple and Khandoba temple Yatra is organized at large scale at Peth. Huge crowd is generally gathered for 'Sasan Kathya Programme' at that time. From all sides of the village, people are gathered. The victim told her that one day prior to Yatra she was kidnapped by accused. Pilgrim date was 20.02.2015. She was kidnapped on 19.02.2015. She had mentioned before the police that the victim told her about threats given to her by the accused. The said fact is not appearing in her statement. From 19.02.2015 to 13.04.2015 she was in contact with the victim. She had narrated the incident to her

mother by the victim.

15. PW-3 is the victim girl. She deposed that she is residing with her parents and brother. Her date of birth is 27.10.1999. Accused Pravin @ Khanna Waidande (Accused No.1) is residing in adjacent lane from her house. Accused No.2 Abhijit @ Rohit Pawar and Sagar Pawar are also residing close to house of accused No.2. On 20.03.2015 at about 9.00 p.m. she was going to the shop for purchasing medicine as her sister was suffering from illness. Accused No.2 came there on motorcycle. He said that he will take her towards her house. She refused. Sagar Pawar came there. Accused No.1 Pravin @ Khanna Waidande came there. Sagar lifted her and compelled her to sit on motorcycle behind accused No.2. Sagar pressed his hand on her mouth. Accused No.1 occupied seat behind Sagar on motorcycle. They took the motorcycle from outside road towards the field. Sagar assaulted her. She was pushed on the ground. Accused committed sexual intercourse. All of them took her on motorcycle and came upto Samaj Mandir. Accused No.2 threatened her not to disclose the incident to any person or else he would kill her family members. Due to pain she disclosed the incident to Kajal (PW-2). Kajal advised her to inform the incident to her mother. She informed about the incident to her

mother. Her mother called the relative. They went to Police Station. Complaint was lodged. She pointed out the place of incident. She was produced before the Medical Officer. She was examined by him. Accused No.1 is residing in backside lane of her house. Accused No.2 is residing with her parents. Sagar Pawar is also residing nearby her house. Her sister Pooja had come to attend Yatra. In her complaint date of pilgrim was wrongly mentioned as 20.03.2013. In her complaint it is stated that the incident took place on the day of pilgrim. She did not mention before police that accused No.2 was standing near Anush Electrical Shop. She tried to oppose when she was forcibly kept on her motorcycle but her mouth was pressed. Mankeshwar temple is at South side. Motorcycle was taken from outside road towards field. Mankeshwar temple is away from passage from which motorcycle was taken by accused. Injury was sustained on her private part during incident. She had not washed her clothes which was given to Police.

16. PW-4 Rafik Nashir Inamdar has acted as panch witness. He has stated that the accused No.2 was at police station. He has stated that he was ready to point out his clothes. Statement was recorded. Memorandum of statement of accused was

recorded. The accused pointed out his house. He pointed his clothes kept in bed. Panchanama was prepared. He was not cross examined.

17. PW-5 Dr. Prakash Mahadeo More is the Medical Officer. According to him he had examined Accused No.2. He gave history that on 20.03.2015 Sagar Pawar and Khanna Waidande had come near Montessori School at 7.00 p.m. They asked him to drive motorcycle. All of them came to village Peth. They took the victim towards the field by road from medical store. Sagar and Accused No.1 took the victim inside the field. After half an hour they returned. Victim was dropped near the temple. Certificate was issued by him after examining the accused. According to him no injuries were found on the private part of the accused. As per C.A. report no semen was detected on pubic hairs.

18. PW-6 Dr. Vishnu Shankar Shinde is the Medical Officer. He examined the victim. He deposed that victim was produced before him on 17.04.2015 by lady police constable. Her mother and maternal aunt were also present with her. She gave history that she had gone for purchasing medicine. The accused kidnapped her. She was taken to the field. All of them raped her. On examination he did not find evidence of injury seen over vulva region. No acute

p/v bleeding was present. No injury marks were seen anteriorly or posteriorly. The witness further stated that he had examined accused No.1 on 18.04.2015. He had given history about the victim being taken to field and subjected to sexual intercourse. No injuries were found on his body. He issued certificate. In the cross examination he stated that female doctor was not available in their hospital. Hymen old tear ++ means tear was of large size. In answer to question No.2 of second page of Exhibit-49 he has mentioned old tear +. This means there was tear of hymen.

19. PW-7 Pralhad Pandurang Mali has deposed that he acted as panch for seizure of Motorcycle. The motorcycle was pointed out by accused No.1.

20. PW-8 Shamrao Vithal Teware is the panch witness for the clothes of accused. According to him memorandum statement was recorded. Accused pointed out the clothes kept in a bag in iron cup-board. Clothes were recovered. Clothes were seized by the Police. Clothes were recovered at the instance of accused No.1.

21. PW-9 Dadasaheb Dinkar Mane was the panch witness for seizure of clothes of victim girl. He was declared hostile. He was cross examined by the prosecutor. He admitted his signature on the panchanama.

22. PW-10 Sanjay Dinkar Patil is the Investigating Officer. According to him the victim came to the Police Station. She gave complaint. Her mother was present. The victim produced her clothes. Seizure panchanama was recorded. She was produced before the Medical Officer. Statements of victim and other witnesses were recorded. Accused No.1 was arrested. He visited place of incident. He recorded statement of medical shop keeper Pradeep Mali. Sagar Pawar was produced before the juvenile Court. Motorcycle was recovered at the instance of Accused No.1. Clothes were recovered at the instance of accused. He collected medical certificate. Clothes of victim were seized. Statement of victim was recorded under Section 164 of Cr.PC. After completing investigation, charge-sheet was filed. In the cross examination it was stated that Bonafide certificate of the victim's school is not collected. Birth certificate of victim is collected by Police. He does not know by which constable the document was collected. In the certificate victim's father's name is mentioned as Sunil Bhagwan Babar. Portion Mark A recorded in the statement of Asha before him is written by him as narrated by her. Portion recorded in the statement of Kajal Waidande is also narrated by her. Incident took place on 20.03.2015. There was no pilgrim on that day. For clarification about the date of incident, supplementary statements

of witnesses were not recorded by him. Area of medical shop, temple area and other places in the village are crowd during that period. No inquiry was made by him to ascertain whether accused had threatened victim when she was attending her school after incident. Inquiry was not made by him to ascertain whether victim was attending school after incident. He has not recorded statement of Pooja (sister of victim). He has not collected bangles used by the victim as a sample. Bangle pieces were sent to C.A. but not received back.

23. From the evidence on record it is apparent that the alleged incident had occurred on 20.03.2015. The FIR was registered on 17.04.2015. The alleged incident had occurred at around 9.00 p.m. According to victim, the Appellants and the third person Juvenile in Conflict with Law had forcibly made the victim to sit on motorcycle and she was taken to the field where all of them had subjected her to sexual assault. She did not narrate the incident immediately to any person. Subsequently she had disclosed it to PW-2. Thereafter disclosure was made to the mother of victim. Complaint was lodged. The evidence also discloses that there was Yatra in the village. On account of Yatra there was crowd and several persons had visited the village. The victim has alleged

that she had gone to medical store for purchasing medicine for her married sister Pooja, who had come to her house for attending Yatra. The prosecution has not examined mother, sister (pooja) and the medical store keeper. The defence of the accused is that the victim's theory that she was forcibly made to sit on motorcycle and taken to the field creates doubt. She did not protest or shout. Medical evidence does not support the ocular evidence of the victim.

24. The prosecution case proceeded on the basis that the victim is minor. Charge was framed for offence under Section 6 of the POCSO Act. On account of lack of evidence to show that the victim was minor. The trial Court has opined that the prosecution has failed to prove the age of victim and acquitted the accused under Section 6 of the POCSO Act.

25. In the case of **Dola Alias Dolagobinda Pradhan and Another V/s. State of Odisha** (supra) the Appellant was convicted for offence under Section 376 of IPC. The Court analysed the evidence of the victim and observed that the scene of offence is busy area wherein number of buses ply, many shops and residential houses exist and a school is situated. Although the victim had admitted that she sustained bleeding injuries on her hand because

of the shattering of eight bangles worn by her on her right hand and seven bangles on her left hand, and had marks of violence present on her body, the medical record do not support the said version. There were no injuries on the person of the victim. There was no internal injury on any part of the body and no injury was found on the vulva, pelvis and vagina. There were no signs of injury on thighs. Except for one bruise on cheek, there was no other injury was found on the victim which is clear from the medical report. FSL report disclosed that semen was not detected on the petticoat since the petticoat did not contain any seminal stain, which was hard for the Court to believe that sexual assault had taken on the victim, more particularly when the other material does not support the case of the prosecution and when it is not the case of the prosecution that the victim had changed her dress or that she had washed her clothes. The spot where the alleged rape had been committed and the spot from where the victim was forcibly physically lifted by the accused were not deserted places. As in the normal course of a day, numerous passers-by and vehicles ply there. It is unlikely that no one had noticed the victim being lifted and subjected to forcible sexual intercourse. The Apex Court then observed that the evidence of victim is unreliable and untrustworthy. She is not credible witness.

26. In the case of **Lalliram & Another V/s. State of Madhya Pradesh** (supra) the Appellants had challenged the Judgment of conviction before the Apex Court. The Appellants were convicted for offence under Section 376 of IPC. It was observed that the trial Court had found discrepancies in the version of witnesses and though the victim was raped by several persons at several times, there was no injury noticed and doctor has categorically stated that there was no sign of rape. The Apex Court observed that injury is not sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. If the Court finds it difficult to accept the version of prosecutrix on the face value, it may search for evidence direct or circumstantial.

27. In **Sham Singh V/s. State of Haryana (supra)** the Apex Court was dealing with an appeal arising out of Judgment of conviction for offence under Section 376 of IPC. The contention of the Appellant was that the High Court was justified in assuming that the injuries sustained by victim may have healed at the time of medicolegal examination and the FSL report. There was no enmity between the family of the accused and the victim. The medical evidence disclosed that the victim was aged around 15 years at the time of incident. The doctor observed the absence of hymen. The

age of tear of the hymen was not mentioned. The tear was old. The vaginal swab and the Salwar worn by the victim during the course of the incident were sent by the doctor to forensic sciences laboratory for chemical examination but not presence of semen was found on any of these exhibits. However, the doctor has opined that the possibility of sexual assault upon the victim cannot be ruled out, though she did not specify as to whether the sexual assault was in the recent past. The Court observed that some of the vital witnesses were examined by prosecution which also weakens the case of the prosecution. On analysing the evidence it was opined that there is every possibility of false implication of the accused to take revenge.

28. In the case of **Santosh Prasad Alias Santosh Kumar V/s. State of Bihar** (Supra) the Appellant was aggrieved by the Judgment of the High Court dismissing his Appeal against the conviction for offence under Section 376 of IPC. The contention of Appellant/Convict was that the medical report does not support the case of the prosecutrix/prosecution. The evidence of the prosecutrix is not supported by the medical evidence since no stains of semen or blood were found on the clothes of the victim. The prosecution had not examined material independent witness. As

per the doctor's medical report/injury report indicate that no injury was found on the person of the victim and private parts. The apex Court held that it cannot be disputed that there can be conviction on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. The Court found discrepancies in the evidence of the prosecutrix and allowed appeal by setting aside the judgment of conviction.

29. In the case of the **Aslam V/s. State of Uttar Pradesh** (supra) on which strong reliance is placed by learned A.P.P., the Hon'ble Supreme Court was dealing with the appeals challenging the conviction under Section 376 of IPC. It was alleged that the victim was raped by both the accused. The incident was immediately reported to Pradhan of the village. The victim lodged the FIR on the next day. The trial Court had reached the conclusion that the testimony of victim inspires confidence and rejected the case of defence. It was held that analysis of evidence of witnesses and in particular the prosecutrix shows that the evidence of said witnesses is not only reliable but also trustworthy. If upon consideration of prosecution case in its entirety, testimony of prosecutrix inspires confidence in the mind of Court, necessity of corroboration of her evidence may be excluded. The Apex Court

noted that that the trial Court keeping in view evidence of the victim has come to the conclusion that the accused persons have committed the offence under Section 376 of IPC which view has been affirmed by the High Court after re-appreciating the entire evidence and both the Courts have not committed any error which clause for interference by the Apex Court.

30. Another decision relied upon by the learned A.P.P. in the case of **State of Uttar Pradesh V/s. Chhotey Lal** (Supra) wherein the appeal was preferred by the State challenging the Judgment of the High Court acquitting the accused by reversing the Judgment of conviction. The apex Court observed that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that Court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.

31. The evidence of prosecutrix discloses that on 20.03.2015 at about 9.00 p.m. she was going to the shop for purchasing medicine as her sister Pooja was suffering from illness. She came out of the shop after purchasing the medicine. At that time all the three accused made her to sit on motorcycle under force and took her to the spot of incident. One of them pressed his hand and her mouth. The facts narrated by the victim make it evident that four persons were sitting on the motorcycle. She has stated that the motorcycle was taken from outside road towards field. Victim had declined offer by the accused to drop her on motorcycle on the ground that there was electricity on the road and she had no fear of going home by walking. It is not the case of the prosecution that the spot from where the victim was forcibly kidnapped is secluded. The victim then alleged that she was forcibly subjected to sexual assault by the accused persons. Thereafter all the accused took her on motorcycle and came up to Samaj Mandir in her area. She disclosed the incident to her friend Kajal belatedly and on her advise she informed the incident to her mother. Mother of victim called the maternal aunt of the victim Asha from Mumbai. The victim, her mother, Asha and Kajal went to Police Station. The victim has not disclosed as to when she has narrated the incident to Kajal. Prosecution has not examined

mother of victim, maternal aunt of victim and the medical store keeper from where she has purchased the medicine. The complaint was lodged on 17.04.2015. Thus, although the incident had occurred on 20.03.2015, the complaint was lodged on 17.04.2015. From her evidence it is evident that the accused are known to her. Their residence is in same area. Her father is working in shop of Sunil Nage. She admitted that father did not come with her to Police Station. Her sister Pooja had come to her house for pilgrim. Statement of Pooja is not recorded by Police. According to her, in her complaint date of pilgrim is wrongly mentioned as 20.03.2015. She admitted that in her complaint it is mentioned that the incident took place on the day of pilgrim. It is not correctly written. Photographs of pilgrim are filed with Exhibit-42. She admitted that these photographs are regarding pilgrim ceremony of village. Nobody obstructed the accused when they drove motorcycle towards field. She denied the suggestion that mother of the Juvenile in Conflict with Law had quarrelled with her mother. She stated that injury was sustained to her private part during incident. Minor injuries were sustained on her back, neck and chest. She used to go with Kajal in dilapidated bungalow for study. During festival she used bangles. She had not washed clothes which were handed over to Police.

32. In the FIR dated 17.04.2015 Exhibit - 36 it was stated that the Yatra of Village had commenced on 20.03.2015. The incident had occurred on 20.03.2015. She disclosed the incident to Kajal two to three days prior to lodging complaint.

33. In the context of the evidence of prosecutrix it would be appropriate to analyze the evidence of PW-2 Kajal Waidande and PW-6 Dr. Vishnu Shankar Shinde, who examined the victim.

34. PW-2 Kajal Waidande has stated that the prosecutrix had told her that during Yatra she had gone to shop for purchasing medicine to her sister Pooja. She narrated the incident of sexual assault by the accused to her. Her evidence corroborates the fact that the alleged incident had occurred during Yatra. She admitted that the house of victim is close to her house. Thus, although the incident had occurred on 20.03.2015, the victim did not narrate the said incident to PW-2 for substantial period of time. PW-2 has admitted that the Mankeshwar and Khandoba Temple Yatra is organized at large scale at Peth. Huge crowd is generally gathered for Sasan Kathya programme. From all sides of village pilgrim with Sasan Kathya had gathered at Peth. Main square/point is close to Grampanchayat Office. Pooja programme is performed near that place. Procession is taken through out the village with band/banjo.

Police Constables are also posted for Bandobasta on that day. The evidence of this witness would indicate that at the time of incident there was likelihood of huge crowd in the village. It is difficult to accept that the victim could not protest in any manner while she was being kidnapped on motorcycle by the accused. The victim also did not disclose the incident to PW-2 immediately, although she is residing in his neighborhood and close friend of victim. PW-2 tried to change the complexion of the case by stating that the victim had told her that she was kidnapped one day prior to Yatra. Pilgrim date was 20.02.2015. She was kidnapped on 19.02.2015. This version is contrary to the deposition of victim. The date of incident mentioned by the victim is of 20.02.2015. In the statement before the Police there is no reference of threats issued to the victim.

35. PW-6 Dr. Vishnu Shankar Shinde has stated that on examination of victim he did not find evidence of injury over vulva region. There was no acute bleeding. No injury marks were seen over body anteriorly or posteriorly. Although the prosecution tried to contend that the victim was examined after several days from the date of incident, it cannot be said that there would be no injury of whatsoever nature on the private part of the victim or injuries on

anteriorly or posteriorly. Considering the alleged nature of sexual assault committed by the accused, from the evidence of this witness it can be seen that the witness tried to explain age of hymenal tear. He has stated that tear was of large size. He has referred to old tear. That would mean tear of hymen. There is no explanation that old tear could be related to the incident of sexual assault in the present case. Medical Certificate of the victim mentions that there was no injuries seen over vulva region. No acute p/v bleeding present. No injuries seen over body anteriorly or posteriorly. No injury was seen over breast. Vaginal admits 2 fingers. Hymen old tear ++. For answer to the queries by the Police it is stated that there are no signs of squeal and there are no injuries of vagina.

36. The circumstances referred to herein above creates doubt about the veracity of the evidence of the victim. The prosecution has not been able to prove its case beyond reasonable doubt.

37. There is no corroborative evidence to support the version of the victim. Apart from the fact that the medical evidence runs counter to the ocular evidence of the victim, the forensic evidence does not support prosecution. The victim has admitted that she had not wash her clothes. The clothes were handed over

to the Investigating Agency. The clothes of the accused are also seized. C.A. report are on record. The clothes of victim viz. Nicker, Kurta and Salwar were sent for forensic examination. There is no detection of semen on the clothes. Human blood was found on nicker. ABO group was inconclusive. Human blood was found on Salwar Pant and ABO group was inconclusive. Examination of clothes of accused No.2 does not show presence of semen. The shirt, underwear and full pant of the said accused was examined and no blood was found. Clothes of accused No.1 were also forwarded for forensic examination. No semen was detected. No blood was found on shirt, full pant and underwear.

38. The Investigating Officer has deposed that he had recorded statement of shop keeper. He was not examined. No independent witnesses has been examined by the prosecution. Pieces of bangle were seized under panchanama which was allegedly owned by the victim on the day of incident. No injuries were found on her hand. Pieces were sent for examination to C.A. but report has not received back.

39. The prosecution also relied upon the alleged conviction made by the accused to the medical officer allegedly admitting that the victim was sexually assaulted. It is pertinent to note that the

accused was arrested. He was in custody of Police. He was produced for medical examination for custody of Police. He was examined by the medical officer. Statement, if any made by the accused to the medical officer would be hit by Section 26 of the Evidence Act.

40. It is well settled that the version of prosecutrix if believed and found to be credible and consistent, the same would form the basis of conviction. Corroboration is not a *sine qua non* for a conviction in a rape case. However, if the evidence of the prosecutrix suffers from discrepancies and found unworthy of credence, the benefit of doubt could be given to the accused.

41. In the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra**<sup>10</sup> it was reiterated that the sole testimony of the prosecutrix could be relied upon if it inspires confidence of the Court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the Courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

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<sup>10</sup> (2007) 1 SCC (Cri.) 161

42. In the case of **Raju Vs. State of M.P.**<sup>11</sup> it is observed that the accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved.

43. In **Pratap Misra Vs. State of Orissa**<sup>12</sup> it was observed that the allegations of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration.

44. In the case of **Aman Kumar Vs. State of Haryana**<sup>13</sup> it is observed that if the Court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial.

45. In **Krishan Kumar Malik Vs. State of Haryana**<sup>14</sup> it is observed and held by Hon'ble Supreme Court that no doubt, it is true that to hold accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

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11 (2009) 3 SCC (Cri.) 751

12 1977 SCC (Cri.) 447

13 (2004) SCC (Cri.) 1266

14 (2011) 3 SCC (Cri.) 61

46. In the case of **Rai Sandeep Vs. State (NCT of Delhi)**<sup>15</sup> the Hon'ble Supreme Court had an occasion to consider who can be said to be a "sterling witness". In that context it was observed that the "sterling witness" should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused.

47. The evidence of the prosecutrix does not inspire confidence. It is doubtful. It is not corroborated by medical evidence. It is shaky. It is not corroborated by any independent witness. Considering these circumstances, the accused are entitled for benefit of doubt. The conviction of the accused is required to be set aside.

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<sup>15</sup> (2012) 8 SCC 21

**ORDER**

- i) Criminal Appeal Nos.996 of 2017 and 655 of 2016 are allowed and disposed of.
- ii) Impugned Judgment and order dated 23.08.2016 passed by learned District Judge -1 & Additional Sessions Judge, Islampur in Sessions Case No.30 of 2015 is set aside and both the Appellants are acquitted of all the charges.
- iii) The Appellants be set at liberty forthwith unless required in any other case.
- iv) In view of disposal of both the Appeals, all Criminal Applications and Interim Applications are disposed of.

**(PRAKASH D. NAIK, J.)**