



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.665/2023

Pankaj Kishor Surwade,
aged 32 years, Occ. Nil,
R/o Gudadhi, Tq. Dist.Akola.

.....APPELLANT

...V E R S U S...

The State of Maharashtra, through
Police Station Officer, Police Station,
Civil Lines, Akola, Tq. Dist. Akola

...RESPONDENT

Mr. U. J. Deshpande, Advocate for appellant.
Mrs. K. Bhondge, A.P.P. for respondent-State.

CORAM:- ANIL L. PANSARE, J.

DATE ON WHICH ARGUMENTS WERE HEARD: 02.01.2024

DATE OF PRONOUNCING THE JUDGMENT : 08.01.2024

JUDGMENT

The appellant – original accused is aggrieved by the judgment and order dated 03.08.2023, passed by Sessions Court, Akola in Sessions Trial No.84/2015, holding him guilty for the offence punishable under Sections 376(2)(f) and 506 of the Indian Penal Code, 1860 (Hereinafter referred to as the, “IPC”). The appellant has been sentenced to suffer rigorous imprisonment for ten years and one year respectively and also to pay fine.

2. The case of the prosecution is/was that the appellant being relative (cousin) of the victim, committed rape on her by threatening her of killing her father. As such, the appellant was

charge-sheeted for the offence under the provisions of Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the, “POCSO Act”), however, the prosecution failed to prove the age of the victim and, therefore, the appellant has been acquitted of the offences punishable under the POCSO Act. The State has not filed appeal and, therefore, the case is being examined only to the extent of appellant’s conviction for the offences punishable under Sections 376 (2)(f) and 506 of the IPC.

3. Conviction of the appellant is based solely on the testimony of the victim. The victim became pregnant and delivered a male child on or about 10.02.2015. The report has been lodged on that day itself i.e. on 10.02.2015 on the advise of Doctor, who said that its a police case. The DNA test was conducted. The result of the test is positive. However, the Sessions Court was of the view that the report cannot be taken aid of because the prosecution failed to tender the evidence linking the handling of the DNA samples from the date of its collection till it was sent to the Forensic Sciences Laboratory.

4. The evidence also indicates that the victim and her father were residing in their house. The victim’s mother had expired and there was no other person residing with them. The

appellant is the cousin brother of the victim. He was residing opposite the victim's house. The victim did not disclose the incident despite being pregnant. She suffered labours on 09.02.2015. She informed her father about pain in her stomach. She was taken to the hospital where the doctor disclosed that she is pregnant. She delivered the male child on 10.02.2015. After inquiry by the father as also the police, the victim stated that the appellant is the one who is responsible for her pregnancy.

5. The learned counsel for the appellant submits that this is a case of consensual sex. The victim's silence for nine months speaks volumes about her consent. She has not disclosed the incident to anyone including her father. None from the thickly populated locality has noticed her swollen stomach. Even her father did not inquire of the same and, therefore, her testimony on forceful sexual assault is unreliable.

6. With the aforesaid status of the argument, the only point that requires answer is, whether the testimony of the victim is trustworthy and thus brings home the guilt of the appellant? The answer, to my mind, is certainly in the affirmative, for the reasons to follow:

7. The victim has been examined as first witness. She deposed that in the year 2014-15, she was residing at village Gudadhi. Her mother had expired. Her father used to go to work and she alone used to remain in the house. She then stated that the appellant is her cousin brother and was residing opposite her house. He used to visit her house regularly. He asked her to permit him to sleep with her. On her refusal, he threatened her that if she does not allow him to sleep with her, he will kill her father, upon which she allowed him to sleep with her. This incident has happened 2 to 3 times. She did not narrate the incident to anyone including her father. Thereafter, the appellant stopped visiting her house. She did not narrate the incident to anyone including her father. After some days, she suffered labour and was hospitalized, where truth of the incident was revealed.

8. In the cross examination, she admitted that till 10.02.2015, she did not inform anyone about appellant's forceful sleeping with her. The victim, however, volunteered that the appellant had given her threats. The appellant had then given a suggestion, which was denied by the victim, that the appellant did not sleep with her forcibly but she, at her own, slept with him. Thus, theory of sleeping together is, in a way, admitted by the

appellant. He has then given yet another suggestion, which is somewhat fatal to his own case. The appellant has put up a case to the victim that when he forcibly slept with her, she had completed the age of 18 years. Thus, appellant himself has come up with the theory of forceful sleeping.

9. This is how, the victim has testified before the Court. The counsel for the appellant has argued that this is a case of consensual relationship.

10. I do not, however, find any merit in the aforesaid submissions. Firstly, the appellant is cousin brother of the child. As such, the possibility of cousins getting involved in sexual relationship cannot be always ruled out, but then considering the relationship, there has to be overwhelming evidence in this regard. What is the evidence here, is that the appellant had committed forcible sexual intercourse 2 to 3 times. Thereafter, he stopped visiting her house. If the appellant and the victim were in a voluntary relationship, there appears no reason why should the appellant stop visiting the victim's house after such a short duration of sexual activities. Usually, consensual sex continues for a reasonable period. The defence of consensual relationship is under cloud. On the top of it, the appellant himself has given a

suggestion that when he forcefully slept with the victim, she had completed 18 years. As such, the meaningful reading of the suggestions given by the appellant will only indicate that the appellant has put forth a case of consensual sex. However, the counsel ought to have been careful while putting up the defence. Thus, the examination-in-chief coupled with the cross-examination, to my mind, would adversely seal the fate of the consensual relationship. There is, thus, no substance in the submissions of the counsel for the appellant that this is a case of consensual sexual intercourse.

11. The learned counsel for the appellant has relied upon a series of judgments in support of his contention that the delay in lodging the FIR may lead to the inference of consensual relationship which, in my view, depends on the facts and circumstances of each case. The Supreme Court, in the case of *Srivalla Rao and Ors. Vs. State of Andhra Pradesh*, reported in *(2011) 8 SCC 113*, has held that the rape itself brings enormous shame to the victim and it is after much persuasion that a rape victim goes to the police station to lodge a report and if some delay occasioned that cannot be, in any way, detract from the other creditable evidence.

12. The judgments cited by the counsel for the appellant are as under:

(i) *Amol alias Ratan Pralhadrao Tayade .Vs. State of Maharashtra;* reported in *2022 (2) Mh.L.J. (Cri) 332.*

In this case, the victim's evidence was such that the appellant and the victim had indulged into sexual intercourse on multiple occasions. There was evidence that the appellant was taking care of the victim and has even taken her, on couple of occasions, for shopping and marketing as well. Thus, there was ample evidence on consensual relationship. Accordingly, the Division Bench has accepted the theories of consensual relationship.

(ii) The next case is of the Hon'ble Supreme Court in *Manak Chand alias Mani .Vs. The State of Haryana;* reported in *2023 SCC ONLINE SC 1397.*

The victim was not believed because she alleged that the incident had happened on a particular day i.e. on 12.09.2000. However, it was brought on record that she attended the school on that day. Further, the victim was alleged raped in the matrimonial house of her sister. The evidence also indicated that the FIR was lodged because the initial proposal of marriage was turned down. Thus there were reasons to believe that victim's version was doubtful.

(iii) The next case is again of the Hon'ble Supreme Court in *Sadashiv Ramrao Hadge .Vs. State of Maharashtra and anr.* reported in *2006 (10) SCC 92.*

The Supreme Court disbelieved the prosecutrix's version on the ground that there were many persons present in the clinic and it was highly improbable that the appellant therein would have made sexual assault on the victim when large number of patients were present in the nearby vicinity. There were other factors as well to disbelieve the prosecutrix. The crucial was the one that has been noted above. In the present case, there is nothing to suggest that many persons were present in or around the house. Merely because the locality is thickly populated, would not mean that the surrounding people were present in their houses and will peep into the neighbouring house to see what is happening.

One cannot ignore the fact that the appellant is cousin brother of the victim. He used to visit the victim's house regularly. The relationship was such that no one would raise a doubt of his entry and exit in the victim's house.

(iv) The Hon'ble Supreme Court in the case of *Tameezuddin alias Tammu .Vs. State of (NCT) of Delhi,* reported in *2009 (15) SCC 566,* has held that in a case of rape, the evidence of the prosecutrix must be given

predominant consideration. But to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of the evidence in a criminal matter.

The facts before the Supreme Court were that the prosecutrix and her husband had been to the factory where the appellant met. The appellant was known to the husband. The appellant sent the husband outside on the pretext of buying some meat. The workers present in the factory also left for some reason. The appellant is said to have caught hold of the prosecutrix, took her to first floor of the factory and then committed rape. The husband returned in a short while later. The prosecutrix narrated the entire story to him. The husband, however, told the appellant that whatever had happened was to be forgotten and that bygones are the bygones. He (husband), however, took the appellant to police station accompanied by the prosecutrix and there children and lodged the FIR against the appellant who came to be arrested immediately. The Supreme Court disbelieved this theory on the ground that the entire incident is improbable, in the sense that husband telling the appellant that everything was to be bygone and forgotten but taken the appellant to the police station. The Court noted that the appellant being from

the very same locality must have been aware of location of the police station and would have easily realized that he is being dragged. That apart, the Court noted that the medical evidence also did not support the prosecution theory.

Thus, the facts are altogether different. In the present case, the medical evidence, on the point of sexual intercourse is writ large. The victim has delivered a male child. There is nothing to even suggest that except for the appellant, she had indulged into sexual activities with any other person.

(v) Then comes the case of *Prakash Chand Vs. State of Himachal Pradesh*, reported in *2019 AIR (SC) 1037*. The case put forth by the appellant was of consensual sex. The Supreme Court doubted the prosecutrix's version for the reason that the incident had taken place near a path which admittedly was common path. The case of the prosecutrix was that she raised hue and cry but then no one had heard her. The Court noted surprise, that the labourers who are supposed to haunt common path could not hear the hue and cry and, therefore, held that it will be quite risky to convict the appellant on the testimony of the prosecutrix.

(vi) The next case is of Division Bench of this Court in *Raju Sukhdeo Dabhade Vs. State of Maharashtra, through*

PSO P.S. (Shivaji Nagar) and anr. reported in *2018 (2) AIR Bom. R (Cri). 152.* The facts of the case were that the incident occurred in Deepavali holidays. The prosecutrix was alone in the house. The appellants (two in numbers) along with the prosecutrix's uncle came to her house. The uncle was in drunken condition and, therefore, slept in the house. The appellants, by pressing her mouth, took her forcibly to the house of her grandmother, who was sitting in front of her house. The appellants committed forcible sexual intercourse and left her house. They again came after 2-3 days, committed the same act. Thereafter, they again came and committed the same act. She was threatened and, therefore, she did not narrate the incident to the uncle. After some days, she started vomiting. She was taken to hospital, upon which it was revealed that she is pregnant. The defence put forth in the case was that her uncle had borrowed money from the appellants and, therefore, the appellants had been to her house to take her uncle but were falsely implicated. It was suggested to her that on the say of her uncle, she lodged false report, to which she denied. She admitted in the cross-examination that she did not raise shouts or disclosed the incident. Thus the case was of false implication. The occurrence of the incident was also denied.

As against, in the present case, the occurrence of the incident has been not denied, rather the suggestion was put forth by the appellant, which is fatal to his case. In any case, the appellant herein has come up with a story of consensual sex, which is found to be devoid of merit, for the reasons already noted.

(vii) The Division Bench of this Court in the case of *Siddhodhan alias Shudhodhan Vs. State of Maharashtra and Ors.* reported in 2023 (2) Mh. L. J. (Cri.) 686, disbelieved the prosecutrix for number of reasons, one of which was, inordinate delay in lodging the FIR. Another important reason was the long standing acquaintance between the two. The appellant and prosecutrix had indulged into sexual activities on several occasions. Accordingly, the Division Bench of this Court has opined that the story is apparently of consensual relationship. Thus, one of the important factors of consensual relationship is a long standing relations.

(viii) The Division Bench of this Court in the case of *XYZ Vs. Mahesh Subhash Tambe and Ors.* reported in 2023 (2) Bom.C.R. (Cri.) 295, disbelieved the prosecutrix on the ground that she was a 23 years old woman, her parents and other siblings were present in her house and were in her close proximity, the house being of two rooms. Despite such

status, the prosecutrix claimed that the appellant came and raped her by threatening. She did not depose that the appellant has given any threats to her. Rather, she went out of the house and had sexual intercourse behind her own house while her parents and siblings were sleeping at a short distance.

(ix) The Co-ordinate Bench of this Court in the case of *Jafar Amir Khan .Vs. State of Maharashtra*, reported in *2015 All MR (Cri) 1480*, disbelieved the prosecution theory on the ground that the incident had occurred in small room locked in a crowded locality. The window of the room was open and the daughters of the prosecutrix were awake at the time of incident. The appellant was in the room for two hours and there was no evidence to even remotely suggest that the prosecutrix was gagged or held captive on the point of knife. Accordingly, the Court noted that the conduct of the prosecutrix in not raising alarm and not narrating the incident to her mother even if her mother had visited her house, is highly unnatural and is the one amongst many other factors to disbelieve the prosecutrix.

(x) The Coordinate Bench in the case of *Santosh s/o Raisingh Chavhan and anr. vs. State of Maharashtra and anr.* reported in *2018 (3) AIR Bom. R (Cri) 923*, disbelieved the

prosecutrix. She used to sell the detergent powder. The appellant met her at CIDCO bus stop and took her to his room on the representation that he will purchase the detergent powder at his quarter. The appellant, however, did not purchase detergent powder and committed rape. Despite this fact, she again went to his quarter and subjected herself for rape. She disclosed the incident to her mother only after she became pregnant. With the aforesaid background, the Court was of the view that this is a case of consensual relationship.

(xi) The Supreme Court in the case of *Vijayan Vs. State of Kerala*, reported in *2008 (12) SCALE, 107*, has disbelieved the prosecutrix on the ground that she subjected herself to sexual intercourse and waited for more than seven months to lodge the FIR. The appellant is said to have committed sexual intercourse on the pretext of marriage. Thus, again the theory of consensual sex is on the pretext of sexual intercourse on multiple occasions.

(xii) In *Kani Rajan Vs. State of Kerala*, reported in *(2013) 9 SCC 113*, the prosecutrix was disbelieved by the Supreme Court on the point that the appellant was having close acquaintance with the prosecutrix's family. The incident has occurred in broad daylight at the place near the

compound of one Karunakaran and not within the four walls of a house or a building. The Court noted that the prosecutrix had previous acquaintance with the accused or else in all probability she should have resisted forcefully, attracting passers-by or people from the neighbourhood. The prosecutrix has stated that she was threatened and made to believe that the accused would marry her. She later became pregnant and delivered a child. Thus, the case is of multiple sexual intercourse on the pretext of marriage, which in the peculiar facts of the said case, appeared to be true.

(xiii) The Coordinate Bench of this Court in the case of *Lotan Budha Chaudhari .Vs. State of Maharashtra and anr.,* reported in *2017 ALL MR (Cri) 2680*, disbelieved the theory of rape on the count that the appellant and prosecutrix have indulged into sexual activities for multiple times.

13. In all the above judgments on which the appellant has placed reliance, not only the facts were different but also there was reason to believe that the appellant and the victim had indulged into consensual sexual intercourse. As noted in the judgments, one of the factors that impressed upon the Court was the long standing acquaintance between the appellant and the victim.

14. That apart, in none of the cases, the appellant was cousin brother of the victim. I have already noted that the cousin brother indulging into sexual activities, being unusual, can only be believed upon getting overwhelming evidence. Thus, merely because there was delay in lodging the FIR, one cannot jump to the conclusion that the appellant and the victim indulged into consensual sexual activities. Further, the appellant himself has given a fatal suggestion in this regard and, therefore, none of the judgments will be of any help to the appellant.

15. Unfortunately, there is a trend to cite series of judgments. The lawyers pursue that everything that is said in the judgments of the higher court in a particular case has to be presented as a binding law. Let me, therefore quote some excerpts from the judgment of the Supreme Court in the case of **State of Andhra Pradesh Vs. M. Radha Krushna Murthy**, reported in **2009 ALL MR (Cri) 1657**. Paragraphs 6 to 9 of the judgment read thus:

“6. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid’s theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed

as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermot observed:

“The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.”

7. *In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, “Lord Atkin’s speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances.” Megarry, J in (1971) 1 WLR 1062 observed: “One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament.” And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:*

“There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.”

8. *Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance*

on a decision is not proper. 9. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

“Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.”

16. Thus, the lawyers, before laying hand on the judgments of the higher court must examine how the factual situation of the case in hand fits in with the fact situation of the decision on which reliance is placed. The lawyer should be mindful to the reality that each case depends on its own facts and even close similarity in one case with another is not enough because a single additional or different fact may make world of difference between the conclusion in two cases. The counsel for the appellant, in the present case, has relied upon thirteen judgments, but, unfortunately, has not taken efforts to adhere to the fundamental principles of

binding precedent, which could only bind the Court upon ensuring that the factual situation of both the cases viz. case in hand and the decision on which the reliance is placed, are absolutely identical. None of the judgments lay down the law that the delay in lodging the FIR would lead to the sole conclusion that the relationship between victim and appellant is of consensual nature.

17. The law on the point of appreciation of evidence in a case of sexual assault is well settled. The Apex Court in the case of *Tameezuddin* supra, has held that in a case of rape, evidence of the prosecutrix must be given predominant consideration, of course, if the evidence is credible. The law is further settled that in such cases, sole testimony of the prosecutrix, if found worth of credence, will be sufficient to bring home the guilt of the accused.

18. On the point of delay, the Supreme Court, in the case of *Satpal Singh Vs. State of Haryana*, reported in (2010) (8) SCC 714, has held that the delay in lodging FIR in a case of sexual assault cannot be equated with the case involving other offences. The Court further held that the delay in lodging FIR in the sexual offence has to be considered with a different yardstick considering the fact that in a rape case, the prosecutrix remains worried about her future and remains in traumatic state of mind and the society's

attitude towards her is different and it casts doubt and shame upon her rather than comfort and sympathize with her.

19. Considering the above position of law, if the evidence of PW1 herein is looked into, what transpires is that she was forced to sleep with the appellant, who has committed penetrative sexual assault on 2 to 3 occasions. The consent given by the victim was under fear and thus cannot be treated as voluntary act. In this regard, two suggestions given by the appellant in the cross-examination are vital. The first is that the victim herself has consented to sleep with the appellant and second is that when he forcibly slept with her, she had completed 18 years. Both these suggestions, if read with the chief-examination of PW1 and considering the fact that there is absolutely nothing in the cross-examination to disbelieve her testimony, the evidence of PW1 will have to be accepted, being trustworthy.

20. As regards delay, she was left with no other alternative but to keep silence. She was put under threat of killing her father. Unfortunately, she suffered further plight of becoming pregnant and also to conceal the pregnancy. The truth was to surface upon maturity of pregnancy and thus she was forced to disclose the truth in the hospital. This forceful act of commission of sex cannot be equated with the consensual act only on the ground of delay.

21. Further, the argument of learned counsel for the appellant that the swollen stomach ought to have been noticed by father and the neighbouring persons, appears to me to be presumptive. The swollen stomach, will depend on the personality of a lady. If she is obese, the swollen stomach may not be visible. The cloth style is also relevant. If one wears loose clothes, the swollen stomach may not be visible. The situation can be looked into from another angle as well. There is absolutely no reason for the father or the neighbouring people to suspect the victim's pregnancy. In that sense, there is no reason for these people to focus on stomach of the victim to notice the swelling and question her of its reason. The appellant has not led a foundation on this point in the evidence and, therefore, he cannot be permitted to put forth such a presumptive argument and take benefit. There is, thus, no substance in the aforesaid submission.

22. It further appears from the record that on 07.12.2018, the trial Court has taken note of the threats given by father and mother of the appellant to the family members of the prosecutrix/victim. It appears that the Court took a note of submission made by the husband of the prosecutrix (victim appears to have married pending trial) that the appellant's father had been to his shop and informed him that the prosecutrix was having physical relationship

with his son (appellant herein) and asked him to leave her. The second incident is that the mother of the appellant approached the father of the victim and threatened him that if her son is released on bail, he will kill him and his daughter and further asked him to withdraw the case. Thus, the appellant and his family members appear to be little notorious. This conduct of the family members of the appellant, where the mother is confident of appellant teaching a lesson to the victim's father, will substantiate that the victim has indeed submitted herself under fear.

23. On the point of consent, the learned A.P.P. has rightly invited my attention to the finding rendered by the trial Court. The trial Court noted observations of the Hon'ble Supreme Court in *State of H. P. Vs. Mango Ram*, reported in (2000) 7 224 on Section 375 of the IPC and tested the aspect of consent in following words:

“Section 375 of IPC:

Submission of the body under the fear of terror cannot be construed as the consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercise the choice between resistance assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

“43. On reading of this observation, it is clear that the submission of body under fear cannot be construed as consented sexual act. In the case at hand, the Victim has testified that she submitted herself to the accused under the fear of his threat to kill her father. In this fact the consent of the Victim was under fear and it was not a voluntarily participation with knowledge that this sexual act can give a result of pregnancy. It is, therefore clear that the fear of the Victim herself was responsible for the incident regardless of her innocence. In this back ground it is difficult to accept that there was a motive for false accusation or false implication of the accused. It be noted the accused has taken defence in his statement under Section 313 of Cr.p.C. that he has been falsely - implicated in this case. Nothing has been brought on record that may probabalize that the prosecutrix has motive to falsely implicate him.”

24. Thus, submission of body under fear cannot be construed as consented sexual act. At this stage, learned counsel for the appellant has invited my attention to the charge framed by the trial Court on the point of threats given by the appellant. The charge reads thus:

“...Firstly, Prior to that on 9.02.2015 at Gram Gudhadi, Tq. & Dist. Akola you accused committed rape on XYZ aged about 18 years, who was pregnant at the relevant time, being a relative (Cousin brother) and thereby committed an offence

punishable under section 376(2)(f)(h) of Indian Penal Code and within my cognizance.

Secondly, that on the same date time and place you accused threatened XYZ, that not to disclose this incident to anybody else, otherwise you will kill her, and there by committed an offence under section 506 of the Indian Penal Code...”

25. The counsel for the appellant submits that the threat given is of killing the victim herself and not her father. He submits that it is neither the case of the prosecution nor the evidence that the appellant has given such threats. The victim has deposed that the appellant has threatened to kill her father. Thus, according to him, the theory of threatening has been not proved and once the said theory is disbelieved, what remains is consented sexual act between the two.

26. In support, he referred to the judgment of the Supreme Court in the case of Willy (William) Slaney .Vs. State of Madhya Pradesh, reported in AIR 1956 SC 116. The Court held that while determining the question whether the accused had a fair trial, what should be seen is whether he knew what he was being tried for and whether the main factors sought to be established against him were explained to him fairly and clearly and whether he was given full and fair chance to defend himself. In doing so, the

Court also referred to Sections 222 to 225 of the Criminal Procedure Code, 1973 and other relevant provisions to observe that an omission to frame charge as well as irregularities, errors or omissions in framing the charge do not vitiate or invalidate the conviction unless there is prejudice.

27. In the light of the Supreme Court's observations above, if the case in hand is examined, I do not find that any prejudice has been caused to the appellant. This fact is evident because this plea of defective charge was not even raised before the trial Court. That apart, in the cross-examination of the prosecution witness, there is absolutely nothing to remotely indicate that the appellant was made to believe that threat is in respect of killing the victim and not her father. The victim (PW1), her father (PW3) both have deposed that the threat was of killing her father. The prosecution's case was that the appellant has committed sexual intercourse by threatening the victim of killing her father. The cross-examination continued on the same line. The error in charge is a typographical error and will not extend any protection to the appellant. In any case, no prejudice has been caused due to the aforesaid irregularity in the charge. The irregularity will, therefore, not vitiate or invalidate the conviction, as has been held in the judgment cited above.

28. The prosecution has in all examined seven witnesses. PW1 is victim, PW2 is Head Master (Examined for the purpose of proving the age of the victim), PW3 is father of the victim, PW4 and PW5 are Doctors, PW 6 is Constable. The evidence of PWs 4, 5 and 6 is in relation to collecting DNA sample and sending it to the laboratory. PW7 is the investigating officer. Out of the above, the evidence of PW1, 3 and 7 is only relevant because the trial Court has acquitted the appellant of the offence punishable under the POCSO Act. Therefore, the evidence of PW2 on the point of age does not require comment. So far as evidence of PWs 4, 5 and 6 is concerned, the Court below found that the DNA report cannot be relied upon and hence their evidence is not discussed in detail. PW7 the investigating officer, who has disclosed the details of investigation carried out by him. PW3's evidence is based on what PW1 has informed him and thus a hearsay evidence. The case of the prosecution revolves around the evidence of PW1, which has been dealt with in detail. Her evidence is found to be trustworthy. Rather in the cross-examination the appellant has in a way cemented the case of the prosecution on the point of forceful sexual intercourse.

29. The trial Court has considered the evidence in the light of the provisions of the Indian Evidence Act, 1872 and has

rendered a well reasoned finding. I do not find any reason to interfere with the judgment of the trial Court. There is no merit in the appeal. Hence, I pass the following order.

ORDER

- (i) The appeal is dismissed.

(Anil L. Pansare, J.)

kahale