



Judgment

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

CRIMINAL APPEAL NO.147 OF 2023

Shrikrushna @ Kisan Maroti Gaikwad,
aged 21 years, occupation : labour,
r/o Khairy (Yende), tahsil Arvi,
district Wardha. **Appellant.**

:: VERSUS ::

State of Maharashtra,
through Police Station Kharangana,
tahsil Arvi, district Wardha.
(Crime No.231/2020). **Respondent.**

Shri M.V.Rai, Counsel for the Appellant.
Mrs.S.S.Dhote, Additional Public Prosecutor for the
Respondent/State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 04/04/2025

PRONOUNCED ON : 29/04/2025

JUDGMENT

1. By this appeal, the appellant (accused) has
challenged judgment and order dated 20.8.2022 passed

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by learned Additional Sessions Judge, Wardha (learned Judge of the trial court) in Sessions Case No.55/2020.

2. By the said judgment impugned in the appeal, the accused is convicted for offences under Section 376, 376(2)(f), and 376(2)(n) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years and to pay fine Rs.10,000/-, in default, to undergo rigorous imprisonment for 3 months.

3. Brief facts of the prosecution case emerged from the police papers and recorded evidence are as under:

The accused, cousin brother of victim, allegedly, committed sexual assault on her repeatedly on 9.1.2020, 12.1.2020, and 14.1.2020 which resulted into pregnancy and she delivered a child. On the basis of report, Kharangana Police registered the offence against the accused. On registration of the offence, the victim was

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referred for medical examination and it was found that she is carrying pregnancy of five months. The accused was also referred for medical examination. The spot panchanama was drawn. The samples of the victim and the accused are collected. After recording relevant statements, chargesheet is filed against the accused. During investigation, Chemical Analyzer's and DNA Reports are also collected. As per the DNA Report, the victim and the accused are biological parents of the child delivered by the victim.

4. Learned Judge of the trial court framed charge vide Exh.18. In support of the prosecution case, the prosecution has examined in all 15 witnesses, as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	Suresh Hanwate, pancha on spot panchanama and seizure memos	21
2	Father of the victim	29

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3	Mother of the victim	32
4	Grandmother of the victim	34
5	Borther of the victim	36
6	Taibai Kasar, neighbour of the victim	37
7	The victim	40
8	Dr.Priyanka Talwekar	45
9	Dr.Mohini Hiware, Medical Officer	50
10	Dr.Aarti Masaram, Medical Officer	54
11	Dr.Abhay Shinde, Medical Officer	57
12	Yogesh Ghumande	60
13	Amar Hajare, carrier	66
14	Dr.Robin Kamble, Medical Officer	72
15	Sanjay Gaikwad, Investigating Officer	75

5. Besides the oral evidence, the prosecution placed reliance on CA Report Exh.13, DNA Report Exh.14, notice to pancha Exh.22, spot panchanama Exh.23, seizure memos Exhs.25 and 26, report Exh.41, FIR Exh.42, letter to Medical Officer Exh.46, medical certificate Exh.47, letter to Medical Officer Exh.51, identification form obtained for the purpose of DNA of newly born baby

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Exh.52, identification form of the accused Exh.55, identification form of victim Exh.56, letters to the CA Exhs.63, 67, letter to Medical Officer Exh.73, medical certificate of the accused Exh.74.

6. On the basis of the said oral as well as documentary evidence, the prosecution claimed that charges are proved against the accused. All the incriminating evidence is put to the accused to obtain his explanation by recording his statement under Section 313 of the CrPC. The defence of the accused is of total denial and of false implication.

7. After appreciating the evidence, learned Judge of the trial court held the accused guilty and sentenced him as the aforesaid.

8. Heard learned counsel Shri M.V.Rai for the accused and learned counsel Mrs.S.S.Dhote for the State.

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9. Learned counsel for the accused submitted that relationship between the victim and the accused is not disputed. The victim is elder to the accused. The sole testimony of the victim is not sufficient to warrant conviction against the accused. There is no independent corroboration as to the fact of sexual assault by the accused. The FIR is rather delayed as the alleged incident has taken place between 9.1.2020 and 14.1.2020. Whereas, FIR is lodged on 17.6.2020. The physical relationship was out of consent. He submitted that there is no evidence that since obtaining the samples for the purpose of DNA till the same are forwarded to analysis were intact. There is every possibility of tampering of the said samples. No evidence is adduced by the prosecution to show that since seizure of the samples till the same are forwarded to DNA, the same was intact. Thus, considering the nature of the evidence, the prosecution

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miserably failed to prove the charges against the accused. In view of that, the judgment impugned deserves to be quashed and set aside.

10. In support of his contentions, learned counsel for the accused has placed reliance on following decisions:

1. Vijayan vs. State of Kerala, reported in (2008)14 SCC 763;

2. Kaini Rajan vs. State of Kerala, reported in (2013)9 SCC 113;

3. Lotan Budha Chaudhari vs. The State of Maharashtra and anr, reported in 2017 ALL MR (Cri) 2680;

4. Sandeep s/o Kaniram Rathod vs. State of Maharashtra, reported in 2010 ALL MR (Cri) 2673, and

5. Munja s/o Jijabhau Bhange vs. The State of Maharashtra, reported in 2024 ALL MR (Cri) 717.

11. *Per contra*, learned Additional Public Prosecutor for the State supported the judgment impugned in the appeal

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and submitted that the evidence of the victim, corroborated by the parents and brother of the victim, shows that father of the accused is the maternal-uncle of the victim. She had been to the house of her maternal-uncle wherein the accused subjected her for forceful sexual assault. The said fact is not only corroborated by the medical evidence but also corroborated by DNA Report. The evidence of the Medical officer as to obtaining of samples is not challenged. The evidence of the prosecution is also not challenged as to the validity of obtaining the samples till the same are forwarded to the Chemical Analyzer. The DNA Report shows that the victim and the accused are biological parents of the child delivered by the victim. The victim and her parents were under expectation that the accused would perform marriage with the victim and considering the relationship, initially, they have not lodged report. The delay is

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properly explained by the prosecution. Thus, the prosecution has proved the charges against the accused beyond reasonable doubt. In view of that, the appeal being devoid of merits is liable to be dismissed.

12. To prove the charges against the accused, the prosecution mainly relied upon the evidence of PW7 victim. She testified that the accused is her nearest relative, the son of her maternal-uncle. The sister of the accused had been to her house at Rasulabad for fair and on 7.1.2020 she insisted the victim to come along with her and, therefore, she along with the sister of the accused had been to the house of her maternal-uncle. Her brother dropped them there. On 9.1.2020, her maternal-uncle and aunt had been to attend their work. The sister of the accused had been to her school and she was alone in the house. At the relevant time, when she was lying on bed and watching TV, at about 1:00 pm, the accused came

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in the house, locked the door of the house from inside, and asked for the sexual favours by saying “मला तु एकदा जमु दे”. He then pressed her chest and subjected her for the forceful sexual assault. Though she resisted the act of the accused, he did not listen. Similarly, on 12.1.2020 and 14.1.2020, again, the accused subjected her for the physical assault by taking disadvantage of the fact that she was alone in the house. On 15.1.2020, she informed about the incident to the sister of the accused Suwarna. On 29.1.2020, she returned to home. As she did not receive her menstrual for five months, she disclosed the said incident to her mother. It revealed that she is pregnant of five months and, therefore, they went to the house of the accused to talk about her marriage, but the accused refused to marry her. Therefore, she approached the police station on 17.6.2020 and lodged report Exh.41. The prescribed format of FIR is at Exh.42.

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13. The evidence of the victim further shows that she delivered a baby boy. Her medical examination was conducted. During her cross examination, she admitted that immediately after the incident, she has not disclosed the said incident to anybody. She voluntarily explained the same that she did not tell because she was scared. She also admitted that the accused never assured her for marriage when he had sexual relations with her on three occasions. She further admitted that on 29.1.2020, when she returned home, she has not disclosed the incident to anyone. Rest of the cross examination is mere denial of the incident.

14. Thus, the cross examination shows that defence of the accused is of total denial. He has neither stated that there was love affair nor taken the defence of consent.

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15. To corroborate the version of the victim, the prosecution has examined PW2 the father of the victim. As per his evidence, five months ago, he came to know that the victim is pregnant. The victim has disclosed this fact to her mother that the accused forcibly had physical relationship with her for 3-4 times and he came to know this fact from his wife. His evidence further shows that the sister of the accused, who is his niece, took the victim at her house in village Khairi Ade and the victim stayed there till 29.1.2020. During the said period, the alleged incident took place. After noting the victim is pregnant, and on disclosure of the victim, he also with other relatives went to the house of the accused, but the parents of the accused quarreled with them and the accused also denied to perform marriage. Therefore, they approached to the police station and the victim lodged the report. During his cross examination, one omission is brought on

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record that the victim told his wife that the accused had forcible physical relationship with her for 3-4 times which is not appearing in his statement. Rest of the cross examination is only in denial form.

16. PW3 the mother of the victim is examined vide Exh.32. Her evidence is on the similar line that the sister of the victim, who is her niece, took the victim along with her at village Khairi Ade. The victim returned home on 29.1.2020. After five months, the victim disclosed her that she has not received menstrual period and also disclosed that the accused forcibly established the physical relations with her for three times. She realized the changes in the body of the victim. She disclosed the said fact to her husband. Thereafter, she along with her husband went at the house of the accused, but her brother's wife, who is the mother of the accused, quarreled with them. The accused also refused to marry with her. During her cross

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examination, it came on record that the victim is two year elder to the accused. She is unable to tell the dates when these physical relations were established between the accused and the victim. She further admitted that the victim did not tell about the incident for five months.

Here, the first time defence was taken by the accused that the victim and her parents wanted to perform his marriage with the victim forcibly and, therefore, this false report is lodged.

17. PW4 grandmother of the victim also deposed on the similar line that on disclosure by the victim to her mother, they came to know that the accused in his house forcibly established physical relations with the victim. The victim was five months pregnant. They had been to the house of the accused, but the accused denied to perform the marriage. Her entire cross examination is only denial

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of the fact which she has stated during her chief-examination.

18. PW5 is the brother of the victim examined vide Exh.36, who deposed that on 7.1.2020 he dropped the victim and sister of the accused at the village of the accused on his motorcycle. After 4-5 months, the victim disclosed to her mother that she has not received menstrual period. They learnt that she is pregnant for five months. They had been to the house of the accused, but the accused refused to marry. During his cross examination, he admitted that his parents and others went to the house of the accused to talk about the marriage between the victim and the accused.

19. PW6 Taibai Kasar, is the neighbour of the victim. She came to know from the mother of the victim that the accused has forcibly physical relationship with the victim

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which resulted into pregnancy of the victim. She along with the parents of the victim had been to the house of the accused, but the mother of the accused quarreled with them and the accused also refused to perform marriage with the victim. She also admitted that they went to the house of the accused to fix marriage of the victim and the accused.

20. To corroborate the evidence of these witnesses, as to sexual assault on the victim, the prosecution has examined Medical Officer PW8 Dr.Priyanka Talwekar. As per her evidence, on 17.6.2020, she was working as Medical Officer, Gynaecologist Department at General Hospital, Wardha. On that day, they received letter from Kharangana Police Station as to the medical examination of the victim Exh.46. The victim was brought by LPC Leena. After obtaining the consent, the victim narrated the history that she had sexual intercourse on 14.1.2020

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with the accused and also disclosed that the said sexual intercourse was against her wish and without her consent. On examination, she found that the victim was pregnant of 23.4 gestational age. On general examination, she was well oriented with time, the hymen was ruptured with old multiple tear. The ultra sonography was conducted. Her pregnancy was beyond 20 weeks. Accordingly, she issued certificate Exh.47. Discharge card is at Exh.48. During cross examination, only suggestion is given that she has not noted the history properly.

21. PW9 Dr.Mohini Hiware, is the another Medical Officer examined vide Exh.50. As per her evidence, she received letter from police officer of Kharangana Police Station requesting to obtain DNA Samples of newly born baby of the victim. The said letter is at Exh.51. She examined the baby boy which was brought to the hospital and identified the victim. She obtained blood samples for

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DNA Testing after consent of the victim. The blood samples were properly sealed and handed over the same to the police. The identification form of the baby boy is at Exh.52. This evidence remained unchallenged as she is not cross examined by the defence.

22. PW10 Dr.Aarti Masaram, examined vide Exh.54. As per her evidence, she was working as Medical Officer at the General Hospital. On 23.6.2020, the accused was brought in the hospital by Police Constables Rajesh and Pankaj for obtaining blood samples and samples for DNA Analysis. The identification form of the accused bears her signature and the photograph of the accused. The police brought DNA Kit. She obtained the blood samples in empty bottle of kit. The samples were labeled with name, age of the accused and the case number. After obtaining the samples, she filled declaration form which is at Exh.55. Similarly, the victim was also brought to the

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hospital for taking blood samples and DNA Analysis. She has taken blood samples of the victim in empty bottle of DNA Kit. The samples were labeled with name, age of the victim and case number. Accordingly, she filled declaration form Exh.56. During her cross examination, only suggestion was given that she is deposing false that she has obtained blood samples of the victim and the accused.

23. PW11 Dr.Abhay Shinde, examined vide Exh.57, deposed that he was working as Radiologist and Sonologist at General Hospital, Wardha. The victim was brought in hospital on 18.6.2020. He conducted sonography test and it revealed that the victim was pregnant of 23 weeks and five days. The sonography report is Exh.58. Only one suggestion was given to this witness that the age of fetus was not 23 weeks and five days. Rest of the evidence remained unchallenged.

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24. PW14 Dr.Robin Kamble, examined vide Exh.72, deposed that on 26.2.2020 he received letter for medical examination of the accused. The accused narrated the history that five months before he had sexual intercourse with the victim. On examination, he opined that the accused was competent to have sexual intercourse which is at Exh.64. Though he is cross examined at length, nothing incriminating came on record.

25. PW1 Suresh Hanwate was examined to prove the spot panchanama and seizure memos. He deposed that on 20.6.2020 spot panchanama Exh.23 was drawn. In his presence two blood samples of the victim were drawn by doctor of General Hospital, Wardha. In his presence, two sealed tubes were seized. In his presence, the blood sample of the accused and his nails samples were also seized and the said seizure memos are at Exhs.26 and 28. During his cross examination, she has shown his inability

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to tell about adjoining houses near the spot of the incident.

26. PW13 Amar Hajare, is the Police Constable who testified that on 6.8.2020, the Police Inspector of Kharangana Police Station issued him a letter in the name of Forensic Science Laboratory requesting for DNA Kit. The said letter is at Exh.67. He brought DNA Kit from Nagpur and gave it to ASI Nikam. The DNA Samples of newly born baby was taken in DNA Kit by Medical Officer at General Hospital at Wardha. The said DNA Samples are carried by him to Forensic Science Laboratory, Nagpur. Letter was given to him to carry the same which is at Exh.69. Along with the same, the identification form of the newly born baby was also handed over to him. He handed over the same to the Forensic Science Laboratory. Here also, his cross examination is only the denial as to the chief-examination.

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27. PW15 Sanjay Gaikwad, examined vide Exh.75, is the Investigating Officer, who has narrated about the investigation carried out by him. During evidence, he has stated that he has obtained the blood samples of the victim, accused, and the newly born baby of the victim and forwarded it to the Forensic Science Laboratory. The extract of muddemal register in respect of submitting blood samples and nail cutting of the accused are at Exh.84. He has called DNA Kits from Forensic Science Laboratory and obtained the blood samples in kit. On obtaining the blood samples, immediately, on 23.6.2020, he forwarded the samples to the Forensic Science Laboratory. Thus, after completion of the investigation, he submitted the chargesheet against the accused. During cross examination, he admitted that he has not seized inner garments of the accused and the victim. He has also not recorded the statements of neighbouring witnesses

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residing near the house of the accused. He admitted that it was stated by the victim that there were talks of marriage between family members of the accused and the victim and, therefore, there was delay in lodging of the FIR. The victim lodged FIR as the accused refused to marry her.

28. Besides the oral evidence, the prosecution placed reliance on DNA report Exh.14. As per the said DNA Report, the victim and the accused are concluded to be biological parents of the baby delivered by the victim.

29. On appreciation of the evidence, there is no dispute as to the fact that the victim and the accused are close relatives. The accused is the son of maternal-uncle of the victim. The evidence of the father of the victim, the mother of the victim, grandmother of the victim, and the brother of the victim shows that the victim had been to

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the house of the accused as it was the house of her maternal-uncle. The accused has also not denied her visit to his house and her stay in the house. The entire evidence of these witnesses discloses that when the victim had been to the house of the accused, she was subjected for the forceful sexual assault by the accused on three occasions which resulted into her pregnancy. The defence of the accused is of total denial and false implication. It is further defence of the accused that parents of the victim insisted him to perform the marriage with the victim to which he denied and, therefore, the false report is lodged against him. The prime witness to prove the incident is the victim who categorically stated that when she had been to the house of her maternal-uncle, the accused who is son of her maternal-uncle asked her for the sexual favour and subjected her for the forceful sexual assault. Though she

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is cross examined at length, only admission given is that the accused never assured her for marriage. Nothing incriminating is brought on record. Admittedly, she has not disclosed the said incident to her parents till 5 months after she returned from the house of the accused. The evidence on record sufficiently shows that she was pregnant of five months. This fact is disclosed by her to her mother as she has not received her menstrual for five months and, thereafter, her parents approached the family members of the accused and the accused refused to perform marriage with her. It is not the defence of the accused that out of love affair physical relationship was developed between him and the victim. It is also not defence of the accused that out of consent the alleged incident of physical relationship was developed between them.

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30. The evidence of Medical Officer PW8 Dr.Priyanka Talwekar shows that when the victim was examined by her, she was pregnant of more than 20 weeks. This evidence remained unchallenged.

31. The evidence of Medical Officer PW11 Dr.Abhay Shinde, also discloses that he had conducted sonography test and it revealed that she is pregnant of 23 weeks and five days. The evidence of the prosecution witnesses and the victim further shows that she delivered a baby boy. PW9 Dr.Mohini Hiware has obtained the samples of baby boy on 7.8.2020 at 1:00 pm. PW10 Dr.Aarti Masaram deposed that blood samples of the victim and the accused were obtained in DNA Kit on 23.6.2020 and the evidence of PW13 Amar Hajare, the Police Constable, shows that he has carried the said samples for DNA and handed over the same.

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32. Thus, the evidence on record, especially the evidence of the victim, shows that the alleged incident of sexual assault took place on 9.1.2020, 12.1.2020, and 14.1.2020. On 15.1.2020, she disclosed the said fact to the sister of the accused. On 29.1.2020, she returned to her house. After that, she has not received her menstrual till 12.6.2020. She was pregnant of 5 months. She waited for the message of the accused till 16.6.2020 and on 17.6.2020 she has lodged the report. The victim was first time medically examined on 17.6.2020 and found pregnant of more than 20 weeks. Her medical certificate is at Exh.47. After delivering a child, the child was brought to the hospital on 7.8.2020 for obtaining the DNA Samples. The DNA Kit was produced before her and she obtained the said blood samples in the said DNA Kit on 7.8.2020. The letter addressed to the Medical Officer is dated 7.8.2020. The said letter also discloses that the victim has delivered

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a child on 4.8.2020. Immediately, on 7.8.2020, the blood samples of newly born child was obtained. The blood samples of the victim and the accused were obtained on 23.6.2020. The identification forms of the victim and the accused are at Exhs.55 and 56. PW13 Amar Hajare, brought the DNA Kit for obtaining the blood samples of the newly born baby on 6.8.2020 and on 7.8.2020 the blood samples were obtained. The letter was also issued to the Forensic Science Laboratory to provide the DNA Kit to obtain the blood samples of the victim and the accused on 22.6.2020 and their blood samples were obtained on 23.6.2020. The letter was also issued to the Forensic Science Laboratory, Nagpur forwarding the blood samples of the victim and the accused for DNA analysis. Whereas, the samples of the newly born baby was forwarded on 7.8.2020.

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33. Thus, the communication on record Exh.61 shows that on 22.6.2020 DNA Kits are obtained for obtaining the samples of the victim and the accused. The evidence of PW10 Dr.Aarti Masaram discloses that the said blood samples were obtained on 23.6.2020 in DNA Kits and letter Exh.63 shows that on 23.6.2020 the said blood samples were forwarded for DNA Analysis to the Forensic Science Laboratory. The victim girl has delivered a baby boy on 4.8.2020. PW13 Amar Hajare was sent to obtain DNA Kits on 6.8.2020 vide letter Exh.67 and PW9 Dr.Mohini Hiware obtained the said blood samples on 7.8.2020 and the said blood samples were immediately forwarded for the DNA Analysis on 7.8.2020 vide letter Exh.69. The evidence of the Medical Officers PW9 Dr.Mohini Hiware and PW10 Dr.Aarti Masaram shows that they have obtained the blood samples, sealed it, and handed over the same to the police in a sealed condition.

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The sealing of the said samples or defence of tampering is not taken by the accused. Exhs.13 and 14 DNA Reports show that the blood samples of the victim and the accused were received in Forensic Science Laboratory on 23.6.2020 vide reference No.928/2020 and the blood sample of the newly born baby was received in Forensic Science Laboratory on 7.8.2020 vide reference no.1282/2020. The letters addressed to the Police Station Officer along with the DNA Reports further disclose that the samples were received in a condition “seals intact”. On receipt of the said DNA Samples, the same were analyzed by the Analyzer and opined that the victim and the accused were concluded to be biological parents of the child delivered by the victim.

34. As already observed, the accused has not taken defence as to sealing of the samples and tampering of the same.

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35. There is no dispute as to the fact that the victim has delivered a baby boy and DNA Reports disclose that the victim and accused are biological parents of the baby boy delivered by the victim. The defence is not taken as to the consent or the love affair. The evidence on record sufficiently shows that immediately obtaining the samples, the same were forwarded to the Forensic Science Laboratory for analysis. Thus, the evidence on record shows that after obtaining the samples, till samples were forwarded and the analyzed, the same were in a sealed condition and there is no case of tampering of the seals. Nothing is on record to show that the seals were not intact or the same were kept either in the police station or with the medical officer. The evidence categorically shows that immediately after obtaining the samples, the same were forwarded for the DNA Analysis.

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36. The DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results. The DNA is the genetic blue print for life and is virtually contained in every cell. The DNA testing can make a virtually positive identification when two samples are matched. Thus, the DNA Report is helpful to inculcate as well exculpate the accused.

37. Thus, basic requirement that the samples were kept in a proper condition and were in a sealed condition, till the same were taken for the analysis is established by the prosecution.

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38. In **Mukesh Singh vs. The State (NCT of Delhi)**, reported in AIR 2017 SC 2161, known as Nirbhaya's case, it is observed that DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. It has a double helix structure which can be compared with a twisted rope 'ladder'.

39. The DNA Report is acceptable as proper samples and there is no evidence of tampering. Being DNA Report is absolutely free from tampering and proved to be that

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the sampling is properly, it is acceptable in support of the prosecution.

40. Learned counsel for the accused submitted that the victim is elder to the accused and sole testimony of the victim is available. She has not disclosed the incident to anybody and, therefore, the consent on her part can be inferred. In support of his contentions, he placed reliance on the decision of the Hon'ble Apex Court in the case of **Vijayan vs. State of Kerala** *supra* wherein it has been held that in cases where sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix.

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Moreover, no DNA Test was conducted to find out whether the child was born out of the said incident of rape and that the appellant-accused was responsible for the said child.

41. In the present case, the facts show that the samples of the DNA Analysis are obtained and on analysis, the victim and the accused are disclosed to be biological parents of the baby delivered by the victim.

42. Learned counsel for the accused further placed reliance on the decision in the case of **Amol @ Ratan Pralhadrao Tayade vs. State of Maharashtra**, reported in **2022 ALL MR (Cri) 801** wherein the Division Bench of this Court held long period of intimate relations between the appellant and the victim would clearly indicate that the victim was a consenting party.

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Here, the facts of the present case shows that the victim had been to the house of the accused being his relative. It is neither case of the prosecution nor the accused that there was long standing relationship between the accused and the victim. Therefore, the said decision is also not helpful to the defence.

43. Learned counsel for the accused further placed reliance on the decision of the Hon'ble Apex Court in the case of **Kaini Rajan vs. State of Kerala** *supra* wherein it is held that the consent given by the prosecutrix believing accused's promise to marry her consent would amount to misconception of fact if the same arises from false representation of accused as regards his intention. If the accused never intended to marry her and made promise of marriage only to induce prosecutrix to give consent, sexual act committed by accused pursuant to such consent would constitute rape. In the present case, key material

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facts alleged by the prosecution of the alleged first incident of rape did not inspire confidence.

Here, it is not the case that the evidence of the victim supported by the medical evidence establishes that the victim was subjected for sexual assault when she had been to the house of the accused. Thus, facts of the cited case are not identical to the present case in hand.

44. The decisions of this court in the cases of **Lotan Budha Chaudhari vs. The State of Maharashtra** and **anr Sandeep s/o Kaniram Rathod vs. State of Maharashtra** are also not helpful to the defence.

45. Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will. The expression “against her will” means that the act must

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have been done in spite of the opposition of the woman. “Consent” is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. “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 exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. An inference as to consent can be drawn if only based on evidence or probabilities of the case.

46. The Hon’ble Apex Court in the case of **Kaini Rajan vs. State of Kerala** *supra* held Section 90 of the IPC though does not define “consent”, it describes what is not “consent”. It says that a “consent” is such a “consent” as

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is intended by the IPC if it is given under a misconception of fact. a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. the consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact.

47. Section 114A of the Evidence Act deals with presumption. If sexual intercourse has been committed by the accused and if it is proved that it was without consent of the prosecutrix and she states in her evidence before the court that she did not consent the Court shall presume that she did not consent. Presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed and in the instant case as per statement of the victim, she resisted and she did not give

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consent to the accused at the first instance and he committed rape on her.

48. Thus, the evidence on record shows that there was no “consent” on the part of the victim and the presumption under Section 114A, which is in favour of the the victim, is not rebutted by the accused. This is not a case wherein it can be said that the accused was having love affair with the victim or the consent was obtained on the promise of marriage.

49. In the present case, considering the evidence of the victim, it is neither the case of the accused that the victim was consenting party to the said physical relationship nor it is the defence that there was love affair between them. Therefore, it must be concluded in the background of the facts that the victim was subjected for sexual assault by the accused to fulfill his lust.

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50. Thus, Section 90 of the Indian Penal Code though does not define the term 'consent', in negative terms it describes what does not amount to consent. The “consent” may be express or implied, must be actuated, obtained through deceit or fraud. If the “consent” is given by the victim under misconception of fact, it vitiates. The “consent” for the purpose of Section 375 of the Indian Penal Code, 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 exercised the choice between resistance and assent. Whether there was “consent” or not, is to be ascertained only on a careful study of all relevant circumstances.

51. The Hon’ble Apex Court, in the case of **Deelip Singh vs. State of Bihar**, reported in (2205)1 SCC 88 framed two questions relating to consent:-

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(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in? and

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?

While answering these questions, the Hon'ble Apex Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false

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promise to marry, for which the accused is prima facie accountable for damages under civil law.

52. The Hon'ble Apex Court, in the case of **Deepak Gulati vs. State of Haryana, reported in (2013)7 SCC 675**, has drawn distinction between “rape” and “consensual sex” and held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living with the accused for several days, and had travelled with him from one place to another.

53. In the instant case, there was no love affair between the victim and the accused. They being relatives were visiting each others house. It is also not the defence that out of “consent”, physical relations were developed

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between them. The cross examination also nowhere discloses that it was active participation of the victim in the act on the basis of which the inference of “consent” can be drawn. On the contrary, the evidence of the victim consistently shows that the accused has asked her for sexual favour and despite her resistance, he subjected her for sexual assault. Thus, presumption under Section 114A of the Evidence Act is applicable and the same is not rebutted by the accused.

54. The another contention of learned counsel for the accused is that there is inordinate delay in lodging the FIR.

55. The evidence on record shows that the victim has not disclosed the said incident to anybody for five months except sister of the accused. The fact about her disclosure to the sister of the accused is not denied or no contrary

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evidence is brought on record by the accused by examining his sister. The delay in lodging the FIR in sexual assault cases is not always fatal to the prosecution if the delay is properly explained. The evidence of Investigating Officer PW15 Sanjay Gaikwad during cross examination reveals that the victim disclosed to him that there were talks of marriage between family members of the victim and the accused and, therefore, there was delay in lodging the FIR. Not only the evidence of the victim but also her father, mother, grandmother, brother, and neighbour also shows that after disclosure of the incident, they approached the parents of the accused and disclosed the incident to them and requested to perform the marriage of the victim and the accused which is denied by them. This act of the victim and her parents is natural in the light of the fact that accused was her nearest relative. It was obvious on the part of the victim

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and her parents first to settle the issue considering relationship between them and as the accused denied to perform the marriage, the victim approached the police station.

56. Thus, the delay caused in lodging the FIR is properly explained by the prosecution. The delay in lodging FIR is not always fatal to the prosecution. The delay in lodging FIR in sexual offences has to be considered with different yardstick.

57. In the case of **Satpal Singh vs. State of Haryana, reported in (2010)8 SCC 714** the Hon'ble Apex Court held that in a rape case the prosecutrix remains worried about her future. She remains in traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It has further been held that no straight

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jacket formula can be laid down this regard. In case of sexual offences, the criteria may be different altogether. As honour of the family is involved, its members have to decide whether to take the matter to the court or not. In such a fact-situation, near relations of the prosecutrix may take time as to what course of action should be adopted. Thus, delay is bound to occur.

58. This Court has always taken a judicial note of the fact that “ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon.”

59. Although it is true that in the case of “rape” conviction can be made on the sole testimony of the prosecution, as her evidence is in the nature of an injured witness, which is given a very high value, but when a

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person is to be convicted on the testimony of sole witness, the utmost care is to be taken and the testimony of such witness must inspire the confidence. It is true that in a “rape” case the accused could be convicted on the sole testimony of the victim, if it is capable of inspiring of confidence in the mind of the court. If the version given by the victim is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, court shall not act on the solitary evidence of the victim. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

60. As far as ground of delay is concerned, the evidence on record shows that the victim has disclosed the incident to her mother after five months as she has not received menstrual and, thereafter, a first attempt was

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made to settle the marriage of the victim and the accused considering close relationship between them. As the accused and his family members denied to perform the marriage, the victim approached the police station and lodged the report. Thus, delay has to be considered in the light of facts and circumstances of the case that such delay is not always fatal to the prosecution.

61. After re-appreciating the entire evidence, it reveals that the victim, who is the nearest relative of the accused, was subjected for sexual assault by him by betraying her trust. Learned Judge of the trial court has appreciated all these aspects and rightly convicted the accused.

62. In the light of the above foregoing discussion, no infirmity can be found in the judgment impugned in the appeal. In this view of the matter, the appeal being

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devoid of merits is liable to be dismissed and the same is **dismissed**.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!