

**THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH : NAGPUR.**

**CRIMINAL APPEAL NO. 576 OF 2017**

Pradeep Sunil Bawane  
Age 28 years, Occup. : Labour  
R/o Nanda Fata, Ward No. 4,  
Tah. Korpana, Dist. Chandrapur.

... Appellant

**VERSUS**

The State of Maharashtra  
through its Police Station Officer,  
Police Station, Gadchandur,  
Tah. Korpana, Dist. Chandrapur.

... Respondent

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Shri R. M. Daga, Advocate for the appellant  
Ms. T. H. Udeshi, Additional Public Prosecutor for the State/respondent  
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**CORAM : R. K. DESHPANDE AND**  
**M. G. GIRATKAR, JJ.**

**Date : 02/05/2018.**

**Oral Judgment** (Per : M.G. Giratkar, J)

Appellant assailed the judgment in Sessions Case No. 55/2012 delivered by 3<sup>rd</sup> Additional Sessions Judge, Chandrapur dated 25-10-2017 by which he is convicted for the offences punishable under Sections 376 and 417 of the Indian Penal Code and sentenced to suffer

imprisonment for life and to pay a fine of Rs. 50,000/- in default to undergo rigorous imprisonment of six months for the offence punishable under Section 376 of the Indian Penal Code. He is also convicted for the offence punishable under Section 417 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 10,000/- in default he shall undergo rigorous imprisonment of one month.

2. The case of the prosecution against the appellant can be summarized as under.

(i) Prosecutrix was aged about 16 years at the time of incident. She was residing with her adoptive parents at Rajiv Gandhi Ward, Warora. Appellant (hereinafter referred to as 'accused') is her nearest relative. He is son of her maternal uncle. In the month of December, 2010, accused came to her house at Warora and taken her to his house at Nanda Fata for doing household work because sisters of accused came to his house for deliveries. Both the sisters of accused resided at his house for about 2½ months. After delivery, they went to their matrimonial homes. During that period, she had close relations with the accused but

their relations were not to the extent of sexual intercourse. On the day of incident, her maternal uncle and aunt went out of the house. Accused was alone in his house along with her. Accused threatened her, beat her and committed forcible sexual intercourse with her. Complainant told him that she will disclose to his parents. Accused threatened her to commit suicide. Therefore, she did not disclose the said incident to his parents. On the next day again, he wanted to do sexual intercourse. Complainant told him that if she became pregnant, then what will happen. Appellant promised to marry with her after breaking engagement with another girl. He did sexual intercourse with her. After 2-3 days, her maternal aunt reached her to her parents house at Warora.

(ii) It is alleged in the report that complainant was pregnant. Her parents enquired with her but she did not disclose. Thereafter her parents called accused and his parents at Warora. On 17-11-2011, there was meeting at the house of Damu Pardhi. Accused and his parents agreed to perform marriage with her in the temple of Lord Vitthal. Accused went to the house of Sharad Pardhi. He did not reach to temple of Lord Vitthal for marriage and went to his village. Thereafter

she lodged report in Police Station, Warora. Same was transferred to Police Station, Gadchandur for investigation. API Shri Gedam investigated the crime and after complete investigation, filed charge-sheet before the Judicial Magistrate First Class, Rajura, who committed the same to the Court of Sessions at Chandrapur for trial.

(iii) Charge was framed at Exhibit 15. Same was readover and explained to the accused. Accused pleaded not guilty and claimed to be tried. Prosecution has examined 9 witnesses. At the conclusion of the trial, accused is convicted as stated above.

3. Heard learned counsel Shri R. M. Daga for the accused. He has pointed out evidence of P.W. 1. Learned counsel has submitted that P.W. 1/victim was more than 16 years of age at the time of incident. She was in love with the accused. Sexual intercourse took place with her consent. Therefore, it is not a rape as defined in Section 375 of the Indian Penal Code.

4. Learned counsel Shri Daga has submitted that accused married with cousin sister of the complainant. She was knowing the engagement of accused with her cousin sister at the time of incident.

Now, the complainant is residing with the wife of accused as they are cousin sisters. Accused and his family members agreed to maintain the child born to the accused and complainant. Learned counsel has submitted that accused has already undergone sentence for about six months and that may be taken into consideration while deciding offence of cheating punishable under Section 417 of the Indian Penal Code.

5. Learned counsel Shri Daga has submitted that prosecution failed to prove the date of birth of the complainant. Document, Exhibit 32/birth certificate is not proved. It has not come from proper custody. Complainant herself produced the same during the course of cross-examination. Exhibit 32 was not collected by the Investigating Officer. Evidence of complainant, her mother and Medical Officer show that she was aged about 16 years. There was no any medical examination to determine her age. Hence, prosecution has failed to prove that she was below 16 years at the time of incident. Learned counsel has submitted that trial Court not taken into consideration evidence properly and wrongly convicted the accused, at last, prayed to allow the appeal.

6. Heard learned Additional Public Prosecutor Ms. T. H.

Udeshi for the State/respondent. She has strongly supported the impugned judgment.

7. The case of the prosecution based on the evidence of P.W. 1 /prosecutrix. She has stated in her examination-in-chief that accused forcibly did sexual intercourse with her. She has stated her age at the time of lodging the report as 16 years. Her mother P.W. 3 Vimal Pardhi has stated in her examination-in-chief that at the time of incident, she was aged about 16 years. Investigating Authority not collected legal and proper evidence to prove the date of birth of prosecutrix. Only bonafide certificate was collected. It was proved by P.W. 1 victim herself. Date of birth mentioned in the bonafide certificate issued by the school authority, Exhibit 25 is not properly proved. Not even a single person from the school was examined by the prosecution to prove Exhibit 25. Prosecutrix herself produced birth certificate, Exhibit 32 issued by Municipal Council, Bhadrawati. This certificate was not collected by the prosecution during the investigation, therefore, accused had no any opportunity to properly cross-examine on this point. Even both the certificates are taken into consideration, then also prosecutrix was aged about 16 years at the time of incident. Medical Officer, P.W. 4 Dr. Vijay

Kalaskar has stated in his evidence that when he examined the prosecutrix, she was 16 years old. This itself shows that prosecutrix was aged 16 years. Ossification test was not conducted by the Medical Officer to prove her age. Prosecution failed to prove beyond reasonable doubt that she was below 16 years of the age at the time of incident. It appears from the evidence of P.W. 1, P.W. 3 and P.W. 4 and the report, Exhibit 23 that prosecutrix was aged 16 years at the time of incident. Prosecutrix has not stated her date of birth in the report, Exhibit 23. She has stated her age as 16 years. P.W. 3, her adoptive mother has stated age of prosecutrix as 16 years. P.W. 4 Medical Officer has stated that prosecutrix was 16 years old. Therefore it has to be seen whether she had given consent for the sexual intercourse.

8. Section 375 defines 'rape' (before amendment of 2013) as under :-

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

*First.* - Against her will.

*Secondly.* - Without her consent.

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

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

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

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

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

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

9. P.W. 1/prosecutrix has stated in her examination-in-chief that accused forcibly did sexual intercourse with her. But her evidence

on this point is not reliable because in her report itself she has stated that accused is her brother-in-law (Mevhana). She was taken by him to the house of her maternal uncle. She resided there for about 2½ months. During that period, she had closed relations with the accused. This itself shows that she had love and affection with the accused. Portion marked 'A' of her report was pointed to her but she denied it. Exhibit 23 proved by her in her evidence. Therefore, contents can be read as it is. During her cross-examination, she has admitted that accused was already engaged with her cousin sister at the time of incident and she was knowing about the same. Material omissions are brought on record. She has stated in her cross-examination as under.

14. I told police while recording statement and *report that when I declined to have physical relations accused beaten me mercilessly ; and in evening accused came and again had physical relations with me ; and when my paternal aunt woke-up, accused hid himself under the bed and when I resisted accused hit on my back with his hand. I also told that I did not say anything, I went on crying ; and my maternal uncle saw me with accused, but he did not say anything and went to sleep ; and I had menstruation for two months, but did not get menstruation in third month and hence accused gave me cloves to eat. I told police that accused said it will cause miscarriage ; and I stayed there for 1 ½ month and*

*my maternal uncle said that there is marriage in 5<sup>th</sup> month and he will leave me in that month ; and still accused used to visit my house and used to say that even if I am pregnant, he will marry me. I told police that as I was pregnant of 7 months, my mother took me to the Hospital of Chandak ; and in Sonography there was a fetus, hence my mother started crying ; and accused married my elder uncle's daughter in a temple. I told police that when we went to Nandaphata, there was lock to the house but the mother and brother of accused were inside the house ; and because of falling utensils, when we saw from the window we came to know. I told to police that accused went to Chandrapur for marriage. I cannot say that why all these things are not recorded in my statement and report. ---*

10. Evidence of P.W. 2 and P.W. 3 are not material. There is no dispute that accused had sexual intercourse with the prosecutrix. Prosecutrix conceived from the accused. DNA samples were sent to the Forensic Laboratory at Hyderabad. DNA report is at Exhibit 53. As per the DNA report, accused Pradeep Sunil Bawane and prosecutrix are concluded to be biological parents of Gunjan Pradeep Bawane. There is no dispute that prosecutrix delivered female child Gunjan. Her birth certificate is also placed on record. The name of father of Gunjan is shown as accused. From the evidence of prosecutrix, it is clear that she

was in love with the accused and whatever sexual intercourse took place was with her consent. She was sixteen years old at the time of incident. Therefore, as per clause sixthly of Section 375 of the Indian Penal Code, it is not a rape.

11. Prosecutrix was aged 16 years at the time of incident. Sexual intercourse took place with her consent. Therefore, in view of definition of 'rape' defined under Section 375 of the Indian Penal Code, it is not a rape. Learned counsel Shri Daga for the appellant has pointed out decision in the case of ***Deelip Singh alias Dilip Kumar Vs. State of Bihar*** reported in **(2005) 1 SCC 88**. In this case, Their Lordships of Hon'ble Supreme Court have held as under :-

*The question is : What is the meaning and content of the expression “without her consent” in Section 375 secondly, IPC ? Whether the consent given by a woman believing the man's promise to marry her is a consent which excludes the offence of rape ?*

*Though will and consent often interlace and an act done against the will of a person can be said to be an act done without consent, the Indian Penal Code categorises these two expressions under separate heads in order to be as comprehensive as possible. Further, it is not easy to find a dividing line between submission*

*and consent except in the situation contemplated by clause fifthly of Section 375 IPC. Yet, the evidence has to be carefully scanned. The ultimate conclusion depends on the facts of each case.*

Another decision pointed out by learned counsel Shri Daga is in the case of ***Kaini Rajan vs. State of Kerala*** reported in **(2013) 9 SCC 113**. In this case, Their Lordships of Hon'ble Supreme Court held as under :-

*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 have been done in spite of the opposition of the woman.*

*“Consent” is 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.*

12. Evidence of prosecutrix shows that she was in love with the accused. Whatever sexual intercourses took place was with her consent. Her report itself shows that she was 16 years at the time of incident. Evidence of P.W. 4, Medical Officer shows that she was 16 years old. Therefore, in view of the afore stated decisions of the Apex Court, sexual intercourse with the consent of prosecutrix does not amount to rape. Learned trial Court wrongly convicted the accused for the offence punishable under Section 376 of the Indian Penal Code.

13. In respect of offence punishable under Section 417 of the Indian Penal Code, prosecutrix has stated in her evidence that when accused was doing sexual intercourse continuously and when she was opposing him saying that she would conceive, that time, accused told her that he would break engagement with her cousin sister and will perform marriage with her. Evidence of prosecutrix/P.W. 1, P.W. 2 and P.W. 3 show that meeting was called. In that meeting, accused with his parents were present. Accused agreed to perform marriage with prosecutrix but instead of performing marriage, he went to the house of her uncle and thereafter disappeared. Accused cheated her by not performing marriage with her. Therefore, he is rightly convicted for the

offence punishable under Section 417 of the Indian Penal Code.

14. During the course of argument, learned counsel Shri Daga has submitted that prosecutrix with her newly born child is residing in the house of accused. Wife of accused is her cousin sister. Accused has undertaken to maintain the prosecutrix and her child Gunjan. Therefore, this fact may be taken into consideration while deciding the appeal.

15. We have already come to the conclusion that prosecution has failed to prove the guilt of accused for the offence punishable under Section 376 of the Indian Penal Code. We have come to the conclusion that prosecution has proved that the accused cheated the prosecutrix by not performing marriage with her. Hence, we are inclined to partly allow the appeal. In the result, we proceed to pass the following order.

### **ORDER**

(I) Criminal Appeal is partly allowed.

(II) The impugned judgment in respect of the offence punishable under Section 376 of the Indian Penal Code is hereby

quashed and set aside. Appellant is acquitted of the offence punishable under Section 376 of the Indian Penal Code. Conviction for the offence punishable under Section 417 of the Indian Penal Code is maintained but sentence is modified as under.

Appellant/accused is convicted for the offence punishable under Section 417 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 50,000/- (Rupees Fifty Thousand Only). In default of payment of fine, he shall undergo rigorous imprisonment for two months. Appellant/accused shall pay fine amount of Rs. 50,000/- before the trial Court. Hence, trial Court is directed to deposit amount of Rs. 50,000/- in the name of Gunjan Pradeep Bawane (child of victim and accused) for a period of six years. After maturity, said amount be paid to the prosecutrix on behalf of Gunjan (minor child).

(III) Accused/appellant is in jail for the period of more than six months. Hence, he be released forthwith, if not required in any other crime or case.

(IV) R & P be sent back to the trial Court.”

**JUDGE**

**JUDGE**

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