
Rattan Suka Lilke Vs State of Maharashtra

Criminal Appeal No. 489 of 2005

Court: Bombay High Court

Date of Decision: Sept. 23, 2011

Acts Referred:

Evidence Act, 1872 & Section 114A#Penal Code, 1860 (IPC) & Section 34, 363, 366, 376, 376(2)

Citation: (2012) BomCR(Cri) 718 : (2011) 113 BOMLR 3351

Hon'ble Judges: A.M. Thipsay, J

Bench: Single Bench

Advocate: M.S. Karnik, for the Appellant; V.R. Bhosale, APP, for the Respondent

Final Decision: Allowed

Judgement

A.M. Thipsay, J.

The Appellant was the original Accused No.2 in Sessions Case No.211 of 2002, which was tried by the Additional

Sessions Judge, Nashik. The learned Additional Sessions Judge convicted the Appellant of an offence punishable u/s 366 of the Indian Penal Code

read with Section 34 of the Indian Penal Code and also of an offence punishable u/s 376(2)(g) of the Indian Penal Code. The learned Additional

Sessions Judge sentenced the Appellant to suffer R.I. for three years and to pay a fine of Rs.300/- with respect to the offence punishable u/s 366

of the IPC, read with Section 34 of the IPC, and R.I. for 10 years and fine of Rs.500/- with respect to the offence punishable u/s 376(2)(g) of the

IPC. The Appellant, being aggrieved by the said judgment and order of conviction and sentence, has appealed to this Court.

2. I have heard Mr. M.S. Karnik, the learned Counsel for the Appellant, and Smt. V.R. Bhosale, the learned APP for the Respondent State .I

have been taken through the evidence adduced before the trial Court. I have also been taken through the impugned judgment and order.

3. The case of the prosecution before the trial Court was as follows:

~½ The prosecutrix, (name not mentioned in order to ensure nondisclosure of identity), who was at the material time unmarried, was residing with

her parents. The father of the prosecutrix was an agriculturist and the family of the prosecutrix used to work in the fields. That, on 19th October,

2010, the parents of the prosecutrix had gone to the field. However, as the prosecutrix was suffering from headache, she had not gone with them

and had remained at the residence. That, at about 3:00 p.m. to 4:00 p.m., the headache stopped and as the prosecutrix felt alright, she started

going to the field. That, when the prosecutrix had reached near the field of one Rangnath Thamake, which is situate at some distance from the field

of the family of prosecutrix, the original Accused No.1 Rajaram Kalu Namede came there in a jeep. The prosecutrix knew him, he being the

resident of the same village as that of the prosecutrix, namely, Ganeshgaon. The said original Accused No.1 caught hold of the hand of the

prosecutrix and took her inside the jeep. The prosecutrix asked him to leave her hand, but the original Accused No.1 did not release the hand.

That, he started taking the jeep to the side of Ozarkhed Road. While on the way, the Appellant came from the opposite direction in a tempo. That,

the Appellant stopped the tempo by the side of the road and got into the jeep. The Appellant started driving the jeep. The original Accused No.1

then put his hand around the body of the prosecutrix by coming on the back side seat. He touched the breast of the prosecutrix with his hand,

causing scratches on her body. The jeep reached to Ozarkhed Bari. The Appellant stopped the jeep. The Appellant went out of the jeep and

waited by the side of the jeep. The original Accused No.1 then removed his clothes, removed the clothes of the prosecutrix and had sexual

intercourse with the prosecutrix, though the prosecutrix had tried to push him and to remove him from her person. The original Accused No.1 had

threatened her that if she would disclose about the incident to anyone, then he would kill her. Thereafter, the original Accused No.1 dropped the

prosecutrix near a bridge Shivangaon Farshi. At that time, the original Accused No.1 again threatened the prosecutrix.

~½ The prosecutrix then went to her home. Her parents returned from the field at about 7:00 p.m. On the next day, the prosecutrix told about the

incident to her parents.

The matter was thereafter reported to the Police. Subhashchandra Shivajirao Borse (PW5), attached to Trimbakeshwar Police Station at that time,

recorded the statement of the prosecutrix and treated the same as the First Information Report (Exhibit26). On the basis thereof, a case in respect

of offences punishable under Sections 366 IPC, 376 IPC and 506 of the IPC was registered against the original Accused No.1 and the Appellant.

In the course of investigation, the prosecutrix was referred for medical examination. She was examined by Dr. Madhukar Yashwant Shankpal

(PW1) who was attached to the Civil Hospital, Nashik. On the next day, she was examined by Dr. Kanchan Narayan Wanere (PW4), a

Gynaecologist.

During the trial, totally five witnesses were examined for the prosecution, four of whom have been already referred to above. Balu Ambu Dahale,

father of the prosecutrix, was examined as Witness No.3 for the prosecution.

4. It is contended by Mr. M.S. Karnik, the learned Counsel for the Appellant, that there was no evidence to hold the Appellant guilty. He also

submitted that, even as regards the original Accused No.1, there was no satisfactory evidence. He submitted that the evidence on record atleast

creates a doubt that the prosecutrix was probably a consenting party, and that the original Accused No.1 was also entitled for the benefit of such

doubt. He further submitted that, in any case, there was no basis for holding the Appellant guilty of the alleged offences.

5. It is to be understood that it is not the case of the prosecution that the Appellant had raped the prosecutrix. It is not the case of the prosecution

that the Appellant had abducted the prosecutrix. The case of the prosecution is that the prosecutrix was abducted by the original Accused No. 1 in

order that she might be forced or seduced to illicit intercourse, and that the prosecutrix was, thereafter, raped by the original Accused No.1, in

furtherance of the common intention of the said original Accused No.1 and the Appellant.

6. On a consideration of the evidence adduced, the trial Court came to the conclusion that, not only the original Accused No.1, but the Appellant

was also guilty of an offence punishable u/s 366 of the IPC, read with Section 34 thereof, as he had shared such a common intention with the

original Accused No.1. The trial Court also observed that since the Appellant had stood by the side of the jeep when the prosecutrix was being

raped by the original Accused No.1 and since the Appellant was guarding the place, the Appellant was guilty also of an offence punishable u/s

376(2)(g) of the IPC.

7. On the basis of the facts alleged, the proper charge against the Appellant would have been of abetting the offences in question by the original

Accused No.1, rather than accusing that the acts in question were done by the original Accused No.1 and the Appellant in furtherance of the

common intention of both of them.

8. Before proceeding further, it must be recorded that the original Accused No.1 had also preferred an Appeal from his conviction and sentence

(Criminal Appeal No.545 of 2005), which came to be decided by me on 16th September, 2011. The learned Advocate for the original Accused

No.1 - the Appellant in the said Appeal - did not contest the said Appeal on merits of the conviction, but kept his submission confined to the

sentences imposed upon the said original Accused No.1. All that was urged was that a lenient view of the matter with respect to the sentence be

taken. In view of this concession made by the Advocate for the Appellant in the said Appeal, a closer examination of the evidence adduced before

the trial Court for ascertaining the correctness of the conclusion of guilt arrived at by the trial Court, was not thought necessary and it was not

meticulously examined whether the finding of the guilt recorded by the trial Court was proper and legal. The Appeal was disposed of by

maintaining the conviction, in view of the concession made by the Advocate for the Appellant, and by reducing the substantive sentence imposed

upon the said original Accused No.1 with respect to the offence punishable u/s 376(2)(g) of the IPC for the reasons mentioned in the order

disposing of the said Appeal.

9. The question is whether because the conviction of the original Accused No.1 with respect to the aforesaid offences was not disturbed in the

Appeal filed by him before this Court, the present Appellant is also precluded from canvassing that no case had been made out even against the

original Accused No.1. In my opinion, the Appellant would not be precluded from making such a submission for the reason that the said Appeal

filed by the original Accused No.1 was decided on the basis of the concession made by the Advocate appearing for the original Accused No.1. It

is not that the arguments which are now sought to be advanced on behalf of the present Appellant were advanced during the course of hearing of

the said Appeal, and that such arguments were not found acceptable to this Court. The issue regarding the guilt of the said original Accused No.1

was examined only superficially, in view of the concession made by his Advocate, and, therefore, there would be nothing wrong if the present

Appellant is allowed to make submissions with respect to the evidence against the original Accused No.1 also. Obviously, whether the charges

against the said original Accused No.1 have been proved or not would be extremely relevant in the context of the conviction of the present

Appellant and the Appellant should be allowed to raise those issues in the process of challenging the correctness of his own conviction, as has been

recorded by the trial Court.

10. In this case, admittedly, the prosecutrix is above 18 years of age. It is for this reason that the offence punishable u/s 363 of the IPC, in respect

of which originally a charge was framed, appears to have been given up.

11. Mr. Karnik, the learned Advocate for the Appellant, urged that the evidence of the prosecutrix suggests that she was a consenting party to the

act of sexual intercourse. He submitted that it was not possible for the original Accused No.1 to forcibly drag her inside the jeep single handedly.

He also submitted that while the original Accused No.1 was driving the jeep, he could not have held the prosecutrix, and that the prosecutrix had

enough opportunity to shout or raise cries. He also submitted that, admittedly, the jeep driven by the original Accused No.1 had stopped for some

time before the Appellant got down from the tempo, which he was driving, and stepped into the jeep, and that the prosecutrix had an opportunity

to escape at that time. According to him, the prosecutrix had not offered any resistance at all, and that the facts that are revealed from the evidence

indicate it to be a case of consent.

12. I have carefully considered the evidence of the prosecutrix and the medical evidence in this context. Indeed, it appears to be difficult to me that

the original Accused No.1 would be able to drag the prosecutrix inside the jeep single handedly. If the prosecutrix would offer resistance, it would

not be easy for the original Accused No.1 to be able to drag her inside the jeep without causing certain injuries to the prosecutrix as well as to

himself.

13. It must be observed here that, that act of sexual intercourse took place between the prosecutrix and the original Accused No.1 on or about

19th October, 2002, cannot be doubted. The medical examination of the prosecutrix indicated that there was a fresh rupture to the hymen and, in

my opinion, this corroborates version of the prosecutrix so far as the act of sexual intercourse is concerned. One has to proceed, therefore, on the

basis that the act of sexual intercourse between the prosecutrix and the original Accused No.1, indeed, took place. However, there are certain

aspects of the matter which create a doubt as to whether the sexual intercourse in question had taken place against the will of the prosecutrix or

without her consent.

14. It may be recalled that the prosecutrix did not go to work in the field along with her parents by claiming that she was suffering from headache.

According to her, she felt alright at about 3:00 p.m. to 4:00 p.m. whereafter she decided to go to the field, and that the incident took place while

she was so proceeding. Thus, according to her version, the meeting between the original Accused No.1 and her was purely accidental and a

matter of chance.

15. The injuries that were sustained by the prosecutrix were as follows:

(i). Nail scratch injury on right side of neck;

(ii). Multiple abrasions on back, right side of size 1 x 1 cm.;

(iii). Abrasion on right side of back size 5 x 6 cms.

(iv). Bruising plus on the chest of the size 0.5 x 1 cm.

16. It can be noticed that all these injuries are minor and do not show the signs of any resistance put up by the prosecutrix, either at the time of

dragging her inside the jeep, or during the act of sexual intercourse. Interestingly, according to Dr. Madhukar Shankpal (PW1), the history of

injuries at Sr. Nos.1, 2 and 3 above, as given by the prosecutrix to him, was that they were by beating of her father. It is only the Injury No.4 that

the prosecutrix claimed to have been caused by the original Accused No.1.

17. There is some discrepancy in the evidence of the prosecutrix and the evidence of her father Balu (PW3) as to when the incident in question

was allegedly reported by the prosecutrix to her parents. In her evidence, the prosecutrix claims that she reported the incident to her parents on the

next day, and that, thereafter, she went to the Police Station. However, when the First Information Report was shown to her, she admitted that she

had been to the Police Station after three days from the incident. According to Balu (PW3) father of the prosecutrix the prosecutrix disclosed the

incident to him on the same day on which it took place, which, according to him, was a Saturday. According to him, however, the matter was

reported to the Police on Wednesday. The delay in reporting the matter to the Police is not satisfactorily explained either by the prosecutrix or by

her father Balu (PW3).

18. There is also a denial of the fact, that the prosecutrix was beaten by her father Balu (PW3), by both of them. However, in my opinion, the

evidence of Dr. Madhukar Shankpal (PW1) that the prosecutrix had given the history of some injuries found on her person as sustained by

beatings of her father, has to be accepted. The evidence of Dr. Madhukar Shankpal (PW1) is supported by the contemporaneous record which is

in the nature of entries made by him in the case papers (Exhibit23) and it is inconceivable that the Doctor would make such false entries without

any reason. Once it is accepted that the prosecutrix had given such history of certain injuries to the Doctor, when she was medically examined, the

fact that now she as well as her father are denying that she was ever beaten by her father gives rise to a suspicion that the beating may have

something to do with the alleged incident. One may observe that such beating, if related to the alleged incident, would be more in consonance with

the possibility of the belief on the part of the Balu (PW3) - father of the prosecutrix - that there was a consensual sexual intercourse, rather than the

prosecutrix being a victim of rape. It is quite possible that it is for this reason that the prosecutrix and her father find it convenient to deny that the

prosecutrix was beaten by her father.

19. The evidence of Dr. Kanchan Wanere (PW4), a Gynaecologist, that the medical examination revealed the case of forceful intercourse does

not, in my opinion, advance the theory of rape. This witness has stated that, on examination of the private parts of the victim, she found the valva,

vagina and perineum to be normal. She has also stated that there were signs of fresh hymeneal rupture, and that on P.V. examination, tenderness

was found present in vagina. When she was asked to clarify what she meant by "forceful intercourse", she stated that, according to her, forceful

intercourse means "intercourse against the will of the patient".

20. I am not able to accept the opinion of this witness that the medical examination showed the case to be one of rape. Undoubtedly, it showed the

case of sexual intercourse, but that would be quite distinct from claiming that it was a case of rape. This witness has opined that the intercourse had

taken place for the first time and the prosecutrix was not habituated to sexual intercourse. In that case, the injuries, as noticed by this witness, were

bound to be caused even in case of consensual sexual intercourse. The term "forceful" was, apparently, used to indicate use of some force, but to

claim from this, that it would show absence of consent on the part of the woman, would not be correct, particularly because according to the

witness it was a case of first sexual intercourse by the victim.

21. The injuries, as were found on the person of the prosecutrix by Dr. Madhukar Shankpal (PW1) and Dr. Kanchan Wanere (PW4), are not

incompatible with the case of sexual intercourse by consent.

22. A number of other contentions are also raised by Mr. Karnik, the learned Advocate for the Appellant, in support of his claim that there was no

satisfactory evidence even against the original Accused No.1. However, in view of the fact that the Appeal filed by the original Accused No.1 has

been disposed of without disturbing the conclusion arrived at by the trial Court with regard to his guilt - albeit on concession made by the Counsel

- I do not wish to go any deeper into this aspect. What needs to be observed in the context of the present Appeal is, however, that there is no

evidence that any resistance put forth by the prosecutrix. The trial Court has relied upon the presumption u/s 114A of the Evidence Act to hold the

charge of rape as against the original Accused No.1 proved. As aforesaid, no probe into that aspect of the matter in the present Appeal is

warranted and certainly in this Appeal, this Court would not be required to evaluate the evidence against the original Accused No.1 so as to

pronounce a verdict as regards the guilt or innocence of the said accused. The aforesaid discussion with respect to the possibility of the sexual

intercourse between the prosecutrix and the original Accused No.1 being consensual became necessary only incidentally, as the contention of the

Appellant is that he had no idea of the intention, if any, of the original Accused No.1 to have forcible sexual intercourse with the prosecutrix.

23. The question that needs to be decided in the present Appeal is whether the present Appellant can be said to have shared any common

intention between the said original Accused No.1 and him, or, in the alternative, whether the present Appellant can be said to have abetted the

commission of the offences in question by the original Accused No.1. In the context of the arguments advanced by Mr. Karnik, the learned

Counsel for the Appellant, what requires to be examined is whether there is evidence to indicate that the Appellant was aware of the intention of

the original Accused No.1 to rape the prosecutrix.

24. It may be recalled that, according to the prosecutrix, she met the original Accused No.1 accidentally. That, she had stayed at home because of

headache and, that, when she felt alright, she decided to go out. Obviously, if the things had happened this way, then, that she would be found at

that particular place could not have been known to the Appellant. Thus, the first relevant aspect would be that the Appellant met the prosecutrix

and the original Accused No.1 accidentally and he could not have had any idea if the version of the prosecutrix is accepted that he would be

meeting the original Accused No.1 and the prosecutrix.

25. Admittedly, when the prosecutrix was allegedly dragged inside the jeep by the original Accused No.1, the Appellant was not present. The jeep

was being driven by the original Accused No.1. It is only after the original Accused No.1 had taken the prosecutrix in the jeep to a certain

distance, that the Appellant came in picture. The Appellant was said to be sitting in his tempo, which was standing by the side of the road, when

the original Accused No.1 and the prosecutrix were proceeding in the jeep. Obviously, the presence of the Appellant on the spot was accidental.

If it is to be suggested that the meeting of the prosecutrix and the original Accused No.1 and, further, their meeting the Appellant was preplanned,

it would change the complexion of the case entirely and would indicate that the prosecutrix was a consenting party. Thus, looked at from any angle,

it has to be accepted that the Appellant met the prosecutrix and the original Accused No.1 accidentally.

26. According to the prosecutrix, after the original Accused No.1 had stopped his jeep on seeing the tempo of the Appellant, the Appellant got

down from his tempo and got inside the jeep. The prosecutrix has then stated that the Appellant started driving the jeep. The prosecutrix does not

state that any talk took place between the original Accused No.1 and the Appellant, but it is obvious that there must have been some talk between

the Appellant and the original Accused No.1, without which the Appellant could not have got inside the jeep and started driving the same. It

appears to me that, that the prosecutrix has avoided stating what talk took place between the original Accused No.1 and the Appellant, is also

quite significant.

27. It also appears that the prosecutrix was probably sitting in the jeep on the back seat, even while the original Accused No.1 was driving the

same, though, at some place, the prosecutrix has suggested that she was sitting on the front seat itself before the Appellant came in the jeep. Any

way, the place where the original Accused No.1 and the prosecutrix were sitting is not very significant, in as much as, according to the prosecutrix,

after the Appellant sat in the jeep and started driving it, the original Accused No.1 came on the back seat and started touching the body of the

prosecutrix. The prosecutrix does not state that she protested against such advances of the original Accused No.1.

28. The prosecutrix then states that the Appellant stopped the jeep - again without stating that the original Accused No.1 asked him to stop the

jeep, or that any talk between the original Accused No.1 and the Appellant took place. It is not possible to accept that there would be no

conversation between the original Accused No.1 and the Appellant if not between all the three i.e. the Appellant, the original Accused No.1 and

the prosecutrix - but still, the jeep would be stopped, the Appellant would get down from his tempo and enter in the jeep, start driving, the original

Accused No.1 would go on back seat, the jeep would move further, and stop at a particular place, the Appellant would get down and wait

outside, etc. Obviously, the prosecution is deliberately keeping silent about the conversation that took place. The other view that, indeed, there

was no talk of any kind between the Appellant, the original Accused No.1 and the prosecutrix would mean that all this was preplanned, which

would obviously mean that the prosecutrix was a consenting party.

29. There is absolutely no evidence that the prosecutrix was offering any resistance to the original Accused No.1 when the Appellant saw the jeep

or entered inside the jeep. Thus, from the point of view of the Appellant, all that he saw was that the prosecutrix and the original Accused No.1

were proceeding somewhere together in the jeep. The prosecutrix nowhere claimed to have offered any resistance or raised any shouts.

30. The Appellant appears to have got down from the jeep and waited till the act of sexual intercourse was over. However, at that time also, the

prosecutrix had not resisted or raised any cries. The prosecutrix does state that the original Accused No.1 threatened to kill her, but it was after

the act was over; "and admittedly, at that time, the Appellant was not in the jeep". Thus, nothing which would create a belief in the mind of the

Appellant that what was happening was without the consent of the prosecutrix, had taken place in the presence of the Appellant. In fact,

admittedly, the prosecutrix and the Appellant are related to each other and it was inconceivable for the Appellant to imagine that the prosecutrix

was being taken by the original Accused No.1 against her wish when she did not tell him so and he could never notice any protest, resistance, or

even reluctance on the part of the prosecutrix.

31. Undoubtedly, there is substance in the contentions advanced by Mr. Karnik, the learned Counsel for the Appellant, that considering the

evidence of the prosecutrix, she appeared to be a consenting party. As aforesaid, however, since it would not be necessary in the present Appeal

to give a verdict as to the correctness of the conviction of the original Accused No.1, the matter may be left at that. However, even assuming that

the prosecutrix actually did not consent, as claimed by her, the question that would need consideration is "whether the Appellant had means of

knowing this". It is difficult to see how the Appellant, who was related to her, would come to such a conclusion, when he had noticed the original

Accused No.1 and the prosecutrix proceeding in the jeep of the original Accused No.1 without the prosecutrix offering any resistance or protest.

In the absence of the prosecutrix telling the Appellant that she was forcibly being taken by the original Accused No.1 against her wish, in the

absence of any resistance offered by her, in the absence of any protest or shouts raised by her, the Appellant could not have had any reason to

believe that she was not a consenting party.

32. Mr. Karnik submitted that the Appellant and the Accused No.1 being friends, the Appellant might have assisted the original Accused No.1 in,

what was, supposedly, an act taking place by the consent of the prosecutrix. Indeed, I find force in these contentions. There is absolutely no

evidence indicating that the Appellant was aware or had a reason to believe that what was going to take place was without the consent of the

prosecutrix. In fact, in the circumstances, it would be natural for him to presume that the prosecutrix had voluntarily accompanied the original

Accused No.1 and that the said two needed privacy.

33. The learned APP for the Respondent State contended that the Appellant should have been aware of the intentions of the original Accused

No.1, as the jeep was being driven to a lonely place. According to her, that the Appellant kept a watch by standing outside the jeep when the act

was going on shows his involvement in the matter. I am unable to accept these submissions. Privacy would be required even where the sexual

intercourse would be consensual and, as such, if the man and woman concerned wish to go to a secluded and lonely place, an inference that the

woman was being taken to such place against her will and in order to rape her, cannot be drawn.

34. I have examined the impugned judgment with the object of finding out therefrom what has weighed with the trial Court in holding the Appellant

guilty. The relevant discussion finds a place in para 43 of the impugned judgment. It has been observed as follows

It has further come in her evidence that accused no.2 Ratan was coming with his tempo. He has halted his tempo by the side of the road and get

into the said jeep and he started driving the jeep. This act of accused no.2 goes to establish that he has joined accused no.1 in sharing common

intention. It further again gathered from the spot where he has stopped the jeep. It has come on record that further he has taken the jeep towards

Ozarkhed and he has stopped the vehicle at Ozarkhed Bari and he get down from the said vehicle at the said spot and stood by the side of the

vehicle.

35. These and the other observations made in the para make it clear that the involvement of the Appellant in the alleged offences was based by the

trial Court on the following:

(a). The Appellant stopped his tempo by the side of the road and got inside the jeep and started driving the jeep

(b). He took the jeep towards a lonely place

(c). He got down from the jeep and stood by its side.

36. None of these factors would indicate that the Appellant had knowledge that the victim was not a consenting party, and that the original

Accused No.1 had abducted her for the purpose of committing rape on her. These aspects only show that the Appellant was aware that the

original Accused No.1 and the prosecutrix needed privacy, and that probably they wanted to have sexual intercourse. The knowledge that such

sexual intercourse was to be against the will of the prosecutrix or without her consent cannot be attributed to the Appellant even if it is assumed

that the prosecutrix was actually not the consenting party. Since there was no visible demonstration or manifestation of her unwillingness for the act,

it cannot be said that the Appellant was, or should have been, aware of the mens rea on the part of the original Accused No.1. In fact, the

circumstances in which the original Accused No.1 and the prosecutrix were noticed by the Appellant, namely, travelling together in the jeep, and

the circumstance of the prosecutrix not even once suggesting to, or in the presence of, the Appellant that she did not want to be taken anywhere,

(though the Appellant was related to her), it could very well be presumed by the Appellant that she was a consenting party.

37. The question is not whether what the Appellant appears to have done is morally justified. The question is whether what he has done amounts to

an offence and, more particularly, abetting the commission of rape by the original Accused No.1, which would be the charge that could have been

brought against the Appellant, at best. The other charges, namely, of the Accused No.1 having raped the prosecutrix in furtherance of the common

intention of the Accused No.1 and the Appellant etc. stand on much weaker footing.

38. The conduct of the Appellant, as revealed from the evidence on record, and even if the same is believed, is fully compatible with the conduct of

a person who would assist his friend in getting privacy for the purpose of being intimate with a woman who is seen to be accompanying him, and

willing for the act.

39. Interestingly, when the prosecution case is not at all that the Appellant committed rape on the prosecutrix, or had intercourse with her, Balu

(PW3) - the father of the prosecutrix - has stated in his evidence that the prosecutrix was raped by the Appellant also. According to him, the

prosecutrix had told him that even the Appellant had, had sexual intercourse with her. This is falsified from the evidence of the prosecutrix. That

such a false allegation should be made against the Appellant may be taken as an indication of the fact that what had actually been alleged against

the Appellant by the prosecutrix was not felt sufficient by the witness himself, to implicate the Appellant.

40. It is, therefore, not possible to hold that the prosecution had succeeded in establishing the charges against the Appellant. In my view, this was a

fit case where, the benefit of the reasonable doubt, which arises about the guilt of the Appellant, should have been given to him. The finding of guilt

arrived at by the trial Court with respect to the Appellant, is neither proper, nor legal. In my opinion, the Appellant was entitled to be acquitted.

41. The learned APP for the Respondent State submitted that though the charge of an offence punishable u/s 376(2)(g) of the IPC cannot be said

to have been proved against the Appellant, the charge of an offence punishable u/s 366 of the IPC, read with Section 34 of the IPC, has clearly

been proved against the Appellant, and that, to that extent, the conviction of the Appellant may be maintained. I am unable to agree with the

learned APP.

42. Considering the ingredients of an offence punishable u/s 366 of the IPC, it is obvious that the prosecution was required to establish, in this

case, the abduction of the victim by the original Accused No.1, and the intention of the original Accused No.1 to force or seduce the prosecutrix

to illicit intercourse AND, that the Appellant knew this and either shared the intention, or aided and abetted the original Accused No.1 in doing so.

There is no such evidence. It has already been discussed that since the victim has, admittedly, not offered any resistance or raised any protest in the

presence of or in the view of the Appellant No.1, it could not be presumed by him that she was being taken by the original Accused No.1 against

her will and for the purpose of seducing her to illicit intercourse against her will.

43. In the result, the Appeal is allowed.

44. The order of conviction of the Appellant and the sentences imposed upon him by the learned Additional Sessions Judge, Nashik, are set aside.

The Appellant stands acquitted.

45. Fine, if paid, be refunded to the Appellant

For the reasons separately recorded in the oral judgment, the Court passed the following order :-

OPERATIVE ORDER

1. In the result, the Appeal is allowed.

2. The order of conviction of the Appellant and the sentences imposed upon him by the learned Additional Sessions Judge, Nashik, are set aside.

The Appellant stands acquitted.

3. Fine, if paid, be refunded to the Appellant.