
(2011) 07 BOM CK 0189
In the Bombay High Court
Case No : Criminal Appeal No. 90 of 2001

Lahanu Waman Kharde

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 415, 417, 420

Citation : (2011) 07 BOM CK 0189

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : S.K. Shinde, for the Appellant; Y.M. Kshirsagar, APP, for the Respondent

Final Decision : Allowed

Judgement

Shrihari P. Davare, J.

1 The challenge in this appeal is to the conviction and sentence imposed upon the Appellant for the offence punishable u/s 417 of the Indian Penal Code. It appears that the Appellant herein (hereinafter called as "the accused") was charged for the offences punishable under Sections 376 and 420 of the Indian Penal Code for having cheated and committed rape on the prosecutrix, namely Saraswati Kharde and he faced the trial for the said charges in Sessions Case No. 59 of 2000, but the learned Additional Sessions Judge, Sangamner by the judgment and order dated 17.2.2001 convicted him for the offence punishable u/s 417 of the Indian Penal Code and sentenced him to suffer R.I. for 8 months and to pay fine of Rs. 500/-, in default to further suffer R.I. for one month; whereas he was acquitted for the offence punishable under Sections 376 and 420 of the Indian Penal Code.

2 The facts and events, which gave rise to the present appeal, are briefly stated as follows:

The complainant, namely Saraswati Dharmaji Kharde is the resident of Ganesh

Wadi, Zole Wasti, Taluka Sangamner, District Ahmednagar and the Appellant herein is also the resident of Ganesh Wadi, Taluka Sangamner, who is relative of wife of complainant's brother, namely Raju Kharde. Hence, the Appellant used to visit the house of the complainant. It is alleged that about 8 months prior to the occurrence of the incident i.e. 16.11.1995, the accused had visited the house of the complainant, but the family members of the complainant were not present in the house and only the complainant Saraswati was present therein. The accused stated to the complainant that he would marry with her and requested her to allow him to have sexual intercourse with her. The complainant believed the accused and conceded to his request. Thereafter the accused used to visit the house of the complainant and used to commit sexual intercourse with her. Ultimately, the complainant remained pregnant. Hence, the complainant's mother i.e. PW4 Yashodabai made inquiry with her about the said pregnancy. Thereupon, the complainant narrated the afore said incident to her and stated that the accused committed the sexual intercourse with her on the promise of performance of marriage by him with her. Hence, the complainant and her parents went to the house of the accused. Thereupon the accused assured that he would marry with the complainant, and therefore, the complainant remained silent. Thereafter the accused went to Thane for work and returned after about 3 to 4 months during Diwali festival. Hence, the complainant and her parents approached the accused and inquired about the performance of marriage. However, the accused flatly refused to marry with the complainant. Hence, the complainant and her parents returned back and discussed for about 10 to 12 days and then approached the Sangamner Taluka police station, since the complainant was carrying for about nine months pregnancy, and accordingly, lodged the complaint on 16.11.1995 (Exh.11) at about 6.00 p.m. and the police personnel registered the offence u/s 376 of the Indian Penal Code under C.R. No. 198 of 1995.

3. PW5 P.I. Ramesh Athawale, who was attached to Taluka police station, Sangamner at the relevant time, registered the offence on the basis of complaint lodged by the complainant PW3 Saraswati and criminal law was set into motion and the investigation was commenced with. Accordingly, PW5 P.I. Athawale prepared the panchanama of scene of offence (Exh.9) in presence of PW1 Rohidas Sable and PW2 Salba Borhade. Moreover, he sent PW3 Saraswati to the Medical Officer for examination. PW6 Dr. Rajiv Ghodake examined the victim i.e. the complainant on 16.11.1995 and he also took Xrays of the complainant and according to the Xrays, the age of the victim was between 16 to 18 years. The said doctor found her pregnant for about 36 weeks. PW5 P.I. Athawale recorded the statements of her parents and also statements of some other witnesses on 17.11.1995 and arrested the accused on 18.11.1995. On the same day, the complainant delivered a male child in Civil Hospital, Ahmednagar and Dr. Ghodake issued the certificate to that effect (Exh.22).

4. PW5 P.I. Athawale also gave letter to the Tahsildar and drew the map of scene of occurrence and also sent the accused to the Medical Officer for examination on

4.12.1995. He also collected the blood of the baby of the complainant and on 7.12.1995 sent all the samples to the office of the Chemical Analyser, Aurangabad for analysis purpose, along with forwarding letter dated 30.12.1995, copy thereof is produced at Exh.16. Moreover, PW5 P.I. Athawale also sent the sample of blood of the baby for the paternity test on 12.12.1995 along with forwarding letter Exh.17, as well as on 19.12.1995 he sent the samples of blood and semen of the accused for paternity test along with forwarding letter Exh.18. Accordingly, the report of the chemical analysis was received in that respect, which is produced at Exh.19.

5. Thus, after completion of investigation, PW5 P.I. Athawale filed the charge sheet against the accused in the court of the Judicial Magistrate, First Class, Sangamner, since it was transpired in the investigation that the accused promised to marry with the complainant and committed sexual intercourse with her under the said pretext. Since the charge was exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Sangamner committed the case to the Court of Sessions, Sangamner for trial.

6. To substantiate the charges levelled against the accused, the prosecution examined as many as 6 witnesses, as mentioned below.

PW1 - Rohidas Raghunath Sable, panch to the spot panchanama turned hostile.

PW2 - Salba Chafa Borhade, second panch to spot panchanama, dated 16.11.1995.

PW3 - Saraswati Dharma Kharde, prosecutrix - complainant.

PW4 - Yashodabai Dharmaji Kharde, mother of victim.

PW5 - P.I. Ramesh Dinkar Athawale, investigating officer.

PW6 - Dr. Rajiv Sambhaji Ghodake, who examined the victim.

7. The defence of the accused is of total denial and according to him, one Sanjay Jadhav used to visit the house of the complainant and she was pregnant from him and the accused has no concern with the pregnancy of the complainant. According to him, he never promised to marry with her and he never committed sexual intercourse with her and he has stated that he has not committed any offence. Thus, the accused claimed to be innocent.

8. After scrutinizing and analysing the oral, the documentary and the medical evidence on record, as well as after considering the rival submissions advanced by the learned Counsel for the parties, the learned Trial Court acquitted the accused for the offences punishable under Sections 376 and 420 of the Indian Penal Code, but convicted him for the offence punishable u/s 417 of the Indian Penal Code and sentenced him to suffer R.I. for 8 months and to pay fine of Rs. 500/, in default further to suffer R.I. for one month.

9. Hence, being aggrieved by the said judgment and order of conviction and

sentence, the Appellant has preferred the present appeal challenging the same and prayed for quashment thereof.

10. To deal with the submissions advanced by the learned Counsel for the parties effectively, it is necessary to advert to the material evidence adduced/produced by the prosecution. In the said context, admittedly the accused has been acquitted for the offences punishable under Sections 376 and 420 of the Indian Penal Code as mentioned herein above, but was convicted for the offence punishable u/s 417 of the Indian Penal Code and the Respondent/State has not filed any appeal against the said order of acquittal. Hence, the question revolves around the conviction against the accused for the offence punishable u/s 417 of the Indian Penal Code.

11. Keeping the same in mind and coming to the deposition of prime witness i.e. complainant PW3 prosecutrix Saraswati Dharma Kharde, who stated in her deposition that she knew the accused, since he was related to wife of her brother, and therefore, he used to visit her house. Accordingly, she stated that once the accused visited her house at about 2.00 p.m. to 2.30 p.m., but nobody was present in the house and the accused told her that she should love with him, so that he would perform marriage with her. Since the accused had a talk about the marriage, the complainant gave consent for marriage. Thereupon, the accused expressed his intention to have sexual intercourse with her. Thereupon she removed her clothes from her person and accused fell her down and thereafter the accused committed sexual intercourse with her. She also stated that thereafter the accused had sexual intercourse with her for about 3 to 4 times in the same month, and hence, she remained pregnant as there was development of foetus. Accordingly, her family members came to know about pregnancy and they inquired with her about the pregnancy. Thereupon she narrated that the accused had come to their house when nobody was there and he had committed sexual intercourse for 3 to 4 times with her, and her family members asked her as to why she had done so, thereupon she told that the accused had promised to marry with her, and hence, she gave consent for sexual intercourse. She further stated that therefore her parents went to the house of the accused along with her and in presence of the accused, they informed to the parents of the accused that the accused committed sexual intercourse with her. Thereupon the accused stated that he would marry with the complainant, and hence, all of them returned back. She further stated that family members of the accused also told that they would perform marriage of accused with her.

12. PW3 Saraswati Kharde further stated that thereafter the accused went to Thane for work and returned back to village Ganesh Wadi at the time of Diwali festival. Hence, the complainant and her parents went to the house of the accused at village Ganesh Wadi and asked about the performance of marriage. Thereupon, she stated that the accused flatly refused to marry with her and asked her that she may take whatever steps she wanted to take. Hence, the complainant and her parents returned back. Thereafter she stated that they all

discussed and approached the police station and the complainant narrated the entire incident to police personnel, and the said complaint was reduced into writing and the complainant PW3 prosecutrix affixed her thumb impression thereon. The said complaint, dated 16.11.1995 is tendered at Exh.11.

13. PW3 Saraswati further stated that thereafter police personnel referred her to the Hospital at Ahmednagar for examination purpose. She delivered a male child in the Government Hospital at Ahmednagar within 3 to 4 days from the date of complaint.

14. During crossexamination, PW3 Saraswati stated that the accused is cousin brother of her cousin, and accordingly, she admitted that she is from Bhawaki of the accused. She also stated that she knows one Sanjay Madhav Jadhav from Thane, whose land is adjacent to their land. She also stated that as Sanjay used to visit her house, she knew him and he also used to visit the house of her uncle on the occasions of festivals and pilgrims at the village. She denied that said Sanjay Jadhav used to come for work on the field of his uncle on holidays.

15. The defence also put its case to her that 34 months prior to the incident there was election of Grampanchayat, but she denied any knowledge thereof. She also denied that she knew Sakharam Kharde, uncle of the accused, who was contesting election of Grampanchayat. She also denied to have knowledge that Sakharam Kharde was elected and was Deputy Sarpanch of the village. She further stated that she does not know whether there was dispute between the family of the accused and their family on account of said election. She also stated that her parents were with her at the time of lodging the complaint. Hence, suggestion was given to her that her parents narrated the complaint to the police, but same was denied by her. She further stated that when she narrated the incident, the police took it down and obtained her thumb impression thereon. She also stated that after meeting the accused at the time of Diwali festival, they discussed for about 10 to 12 days for lodging the complaint.

16. In the crossexamination of PW3 Saraswati, omissions in her complaint and improvements in her statement were brought on record to the effect that the incident occurred after the marriage of her brother and accused came to her and said that she should love him and the accused committed sexual intercourse for about 3 to 4 times with her in the same month and the said omissions are vital omissions in the complaint amounting to improvement in her testimony. The complainant also tried to improve her version stating that sometimes the accused used to come to her house and he used to commit sexual intercourse with her. As regards the subsequent conduct also, vital omissions were taken out in the complaint of the complainant amounting to improvement in her testimony in respect of the fact that they had gone to the house of the accused and stated to his father that accused had committed sexual intercourse with her, and also in respect of the fact that she stated to police that she removed her all clothes from her person and said omissions in the complaint amounting to improvement in her testimony also are material and go to the root of the matter.

17. Hence, suggestion was given to PW3 prosecutrix that she falsely stated that the accused had come to her house in the noon time and had committed sexual intercourse with her, but same was denied by her. It was suggested to her that accused never came to her and told her to love him, but same was denied by her. It was also suggested to her that accused never told her that he would marry with her and accused never committed sexual intercourse with her, but same was denied by her. It was also suggested to her that she and her parents never went to the house of the accused and informed about the incident, but same was also denied by her. Suggestion was also given to her that her parents and her relatives as well as she herself filed false case against the accused on account of election dispute, but same was denied by her. It was further suggested that accused has no concern with her pregnancy, but same was denied by her. The defence put its case that she was pregnant from Sanjay Jadhav and accused had never committed sexual intercourse with her under promise of marriage, but same was denied by her.

18. Coming to the testimony of PW4 Yashodabai Dharmaji Kharde, mother of victim, who has stated that complainant Saraswati is her daughter and she used to reside in her house and she knew the accused. She also stated that the incident took place about five years back. Since there was development of foetus, she inquired with complainant Saraswati and thereupon she stated that the accused had committed sexual intercourse with her for 3 to 4 times on the promise of marriage. Hence, her husband, complainant Saraswati and her two sons went to the house of the accused and met the parents of the accused and the accused was also present in the house, and stated that the accused committed sexual intercourse with the complainant, and hence, he should marry with her. Thereupon the accused stated that he would marry with complainant Saraswati. Hence, they returned back. She also stated that they remained silent for about 2 to 4 months, since the accused had gone to Thane for work. The accused returned back at the time of Diwali festival. Hence, on the next day, they went to the house of the accused and made inquiry with him and asked him to marry with the complainant as early as possible, since she was pregnant. However, thereupon the accused refused to marry with the complainant. Hence, they returned back. Thereafter they discussed for about 8 to 10 days and then approached the police station and the complainant narrated the incident to police personnel. She further stated that a male issue was also born to the complainant after the filing of the complaint.

19. During crossexamination, she stated that she does not remember whether elections of Grampanchayat were held about 3 to 4 months prior to the incident. She also stated that she knew Sakharam Yashwant Kharde, but could not state whether he had contested the election of Grampanchayat. Suggestion was given to her that there was dispute between her husband and the family members of the accused during the elections, but same was denied by her. She also stated that she does not know whether Sakharam Kharde was Deputy Sarpanch of the village. She further stated that she did not feel it necessary to lodge complaint

with the police personnel immediately soon after her daughter informed her about the incident. She volunteered that they thought that the accused would marry with the complainant, so they did not lodge the complaint. However, she further stated that they did not feel it necessary to lodge the complaint immediately when they approached the accused at the time of Diwali festival and he refused to marry with the complainant. She also stated that they did make discussion with the relatives about the incident during the period of 8 to 10 days.

20. Omissions in the police statement of PW4 Yashodabai and improvement in her testimony were brought in respect of the facts that they kept mum for 2 to 4 months after approaching the accused and they had been to the accused on the next day when he came from Thane and they stated the accused that the complainant was pregnant and asked him to marry with her. Suggestion was given to her that she falsely stated to the effect that on inquiry with her daughter, she informed her that the accused had committed sexual intercourse 3 to 4 times with her and that accused told her that he would marry with her, but same was denied by her. It was also suggested to her that her daughter did not tell her that she was pregnant from the accused, but same was also denied by her. The accused put his case that she stated falsely against the accused on account of enmity of her husband on the ground of politics. Suggestion was also given to her that Sanjay Madhav Jadhav also used to come to the school at Samgamner, but she denied the same.

21. That takes me to the testimony of PW6 Dr. Rajiv Sambhaji Ghodake, wherein he stated that he was attached to the Cottage Hospital, Samgamner as a Medical Officer at the relevant time and on 16.11.1995 complainant Saraswati was referred to him for examination and he examined her at about 6.00 p.m. and on examination he noted the following signs.

Her general condition was fair.

A Febrile pulse 96 per minute, B.P. 130/80 RS/TVS NAD. P/A (per abdomen) uterus 36 weeks ROA Vx. Fixed FHB present 144/M Regular.

contraction - present (Mod) Per vaginal examination: cervix 5 cm. dilated.

Hand felt.

On local examination he stated that he found, Hand seen at the introitus. He also stated that the patient was referred to the Civil Hospital, Ahmednagar for scissor in section and the Xray for age determination of the patient. He further stated that Xray of the complainant was taken in the Civil Hospital, Ahmednagar and he received the Xray plates, and according to the Xrays, the age of the complainant/patient was between 16 to 18 years i.e. more than 16 and less than 18 years. He further stated that he clinically found that the pregnancy was of 36 weeks of gestation (9 months complete). Xray of the foetus in uterus suggested baby of 36 weeks. He collected the blood of the patient and it was sent for blood grouping. He also stated that the patient delivered a child in the Civil Hospital,

Ahmednagar and he issued certificate of the patient, which is produced at Exh.22. He further stated that on 4.12.1995 the police personnel had brought the complainant and her child, and blood of the complainant and the baby was collected and it was sent to the Laboratory at Aurangabad. He further stated that in the month of August, 1996 the police had again brought the patient and baby and also the accused to him. He collected the blood samples of the complainant, her baby and the accused in the month of August, 1996 and in pursuance of the requisition letter (Exh.24), the samples were sent to the Forensic Science Laboratory, Bombay. He further stated that he received the report (Exh.19) in that respect. He further stated that he handed over the samples to the police personnel in order to carry the same to the Forensic Science Laboratory, Bombay and produced the office copy thereof at Exh.25.

22. During crossexamination, he admitted that on mere testing of blood, paternity could not be ascertained. He denied that it requires 6 months to develop the characteristic of blood of a newly born baby. However, he stated that as per the Government guidelines, it is necessary to examine the blood of the father, mother and the baby in the same Laboratory in order to determine the paternity. He further stated that in such cases, if the sample of blood is collected, it should be sent immediately to the Laboratory. He also stated that the D.N.A. Test is the conclusive test about the paternity.

23. On the afore said background of the material evidence adduced/produced by the prosecution on record, the learned Counsel for the Appellant canvassed that delay of 8 to 10 months in filing the complaint has not been explained by the complainant properly. Moreover, it is also canvassed that the complainant PW3 Saraswati as well as PW4 Yashodabai, her mother, admitted in their respective depositions that they discussed for about 8 to 10 days when the accused refused to marry with the complainant and thereafter lodged the complaint with the police personnel, which itself clarifies that the complainant lodged the complaint after deliberations and discussion and same is after thought. It is further canvassed by the learned Counsel for the Appellant that due to Grampanchayat elections there was dispute between the two families i.e. the family of the complainant and the family of the accused, and therefore, the complainant has falsely implicated the accused in the present case.

24. According to the learned Counsel for the Appellant, there are vital omissions and contradictions in the testimonies of PW3 Saraswati and PW4 Yashodabai, who are the only witnesses, on whose testimonies the prosecution mainly relied upon and the said testimonies suffer from infirmities and deformities, and the said omissions and contradictions go to the root of the matter and diminishes the credibility of the testimonies of both the said witnesses, and hence, it is submitted that such defective testimonies cannot be relied upon to base the conviction against the Appellant.

25. Moreover, it is further canvassed by learned Counsel for the Appellant that PW6 Dr. Rajiv Ghodake categorically admitted that the paternity of baby cannot

be ascertained on mere testing of blood. He also admitted that the D.N.A. test is the conclusive test about the paternity.

26. On the said background, it is canvassed that only blood samples of the accused, complainant Saraswati and her son were sent to the Chemical Analyser for examination purpose by forwarding letter dated 4.8.1996 (Exh.25) and the report of the Chemical Analyser, dated 17.10.1996 (Exh.19) discloses that the blood group of accused was "O" and the blood group of complainant Saraswati was "AB"; whereas the blood group of son of Saraswati was "A" and the said chemical analysis report, dated 17.10.1996 does not specifically crystallize that the male child was born from the accused and complainant Saraswati and the said alleged paternity test is not positive. It is further canvassed that no D.N.A. test was made to prove and establish that male child was born from accused, since the D.N.A. test is the conclusive test, as stated by PW6 Dr. Rajiv Ghodake. Hence, it is submitted that the Chemical Analyser's report, dated 17.10.1996 will not connect the accused to the paternity of the male child born from complainant Saraswati and the conclusion drawn by the learned Trial Court in that respect is erroneous.

27. As regards the alleged false promise of marriage given by the accused to the complainant and inducing her for committing sexual intercourse with the accused and the alleged deception practised by the accused upon the complainant, it is canvassed by the learned Counsel for the Appellant that there is only evidence of PW3 complainant Saraswati and PW4 Yashodabai, her mother, on record in that respect and both the said testimonies i.e. the depositions of victim and her mother are the testimonies of interested persons, and hence, close scrutiny thereof is required. It is further submitted by the learned Counsel for the Appellant that to attract the provisions of Section 415 of the Indian Penal Code, intention to deceive the aggrieved person is required since inception, but so is not the position in the instant case and the prosecution has failed to prove and establish the same beyond reasonable doubt by way of cogent and concrete evidence and mere contentions of PW3 complainant Saraswati and PW4 Yashodabai, her mother, in that respect, do not establish the ingredients of Section 415 of the Indian Penal Code, and accordingly, it is submitted that the very ingredients of Section 415 of the Indian Penal Code are lacking in the instant case, and therefore, the conviction and punishment given by the learned Trial Court u/s 417 of the Indian Penal Code is unsustainable in law.

28. Besides, the learned Counsel for the Appellant further argued that the complainant has admitted in her testimony that the accused belongs to her Bhawaki i.e. same kinsmen and the marriage between such parties is prohibited under Hindu Law, and hence, it is canvassed that the complainant was aware that the accused belonged to her Bhawaki i.e. kinsmen and the marriage between both of them was prohibited, and therefore, it is submitted that there is no substance in the case of the complainant that the accused allegedly gave false promise of marriage to her and committed sexual intercourse with her under the

said pretext, since the complainant was aware that the said alleged promise given by the accused cannot be fulfilled and complied with, and therefore, consequently it is submitted that it cannot be said that the accused had any intention to cheat the complainant since beginning.

29. Besides, it has come in evidence of PW3 Saraswati and PW4 Yashodabai that Sanjay Jadhav used to visit the house of the complainant, and therefore, it is canvassed by learned Counsel for the Appellant that possibility of having sexual relations by the complainant with him and giving birth to child by her, out of the said sexual relations with him, cannot be ruled out.

30. Moreover, learned Counsel for the Appellant further canvassed that the defence has put its case to the complainant PW3 Saraswati and PW4 Yashodabai that there was political rivalry between the party of the complainant and the accused party due to the elections of Grampanchayat, and therefore, it is canvassed that the possibility of implicating the accused by the complainant in the present case, on that count, cannot be ruled out.

31. Learned Additional Public Prosecutor countered the said arguments vehemently and submitted that the prosecution has explained the delay satisfactorily, since PW4 Yashodabai came to know about the pregnancy of the complainant from the accused when the foetus was developed and when she made inquiry with her, the complainant and her father and two brothers approached the accused, whereupon the accused assured to marry with the complainant, but thereafter accused went to Thane for work and returned back at the time of Diwali festival and at that time, the complainant and her relatives approached the accused and asked him to marry with the complainant, since the complainant was pregnant from him and foetus was developed, but the accused refused to marry with her, which naturally consumed time of about 5 to 6 months, which resulted into delay in lodging the complaint. Besides, it is canvassed that when the accused refused to marry with the complainant, and hence, the complainant and her family members returned back and discussed for about 8 to 10 days in respect of further course of action and then lodged the complaint and there is nothing wrong in that and same cannot be construed as delay and said complaint also cannot be construed as lodged after thought. It is also submitted that the complainant waited for lodging the complaint since there was love affair between the complainant and the accused and the said delay cannot be construed as fatal to the case of prosecution.

32. As regards the report of the Chemical Analyser dated 17.10.1996, learned Additional Public Prosecutor submitted that it is explicitly clear from the said report that the blood group of accused is "O" and blood group of victim Saraswati is "AB"; whereas the blood group of baby of the complainant was "A", and relying upon the judicial pronouncement of Kerala High Court, reported at ILR 1975 (2) Ker 295 and chart given therein, if there is "O" and "AB" blood group of the parents, the possibility of blood group of the child is "AB"; whereas impossibility is of "O" and "AB" and coming to the present case, since the blood

group of the complainant is "AB" and the blood group of the accused is "O" and the blood group of child is "A", it could be inferred that the baby was born out of sexual intercourse between the complainant and the accused, as inferred by the learned Trial Judge and there is nothing wrong in the said finding given by the Trial Court.

33. It is further canvassed by the learned Additional Public Prosecutor that it is not in dispute that the complainant was consenting party for the sexual intercourse and the school leaving certificate of the complainant filed at Exh.20 shows that she was above 16 years of age at the time of the incident, and the Medical Officer also opined that the prosecutrix was between 16 to 18 years of age at the time of the incident, and hence, considering the medical evidence and the school leaving certificate, the complainant was about 16 years at the time of the incident, and therefore, it is amply clear that sexual intercourse between the complainant and the accused was the consensual intercourse, but it was based upon the false promise given by the accused to the complainant to marry with her and the learned Additional Public Prosecutor submitted that the requirements constituting the offence u/s 415 of the Indian Penal Code are present in the instant case and the intention to deceive is the gist of the offence and the accused herein cheated the complainant by inducing her to do a particular act, which he would not have done or omitted to do, which he would not have done owing to the deception practiced on her, and it is submitted that the facts emerged in the present case go to show that the accused first promised to marry with the complainant and then he committed sexual intercourse with her, but later on he declined to marry with her, and therefore, clear inference could be drawn that the accused has intentionally induced to marry with the complainant and committed sexual intercourse with her, and subsequently, he retracted therefrom, and hence, it is submitted that the present case fits within the four corners of Section 415 of the Indian Penal Code, and hence, the conviction and sentence imposed upon the accused by the learned Trial Court for the offence punishable u/s 417 of the Indian Penal Code is proper and legal, and accordingly, urged that the impugned judgment and order of conviction and sentence be confirmed and submitted that no interference is called therein in the appellate jurisdiction, and consequently, submitted that the present appeal bears no substance and same is devoid of any merits and same be dismissed.

34. I have perused the ocular, documentary and medical evidence on record as well as the R. and P. and considered the submissions advanced by the learned Counsel for the parties anxiously.

35. At the out set, PW3 Saraswati lodged the complaint against the accused on 16.11.1995 in respect of the incident occurred about 8 months back and the prosecution has given the explanation for the said delay of 8 to 10 months that when the foetus was developed, PW4 Yashodabai i.e. mother of the victim inquired with the victim and thereupon she stated that the accused promised her to marry and committed sexual intercourse with her for 3 to 4 times, and hence,

said complainant and her father along with two brothers approached the accused and his parents and narrated the said incident to them and thereupon accused promised to marry with her, and therefore, they returned back, and thereafter accused went to Thane for work and returned back after 34 months and the complainant and his father again approached the accused and requested to marry with the complainant, but the accused refused therefore, and hence, the complainant and his father returned back and discussed for 8 to 10 days and thereafter lodged the complaint with the police personnel, but the said theory advanced by the prosecution does not explain delay of 8 to 10 months in filing the complaint convincingly. Moreover, there is no plausible explanation about 8 to 10 days delay even after refusal by the accused to marry with the complainant and it has nowhere come in evidence that during said 8 to 10 days period, the complainant and her parents discussed with which relatives and no names and particulars have been disclosed by any of the witnesses and none of the said relatives have been examined by the prosecution to explain the said delay. Hence, it is amply clear that the complainant lodged the complaint with the police personnel after deliberations and discussion and same is apparently after thought.

36. Moreover, considering the testimonies of PW3 Saraswati and PW4 Yashodabai, there are vital omissions and contradictions in the said testimonies, who are the only witnesses, on whose testimonies the prosecution mainly relied upon and the said testimonies suffer from infirmities and deformities, and the said omissions and contradictions go to the root of the matter and certainly diminishes the credibility of the testimonies of both the said witnesses, and hence, learned Counsel for the Appellant has rightly submitted that such defective testimonies cannot be relied upon to base the conviction against the Appellant.

37. Admittedly, learned Trial Court has acquitted the Appellant for the offences punishable under Sections 376 and 420 of the Indian Penal Code.

38. As regards the the paternity of the male child allegedly born out of the sexual intercourse between the accused and the complainant, PW6 Dr. Rajiv Ghodake has categorically admitted in his deposition that the paternity cannot be ascertained by mere testing of blood and he also admitted that D.N.A. test is the conclusive test about the paternity. On this background, it is material to note that the blood samples of the accused, complainant Saraswati and her son were sent to the Chemical Analyser for examination purpose by forwarding letter dated 4.8.1996 (Exh.25) and the report of the Chemical Analyser, dated 17.10.1996 (Exh.19) discloses that the blood group of accused was "O" and the blood group of complainant Saraswati was "AB"; whereas the blood group of son of Saraswati was "A" and the said chemical analysis report, dated 17.10.1996 does not specifically crystallize that the male child was born from the accused and complainant Saraswati and it is apparently clear that the said alleged paternity test is not positive. Admittedly, no D.N.A. test was made to prove and

establish that male child was born from accused, since the D.N.A. test is the conclusive test, as stated by PW6 Dr. Rajiv Ghodake. Hence, learned Counsel for the Appellant rightly canvassed that the Chemical Analyser's report, dated 17.10.1996 will not connect the accused to the paternity of the male child born from complainant Saraswati and there cannot be any quarrel that the conclusion drawn by the learned Trial Court in that respect is unsustainable and erroneous.

39. Then the question remains about the the promise of marriage given by the accused to the complainant and inducing her for committing sexual intercourse with the accused and the alleged deception practiced by the accused upon the complainant, and in that context, there is only evidence of PW3 complainant Saraswati and PW4 Yashodabai, her mother, on record and both the said testimonies are the testimonies of interested persons, and close scrutiny of both the said testimonies, more particularly testimony of PW3 Saraswati discloses that she admitted that the accused belongs to her Bhawaki i.e. same kinsmen and the accused is cousin brother of her cousin and the marriage between such parties is exfacie prohibited under Hindu Law, and thus, the complainant was very well aware that the accused belonged to her Bhawaki i.e. kinsmen and the marriage between both of them was prohibited, and therefore, the case of the complainant that the accused allegedly gave false promise of marriage to her and committed sexual intercourse with her under the said pretext is not digestible, since the complainant was very well aware that the said alleged promise given by the accused cannot be fulfilled and complied with, and hence, consequently there is nothing on record to show that the accused has intentionally cheated the complainant since inception.

40. Coming to Section 415 of the Indian Penal Code, intention to deceive the aggrieved person is required since inception, but so is not the position in the instant case and the prosecution has failed to prove and establish the same beyond reasonable doubt by way of cogent and legal evidence and mere contentions of PW3 complainant Saraswati and PW4 Yashodabai, her mother, in that respect, do not establish the ingredients of Section 415 of the Indian Penal Code, and accordingly, the ingredients of Section 415 of the Indian Penal Code are lacking in the present case, and hence, the conviction and punishment given by the learned Trial Court u/s 417 of the Indian Penal Code is not sustainable in law.

41. Besides, PW3 victim Saraswati admitted in her cross examination that, she knows one Sanjay Madhav Jadhav, who is from Thane and it has come in the evidence that he used to visit the house of the complainant, and proposition put forth by the defence that possibility of complainant having sexual intercourse with him and giving birth to male child out of the said sexual relations, cannot be ruled out, cannot be ignored. Moreover, sight cannot be lost of the fact that defence put forth by the accused that there was rivalry between the party of the complainant and the party of the accused due to the elections of Grampanchayat, and therefore, possibility of implicating the accused by the complainant in the

present case on that count cannot be ruled out.

42. In the circumstances, having the survey of the totality of the evidence on record, there is no tangible evidence against the Appellant to convict and sentence him for the offence punishable u/s 417 of the Indian Penal Code and the prosecution case does not inspire any confidence in that respect, and therefore, the conviction and sentence imposed upon the Appellant for the offence punishable u/s 417 of the Indian Penal Code is erroneous and unsustainable, and hence, I am inclined to accept the submissions advanced by the learned Counsel for the Appellant and said conviction and sentence deserves to be quashed and set aside by allowing the present appeal.

43. In the result, present appeal is allowed and the conviction and sentence imposed upon the Appellant for the offence punishable u/s 417 of the Indian Penal Code stands quashed and set aside and the accused is acquitted thereof. Bail bond of the accused stands cancelled. Fine amount, if any paid by the Appellant, be refunded to him.