

(2020) 08 GUJ CK 0324
In the Gujarat High Court
Case No : R/Criminal Appeal No. 1068 Of 2015

Sanjaybhai Bhimsingbhai Vasava

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 31-08-2020

Acts Referred:

Indian Penal Code, 1860 — Section 6, 228A, 323, 363, 366, 375, 376, 506(2)
Code Of Criminal Procedure, 1973 — Section 313, 428
Evidence Act, 1872 — Section 9, 35, 114, 118

Citation : (2020) 08 GUJ CK 0324

Hon'ble Judges : Ilesh J. Vora, J

Bench : Single Bench

Advocate : Nirad D Buch, Maithili Mehta

Final Decision : Allowed

Judgement

Ilesh J. Vora, J

1. The present appeal is directed against the judgment and order of conviction dated 10.06.2014 passed by learned 5th Additional Sessions Court, Surat, in Sessions Case No.452/2012 arising out of the FIR being C.R.No.I-60/2012 under Sections 323, 363, 366, 376 and 506(2) of the Indian Penal Code, 1860, (hereinafter referred to as the IPC for short) registered at Umarpada Police Station, Dist. Surat, whereby, the learned Sessions Judge found the appellant - accused guilty and sentenced him as follows:

Sr. No

Section

Sentence

Sentence

1.

323

6 months simple imprisonment

Rs.1,000/- (in default 15 days Simple Imprisonment)

2.

363

5 years rigorous imprisonment

Rs.5,000/- (in default 2 months simple imprisonment)

3.

366

7 years rigorous imprisonment

Rs.7,000/- (in default 3 months simple imprisonment)

4.

376

10 years rigorous imprisonment

Rs.10,000/- (in default 5 months simple imprisonment)

5.

506(2)

1 month simple imprisonment

No fine

All the sentences shall run concurrently and also he has been given benefit of Section 428 of the Code of Criminal Procedure.

2. In the present judgment, I do not propose to mention the name of the victim girl in view of the provisions of Section 228A I.P.C. and in pursuance of the observations made by the Hon'ble Supreme Court in para-4 in the case of State of Himachal Pradesh v. Shree Kant Shekari (AIR 2004 SC 4404).

3.The facts, as elaborated by the Id. trial Court are extracted in extenso, as follows:

(a) The incident in question was happened on 22.08.2012 at about 14:45 hours at the sim of village Govat, Taluka Umapada, Dist. Surat. The date of birth of the prosecutrix is 25.03.1998 and at the relevant point of time, the prosecutrix was aged about 15 years and was studying in St. Xavier's School, Umapada;

(b) As per the FIR lodged by the prosecutrix, she being a residence of village Salli, used to come at her school regularly from village Salli to Umapada. On the

day of incident, when she was walking on the road towards her village Salli after attending the school, at about 1:30 P.M, the accused - appellant herein came upon his motorcycle and she was caught hold and dragged to the secluded place, where she was subjected to sexual intercourse forcibly by the accused - appellant. It is further case of the prosecution that, despite her resistance, she was raped by the accused and the accused had also caused the injuries over her body and he also threatened to kill her if she further make hue and cry.

(c) It is further case of the prosecution that, after the alleged incident at about 03:30 P.M, the prosecutrix rushed to nearby farm where she met her maternal aunt Gitaben and had narrated the whole incident. It is further case of the prosecution that, she along with her maternal aunt came at the place of offence as her trouser (payjama) was left there.

(d) It is further case of the prosecution that, she along with her maternal aunt went at the home where the facts of the incident having been said by her to the parents and accordingly, they came at Umarpada Police Station for lodging the complaint and accordingly FIR of the said incident was registered as C.R.No.I-60/2012 for the offence punishable under Sections 323, 363, 366, 376 and 506(2) of the IPC.

(e) It is further the case of the prosecution that, after registration of the offence, the investigation was undertaken by Police Sub-Inspector Mr. R.R.Vasava, Umarpada Police Station. During the course of investigation, he visited the place of incident and prepared necessary panchnama of scene of offence, sent the prosecutrix for medical examination at Umarpada CHC and for determination of the age, she was referred to Civil Hospital, Surat and recorded the statement of the witnesses, obtained the school leaving certificate of the prosecutrix for the purpose of age and arrested the accused and also sent him for medical examination. The Investigation Officer had seized the vehicle being Honda Motorcycle and collected the necessary medical case papers and sent the necessary samples to Forensic Science Laboratory, Surat and after receiving the same, the Investigating Officer had prepared and submitted the charge-sheet of the case before the concerned Judicial Magistrate.

(f) As the case was exclusively triable by the Court of Sessions, it was committed to the Sessions Court, Surat and numbered as Sessions Case no.452/2012.

(g) The Id. trial Court framed the charges under Sections 323, 363, 366, 376 and 506(2) of IPC, which was read over and explained the appellant - accused herein and he pleaded not guilty and claimed to be tried.

4. In order to bring home the guilt of the accused, the prosecution examined the following witnesses :

Sr. No

Names of the witness

Exh:

1.

Amarsinh Sidiyabhai

12

2.

Jignesh Gimbabhai Vasava

15

3.

Sursinh Vestabhai Vasava

21

4.

Mahesh Ramabhai Vasava

23

5.

Dr. Manish Naginbhai Chaudhary

29

6.

Dr. Nilam Ambaram Prajapati

35

7.

Dr. Kalpesh Maheshbhai Zanzrukiya

41

8.

Sujit Ranjan Fanindralal

44

9.

Prosecutrix

48

10.

Gitaben Vijaybhai Vasava

50

11.

Maganbhai Guliyabhai Vasava

51

12.

Methaben Maganbhai Vasava

54

13.

Balubhai Vitthalbhai Dhod

55

14.

Pravinbhai Bauchandbhai Patel

61

15.

Maheshbhai Supadiyabhai Vasava

64

16.

Mineshbhai Samsingbhai Vasava

65

17.

Rakeshkumar Rameshchandra Vasava

67

5. The prosecution produced and proved the following necessary documentary evidence:

Sr. No.

Particulars

Exh/s:

1.

Panchnama of Scene of offence

13

2.

Panchnama of recovery of clothes of prosecutrix

16

3.

Panchnama of vehicle used in the offence

22

4.

Panchnama of clothes of the accused wear at the time of offence

24

5.

Medical Certificate of prosecutrix

32, 39

6.

Medical Certificate of accused

34

7.

Certificate regarding the age of the prosecutrix

42

8.

X - ray

43

9.

FSL report

46,63

10.

Complaint (FIR)

49

11.

School leaving certificate of prosecutrix

56

12.

Bonafide certificate of prosecutrix issued by St. Xavier's school

57

13.

SL opinion report

71

14.

Serology report

72

15.

Birth certificate of the prosecutrix

52

6. After the closure of prosecution evidence, the statement of the accused-appellant under Section 313 of Cr.P.C. was recorded. Accused stated that he has been falsely implicated in this case on the basis of false and fabricated evidence.

7. After appreciating and considering the rival contentions of the parties and scrutinizing the evidence, the Id. trial Court held the accused guilty and convicted him for the charged offences.

8. Being aggrieved by the judgment and order of the learned trial Court, this appeal has been preferred by the accused - appellant herein.

9. Heard Mr. Nirad D. Buch, learned counsel for the appellant - accused and Ms. Maithili Mehta, learned APP appearing on behalf of the State through Video Conferencing due to Covid-19 pandemic situation.

10. Learned counsel for the appellant has mainly raised the following contentions:-

(a) There are material contradiction and inconsistencies in the deposition of the prosecutrix as PW:9 and other witnesses, who are near relatives of the prosecutrix. Therefore, in absence of any corroboration either from direct evidence of alleged offence or from medical evidence, the reliance cannot be placed on the testimony of the prosecutrix. The impugned judgment dated 10.06.2014 is based upon the conjectures and surmises and the same is against the facts and settled proposition of law and the learned trial Court has ignored and omitted the material evidence and has disregarded the cogent evidence in favour of the appellant accused;

(b) That, undisputedly the offence in question occurred at about 2:45 P.M on

22.08.2012 and the FIR registered with Umarpada Police Station at about 07:45 P.M. Thus, delay was occurred in lodging the FIR without any explanation on the part of the prosecution, creates a doubt about complicity of the accused and version of the prosecution case.

(c) That, considering the testimony of the prosecutrix and place of panchnama, the incident might have happened at some another place as there is a major contradiction and discrepancies on the issue which can be inferred from the prosecution witnesses. Thus, when place of incident having not been proved by the prosecution, the benefit should be given to the accused.

(d) Mr. Buch referring to the medical evidence submitted that, there were discrepancies and contradictions with regard to injuries found on the body of the prosecutrix. He further submitted that, no internal injuries were found over the genital organ. Thus, when was an allegation of forceful intercourse alleged and resistance by the prosecutrix, the injuries could have found on the external or internal part of the prosecutrix. Thus, in the absence of express opinion of the medical witnesses with regard to sexual intercourse, it would be legitimately inferred that, there was no any penetration for the alleged offence. In support of the submissions, learned counsel for the appellant has relied upon the case of Aman Kumar & Anr. Vs. State of Haryana [2004 (4) SCC 379], submitted that, in absence of specific opinion of the doctor on the issue of penetration and considering the testimony of the prosecutrix on the issue, neither rape or nor attempted to rape is established. Learned trial court failed to deal with this aspect while convicting the accused which shows that, the findings on the issue are perverse.

(e) Mr. Buch, has raised the issue of identification of the accused - appellant. Referring to the testimony of father of the prosecutrix Maganbhai ,PW:11, he had deposed that, the accused of the alleged offence was like Sanjay. Therefore, in this circumstance, the investigating officer failed to demonstrate the test identification parade to be performed by Executive Magistrate. In absence of corroboration on the issue, the identification of the accused in the court cannot be relied. The learned trial court grossly erred in relying the testimony of the witnesses for identification of accused in the court.

(f) It submitted by the learned counsel for appellant that, the age of the prosecutrix having not properly established and proved by the prosecution. The contents of birth certificate at Exh:52 produced by father of the prosecution having not been proved by examining the issuing authority. Therefore, merely given an exhibit to the documents would not sufficient, but contents thereof should be proved by examining the authority concerned. Thus, the birth certificate at Exh:52 could not have been read and admitted in the evidence. The school leaving certificate having little value for determination of the age of the person. The learned trial Court failed to appreciate the settled legal principle while determining the age of the prosecution. In view of this, the minority of the prosecutrix having not established and proved and the learned trial Court failed

to appreciate the evidence on record and the finding of the age based upon this evidence is not sustainable.

(g) It is further submitted that, the Investigation in the present case is unfair to the accused as the investigating officer Mr. Vasava did not collect the birth certificate from the concerned office as well as failed to recover the school bag as well as undergarments of the prosecutrix from the spot. Moreover, the learned counsel further submitted that, the FIR was recorded by the Investigating Officer and also registered by him and lastly, laid the chargesheet which action on the part of the Investigating Officer is prejudicially to the right of the accused as there was no any fair investigation on his part.

(h) It is further submitted that, the conviction under Section 363 and 366 of IPC for abduction and kidnapping of the prosecutrix is not sustainable in the law as there is no evidence to prove that, the accused has committed the alleged crime of abduction and kidnapping.

(i) That the sentence awarded to the appellant -accused for a period of 10 years is inappropriate and at the time of awarding sentence, the learned trial Court did not have considered the settled principles of law and the impugned judgment of conviction is disproportionate to the alleged offence.

(j) Mr. Buch lastly submitted that, the testimony of the prosecutrix is unreliable and without corroboration from the material particulars, the complicity of the accused by way of circumstantial evidence also not established.

(k) In view of aforesaid submissions advanced by learned counsel for the appellant Mr. Buch, he submitted that, the findings recorded by the learned trial court convicting the accused appellant are not sustainable in the eyes of law and the same deserves to be set aside.

The learned counsel for the appellant - accused Mr. N.D.Buch, vehemently submitted that, considering the aforesaid submissions, the appeal may be allowed.

11. On the contrary, Ms. Maithili Mehta, learned APP appearing for the State invited the attention of this Court, to the clear and unrebutted testimony of the prosecutrix, read in conjunction with the corroborating testimony of the other material prosecution witnesses as well as documentary evidence, urged that, there was no warrant or reason in the present case to interfere with the finding of the guilt arrived at by the learned trial Court.

(a) Learned APP further submitted that, the learned trial Court has appreciated the testimony of the prosecutrix in its right perspective and relying on the well settled proposition of law that, the sole testimony of the victim of a sexual offence is sufficient to base conviction of the accused. She further submitted that, date of birth dated 25.03.1998 was registered with competent authority and the same was reflected in the school record and there is no any inconsistency with regard to date of birth. Therefore, the learned trial Court has

rightly believed the birth certificate and has not committed any mistake while determination of the age of the victim.

(b) Learned APP further submitted that, the accused herein is not unknown to the victim and other witnesses as the accused is residing in the same area where there was hardly distance of 3 - 4 kms. between two villages. Therefore, the identification of the accused by the victim in the Court is substantial evidence and the learned trial Court has rightly relied upon the evidence of the victim so far identity of the accused is concerned in the present case.

(c) Learned APP further contended that, sentence awarded by the learned trial Court is appropriate and proportionate with the alleged and the same does not warrant interference.

Based on these submissions, learned APP appearing for the State urged that, this Court may not interfere with the well reasoned order passed by the learned trial Court convicting the appellant - accused for the alleged offence.

12. I have given my anxious consideration to the submissions advanced on behalf of the respective parties at considerable length and also perused the paper-book on record.

13. Before I proceed to examine the rival contentions advanced by learned counsel for both the sides, it may be desirable to refer to the settled principles which have to be applied in the instant case.

14. It is settled principle of law that, the conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence, and where the testimony of the victim of sexual assaults instils confidence in the Court and same can be relied upon for conviction of the accused. It is also settled by the catena of decisions of the Hon'ble Supreme Court that, the Evidence Act nowhere says that, the victim's evidence cannot be adopted, unless it is corroborated in material particulars as the victim is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as attached to an injured witness, in case of physical violence. The same degree of care and caution attached in the evaluation of her evidence as in the case of injured complainant or witnesses. The testimony of victim cannot be discarded unless there is reason to believe that, the inconsistencies or falsehood are so glaring as to destroy confidence in the prosecution witnesses.

15. Looking to the facts and circumstances of the case, it is apt to refer to the case of State of Maharashtra vs. Chandraprakash Kevalchand Jain [AIR 1990 SC 658], wherein the Apex court has held that, a woman who is a victim of sexual assault, is not an accomplice to the crime, but is a victim of another person's lust and therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Apex Court observed as under:

"A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is

in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

16. In view of the settled law, the issue is whether the evidence adduced by the prosecution, particularly the testimony of the victim at PW:9 is trustworthy, credible and can be relied upon ?

17. In this regard, it would be necessary and profitable to extract and appreciate testimony of the victim as well as other witnesses :

(a) PW: 9 at Exh:48, the victim's deposition has been recorded. Victim has specifically stated that, on the day of incident, while she returning back from her school, she was forcefully raped by the accused and was given threats to her life and also hit by the accused over her chin and neck. The prosecutrix has specifically stated that, the accused came at the place and she was taken to secluded place beside the road and after undressed her, the alleged offence of rape was committed by the accused. She has stated that, after the incident, she rushed to nearby farm where she met her maternal aunt Gitaben and narrated the whole incident to her and they came back at the place for taking her clothes. During the cross-examination, her evidence was not shaken so far allegation of rape and causing the injury is concerned. She has also mentioned in her testimony regarding her date of birth and lodging the complaint before the Umarpada Police and the same is produced at Exh:49. On the issue of identification of the accused, she has stated that, the accused is residing of village Govat and was used to sit at the chicken shop which was situated on the main road of the village. In the cross-examination, she has denied to the

suggestion made by the defence that, in the alleged offence she was consenting party. She has also denied that, she is falsely deposed against the accused to convict the accused.

(b) PW:10 Gitaben Vijaybhai, PW:11 Maganbhai Guliyabhai and PW:12 Methiben Maganbhai were examined before the learned trial Court and the said witnesses are maternal aunt, father and mother of the prosecutrix respectively. They have supported the version of the prosecutrix and also proved the date of birth dated 25.03.1998 of the prosecutrix.

(c) PW:5 Dr. Manish Chaudhary, who is Medical officer of Village Umarpada was examined by the prosecution to prove the medical examination of the prosecutrix and accused.

(d) PW:6 Dr. Nilam Prajapati and PW:7 Kalpesh Zanzrukiya were examined to prove the determination of the age of the prosecutrix.

(e) PW:13 Mr. Babubhai Dhodi, who was Principal of St. Xavier's School had been examined to prove the date of birth i.e. 25.03.1998.

(f) PW:17 Mr. Rakesh Vasava, investigating officer, who laid the chargesheet as an Investigating Officer of the case. He had produced the necessary documents like panchnama of scene of offence, medical case papers, material evidence of age, FSL report, seizure of motorcycle. The Investigating Officer after arresting the accused and based upon the investigation case papers, filed chargesheet before the competent Court. During the cross examination, the Investigation Officer had admitted the facts that, he did not have demonstrated the test identification parade of the accused in the present case. He has admitted that, during the investigation, he did not try to get birth certificate of the victim from forest office.

18. In view of the aforesaid evidence as discussed, now let us examine the contentions raised by Mr. Buch, learned counsel for the appellant - accused.

19. After close scrutiny of the evidence of testimony of PW:9 at Exh:48, the prosecutrix has withstood the exhaustive and searching cross-examination and on scrutinizing the same, it is clear that, no material discrepancies /infirmities could be elicited in her cross-examination. She stuck to the version so far forcefully intercourse done by the accused under the guise of threat. She had clearly stated in her deposition that, she was restrained to make hue and cry by the accused and after undressed her, rape was committed by the accused despite her resistance. She had clearly stated that, on account of her resistance, the injuries were caused by the accused upon her neck. So far as the injuries are concerned, PW:5 Dr. Manish Chaudhary at Exh:29 has stated that, after examination the prosecutrix, there were injury marks found over neck of the prosecutrix. The same was found by Dr. Nilam Prajapati PW:6 at Exh:35. Even PW:5 Dr. Manish Chaudhary found the injuries over the left chest of the accused which were in the nature of nail scratches. The Certificates of both the doctors at

Exh:32, 34 and 39 shows that, the injuries were fresh and possibly it might be caused in the process of resistance of either side. Record indicates that, hymen of the prosecutrix was ruptured. In view of the testimony of the prosecutrix, the medical evidence also supports to the version of the prosecutrix and also corroborated by her own FIR at Exh:49. It is also required to be noted that, the prosecutrix had identified the accused in the Court and also gave her explanation how the accused previously known to her.

20. It is settled law that, the Court should examine the broader probability of the case and not get swayed by minor contradiction or insignificant discrepancies in the statement of the prosecutrix, which are not of fatal nature to throw out and otherwise reliable prosecution case. Thus, this Court while examining the sole testimony of the prosecutrix finds that, her evidence has been consistent in her version throughout that, the alleged act was committed by the accused and had been threatened and hit by the accused while subjecting her to sexual intercourse. Even the change of place of offence having no any merits as the place stated by the prosecutrix on oath before the trial court and shown in the panchnama are same. Therefore, no any slightest doubt from the record with regard to change of place of incident.

In view of the aforesaid, the sole testimony of the prosecutrix as PW:8 is credible, consistent and the same is reliable and this Court do not find any infirmity or unworthy of credence as pointed out by learned counsel for the accused - appellant herein.

21. Let examine the contention of delay in lodging the FIR raised by learned counsel for the accused. After close scrutiny of the material on record and considering the oral evidence of the witnesses, it clearly established that, the witnesses are residents of rural tribal area and after the incident, the prosecutrix as PW:9 and her aunt Gitaben as PW:10 came at the home at village Salli. The parents of the prosecutrix came to know about the alleged incident and decided to lodge the FIR at Umarpada Police Station. It is difficult for the family to take prompt decision in lodging the complaint in rape case when the witnesses belonging to rural tribal area. In view of the evidence on record, this Court is of view that, 4 hours delay in lodging the FIR cannot be ground to throw away the case of the prosecution. The circumstances as discussed, explained in causing the delay in lodging the FIR.

22. It is profitable to refer to the case of State of Rajasthan Vs. Narayana [1992 (3) SCC 615], wherein, the Apex Court held thus:

"True it is that the complaint was lodged two days later but as stated earlier Indian society being what it is the victims of such a crime ordinarily consult relatives and are hesitant to approach the police since it involves the question of morality and chastity of a married woman. A woman and her relatives have to struggle with several situations before deciding to approach the police,....."

23. On the issue of delay, in the case of rape, the Apex Court in the case of State

of Punjab Vs. Gurmit Singh [1996 (2) SCC 384] observed in para 8, which reads as under:

"The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged."

24. In view of the law laid down by the Apex Court and considering the facts and material evidence of the present case, the delay of 3 to 4 hours cannot be said to be fatal to the prosecution case and the conduct of the witnesses while approaching Umarpada Police Station seems to be natural and there is no any smack of any ulterior motive to falsely involve the accused. Thus, the contention as raised by defence counsel having no merits and the same is rejected.

25. The learned counsel for the defence has raised the contention that, in the absence of any specific opinion by the doctors, who had examined the prosecutrix with regard to possibility of rape by forceful intercourse, reasonable inference would arise for non-penetration theory and accordingly, if there is no penetration by the accused, the offence under Section 375 of IPC as defined, cannot be legally sustained. On this issue, learned counsel for the accused referred to the medical evidence showing that, there were no any internal injury marks found while examination of the prosecutrix and even spermatozoa did not found either on the internal part of the body of the prosecutrix and accused or upon the clothes seized by the investigating officer.

26. After examining the material evidence on record, the medical evidence shows that, there were no any internal injuries found on the body of the prosecutrix. Hymen of the prosecutrix was ruptured. The opinion of Dr. Nilam Prajapati as PW:6 go to show that, the ruptured of hymen might have caused before 2 days of the examination. The accused was arrested after 4 days of the incident and naturally the spermatozoa was not found on his clothes as it might be disappeared during time. The I.O was unable to seize the undergarments of the prosecutrix as he could not find out it from the place. It is settled by catena of decisions of the Hon'ble Supreme Court that, slightest or partial penetration with or without emission of semen or even an attempt to penetration is sufficient in making out the case of the rape. It is further observed in the various cases by the Hon'ble Supreme Court that, in absence of spermatozoa cannot casted out on the correctness of the prosecution case as there are several factors which may negative the presence of spermatozoa and absence of the same, does not falsify the version of prosecutrix. In this regard, it is profitable to refer to the case of State of U.P. Vs. Babul Nath [1994 (6) SCC 29]. Para 8 of the said judgment reads as under:

"8. It may here be noticed that Section 375 of the IPC defines rape and the

Explanation to Section 375 reads as follows:

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

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

27. Keeping in mind the aforesaid settled law and considering the facts and material evidence of the present case, there is no any clear conflict between the medical evidence and ocular evidence which creates doubt in the case of prosecution. On the contrary, considering the facts of the rupture of hymen of prosecutrix, the possibilities of penetration cannot be ruled out. This Court do not find any substance on the submission that the facts of the penetration by the accused having not been established by the prosecution and in the absence of injury marks at the gentile organs, the testimony of the prosecutrix to the facts of forcible sexual assault would render unbelievable.

28. The learned counsel raised the contention that, the date of birth having not proved and established and the findings of the learned trial Court are against the settled principles of law and evidence on record. To buttress the said contention, learned counsel has drawn the attention of this Court towards birth certificate at Exh:52 and age determined on the basis of ossification test by PW:7 Dr.Kalpesh Zanzrukiya at Exh:41 and certificate and medical case papers produced by the witnesses. It is specifically contended that, birth date i.e. 25.08.1993 as reflected in Exh:52 issued by Range Forest Officer having not been proved and established by examining the Public officer, who has noted the birth date in the register maintained in due course of business. It is also contended that, the investigating officer failed to obtain the same during the course of investigation.

29. On the issue raised by learned counsel for the accused qua non-holding of test identification parade of the accused, let us first examine the evidence led by

the prosecution. The prosecutrix PW:9 has specifically stated that, her date of birth is 25.03.1998. The parents of the prosecutrix have categorically stated that, the delivery of the prosecutrix was done at home and her birth took place on 25.03.1998 and the same was registered with Forest Department on 04.04.1998. The principal of St. Xavier's School i.e. PW: 13 Babubhai Dhundi at Exh:55 had produced school leaving certificate and bonafide certificate at exh:56 and 57 respectively, wherein the date 25.03.1998 is mentioned as the date of birth. It is an admitted fact that, prosecutrix had taken primary education at Aadi Shishuvihar school (Exh:56) and on the basis of school leaving issued by the same school, she was admitted in St. Xavier's School. The father of the prosecutrix Maganbhai as PW:11 had produced the certified copy of the birth certificate issued by Forest Department at exh:52. Therefore, there is a consistency throughout found so far date of birth is concerned.

30. The legal position is settled on the aspect of determination of age of the person. Section 35 of the Evidence Act says that, entries from the birth register are relevant for the purpose of determination of age. This section further says that, an entry in any public or other official book stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty is itself a relevant fact. The issue raised by defence counsel is that, the author of the documents required to be examined to prove the contents thereof and merely production of the same giving exhibit to the documents cannot be read in the evidence. This Court disagrees with the contention raised by the counsel so far examination of author of the documents is concerned. Once the true copy of the official document fulfilled, the criteria of Section 35 of the Evidence Act, the contents thereof can be read in the evidence and there is no need to examine its author. The same issue came up before the Hon'ble Supreme court in the case of Harpal Singh Vs. Case of H.P. [AIR 1981 SC 361], wherein, the Supreme Court has ruled that, "entries having been made by concerned official in the discharge of his official duties, it is clearly admissible under Section 35 and it is not necessary to examine its author."

31. In view of the legal provision and principle settled by the Apex Court and considering the facts and circumstances of the present case, it is proved and established that, the date of birth of the prosecutrix is 25.03.1998. Therefore, the birth certificate at Exh:52 has been rightly relied by the learned trial Court and also rightly considered the school leaving certificate at Exh:56 and bonafide certificate at exh:57 while determining the age of the prosecutrix. Therefore, it is proved and established that at the time of commission of offence, she was 15 15 old and she was minor, as a result, the case of the prosecution would certainly falls under the definition of section 6 of the IPC.

32. The another contention is of non-holding of test identification parade by the Investigating officer would fatal to the prosecution case as the identity in the Court for the first time by the prosecutrix cannot be relied upon proving the complicity of the accused in the commission of crime. This Court has minutely

examine the material evidence led by the prosecution. The prosecutrix had stated before the lower Court that, she knew the accused by person as well as by his name as he was used to sit at the chicken shop situated on the main road of village Govat to Salli. The statement of the prosecution also got support from her own FIR at Exh:49. In view of this, when prosecutrix regularly passing on the same road for attending the school, naturally she would be knowing the accused as a person as well as by his name. If the accused previously known to the prosecutrix, then legally no need to hold test identification of the accused. The evidence of test identification is not substantial piece of evidence. The substantial evidence is the evidence of identification in Court. The law on this issue has been settled by various decisions of Hon'ble Supreme Court. Few decisions for deciding the issue of test identification parade are as under:

(A) In *Malkhan Singh v. State of M.P.* [AIR (2003) SC 2669], this Court has observed as under:

"It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine."

(B) In *Mulla and Anr. v. State of Uttar Pradesh* (2010) 3 SCC 508, this Court (one of us, Hon'ble P. Sathasivam, J.) placed reliance on *Matru@Girish Chandra v. The State of Uttar Pradesh* : AIR 1971 SC 1050; and *Santokh Singh v. Izhar Hussain and Anr.* AIR 1973 SC 2190, wherein it had been held as under:

"that the Tests Identification Parades do not constitute substantive evidence. They are primarily meant for the purpose of providing the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. The Test Identification Parade can only be used as corroboration of the statement in Court. The necessity for holding the Test Identification Parade can arise only when the accused persons are not previously known to the witnesses. The test is done to check the veracity of the witnesses."

The court further observed as under:

"The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court."

33. Considering the material evidence on record on the issue of identification of the accused, the prosecutrix has rightly identified the accused in the Court and her evidence would not be shaken in the cross-examination. Therefore, the contention for non-holding of test identification parade is meritless, and deserves to be negative.

34. The another contention raised by learned counsel is that, genesis of prosecution having been suppressed and on the basis of suspicion, the accused has been falsely involved in the present commission of crime and the investigating officer was unfair to the accused. This contention raised by the learned counsel for the accused is without any basis and material on record. The accused failed to mention the reasons for his false involvement, while recording of his further statement under Section 313 of the Cr.P.C. Even otherwise, there is no reason to disbelieve the testimony of the prosecution as PW:9, who has lodged the FIR disclosing the name of the accused. The conduct of the prosecutrix seems to be natural. The person who is subjected to sexual intercourse never forgets the face of the culprit. In the present case, the prosecutrix and family members belong to tribal area. It is also required to be considered that, why she wrongly put her reputation in peril by alleging falsely about forcible sexual intercourse against the accused.

35. On this issue, it is profitable to refer to the decision of the Hon'ble Supreme Court in the case of State of U.P. Vs. Chhoteylal [2011 (2) SCC 550]. Paras 25 and 26 thereof are as under:

"25. In *Vijay v. State of M.P.* [(2010) 8 SCC 191 : (2010) 3 SCC (Cri) 639] , decided recently, this Court referred to the above two decisions of this Court in *Chandraprakash Kewalchand Jain* [(1990) 1 SCC 550 : 1990 SCC (Cri) 210] and *Gurmit Singh* [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] and also few other decisions and observed as follows: (*Vijay case* [(2010) 8 SCC 191 : (2010) 3 SCC (Cri) 639] , SCC p. 198, para 14)

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

26. The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of women's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous

embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the levelling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge."

36. The another contention with regard to unfair investigation undertaken in the present case by the Investigating Officer on the ground that, he himself had registered the offence and completed the investigation of the case. This contention having been raised without any basis as it is the accused to show that, how his right of fair trial being prejudiced on account of investigation undertaken by the P.S.I Mr. R.R.Vasava at exh:67. Therefore, merely a raising a contention without any basis cannot be sustained in the eyes of law.

37. After considering the contention raised by the learned counsel for the appellant Mr. Buch with regard to guilt of the accused under Sections 363 and 366 of IPC, this Court is of view that, the accused had undergone the substantial sentence for the alleged offence. Therefore, no need to examine the contention raised qua the guilt of the accused under Sections 363 and 366 of IPC and conviction recorded by the learned trial Court.

38. The another contention raised by learned counsel Mr. Buch with regard to sentence awarded for a period of 10 years for the commission of offence under Section 376 of IPC. This Court has taken into account the law on the issue of punishment. It is settled that, the punishment should always be proportionate/ commensurate to the gravity of the offence. It is settled by the Hon'ble Supreme Court that, the question of sentence is normally a matter of judicial discretion of the trial Court and superior Court should not as a rule interfere with the exercise of such discretion. Therefore, considering the seriousness of the offence and tender age of the prosecutrix, this Court is of the view that, sentence awarded by the Id. trial Court for the offence of Section 376 of IPC to suffer rigorous imprisonment for a period of 10 years cannot be said to be disproportionate to the gravity of the offence.

39. Record indicates that, the appellant - accused has already undergone the substantial sentence for a period of 9 years and 10 months. The learned APP fairly stated that, the accused has undergone the substantial sentence recorded by the learned trial Court under Section 376 of IPC. Before amendment made in Section 376 of IPC, the minimum punishment for the offence under Section 376 of IPC was upto 7 years imprisonment, which may extend to 10 years or life.

40. In view of the peculiar circumstances of the case so far the appellant accused has already undergone the rigorous imprisonment of 9 years and 10 months for the offence of Section 376 of IPC, this Court is of the view that, the end of justice would meet if sentence of imprisonment awarded to the appellant accused for the offence under Section 376 of IPC is reduced to the period already undergone.

Rest of the sentence as well as imposition of fine remain undisturbed.

41. In view of the foregoing discussions made hereinabove and the reasons thereof, learned trial Court has considered the evidence on record in proper perspective and no legal infirmities in the impugned judgment and order of conviction recorded by learned trial Court. As a result, the prosecution succeeded in proving beyond reasonable doubt that, the accused - appellant has committed the charged offence.

42. Accordingly, present Criminal Appeal is allowed in part. The impugned judgment and order of conviction passed by the learned Trial Court is affirmed and the sentence awarded under Section 376 of IPC is hereby modified and reduced the sentence to the period already undergone. The appellant - accused be set at liberty forthwith if he is not required in any other offence. The amount of fine if not paid by the accused, he is directed to pay the same within a period of 3 months from the date of this judgment. In the event of his failure to pay the amount of fine, it will be recovered as arrears of land revenue. The victim is entitled to get Rs.10,000/- as amount of compensation awarded by the learned trial Court.

43 Copy of this judgment be sent to the jail authority concerned as well as the trial Court additionally by email/fax. Record and proceedings, if any, be sent back to the concerned trial Court forthwith.