

(1991) 10 BOM CK 0001
In the Bombay High Court
Case No : Criminal Appeal No. 111 of 1987

Shivaji Khairnar and Another	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 31-10-1991

Acts Referred:

Evidence Act, 1872 — Section 3, 8
Penal Code, 1860 (IPC) — Section 366, 372, 376

Citation : (1991) 4 BomCR 669

Hon'ble Judges : B.U. Wahane, J

Bench : Single Bench

Advocate : Manohar, for the Appellant; Naikh, Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

B.U. Wahane, J.—This appeal is directed against the judgment and Order passed by Shri D.U. Khan, Addl. Sessions Judge, Nagpur on 9th April 1987, in Sessions Case No. 220/1984, convicting both the accused (appellants) for the offence punishable u/s 366 of I.P.C. and sentencing them to undergo R.I. for one year and to pay a fine of Rs. 100/- each in default of payment of fine each of the accused shall undergo R.I. for one month. The appellant/accused No. 1 further convicted for the offence punishable u/s 376 of I.P.C. and sentenced to undergo R.I. for 3 years and to pay a fine of Rs. 300/-, in default of payment of fine to undergo further R.I. for 3 months.

2. Both the appellants/accused were chargesheeted and tried for the offence punishable under sections 366, 376 of I.P.C. for kidnapping Smt. Ranjana W/o Liladhar or abducting Srimati Ranjana w/o Liladhar with intent that she may be forced or seduced to illicit inter-course and committing rape on her.

3. The facts giving rise to the prosecution are as follows :---

The prosecutrix Smt. Ranjana w/o Liladhar (P.W. 11) is originally resident of Uran

in Raigarh District. She was residing there with her parents. The appellant/accused No. 1 Shivaji is well known to Smt. Ranjana as his house being just near the house of her parents. The accused No. 1 Shivaji is also a resident of Uran. It is also transpired from the evidence that the accused No. 1 Shivaji had occupied the house of Smt. Ranjana's paternal uncle as a tenant. The appellant/accused No. 2 Eknath is a resident of Nashik and a friend of appellant/accused No. 1 Shivaji.

It is transpired in the evidence of the prosecutrix Smt. Ranjana that she being in love with one Krishna for the last 2 years who was residing at Banglore, she left her parent's house on 23-5-84. At Uran she met the accused No. 1 Shivaji and requested him to reach her to Panvel. He acceded her request and reached her to Panvel on his motor-cycle. From there the prosecutrix had gone to Bombay to catch the train or bus bound for Banglore. She halted at Dadar as no train was available for Banglore. She went to Pune by S.T. Bus. At Pune too there being no direct Bus for Banglore she went to Railway Station. She purchased a ticket for Banglore but her train was scheduled for Banglore in the mid-night. She happened to meet Shri Liladhar on the Railway Platform who extended help and co-operation to the prosecutrix. At Railway Station she narrated her story to Shri Liladhar and also informed him that two goondas are following her.

Apprehending danger to her life or honour at the hands of goondas, Shri Liladhar asked her to accompany with up to Bhusawal from where he will board her in the train for Banglore. Liladhar also informed her that he is proceeding to Nagpur and Bhusawal is on the way. As Nagpur bound train came earlier than Banglore bound, she accompanied with Liladhar.

At Bhusawal, Liladhar made enquiries whether any train goes to Banglore as well as its, scheduled time to proceed. However, the prosecutrix and Liladhar were informed that no train goes from Bhusawal to Banglore. Shri Liladhar requested her to accompany with him to Nagpur from where she would be in a position to catch the train for Banglore. As the prosecutrix also found her life safe in the company of Liladhar, she went to Nagpur along with him. Both reached at Nagpur on 24-5-84 at 4 or 5 p.m. Banglore train was in the mid-night. She purchased a ticket. But as the departure of Banglore bound train was in mid-night, Liladhar requested the prosecutrix Smt. Rajana, instead of sitting on the platform till mid-night, to accompany with him to sister's house which is at Moti-bag Nagpur. Thus, she accompanied Liladhar and gone to the house of Liladhar's sister. The prosecutrix instead of going to Banglore she stayed for the whole night in the house of Liladhar's sister. On the next morning, the uncle of Liladhar came to the house of his sister and after some talk, put a proposal before the prosecutrix to marry with Liladhar. The prosecutrix Ranjana accepted the proposal. However, the marriage could not be finalised. Liladhar who was in Military Service is a resident of village Dhurkhed, Tahsil Katol, Dist. Nagpur. On 30-5-84, Liladhar and the prosecutrix went to Katol and on 1-6-84, they approached before the Registrar of Marriages and they got married. From Kotal, both went to village

Dhurkhed. The prosecutrix cohabited with Liladhar as his wife. After 2 days, Liladhar being a Military man and posted at Assam, left for Assam.

While the prosecutrix was residing in village Dhurkhed with her in-laws, she sent a letter to the wife of the accused No. 1 Shivaji who happened to be her friend. According to the prosecution, on 16-6-84 in the night both the appellants/accused came to the house of Smt. Ranjana's father-in-law Shri Janrao (P.W. 1) at village Dhurkhed. It is alleged that both the appellants/accused falsely represented that the mother of Smt. Ranjana was lying in the Hospital at Bombay in a serious condition and remembering her and induced the prosecutrix Srimati Ranjana to leave the house of her in laws. Initially, she declined to accompany them. Due to persuasion she consented to accompany them.

On 17-6-84 in the morning the appellants/accused took Smt. Ranjana on foot up to village Kondali. From Kondali, by bus, they proceeded towards Khamgaon. Before going to Khamgaon they halted at Shegaon, took the darshan of Gajana Maharaj and from there appellants/accused alongwith the prosecutrix gone to Khamgaon. At Khamgaon the appellant/accused No. 1 hired a room in "Alka Lodge" representing Srimati Ranjana as his wife and both the accused and Smt. Ranjana halted in the night in one and the same room.

It is the case of the prosecutrix that in the dead of night the accused Shivaji forcibly subjected Smt. Ranjana to sexual intercourse against her will and even after exercising resistance. At that particular moment the accused No. 2 Eknath was not in the room.

On the next day i.e. on 18-6-1984, both the appellants/accused alongwith Smt. Ranjana boarded the bus bound for Pune. The bus reached Aurangabad at about 1.30 p.m. The prosecutrix alleged that during the journey the appellants/accused were fondling her and she made to sit in between both the appellants/accused in Bus. Similarly, all the while appellants/accused threatened her and did not allow her to go near any lady passenger. At the bus stop of Aurangabad, both the accused got down from the bus to take tea. The conductor of the bus, Shri Surendrasingh (P.W. 5) when found the prosecutrix Srimati Ranjana alone sitting in the bus, asked her why she has not gone for tea as no tea will be available at any place till Pune. According to the prosecutrix, she told her woes to him and specifically told him that her life is not safe in the hands of the accused. So also, according to the prosecutrix, she informed the conductor that the accused. No. 1 Shivaji has committed intercourse with her. She requested the Bus conductor Shri Surendrasingh to save her from the clutches of the appellants/accused. Therefore, Shri Surendrasingh took her to the police station, of S.T. Bus Stand, Aurangabad and informed about the incident to Police Constable, Shri Mali who was on duty there. Police apprehended both the accused and they were taken to Police Chowki. After making preliminary enquiries from Srimati Ranjana, police constable Shri Mali of Police Chowki informed the police station, Kranti Chowk, Aurangabad on telephone. Shri Ambhore, A.S.I. (P.W. 13) came to Police Chowki in a Jeep and took the prosecutrix Smt. Ranjana, both the accused, Bus

conductor and others to Police Station, Kranti Chowk, Aurangabad. Smt. Ranjana lodged the oral report which was scribed and on the basis of which an offence was registered against the appellants accused for the offences under sections 366 and 376 of I.P.C. Shri Ambhore, A.S.I. took the entry in the Station Diary also. The prosecutrix and the accused No. 1 Shivaji were sent for medical examination, Doctor Kude who examined the accused No. 1 Shivaji on 18-6-84 at about 7.20 p.m., opined that there is no evidence of intercourse within 24 hours. Shri Ambhore, A.S.I. seized the underpant (Article 4) and hand-kerchief (Article No. 5) from the accused Shivaji.

The prosecutrix was also sent for medical examination. Doctor Karwa (P.W. 12) who examined the prosecutrix Ranjana on 18-6-84, issued certificate vide Exhibit 41. A.S.I. Shri Ambhore seized sari (Article No. 1) from the prosecutrix Ranjana as there appeared stains of semen. In the hospital, public hair were removed. Vaginal smear was also collected with the help of cotton swab for microscopic examination.

As the offence of kidnapping or abducting being taken place within the jurisdiction of Kondali P.S., all the papers of investigation were sent to P.S. Kondali. Police Head Constable Shri Chaturvedi of Kondali P.S., registered the offence. Shri Tripathi, P.S.I. (P.W. 10) took the investigation and recorded the statements of the witnesses. Subsequently, investigation was taken up by Shri Gulab Patil, A.S.I. (P.W. 14) of P.S. Kondali. During the investigation, Shri Patil seized the register of Alka Lodge, Khamgaon from the owner Shri J.P. Gothalkar (P.W. 3) in presence of the panchas viz., Sukhdeo Tikar (P.W. 4) and Shridhar Lande. All the incriminating articles which were seized from the prosecutrix and the accused No. 1 Shivaji, were sent to C.A for examination and report. Exh.47 is a C.A. report in respect of public hair. Exh. 48 is the C.A. report in respect of the clothes of the prosecutrix and the clothes of the accused No. 1 Shivaji. Exhibit 49 is the C.A. report regarding the blood collected of accused No. 1 Shivaji. After completing the investigation, charge-sheet was filed in the Court of C.J.M., Nagpur who committed the same for trial to the Sessions Court, Nagpur.

The defence of the accused is of denial. According to the accused, they were sent to village Dhurkhed by the parents of the prosecutrix as every one was aware of her address from the letter which she has sent to the wife of the accused No. 1 Shivaji. Therefore, according to the defence, the prosecutrix voluntarily left the house of her in laws and accompanied them. In fact, her mother was ill and they have not made any false statement. According to the accused No. 2 Eknath, as he was not known to the prosecutrix, he simply accompanied with the accused No. 1 Shivaji, as he happened to his friend and therefore committed no offence.

3. Shri Manohar, the learned Counsel for the appellants/accused assailed the findings of the learned trial Court on various grounds and submitted that from the evidence and circumstances which have been brought on record, it is clear that the prosecutrix is a girl of loose character and of each virtue and, therefore, no reliance can be placed on her evidence. It is further submitted that if the

accused No. 1 Shivaji committed sexual intercourse with the prosecutrix, it was not against her will but she being a consented party, it will not be a case to attract the provisions of section 376 of I.P.C.

4. The undisputed facts are as under :

1. The parents of the prosecutrix Smt. Ranjana and the accused No. 1 Shivaji are the residents of one and the same place i.e. village Uran in Raigarh Dist. The accused No. 1 Shivaji was also a tenant occupying the house of her paternal-uncle.

2. The prosecutrix cohabited with Liladhar and even after he left for Assam, the prosecutrix was living with her in-laws. According to the prosecutrix she lived there as wife of Liladhar claiming registered marriage.

3. On 16-6-84 during the night hours both the accused had been to village Dhurkhed and visited the house of in-laws of Smt. Ranjana.

4. On the same night both the accused informed the prosecutrix and her in-laws that the mother of Smt. Ranjana is ill and admitted at Bombay and remembering Smt. Ranjana.

5. On 17-6-84, the prosecutrix Smt. Ranjana accompanied with them on foot from Dhurkhed to Kondali Bus-stand and from there they boarded the bus.

6. On 17-6-84, accused No. 1 Shivaji hired a room in Alka Lodge, Khamgaon disclosing Smt. Ranjana as his wife and stayed during the night in one room.

7. On the next morning, they all left Khamgaon.

8. At Aurangabad Bus Stand, both the accused got down from the bus and went to take tea.

9. The prosecutrix informed her woes to the Bus Conductor of the bus who took the prosecutrix to the Police Chowki at S.T. Bus Stand and thereafter to P.S., Kranti Chowk, Aurangabad.

10. The prosecutrix lodged the report with the P.S. Kranti Chowk, Aurangabad, on the basis of which the offence was registered against both the accused for the offence u/s 366, 376 of I.P.C.

11. The prosecutrix and accused were sent for medical examination.

12. A.S.I., Shri Ambhore seized under-pant and hand-kerchief from accused No. 1 Shivaji and also saree and petti-coat from the prosecutrix.

13. On 18-6-84 at about 4 p.m. both the accused were addressed by P.S., Kranti Chowk, Aurangabad.

5. Shri Manohar, the learned Counsel for the appellants/accused and Shri Naik, learned P.P. took me through the evidence of all the witnesses and the findings of the learned trial Judge. Shri Manohar, the learned Counsel for the appellants/

accused relied on the following circumstances to discard the evidence of not only the prosecutrix but entire prosecution evidence and thereby submitted to set aside the conviction and sentence.

1. As admitted by the prosecution even prior to this incident, the prosecutrix had earlier ran away from the house and thereby she is a girl of easy virtue.

2. According to the prosecutrix she had love affair with Krishna and to meet him she left her parent's house but from Pune instead of going to Bangalore to meet her paramour Krishna she accompanied Liladhar and came to Nagpur and alleged to have married with Liladhar. This circumstance shows that the prosecutrix is a flutter girl.

3. Though it was alleged by the prosecutrix that she was raped in "Alka Lodge", Khamgaon she has not reported to the police at Khamgaon, Chikhali bus stop or even at Aurangabad voluntarily.

4. Without consent it is not possible to remove the blouse and under-wear from the person of a grown up girl. If the blouse and under wear were removed against her will such clothes must have been torn but blouse and under wear found in tact.

5. The prosecutrix alleged that she received abrasion on her hand by a nail of the accused No. 1 Shivaji. But, it is falsified by Doctor's evidence as Doctor has not found any abrasion on her person.

6. The evidence of the prosecutrix is that her both the hands were held and mouth was gagged. It is an improbable circumstances to hold two hands as well as to gag the mouth.

7. If really any resistance would have been exercised by the prosecutrix, the accused No. 1 Shivaji would have received injuries on his person, at least to his private part.

8. It is the case of the prosecutrix that at the time of sexual intercourse she was wearing a saree and petti-coat. But no blood, semen nor spermatozoa found by C.A. Thus, falsified her claim.

9. The prosecutrix deposed that when the accused No. 1 Shivaji removed her blouse and underwear, she raised cries. Her claim is falsified because though the other rooms of Alka Hotel were occupied by the passengers, none came to her rescue.

10. It is alleged that sexual intercourse committed at about 3 or 4 a.m. but in the morning she neither informed any one in the lodge at Khamagaon, Khamgaon Bus Stand, Chikhali Bus Stand and to the passenger in the Bus, though the Bus was occupied by about 50 persons including women. This is an unnatural conduct and, therefore, falsify the story.

11. If really the accused No. 1 had committed sexual intercourse with her

without her consent, definitely she would not have travel with him.

12. It is alleged by the prosecutrix that when she boarded Bus from Khamgaon to Aurangabad, during the travel both the accused molested her. This is an improbable circumstances because there were about 50 passengers in the bus.

13. Medical evidence and C. A. report is not supporting the version of the prosecutrix.

6. Certainly, it is not a case of kidnapping of Smt. Ranjana out of the keeping of her parents in- law within the meaning of section 361 of I.P.C. in that Smt. Ranjana was not, on any reckoning, below 18 years of age when on 17-6-84 she was admittedly taken by the accused persons from the house of her in- laws at village Dhurkhed. Naturally, it will have to be seen whether the act perpetrated by the accused persons would fall within the purview of "abduction" as defined by section 362 of I.P.C. The "abduction" by itself is not an offence unless it is accompanied by one of the three intentions described in sections 364, 365 and 366 of I.P.C. "Abduction" is defined in section 362 of I.P.C. in these words :

"Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person".

From the prosecution evidence, it is not a case where Smt. Ranjana was per force compelled to leave the place of her in- laws. It is a case, according to the prosecution, that the accused persons by deceitful means inducted Smt. Ranjana to leave the place of her in laws at village Dhurkhed. The evidence of the prosecutrix Smt. Ranjana (P.W. 11) is that on 16-6-84 at about 9 p.m. both the accused persons came to the house of her in laws. Both the accused told her that her mother was admitted in the hospital at Bombay being seriously ill and she is remembering her. The accused No. 1 Shivaji introduced the accused No. 1 Eknath as cousin of his wife. Accused No. 1 Shivaji told her in- laws that if they do not send her, they would be responsible if something happened to her mother. In the night, both the accused halted at the place of her in laws.

On the next morning her in- laws requested them to wait and have a meal but they refused. After taking poha, she accompanied both the accused on foot up to Kondali.

7. In cross-examination in para 14, the prosecutrix deposed that :

"My mother was recovering after illness when I ultimately reached home. My mother was at home and not in the hospital. My mother was ailing since one year before I ran away from the parental house".

8. Shri Janrao Bhongle (P.W. 1) the father-in-law of the prosecutrix deposed that "his son Liladhar is a Military Jawan. He is the only son married. The marriage between Liladhar and the prosecutrix Smt. Ranjana was a registered marriage. The accused persons came to his house and told Smt. Ranjana that her mother is ill. Ranjana refused. She stated that her parents would beat her. Those two

persons replied that they would not allow this. One of them took Smt. Ranjana aside and talked something with her. Then Smt. Ranjana said that she would like to see her mother. These two persons stayed in my house in the night. In the morning they got up and showed haste to leave the house. I requested them to wait and have meals. They told that if Smt. Ranjana is not sent, they would report the matter with police and if something happened to Smt. Ranjana's mother, we would be responsible. Therefore, Smt. Ranjana accompanied them.

9. Smt. Anjanabai (P.W. 8) the mother-in-law of the prosecutrix deposed that "My son Liladhar is married to Ranjana. Liladhar is in military service. The marriage between Liladhar and Ranjana was a registered marriage and it took place at Katol. After the marriage Liladhar went to Assam to join his duty. Ranjana sent a letter and after 10-12 days, both the accused came to our house. Ranjana stated that the accused No. 1 Shivaji is the husband of her friend. Both the accused told Ranjana that her mother was seriously ill and asked her whether she would accompany them. On the next day morning both the accused and Smt. Ranjana went away. After about 8 days Ranjana returned to our house alongwith her brother.

10. This is the evidence against the appellants/accused regarding abduction. It is an admitted fact that Smt. Ranjana was not knowing the accused No. 2 Eknath. For the first time, the accused No. 1 Shivaji introduced him that he is the brother of his wife. It is said that he too joined with the accused Shivaji in saying that (Smt. Ranjana's) mother is ill and admitted in the hospital at Bombay. It is possible that he may have joined hands with accused No. 1 Shivaji on his saying. Therefore, it cannot be said that accused No. 2 Eknath shared common intention of the accused No. 1 Shivaji to induced Smt. Ranjana by deceitful means to leave the house of her in laws. Similarly, it is the evidence that accused No. 2 Eknath played no role even at "Alka Lodge" at Khamgaon. It is an admitted fact that at the relevant time when it is alleged that accused No. 1 Shivaji committed rape, the accused No. 2 Eknath was not in the lodge. Therefore, according to me, the accused No. 1 Shivaji is the only who by deceitful means induced the prosecutrix to accompany with him by saying that her mother is seriously ill and admitted in the Hospital at Bombay. The offence of abduction is, thus, committed by the accused No. 1 Shivaji. Considering to overall evidence, the accused No. 2 Eknath has not played any major role in any way and, therefore, he has committed no offence of abduction. Therefore, the accused No. 2 Eknath is acquitted for the offence punishable u/s 366 of I.P.C.

11. The learned defence Counsel on the basis of certain admitted facts touching the character of the prosecutrix Ranjana, vociferously argued that she is a woman of easy virtue and that the Court should be on it's guard and rather show in accepting her version as true. True, it is admitted by Smt. Ranjana in her evidence that not only on 23-5-1984 but once prior to that also she had eloped from her parental house. On her own admission, she never knew Liladhar and came in contact with him only on 23-5-84 in the evening at the Rly. Station,

pune. She left her parents house to go to Banglore to see her paramour. Instead of going to Bangalore she rather unhesitatingly accompanied Liladhar from Pune to Nagpur and got herself married by a Registered marriage with him on 1-6-84. According to the learned Counsel for the appellants/accused, it is rather dramatic and unusual circumstance when she had love affair with Krishna who was living at Banglore. This is all what the defence pointed out vis-a-vis the character of Smt. Ranjana.

This circumstance really appears strange and rather dramatic but this would not detract from the truth that the accused No. 1 Shivaji by deceitful means induced the prosecutrix to leave the house of her in-laws.

The prosecutrix admitted that she was in love with Krishna and to see him only she left her parents house. On platform she met with Liladhar who helped her in getting ticket, saving her from the clothes of Gundas and directed her to accompany with him till Bhusawal from where she could get the train for Banglore. However, at Bhusawal an enquiry was made by him but there being no train she accompanied him till Nagpur where too he extended his help and cooperation for sending her to Banglore. It is just probable that she might have been overwhelmed by simplicity, co-operative attitude of Liladhar towards woman and lastly he being military man, the possibility cannot be ruled out that she fell in love with Lil adhar by forgetting her past lover Krishna. This cannot be said improbable, considering prime youth of prosecutrix. It is said that "passion and pride are to their soul unknown in such age". Shakespeare said that "a woman"s thought runs before her action" and a woman"s fitness comes by fits". They are frail too. It is also said that "women are apt to love the man who they think has the largest capacity of loving.

However, the fact remains that the prosecutrix married with Liladhar which fact is admitted even by the parents of Liladhar. So also it is clear from the evidence of the prosecutrix that after the alleged incident she had been to the house of her in-laws and she stayed with them till Diwali of 1984. Thus, from the circumstances, according to me, the prosecutrix cannot be stamped as a girl of easy virtues and, therefore, her evidence can not be discarded.

12. It has been argued that there was no sexual intercourse committed on the prosecutrix by the accused Shivaji against her will but the facts would reveal that it is with her consent. It is true that the prosecutrix had deposed that she exercised resistance to prevent the sexual intercourse but no injuries were found on her person. Then no injuries were found on the private organ of the accused. It is the case of the prosecutrix that while she was sleeping on the cot, in the dead of night, the accused Shivaji slept on her cot and thereafter he exercised force by holding her hands and gagging her mouth. The prosecutrix not being sleeping on the rough and hard floor, no injury can be expected on her person. Similarly, according to the prosecutrix, she only prevented him from committing sexual intercourse. The prosecutrix was accustomed to the sexual intercourse as admitted by her in her evidence that after the marriage with Liladhar she

cohabited with him for 2-3 days and during that period Liladhar had sexual intercourse with her on 5-6 occasions. Under the circumstances, injuries cannot be expected on the person of the accused too.

It is further submitted that neither the blouse nor the under wear being found torn and it being impossible to remove the blouse and underwear without consent, this aspect clearly shows that the prosecutrix was a consenting party. Considering the dead of night, she being away from her in-laws house and under the threat, inspite of resistance, one can find no difficulty in removing the blouse and underwear. Similarly, it is submitted that the prosecutrix admitted that she received abrasions by nails of the accused, but her version is false as doctor found no injuries. Some abrasions being minor and superficial it may disappear after sometime. The prosecutrix was examined by Doctor Karwa (P.W. 12) on 18-6-84. Doctor found no abrasions on the person of the prosecutrix. However, on examination the private part of the prosecutrix Ranjana, the doctor was of the definite opinion that Ranjana was subjected to sexual intercourse.

Exh. 47 i.e. C.A. report has been brought to my notice according to which neither semen nor spermatozoa are detected on public hair. Doctor Mahendra Karwa (P.W. 12) deposed in his evidence that.

"Though the vaginal smear was removed with the help of cotton swab for microscopic examination, it was not sent to the Chemical Analyser. According to him, spermatozoa would not disappear from the swab. However, with the passage of time spermatozoa would die and its identification would be difficult. Life span on Spermatozoa is 24 hours at the most."

Considering the time of rape, collecting the public hair and vaginal swab, due to washing of the private part, it is very difficult to find spermatozoa in the vaginal swab.

13. The learned Counsel for the appellants/accused also submitted that though it is deposed by the prosecutrix that she raised shouts, the passenger occupying the other rooms of the Lodge could not hear her cries. She has not disclosed the incident either to the proprietor or any passenger of Alka Lodge. She went to Bus stop of Khamgaon from where to Chikhali but she has not reported to any Police Officer on duty at Bus Stand. Another suspicious circumstance has been brought to my notice i.e. the prosecutrix has alleged that while she was sitting between the accused persons in the bus, they are fondling with her body, which is according to defence is an impossible circumstance considering the fact of 50 passenger sitting in the Bus.

Again what is to be considered is that it was a dead of night when the prosecutrix alleged to be raped by the accused Shivaji. During the dead hours of night people used to be in sound sleep. It is the case of the prosecutrix that she was not allowed to raise cry because her mouth was gagged. Under the circumstance, it is difficult to attract the attention of other passengers who had occupied other rooms in the lodge. Similarly, merely because she has not informed either to the

proprietor or any one who occupied in other rooms in the lodge or any police officer at Bus Stand of Khamgaon and Chikhali, her testimony cannot be discarded. It has been brought to my notice that Police Officers used to be present at the Bus Stand but it does not mean that when she was travelling she had seen any police officer, either at Khamgaon or Chikhali Bus Stand. It is evidence from the evidence of the prosecutrix that as soon as she got a chance to inform about her woes, she disclosed the facts to Shri Surendra Singh, Bus Conductor (P.W. 5) at the Bus Stand of Aurangabad, though there is a direct conflict in the evidence of both regarding whether she disclosed the entire story to him or not. However, the fact remains that the prosecutrix requested the Bus Conductor to save her life from the hands of accused and Shri Surendra Singh, the Bus Conductor, immediately took her to Police Chowki at the Bus Stand.

It is the evidence of P.W. 7 Hussan Pasha that the woman (Smt. Ranjana) was telling that the accused were taking her away.

Immediately at her say, F.I.R. was registered at Exh. 36 in the Police Station, Kranti Chowk, Aurangabad wherein she has specifically alleged that Shiva had committed rape on her. Thus, this F.I.R. Exh. 36 corroborates the testimony of Smt. Ranjana. In view of this, only because she did not disclose to Surendra Singh the Bus Conductor that she was raped by the accused Shivaji, it cannot be taken the testimony of Smt. Ranjana as false.

It is an admitted fact that the prosecutrix Ranjana did not inform to anyone either at Khamgaon or Chikhali Bus Station, till she reached Aurangabad. The prosecutrix explained that the accused were threatening her and they did not allow her to go near any passenger. She even stated in her evidence that after the incident at Alka Lodge, she had told to the accused that she would not accompany them, on which the accused threatened her and brought her to khamgaon Bus Stand. The evidence of Ranjana that the accused threatened her is also finds place in her F.I.R. Exh. 36.

The defended has tried to build the mountain out of mole till relying on the circumstance that the prosecutrix did not object when accused Shivaji represented her as his wife while booking a room in the Alka Lodge. The prosecutrix Ranjana deposed that the accused Shivaji told her that it was required to be represent like that. In the cross-examination she also explained that she has not informed to the Proprietor of the Lodge to have a separate room because she had no suspicion against the accused.

14. According to me, under the following circumstances a grown up girl can give her consent or be a willing party to sexual intercourse.

1. If she meets an unknown person in a lonely place and when she is in a helpless position.
2. If the girl is infatuated or mad or an ardent love with the accused.
3. In love a girl can submit her body if false promises of marriage are extended

to her.

4. Consent can be procured of the loose character or sexually unsatisfied girl by money.

5. Taking advantage of the incapacity of the girl and then putting her in fear of death or of hurt.

6. If the girl is in difficulties the person may take undue advantage of her helplessness. If woman is in need of money for the treatment of her child or husband or parents, beggars, orphans who generally used to submit her body.

7. Playing fraud or under duress or taking her into confidence. Example girl missed her parents on platform-accused took her into confidence and promised to reach her to her destiny. Took her to lonely place and committed rape. It is not a consent.

8. If the boy and girl seen uncompromising position by another then if he expressed his desire of sexual intercourse the girl may submit her body to save herself from humiliations and shame thinking that if not the person may report matter to police or her relatives.

15. However, in the case in hand the prosecutrix cannot be a consenting party. Admittedly, she was not of a loose character but she married with Liladhar and she enjoyed marital life in his company till he left for Assam. Another circumstance is that if no sexual intercourse would have taken place against her consent, she being under obligation of the accused No. 1 Shivaji who had extended active co-operation to reach her from her parental house to Panvel and that too on his motor cycle and he being the husband of her friend to whom she has admittedly written the letter and informed about her marriage, definitely she would not have been reported against the accused Shivaji levelling serious allegations against him. Considering the facts and circumstances, it is clear that accused Shivaji had ill motive and, therefore, without asking by anybody else to go to Dhurkhed, a distant place and to inform her about illness of her mother, he voluntarily had been to Dhurkhed alongwith the accused No. 2 and he disclosed the prosecutrix and her in-laws that her mother is seriously ill and admitted in Bombay and, thus, by deceitful means compelled the prosecutrix to leave her in-law's. Desire to satisfy his lust is apparent. Probably the accused Shivaji thought that as she left her parents aboard to go to Bangalore to meet her paramour, but gone to Nagpur with a Military man and married with him., could easily become his prey. He was certainly successful to bring her in-laws house. The accused Shivaji, therefore, took the prosecutrix to khamgaon, stayed in one room alongwith her and taking advantage of lonely place and dead of night, against her will and wish he committed sexual intercourse with her. It means he thought better make hay while the sun shines. It means to make the earliest use of once opportunity.

16. The learned Counsel for the appellant merely submitted that the girl

(prosecutrix) has falsely implicated the accused though he has committed no offence. However, the submission appears to be in the air as nothing has been brought on record in the cross-examination to arrive at the conclusion that the prosecutrix has falsely implicated the appellant Shivaji, particularly in view of the discussions in the preceding paras. The evidence of the prosecutrix is amply corroborated by the evidence of the Bus Conductor and the various circumstances brought on record. The learned A.G.P. for the State rightly submitted that as the prosecutrix was under the obligation of the appellant Shivaji who earlier extended his kind co-operation to her, the prosecutrix would be the last to level such serious allegations against his and to involve him in such a serious case. At this stage itself we want to refer to the observations of the Hon"ble Supreme Court reported in *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, , Their Lordships observed as under :

"A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not took then to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expressed in sex-offences, having regard to the very nature of the offence. It would, therefore, be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the Western World. If the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason insist to on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to the following qualification; corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the "probabilities factor" is found to be out o tune."

Further Their Lordship observed that :

"We are, therefore, of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the "Probabilities-factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, when having regard to the circumstances of the case, medical evidence can be expected to the forthcoming".

In a recent case reported in State of Maharashtra Vs. Chandraprakash Kewalchand Jain, , their Lordships have observed as follows :

"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 u/s 118 of Evidence Act 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. Therefore, ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation."

In this case, their Lordship considered the case reported in AIR 1983 SC Bhoginbhai Hirjibhai v. State of Gujarat, in detail.

17. The evidence of the prosecutrix Ranjana that due to threats extended by the accused, she did not disclose the incident to anybody till they reached

Aurangabad, deserves to be believed. The evidence of the prosecutrix is cogent and reliable. Therefore, the prosecution has proved that the accused Shivaji has committed rape on the prosecutrix Ranjana and committed the offence punishable u/s 376 of I.P.C.

18. To press the point that prosecutrix was a consenting party, reliance has been placed on the case of Pratap Misra and Others Vs. State of Orissa, and on the case of Tukaram and Another Vs. The State of Maharashtra, .

The instant case, however, presents quite different features and facts. In the present case, it cannot be said that the medical evidence is in conflict with the evidence of the prosecutrix Ranjana. The boot is on the other leg and the evidence of Ranjana is aptly corroborated is discussed hereinbefore. The medical evidence and the negative report of the Chemical Analyser would not affect the prosecution case considering the time gap between the actual incident and examination by Doctor. It is not disputed that the prosecutrix, both the accused after performing their morning duties, got dressed and left the lodge for onward journey. Thus, while performing morning duties, i.e. urination and easing, the semen and blood definitely could have been washed and under the circumstances it cannot be detected either on the clothes and vaginal swab. Therefore, negative report of C.A. does not in any way comes in the way of cogent and reliable evidence of the prosecutrix.

19. It is relevant to refer the observations of the Apex Court in the case of Rafiq v. State of Uttar Pradesh, reported in AIR 1980 SC 1344. Their Lordships in a case u/s 376 of I.P.C. observed as follows:

"Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of procedural tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggrieved."

20. In view of the above discussion, the accused Shivaji has committed the offence punishable u/s 376 of I.P.C. and, therefore, the findings of the Addl. Sessions Judge, Nagpur are just and proper. Similarly, there is voluminous evidence as discussed above that the accused Shivaji also by deceitful means induced the prosecutrix Ranjana to leave the place of her in-laws. Therefore, the accused Shivaji also committed the offence u/s 366 of I.P.C. Conviction and sentence awarded by the learned Addl. Sessions Judge, Nagpur in respect of accused Shivaji is confirmed.

Considering the evidence discussed in the preceding paras the accused No. 2 Eknath has not committed offence u/s 366 of I.P.C. and, therefore, he is

acquitted of the charge. Conviction and sentence awarded by the trial Court in respect of accused Eknath is set aside.

21. The appeal is partly allowed. The conviction and sentence awarded by the learned trial Court in respect of accused No. 1 Shivaji is confirmed. The appellant/accused No. 1 Shivaji being released on bail, he is granted 2 months time to surrender to his bail bonds. The conviction and sentence awarded by the trial Court in respect of accused No. 2 Eknath is set aside and he is acquitted of the charge. His bail bonds shall stand cancelled.

If the appellant/accused No. 1 Shivaji fails to surrender his bail bounds within the period of 2 months, warrant of arrest be issued by the trial Court.