ABC 2019 (III) 237 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(Rohit B. Deo, J.)

Criminal Appeal No. 198 of 2019

Decided on 30 July 2019

Nagpur Bench

MOHAN S/o DIGAMBAR LOKHANDE ***- Appellant(s).***

Versus

STATE OF MAHARASHTRA ***- Respondent(s).***

Law Covered:- ***(A) Indian Penal Code, 1860 — Section 376 (2)(b) — Rape case — Medical evidence — no forcible sexual intercourse. — victim was not under intoxication due to alcohol or drug— hymen can tear due to reasons other than rape— no evidence of any obvious external injury was found— age of the hymen tear is not recorded in the certificate— Held, medical evidence is of no assistance to the prosecution and is of no corroborative value — Evidence of victim —not at all confidence inspiring — lingering doubt regarding sexual intercourse— at any rate the sexual intercourse is consensual — evidence of the victim is marred by embellishments — attempt to evade the questions in the cross-examination and to avoid answering the probing questions— The evidence in the Court is inconsistent with the first information report — Held, the evidence of the victim is not of such sterling quality as would obviate the need to seek corroboration or assurance—the alternate defence theory that the sex was consensual credible — Acquittal. (Para 9, 14 & 16)***

(B) Criminal jurisprudence — Indian Penal Code, 1860 — Section 376(2)(b) — Rape case —Evidence of victim — Relying solely on — Held, if the evidence of the victim is of sterling quality, the conviction can be based on the sole & uncorroborated testimony of the victim — The victim is not an accomplice & her evidence must be treated akin to that of an injured witness — if there is any lingering doubt assurance short of corroboration may be sought from the other evidence on record including the medical evidence. (Para 11)

(C) Criminal jurisprudence — Indian Penal Code, 1860 — Section 376(2)(b) — Rape case —Rights of the accused — Rape causes the greatest distress & humiliation to the victim — but at the same

time a false allegation of rape can cause equal distress, humiliation & damage to the accused as well — The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved — Rajoo and others v. State of M.P. — relied upon. (Para 11)

(D) Criminal jurisprudence — Indian Evidence Act, 1872 — Section 114-A — Injured witness vis-à-vis rape victim — Evidence of — Evidentiary value — Broad principle — that an injured witness was present at the time when the incident happened & that ordinarily such a witness would not tell a lie as to the actual assailants — but there is no presumption or any basis for assuming that — the statement of such a witness is always correct or without any embellishment or exaggeration— Rajoo and others v. State of M.P. — relied upon. (Para 11)

(E) Interpretation of Statute — Indian Evidence Act, 1872 — Section 114A — in prosecution for certain categories of rape where sexual intercourse by the accused is proved — & the question is whether it was without the consent of the woman alleged to have been raped & she states in the evidence that she did not consent — the Court shall presume that she did not consent. (Para 12)

(F) Interpretation of Statute — Indian Evidence Act, 1872 — Section 4 — the Section mandates that whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. (Para 12)

(G) Indian Penal Code, 1860 — Section 376 — Rape case — Conduct of prosecutrix — She states that she told the accused to drop her at her maternal aunt place & the accused obliged— Both the victim and the accused are residents of same place — Held, why would the victim ask the accused to drop her at her maternal aunt's place & not at her village, is left unexplained— fatal to prosecution. (Para 13)

(H) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Rape case — Delay in FIR — Ordinarily, in cases of sexual assault the delay in lodging the first information report may not always be very significant —Since the very credibility of the victim's version appears to be in serious doubt — the delay in lodging the report would assume significance. (Para 13)

(I) Indian Penal Code, 1860 — Section 376 — Rape case — Standard of proof — Evidence of rape victim vis-à-vis corroboration — requirement of corroboration — Held, the evidence of the victim is

not of such sterling quality as would obviate the need to seek corroboration or assurance. (Para 14)

(J) Interpretation of Statute — Indian Penal Code, 1860 — Section 376(2)(b) —Evidence Act— S 114-A— Sexual intercourse — Presumption as to absence of consent — Expression, "shall presume" — interpretation of — the presumption can be rebutted — What is provided is presumption and not conclusive proof of the fact. (Para 15)

(K) Indian Evidence Act, 1872 — Section 114-A r/w 4 — Absence of consent — proving of — Intention of legislation — Held, the legislative intent is not that the accused must disprove the absence of consent beyond reasonable doubt — It would not be necessary for the accused to adduce direct evidence — The accused can rely on material brought on record in the cross-examination of the victim & the evidence of the other prosecution witnesses. (Para 16)

(L) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Victim of rape — Conduct of — Victim openly moved around — clearly impeaches the testimony of the prosecutrix that she did not consent for the intercourse — Indian Penal Code, 1860 — Section 376 (2)(b) —Evidence Act— S 114-A— Sudhakar & Two Ors. v. State of Maharashtra — relied upon. (Para 16)

(M) Indian Evidence Act, 1872 — Section 114-A — Presumption as to absence of consent — Ambit — Held, the presumption does not preclude the Court from assessing the entirety of the evidence that comes before the Court — Sudhakar & Two Ors. v. State of Maharashtra — relied upon. (Para 16)

(N) Criminal trial — Rape case — Testimony of the victim of rape — doubtful — not corroborated— benefit of the doubt must go to the accused. (Para 17)

(O) Indian Penal Code, 1860 — Section 376 — Rape case — Conduct of prosecutrix — Victim traveled on the motorcycle of the accused for around three hours — Admission by prosecutrix — there was ample opportunity to escape & to alert the people on way — explanation that she was issued threats & the improvised version that she was administered intoxicating pills — no reference of pills in the statement recorded during the investigation— Held, the conduct of the victim is unnatural—fatal to prosecution. (Para 14)

Facts:- *It was alleged that the victim received a message on her cell phone from the accused that the government subsidy - grant of her cycle is deposited at the and that she should come near the said Bank the next day, to*

which message the victim replied in the affirmative. The accused came there and told the victim that the amount will not be withdrawn on that day and offered to drop the victim to her village. The victim agreed and sat on the Motorcycle of the accused. it was further alleged that the accused took her to a jungle and threatened the victim to kill her parents. The accused removed the clothes of the victim and subjected her to forcible sexual intercourse five times. Thereafter, in the evening, the accused dropped the victim at her maternal aunt's house. The victim disclosed the entire episode to her maternal aunt who called the father of the victim. After a delay of 5 days, the victim lodged report at the Police Station alleging that the accused abducted and subjected her to forcible sexual intercourse multiple times. On the basis of the report offences punishable u/ss 363, 366A, 376 (2)(n) and 506 of the IPC and Section 4 of the POCSO Act were registered.

The learned Sessions Judge recorded a finding that the prosecution did not prove that the victim was aged less than 18 years and therefore, the provisions of the POCSO Act are not attracted. The learned Sessions Judge found that the delay in lodging the report was explained. The evidence of the victim was found reliable. The defence that the sexual intercourse, if any, was consensual was rejected. The accused was convicted u/s 376(2)(n). However, in the present appeal the accused was acquitted.

Law of relief:- Before attracting Sec. 114-A the prosecution has to prove the foundational fact beyond reasonable doubt.

Held:- The medical evidence may now be scanned. The victim was medically examined by PW 5 Dr. Sushma Sharad Gore who admits that there was no forcible sexual intercourse. PW 6 further admits that the victim was not under intoxication due to alcohol or drug. PW 5 admits that hymen can tear due to reasons other than rape. PW 6 admits that fresh and old hymen tear can be differentiated. PW 5 has proved the medical certificate Exh.48. Perusal of medical certificate Exh.48 would show that no evidence of any obvious external injury was found. The age of the hymen tear is not recorded in the certificate. The medical evidence is of no assistance to the prosecution and is of no corroborative value. No injury whatsoever is detected on the person of the victim and the age of the hymen tear is not disclosed in the report. (Para-9)

It is well settled that if the evidence of the victim is of sterling quality, the conviction can be based on the sole and uncorroborated testimony of the victim. The victim is not an accomplice and her evidence must be treated akin to that of an injured witness. If the

evidence of the victim of sexual offence is implicitly reliable and confidence inspiring, no corroboration is required and if there is any lingering doubt assurance short of corroboration may be sought from the other evidence on record including the medical evidence. Ms. F.N. Haidri would further rely on the decision of the Supreme Court in ***Rajoo and others v. State of M.P.*** reported in ***AIR 2009 858*** and in particular the following observations:

> *9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the*

spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined. (Para-11)

Section 114A of the Indian Evidence Act provides that in prosecution for certain categories of rape where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in the evidence that she did not consent, the Court shall presume that she did not consent. Section 4 of the Indian Evidence Act mandates that whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. (Para-12)

The victim traveled on the motorcycle of the accused from Ner to Arni which is a three hour journey. The victim admits that she could have alerted people on the way and indeed could have jumped from the vehicle. The explanation of the victim that she did not do so since the accused issued threats is not convincing. The victim then states that she told the accused to drop her at her maternal aunt place, and the accused obliged. Why would the victim ask the accused to drop her at her maternal aunt's place in Hinganghat and not at her village in Khandala, when admittedly both the victim and the accused are residents of Khandala, is left unexplained. Again, there is no explanation as to why the victim could not alert anybody on her way from the scene of the incident to Hinganghat. It is in the context of the fragile evidence that the delay in lodging the first information report must be viewed. Ordinarily, in cases of sexual assault the delay in lodging the first information report may not always be very significant. The delay would have to be examined in the context of the individual facts of the case and obviously there cannot be a straight jacket formula to assess the impact of the delay on the case of the prosecution. It is seen that due to fear of defamation and social stigma the family of the victim of sexual assault are at times reluctant to lodge police report promptly. In the present case, since the very credibility of the victim's version appears to be in serious doubt, the delay in lodging the report would assume significance. (Para-13)

I am satisfied that the evidence of the victim is not of such sterling quality as would obviate the need to seek corroboration or

assurance. *Au contraire*, the evidence is not at all confidence inspiring and there is a lingering doubt that the victim is not subjected to sexual intercourse, and at any rate the sexual intercourse is consensual. Such doubt arises since the evidence of the victim is marred by embellishments and there is an attempt to evade the questions in the crossexamination and to avoid answering the probing questions on the pretext that the victim memory was impaired since she was administered intoxicating pills, to which there is no reference at all in the statement recorded during the investigation. The conduct of the victim is unnatural. The version of the victim that she was induced to come to Ner it belied by the evidence on record. The victim admits that there was ample opportunity to escape and to alert the people on way to Arni and then to Hinganghat and as noted *supra* the explanation that she was issued threats by the accused and the improvised version that she was administered intoxicating pills does no service to the prosecution case. (Para-14)

The submission of the learned APP Shri T.A. Mirza is that in view of the presumption under Section 114A of the Indian Evidence Act it shall have to be held that the victim did not consent. Section 114A of the Indian Evidence Act provides that in a prosecution for rape under certain clauses of subsection (2) of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. The prosecution was for rape under clause (n) of subsection (2) of Section 376 in view of the allegation that the victim was subjected to multiple forcible sexual intercourse. However, the foundational fact which must be established before the presumption under Section 114A is triggered is that the victim was subjected to sexual intercourse by the accused. In the teeth of the evidence on record, it is difficult to conclude with any degree of certainty that the victim was subjected to sexual intercourse much less on multiple occasions. Moreover, while it is mandatory to draw the presumption in view of the use of the expression, "shall presume" the presumption can be rebutted. What is provided is presumption and not conclusive proof of the fact. (Para-15)

The learned APP Shri T.A. Mirza argues that the legislative mandate as is discernible from Section 114A read with Section 4 of the Indian Evidence Act is that the Court shall regard that absence of

consent is proved unless and until it is disproved. I have already observed that the prosecution has not proved the foundational fact beyond reasonable doubt. Moreover, in my considered opinion the legislative intent is not that the accused must disprove the absence of consent beyond reasonable doubt. It would not be necessary for the accused to adduce direct evidence to prove that there was consent or to disprove the absence of consent. The accused can rely on material brought on record in the cross-examination of the victim and the evidence of the other prosecution witnesses. In the present case, enough material is brought on record in the cross-examination of the victim and the evidence of the other prosecution witnesses to lend credibility to the alternate defence theory that the sex was consensual. It would be apposite to refer to the following observations of a learned Single Judge of this Court in ***Sudhakar & Two Ors. v. State of Maharashtra*** reported in ***2004 (3) Crimes 657:***

> *18. While the intention of law makers while introducing the amendment and providing severe punishment by incorporating sub clause (b) in Section 376(2) as well while introducing Section 114A of the Evidence Act also requires to be respected, the potential risk that follows is that any error in reaching the conclusion as to the lack of consent results in the conviction. The text of presumption as to lack of consent cannot be said to operate to a fixed yardstick or rigid rule where bare testimony of the prosecutrix in the form of her statement before the Court that she did not give consent would lead to raise an arithmetical equation of leading the court to conclude in favour of conviction and award the sentence. The statement of victim, therefore, required to be assessed by considering the entirety of evidence that may come before the Court. The manner in which the victim openly moved around clearly impeaches the testimony of the prosecutrix that she did not consent for the intercourse. The presumption raised in Section 114A of the Evidence Act, does not preclude the Court from assessing the entirety of the evidence that comes before the Court. Be that as it may, the presumption raised under Section 114A is laying down rigid yardsticks that no other conclusion is possible and that the accused have by evidence other than one which has come before the Court through the presumption to prove to the contrary, it would lead to the conclusion that never intended by the said Section.*
>
> I respectfully concur with the above quoted observations. (Para-16)

The prosecution case has too many holes and grey areas and it would be absolutely unsafe to base the conviction on the testimony of

the victim which is not corroborated. Enough doubt is created about the veracity of the victim's version and the benefit of the doubt must go to the accused. I am satisfied that the prosecution has not proved the offence beyond reasonable doubt and the gulf between suspicion and proof is not bridged. (Para-17)

Counsel:- ***For Appellant(s):*** *Ms. F.N. Haidri, Adv.*

For Respondent(s): *Shri T.A. Mirza, Adv.*

Cases Referred:-

1. *Vijay alias Chinee vs. State of Madhya Pradesh. 2010 (8) SCC 191 : [2010 ALL MR (Cri) 3326 (S.C.)], (Para-11)*
2. *State of Rajasthan vs. Rohsan Khan and others. 2014 Cri. L.J. 1092 : [2014 ALL SCR 984] , (Para-11)*
3. *State of Himachal Pradesh vs. Gian Chand AIR 2001 SC 2075. , (Para-11)*
4. *Karnel Singh v. State of M.P. AIR 1995 SC 2447, (Para-11)*
5. *Balwant Singh and others v. State of Punjab and Saudagar Singh v. State of Punjab, AIR 1987 SC 1087, (Para-11)*
6. *State of Karnataka vs. F. Nataraj reported in 2015(10) SCALE 495, (Para-11)*
7. *Mohd. Ali alias Guddu v. State of Uttar Pradesh reported in (2015) 7 SCC 272, (Para-11)*
8. *Rajoo and others v. State of M.P. reported in AIR 2009 858, (Para-11)*
9. *Prafulla Vinayak Nage & Anr. vs. The State of Maharashtra, 2018 ALL MR (Cri) 525, (Para-12)*
10. *The State of Maharashtra v. Macchindra @ Babdu Gangadhar Sonawane, 2019 ALL MR (Cri) 2353. , (Para-12)*
11. *Sudhakar & Two Ors. v. State of Maharashtra, 2004 (3) Crimes 657, (Para-16)*

JUDGMENT

ROHIT B. DEO, J.: - 1. This appeal questions the judgment dated 06.02.2019 rendered by the Additional Sessions Judge3, Yavatmal in Special (POCSO) Case 9 of 2018 whereby the appellant - accused is convicted for the offences punishable under Section 376 (2)(n) of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for a term of ten years and to payment of fine of Rs. 15,000/and in default to suffer simple imprisonment for one year, and is further convicted for the offence punishable under Section 506 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for a term of two years and to payment of fine of Rs.1000/and in default to suffer simple imprisonment for one month.

2. The prosecution case:

2.1] The victim lodged report dated 05.11.2017 at the Ner Police Station (Exh.21) alleging that the accused abducted and subjected her to forcible sexual intercourse multiple times at the *jungle* at Arni.

2.2] The victim alleged that on 31.10.2017 at 01:00 p.m. she received a message on her cell phone from the accused that the amount (government subsidy - grant) of her cycle is deposited at the Union Bank, Ner and that she should come near the said Bank the next day, to which message the victim replied in the affirmative.

2.3] On 31.10.2017 at 12:30 p.m. the victim came to the Union Bank at Ner to withdraw the amount. The accused came there and told the victim that the amount will not be withdrawn on that day and offered to drop the victim to her village, Khandala. The victim agreed and sat on the Splendor Motorcycle of the accused.

2.4] The accused took the victim via Darwha road and when the victim told the accused that the said road is not the road which approaches her village she was threatened with physical harm to her parents. The victim accompanied the accused due to the threat issued and was taken to the *jungle* at Arni.

2.5] The accused snatched the mobile of the victim, removed and destroyed the sim card and attempted to establish physical proximity. The victim tried to resist and again the accused threatened to kill her parents. The accused removed the clothes of the victim and subjected her to forcible sexual intercourse five times.

2.6] On 02.11.2017 at 05:00 p.m. the accused dropped the victim at Nanduri square, Hinganghat and left. The victim walked to her maternal aunt's house. The victim disclosed the entire episode to her maternal aunt who called the father of the victim. The victim returned to her village along with her father on 03.11.2017. Due to fear of defamation the victim did not lodge the police report immediately. She lodged the police report on 05.11.2017.

2.7] On the basis of the report Exh.21 offences punishable under Sections 363, 366A, 376 (2)(n) and 506 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) were registered vide printed FIR Exh.22.

2.8] PSI Maya Vaishy took charge of the investigation. She prepared the spot *panchanama*, sent the victim for medical examination, arrested the accused, seized the clothes of the victim and the accused

and the Splendor Motorcycle of the accused, sent the accused for medical examination, recorded the statements of witnesses, obtained and seized the biological samples of the victim and the accused, collected and seized the copy of the admission register of the Zilla Parishad School, sent the seized samples for chemical analysis and after completion of investigation submitted the final report.

2.9] The learned Sessions Judge framed charge (Exh.6) for the offences punishable under Sections 363, 366A, 376 (2)(n) and 506 of the Indian Penal Code and Section 4 of the POCSO Act. The accused pleaded not guilty and the defence is of total denial and false implication.

2.10] The prosecution examined PW 1 - victim, PW 2 Ashok Ramrao Misal, PW 3 Dadarao Laxmanrao Gajghate who is the father of the victim, PW 4 Avinash Vinayak Jawalkar, PW 5 Dr. Sushma Sharad Gore and PW 6 PSI Maya Ramesh Vaishy who is the Investigating Officer.

2.11] The learned Sessions Judge was pleased to convict the accused as aforestated. The learned Sessions Judge recorded a finding that the prosecution did not prove that the victim was aged less than 18 years and therefore, the provisions of the POCSO Act are not attracted. The learned Sessions Judge found that the delay in lodging the report is explained. The evidence of the victim is found reliable. The defence that the sexual intercourse, if any, was consensual is rejected.

3. I have heard the learned counsel Ms. F.N. Haidri for the appellant and the learned Additional Public Prosecutor Shri T.A. Mirza for the respondent/State.

4. Ms. F.N. Haidri would submit that the prosecution failed to prove beyond reasonable doubt that the victim was subjected to forcible sexual intercourse much less on multiple occasions from 31.10.2017 till 02.11.2017. Ms. F.N. Haidri would submit that the sexual relationship, assuming *arguendo* that the sexual contact was established, was obviously consensual. Ms. F.N. Haidri highlights the delay in lodging the report and the embellishments in the evidence of the victim to buttress the submission that the evidence of the victim cannot be the basis of conviction.

5. In rebuttal the learned APP Shri T.A. Mirza would submit that the evidence on record clinchingly establishes that the victim was

subjected to forcible sexual intercourse on multiple occasions and the defence of consent must be rejected since the statutory presumption under Section 114A of the Indian Evidence Act, 1872 is not rebutted.

6. The learned Sessions Judge has held that the prosecution failed to prove the age of the victim, and as see no reason to differ. In all fairness, the learned APP Shri T.A. Mirza has not argued that the learned Sessions Judge erred in holding that the age of the victim is not proved and therefore, the provisions of the POCSO Act are not attracted.

7. The central evidence is that of PW 1 - victim. She has deposed that the accused is her maternal uncle and is a member of Gram Panchayat. She states that the accused told her that the amount of cycle is deposited in Union Bank, Ner. The victim states that she took Rs.200/from her father and came to Ner. The accused told her that the money will not be released on that day and that they should return home. The victim then states that instead of taking her home the accused took her on his two-wheeler to a forest and had sexual intercourse. The victim further states that she stayed with the accused for two days during the course of which stay the accused subjected her forcible sexual intercourse five times. The victim then states that she asked the accused to drop her at her maternal aunt's house. On 02.11.2017 the accused dropped her at Hinganghat and then the victim maternal aunt telephonically called her father who came to fetch the victim on 03.11.2017. The victim states that the report was lodged on 05.11.2017.

8. The victim was subjected to searching and prolonged crossexamination during the course of which it is extracted that the victim does not know her cell phone number or the cell phone number of the accused. The victim denies that she received message from the accused on 30.10.2017, which denial is inconsistent with the report. The victim denies the suggestion that since many years there were exchanges of messages between her and the accused, which suggestion was presumably given to lay the foundation of the defence of consensual sexual relationship. The victim further denies that she and the accused used to talk on cell phone. It is extracted that the police station is situated beside the Union Bank which faces the eastwest Amravati-Yavatmal road and the northsouth Shivaji Nagar, road. It is further elicited that in an around Union Bank the main market and shops are located. The victim states that she went inside

the Bank, made inquiries and in the next breath states that due to the rush she returned back without making inquiry. The victim then states that she did not inquire with the accused about the money nor did the accused tell her anything about the money. The endeavour of the defence was to bring on record that there was no occasion whatsoever for the victim to visit the Bank, and as a fact the victim did not visit the Bank as is her version. The victim however, denies the suggestions given on these lines. The victim admits that on the way from Ner to Arni she did not complaint to any person and volunteers that she was threatened by the accused. The victim admits that she could have jumped from the motorcycle or could have alerted the people and then again volunteers that she was threatened. The victim admits that when she left home she was having mobile hand set and then volunteers that the mobile was not charged. At a later stage in the cross-examination she states that on the day of the incident the mobile and sim card were broken and crushed. The first information report does not attribute any role to the accused in the destruction of the mobile set or sim card. The victim then admits that there was ample opportunity to escape from the scene of incident. The victim volunteers that since she was administered intoxicating pills she is not in a position to remember the details and her memory is impaired. The victim states that she does not remember whether she had meal on the day of the incident. In response to a suggestion, she states that she does not know that on the day of the incident in the evening accused brought *bhaji-poli* and mineral water for her. The victim states that she does not remember what is stated in the police report. The victim states that due to intoxicating pills she does not know who did what with her on the day of the incident and the day following. The victim admits that Arni to Hinganghat is journey of three hours. The victim denies the suggestion that on the day of the incident she purchased clothes and gold at Digras. She denies the suggestion that on the day of the incident and the day thereafter she was at Mahagaon and Digras.

9. The medical evidence may now be scanned. The victim was medically examined by PW 5 Dr. Sushma Sharad Gore who admits that there was no forcible sexual intercourse. PW 6 further admits that the victim was not under intoxication due to alcohol or drug. PW 5 admits that hymen can tear due to reasons other than rape. PW 6 admits that fresh and old hymen tear can be differentiated. PW 5 has proved the medical certificate Exh.48. Perusal of medical certificate

Exh.48 would show that no evidence of any obvious external injury was found. The age of the hymen tear is not recorded in the certificate. The medical evidence is of no assistance to the prosecution and is of no corroborative value. No injury whatsoever is detected on the person of the victim and the age of the hymen tear is not disclosed in the report. However, Shri T.A. Mirza, the learned APP would submit that in view of the reliable evidence of the victim, no corroboration is necessary and the fact that the medical evidence is not conclusive or is of no corroborative value is not fatal to the case of the prosecution. This submission shall be considered at a later stage in the judgment.

10. The learned Sessions Judge has held, and I concur, that the reports of the chemical analyzer to whom the biological samples and the clothes were sent for chemical analysis (Exh.59 to 61) do not take the case of the prosecution any further since there is nothing incriminating in the said reports. PW 2 Ashok Misal is examined to prove the spot *panchanama* Exh.26 and the seizure *panchanama* of the motorcycle Exh.27. In the crosse-xamination it is elicited that two routes, from Darwha as well as Yavatmal, are available to approach Arni and in between Ner and Darwha and Darwha to Arni there are small villages and shops. PW 2 denies the suggestion that there was a stone mine where labours were working, near the spot of the incident. PW 2 is not in a position to state who applied the whitener on Exh.26 and when the map was drawn. PW 2 is not in a position to state whether the map was in existence when he signed the *panchanama*. The evidence of PW 3 Dadarao Gajghate, who is the father of the victim, is relied upon by the prosecution to the extent of the disclosure made by the victim when she was fetched from the house of her maternal aunt at Hinganghat. PW 3 has also attempted to explain the delay in lodging the report. Several suggestions are given by the defence to PW 3 to buttress plea of false implication, which suggestions are denied. It is not necessary to consider the evidence of PW 4 Avinash Jawalkar who is examined to prove the school record of the victim since the learned Sessions Judge has rightly held that the primary material on the basis of which the entry in the school record is taken is not proved. PW 6 is the Investigating Officer through whose evidence the omissions in the evidence of the victim are proved. PW 6 Maya Vaishy admits that she did not make any inquiry as regards the Bank account of the victim at the Union Bank and that she did not visit the Union Bank. PW 6 states that

since the story of the cycle amount was false, she did not make any inquiry in that regard. It is elicited in the evidence of the Investigating Officer that she made inquiries with the shop owners in the vicinity of the Union Bank and that nobody disclosed anything about the presence of the victim in front of the Union Bank. The Investigating Officer volunteers that the victim was not known to the shopkeepers. PW 6 admits that she did not come across any witness who saw the victim and the accused traveling from Ner to Arni and then from Arni to Hinganghat. PW 6 admits that she did not seize the mobile of the accused.

11. It is well settled that if the evidence of the victim is of sterling quality, the conviction can be based on the sole and uncorroborated testimony of the victim. The victim is not an accomplice and her evidence must be treated akin to that of an injured witness. If the evidence of the victim of sexual offence is implicitly reliable and confidence inspiring, no corroboration is required and if there is any lingering doubt assurance short of corroboration may be sought from the other evidence on record including the medical evidence. Reference may be made to the decisions of the Apex Court in ***[i] 2010 (8) SCC 191 : [2010 ALL MR (Cri) 3326 (S.C.)] Vijay alias Chinee vs. State of Madhya Pradesh. [ii] 2014 Cri. L.J. 1092 : [2014 ALL SCR 984] State of Rajasthan vs. Rohsan Khan and others. [iii] State of Himachal Pradesh vs. Gian Chand AIR 2001 SC 2075. [iv] AIR 1995 SC 2447 Karnel Singh v. State of M.P. [v] AIR 1987 SC 1087 Balwant Singh and others v. State of Punjab and Saudagar Singh v. State of Punjab.*** In all fairness Ms. F.N. Haidri, the learned counsel for the accused has not even argued to the contrary. Ms. F.N. Haidri has no quarrel with the settled position of law that the absence of injury is not decisive and that if the evidence of the prosecutrix - victim is found implicitly reliable, conviction can be based on her sole uncorroborated testimony. Ms. F.N. Haidri would however argue that the evidence of the victim is wholly unreliable. The evidence of the victim is inconsistent with the first information report, is marred by embellishment and her version is inherently improbable. Ms. F.N. Haidri would submit that in the factual matrix the delay in lodging the first information report assumes significance. Ms. F.N. Haidri would invite my attention to the decision of the Apex Court in ***State of Karnataka vs. F. Nataraj*** reported in ***2015(10) SCALE 495*** and in particular to paragraphs 10, 12 and 16 thereof. In *State of Karnataka vs. F. Nataraj* the Apex Court notes

that the victim did not raise any alarm when the accused attempted to kidnap her, which is quite unnatural and that the material witnesses were not examined. The Apex Court noted the discrepant testimonies and the gaps in the evidence of the prosecutrix and the medical officer and held that the solitary evidence of the prosecution, in the absence of any corroboration by the medical evidence, is not of such quality which can be relied upon. Ms. F.N. Haidri further relies on the decision of the Apex Court in ***Mohd. Ali alias Guddu v. State of Uttar Pradesh*** reported in ***(2015) 7 SCC 272*** in support of the submission that when the Court on scrutiny of the evidence finds it difficult to accept the version of the prosecutrix then there is a requirement to ascertain the existence of such direct or circumstantial evidence as would lend assurance to her testimony. Ms. F.N. Haidri would further rely on the decision of the Supreme Court in ***Rajoo and others v. State of M.P.*** reported in ***AIR 2009 858*** and in particular the following observations:

> *9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that*

Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

12. Shri T.A. Mirza, the learned APP would rely on the decision of a learned Single Judge of this Court (Rohit B. Deo, J.) in ***Prafulla Vinayak Nage & Anr. vs. The State of Maharashtra*** reported in ***2018 ALL MR (Cri) 525*** and the decision of the Division Bench in ***The State of Maharashtra v. Macchindra @ Babdu Gangadhar Sonawane*** reported in ***2019 ALL MR (Cri) 2353***. The decision of the Division Bench is pressed in service to buttress the submission that presumption under Section 114A that the victim did not consent is not rebutted. Section 114A of the Indian Evidence Act provides that in prosecution for certain categories of rape where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in the evidence that she did not consent, the Court shall presume that she did not consent. Section 4 of the Indian Evidence Act mandates that whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

13. The seminal question is whether the evidence of the victim is trust worthy and implicitly reliable as would obviate the need to seek corroboration or assurance short of corroboration. I have given anxious consideration to the evidence of the victim and having done so, I am satisfied that the evidence of the victim is not confidence inspiring. The evidence in the Court is inconsistent with the first information report. The version of the victim that she was asked by the accused to come to Ner on the pretext of withdrawing certain amount from the Union Bank is belied by the admissions in the cross-

examination and the evidence of the Investigating Officer who could not collect any evidence to indicate the presence of the victim at the Union Bank at Ner. While in the first information report the victim states that she received a SMS from the accused on her mobile asking her to come to Ner, in the evidence she out rightly denies that she received SMS from the accused. There is no cogent evidence on record to suggest that the victim was asked to come to Ner under a false pretext. The victim traveled on the motorcycle of the accused from Ner to Arni which is a three hour journey. The victim admits that she could have alerted people on the way and indeed could have jumped from the vehicle. The explanation of the victim that she did not do so since the accused issued threats is not convincing. Equally unconvincing is the version of the victim that she and the accused stayed in the *jungle* from 31.10.2017 till 02.11.2017 during which period she was subjected to forcible sexual intercourse five times. The response of the victim to probing questions is tentative and indeed bordering on the evasive. The victim states that she does not remember whether on the evening of the day of the incident the accused brought meal and mineral water for her. The victim states that she does not remember what she stated in the police report. Answers to inconvenient questions are evaded by stating that she was administered intoxicating pills. Be it noted, that the administration of intoxicating pills is stated for the first time in the Court. The victim admits that there was ample opportunity to flee from the scene of the incident and the explanation for not availing the opportunity which is given is the administration of intoxicating pills. At one stage, the victim states that due to intoxication she did not know who did what with her on the day of the incident and the next day. The victim then states that she told the accused to drop her at her maternal aunt place, and the accused obliged. Why would the victim ask the accused to drop her at her maternal aunt's place in Hinganghat and not at her village in Khandala, when admittedly both the victim and the accused are residents of Khandala, is left unexplained. Again, there is no explanation as to why the victim could not alert anybody on her way from the scene of the incident to Hinganghat. It is in the context of the fragile evidence that the delay in lodging the first information report must be viewed. Ordinarily, in cases of sexual assault the delay in lodging the first information report may not always be very significant. The delay would have to be examined in the context of the individual facts of the case and obviously there cannot be a straight jacket formula to assess the impact of the delay on the case of the

prosecution. It is seen that due to fear of defamation and social stigma the family of the victim of sexual assault are at times reluctant to lodge police report promptly. In the present case, since the very credibility of the victim's version appears to be in serious doubt, the delay in lodging the report would assume significance.

14. I am satisfied that the evidence of the victim is not of such sterling quality as would obviate the need to seek corroboration or assurance. *Au contraire*, the evidence is not at all confidence inspiring and there is a lingering doubt that the victim is not subjected to sexual intercourse, and at any rate the sexual intercourse is consensual. Such doubt arises since the evidence of the victim is marred by embellishments and there is an attempt to evade the questions in the cross-examination and to avoid answering the probing questions on the pretext that the victim memory was impaired since she was administered intoxicating pills, to which there is no reference at all in the statement recorded during the investigation. The conduct of the victim is unnatural. The version of the victim that she was induced to come to Ner it belied by the evidence on record. The victim admits that there was ample opportunity to escape and to alert the people on way to Arni and then to Hinganghat and as noted *supra* the explanation that she was issued threats by the accused and the improvised version that she was administered intoxicating pills does no service to the prosecution case.

15. The submission of the learned APP Shri T.A. Mirza is that in view of the presumption under Section 114A of the Indian Evidence Act it shall have to be held that the victim did not consent. Section 114A of the Indian Evidence Act provides that in a prosecution for rape under certain clauses of subsection (2) of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. The prosecution was for rape under clause (n) of subsection (2) of Section 376 in view of the allegation that the victim was subjected to multiple forcible sexual intercourse. However, the foundational fact which must be established before the presumption under Section 114A is triggered is that the victim was subjected to sexual intercourse by the accused. In the teeth of the evidence on record, it is difficult to conclude with any degree of certainty that the victim was subjected to sexual intercourse much less

on multiple occasions. Moreover, while it is mandatory to draw the presumption in view of the use of the expression, "shall presume" the presumption can be rebutted. What is provided is presumption and not conclusive proof of the fact.

16. The learned APP Shri T.A. Mirza argues that the legislative mandate as is discernible from Section 114A read with Section 4 of the Indian Evidence Act is that the Court shall regard that absence of consent is proved unless and until it is disproved. I have already observed that the prosecution has not proved the foundational fact beyond reasonable doubt. Moreover, in my considered opinion the legislative intent is not that the accused must disprove the absence of consent beyond reasonable doubt. It would not be necessary for the accused to adduce direct evidence to prove that there was consent or to disprove the absence of consent. The accused can rely on material brought on record in the cross-examination of the victim and the evidence of the other prosecution witnesses. In the present case, enough material is brought on record in the cross-examination of the victim and the evidence of the other prosecution witnesses to lend credibility to the alternate defence theory that the sex was consensual. It would be apposite to refer to the following observations of a learned Single Judge of this Court in ***Sudhakar & Two Ors. v. State of Maharashtra*** reported in ***2004 (3) Crimes 657:***

> *18. While the intention of law makers while introducing the amendment and providing severe punishment by incorporating sub clause (b) in Section 376(2) as well while introducing Section 114A of the Evidence Act also requires to be respected, the potential risk that follows is that any error in reaching the conclusion as to the lack of consent results in the conviction. The text of presumption as to lack of consent cannot be said to operate to a fixed yardstick or rigid rule where bare testimony of the prosecutrix in the form of her statement before the Court that she did not give consent would lead to raise an arithmetical equation of leading the court to conclude in favour of conviction and award the sentence. The statement of victim, therefore, required to be assessed by considering the entirety of evidence that may come before the Court. The manner in which the victim openly moved around clearly impeaches the testimony of the prosecutrix that she did not consent for the intercourse. The presumption raised in Section 114A of the Evidence Act, does not preclude the Court from assessing the entirety of the evidence that comes before the Court.*

Be that as it may, the presumption raised under Section 114A is laying down rigid yardsticks that no other conclusion is possible and that the accused have by evidence other than one which has come before the Court through the presumption to prove to the contrary, it would lead to the conclusion that never intended by the said Section.

I respectfully concur with the above quoted observations.

17. The prosecution case has too many holes and grey areas and it would be absolutely unsafe to base the conviction on the testimony of the victim which is not corroborated. Enough doubt is created about the veracity of the victim's version and the benefit of the doubt must go to the accused. I am satisfied that the prosecution has not proved the offence beyond reasonable doubt and the gulf between suspicion and proof is not bridged.

18. The judgment dated 06.02.2019 rendered by the Additional Sessions Judge3, Yavatmal in Special (POCSO) Case 9 of 2018 is set aside.

19. The accused is acquitted of offence punishable under Section 376 (2)(n) and 506 of the Indian Penal Code.

20. The fine paid by the accused, if any, shall be refunded.

21. The accused shall be released from custody forthwith unless his custody is required in connection with any other crime.

22. The appeal is allowed.

***Result*:-** Appeal allowed.