ABC 2019 (III) 215 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(Rohit B. Deo, J.)
Criminal Appeal No. 331 of 2019
Decided on 17 July 2019
Nagpur Bench

HIRAMAN JANGU UIKE ***- Appellant(s).***

Versus

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

Law Covered:- ***(A) Indian Penal Code, 1860— Sections 376 & 448— Rape & criminal trespass — Conviction for — Evidence of the prosecutrix — not of unimpeachable character — evidence of the husband not confidence inspiring— embellishments & omissions resulting in to contradictions— Braking of latch of the door by the husband of the prosecutrix — no reference to broken latch in spot panchnama makes — No discloser by the prosecutrix to the police regarding the latch of the door — Held, the version of the prosecutrix is improbable — Non-examination of material witness — Presence of the accused — not disputed — The defence taken by the accused held probable & reasonable — no other scientific or forensic evidence in the form of any trace of semen or human spermatozoa on the clothes — Conviction set aside. (Para 19, 22, 24 & 25)***

(B) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Delay in FIR — Impact on the probative value of the evidence — would have to be assessed on the anvil of the evidence on record. (Para 19)

(C) Criminal Jurisprudence — Timely FIR vis-à-vis Delay in FIR — Evidentiary Value — Promptitude in lodging the First Information Report is an assurance that the report is spontaneous and truthful— The more the delay, the more the possibility of coloured, embellished & exaggerated versions creeping in— as regards the manner in which the incident occurred and/or the persons responsible. (Para 19)

(D) Criminal Jurisprudence — Delay in FIR in case of Sexual offences — Held, in cases of sexual ravishment, delay in lodging First Information Report is not necessarily fatal. (Para 19)

(E) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Delay in FIR — Appreciation of — Held, the delay would be one

relevant circumstance which would have to be appreciated along with the substantive evidence on record. (Para 20)

(F) Indian Penal Code, 1860 — Section 376 — Rape — Conduct of the accused — The accused was aware that the husband of the prosecutrix would return shortly — In such situation, the accused subjecting the prosecutrix to violent sexual intercourse is inconsistent with normal human conduct. (Para 20)

(G) Indian Penal Code, 1860 — Section 376 — Rape — Place of occurrence — Small & congested area — Held, it would be extremely difficult to subject a fully grown woman to forcible sexual intercourse — Indian Evidence Act, 1872 — Section 3 — Relevant fact. (Para 22)

(H) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Injury suffered by the prosecutrix by the act not attributed to the accused — fatal to prosecution. (Para 22)

(I) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Rape by bringing the prosecutrix down on the floor — Injury to the prosecutrix — no abrasion or any other tell tale sign on the back or rear portion of the person of the prosecutrix —fatal to prosecution — Indian Penal Code, 1860 — Section 376. (Para 22 & 24)

(J) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Rape case — Injury to the prosecutrix — Defence of the accused — the prosecutrix suffered injuries at the hands of her husband who doubted her character — injuries were not corresponding to the attributed act of the accused — defence version more probable — Acquittal — Indian Penal Code, 1860 — Section 376.(Para 22)

(K) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Rape case — Absence of sign of sexual intercourse on the vagina of the married prosecutrix — the fact that hymen tear was old and healed & the vagina admitted two fingers — is of no significance — would not exclude forcible sexual intercourse — Indian Penal Code, 1860 — Section 376. (Para 24)

(L) Criminal Jurisprudence — Possibility of two reasonable views — the benefit must undoubtedly go to the accused. (Para 25)

(M) Criminal Jurisprudence — Delay in FIR — Significance of — Held, the delay is significant, not in itself, but in the context of the substantive evidence on record. (Para 25)

Facts:- *As per the case of prosecution the husband of the went to the pan shop to purchase betel nut and tobacco mixture. After sometime, the*

accused, who was the nephew of the prosecutrix, came to her house, gave the children money and sent them to purchase some articles from the shop. Thereafter, he locked the door from inside which did not strike the prosecution since she was busy cooking. The prosecutrix was cutting the tomatoes and was facing the gas stove while conversing with the accused. The accused suddenly came from behind and applied colour to the face of the prosecutrix, who stood up. The accused brought the prosecutrix down on the floor due to which she suffered injuries below the left eye and on the left hand palm. The accused caught hold of the hands of the prosecutrix, then gagged her and subjected her to sexual intercourse. In the mean time the husband of the prosecutrix came, he pushed the door and entered the house. On seeing him the accused fled. A case was registered and after trial, the accused was convicted u/s 376 & 448, IPC. In the present appeal, the High Court held the version of the defence as probable one. Accused was acquitted.

Law of relief:- Injury suffered by the victim by the act not attributed to the accused is fatal to prosecution.

Held:- The delay in lodging the report, if any, and the impact thereof on the probative value of the evidence would have to be assessed on the anvil of the evidence on record. The First Information Report, though not expected to be encyclopedia of every fact or aspect related to or touching the incident, serves a salutary purpose. Promptitude in lodging the First Information Report is an assurance that the report is spontaneous and truthful. The more the delay, the more the possibility of coloured, embellished and exaggerated versions creeping in, as regards the manner in which the incident occurred and/or the persons responsible. However, it is judicially recognized that in cases of sexual ravishment, delay in lodging First Information Report is not necessarily fatal. The conservative Indian society unfortunately views rape as a stigma. The honour of the family is at stake. The ghost of the stigma and the trauma haunts the family of the victim, sometimes forever. More often than not, serious and prolonged thought is given, the issue is deliberated between the relatives and then, and only then, a decision to approach the police is taken. There is no cut and dried formula to assess whether the delay in lodging the First Information Report affects the credibility of the prosecution version, and indeed, there can be none. (Para-19)

At this stage, the evidence of the prosecutrix may be revisited in the context of the rival submission on the significance or lack thereof of the prosecutrix lodging the report on the 3rd day of the

incident. Notably, the version of the prosecutrix is that on the day of the incident, the incident was disclosed to the neighbours and the news spread like wildfire in the entire village. The decision to seek redressal was taken on the date of the incident. The explanation given by the prosecutrix for the delay in lodging the report is that she and her husband tried to contact the President of the Tanta Mukti Samiti on 06.03.2015 and 07.03.2015 and failed to meet the President of the Tanta Mukti Samiti since he was not at his residence. The prosecutrix states that she and her husband met the President of the Samiti on 08.03.2015 and since the response was most unsatisfactory, she lodged the report on 09.03.2015. No evidence is adduced by the prosecution to corroborate this version. It is admitted by the Investigating Officer that the statement of the President of the Tanta Mukti Samiti was recorded. No explanation is given for not examining the President of the Tanta Mukti Samiti as a witness. The version of the prosecutrix is not supported by PW 3 - Isaru - her husband. The police station is at a distance of 1/2 km from the village. In these set of facts, the First Information Report which is lodged on the 3rd day of the incident is indeed lodged belatedly. The explanation given for the delay is not entirely satisfactory. However, I am not inclined to uphold the submission of the learned counsel for the accused Shri R.M. Tahiliyani that the unexplained delay of 3 days *ipso facto* dilutes the credibility of the evidence of the prosecutrix. Irrefutably, the delay in lodging the First Information Report would be one relevant circumstance which would have to be appreciated along with the substantive evidence on record. (Para-20)

The accused was aware that the husband of the prosecutrix would return shortly after purchasing *kharra*, if the evidence of the prosecutrix is to be believed. In such situation, the accused subjecting the prosecutrix to violent sexual intercourse is inconsistent with normal human conduct. The prosecutrix admits that the kitchen is a small space admeasuring 20 feet in area with stacked household articles. The injury suffered under the eye is suggestive of assault by slap or fist, which act the prosecutrix does not attribute to the accused. The version of the prosecutrix was that she was brought down on the floor, her hands held and then subjected to forcible sexual intercourse. Notably, there is no abrasion or any other tell tale sign on the back or rear portion of the person of the prosecutrix. It has come on record that the injury sustained to the palm may be caused by broken bangles. This evidence is not necessarily suggestive of rape,

the injury may as well be due to the assault, which according to the defence, the prosecutrix suffered at the hands of her husband who doubted her character. The evidence of the prosecutrix that she and her husband tried to meet President of the Tanta Mukti Samiti on 06.03.2015 and then on 07.03.2015 but in vain and then met the President only on 08.03.2019 is not reliable. As noted *supra*, the President is not examined though his statement is recorded during investigation. (Para-22)

Only other evidence appears to be the medical examination in which the two injuries which are referred to *supra* were noticed. The prosecutrix is a married woman and therefore, the fact that hymen tear was old and healed and that the vagina admitted two fingers is of no significance and would not exclude forcible sexual intercourse. However, the fact that no injury was noticed on the back is of some significance in the context of the manner in which the incident allegedly occurred. Concededly, there is no other scientific or forensic evidence in the form of any trace of semen or human spermatozoa on the clothes of the prosecutrix which were sent for forensic examination. (Para-24)

Holistic consideration of the evidence on record creates enough doubt on the prosecution version as would render the conviction unsustainable. It is trite law that if two views are reasonably possible, the benefit must undoubtedly go to the accused. The delay in lodging the First Information Report is significant, not in itself, but in the context of the substantive evidence on record. The version of the prosecutrix is improbable due to the circumstances articulated *supra*, and the other evidence on record is not sufficient and cogent enough to bridge the gap between suspicion and proof. The presence of the accused on the spot is no longer in dispute. However, in view of the evidence on record, the defence is probabilized and a reasonable and lingering doubt is created, which is good reason to set aside the conviction. (Para-25)

Counsel:- ***For Appellant(s):*** *Mr. R.M. Tahiliyani, Mr. Jasprit Singh Chilotra, Advs.*

For Respondent(s): *Mr. A.R. Chutke, Adv.*

Cases Referred:-

1. *Harpal Singh and another v. State of Himachal Pradesh, AIR 1981 SC 361, (Para-19)*
2. *Rajshekhar Bansode @ Babu @ Mohd Dilawar Hussain Mulla v. The State of Maharashtra, 2016 ALL MR (Cri) 3094, (Para-19)*

October & November 2019

JUDGMENT

ROHIT B. DEO, J.: - 1. This appeal takes exception to the judgment dated 27.03.2019 rendered by the Sessions Judge, Chandrapur in Sessions Case 58 of 2015 whereby the appellant is convicted for offence punishable under Section 376 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for ten years and to payment of fine of Rs.1000/and in default to suffer further rigorous imprisonment for one year and is further convicted for offence punishable under Section 448 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for six months.

2. The genesis of the prosecution lies in the report lodged by the prosecutrix (PW 2) at Police Station Patan alleging that she was subjected to forcible sexual intercourse by the accused.

3. The gist of the report (Exhibit 26) is thus:

3.1. The prosecutrix is employed at the Patan *Anganwadi* as Helper and resides at Patan with her husband and two children.

3.2. The festival of *rangpanchmi* (the day following Holi) was celebrated on 06.03.2015 the husband of the prosecutrix purchased meat and the prosecutrix started the preparation for cooking the meat. At 01:00 p.m. or thereabout the husband of the prosecutrix went to the pan shop to purchase *kharra* (betel nut and tobacco mixture). After sometime, the accused, who is the nephew of the prosecutrix, came to her house, gave the children money and sent them to purchase some articles from the shop.

3.3. The accused locked the door from inside which did not strike the prosecution since she was busy cooking. The prosecutrix was cutting the tomatoes and was facing the gas stove (*chul*) while conversing with the accused.

3.4. The accused suddenly came from behind and applied colour to the face of the prosecutrix, who stood up.

3.5. The accused brought the prosecutrix down on the floor due to which she suffered injuries below the left eye and on the left hand palm. The accused caught hold of the hands of the prosecutrix, then gagged her with one hand and with the other hand lifted up her *saree*. The prosecutrix implored and tried to resist. The accused did not relent. The accused undressed. The accused then lifted up the *saree* and lowered the knicker of the prosecutrix and subjected her to sexual intercourse.

3.6. The prosecutrix was shouting. The husband of the prosecutrix (PW 3) Isaru pushed the door and entered the house. On seeing PW 3 Isaru, the accused fled. PW 3 Isaru tried to give chase, but in vain.

3.7. The prosecutrix and her husband Isaru approached the Tanta Mukti Samiti, Patan and since the Samiti did not respond, the report was lodged after due deliberations with PW 3 Isaru, which is the explanation for the delay.

4. Pursuant to the report Exhibit 26 Crime 3 of 2015 was registered. Amol Kishor Puri (PW 7) carried out the investigation. The spot *panchnama* was recorded in the presence of *panchas*. Mobile phone of the accused was seized. The clothes worn by the prosecutrix at the time of incident were seized. The prosecutrix was medically examined. The accused was arrested and medically examined. The statements of witnesses were recorded and the samples sent for medical examination. On completion of the investigation the chargesheet was presented in the Court of jurisdictional Magistrate who committed the case to the Sessions Court.

5. The learned Sessions Judge framed charge under Section 376 and 448 of the Indian Penal Code (Exhibit 19). The accused abjured guilt and claimed to be tried in accordance with law.

6. The prosecution examined eight witnesses. PW 1 Sachin Prabhakar Uttarwar is examined to prove the seizure of the clothes of the accused. PW 1 did not support the prosecution. PW 2 is the prosecutrix. PW 3 Isaru is the husband of the prosecutrix. PW 4 Dayanand Bapurao Pawar is examined to prove the spot *panchnama*, the seizure of the mobile phone and the clothes of the prosecutrix. PW 5 Ankush Dynaneshwarrao Khichade is the Medical Officer who examined the prosecutrix and issued medical certificate (Exhibit 36). PW 6 Kanhaiyya Ratan Pawar is the Police Constable who carried the seized articles to the Forensic Science Laboratory, Nagpur. PW 7 Amol Kishor Puri is the Investigating Officer and PW 8 Dr. Vaishali Sadashivrao Dhoke is the Medical Officer then attached to General Hospital, Chandrapur who also examined the prosecutrix at 11:45 p.m and issued report Exhibit 57.

7. The accused did not step into the witness box nor is any witness examined in defence. In response to the question put in the examination under Section 313 of the Code of Criminal Procedure, 1973 the accused states that he is falsely implicated. The suggestions

given to the prosecution witnesses in the cross-examination is that the husband of the prosecutrix saw the prosecutrix and the accused sprinkling colour and in rage assaulted the accused. It is further suggested that the prosecutrix was beaten up by her husband who suspected an illicit relationship between the prosecutrix and the accused. It is further suggested to the prosecutrix, that the report is lodged since her husband threatened to drive her out of the house unless she lodges the report against the accused.

8. I have heard the learned counsel Shri Tahiliyani for the accused and Shri Chutke, the learned Additional Public Prosecutor for the respondent/State.

9. Shri Tahiliyani submits:

9-a]. The FIR is delayed and the explanation offered is belied by the material on record.

9-b]. The evidence of the prosecutrix is inconsistent with the evidence of her husband Isaru.

9-c]. The version of the prosecution is inherently improbable. Considering the distance of the pan shop from the house and the imminent return of the prosecutrix's husband within few minutes, it is inconceivable that the accused would think of ravishing prosecutrix in the kitchen of the house.

9-d]. The spot *panchnama* and the evidence of the Investigating Officer falsifies the version of PW 3 Isaru that he broke the latch and entered the house.

9-e]. The injuries noticed are, more likely than not, caused by PW 3 assaulting the prosecutrix since he suspected that the accused and the prosecutrix were in a relationship.

9-f]. The statement of the President of the Tanta Mukti Samiti is recorded by the I.O. However, the President of the Tanta Mukti Samiti not examined, and the inference which must be drawn is that he did not support the version of the prosecutrix. Considering the size of the kitchen and the space occupied by the household articles, it would be next to impossible for any person to subject the prosecutrix to forcible sexual intercourse. Moreover, the prosecutrix could have effectively resisted since she was possessing a sharp edged kitchen implement for cutting vegetables and the stone used for a mortar and pestle (*khalbatta*) was at hand.

9-g]. If the evidence of the prosecutrix and her husband is to be accepted, the accused immediately fled on seeing the husband, obviously the accused would be flee in a disheveled and improperly and inappropriately worn clothes and would have caught the eye of the residents considering that the incident allegedly occurred in the afternoon on *rangpanchmi* day. No independent witnesses are examined on this aspect.

9-h]. The prosecution story is extremely doubtful, and the benefit of the doubt must be given to the accused.

10. The learned Additional Public Prosecutor Shri Chutke would rebut thus:

10-i]. The delay in lodging the first information report is properly explained.

10-ii]. The delay in lodging the report is not fatal in cases of sexual assault. The notorious tendency of the Indian society to view rapes as a stigma and the victim as a sinner more often than not deter the victim from taking immediate action.

10-iii]. The evidence of the prosecutrix is implicitly reliable, and therefore, no corroboration is necessary and none be sought.

10-iv]. Even if the evidence of the prosecutrix is assumed to be not of sterling quality, enough assurance to the prosecution version is lent by the evidence of her husband PW 3 and the medical evidence.

11. The evidence may now be analyzed on the anvil of the submissions of the learned counsel.

12. The presence of the accused on the spot at the time and date of the incident is no longer in dispute. The mobile phone of the accused was recovered from the spot and the fair inference is that the accused left the spot in haste. The text and tenor of the cross-examination would suggest that the defence is that the accused and the prosecutrix were celebrating *rangpanchmi* by applying colour, that the husband of the prosecutrix misunderstood and suspected that there was something more than met the eye and that the injury suffered by the prosecutrix are signs not of resistance or sexual assault, are signs of the physical assault to which she was subjected by her husband. It is further suggested to the prosecutrix that she was not inclined to lodge police report and she was forced to do so by her husband who threatened her with desertion.

13. The central evidence is of the prosecutrix and her husband, which is the very edifice of the prosecution case. The evidentiary value to be attached to the medical evidence would depend on the reliability of the evidence of the prosecutrix and her husband. Be it noted, that it is elicited in the cross-examination of PW 5 Dr. Ankush Khichade that the injuries are simple, that the injury near the left eye is possible due to fist blow or the face striking against the wall and the injury to the right palm can be caused due to fall during scuffle or if contact with the wall is prevented or resisted by palm. PW 8 Dr. Vaishali Dhoke also accepts that the injury to the eye can be caused due to slap or fist blow and that the injury to the palm can be caused if the bangles worn are broken. In the context of the version of the prosecutrix that she was brought down on the floor and then subjected to forcible sexual intercourse and that she resisted, it may be noted that no injury, abrasion or otherwise, was found on the back or the person of the prosecutrix other than the two injuries below the left eye and to the left palm. The evidence of the prosecutrix and PW 3 would have to be minutely scrutinized to assess whether the evidence of the prosecutrix is implicitly reliable and confidence inspiring as would obviate the need to seek assurance albeit short of corroboration.

14. The prosecutrix has deposed that on the day of *rangpanchmi* her husband purchased mutton and at 01:00 p.m. left home to purchase *kharra*. The accused came and the prosecutrix asked him to sit. While the prosecutrix was cooking the accused applied colour to her cheeks. The accused made the prosecutrix to fall on the floor and she sustained injuries near the eye. She also sustained injury to the left palm since her bangles broke. The accused then subjected her to forcible sexual intercourse. Before the incident, the accused give some amount to the children and sent them out of the house. When her husband returned the prosecutrix was shouting. Her husband opened the door and entered the house and on seeing him the accused fled leaving his mobile behind. It is further deposed that when the accused came inside the house he locked the door from inside. The prosecutrix states that since the accused is a relative she and her husband went to the house of the President of the Tanta Mukti Samiti, who was not available. She then states that on the next day (07.03.2015) she and her husband again went to the house of the President and again he was not home. The prosecutrix then states that she and her husband met the President on 08.03.2015 and narrated the incident and since the President did not respond she lodged the report.

15. In the cross-examination, it is brought on record that the house has two doors which face each other and a person standing at the front door can see what is happening in the kitchen. It is elicited that the kitchen is 4 feet wide and 5 feet in length and at the time of the incident the gas cylinder, the water vessel and the utensils rack were placed in the kitchen. The line of cross-examination is to buttress the defence that in the small and congested area it would be extremely difficult to subject a fully grown woman to forcible sexual intercourse. It is then elicited that when PW 3 left the house to purchase *kharra* he met the accused and asked him to sit in the house till he returned. It is further elicited that the pan shop from which the husband purchased *kharra* is located 2 to 3 houses away and the husband of the prosecutrix returned within 5 to 10 minutes. It is further elicited that the prosecutrix was cutting the tomatoes with sickle and the grinding stone was at hand in the kitchen. The prosecutrix is not aware whether the front door of the house was locked or only closed. The prosecutrix admits that she did not disclose to the police that the latch was broken when the police inspected the spot. The evidence that the prosecutrix went to the house of the President of the Tanta Mukti Samiti on the day of the incident and thereafter is an omission which is proved through the I.O. In the cross-examination, the prosecutrix states that before she went to the house of the President of the Tanta Mukti Samiti the neighbours inquired with the prosecutrix and her husband about the incident and that she disclosed the incident to her neighbours. She admits that within a short time the news of the incident spread in the entire village. It is elicited that the police station is at a distance of half kilometer from the village. The rest of the cross-examination attempts to probablize the defence by giving several suggestions to the prosecutrix, which are denied.

16. PW 3 Isaru has deposed that he returned 20 to 25 minutes after leaving the home to purchase *kharra*. While returning home, he met his sons who were holding currency notes of Rs.10/in their hands. PW 3 - Isaru was told by his sons that accused gave them money. PW 3 reached home along with his two sons. PW 3 heard the prosecutrix shouting and peeped through the gap in the door. PW 3 saw the accused subjecting the prosecutrix to forcible sexual intercourse. The door was closed from inside and PW 3 pushed the door which caused the latch to break. PW 3 - Isaru entered the house and attempted to apprehend the accused who gave a push and fled.

PW 3 then states that he accompanied the prosecutrix to the house of the President of Tanta Mukti Samiti and since the grievance was not redressed, the report was lodged.

17. The evidence of PW 3 - Isaru is at variance with that of the prosecutrix on certain aspects. While the prosecutrix states that the accused met her husband and was asked to sit in the house, PW 3 flatly denies having met the accused while leaving home to purchase the *kharra*. The version of the prosecutrix is that PW 3 returned home after purchasing *kharra* within 5-10 minutes while PW 3 states that he returned home after 20-25 minutes. The prosecutrix states that the pan shop from which the *kharra* was purchased by her husband is at a distance of 23 houses away from her house while PW 3 Isaru states that the pan shop is at walking distance of 10-15 minutes. The version of the prosecutrix is that on the day of the incident, her neighbors visited her house and made inquiries and she disclosed the incident to the neighbours. The prosecutrix further states that the news about the incident spread in the entire village having population of 600 within a short time. However, PW 3 has deposed that the neighbours were disclosed the incident only on the 2nd and 3rd day of the incident. While the prosecutrix states that she and PW 3 - Isaru tried to meet the President of the Tanta Mukti Samiti on 06.03.2015 and 07.03.2015 in vain and could met him only on 08.03.2015, PW 3 - Isaru only states that he and the prosecutrix went to the house of the President of the Tanta Mukti Samiti.

18. In the cross-examination, several suggestions are given to PW 3 to probabilize the defence that he misunderstood the innocuous sprinkling of colours by the accused and the prosecutrix, doubted her character, assaulted the prosecutrix and forced her to lodge the report threatening desertion. The suggestions are denied. The evidence of PW 3 that he left home to purchase *kharra* and after 20-25 minutes when he was returning home, his sons met him on the way, is proved to be omission through the evidence of the Investigating Officer - PW 7 - Amol Puri. The evidence that PW 3 saw his sons holding currency notes of Rs.10/in their hands, that he asked his sons who gave the money and was told that the accused gave the money and thereafter he returned home with his sons, is a proved omission. The evidence that PW 3 - Isaru peeped through the gap in the door, saw that the accused was subjecting his wife to forcible sexual intercourse, is a proved omission. The evidence that the door was closed from inside and he pushed the door causing the latch to break is again a proved

omission. The evidence that PW 3 and his wife went to the house of the President of Tanta Mukti Samiti and failed to get justice, is a proved omission.

19. The delay in lodging the report, if any, and the impact thereof on the probative value of the evidence would have to be assessed on the anvil of the evidence on record. The First Information Report, though not expected to be encyclopedia of every fact or aspect related to or touching the incident, serves a salutary purpose. Promptitude in lodging the First Information Report is an assurance that the report is spontaneous and truthful. The more the delay, the more the possibility of coloured, embellished and exaggerated versions creeping in, as regards the manner in which the incident occurred and/or the persons responsible. However, it is judicially recognized that in cases of sexual ravishment, delay in lodging First Information Report is not necessarily fatal. The conservative Indian society unfortunately views rape as a stigma. The honour of the family is at stake. The ghost of the stigma and the trauma haunts the family of the victim, sometimes forever. More often than not, serious and prolonged thought is given, the issue is deliberated between the relatives and then, and only then, a decision to approach the police is taken. There is no cut and dried formula to assess whether the delay in lodging the First Information Report affects the credibility of the prosecution version, and indeed, there can be none. In ***Harpal Singh and another v. State of Himachal Pradesh***, reported in ***AIR 1981 SC 361,*** the delay of 10 days in lodging the First Information Report was held properly explained. In ***Rajshekhar Bansode @ Babu @ Mohd Dilawar Hussain Mulla v. The State of Maharashtra,*** reported in ***2016 ALL MR (Cri) 3094*** a learned Single Judge of this Court found that the delay of 7 days in lodging the First Information Report satisfactorily explained. Shri A.R. Chutke, the learned Additional Public Prosecutor has invited my attention to several decisions in which it is emphasized in cases of rape or sexual assault, the Court must not be unmindful of the sensitivity of the victim and her family and that if the delay in lodging the First Information Report is explained by the prosecution reasonably, the version of the prosecutrix must not be doubted considering that the honour of the family is at stake and the decision to lodge the First Information Report is taken only after consulting the husband and other relatives and deliberating over the issue. The submission, as a principle of law, is unexceptionable.

20. At this stage, the evidence of the prosecutrix may be revisited in the context of the rival submission on the significance or lack thereof of the prosecutrix lodging the report on the 3rd day of the incident. Notably, the version of the prosecutrix is that on the day of the incident, the incident was disclosed to the neighbours and the news spread like wildfire in the entire village. The decision to seek redressal was taken on the date of the incident. The explanation given by the prosecutrix for the delay in lodging the report is that she and her husband tried to contact the President of the Tanta Mukti Samiti on 06.03.2015 and 07.03.2015 and failed to meet the President of the Tanta Mukti Samiti since he was not at his residence. The prosecutrix states that she and her husband met the President of the Samiti on 08.03.2015 and since the response was most unsatisfactory, she lodged the report on 09.03.2015. No evidence is adduced by the prosecution to corroborate this version. It is admitted by the Investigating Officer that the statement of the President of the Tanta Mukti Samiti was recorded. No explanation is given for not examining the President of the Tanta Mukti Samiti as a witness. The version of the prosecutrix is not supported by PW 3 - Isaru - her husband. The police station is at a distance of 1/2 km from the village. In these set of facts, the First Information Report which is lodged on the 3rd day of the incident is indeed lodged belatedly. The explanation given for the delay is not entirely satisfactory. However, I am not inclined to uphold the submission of the learned counsel for the accused Shri R.M. Tahiliyani that the unexplained delay of 3 days *ipso facto* dilutes the credibility of the evidence of the prosecutrix. Irrefutably, the delay in lodging the First Information Report would be one relevant circumstance which would have to be appreciated along with the substantive evidence on record.

21. Shri A.R. Chutke, the learned Additional Public Prosecutor painstakingly invites my attention to several decisions of the Hon'ble Apex Court which articulate that the evidence of a victim of sexual assault can be the sole basis of conviction. The victim is not an accomplice and unless there are compelling reasons for seeking corroboration, her testimony needs no corroboration. A lingering or a disturbing though may persuade the Court to seek some assurance short of corroboration. The law is too well settled to necessitate a reference to the plethora of the decisions which enunciate that the victim of sexual assault is not an accomplice and that her testimony alone can be the basis of conviction. In all fairness, Shri R.M.

Tahiliyani, the learned counsel for the accused has not even argued to the contrary.

22. The seminal issue is whether the evidence of the prosecutrix is implicitly reliable and of such sterling quality as would obviate the need to seek corroboration or assurance short of corroboration. The accused is the nephew of the prosecutrix. The version of the prosecutrix is that while leaving the house to purchase *kharra,* her husband met the accused and asked him to sit in the house and that her husband returned within 5-10 minutes. According to the prosecutrix, the pan shop from which her husband purchased the *kharra* is hardly 2-3 houses away from her house. The accused was aware that the husband of the prosecutrix would return shortly after purchasing *kharra*, if the evidence of the prosecutrix is to be believed. In such situation, the accused subjecting the prosecutrix to violent sexual intercourse is inconsistent with normal human conduct. The prosecutrix admits that the kitchen is a small space admeasuring 20 feet in area with stacked household articles. The injury suffered under the eye is suggestive of assault by slap or fist, which act the prosecutrix does not attribute to the accused. The version of the prosecutrix was that she was brought down on the floor, her hands held and then subjected to forcible sexual intercourse. Notably, there is no abrasion or any other tell tale sign on the back or rear portion of the person of the prosecutrix. It has come on record that the injury sustained to the palm may be caused by broken bangles. This evidence is not necessarily suggestive of rape, the injury may as well be due to the assault, which according to the defence, the prosecutrix suffered at the hands of her husband who doubted her character. The evidence of the prosecutrix that she and her husband tried to meet President of the Tanta Mukti Samiti on 06.03.2015 and then on 07.03.2015 but in vain and then met the President only on 08.03.2019 is not reliable. As noted *supra*, the President is not examined though his statement is recorded during investigation.

23. In my considered view, the evidence of the prosecutrix is not of such unimpeachable character as would obviate the need to look for assurance. The evidence of the husband of the prosecutrix PW 3 - Isaru is not confidence inspiring. The variance *inter se* between evidence of PW 3 - Isaru and the prosecutrix is noted *supra*. The evidence is marred by embellishments and the omissions are significant and would partake the character of contradictions. Illustratively, the evidence that PW 3 peeped through the door, saw

the sexual intercourse, pushed the door and in the process broke the latch, has come on record by way of omission, which is duly proved. The spot *panchnama* makes no reference to broken latch. The prosecutrix admits that she did not disclose to the police that the latch of the door broke. It would be unsafe to hold that the evidence of PW 3 - Isaru lends assurance to the version of the prosecutrix.

24. Only other evidence appears to be the medical examination in which the two injuries which are referred to *supra* were noticed. The prosecutrix is a married woman and therefore, the fact that hymen tear was old and healed and that the vagina admitted two fingers is of no significance and would not exclude forcible sexual intercourse. However, the fact that no injury was noticed on the back is of some significance in the context of the manner in which the incident allegedly occurred. Concededly, there is no other scientific or forensic evidence in the form of any trace of semen or human spermatozoa on the clothes of the prosecutrix which were sent for forensic examination.

25. Holistic consideration of the evidence on record creates enough doubt on the prosecution version as would render the conviction unsustainable. It is trite law that if two views are reasonably possible, the benefit must undoubtedly go to the accused. The delay in lodging the First Information Report is significant, not in itself, but in the context of the substantive evidence on record. The version of the prosecutrix is improbable due to the circumstances articulated *supra*, and the other evidence on record is not sufficient and cogent enough to bridge the gap between suspicion and proof. The presence of the accused on the spot is no longer in dispute. However, in view of the evidence on record, the defence is probabilized and a reasonable and lingering doubt is created, which is good reason to set aside the conviction.

26. The judgment dated 27.03.2019 rendered by the Sessions Judge, Chandrapur in Sessions Case 58 of 2015 is set aside.

27. Accused is acquitted of offence punishable under Section 376 and 448 of Indian Penal Code.

28. Accused is in jail custody. He be released forthwith unless his custody is required in connection with any other crime.

29. Fine, if any, paid by the accused be refunded.

30. Appeal is allowed in the aforestated terms.

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

October & November 2019