

P.D. Pandit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.638 OF 2007

Vasant Mahadeo Powar

Age 45 years, Occ.: Service,

Resident of Village Kurtade,

Taluka & District Ratnagiri

.. Appellant

(Org. Accd. No. 1)

V/s.

1. State of Maharashtra

(Through P.I. Juna Rajwada

Police Station, Kolhapur)

2. Ms. Sushma Thorat

Lastly residing at Tejaswini

Mahila Hostel, Kolhapur

.. Respondents

WITH

CRIMINAL APPEAL NO. 680 OF 2007

The State of Maharashtra

through, Police Inspector

Juna Rajawada Police Station,

Kolhapur.

.. Appellant

V/s.

Vasant Mahadeo Powar

Age 45 yrs. Occ: Service,

R/o Kurtade, Tal. & Dist. Ratnagiri .. Respondent

Mr. Ramesh Ramamurthy for appellant-accused in both the appeals.

Mrs. Sangeeta D. Shinde, APP for State in both the appeals.

CORAM : B. P. DHARMADHIKARI &
A.S. GADKARI, JJ.

RESERVED ON: 23RD JULY, 2015.

PRONONCED ON : 31ST JULY, 2015.

JUDGMENT [Per B. P. Dharmadhikari, J.] :

1. Accused No. 1 in Sessions Case No. 80 of 2006 decided on 11/05/2007 by the Adhoc Additional Sessions Judge – 5, Kolhapur, has assailed his conviction under Section 376 (2) (c) of the Indian Penal Code whereby he is sentenced to suffer RI for ten years and to pay fine of

Rs.15,000/- or in default thereof to suffer RI for six months. He has been acquitted of offence punishable under Sections 354 and 506 (Part I) of the Indian Penal Code. Accused Nos.2 to 7 tried with him have been acquitted. Accused No.2 has been acquitted of offence punishable under Sections 354 and 376(2)(c) read with Section 109 of the Indian Penal Code, while accused nos.3 to 7 have been acquitted of offence punishable under Sections 376(2)(c) and 354 read with Section 109 of the Indian Penal Code.

2. It is to be noted that acquittal of accused no.1 under other sections and all other accused persons was questioned by State Government by moving an application, seeking leave under Section 378(3) of Cr. P.C. Said Criminal Application No. 2359 of 2007 has been rejected by this court on 16/1/2009. The appeal filed by the State Government vide Criminal Appeal No. 680 of 2007, seeking enhancement of punishment of accused no.1 under Section

377 of Cr. P.C., came to be admitted on 16/1/2009. Criminal Appeal No. 638 of 2007 by convicted accused challenging his conviction under Section 376 (2)(c) has been placed for hearing along with this appeal. The learned Single Judge of this court has, on 21/3/2011, passed order in Criminal Appeal No. 638 of 2007 and Criminal Appeal No. 680 of 2007 and in view of provisions of Rule 2-II (a) of Chapter – I of the Bombay High Court Appellate Side Rules, 1960, both these appeals have been placed before the Division Bench.

3. Accordingly, we have heard Advocate Ramamurthy for appellant-accused and learned APP Mrs. Sangeeta Shinde for respondent – State in both the appeals.

4. The learned counsel for accused has raised following contentions :-

(a) Prosecution examined total 17 witnesses and out of them 12 have turned hostile. Prosecution Witness Nos.1 to 5, 8, 10, 12 and 13 were inmates of Hostel, where the alleged offence took place. Trial court, therefore, ought to have appreciated their evidence without ignoring it on the ground that they are not helping prosecution.

(b) He further states that prosecutrix / victim was examined medically by PW 16, Medical Officer, and he could not get any evidence of forcible intercourse. The Chemical Analyzer also could not get any material to support said contention.

(c) PW 9 is the member of Vigilance Committee to whom the alleged rape was reported and as such her evidence does not throw any light on actual incidence.

(d) PW 15 is Police Head Constable, who registered FIR at Police Station in the night of 15/3/2006 and as such that evidence is also not useful to prosecution. PW 14 is Investigating Officer, who came to ladies Hostel in the

morning on 15/3/2006 with PW 9 and carried out the investigation. She has also thereafter carried on the investigation, hence her evidence also cannot explain the deficiencies and inherent weakness in the story of the prosecution.

(e) Advocate Ramamurthy points out that PWs 6, 7 and 11 are panch witnesses and as such their evidence is not helpful to find out whether rape took place, as alleged, on two occasions.

(f) He has stated that prosecutrix / victim has been examined as PW 17 i.e. as last witness as she was not available for quite some time. Her story about two incidences of rape is highly improbable and when her examination-in-chief and cross-examination are perused together, it is apparent that no rape took place in bathroom on first floor in the night between 14/3/2006 and 15/3/2006.

(g) He invites attention to the fact that said lady came to ladies Hostel on 27/1/2006 and alleged rape

within ten days thereafter. However, no grievance about it was made till morning of 15/3/2006 i.e. for more than 40 days. This delay is fatal to the case of the prosecution.

(h) Inviting attention to depositions of PW 17, even in relation to said episode, he contends that, that also has not been established beyond reasonable doubt.

(i) He submits that in view of inherent weakness which cast doubt on conduct of PW 17 and her evidence, trial court ought to have looked for corroboration and that corroboration is totally lacking in present matter.

(j) He also adds that present appellant was taken in custody on 15/3/2006 itself and during pendency of these proceedings, has completed his jail punishment. He has been set free on account of completion thereof.

(k) Inviting attention to the material on record, learned counsel submits that in any case appellant is entitled to be given benefit of doubt and his appeal is liable to be allowed.

5. Learned APP, on other hand, submits that though the trial court has based its findings on evidence of PW 9, member of Vigilance Committee, PW 10, a lady inmate, Investigating Officer at PW 14 and victim herself at PW 17, the overall material on record shows that all was not well. She comments upon the mode and manner in which all other inmates have turned hostile. She submits that even solitary testimony of prosecutrix is sufficient to sustain conviction. The victim here has pointed out her plight and also both incidences of rape. Efforts made by her to obtain help after first incidence and to avoid second one are deposed to by her and hence the contention that there is no corroborations or then there are weakness in her testimony cannot be accepted.

6. Learned APP points out that before coming to present Hostel, PW 17 was an inmate in hostel other town, where she was allegedly subjected to similar offence. On

account of her complaint and request, she was shifted from there to present Hostel. Being destitute, who has been subjected to such treatment, she did not approach the police authorities but then her conduct shows that even after first incidence she has contacted all working staff at the Hostel and also sought their help. Even on second occasion when she was asked to deliver a bucket full of water in night hours in bath-room on first floor by appellant-accused, her refusal, pressurization by accused, reluctance of others to help her has been brought on record. Learned APP urges that all these aspects have been correctly appreciated by the trial court and, therefore, no interference is warranted.

7. It is submitted that in view of earlier incidence of rape and it is repetition on night between 14/3/2006 and 15/3/2006, the prosecutrix approached PW 10 – Shubhangi (another inmate) and then that inmate approached PW 9 who happens to be the Chairman of

Vigilance Committee appointed by State Government to supervise working of such Hostels. Said woman thereafter initiated inquiry along with police in incognito and attempted to find out the truth. Police Officer thereafter disclosed their identity. Only after Hostel staff was asked to go out, the inmates could reveal truth. The arguments of Advocate Ramamurthy about absence of power or authorization with PW 14 to investigate into the offence, learned APP submits that as Superintendent of Police or Dy. S.P. is authorized to nominate a competent lady officer to investigate into such offence, the officer like PW 14, though posted at a different police station, was asked to visit Hostel and to attend to the matter. The subsequent investigation has also been carried out by PW 14 only as per authorization in her favour and no objection in this respect was raised in the trial court. She further submits that appellant-accused never pleaded any prejudice because of such investigation.

8. She points out that there is no enmity between the hostel inmates and appellant and as such there was no chance of his false implication. Appellant has not taken any such defence. In this situation, when offence of grave and serious nature has been committed on more than one occasion, the intention of parliament in incorporating a provision like Section 376(2)(c) required trial court to impose maximum punishment of life imprisonment and lesser punishment of 10 years as imposed is unsustainable. She, therefore, states that appeal filed by the appellant must be dismissed, while appeal preferred by the State Government for enhancement should be allowed. She has placed reliance upon judgments reported in the case of **State of Himachal Pradesh vs. Shree Kant Shekari [AIR 2004 SC 4404]** and in the case of **Mukesh vs. State of Chhattishgarh [(2014) 10 SCC 327]**.

9. While narrating the arguments of learned counsel, we have briefly mentioned classification of witnesses also.

Though counsel for appellant has urged that depositions of hostile witnesses, to the extent they are in favour of the appellant, need appreciation, we are not willing to undertake that exercise here. PW 1 has stated that she has no knowledge about the incidence. PW 2 has spoken about the investigation after PW 9 came to hostel on 15/3/2006. Thus her testimony also does not throw any light upon the events. Most of the witnesses, who have turned hostile and not helped prosecution, have continued to depose on these lines only. In this situation, only inference can be drawn that they are not sticking to their police statement and, therefore, are not helpful to prosecution. That does not make them witnesses in defence.

10. PW 9 is the member of Committee constituted under Chairmanship of Superintendent of Police for redressal of grievances of women, like present prosecutrix. She has pointed out that on 15/3/2006 at 11 a.m., when

she was at her residence, she received a phone call from a female inmate by name Shubhangi (PW 10). Then she points out the discussion between Shubhangi and herself and then their going to office of Superintendent of Police and Superintendent of Police then calling lady Police Inspector by name Lokare and asking her to accompany without uniform the said witness to Tejaswini Hostel . Thereafter she speaks about the developments at the hostel. Again this evidence is not helpful at this stage to consider the grievance about actual offence committed within ten days of 27/1/2006 or then in night between 14/3/2006 and 15/3/2006. We may, however, mention here that when she entered the hostel, she did not make any entry in the register and taking advantage thereof, counsel for appellant has urged that there was no such visit to hostel. He has further submitted that PW 14 – Investigating Officer also did not go to hostel on that day.

11. PW 10 – Shubhangi was the inmate of hostel to

whom prosecutrix lodged complaint after the incidence at 8.00 a.m. in the morning on 15/3/2006. This witness, while speaking about the incidence of rape in the night between 14/3/2006 and 15/3/2006 states that prosecutrix narrated the same to her at about 8 a.m. This witness has also submitted that prosecutrix then told her that accused had bitten her on breasts and showed her bite marks. This fact is found to be an omission in her police statement. We did not go into the more details of her statement at this stage, but fact that alleged rape came to her notice after prosecutrix narrated it at 8 a.m. on 15/3/2006 is itself sufficient to show that she has no personal knowledge about it.

12. Deposition of PW 11 shows that he is witness to recovery of knife under Section 27 from present appellant. Trial court has found that victim nowhere spoke about use of any such knife during her deposition. Evidence of PW 12, a female inmate by name Rupali, shows that she had

no grievance against the appellant/accused no.1. She has stated that his behaviour with her was good.

13. Perusal of evidence of PW 13 – Laxmi is not necessary as she was discharged on request of learned APP, who pointed out to court that witness suffers from mental illness.

14. PW 14 is Investigating Officer. She was Police Sub Inspector attached to Laxmipuri Police Station, who was asked by Dy. S.P. to hold inquiry and to conduct investigation. After conducting that investigation, she has handed over the papers to Head Constable Lohar of Junarajwada Police Station, who registered a Crime bearing No. 53 of 2006. On the basis of order of Dy. S.P., further investigation was also handed over to this Investigating Officer. As till then the prosecutrix was not examined, most of the documents were got exhibited

through PW 14 only by the prosecution. PW 15 - Lohar is that Head Constable. PW 16 - Dr. Lade is the Medical Officer, who examined prosecutrix on 16/3/2006. He did not find any injuries on her. Needless to mention that he did not find any bite marks also.

15. In fact learned Counsel for parties also have mostly relied upon the evidence of the prosecutrix only either to demonstrate that the offences have not been committed or committed. Law on the perspective to be adopted in such case can be found in following two judgments of the Hon. Apex Court. In **Narender Kumar Vs. State (NCT of Delhi) –(2012) 7 SCC 171**, Hon. Apex Court points out the settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for

corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. However, where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a woman of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration. Hon. Apex Court states that even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an

offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Hon. Apex Court in matter before it observes that the facts and circumstances

therein made it crystal clear that if the evidence of the prosecutrix was read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence was alleged to have been committed, her deposition did not inspire confidence. The prosecution had not disclosed the true genesis of the crime. It therefore, found the appellant entitled to the benefit of doubt.

16. In **Rai Sandeep @ Deepu Vs. State of NCT of Delhi –2013(1) Mah.L.J. (Cri) SC 2**, Hon. Apex Court states that the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant

would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. Hon. Court applied these principles to the facts before it & has observed that PW-4, the prosecutrix, failed to pass any of those tests. It notices total variation in her version from what was stated in the complaint and what was deposed

before the Court at the time of trial. There were material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.

As such, in the light of these precedents, it is not necessary to refer to the judgments of Hon. Apex Court in **State of Himachal Pradesh vs. Shree Kant Shekari** and in the case of **Mukesh vs. State of Chhattishgarh** [both supra].

17. Present appellant was accused no. 1 with 6 other persons as accused 2 to 6 before the Addl. Sessions Judge, Kolhapur. Charge against the total 7 accused in Sessions

Case No. 80 of 2006 was that accused 1 on 15.3.2006 in between 1 to 1.30 & prior to that on one occasion in a bathroom on 1st floor of the Government's Women Hostel i.e. Tejaswini Mahila Vastigruha & in the room of sewing class which is situated at Dattachaya Buliding, Kalamba Road, taking advantage of his position as junior care-taker of said hostel, committed rape on an inmate prosecutrix without her consent & against her will, thereby committing an offence under S. 376(2)(c) IPC. This provision is now S. 376(2)(d) after 3.2.2013 amendment. Second charge against appellant 1 & accused no. 2 a sewing instructor working in said hostel, was that they both used criminal force on prosecutrix intending to outrage her modesty & thereby committed an offence punishable under S. 354 IPC. Accused no. 3 to 7 were the servants at said hostel & charge against them was that by suppressing & hiding the facts, they abetted the commission of above offences. Apart from this, charge under S. 506(part-I) was also framed against appellant/accused 1 for criminal

intimidation by threatening the prosecutrix with injury to her person.

18. We find that the Trial Court has mostly relied upon the evidence of the prosecutrix (PW17), Member of the vigilance committee Smt. Mutekekar (PW-9), Inmate Shubhangi (PW10) & Investigating Officer PSI Smt. Gaikwad. Total 17 witnesses were examined to bring home the charges & 12 out of them have been declared as hostile. PW 1 to 5, 8,10,12 & 13 are the inmates of hostel while PW 6,7 & 11 are the pancha witnesses. These witnesses do not support the prosecution. PW15 is the police head constable who recorded the FIR. Trial Court has found the appellant accused 1 guilty of the alleged offence under S. 376(2)(c) IPC for the incident dated 15.3.2006 & an incident prior thereto. It is the claim of the prosecution that prosecutrix was subjected to offence within few days after she came on transfer to Tejaswini Hostel from her earlier hostel. The second incident has

thereafter been on 15.3.2006. The position or post of the appellant & status of prosecutrix as an inmate is not in dispute before us. As such, there are no technical arguments regarding the invocation of S. 376(2)(c) IPC here. We find that this matter entirely turns upon the evidentiary value to be attached to the deposition of Pw-17 Prosecutrix.

19. Police has been approached immediately after the incidence in early hours of 15.3.2006. The first or earlier incident is in first week of February, 2006. Complaint about is being lodged all most 40 days thereafter. We will therefore consider the recent or fresh instance & material on record in relation thereto. Perusal of the evidence of PW17 in as far as the second rape ie incident in the night between 14.3.2006 & 15.3.2006 is concerned shows serious anomalies. It is alleged to be in the same first floor bathroom where first rape was committed as per the prosecution. Her statement to the police, FIR &

examination in chief shows bathroom on first floor as the place where the offence took place. Appellant had called her in the middle of night for bringing a bucket full of water & to place it in the bathroom on first floor. Paragraph 3 of her deposition shows that when she was in that bathroom, appellant closed the door latch. When she cried loudly, he pressed her mouth & then committed rape on her. She deposed that in the morning ie on 15.3.2006, she disclosed this to inmate PW10 Shubhangi & later brought lady police to the hostel. She narrated entire episode to lady inspector who reduced it into writing & thereafter, prosecutrix signed on it. She proved it as Ex. 93.

20. Her cross-examination about the second offence is contained in paragraph 7 of the deposition. In cross, she states that this second incident occurred after 15 days of the first one. She expressed her unwillingness to carry the water to the bathroom. She pointed it out to lady officer on

duty that night & the lady watchman did not accompany her to the bathroom on first floor. She has stated that she was not aware whether accused was intending to commit rape on her at that time. She did not request any other woman to accompany her to fetch the water. At that time she was in the room on first floor & other ladies had slept. She indicated her unwillingness to fetch water to appellant who pressurized her to bring the water. She felt that she should not go to bathroom & therefore she kept bucket filled with water in varandah & went to the room to sleep. She has volunteered that appellant did not permit her to sleep, he was under influence of alcohol & created commotion in the room. Other ladies also woke up & she then went to ground floor to wake up the lady guard. No other inmate accompanied her. All women residing at ground floor gathered when she was narrating the incident to the lady watchman. It appears that after this the prosecutrix was asked about calling the police officers & she stated that thereafter, they called the police officers.

After putting her few questions about the police procedure, she was asked about the second incidence. She has denied that appellant had not then asked her to bring the bucket to first floor bathroom. She has stated that she raised a cry for about one hour but no inmate or watchman came to first floor bathroom. She did not attempt to run away from the bathroom on second occasion. Here the learned Trial court has recorded that she was not giving proper reply to the questions put by the counsel for accused 1 ie appellant. She did not resist the appellant on second occasion while attempting to rape her. She has given the admission that then the door of the said bathroom was also open. She denied that accused did not enter the bathroom & did not commit rape on her at that time. Her cross-examination in paragraph 8 onwards is about the events in the morning of 15.3.2006 after she communicates the occurrence to PW-10 ie another inmate.

21. Narration of second incidence in her report to

police at Ex. 93/C shows that when she was asleep in first floor room along with other inmates, at about 1.00 to 1.30 AM (on 15.3.2006) the door was knocked & she was called. She opened the door & found the appellant who asked to get the bucket in bathroom filled. She carried empty bucket to ground floor, got it filled & then went in first floor bath room. Appellant entered the bathroom behind her & told her that his wife was not home & they should have fun. She declined & but he showed her knife, broke the blouse buttons, tore it & did bite on her breasts on both sides. He removed saree, nicker & had sex & left. She then put on her saree blouse & came to room. Appellant then called inmates Laxmi & Shewanta, gave them money & biscuits & told them not to disclose the incident to anybody. After Laxmi & Shewanta returned, she narrated the incidence to them but they ignored her. After getting up in the morning, she narrated it to Mistri, a woman on night duty, but she also paid no attention. She thereafter mentioned it to Harjeet & Shubhangi (PW10)

who told her that they have also suffered it. They asked her not to speak to anybody & they will bring Mutkekar madam(PW9). Thereafter, PW-9 & police came there.

22. Thus the variance & inconsistencies between her report or examination in chief on one hand & the cross-examination on the other hand is very revealing. It appears that she did not enter the bathroom on first floor on the second occasion & delivered bucket in varandah. Her deposition about adopting cautious approach on second occasion by showing unwillingness to accused, pressure exerted by accused, about informing it to lady watchman who declined to come with her, asking other inmate to accompany her which should have been a natural conduct due to alleged previous experience are all improvements by way afterthought as same are absent in her statement to police. Hence, entire story of the second incident of rape is not substantiated by the prosecution & needs to be disbelieved.

23. However, her assertion about the first incident of rape needs to be scrutinized independently uninfluenced by the above finding. In report at Ex. 93/c she has stated that at earlier hostel, taking advantage of the fact that she has no support from her maternal side & her husband has deserted her, night staff their started raping her. Their names are also mentioned in her FIR. She had not lodged any complaint about it. But, she requested the concerned authority to transfer her to other hostel & accordingly, she came to Tejaswini hostel on 27.1.2006. For first 8 days, she faced no problem. However, when she pointed out her plight to others, appellant/accused started attempts to seduce her. After about 8 days when she along with 5 other inmates (names mentioned in FIR) were asleep in first floor room, appellant knocked the door at about 12.30 to 1.00 in the night. He also called out two names & as her name was called out, she opened the door. Appellant asked her to bring the water in bucket to his bathroom.

When she was keeping the bucket filled with water in bathroom, he entered the bathroom behind her. He offered her money & biscuit to have fun but she declined. Against her will, he pressed her breast & tore the top worn by her, removed the petticoat & tore her nicker. Then he had intercourse with her. She shouted but nobody came. He threatened her with killing & frightened, she put on the torn clothes, returned to her room & slept. Next morning she informed the event to a woman on duty in night shift but said woman scolded her & spoke in favour of appellant. She also slapped her. Then she communicated it to two other ladies who did not believe her. When she informed it to a male employee, he expressed that she (prosecutrix) did not need husband & can tie knot with the appellant. It needs to be noted here that this other staff was co-accused with the present appellant in Sessions Court & has been acquitted. States leave application under S. 378(3) Cr.P.C. is also rejected by this Court. Prosecutrix has further stated in her report that on next day when she

complained of pain in vagina & chest to the lady doctor, other lady staff (acquitted co-accused) told Doctor that prosecutrix was half-mad & not to take her seriously. She then told this to other acquitted male co-accused who used to teach sewing but he inserted his hand in blouse & pressed her breast. She then states that a day before holi festival. She attempted to tell it to one madam who was in hurry & therefore asked her to talk to her husband. Her husband did not listen to grievance & asked the prosecutrix to go to her room. In FIR, after this narration, the other incident of rape in the night between 14th & 15th March has been recorded.

24. Relevant examination in chief shows that after 8 days of her arrival in the hostel, appellants asked her to bring bucket of water in first floor bathroom & she obeyed him. Then he gave her biscuits which she took. In the said bathroom, he tore her clothes & committed rape. On next day she narrated it to a lady employee who did not take its

cognizance. She has named this employee but has not spoken of a slap alleged in FIR. She also stated that she told it to other ladies whose names she was not remembering & to all the lady officers working in the hostel. She stated that all those lady officers were present in the court. Her cross-examination in paragraph 5 shows that when she was asked to bring water, other ladies were chatting with each other. When appellant offered her biscuits, she inquired why the same were given & then distributed it amongst other inmates in her room on first floor. She denied that she did not go to bathroom on first floor. She deposed that before rape, she raised cry but female who had slept in the room did not come to see her. She opposed when appellant started removing her clothes & attempted to run away. She denied that when she raised cry, accused ran away. She stated that she was resisting accused by asking him for half an hour not to rape her. Trial Court records that upon being asked by the counsel for accused, the duration for which she raised cry, she kept

mum. She stated that appellant caught hold of her hand & hence, she could not hit him. She also did not kick him. She volunteered that as door was latched from inside, she became helpless. She also knocked the door of the bathroom. Out of 4 lady staff, two were present in night & she informed the incident to them. When she narrated the incident to all servants all inmates had gathered there. Servants did not listen to her. She denied that the lady watchman had slept on first floor along with the inmates. She had also requested one superior by name Shri Mane Saheb from Pune. Trial Court has recorded her version that - "After 2 times of incident of alleged rape, Mane took us at Pune (Mundawa). We narrated that we wish not to live in this hostel only to the ladies police officer. After first alleged incident, I disclosed said incident to the lady police inspector." In paragraph 6, she has stated that she was sent for medical examination after first incident.

25. This material on record poses various questions.

The first rape within few days of arrival in Tejaswini Hostel was not complained of in writing to the police authorities. There is nothing to show that she narrated it to staff or the superiors. The disclosure to the investigating agency is after second incident in night between 14.3.2006 & 15.3.2006. When we find that the second incident is not substantiated by the police, whether this late disclosure needs to be viewed with circumspection or not? It is to be noted that the lady medical officer to whom the prosecutrix complained of body pain after first rape has not been examined by the prosecution. In trial before the Sessions Court, appellant with two other male colleagues were accused with 4 lady staff members. Whether these four ladies who were government servants would have tolerated such a misbehaviour with an inmate? We can not forget that all ladies or inmates used to address the appellant as "dada" viz. as an elder brother. PW-10 at one place has stated that acquitted accused 2 was treating her as his daughter. This deposition is inconsistent with her

stand that in sewing class he had brought his face close to her face with design to kiss her. Prosecutrix also has put a statement in mouth of PW-10 that PW-10 had gone through similar incident as experienced by her.

26. On the other hand, if we lean in favour of the victim, we get a prosecutrix who complained of similar incidents at her earlier hostel where she stayed & then, upon transfer came to the present hostel. In present hostel, after few days she is subjected to same treatment by the care-taker. Her efforts to ventilate her plight failed & again, she alleges some attempt of similar nature on 14/15.03.2006. As she was a destitute & offence is by a person who wielded authority, a lady in her situation might have several apprehensions & fears. She may take a calculated decision not to complain. Hence belated complaint or grievance by itself can not be a sufficient ground in the eyes of law to discredit her. But here the prosecution case shows efforts made by her to seek

redress even on first occasion. These efforts have not been substantiated through evidence on record. When there was no second occasion, in order to convict the offender for an incident which is more than a month old, in these circumstances, a corroboration will be necessary. In relation to first incident, FIR shows that she along with 5 other inmates (names mentioned in FIR) were asleep in first floor room when appellant knocked the door at about 12.30 to 1.00 in the night. He also called out two names & as her name was called out, she opened the door. Her cross-examination in paragraph 5 shows that when appellant asked her to bring water, other ladies were chitchatting with each other. When appellant offered her biscuits, she inquired reason therefor & then distributed it to her room-mates on first floor. She is a married woman & on 16.3.2006, PW-16 Doctor could not get any evidence of forcible intercourse or an injury. PW-6 & PW-11 are the witnesses on recovery of a knife by the police under S. 27 of the Evidence Act at the instance of the appellant. Trial

Court has not found use of any knife by the accused appellant in the offences. PW-7 is the witness on spot panchanama. Thus, the prosecution could not bring on record any torn nicker or blouse alleged to be torn by the appellant in the bathroom while committing rape. Clothes put on by the appellant or prosecutrix on second occasion are also not seized. Hence, the prosecution does not have any evidence to corroborate the version of the victim in relation to first incident also. The incriminating circumstances could have been brought on record through the clothes sent to chemical analyzer. Said report is at Ex.114. These clothes or then samples ie swab etc. from the victim collected through the medical officer do not show any semen. In this background, we may also mention that prosecutrix not adopting cautious approach in night of 14.3.2006 & 15.3.2006 as noted by us supra also may militate with the first incident.

27. We accordingly find that the prosecution has failed

to prove beyond reasonable doubt the commission of either of the offences. We therefore quash & set aside conviction of the appellant-accused under S. 376(2)(c) IPC & acquit him of the charges as leveled. Judgment & order against him in Sessions Case No. 80 of 2006 decided on 11/05/2007 by the Adhoc Additional Sessions Judge – 5, Kolhapur, is quashed & set aside. Appeal is thus allowed.

In view of discussion above, it is apparent that appeal filed by the State Government vide Criminal Appeal No. 680 of 2007, seeking enhancement of punishment under Section 377 of Cr. P.C. is liable to be dismissed and is accordingly dismissed.

[A. S. GADKARI, J.]

[B. P. DHARMADHIKARI, J.]