

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.141 OF 2003

Sk. Rustum s/o Sk. Dada,
Age-26 years, Occu:Agril.,
R/o-Gavalipura, Cantonment,
Aurangabad.

**...APPELLANT
(Orig. Accused)**

VERSUS

The State of Maharashtra

...RESPONDENT

...
Shri V.D. Sapkal, Advocate for Appellant.
Shri K.D. Mundhe, A.P.P. for Respondent.
...

CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 10TH JUNE,2016.

DATE OF PRONOUNCING JUDGMENT: 1ST JULY, 2016.

JUDGMENT :

1. The Appellant - original Accused

(hereafter referred as "Accused") has been convicted by the IInd Ad-hoc Additional Sessions Judge, Aurangabad in Sessions Case No.58 of 2002 on 28th January 2003, under Section 376 of the Indian Penal Code, 1860 ("IPC" in brief) and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rupees Two Thousand. In default he has been directed to suffer rigorous imprisonment for three months. Aggrieved by the conviction and sentence, present Appeal has been filed.

2. I will refer to the prosecutrix (examined as PW-2) and her mother (examined as PW-1) and sister (examined as PW-5) as "victim", "mother of victim" and "sister of victim" respectively to conceal their identity.

3. The case of prosecution, in brief, is as follows:-

A) The victim resides in Gavalipura in Cantonment area of Aurangabad. The mother of victim is tenant of one Shaikh Mohammad Shaikh Ismail (also referred as "Shaikh Dada"). On 20th February 2000 victim filed F.I.R. at about 6.30 p.m. with Cantonment Police Station. Crime No.29 of 2000 was registered. The F.I.R. stated that victim, 19 years old, was taking education and residing in Ismail Gavalipura, behind Visava Hotel in Cantonment and her caste is "Mang". F.I.R. mentions regarding who are her family members and that she is studying in B.Sc. first year. She stated that on that day of 20th February 2000 at about 3.30 p.m. she went in the open area near her house where there were bushes, for toilet. After toilet she was returning home and was passing from near water tank which is for buffaloes to drink water. The Accused was hiding behind the said water tank and called out the victim to come near him. She declined and at that time the Accused

came near her and held her hands and threw her water tin of toilet which she was carrying and started pulling her. She sat down. Then he dragged her to the cattle-shed of buffaloes. There was nobody and he took her to left side in the *Wada* i.e. Cattle-shed. At that place the floor was of mud. When she shouted, he put his hand on her mouth. When she was lying on the ground, he put one hand under her head and lay on her person and by one hand pushed her *Kurti* upwards and pulling the string of her *Salwar*, pushed it down and removed her under-garments and removing his own pant and under-garment, he lay on her person. The F.I.R. gives details of Accused committing intercourse on her and that she suffered pain and started shouting. It is mentioned that the Accused, at that time, pressed her mouth and the victim was trying to put it aside, in which process her *Odhani* tore. She was trying to push him aside, but the Accused did not get up and completed the act. Thereafter he left her and gave

her clothes and wearing his own clothes, he went away. The Victim was crying and wore her clothes and she had blood from her private part which came on her under-garment, *Salwar* and *Kurti*. As she was dragged to the spot, there was mud on her clothes also. F.I.R. mentioned particulars about her clothes and it is stated that she went home crying and told the incident to her younger sister, aged about 14 years. She sat crying and after half an hour her mother came and mother was also told the incident. Then her brother came, to whom the mother told the incident. Thereafter with her mother and brother she came to the Police Station and was filing the F.I.R.

B) The offence was registered of in F.I.R. as above and P.I. Vitthal Pawar (PW-6) took up the investigation. The victim was referred to Ghati Hospital at Aurangabad and her medical examination was got done. Dr. Prakash Shivnikar (PW-7) carried out her medical examination. Her blood sample,

sample of pubic hair, nail clippings, vaginal swab were also taken. The Investigating Officer also seized the clothes of the victim vide Panchanama (Exhibit 18), on 20th February, 2000 at about 6.45 p.m. The medical examination was done at about 10.30 p.m. on 20th February, 2000. Spot Panchanama was carried out on 21st February, 2000 at about 9.00 a.m. - 9.30 a.m. Statements of witnesses were recorded. The seized clothes and samples of vaginal swab which had been collected, were sent to C.A. The C.A. reports were obtained. After investigation, Charge-sheet came to be filed.

3. In the Sessions Court, prosecution brought on record evidence of seven witnesses. The cross-examination of witnesses and statement of Accused under Section 313 of the Code of Criminal Procedure shows the defence to be of denial. It is claimed that the owner of the *Wada* where mother of the victim was residing is of uncle of the Accused and the said uncle Ismail and the Accused had

asked the mother of the victim to vacate the rented premises. As they wanted the mother of victim to vacate, false case has been filed.

4. Trial Court considered the oral and documentary evidence which was brought before it and found that the oral evidence of the victim appealed to it. Trial Court relied on the oral evidence of the victim as well as the medical evidence given by PW-7 Dr. Prakash Shivnikar as well as C.A. reports and found the Accused to be guilty. Consequently the trial Court convicted the Accused and sentenced him as above. The Accused was charged for offence under Section 323 of IPC and also under Section 3 (i) read with 11 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 also, but he came to be acquitted for those Sections. There is no appeal against that acquittal.

5. The Appellant-Accused claims in the

Appeal and it has also been argued on his behalf that the trial Court did not appreciate the evidence properly. Trial Court failed to consider the evidence of prosecutrix that she did not sustain any injury to her body or private part at the time of commission of alleged incident. If it was to be found that intercourse took place then it should be treated as by consent. There was no evidence that the victim had resisted. Absence of injury on the body of the victim showed that her evidence that she was forced and dragged to the *Gotha* on hard and rocky soil, was not acceptable. The evidence could not be accepted that the victim was forcibly raped. The evidence showed that the spot was such that it was visible from the house of the victim as well as other neighbours and thus it could not be accepted that nobody saw the incident of forcibly taking the victim to the *Gotha*. There was enmity between the uncle of the Accused and parents of the Victim regarding the tenanted premises and arrears of rent and thus the

Accused had been falsely implicated. The evidence of doctor does not prove that act of rape was committed.

6. It has been argued by the learned counsel for the Appellant-Accused that document Exhibit 29 regarding examination of the Victim was produced by the doctor at the time of evidence and the doctor stated that he had kept the concerned document with him. Thus, according to the counsel it was not produced from official record. Although, the doctor claimed that there was evidence of fresh tear of hymen, the examination certificate Exhibit 31 did not tick either of the columns regarding fresh or old tear. According to the counsel, the doctor relied on his memory to say that it was fresh tear. Referring to the C.A. reports, learned counsel submitted that the same showed that the under-garment had blood stain but the under-garment appeared to have been washed. Thus, according to him there was no sufficient

evidence to hold the Accused guilty. The *Gotha* and the spot where the Victim had gone for toilet, were in different directions. According to him the spot was not isolated spot and it was in range of shout and still the Victim wanted it to be believed that she shouted but nobody got attracted. Referring to the evidence, the counsel submitted that evidence claims that she was dragged to some distance but still wanted it to be accepted that she did not suffer any injury. It has been argued that in cross-examination the Victim, at one stage, accepted that when the Accused held her hands she sat. She then claims that she was dragged and taken but still the medical evidence did not show that she suffered any injury on her body.

7. Learned counsel for the Appellant-Accused referred to (I) the case of **Valliappa Harijan vs. State of Goa, 1997 Cri.L.J. 1484**, (II) the case of **Narender Kumar vs. State (NCT of Delhi), AIR 2012**

SC 2281(1), (III) the case of **Rajoo and Others vs. State of M.P.** AIR 2009 SC 858, (IV) the case of **the State of Maharashtra vs. Shri. Subhash Sitaram Sangare**, 2001 All M.R. (Cri) 1541, (V) the case of **State of Sikkim vs. Pem Dorjee Sherpa**, 2015 CRI.L.J. 2507, (VI) the case of the **State of Gujarat vs. Popatbhai Bhalabhai alias Bharabhai Bharwad**, 2014 CRI. L.J. 107, (VII) the case of **State of Gujarat vs. Dhirajlal Naranbhai Patel and Another**, 2014 CRI. L.J. 2058, (VIII) the case of **Joseph vs. State of Kerala**, 2000 ALL M.R. (Cri) 1920, to submit that if the evidence of the prosecutrix is appreciated regarding the manner in which the offence was committed, then it is unlikely that she would not have had any physical injury on her person. According to the counsel the Judgments, referred above, show that where the victims were forcibly taken and rape was committed, the Hon'ble Supreme Court and different High Courts have observed that in such

contingencies the injuries on the person are expected. According to the counsel in the present set of facts also the Victim deserved to be disbelieved regarding her evidence that she was forcibly dragged and taken and rape was committed on her.

8. Learned counsel for the Appellant-Accused further argued referring to the case of **Suresh Yellaji Yerewar vs. State of Maharashtra, 2003 ALL M.R. (Cri) 2014** and the observations in para 5 of that Judgment where the mere circumstance that the hymen was found ruptured was not used against the accused as the report of doctor had not mentioned color to decide age of rupture of vagina. It has been also argued that the Judgment found that in that matter also the finding was that washed blood on the underclothes of adult girl could not be circumstance in favour of prosecution as the finding of such blood could be due to variety of reasons. For such reasons, the learned counsel for

the Appellant-Accused vehemently submitted that that Accused needs to be acquitted.

9. Per contra, the learned A.P.P. submitted that although the mother of Victim was old tenant in the concerned *Wada*, there was no material to show that there was any eviction proceeding. According to him, the Victim was un-shattered in the cross-examination and there was other evidence also like her immediately telling the incident to her sister, mother and brother. The details of the spot showed that from the house of the Victim even if the *Gotha* or cattle-shed was visible, the vision was obstructed and what happens behind the *Gotha* could not be accepted to be visible. There were also trees in between. The house and *Gotha* were at considerable distance as in between there was road and then open space and then *Gotha* was there. According to the A.P.P., the water tank was behind the *Gotha* and the incident of dragging took place from near the water tank and the evidence

shows that actual dragging was only for a distance of about 10 ft. and the Victim may not have suffered injury. According to the A.P.P., it is unacceptable that just to avoid eviction from house, the parents would put forward the Victim, an unmarried girl to make such allegations, which would jeopardize her future marital prospects. The A.P.P. referred to C.A. reports to show that blood and semen had been found on the clothes of Victim and doctor also found injury to her fourchette. According to the A.P.P., the fact that there was injury to the private part of the Victim showed that she had been forcibly raped. The learned A.P.P. submitted that the Judgments relied on by the learned counsel for the Appellant-Accused are based on their own facts and the present matter will have to be considered on its own facts to appreciate the evidence. Learned A.P.P. relied on the case of **Aman Kumar and another vs. State of Haryana, AIR 2004 SC 1497(1)** to submit that the evidence of the prosecutrix stands on higher

pedestal than even injured witness. The learned A.P.P. submitted that the trial Court has rightly appreciated the evidence and convicted the Accused.

10. Before discussing the oral and documentary evidence of the present matter, it would be appropriate to refer to the Rulings relied on by the learned counsel for the Appellant-Accused:

a) The Judgment in the matter of **Valliappa Harijan vs. State of Goa**, cited supra, shows that there was no injury on the private part of the prosecutrix. In that matter, the prosecutrix had, in her complaint, claimed that she was forcibly thrown down and made to lie on towel and that her hands had been tied with creeper trees. The Division Bench of this Court appreciated the facts of that matter to conclude that it could not be found that there had been resistance.

b) In the matter of **Narender Kumar vs. State**, cited supra, the Hon'ble Supreme Court discussed the evidence and in para 15 of the Judgment considered the picture which emerged on considering the evidence and further discussed the observations of the Supreme Court in various earlier Judgments and taking note of the settled legal propositions, found that it could not be held in that matter that the prosecutrix was not knowing the appellant prior to the incident and if her evidence was to be read and considered in totality of circumstances, the same did not inspire confidence. The Hon'ble Supreme Court gave benefit of doubt to the appellant therein.

c) In the matter of **Rajoo and others vs. State of M.P.**, cited supra, the prosecutrix had alleged rape by 13 persons. In the facts of that matter, the Hon'ble Supreme Court found that the prosecutrix had been involved earlier in some kind

of improper activity. It took note of the fact that although rape was alleged by 13 persons, no injury was found on the person of prosecutrix. In the facts of that matter, the Hon'ble Supreme Court found, on examination of entire evidence, that it would be difficult to conclusively show the involvement of each of the accused beyond reasonable doubt. It was observed that truth and falsehood were so inextricably intertwined, that it was impossible to discern where one ends and the other begins.

d) In the matter of the **State of Maharashtra vs. Shri. Subhash Sitaram Sangare**, cited supra, Division Bench of this High Court, in para 8 of the Judgment, considered the evidence of prosecutrix in that matter. It was noticed that the victim and accused were known to each other since child-hood; there was no resistance from prosecutrix as per her own deposition; there was no abrasion or scratches on any part of her body

nor there was injury to her private parts; that her clothes were not torn and that she was not crying when she went home. For such reasons, it was found that the prosecutrix was a consenting party.

e) In the matter of **Joseph vs. State of Kerala**, cited supra, the Hon'ble Supreme Court dealt with matter where the accused had taken the victim from the Convent by representing himself to be husband of one of the sisters of the victim and on next day the dead body of the victim was found near the Railway line. In addition to Section 302 of IPC, the accused was found guilty of offence under Section 376 of IPC. The conviction came to be maintained under Sections 302 and 392 of IPC by the Hon'ble Supreme Court but for offence under Section 376 of IPC, it was observed that the victim was grown up lady and if there would have been forcible sexual intercourse, some injuries would have been found on the vagina/private parts

of the body or some other parts indicative of any such use of force and it would be too much to assume that there would have been no injuries whatsoever on the body, on this count. The Hon'ble Supreme Court also observed that though injuries on the body is not always a must or sine qua non to prove a charge of rape, having regard to the case of prosecution, in that matter, that the victim had been subjected to brutal rape and forced sexual intercourse, this aspect of the matter can not be completely lost sight of. Considering these and other reasons the accused was given benefit in that matter as regards offence under Section 376 of IPC.

. I have gone through the Rulings. The rulings contain reasonings based on the facts of the matters therein. Present matter needs to be appreciated on its own facts.

11. In order to appreciate the evidence of

the prosecutrix - Victim, it would be appropriate to first keep in view the alleged spot and its surroundings where the incident is said to have taken place.

(a). In this regard firstly reference needs to be made to the Spot Panchnama Exhibit 14. PW-3 Ravi Saudagar, the Panch turned hostile. However, PW-4 Samson Bhingardive supported the prosecution and the Panchnama came to be proved. If the Spot Panchnama Exhibit 14 is seen, the picture that emerges shows that it is a *Gotha* or cattle-shed in the cantonment area of Aurangabad behind one Visava Hotel. The *Gotha* faces East and there is a gate with two planks. To the North of that gate at about 100 ft. the water tank for buffaloes to drink water was situated. Entering the *Gotha* what appeared was that there were stone walls on all the four sides of *Gotha* having height of 10 ft. The Southern and Western wall had tin-shed where buffaloes were tied. In the corner of Northern and

Eastern wall, there was a constructed room in front of which there was a tin-shed. The Victim took the Panchas in the *Gotha* and entering the gate she pointed out towards the left and taking them near the Southern wall, she pointed out "*Gavanit*" i.e. channel created for putting fodder for animals to eat, as the place where the rape took place. The place was of "*Vairanachi*" i.e. fodder and was in the use and thus no special marks could be seen at the spot. The said *Gotha* was of a diameter of 100 ft. X 100 ft. As per the Spot Panchnama, to the East of the *Gotha*, there was open space and thereafter house of the complainant; to the West there was a lane and beyond that school of one Bagade Bai; to the South there was open space and beyond that wall of Little Flower High School and towards the North there was machine room for cutting fodder and thereafter open space.

(b). The oral evidence gives further details

of the spot mentioned above. The evidence of PW-1, mother of the Victim, shows that the *Gotha* where incident took place is beyond open side after crossing road which is opposite their house. This witness stated that from the windows of her house and the houses of persons residing nearby the *Gotha* is visible and between the *Gotha* and their house, there is no other structure. The witness stated that beyond the road which is behind her house, there is Milind College and to the South of her house there was a big building and thereafter a school. The witness stated that the road which is in front of her house runs towards Idgah and colony. The Victim herself (PW-2) has also stated that the *Gotha* is to the West of her house and there is a narrow road in front of her house. The Marathi version of this witness shows that from such road in front of her house vehicles are passing. She deposed that beyond such road, there is open space and then there is *Gotha* of the accused. There are ten tenants residing in the

Wada where she lived. This witness stated that the water reservoir was towards the Eastern side of the *Gotha* and it was outside the *Gotha*. Her evidence is that the entrance of the *Gotha* was about 20 ft. wide.

(c). Thus reading the Spot Panchnama with the evidence of Victim shows that the *Gotha* which was facing towards East where *Wada* of Victim was situated, had a gate which was about 20 ft. broad and having two planks and from the gate the water tank was about 100 ft. towards North. The *Gotha* which was about 100 ft. X 100 ft. had gate appearing to be in the middle and from there the water tank was about 100 ft. towards North.

(d). Further details regarding the *Gotha* can be seen from the evidence of Panch PW-4 Samson. He deposed that there are walls around *Gotha* but roof is not fully covered by tin sheets. His evidence

shows that the ground between the water tank or reservoir till the entrance of the *Gotha* was "rocky". Then the evidence of PW-6 Vitthal Pawar, the P.I. who prepared Spot Panchnama, shows that *Gotha* was partly covered with tins and below the tin-shed the buffaloes were tied. His evidence shows that ground inside the *Gotha* was "rough".

(e). The above discussion shows picture of a *Gotha* with rough insides and even the open space from the gate of the *Gotha* till the water reservoir was rocky place. Although it appears that there were open spaces around the *Gotha*, it appears to be surrounded by lane towards the West and a small road between the *Gotha* and the house of the Victim which admittedly had vehicles passing. The Victim PW-2 claimed that at such place she had gone for answering call of nature in the open. The time of incident is stated about 3.45 p.m. Her cross-examination shows that she had gone towards the Northern side from her house for

answering call of nature where there were standing trees.

12. Keeping such spot of incident in view and the timing of the incident, now it would be appropriate to refer to the oral evidence of the Victim regarding the incident.

13. The Victim gave her evidence in January 2003. The incident is of 20th February 2000. She was about 20 years old at the concerned time. She claimed that at the concerned time she was studying in Milind College of Science in B.Sc. first year. The Medical Examination Form of the Victim Exhibit 31 shows that her general body built was "fair" with height 152 c.m.s and weight 39 K.g.s.

14. Keeping the spot and built of the Victim in view, the evidence of the Victim needs to be considered. I am referring to her evidence

regarding incident from Marathi version as I find the English version at places to be incorrect or not correctly translated. The Victim deposed that at about 3.30 p.m. she had gone for toilet in the open near the bushes. Her sister PW-5 at that time was at home while the mother had gone to the market. According to her, after toilet she was returning home and walking with her head down. The water tank falls on the way. The Accused was behind the water tank and he called out to her to come there. According to her, she refused. At that time the Accused came near her and held her hand. She was holding the water tin of toilet. The tin was thrown away and the Accused dragged and dragged her to the *Gotha* of buffaloes and inside the *Gotha* he took her towards left (which would be towards South of the *Gotha*). Her evidence is that she was trying to shout and at that time the Accused closed her mouth by hand. The evidence is that the Accused put her down and lay on her. She was resisting. He pushed her *Kurta* upwards and

removed her Salwar and he also removed her under-wear. Her evidence is that the Accused then removed his pant and under-wear. The trial Judge recorded that at the time of such evidence the witness was crying. The Victim then deposed that the Accused did everything with her and did intercourse. She added that the Accused did dirty job with her. He was fully lying on her person. She claims that he was lying on her for 5-10 minutes. The evidence is that, thereafter the Accused gave her, her clothes and she wore the same. She deposed that complete intercourse was done. She claimed that after the intercourse, she could not get up and she had problem in her private parts. She some how got up and wore her clothes and went home.

15. Cross-examination of the Victim shows that when the Accused caught her hands, she did not shout. She claimed that she sat on the ground and from the ground "*Ghasardat - Ghasardat*" i.e.

continuously dragging, she was taken to the *Gotha* by the Accused. Then she slightly changed her version to say that from the spot from where she was dragged, she was dragged for only 10 - 15 paces. The cross-examiner asked the Victim but she claimed that, when she was dragged she did not suffer any scratches. She further deposed that when she was being dragged and taken, she shouted but nobody came running for her help. She deposed that when the Accused was taking out her clothes, she had torn the shirt of the Accused. The cross-examiner asked the Victim and she stated that she neither clawed him nor bit him. She was asked again and she still claimed that at the time of execution of such incident she still did not suffer any injury. She deposed that even her private parts did not suffer any injury.

16. I have purposely referred to the details of the incident from the evidence of the Victim, as I want to appreciate whether her oral evidence

inspires confidence when I keep the spot and its surroundings and the Victim in view (which I have already discussed). It is quite clear that the water tank from where the incident is supposed to have started, was about 100 ft. from the gate of the *Gotha* which tank was towards the Northern side. As per the version of the Victim, after she was taken inside the *Gotha*, she was taken towards the South, which would further add the distance. The Victim claims that she was dragged over a distance of more than 100 ft. from near the water tank to inside the *Gotha* towards one end. I have already pointed out that the ground between the water reservoir and the entrance of the *Gotha* was rocky. The evidence also shows that the ground inside the *Gotha* was also rough. Although in the F.I.R. the Victim had mentioned that in the course of incident her "*Odhani*" had got torn, in evidence she gave no such details. Details of the actual spot shown in the Panchnama where rape was allegedly done, was also not some bed or a soft

place. It was a place where the fodder is said to be put so that the buffaloes can eat the same. This is not a case where the Victim is suddenly caught unaware in the room and forcibly put down on normal floor of a room or bed and is violated. This is a matter where the Victim claims to have been dragged for over 100 ft. on rough ground and claims to have been violated on rough surface inside the *Gotha*. If the evidence of PW-7 Dr. Prakash is perused, he refers to only finding of one abrasion at fourchette. Though repeatedly asked, the Victim still wanted to be believed that in the course of such incident as she was claiming, she did not suffer any injury to her person. Although the doctor claimed that there was abrasion at fourchette, the Victim herself insisted that she did not suffer any injury even to her private parts. It shows how negligible the abrasion at the fourchette was, which the doctor noted.

17. Keeping the spot, the built of the Victim in view, I find it very difficult to accept that intercourse, if any, could be said to have been forcibly committed. It just does not stand to reason as to how forcibly the Victim could have been dragged over more than 100 ft. and she neither suffered any injury on her person nor attracted any attention from anybody around. It was not an isolated forest area. It was a spot which, although had open spaces, had small road towards East and a lane towards the West of the *Gotha*. The timing was also of the afternoon. With school and hotel around and road and lane passing at short distance having traffic, it is surprising that nobody was attracted. If there was resistance, it would not be easy to simply drag a Victim for more than 100 ft. without attracting attention of anybody. The Victim claims to have shouted or tried to shout. The details given by her regarding removal of her clothes by the Accused and removal of his own clothes by the

Accused, would require the Accused using both his hands and it is simply difficult to accept that at such times neither the Accused is physically pushed nor the Victim tries to get away or shout so as to attract attention, or claw or bite the Accused. There is no evidence that the Accused physically beat the Victim or put her under any threat or intimidation. Keeping these various factors in view, I am finding it difficult in this matter to take the Victim on her words. I am aware of the Judgment of the Hon'ble Supreme Court in the matter of **Aman Kumar and another vs. State of Haryana**, cited supra, that the evidence of the prosecutrix stands at higher pedestal than the injured witness. However, in the present matter I am finding it difficult to accept version of prosecutrix on its face value. Thus, it would be necessary to see if there is any other evidence direct or circumstantial, which could lend assurance to her testimony.

18. Regarding the circumstantial evidence, there is evidence of PW-5, sister of Victim to whom the Victim claims to have told the incident. PW-5 claims that when the Victim came back home, she was crying and she told her that the Accused had raped her. According to this witness, the *Odhani* of the Victim had been torn. She claimed that the *Odhani*, Article 4 which was before the Court, was the same *Odhani*. In fact this PW-5 went one step ahead and claimed that Pajama and shirt of the Victim had also been torn, something which the Victim did not claim in her evidence and also in the F.I.R. which she had filed at Exhibit 12. Then there is evidence of PW-1, the mother of Victim, who also claims that when she returned from the market at about 4.30 p.m., she found the Victim crying and when asked, the Victim told her that the Accused had dragged her forcibly in buffalo *Wada* and raped her. The cross-examination of PW-5, the sister of the Victim shows that when the Victim was telling the story of the incident

of rape, the residents of their *Wada* came around. They included one Shashikant Shinde, Arun Waghmare and Nade. Thus, although the circumstance tried to be shown is that immediately after the incident the Victim told about the same to her people at home and even to the nearby residents, no other witness is examined except the mother and sister of the Victim. Although, the *Odhani* is claimed to have been torn, the Victim in evidence did not claim that the *Odhani* got torn in the course of the execution of the incident. Although, in the F.I.R. it was claimed that at the time of incident, the clothes which the Victim was wearing got soiled in mud as she was dragged to the Gotha, the seizure Panchanama of clothes Exhibit 18 did not record any such fact. The mud on the spot and the soiling of the clothes in mud is also not matched.

19. It is to be noted that the incident is claimed to have taken place at about 3.45 p.m. and

it is claimed that the mother came home after half an hour and after some time the brother came and then the Victim had gone to the Police Station to file F.I.R. The F.I.R. Exhibit 12 shows that it was registered by 6.30 p.m. Thus, the evidence tried to be shown is that almost immediately after the incident, the Victim had gone to the Police Station and filed F.I.R. The seizure of clothes of Victim, Panchanama Exhibit 18 proved by PW-4 Samson shows that clothes (allegedly) worn at the time of incident were produced by the Victim and Police seized the same between 6.45 p.m. - 7.30 p.m. on the same day of 20th February, 2000. Thus, the F.I.R. was registered at 6.30 p.m., and at 6.45 p.m. the Victim had produced the clothes which were seized. It would show that while going to Police Station, she carried along the said clothes. If Exhibit 18 is appreciated, it would appear that after the incident the Victim changed her clothes and the clothes worn at the time of incident were taken along to the Police Station

where the same were seized immediately on filing of the F.I.R. Panchanama Exhibit 18 shows seizure of the *Salwar* with blood stains. The *Kurta* was also said to be having blood stains on the front lower side and was old and dirty. The underwear was stated to be having blood stains in the center and to be old and in use. The original of Exhibit 18 when perused, shows that while recording description of the underwear, subsequently the words have been squeezed in to show that in addition to blood stains there were also stains of "semen". The *Odhani* seized was recorded as in torn condition. Although, this seizure Panchanama Exhibit 18 claims that it was recorded between 6.45 p.m. - 7.30 p.m., the evidence of PW-6 Investigating Officer P.I. Vitthal Pawar claims that he seized the clothes of the Victim only after she came back from the hospital. Now, the evidence of Dr. Prakash PW-7 read with the Form of Examination of Victim Exhibit 31 shows that she was examined by the

doctor at 10.30 p.m. Thus, the oral evidence of the Investigating Officer does not match with the seizure Panchanama read with the evidence of the doctor.

20. Keeping the seizure of clothes Panchanama Exhibit 18 in view, when I have examined the letter Exhibit 23 sent by Police to the C.A. along with the articles seized and considered C.A. report Exhibit 24, I find that the C.A. recorded that the underwear had stains of blood and appeared to be washed. Thus, if the incident had occurred at about 3.45 p.m. or 4.00 p.m. and by 6.45 p.m. the Victim had given seizure of such clothes to the Police, when the underwear got washed and when it got dried is not clear. If the same had been washed, the seizure Panchanama Exhibit 18 did not note that it appeared to be wet or any such thing. If the underwear had to be washed, it does not appear that the other clothes were washed, which also it is claimed, suffered

blood stains. The C.A. report Exhibit 24 shows that the *Kurta* and *Salwar* had stains of semen. The Panchanama Exhibit 18 although, it added in the description that there was stains of semen on the underwear, had not recorded any such factor of semen on the *Salwar* and *Kurta*. The Victim appears to have had blood group "B" as can be seen from Exhibit 25 and the blood found on *Salwar* and underwear was stated to be of blood group "B" in Exhibit 24. However, this does not take the case of prosecution much further. Thus, even this circumstantial evidence regarding the seizure of clothes and subsequent finding of semen and blood is not much inspiring confidence.

21. Coming to the evidence of PW-7 Dr. Prakash, his evidence shows that he examined the Victim on 20th February, 2000 at about 10.30 p.m. This doctor proved the M.L.C. papers of the Victim at Exhibit 29. It appears that he has taken consent of the Victim and her father for her

examination and the document is proved that Exhibit 30. This doctor produced these documents Exhibit 29 and 30 at the time of evidence and his cross-examination shows that he stated that on his transfer from Aurangabad to Beed, he had kept these papers with him. The doctor however, claimed that they are part of the official record. Although the learned counsel for the Accused criticized this approach of the doctor, I am not giving the same much importance because the doctor having examined young girl may have kept the consent paper and M.L.C. paper with him out of precaution. It is true that the official record must remain in the concerned office but even if the doctor produced these documents from his custody, I am ignoring this aspect in this matter as much would not turn on the same.

. The doctor proved "Examination of the Accused Form" at Exhibit 31. PW-7 Doctor deposed that the hymen of the Victim was ruptured and that

the rupture was fresh. However, in the cross-examination the Doctor was confronted with Exhibit 31 where in column No.12 dealing with "tears" (presumably of the hymen which was at serial No.11) there were two options - "fresh/old". Although, the doctor chose the concerned options in earlier and subsequent columns, he did not put any marking against column No.12 dealing with "tears". The doctor in evidence stated that he was relying on his memory to claim that the hymen had fresh rupture. This PW-7 having been attached to the Civil Hospital at Aurangabad and subsequently who was working as medical officer at Civil Hospital Beed, must be dealing with multiple cases everyday and it would not be appropriate to accept his evidence relying on memory that the Victim had fresh rupture of hymen.

22. The evidence of PW-6 P.I. Vitthal Pawar claimed that he had sent the Victim to the doctor at Ghati Hospital with referring letter proved by

him at Exhibit 22. Although, the evidence was given claiming that Exhibit 22 was referring letter, if Exhibit 22 is perused, it is not a letter referring the Victim for examination. In fact the document is not even dated 20th February, 2000. It is letter dated 22nd February, 2000 by which this P.I. was inquiring from the Doctor as to what is the report of the Medical Examination. The doctor appears to have endorsed on Exhibit 22 that the samples are sent for chemical analysis and reports are awaited and opinion is not possible without C.A. reports. The doctor having kept the opinion reserved, has not, in evidence, stated anything regarding forcible intercourse by referring to the C.A. reports.

. Thus, I do not get much assurance even from the medical evidence which the prosecution brought on record.

23. Coming to the defence, the cross-

examination of PW-1, the mother of Victim shows that one Ibrahim is the owner of *Wada* where they had been living. Said Ibrahim is the uncle of the Accused. Although, she stated that said Ibrahim had never issued notice through lawyer for vacating the premises, she still accepted that said Ibrahim and Accused had called upon her to vacate the house. Then there is evidence of PW-2, the Victim herself, who deposed in the cross-examination that the Accused and his uncle have been pursuing her mother and other tenants to vacate the premises which are occupied by them. The defence is that as the Accused was pursuing the mother of the Victim to vacate the premises, false case has been filed. Defence is not forceful. No further reference requires to be made to this defence looking to the fact that I am unable to even otherwise find the Victim reliable for her evidence of alleged rape.

24. I have gone through the Judgment of the

trial Court. The trial Court appears to have been impressed with the evidence of the Victim. According to trial Court, her evidence left indelible mark of confidence and trust. The trial Court held that truth sat on the lips of the Victim when she swore in the witness box that she had been subjected to aggressive rape by the Accused. I am not sure if crying of the Victim in witness box moved the trial Court. But then if admittedly it was an aggressive rape, it is surprising that there should not even be any scratch on the person of the Victim and if it was not consensual, she should not have caused any harm or injury to the Accused. I have gone through the other reasons recorded by the trial Court and find that I am unable to concur, due to the reasons I have recorded above.

25. For reasons discussed above, I pass the following order:-

O R D E R

(I) Criminal Appeal is allowed.

(II) The impugned Judgment of conviction and the sentence passed against the Appellant-Accused is quashed and set aside. The Appellant is acquitted of the offence punishable under Section 376 of the Indian Penal Code, 1860.

(III) Fine, if paid, be returned to the Appellant - Accused.

(IV) The Bail Bonds of the Appellant are cancelled.

[A.I.S. CHEEMA, J.]