

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1029 OF 2012**

CHANDRAKANT VISHNU LANJEKAR )...APPELLANT

V/s.

THE STATE OF MAHARASHTRA )...RESPONDENT

Mr.Rakesh Bhatkar, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

**CORAM : A. M. BADAR, J.**

**DATE : 14<sup>th</sup> FEBRUARY 2018 &  
15<sup>th</sup> FEBRUARY 2018**

**ORAL JUDGMENT :**

1           The appellant/accused, by this appeal, is challenging the judgment and order dated 31<sup>st</sup> August 2012, passed by the learned Additional Sessions Judge, Ratnagiri, in Special Case No.6 of 2011 between the parties, thereby convicting him of the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment of 7 years apart

from imposing fine of Rs.5,000/- and default sentence of simple imprisonment of 3 months.

2 Briefly stated, facts leading to the prosecution of the appellant/accused can be summarized thus :

(a) PW1 Arpita along with her husband, parents-in-law, children, brother-in-law Suresh, his wife and children were jointly residing at Village Argaon Devmala in Lanja Taluka of Ratnagiri. Sister-in-law of PW1 Arpita is the victim of the crime in question. She (the prosecutrix/PW5) is unfortunately deaf and dumb, so also her husband. The appellant/accused is cousin brother-in-law of PW1 Arpita who is First Informant in the instant case.

(b) It is case of the prosecution that both houses of PW1 Arpita, the prosecutrix/PW5 and that of the appellant/accused are abutting each other. The prosecutrix/PW5 along with either the appellant/accused or his wife used to go for grazing cattle together.

- (c) The incident in question took place in the morning hours of 25<sup>th</sup> September 2010. On that day, in the morning hours, PW1 Arpita had gone for washing clothes. Similarly, the prosecutrix/PW5 left the house at about 8.30 a.m. for grazing cattle. The appellant/accused also took his cattle for grazing by the same time. It is averred by the prosecution that at the grassland of Village Argaoon Devmala, when the prosecutrix/PW5 was grazing her cattle, the appellant/accused had committed rape on her. The prosecutrix/PW5 immediately returned to her house and disclosed the incident by gestures to her mother-in-law. PW1 Arpita also returned to her house after washing clothes. At about 1.00 p.m., PW7 Nilesh – son of the prosecutrix/PW5, returned from the school. Thereafter, mother-in-law of PW1 Arpita disclosed the incident to her as well as PW7 Nilesh. PW1 Arpita then questioned the prosecutrix/PW5 about the incident and she was informed about the incident by the prosecutrix/PW5 by gestures and communicated to her that the appellant/accused had

committed rape on her after assaulting her and dragging her. PW1 Arpita accompanied by the prosecutrix/PW5 along with PW7 Nilesh, then went to the house of the appellant/accused and questioned him. The appellant/accused did not reply but sat by bowing his head down.

- (d) As husband of PW1 Arpita had gone to Dhulia, immediate action in the matter could not be taken by the prosecuting party. On return of her husband on 27<sup>th</sup> September 2010, PW1 Arpita disclosed the incident to him and then the First Information Report (FIR) came to be lodged against the appellant/accused by PW1 Arpita which has resulted in registration of Crime No.56 of 2010 for offences punishable under Sections 376, 354 and 506 of the Indian Penal Code against the appellant/accused at Police Station Lanja. During course of investigation, the Investigating Officer referred the prosecutrix/PW5 to the Civil Hospital, Ratnagiri, where she was medically examined by PW9 Dr.Nilofar Malpekar. The spot was inspected in presence of

PW3 Sadanand Khamkar and panchnama Exhibit 51 came to be drawn. Sketch of the spot of the incident was got drawn from PW4 Hanumant Surve, Circle Officer. Clothes of the appellant/accused came to be seized on 28<sup>th</sup> September 2010 itself, after arresting him, vide panchnama Exhibit 14. Similarly, on the very next day, upon being produced by PW1 Arpita, clothes of the prosecutrix/PW5 viz. petticoat, saree, blouse and knicker came to be seized by effecting panchnama Exhibit 15 dated 29<sup>th</sup> September 2010. Statement of witnesses came to be recorded. Necessary sample of blood and semen came to be collected from the appellant/accused. Seized muddemal was sent for chemical analysis through carrier Head Constable PW6 Chandrakant Chavan. On completion of investigation, the appellant/accused came to be charge-sheeted.

- (e) The Charge for offences punishable under Sections 376 and 506 of the Indian Penal Code came to be framed and explained to the appellant/accused. He pleaded not guilty

and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses and also relied on documentary evidence. First Informant Arpita is examined as PW1. Santosh Jadhav - panch witness to the seizure of clothes of the appellant/accused and that of the prosecutrix/PW5 is examined as PW2. Sadanand Khamkar – panch witness to the spot panchnama Exhibit 21 is examined as PW3. Circle Inspector Hanumant Dalvi, who drew the sketch Exhibit 23 is examined as PW4. The prosecutrix is examined as PW5 and her evidence is recorded with the help of interpreter Arpita who is also examined separately as interpreter. Carrier Head Constable is examined as PW6 and his name is Chandrakant Chavan. Nilesch Lanjekra – son of the prosecutrix/PW5 is examined as PW7. Investigating Officer Manohar Surve is examined as PW8 and Medical Officer Dr.Nilofar Malpekar is examined as PW9. The defence has admitted some documents pursuant to the notice under Section 294 of the Code of Criminal Procedure. As such,

request letter addressed to K.PAbhyankar Deaf and Dumb School, Ratnagiri, by the Investigating Officer is marked as Exhibit 18, whereas the reply of the Head Master of the same school addressed to the Investigating Officer came to be marked as Exhibit 19 and were read in evidence by the learned trial court. The defence of the appellant/accused is that of total denial. It was tried to demonstrate that on the day of the incident, the appellant/accused had been to Pune for attending funeral of his relative named Bandarkar.

- (f) After hearing the parties, the learned trial court by the impugned judgment and order came to the conclusion that the prosecution has established commission of forcible sexual intercourse by the appellant/ accused on the prosecutrix/PW5 and accordingly, he came to be convicted for the offence punishable under Section 376 of the Indian Penal Code and is sentenced as indicated in the opening paragraph of this judgment.

3           I have heard the learned advocate appearing for the appellant/accused at sufficient length of time. He argued that forensic evidence in the form of finding of semen stain of blood group “B” on seized knicker of the prosecutrix/PW5 is of no use to the prosecution because seizure of the said knicker was effected on 29<sup>th</sup> September 2010, whereas, cross-examination of PW1 Arpita shows that, as usual, in the evening hours of the day of the incident i.e. on 25<sup>th</sup> September 2010, the prosecutrix/PW5 had taken a bath and washed her clothes. Therefore, finding of semen stain of blood group “B” on seized knicker of a married woman, in absence of collecting semen sample of her husband, is of no avail to the prosecution.

4           The learned advocate for the appellant/accused submitted that the prosecution was required to avail services of totally disinterested person as an interpreter in order to record evidence of the prosecutrix/PW5, who is a deaf and dumb person. Instead of that, PW1 Arpita was chosen to act as an interpreter and PW1 Arpita being the First Informant, is highly interested in

securing conviction of the appellant/accused. Therefore, case of the prosecution is not free of doubt. The learned advocate further argued that even if evidence of the prosecutrix/PW5 is accepted as it is, then also, it is seen that the evidence falls short of making out a case for the offence punishable under Section 376 of the Indian Penal Code. In submission of the learned advocate for the appellant/accused, evidence of PW9 Dr.Nilofar Malpekar to the effect that, she had witnessed bite marks on breast of the prosecutrix/PW5, is an improvement in the version of the prosecution because PW1 Arpita is silent on this aspect. The learned trial court committed error in coming to the conclusion that presence of bite marks on breast of the prosecutrix/PW5 are sufficient to conclude that the appellant/accused had committed forcible sexual intercourse on the prosecutrix/PW5.

5           The learned APP supported the impugned judgment and order by pointing out that clothes of the prosecutrix were promptly seized and sealed and in sealed condition those were sent to PW6 Chandrakant Chavan for chemical analysis. Report of

the Chemical Analyser shows that knicker of the prosecutrix was stained with semen of the appellant/accused. The learned APP further argued that evidence of the prosecutrix is gaining corroboration from her conduct when she was taken to the house of the appellant/accused as well as from her narrations by gestures to her relatives including PW1 Arpita and PW7 Nilesh.

6           I have carefully considered the rival submissions and also perused the Record and Proceedings. The appellant/accused is convicted of the offence punishable under Section 376 of the Indian Penal Code by holding that on 25<sup>th</sup> September 2010, he had committed rape on the prosecutrix/PW5 at Argaon Devmala, Taluka Lanja, District Ratnagiri. The prosecutrix/PW5 is an adult lady having a son and a daughter. Her 17 years old son Nilesh is examined as PW7 by the prosecution. Undisputedly, the prosecutrix is deaf and dumb. In response to the letter Exhibit 18 issued by the Police Station Lanja, undisputedly, Head Master of K.PAbhyankar Deaf and Dumb School, Ratnagiri, has by communication at Exhibit 19 informed the police that though the

prosecutrix/PW5 came to be questioned, she being illiterate, could not answer those questions even by gestures, as she is not acquainted with the sign language. With this, the Head Maser of the Deaf and Dumb School has reported to the police that he is unable to record statement of the prosecutrix/PW5. These admitted documents viz. Exhibits 18 and 19 goes to show that the prosecutrix/PW5 was unable to communicate by sign language to the expert in the field i.e. Head Master of the Deaf and Dumb School at Ratnagiri. The letter at Exhibit 19 issued by the said school in no uncertain terms mentioned that the prosecutrix/PW5 is unable to understand the specialised language of signs. This undisputed position emerging on record will have to be kept in mind while assessing evidence of the prosecutrix/PW5, who according to the prosecution case, is the victim of forcible sexual intercourse by the appellant/accused. Section 375 defines the term rape. To constitute the offence of rape, it is not at all necessary that there should be complete penetration of the male organ with the emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ in labia majora

or the vulva with or without emission of semen, is sufficient to constitute the offence of rape. In other words, the depth of penetration is immaterial but the penetration is sine-qua-non of this offence. Now let us put on record the law regarding appreciation of evidence in case of rape or sexual offence settled by catena of judgments by the Honourable Apex Court. In the matter of Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarat<sup>1</sup> Honourable Supreme Court has held thus in paragraph 9:

“In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated eye in the light of probabilities with our

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1 AIR 1983 SUPREME COURT 753(1)

feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian Soil regardless of the altogether different atmosphere, attitudes, mores responses of the Indian society, and its profile. The identities of the two worlds are different”.

7           It is, thus, clear that the prosecutrix in a rape case is treated as victim of the offence. However, it is also certain that corroboration is ordinarily required in the case of woman having attained majority and who is habitual to sexual intercourse as there is likelihood of her leveling such an accusation on account of instinct of self-preservation. At this juncture, it is relevant to quote law laid down by the Honourable Apex Court in the matter of

**Radhu Vs. State of M. P.**<sup>2</sup>. In paragraph 5 of this judgment, it is held thus :-

“5 It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape' if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim

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2 2007 Cri.L.J. 4704

especially on the forearms, wrist, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.”

8           Now let us examine what First Informant PW1 Arpita and the prosecutrix/PW5 has stated about the incident in question, as fate of the prosecution case is largely dependent on their testimony. PW1 Arpita – sister-in-law of the prosecutrix/PW5 has deposed that on 25<sup>th</sup> September 2010, after washing clothes, she returned to her house at 9.45 a.m., whereas the prosecutrix/PW5 returned to the home after grazing cattle at about 8.45 a.m. This witness has not claimed that soon after her return, the prosecutrix/PW5 who came back earlier had narrated the incident to her by gestures. Her evidence makes it clear that

the appellant/accused and the prosecutrix/PW5 used to take cattle for grazing at Argaon Devmala. This witness has stated that at about 1.00 p.m. of that day, her nephew PW7 Nilesh came back from the school and then her mother-in-law disclosed the incident to PW7 Nilesh in her presence. This witness further claimed that the prosecutrix/PW5 disclosed the incident by removing her knicker and pointing the finger at the house of the appellant/accused while weeping. Then, this witness accompanied by the prosecutrix/PW5 went to the house of the appellant/accused, who sat down before them bowing his head down and at that time, the prosecutrix/PW5 became angry. As per version of PW1 Arpita on 27<sup>th</sup> September 2010, her husband returned from Dhulia, and therefore, on 28<sup>th</sup> September 2010 the FIR Exhibit 12 came to be lodged at Police Station Lanja. PW1 Arpita has deposed that thereafter she handed over knicker, petticoat, blouse and saree of the prosecutrix/PW5 to the police.

9            In order to demonstrate delay in lodging the FIR, PW1 Arpita was cross-examined at length for bringing on record that

she is having good relations with Police Patil Sadanand Khamkar and they had disclosed the incident to Bava Khamkar – ex-Sarpanch with whom husband of the prosecutrix/PW5 was working. However, I am of the considered opinion that the delay of two days in lodging the report is not fatal to the prosecution case because the FIR lodged on 28<sup>th</sup> September 2010 itself mentions the fact that as there was no male member in the house, on return of husband of the First Informant, he was informed about the incident and thereafter, the report was lodged. Thus, delay in lodging the report is sufficiently explained in the FIR itself. Evidence of PW1 Arpita also is cogent in explaining this delay. It is a matter of common knowledge that honour and reputation of the entire family is at the stake in such sexual offences, particularly when the perpetrator of such crime is relative of the victim, and therefore, usually there is some delay in lodging the FIR, as family members think it fit to deliberate over the issue in order to decide whether to lodge the report or not. In the case in hand, the prosecutrix/PW5 as well as her husband are deaf and dumb and brother-in-law of the prosecutrix/PW5 was

not available in the village. The accused is relative of the victim of the crime. Thus, case of the prosecution cannot be jettisoned on this aspect of short delay in lodging the FIR.

10           Cross-examination of PW1 Arpita goes to show that the prosecutrix/PW5 is elder to her and married first in point of time. As such, the prosecutrix/PW5 is senior to PW1 Arpita in the family of the prosecuting party. From cross-examination of PW1 Arpita it is elicited by the defence that she can understand gestures of the prosecutrix/PW5. As such, I do not find any substance in the argument of the learned advocate for the appellant/accused that PW1 Arpita is unable to interpret the sign language which was being used by the prosecutrix/PW5. Ultimately, PW1 Arpita was residing with the prosecutrix/PW5 since long and the affirmative answer about her knowledge to the sign language used by the prosecutrix/PW5 is elicited by the defence in the cross-examination of PW1 Arpita.

11           The prosecution has used PW1 Arpita to interpret sign language used by the prosecutrix/PW5. The offence in question allegedly took place on 25<sup>th</sup> September 2010. Section 119 of the Evidence Act, as it stood then, reads thus :

**"119. Dumb Witness** - A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence."

Provisions of this Section itself makes it clear that when the witness is unable to speak, he can give his evidence in any other manner in which he can make it intelligible including giving evidence by signs. The learned advocate for the appellant/accused placed reliance on the judgment of the Honourable Apex Court in the matter of **State of Rajasthan vs. Darshan Singh alias Darshan Lal**<sup>3</sup> and more particularly to paragraphs 18 to 21 of the said judgment. Those read thus :

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3 AIR 2012 SC 1973

“18 The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.”

“19 In Meesala Ramakrishan v. State of A.P., (1994) 4 SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by

means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that 'verbal statement does not amount to 'oral' statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.”

“20 Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.

A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.”

“**21** To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”

12 The learned advocate for the appellant/accused has criticized the manner of using PW1 Arpita as an interpreter in the instant case by arguing that she is not an independent witness, but

being the First Informant, she is interested in the prosecution and its ultimate result. The learned advocate further argued that recording of such evidence requires that it must record the signs and not the interpretation of signs.

13 I am of the considered opinion that there is no substance in the argument that choosing PW1 Arpita as an interpreter by the prosecution is incorrect as she is an interested witness. As mentioned in the earlier part of this judgment, the defence has admitted the documents at Exhibits 18 and 19. Not only that, the defence has elicited from the cross-examination of PW1 Arpita that she is a person who understands the sign language used by the prosecutrix/PW5. When said PW1 Arpita was called as an interpreter, several questions were put to her by the defence counsel and she had satisfactorily answered those questions to a large extent, but for the question as to how she will explain the prosecutrix/PW5 about the rough surface. The entire cross-examination of this witness by the defence points out that PW1 Arpita was in a position to interpret the signs of the

prosecutrix/PW5. The letter at Exhibit 19 makes it clear that for want of special education, the prosecutrix/PW5 is not in a position to understand the specialised sign language employed by the expert. There is no cross-examination of any prosecution witness to suggest that other persons from the locality or area or the village were knowing the sign language of the prosecutrix/PW5. In this view of the matter, there was no alternative with the prosecution, but to use PW1 Arpita as an interpreter. Justice cannot be made sterile by showing helplessness in the event of non-understanding the sign language of the prosecutor by the experts. Hence, the argument to that effect deserves rejection.

14           Reverting to the evidence of PW1 Arpita, it needs to be put on record that she heard the incident from her mother-in-law and then she witnessed the gestures made by the prosecutrix/PW5 by removing her knicker and pointing her finger at the house of the appellant/accused. PW7 Nilesh was present at that time to witness what his mother was stating. As per his version, his mother had pointed out the direction of the house of

the appellant/accused, she placed her fingers on her breast, made sign of lying down and made sign of catching her hand and pulling her. This can be construed as former statements of the prosecutrix/PW5 made to her sister-in-law and son. Those are, as such, admissible to corroborate the version of the prosecutrix/PW5 in terms of the provision of Section 157 of the Evidence Act.

15           Now let us examine what the prosecutrix/PW5 has stated about the incident, as interpreted by her sister-in-law PW1 Arpita. While examining the evidence of the prosecutrix/PW5, I have noted that the evidence recorded in English language is at variance with the evidence recorded in Marathi language. Undisputedly, the Marathi version prevails in such situation. I have specifically noted the question which is recorded by the learned trial court while recording deposition of the prosecutrix/PW5 namely - "Question : What happened after laying down ?" and answered to it to the effect "showed the sign by touching her clothes that clothes removed" is missing from the

Marathi version of the deposition of the the prosecutrix/PW5. Thus, this part of the English version of deposition of the prosecutrix/PW5 which is missing from recorded Marathi version, needs to be discarded.

16           Be that as it may, rest of the evidence of the prosecutrix/PW5 and particularly in English language does not appear to be recorded properly. Recording of the signs is also not properly made. Still, one will have to ascertain what was sought to be communicated by the prosecutrix/PW5 in respect of the incident in question, by using Marathi deposition of the prosecutrix/PW5. The prosecutrix/PW5 conveyed that when she had been for grazing cattle, her breast was touched and she was made to lie down. As noted in foregoing paragraphs, Marathi version of her deposition does not contain the question and answer as to who had done this to her. To a specific question through interpreter, the prosecutrix/PW5 has stated by sign language by pointing to the appellant/accused that he had pressed her breast and removed her clothes. Then the most material and

relevant question was asked to her about the incident in question. This was to the effect that what took place after she was made to lie. The answer to this question given by the prosecutrix/PW5 is to the effect that she pointed out to the appellant/accused and made gestures by shaking hand. Marathi version of the answer to this question, recorded by the learned trial court is thus –

"आरोपीने खुण करून हात हलवून हाव भाव केले"

Cross-examination of the prosecutrix/PW5 reveals that the interpreter was unable to understand the prosecutrix/PW5 as to for how much time the incident lasted. The prosecutrix/PW5 communicated in cross-examination that on the day of the incident, her son had beaten her. She also suggested by signs that she was communicating with the appellant/accused by gestures.

17 If the entire evidence of the prosecutrix/PW5 is accepted as it is, then also, the same is falling short of making the offence of rape as defined in Section 375 of the Indian Penal Code and made punishable by provisions of Section 376 of the Indian Penal Code. There is no evidence regarding the act of commission

of rape by the appellant/accused, disclosed by sign language used by the prosecutrix/PW5 and interpreted by PW1 Arpita – her sister-in-law. Pointing out the accused and making gestures by shaking hands, by no stretch of imagination, can be construed as an act of commission of rape by penetration of the prosecutrix/PW5 with his male organ by the appellant/accused. At any rate, considering this nature of evidence, which is falling short of a standard of a prudent person for making out the offence punishable under Section 376 of the Indian Penal Code, benefit of doubt will have to be given to the appellant/accused.

18           The learned APP has argued that forensic evidence is supporting the case of the prosecution. Evidence of PW2 Santosh Jadhav coupled with that of PW1 Arpita shows that it was on 29<sup>th</sup> September 2010 that saree, blouse, petticoat and knicker of the prosecutrix/PW5 were produced before the police by PW1 Arpita and then those clothes came to be seized and sealed by the police vide panchnama Exhibit 15. These seized articles were sent to the Forensic laboratory through PW6 Chandrakant Chavan. The

Chemical Analyser's Reports are at Exhibits 31 and 33. The Chemical Analyser's Report at Exhibit 33 is in respect of chemical analysis of blood and semen of the appellant/accused. The same were found to be of "B" group. Chemical Analyser's Report at Exhibit 31 shows that knicker of the prosecutrix/PW5 was found to be stained with semen of "B" group. The prosecutrix/PW5 is a married woman living with her husband. The incident took place on 25<sup>th</sup> September 2010. Clothes were seized on 29<sup>th</sup> September 2010. There is no evidence on record to show that in the intervening period the prosecutrix/PW5 had no sexual intercourse with her husband. Similarly, there is no evidence on record to show that blood as well as semen of husband of the prosecutrix/PW5 is that of some different group than group "B". To crown this all, cross-examination of PW1 Arpita reveals that the prosecutrix/PW5 was accustomed to take bath in the evening hours and on the day of the incident also, she had taken bath in the evening hours. PW1 Arpita has further deposed in her cross-examination that after taking bath in the evening of 25<sup>th</sup> September 2010, the prosecutrix/PW5 had washed her clothes.

PW1 Arpita was residing in a small house with her sister-in-law i.e. the prosecutrix/PW5, in Village Argaon Devmala in Lanja Taluka. Considering the rustic background from which the members of the prosecuting party are hailing, it is but natural that there must be one washroom in the said house, and as such, PW1 Arpita was knowing the fact of taking bath and washing clothes by the prosecutrix/PW5 on the day of the incident, and that too after the incident, because the incident took place in morning hours of 25<sup>th</sup> September 2010. In the wake of this position of evidence coming on record, it is not possible to place implicit reliance on the forensic evidence to conclude that the appellant/accused had committed rape on the prosecutrix/PW5.

19            Now what remains is the evidence of PW9 Dr.Nilofar Malpekar, who had medically examined the prosecutrix/PW5 on 29<sup>th</sup> September 2010. This witness is a Medical Officer working at the Civil Hospital, Ratnagiri, having no enmity with the appellant/accused. She had made record of her medical examination in the form of contemporaneous documents. Evidence of PW9 Dr.Nilofar

Malpekar shows that upon examination of the prosecutrix/PW5, she had noted three bite marks on right side of the breast of the prosecutrix/PW5. The prosecutrix/PW5 being a married woman with two grown up children, no other incriminating evidence was found after four days of the incident from internal examination of the prosecutrix/PW5. No injuries were found on the back of the prosecutrix/PW5.

20           Evidence of PW9 Dr.Nilofar Malpekar, to my mind, corroborates the version of the prosecutrix/PW5, which was interpreted by PW1 Arpita to the effect that breast of the prosecutrix/PW5 were touched by the appellant/accused. Infact, it is seen that the prosecutrix/PW5 intended to communicate that the appellant/accused had bitten her breast at the time of the incident in question and made her to lie. However, the evidence adduced by the prosecution is not going any further than this stage to show that then the accused committed rape on the prosecutrix. As such, even if evidence of PW9 Dr.Nilofar Malpekar is accepted as it is, then also no case of rape is made out against

the appellant/accused. The appellant/accused is entitled for the benefit of doubt due to discrepant evidence on this aspect.

21           Now the question which falls for consideration is, what offence, if any, is committed by the appellant/accused. It is seen from the version of the prosecutrix/PW5 as well as her sister-in-law/PW1 Arpita and PW7 Nilesh coupled with evidence of PW9 Dr.Nilofar Malpekar that, the appellant/accused had bitten the breast of the prosecutrix/PW5 and made her lie by removing her clothes during the course of the incident. However, the evidence is falling short of the actual act of penetration. Thus, the evidence on record is reflecting intention of the appellant/accused to commit rape coupled with preparation to commit the actual offence of rape, and then his attempt in the said direction. However, it appears that, the said attempt did not culminate into actual act of rape. The incident in question, as seen from evidence of PW3 Sadanand Khamkar coupled with that of PW4 Hanumant Surve, Circle Officer, took place on kaccha road having traffic of cattle and people. The spot panchnama at Exhibit 21 as well as

sketch map at Exhibit 23 is disclosing this position. Then something must have happened during the attempt, foiling the attempt to commit rape, probably due to the situation prevailing at the spot which was a kaccha road having traffic of cattle and people. Therefore, the prosecution has proved that the appellant/accused has committed the offence punishable under Section 511 read with 376 of the Indian Penal Code.

22 In the result, the appeal needs to be allowed partly by holding that the prosecution has failed to prove the offence punishable under Section 376 of the Indian Penal Code, but has proved the offence punishable under Section 511 read with 376 of the Indian Penal Code. Therefore, the order :

**ORDER**

- i) The appeal is partly allowed.
- ii) The conviction as well as resultant sentence imposed on the appellant/accused by the impugned judgment and order passed by the learned Additional Sessions Judge, Ratnagiri,

on 31<sup>st</sup> August 2012, in Sessions Case No.6 of 2011, for the offence punishable under Section 376 of the Indian Penal Code is quashed and set aside.

iii) Instead, the appellant/accused is convicted of the offence punishable under Section 511 read with 376 of the Indian Penal Code and he is sentenced to suffer rigorous imprisonment for 5 years and 6 months apart from direction to pay fine of Rs.5,000/- and in default, to undergo further simple imprisonment for 3 months.

iv) The appellant/accused be set at liberty, if he has already undergone the sentence imposed upon him by this judgment and order.

v) The appeal stands disposed of accordingly.

**(A. M. BADAR, J.)**