

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.147 OF 2018

Sitaram Sambhaji Mane,
Age - 65 years, Occu. Agri,
R/o. Goykarwada (Khandala),
Tq. Karjat, Dist. Ahmednagar

...APPELLANT
(Ori.Accused)

VERSUS

The State of Maharashtra

...RESPONDENT

Mr.Amol K. Gawali, Advocate for the appellant
Mr.P.N. Kutti, APP for the respondent/State.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 26/03/2019
PRONOUNCED ON : 02/04/2019

J U D G M E N T :-

. Heard.

2. Admit, since the appellant/accused is in jail, appeal is taken up for final hearing.

3. The challenge in this appeal is to the judgment and order dated 27/01/2017 passed by the

Additional Sessions Judge, Ahmednagar in Sessions Case No.219 of 2015, whereby convicting the appellant/accused for the offence punishable under Section 376 read with Section 511 of the Indian Penal Code (For short IPC) and sentencing him to suffer Rigorous Imprisonment for 5 (five) years with a fine of Rs.5,000/- (Rs. Five thousand only) and in default of payment of fine, to suffer simple imprisonment for 1 (one) year. Appellant is given set off as per Section 428 of the Code of Criminal Procedure, for the period undergone by him from 08/06/2015. Appellant has deposited fine of Rs.5,000/- on 27/01/2017.

4. Facts in brief, are as under:-

(a) The complainant Sau.Vandana Satish Mane (PW-1) was residing at Goykarwada (Khandala), Tq. Karjat, Dist. Ahmednagar alongwith her husband, parents-in-law and children including her daughter the prosecutrix at the time of incident and the appellant/accused is also resident of the same

village. On 03/01/2014 the complainant lodged the report Exh.24 with Karjat police Station contending that date of birth of her daughter the prosecutrix is 10/05/1992 and she is mentally retarded since her birth. The complainant's husband is working in Shrigonda Sugar Factory and he used to return home on weekly holiday. Her son Dinesh was studying in Jamkhed ITI. Her agricultural land known as 'Kohini' is situated in the limits of village Goykarwada. Adjacent to her agricultural land there is a agricultural land of appellant. At the relevant time there were crops of Jawar and Onion in her land.

(b) It was further alleged that, on 03/01/2014 at about 11.00 a.m. the complainant alongwith her mother-in-law Vimal and the prosecutrix had been to their agricultural land. When they were plucking the grass in the Onion crop, at about 5.00 to 5.30 p.m. they heard the voice of birds from the field of Jawar crop and the complainant asked the prosecutrix to go to that field and to flee the birds. Thereupon, the

prosecutrix had gone there. After about 10-15 minutes as the complainant was feeling thirsty, she proceeded towards well for brining water. At that time, she heard shouting of the prosecutrix as "Aayo, Aayo" from the direction of Jujube tree. She then noticed that the prosecutrix was lying on ground and the appellant was lying on her body. Appellant saw her and started running towards his agricultural land by holding skirt of dhoti. The complainant abused him and lifted one stone and hit the same on his back. Appellant ran away from there. The complainant noticed that Salwar and knicker were not on the person of prosecutrix. She then worn clothes to prosecutrix. By that time her mother-in-law Vimal reached there. So also, after hearing their shouts her cousin mother-in-law Kisnabai Maruti Mane and Vithabai Popat Parkhe came there. The complainant narrated incident to them. Thereafter, she returned to home alongwith prosecutrix. She contacted her husband on phone and informed him the incident. She also informed incident to her cousin brothers-in-law

Santosh Mane, Maruti Mane and her son. Then alongwith the prosecutrix and her son she went to police Station and lodged complaint as above.

(c) On the basis of aforesaid complaint crime No.I-05/2014, under Section 376(2)(1) of the IPC was registered against the appellant. The prosecutrix was referred for medical examination to Sub District Hospital, Karjat. Appellant was arrested on 08/06/2015 and since then he is in jail. He was also got medically examined. During investigation the Investigation Officer (PW-6) prepared spot panchanama, seized clothes of prosecutrix and sent the clothes for chemical analysis. He also recorded statements of witnesses. After completion of investigation charge-sheet was submitted in the Court of Judicial Magistrate, First Class, Karjat, who then committed the case to the Sessions Court, Ahmednagar.

(d) Charge was framed against the appellant for the offence punishable under Section 376(2)(1) of the

IPC. Accused pleaded not guilty and claimed to be tried.

(e) To establish the guilt of the appellant prosecution has examined in all 7 witnesses, namely, the complainant Sau. Vandana Satish Mane (PW-1), Panch Nana Subhan Maharnawar (PW-2), to the spot panchanama, Sau. Sneha Pramod Mahajan (PW-4) Headmistress of school for mentally challenged, Dr. Pusha Trimbak Narote (PW-5) Medical Officer, Bashradkhan Jamsherkhan Pathan (PW-7) Medical Officer and the Investigating Officers (PWs-3 and 6) and one Tulshidas Dhanwade was examined as a Court witness.

(f) Thereafter statement of appellant under Section 313 of the Code of Criminal Procedure was recorded. His defence is denial and that he has been falsely involved in the case to extract money and to grab his land.

(g) On considering the evidence adduced by the

prosecution and defence of the appellant the learned Additional Sessions Judge on holding that the prosecution has proved offence under Section 376 read with Section 511 of the IPC against the appellant convicted and sentenced him by the impugned judgment and order as referred in the opening paragraph of this judgment. Therefore this appeal by the appellant challenging the conviction and sentence recorded against him.

5. I have heard Mr. Gawali, learned counsel for the appellant/accused and Mr. Kutti, learned APP for the respondent/State and with their assistance I have perused the impugned judgment and order and the evidence adduced by the prosecution.

6. Mr. Gawali, learned counsel for the appellant submitted that as per prosecution case on the date of incident i.e. on 03.01.2014 at about 5.00 to 5.30 p.m. when the complainant (PW-1) with her daughter the prosecutrix and her mother-in-law Vimal

were in the field they heard the voice of birds from the field of Jawar crop and hence PW-1 asked the prosecutrix to go to that field to flee the birds and then after about 10-15 minutes when PW-1 went to the well for brining water as she was thirsty she heard shouting of prosecutrix "Aayo, Aayo" and saw the appellant lying on the body of the prosecutrix and on seeing her he ran away. It is submitted that at that time PW-1 lifted one stone and hit the same on the back of appellant and then he ran away. It is submitted that no injury was noticed on the person of appellant and the Investigating Officer has not seized the stone which had allegedly hit the appellant. At that time Vimal mother-in-law of PW-1 and her cousin mother-in-law Kisnabai Mane and Vithabai Parkhe had also come there. The prosecution has not examined either mother-in-law or cousin mother-in-law of PW-1. So also, prosecution has not examined the prosecutrix, in fact, she should have been examined by the prosecution.

7. Mr. Gawali, learned counsel for the appellant further submitted that PW-1 claims that after she went to the spot of incident after hearing shouts of the prosecutrix she noticed that the prosecutrix was lying on the ground and appellant was lying on her body and salwar and knicker were not on the person of the prosecutrix. But PW-4 Sau. Sneha Mahajan who is Headmistress of school for mentally challenged, who had recorded opinion Exh.32 on the basis of observations of the prosecutrix and recorded statement Ex.31 in question and answer form of the prosecutrix after she was produced by her mother and others has stated that the prosecutrix told her that one Sitya touched the clothes of the prosecutrix and the prosecutrix did not tell to PW-4 that the Salwar and knicker on her person were removed by the appellant. Thus, according to the learned counsel there is no consistency in the evidence of PW-1 and PW-4. In such circumstances the prosecution should have examined the prosecutrix and as such non examination of the prosecutrix by the prosecution is

fatal to the prosecution case.

8. Mr. Gawali, learned counsel for the appellant further submitted that when the prosecutrix was examined by the Doctor nothing was noticed by the Doctor to suggest that any attempt of forcible sexual intercourse was made by the appellant and no injury was seen. So also, it is submitted that when the statement of the prosecutrix was recorded by PW-4 Mrs. Mahajan at one place she refers appellant as "Anna" and at another place she refers him as 'Sitya' and therefore it cannot be said that Sitya or Anna is the same person and he is the appellant Sitaram. Moreover, it is submitted that the complainant PW-1 does not claim that when allegedly she saw the appellant running from the spot of incident he was naked or he was without clothes on his person. It is submitted that there is absolutely no evidence to show that the appellant attempted to penetrate or to insert his penis inside the private part of the prosecutrix and according to the learned counsel

unless such attempt is established by the prosecution offence under Section 376 read with Section 511 of the IPC can not be attracted. Moreover, it is submitted that only because the appellant was absconding for one year after the incident it cannot be said that he is guilty or he has committed the alleged offence.

9. Mr. Gawali, learned counsel for the appellant submitted that appellant/accused is cousin father-in-law of the complainant (PW-1) and to grab amount from him and to grab the land of appellant which is adjacent to the field of the complainant the appellant has been falsely implicated. According to the learned counsel the prosecution has thus failed to prove offence of attempt to commit rape on the prosecutrix punishable under Section 376 read with Section 511 of the IPC and as such appellant is entitled to be acquitted of the said offence by allowing the appeal.

10. Alternatively, Mr. Gawali, learned counsel for the appellant submitted that even if the evidence of the complainant (PW-1) and PW-4 is accepted at the most it would be a case of outraging modesty of the prosecutrix which act is punishable under Section 354 of the IPC and nothing more than that. It is submitted that in that case leniency be shown to the appellant as his more than 65 years old and period undergone by him since the date of his arrest i.e. 08/06/2015 is more than 3 years and 9 months and it would be the proper sentence for the offence under Section 354 of the IPC and accordingly conviction and sentence recorded against the appellant be altered from Section 376 read with Section 511 of the IPC to Section 354 of the IPC by allowing the appeal to the said extent.

11. Mr. Gawali, learned counsel for the appellant to support his submissions relied upon the decision in the case of Aman Kumar and Another Vs. State of Haryana, (2004)4 Supreme Court 379 wherein

Hon'ble Supreme Court observed in paragraph Nos.7 to 13 and 15 as under:

"7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines IC & K 893*). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See *Dr. S.P. Kohli (Dr) V. High Court of Punjab and Haryana*¹]. In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her

testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient

to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

8. The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to

commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case.

There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a

determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by the police during investigation. The evidence of PW-11, the father who according to the prosecution made a departure from what he allegedly stated during investigation is to the effect that his wife PW 9 told her (*sic* him) that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get effected. Significantly, the evidence of the prosecutrix and the doctor does not specifically refer to penetration which is *sine qua non* for the offence of rape.

13. There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Section 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her

intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word "modesty" is not defined in IPC. The *Shorter Oxford Dictionary* (3rd Edn.) defines the word "modesty" in relation to a woman as follows:
"Decorous in manner and conduct; not forward or lewd; Shame-fast; Scrupulously chaste.

15. In that view of the matter, it would be appropriate to set aside the conviction of the appellants under Section 376(2)(g) and convict them under Section 354 read with Section 34 IPC. Custodial sentence of two years each, with a fine of Rs.500/- each and a default stipulation of three months' rigorous imprisonment in case of failure to pay the fine would meet the ends of justice. The appeal is allowed to the extent indicated above. "

12. The second decision relied upon by the learned counsel for the appellant is in the case of **Tukaram Govind Yadav Vs. State of Maharashtra 2011 Cri.L.J. 1501 (Bombay High Court)**. As per the facts of the said case the appellant/accused was convicted for the offence punishable under Section 376 read with Section 511 of the IPC. In the appeal challenging the said conviction and sentence in paragraph 14,15 and 17, it was observed as under:-

"14. The medical evidence in the present case do not indicate as to whether the accused has tried to force his penis inside the private part of the girl but could not succeed. Evidence of PW-2 Parvati Yadav before the Court, in para - 3 of her deposition, indicate that when she went there (in the house of the accused), she found Ujwala sleeping on the floor and the accused was lying on her. Nothing appears to have been stated beyond this by Parvati except that knicker which was removed was brought back by her alongwith grand-daughter to her house.

15. Under these circumstances, it must be held that the offence committed by the accused did not amount to attempt to commit rape punishable under Section 376 read with Section 511 of IPC, but, was one under Section 354 of IPC. Therefore, the appeal has been partly allowed by convicting the appellant/accused for minor offence under

Section 354 of IPC.

17. In the result, therefore, appeal is partly allowed. The order of conviction and sentence recorded by the learned Additional Sessions Judge, Kolhapur dated 06.07.1996 in Sessions Case No.49 of 1996 against the appellant for the offence punishable under Section 376 read with Section 511 of IPC set aside and modified. Instead, the appellant is convicted for the offence punishable under Section 354 of IPC. The impugned order regarding the conditional release and punishment, however as directed by the trial Court is maintained. R & P be sent back to the trial Court. Both Criminal Appeal and Criminal Revision Application are disposed of accordingly."

13. Mr. P.N. Kutti, learned APP for the respondent/State on the other hand submitted that the prosecutrix is a rustic villager and therefore she referred appellant/accused as "Sitya" and as he is her relative and elder she referred him as "Anna" while making statement before PW-4-Headmistress and appellant Sitaram is the same person. It is submitted that the trial Court has rightly considered the evidence adduced by the prosecution and rightly concluded that act of the appellant amounts to an attempt to commit rape on the prosecutrix and

therefore there is no reason to interfere with the impugned judgment and appeal is liable to be dismissed.

14. Charge was framed under Section 376(2)(1) of the IPC and after considering the evidence the learned Additional Sessions Judge on finding that offence of rape is not proved and the prosecution has proved offence of attempt to commit rape against the appellant convicted and sentenced him under Section 376 read with Section 511 of the IPC and it appears that there is no appeal by the State and therefore the only aspect which is required to be considered is, whether the conviction of the appellant under Section 376 read with Section 511 of the IPC is proper and sustainable? To prove this offence the prosecution has mainly relied upon the evidence of the complainant (PW-1), Sau. Mahajan-Headmistress (PW-4), statement of prosecutrix Exh.31 recorded by PW-4, opinion of PW-4 Exh.32 and the medical evidence of Dr. Pusha Narote (PW-5),

certificate (Exh.42), report of examination of prosecutrix (Exh.43) issued by the said Doctor.

15. Now coming to the evidence of PW-1 the complainant there appears no dispute that on the date of incident i.e. on 03.01.2014 PW-1 had gone to her field alongwith her mother-in-law Smt. Vimal and the prosecutrix at about 11.00 a.m. As regards the incident she has deposed that the prosecutrix is mentally weak by her birth. They were plucking the grass in the onion field. At about 5.00 to 5.30 p.m. they heard the voice of birds from the field where the crop of Jawar was standing. Therefore, she instructed the prosecutrix to go to that field and to flee the birds. Therefore, the prosecutrix had gone there. After 10 to 15 minutes from that time PW-1 was feeling thirsty, therefore she was proceeding towards well for bringing water which well is situated at a distance of 10 to 12 meters from the field of Jawar. She further deposed that when she was proceeding she heard shouting of her daughter/prosecutrix as "Aayo

Aayo" from the said direction. She deposed that she noticed that her daughter was lying under tree of Jujube (Bor) and appellant was lying on her body. Accused sitting on the last bench is the same person. Further she stated that she started shouting, therefore appellant/accused hurriedly started running from that spot. Then she lifted one stone and had thrown it towards appellant/accused. It was hit on his back. But still accused ran away. According to her she noticed that lower apparels of her daughter i.e. her knicker and salwar were not on her body. Till that time her mother-in-law reached there after hearing her shouts. Moreover, as she shouted her two cousin mothers-in-law, namely, Smt. Kisanabai and Smt. Vithabai also came there from their field. She stated that after noticing her daughter without lower apparels, she worn the clothes to her. Thereafter she has stated about informing the incident to her son and husband and that then on the same day she went to police Station, Karjat at about 9.30 p.m. with her son and prosecutrix and others and about lodging of

complaint (Exh.24). She also deposed that in the same night at about 12.00 p.m. the prosecutrix was medically examined by PW-5 Dr. Narote.

16. In the cross-examination above said evidence of PW-1 has not been specifically challenged and more particularly her evidence that she noticed that the prosecutrix was lying under tree of Jujube and appellant was lying on her body and that on her shouting appellant/accused started running from the spot of the incident and that she hit stone on his back and still he ran away has gone unchallenged. She has denied that she deposed false and that to grab amount from the appellant and to grab his agricultural land, false case has been initiated against him by her. So also, she has stated in the examination-in-chief itself that the appellant is her cousin father-in-law, she is acquainted with him and he is residing in front of her house and that there is courtyard between their houses admeasuring about 25 feet. Thus, there is no reason to disbelieve

testimony of PW-1.

17. Now coming to the evidence of PW-4 Mrs. Sneha Mahajan, Headmistress of the school for mentally challenged, who recorded statement of the prosecutrix Exh.31 on 19.06.2015 stated that she inquired with the prosecutrix as to who troubled her to which prosecutrix replied as 'Sitya'. She/ prosecutrix informed about the incident stating that she was taken into agricultural field. Prior to that she inquired whether she/prosecutrix works in agricultural field, to which she said Yes. The prosecutrix informed her that one Sitya took her to agricultural field. She also informed that Sitya touched her cloths. She stated that she inquired with the prosecutrix whether she shouted and thereupon prosecutrix said "No". She also inquired with the prosecutrix whether she is acquainted with Sitya and she said "Yes" and informed that he is "Anna". But she had not informed about the details. It is true that in the cross-examination PW-4 stated that

prosecutrix disclosed two names i.e. Sitya and Anna and she inquired with her about Anna, but she had not responded. The evidence of this witness that she recorded statement Exh.31 of the prosecutrix has not been challenged on behalf of the appellant in the cross-examination. Exh.31 statement of the prosecutrix recorded by PW-4 shows that Sitya has harassed the prosecutrix. It further shows that to the question what he has done, the prosecutrix had answered that, "laid down and sat on chest". To the further question what else was done the prosecutrix answered that the clothes were touched. So also, to the question whether she was harassed in the house or field, the prosecutrix answered as 'field'. Moreover to the question whether her clothes were removed she replied in the affirmative. As regards the question whether she knows Sitya she answered in the affirmative and to the question who is he she answered as 'Anna'. Thus, from the above questions asked to the prosecutrix by the Headmistress and the answers given by the prosecutrix it can be said that

incident of harassing the prosecutrix has taken place in the field and it is Sitya who harassed her and further it can be said that she was laid and he sat on her chest. But on the basis of affirmative answer given by her to the question whether her clothes were removed it can not be conclusively said that her clothes were removed by Sitya. The prosecutrix is a lady who residing in the village and therefore she must be referring accused Sitaram as a 'Sitya' and as he is cousin father-in-law of mother of the prosecutrix and elder to the prosecutrix she must be calling him as a 'Anna'. Therefore, it can not be said that Sitya and Anna are two different persons even if PW-4 states that the prosecutrix disclosed two names i.e. Sitya and Anna. Therefore argument advanced by the learned counsel for the appellant that appellant is not Sitya or Anna is not acceptable. Thus, statement Exh.31 of the prosecutrix and evidence of PW-4 have corroborated the evidence of PW-1 the complainant eye witness that the appellant was lying on the person of the prosecutrix

at the material time of incident. The evidence of PW-1 that salwar and knicker of the prosecutrix were removed is not sufficient to state that they were removed by the appellant because in her statement Exh.31 the prosecutrix does not specifically say that her said clothes were removed by the appellant and even PW-4 Headmistress has also not stated that the prosecutrix disclosed to her that her above said clothes were removed by the appellant.

18. Thus, on the basis of above referred evidence of PW-1, PW-4 and statement Exh.31 it can be inferred that at the material time of incident appellant was seen lying on the person of the prosecutrix. Now, it is to be seen whether this act of the appellant amounts to attempt to commit rape. This act of the appellant certainly amounts to preparation to commit offence. Therefore, it is necessary to find out whether appellant has done further act of attempt to commit rape by making attempt of penetrating or attempted to insert his

organ/penis in the vagina of the prosecutrix, but said act was failed, to say that attempt was made but it was not successful. It is true that it has come in the evidence of PW-1 that after seeing her the appellant stood-up and ran away holding his dhoti, but as rightly pointed out by the learned counsel for the appellant that PW-1 is not saying that she saw appellant naked while lying on the prosecutrix or she saw him naked while running after seeing her at the time of incident. Therefore, for want of this type of evidence it can not be said that accused attempted for penetration.

19. The prosecution has relied upon the evidence of Dr. Pusha Narote (PW-5) to prove the fact that the appellant attempted to commit rape on the prosecutrix. The evidence of Dr. Narote is that on 03.01.2014 in mid-night at about 12.40 a.m. the prosecutrix was produced for medical examination by one lady police constable alongwith mother of the prosecutrix and she conducted medical examination of

prosecutrix. Mother of the prosecutrix narrated history of sexual assault on prosecutrix by appellant on 03.01.2014 at about 5.30 p.m. in the field. According to her on external examination of the prosecutrix she noticed injuries, namely, (1) Abrasion over back thorasic region-2x2x0.1 c.m. (2) Abrasion over right elbow joint posterior aspect-2x1x0.01 c.m. Dr. Narote stated that probable cause of both injuries was hard and blunt object. Age of injuries was within 24 hours and accordingly she issued certificate Exh.42. She further stated that she had not noted any injury over genital organ. The clothes were changed by the prosecutrix. She collected samples of vaginal swab, perineal swab, pubic hair and nails and as per her opinion, which was provisionally given, "there was evidence of vaginal penetration". In the cross-examination she stated that the hymen was absent, but there was no fresh tear and on that basis she reached to the conclusion of vaginal penetration. Thus, it is clear that only because hymen was absent though there was

no fresh tear Dr. Narote drew conclusion of vaginal penetration. Thus it is obvious that there was no fresh tear and Dr. Narote did not notice injury over genital organ of the prosecutrix. Moreover the age of injuries abrasions noticed on the person of the prosecutrix was within 24 hours, when she was examined within 7 hours of incident. Hence said abrasion injuries being not on genital organ caused even prior to time of incident are not useful to prosecution to state that any attempt was made by appellant to have sexual intercourse with the prosecutrix. Report of physical examination of the prosecutrix Exh.43 as well does not show any injury over external genital of prosecutrix. Therefore, above medical evidence is not sufficient to state that the appellant made attempt of penetration and crossed the line of preparation to commit offence.

20. Exh.50 report of the Chemical Analyser shows that on salwar and knicker of the prosecutrix blood of 'O' group which is blood group of the prosecutrix

as per Chemical Analyser's report Exh.51 was found, but when Dr.Pusha Narote has stated she had not noted any injury over genital organ and there was no fresh tear noticed in the internal examination of the prosecutrix it cannot be said that blood which was found on the salwar and knicker of the prosecutrix was due to the injury on genital organ caused in the attempt of penetration made by the appellant. Here it is pertinent to note that in the opinion Exh.32 given by PW-4-Headmistress it is stated that the prosecutrix has no proper understanding of herself, she is not in a position to take her care and she cannot keep cleanliness of herself during menstruation. In such circumstances possibility of finding of blood of her own group on the clothes of the prosecutrix due to menstruation cannot be totally ruled out. It would not be out of place to mention here that no injury was seen on external genital and body of appellant as per injury certificate Exh.56.

21. On perusal of the impugned judgment it is

seen that in paragraph 29 the learned Additional Sessions Judge referred the decision in the case of **Anil Raghunath Dhiwar Vs. State of Maharashtra, 2016. All M.R. (Cri) 4657** wherein in paragraph nos. 19 and 20 it was observed as under:-

"19. It is true that even in a completed offence of rape, complete or significant penetration of male organ is not necessary, and even slight penetration would be sufficient to constitute rape. The prosecutrix does say, in this case, that there had been a penetration, but evidently the theory of a complete or full penetration, as said by the prosecutrix, is wrong. The prosecutrix, who is a child, cannot be relied upon in this regard, so as to determine whether penetration had, in fact, taken place only on the basis of what she says, and though the medical evidence fails to support such a theory.

20. The learned Additional Sessions Judge observed that complete penetration would not be necessary to constitute the offence of rape, and that the offence of rape is possible of being committed without causing any injury to the genitals. She also observed that non rupture of the hymen is not a conclusive factor to determine this aspect. Though these observations of the learned Additional Sessions Judge are proper and reveal the correct legal position, the fact remains that whether penetration had, indeed, taken place, would be a question of fact to be decided on the basis of entire evidence before the Court. The learned Judge accepted the theory of penetration having

been there, basically, on the basis of presence of blood on the nicker of the victim girl. There is substance in the contention advanced by the learned counsel for the appellant that this could also be due to menstruation."

On the basis of above observations the learned Additional Sessions Judge observed that it is proved by the prosecution that an attempt was made by the appellant in the present case to commit rape on mentally retarded girl, as witnessed by her mother. It appears that this conclusion is appeared to be drawn by the learned Additional Sessions Judge on the basis of opinion expressed by the Doctor that sexual assault was committed, but no injuries were noted on genital organ. As discussed earlier the evidence of the Doctor (PW-5) shows that said Doctor reached to the conclusion of vaginal penetration as the hymen was absent but said opinion as discussed earlier while appreciating the evidence of PW-5 is not acceptable to conclude vaginal penetration as there was no fresh tear and said Doctor did not notice any injury over genital organ of the prosecutrix.

22. It is pertinent to note that in the case of **Anil Raghunath Dhiwar (Supra)** the prosecutrix in her evidence stated that while she was sleeping, she woke up by feeling pain into her vagina. She then woke up and saw her knicker and salwar lying by aside and that the appellant in the said case had inserted his penis into her vagina. The evidence of Dr. Gupta in the said case shows that the prosecutrix gave history of rape by her uncle Anil Dhiwar-the appellant and that Dr. Gupta did not notice any external or internal injuries on the private part of the prosecutrix and opined the case to be of attempt of penetrative vaginal sexual intercourse and the evidence of doctor was supported by certificate issued by him immediately after examination of the prosecutrix. The facts of the present case are different from the facts of the decision in the case of **Anil Raghunath Dhiwar (Supra)** and in the present case only evidence is that the appellant was lying on the prosecutrix and there is nothing to suggest that he had inserted his penis into vagina of the

prosecutrix. Therefore, conclusion drawn by the learned Additional Sessions Judge on the basis of decision in the case of Anil Raghunath Dhiwar (Supra) that the prosecution has proved that an attempt was made by the appellant to commit rape on the prosecutrix/ mentally retarded girl is not correct and sustainable.

23. For the foregoing reasons, the evidence of PWs 1,4 and 5 is not sufficient to prove that the appellant has done any act beyond preparation to commit offence and that necessarily he did further act towards commission of offence i.e. act of penetration, so as to say that he crossed the line between preparation and attempt to say that he attempted to commit rape on the prosecutrix. Thus, I hold that the evidence discussed above led by the prosecution is not sufficient to infer beyond doubt that appellant attempted to commit rape, which offence is punishable under Section 376 read with Section 511 of the IPC. However, on the basis of

evidence of PWs 1 and 4 and statement Exh.31 of the prosecutrix it can be said that the appellant did outrage the modesty of the prosecutrix and committed offence punishable under Section 354 of the IPC.

24. To draw the aforesaid conclusion, I also rely on the decision in the -case of **Baburao s/o Govinda Kumoti Vs. State of Maharashtra, 2019 All MR (Cri) 310**. As per the facts of the said case the victim aged 17 years was asked to remove her cloths by the appellant/accused. The accused too removed his clothes and demanded sexual favour. The victim refused to oblige and attempted to raise an alarm. The accused threatened to kill her with an iron bar. The accused made the victim lie down on the floor and subjected her to forcible sexual intercourse. The evidence on record shows that the accused and the victim were seen lying together naked. In paragraph 8 of the said decision it was observed that the pivotal question is whether the accused can be convicted for attempt to rape under Section 376 read with Section

511 of the IPC. It is proved beyond reasonable doubt, that the accused did outrage the modesty of the victim and Section 354 of the IPC is clearly attracted. However, the evidence on record is not sufficient to prove that the accused crossed the line between preparation and attempt. It is well settled that every offence has four facets. The first is intention, the second is preparation, the third is attempt and fourth is the completion of the offence if the attempt is successful. The intention of the accused, in the present case, may be vile. The fact that he asked the victim to undress and that he too undressed and both were found naked when the door was forcibly opened is suggestive at the most the preparation. However, it is difficult to record a finding that the accused did any overt act towards commission of the offence and thereby crossed the line between preparation and attempt. The appeal against conviction of the appellant was partly allowed and appellant/accused was acquitted of the offence punishable under Section 376 read with

Section 511 of the IPC and Section 4 read with Section 17 of the Protection of Children from Sexual Offences Act (POCSO) Act. However, the accused was convicted for offence punishable under Section 354 of the IPC and was sentenced to suffer rigorous imprisonment for three years.

25. For the reasons discussed above, I hold that the prosecution has failed to prove offence under Section 376 read with Section 511 of the IPC against the appellant beyond reasonable doubt and the offence which is proved beyond doubt against the appellant is of outraging modesty of the prosecutrix punishable under Section 354 of the IPC. The decision in the case of **Tukaram Govind Yadav** (Supra) relied upon by the learned counsel for the appellant is squarely applicable to the present case. Therefore, conviction and sentence recorded by the Additional Sessions Judge against the appellant for the offence under Section 376 read with Section 511 of the IPC on the basis of incriminating evidence referred in paragraph

No.24 of the impugned judgment is not sustainable. In paragraph 24 the learned Additional Sessions Judge observed that the appellant was absconding from date of incident i.e. 03.01.2014 till 08.06.2015 and he has not offered any explanation about his absence from village and the complainant (PW-1) noticed the appellant lying on the body of the prosecutrix and FIR was promptly lodged and therefore offence of attempt to commit rape has been proved against the appellant. It is true that the appellant has not offered explanation about his absence from the village for the period mentioned above, FIR was promptly lodged and PW-1 was eye witness to the incident and she noticed appellant lying on the person of the prosecutrix, but when as discussed earlier the prosecution has not established any overt act of the appellant towards the commission of the offence of rape the above referred incriminating evidence against the appellant is not sufficient to attract offence under Section 376 read with Section 511 of the IPC against the appellant. Therefore

conviction and sentence recorded against the appellant for the offence under Section 376 read with Section 511 of the IPC being unsustainable is liable to be set aside and appellant is to be acquitted of the said offence. However the appellant can be convicted for offence under Section 354 of the IPC even in the absence of charge under Section 354 of the IPC as this offence being minor offence to offence under Section 376(2)(1) of the IPC under which charge was framed, in view of the provisions under Section 222 of the Code of Criminal Procedure, by allowing the appeal partly.

26. As regards the punishment to be awarded for the offence under Section 354 of the IPC is concerned. The punishment provided for the said offence is imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine. The incident took place on 03/01/2014. Appellant is in jail since 08/06/2015 i.e. for more

than 3 years, 9 months and 22 days. Considering the said period and the present age of the appellant/accused i.e. 65 years and punishment provided for the offence under Section 354 of the IPC the period undergone by the appellant/accused with fine of Rs.5,000/- would be the proper sentence and would meet the ends of justice.

27. In the result following order is passed:-

ORDER

(i) The appeal is partly allowed.

(ii) The impugned judgment and order dated 27/01/2017 passed by the Additional Sessions Judge, Ahmednagar in Sessions Case No.219 of 2015 convicting and sentencing the appellant/accused for the offence punishable under Section 376 read with Section 511 of the IPC is set aside and he is acquitted of the said offence.

(iii) However, the appellant/accused is

convicted for the offence punishable under Section 354 of the IPC and he is sentenced to suffer Rigorous Imprisonment for the period undergone by him from 08/06/2015 i.e. the date of his arrest, and to pay a fine of Rs.5,000/-, in default to suffer simple imprisonment for one year.

(iv) Fine amount of Rs.5,000/- imposed as per impugned judgment and deposited by the appellant immediately be treated as payment of fine now imposed for the offence under Section 354 of the IPC.

(v) Rest part of the impugned judgment and order is maintained.

(vi) Since the appellant has already paid fine amount and the sentence imposed is the period undergone he shall be released forthwith if not required in any other crime or case.

(vii) Record and Proceedings in Sessions Case

(45) criappeal147.18 final

No. 219 of 2015 be sent to the trial Court forthwith
for compliance of the order.

[S.M.GAVHANE, J.]

SSP