

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.715 OF 2015**

Pramod Laxmikant Upadhya	]	
aged 31 years, R/o.Vishwakarma Chawl,	]	
Near Khan Medical Yadav Nagar,	]	
Saki Naka, Andheri (E) – 72.	]	
Currently lodged at Nasik Jail	]	Appellant
		(Orig. Accused)

Versus		
STATE OF MAHARASHTRA	]	
(through Powai Police Station in	]	
C.R. No.47 of 2014)	]	Respondent
		(Original Complainant)

.....

Ms. Apeksha Vora, for the Appellant.

Mr. Vaibhav Bagade, Special Public Prosecutor a/w Ms. M.H. Mhatre,
Additional Public Prosecutor, for Respondent-State.

.....

CORAM: PRITHVIRAJ K. CHAVAN, J.

RESERVED ON: 27th FEBRUARY, 2020.

PRONOUNCED ON: 2ND JUNE, 2020.

JUDGMENT:

Feeling aggrieved with and dissatisfied by the impugned judgment and order of conviction dated 21st May, 2015 passed by the learned Sessions Judge, Mumbai, in Sessions Case No.534 of 2014 convicting the appellant of the offences punishable under section 376

Shailaja
S.
Halkude
Digitally
signed by
Shailaja S.
Halkude
Date:
2020.06.02
20:13:18
+0530

and 392 of the Indian Penal Code, (for short 'I.P.C'), the present appeal has been filed amongst following facts and grounds:

The victim is a dance teacher. She is resident of Rainbow Apartment, Mumbai. Her father was working in a private company at Jakarta, Indonesia. He was residing at Jakarta along with her mother. The victim had been running a Dance School at Chandivali. Incident in question had occurred on 23rd January, 2014. On that day, the victim returned from the dance class at about 6.30 p.m. Kaveri, Vikrant and Hemant Gupta were her students. They had decided to take dinner in Hotel Hary's Restaurant at Hiranandani, Powai. They had consumed considerable amount of wine at the Hotel. Thereafter, all the three left the hotel in an auto rickshaw. It was around 1.40 a.m. Kaveri was dropped at her residence situate at Nahar Amrit Shakti. Thereafter, both the victim and Hemant Gupta proceeded further in the same auto rickshaw. Admittedly, the victim was fully under the influence of wine. When the rickshaw arrived near her Housing Society, Hemant asked her to alight. However, she could not realize as to where she should move due to the influence of alcohol. She was carrying a purse, wallet and Nokia Mobile with her.

2. On 24th January, 2014, at around 7.00 a.m, when she regained her consciousness, she found herself admitted in the Hospital with several injuries on her person. She had a contusion over her head, bruises on her hands and legs as well as bite marks on her breasts. She had also pain in her private part. She realized that something had gone wrong with her.

3. Police Station at Powai received an information on 24th January, 2014 at about 8.00 a.m from Seven Hills Hospital that there was a case of sexual assault and rape. P.W.24-Rajeev Chavan is the Investigating Officer of this case. Station diary entry was effected. He formed a team. Lady Police Sub Inspector Naik recorded statement of the victim. An offence came to be registered under section 376 and 392 of the I.P.C vide C.R. No.47 of 2014. Investigating Officer had collected CCTV footage from Rainbow Society. A team from Forensic Science Laboratory, Kalina was pressed into service. Since seven Hills Hospital was newly established, the requisite forms were called for from K.E.M Hospital, Mumbai. Statements of the witnesses were recorded. Clothes of the victim were seized in the presence of Panchas (**Exhibit 92**). It comprises a s black coloured long top and a black coloured bra.

4. Auto Rickshaw Driver Vinodkumar Tiwari was brought to the Police Station and inquired with. He identified the passengers i.e Hemant Gupta and Kaveri Singhvi. The detection staff brought the Security Guard of the said Housing Society to the Police Station including the appellant. P.W.21- Shashank Mishra was the watchman of the Rainbow Society. He was with the appellant at the relevant time. It revealed from his statement that the appellant was not on duty for some time on 24th January, 2014. When the appellant was asked about it, he could not give any satisfactory answer. His movements were found to be suspicious after watching the C.C.T.V footage. He was, therefore, arrested. While in the Police custody the appellant voluntarily made a statement. Pursuant to his statement, in the presence of Panch witnesses, Investigating Officer recovered clothes of the appellant which were on his person at the time of committing the offence.

5. In a subsequent statement voluntarily given by him before the Panch witnesses, the Investigating Officer could recover mobile handset, battery and SIM card of the victim from the Housing Society at the instance of the appellant. The C.C.T.V footage which came to be recovered, as a part of investigation, has been duly seized under a

panchanama.

6. On the basis of disclosure statement made by the appellant on 25th January, 2014, memory card as well as cell phone was discovered near stilt car parking and duct of the lift at the instance of the appellant. Those articles were recovered from the premises of Paradise Society, Raheja Vihar. All the muddemal articles were sent for chemical analysis to the Forensic Science Laboratory, Kalina.

7. After investigation, P.W.24- Rajiv Chavan, the Investigating Officer laid a charge-sheet against the appellant in the Court of Metropolitan Magistrate, Mumbai. Since, the offences were exclusively triable by the Sessions Court, the case was committed to the Sessions Court, Mumbai.

8. The learned Additional Sessions Judge framed a charge below **Exhibit 6** against the appellant under section 376 and 392 of the I.P.C. It was read over and explained to him to which he pleaded not guilty and claimed trial. His defence was of total denial and false implication in this case. No defence evidence has been adduced on his behalf.

9. The prosecution examined 24 witnesses. The learned Additional Sessions Judge placed reliance by exhibiting the evidence in the form of C.C.T.V footage wherein the appellant could be seen, as well as discovery of mobile handset, SIM Card and battery of the handset at the instance of the appellant. The learned Additional Sessions Judge also observed that the injuries on the person of the victim which have been described by P.W.14-Dr. Hemlata Pandey (Forensic Odontologist) as regards the matching of the bite marks on the breast of the victim vis-a-vis the appellant was found to be clinching and acceptable.

10. I heard Ms. Apeksha Vora, learned Counsel appearing for the appellant and Mr. Bagade, learned Special Public Prosecutor for respondent-State.

11. At the outset, Ms. Vora would argue that the prosecution has not proved the charge beyond all reasonable doubts as there are several omissions and discrepancies in the evidence of the prosecution witnesses. There are several material omissions and contradictions which go to the root of the prosecution case and render the testimony of the witnesses unworthy of credit. She would argue that the

impugned judgment is based on surmises and conjectures, in the sense that the learned Judge wrongly ignored material omissions and contradictions in the evidence of the witnesses, more particularly in the evidence of the victim. She would argue that the victim made improvements with regard to her pain in the private part, which in fact does not find place in her statement recorded by the Police. It is contended that the possibility that the victim might have sustained injuries before she was dropped by her friends in an inebriated condition, cannot be ruled out. It is brought to my notice that friends of the victim's namely Hemant Gupta and Kaveri Singhavi have not been examined by the prosecution though their statements were recorded by the Police under section 161 of Cr. P.C. Therefore, adverse inference, according to the learned Counsel, is required to be drawn against the prosecution for suppressing the evidence of material witnesses. It is also brought to my notice that the very first conversation of the victim was with her real brother which could not be substantiated for want of his evidence. It is further contended that record of Seven Hills Hospital does not indicate injuries on the private part of the victim nor it speaks about violent sexual intercourse. Presence of smegma on the private part of the appellant during his medical examination after the incident is sufficient to discard the

theory of rape.

12. The learned Counsel would further argue that bite marks found on the breasts of the victim is not a conclusive piece of evidence as there are discrepancies with regard to the size of injuries. The appellant is classified as a possible biter being third of the five categories of biters. It is contended that the learned additional sessions Judge has committed an error in relying upon the spot panchanama as well as seizure memos. It is contended that the learned trial Judge has erred in relying upon Compact Disk of the C.C.T.V footage which is in violation of Section 65B of the Indian Evidence Act, 1872 (for short 'Evidence Act'). Thus, it is contended that the prosecution has failed to prove the charges beyond all reasonable doubts. The learned Counsel has thus prayed for acquittal of the appellant.

13. The learned Special Public Prosecutor, on the other hand, supported the judgment of conviction by taking me through the evidence of not only the prosecution witnesses but also displayed the C.C.T.V footage on the computer screen and strenuously argued that the circumstances formed a complete chain indicating the complicity

of the appellant in the crime. There is no question of any third person being involved in the crime and there is no reason to implicate him falsely. The learned Special Public Prosecutor relied on the evidence of the Odontologist which, according to him, is so cogent and convincing that there is hardly any scope to raise any doubt about the genuineness of the prosecution case.

14. The prosecution case revolves around following circumstantial evidence. The circumstances are as follows:

- (a) C.C.T.V footage of Raheja Vihar Rainbow Apartments where the victim and some of the witnesses reside.
- (b) The statement of P.W.21-Shashank Mishra, another security guard who was present on duty at the relevant time.
- (c) Discovery of mobile, SIM card and battery of the victim at the instance of the appellant pursuant to his statement under section 27 of the Evidence Act.
- (d) The injury marks on the person of the appellant of which he could not give any explanation either in the cross-examination or in his statement under section 313 of the Cr. P.C.
- (e) Opinion of Odontologist P.W.14- Dr. Hemlata Pandye coupled with evidence of P.W.19-Dr. Chitwan Dubey who examined the victim immediately after she was brought to the Seven

Hills Hospital. Dr. Dubey is a Gynecologist.

The circumstances, if juxtaposed, would definitely point towards complicity of the appellant in the crime for the reasons to follow:

15. First of all, it would be expedient to scan the evidence of the victim who testified as P.W.1. Her evidence reveals that on 23rd January, 2014, she had been to the dance class at Andheri (West) at about 11.30 a.m. She returned by 6.30 p.m. In her class, there were her friends namely Kaveri, Vikrant and one Hemant Gupta who had decided to go for a dinner at Hary's Restaurant, Powai. Admittedly, Kaveri and Hemant are the students of the victim. At about 8.45 p.m on the same day, all of them went to Harris Restaurant in a rickshaw. They consumed wine. When the restaurant was about to be closed, the victim first went to drop Kaveri at Nahar Amrit Shakti situate in Chandivali. She testified that due to the influence of wine, she was quite tired and feeling sleepy. When the rickshaw reached near her society, Hemant asked her to get off. The victim had a vomiting sensation. Thereafter, she does

not remember anything. She gained her consciousness in the hospital in the morning of 24th January, 2014. She woke up with severe body pain as well as pain in her private part. There was swelling to her head as well as on her right hand elbow. There were bruises on her person i.e on her thighs and legs. She had also bite marks on both breasts. She realized that she was sexually abused and assaulted by someone .

16. Her brother Vivek was about to leave the flat around 5.00 a.m to take his dogs out when he noticed the victim in a semi unconscious state with a half naked condition in the lobby of the Rainbow Society. Her clothes were soiled. She was taken to the flat by her sister. After cleaning her and taking some rest, brother of the victim called their mother at Jakarta and told about the condition of the victim. At around 7.00 a.m, the victim was taken to Seven Hills Hospital. A Police officer recorded her statement. She was discharged from the Hospital on 24th January, 2014 at 9.00 p.m. On 15th February, 2014, her statement under section 164 of Cr. P.C came to be recorded by Metropolitan Magistrate, Andheri. By that time, the Police had shown her mobile phone kept in a plastic cover. She recognized

that it was her mobile phone.

17. During cross-examination, learned Counsel for the appellant tried to bring on record certain omissions with respect to her statement recorded by the Police. These omissions, as a matter of fact, are not material one in the sense that the victim had not named the appellant or anyone else as an author of the crime. Merely because there is no mention in the statement that she had pain in her private part does not render her testimony unbelievable in view of the other clinching evidence on record. However, the victim in her cross-examination admits that she used to consume liquor but on special occasions. She also admits that she used to take contraceptive emergency pills on and off as she used to have sexual intercourse. Be that as it may. This admission of the victim, per say, would not be of any relevance with the case in hand.

18. The fact as regards forcible sexual intercourse or rape of the victim has been substantiated by the evidence of P.W. 19-Dr. Chitwan Dubey. The evidence of P.W.19- Dr. Chitwan Dubey reveals that at the relevant time, he was

working as a consultant Gynecologist in Seven Hills Hospital. On 24th January, 2014, he received a call from the Casualty Department at about 8.30 a.m. The victim was found in an emotionally traumatic condition. When he examined her, he found that her private parts, waist, thigh and breasts were indicating injuries which suggest a violent sexual assault. Since this Doctor was earlier working in the Government Hospital, he was aware of the procedure to be followed while examining and treating rape victim. He testified that injuries were suggestive of rape. He had called for the necessary forms from K.E.M. Hospital so that he could complete the formalities. He had collected vaginal swab, urethral swab and blood from the wounds. He sealed the samples in a box. He noticed the following injuries on the person of the victim;

- (a) Bruise on right forearm extension aspect mid 1/3rd 8 cm above wrist 2x1.5 cm red in colour, nature of injury simple.
- (b) Bruise on Right arm middle aspect lower 1/3rd 0.5 c.m red in colour nature of injury simple.
- (c) Bruise on Axilla 3x2 c.m red in colour, nature of injury simple.
- (d) Bruise on flexor aspect of left forearm 7 c.m from wrist 1x1 c.m red in colour, nature of injury simple..

- (e) Bruise on lateral aspect of left forearm middle 1/3rd 2.5x1 c.m red in colour, nature of injury simple.
- (f) Bruise on above angle over skin of tibia left leg 3x2.5 cm red in colour, nature of injury simple.
- (g) Finger tip bruising within medial aspect of left leg 3x1.5 c.m red in colour, nature of injury simple.
- (h) Finger tip bruising later outer aspect of left knee 2x1 c.m red in colour, nature of injury simple.
- (i) 3 oblique abrasions medial aspect of left thigh lower 1/3rd 7 x 0.1 cm, 4.01 c.m, 3x0.1 c.m red in colour, nature of injury simple.
- (j) Multiple impact abrasion poster later aspect of right thigh 4.5 c.m. red in colour, nature of injury simple.
- (k) Impact abrasion posterior aspect of thigh middle 1/3rd (right) 4x1 c.m red in colour, nature of injury simple.
- (l) Boggy swelling tender on the occipital brain scalp 4x4 c.m red in colour, nature of injury simple.
- (m) Right breast abrasion 0.3 x 2 c.m with teeth bite mark over nipple reddish in colour.
- (n) Left breast reddish abrasion over areolar nature 2.2 c.m x 0.4 c.m with teeth bite mark on nipple.
- (o) Left side lower back irregular abrasion of size 0.2 c.m x 0.4 c.m over an area of 7x6 c.m

19. The learned Counsel for the appellant made a futile attempt to rebut the testimony of this witness. In the cross-examination, it has been reiterated that there were bruises and

abrasions on the person of the victim. There is nothing in the cross which would be helpful to the defence in any manner. I do not see any reason to doubt the well narrated evidence of Dr. Chitwan Dubey.

20. The next important evidence would be that of P.W.14- Hemlata Pandey who has a Bachelor's Degree in Dental Surgery and Masters in Forensic Odontology. She has also obtained a diploma in Forensic Human Identification. At the relevant time, she was working in the department of forensic medicine in the K.E.M. Hospital. She received a request from Powai Police station on 24th January, 2014 for examination of the injuries which were suspected to be bite marks on the body of the victim in connection with the present case. She went to examine the victim at Seven Hills Hospital on the same day. After obtaining consent of the victim, she took photographs of the injuries. She filled necessary forms of consent which are at **Exhibit 55**. She took the photographs of the bite marks of the portion of left and right breasts with scars present.

21. Evidence of Hemlata Pandye reveals that she issued a request letter to examine the appellant on 25th January, 2014. Due consent of the appellant was taken before examining him. The consent

form is at **Exhibit 56**. P.W.14-Dr.Hemlata Pandye took dental impressions of the appellant. She also took dental photograph. She took the dental impression of the appellant and put it in the dental model. She examined the injuries of the victim and the dental model of the appellant which was photographed and scanned the photograph on flat bed scanner with the scale. Overlays were prepared from the scanned photographs. She testified that the injuries photographs and scanned photographs were made one is to one measurement.

22. The injury photographs of the bite marks of the victim and scanned photograph of the appellant matched with each other. The overlay prepared was super imposed on the bite marks present on the victim's breast and the comparison was conducted. Her evidence further reveals that the bite mark on the right breast was about 3.3.5 c.m, on the right side specific feature of the biter's teeth was observed. While the left side was diffused. Overall shape of the arch can be observed in the photograph. The left breast exhibited bite mark which was 3.3.5 c.m wide, reddish in colour. This mark was diffused. On examination of the appellant and from the photographs of the teeth of the appellant, it was observed that the biting edge of upper right lateral incise wound was curved and tooth was supra erupted. Spacing was

present between biting edge of upper left central inciser and lateral incise wound. Spacing was also present on biting edge between right central and lateral incise wound. Abrasion was present with upper and lower and left and right canines. The pressure point on the bite mark injury on right breast coincided with the supra erupted and curve biting edge of upper right lateral incise wound of the appellant. The spacing present between the right lateral and central incisor coincided with the gap of the injury. The shape of the bite mark is consistent with the shape of appellant's upper dental arch. The bite marks present on the right breast exhibit arch of biter's teeth and the features are consistent with the feature present in appellant's dentition. She identified the appellant in the trial Court. She testified that the report was prepared by her and submitted to Powai Police station. It also bears signature of Dr. Harish Pathak, Head of the Department. The letters and photographs are proved at **Exhibit 57 colly**.

23. Again in the cross-examination, a futile attempt has been made by the learned Counsel to shatter the version of the expert. Certain suggestions were given which have been denied. It has been brought in the cross-examination that there are five categories namely;

- (a) definite biter
- (b) probable biter
- (c) possible biter
- (d) definitely not the biter
- (e) inconclusive

She admits in the cross that she had specifically mentioned the teeth by which there are marks on the breasts of the victim. Along with other factors, the nature of the bite marks corresponds to the teeth produced the bite marks. She categorized the appellant in a probable biter category. The evidence of this witness, indeed to a very considerable extent, establishes the fact that the bite marks on the breasts of the victim were of the appellant and none other. She denied a suggestion in the cross that there is no definite science in forensic Odontology since there are no definite specific guidelines by the Indian Medical Board. She admits that it is not imperative to collect the swab of saliva to come to a conclusion as it is a specialized branch *qua* the Odontology science and therefore, there was no question of collection of saliva. She admits that the guidelines which are provided by forensic Odontology are different and the guidelines are merely recommendations which may or may not be followed.

24. Now, turning to the evidence of P.W.13-Dr. Sachin Patil

who had examined the appellant. He had examined the appellant on 25th January, 2014. While working as an Assistant Professor in Forensic Medicine Department in K.E.M. Hospital, he received a requisition from the Police which is proved at **Exhibit 13**. After taking consent of the appellant, he examined and noticed the following injuries:

- (a) Abrasion was present over posterior aspect of left shoulder, upper half of size 1.5 x 0.5 c.m, reddish.
- (b) Contusion present over anterior aspect of right forearm of size 6 c.m x 4 c.m, reddish.
- (c) Contusion present over anterior aspect of left forearm lower 1/3rd of size 3 c.m x 2 c.m., reddish.

The medical officer P.W.13-Dr. Sachin Patil testified that on systemic examination he did not notice any abnormality. He testified that smegma was slightly present. He collected his blood samples, pubic hairs, nail clippings of both hand, two penile swab from glans penis, corona and blood for detection of sexually transferred diseases and handed it over in a sealed packet to the Investigating Officer P. I. Chavan. It is testified by P.W.13- Dr. Sachin Patil that the appellant was capable in performing sexual intercourse. The samples were

preserved for necessary investigations. He prepared the detailed report about it. It bears his signature. The report is proved at **Exhibit 53**. It is testified by him that he has conducted examination with one Dr. Shashank Tyagi. The report also bears signature of Dr. Shashank Tyagi. There is signature of the appellant too. During trial, he identified the appellant.

25. In the cross-examination, he testified that if the smegma is present and D.N.A test is negative then it does not negate the case of rape. It indicates that the complete penetration does not occur. He testified that smegma was slightly present. He denied the suggestion that due to the passage of time i.e from the time of the incident till examination, smegma disappears. He denied the suggestion that he has not examined the appellant.

26. Evidence of P.W.5- Ankita Koli is also quite relevant in the present set of facts. She is also a resident of Rainbow Apartment. At the relevant time, she was working in the Reliance Retail as a senior Manager. She identified the appellant who is a security guard in Raheja building. The appellant was introduced to her by her Driver as the appellant was in need of some extra work. The appellant has

admitted this fact in his statement under section 313 of the Cr. P.C.

27. The evidence of P.W.5-Ankita Koli reveals that on 24th January, 2014, at around 3.55 p.m, she was leaving for Ahmedabad by a flight. She came down from the lift. She had her luggage. When she came out of the lift she heard a moaning sound and noticed a lady lying on her back and her hands were under her neck. She was in a semi conscious condition. Her evidence reveals that the said lady was wearing only a black top up to her thigh. After watching her, she first informed the security guard by rushing to his cabin. She noticed another new guard over there who was sleeping. She knocked the door and woke him up. She informed him about the said lady lying in the lobby. This witness did not know that the victim also stays in the same building. She asked the security guard to drop her to her flat. Thereafter, she left in a cab.

28. P.W.5-Ankita Koli specifically deposed that when she left the building, the appellant was not on duty. She left the society at around 3.55 a.m. On 26th January, 2014, when she returned, she came to know that something had happened with the said lady. This evidence is quite relevant as she had seen the victim in the lobby and

also the fact that the appellant was not on duty. There is nothing in her cross as she did not say anything against the appellant except as regards his absence which was conspicuous.

29. Apart from the evidence of P.W.5-Ankita Koli, there is one more independent witness namely P.W.4-Yash Patel who is also resident of Rainbow Apartments. According to him, on 24th January, 2014, he returned around 2.15 a.m to 2.20 a.m. He was waiting outside the gate to get it opened. He witnessed one auto rickshaw parked and one boy was vomiting. Thereafter, the watchman opened the gate. The person who opened the gate, according to this witness was the appellant. While going towards the lobby, this witness saw the appellant standing there and was watching towards the Rickshaw. His evidence further reveals that when he asked the appellant as to whether the person was from their building to which the appellant replied that the victim is staying in Flat No.704 and she is there. The rickshaw took a “U” turn and about to leave. This witness, however, could not see the victim getting down from the rickshaw. Thus, presence of the appellant at the relevant time has been sufficiently proved from the evidence of other witnesses and P.W.4-Yash Patel.

30. The learned Special Public Prosecutor while displaying C.C.T.V footage on the computer screen in the Court has simultaneously, taken me through the notes of his arguments which corresponds with the minute to minute movements/details of the appellants as well as other relevant facts of the incident in question which read as follows:

“Raheja Main Gate

Camera No.3

Time : Description

01:58:05 Yash on bike with friend leaves Raheja Vihar

02:07:40 Auto enters Raheja Vihar

02:17:13 Yash on bike enters Raheja Vihar

02:22:56 Auto exits Raheja main gate

Sunrise (time difference between sunrise and Rainbow of about 15 to 17 mins)

ch01 20140124014550.mp4

01:48:17 Auto stops infront of Rainbow

01:57:21 Yash comes back to Rainbow

01:58:33 Auto leaves Rainbow

02:02:56 Upadhyay seen walking towards Lakeside (1st time)

02:07:02 Upadhyay seen returning to Rainbow

ch01 20140124021302.mp4

02:13:48 Upadhyay seen walking towards Lakeside (2nd time. Head not covered)

ch01 20140124024005.mp4

02:54:33 Upadhyay seen coming back to Rainbow2

03:03:08 Upadhyay leaves Rainbow, seen walking towards Paradise

ch01 20140124030652.mp4

03:28:25 *Damini seen walking towards Rainbow*

Lakeside (no time available on camera so please refer to time as time elapsed)

Camera: ***A WING BACKSIDE _020000(1)***

01:08 - *Auto seen going and stopping in front of Rainbow*
10:13 - *Yash Returns to Rainbow*
11:28 - *Auto takes a U turn from Rainbow to go*
11:41 - *Auto stops in from of Lakeside (estimate)*
16:09 - *Upadhay seen walking from Rainbow to Lakeside (1st time)*
19:41 - *Upadhay seen walking back to Rainbow*
26:55 - *Upadhay seen walking from Rainbow towards Lakeside (2nd time) (head not covered)*

Camera: ***SECURITY CABIN _0200000(1)***

11:55 - *Auto stops in front of Lakeside, Damini and Hemant get off.*
13:53 - *Hemant gets in to the auto. Auto leaves to go.*
17:00 - 19:39 - *Upadhay walks in front of lakeside takes a U turn and is seen there for 2 mins 39 seconds.*
27:33 - *Upadhay comes back the second time is seen there.*

Camera: ***SECURITY CABIN _023100(0)***

6:15 – 7:01 - *Upadhay seen*
14:45 – 156:23 - *Some activity seen. Upadhay seen between two cars on the ground. Only head noticeable.*

Camera: ***SECURITY CABIN _30000(1)***

16:20 - 16:28 - *Upadhay seen walking towards Paradise*

Rainbow

1ch03

01:52:24 - Yash is seen exiting the lift with friend and exits lobby

2ch02

01:53:24 - Watchman Upadhaya opens gate for Yash and friend

3ch01

*01:53:31 - (Continued from previous clip)
Watchman Upadhaya opens gate for Yash*

7ch02

02:05:53 - Auto comes and stops in front of Rainbow

9ch02

*02:09:53 - Auto is still waiting watchman Upadhaya is staring at the
Auto*

10ch02

02:11:24 - Auto still waiting watchman Upadhya still staring

11ch01

*02:11:32 - Watchman Upadhya seen hovering near gate and cabin
and still looking towards auto*

12ch01

*02:13:01 - Watchman Upadhya standing at the gate staring at the
auto*

13ch02

*02:14:47 – 02:15:00 - Watchman Upadhya still looking at auto.
Yash returns on bike. Upadhya opens gate for Yash*

14ch01

02:14:47 - same as the above clip from a different angle

15ch02

*02:15:46 - Watchman Upadhya standing at the gate looking at auto,
Hemant and Damini seen getting into the auto*

16ch01

02:15:52 - Watchman Upadhya looking at auto, Yash calls him and

enquires auto seen going back.

02:16:16 - Auto seen going, Yash gone, watchman Upadhya still looking in the direction of the auto

17ch03

02:16:22 - Yash enters in the lobby goes up in the lift

18ch02

02:16:10 - Auto seen taking U turn at Rainbow2

19ch02

02:18:14 - Watchman Upadhya looking in the direction where auto went

20ch01

02:18:13 - Watchman Upadhya still looking in that direction.

21ch01

02:19:33 - Watchman Upadhya still looking in that direction

22ch02

02:19:32 - same as the above clip

23ch02

02:20:14 - Watchman Upadhya opens gate and goes outside rainbow building

24ch02

02:20:30 - Watchman Upadhya seen walking towards lakeside

25ch01

02:20:38 - Watchman Upadhya seen walking towards lakeside

26ch01

02:24:37 - Watchman Upadhya seen coming back to Rainbow

27ch02

02:24:48 - Watchman Upadhya seen coming back to Rainbow still looking in the direction of lakeside

27ch01

02:25:00 - *same as above*

29ch02

02:29:05 – 02:30:06 - *Watchman Upadhya seen going to the security cabin, goes to the gate about to go out but comes back*

30ch01

02:269:09 - *same as above*

31ch01.

02:30:37 - *Watchman Upadhya goes to cabin, exits cabin exits Rainbow gate seen going towards lakeside*

32ch02

02:30:42 - *same as above*

42ch01

03:12:08 - *Watchman Upadhya seen coming back to Rainbow*

43ch01

03:12:28 - *Watchman Upadhya goes to cabin and sits down*

44ch02

- *same as above*

45ch02

03:13:30 - *Watchman Upadhya seen sitting in the cabin*

46ch02

03:14:35 *Watchman Upadhya inside the cabin folding shawl*

47ch01

Same as above

48ch02

03:14:54 *Watchman Upadhya still inside the cabin*

49ch01

03:15:40 *Watchman Upadhya exits the cabin still looking in that direction walks towards the inside of the compound with water bottle in hand.*

05ch02
03:15:48 *Same as above*

51ch01
03:17:13 *Watchman Upadhya seen going towards the cabin*

52ch02
03:17:21 *same as above*

58ch02
03:19:43 *Watchman Upadhya seen going towards the cabin
second watchman there*

59ch01
same as above

60ch01
same as above

60ch02
03:20:25 *Watchman Upadhya seen going out of Rainbow*

61ch01
03:20:26 *Watchman Upadhya seen exiting Rainbow going towards
Lakeside/Paradise*

68ch01
03:46:08 *Damini seen staggering towards Rainbow outside the
gate*

69ch02
03:46:12 *Damini struggling in a disoriented state enters the gate*

70ch01
03:46:36 *enters the gate pacing there unsure where to go then
seen running towards the lobby*

71ch03
03:47:01 *enters lobby presses the lift button barely above to
support her head which is lolling down*

72ch03

03:47:29 *Damini still in the lobby near the lift unable to stand upright. Constantly pressing her abdomen area and rubbing her legs up to down in apparent pain*

73ch03
03:48:52 *Damini disoriented wandering in the lobby*

74ch03
03:49:08 *Damini seen going to the other side of the lobby*

76ch03
03:52:14 *Antika seen coming out of the lift exit lobby*

77ch01
03:53:08 *Antika seen going towards watchmans cabin wakes up the watchman tells him about Damini lying in the lobby*

78ch02
03:53:20 *Antika at the watchman cabin telling him to take action*

79ch01
03:53:32 *Antika still at watchman cabin*

80ch01
03:53:46 *Antika still explaining to the other watchman pointing towards the lobby. Then she exits gate and watchman seen walking towards lobby looks towards the inside continues walking*

81ch01
03:53:50 *Antika exits Rainbow and watchman seen walking towards lobby turns his head looks towards the inside Antika seen getting into the taxi watchman seen casually walking back to cabin no action taken*

82ch02
03:54:52 *Watchman back in the cabin*

83ch02
03:55:15 *Watchman in the cabin*

84ch02

03:56:05 *Watchman still in the cabin*

132ch03
05:00:29 *Vivek comes out of the lift in the lobby with 2 dogs seen going towards lobby exit*

133ch02
05:01:00 *other watchman seen getting Sunrise watchman to Rainbow enter Rainbow gate*

134ch01
05:00:52 *other watchman seen getting Sunrise watchman to Rainbow enter Rainbow gate walk towards lobby*

135ch03
05:00:55 *Vivek seen walknig with 2 dogs to the other end of lobby and finds Damini lying there in shock and disbelief*

136ch03
05:02:07 *Sunrise watchman with Rainbow watchman standing in lobby looking at Damini. Vivek asks the two watchman to leave*

137ch03
05:02:42 *Damini seen walking in pain walks towards the lift with Vivek and 2 dogs. Vivek helps Damini enter the lift*

138ch02
05:02:59 *Sunrise watchman exits Rainbow Gate*

139ch01
05:03:00 *Same as above*

155ch03
05:08:02 *Vivek once again with 2 dogs seen exiting lift going towards lobby exit*

156ch01
05:08:28 *Vivek seen exiting Rainbow gate taking dogs for walking*

157ch02
05:08:33 *Vivek takes 2 dogs for walking*

204ch02
05:30:25 *Vivek back from walk with 2 dogs inquiring with the watchman*

205ch01
05:30:28 *Same as above*

206ch02
05:31:17 *Vivek finishes asking watchman seen walking towards lobby*

207ch01
05:31:21 *Vivek walks with 2 dogs towards the lobby*

208ch03
05:31:36 *Vivek back with dogs enters the lift*

224ch03
05:37:25 *Vivek seen exiting lift in the lobby taking 3rd dog for a walk*

225ch01
05:37/8:00 *Vivek seen taking 3rd dog for walk. Says something to watchman exits gate*

237ch01
05:42:0 *Vivek comes back from 3rd dog walk seen questioning watchman exists gate*

238ch01
05:42:18 *Vivek still talking to watchman and then walks with dog to the lobby*

239ch03
05:42:40 *Vivek seen entering lift with dog*

246ch01
05:57:53 *Watchman Upadhya comes back*

247ch03
06:02:23 *Bhattacharya seen exiting lobby taking dog for a walk*

248ch01
06:02:40 *Watchman Upadhya seen informing with graphic details about events of the night*

249ch01
06:03:43 *Bhattacharya talks and listens to watchman Upadhya leaves for morning walk with dog*

250ch03
06:14:23 *Mrinalini, Vivek along with disoriented Damini seen exiting lobby*

251ch01
06:15:32 *Watchman Upadhya and other watchman open gate for Mrinalini car to exit*

06:15:48 *Mrinalini Damini Vivke leave for hospital*

252ch02
06:15:48 *car exits gate. Both watchmen look at the car going down the road*

253ch01
06:26:04 *Ganga house maid seen arriving at Rainbow entering gate and questioning Watchman Upadhya, Bhattacharya same time returned with his dog*

254ch03
06:26:46 *Bhattacharya and Ganga seen in the lobby. Ganga takes the lift and Bhattacharya walks up to his flat on 1st floor.”*

31. Thus, from the evidence of the witnesses, it can be seen that the appellant was absent from duty for about 30 to 40 minutes. Thereafter, he returned to the cabin, picked up water bottle.

Thereafter, he went for a tea. This has been testified by another security guard P.W.21-Shashank Mishra. The argument of the learned Counsel for the appellant that non examination of Hemant Gupta and Kaveri would lead to drawing adverse inference against the prosecution is futile one. I am afraid this argument cannot be accepted for the reasons that P.W.1-victim, P.W.3- Vinodkumar Tiwari, Auto Driver and P.W.21-Shashank Mishra have sufficiently established through their evidence as regards the victim travelling from Hary's Restaurant to Rainbow Apartments and left the auto over there. In that view of the matter, the non examination of Hemant Gupta and Kaveri Singhvi would not at all be fatal to the prosecution case as there is no suggestion that the victim did not return to her society at the relevant time. Moreover, there is nothing on record to show that non examination of these two witnesses would be prejudicial to the appellant. There can be no room for any doubt that it was the appellant who had raped the victim and robbed her of her belongings.

32. Interestingly, while answering question No.58 in his statement under section 313 of the Cr.P.C, the appellant admits that P.W.7- Mohammed Rafiq who is the Manager of Rainbow Housing Society has rightly deposed about installation of C.C.T.V cameras to

both A and B Wing and that both the cameras were functioning on the day of the incident. Thus, there is no prejudice caused to the appellant in not supplying the C.C.T.V footage in advance as no grievance has been made by the defence while cross examining the witnesses namely P.W.7- Mohammed Rafiq and P.W.8-Vijaykumar Jagdale and P.W.11-Sunil Rane. The appellant, however, unequivocally admits while answering question No.204 that what has been stated by his buddy P.W.21-Shashank Mishra that the appellant too was on duty on 24th January, 2014 at Raheja Vihar in Rainbow Society as a watchman is correct. He admits that he is senior guard to Shashank Mishra. Thus, un-disputedly, he was on duty at the time of the incident. While answering question No.208, the appellant admits that at the relevant time he returned after 30 to 40 minutes inside the society and then he went out for taking a tea.

33. It is an undisputed fact that he had several injuries on his person. Since the prosecution has proved all the circumstances by establishing a complete chain, the onus now shifts upon him in view of section 106 of the Evidence Act to explain about these circumstances which are exclusively within his knowledge. Firstly, why he left the point of his duty in midnight. Secondly, where were

he for about forty minutes. Thirdly, how had he suffered injuries. The appellant in fact did not give any explanation, much less, satisfactory explanation and, therefore, this can also be additional circumstances against him. It would be apposite to look into the latest judgment of the Hon'ble Supreme Court in the case of **Pattu Ranjan Vs. State of Tamil Nadu, AIR 2019 Supreme Court 1674** wherein after having taken survey of several decisions on the aspect of circumstantial evidence, it is observed thus;

“30. Before we undertake a consideration of the evidence supporting such circumstances, we would like to note that the law relating to circumstantial evidence is well settled. The Judge while deciding matter resting on circumstantial evidence should always tread cautiously so as to not allow conjectures and or suspicion, however, strong, to take the place of proof. If the alleged circumstances are conclusively proved before the Court by leading cogent and reliable evidence, the Court need not look any further before affirming the guilt of the accused. Moreover, human agency may be faulty in expressing the picturisation of the actual incident, but circumstances, cannot fail or be ignored. As aptly put in this oft-quoted phrase:”Men may lie, but circumstances do not”.

31. As mentioned supra, the circumstances relied upon by the prosecution should be of a conclusive nature and they should be such as to exclude every other hypothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused. Although it is not

necessary for this Court to refer to decisions concerning this legal proposition, we prefer to quote the following observations made in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 (SCCp. 185 para 152-153)

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

“[1] The circumstances from which the conclusion of guilt is to be drawn should be fully established.

[2] The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

[3] The circumstances should be of a conclusive nature and tendency.

[4] They should exclude every possible hypothesis except the one to be proved.

[5] There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused”.

34. Thus, the aforesaid five golden principles have been duly established by the prosecution. The facts established are so consistent with each other that it only points towards the hypothesis of the guilt of the appellant and that it is none except the appellant who had

committed the crime.

35. From the circumstances and the evidence, it is clear that the appellant had a strong motive to commit the crime with a view to satisfy his lust of having sex with the victim. It appears that initially the appellant had minutely observed the condition of the victim who was totally inebriated due to consumption of liquor. He waited for a proper opportunity till the time she left alone by her friend Hemant Gupta in an auto rickshaw in front of Rainbow Society. After having spent sufficient time in a very calculated manner, he had executed his nefarious design to take the victim to a secluded lonely place near the ambulance where not only he raped her but robbed her of her mobile and other valuable articles. He took sufficient care not to be noticed by the passers by. He made proper preparation and then executed the crime. The appellant who was appointed as a security guard was duty bound to guard and protect the members of the society and their property. However, the appellant, instead, took disadvantage of his position and instead of helping the victim girl who was fully under the influence of alcohol to take her to her flat, he molested and robbed her brutally in the wee hours of 24th January, 2014.

36. The C.F.S.L report dated 12th December, 2014 bearing ML Case No.K-243 of 2014 was placed on record and is proved at **Exhibit 109 colly**. Report in turn proves that the earth sample from Exhibit (1) to Exhibit (6), 6(a) and Exhibit 7 to Exhibit 14 tally with earth in Exhibit 16 and Exhibit 18 in respect of hue, physic -chemical characteristics and spectro-chemical composition.

37. Thus, the C.F.S.L report establishes the fact that the crime was committed on the spot which has been established by the prosecution and the appellant was with the victim whose clothes got soiled with the earth over there. Panchanama **Exhibit 29** is in respect of place of offence. **Exhibit 92** and **Exhibit 37** prove other aspects relevant to the report of chemical analysis. Since the appellant has failed to explain this clinching circumstantial evidence against him, it would be one more additional circumstance against him indicating his complicity in the offence.

38. Spot panchanama was proved by P.W.6-Namdev Waghmare. The sum and substance of his evidence was that he was summoned by Police to act as Panch witness. When he was taking tea in the canteen, one Constable came to him. He testified that the spot

was situate near Rainbow Apartment 'A' wing where there was an ambulance. Near the front wheel of the ambulance, the scientist of the C.F.S.L found clothes namely full legging, one nicker, one half pant and black coloured shoes. The articles were shown by Vivek-brother of the victim. The Articles were seized by the Police duly wrapped in a label and obtained signature of this witness. The scientist took samples soils, hair and a cigarette but. Those articles were packed in different packets, labelled and then signature of this witness as well as another panch was obtained. He further testified that panchanama was read over to him before obtaining his signature. There was one lady panch witness also. The said panchanama is proved at **Exhibit 29**. Article 4 is the black legging, Article -6 is one black short, Article-7 is one nicker. These articles were duly identified by this witness during trial. Even in the cross-examination, he reiterated that panchamana was written as per his say.

39. P.W.2 Murnalini Tiwari is the sister of the victim. She was doing some course in films at Goregaon. The evidence of this witness reveals that on 23rd January, 2014, she left for her classes at 10.30 a.m. The victim and her brother Vivek were at home. She returned around 9.30 p.m. When she returned, her brother Vivek was

at home but the victim was not at home. When she asked Vivek, he informed that the victim had gone to Hary's Hotel for birthday party of her friend. It was the birthday of Hemant Gupta. In the morning around 5.00 a.m to 5.15 a.m., Vivek took his dogs for a walk. He returned within 5 to 7 minutes. He was panicked as he saw the victim lying in the lobby in a half naked condition. P.W.2-Mrinalini rushed to her sister and brought her to the flat. She was dirty and soiled. This witness cleaned her up and thereafter she immediately called her mother P.W.12-Sujata on Skype who was in Jakarta, Indonesia. As per her mother's advice, the victim was immediately taken to the Seven Hills Hospital. It is testified that the victim was unconscious. She was taken to the hospital by P.W.2 and her brother Vivek. During her examination by the Doctor at Seven Hills Hospital, she regained consciousness. She was unable to recall anything, however, it is testified that she remembered of having been sexually assaulted or raped by someone and that the person had also stolen her phone and purse. The evidence of P.W.2-Mrinalini reveals that she noticed bruises on the elbow, legs, back and face and fresh bite marks on the breast of the victim. She had pain in the back of her head. There were nail scratches on her lower back and thighs. There is no effective cross of this witness as there is nothing against the appellant. There

are obviously certain minor discrepancies and omissions in the evidence of this witness as well as some other witnesses *qua* their statements recorded by the police which are quiet obvious and natural, which rather confirms truthfulness of their evidence. Such minor omissions and contradictions do not affect, the otherwise acceptable and believable version of this witness as well as the other prosecution witnesses.

40. It is elicited in the cross-examination that the appellant was not seen on duty on that day after the incident. The fact that the appellant was on duty on the date of the incident has not been disputed by the defence. Similarly, P.W.12- Sujata who is the mother of the victim testified what she had gathered from the conversation with her daughter P.W.2-Mrinalini and her son Vivek as well as from the victim. She immediately returned to India. Her evidence is mainly in the form of hearsay which corroborates testimony of her daughter P.W.2-Tiwari and what has been stated by the victim. This witness obviously being mother of the victim tried to collect the evidence in the form of C.C.T.V footage in which there is nothing wrong. Since the investigating officer had already collected the C.C.T.V footage and the C.C.T.V footage is undisputedly of the said society, the evidence

of this witness can be looked into only to the limited extent of what had been stated to her by P.W.1 and P.W.2. She has been unnecessarily cross-examined extensively by the defence.

41. The learned trial Court in the impugned judgment has carefully considered all the circumstances as well as the evidence on record in its correct perspective and rightly concluded that the prosecution has proved it's case beyond all reasonable doubts.

42. In view of the aforesaid observations, there is no reason to interfere in the well reasoned judgment of the trial Court. I, therefore, do not find any merit in the appeal which deserves to be dismissed and as such it is dismissed.

[PRITHVIRAJ K. CHAVAN, J.]