

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

APPEAL NO. 372 OF 1998

- 1. Anil Vishnu Patil (Abated)**
Adult, Hindu, Age-26 yrs.
Occ. Agriculturists
R/o. Chikhali, Tal. Mohol
Dist. Solapur.
 2. Vilas Namdeo Mate
Age-44, R/o. Chikhali.
Tal. Mohol, Dist. Solapur ... Appellants
- V/s.
1. The State of Maharashtra
through Mohol Police Station
 2. Chababai Dadarao Chaudhari
Age-35 yrs, R/o. Wadachiwadi
Tal. Mohol, Dist. Solapur ... Respondents

WITH

CRIMINAL SUO-MOTO APPLICATION NO.2 OF 1998

The High Court on its Own Motion ... Applicant

V/s.

1. Anil V. Patil (Abated)
2. Vilas Namdeo Mate
3. State of Maharashtra ... Respondents.
(Respondent Nos.1 & 2
/Org.Accused Nos. 1 & 2)

Mr. V.M. Throat for the Appellant No.2 – Vilas Mate.
Mrs. Geeta P. Mulekar, APP for the Respondent -State.

**CORAM : PRASANNA B. VARALE &
N.R. BORKAR, JJ.**
DATE : 17.8.2021.

JUDGMENT (PER N.R. BORKAR, J.)

1] This appeal takes an exception to the judgment and order dated 26.2.1998 passed by the learned IInd Additional Sessions Judge, Solapur in Sessions Case No. 239 of 1997. By the impugned judgment and order, the appellants, who were the accused Nos.1 and 2 respectively before the trial court, have been convicted for the offence punishable under section 376(G) of the Indian Penal Code, 1860 (for short “IPC”) and sentenced to suffer Rigorous Imprisonment for a period of five years and to pay fine of Rs.3,000/- each, in default, to suffer Rigorous Imprisonment for six months.

2] Appellant No.1 / accused No.1 died during the pendency of the appeal.

3] We have heard the learned counsel for the appellant No.2/accused No.2 and the learned APP for the respondent – State.

4] The prosecutrix was residing at village Wadachiwadi, Tal. Mohol, Dist. Solapur. The incident took place on 22.7.1997. According to the prosecutrix, on the date of incident, at about 2.00 p.m., she had gone to village Chikhali

to offer Naivedya to Goddess Mariai-Laxmi. After offering Naivedya, she came to Chikhali Phata and was waiting for the Bus to return to her village. At that time, the accused No.1 came there and told her that her nephew is sitting at his Dhaba and he called her there. She, therefore, accompanied accused No.1 to his Dhaba.

5] According to the prosecutrix, when she reached there at the Dhaba of accused No.1, accused No.2 was sitting there and her nephew was not there. According to her, the accused No.1 forcibly took her in one room and closed the door from inside. She tried to open the door, however, accused No.1 locked the door from inside. According to the prosecutrix, the accused No.1 then made her to lie down on the floor and thrice committed rape on her. According to her, then accused No.2 came inside the room. Accused No.2 also made her to lie down and thrice committed rape on her. The accused then allowed her to go home and threatened her of dire consequences, if she dares to disclose about the incident to anybody else.

6] In the cross-examination conducted on behalf of the accused, the prosecutrix has admitted that she had gone to Mohol police station, one year prior to the present incident, in order to file a complaint against one person as he tried to outrage her modesty. She has admitted that she was not knowing the name of accused No.1 prior to the incident and she was not acquainted with him. She has further admitted

that when she went to the Mohol police station on the next day of incident in order to lodge a complaint, Dy. Sarpanch Arun Yadav of village Chikhali was present there and he told the name of the accused No.1 to the police.

7] The prosecutrix has further admitted that in the report at Exhibit-22, she has not mentioned the name of accused No.2. She has admitted that the surface of floor of room was rough. She has further admitted that on the date of incident, she reached home at about 6.00 p.m. and on that day, she did not try to inform about the incident either to Police Patil or to Sarpanch of the village.

8] Admittedly, after lodging the report, the prosecutrix was referred for medical examination.

9] PW-5 Dr. Mariamma Paul, the doctor who examined the prosecutrix, has stated in her evidence that on 23.7.1997, she was attached to Civil Hospital, Solapur. On that day, she examined the prosecutrix. She found that the general condition of prosecutrix was good and there were no external injuries. On local examination, she found that there was bleeding, i.e., to perinium. The hymen was torn (old tear). On internal examination, she found that there was bleeding and injury of 1 cm on the posterior fornix. According to her, the bleeding was on account of forceful intercourse. According

to her, the prosecutrix might have been subjected to sexual intercourse.

10] In the cross-examination conducted on behalf of the accused, PW-5 has admitted that since there was injury on the posterior fornex, she said that the prosecutrix might have been subjected to sexual intercourse. After examining the prosecutrix, she reserved her opinion. She has further admitted that the bleeding and injury can be caused due to other reasons also.

11] The first information report lodged by the prosecutrix on 23.7.1997 is at Exhibit-22. We have perused the first information report at Exhibit-22. As regards accused No.2, the prosecutrix in her report at Exhibit-22 has stated that when she reached at Dhaba, one person aged about 50 years wearing Dhoti, Shirt and Cap was sitting there. The prosecutrix has admitted that she had not mentioned the name of accused No.2 in her complaint at Exhibit-22. It is thus apparent that accused No.2 was not known to the prosecutrix. PW-6 API Ramchandra Mane, the investigating officer, has admitted in his cross-examination that he did not conduct any test identification parade in respect of accused No.2. Though he has stated that the letter was issued to Tahsildar, Mohol for conducting test identification parade, however, he has not placed that letter on record. The fact remains that accused No.2 was unknown to the prosecutrix on the date of incident and no test identification parade is held.

12] The Hon'ble Supreme Court in the matter of **Kanan and ors. vs. State of Kerala - (1979) 3 SCC 319** has observed:

".....We feel that the High Court erred in law in taking this view. It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. In these circumstances, therefore, we feel that it was incumbent on the prosecution in this case to have arranged T. I. parade and got the identification made before the witness was called upon to identify the appellant in the court....."

In view of the above, no reliance can be placed on the identification of accused No.2 by the prosecutrix for the first time in the court. Nor her evidence in that respect can be relied upon to connect accused No.2 with the alleged crime.

13] Apart from above, according to the prosecutrix she was made to lie down on the floor and was raped for six times. The prosecutrix has admitted that the surface of floor was rough. PW-5 has admitted that there were no external injuries on the person of the prosecutrix. It is unlikely that in the incident as alleged by the prosecutrix, she would not sustain any external injuries. According to prosecutrix, she resisted

the alleged act. However, medical examination report of accused No.2 dated 28.7.1997 at Exhibit-19 does not reveal any injury to him.

14] Considering the overall facts and circumstances, the trial court was not justified in convicting the appellant No.2/accused No.2 for the offence punishable under section 376(G) of the IPC.

15] This court while admitting the present appeal has found that the punishment imposed by the trial court was less than the minimum punishment prescribed for the offence punishable under section 376(G) of the IPC and therefore, notice was issued to the appellants/accused to show cause as to why their punishment should not be enhanced. Accordingly, Criminal Suo-moto Application No.2 of 1998 was registered. As we have allowed the appeal filed by the accused No.2, noting survives in the Criminal Suo-moto Application No.2 of 1998. In the result, the following order is passed.

ORDER

- i] Criminal Appeal is allowed.
- ii] The conviction of **appellant No.2/accused No.2 Vilas Namdeo Mate** for the offence punishable under section 376(G) of the IPC vide judgment and order dated 26.2.1998 passed by the learned IInd Additional Sessions

Judge, Solapur in Sessions Case No. 239 of 1997 is quashed and set aside.

iii] The appellant No.2/accused No.2 is acquitted of the offence punishable under section 376(G) of the IPC.

iv) Fine amount, if any paid by appellant No.2/accused No.2, be refunded to him.

v) His bail bond stands cancelled.

vi) Criminal Appeal stands disposed of accordingly.

vii) Criminal Suo-Moto Application No. 2 of 1998 does not survive and the same is also disposed of.

(N.R. BORKAR, J.)

(PRASANNA B. VARALE, J.)