

**1**

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
NAGPUR BENCH, NAGPUR**

**CRIMINAL APPEAL NO.374 OF 2018  
WITH  
CRIMINAL APPEAL NO.492 OF 2018**

**CRIMINAL APPEAL NO.374 OF 2018**

Gulab s/o Sadu Jadhao,  
Aged about 45 years, occupation agriculturist,  
R/o Jivati Ward No.3, tahsil Jivati,  
District Chandrapur. .... **Appellant.**

**:: VERSUS ::**

The State of Maharashtra,  
Through Police Station Officer,  
Police Station Jivati,  
Tahsil Jivati, district Chandrapur. .... **Respondent.**

=====

Shri R.M.Daga, Counsel for the Appellant.  
Shri T.A.Mirza, Additional Public Prosecutor for the Respondent/State.

=====

**CRIMINAL APPEAL NO.492 OF 2018**

Pappu s/o Ratanlal Karase,  
Aged 52 years, occupation labour,  
R/o Zakir Hussain Ward No.13,  
Ballarshah at present Shantinagar  
Ward, Jivati, tahsil Jivati, district  
Chandrapur. (Presently Central  
Prison at Nagpur). .... **Appellant.**

**:: VERSUS ::**

The State of Maharashtra,

Through Police Station Officer,  
Jivati, tahsil Jivati, district Chandrapur. .... **Respondent.**

=====

Shri C.R.Thakur, Counsel for the Appellant.  
Shri T.A.Mirza, Additional Public Prosecutor for the Respondent/State.

=====

**CORAM** : **V.M.DESHPANDE, & AMIT B.BORKAR, JJ.**  
**DATE** : **SEPTEMBER 27, 2021**

**COMMON JUDGMENT** (Per : V.M.Deshpande, J.)

1. Learned Special Judge, Chandrapur in Special (Atrocity) Case No.13/2015 framed charge against four accused persons. They were charged for offences punishable under Sections 363 and 366 read with Section 34 of the Indian Penal Code.

Accused Nos.1, 2, and 4 were further charged for offence punishable under Section 376(2)(j)(l) of the Indian Penal Code. Whereas, accused No.3 was charged for offence punishable under Section 376-D of the Indian Penal Code. In addition to the said, accused Nos.2 and 3 were charged for offence punishable under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and both accused persons were also charged for offence punishable under Section

**3**

376(2)(j)(i) of the Indian Penal Code.

2. Accused persons denied the charge and claimed for their trial. After a full dressed trial, vide judgment dated 8.5.2018, learned Judge acquitted accused Nos.3 and 4 from all charges. Similarly, accused No.2 was also acquitted of offence punishable under the atrocities Act.

3. Original accused Nos.1 and 2, by the said judgment, were convicted for offences punishable under Sections 363; 366 read with Section 34, and 376(2)(j)(l) of the Indian Penal Code.

They were directed to suffer rigorous imprisonment for three years and to pay fine Rs.3000/-, on account of their conviction for offence punishable under Section 363 of the Indian Penal Code.

They were also directed to suffer rigorous imprisonment for five years and to pay fine Rs.5000/-, on account of their conviction for offence punishable under Section 366 of the Indian Penal Code.

**4**

Both of them were directed to suffer rigorous imprisonment for life and to pay fine Rs.10,000/-, by each of them, on account of their conviction for offence punishable under Section 376(2)(j)(l) of the Indian Penal Code.

4. Being aggrieved by the aforesaid judgment and order of conviction, accused No.1 Pappu s/o Ratanlal Karase filed Criminal Appeal No.492/2018. Whereas, accused No.2 Gulab s/o Sadu Jadhao filed Criminal Appeal No.374/2018.

5. In view of fact that these two appeals arise out of the same judgment and order of conviction, they are taken up for its final hearing simultaneously and they are disposed of by this common judgment.

6. For accused No.1 Pappu Karase, learned counsel Shri C.R.Thakur appeared and argued his case. For accused No.2 Gulab Jadhao, learned counsel Shri R.M.Daga appeared and submitted the said appellant's case. Learned Additional Public Prosecutor Shri T.A.Mirza defended the judgment and order of conviction for and on behalf of the State in both these appeals.

**5**

7. The prosecution case, as it was disclosed during course of trial, is narrated herein under:-

A lady Police Constable Premila Madhukar Sidam (PW21), was discharging her station diary duties of Jivati Police Station on 26.2.2015 from 8:00 a.m. to 9:00 p.m.. At 8:30 p.m., Uddhav (PW2) (*his surname is withheld to screen identity of victim and only his name is mentioned in this judgment*) came to the police station and lodged his oral report (Exhibit-69). Gist of the First Information Report is that on day of incident victim, her brother, father, and grandfather went to Gadchandur for obtaining a doctor's certificate of the victim, a widow who used to stay with the first informant. After completion of their work, all of them came at Jivati Bus Stop at about 4:30 p.m.. At Jivati, somehow the victim got separated from her brother and her grandfather. When the first informant came back to village Yellapur, where they used to reside, made enquiries about the victim. Upon that, his father told about their separation. Therefore, immediately, the first informant along with his friend Shuddhodhan Babarao Chandankhede (PW7) came to Jivati at about 8:30 p.m. and

**6**

started enquiry from persons who were standing on road where he got an information that the victim was found in company of Pappu Karase, accused No.1, and, therefore, after gathering inputs, in respect of his residential address, he reached to Pappu's house. He found door was closed. He gave a call and pushed door to notice that the victim was found sleeping on a cot in a semi-nude condition and Pappu was on her person and was committing sexual intercourse. The First Information Report recites that he accosted Pappu. Upon that, Pappu got up and put his clothes. The first informant, thereafter, made enquiries with his sister who disclosed that when she was proceeding to tahsil office along with father on foot, she was tired and, therefore, she sat near a bus stop. At that time, Pappu gave some eatables to her and brought her to his house by holding her hands and, thereafter, asked her to drink liquor which she drank thinking that it is water. Resulting into, her fuddle and taking its disadvantage he committed sexual intercourse on her. Therefore, the first informant came to the police station along with his sister and lodged the First Information Report and asked to take action against Pappu.

**7**

8. On the basis of oral report (Exhibit-69), the offence was registered against Pappu, accused No.1, vide Crime No.7/2015.

9. Investigation of the said crime was entrusted to Police Sub Inspector Rajesh Malpilu (PW22) by superior police officers. On 27.2.2015, he arrested Pappu, accused No.1, under arrest form (Exhibit-175). The victim was referred for her medical examination to Primary Health Centre at Jivati. Medical Officer informed the Investigating Officer that medical examination of the victim is not possible at Jivati and, therefore, she was referred to Civil Hospital at Chandrapur. The Investigating Officer also visited spot of incident and spot panchnama was drawn which is duly proved by Kisan Loharale (PW1). The said spot panchnama is at Exhibit-60. The spot panchnama shows that spot, where there was sexual intercourse with the victim, is a residential house of appellant Pappu. The Investigating Officer also seized from spot of incident a glass bottle of liquor having label Rocket Santra and a blanket which are mentioned in Exhibit-60 itself. He seized various samples of the victim handed over by Medical Officer, Civil

**8**

Hospital at Chandrapur as well as various samples of Pappu handed over by Medical Officer, Gadchandur Rural Hospital. Clothes of the victim are seized under seizure panchnama (Exhibit-61). Clothes of Pappu is seized under seizure panchnama (Exhibit-62). His blood samples on pubic hairs were seized under seizure panchnama (Exhibit-63). Similarly, blood samples of the victim were seized under seizure panchnama (Exhibit-64).

10. Police Sub Inspector Rajesh Malpilu (PW22), on 27.2.2015 tried to record statement of the victim in presence of lady Police Inspector Geeta Tangade. However, the victim was unable to give her statement and, therefore, a letter was given to Medical Officer, Civil Hospital, Chandrapur to give opinion as to whether the victim is fit to give statement. The said letter is at Exhibit-73. On the said, Medical Officer opined that the victim is suffering from mental ailment and as such they are admitting her in hospital for the purposes of observation. The said remark is at Exhibit-74. The Investigating Officer also forwarded a letter to Medical Officer of Primary Health Centre at Jivati on 26.2.2015 for obtaining an opinion as to whether the victim was under the

influence of liquor or not. The said letter is at Exhibit-118. Opinion given by the doctor is at Exhibit-119. Opinion given by the doctor clearly states that the victim was found under the influence of liquor. The Investigating Officer also recorded statements of witnesses.

11. Since during course of the investigation it was found that the victim belongs to the Scheduled Castes, the investigation was given to the Deputy Superintendent of Police Vijaykumar Chavhan (PW23). He arrested Gulab Jadhao, accused No.2. His arrest memo is at Exhibit-182. The said arrest memo shows that Gulab was arrested on 2.3.2015. His blood samples were seized.

12. After completion of the investigation, chargesheet was filed and, thereafter, trial was commenced against four accused persons and the judgment and order of conviction, impugned in these appeals, was passed.

13. According to learned counsel for appellant Pappu, he is falsely implicated in the crime. Learned counsel submitted that the prosecution did not examine the victim as its witness and she

**10**

was examined as defence witness by accused No.2 Gulab and from her evidence it is clear that on the say of her brother Uddhav (PW2) and his wife she is deposing before the Court that four persons made sexual assault on her. He, therefore, submitted that his appeal be allowed.

14. According to learned counsel for appellant Gulab, name of Gulab did not figure in the First Information Report and his presence near bed inside the house of appellant Pappu, is an improvement and in addition to that it is his submission that even Uddhav (PW2) did not speak about sexual intercourse by him. He submitted that DNA Report, which was made a basis to convict him by learned Judge of the Trial Court, also does not show his complicity. He, therefore, prayed that his appeal be allowed.

15. Learned Additional Public Prosecutor for the State vehemently supported the judgment and order of conviction impugned in these appeals.

16. In this judgment, we will be discussing that part of evidence concerning with appellant Pappu and appellant Gulab

**11**

only in view of acquittal of accused Nos.3 and 4 and also we would not touch that part of evidence pertains to the offence under the atrocities Act because of acquittal of appellants before us from the offence under the said Act. Here, it is to be mentioned that the State did not challenge the acquittal of original accused Nos.3 and 4 and acquittal of present appellants from offence punishable under the atrocities Act.

17. First submission of learned counsel for appellant Pappu is that the victim was not examined has its own impact on the prosecution case. True it is that the victim was not examined as prosecution witness.

18. Whether the prosecution was justified for non-examination of the victim?

19. Kiran Deshpande (PW3) is doctor, who is MD Psychiatric, was attached to the Government Hospital at Chandrapur. Exhibit-73 is communication dated 27.2.2015 by Police Sub Inspector Rajesh Malpilu (PW22) to the Superintendent of the Government Hospital, Chandrapur. Perusal of the said

**12**

communication reveals that after registration of the crime on 26.2.2015, since the victim was found under the influence of liquor, her statement could not be recorded and, thereafter, also though repeated attempts were made to record her statement, it was found that she is behaving like a mentally challenged women. Therefore, request was made to examine her in that behalf.

20. In the light of the aforesaid communication, it would be useful to mention here that the victim was firstly brought in the Primary Health Centre at Jivati by police. A requisition (Exhibit-118) was given to doctor to verify as to whether she is under the influence of liquor. Accordingly, Dr. Shalini Tarone (PW8) examined the victim on 26.2.2015 at 10:30 p.m.. Her evidence shows that when she examined the victim, she noticed smell of alcohol from her mouth and her speech was slurred. She was not responding to questions properly and she was having mild drowsiness. Accordingly, the doctor gave her opinion (Exhibit-119) in which she in unequivocal term recorded that the victim was under the influence of liquor.

**13**

21. On getting communication (Exhibit-73) from Police Sub Inspector Rajesh Malpilu (PW22), the Superintendent of the Government Hospital, Chandrapur directed Dr.Kiran Deshpande (PW3) to examine the victim. Accordingly, he directed his staff to admit the victim in ward No.8 for observations and treatment. The victim was admitted for observations for about four days and found that she was not in a condition to give her statement and after four-five days her mental condition may improve. Dr.Kiran Deshpande proved his said noting and finding (Exhibit-74). He also proved medical certificate (Exhibit-76). His evidence shows that as per direction of Court, the victim was again observed for next five to six days and on her examination it was found that the victim is lunatic and her mental illness is subsisting for more than twenty years and accordingly he gave his certificate (Exhibit-78). His evidence shows that after submission of Exhibit-78 to Court pertains to the victim, the Court referred the victim for further treatment to Mental Hospital, Nagpur.

22. Though Dr.Kiran Deshpande (PW3) was cross-examined by counsel for appellant Pappu, whose cross-

**14**

examination was adopted by remaining accused persons, does not show anything to discard Dr.Kiran's evidence to record a contrary finding that the victim was not lunatic or was not having mental illness for past twenty years.

23. In view of evidence of Dr.Kiran Deshpande (PW3), no exception can be taken for non-examination of the victim by the prosecution during course of the trial. Therefore, we reject the contention of learned counsel for appellant Pappu that the prosecution case has to be discarded in its entirety for non-examination of the victim.

24. Dr.Jaya Bhongale (PW24), the Medical Officer attached to the Civil Hospital, Chandrapur, examined the victim when she was brought for her medical examination by a lady police constable of Jivati Police Station. Exhibit-244, which is Forensic Examination Report of the victim, shows that the victim was examined on 27.2.2015 at 3:00 p.m.. On genetic examination, the doctor found hymen of the victim was torn and it was in circumferential shape. Medical Report of the victim given

**15**

by the doctor is at Exhibit-245. The doctor also collected samples of vaginal swab, blood sample, nail and pubic hair, and also filled Form-B of the victim under Exhibit-247. Under Exhibit-246, she gave an opinion that sexual intercourse had occurred.

25. In respect of search and noticing presence of the victim in the house of appellant Pappu, two witnesses are relevant and they are:

(i) Uddhav (PW2) and (ii) Shuddhodhan Babarao Chandankhede (PW7)

Uddhav (PW2), is real brother of the victim. Whereas, Shuddhodhan (PW7) is his friend. Evidence of Shuddhodhan corroborates version of Uddhav that he came along with him from village Yellapur to Jivati in search of the victim and in the search they reached Deulaguda Bus Stop and there, upon enquiry by Uddhav, it was informed to him that he may visit to the house of Pappu, accused No.1. As per evidence of Shuddhodhan, he went to the house of appellant Pappu. Evidence of Uddhav shows that in the meantime he was also searching for his sister. As per

**16**

evidence of Shuddhodhan, when he reached to the house of appellant Pappu, he found that door was closed from inside. He gave a call and asked as to whether it is house of Pappu. On getting an affirmative reply, he asked any lady member is inside. Upon that, he received a negative reply. He, thereafter, came back to search Uddhav. It is his version that after some time he again went to the house of Pappu. That time, he found that Uddhav was beating appellant Pappu and his sister was present inside the house of appellant Pappu. Evidence of Shuddhodhan shows that he persuaded Uddhav not to beat appellant Pappu, instead shall file a police complaint. However, for other part of the prosecution case, this witness did not support the prosecution and, therefore, he was declared hostile.

26. The law in the case of **Khujji @ Surendra Tiwari vs. State of Madhya Pradesh**, reported at **AIR 1991 SC 1853** is well settled on the aspect that merely because a witness has turned hostile, the Court need not discard his evidence in its entirety. The Court can consider his evidence to that extent he supports the prosecution case.

**17**

27. Evidence of Uddhav (PW2) shows that he reached to Jivati along with Shuddhodhan in search of his sister and after getting a vital information that his sister was taken by appellant Pappu to his house, he reached to his house and when door was opened he found appellant Pappu was committing sexual intercourse with his mentally challenged sister who was administered liquor and she was under the influence of liquor. He, therefore, lodged the report.

28. Uddhav (PW2), in his oral report (Exhibit-69) did not mention names of any other accused nor their presence was mentioned in the First Information Report. From witness box, he did state that when he went inside the house of appellant Pappu, he was committing sexual intercourse and appellant Gulab was standing nearby wooden cot. Therefore, he became angry and assaulted on appellant Pappu and tried to assault on appellant Gulab also, however he was threatened by him.

29. In our view, not referring presence of Gulab, accused No.2, in the First Information Report (Exhibit-69), which was

**18**

lodged immediately, assumes importance *qua* Gulab. It is really unbelievable that a brother will not mention at least a person who was present, may be standing, while other accused person was committing sexual intercourse with his mentally challenged sister. It is quite possible that at that point of time Uddhav might be not having name of accused No.2, but surely he would have stated in his First Information Report about presence of at least the unidentified person. Not mention of name of Gulab in the First Information Report, which was lodged immediately, is a relevant fact while considering the case of Gulab. Even, in his subsequent statement also he did not name the other accused persons. It is to be mentioned here that from his evidence it is clear that he was a police patil for last eleven years. Uddhav, being a police patil, it is really hard to believe that he will miss mentioning of presence of other accused persons at the time of commission of offence of rape.

30. Sheikh Sattar Sheikh Nijam is (PW9), who runs a panthela, and Husainkhan Pathan is (PW11), who runs a tea stall.

Evidence of Sheikh Sattar (PW9) shows that he runs a

**19**

panthela near Deulaguda Bus Stop. His evidence shows that on the day of the incident he noticed presence of a lady near his panthela, but he was unable to throw further details since she was sitting at a distance of 10 to 15 feet from his panthela. His evidence also shows that at 8:30 p.m. a person came to his panthela and was asking people gathered as to whether they have seen any insane lady member. His evidence shows that he overheard their conversations between the said person and the persons gathered there that lady has gone to Pappu, accused No.1. Evidence of this prosecution witness does not show either presence of Gulab, accused No.2, or even his remote reference in his evidence.

Evidence of Husainkhan Pathan (PW11) shows that he runs a tea stall near Deulaguda Square at Jivati. His evidence shows that he, during enquiry by police, told that Pappu, accused No.1, and Ajay Khanke, acquitted accused No.3, were at his hotel and they left and also he told that somebody came to him in search of a woman. This witness has not supported the prosecution fully.

**20**

31. Be that as it may, evidences of Sheikh Sattar (PW9) and Husainkhan Pathan (PW11) corroborate attempts of Uddhav (PW2) in respect of the search of his sister.

32. The prosecution heavily relied on DNA Reports and Chemical Analyzer's Report.

33. One of submissions of learned counsel for appellant Pappu was that the victim was not examined by the prosecution, but she was examined by defence i.e. by accused No.2 Gulab.

34. In preceding paragraphs of this judgment, we have already recorded our findings that the prosecution was fully justified in not examining the victim.

So far as she being examined as defence witness, the said aspect is also thoughtfully considered by learned Judge of Trial Court in paragraph No.57 of his judgment. Learned Judge observed that after completion of all arguments in trial, an application was moved by accused No.2 Gulab to record demeanor and conduct of the victim and accordingly the victim was called in the Court. The Court observed that some questions were put to

**21**

her. However, the Court found that her answers were not rational. The Court found that at the time of answering questions about her age, she started counting fingers, but she was unable to answer about age. Learned Judge, therefore, in our view, rightly discarded evidence of the victim because she was unable to give any rational answers. We also independently noticed that the evidence of the victim need not be considered at all in view of the evidence of Dr.Kiran Deshpande (PW3), a Psychiatric.

35. The prosecution examined Dr.Kewal Korde (PW4). His evidence shows that Pappu, accused No.1, and Gulab, accused No.2, were brought at Primary Health Centre at Jivati for their medical examinations and accordingly they were examined. Requisition-cum-medical report of Pappu is at Exhibit-93. Whereas, requisition-cum-medical report of Gulab is at Exhibit-94. Thereafter, he referred both of them for further examination to Rural Hospital at Gadchandur.

36. The prosecution examined Dr.Vijay Kalaskar (PW5). On 3.3.2015, Gulab, accused No.2, was brought to him for his

**22**

medical examination. Exhibit-102, is Forensic Medical Examination of Gulab. Perusal of the said shows that blood of Gulab was extracted by the doctor.

It is submission of learned counsel for appellant Gulab, accused No.2, that from Exhibit-103 it is clear that 5 ml plain blood was preserved and it was sealed. However, he submitted that on the basis of Exhibit-110 dated 4.3.2015, the communication from the Deputy Superintendent of Police Vijaykumar Chavhan (PW23) to the Medical Officer, Rural Hospital at Gadchandur for taking blood sample of Gulab for DNA, there is no evidence to show that on 4.3.2015 or subsequent thereto Gulab was produced before any doctor and his blood was taken in DNA Kit.

37. Clothes of Pappu, accused No.1, Gulab, accused No.2, and the victim were sent to Chemical Analyzer under C.A. Requisition (Exhibit-193). Chemical Analyzer's Report (Exhibit-83) does not show blood or semen on their clothes. However, semen was found on saree and petticoat of the victim.

38. The semen stains cuttings from saree, the semen stains

**23**

cutting from petticoat, and vaginal swab were referred for DNA in Ml Case No.DNAn-197/2015 along with that blood of Pappu, accused No.1, was also sent. DNA Report is at Exhibit-80. The said DNA Report shows that the DNA was extracted from blood sample of the victim and Gulab, accused No.2 and semen was detected on saree and on petticoat. As per the Report, DNA Profiling Evidence for Establishing Identity is as under:

*“Opinion : 1) Mixed DNA profiles obtained from semen stains 1 and 2 on exhibit 2, saree (Bn/830/15) and semen stains 1,2, 3 and 4 on exhibit 3, petticoat (Bn/830/15) contain DNA profiles of the victim (DNAn/132/15) and Gulab Jadhav (DNAn/132/15).*

2) DNA profile obtained from exhibit 4, nail clippings (Bn/831/15) is of female origin and matched with DNA profile of the victim (DNAn/132/15).

3) DNA profile obtained from exhibit 1, nail clippings (Bn/832/15) is of male origin and matched with DNA profile of Pappu Karse (Bn/832/15).”

From the aforesaid, it is clear that DNA profile obtained from exhibit-4, nail clippings are of female origin and matched with DNA profile of the victim. Similarly, DNA profile

**24**

obtained from exhibit-1, nail clipping are of male origin and matched with DNA profile of Pappu, accused No.1.

However, insofar as Gulab, accused No.2, is concerned, it does not state that DNA obtained from the semen matches with DNA of Gulab. Thus, the DNA Report exonerates Gulab though firmly implicates Pappu.

39. In view of the consistent evidence of Uddhav (PW2) that he caught red handed Pappu, accused No.1, while committing rape on his mentally challenged sister, which is conclusively proved by the DNA Report, we have no difficulty to uphold the judgment and order of conviction in respect of Pappu, accused No.1, and we confirm the judgment and order of sentence punishing Pappu.

40. However, there is no evidence at all that Gulab, accused No.2, had any role in taking away the victim from lawful custody of her father and grandfather and he has any role to bring her inside the house of Pappu, accused No.1. In absence of any

**25**

evidence in that behalf, we are of view that conviction of Gulab for offences punishable under Sections 363 and 366 read with Section 34 of the Indian Penal Code cannot be sustained. Insofar as conviction for offence punishable under Section 376(2)(j)(l) of the Indian Penal Code is concerned, we have already discussed that his name was not there in First Information Report (Exhibit-69) and even his presence in the house of Pappu, accused No.1, as stated during course of the evidence by Uddhav (PW2), is an improvement. In addition to that, the scientific evidence, DNA Report (Exhibit-80), also exonerates him. In this view of the matter, we are of view that his appeal is required to be allowed.

41. Conspectus of the entire discussion leads us to pass following order:

**ORDER**

(i) Criminal Appeal No.492/2018 filed by accused No.1-Pappu s/o Ratanlal Karase is **dismissed**.

(ii) Criminal Appeal No.374/2018 filed by accused No.2-Gulab s/o Sadu Jadhao is **allowed**.

**26**

(iii) The judgment and order passed by learned Special Judge, Chandrapur dated 08.05.2018 in Special (Atro.) Case No.13/2015 is set aside to the extent it convicts appellant-Gulab s/o Sadu Jadhao for offences punishable under Sections 363, 366 and 376(2)(j)(i) read with 34 of Indian Penal Code.

(iv) The appellant-Gulab s/o Sadu Jadhao stands acquitted for the offence punishable under Sections 363, 366 and 376(2)(j)(i) read with 34 of Indian Penal Code.

(v) The appellant-Gulab s/o Sadu Jadhao, who is in jail, shall be released forthwith, if he is not required in any other case.

**JUDGE**

**JUDGE**

!! BRW !!

...../-