

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

**CRIMINAL APPEAL NO.533 OF 2012
WITH
CRIMINAL APPLICATION NO.1244 OF 2012**

1) Suresh @ Tatya Parshuram Powar
Age – 42 years, Occu.: Iron Smith,
R/a – 869, C Ward, Behind Uma Talkies, Appellant/Applicant
Kolhapur. ... (Orig. Accused No.1)

V/s.

1) The State of Maharashtra
(Through Police Station Officer,
Kodoli Police Station, Kolhapur)

2) Kum. Madhuri Popat Bansode,
C/o. Raju Sutar, R/o. Malwadi Nagaon,
Tal. - Hatkanangale, ... Respondents
Dist. - Kolhapur.

**WITH
CRIMINAL APPEAL NO.556 OF 2012**

Vishwanath Ramesh Shetti
Age – 21 years, Occu.: Labour,
R/a – Hotel Raj Permit Room,
Bakari Bazar, Laxmipuri, Kolhapur
Originally R/a – Ligade Mala,
Ichalkaranji, Tal – Hatkanangale. ... Appellant
(Orig. Accused No.2)

V/s.

The State Of Maharashtra
(Through Police Station Officer,
Kodoli Police Station, Kolhapur). ... Respondent

**WITH
CRIMINAL APPEAL NO. 672 OF 2012**

The State of Maharashtra
(Through Police Station Officer,
Kodoli Police Station, Kolhapur)

... Appellant

V/s.

1) Suresh @ Tatya Parshram Powar,
Age – 42 years, Occu.: Iron Smith,
R/a – 869, C Ward, Behind Uma Talkies,
Kolhapur.

2) Vishwanath Ramesh Shetti,
Age – 21 years, Occu.: Labour,
R/a – Hotel Raj Permit Room,
Bakari Bazar, Laxmipuri, Kolhapur
Originally R/a – Ligade Mala,
Ichalkaranji, Tal – Hatkanangale.

3) Kishor @ Bapu Jagannath Sathe (Abated)
Age – 24 years, Occu. : Labour,
R/a – Behind S.T. Stand, Kodoli,
Taluka – Panhala, Dist – Kolhapur.

... Respondents
(Orig. Accused Nos.1
to 3)

Shri. S.A. Ingawale, Advocate for the Appellant in Apeal/533/2012
and in Appa/1244/2012 for Applicant.

Shri. Omkar G. Nagwekar, Advocate for the Appellant in
Appeal/556/2012.

Ms. Vrushali Maindad Appointed Advocate for Respondent No.2 –
complainant in Apeal/533/2012.

Ms. Veera Shinde, APP for Respondent – State.

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.**

JUDGMENT RESERVED ON : 8th DECEMBER, 2021.

JUDGMENT PRONOUNCED ON : 24th FEBRUARY, 2022.

JUDGMENT : (Per Sadhana S. Jadhav, J.)

CRIMINAL APPEAL NO.533 OF 2012 and CRIMINAL APPEAL NO.556 OF 2012 :

1. The appellants in these appeals have impugned the judgment and order dated 5th March 2012 passed by the learned Additional Sessions Judge, Kolhapur in Sessions Case No.42 of 2009. The appellants/accused No. 1 and accused No. 2 are convicted for the offence punishable under section 376(2)(g) of Indian Penal Code 1983 (earlier Act) and sentenced to suffer rigorous imprisonment for seven years each and to pay fine of Rs. 5,000/- each I.d. to undergo simple imprisonment for 3 months. The appellant/accused No. 3 is convicted of the offence punishable under section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 5,000/- I.d. to undergo simple imprisonment for 3 months. Hence, these appeals.

2. Such of the facts necessary for the decision of these appeals are as follows :-

(i) On 16th November 2008, Ms. 'X' approached Kodoli Police

Station on 22nd November 2008 and lodged a report alleging therein that on 15th November 2008 her parents had scolded her as she used to remain outdoors till late night and therefore, on 15th November 2008 she left her house without informing the family members. When she reached Nagaon Phata, she met Shivraj Jagtap who was acquainted with the family. She requested him to drop her at Kolhapur. Mr. Jagtap had obliged and dropped her at S.T. Terminal at Kolhapur. She had been to the temple to offer prayers. Thereafter, she met one boy viz. Rahul Patil, who proposed marriage with her. She was persuaded to accept the proposal of marriage, which she did. He had taken her to Dilbahar Lodge. Rahul had asked her to be in the company of his friend Tatya and had left their company. His friend Tatya had ravished her against her will. Thereafter, Rahul had also ravished her against her will. He had left the room with a promise that he would return soon. Ms.X waited at the lodge till 7.00 am. She then proceeded to Shirol and from there to Vadgaon. From there they had been to a Gymkhana where she met Bapu Gaikwad who also ravished her against her will. She was forced to stay in Gym.

(ii) On 22nd November 2008, she was apprehended by the Police. On the basis of the said report Crime No.122 of 2008 was

registered against the accused for the offence punishable under section 376(2)(g) r/w 34 of IPC.

(iii) At the trial, the prosecution has examined as many as 9 witnesses to bring home the guilt of the accused.

3. PW.1 is the victim. According to her, on 15th November 2008 since she had a quarrel with her parents she left the house. Investigation was completed and charge sheet was filed. She has deposed as per her FIR and has proved the contents of the FIR. According to her, the accused no.3 had disclosed his name as Kishor @ Bapu Sathe and that he had a family to look after. Accused no.3 is alleged to have taken the victim near the Kodoli Canal at about 11.00 pm. When she was trying to escape from the clutches of accused no.3 she had sustained injury to her right leg. She was taken to a house which was occupied by a couple Swati and Suresh. She was forced to have sexual intercourse with accused no.3 under threat and coercion. On the very next day, she had escaped from the clutches of accused no.3, approached the police station and lodged a report. She was unable to state her date of birth before the Court. Her date of birth is 26th September 1993 as per School Leaving Certificate.

4. In the cross-examination, the victim has admitted that there was no quarrel between her and her parents. According to her, she had met accused no.3 at Kodoli Phata at about 9.30 pm. There are inherent omissions and contradictions in the evidence of the prosecutrix which are brought to her notice. A question was put to her as to whether she had disclosed before the Police that she met accused No.3 - Sathe at Pargaon Bus Stand and he had taken her to his house where he was staying along with his wife and a small child. He was making her run along with him. The said house was occupied by Swati and Suresh and on that night, she was tortured by accused No.3 and coerced her to have intercourse. According to her, she had stated all the said facts. However, upon perusal of her statement it appears that it is rather omission.

5. On the day she lodged the FIR, she was referred for medical examination and her medical examination report is at **Exh.18** which shows that she had previous scar of wound on her right knee joint, scar of previous wound on the right forearm above elbow, abrasion over inner aspect of both thighs. It is further opined that she was habituated to sexual intercourse. It is pertinent to note that on the day her evidence was recorded she was presented before the Court

from the mental hospital at Pune but the Court has observed that she had the ability to understand the questions put to her and the consequences of its answers. A suggestion was put to her in her cross-examination as to whether she was in love with Rahul Lambe and she had expressed annoyance and displeasure at the said question. In the cross-examination, she had stated that she was taken to Dilbahar Lodge by accused no.2 – Vishwanath Shetty. It is further pertinent to note in the FIR that she had stated that she was taken to Dilbahar Lodge by Rahul Patil wherein she was ravished by accused no.1. Thereafter, she was ravished by Rahul Patil whereas it appears that the real name of Rahul Patil was Vishwanath Shetty i.e. original accused no.2. It is further pertinent to note that there is no reference to Dilbahar Lodge where she was ravished by accused nos.1 and 2 and instead reference is to Ambai Lodge.

6. PW.6 – Bandu Hari More, who was working at Ambai Lodge is declared hostile.

7. In the meanwhile, a missing complaint was lodged by the father of the complainant wherein it was stated that she was differently-abled i.e. her cognitive ability was low and she was

disoriented.

8. PW.2 – Popat Akaram Bansode happens to be the father of PW.1. He has deposed before the Court that two years prior to the incident she had an accidental fall while playing volleyball and therefore, she had sustained injury to her head and hence, she was having psychological problems. She was treated at CPR Hospital, Kolhapur but she did not respond to the treatment. She was also treated at the hospital at Ratnagiri and after she was cured she was residing with her parents. According to P.W.2, on 15th November 2008, when he was about to proceed on duty at about 10.30 pm, he had warned PW.1 not to leave the house but help her mother. She was missing in the night. Upon enquiry, her mother had disclosed that she must have gone to her maternal uncle's house. He had enquired with the relatives but to no avail and therefore, he had lodged a missing report with Shiroli, MIDC.

9. On 22nd November 2008, when he was returning from Nipani, he was informed by his wife that P.W.1 has been traced by the Police and that he should visit Kodoli Police Station. When he reached the Police Station, he saw that accused no.3 was already apprehended

by the police. Upon enquiry, P.W.1 had disclosed to P.W.2 that she was taken to Ambai Lodge by accused nos.1 and 2 who ravished her. Accused no.2 had promised her that he would visit again on the next day but he did not turn up. She disclosed to him that when she was in S.T. Bus she had seen P.W.2 and his wife but she was in the company of the accused nos.1 and 2. She was then taken to Kodoli to a Gymkhana (Talim) and was ravished by accused no.2. It is elicited in the cross-examination that she was staying with her maternal uncle till 7th Standard at Pargaon. Her maternal uncle had also asked P.W.2 to keep a watch on her. P.W.2 had admitted her in Ashram School at Pachgaon. At the request of the Headmaster, he had to take Madhuri home. There was a complaint that she used to loiter here and there instead of attending school. It is further pertinent to note that from Kodoli Police Station, the victim was not taken home. On the next day of lodging of FIR, he had taken his daughter to his house. She was brought to the Police Station by P.W.4 – Rajendra Ekkal who was officiating as Police Constable at Kodoli Police Station. He had received a call from API Shinde that the girl missing from Shirolu MIDC jurisdiction was standing at the bus-stand at Shirolu. He found P.W.1 standing at the Chawdi Square. After verifying her identification as per the missing

report, she was brought to the Shirol Police Station. Thereafter, API Shahaji Shinde had instructed two police constables to bring Bapu Gaikwad. She identified him at the Police Station and thereafter, he was arrested. At the time of arrest, accused no.3 Bapu Gaikwad has disclosed his real name as Kishor @ Bapu Jagannath Sathe.

10. PW.5 – Sanjay Patil has deposed before the Court that on 15th November 2008 at about 7.30 to 8.00 pm he had met his friend Rahul Lambe who was in the company of one girl. They had requested him to drop them at Nagaon Phata. Rahul had dissociated them at Nagaon Phata whereas the said girl had requested him to drop at Kolhapur. He dropped her at Central bus-stand, Kolhapur. He could identify her by face that she hailed from Nagaon village but did not know her name.

11. PW.9 – Shahaji Shinde is the investigating officer. According to him, after hearing saga of the complainant he suspected that it could be Bapu Gaikwad and therefore, he asked the police to bring Bapu Gaikwad to the Police Station. He was identified by the victim and therefore, arrested. It is pertinent to note that he has not deposed before the Court that the real name of Bapu Gaikwad was

Kishor @ Bapu Jagannath Sathe – accused no.3.

12. On 23rd November 2008, he had searched for accused no.1 with the help of complainant. She identified him and therefore, he was arrested whereas accused no.2 was arrested from Hotel Raj where he was working. On 24th November 2008, the complainant was referred to CPR Hospital for being examined by a psychologist. No enquiry was made at Hotel Raj Permit Room in order to verify his working hours. The accused were also medically examined on 24th November 2008. There were no signs of external injury.

13. With the help of the learned counsel for the appellants and the learned APP, we have meticulously perused the evidence adduced by the prosecution and the following facts would emerge :-

(I) That, P.W.5 Sanjay had seen the victim proceeding on the motorcycle with Rahul Lambe and he had dropped them at Nagaon Phata. However, the same does not find place in the substantive evidence of P.W.1. It is her contention before the Court that she had walked upto Nagaon. A motorcyclist had dropped her at Ambai Lodge at Kolhapur;

(II) That, her father had lodged a missing complaint in which it was specifically stated that his daughter was differently-abled;

(III) In the FIR, there is no reference to Ambai Lodge but there is a reference to Dilbahar Lodge. Hence, there is an apparent change in the scene of offence;

(IV) The informant without giving description of the person who had ravished her had named her molester as Bapu Gaikwad;

(V) PW.9 had directed constables to produce the person so named. The person who was produced before PW.1 at the Police Station was in fact, Kishor @ Bapu Jaganath Sathe who is originally accused no.3;

(VI) Accused no.2 was arrested from Hotel Raj Permit Room on the next day;

(VII) This could be a case of mistaken identity. It was incumbent upon the police to hold Test Identification Parade;

14. It is further seen that at the instance of PW.1 accused no.1 was arrested. She named him as Rahul Patil whereas his real name is Vishwanath Shetty i.e. original accused no.2. It is not the case of the victim that the accused had disclosed their names to her as Rahul Patil or Bapu Gaikwad. Neither it is her case that she had heard them calling

each other by the said names. In fact, her evidence would show that Rahul Patil proposed to marry her. She had not seen Rahul and Tatya coming together or inviting each other. She had met Bapu Gaikwad in the Gymkhana independently. That, since the act of accused No. 3 was done independently, it cannot be said to be the case under section 376(2)(g) of the Indian Penal Code.

15. Charge was framed for the offence punishable under section 376(2)(g) which reads thus :-

“376. Punishment for rape. - (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever, -

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less ten years.”

16 PW. 1 has deposed before the Court that she was asked by Rahul Patil to be in the company of his friend Tatya and thereafter, Rahul Patil had disassociated with them. This would show that the accused Nos.1 and 2 were acquainted with each other and the victim was sexually abused by accused Nos.1 and 2. This would in all probabilities show the meeting of minds between the accused Nos.1 and 2, and therefore, the learned Sessions Judge had convicted accused Nos.1 and 2 under section 376(2)(g) of the Indian Penal Code. However, it cannot be said that they belong to the same group. Explanation 1 to section 376(2)(g) of IPC reads as follows :

“Explanation 1- where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the person shall be deemed to have committed gang rape within the meaning of this sub-section.”

In the facts of the present case, it can be said that accused Nos. 1 and 2 may have been acquainted with each other. However, there is nothing on record to show that they had approached the victim together or that

the accused No.2 had knowledge that the accused No.1 would take undue advantage with the victim girl. Neither there is anything on record to show that they had aided, assisted or instigated each other to molest P.W. 1. Therefore, their act of ravishing the victim ought to be considered as an individual act of each of accused. The question whether she had given the description of the accused to P.W. 9 in such a manner that he would be able to direct the constable to apprehend the accused No.1 is still a matter of doubt, but the accused No.2 was apprehended at her instance. However, the fact that the moment they were brought to the police station she identified them as her molesters is sufficient to hold that there was no loss of memory and the accused were arrested in less than 48 hours. In every case, the investigating agency need not bring on record the reason for suspecting the complicity of a person before he is called for an enquiry. Lacunas in the investigation in each and every case would not entitle an accused to acquittal.

17. The appeal stands abated as against accused No.3, as he has expired. A report was called from Central Prison, Kolhapur and it is reported that accused no.1 - Suresh @ Taty Parshuram Powar was released from the prison on 26th February 2015 after having undergone

substantive sentence. Similarly, accused no.2 – Vishwanath Ramesh Shetti was released from prison on 20th February 2015 after completing substantive sentence. The judgment of the trial court convicting the appellants for the offence punishable under section 376 of the Indian Penal Code calls for no interference.

18. For the reasons discussed hereinabove, the appeals deserve to be partly allowed.

CRIMINAL APPEAL 672 OF 2012:

19. Being aggrieved by the judgment and order, the State has filed this appeal for enhancement of sentence under section 376(2)(g) Indian Penal Code as the minimum sentence prescribed under section 376(2)(g) of the Indian Penal Code is “not less than 10 years and may extend to rigorous imprisonment for life”. Similarly, the sentence inflicted upon the original accused No.3 is disproportionate to the offence committed.

20. The learned APP has submitted that the prosecution has proved the case against the accused. That, they are arrested on the basis of suspicion. That the complainant had a poor understanding. It is submitted that the evidence of the victim/ complainant would not

inspire the confidence as it is not trustworthy. The accused in the present case have taken undue advantage of the poor cognitive ability of the victim and have waylaid her and have ravished her. That, the learned Sessions Judge had rightly convicted the appellants for the offence punishable under section 376(2)(g) of the Indian Penal Code and therefore, well reasoned the judgment of the Sessions Judge calls for no interference.

21 It is the further contention of the learned APP that the trial Court has convicted the accused Nos.1 and 2 for the offence punishable under section 376 (2)(g) of the Indian Penal Code for which the minimum sentence prescribed is 10 years and therefore, the sentence inflicted upon the accused/respondents is disproportionate to the act committed by them.

22 With the help of learned APP and the learned Counsel for the respondents, we have meticulously gone through the records, more particularly, the evidence of the victim. In Criminal Appeal Nos. 533 and 556 of 2012, we have arrived at a conclusion that the evidence adduced by the prosecution does not in any way indicate that the offence committed by the accused falls under section 376(2)(g) of the

Indian Penal Code. That, they are convicted for their individual acts of sexually abusing the victim and therefore, their act is covered under section 376 of the Indian Penal Code. In view of this finding, it cannot be said that the sentence inflicted upon the accused is disproportionate to the offence committed. They are sentenced to 7 years rigorous imprisonment, which the accused/appellants have undergone. Hence, the appeal filed by the State seeking enhancement of the sentence deserves to be dismissed.

23. The Court had appointed the learned counsel Ms. Vrushali Maindad to espouse the cause of the complainant. She has rightly submitted that the victim in the present case needs care and protection. She deserves compensation in order to enable her to take proper treatment. It is submitted that the victim has a long life ahead and therefore, she is entitled to the compensation as per the guidelines in the case of **Nipun Saxena v/s. Union of India (Writ Petition (C) No. 565 of 2012)**.

24. The learned counsel Ms. Vrushali Maindad has assisted us to the best of her capacity and hence, she is entitled to the professional fees as per Rules.

25. Hence, following order is passed.

ORDER

- (i) Criminal Appeal No.533 of 2012 and Criminal Appeal No.556 of 2012 are partly allowed;
- (ii) The conviction and sentence imposed upon the accused - appellants passed by the learned Additional Sessions Judge, Kolhapur in Sessions Case No.42 of 2009 vide judgment and order dated 5th March 2012 under section 376(2)(g) of the Indian Penal Code is set aside;
- (iii) The appellants are convicted for offence punishable under section 376 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 7 years. Fine amount is maintained;
- (iv) Appellants – Accused have undergone the sentence imposed upon them;
- (v) The District Legal Services Authority, Kolhapur shall pay to the victim an amount of Rs.5,00,000/- (Rupees Five Lakhs only) towards compensation. Copy of this judgment be sent to the office of the District Legal Services Authority, Kolhapur. Compensation be paid to the victim within a

period of four months;

- (vi) Criminal Appeal No.533 of 2012 and 556 of 2012 stand disposed of accordingly;
- (vii) In view of disposal of Criminal Appeal No.533 of 2012, Criminal Application No.1244 of 2012 does not survive and the same stands disposed of;
- (viii) Criminal Appeal No.672 of 2012 is dismissed and disposed of accordingly.

(PRITHVIRAJ K. CHAVAN, J)

(SMT. SADHANA S. JADHAV, J)