

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

CRIMINAL APPEAL NO.539 OF 2021

1. Ajmat Shaha @ Ajju Tayyab Shaha,
Aged about 27 years, Occ. Labour,
R/o. Adgaon Kd, Taluka Akot,
District Akola.
(Presently lodged at Central Prison,
Amravati)

.... APPELLANT

// VERSUS //

1. The State of Maharashtra,
Through Police Station Officer,
Police Station, Akot, Rural,
District Akola.

....RESPONDENT

Shri N.A. Badar, Advocate for the appellant.
Shri A.A. Madiwale, Advocate for the respondent/State.

CORAM :- G. A. SANAP, J.
RESERVED ON :- 11/08/2022
PRONOUNCED ON :- 22/08/2022

JUDGMENT: (Per: G.A. Sanap, J.)

1. The appellant has challenged the judgment and order dated 23.12.2019 passed by the learned Additional Sessions Judge, Akot District Akola in Sessions trial No.07/2017, whereby the learned Judge convicted the appellant for the offence punishable under Section 376 (2)(j)(l) of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for 10 years and pay a fine of Rs.5,000/-, in default of payment of fine, to further undergo simple imprisonment for six months.

The facts leading to this appeal may be stated in brief.

2. The incident occurred on 10.12.2016 at about 7.00 p.m. to 7.30 p.m. The report of the incident was lodged by Nandkishor Ghonge (PW-2) at Akot Police Station. The victim, who was subjected to sexual intercourse, on the date of incident, was 60 years old. She was physically challenged and/or mentally ill. It is the case of prosecution that the victim had come to Adgaon Phata, 7 to 8 days prior to the unfortunate incident. The victim was mentally ill. The victim took shelter under a tamarind tree near Adgaon Phata. Investigation in the case revealed that she was resident of Jambhala, Taluka Hadgaon, District Nanded.

3. The informant owns a auto rickshaw. He plied the auto rickshaw between Akot and Adgaon Khurd. The informant noticed presence of mentally ill victim under tamarind tree at Adgaon Phata. The informant took pity on the victim and started providing snacks/food to the victim everyday. On 10.12.2016, while coming back from Akot to Adgaon Khurd, he brought samosa/snack for the victim. On that day, Suresh Miraji Amle, Gopal Vishwanath Bhute, Mangesh Narayan Adhao, Amar Prakash Gawai and others were carried by the informant in his auto rickshaw as passengers. The informant, after coming near the tamarind tree, where the victim had taken shelter, stopped his auto rickshaw, but he could not locate the victim. A gunny bag used by the victim was lying under the tree. The other passengers got down from the auto rickshaw for urination. The informant turned his auto rickshaw in order to search and locate the victim with the help of the head lamp of the auto rickshaw. It is stated that the informant in the light of head lamp saw the appellant in a naked condition. He was lying on the body of the victim. He was doing sexual intercourse with the victim. The informant and other passengers thereafter went towards the said spot. The appellant ran away from the spot. He

hid himself in thorny bushes at the other side of the spot. The informant and passengers took search. However, he was not found. They all came back to the victim. The victim was completely nude. They put saree on her person. The victim was unable to speak. The informant and other passengers therefore, realized that the appellant, by taking undue advantage of mental illness of the victim, forcibly committed sexual intercourse with her. The informant went to Police Station, Akot, Rural and lodged report.

4. On the basis of his report, the crime was registered against the appellant. The police on the basis of this report, displayed due diligence and paid visit to the spot. They brought victim to the Police Station. Police sent the victim to the hospital for medical examination. The Investigating Officer drew panchanama of the spot of the incident. He seized one steel tiffin box and one underwear from the spot. The accused was arrested. He was medically examined. The clothes of the appellant were seized. The samples were collected by the Medical Officer at the time of examination of the victim. The clothes of the victim and the clothes of the appellant had been

sent to Regional Forensic Science Laboratory, Amravati. The Investigating Officer took search of the relatives of the victim. He handed over the victim in the custody of her son. After completion of investigation, the Investigating Officer filed charge-sheet against the appellant in the Court of learned Judicial Magistrate First Class, Akot.

5. On committal of the case to the Sessions Court, the learned Additional Sessions Judge framed Charge against the appellant for the above offence. The accused pleaded not guilty. His defense is of total denial and false implication in the case. Prosecution examined 12 witnesses to bring home the guilt against the appellant. The learned Additional Sessions Judge, on analysis and consideration of the evidence, found the appellant guilty of the offence and sentenced him as above. Being aggrieved by this judgment and order of conviction and sentence, the appellant is before this Court.

6. I have heard learned Advocate for the appellant and learned APP for the respondent/State. I have gone through the record and proceedings.

7. Learned Advocate for the appellant submitted that the material witnesses examined by prosecution, including the informant, have not supported the case of prosecution. Learned Advocate submitted that there is no iota of evidence to establish involvement of the appellant in the commission of crime. Learned Advocate took me through the evidence of eye-witnesses and the informant and submitted that they have not stated that the appellant committed rape on the victim. Learned Advocate submitted that the learned APP with the permission of the Court put the questions of the nature to be put in cross examination to the witnesses, however, no material has been elicited to establish involvement of the appellant in commission of crime. Learned Advocate submitted that the statement of Mangesh Adhau (PW-7) recorded under Section 164 of the Code of Criminal Procedure has been relied upon by the learned Judge to accept the case of prosecution as if the said statement is substantive evidence. In the submission of learned Advocate for the appellant, the statement of the witnesses recorded under Section 164 of the Cr.P.C. by the learned Magistrate cannot be used as a substantive evidence, when the witnesses turn hostile. Learned Advocate submitted that statement of witnesses

recorded under Section 164 of the Cr.P.C. can be used only for the purpose of proving contradiction and for the purpose of corroboration. Learned Advocate submitted that medical evidence of the examination of victim is not sufficient to record a positive finding that she was subjected to sexual intercourse. Learned Advocate submitted that CA report does not corroborate the case of prosecution. Learned Advocate took me through the reasons recorded by the learned Additional Sessions Judge in support of his finding against the appellant and submitted that learned Additional Sessions Judge has convicted the appellant on the basis of mere suspicion. Learned Advocate submitted that the prosecution has failed to prove by leading cogent and reliable evidence that the appellant committed rape on the victim. Learned Advocate therefore, submitted that the doubt created on record is sufficient to extend benefit to the appellant. In the submission of learned Advocate for the appellant, the appellant deserves to be acquitted.

8. Learned APP submitted that evidence of the informant and the remaining eye-witnesses is sufficient to prove that the appellant committed rape on the victim. Learned APP

submitted that the informant and the remaining eye witnesses, though turned hostile, have partly supported the case of the prosecution. Learned APP submitted that evidence of hostile witnesses cannot be rejected in toto. Learned APP submitted that the relevant part of the evidence of hostile witnesses can be used to prove the case of the prosecution. Learned APP submitted that Mangesh Adhau (PW-7) though turned hostile, has categorically stated that while recording his statement under Section 164 of the Cr.P.C. by the learned Magistrate, he had narrated the truth. Learned APP submitted that evidence of Mangesh Adhau (PW-7) coupled with his statement under Section 164, which is marked as Exh. 38, is sufficient to establish complicity of the appellant in commission of this crime. Learned APP submitted that evidence of Medical Officer Dr. Madhuri Thakare (PW-10), who had examined the victim, is sufficient to prove that the victim was subjected to sexual intercourse on the given date and time. Learned APP submitted that evidence of Dr. Roshan Deole (PW-14), who had examined the appellant, is sufficient to corroborate the case of the prosecution. Learned APP submitted that Dr. Roshan Deole (PW-14), on examination had found abrasion on both knees of

the accused. Learned APP submitted that findings of a fact recorded by learned Additional Sessions Judge is based on proper appreciation of evidence. Learned APP submitted that the well reasoned judgment of the learned Additional Sessions Judge is unassailable.

9. In order to appreciate the rival submissions, I have minutely perused the evidence and available record. At the outset, it is necessary to mention that in this case, unfortunately, the prosecution have had no benefit of the evidence of the victim. The victim on the date of the incident was about 60 years old. She was physically challenged/mentally ill. She could not help the Investigating Officer during the course of investigation on any point, namely the rape on her and the complicity of the appellant in the commission of rape. She was examined by Dr. Amol Jadhav, a Psychiatrist (PW-12) on 11.12.2016. Dr. Amol Jadhav (PW-12) on the basis of his examination opined that she was a case of psychosis. PW-12 has stated that she was physically and verbally aggressive towards others. He found that the victim was having auditory hallucination. She did not narrate the history of assault to him. Her medical certificate is at Exh.50. The Investigating Officer has categorically stated that

the victim was unable to narrate the incident to him therefore, he could not record her statement. The record reveals that on 13.12.2019, as per the order of learned Additional Sessions Judge, the victim was brought to the Court. It is seen that the object of bringing the victim to the Court was to verify her competence to depose before the Court and record her evidence, if found competent to depose. The record reveals that the victim was brought in the Court by her son. Learned Judge made an enquiry with the victim to ascertain her competence. The learned Judge observed the conduct, behaviour and gestures of the victim during the course of enquiry and found that she was not competent to testify as a witness. The learned Judge, therefore, could not record her evidence. This fact would indicate that from the time of incident, which occurred on 10.12.2016, till 13.12.2019 there was no improvement in the mental illness of the victim.

10. It is to be noted that this proved to be the biggest handicap of the prosecution. The prosecution therefore, has no benefit of the evidence of the victim to prove the first hand account of the incident and the involvement of appellant. The

witnesses have stated that the victim told them that she was raped. This part of their evidence if read with the evidence of Dr. Amol Jadhav (PW-12) and the observations recorded by the learned Judge about the mental state of victim on 13.12.2019, would show that the evidence of the informant and eye witnesses on the point that the victim told them that she was raped is totally unbelievable. The evidence of the witnesses therefore, has to be appreciated keeping the above important aspect in mind. The second handicap in the way of the prosecution is that the informant and eye witnesses to the incident did not support the prosecution. They turned hostile. Learned APP, in-charge of the case, with the permission of the learned Judge put the questions of the nature to be put in cross examination by adverse party to the witnesses. Learned Judge has accepted and relied upon the evidence of hostile witnesses. It would, therefore, be necessary to minutely and carefully scrutinize the evidence of the witnesses.

11. Nandkishore (PW-2) is the informant. He has admitted his signature on the report at Exh.-20 and the printed First Information Report at Exh. 21. He has not at all supported

the case of the prosecution. He completely resiled from his statements recorded in the report, First Information Report and his subsequent statement. On the basis of his evidence at the most the presence of the victim in mentally ill condition near Adgaon Phata would be established. He has categorically stated that he did not see the appellant near Adgaon Phata at the time of incident. He has stated that when he saw mentally ill woman in naked condition, he wrapped the clothes around her body. He has admitted that he went to the Police Station and reported the matter to the police. His evidence would show that he has not made any statement with regard to rape of the victim and involvement of the appellant in the crime. No material has been brought on record by the learned APP by putting questions of the nature to be put, in cross examination which would lead to even an inference of the occurrence of incident and involvement of the appellant. It is further pertinent to note that during the course of investigation, his statement was recorded under Section 164 of Cr.P.C. by the learned Magistrate. His 164 Cr.P.C. statement is a part of the record. However, Nandkishor (PW-2) was not confronted with the facts stated by him in his 164 Cr.P.C. statement. The said statement has not been admitted

in evidence. It is, therefore, seen that this statement recorded under Section 164 of the Cr.P.C. was not made use by learned APP for contradicting Nandkishor (PW-2). There is no reason for not undertaking such an exercise by the learned APP as well as by the learned Additional Sessions Judge. In the fact situation, it was expected on the part of learned APP and learned Judge to confront Nandkishor (PW-2) with the facts recorded in his statement under Section 164 of the Cr.P.C. Be that at it may, a perusal of his evidence would show that said evidence is not sufficient to establish the incident of rape on the victim and involvement of the appellant in the crime. It is to be noted that the report lodged by the informant at Exh.20 and the First Information Report registered on the basis of the said report cannot be treated as a substantive piece of evidence. It is settled position in law that the First Information Report registered on the basis of the report, at the most can be used as a corroborative piece of evidence. In this case, since Nandkishor (PW-2) has resiled from the statement the First Information Report cannot be used as a corroborative piece of evidence. The report and the First Information Report therefore, cannot be accepted as a gospel truth to establish involvement of the appellant in the

commission of crime.

12. Suresh Miraji Aamle (PW-3) is one of the eye witnesses. Perusal of his evidence would show that he has not supported the case of prosecution. In his examination-in-chief, he has stated that the victim had taken shelter under Tamarind Tree. She was mentally challenged. While narrating the facts seen by him on the date of incident, he has stated that when Nandkishor (PW-2) searched the victim on the given date and time with the help of light of autorickshaw she was found behind the hotel of Vishnu Telharkar, near the bushes. He has further stated that near the said woman, one man was seen. The woman was naked. He has stated that the said person ran away. He has stated that on his enquiry old woman, told him that she was raped. He has stated that on the spot one underwear and tiffin box of the said person were lying. In his evidence, he has not stated positively that the person they saw on the spot was the appellant. In fact he has stated that the said person was not the appellant. In further part of his evidence, he has stated that the said person had removed his pant and underwear and was in a naked condition. The learned APP put a suggestion to this

witness that the person seen by him near the victim at that time was the appellant. He has specifically denied that said person was the appellant. It is to be noted that during the course of investigation, the statement of this witness was recorded under Section 164 of the Code of Criminal Procedure by the learned Magistrate. This witness was not confronted with the said statement. His statement recorded under Section 164 Cr.P.C. is part of the record. The said statement has not been exhibited. No reason has been placed on record for not undertaking such exercise by learned APP in-charge of the prosecution. The evidence of this witness, in my view, therefore, is of no use to establish the incident of rape on the victim and involvement of the appellant in the said crime.

13. Gopal Vishwanath Bhute (PW-6) is another eye witness. He has stated that on the given date, he was travelling in the auto-rickshaw of Nandkishor (PW-2). He has stated that Nandkishor (PW-2) had brought (snacks)samosa for the old woman. He has stated that old woman was mentally ill. The mentally ill woman was not found sitting under Tamarind Tree. He has stated that Nandkishor (PW-2) therefore, went back with

his auto-rickshaw to search the said woman. He has stated that Nandkishor (PW-2) found the said woman lying under a Babul Tree near hotel of Vishnu Telharkar. There were no clothes on her body. They brought the woman near the road. She was weeping. He has nowhere stated that he saw the incident of rape on the victim and involvement of the appellant in the said crime. With the permission of the Court, learned APP put him certain questions of the nature to be put in cross examination. However, no material has been elicited to support the case of prosecution that this witness has seen the incident of rape and involvement of the appellant in the commission of rape.

14. Mangesh Narayan Adhau (PW-7) is another eye witness. He has stated that on the given date he traveled from Akot to Adgaon Phata in the autorickshaw of Nandkishor (PW-2). He has stated that remaining eye witnesses also traveled with him. He has stated that at about 7.00 p.m. to 7.15 p.m., they came to Adgaon Phata. Nandkishore (PW-2) had brought Samosa for the old woman. The old woman was not found under the tree. He has stated that therefore, Nandkishor (PW-2) searched the said woman in the light of autorickshaw.

He has stated that old woman was found lying behind the hotel of Vishnu Telharkar in naked condition. One person was present by her side. The said person ran away from the spot. He has stated that on their enquiry, the old woman told that she was ravished. They all put saree around her body. In his examination-in-chief, he has not supported the prosecution. Learned APP, with the permission of the learned Judge asked questions of nature to be put in the cross examination to this witness. He was confronted with his 164 Cr.P.C. statement. He has stated that his statement was recorded before the Court on oath. He had stated the truth before the Court. He has stated that he told before the Court that he saw the accused near the old woman. It is to be noted that this exercise on the part of learned APP was half hearted. He was not fully contradicted with the relevant statement made by him before the Magistrate. He did not support the case of the prosecution. He has only admitted that his statement was recorded by the learned Magistrate and he narrated the truth before the Court. The question is whether his statement under Section 164 Cr.P.C. can be read as it is? It is to be noted that statement of the witness recorded under Section 164 of the Cr.P.C. cannot be used as a

substantive evidence. It can be used for the purpose of contradiction of witnesses and for the purpose of corroboration of the evidence of witnesses. Here, in this case, Nandkishor (PW-2) has turned hostile. Therefore, the said 164 statement cannot be used for the purpose of corroboration. It is seen that this witness was not properly contradicted with the facts recorded in the statement at Exh.-38. As far as the evidentially value of Section 164 Cr.P.C. statement is concerned, I may usefully refer the decisions in the cases of *Bhuboni Sahu Vs. the King*¹, *Ram Kishan Singh Vs. Harmit Kaur and another*² and *Baij Nath Sah Vs. State of Bihar* .³ In the case of *Bhuboni Sahu Vs. the King*, the Privy Council has considered the provisions of Section 157 of the Indian Evidence Act, 1872 and Section 164 of Code of Criminal Procedure and held that the statement made under Section 164 of the Code of Criminal Procedure can never be used as substantive evidence of the facts stated, but it can be used to support or challenge the evidence given in Court by the person who made the statement.

1 AIR 1949 PC 257

2 (1972) SC 468

3 (2010) 6 SCC 736

In the case of ***Ram Kishan Singh Vs. Harmit Kaur and another***, it is held that statement under Section 164 of Code of Criminal Procedure is not substantive evidence. It can be utilized only to corroborate or contradict the witness vis-a-vis., a previous statement and nothing more. The same view has been followed by the Hon'ble Apex in the case of ***Baij Nath Sah Vs. State of Bihar***. It is held that even exhibited statement under Section 164 Cr.P.C. cannot be used in its entirety though the same was put to the witness and denied by the witness.

15. A minute perusal and appreciation of the evidence of above witnesses would show that their evidence is not sufficient to prove rape on the victim and involvement of the appellant in commission of rape. On the basis of their evidence at the most, it can be established that on the given date and time these witnesses saw the victim in naked condition. The evidence at the most would prove that one person was seen with the said woman. This evidence, in my opinion, would not be sufficient to establish rape on the victim and involvement of the appellant in commission of rape.

16. It would be necessary to consider the remaining

corroborative evidence placed on record by the prosecution. The most important evidence is of the Medical Officer Dr. Madhuri Thakare (PW-10). She had examined the victim. It is to be noted that the alleged incident occurred between 7.00 p.m to 7.30 p.m. on 10.12.2016. The victim was examined by Dr. Madhuri Thakare (PW-10) at 3.00 a.m on 11.12.2016. It is not the case of the prosecution that before examination, the victim had taken bath or washed her clothes. The evidence of the Investigating Officer would show that after lodging the report by Nandkishore (PW-2), police visited the spot and brought the victim to the Police Station. After recording the First Information Report, the victim was sent for medical examination. This fact, therefore, proves beyond doubt that the victim was in custody of the police immediately after the incident. Dr. Madhuri Thakare (PW-10) has deposed that the victim was conscious but disoriented and she was talking irrelevant. She has stated that the victim was a case of extreme malnutrition and extreme weight loss. The victim did not provide history of assault. She examined the victim. There were no injuries on her body. She has stated that redness was seen over the fourchette and introitus of her private part. There was

2 m.m. superstitial tear on fourchette. There was no bleeding. She has stated that there was evidence of dried blood on the perennial area. On the basis of the examination and symptoms noticed during the examination of the victim, Dr. Madhuri Thakare ((PW-10) opined that possibility of sexual assault on the victim could not be ruled out. It is to be noted at this stage that on the basis of over all examination of the victim and particularly examination of her private part, Dr. Madhuri Thakare (PW-10) could not give a positive opinion that the victim was subjected to sexual intercourse within a period of 12 hours. The medical examination certificate is at Exh.45. The notes made by Dr. Madhuri Thakare (PW-10) are at Exh.46. In my opinion therefore, on the basis of evidence of medical officer, it is not be possible to come to a positive conclusion that the victim was subjected to sexual intercourse.

17. It is a pertinent to note that at the time of examination of the victim Dr. Madhuri Thakare (PW-10) did not find any injury to her hymen. Dr. Madhuri Thakare (PW-10) had collected blood samples of the victim. She had collected the pubic hair, two vaginal swabs and vaginal smear for semen examination. It is undisputed that samples collected by

the medical officer (PW-10) were sent to the CA for analysis. Similarly, the clothes of the victim and the clothes of the accused were also sent for examination to CA. Exh. 63 is the examination report of samples collected by PW-10. In the analysis of sample, semen was not detected in the vaginal swabs, vaginal smear and pubic hair of the victim. The blood samples of the victim could not be determined as the result was inconclusive. It has come on record that samples were collected within 8 to 9 hours from the alleged incident. It has come on record that during this period the victim had not taken bath. It is to be noted that if there was a sexual intercourse, as sought to be made out by the prosecution, then, definitely there would have been emission of semen. The semen would have been found in the vaginal swab and vaginal smear, if there had been penetration and emission of semen. In my opinion, this would be very important aspect and the circumstance against the case of prosecution. I am conscious of the fact that for the purpose of constituting rape, slightest penetration is necessary. There is no need of emission of semen in the said penetration. However, in the facts and circumstances, if the victim had been raped by the appellant and there had been penetration, there would have

been injury to the private part of the victim. The victim, as can be seen from the evidence of medical officer, was a case of malnutrition and extreme weakness. In my view, the CA reports therefore, do not support the case of prosecution.

18. Exh. 63 is the CA report of examination of clothes of the victim. Perusal of report of Exh.63 would show that neither blood nor semen was detected on the clothes of the appellant. The blood was detected on saree of the victim. It was found to be human blood. However, the blood group of the blood detected on the saree could not be determined as the result was inconclusive. It is to be noted that if the incident as alleged had occurred then some blood or semen stain ought to have been found on the clothes of the victim as well as on the clothes of the accused. Exh.64 is the CA report of the examination of the blood of the appellant and pubic hair of the appellant. No semen was detected on his pubic hair. The blood group could not be determined as the result was inconclusive. The CA report therefore, does not take case of prosecution further. If the CA report had been positive, then the same would have been the best piece of evidence to connect the appellant with the crime. In my opinion, therefore, evidence of the

medical officer fails to prove positively that the victim was subjected to sexual intercourse. The evidence of the analysis of the samples by CA does not corroborate the case of the prosecution on any aspect.

19. The next important witness examined by the prosecution is the medical officer, who had examined the appellant. Dr. Roshan Deole (PW-14) has deposed that on 11.12.2016 the appellant was brought to Rural Hospital, Akot for examination. He examined the appellant. On examination, he found that there was abrasion on both knees of the appellant. He has stated that his black and white shirt was torn from back side. He obtained the blood samples and pubic hair of the appellant. He has stated that possible cause of injury to knees was due to friction with hard surface. Except the abrasion on the knees of the appellant no other injury was found on his body. It is to be noted that if victim was subjected to sexual intercourse by force, she would have made some resistance and prevented the appellant from committing the intercourse. In that event, the appellant would have sustained some injuries on the upper part of the body. Dr. Roshan Deole (PW-14) has stated that he did

not notice any injury on the private part of the appellant. It is to be noted that if the appellant had indulged in sexual intercourse at 7.00 p.m. to 7.30 p.m. on 10.12.2016 and examined on 11.12.2016 at 10.00 a.m., the Doctor ought to have noticed absence of smegma on the private part of the appellant. The doctor has not made any statement in his report as well as in his evidence about it. In his cross-examination, the medical officer has admitted that due to friction with any hard surface abrasion can occur. He has further admitted that due to fall on the ground such injury may occur. In my opinion, only on the basis of abrasion on the knees of the appellant, his involvement in the crime cannot be established. This could have been used as corroborative piece of evidence. There is no other evidence to positively establish his involvement in the commission of crime. In my opinion, the evidence of Dr. Roshan Deole (PW-14) is also not sufficient to take case of prosecution forward.

20. It has been proved that during the course of investigation, the tiffin box and underwear were seized from the spot. It is the case of prosecution that tiffin and the underwear belonged to the appellant. It is to be noted that except seizure

no other concrete evidence has been adduced to prove that these articles belonged to the appellant. Mahesh Mahalle (PW-4) has been examined to prove that at about 6.30 p.m. he was proceeding from Adgaon Khurd towards his village. At that time there was a darkness on the road and he saw the appellant coming from the direction of village with tiffin box in his hand. He has stated that he saw the appellant in the light of mobile torch. This witness has been examined to prove the presence of the appellant in the vicinity of the spot of the incident and to connect the appellant with the tiffin box found on the spot. In his evidence, he did not state about specific identification mark on the tiffin box. Perusal of his evidence would show that the appellant came from his opposite direction in the darkness. He has not stated any reason to switch on the mobile torch and see the appellant. The tiffin box which was produced in the Court was not shown to this witness. Perusal of his evidence would show that this witness has been examined just to fill the lacuna. On minute appreciation of the evidence of PW-4 I do not say that his evidence inspires confidence. Besides, even if his evidence is accepted as it is, it would not corroborate the case of prosecution on the material aspects.

21. The perusal of the judgment and order passed by learned Judge would show that learned Judge has accorded importance to the evidence of hostile witnesses. On re appreciation of their evidence, I am satisfied that their evidence is neither reliable nor sufficient to prove the incident of rape and the involvement of the appellant in the commission of rape on the victim. It is to be noted that their statements recorded by the police during the course of investigation under Section 161 of the Code of Criminal Procedure could only be used for the purpose of finding of omissions and contradictions. Similarly the statements of witnesses recorded under Section 164 of the Cr.P.C. by the Magistrate cannot be used as a substantive evidence. Those statements could be used for the purpose of contradiction and corroboration. The question of making use of those statements for the purpose of corroboration would be out of question, inasmuch as these witnesses turned hostile to the prosecution. I am conscious of the fact that in this case the victim was a helpless, mentally ill woman. It is seen that the mental illness of the victim totally handicapped her and as such became obstacle in the way of prosecution to bring on record the narration the first hand account of the incident and involvement

of the appellant in the said incident. The incident, if had occurred, would be the most unfortunate. It is to be noted that in a criminal trial, the prosecution has to prove the guilt of the accused beyond all reasonable doubts. If there is a doubt in the case of prosecution with regard to the involvement of accused in the commission of crime, then benefit must go to the accused. It seems that the learned Judge on the basis of material on record had strong suspicion in his mind about involvement of the appellant in the commission of crime. It is a settled legal position that the suspicion, however strong it may be, cannot be substituted for the proof. The accused cannot be convicted on the basis of mere suspicion. On this point reported decision in the case of *Jaharlal Das Vs. State of Orissa* ⁴ can be usefully referred. In the judgment the Hon'ble Apex Court has observed as under:-

"No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Invariably in such cases a person last seen with the victim, unless otherwise there are circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudication suspicion, howsoever strong, cannot be allowed to take the place of proof."

4 (1991) AIR 1388

In the facts and circumstances, in my opinion in this case the prosecution has failed to prove the guilt of the appellant. The star witnesses of the prosecution have turned their back to the prosecution. It is to be noted that their statements under Section 164 of the Cr.P.C. cannot be used as a substantive piece of evidence. At the most, those statements can be made basis of prosecution against those witnesses for giving false evidence. In this case, learned Sessions Judge did not insist the learned APP to prove 164 of the Cr.P.C. statements of the witnesses. It is to be noted that the Magistrate is not required to be examined to prove the 164 Cr.P.C. statement. However, there is no legal bar to examine the Magistrate to prove the relevant facts touching to the recording of 164 Cr.P.C. statement. In this case, considering the fact that 164 statements of the witnesses had been recorded and witnesses did not support the case of prosecution, the learned APP at least could have made a request to the learned Sessions Judge to allow him to examine the Magistrate. In my opinion, considering the seriousness of this crime, examination of Magistrate, who had recorded the statements of the witnesses under Section 164 of the Cr.P.C. would have made a difference.

22. In the facts and circumstances, I am of the view that in the teeth of the available evidence the conviction and sentence awarded to the appellant cannot be sustained. The prosecution has failed to bring home guilt against the appellant beyond reasonable doubt.

23. In my opinion, therefore, the appellant is entitled to be acquitted. Hence, the following order:-

ORDER

- (i) The appeal is allowed.
- (ii) The judgment and order dated 23.12.2019 passed by learned Additional Sessions Judge, Akot is set aside.
- (iii) The appellant is acquitted for the offence punishable under Section 376 (2)(j)(l) of the Indian Penal Code.
- (iv) The appellant be released forthwith, if not required in any other case.

JUDGE