

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.1219 OF 2019

Sachin s/o Vaijinath Tandale
Age : 25 years, Occu – Agri.,
R/o Hingani (Kh),
Tal. & Dist. Beed.

...Appellant

VERSUS

The State of Maharashtra
Through the Police Station Officer,
Police Station, Neknoor,
Tal & Dist. Beed

...Respondent

...

Mr. S.S. Thombre, Advocate for Appellant.
Ms V.N.Patil Jadhav, APP for Respondent/State.

...

CORAM : S.G. MEHARE, J.

RESERVED ON : JUNE 28, 2023

PRONOUNCED ON : SEPTEMBER 13, 2023

JUDGMENT:-

1. The appellant has preferred this appeal under Section 374 of the Criminal Procedure Code against the judgment and order of conviction passed by the learned Additional Sessions Judge, Beed in Sessions Case No.24 of 2017 dated 27.11.2019 for the offence punishable under Sections 452 and 376 of the Indian Penal Code.
2. The appellant would be referred to as 'accused', and the respondent would be referred to as 'prosecution' hereafter.
3. The gist of the prosecution case was that the prosecutrix and the accused were residing in the same village. On 05.12.2016,

from about 05.00 to 5.30 p.m., the prosecutrix was alone in her house. She was cooking pulses on the earthen stove. The accused went there, held her right hand, dragged her inside the house and pushed her on the bed. She resisted the accused, but he did not listen. She had an abrasion. The accused rolled her saree up, forcibly inserted his private part into her genital and committed rape on her. That time, the husband of the prosecutrix came home for water. He saw the accused committing rape with the prosecutrix. He pulled the accused and assaulted him. The accused gave a jerk to his hand and fled away. She screamed; hence, neighbours also came there.

4. The incident was reported on 06.12.2016 to the Police Station Nekloor, District Beed, at about 06.01 hours. The accused was arrested on 06.12.2016 at 19.00 hours. The prosecutrix and the accused underwent a medical examination on 06.12.2016.

5. The learned Sessions Court had framed the charges against the accused. The accused denied the charges and claimed to be tried. The prosecution examined eight witnesses in all. The statements of the accused under Section 313 Cr.PC were recorded. The accused neither entered the witness box nor examined a witness. The accused had a defence that the husband of the prosecutrix had raised a loan of Rs.1 lac from one Vijay Ghule for his grocery shop. He was the middleman in the said loan. The borrower insisted the accused recover the amount; hence, on the day of the incident in the

morning, he went to the grocery shop of the prosecutrix's husband. They quarrelled over it, and his right hand was fractured due to the blow given by her husband. He also has the defence that considering the spot of the incident, which was surrounded by houses and a school, the incident was impossible. Only to avoid the payment of Rs.1 lac, he has been implicated falsely in the crime.

6. Heard the learned Counsel for the accused and the learned APP for the State at length.

7. The following points arise for the determination of this Court, and the findings thereon are recorded for the reasons to follow:

Serial No.	Points	What order
1	Does prosecution prove that on 05.06.2012 at about 5.00 to 5.30 p.m., the accused committed house-trespass by entering into the house of the prosecutrix having made preparations to commit the rape on her?	Yes
2	Does the prosecution prove that the accused, on 05.06.2012 at about 5.00 to 5.30 p.m., had committed rape on the prosecutrix in her house?	Yes. under Section 376/511.

8. The prosecution examined the following witnesses to prove the charges against the accused.

P.W. Nos.	Names of Witness	Type of Witness and documents proved	Exh. Nos.
1	Ganesh Mahadeo Khose	a) Cloth recovery panchnama of the accused.	33
		b) Cloth recovery panchnama of the prosecutrix.	34

		c) Spot panchnama	35
2	The Prosecutrix	a) Report dt. 6.12.2016	37
		b) Statement under Section 164 of Cr.PC.	38
3	Dr. Santosh Ganpati Shahane	Medical Officer a) Age estimation report of prosecutrix	41
		b) Medical examination report of the prosecutrix	42
4	Shrikant Sahebrao Andhale	Husband of the prosecutrix (Eye Witness)	---
5	Ashok Tukaram Tandale	The witness, on seeing the accused fleeing away	---
6	Bharat Suresh Garade	Police Constable Carrier of muddemal property	52
7	Arvind Ramchandra Gaikwad	Revenue Circle Officer. Sketch of the spot of the incident.	57
8	Gopinath Sadashivrao Waghmare	Investigation Officer a) Letter sending prosecutrix for medical examination.	61
		b) Medical Examination report of the prosecutrix	41 & 42
		c) Medical report of the accused	58
		d) Arrest panchnama	64
		e) PTR of prosecutrix	66
		f) C.A. reports	17, 18 & 19

REASONS

As to Points nos. 1 and 2: Both points are interlinked; hence, discussed together.

A. Direct Evidence.

1. The victim, P.W.2, has deposed that on the day of the incident, she was at her house and cooking yellow pulse on the earthen stove in the courtyard. That time, the accused entered her home, held her hand and dragged her into the house. She resisted him, but he did not listen. He pushed her forcefully onto the bed and laid on the cot. He took his underwear down, rolled her saree up, inserted his penis into her vagina, and did forceful sex with her. She screamed, but nobody came as neighbours were gone to fair. That time, her husband (P.W. 3) came home to have water. He saw the accused was raping her. Her husband beat him. He gave a jerk to him and fled away. She lodged the report to the Police. (Ex. 37). Her Statement under Section 164 Cr.P.C. was also recorded.

2. The husband (P.W.3) of the prosecutrix was the first eyewitness to the incident. He deposed that on the day and time of the incident, he went to his house from his grocery shop to bring water. That time, he saw the accused having sex with the prosecutrix. He pulled him from her body. He gave a jerk to his hand and fled away.

3. P.W 5 deposed that he saw the accused running from the front of Z.P. School. He asked him why he was running.

But saying nothing, he went running. The prosecutrix told him about the incident. His further evidence is hearsay.

B. Physical Evidence.

1. P.W. 3 Dr. Santosh Ganpati Shahane testified that on 6.12.2016, he examined the prosecutrix with the assistance of a staff Nurse. He proved the Medical Examination Report of the prosecutrix below Ex. 41. He collected her matted pubic hair, vaginal swab, fingernails, and blood for blood grouping. However, he was silent about the vaginal fluid stains, blood stains, semen stains on public hair, thighs and clothes, and smears of foreign hair, especially on her private part intermingled with pubic hairs and stains of cosmetics on the person and clothes, vaginal fluid, skin, fibres cosmetics in fingernails.

C. Medical Evidence.

1. P.W. Dr Santosh Shahane testified that he found an abrasion on the upper limb measuring 0.5 X 0.5 cm., dorsally mid 1/3rd, caused within 24 hours. Medical Examination Report Ex. 41 mentions the same injuries on the person of the prosecutrix. He also noticed that due to a child's birth, her hymen was torn, and it was an old, healed tear.

D. Trace evidence

1. P.W.1 has proved the spot panchanama dated 6.12.2016. (Ex.35). The bed sheet on the bed was wrinkled. A small piece of gram pulse and broken pieces of bangles were found on the bed sheet. However, the panchanama did not disclose the police officer who drew the spot panchanama seized the above articles from the spot. The same witness proved the recovery panchanama dated 6.12.2016 (Ex.33) of the seizure of the ash colour pant stained with blood at various places on the thigh, a white shirt stained with blood at various places, a sando banian and an underwear of the accused. Those clothes were seized from the person of the accused. He further proved the seizure panchanama of the clothes of the prosecutrix (Ex.34), which were produced by her husband (P.W.3). Under the said panchanama, her saree with blood stains at various places, a petticoat stained with blood, a blouse and knicker were seized on 6.12.2016.

E. The Investigation.

1. The Investigation Officer sent the seized clothes to the Deputy Director of Forensic Laboratory, Aurangabad, on 15.12 2016 under invoice with questionnaire through carrier witness P.W. 6 Bharat Suresh Garade. He delivered the seized articles to the Office of Forensic Laboratory on the same day.

He testified that he drew the seizure panchanama and the occurrence scene. He also testified that the Chemical Analyser's reports (C.A. report for short) were below Exhs., 17, 18 and 19.

F. Chemical Analyser's report.

1. C.A. report Exh.17 is about the clothes of the prosecutrix and the accused. The analysis reports were that the Saree was stained with blood ranging from 0.5 X 0.5 cm in diameter, the petticoat was blood stained ranging from 0.5 X 4 cm in diameter at the middle and lower portion, her undergarment was also blood-stained, but it was washed. Full pant and the shirt of the accused was found moderately blood stained on front portion of legs ranging from 0.1 cm to 3 cm. knicker of the accused was stained with semen in the middle. The blood detected on the clothes was human. The blood on the petticoat, undergarment of the prosecutrix and the full pants and shirt of the accused were stained with blood Group 'A.B.' However, the blood group on the saree of the prosecutrix and the semen of the accused were inconclusive. The C.A. report EX. 18 indicates the blood group of the prosecutrix was 'A.B.'. No semen was detected on the pubic hair and vaginal swab of the prosecutrix. No human blood was detected on pubic hair and in the nail

clippings of the accused (Ex.19). However, the blood group of the accused was also "A.B."

G. The scene of occurrence.

1. As per spot panchanama Ex. 35 proved by P.W. 1 Ganesh Mahadeo Khose, it was the two rooms of the tin residential house of the prosecutrix and courtyard facing East. On the East, there was Zilla Parishad Primary School. On the West, the house of Jivan Wads Sonawane. On the North, the house of Keshav Anna Tandale, and on the South, the house of Ramrao Sopan Andhale. In the south side of the room, a wooden cot with bed and bed sheet was lying East-west.

H. Defence of the Accused.

1. The accused has a defence that the husband of the prosecutrix had borrowed Rs. One lack for four months in January 2016. from one Vijay Ghule through him for his grocery shop. He had promised to return the money within four months. Vijay Ghule was calling him for money. Hence, on the day of the incident, he went to his grocery shop to demand money in the morning at about 9 to 10 a.m. Her husband abused and beat him. In that beating, his hand was fractured. He went to Beed with his father to treat the fracture. On 16.6.2016, plaster was applied to his hand. In

the evening, he went to lodge a report to the Police Station, Neknoor, but he was arrested in the present crime instead of taking his report. The false case was lodged to embezzle the borrowed money.

9. Appreciating the evidence, the learned Additional Sessions Judge, Beed, convicted the accused for the offence punishable under Sections 452 and 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for three and seven years for the respective offences.

10. Assailing the reasons and findings of the learned Additional Sessions Judge, the learned Counsel for the accused has vehemently argued that the learned Judge did not consider the delay of around six hours in lodging the report. The reason for the delay was also not explained. The Chausala Police Chowki was only five km from her village. She admitted that she gave intimation of the incident of the said Police Chowki. However, there was no record that her report was taken there. PW 8 Investigation Officer admits that no report as such was received at police Chowki. She deposed falsely that she went to the Police Station Neknoor at 11 p.m. PW. 8, the Investigating Officer deposed that when he returned to the Police Station at 5 a.m., the prosecutrix and her relatives were sitting there. Then, he directed P.S. I. Patil to record her statement. Her report was received at 6 a.m. He would submit that it was an afterthought

report. Her brother-in-law reached home at 3 a.m. as she admitted in her cross. Then, they consulted and lodged a false report.

11. Per contra learned, APP submits that the police Station Neknoor was thirty km away from the village where the incident happened. The incident happened at 5.30 p.m. Considering these facts and the distance of the police Station, the time spent to reach there, and the absence of the PSO at the Police Station, it would be difficult to believe that the report was lodged deliberately late. Though her brother-in-law reached the village at 3 a.m., the victim went to the Police Station at 11 p.m. Time was spent in completing the procedure, cooling and settling her.

12. The law is well settled that mere delay in lodging F.I.R. is not fatal, but the delay must be explained satisfactorily and accounted for by the prosecution. The Court has to examine whether the plausible explanation is offered and, if offered, whether it is satisfactory. The delay assumes significance in the cases where the accused has been unnecessarily implicated in the crime. The sequence of the events till reaching the Police Station should be considered where the F.I.R. was delayed. The Court should evaluate the possibilities on the touchstone of events that happen in the ordinary course of nature.

13. The prosecutrix on delay in lodging the F.I.R. has testified that after the incident, her husband consoled her and then went to

the field to call her in-laws. He brought them home. Her husband called her brother-in-law from Pune. She told the incident to the villagers. Then she, her in-laws and her husband went to the police station to lodge a report.

14. PW. 8, the Investigation Officer, deposed that when he reached the Police Station at about 5.00 a.m., after patrolling. He saw the prosecutrix sitting in the police station, and then her report was reduced to writing by one P.S.I.

15. In her cross-examination, she deposed that they reached the Police Station at 11 p.m. and lodged the report. Thereafter, they were there till 5 p.m., until her brother-in-law arrived. The sequence of events that came on record by way of evidence appears plausible. In addition, the distance between the police station and their village was another circumstance that inspires the confidence that time must have been spent reaching the police station. The delay in recording her report was not at her instance, but it appears that it was not recorded till PSO reached the police Station. Evaluating the relevant evidence on lodging the report, the Court is not impressed with the arguments of the learned Counsel for the accused that there was a deliberate delay in lodging the report.

16. The next limb of the argument of the learned Counsel for the accused was that the presence of P.W. 5 Ashok was not probable. He was a planted witness. He would refer to the evidence of the

prosecutrix PW. 1 and argue that she did not state due to her screaming, PW.5 Ashok or her cousins-in-law came there. However, her husband, PW. 4, has improved the case. The evidence of the prosecutrix was specific that she had screamed. However, nobody came since the villagers went to the fair at the village Jeba Pimpri. The prosecution did not examine her in-laws. Hence, an adverse inference may be drawn for withholding the material witnesses.

17. The learned APP submits that whatever evidence was laid before the Court was sufficient to prove the charges against the accused. Every witness listed in the charge sheet need not be examined. The evidence of the prosecutrix was supported with medical evidence, and evidence of her husband corroborates the facts as he reached home during the commission of the crime. His credit was also not impeached on the fact that PW-5 was the accused of the murder of his wife and the husband of the prosecutrix was helping him. He was natural witness. His character does not impeach the worthiness of his credit.

18. PW. 5 was examined to prove the facts that he saw the accused running away from the house of the prosecutrix immediately after the incident. He testified that hearing the screaming of the prosecutrix while going to her home, he saw the accused running from in front of Z.P. School. He asked him why he was running. He did not tell him anything. Then he went to her home, and she

narrated the incident to him. In his cross-examination, he admitted that his house is 150 to 200 feet away from the house of the prosecutrix. He also did not deny that he was behind bars for the murder of his wife. However, he denied the suggestion that the husband of the prosecutrix and his uncle were helping him in his case. However, P.W. 3, the husband of the prosecutrix, admitted in his cross-examination that he had stated to the Police that P.W. Ashok had come to his house, but he cannot assign any reason why it was not mentioned in his statement. The accused had proved the above omission from the Investigation Officer, P.W. 8. It was a material improvement in the testimony of P.W. 3 and does not corroborate the testimony of P.W. 5. Hence, hearing the screaming of the prosecutrix he came to her house and saw the accused running from in front of the school raises doubt. He appears to be a planted witness. For these reasons, he cannot believe that he saw the accused running from the road in front of the Zilla Parishad School road, and he ask him why he was running, and he did not tell him anything. His testimony does not appear natural and believable; hence, it does not inspire confidence. His presence on the spot was also false under the shadow of doubt. Hence, his testimony cannot be received as corroborating the prosecution case.

19. Section 114 illustration (g) of the Indian Evidence Act deals with the presumption arising from withholding evidence. That

provides that the Court may presume that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it. The Hon'ble Supreme Court in Chacko Vs. State (1985) 5 SCC 602 has observed that only because the prosecution, after examining the witness who was injured in the incident, dropped the other witnesses, it cannot be said that presumption under clause (g) of Section 114 is attracted. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall, in any case, be required for the proof of any fact. In Maqsoodan and others vs. State of U.P (1983) 1 SCC 218, the Hon'ble Supreme Court has observed that it is not the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events upon which the prosecution is essentially based irrespective of considerations of number and reliability. The quality of the testimony matters and not its quantity or the number of witnesses. Failing to examine all witnesses named in the F.I.R. or any of the neighbours would not make the testimony of the best and natural witnesses unreliable. In the cases of rape, the law is well settled that solitary evidence of the prosecutrix if inspires the confidence that she is deposing the truth; the accused may be convicted without corroboration. The evidence produced by the prosecution is itself sufficient to prove the case. Hence, the presumption under clause (g) of Section 114 of Evidence Act would not apply. The Court does not find water in the argument

of the learned Counsel for the accused that the prosecution case falls under the shadow of doubt for withholding the evidence of in-laws of the prosecutrix.

20. The learned Counsel for the accused has also argued that the prosecution did not prove the presence of the accused on the spot. The prosecutrix admitted in her cross that on 5.12.2016, her husband beat the accused; hence, his hand was fractured. When he went to the Police Station, the plaster was applied to his hand was also proved. This admission and facts make the probability of the defence strong that the quarrel took place as the accused went to his shop to demand money. He also argued that the medical evidence shows no signs of forceful sex. Hence, the prosecution failed to prove the case beyond a reasonable doubt.

21. The prosecutrix and the accused were medically examined on 6.12.2016. The prosecutrix was examined at 1:00 p.m., and the accused was examined at 3:30 p.m. The Medical Officer did not find any injury on the entire body, including the genitals of the prosecutrix, except abrasion measuring 0.5 X 0.5 cm dorsally mid 1/3rd caused within 24 hours. In the same way, no injuries were found on the person of the accused.

22. In the medical examination report of the prosecutrix and the accused, no stains/foreign material, including pubic hairs and fingernails, were found on their person.

23. No stains were found on the cloth of the prosecutrix in her medical examination report. However, in the medical examination report of the accused, blood stains were found on his clothes.

24. The clothes worn by the prosecutrix and the accused at the time of the alleged incident were seized on the same day after their medical examination. Surprisingly, blood was found on her saree and petticoat in the cloth recovery panchanama of the prosecutrix (Ex. 34/C). However, no blood stains were found on her blouse and knickers. The recovery panchanama of the clothes of the accused was drawn on 6.12.2016 in the evening. (Ex.33/C). Blood stains were found on his full pant and shirt. However, his sando banyan and undergarments were not blood-stained. The prosecution did not produce the evidence when and who collected the blood and semen samples of the accused and prosecutrix from the Medical Officer, though he was requested to collect those samples by letters dated 6.12.2016 (Exhs 61 and 62). The Investigating Officer also did not testify about it. The letters Exhibits 61 and 62 do not bear the endorsement of collecting those samples. The Medical examination report bears a column about the collection of samples for the forensic laboratory. The directions have been given to the Medical Officer in the said column that the list of samples should be preserved in triplicate. The specific words were to be mentioned in words as to which samples were collected and which were not collected. Neither

the Medical Officer testified which samples as per the requisition were collected nor the seizure panchanama of any such samples was produced. However, C. A. reports Exhs 18/C and 19/C mention receiving samples of blood, semen, pubic hair, vaginal swab and nail clippings of the prosecutrix and the accused on 15.12.2016. The Investigating Officer has proved a requisition dated 15.12.2016, sending only the clothes of the accused and the prosecutrix. That requisition does not include the samples mentioned above.

25. The prosecution heavily relied on the C.A. report, Ex. 17/ C detects blood stains on the saree, petticoat and knicker of the prosecutrix and semen on the underwear of the accused, which was not noted by the Medical Officer while examining them. She had an abrasion over her right hand dorsally. The abrasion injury may cause a light injury. If it is considered, it was doubtful whether such a moderate spreading of blood on her saree was possible. The absence of recovery panchanama of blood samples gives rise to doubt that the blood must have been spread over the clothes of the prosecutrix. When she had no injuries on her legs, thighs and genitals, it cannot be believed that her petticoat and knicker were blood-stained during the incident. There were no injuries on the person of the prosecutrix as per her medical examination report except on the right-hand dorsal. These facts raise serious doubt about getting her inner clothes like petticoat and knicker blooded. However, considering the evidence

that the husband of the prosecutrix beat the accused on the spot of the incident, causing him injuries, cannot be ruled out.

26. Other important facts of the case were that no stains/foreign materials, including semen, were found on the pubic hairs and fingernails of the prosecutrix and the accused.

27. The prosecutrix had an abrasion over her right hand dorsally. Though P.W. 4 Doctor has admitted in his cross-examination that such injury was possible by itching, the Medical Jurisprudence does not approve his opinion. It is the injury where skin rubs off. It is also known as a scrap. It may be caused by trapping on an uneven sidewalk or falling off of the bicycle. It causes pain, skin discolouration and light bleeding. If the nature of abrasion injury and its causes are considered, it cannot be believed that it may be caused by itching. It was caused on the dorsal side of the hand, which means it was caused on the back side of the hand. There were no injuries on the person of the prosecutrix as per her medical examination report except on the right-hand dorsal. These facts again raise serious doubt about getting her inner clothes like petticoat and knicker blood stained. The prosecution had proved that it was caused within twenty-four hours. The prosecution has proved that the accused held her hand, dragged her into the house and failed her on a wooden cot,

and she was resisting him. In the struggle, he had received the above injury.

28. The next question would be whether the injury on the person of the prosecution other than her genital is sufficient to prove the offence of rape, and the accused shall be convicted only on the testimony of the prosecutrix and her husband.

29. The prosecutrix and her husband testified that the accused penetrated his penis into her vagina. The prosecutrix has given a material admission that after dragging her into a room. Fifteen minutes thereafter, her husband came home. Her husband testified that when he entered the room, the accused was lying over his wife and having sex with her; he pulled, slapped, and struck him with a fist. He did not try to catch the accused when he fled away by giving a jerk to his hand. The evidence proves that the incident lasted for 15 to 20 minutes. In such a time, penetration is possible. However, the medical evidence discussed above does not support the prosecution that there was penetration and ejaculation.

30. The Hon'ble Supreme Court in the case of Dastagir Sab and Anr. V State of Karnataka (2004) 3 SCC 106 held that the presence of injury on the body of the victim is not a sine qua non to prove the charge of rape. In Sadashiv Ramrao Hadbe v State of

Maharashtra and Anr (2006) 10 S.C.C. 92, it was observed that where the sole testimony is unsupported by any medical evidence or the whole circumstances are highly improbable to believe the case set up by the prosecutrix, the Court shall not act on the solitary evidence of the prosecutrix. The Hon'ble Supreme Court in *Moti Lal v State of M.P.* (Criminal Appeal No. of 2008 (Arising out of S.L.P. (C) 4751 of 2006) dated July, 15, 2008, held that if evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If, for some reason, the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence that may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case.

31. The testimony of the prosecutrix is that the accused did sex with her even though she was resisting him and penetrated his penis in her vagina, and her husband also saw the same. The investigating Officer, as discussed above, created evidence of blood stains on her inner clothes in contra to the same fact by the Medical evidence. Hence, the Court finds it difficult to place implicit reliance on the testimony of her husband and hers, therefore, corroboration appears necessary. The medical evidence does not support the prosecutrix of having penetrative sexual assault. Therefore, the

testimony of the prosecutrix and her husband on penetrative sexual assault does not inspire confidence. However, a dorsal injury on her right hand might have been caused by rubbing her skin on the wooden cot. Such injury proves that she had resisted the accused while committing an offence.

32. The accused in support of defence did not produce the medical certificate issued by the doctor who treated him for fracture and its timings. Instead of examining the person who lent money through him to the husband of the prosecutrix, he produced the bank statements of her husband. The Bank statement does not prove that the money was transferred to his account through the said person or he had deposited the same in his account. Therefore, it was not sufficient to believe that her husband bet him in the morning near his shop when he went to demand the loan money back on the message of the borrower, and he was falsely implicated in the crime. His defense also not appears probable.

33. It is evident that there was no penetration, but it is proved that the accused dragged the prosecution into a room and fell her on a wooden cot; he rolled her saree up, and in the struggle, she suffered abrasion. Hers and her husband's evidence of the presence of the accused on the spot of the incident has not been shattered. Therefore it cannot be believed that the accused was not on the spot

of the incident. That also proves that he entered her house with the intention to commit a crime punishable with imprisonment.

34. In every crime, there is firstly, intention to commit it; secondly, preparation to commit it; thirdly to commit it. If the third stage, that attempt is successful, then the crime is complete. If the attempt fails due to reason beyond his control, he is said to have attempted to commit the offence. In the case at hand, it has been proved beyond reasonable doubt that the accused entered the house of the prosecutrix, held her hand, dragged her into a room, fell her on a wooden cot and rolled her saree up. However, her resistance was beyond his control; hence, he could not complete the penetration. He entered her home with the intention to rape her and prepared to commit it, but his attempt was failed. Hence, the Court concludes that the acts of the accused were an attempt to commit rape.

35. The attempt to commit an offence is punishable under Section 511 of the Indian Penal Code. Admittedly, the accused was not charged for the offence under Section 511 of the Indian Penal Code. The Hon'ble Supreme Court in *State of Maharashtra v Rajendra Jawanmal Gandhi* A.I.R. 1977 SC 3986 has held that the accused could be convicted under Section 376 read with Section 511 of the Indian Penal Code, though no charge was framed under Section 511 of the said Code.

36. The discussion made above led this Court to conclude that the prosecution has proved the charges against the accused for the offences punishable under Sections 452 and 376(1) read with 511 of the Indian Penal Code. Accordingly, Point no.1 is answered that the prosecution has proved that the accused entered the house of the prosecutrix with the intention to commit rape with the prosecutrix, punishable under section 452 of the Indian Penal Code and and point no. 2 is answered that the prosecution has proved that accused attempted to commit rape with the prosecutrix punishable under Section 376 (1)/511 of the Indian Penal Code.

37. The accused has been sentenced to suffer rigorous imprisonment for seven years for the offence punishable under Section 376 of the Indian Penal Code. However, this Court held him guilty of the offence punishable under Section 452 and 376(1), read with 511 of the Indian Penal Code. No benefit under the Probation of Offender Act would be extended for the offence of rape. Hence, the following order.

ORDER

- (i) The appeal is partly allowed.
- (ii) The accused is sentenced to suffer rigorous imprisonment for three and half years (half of the sentence imposed for the offence punishable under Section 376 of the Indian Penal Code) for the

offence punishable under Section 376/ 511 of the Indian Penal Code under Section 235(2) of the Code of Criminal Procedure Code.

(iii) The conviction for the offence under Section 452 of the Indian Penal Code and the fine imposed for both offences has been confirmed.

(iv) The Set off be granted to the accused under Section 428 of Cr.P.C. for the period he has undergone the sentence.

(v) Both sentences shall run concurrently.

(vi) R and P be sent to the trial Court.

(vii) Rule is made partly absolute in above terms.

(S.G. MEHARE. J.)