



Judgment

344 apeal143.23

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

CRIMINAL APPEAL NO.143 OF 2023

Alkesh Ashokrao Deshmukh C-6035,
aged about: 30 years,
occupation: service,
presently detained in
Central Jail, Amravati. **Appellant.**

:: V E R S U S ::

1. State of Maharashtra,
through Police Station Officer Badnera,
tahsil & district Amravati.

2. XYZ (victim),
Crime No.490/2020,
Police Station Officer,
Police Station Badnera,
tahsil and district: Amravati (city). **Respondents.**

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Shri G.L.Agrawal, Counsel Appointed for the Appellant.
Mrs.S.S.Dhote, Additional Public Prosecutor for Respondent
No.1/State.

Mrs.A.Mishrikotkar, Counsel Appointed for Respondent
No.2/Victim.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 10/01/2025

PRONOUNCED ON : 22/01/2025

JUDGMENT

1. By this appeal, the appellant (the accused) has
challenged judgment and order dated 2.2.2022 passed

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by learned Additional Sessions Judge-2, Amravati (learned Judge of the trial court) in Special (Atrocity) Case No.207/2020.

2. By the said judgment impugned, the accused is convicted for offence under Section 376(1) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and to pay fine Rs.10,000/-, in default, to undergo rigorous imprisonment for two months.

The accused is further convicted for offence under Section 354 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and to pay fine Rs.5000/-, in default, to undergo rigorous imprisonment for one month.

3. Facts of the prosecution case necessary for disposal of the appeal are as under:

On 28.7.2020, the victim lodged a report to Badnera Police Station, Amravati contending that she belongs to "Mahar Community" and aged about 24 years

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old working as “Promoter” in “Walmart” at Amravati. On 24.7.2020, one “Covid Positive” patient was found in the “Walmart” and, therefore, the Amravati Municipal Corporation had asked all employees working in the “Walmart” to undergo “Antigen Covid Test”. Therefore, on 28.7.2020, 20 employees of the “Walmart” approached “Modi Trauma Care Hospital at Badnera” for the same “Antigen Covid Test”. One Supriya Vitekar working as “Assistant Protection Manager” in the “Walmart” accompanied all employees to the said test centre. The accused was working there as an “Analyst” and work of obtaining samples was allotted to him. He had obtained “Swab Samples” from “naustril” of the employees. After some time, he called the victim and told her that her first “Covid Test” is “Positive” and, therefore, another test has to be carried out by obtaining sample from her “vagina”. The victim could not understand why sample from “vagina” is required and, therefore, she informed about it to said Supriya and again contacted to the accused and he repeated the same fact that as the victim’s first

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“Covid Test” is “Positive, her “vaginal fluid sample” is required on which said Supriya enquired with the accused as to whether any female employee is available to take the sample and he replied that no female employee is available to take the sample. Therefore, the victim along with said Supriya went along with the accused to give the sample. The accused by taking them in a room inserted a swab stick in her vagina and took a sample and disclosed that the victim’s test is negative.

4. As only the sample of the victim was taken, she suspected the act of the accused and informed this fact to her brother. Her brother also came to “Irvin Hospital at Amravati” to verify about procedure of taking sample and he came to know that there is no need to obtain sample from “vagina” for “Covid Test”. Subsequently, the victim received a text message from one mobile number 9637636378 commenting that “you are looking so beautiful, friendship karate ka?” The victim asked about the identity of the person who sent the text

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message to her and it revealed that it was the person who obtained her sample and, therefore, she approached the police station and lodged the report.

5. On the basis of the said report, the police registered the crime. After registration of the crime, during investigation, the Investigating Officer has recorded relevant statements of witnesses, drawn spot panchanama, obtained samples of the victim as well as the accused, and also collected samples which are obtained by the accused. After completion of the investigation, chargesheet was submitted against the accused.

6. Learned Judge of the trial court framed charge vide Exhibit-2. The accused pleaded not guilty and claimed to be tried.

7. In support of the prosecution case, the prosecution examined as many as twelve witnesses namely the victim vide Exhibit-15 (PW1); brother of the victim vide Exhibit-23 (PW2);

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In view of mandate of Section 228-A of the Indian Penal Code, names of the victim and her brother are not mentioned hereinafter);

Supriya Vitekar vide Exhibit-28 (PW3); Dr.Shamsundar Nikam vide Exhibit-30 (PW4), the Civil Surgeon; Jyoti Madhait vide Exhibit-32 (PW5), the co-employee of the accused; Dr.Vipin Singh vide Exhibit-36 (PW6), the Medical Officer; Amardeep Wadadkar vide Exhibit-38 (PW7), the pancha on spot; Shubhangi Gulhane vide Exhibit-49 (PW8), the Assistant Police Inspector (Investigating Officer); Rupa Hajare vide Exhibit-51 (PW9), the NPC; Punjab Wanjari vide Exhibit-54 (PW10); Sudam Asore vide Exhibit-60 (PW11), the Investigating Officer; and Sohail Shaikh vide Exhibit-68 (PW12), the ACT (Investigating Officer).

8. Besides the oral evidence, the prosecution placed reliance on documentary evidence namely CA Reports Exhibit-10 to 12, report by the victim Exhibit-16, FIR Exhibit-17, seizure memo Exhibit-18, statement under

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Section 164 of the Code of Criminal Procedure Exhibit-19, Test Identification Parade Memorandum Exhibit-20, communication by Civil Surgeon Dr.Shamsundar Nikam to the Investigation Officer Exhibit-31, seizure memos Exhibits-32 and 35, spot panchanama Exhibit-39, seizure panchanama Exhibit-40, medical certificate Exhibits-41 to 43, seizure memo Exhibit-44, medical certificate of the accused Exhibit-45, special report by PW10 Exhibit-55, letter to the Medical Officer Exhibit-56, letter to Police Commissioner Exhibit-57, letter to District Collector Exhibit-58, letter to Civil Surgeon Exhibit-59, arrest panchanama Exhibit-61, verification panchanama Exhibit-62, and letter to CA Exhibit-73.

9. All incriminating evidence is put to the accused for obtaining his explanation regarding the evidence appearing against him. The defence of the accused is of total denial and of misidentity.

10. On the basis of the oral as well as the documentary evidence, learned Judge of the trial court

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held that the act of the accused is covered under definition given under Section 375(b) of the Indian Penal Code and thereby held the accused guilty under Section 376(1) of the Indian Penal Code and thereby convicted the accused as the aforesaid.

11. Heard learned counsel Shri G.L.Agrawal appointed for the accused; learned Additional Public Prosecutor Mrs.S.S.Dhote for the State, and learned counsel Mrs.A.Mishrikotkar appointed for the victim.

12. Learned counsel for the accused submitted that as far as the evidence adduced by the prosecution is concerned, the same does not disclose the offence of sexual assault as it is not a case of penetration. Moreover, the identity of the accused is also not established. He submitted that it is not established that the accused was serving in "Modi Trauma Care Hospital at Badnera". It is also not established that it was the accused who has obtained the swab sample. The witnesses have admitted that the person who obtained

the sample was wearing A “Special Kit” and, therefore, there was no opportunity for the witnesses to identify the said person. Thus, the offence against the accused is not established beyond reasonable doubt. Moreover, there is no use of force and if the prosecution story is accepted, the sample was obtained by consent of the victim and, therefore, as no offence is made out against the accused, the judgment impugned deserves to be quashed and set aside.

13. In support of his contentions, learned counsel for the accused placed reliance on following decisions:

1. Anversingh alias Kiransinh Fatesinh Zala vs. State of Gujarat¹;

2. Zindar Ali Sk vs. State of W.B.²;

3. Raju vs. State of Karnataka³;

4. Thongam Tarun Singh vs. State of Manipur⁴.

1 (2021)3 SCC 12

2 AIR 2009 SC 1467

3 (1994)1 SCC 453

4 (2019)18 SCC 7

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14. *Per contra*, learned Additional Public Prosecutor for the State supported the judgment impugned and submitted that the evidence adduced by the prosecution shows that it was the accused who was deputed for obtaining samples. Jyoti Madhait, the co-employee of the accused, Civil Surgeon Dr.Shamsundar Nikam, and Dr.Vipin Singh disclose that it was the accused who was deputed for obtaining samples. The accused is identified during the evidence by all witnesses which is substantive evidence. As far as the consent is concerned, it was not free consent and obtained on misconception of fact. Therefore, merely because the victim has given a consent to obtain sample, it is not sufficient to exonerate the accused from punishment. She submitted that the act of the accused surely covers under the definition of rape given under Section 375 of the Indian Penal Code. She submitted that the appeal being devoid of merits is liable to be dismissed.

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15. Learned counsel for the victim endorsed the same contentions made by learned Additional Public Prosecutor for the State.

16. Heard learned counsel appearing for respective parties.

17. The first and foremost question is, whether the act of the accused obtaining the sample from “vagina” of the victim would come under sexual assault in view of amended definition of “rape” given under Section 375 of the Indian Penal Code.

18. To support the charge levelled against the accused, the prosecution placed reliance on the evidence of PW1 victim.

The evidence of PW1 victim shows that she was serving as “Promoter” in the “Walmart”. As one of employees of the “Walmart” tested “Corona Positive”, they received instructions from the Amravati Municipal Corporation that all employees should undergo “Covid Antigen Test”. Accordingly, they approached “Modi

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Trauma Care Hospital at Badnera” for the same “Antigen Covid Test” wherein the accused was also serving. She came to know the name of the accused as one of employees gave him a call and asked him to obtain swabs. Out of twenty employees, she was called by the accused and asked her to undergo “Urine Test” as her “Covid Test” is “Positive”, but she informed the said fact to her superior PW3 Supriya Vitekar. The accused disclosed the similar fact that the victim has to undergo “vaginal test” and, therefore, PW3 Supriya asked him about a female employee on which he disclosed that female employee is not available. The victim was taken along with Supriya to a room and by using testing stick, swab was obtained from her vagina. Subsequently, she came to know that such swab is not required as far as “Covid Antigen Test” is concerned. She also received a message from the accused expressing that she looks beautiful and he wants to develop friendship with her.

PW2, the brother of the victim, is also examined who has also disclosed that from his sister, he came to

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know that the accused has obtained her “vaginal swab” which was not required. He made an enquiry from “Irvin Hospital” and he came to know that no such “Urinal Test Examination” is required for “Corona Test.”

Though these witnesses are cross examined by the defence, nothing incriminating is brought on record.

As far as the cross examination of the victim is concerned, the same is on the point of procedure adopted in the hospital before obtaining sample. She admitted that she came to know the name of the accused from the other employee who were calling the accused.

Thus, as far as the evidence of the victim on obtaining the “vaginal sample”, which was not required, is concerned, nothing incriminating is brought on record.

Similarly, the cross examination of the brother of the victim also shows that his sister disclosed him that initially, sample from her “nostril” was obtained and it was the accused, who was “Technician” there, who told

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her that as her first "Covid Test" is positive, she has to undergo another test and has to give her "vaginal sample" and, therefore, she gave "vaginal swab".

19. To corroborate the version of PW1 victim, the prosecution has also examined PW3 Supriya Vitekar, who stated that she was along with the victim at the time of obtaining the sample. Her evidence also shows that on the day of the incident i.e. 28.7.2020 she along with 20 employees had been to "Modi Trauma Care Hospital at Badnera" for giving samples to undergo "Corona Test". Thereafter, it was the accused who disclosed the victim that she has to undergo another test. The victim disclosed to her that she has to undergo another test and for that purpose "Urinal Test" is required and, therefore, she enquired with the accused and also enquired, "whether any female employee is available". She specifically stated that the accused informed her that the first test of the victim is "Positive" and, therefore, another test is to be carried out by obtaining "vaginal fluid". Therefore, she along with the victim went

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in a room wherein the accused has obtained “vaginal sample” with the help of testing stick. Subsequently, she came to know from the victim that she has received a message of the accused asking her to have friendship with her.

The cross examination of Supriya also confirms that she went along with 20 employees. It further confirms that it was the accused who told the victim that as first “Covid Test” is “Positive”, another test has to be carried out by obtaining “vaginal fluid” and, therefore, in her presence, the said sample was obtained.

Her further cross examination is on the point of identification of the accused. She admitted that at the relevant time, the person who obtained the sample was wearing “PPE Kit”. She came to know the name of the accused from police. She further admitted that she has not seen the entire face of the accused at the time of obtaining the sample. She further clarifies that at the

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time of obtaining the sample, she was in a position to see eyes of the accused.

20. Whether the accused is the same person who obtained the sample and was allotted the duty of obtaining the samples, the prosecution placed reliance on the evidence of Civil Surgeon PW4 Dr.Shamsundar Nikam, co-employee of the accused PW5 Jyoti Madhait, and Medical Officer PW6 Dr.Vipin Singh.

21. The evidence of Civil Surgeon PW4 Dr.Shamsundar Nikam shows that the accused was deputed as "Lab Technician" from 9.7.2020 in "Modi Trauma Care Hospital at Badnera" and since then he was working there. He was allotted with duty to obtain the samples who are suspected "Corona Patients". He further testified that the test result of "Rapid Antigen Test" requires half an hour. For detecting the corona virus, sample of "vaginal fluid" is not required and there is no permission to obtain such samples. His evidence shows that PW5 Jyoti Madhait, one Nandkisor, Nitin,

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and Ankita were co employees of the accused on 28.7.2020. The responsibility of obtaining the samples was allotted to the accused and responsibility of taking entry of the names of patients, who approached for said “Rapid Antigen Test”, was of Jyoti Madhait, who was “Data Operate.” His evidence specifically shows that except the accused, no other person was permitted to obtain the samples. He informed the said information to the Investigating Officer.

The cross examination of the said witness is to the extent that “Modi Trauma Care Hospital at Badnera” is run by the Amravati Municipal Corporation and the employees in the hospital were of Amravati Municipal Corporation and, therefore, he is not personally aware about the same. He clarified that the presence of the accused on the day of the incident in “Modi Trauma Care Hospital at Badnera” reveals from the documents.

22. Similarly, PW5 Jyoti Madhait also testified that the responsibility of obtaining the samples was of the

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accused and she was “Data Operator” on the day of the incident. She further stated that on the day of the incident, employees of the “Walmart” had been to the centre to undergo “Antigen Test” and it was the accused who was assigned the work of obtaining the samples and she has taken the entry of the said persons. She admitted that the police have not collected any information as to the entries of the names of the persons who have undergone the said test on that day.

23. Medical Officer PW6 Dr.Vipin Singh, examined the victim who also testified that he was working as Medical Officer at “Modi Trauma Care Hospital at Badnera”. The Amravati Municipal Corporation had directed me to make available the space in the hospital for starting “Rapid Antigen Test Centre.” The required temperature for the test centre was 25°C and, therefore, they vacated the operation theater for that purpose. The accused was working there and brought by Dr.Rajurkar who introduced the accused to him. The accused was working as “Lab

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Technician”, Jyoti Madhait was working as “Data Operator”, and Nandkishor was working as “Peon”.

The cross examination of the said witness shows that he was an “Orthopedic Surgeon” and being a doctor he has general information as to the “Covid Test”. He was not present at the relevant time in the hospital.

Thus, an attempt was made to show that the said witness is not aware about the incident.

24. PW7 Amardeep Wadadkar, acted as pancha in whose presence spot panchanama was drawn as well as the police prepared seizure panchanama. His evidence is not shattered during the cross.

25. PW8 Shubhangi Gulhane, PW10 Punjab Wanjari, PW11 Sudam Asore, and PW12 Sohail Shaikh are the Investigating Officer who narrated about the investigation carried out of by them. PW9 Rupa Hajare is the Police Constable in whose presence the report was recorded.

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26. The Chemical Analyzer's Reports Exhibits-10 to 12 show that Exhibit-8 is the "vaginal swab", "vaginal smear", and "Blood Samples" of the victim. The "Blood Sample" of the victim was analyzed as Blood Group "A". Exhibit-12 is the report of "Blood Sample" of the accused.

27. On the basis of the above evidence, learned Judge of the trial court held the accused guilty by observing that definition under sub-clause (b) of Section 375 of the Indian Penal Code shows that a man is said to commit "rape" if he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person.

The "Explanation" given under the said Section shows that, "for the purpose of this Section, "vagina" shall also include labia majora."

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For reference, said Section 375 of the Indian Penal Code which deals with definition of "rape" is reproduced as under:

375. Rape.-- A man is said to commit "rape" if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

*First.*Against her will.

*Secondly.*Without her consent.

*Thirdly.*With her consent, when her consent has been obtained by putting

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her or any person in whom she is interested, in fear of death or of hurt.

*Fourthly.*With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

*Fifthly.*With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

*Sixthly.*With or without her consent, when she is under eighteen years of age.

*Seventhly.*When she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of

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penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

*Exception 1.*A medical procedure or intervention shall not constitute rape.

*Exception 2.*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

28. Thus, the act of the accused, proved by the victim and PW3 Supriya Vitekar, is covered under the definition of rape given in Section 375(b) of the Indian Penal Code.

29. Now, only question is, whether the consent of the victim to obtain sample was valid consent.

30. Section 90 of the Indian Penal Code, reads as follows:

90. Consent known to be given under fear or misconception. --A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

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Consent of insane person. -- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child. -- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

31. The evidence on record, especially of PW1 victim and PW3 Supriya Vitekar, shows that it was told to them by the accused that sample of “vaginal fluid” is required to ascertain whether the victim is suffering from “Covid” or not.

32. The evidence of PW4 Dr.Shamsundar Nikam, who was serving as “Civil Surgeon” at the relevant time, specifically shows that for “Corona Test”, samples from “naustril” are to be taken and report of the same can be given within half an hour. He specifically stated that there is no procedure for obtaining “vaginal fluid” sample to ascertain whether patients are suffering from “Corona

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Virus” or not. He clarified that there is no such permission to obtain sample from “vaginal fluid”.

33. PW6 Dr.Vipin Singh, also stated that no such sample is required as far as testing of “Corona Virus” is concerned.

34. Thus, the evidence specifically states that whatever impressed by the accused, that “vaginal fluid” is required to ascertain whether the victim is suffering from “Corona Virus” or not, was not at all required. The evidence of experts shows that neither such samples are required nor it is permissible.

35. Thus, the act of the accused sufficiently shows that under the misconception of fact, such sample is required and obtained the consent from the victim to take sample and obtained the samples. Misconception of fact is, when someone gives consent to an act based on false or misleading facts which is not consent at all.

36. Section 90 of the Indian Penal Code though not gives an exhaustive definition of consent, normal

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connotation and concept of consent requires to be taken into consideration. The consent obtained in the present case is under misconception of fact. Under the said Section, consent obtained under misconception of fact is not a valid consent. The expression “under misconception of fact” is broad enough to include all cases where consent is obtained by misrepresentation. The misrepresentation should be regarded as leading to a misconception of facts with reference to which the consent is given. As per Section Section 3 of the Indian Evidence Act, Illustration-D, a person has certain intention is treated as a fact.

37. So, in the present case, the fact about which PW2 the brother of the victim and PW3 Supriya Vitekar stated shows that under misconception of fact “vaginal fluid” sample is required, the consent was obtained from the victim and by inserting swab stick, the sample was obtained. The said act is sufficient to show that under misrepresentation, the accused has obtained the consent

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and that misrepresentation sufficiently shows his intention.

38. The intention of the accused can be gathered from the circumstance that out of 20 employees, he only called the victim for “vaginal swab” and obtained her “vaginal swab” under the misconception of the fact that the said swab is required.

39. As far as defence of the accused is concerned, the swab was obtained to ascertain whether the victim is suffering from “Corona Virus” or not, is also washed out in the light of evidence of Civil Surgeon PW4 Dr.Shamsundar Nikam who specifically stated that no such samples are required and there is no permission to obtain such samples.

40. Another defence of the accused, that he is victim of misidentity, is also has no substance as his identity is not only stated by PW1 victim and PW3 Supriya but also it is established through the evidence of Civil Surgeon PW4 Dr.Shamsundar Nikam who stated that the accused

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was deputed at “Modi Trauma Care Hospital at Badnera” as “Lab Technician” and was allotted duty of obtaining samples.

41. PW6 Dr.Vipin Singh, has also stated that he knows the accused as he was introduced by Dr.Rajurkar of Amravati Municipal Corporation and was deputed at “Modi Trauma Care Hospital at Badnera” for obtaining swabs/samples for “Rapid Antigen Test”.

42. Thus, beyond doubt, it was established by the prosecution that it was the accused who obtained the sample of the victim which was not required under the misconception of fact.

43. Initially, sub-clause (b) of Section 375 of the Indian Penal Code was not covered under the definition of “rape”. By amendment, the said clause was introduced and now in view of the amended definition, a man is said to commit “rape” if he inserts, to any extent, any object or a part of the body, not being the penis, into the

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vagina, the urethra or anus of a woman or makes her to do so with him or any other person.

44. The accused is also convicted for offence under Section 354 of the Indian Penal Code.

45. Section 354 of the Indian Penal Code, deals with assault or use criminal force with an intent to outrage modesty of any woman.

46. Regarding ingredients of outraging modesty of a woman and what amounts to modesty of a woman, the Hon'ble Apex Court in the case of **Aman Kumar and another vs. State of Haryana**⁵, held that Essential ingredients of the offence punishable under Section 354 of the Indian Penal Code are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the

⁵ (2004)4 SCC 379

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accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

47. A great emphasis is on the modesty of a woman in Indian Society.

48. The offence of outraging modesty of a woman is not limited to physical acts of violence but also included any verbal or non verbal conduct that is intended to insult the woman. The act of outraging female's modesty refers to the virtue that attaches to a female owing to her gender and is an attribute associated with females in general. The modesty to a woman has evolved as altogether a different concept which has very little to do with the physique of the woman. The moral modesty of a woman is said to be the sense of shame or bashfulness that a woman feels when faced with any act that is intended to outrage her modesty. The

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psychological modesty of a woman is said to be her innate sense of self-respect and dignity.

49. As discussed hereinabove, the illegal act of the accused by keeping the victim under the misconception that her “vaginal swab” is required and inserting “Covid Testing Stick” into “vagina” of the victim under the pretext of taking her sample and subsequently getting knowledge by the victim that such sample was not required gives her sense of shame or bashfulness which is sufficient to attract the offence under Section 354 of the Indian Penal Code which is established by the prosecution beyond reasonable doubt. Therefore, the conviction imposed by learned Judge of the trial court is on the basis of legal evidence.

50. Learned counsel for the accused vehemently submitted that the sentence of the accused be reduced considering no force was used by the accused, no criminal antecedents are against the accused, no injury received by the victim, young age of the accused, and no

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pre-planning and, therefore, the said mitigating circumstances sufficiently show that he has made out a case for reducing the sentence. In support of his contentions, he placed reliance on the decisions of the Hon'ble Apex Court in the cases **Zindar Ali Sk vs. State of W.B. and Raju vs. State of Karnataka** *supra* wherein the Hon'ble Apex Court considered that incident took about six years back and the accused was behind the bar for last five years and reduced his sentence.

51. Perusal of the definition of "rape" given under Section 375 of the Indian Penal Code shows that punishment for the same is given under Section 376 of the Indian Penal Code. Section 376(1) of the Indian Penal Code deals with punishment for "rape" which states that whoever, except in the cases provided for by sub-section (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine. The wordings are, the punishment shall not be less than ten

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years are inserted by Act of 22 of 2018 and it came into effect from 21.4.2018.

52. Thus the above provision came into play after the amendment by the Act of 22 of 2018 from 21.4.2018. Therefore, the decisions of the Hon'ble Apex Court in the cases **Zindar Ali Sk vs. State of W.B. and Raju vs. State of Karnataka** *supra* are prior to the amendment.

53. As far as the provision under Section 376(1) of the Indian Penal Code is concerned, discretion is not left at the hands of the court to reduce the punishment. The said Section states that if the offence is proved, the accused should not be punished by imposing less than ten years sentence.

54. Turning to the present case, the crime is "rape" which is a crime against the society and crime against human dignity. Once such offence is proved, treating it lightly by imposing lesser punishment, itself is an affront to the society.

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55. The Hon'ble Apex Court in the case of **Shimbhu and anr vs. State of Haryana**⁶ observed that Punishment should always be proportionate/ commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute.

56. Thus, considering that the offence committed by the accused is established by the prosecution, the standard of proof required to prove the cases and the prosecution has adduced the evidence to the extent of the said standard of proof which is expected and in the light of observation of the Hon'ble that once the offence is proved, treating it lightly, would be an affront of the society. Moreover, sympathy to the accused in such a scenario would be miscarriage of justice.

6 2013 ALL MR (cri) 3306 (SC)

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Therefore, the contentions of learned counsel for the accused are not acceptable and sustainable.

57. Thus, for all above reasons, I do not find any merits in the submissions of learned counsel for the accused.

58. In the result, the appeal deserves to be dismissed and the same is **dismissed**.

59. Fees of learned counsel Shri G.L.Agrawal appointed for the accused and learned counsel Mrs.A.Mishrikotkar appointed for respondent No.2/victim are quantified and the same be paid to them as per Rules.

Appeal stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

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