



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO. 219 OF 2023

Santosh S/o Sitaram Ingale,
Aged about 40 years, Occupation :
Labour
R/o Milind Nagar, Hivarkhed, Tq.
Telhara, Dist. Akola
(Present at Central Prison, Amravati)

... Appellant.

// VERSUS //

State of Maharashtra through Police
Station Officer, Police Station
Hivarkhed, District Akola

... Respondents

Shri R.M.Daga, Advocate for the appellant.
Shri S.S.Hulke, APP for the respondent/State.

CORAM : NIVEDITA P. MEHTA, J.

Reserved on : 17th December, 2025
Pronounced on : 24th December, 2025.

JUDGMENT :

Being aggrieved by the judgment and order dated 28.02.2023
passed by the learned Additional Sessions Judge, Akot, District Akola, in
Sessions Case No. 18 of 2021, the appellant has preferred the present

appeal. By the impugned judgment, the appellant came to be convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”) and sentenced to suffer rigorous imprisonment for fifteen years with fine of ₹20,000/-, in default to suffer rigorous imprisonment for three years.

The appellant was further convicted for the offence punishable under Section 376(2)(l) of the IPC and sentenced to suffer rigorous imprisonment for fifteen years with fine of ₹20,000/-, in default to suffer rigorous imprisonment for three years.

He was also convicted for the offence punishable under Section 452 of the IPC and sentenced to suffer rigorous imprisonment for three years with fine of ₹10,000/-, in default to suffer rigorous imprisonment for one year.

Additionally, he was convicted for the offence punishable under Section 506 of the IPC and sentenced to suffer rigorous imprisonment for three years with fine of ₹10,000/-, in default to suffer rigorous imprisonment for one year. All the sentences were directed to run concurrently.

2. The prosecution case, in brief, is as under:

2.1 On 31.08.2020, the informant alleged that at about 7.30 a.m., she along with her husband and son had gone out for work, leaving her daughter *Karuna @ Bali* who is physically handicapped alone at home. At about 1.00 p.m., upon returning home, one Lucky @ Sumedh Rahul Ingle, his mother Anita Rahul Ingle, and Asha Vinod Ingle approached the informant. Lucky Ingle informed her that at about 11.00 a.m., while Karuna was sleeping on a cot (bajewar) outside the house, the present appellant came there, inappropriately touched her, took her inside the house, removed her pant, made her lie on the ground, and had sexual intercourse with her. The two accompanying women corroborated the said version.

2.2 The informant then enquired with her daughter Karuna, who was frightened and initially unable to speak. After being assured by her mother, Karuna disclosed that while she was sleeping outside the house, the appellant approached her, enquired about her parents, touched her inappropriately, took her inside the house, raped her, and threatened to kill

her if she disclosed the incident to anyone. It was further stated that the victim was mentally challenged and disabled.

2.3 As the Hivarkhed police station was closed due to the COVID-19 pandemic, the informant approached Telhara Police Station, where FIR No. 199 of 2020 came to be registered against the appellant for offences punishable under Sections 376(2)(l), 506, and 452 of the IPC.

3. During investigation, the victim was referred for medical examination at District Hospital, Akola. Biological samples were collected and seizure panchanamas were prepared. Spot panchanama was drawn and photographs of the scene of offence were taken. The appellant was arrested and medically examined. The victim and the appellant's biological samples and clothes were seized. The seized articles were sent to the Forensic Science Laboratory, Amravati, for chemical analysis. Statements of witnesses were recorded, including statements under Section 164 of the Code of Criminal Procedure, 1973 (CrPC). Owing to the victim's mental disability and inability to communicate coherently, psychiatric assessment was conducted by Dr. Kelkar, and it was reported that the victim was suffering from a mental disorder. After completion of investigation, charge-sheet was filed.

4. The learned trial Court framed charges against the accused for offences punishable under Sections 376(2)(l), 376(2)(f), 452, and 506 of the IPC. The appellant pleaded not guilty and claimed to be tried.

The prosecution examined eleven witnesses, including the mother and father of the victim, alleged eyewitnesses, Medical Officers, panch witnesses, and the Investigating Officer. After completion of prosecution evidence, the statement of the appellant under Section 313 CrPC was recorded, wherein the appellant denied all allegations and contended that he was falsely implicated due to a monetary dispute with the parents of the victim.

5. Upon appreciation of the evidence, the learned trial Court held that the prosecution had proved the date, time, and manner of the incident and concluded that the appellant had molested the victim in the verandah, forcibly took her inside the house, committed rape upon her and threatened her with dire consequences. The learned trial Court found the testimony of the informant and other witnesses trustworthy and corroborative, and accordingly convicted the appellant as stated herein above.

6. Heard Shri Daga, learned counsel for the appellant, and Shri S.S. Hulke, learned Additional Public Prosecutor for the respondent-State.

7 Submission on behalf of the Appellant :

Shri Daga, learned counsel for the appellant, advanced the following submissions:

(i) The victim is a married woman aged about 30 years, polio-affected, and having a daughter. After marital discord, she has been residing with her mother.

(ii) The victim was not examined before the Court, despite the prosecution case resting primarily upon her alleged disclosure. PW-1, the informant, is a hearsay witness and did not witness the incident.

(iii) Though it is stated that the victim's statement was recorded by the police, the victim was not examined before the Court without justifiable reasons.

(iv) The testimonies of PW-4 Lucky, PW-5 Anita, and PW-6 Asha only suggest inappropriate touching or an attempt to sexually assault the victim. None of them categorically deposed about penetration or sexual intercourse.

(v) The medical report does not record any external or internal injuries. The medical opinion was reserved and no final opinion regarding sexual intercourse was given. The examination columns are incomplete.

(vi) No injuries were found on the private part of the victim. The clothes seized were not shown to contain semen or bloodstains, and the

chain of custody of seized articles lying with the police for nine days; before sending for chemical analysis has not been established.

(vii) Certain incriminating circumstances relied upon by the trial Court, particularly in paragraphs 64 and 65 of the judgment as regards the DNA, were not put to the appellant in his statement under Section 313 CrPC, causing prejudice. The aforesaid relevant paragraphs are reproduced as under :

“64. वरीलप्रमाणेच्या रासायनिक परीक्षणांच्या अहवालांवरून घटनेच्या दिवशी, लगेच नंतर जप्त करण्यात आलेल्या पीडितेच्या आणि आरोपीच्या कपड्यांचा रासायनिक परीक्षणावरून आणि त्यांच्या जैविक नमुन्या वरून देखील ही बाब स्पष्ट होते की, 'पीडितेच्या आतल्या चड्डीच्या वरील मध्यभागी तिच्याच रक्ताचे डाग होते' आणि 'आरोपीच्या आतल्या चड्डीस त्याच्याच वीर्याचे डाग होते'.

65. उपप्रादेशिक न्यायसहाय्यक वैज्ञानिक प्रयोगशाळेच्या रासायनिक परीक्षण अहवालांची सांगड आता सर्व साक्षीदारांच्या साक्षीपुराव्यांशी घातली असता निष्पन्न होणारे तथ्य म्हणजे, 'घटनेच्या दिवशी, वेळी व ठिकाणी आरोपीने पीडितेवर बलात्कार केला'. हे आणि हेच तथ्य फैलावर वरील संपूर्ण पुराव्याच्या चिकित्सेवरून अगदी दृढरित्या, सर्व शक्य संशयायांच्या अतीत व निरपवादरित्या स्थापताही होते आणि शाबीतही होते.”

(viii) In the absence of proof of penetration, the offence under Section 376 IPC is not made out. At the highest, the evidence suggests an offence of outraging the modesty of the victim.

7.2. Learned counsel appearing for the appellant–accused assailed the impugned judgment of conviction as being contrary to law and the evidence on record. It was submitted that the conviction is founded on

inherently weak and unreliable evidence, inasmuch as the victim herself did not depose before the court and her statement was never recorded either under Section 161 or Section 164 of the Code of Criminal Procedure. In the absence of any substantive testimony from the victim, the entire prosecution case rests upon hearsay evidence, which cannot form the basis of conviction for a serious offence such as rape.

7.3. The learned counsel for the appellant further contended that the impugned judgment suffers from grave errors of law and fact. It was submitted that the conviction rests entirely on conjectures and assumptions rather than legally admissible proof. The most crucial witness, namely the prosecutrix, was neither examined nor her statement recorded under Sections 161 or 164 of the Code of Criminal Procedure, despite the medical evidence indicating that she was capable of understanding and responding. It was argued that the learned trial court wrongly rejected the defence contention under Section 114(g) of the Evidence Act and erroneously justified non-examination of the victim.

7.4. It was further submitted that the so-called eyewitness PW-4 is a child witness whose presence at the spot is highly doubtful, particularly in view of his own admissions regarding the route to the medical shop and contradictions between his version and that of PW-6. The learned counsel contended that PW-5 and PW-6 are admittedly hearsay witnesses and yet their testimony has been relied upon as substantive evidence.

7.5. It was also argued that the medical and forensic evidence does not support the prosecution case. The chemical analyser's reports do not

establish any nexus between the appellant and the alleged sexual assault, as no semen or blood of the appellant was detected on the victim's clothes, nor was any DNA linkage established. The presence of blood of the victim on her own undergarment and semen of the appellant on his own undergarment does not advance the prosecution case.

7.6. The learned counsel further submitted that the learned trial court adopted a legally impermissible approach by drawing adverse inferences against the appellant for alleged non-filing of a counter-complaint and by treating post-incident assault on the appellant as proof of guilt. It was urged that the defence version of false implication due to monetary dispute has not been properly appreciated. Hence, the conviction is unsustainable.

7.7. It was further argued that there is a material contradiction in the prosecution evidence regarding the mental and communicative capacity of the victim. While several witnesses claimed that the victim was incapable of coherent speech, the Medical Officer categorically admitted that the victim was capable of narrating the incident and that her statement was intelligible. Despite this, the Investigating Officer failed to record the victim's statement at any stage, which, according to learned counsel, is a fatal lapse vitiating the prosecution case.

7.8. Learned counsel for the appellant also pointed out the unexplained delay of several hours in lodging the First Information Report. It was contended that the explanation of closure of the local police station due to COVID-19 was neither supported by documentary evidence nor

convincingly established. Such unexplained delay, it was argued, gives rise to a strong possibility of deliberation and false implication.

7.9. Attention was also drawn to the admission of PW-1 that the appellant was beaten by her on the day of the incident, suggesting that the complaint may have been lodged as a counterblast to the assault on the appellant. The hostile testimony of the panch witnesses to the seizure of clothes and biological samples was highlighted to submit that the chain of custody of the alleged incriminating material is doubtful and unreliable.

7.10. Learned counsel further submitted that the testimony of the child witness, PW-4, is that of an interested witness and is riddled with inconsistencies when read along with the evidence of PW-5 and PW-6. In the absence of independent corroboration, reliance on such testimony is unsafe. It was also urged that the medical evidence is inconclusive, as the Medical Officer merely opined that the possibility of sexual assault could not be ruled out. In view of these infirmities and investigative lapses, learned counsel submitted that the prosecution has failed to prove its case beyond reasonable doubt and that the appellant is entitled to an acquittal.

7.11. Learned counsel for the appellant alternatively submitted that, even if the prosecution evidence is taken at its highest and without conceding its correctness, the material on record does not establish the commission of sexual intercourse so as to attract the offence of rape. It was contended that, at the most, the evidence may indicate an act amounting to outraging the modesty of the victim. The learned counsel submitted that the medical evidence is inconclusive and does not establish penetration, which

is the *sine qua non* for the offence of rape. Reliance was placed on the judgments of the *Hon'ble Supreme Court in Aman Kumar and Another v. State of Haryana [(2004) 4 SCC 379] and Sakatar Singh and Others v. State of Haryana [(2004) 11 SCC 291]*.

8. SUBMISSIONS ON BEHALF OF THE STATE

8.1. Per contra, learned Additional Public Prosecutor appearing for the State supported the impugned judgment of conviction and submitted that the learned trial court has rightly appreciated the evidence on record. It was contended that the prosecution has successfully established the guilt of the appellant through a consistent chain of circumstantial and ocular evidence, particularly the testimony of PW-4, PW-5, and PW-6, who are natural witnesses residing in close proximity to the scene of offence and who had no reason to falsely implicate the appellant, who was their close relative.

8.2. The learned Additional Public Prosecutor submitted that the prosecution has proved its case beyond reasonable doubt. It was argued that in cases involving mentally and physically disabled victims, insistence on direct testimony of the prosecutrix is neither mandatory nor practical. It was submitted that the ocular evidence of PW-4, corroborated by PW-5 and PW-6, medical evidence, and chemical analyser's reports, forms a complete chain pointing towards the guilt of the appellant. It was contended that minor contradictions cannot overshadow the gravity of the offence, and that the sentence imposed is commensurate with the seriousness of the crime.

8.3. The learned APP submitted that merely because the victim could not depose before the court, the prosecution case cannot be discarded, especially when the evidence on record establishes that the victim was intellectually disabled and vulnerable. It was argued that the law does not mandate that the victim's testimony is the sole basis for conviction, and that a conviction can be sustained on the basis of trustworthy eyewitnesses and corroborative circumstances.

8.4. It was further submitted that the delay in lodging the FIR stands sufficiently explained by the extraordinary circumstances prevailing at the relevant time due to the COVID-19 pandemic and the closure of the local police station. The complainant being an illiterate rustic woman, some delay was natural and ought not to be viewed with suspicion.

8.5. Learned APP further argued that the medical evidence, though not conclusive, does not rule out sexual assault and supports the prosecution case to the extent possible. The seizure of clothes and biological samples, according to the State, was duly proved through the testimony of the Investigating Officer, and mere hostility of panch witnesses does not render the seizure illegal or unreliable.

8.6. The learned Additional Public Prosecutor opposed the alternative submission advanced on behalf of the appellant. It was contended that the evidence on record, particularly the testimony of PW-4 coupled with the medical and circumstantial evidence, sufficiently establishes that the appellant committed penetrative sexual assault on the victim. The learned APP submitted that the absence of a categorical medical

opinion regarding penetration is not fatal, as it is well settled that medical evidence is only corroborative in nature and that conviction for rape can be based on trustworthy ocular evidence. The reliance was placed on *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, paragraph 8, to contend that minor deficiencies in medical evidence cannot outweigh reliable oral testimony. It was further argued that the conduct of the appellant and the surrounding circumstances clearly rule out a mere act of outraging modesty and point towards commission of rape. The learned APP therefore submitted that the alternative plea deserves to be rejected and the conviction for the offence under Section 376 IPC ought to be maintained.

8.7. It was lastly submitted that minor contradictions or inconsistencies in the testimony of prosecution witnesses are natural and do not go to the root of the matter. The prosecution evidence, when read as a whole, clearly establishes that the appellant took advantage of the victim's physical and intellectual disability and committed the offence. The learned trial court, therefore, committed no error in convicting the appellant, and the appeal deserves to be dismissed.

9. In rejoinder, learned counsel for the appellant submitted that the psychiatric certificate was issued by a private doctor after four months of the incident, and the doctor was not examined. The Government Hospital had refused to issue such certificate, which creates serious doubt about the victim's alleged incapacity.

10. The appeal requires this Court to re-appreciate the entire evidence on record, bearing in mind the settled principle that though an

appellate court normally shows deference to findings of fact recorded by the trial court, it is duty-bound to interfere where the findings are found to be perverse, based on misreading of evidence, or where material contradictions and legal infirmities are ignored.

11. The victim, who was examined as PW-2, did not depose to the incident at all. It is an admitted position on record that her statement was never recorded either under Section 161 of the Code of Criminal Procedure or under Section 164 thereof. The learned trial court itself noted that due to her intellectual disability and limited communicative ability, it was not possible to conduct her examination in court, and even indirect examination through her mother was found to be impermissible. Consequently, there is no substantive evidence from the victim describing the alleged sexual assault. The prosecution case, therefore, rests entirely on the testimony of third-party witnesses, rendering it essentially hearsay in nature so far as the *actus reus* is concerned.

12. There is material inconsistency in the prosecution evidence regarding the mental condition and communicative capacity of the victim. While PW-1, PW-5, and PW-6 stated that the victim's speech is largely incomprehensible to persons other than her mother, PW-10, the Medical Officer who examined the victim on the day of the incident, categorically admitted in cross-examination that she could understand what the victim was stating and that the victim was capable of narrating the incident, albeit with some assistance. Despite this admission, the investigating agency made no attempt to record the victim's statement at any stage, either before the

police or before a Magistrate. This unexplained omission assumes significance and casts a serious doubt on the fairness and completeness of the investigation.

13. The First Information Report was admittedly lodged several hours after the alleged occurrence. The incident is stated to have taken place around 11.00 a.m., whereas the complaint came to be registered late in the evening. PW-11, the Investigating Officer, has conceded in cross-examination that there is no precise explanation for the delay in lodging the complaint. Although an explanation was sought to be offered that the local police station was closed due to COVID-19 restrictions, no documentary material was produced to substantiate such closure. The unexplained delay in lodging the FIR creates room for embellishment and deliberation and, therefore, weakens the prosecution case.

14. The evidence further reveals that the appellant had sustained injuries on the very day of the incident. PW-1, the mother of the victim, expressly admitted during cross-examination that the appellant was beaten by her after the incident. This admission lends plausibility to the defence contention that the appellant was assaulted by the complainant party and that the present complaint could be a counterblast to such assault. The possibility of false implication in such circumstances cannot be ruled out.

15. The seizure of clothes and biological samples, which forms an important link in the prosecution case, is also rendered doubtful. The panch witnesses to the seizure, namely PW-8 and PW-9, turned hostile and denied witnessing the actual seizure of clothes or biological samples. Though they

admitted their signatures on the panchnamas, both witnesses consistently stated that the articles were not shown to them and that the contents were merely read out. As a result, the credibility of the seizure proceedings and the chain of custody of the alleged incriminating articles stand seriously impaired.

16. The ocular version of the incident primarily rests on PW-4, a child witness aged about 14 years, who is closely related to the complainant. His testimony is not free from inconsistencies and contradictions when read in conjunction with the evidence of PW-5 and PW-6, particularly with regard to the sequence of events, the manner in which the incident was reported, and the conduct of the witnesses immediately thereafter. It has also emerged that PW-4's mother accompanied him during police and court proceedings, thereby raising the possibility of tutoring. In the absence of independent corroboration, reliance on such interested testimony becomes unsafe.

17. The medical evidence does not conclusively establish the occurrence of rape. PW-10, the Medical Officer, opined only that the possibility of sexual assault could not be ruled out. The opinion is thus inconclusive and does not affirmatively support the prosecution case. No definitive signs of forcible sexual intercourse were noted, and the medical findings do not corroborate the ocular version in material particulars.

18. The investigation further suffers from serious lapses. The Investigating Officer admitted that photographs of the scene of offence were taken using a private mobile phone without maintaining proper records.

There are discrepancies between the spot panchnama and the map obtained from the land records department. Moreover, despite the presence of several neighbouring residents, statements of some independent witnesses were not recorded, without any satisfactory explanation. Such omissions invite an adverse inference under Section 114(g) of the Indian Evidence Act.

19. When the evidence is considered in its totality, it becomes evident that the prosecution case is marred by the absence of the victim's substantive testimony, unexplained delay in lodging the FIR, contradictory evidence regarding the victim's mental capacity, hostile panch witnesses, inconclusive medical opinion, and significant investigative lapses. These circumstances cumulatively create serious doubt about the prosecution version. In criminal jurisprudence, where the burden lies squarely on the prosecution to prove the case beyond reasonable doubt, such doubt necessarily enures to the benefit of the accused.

20. Having carefully considered the rival submissions and upon re-appreciation of the evidence on record, this Court finds substance in the alternative contention advanced on behalf of the appellant. It is trite law that penetration, however slight, is the sine qua non for the offence of rape. In *Aman Kumar v. State of Haryana*, (2004) 4 SCC 379, the Supreme Court has reiterated that in the absence of proof of penetration, the act would not amount to rape. The relevant paragraph of the judgement is reproduced as under:

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove

that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana.] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within

the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.”

21. In the present case, as already discussed, the prosecutrix did not depose, her statement was never recorded, and the medical evidence is inconclusive. The Medical Officer merely opined that the possibility of sexual assault could not be ruled out and did not affirmatively state that penetration had occurred. The forensic evidence also does not establish any inter-se transfer of semen or biological material linking the appellant to penetrative sexual intercourse. The ocular evidence relied upon by the prosecution does not unequivocally establish penetration. In such circumstances, this Court is unable to sustain the conviction for the offence of rape.

22. However, the evidence on record does indicate that the appellant had entered the house of the victim and subjected her to an indecent and unlawful physical act, which squarely falls within the ambit of outraging the modesty of a woman. The Supreme Court in *Aman Kumar case (supra)* has held that where the act does not culminate in penetration, but clearly demonstrates an intention to outrage modesty, conviction under Section 354 IPC would be appropriate. Applying the said principle, this Court is of the considered view that while the offence of rape is not made out beyond reasonable doubt, the offence under Section 354 IPC stands proved. The relevant paragraphs are reproduced herein below:

“12. Though the prosecutrix's version in court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by the police during investigation. The evidence of PW 11, the father who according to the prosecution made a departure from what he allegedly stated during investigation is to the effect that his wife PW 9 told her (sic him) that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get affected. Significantly, the evidence of the prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape.

13. There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Sections 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC 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 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. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word “modesty” is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word “modesty” in relation to a woman as follows:

“Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste.”

24. At the outset, the non-examination of the prosecutrix assumes decisive importance. While it is true that conviction in a rape case can be

sustained even without examining the victim, such a course is permissible only where the remaining evidence is unimpeachable and of sterling quality. Thus, failure to examine the prosecutrix, when she is available and capable of giving evidence, creates a serious dent in the prosecution case.

25. In the present case, the medical officer (PW-10) categorically admitted that the victim could respond, albeit with difficulty, and that medical history was partly obtained from her. The psychiatrist's report describes the victim as having borderline intellectual disability, not total incapacity. Even the learned trial court recorded that the victim gave coherent answers to some questions. In such circumstances, the blanket conclusion that recording her evidence was "impossible" is legally unsustainable. The prosecution was required, at the very least, to attempt recording her statement with appropriate safeguards, as contemplated under Sections 161 and 164 CrPC. The complete omission to do so, without any judicial determination of incompetence under Section 118 of the Evidence Act, attracts adverse inference.

26. The evidence of PW-4, the child witness, also does not inspire confidence. His presence at the spot is rendered doubtful by his own admission that the route to the medical shop was in the opposite direction. His explanation that he saw the incident while "passing by" is vague and uncorroborated. The evidence of a child witness must be subjected to closest scrutiny and must be free from suspicion of tutoring or improbability. The version of PW-4 regarding witnessing the appellant "lying on top of the victim" is not corroborated by any independent or scientific evidence.

27. PW-5 and PW-6 are admittedly not eyewitnesses to the alleged act of rape. Their testimony is based on what PW-4 allegedly told them and what they inferred upon reaching the spot. Such evidence is essentially hearsay and cannot be elevated to substantive proof.

28. The medical and forensic evidence, far from corroborating the prosecution case, introduces further doubt. No injuries suggestive of forcible intercourse were found on the victim. No semen was detected on the victim's clothes or vaginal swabs. The presence of semen on the appellant's own underwear and blood on the victim's own underwear, without any inter-se transfer or DNA linkage, does not establish penetrative sexual assault. In *Kuldip Singh v. State of Delhi* (2003) 12 SCC 528, the Supreme Court held that Trial Court is under a legal obligation to put incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the Court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under section 313 of CrPC cannot be used against him and have to be excluded from consideration.

29. The learned trial court's reasoning that post-incident assault on the appellant corroborates guilt is legally flawed. Such reasoning reverses the presumption of innocence and amounts to drawing conclusions based on moral assumptions rather than legal proof. Similarly, the rejection of the defence version solely on the ground that no counter-complaint was filed is

contrary to settled law that the burden never shifts to the accused, as reiterated in *Kali Ram v. State of Himachal Pradesh* (1973) 2 SCC 808. The relevant paragraphs are reproduced below :

“23. Observations in a recent decision of this Court, *Shivaji Sahabrao Bobade v. State of Maharashtra* to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

24. Leaving aside the cases of statutory presumptions, the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. The Court may, of course, presume, as mentioned in Section 114 of the Indian Evidence Act, the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation

to the facts of the particular case. The illustrations mentioned in that Section, though taken from different spheres of human activity, are not exhaustive. They are based upon human experience and have to be applied in the context of the facts of each case. The illustrations are merely examples of circumstances in which certain presumptions may be made. Other presumptions of a similar kind in similar circumstances can be made under the provisions of the Section itself. Whether or not a presumption can be drawn under the Section in a particular case depends ultimately upon the facts and circumstances of each case. No hard and fast rule can be laid down. Human behaviour is so complex that room must be left for play in the joints. It is not possible to formulate a series of exact propositions and confine human behaviour within strait-jackets. The raw material here is far too complex to be susceptible of precise and exact propositions for exactness here is a fake.”

The principal issue that arises for consideration in the present appeal is whether the prosecution has succeeded in proving beyond reasonable doubt that the appellant committed the offence of rape punishable under Sections 376(2)(f) and 376(2)(l) of the IPC, along with allied offences, and whether the conviction recorded by the learned trial Court can be sustained in law.

30. At the outset, it must be noted that the prosecutrix, who is the most material witness in a case of this nature, was not examined before the Court. Her statement was neither recorded under Section 161 nor under Section 164 of the Code of Criminal Procedure. The entire prosecution case rests upon the alleged disclosure made by the victim to her mother and upon the testimony of PW-4, PW-5, and PW-6.

31. The prosecution sought to justify the non-examination of the victim on the ground that she was mentally disabled and incapable of giving a coherent statement. However, this justification does not inspire

confidence. The Medical Officer categorically admitted in his cross-examination that the victim was capable of understanding questions and giving intelligible answers. Despite this, no attempt was made by the Investigating Officer to record her statement at any stage of the investigation.

32. The psychiatric certificate relied upon by the prosecution was issued by a private doctor nearly four months after the incident. The said doctor was not examined before the Court. Significantly, the Government Hospital had refused to issue such a certificate. In the absence of examination of the psychiatrist and in view of the delay in obtaining the certificate, serious doubt arises regarding the alleged incapacity of the victim to depose.

33. In these circumstances, the failure of the prosecution to examine the prosecutrix, without any cogent or convincing explanation, attracts an adverse inference under Section 114(g) of the Indian Evidence Act. In a case involving a serious charge such as rape, such an omission goes to the root of the matter and materially weakens the prosecution case.

34. Coming to the evidence of PW-4, he is a child witness and the only witness who claims to have seen the incident. His presence at the spot itself is doubtful, having regard to the inconsistencies in his version and his admissions regarding his movements at the relevant time. His testimony does not inspire confidence and cannot be relied upon without strong corroboration.

35. The evidence of PW-5 and PW-6 does not advance the prosecution case any further. Both witnesses are admittedly not eyewitnesses to the alleged act of rape. Their testimony is essentially hearsay in nature and limited to what they were allegedly informed after the incident. Such evidence cannot be treated as substantive proof of the commission of rape.

36. Even otherwise, a careful reading of the testimonies of PW-4, PW-5, and PW-6 shows that none of them have categorically deposed about penetration or sexual intercourse. At the highest, their evidence suggests inappropriate touching or an attempt to sexually assault the victim.

37. The medical evidence also does not support the prosecution case beyond reasonable doubt. No external or internal injuries were found on the body of the victim. The Medical Officer reserved his opinion and did not give any final opinion regarding sexual intercourse. The examination columns are incomplete and inconclusive.

38. The forensic evidence also fails to establish any nexus between the appellant and the alleged offence. No semen or blood of the appellant was detected on the clothes of the victim. The presence of semen of the accused on his own undergarment and blood of the victim on her own undergarment does not, by itself, establish the charge of rape.

39. Moreover, the chain of custody of the seized articles is doubtful. The panch witnesses to the seizure have turned hostile. There is an unexplained delay of about nine days in sending the seized articles for

chemical analysis. These lapses create serious doubt about the sanctity and reliability of the forensic evidence.

40. There is also a delay in lodging the First Information Report. The explanation that the local police station was closed due to the COVID-19 pandemic has not been supported by any documentary evidence. In the facts of the present case, the delay assumes significance and cannot be brushed aside as inconsequential.

41. Another serious infirmity in the prosecution case is that certain incriminating circumstances relied upon by the learned trial Court, particularly relating to forensic evidence, were not put to the appellant in his statement under Section 313 of CrPC. This has caused prejudice to the appellant and vitiates the finding of guilt.

42. It is well settled that penetration, however slight, is the *sine qua non* for the offence of rape. In the present case, there is no direct, reliable, or cogent evidence to prove penetration beyond reasonable doubt. In the absence of such proof, a conviction under Section 376 IPC cannot be sustained.

43. The settled position of law, as laid down by the Hon'ble Supreme Court, is that where penetration is not proved, the offence would not travel beyond one under Section 354 of the IPC. Even if the prosecution evidence is accepted at its highest, it does not establish the commission of rape.

44. The learned trial Court, in the opinion of this Court, has erred in placing reliance on weak and unreliable evidence and in drawing conclusions based on conjectures and assumptions. The impugned judgment suffers from serious errors of law and improper appreciation of evidence.

45. In view of the foregoing discussion, this Court holds that the prosecution has failed to prove the guilt of the appellant for the offences punishable under Sections 376(2)(f) and 376(2)(l) of the IPC beyond reasonable doubt. The conviction and sentence imposed upon the appellant for the said offences are therefore unsustainable in law.

46. On cumulative assessment, this Court finds that the prosecution case is riddled with serious infirmities, absence of the prosecutrix's testimony, doubtful ocular evidence, hearsay witnesses, inconclusive medical and forensic evidence, and investigative lapses. The learned trial court, with respect, has adopted a prosecution-centric approach and failed to test the evidence on the anvil of "proof beyond reasonable doubt".

47. Criminal jurisprudence mandates that suspicion, however strong, cannot take the place of proof. Where two views are possible on the evidence on record, the one favouring the accused must prevail. The impugned judgment does not meet the standard of judicial certainty required for sustaining a conviction for offences of such gravity.

48. Accordingly, this Court holds that the prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. The appellant is entitled to the benefit of doubt. In view of the foregoing discussion, the conviction of the appellant for the offences punishable under Sections 376(2)(f), 376(2)(l), 452 and 506 of the IPC is set aside. However, from the material on record, this Court is satisfied that the act attributed to the appellant does constitute an offence under section 354 of the IPC. Considering the nature of the offence proved, the circumstances of the case, and the fact that the appellant has already undergone the sentence prescribed for the offence under section 354 of the IPC, no further sentence is required to be imposed. The appellant is therefore entitled to be released forthwith, if not required in any other case. Hence, I pass the following order:

Order

- (i) Criminal Appeal is partly allowed.
- (ii) The impugned judgment and order dated 28.02.2023 passed by the learned Additional Sessions Judge, Akot, District Akola, in Sessions Case No. 18 of 2021 is hereby quashed and set aside.
- (iii) The appellant–accused Santosh Sitaram Ingle is acquitted of all the offences punishable under Sections 376(2)(f), 376(2)(l), 452 and 506 of the IPC.

(iv) However, the appellant-accused is convicted for the offence punishable under Section 354 of IPC.

(v) Since, the appellant-accused has already undergone the sentence prescribed for the offence under Section 354 of IPC, he shall be released forthwith, if not required in any other case.

NIVEDITA P. MEHTA, J.

