

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 79 OF 2000.

1. Agnelo @ Robert Fernandes,
2. Suraj Chodankar,
3. Milton Rebello,
4. Arnaldo Rodrigues,
all presently undergoing
sentence at Central Jail,
Aguada, Bardez-Goa. ... Appellants.

Versus

State. ... Respondent.

Mr. S.G. Dessai, Senior Advocate with Mr. Arun Bras de Sa,
Advocate for the Appellants.

Ms. W. Coutinho, Addl. Public Prosecutor for the Respondent
State.

Coram: P.V. HARDAS, J.

Date: 21st December 2001.

ORAL JUDGMENT.

The appeal is filed by the appellants challenging their conviction for offences punishable under Sections 376(2)(g), 342, and 354 of the Indian Penal Code and sentence of rigorous imprisonment for 10 years and to pay fine of Rs. 10,000/- in default 6 months simple imprisonment, rigorous imprisonment for 6 months and to pay fine of Rs. 1,000/- in default 1 month simple imprisonment and rigorous imprisonment for 1 year and to pay fine of Rs. 1,000/- in default 1 month simple imprisonment. The appellants have also been convicted for an offence punishable under Section 323 of the Indian Penal Code and are sentenced to pay fine of Rs. 1,000/- in default 1 month simple imprisonment. The aforesaid conviction and sentence

has been passed on the appellants by the IInd Additional Sessions Judge, Panaji, in Sessions Case No. 16 of 1996, vide Judgment dated 15th November 2000.

2. P.W.18 Bosco George then P.S.I., received a wireless message on 1st August 1995, from the casualty department of the Goa Medical College, Bambolim that a girl had been admitted in the hospital for attempted rape. P.W.18 George immediately proceeded to the Goa Medical College and requested the doctor on duty to certify whether the girl admitted in Ward No. 115 was in a fit condition to give her statement. On the doctor so certifying, on the letter dated 1st August 1995, at Exhibit 54, P.W.18 P.S.I. George then recorded a detailed complaint of the girl. The said complaint is at Exhibit P.W.2/A and signed by P.W.18 P.S.I. George at point 'A'. P.W.18 P.S.I. George then handed over the complaint Exhibit P.W.2/A to P.I. Umesh Gaonkar P.W.20, who on the basis of the said complaint registered the offence vide Crime No. 250/95 under Sections 354, 342, 323 and 376 read with Section 34 of the Indian Penal Code. P.W.20 P.I. Gaonkar then directed P.W.18 P.S.I. George to arrest the accused. P.W.18 P.S.I. George arrested original accused nos. 1 to 3 and also attached a Maruti Van vide attachment panchanama Exhibit P.W.3/A. Accused no. 4 was arrested on 2nd August 1995. All the four accused were then referred for medical examination to the Goa Medical College and the certificates of the

appellants are at Exhibits P.W.1/B, P.W.1/C, P.W.1/D and P.W.1/E. The letter from the police requesting P.W.1 Dr. E.J. Rodrigues to examine the accused and the prosecutrix is at Exhibit P.W.1/H. The examination report of the prosecutrix is at Exhibit P.W.1/A.

3. On 3rd August 1995 P.W.20 P.I. Gaonkar visited scene of the offence alongwith accused no. 2 and conducted the scene of offence panchanama in the presence of P.W.4 Ramesh Ghadi and one Ramdas. The scene of offence panchanama is at Exhibit 58. Alongwith the scene of offence panchanama a white bedsheet, some hair, a hook of the brassier, a torn brassier and a sleeveless banian came to be attached, which are M.Os. 3, 4, 6, 7 and 8. The hotel register of Goa Lodge also came to be attached. The xerox copy of the register is at Exhibit 30. In the presence of P.W.6 and one Nuru Dias the clothes of accused no. 1 came to be attached. The attachment panchanama is at Exhibit P.W.6/A. The panchanama of the attachment of the clothes of the accused 2 to 4 are at Exhibit P.W.6/A Colly.

4. P.W.14 Vasudeo Bandodkar, who was then working as an Executive Magistrate at Panaji, was requested to hold a test identification parade by a letter Exhibit 41. On 20th September 1995, P.W.14 Mr. Bandodkar held the test identification parade. The memorandum of the test identification parade is at Exhibit 41. Original accused 2

to 4 had been put up in the test identification parade. P.W.20 P.I. Gaonkar forwarded the muddemal property to the Chemical Analyser and on his transfer handed over the investigation to his successor P.I. Banaulikar. After completing the investigation the chargesheet against the appellants came to be filed.

5. The learned Assistant Sessions Judge, Panaji, vide Exhibit 4 framed a charge against the appellants/original accused 1 to 4 for offences punishable under Sections 323, 342, 354 and 376 read with Section 34 of the Indian Penal Code. The appellants abjured their guilt and claimed to be tried. The prosecution, in support of its case, examined 20 witnesses.

6. The entire prosecution case revolves round the evidence of P.W.1 Dr. E.J. Rodrigues, P.W.2 Edalina Afonso prosecutrix, P.W.14 Vasudeo Bandodkar Executive Magistrate, who conducted the test identification parade and the police officers.

7. P.W.1 Dr. Rodrigues, who had examined the prosecutrix, had noted 8 injuries on her person. The injuries noted by P.W.1 Dr. Rodrigues are as under:-

"1. 13 parallel superficial horizontal linear cuts of 3-4 cms. length in an area of 7 x 4 cms. in lower front of left forearm with tailing inwards.

2. 23 parallel superficial horizontal linear cuts of 3-4 cms. length in an area of 8 x 4 cms. in lower front of right forearm with tailing inwards.
3. 3 horizontal linear incised cuts on hypothemar eminence of right palm, 3-4 cms. length with tailing inwards.
4. horizontal linear incised cut of 6 cms. length in upper front of right forearm with tailing inwards.
5. Multiple cuts with reddish border in bright cuboital fossa with oozing of serous fluid in an area of 4 x 1 cms.
6. Horizontal superficial linear cut of 3 cms. over back of left hand with tailing inwards.
7. Abrasion reddish with soft scab of 0.5 x 0.5 cms. on left side of chin.
8. Bruise, bluish of 1.5 x 0.5 cms. right lower eyelid and right cheek bone prominence."

He has opined that the injuries 1 to 6 were covered with reddish soft scab with red margin and caused by sharp edge or tip of a cutting weapon and could have been self inflicted. In respect of injuries 7 and 8 P.W.1 Dr. Rodrigues opined that these injuries could be caused by blunt force. P.W.1 Dr. Rodrigues did not notice any obvious injuries on the neck, back, breast and abdomen. P.W.1 Dr. Rodrigues also noticed fresh tears present at 3-6 and 9 o'clock position of hymen. They were congested edematous tender and did not bleed on touch. The certificate of examination of the prosecutrix is at Exhibit P.W.1/A. Since the examination of the appellants/accused did not reveal any injuries, P.W.1 Dr. Rodrigues opined that in the absence of any positive signs of recent forcible sexual

intercourse, no positive opinion could be given. In the cross-examination P.W.1 Dr. Rodrigues has admitted that he had asked the victim girl as to whether she was wearing an underwear or not. However, the prosecutrix was not in a position to give any reply or any history. He admits that the history of sexual assault was not given by the victim. The history was given by the Casualty Medical Officer. He also admits that he had not questioned the Casualty Medical Officer at all. P.W.1 Dr. Rodrigues further admitted that the injuries mentioned at serial nos. 7 and 8 could be caused by fall on the ground. The tenderness just below the left mastoid process on the left side of the neck could be also caused by fall on the ground.

8. Prosecutrix Edalina Raposo was examined as P.W.2. Her examination-in-chief and cross-examination continued from 21st March 1997 till 12th December 1997. It is shocking to note that she was partly examined on 21st March 1997 and the case was adjourned as there was a custody matter. She was, thereafter, examined on 21st May 1997 and after completing her examination-in-chief, the case was adjourned on the ground that the learned Public Prosecutor stated that he had to go to the other Court. She was, thereafter, examined on 27th June 1997, on which date the examination-in-chief was completed and part of the cross-examination was completed. Thereafter the case was adjourned to 25th July 1997, on which date after completing

a part of the cross-examination, the case was adjourned as the witness had stated that she was not feeling well. Thereafter, she was again cross-examined on 4th August 1997. On this day also the cross-examination was not completed and the case was adjourned to 13th August 1997. She was again cross-examined on 18th October 1997 when the case was adjourned as the witness had stated that she was not feeling well. She was partly cross-examined on two other days and the case was adjourned as the Court time was over. Her cross-examination was ultimately completed and she was discharged on 12th December 1997. The trial had commenced on 28th February 1997 with the recording of evidence of P.W.1 Dr. Rodrigues. The trial concluded on 22nd November 2000, when the Judgment was delivered. It is distressing to note the inordinate time which was taken by the learned trial Court in the disposal of the Sessions trial. What is most distressing is the fact of recording of the evidence of the prosecutrix P.W.2 Edalina piecemeal. The evidence of the prosecutrix had commenced on 21st March 1997 and was concluded on 12th December 1997. The learned trial Court seems to have proceeded in an extremely casual manner in the recording of the evidence of the prosecutrix. Piecemeal recording of the evidence of witnesses has disastrous effects on the prosecution case. Such piecemeal recording of the evidence enures to the benefit of the accused. It is difficult for a witness to re-collect as to what he or she had stated in response to a particular question earlier and

repetitive questioning is bound to elicit a contradictory answer. A witness who is summoned to appear before the Court and whose examination-in-chief commenced, should be examined, cross-examined and thereafter discharged in a continuous process of recording the evidence of the witness day to day. If either the examination-in-chief or the cross-examination remains incomplete at the end of the day, the Court must ensure that the witness is examined immediately on the next day or within the next two or three days but, in no case should the witness be examined piecemeal and the examination stretching to nearly 8 1/2 months. The Courts have to adjust their calendar of cases accordingly and piecemeal recording of the evidence of the witness has to be scrupulously avoided. The provisions of the Criminal Procedure Code especially Section 309 enjoins upon the Courts to record the evidence day to day and complete the trial. Piecemeal recording of the evidence, which enures to the benefit of the accused, has disastrous effects on the prosecution case to defeat justice and lays bare the procedure and attitude to be scoffed at. The trial Courts are, therefore, directed that in future such piecemeal examination of the witness should be avoided and a trial once begun should be conducted on day to day basis till its conclusion, otherwise the impassioned plea of the victim for justice, if the approach and attitude is not corrected, will remain a cry in the wilderness, buried in the labyrinth of recalcitrant attitude.

9. The Supreme Court in **Lt. Col. S.J. Chaudhary v. State (Delhi Administration)**, A.I.R. 1984 S.C. 618 has held as under:-

" The trial before the court of a Sessions must proceed and be dealt with continuously from the inception to its finish. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. Sessions cases must not be tried piecemeal. Once the trial commences, he must except for a very pressing reason which makes an adjournment inevitable, proceed de die in diem until the trial is concluded"

10. The Supreme Court again in a recent Judgment in **Ambika Prasad and another v. State (Delhi Administration)**, (2000) 2 S.C.C. 646 at paragraph 11 has held as under:-

"11. It is also to be pointed out that PW 4 Vikram Singh (informant) who had lodged FIR immediately was under constant threat and was compelled not to speak the truth despite the fact that he was the brother of the deceased. Other witnesses also turned hostile including PW 6 Prem Singh, son of Pratap Singh and PW 8 Rattan Singh, which indicates, as observed by the High Court, that the accused party was stronger in terms of money power and muscle power. At this stage, we would observe that the Sessions Judge ought to have followed the mandate of Section 309 CrPC of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they may not support the prosecution. It appears from the record that the examination-in-chief of PW 4 Vikram Singh was over on 6-2-1984. The counsel representing Ambika Prasad requested the Court that because of his uncle's demise, he would not be in a position to cross-examine the witness

and, therefore, recording of further cross-examination might be adjourned. Thereafter, the witness was cross-examined in the month of July 1985. In our view, this is highly improper. Even if the request for adjournment of the learned counsel for the accused was accepted, the cross-examination ought not to have been deferred beyond two or three days." (Emphasis supplied).

The Supreme Court in **State of U.P. v. Shambhu Nath Singh and others**, (2001) 4 S.C.C. 667 has held as under:-

" We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by the presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment towards duty. No sadistic pleasure, in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers, can be a persuading factor for granting such adjournments lavishly, that too in a casual manner.

Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the

requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court."

11. Mr. Dessai, the learned counsel appearing for the appellants, has urged before me that the evidence of the prosecutrix tasks human credulity for its acceptance. According to the learned counsel appearing for the appellants, the probability factor weighs heavily against the version given by P.W.2 Edalina being true. The learned counsel has also urged that the medical evidence insofar as the injuries are concerned does not corroborate the version of the prosecutrix. It was also urged before me by the learned counsel for the appellants that from the tenor of the evidence of the prosecutrix and the contents of the F.I.R., it is clear that the appellant no. 1 had sexual intercourse with P.W.2 Edalina with her consent.

12. Mrs. Coutinho, the learned Additional Public Prosecutor appearing for the respondent State, has urged before me that the version of the prosecutrix is not required to be corroborated and any attempt to seek corroboration to her version would be adding insult to injury. According to her, the version of the prosecutrix P.W.2 Edalina is strongly corroborated by the F.I.R. and though there are improvements, the version of the prosecutrix deserves to be accepted. According to her,

therefore, the appeal deserves to be dismissed.

13. P.W.2 the prosecutrix Edalina states in her evidence that the appellant no. 1 stays near the Church at St. Inez and he used to meet her whenever she used to go to the Church. This, according to her, had been going on for about 2 years prior to the incident. She also states that the appellant used to call her on his scooter saying the he would drop her at her house, but, she used to avoid him. P.W.2 Edalina also states that the appellant used to say that he would marry her and P.W.2 used to say to him that if he wanted to marry her, the appellant should approach in a proper manner and meet her brother. P.W.2 Edalina states that on 30th July at about 5.00 p.m. or 4.50 p.m. while she was going to the Church, the appellant no. 1 came in a white Maruti Van. The appellant no.2 was also present with the appellant no. 1 in the said Maruti Van. The appellant no. 1 questioned her as to where she was going and she replied that she was going to attend Mass. The appellant no. 1 told her that he would take her to the Church for attending the Mass but P.W.2 declined. The appellant no. 1 then forcibly made P.W.2 sit on the back seat of the Maruti Van. She corrected herself to state that the appellant no. 1 was driving the said Van and appellant no. 2 who was sitting on the rear seat made her sit in the Van against her wish. P.W.2 Edalina also states that she could not shout as appellant no. 2 had kept his hand on her mouth. P.W.2

Edalina further states that appellants 1 and 2 discussed among themselves and decided to go to Dona Paula and, accordingly, she was taken to Dona Paula. The appellant no. 1 stopped the Van somewhere and, thereafter, tried to make advances towards her by touching her body. She states that she was not allowing the appellant no. 1 to touch her body and was fighting with him. Since P.W.2 Edalina was repelling the advances of appellant no. 1, the appellant no. 1 slapped her face many times. P.W.2 Edalina on the pretext of going to answer the call of nature, got out of the Maruti Van and walked a certain distance and, thereafter, ran away. The appellant no. 1 came running behind her and caught her and brought her to the Maruti Van. The appellant nos. 1 and 2 again made her sit in the Maruti Van. Both the appellants then consumed beer and she was made to sit between appellants 1 and 2. She was forcibly made to drink some beer and the appellant no. 1 touched her breast. P.W.2 Edalina states that she told them not to touch her breast. Thereupon the appellant no. 1 again started assaulting her. By this time it was dark and the appellant no. 1 said that they should go to Panaji and, accordingly, brought P.W.2 Edalina to Panaji in the Maruti Van. At Panaji they were joined by the appellant no. 4. Then they proceeded to Altinho, where they were joined by the appellant no. 3. P.W.2 Edalina states that all the accused were discussing amongst themselves that they should go to Margao to find a room. On the way to Margao they were

discussing that a room was not available and that they should go to Mapusa and, therefore, the Van proceeded towards Mapusa. At Mapusa the appellants discussed and said that they should go back to Panaji. The Maruti Van was parked and appellants 1 and 3 alighted from the Maruti Van and went towards a house. After some time they came back and said that they could arrange a room. The appellant no. 1 told P.W.2 to come out of the Van but P.W.2 Edalina declined. The appellant no. 1 threatened her that in case she did not alight from the Van, she would be forcibly taken in the room. The appellant no. 1 then caught her hand and took her inside the room. P.W.2 Edalina stated that she was scared and, therefore, she went with him. She also states that due to the assault she was totally upset. The appellant no. 1 then dumped her on the bed in the room and all the four appellants tried to make advances towards her by touching her body, legs and hands. The appellant no. 1 told her to remove her clothes and P.W.2 Edalina declined to do so. She states that thereafter appellant no. 1 forcibly removed her clothes and her brassier tore in the process. She states that after removing her clothes, all the appellants started touching her body. However, she escaped from their clutches as she entered the toilet, which was attached to the said room. As she could not latch the door from inside, the appellants forcibly opened the door and P.W.2 Edalina was once again brought in the room and dumped on the bed. She states that she was assaulted by the

appellant no. 1. P.W.2 Edalina thereafter states that they were discussing that they would bring some eatables and, accordingly, appellants 1, 2 and 4 went out while appellant no. 3 was in the room. P.W.2 Edalina further states that after some time the said three appellants returned and came inside the room. The appellant nos. 2 and 4 caught her. Appellant no. 2 had caught her hands and appellant no. 4 had caught her legs and, thereafter, appellant no. 1, by removing his clothes, had committed rape on her. Thereafter, appellant no. 2 removed his clothes and had also committed rape on her. Appellant no. 4 started touching her breasts, but she pushed him away. She states that appellant no. 1 questioned her as to why she pushed appellant no. 4 and she replied that while he was approaching her she had pushed him. Thereupon, appellant no. 1 again assaulted her. She states that she came out of the room and started walking. She saw a Church and a house. She also states that during the night appellant no. 1 had given some paper and some money for purchasing some medicine. She states that the appellant had told her that after consuming the medicine she would be well. She thereafter went to the Pharmacy and purchased the medicine and then went to the house of the appellant no. 1 and informed the mother of the appellant no. 1 as to what the appellant no. 1 had done. She states that, on seeing her, the mother of the appellant no. 1 started giving 'bad words'. She states that she went near a gada and purchased

a soda and consumed the medicine. She states that while she was proceeding to her house, the appellant no. 1 met her. He was in a Maruti Van and he forced her to sit in the Maruti Van. She states that she was in the Maruti Van and does not know what happened. She states that she came to her senses in the afternoon when she found herself in the office of the appellant no. 1. She corrected herself to state that she had come to her senses at the house and then went to the office of the appellant no. 1. The appellant no. 1 was in the office and had questioned her as to why she had come to the office. She states that she replied that she had come to make him shy of his acts. The appellant no. 1 told her to go and P.W.2 Edalina told him that she would show him. P.W.2 Edalina states that she came out and lost her senses and sat by the side of the road and found a blade. She states that she gave cuts on her hands and a lady knowing her caught her and took her to her house and whilst walking P.w.2 Edalina states she fell on the ground. One person arranged a rickshaw and P.W.2 and the said lady came to the house of P.W.2 Edalina. Thereafter P.W.2 Edalina was taken to the hospital and she was questioned by the doctor as to what happened. However, her sister told the doctor that P.W.2 was not in the house for three days. She states that the police came to the hospital and recorded her complaint.

14. In the further examination-in-chief P.W.2 Edalina

states that in the Maruti Van at Dona Paula the appellant had requested her to allow sexual intercourse with the appellant. She further states that at that time appellant no. 1 was not married now he is married. she also states that at time she also was not married. It is interesting to note that in the examination-in-chief she does not refer to her response to the request of appellant no. 1. In the examination-in-chief P.W.2 Edalina further states that appellant nos. 1 and 2 had committed rape on her while appellant nos. 3 and 4 were only touching her body. She identifies M.O.2 as her frock. She identifies M.O.6 as the hook of the brassier. She identifies M.O.7 as her brassier. She also identifies M.O.3 as the white bedsheet. She also identifies M.O.4 as another white bedsheet.

15. In the cross-examination she admitted that she had not stated to the police that she was knowing all the accused/appellants. She, however, states that she had stated to the police that she was knowing only accused no. 1. She also admits that she had not stated to the police that accused no. 1 stays near the Church at St. Inez. The following omissions have been elicited from her during cross-examination:-

"I had not stated to the police that whenever I used to go to the Church at St. Inez the acc no. 1 used to meet me. I had not stated to the police that while I was going for Church for about 2 years before the incident the accused no. 1 used to meet me. I had not stated to the

police that the accused used to call me on his scooter saying that he would drop me at my house. I had not stated to the police that I was avoiding accused no. 1. I had not stated to the police that accused no. 1 used to say that he would marry with me. I had not stated to the police that I had told the accused no. 1 that if you want to marry me he should approach in a proper manner to my brother in the house. I had not stated to the police that ten minutes to 5.00 p.m. the accused no. 1 came in a Maruti van. I had not stated to the police that accused no. 1 Robert questioned me as to where I was going. I had not stated to the police that I replied that I was going for mass. I had not stated to the police that accused no. 1 told me that he would take me to the Church for the mass. I had not stated to the police that I replied that I would not go alongwith him. I did not state to the police that accused no. 1 then forcibly made me to sit on the back seat of the Maruti van. I had not stated to the police that accused no. 1 was driving the said van. I had not stated to the police that I could not shout as accused no. 2 had kept his hand on my mouth. I had not stated to the police that accused no. 2 and accused no. 1 discussed that they should go to Dona Paula."

16. She admitted in the cross-examination that she had not stated to the police that accused no. 1 stopped the van somewhere at Dona Paula and, thereafter, accused no. 1 tried to make advances towards her by touching her body. She also admitted that she had not stated to the police that she was not allowing the accused no. 1 to touch her body and was fighting with him and had told him not to touch her body. She also admitted that she had not stated in her cross-examination that on the pretext of going to answer the call of nature she tried to escape. Omission was also proved that she had not stated to the police that the

accused no. 1 initially allowed her to go but when she started running the accused no. 1 caught her and brought her towards the Maruti Van. Another omission has been duly proved that she had not stated to the police that they made her sit in the Maruti Van. Omission is also proved that she had not stated to the police that accused nos. 1 and 2 were drinking beer. P.W.2 Edalina further stated that she did not remember whether she had stated to the police that she was made to sit between accused nos. 1 and 2 and they tried to put the beer bottle in her mouth and forcibly made her to drink beer. Omission is duly proved that she had not stated to the police that accused no. 1 touched her breast and she had told him not to touch. Another omission is duly proved that at Altinho the accused no. 3 boarded the van. Similarly omissions are duly proved that she was made to get down from the Van forcibly by the accused no. 2 and, thereafter, they caught hold of her hand and took her inside the room. Another omission that is duly proved is that she had stated to the police that accused no. 2 caught her hand and accused no. 3 caught her legs and accused no. 1 tried to sleep over her. Another omission duly proved is that she had not stated to the police that accused no. 1 removed his pant and raped her. She denied that she had stated before the police that on that night Robert (accused no. 1) tried to have sexual intercourse with her but since he was high on liquor it did not materialize. Another omission that is duly proved is that she had not stated to the police that

accused no. 2 after removing his clothes had committed rape on her. She admitted that she was in the said room for the whole night and on the next day morning till she came out during the evening hours. Another omission that is duly proved is that the accused no. 1 had given her paper and money for purchasing some medicine and that the accused had told her that she would feel well after consuming the medicine. She admitted that when she went to the pharmacy the father of accused no. 1 was working in the pharmacy and attending to the customers. She also stated that accused no. 1 had sexual intercourse with her in the morning. She also stated that when accused no. 1 was having sexual intercourse with her during the morning time, the other accused were not there. She stated that the accused no. 1 had sexual intercourse with her only once in the morning on the next day. The contradiction is duly proved that she had stated to the police that after all of them had left Robert (accused no. 1) took her to a room near the Panjim Church and left her in the said room promising to come later.

17. P.W.2 Edalina was put the following questions and has answered them as hereunder:-

"Q. Do you want to say that the first version you have given that you left the room during evening hours and started walking, you saw the church and a house and thereafter went to the pharmacy etc., is false?

A. This is not false.

Q. Can you tell me why you did not go out of the room if you were alone there?

A. I was not able to get up."

18. She admitted in the cross-examination that on the second day of the incident she had gone to the house of accused no. 1 to inform his mother. It was late in the evening when she had gone and she went walking. Omission duly proved that mother of the accused no. 1 started giving 'bad words' to her.

19. In the complaint she stated that a boy by name Robert Fernandes was always trying to become friendly with her. She, however, tried to avoid him but, since he promised to marry her, she started to talk to him. In the complaint she stated that on Sunday while she was going to Church at St. Inez around 5.00 p.m. the said Robert came in a white colour Maruti Van alongwith another person. She stated that Robert called her into the Maruti Van and after which they took her to Dona Paula near the cross. At the cross Robert told his friend to go out of the Van and tried to undress her. She also stated that Robert assaulted her since she resisted. She stated that Robert then promises to get married to her if she co-operated. She stated that since it was getting dark, he went to Panaji and went back to his house at St. Inez. She stated that there he picked up another friend of his and went to a hotel in Margao but since accommodation was not given, they went towards Mapusa. She also stated that at Mapusa accommodation was not

available and they returned to Panaji and collected another friend. From there, She stated, they went to a hotel at Panaji. She stated that Robert and his two friends went to bring food while the boy from Altinho was with her and he tried to make advances but she resisted. She stated that after Robert (accused no. 1) returned, the boy from Altinho went away. She stated that Robert and his other two friends stayed alongwith her in the room and all tried to outrage her modesty. She stated that during the night Robert tried to have sexual intercourse with her but since he was high on liquor, it did not materialize. she also stated that on the next morning, that is on Monday, at about 6.00 a.m. Robert had sexual intercourse with her twice. She stated that after that all of them left and Robert had taken her to a room behind the Panjim Church. She stated that Robert had promised to come back at 6.00 p.m. and, since he had not returned, she went to his house at St. Inez and on inquiry learnt that he was not in the house. She went to the pharmacy and brought 10 sleeping tablets and consumed them. She stated that on 1st August 1995 early in the morning she went to the office where Robert was working and she tried to meet him and confront him. Robert had told her to come later as he was busy. She stated that she told him that if he failed to meet her, she would end her life. She stated that she waited for Robert till 1.30 p.m., but, since he did not return, she went to one lonely place and tried to cut her wrist. Thereafter one lady, who was passing, put her in

a rickshaw and took her to her house and thereafter the the Goa Medical College Hospital.

20. Perusal of the complaint clearly shows that, according to the prosecutrix, the appellant no. 1 alone had sexual intercourse with her and that too, on the morning of Monday. She makes a vague statement that the other friends of the appellant no. 1 tried to outrage her modesty. Perusal of the complaint would also show that she does not at all refer to the fact that the appellant no. 1 had sexual intercourse with her against her will. At least there is no reference whatsoever in the complaint to any resistance that she had put up. In the complaint also she does not state that the other accused had held her while the appellant no. 1 had sexual intercourse with her. In the cross-examination she also admitted that at Dona Paula the appellant no. 1 had told her that he would marry her if she co-operated. In the complaint she stated that at Dona Paula the friend of appellant no. 1 was asked to alight from the Maruti Van. Perusal of the entire complaint would show that she does not refer at all to the fact that she had raised any cry or that the accused had gagged her mouth. The tenor of the complaint shows, and particularly her conduct, that, in going in the Van from Dona Paula to Panaji and thereafter to Margao and Mapusa and coming back again to Panaji, it was with her consent. According to P.W.2 Edalina, she was taken to a hotel at Panaji and was kept in the room. Her entire

conduct in not raising any cries of help is extremely suspicious. The hotel would not have permitted 4 boys to bring an unwilling girl inside the hotel. She makes an improvement to her complaint in the substantive evidence to implicate the others in the commission of rape.

21. On minutely examining her testimony and the complaint Exhibit P.W.2/A, it is clear that she was friendly with the appellant no. 1. The appellant no. 1 was a bachelor. The appellant no. 1 was apparently financial well off. The appellant no. 1 had been proposing marriage to P.W.2 Edalina. On the day of the incident the appellant no. 1 had promised to marry P.W.2 if she co-operated. It is, thus, clear that P.W.2 Edalina had succumbed and had agreed to the sexual intercourse with the appellant no. 1 on the promise of marriage made by the appellant no. 1. Her conduct thereafter in repeatedly going to the house and to the office of the appellant no. 1 would clearly show that since the appellant no. 1 was not fulfilling his promise, she was berating him to fulfil his promise. It is, thus, clear that this report came to be lodged with the police complaining of rape when the appellant no. 1 did not fulfil his promise of marriage.

22. The evidence of the prosecutrix does not appear to be probable at all. Her evidence tasks human credulity for its acceptance. It does not appear probable at all that

she would move alongwith the accused from one place to another while the accused were searching for a room. If she had been made to sit in the van forcibly and made to go into the room forcibly, she would certainly put up resistance, at least, she would have raised cries for help. The improvements which have been made by her in her substantive evidence clearly suggests that she had planned to rope in the other accused in the incident of rape also. The probability factor weighs very heavily against the incident having occurred in the manner stated by the prosecutrix P.W.2 Edalina. The evidence of P.W.1 Dr. Rodrigues does suggest that P.W.2 Edalina had sexual intercourse but to my mind the circumstances and the conduct of the prosecutrix suggest that she had sexual intercourse with the appellant no. 1 with her consent. The circumstances on record show that she had boarded the Maruti Van and had gone with the accused to various places without any demur. According to me, no reliance whatsoever can be placed on the evidence of the prosecutrix P.w.2 Edalina, who at the time of the incident was 25 years old. P.W.2 Edalina had every opportunity of running away from the clutches of the appellants. In the report of the Chemical Analyser at Exhibit 38 the muddemal property consisting of the frock, blanket, the clothes of the accused did not show the presence of semen at all. The vaginal slides which were marked Exhibit B showed the presence of semen.

23. Since I have come to the conclusion that the appellant no. 1 had sexual intercourse with P.W.2 Edalina with her consent, it is not necessary to discuss the other evidence of the hotel owners, the owner of the Maruti Van and the Executive Magistrate, who conducted the test identification parade. The test identification parade, according to me, is an extremely weak type of evidence. The infirmities are (1) that the test identification parade had been conducted on 20th September 1995, that is, about 1 1/2 months after the arrest of the accused; (2) P.W.14 Vasudeo Bhandodkar admitted in his cross-examination that the dummy witnesses were common for all the three parades of the three accused. He also admitted that the faces of the accused were not covered when they were brought to his chamber for the test identification parade.

24. Taking into consideration the evidence of P.W.1 Dr. Rodrigues and the evidence of P.W.2 Edalina, I am of the view that the offences alleged against the appellants have not been established. In respect of the injuries 1 to 6, P.W.1 Dr. Rodrigues stated that they could be self inflicted and in fact P.W.2 Edalina admitted to have inflicted the said injuries. In respect of injuries 7 to 8, P.W.1 Dr. Rodrigues stated that they could be caused by blunt force and in fact P.W.2 admitted that she had fallen on the ground while on the way to her home. The absence of other injuries is clearly indicative of the fact that P.W.2

Edalina was not assaulted by appellant no. 1 as claimed by her. According to me, the lodging of the report Exhibit P.W.2/A is as a result of P.W.2 Edalina being scorned by the appellant no. 1.

25. In the result, therefore, the Criminal Appeal is allowed. The conviction and sentence of the appellants passed by the IInd Additional Sessions Judge, Panaji in Sessions Case No. 16 of 1996 for the offences punishable under Sections 36(2)(g), 342, 354 and 323 is quashed and set aside. The appellants are acquitted of the aforesaid charges. They be set at liberty forthwith if not wanted in any other case. Fine, if paid, be refunded to the appellants.

(P.V. HARDAS)
JUDGE.

ed's.