

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 31 OF 2001.

1. Paresh Naik, r/o
H. No. 334, Sakhalowado,
Dhulapi, Corlim.
2. Ganesh Naik, r/o
H. No. 334, Sakhalowado,
Dhulapi, Corlim. ... Appellants.

Versus

State. ... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe,
Advocate for the Appellants.

Mr. A.P. Lawande, Public Prosecutor for the State.

Coram: P.V. HARDAS, J.

Date: 4th April 2002.

ORAL JUDGMENT.

The appellants, who were original accused nos. 1 and 2, in Sessions Case No. 9 of 2000, have challenged their conviction for an offence punishable under Section 376 of the Indian Penal Code and sentence of 10 years rigorous imprisonment and fine of Rs. 2,000/-, as passed by the IInd Additional Sessions Judge, Panaji, by Judgment dated 24th May 2001. The facts necessary for the decision of the appeal are as under:-

2. On 25th March 1999, P.W.6 P.I. Mahesh Gaonkar, was working as the Officer-in-Charge of Old Goa Police Station. On that day he recorded the complaint of P.W.1 Mala. The said complaint is at Exhibit 8. On the basis of the said complaint, P.W.6

P.I. Gaonkar registered an offence under Section 376 against the present appellants. Incidentally, it may be stated that appellant no. 1 is the son of appellant no. 2. After registering the offence, P.W.6 P.I. Gaonkar sent the prosecutrix P.W.3 Chetana for medical examination at the Goa Medical College. At the Goa Medical College, P.W.3 Chetana was examined by P.W.4 Dr. Guruprasad Pednekar and by Dr. Sushama Prabhu. The medical examination of P.W.3 Chetana revealed that there were 5 linear abrasions with brownish scabs on medial aspect of right thigh, .5 cms. in size. P.W.4 Dr. Pednekar noticed two bruises on either side of the labia majora on both sides on the inner aspects, red in colour, .8 cms. x 1 cm. and tenderness present. He noticed that the hymen was intact. He noticed two abrasions 2 mm. in size, red in colour, tender, which were above the clitoris and labia minora. Vaginal swabs were taken for semen analysis and culture. The medical officer's opinion was that the findings were suggestive of attempted vaginal penetration. The medical examination report of P.W.3 Chetana is at Exhibit 14. Vide Exhibit 16 the blood sample of P.W.3 Chetana was drawn and her blood group was determined as A Rh positive. Vide Exhibit 17 the sample of nail clippings of both the hands, scalp hair sample, two vaginal swabs, undergarment and two vaginal smear slides of the prosecutrix P.W.3 Chetana were sent by

P.W.4 Dr. Pednekar and Dr. Prabhu to P.I., Old Goa Police Station. P.W.6 P.I. Gaonkar then conducted the scene of offence panchanama vide Exhibit 10 Colly in the presence of P.W.2 Sanjay and one Rupaji Kunkolkar. Both the appellants came to be arrested on the same day, that is, on 25th March 1999.

3. On the next day, that is, on 26th March 1999, the appellants were examined by P.W.5 Dr. Silvano Sapeco vide requisition Exhibit 19. He examined the first appellant and found that there was nothing to suggest that the first appellant was impotent. In the absence of any positive physical finding, P.W.5 was unable to give any definite opinion whether the first appellant had committed recent forcible sexual intercourse. The examination report of the first appellant is at Exhibit 20. On the same day P.W.5 Dr. Sapeco examined the second appellant, who was stated to be 60 years of age, and found that there was nothing to suggest that the second appellant was impotent. In the absence of any positive physical finding, P.W.5 Dr. Sapeco could not express any definite opinion as to the recent forcible sexual intercourse. The examination report of the second appellant is at Exhibit 23. Vide Exhibits 21 Colly and 24 Colly the urethral swabs and smears of the appellants were submitted to the Police for onward

transmission to the Serologist. Vide Exhibits 22 and 25 the appellants were referred for blood grouping.

4. P.W.6 P.I. Gaonkar then forwarded the muddemal property to the Central Forensic Science Laboratory at Hyderabad vide Exhibit 29. The forwarding note is at Exhibit 30. The report of the Central Forensic Science Laboratory is at Exhibit 32. Nothing incriminating was detected on examination of the muddemal property.

5. A charge sheet against the appellants came to be filed. On being committed to the Court of Sessions, the learned IInd Additional Sessions Judge framed a charge against the first appellant that on or about 18th March 1999 he had committed rape on P.W.3 Chetana. The second appellant was charged of having committed rape on P.W.3 Chetana about a month prior to 18th March 1999. Both the appellants denied their guilt and claimed to be tried. The prosecution in support of its case examined 6 witnesses. P.W.1 Mala, is the complainant and mother of P.W.3 Chetana. P.W.2 Sanjay is a panch witness in whose presence the police had drawn the scene of offence panchanama and a sketch. P.W.3 is the prosecutrix Chetana aged 7 years. P.W.4 is Dr. Pednekar, who examined the prosecutrix. P.W.5 is Dr. Sapeco, who examined the appellants and P.W.6

is P.I. Gaonkar, the Investigating Officer.

6. The pivot of the prosecution case is the testimony of P.W.1 Mala and P.W.3 Chetana. P.W.1 Mala states that she knows both the accused. She has 3 children, P.W.3 Chetana being the eldest and the other two Nitesh and Rajesh, being 3 and 2 years respectively. She states that her duty hours are between 9.00 a.m. to 5.30 p.m. and at the relevant time she was residing at Dhulapi. After attending to her duties, according to Mala, she used to reach home at around 6.00 to 6.30 p.m.. She further states that on 20th she had gone to attend her duty and had reached her house at about 5.30 or 6.00 p.m.. At about 7.30 p.m. the owner of the house and her two daughters named Damini and Kamini had come and had started asking her daughter P.W.3 Chetana what had been done to her either by the second appellant or by the first appellant. The said Kamini and Damini, according to P.W.1 Mala, are the sisters of the first appellant and daughters of the second appellant. On their asking, P.W.3 Chetana, as stated by P.W.1 Mala, told them that on Gudi Padwa day, that is, on 18th March P.W.3 Chetana was taken in a neighbouring house by the first appellant and the first appellant had removed her panty and made her sleep on a cement platform. The first appellant also removed his clothes and, thereafter, the

first appellant slept on her and put his penis in her vagina. After some time, the first appellant told P.W.3 Chetana to go away, after giving her threats not to tell anyone about the incident. P.W.1 Mala states that on the Gudi Padwa day, she was deputed on special duty. She further states that during further questioning of P.W.3 Chetana, P.W.3 Chetana also revealed that the second appellant, father of the first appellant, had done similar act with P.W.3 Chetana near the staircase of his house when all the inmates of his family were absent. P.W.1 Mala states that she lodged a complaint about the incident which was disclosed to her on 20th, on 25th March. According to her, she could not lodge a complaint immediately as her youngest son was sick with high fever. She identified her signature on the complaint, which is marked as Exhibit 8.

7. In the cross-examination she admitted that she was staying in the house of the appellants as a tenant at the relevant time. She also admitted that she had stayed in the house of the appellants for about 2 to 3 years. She admitted as correct that when she was to leave the premises after packing her belongings, the second appellant had put a lock to the premises. She had added that the incident of rape was prior to the incident of locking the premises and in her own

words:- 'and for which the accused was getting into argument with me on being questioned about the incident of rape'. In the further cross-examination P.W.1 Mala admitted as true that the second appellant had come to her house about 8 days prior to her complaint to demand rent for three months. She also admitted as true that she had told the second appellant that she did not have money and would pay the rent in a few days. She also admitted as true that after she had made a report to the Officer about the lock on her room, both the appellants were called to the police station and she was present when the appellants were called by the Investigating Officer but the Investigating Officer had told her to go home. She states that she does not know what transpired thereafter but she found the lock on the door removed when she had gone home. She states that she left the room on the next day after lodging the complaint. She states that there was discussion between the appellant and herself before going to the police station but she added that this discussion was due to incident of rape on her daughter. She also states that both the appellants had come when Damini and Kamini and their mother had come to her house on 20th March.

8. In the further cross-examination she admits that she tried to verify from P.W.3 Chetana as to what

had happened after her disclosure to the wife and daughters of the second appellant. She states that she did not tell anyone about the incident on that day. She also admits that on that day after going home from work as usual she had bathed her children and washed their clothes. She states that she had learnt about the incident on 18th March 1999 only on 20th March 1999. She admits that P.W. 3 Chetana had not complained to her about any pain either on 18th March 1999 or 20th March 1999. She also admits that she had checked the hands and legs of P.W.3 Chetana but had not seen any injuries except some old injuries on the legs of Chetana. She also admitted that P.W.3 Chetana had not shown any other injuries or nail marks on her body nor did P.W.3 Chetana tell her that she had sustained any injuries on account of the alleged rape. She denied the suggestion that the incident of the appellants putting a lock to her room was 8 days prior to Gudi Padwa. She also denied the suggestion that she had a heated argument with the second appellant when he had come to demand the rent and that she had threatened to take action. She also denied the suggestion regarding the disclosure by P.W. 3 Chetana to her in the presence of Damini, Kamini and the wife of the second appellant.

9. One thing emerges from the evidence of this

witness and that is that the incident of locking the room and her reporting the matter to the police was some time prior to her lodging the report Exhibit 8. Second thing that emerges from her evidence is that about a week prior to her lodging the complaint Exhibit 8, the second appellant had come to her house demanding rent for three months and P.W.1 Mala pleading with the appellant to give her time for paying the arrears. Third thing that emerges from her evidence is that she had lodged a report to the police regarding the lock put to her room by the appellants and on her report, the police had arrested the appellants. It also emerges from her evidence that she had left the house on the next day of her lodging the complaint at Exhibit 8. On the basis of Exhibit 8, the appellants came to be arrested on the same day, that is, 25th March 1999.

10. According to the complaint at Exhibit 8, the offence is alleged to have been committed on the Gudi Padwa day, that is, on 18th March 1999. A day prior to 18th March 1999 the second appellant had come to her house for demanding rent and 7 days thereafter Exhibit 8 came to be lodged. In between 18th March 1999 and 25th March 1999 there occurred an incident of the second appellant putting a lock to the door of the room occupied by P.W.1 Mala. It is clear from P.W.1 Mala's

evidence that she complained to the police about it and, after the arrest of the accused, the lock was removed. It is thereafter that the report Exhibit 8 came to be lodged complaining of rape on P.W.3 Chetana by the appellants. Mala admits that on the next day of her lodging her complaint at Exhibit 8 she vacated the room owned by the appellants. If Mala could go to the police station, lodge a report against the appellants for having put a lock on her room, her contention that despite learning about the rape on P.W.3 Chetana on 20th March 1999 she could not lodge the complaint till 25th March 1999 because of ill-health of her youngest son, according to me, is a totally false explanation. If Mala was aware about the incident of rape when she had lodged the complaint about the locking of the room, there is no earthly reason why Mala has not stated about the rape on Chetana in that report itself. May be from 20th March till 25th March her youngest son was indisposed and, therefore, P.W.1 Mala could not report to the police, but, the fact remains that there was some altercation between the appellants and Mala which had made her to lodge a complaint to the police against the appellants and the appellants came to be arrested and it is subsequent to this altercation that the report Exhibit 8 came to be lodged. This, according to me, is an important circumstance, which would put the Court on its guard and would require careful scrutiny

of the testimony of both P.W.1 Mala and P.W.3 Chetana. Incidentally P.W.3 Chetana in her cross-examination admits:- 'it is true that there were quarrels between my mother and A2 Ganesh about 8 days prior to Gudi Padwa which was on account of rent of the room occupied by us.'

11. P.W.3 Chetana, after preliminary questioning by the learned trial Court, states in her evidence that she has two brothers and has a friend named Gaurisha, who is residing in her neighbourhood in Dhulapi. She also states that she knows the first appellant Paresh and his father, the second appellant. She states that the appellants were residing in a house next to her house. She states on Padwa day, P.W.3 Chetana was in her house with her two brothers. At that time the first appellant came to their house and dragged her to a room, which is situated near a well. According to P.W.3 Chetana, the first appellant removed his underwear and made her sleep on him. She states that the first appellant removed her dress and panty and put his private part in her private part. She states that she suffered pain as a result of the act and could not even walk properly. She also states that the first appellant threatened by saying that in case P.W.3 Chetana informed her mother or father, the first

appellant would throw her in the well. P.W.3 Chetana further states that due to pain she went to her house and slept. She states that she did not tell her mother or father about the incident. She further states that the second appellant, father of the first appellant, took her to his house removed his clothes and also removed her clothes. The second appellant made her lie down on the floor and then slept on her and inserted 'his penis in my private part'. According to her the first appellant had done the act to her three times while his father, the second appellant, had done it twice.

12. In the cross-examination P.W.3 Chetana admits that she had told the police that she was playing outside with Gaurisha. She admits that she also told the police that the first appellant had taken Gaurisha and herself from the place near the tap, which is near the house of Gaurisha. She states that her two younger brothers were there when she was playing with Gaurisha. In the cross-examination she states that the first appellant had taken Gaurisha and herself by catching hold of their hands. She further states that Gaurisha ran away and was caught and brought by the first appellant. She states that the first appellant had done the act on her and thereafter on Gaurisha. In the further cross-examination she admits that she had

stated to the police that the first appellant had done similar act on Gaurisha what had been done on her. The above statement is an omission, which the learned trial Court has duly noted. In her further cross-examination she admits that she had not stated to the police that the appellant had taken Gaurisha also to the said house. In the cross-examination she states that the first appellant had taken Gaurisha to the same house on another occasion and she was present at that time. She also admits that the appellant had taken Gaurisha to the same house after about 4 days of taking her. She admits that the first appellant had committed the similar act on Gaurisha as he had done on her and this was told to her by Gaurisha. In the cross-examination she states as under:-

"Al Paresh had done the act on me for the first time on Gudi Padwa day and another time after he did it to Gaurisha, and in the same house. On the third occasion Al Paresh had taken me to his house where he did the same thing to me. I had stated to the police that Al had committed the act on me 3 times and once on Gaurisha. Omission about 2 addl. times on the VG and once on Gaurisha is noted."

13. In the further cross-examination P.W.3 Chetana states that she had told her mother about the act of the first appellant on Gudi Padwa day in the night itself. She states that she had reported the incident to her mother after the second incident. She,

however, states that she had not informed her mother about the third incident. She admits that there was bleeding from her private part after the first appellant had committed the act on her. She states that there was no bleeding from her private part after the second incident but there was bleeding after the third incident. She states that she had informed her mother about the bleeding and her mother had inspected her private part on being informed. She states that after the first incident her mother had gone to the house of the first appellant and asked him about the act informed by P.W.3 Chetana. P.W.3 Chetana states that the first appellant had replied to her mother saying that 'did I do anything to your daughter, I would beat you.' She corrected herself by saying that her mother had questioned the first appellant on the next day of Gudi Padwa. She states that she informed her mother about the second incident after a few days of its occurrence. P.W.3 Chetana further states that her mother questioned the first appellant about the second incident. According to her, the first appellant denied when her mother had confronted him with the second incident. She states that the second appellant, his wife and daughters had come to quarrel with her mother at that time.

14. P.W.3 Chetana further admits to have stated to the police that the second appellant Ganesh had done

a similar act on her on the next day of Gudi Padwa. She was contradicted with the portion in her police statement which related to the second appellant committing the act a month earlier. She further admits in the cross-examination that she had told her mother what had been done to her by the second appellant on the next day of Gudi Padwa. She also admits that there was no bleeding from her private part after the act was committed by the second appellant. P.W.3 Chetana further admits that her father had told her that there were quarrels between her mother and Damini (daughter of second appellant). She also admits as true that there used to be quarrels between her mother and Damini after they returned home and the quarrels included giving abuses to each other. In the cross-examination she denied the suggestion that the second appellant had put the lock to the rented room 4 days prior to Gudi Padwa. She, however, added that this lock was put about 5 days after Gudi Padwa. According to the prosecution case, Gudi Padwa was celebrated on 18th March 1999, and, as per P.W.3, the lock was put by the second appellant 5 days after Gudi Padwa, that is, somewhere on 24th March 1999. The F.I.R. Exhibit 8 came to be filed by P.W.1 Mala on 25th March 1999. The F.I.R., therefore, was filed by P.W.1 Mala after the second appellant had put the lock on her room and curiously, according to Mala, she had reported this matter to the police and the

police had arrested the appellants and, thereafter, the lock was removed. It emerges from this that prior to lodging of the F.I.R. at Exhibit 8 on 25th March 1999, Mala had complained to the police regarding the lock put by the second appellant to her room. Even P.W.3 Chetana admits in her cross-examination 'my mother had gone to report the matter at the P.S. when lock was put on the room'.

15. P.W.3 Chetana further states in the cross-examination that some neighbours had come running when she had shouted as the first appellant was pulling her and Gaurisha towards the unoccupied house. According to her, there were two grown-up females, whose names she does not know. According to her, these two ladies had not seen her since the first appellant had taken her inside the house. She, however, admits that the two ladies had seen her when she was being taken away by the first appellant. She also admits that the two ladies were outside when she came out of the said house. P.W.3 Chetana further admits that she did not tell the two ladies what had happened. She ofcourse denied the suggestion that she was stating a falsehood at the instance of her mother.

16. P.W.6 P.I. Gaonkar in his cross-examination states that he does not recall whether any complaint was

lodged by Mala P.W.1 in connection with locks put to her room by the accused. He also states that he does not recall whether he called the two accused to the police station in connection with the said complaint. He states that he was not in a position to state whether he had conducted the investigation in relation to the complaint by P.W.1 Mala about the lock on the room as he does not remember the same. Ofcourse P.W.6 P.I. Gaonkar has feigned complete ignorance regarding the report of P.W.1 Mala but his ignorance cannot affect the admissions given by P.W.1 Mala and P.W.3 Chetana regarding the lodging of the report of the second appellant putting a lock to her room.

17. A perusal of the evidence of P.W.1 Mala and P.W.3 Chetana would reveal major discrepancies. P.W.3 Chetana does not refer to the presence of the wife of the second accused and the two daughters, namely, Damini and Kamini, questioning P.W.3 Chetana and, on their questioning, Chetana narrating the incident to her mother P.W.1.. P.W.3 Chetana has further exaggerated that Gaurisha was also raped by the first appellant and the first appellant had raped P.W.3 Chetana on subsequent two occasions. She also exaggerated to say that the second appellant had also committed a similar act after the first appellant had raped her. According to P.W.1 Mala, she had inspected the private part while

bathing P.W.3 Chetana and she states that apart from the old injuries she did not notice any fresh injuries. This is a case where truth and falsehood are so intricately mixed that it is difficult to separate the truth from the falsehood. It is really difficult to separate what P.W.3 Chetana states regarding the subsequent incidents of rape and disbelieving them as exaggerated and separate only an incident of rape having been committed on her by the first appellant on 18th March 1999 and the second appellant having raped her about a month earlier. All this has to be appreciated in the background of the fact that before lodging the report Exhibit 8 in relation to rape on P.W.3 Chetana, the second appellant had quarrelled with P.W.1 Mala on the unpaid rent and before Mala lodged a report with the police complaining of rape on Chetana, the second appellant had put a lock to her room. The accused have been able to make out a strong case of previous enmity with Mala. It is really difficult to understand, if Mala could lodge a report regarding putting of lock to her room by the second appellant, why she did not report about the rape on P.W.3 Chetana in that report itself. The evidence of both P.W.1 Mala and P.W.3 Chetana does not inspire the confidence of the Court and in that background it is difficult to accept what they state as true. It is true that it is unreasonable to expect corroboration to the evidence of the witness of rape

with mathematical precision. However, the probability factor is not in favour of P.W.1 Mala and P.W.3 Chetana. Their testimony appear to be highly improbable, which renders its acceptance impossible.

18. Since I have come to the conclusion that the testimony of P.W.1 Mala and P.W.3 Chetana cannot be relied upon, the finding of injuries on the private part of P.W.3 Chetana cannot advance the case of the prosecution further. If the evidence of the prosecutrix inspires the confidence of the Court, corroboration by the medical expert lends further assurance to the Court to implicitly accept the testimony of the prosecutrix. However, in this peculiar case, the testimony of P.W.1 Mala and P.W.3 Chetana does not inspire the confidence of the Court and, therefore, their inaffirmed testimony cannot be fortified by the medical evidence to ultimately sustain the conviction.

19. The learned trial Court has held in paragraph 9 of the Judgment that there was no material which was brought on record to belie the case of P.W.1 Mala that the incident of rape was early in point of time to the incident of the second appellant locking her premises. The attention of the learned trial Court was not drawn to this part of the evidence of P.W.1 Mala that the report Exhibit 8 came to be lodged against the

appellants only after the second appellant had locked the premises of P.W.1 Mala. The attention of the learned trial Court was also not drawn to this part of the evidence that admittedly, according to P.W.1 Mala, she had lodged a report regarding the locking of her premises by the second appellant but still admittedly in the said report there was no mention about the incident of rape on P.W.3 Chetana by the appellants. According to P.W.1 Mala, on the basis of her earlier report, the appellants were arrested and, thereafter, the lock was removed. These factors and other factors which have been referred to by me above, lead to an inference that the F.I.R. at Exhibit 8 came to be lodged because the appellants had locked the premises of P.W.1 Mala. The learned trial Court despite the admission of Mala that she had lodged an earlier report, has held:-

"She has also admitted that she had made a report to the Police Officer about the lock on her room and the two accused being called to the Police Station but which does not stand in the face of her complaint Exhibit 8."

The finding, therefore, of the learned trial Court, according to me, is completely perverse.

20. One Gaurisha, a friend of P.W.3 Chetana, appeared to be a material witness for the prosecution. According to P.W.3 Chetana, rape had also been

committed on Gaurisha. According to P.W.3 Chetana, the first appellant had taken Gaurisha and P.W.3 Chetana by catching hold of their hands. She further states that the first appellant had done the act on her and thereafter on Gaurisha. In such circumstances, Gaurisha was a material witness for the prosecution to corroborate the statements of P.W.3 Chetana. The learned trial Court, while repelling the argument on behalf of the accused that non-examination of Gaurisha has materially affected the prosecution case, observed, while referring to her statement recorded during investigation, to hold that Gaurisha was not a material witness. The learned trial Court further observed that it was a prerogative of the prosecution to examine witnesses in support of its case and non-examination of Gaurisha did not warrant the drawing of an adverse inference against the prosecution. According to me, the non-examination of Gaurisha has materially affected the prosecution case as the examination of Gaurisha would have either corroborated the prosecutrix or would have further demonstrated her version to be untrue.

21. For the aforesaid reasons, I am of the considered opinion that the conviction and sentence of the appellants for an offence punishable under Section 376 of the Indian Penal Code, as passed by the IInd Additional Sessions Judge, Panaji, in Sessions Case No.

9 of 2000, is unsustainable.

22. In the result, therefore, Criminal Appeal is allowed and the conviction and sentence of the appellants for an offence punishable under Section 376 of the Indian Penal Code is hereby quashed and set aside and the appellants are acquitted of the aforesaid charge. Bail bonds of the appellants stand cancelled. Fine, if paid, be refunded to the appellants.

(P.V. HARDAS)
JUDGE.

ed's.