

**(2013) 08 BOM CK 0020****Bombay High Court (Goa Bench)****Case No:** Criminal Appeal No. 7 of 2011

Mahanand Naik

APPELLANT

Vs

State of Goa

RESPONDENT

**Date of Decision:** Aug. 6, 2013**Citation:** (2013) 5 ABR 1194 : (2014) ALLMR(Cri) 69**Hon'ble Judges:** R.C. Chavan, J**Bench:** Single Bench**Advocate:** R. Menezes and Marvin D'Souza, for the Appellant; S.R. Rivonkar, Public Prosecutor, for the Respondent

### **Judgement**

R.C. Chavan, J.

This appeal is directed against the appellant's conviction by the learned Sessions Judge, Panaji for the offence punishable u/s 376 of the Penal Code and sentence of Rigorous Imprisonment for 7 years with fine of Rs. 25,000/- and in default, further imprisonment for two months imposed upon the appellant, on the conclusion of trial of Sessions Case No. 30/2009 before the learned Judge. The facts, which are material for deciding this appeal, are as under:

The victim was residing in village Shiroda with her elder and younger sisters after the demise of her mother in 2005. Victim's father had expired on 1998. Victim's elder sister Dipa, who was examined as PW8, got married in 2007 and from 2007 onwards, the victim was residing with her younger sister in their family house. In 2005, the victim was studying in 12th standard. In November, 2005, the victim was standing at the bus stand for returning to her home. The appellant met her and took her on his scooter to his house telling her that there was some function in the house. There, the appellant committed rape upon the victim and threatened the victim with death, should she disclose this to anyone. He also allegedly took some photographs of the victim without her consent. Thereafter, the appellant used to frequently visit the victim's house around midnight, force her to come out of the house and used to have forcible sexual intercourse with her on several occasions.

The appellant also frustrated the victim's attempt to get married with PW13-Raya Bandodkar some time in 2007. When a neighbour, PW10-Ulhas Parwar noticed that the appellant used to visit the victim's house frequently, he tried to accost the appellant. Then, the appellant forced the victim to lodge a complaint against the said Ulhas some time in May, 2008. In April, 2009, police were investigating the case of murder of one Yogita Naik. In the course of that investigation, police came to find about the use of mobile phone with No. 9922015347 which stood in the name of Victim's elder sister Dipa. The police, therefore, knocked the door of the victim's house and, thereafter, the victim came to report about her being subjected to sexual assault by the appellant, since November, 2005 till she gave the report. An offence was registered and the investigation commenced.

2. On the same day i.e. on 21/04/2009, the police went to the house of the appellant which was locked, made his wife open the house, performed the panchanama of spot and seized, among other things, five photographs showing the victim scantily dressed. The police also performed panchanama of the house of the victim and the places shown by the victim. Nothing was, however, seized from the victim's house. No clothes of the victim or bed-sheets from the house of appellant were seized or sent for Forensic Science Laboratory. The victim and the appellant were referred for medical examination which, as was to be expected, did not reveal that any forcible sexual intercourse had taken place. Since the appellant was arrested for his involvement in murder case, he was produced before the Special Judicial Magistrate for recording his confessional statement and in the course of that confessional statement, he also stated that he had sexual intercourse with the victim under duress. The police recorded the statements of witnesses, collected relevant material and on completion of the investigation, sent the charge-sheet to the Court of Judicial Magistrate, First Class, Ponda, who committed the accused the Court of Session at Panaji.

3. The learned Sessions Judge heard the parties and by an order dated 26/10/2008 held that there was enough material to charge the appellant for the offence punishable u/s 376 of the Penal Code. On 30/11/2009, she proceeded to frame charge against the appellant mentioning that on or about November, 2009 and thereafter, the appellant committed rape upon the victim. The appellant pleaded not guilty and was put on trial. At the trial, the prosecution examined in all 15 witnesses in its attempt to bring home the guilt of the appellant. After considering the prosecution evidence in the light of the defence of false implication, the learned Sessions Judge convicted and sentenced the appellant as aforementioned. Aggrieved thereby the appellant is before this Court.

4. I have heard learned counsel for the appellant and learned Public Prosecutor for the State, and with the help of both, I have gone through the entire evidence on record.

5. PW1- Dr. Andre Fernandes states about the examination of the victim as well as the appellant and has proved the certificates issued by him at exhibits 20 and 23. As already observed, these certificates do not show any evidence of forcible sexual intercourse.

6. PW2- Dr. D" Mello did blood grouping of the appellant and the victim. The appellant was found to have blood group of "0+" whereas the victim had "B+" blood group. However, this evidence is of no use, since the clothes of the victim or the appellant were not seized nor bedsheets etc. were seized and sent to Forensic Science Laboratory. PW3-Mushtak Shaikh is a panch at the arrest panchanama of the appellant drawn up vide exhibit 33. The evidence of these two witnesses is unhelpful to connect the appellant to crime.

7. PW4- Joel Fernandes was a panch at the panchanama of spot and this panchanama was drawn up vide exhibit 37 between 3.30 p.m. and 5.00 p.m. at the house of the appellant and between 5.00 p.m. and 6.15 p.m. at the house of the victim. PW4-Fernandes stated that the victim showed the house of the appellant. The house was locked and, therefore, PW15-P.S.I.- Sanjay Dalavi contacted the appellant's wife, who came with a key. The house was then opened and panchanama was drawn up. As the victim had shown the place in the house where she had been subjected to rape, the panchas and police noted the particulars of that place and since the victim had stated that the appellant had taken some nude photographs, they searched for those photographs. Five such photographs were found in the appellant's house which were seized and which have been admitted in evidence vide exhibit 35. Nothing incriminating was seized at the house of the victim. The fact about drawing up of this panchanama has been duly corroborated by the victim, who was examined as PW11 as also the Investigating Officer, who was examined as PW15.

8. PW5-Dr. Gawade and PW6- Dr. Dessai state that on 05/06/2007, they had occasion to examine and treat the victim, who had come to the Hospital with history of consumption of lizol, a detergent. They proved the medical record. PW6- Dr. Dessai stated that the victim left the Hospital against the medical advice on 06/06/2007. The evidence of PW7-Head Constable Vishnu Jadhav is about the attempt of the victim to commit suicide by consuming lizol on 05/06/2007. He states that on receiving such information on 06/06/2007, he had gone to the Hospital and on learning that victim had been discharged from the Hospital, he went to her house and recorded the victim's statement in the presence of the appellant. The victim told him that she had consumed lizol by mistake mistaking it to be soft drink by name dew.

9. PW10-Ulhas Parwar claims to be residing in the neighbourhood of the victim. He stated that the appellant used to visit the victim's house. In May, 2008, when he saw the appellant going to the victim's house at night, he accosted the appellant, whereupon the appellant threatened the witness that he would teach the witness lesson. He states that thereafter, the victim lodged a complaint at against him at

Police Station, Ponda.

10. PW13-Raya Bandodkar stated that he knew the victim and he was threatened some time in 2007 by a caller, who identified himself as Mahanand and told to keep away from the victim. PW14- P.I Chetan Paul had received a report of the victim on 21/04/2009 and registered an offence vide exhibit 55. He also proved the other 10 F.I.R.s registered against the accused appellant which are irrelevant. PW15-P.S.I. Sanjay Dalavi carried out the investigation.

11. This takes me to the evidence of PW8-victim's elder sister, PW9- victim's young sister and PW11- victim herself. Their evidence shows that the three sisters were residing together till 2007 when PW8 got married. PW8 stated that she had noticed that the appellant used to visit their house around midnight frequently and used to call the victim outside. She also stated that she had mobile phone with No. 9922015347 and that she had given sim card to the victim after her marriage. This sim card was allegedly taken by the appellant who was using it and it is possibly, the use of this sim card that enabled the Investigating Machinery to reach to the appellant and then to the victim. PW8 had also stated in cross-examination about the gold chain being snatched by the appellant from the victim. The victim, however, did not make any such statement.

12. PW9- victim's younger sister stated that the appellant used to come to their house late night and used to bang the door. The appellant used to call the victim out. Once the victim refused to go out, but then left the house. PW9 stated that she followed the victim and found the appellant having sexual intercourse with the victim. The victim reported to PW9 that there were several such incidents in the past. She also stated that the appellant had threatened them that in case they opposed him, the victim's photographs would be shown to all. She also stated that the appellant used to physically assault the victim, if the victim did not accede to the appellant's demand. She also corroborated the story of the victim of consumption of lizol. In her cross-examination, she admitted that she had been shown the photographs by her sister.

13. The victim herself stated about the incident of first rape in the appellant's house in the year 2005. She stated that the appellant took her photographs without her knowledge. The victim admitted in her cross-examination that the appellant's house is also surrounded by the houses of the appellant's parents and brothers. The house of the appellant is just two metres away from the parents' house. The brothers of the appellant are residing in a room adjacent to the house of the parents. She stated that she had gone to the house of the appellant on the incidental afternoon at about 2.15 p.m. from her school wearing school uniform. She claimed to have raised an alarm and stated that nobody came to her rescue. She claimed that she had reported about this incident to the appellant's wife, who, however, flared up stating that the victim was behaving in an ungrateful manner towards the appellant.

14. She stated that the appellant then started troubling her by coming to her house during late night hours and committing rape upon her outside her house and away from neighbours" houses. She stated that the appellant used to threaten her by saying that he would throw her nude photographs on the road. She stated that she was fed up with this harassment and, therefore, consumed lizol in November, 2007. She also stated that she had received proposal of marriage from PW13-Raya Bandodkar. She admitted that she had not lodged any complaint about the incident of 2005 or even thereafter, but claimed that she had not filed a complaint because the appellant had threatened her and her younger sister that the appellant would throw the victim"s nude photographs on the road. She stated that on 04/06/2007, the appellant came to her house during night time and demanded sex though she was having fever. The appellant then assaulted her and had forcible sexual intercourse with her. She claimed to have purchased lizol on the next day and drank it on the night of 05/06/2007 and then stated that she telephoned the appellant and told him that she was ending her life whereupon the appellant came to her house and took her to Primary Health Centre at Shiroda from where she was shifted to Hospicio Hospital at Margao. She stated that the appellant got her discharged from the Hospital forcibly and once again threatened her. Therefore, she made a false statement to the police that she had consumed lizol by mistake.

15. She admitted having made false complaint against PW10-Ulhas Parwar at the instance of the appellant, again because the appellant allegedly threatened her that he would throw the victim"s photographs on the road. She claimed that she had told PW10-Ulhas Parwar that the appellant was visiting her at late hours and harassing her and rather than taking help of PW10-Ulhas Parwar, she had lodged complaint against PW10- Ulhas at the instance of the appellant.

16. In cross-examination, she stated that the appellant had never shown the photographs to her from close distance. She stated that the appellant had taken some additional photographs in night dress which she had handed over to her sister-PW9. She admitted that the house of paternal uncle is at a distance of only 3 metres from her house. PW15- Sanjay Dalavi, the Investigating Officer has stated that he did not record the statement of paternal uncle of the victim because the paternal uncle refused to make a statement saying that his relations with nieces were not good. Another paternal uncle of the victim was residing just across the road at a distance of 15 to 20 metres, but his statement was also not recorded for the same reason. She admitted that her uncle Kamlakant Parwar used to come to their house and stay in their house, but she does not seem to have made any grievance to her uncle. She stated that the appellant used to take her out of the house for forcible sexual intercourse, because her sister was in the house. She denied the suggestion that the photographs could have been fabricated to suit the case. She proved her report at exhibit 55 in which she had referred to only semi nude photographs. There is no reference to nude photographs.

17. Learned counsel for the appellant submitted that this evidence was far too inadequate to hold the appellant guilty of rape. First, he submitted that the charge itself was defective, since it refers to rape from November, 2009 onwards when the charge itself was framed on 30/11/2009. He submitted that since the appellant was misled by the charge framed, the appellant was entitled to a fresh trial or at least further cross-examination of the prosecution witnesses. Learned counsel for the appellant submitted that the facts alleged against the appellant in the course of trial showed that the incidents were spread over for a considerable period of time which was not reflected in the charge framed, if the charge was to be read to convey that the victim was raped from November, 2009 onwards. The learned Counsel for the appellant as well as the learned Public Prosecutor for this purpose relied on the judgment of the Supreme Court in [Main Pal Vs. State of Haryana](#) . Learned counsel for the appellant submitted that as in the reported judgment, the appeal ought to be allowed and the matter might have to be remitted back to the trial Court for fresh trial. In that case, the question was whether a fresh trial was necessary, because the charge was specifically about the use of criminal force to Prakashi Devi when the evidence in fact disclosed that criminal force was used to Prakashi Devi's daughter-in-law Sheela Devi. The Court observed that if only Sheela Devi was present in the house at the time of incident, the accused had assaulted and outraged the modesty of said Sheela Devi and in the charge the name of Sheela Devi was erroneously stated as Prakashi Devi instead of Sheela Devi, the Court could infer that the accused was not misled and what was in the charge was immaterial. Since two women were present in the house and charge referred to use of criminal force against one of them-Prakashi Devi-when in fact it was Sheela Devi, whose modesty had been outraged, a fresh trial was warranted. After considering the various judgments, including the one in [Willie \(William\) Slaney Vs. The State of Madhya Pradesh](#), upon which the learned Public Prosecutor placed reliance, the Court had elicited the following principles in paragraph No. 9 of the judgment:

9. Next comes a class of case for which there is no express provision in the Code, or where there is ambiguity. In that event, the question is whether the trial has been conducted in substantial compliance with the Code or in a manner substantially different from that prescribed.

When a trial is conducted in a manner different from that prescribed by the Code as in N.A. Subramania Iyer v. King Emperor, 28 Ind app 257, the trial is bad and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in, the course of such conduct, the irregularity can be cured u/s 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. AIR 1947 67 (Privy Council) .

18. The learned counsel for the appellant submitted that the question of prejudice would have to be judged with a broad vision and since in this case, the charge was

defective, a fresh trial was warranted. As rightly submitted by the learned Public Prosecutor, there is no error in the charge which could be said to have prejudiced the appellant. There is only typographical error. Instead of the year 2005, year 2009 has been printed. The appellant had been served with entire charge-sheet and, therefore, he knew that he was to face trial on the charge of repeated sexual assaults on PW11 commencing from November, 2005. Therefore, there is no question of conviction being set aside on this ground or the matter being remanded back to the trial Court.

19. The learned counsel for the appellant next submitted that the first incident of rape itself is not possible, since it is alleged to have taken place at about 2.15 p.m. in the month of November, 2005 in the house of the appellant which is surrounded by the houses of the appellant's parents, brothers etc. It is impossible to imagine that a college going girl could be raped without her being able to raise any alarm. In fact, she states in her cross-examination that she did try to raise an alarm, but none came. If she did raise an alarm and yet was raped there is no reason that she did not inform her elder sister, who was very much residing with her at that time, or take the matter to elders or to the police. Her silence is enigmatic. She had stated that some photographs were taken on that day. She does not state that any nude photographs were taken on that day. Incidentally, no nude photographs have surfaced in the trial and the photographs, which have been placed on record at exhibit 35 are semi nude photographs taken inside a house in the sense that the victim is wearing either undergarment or something else, possibly, cycling shorts. As rightly pointed out by the learned counsel for the appellant, the victim does not state about any photographs being taken outside the house. All the incidents about which she speaks except the first, took place outside her house. Therefore, it is difficult to imagine as to when the appellant could have taken her photographs inside the house. As far as the photographs at exhibit 35 which were allegedly found in the appellant's house, it should have been possible for the Investigating Officer to cause the house of the appellant to be photographed to show that the place seen in the photographs at exhibit 35 was the house of the accused. Further, while the victim states that her photographs were taken without her knowledge, as rightly pointed out by the learned counsel for the appellant, at least in one of the photographs, the victim is staring at the lens of camera. After the first incident in the house of the appellant, it is alleged that the appellant committed further assaults on the victim by terrorising her by saying that her photographs would be thrown on the street. Now if there are really no nude photographs and no nude photographs at all had been taken, it is not clear as to what terrorised the victim into submission.

20. The learned counsel for the appellant is also right in submitting that the victim's elder sister was very much residing with the victim for almost two years after first rape. She stated in her deposition that the appellant used to frequently visit their house during midnight and call the victim outside. She claimed to have witnessed this incident, yet, it seems the elder sister was not concerned about the younger

sibling and allowed the things to happen without reporting the matter to the police or even bringing it to the notice of the elders. Therefore, the behaviour of the sister in allowing the alleged incidents of rape to continue, is strange. It is also difficult to conceive that the appellant could have been in a position to commit rape on the victim outside her house, possibly, in open area which is inhabited by the victim's own relations. Therefore, the story given by the victim appears to be suspicious, as rightly submitted by the learned counsel for the appellant.

21. So far as the photographs are concerned, the learned counsel for the appellant submitted that the photographs were shown to have been seized from the house of the appellant in house panchanama drawn up on 21/04/2009 between 3.30 p.m. and 5.00 p.m. He submitted that the house was allegedly locked and the appellant's wife was called and made to open the lock. If certain things were seized from the house, which was opened by the appellant's wife, ordinarily, the Investigating Officer should have taken signature of the appellant's wife on the panchanama. The learned counsel, therefore, submitted that the panchanama is suspicious. The learned Public Prosecutor submitted that seizure of photographs from the house of the appellant, is perfectly natural, since soon after the report of the victim was recorded, the police had proceeded to the spot and in the course of search, the photographs were discovered. The story about these photographs is indeed curious. The victim claimed that the appellant had taken her photographs without her knowledge. The victim states that her nude photographs were shown to her by the appellant from the distance i.e. she was not allowed to actually see the photographs. The victim is not an illiterate girl. She was studying in 12th standard at the relevant time. The victim states that some photographs taken in night dress were given by the appellant to her and she handed them over to her younger sister-PW9. The possibility of these photographs surfacing in the house of the appellant is not ruled out, since the panchanama is not signed by the appellant's wife. The possibility of nude photographs not at all being in existence is strong and the victim may be making up a story that she was threatened with disclosure of these nude photographs, since she has to explain her silence over a long period of time.

22. The learned counsel for the appellant submitted that the evidence of the victim and her younger sister is riddled with considerable improvements and omissions which have been noted by the learned trial Judge, therefore, according to him, the evidence of these two witnesses should not have been believed by the trial Judge. The learned Public Prosecutor on the other hand, submitted that these are small omissions which surfaced only in the cross-examination for which the prosecution could not be blamed. He also submitted that it would not be within the control of the witness as to what should go in the statement recorded by the Investigating Officer as it would be Investigating officer, who would decide as to what question he may be putting. There cannot be doubt that the Investigating Officer would decide as to what questions he may be putting. An intelligent Investigating officer would

obviously be entitled to put all sorts of possible questions and not leave anything to chance.

23. The learned counsel for the appellant submitted that the conduct attributed to the appellant is contrary to the modus operandi attributed to the appellant. The appellant seems to have been tried for several cases of murder of the victims. In this case, rather than allowing the victim to die of lizol poisoning, the appellant seems to have taken her to Hospital, got her treated and discharged, and saved her life. He also points out to the fact that there is no evidence about the victim being made to part with any ornaments and money except, possibly, the evidence of PW8, who claims that the victim had lost her golden chain and the victim had stated that the appellant had taken the same, but the victim herself does not say so. In any case, the fact that the appellant was prosecuted for other offences itself being irrelevant, the modus operandi which could be derived from such prosecution has to be kept out of consideration for determining the complicity of the appellant in this crime.

24. The victim had several opportunities of reporting the matter to the police. First, when she was allegedly ravished in the appellant's house, her elder sister was very much staying with her, therefore, she could have reported the incident to her elder sister and the sisters could have reported the matter to the police. They, however, chose to keep quiet. Thereafter, the sisters had noticed the appellant forcing the victim to come out of the house in the dead of night and committing rape upon the victim. Yet, though three sisters were staying together, they neither reported the matter to elders or police nor did they thrash up the appellant when the appellant made such an attempt or collect the neighbours for having him thrashed up. At the cost of the repetition, it has been pointed out that the victim's uncle was staying just two metres away from the victim's house. The Investigating Officer has cleverly avoided to record the statement of the victim's uncle saying that he was reluctant to give the statement. Thereafter, in 2007, when the victim attempted to commit suicide, in fact the police had been informed and the victim had opportunity to narrate to the police as to what happened. Again, the victim echoed the line, which the appellant allegedly dictated. The story which the victim gives may or may not be correct, but it cannot be overlooked that around same time, the victim had received a proposal for marriage from FW-13-Raya Bandodkar. PW13 stated that the appellant threatened him on telephone. Now, this could be a cause for the victim to attempt to commit suicide rather than the cause, which the victim now deposes in the Court. There was another occasion for the victim to report the matter to the police when PW10-Ulhas Parwar tried to help the victim by accosting the appellant. Again, rather than taking help of PW10-Ulhas, the victim chose to accuse Ulhas of meddling with her affairs by filing complaint to the police.

25. Though the learned Public Prosecutor submitted that the victim had to maintain silence because of the threats of victim's nude photographs being thrown on the street, since there are no such nude photographs, the version appears to be

imaginary. There were ample opportunities for the victim to proceed to the appropriate authorities, yet the victim continued with the relationship with the appellant for four years. Rather than taking help of PW10-Ulhas, she chose to accuse him by making a complaint against him. Further, if the victim and the appellant were in fact having sexual intercourse for a long period of time, there is no reason as to why the victim's clothing's and/or the appellant's clothing's were not seized and sent to Forensic Science Laboratory to establish that there was intercourse between the two. Though the case, which the victim seeks to make out may be true, it cannot be said that the allegations can be accepted at their face value in the face of discrepancies discussed above. In view of this, the appellant is entitled to benefit of doubt. The appeal is, therefore, allowed. The conviction of the appellant for the offence punishable u/s 376 of I.P.C. and sentence of Rigorous Imprisonment for 7 years with fine of Rs. 25,000/- is set aside. He be set at liberty, if not wanted in any other case. Fine amount, if paid, may be refunded to the appellant.