

## Bhawalya @ Bawalal Totaram Vs State of Maharashtra

**Court:** Bombay High Court (Aurangabad Bench)

**Date of Decision:** Jan. 29, 2004

**Acts Referred:** Penal Code, 1860 (IPC) â€” Section 376(2)

**Citation:** (2004) 2 MhLj 498

**Hon'ble Judges:** M.G. Gaikwad, J; B.H. Marlapalle, J

**Bench:** Division Bench

**Advocate:** B.R. Warma, for the Appellant; Umakant K. Patil, Assistant Public Prosecutor, for the Respondent

**Final Decision:** Dismissed

### Judgement

B.H. Marlapalle, J.

This appeal, arises from an order of conviction and sentence dated 8th of September, 1999 in Sessions Case No. 18

of 1998, decided by the learned Additional Sessions Judge at Amalner. The Sessions Court has convicted the accused/appellant for an offence

punishable u/s 376(2)(f) of the Indian Penal Code (the Code, for short) and sentenced him to suffer rigorous imprisonment for life and to pay a fine

of Rs. 500/-, in default of fine further rigorous imprisonment for one month, whereas he came to be acquitted for the offence punishable u/s 506 of

the Code. When this appeal was admitted by order dated 1st February, 2000 there was no application for bail and, therefore, he has been in jail

since 1st February, 1998 as noted in the impugned order of conviction and sentence.

2. The prosecution case briefly states that the prosecutrix Rinku d/o Shivaji Patil is the granddaughter (daughter's daughter) of the complainant

Santosh s/o Naval Patil (PW1), a resident of village Ranaiche in Amalner Taluka of Jalgaon district and an agriculturist by profession, Suman

(PW4) is the wife of Santosh (PW1). The parents of the prosecutrix were residing, at the relevant time, at village Sunwade and it was on 1st

February, 1998 that the prosecutrix was lured by the accused with the promise of giving brinjals and chillies. She was taken towards the field of his

master Subhash Nago Patil (PW8) at about 3.00 p.m. and beneath the Neem tree in the agricultural land of Shri Sudhakar Gulabrao Patil, Gat No.

30, she was raped by the accused. She sustained bleeding injuries on her vagina and returned to her grandparent's house in the same condition

and lied on a cot. The grandmother returned at about 4.00 p.m. after grazing the cattle and seeing the grand-daughter laying on the cot she inquired

about the reason and she was informed by the prosecutrix that the accused had taken her to the agricultural land of Sudhakar Gulabrao Patil and

raped her. The prosecutrix, it appears, showed the injury/bleeding to her grandmother who, in turn, sent a message for her husband and personally

went to Subhash (PW8), the master of the accused. The complainant reached home and when inquired about the reason for his recall he was

informed about the incident at the hands of the accused. Subhash (PW8) alongwith his brother also visited the house of the complainant as per the

request of Sumanbai (PW4) and was made aware of the offence. The complainant requested Bhaiya Patil and Ashok Patil to take the prosecutrix

to the police station at Amalner and thereafter he followed her on another motorcycle. He lodged a written complaint (Exhibit 17) regarding the

incident and the prosecutrix was sent for medical examination. Dr. Jeevanrao Rangrao Patil (PW6), Chief Medical Officer in Municipal Hospital at

Amalner examined the prosecutrix and issued the medical certificate at Exhibit-32. The prosecutrix was brought back to the police station and her

statement was recorded. The accused was taken in custody on the same day and was also subjected to medical examination at the hands of Dr.

Jeevanrao (PW6) who, after medical examination, issued the medical certificate (Exhibit-33). The Investigating Officer, as a matter of precaution,

had subjected the prosecutrix for second medical examination by Dr. Ramkrushna Govindrao Bhusale (PW7) who was, at the relevant time,

working as head of the department of Forensic Medicines and Toxicology in Shri Bhausaheb Hire Government Medical College at Dhule. He

examined the prosecutrix on 2nd February, 1998 and issued the medical certificate (Exhibit-37). While the accused was taken in custody, arrest

Panchanama was drawn and the clothes on his person were also seized in the presence of Sopan Bhimrao Patil (PW5) and the said seizure

Panchanama (Exhibit-25) came to be proved in his depositions. The seized clothes of the accused, as well as the prosecutrix, were sent for

chemical analysis vide forwarding letter (Exhibit-45) and C.A. report was received by the police and on completion of the investigation charge

sheet was filed. As the case was triable exclusively by the Sessions Court it was committed. Charge was framed at Exhibit-2 on 24th July, 1998

for an offence punishable u/s 376(2)(f) and 506 of the Code.

3. The prosecution examined in all nine witnesses i.e. the Complainant Santosh (PW1), prosecutrix Rinkubai Shivaji Patil (PW2), Pradeep Anant

Kulkarni (PW3), Circle Officer in support of the map of the spot of incidence (Exhibit-22), Sumanbai (PW4), the grandmother of the prosecutrix,

Sopan (PW5), Panch witness for seizure of clothes of accused, Dr. Jeevanrao (PW6), Medical Officer, Dr. Ramkrushna (PW7) Medical Officer,

Subhash (PW8) and Murlidhar Bhika Patil (PW9), Police Sub Inspector as well as Investigating Officer.

4. The complainant, in his complaint at Exhibit-37, had stated that between 4.30 and 5.00 p.m. on 1st February, 1998, while he was in his

agricultural field, received a message from his wife through Shri Nana Patil that he was called back to his house and, therefore, when he reached

his house his wife Sumanbai (PW4) informed him about the incident and also the bleeding injury sustained by the prosecutrix. He also stated that

the underclothes of the prosecutrix were stained with blood and she was in pain. The accused had committed the said offence in the agricultural

field of Sudhakar Patil at about 3.00 p.m. on the same day. In addition to the complainant, the prosecution case is mainly based on the depositions

of the prosecutrix, the medical evidence and the grandmother Sumanbai (PW4) as well as Subhash (PW8).

5. Dr. Jeevanrao (PW6) stated that as on 1st February, 1998 he was working as Chief Medical Officer in the Municipal Hospital at Amalner and

on that day the prosecutrix was brought to him for examination with a view to ascertain whether she was sexually assaulted. He examined her and

noticed on her private part the following injuries :

(i) Both labia majore lacerated.

(ii) Vagina lacerated irregularly.

(iii) Vagina torn up to anus on left side, with acute bleeding from

vagina, there were stains of dried blood all around the vagina, anus, both thighs, lower leg and ankles on medical aspect.

According to him, the age of the injury was within 6 hours prior to his examination, they were caused by inserting erected penis by adult person

into the vagina. He had issued the medical certificate (Exhibit-32) under his signature and collected the vaginal swab and smear from the person of

the prosecutrix. He handed over the nicker of the prosecutrix, which was then stained with blood, to the police. He also admitted that the vaginal

swab and smear was sent to the Chemical Analyser's office.

On the same day he had examined the accused in the night and found the following injuries on his person :

(i) Penis and scrotum, testicles of normal size.

(ii) Penis was swollen, haematoma around the glance of penis. He stated that, in his opinion, the said person was capable of sexual intercourse, the

age of the injury found on his private part was within 12 hours of examination and the swelling on penis and haematoma around the glance of penis

must be on account of the forcible intercourse with the child. He had issued medical certificate (Exhibit-33) under his signature and collected the

sample of blood of the accused. In his cross examination, an attempt was made to show that the prosecutrix was not wearing a nicker when she

was examined and this was stoutly denied by the witness. A specific question was asked, as to whether he had checked the position of hymen by

inserting his finger and he stated that he did not do so because the prosecutrix was in pains and he did not feel it necessary to examine her by

administering anesthesia. A specific question was asked, whether the injuries noticed on the person of the prosecutrix could be caused by a stick

pierced while playing and the doctor said it was possible, but it was not the case of the defence that such an eventuality had occurred in the case of

the prosecutrix. It was a general question which the doctor replied so as to give his opinion.

Coming to the medical evidence of Dr. Ramkrushna (PW7), he stated that on 2nd February, 1998, while he was working as the Head of the

Department of Forensic Medicines and Toxicology at Shri Bhausaheb Hire Government Medical College, Dhule the prosecutrix was brought to

him by police for medical examination so as to ascertain whether she was subjected to intercourse. He had examined her and did not find any

external injuries. However, on examination of the vagina he found the following injuries :

(i) Perennial tear (vaginal tear) extending posterior wall upto the anus.

(ii) Labia majora - tear at a 6 O'clock.

(iii) Labia Minor - tear at a 6 O'clock.

(iv) Vestibule - tear at posterior.

He further stated that the hymen was found intact and at vaginal canal-tear posterior there was bleeding from vagina. He found evidence of forcible

intercourse. He had collected the blood and vaginal swab and same was sent to the authorities concerned. He issued medical certificate (Exhibit-

37) in his handwriting and under his signature. In his cross examination he admitted that the exact time of medical examination was not mentioned in

the medical certificate but reiterated that the prosecutrix was admitted in the hospital.

6. Both the doctors indicated that the prosecutrix was between the age group of 9 to 10 years and weighed about 16 kgs. She was subjected to

forcible sexual intercourse. The medical evidence has been consistent and it did not suffer from any discrepancies. This clearly proved the

prosecution case that the prosecutrix was raped by an adult male.

7. Shri Warma, the learned counsel for the accused, at the threshold, submitted that there was no evidence to link the injuries suffered by the

prosecutrix to the accused and there was no eye-witness. It was his case that the circumstantial evidence, as was sought to be placed before the

trial Court, could not complete the chain of events and there were some missing links which vitiated the prosecution story. He reiterated that the

possibility of the prosecutrix sustaining the alleged injuries, while playing, could not be ruled out, more so when in her cross examination she had

admitted that after the incident she had returned home by playing or by acts of playing. He referred to the cross examination of the prosecutrix and

submitted that she was a tutored witness and, therefore, her testimony in entirety was required to be discarded. In his alternative submissions Shri

Warma urged before us that, in any case, the accused deserved leniency from us and, therefore, the sentence awarded to him should be reduced,

more so because the prosecution case suffers from many doubts.

8. The learned A.P.P. on the other hand, has supported the order of conviction and sentence on all counts and reiterated that the same is required

to be confirmed by us. He further stated that the evidence on record has proved the prosecution case beyond reasonable doubt and the author of

the heinous crime is none other than the accused.

9. The Medical Officer Dr. Jeevanrao (PW6), in his medical certificate at Exhibit-33 clearly noted the injuries suffered by the accused and on

examination of the prosecutrix he had noted that she was subjected to forcible sexual assault by an adult male. The injuries noted by him were also

noted by Dr. Ramkrushna (PW7) when the prosecutrix was examined on the next day and he had issued medical certificate at Exhibit-37.

10. We must also note an additional circumstance as, was brought in the cross examination of the prosecutrix. We have noted that in the lengthy

cross examination the prosecutrix was subjected to, in spite of her tender age, the defence lawyer, in his enthusiasm, lead the cross examination to

convey that the prosecutrix was in the company of the accused, she was lured to accompany him to the field of Sahebrao Patil, he kissed her when

she was lying on the ground and, thereafter, she felt pains in her private part. These questions put to the prosecutrix by the defence implied that the

prosecution case was almost admitted.

11. The criticism regarding tutoring, as came through the arguments of Shri Warma, has not impaired the prosecution case, in any way. The

prosecutrix, between the age group of 9 and 10 years, and coming from a village background, was not expected to know what the male and

female private parts are called and that the sexual assault is called as rape, In fact, she may not be knowing about sex even at that tender age and if

she was explained about the human anatomy, either by her family members or by any other prosecution agency, that did not vitiate the prosecution

case.

12. It has come in the evidence of Murlidhar Patil, who had acted as investigating officer, that the seized clothes from the person of the accused

and the clothes of the prosecutrix were sent for chemical analysis vide Exhibit-45. The seizure of these clothes has been proved in the testimony of

Sopan (PW5) under Panchanama at Exhibit-25. The C. A. report was received by the police and we have noted that it is available on record. It

has been forwarded vide letter dated 1st August, 1998, addressed to the Investigating Officer and it was received by the Assistant Police

Inspector, Police Station, Amalner on 6th August, 1998. It is unfortunate that this document remained to be proved by the prosecution before the

trial Court though the learned A.P.P. had submitted this document along with others vide application at Exhibit-11. While the investigating officer

was in the witness box it was necessary that this document was put to him and, in any case, this deficiency does not come in our way in reading the

C.A. report when it is a public document. Section 74 of the Indian Evidence Act, 1872 defines the "Public documents" and Section 77 is regarding

presumptions as to genuineness of certified copies. The C. A. report is in the prescribed form and has been duly signed by the Chemical Analyser

who has affixed his office seal as well beneath his signature. This report has to be connected to Exhibit-45 and, therefore, it has to be accepted as

an additional evidence in support of the prosecution case in view of Section 293, Criminal Procedure Code. The trial Court has rightly referred to

its contents. The C. A. report stated that the blood group of the prosecutrix was "O" and that of the accused "A". His underwear and pant was

found to have bloodstains of blood group "O" and semen of blood group "A" and this unerringly leads to the conclusion that the accused had

sexually assaulted the prosecutrix, a girl of tender age. The prosecutrix had stated that she was knowing the accused when he had asked her to

accompany him to the field of his master Subhash (P.W. 8) and she had identified him before the Court confirming that he was the same person

who had raped her.

13. The medical evidence of two doctors, on examination of the prosecutrix, the medical evidence of Dr. Jeevanrao (PW6), on examination of the

accused, and the incidence, as disclosed by the prosecutrix herself to her grandparents as well as before the Court in her testimony, has been duly

supported by the evidence of the grandfather Santosh (PW1), grandmother Suman (PW4) and Subhash (PW8). The prosecutrix had disclosed the

sexual assault at the first instance to her grandmother who, in turn, had disclosed the same to Santosh (PW1) and Subhash (PW8) and both of

them had seen the prosecutrix and the bleeding that she had suffered on her private part. The seizure of her clothes also has been proved and they

were subjected to chemical analysis. When the accused was arrested his clothes were stained with blood and the C.A. report found that the group

of that blood was "O" which was the blood group of the prosecutrix. The cumulative effect of the Prosecution evidence unerringly proved that the

author of the crime was none other than the accused. The trial Court, in our opinion, rightly convicted the accused for an offence punishable u/s

376(2)(f) of the Code. So far as the offence u/s 506 of the Code is concerned, the accused has been acquitted and there is no appeal by the State.

14. On the point of sentence Shri Warma urged before us to take a lenient view. The accused was of about 32 years of age at the relevant time.

The prosecutrix was found to be in the age group of 9 to 10 years and she hardly weighed about 16 Kgs. The trial Court rightly recorded its view

that the accused had committed a beastly act by forcibly subjecting the minor girl to sexual assault and by luring her with a promise of giving

brinjals and chillies from the farm of his master. His intentions and pre-design, as have come on record, were quite eloquent and he committed the

heinous crime in a broad-day-light. The trial Court was of the opinion that he did not deserve any leniency and, therefore, awarded sentence of life

imprisonment. We do not find ourselves persuaded to disturb the said order of sentence in the obtaining circumstances and, therefore, we confirm

the order of sentence as well.

15. In the result, this appeal fails and the same is hereby dismissed. The order of conviction and sentence dated 8th September, 1999 in Sessions

Case No. 18 of 1998, as passed by the learned Additional Sessions Judge at Amalner, is hereby confirmed.