

(1996) 07 BOM CK 0094**Bombay High Court (Goa Bench)****Case No:** Criminal Appeal No. 18 of 1995

Valliappa Harijan

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision: July 9, 1996**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 324, 342, 376, 506

Citation: (1997) BomCR(Cri) 215 : (1997) CriLJ 1484**Hon'ble Judges:** T.K. Chandrashekha Das, J; R.M.S. Khandeparkar, J**Bench:** Division Bench**Advocate:** T.K. Nasnodkar, for the Appellant; G.U. Bhobe, Public Prosecutor, for the Respondent**Judgement**

Chandrashekha Das, J.

The appellant is the accused in Sessions Case No. 26/92 on the file of Assistant Sessions Judge (B), South Goa, Margao. He was convicted for offences punishable under Sections 342, 376, 324 and 506 of the Indian Penal Code and sentenced to undergo R.I. for 7 years u/s 376, I.P.C. and to pay a fine of Rs. 1000/-, in default to undergo R.I. for 1 year. He was also sentenced to undergo R.I. for 2 years u/s 506, I.P.C. and to pay fine of Rs. 500/-, in default to undergo R.I. for 6 months. The accused was further sentenced to undergo R.I. for 1 year u/s 342, I.P.C. and to pay fine of Rs. 200/-, in default to undergo R.I. for 3 months. All these sentences were directed to run concurrently.

2. The charges against the appellant was that on or about the 26th February, 1991 at 14.30 hours near the jungle area in Zuarinagar he wrongfully confined the complainant one Smt. Kallamma Jaganath Badigar, gave a tooth bite on her and had sexual intercourse without her consent. He had also threatened to kill her if she disclosed the fact to any other person. Therefore a charge was framed against him for the abovementioned offences. After the trial the aforesaid sentences were

ordered against him though he was acquitted u/s 324, I.P.C.

3. According to the prosecution on 26th February, 1991 at about 13.00 hours when P.W. 1 the prosecutrix was watching film on video along with many others in the neighbouring house of one Budasaheb, the daughter of the accused came there at that time and told the prosecutrix that she was called by her father to go to collect wood as decided. Accordingly she came out of the house of Budasaheb to see the accused himself standing outside the house of Budasaheb. Then accused told her to follow him to get the wood for construction of the hut. Accordingly both of them went on foot to the jungle which was on the right side of the Birla Cansaulim Road. When they reached at about 14.00 hours in the jungle the accused caught hold of her saree and removed the same from her person and told her that if she shouts he would kill her. Still she shouted for help. However, she was forcibly thrown down and made her to lie on her towel by spreading it on the ground. He then sat on her thighs and tied her hands on either side with creeper trees. He then removed the buttons of her blouse and opened the same. He then lifted her "ghagra" and committed rape on her.

4. The prosecution has examined apart from P.W. 1 the prosecutrix, Purnand Audi the doctor who examined the prosecutrix as P.W. 2, the daughter of the prosecutrix as P.W. 4, Murari Hari Naik and Shankar Parit are Panch witnesses as P.Ws. 3 and 5 respectively and Shankar Lamani, P.W. 6 to whom she had told the incident immediately after the occurrence. A panchanama has also been prepared for recovery of clothes. The Court below has solely relied upon the evidence of prosecutrix and found the appellant guilty of having committed the offence of rape. The Court below says that there is no ground for disbelieving the version of the prosecutrix and on that basis the accused was convicted. The learned Public Prosecutor Shri Bhobe has argued that in an offence like rape a conviction could be sustained only on the basis of the evidence of the prosecutrix without any further corroboration. There are no materials to disbelieve the version of the prosecutrix except certain minor inconsistencies and discrepancies in her evidence. The learned counsel for the appellant submits that there are contradictions and inconsistencies which may go to the root of the case. He pointed out that there are material contradictions particularly in the recovery of the clothes worn by both the prosecutrix and the accused. The Lungi M.O. 5, the underwear M.O. 6 and the Shirt M.O. 7 of the accused were seized under the panchanama and produced before the Court. According to the evidence the lungi is greenish in colour with checks, the shirt is blue grey in colour and the underwear is light grey in colour while according to the evidence of the prosecutrix the shirt was of blue colour. So also according to the counsel for the appellant the prosecutrix has not stated without any contradictions about her own clothes. According to the prosecutrix she wore at the time of occurrence yellow sari (M.O. 2) and yellow blouse (M.O. 3) and it is proved that the blouse (M.O. 3) was red in colour. The learned counsel for the appellant also attacked the manner under which the clothes were recovered. According to the

prosecutrix she had given her clothes to the doctor who had examined her. At the same time the panch witness has said that they were recovered under a panchanama. These inconsistencies in the evidence as regards the clothes, according to us, goes a long way in appreciating the case stated by the prosecutrix.

5. On going through the oral evidence particularly the evidence of the Doctor, it can be seen that there is enough material to infer that the incident occurred with the consent of the prosecutrix. Medical evidence gives a strong indication towards this aspect. According to the Doctor P.W. 2 he was of the opinion that in the absence of positive physical findings in the genitals no positive opinion regarding forceful sexual intercourse can be given. He also stated that there were no injuries on the private part of the prosecutrix. If her story was to be believed, any woman of character and modesty would have put some amount of resistance when she is being raped. The manner in which the accused had committed rape on her cannot be believed. In her complaint she narrates the incident thus :-

"However, I was forcibly thrown down and made me to lie on my towel by spreading it on the ground. He then sat on my thighs and tied my both the hands on either side with creeper trees."

The same statement she repeats to the panchas when panchanama of scene was prepared. One cannot understand how this action of the accused could be humanly possible particularly when a woman exerts resistance. So we have to come to the conclusion that from the story narrated by the prosecutrix there is no material for us to conclude that she has exercised any resistance when the accused committed rape on her. With these materials and the statement of the Doctor it goes to show that the occurrence of rape could not have happened. It can be inferred that sexual intercourse, if at all it occurred, was only with the consent of the prosecutrix. In view of this the necessary ingredient constituting the offence of rape is absent and the prosecution has not established that the accused has committed an offence of rape beyond all reasonable doubt. In view of this the finding of the Court below that the accused is guilty of the offence of rape has to be set aside.

6. In the result the appeal is allowed and the judgment of the Court below dated 15th April, 1995 is set aside. The appellant is directed to be released forthwith, if he is not required in any other case.

7. Appeal allowed.