

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 10 OF 2022

Shri Sameer Sarkar, s/o Narayan
Sarkar, aged – 47 years, married,
labour, R/o H. No. 16, GRB Colony,
Indiranagar, Chimbhel, Tiswadi, Goa. ... Appellant

Versus

State (through)

1. Public Prosecutor, High Court of
Bombay at Goa, Porvorim, Goa.
2. Police Inspector, Old Goa Police
Station, Old Goa. ... Respondents

Mr. Pradip V. Sawaikar, Advocate for the Appellant under
the Legal Aid Scheme.

Mr. Pravin Faldessai, Additional Public Prosecutor for the
Respondents.

CORAM: **BHARAT P. DESHPANDE, J.**

RESERVED ON: **22nd JANUARY 2024**

PRONOUNCED ON: **29th JANUARY 2024**

JUDGMENT:

1. Vide order dated 16.06.2022, the Appeal was Admitted and
accordingly, records and proceedings were called. After the

preparation of the paper book, the matter was placed for arguments.

2. Heard learned Counsel Mr. P.V. Sawaikar appearing on a legal aid basis for the Appellant/Accused and the learned Additional Public Prosecutor, Mr. Faldessai for the State.

3. The Appellant was chargesheeted for the offence punishable under Sections 376 and 506 (ii) of IPC and accordingly, was tried before the learned Additional Sessions Court. After the completion of the trial, the learned Additional Sessions Judge found the accused guilty for the offence punishable under Section 376 and 506 (ii) of IPC. After hearing the accused on the point of sentence, he has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.20,000/- for the offence punishable under Section 376 of IPC and to undergo rigorous imprisonment for a period of one year for the offence punishable under Section 506(ii) of IPC.

4. Being aggrieved by such conviction and sentence, the present Appeal is filed on various grounds as set out in the memo of Appeal.

5. The Appellant/Accused is the stepfather of the victim. It has been alleged in the FIR dated 28.04.2019 that somewhere in the year 2018, the accused during odd hours and while other family members were sleeping in their rooms committed forcible sexual intercourse with the victim and thereafter sexually exploited her and threatened her with dire consequences. After the first incident, the accused repeated the same on several other occasions and the last of such incident of forcible sexual intercourse was in the third week of the month in which the complaint was filed. The complaint further shows that on 25.04.2019 at around 02:00 hours, the accused came again to the victim in her bedroom and tried to sexually abuse her, however, she pushed him and told him that she would inform her brother. On hearing this, the accused threatened to kill her if she informed the family members.

6. Mr. Sawaikar would submit that the allegations in the FIR are totally concocted, false and only with a view to implicate the accused falsely as the accused being the father was against the relationship of the victim with a boy. He would further submit that there is absolutely no evidence except the version of the victim, which is also not of sterling quality so as to award a conviction. Mr. Sawaikar would then submit that there are major contradictions in the testimony of the victim herself and her

statements contradict with the statements of the other family members.

7. Mr. Sawaikar would then submit that first of all, charges framed against the accused are only in connection with the alleged sexual assault in the year 2018, however, this aspect has not been proved at all. Moreover, the learned Trial Court accepted the version of the victim with regard to the sexual assault in the year 2019, that too, when no charge to that effect was even framed or explained to the accused.

8. Mr. Sawaikar would then submit that the statement of the victim recorded under Section 164 of Cr.P.C. is quite different and distinct, however, the same is not consistent with her first information report. He would further submit that there is no medical evidence supporting the contentions of the victim with regard to the alleged forcible sexual intercourse. He claimed that since the victim was having a relationship with another boy, which the accused was opposing, the possibility of falsely implicating the accused as he being the stepfather of the victim is not ruled out. Mr. Sawaikar while inviting the attention to the deposition of the victim and other family members would submit that the theory

put forth by the victim about forcible sexual assault is highly improbable and cannot be believed.

9. Mr. Sawaikar would then submit that the inconsistency and the contradictions go to the root of the matter and make the statements of the victim unreliable and untrustworthy, however, the learned Sessions Judge ignored such contradictions by labelling the same as “minor contradictions” and thereby, committed an error in law. He would submit that the FIR nowhere discloses about any sexual assault as she has claimed in her statement under Section 164 of Cr.P.C. and thus, the witness is not trustworthy to believe and convict the accused solely on such material.

10. Mr. Sawaikar would then submit that injuries on the accused are not explained by the Prosecution when it is the defence of the accused that he was assaulted by his son, XXX due to their differences and when the accused threatened that he will lodge a complaint against the son, XXX, the victim filed a false complaint against the accused.

11. Mr. Sawaikar would then submit that the delay in lodging the FIR is not satisfactorily explained. He claimed that the FIR

shows that an attempt to commit sexual assault last happened on 25.04.2019 whereas the complaint was lodged on 28.04.2019. The explanation for such delay is that the victim along with her family members were searching for the accused, cannot be accepted.

12. Mr. Sawaikar while assailing the findings of the learned Trial Court would submit that such findings are perverse and against the settled proposition of law. He submits that points for determination framed by the learned Sessions Judge would clearly go to show that the same is not in accordance with the charges framed against the accused. The points for determination speak about the allegation of sexual assault till the third week of April 2019, however, no such charge is framed against the accused in respect of any sexual assault on the victim in the year 2019. In this respect, he would submit that the charges framed against the accused vide Exhibit-6 are only with regard to the alleged sexual assault in the year 2018. Thus, the findings on the points for determination by the learned Sessions Judge are all together on the material which does not connect the charges framed in the matter.

13. Mr. Sawaikar would then submit that when the victim admitted of not making any statement before the Magistrate under

Section 164 of Cr.P.C., during her cross examination before the Court, the omissions/contradictions stand proved, however, the learned Sessions Judge brushed aside such aspect casually by saying that such contradictions were not put to the witness and no opportunity was given to explain. He submits that Section 145 of the Evidence Act clearly shows that once the witness admits a particular statement as not given by her, there is no question of giving any further opportunity as the omissions/contradictions stand proved. Besides this, it is contented by Mr. Sawaikar that it is the duty of the Presiding Officer that, when omission/contradiction is pointed out to a witness, to bring it to the notice of the said witness and give an opportunity to explain, only then, omissions/contradictions could be marked and later on proved through the Investigating Officer or the Officer who has recorded such statements.

14. Mr. Sawaikar would then submit that the decisions cited by the accused or as the case may be, by the Prosecution were not properly appreciated/considered, however, instead of ascertaining the ratio laid down in the said decisions, the learned Sessions Judge simply copied and pasted the head note. He submits that it is the duty of the Presiding Officer to go through the facts and the questions raised in the matter and thereafter the conclusion

drawn, so as to find out the ratio of the decisions, however, simply copying and pasting the head note, which is considered to be the opinion of the publisher, may not be showing the correct view. It is the duty of the Judicial Officer to extract the exact ratio laid down in the judgment and then to find out whether the said ratio would be applicable to the matter in hand.

15. Finally, Mr. Sawaikar would submit that since no charge with regard to sexual assault in the year 2019 was framed against the accused and the statements of the victim to that effect were accepted by the Trial Court, great prejudice has been caused to the accused as the charge explained to him was only of the year 2018. He submits that the matter in hand cannot be simpliciter considered as a mistake in framing charge. In this matter, much prejudice is caused to the accused as the material beyond the charge has been considered for convicting him. He, therefore, submits that this is a fit case where the Appellant/accused is entitled to acquittal on the benefit of doubt.

16. Per contra, the learned Additional Public Prosecutor, Mr. Faldessai would submit that the offence alleged against the accused is heinous in nature. The allegations against the accused clearly go to show that he was in the habit of consuming alcohol

and the victim being the stepdaughter i.e. the child of his wife from her previous marriage, no leniency could be shown.

17. Mr. Faldessai would submit that the statements of the victim are consistent, though there are some minor discrepancies. It is submitted that in such cases, it is difficult to get supportive medical evidence due to passage of time. He submits that the victim was unable to resist due to fear of the accused and finally, she informed her elder sister when the accused was trying to repeat such acts and thereafter, a complaint was lodged. Mr. Faldessai would submit that in such matters, it is difficult for the victim to immediately approach the Police Station due to family repute, fear and the pressure of society. In this case, the delay has been explained and therefore, such an aspect will not affect the other sufficient evidence on record. He submits that the medical evidence, in fact, supports the case of the victim. He, therefore, submits that even though there is no other corroborative evidence, deposition of victim is sufficient to convict the accused.

18. Mr. Faldessai would then submit that though some discrepancies appear in the evidence, the same are not fatal to allow the Appeal. However, since the accused has already

undergone half of the sentence awarded to him, the Court may consider reducing such sentence.

19. The points for determination of the present Appeal are as under together with my findings against it:-

<u>Point for determination</u>	<u>Finding</u>
(i) Whether the Prosecution succeed in proving that in the year 2018-2019, the accused committed forcible sexual intercourse with the victim in the house ?	In the negative
(ii) Whether the Prosecution succeed in proving that the accused threatened the victim with dire consequences when she opposed the accused ?	In the negative

20. Both the above points are taken for joint determination in order to avoid repetitions.

21. It is an admitted fact that the victim, accused and other family members were residing in the same house at the time of the alleged incident. The address of the victim is mentioned in the complaint. The victim was residing along with her mother, elder

brother, younger sister, younger brother and the accused being stepfather.

22. At the time of filing of the complaint, the victim disclosed her age as 22 years. The complaint was lodged on 28.04.2019. The victim claimed in her complaint that she used to sleep separately in one bedroom while other family members used to sleep separately in other two rooms. The complaint shows that along with the victim and the accused, four other family members were staying in the same house.

23. The order framing of charge is dated 13.08.2019 wherein the learned Additional Sessions Judge observed that the allegations in the complaint are regarding sexual intercourse without her consent in the year 2018 and thereafter, giving threats. More important was the framing of the charge against the accused.

24. The first charge framed against the accused for the offence punishable under Section 376 of IPC reads thus:

“That beyond on or about 2018, at house no. 16, GRB Colony, Indiranagar, Chimbhel, Tiswadi, Goa, committed rape on your daughter Miss. XXX, and that you thereby committed an offence under Section 376 of the Indian Penal Code and within the cognizance of this Court.”

25. The next charge against the accused is with regard to giving threats to the victim on or about 25.04.2019 for the offence punishable under Section 506(ii) of IPC.

26. On perusal of the chargesheet as well as the first information report dated 28.04.2019, one thing is clear that the order of framing charge and thereafter, framing of charge against the accused was done in a very casual and cryptic manner. The learned Trial Court, it seems, did not peruse the complaint, the statements and more particularly, the allegations made against the accused in detail so as to extract as to the nature of the offence, the time and type of the offence committed by the said accused as alleged.

27. The complaint dated 28.04.2019 and more specifically, paragraph 4, would go to show that somewhere in the year 2018, during odd hours while other family members were sleeping in other rooms, the accused suddenly came into the room of the victim, caught hold of her mouth and had sexual intercourse without her consent. After sexually exploiting her, he threatened the victim with dire consequences. The victim further stated in the said paragraph that recently the accused had forceful sexual intercourse with her in the third week of the same month.

28. The complaint was lodged on 28.04.2019, which means that the statement regarding the last forcible sexual intercourse was in the same month but in the third week. Though the complainant/victim failed to disclose the exact date and time of the alleged forcible sexual intercourse which took place firstly in the year 2018 and thereafter, on several occasions and last of such act in the same month, the charge as framed against the accused, as quoted above, clearly ignored such contents of the complaint. The duty of the Court is to ascertain the exact nature of the offence and if there is repetition of such offence, the charge must specifically refer to it.

29. The charges against the accused as quoted above, if perused, would go to show that it was only with reference to the first incident which took place somewhere in the year 2018. However, there is no reference in the said charge about such repetition in the year 2018 and finally, in the third week of the month in which the complaint was lodged. When the charge is defective or not properly framed, the accused loses an opportunity to understand on which charge he would be prosecuted.

30. Section 464 of Cr.P.C., which is appearing in Chapter XXXV dealing with irregular proceedings, also deals with the effect of

omission to frame, or absence of, or error in, charge. By this provision of the Code, it has been provided that (1) no finding of the sentence or order by a competent Court shall be deemed invalid, merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby and (2) if the Court of the appeal comes to the conclusion that failure of justice has in fact been occasioned, two clauses are required to be opted, namely, (a) in case of an omission to frame a charge, the Appellate Court may order that the charge be framed and the trial be recommenced from the point immediately after the framing of the charge and (b) in the case of an error, omission or irregularity in the charge, the Appellate Court may direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

31. In the case of **Soundarajan Vs. State, represented by the Inspector of Police Vigilance Anticorruption Dindigul, 2023 SCC OnLine SC 424**, the Apex Court has observed that it is the duty of the Trial Court to be very meticulous when it comes to framing of charges. In a given case, any such error or omission may lead to acquittal and/or a long delay in trial

due to an order of remand. Apart from the duty of the Trial Court, even the Public Prosecutor has a duty to be vigilant, while drafting and explaining charges to the accused. If the Court fails to frame charges properly, the learned Public Prosecutor is duty bound to apply to the Court to frame a proper charge.

32. In the same decision, the Apex Court also observed that it is never fatal to the case unless it is proved that prejudice is caused to the accused due to any defect or mistake or error in framing the charge.

33. The same principles could be applied to the matter in hand. The cross examination of the victim and other witnesses would go to show that the accused clearly understood the case of the Prosecution including the allegations of the complainant with regard to the alleged incident of forcible sexual intercourse in the year 2019. The witness has been cross examined on this aspect. It is no doubt true that the charges framed against the accused are not a complete charge as per the allegations found in the complaint as well as the chargesheet. There is a serious omission to frame a proper charge with regard to the allegation of repeated forcible sexual assault in the year 2018 and the last such overt act of the accused in the third week of the same month in which the

complaint was filed. It is clear omission and defective framing of charge, however, by reasoning of such omission/defect of framing of charge, to my mind, no serious prejudice has been caused to the accused so as to defend his case, which is clear from the tenor of the cross examination. Thus, this is a case of omission to frame a proper charge and/or error in framing a charge, which is not fatal to the case or the defence of the accused.

34. However, it cannot lose sight of the duty of the learned Presiding Officer and equally that of the learned Public Prosecutor while assisting the Court to frame charge, by including all the ingredients of the said offence. The main purpose of framing a charge and explaining it to the accused is to give him an opportunity to understand the exact level of allegation so that he can properly defend such allegations during trial, if the charge is not admitted. Thus, the duty of the learned Presiding Officer is to meticulously pursue not only the contents of the chargesheet, but also the complaint and other evidence produced with the chargesheet.

35. Chapter XVII of Cr.P.C. deals with charge. Section 211 of Cr.P.C. speaks about the contents of the charge and provides that every charge shall state the offence with which the accused is

charged. Section 212 mandates that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom, or thing in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 213 of Cr.P.C. further provides that when the nature of the case is such that the particulars mentioned in Sections 211 and 212 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. Section 215 of Cr.P.C. deals with the effect of errors and provides that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state that offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

36. Though above provisions deals with case of omission or failure to frame proper charge, the duty of the Court as well as the learned Prosecutor cannot be ignored or avoided. First of all, the Presiding Officer must ascertain what are the allegations made in the FIR and the chargesheet with supporting material for the

purpose of framing proper charges. In this matter, one thing is clear that after the order of framing charge and subsequently framing and explaining the charge against the accused, was carried out in the most casual manner. Though there are omissions or errors, the material brought on record shows that no prejudice was caused to the accused and such errors and omissions cannot be considered as fatal to exercise the option found in sub-section (2) of Section 464 of Cr.P.C.

37. In order to prove the charges levelled against the accused, the Prosecution examined nine witnesses during the trial.

38. PW-1, Dr. Andre Fernandes, who examined the accused on 08.05.2019, at the request of the Investigating Officer, issued the certificate showing one injury i.e. stitched incised vertically placed wound, partly healed, partly infected of more than ten days on the left outer aspect of mid-torso, the upper end is placed 11 cm. below the apex of the left axilla (11 cm. below the armpit towards the back). The certificate of examination in sexual offence is material. The accused explained on asking as to how he received injuries by saying that, “they have assaulted him and stabbed him”. The reference “they” in the above statement is clearly with regard to his stepson by name XXX and other family members.

39. PW-2 is the victim who deposed about the alleged overt act of the accused. She was cross examined at length. During her testimony, the complaint at Exhibit-15 and her statement recorded under Section 164 of Cr.P.C. by the Magistrate vide Exhibit-16 were brought on record.

40. PW-3, Dr. Rini Naik, who examined the victim on 28.04.2019 at the request of the Investigating Officer, gave her report of medical examination for sexual offence at Exhibit-19. She opined that there was evidence of vaginal penetration.

41. PW-4, who is the sister of the victim deposed that she was staying in the same house and was sleeping along with the victim in the same room. She claimed that the victim told her about the overt act committed by the accused and accordingly, both of them informed their brother, XXX, who decided to lodge a complaint. PW-5, the brother of the victim has also claimed that he was told by the victim on 25.04.2019 about the incident and accordingly, they lodged a complaint. PW-6, who is the mother of the victim claimed that her son, PW-5 told her that the accused had sexual intercourse with the victim. PW-7 is the other brother of the victim.

42. PW-8, Suleman Shaikh is the panch witness with regard to the scene of offence panchanama conducted on 28.04.2019 at the house of the victim at Chimbel. The last witness is PW-9, Suden Redkar, PSI, who disclosed about the investigations carried out by him and the filing of the chargesheet.

43. The statement of the accused was recorded under Section 313 of Cr.P.C., in which, he denied the entire case of the Prosecution and claimed that he has been falsely implicated.

44. In defence, the accused entered into the witness box as DW-1 and deposed in support of his innocence. It is his case that he was the sole earning member of the family and his wife (PW-6) had one son and one daughter (victim) from her earlier marriage. He claimed that his son, (PW-5) was not studying and was not listening to his instructions. Said PW-5 used to abuse him verbally and on one such occasion when the Accused got the knowledge that the victim was in love with someone else, the accused objected to such a relationship, but his son (PW-5) had a fight with him and at that time, said PW-5 hit him with a bottle on his head. Similarly, at that time, he was caught hold by the other family members and one of them stabbed him with a knife. Thereafter, he left the said house and went to Calcutta where his sister stays,

however, Goa Police came and arrested him on a false charge as he was opposing the relationship of the victim with another boy.

45. With this material, the learned Trial Court found that the case of Prosecution is proved beyond doubt though having minor discrepancies.

46. As rightly pointed out by Mr. Sawaikar that the points of determination are not in consonance with the charges, perusal of the points for determination on the internal page no. 5 of the judgment would clearly fortify such contention. Admittedly, the charge was framed only with regard to the alleged sexual assault in the year 2018. The points for determination are with regard to such sexual assault in the year 2018, but also speaks about the last such overt act in the third week of April 2019. However, since it was already observed earlier that failure to claim proper charges would not be fatal in the present case, the points for determination, which have not been properly framed, would not affect the accused in any manner and the same cannot be considered as prejudicial to the case put forth by the accused.

47. Since in this Appeal, it has been specifically argued that except the testimony of the victim, there is no other corroborative

evidence, the testimony of the other family members, cannot be believed together with the testimony of the victim and could be labelled as highly improbable. It is necessary to re-appreciate the evidence of the Prosecution witness to find out whether the charges are proved beyond all reasonable doubt.

48. Admittedly, the alleged incident took place in the house of the victim and the accused and that too in the presence of other family members. Apart from the victim and the accused, there are other four family members, who used to reside in the said house.

49. The composition of the house is found deposed by the witnesses and it is of much importance to refer to such deposition. Admittedly, the house is a small house and it consists of two rooms. The scene of offence panchanama is produced through PW-8, Suleman Shaikh, which is at Exhibit-27. The deposition of PW-8 shows that on entering the house, he saw one bedroom on the right hand side. There was one T.V. in the first room. He also saw the kitchen and by the side of the kitchen, there was another bedroom.

50. PW-6, who is the wife of the accused claimed that the room of her children is having a wall separating the hall. Thus, it is clear

that there are two bedrooms, a hall and a kitchen in the said house. According to PW-6, wife of the accused and the mother of the victim, the victim along with her sister/PW-4 used to sleep in one bedroom whereas other family members used to sleep in the second bedroom or in the hall. PW-6 also deposed that the accused was working on a night duty shift and he used to come home at around 02:00 hours. PW-4 i.e. sister of the victim claimed that she along with the victim used to sleep in one room, but separately. PW-2/victim admitted during cross examination that the rooms are adjacent to one another and if one calls from one room, it could be heard in the other room of the house.

51. With this material on record, which is clearly admitted by all the witnesses, the allegation against the accused that too during the night hours will have to be considered as probable or otherwise.

52. PW-2/victim claimed that she was sleeping in a separate room in the house whereas all other family members used to sleep in other rooms or hall. This statement of PW-2/victim is not supported by her sister (PW-4) and her mother (PW-6). The sister and the mother of the victim specifically deposed that the victim used to sleep along with PW-4 (sister of the victim) in one

bedroom. Thus, the contention of the victim that she had a separate room for her to sleep in the house is not supported by other witnesses including her sister and mother.

53. PW-2/victim would then claim that somewhere in the year 2018 and during the night time, the accused used to come to her bedroom, catch hold of her hands and had forcible sexual intercourse with her. First of all, in the complaint as well as her deposition, PW-2 did not disclose the date of the first such offence, even the month or the timings were not disclosed.

54. PW-6, the mother of the victim and wife of the accused deposed that the accused was working on night duty and used to return home at 02:00 hours. With this statement, the deposition of PW-2 will have to be looked into when she does not disclose the timing, the date or even the month of the alleged sexual assault in the year 2018.

55. PW-2/victim stated during the cross examination that she studied upto the 9th standard, but failed to complete her 10th standard. She also claimed that earlier, she was working in Bombay Bazaar situated at 18th June Road, Panaji and she can

speak and understand English. Thus, it is clear from this deposition that the victim is not completely illiterate. She completed her studies upto 9th standard and understands as well as speaks in English. This confirms that the victim also understands and recognizes the date, time and month so as to disclose about the alleged forcible sexual intercourse. It is difficult to accept that the victim who suffered such a gruesome acts, as alleged, by her and does not recollect the date, month and time of such similar attacks.

56. PW-2/victim would then depose that she used to shout when the accused used to sexually assault her, but not loudly. In the same breath, she states that the rooms are adjacent to each other in the house and if one calls from one room, it can be heard in the other room of the house. With this specific statement of the victim, it is highly improbable or unacceptable that the other members of the family though sleeping in the other rooms, were totally unaware of such acts of the accused. PW-4, the sister of the victim, specifically claimed that she used to sleep in the same room along with the victim, however, it is difficult to digest that she was totally unaware and did not witness such gruesome acts of the accused. The brother of the victim, PW-5 and the mother of

the victim, PW-6 also did not disclose anything which they found unusual during such nights.

57. The contention of the victim that the accused used to sexually assault her, even though she used to resist/shout was unnoticed by her own sister who used to sleep in the same room and other family members who used to sleep in the adjacent room is highly improbable. The statement of the victim that such an overt act which was done repeatedly by the accused in the year 2018 and that too without being noticed by other family members, again seems to be highly improbable when other family members used to sleep in the same house.

58. Apart from the statement of the victim about such acts of the accused, that too in the presence of her own sister sleeping in her own room, has not been supported by other witnesses. PW-4 though claimed that she was sleeping with the victim in the same room, but separately, did not utter a single word about such an incident. She only claimed that on 25.04.2019 when she returned home, the victim informed her that on many prior occasions, the accused had forcible sexual intercourse with her and threatened her with dire consequences.

59. It is not the case of the victim that such acts alleged against the accused were committed by him in the absence of other family members. It is her case that she used to sleep in a separate room whereas the other family members used to sleep in the hall or other bedroom. Such a statement of the victim has not been corroborated by other witnesses. In fact, PW-4 (sister of the victim) and PW-6 (mother of the victim) clearly deposed that the victim used to sleep along with PW-4 in one bedroom, Thus, the allegation of PW-2/victim that such sexual assault on her by the accused was committed in the house and in the presence of other family members is clearly improbable. It is not the sole act, but the contention of the victim is about repeated acts by the accused.

60. Mr. Sawaikar would submit that the statement of the victim was recorded under Section 164 of Cr.P.C. by the Magistrate which is placed at Exhibit-16. He would submit that the contents of the said statement are totally different and contrary to the complaint lodged by PW-2/victim. He further submits that except for showing her statement during her examination in chief and marking it as Exhibit-16, the contents of such statement are not proved at all. He would submit that in the statement of the victim recorded under Section 164 of Cr.P.C, there is absolutely no allegation against the accused in connection with forcible sexual

assault on the victim in the year 2018. He also claimed that such a statement speaks about an attempt to commit the sexual assault on 25.04.2019, but nowhere refers to the last sexual assault in the third week of the month in which the complaint was made, as found in the complaint.

61. The cross examination of PW-2/victim would go to show that certain contradictions have been marked in connection with her statement under Section 164 of Cr.P.C. It is an admitted fact that the Magistrate, who recorded her statement, was not examined. Therefore, the accused had no opportunity to put such contradictions to the Magistrate. Be that as it may, the crucial contradiction is the admission of PW-2/victim wherein she stated as under:

“I had not stated in my 164 statement that the accused had sex with me without my consent in the year 2018.”

62. On perusal of the statement recorded under Section 164 of Cr.P.C., which is at Exhibit-16, it is clear that such statement is clearly contrary to her own complaint, deposition as well as her cross examination. The victim admits that she did not disclose to the Magistrate about any forcible sexual assault on her by the accused in the year 2018. Once, the witness admits that no such

statement was made, the contradiction stands proved. Admittedly, the statement recorded under Section 164 of Cr.P.C. is a previous statement. Thus, Section 145 of the Indian Evidence Act stands attracted wherein it is stated that a witness may be cross examined as to the previous statements made by him/her in writing, without such writing being shown to him/her, or being proved, but, if it is intended to contradict him/her by the writing, his/her attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

63. The wording in the above section is very material, which shows that the witness could be cross examined as to the previous statements recorded in writing, without such writing being shown to have been proved. Once such a question is put in the cross examination, the witness if admits to such a contradiction, there is no need to draw the attention of such a witness for the simple reason that by admitting such a question, the witness knows what he/she stated in the said statement.

64. In the case of **V.K. Mishra & Another Vs. State of Uttarakhand & Another, (2015) 9 SCC 588**, the Apex Court considered in detail the provisions of Sections 145 and 155 of the

Evidence Act and after quoting the section itself, observed in paragraph 19 as under:

“19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement

was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.”

(Emphasis supplied)

65. With the above observations of the Apex Court and applying them to the facts of the present matter, it is clear that the victim in her cross examination clearly admitted the contradiction in her statement under Section 164 of Cr.P.C., wherein she claimed that she did not inform the Magistrate that she was sexually assaulted by the accused in the year 2018. Such a statement under Section 164 of Cr.P.C. was recorded on oath. Thus, at one stage, the victim claimed that she was sexually assaulted on various occasions by the accused in the year 2018, but while recording the statement before the Magistrate, she did not utter such words or allegations against the accused. Accordingly, such admission on the part of the victim during her cross examination is itself a contradiction which has been proved. There was no need to invite her attention to such a statement. Inviting the attention of the witness is necessary and mandatory when the witness denies of making such statements. However, when the witness admits, there is no need

to invite his/her attention in order to give him/her an opportunity to explain. PW-2/victim admitted that she did not disclose to the Magistrate while recording her statement under Section 164 of Cr.P.C. that the accused had sex with her in the year 2018. The witness knows what statement she is making and therefore, the observations of the learned Trial Court that contradiction has not been proved as the witness was not confronted with the statement, is contrary to the law laid down by the Apex Court as well as the intent of the legislature under Section 145 of the Indian Evidence Act.

66. Mr. Sawaikar would be right in contending that the learned Sessions Judge brushed aside such major contradictions on the ground that it was not properly proved. In fact and as disclosed above when the witness admits that she did not disclose a particular aspect to the Investigating Officer or to the Magistrate while recording her statement under Section 161/164 of the Cr.P.C., nothing remains to be proved further. If the witness denies, then only, the attention of such witness has to be drawn to the portion of the statement and after giving the opportunity to explain, contradictions/omissions need to be marked. Thereafter, such contradictions/omissions could be proved through the Investigating Officer and only thereafter, it could be used against

the witness as a contradiction. However, when the witness admits that though she claimed in the Court a particular incident, it was not disclosed to the Investigating Officer or to the Magistrate while recording her statement, has to be considered as contradiction/improvement in her statement before the Court as proved. There is no question of further explanation from the concerned witness.

67. Mr. Sawaikar was right in pointing out paragraph 55 of the judgment wherein the learned Sessions Judge observed that the witness has stated in her statement recorded under Section 164 of Cr.P.C. that she was being raped in the third week of that month and that the same has been corroborated directly in her complaint and subsequent to that in her statement in the Court, is perverse finding.

68. The deposition of PW-2/victim as disclosed earlier in detail, would go to show that what she has deposed about the sexual assault is only of the year 2018. Such deposition is so cryptic that no specific details of the date, time or month and on how many occasions such acts were performed are not elicited from the witness. She only deposed that in the year 2018 during night time, the accused used to come to her bedroom, catch hold of her hands

and have sex and thereafter, used to threaten her. There is absolutely no reference to such acts by the accused in the year 2019. What she stated about the year 2019 and prior to filing the complaint is that on 25.04.2019, the accused came to her bedroom, caught hold of her mouth and tried to have sex with her forcibly, however, she pushed him and at that time, the accused threatened to kill her. The next morning, she disclosed about it to her sister as to what happened on the previous night and accordingly, they told their brother (PW-5). Thus, in the chief examination itself, PW-2/victim did not support her own complaint or statement recorded under Section 164 of Cr.P.C. in connection with any sexual assault in the third week of the same month, in which, the complaint was filed.

69. The complaint was lodged on 28.04.2019. She claimed that on 25.04.2019, there was only an attempt on the part of the accused to commit forceful sexual intercourse. Admittedly, there is no charge framed against the accused with regard to such an attempt to commit the offence under Section 376 of IPC. The statement of the victim under Section 164 of Cr.P.C. produced at Exhibit-16 also speaks only about the attempt on 25.04.2019. However, she admits during cross examination that there is nothing in her statement under Section 164 of Cr.P.C. stating that

the accused had sexual intercourse without her consent in the year 2018. Thus, the findings of the learned Sessions Judge in paragraph 55 that there is corroboration, is clearly perverse and against the record.

70. It has been claimed by the learned Counsel for the Appellant that there is a delay in lodging the FIR and that no proper explanation is coming forth for such delay. It is submitted that the accused was assaulted by PW-5 and other family members, which he was about to report and lodge a complaint and therefore, the present FIR is lodged only to falsely implicate the accused.

71. The complaint filed by PW-2 was on 28.04.2019 and Crime No. 70/2019 was registered at around 02:00 hours on 28.04.2019. The last incident i.e. the attempt as alleged was on 25.04.2019 at around 2:00 hours. Thus, the complaint was lodged after three days. There is no explanation as to why the complaint was lodged after three days. However, PW-2 in her deposition on page 2 claimed that there was a delay in filing the complaint as the accused had ran away to his native place and they were looking for him. This reason given by the victim for delay in lodging a complaint is not a plausible reason for the purpose of filing the complaint after three days. Such an explanation clearly go to show

that the complainant/victim only waited for three days as the accused ran away to his native place and for no other reason.

72. In the case of **Thulia Kali Vs. the State of Tamil Nadu, (1972) 3 SCC 393**, the Apex Court considered the delay in lodging the FIR and whether it would be safe to rely on such a detailed report. It is no doubt true that the matter before the Apex Court was in connection with murder. However, the concept of delay in lodging the FIR has been culled out. The FIR is an extremely important and valuable piece of material for the purpose of corroborating the oral testimony adduced during the trial. The object of insisting for reporting the report at the earliest to the Police is merely to obtain early information regarding the circumstances in which the crime was committed, the actual culprits and the part played therein. The delay in lodging the FIR often results in embellishment which is a creature of afterthought. On account of the delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in with the introduction of a coloured version, exaggerated account or concocted story, as a result of deliberation and consultation. Thus, it is, therefore, essential that the delay in the lodging of the FIR should be satisfactorily explained.

73. In the case of **Ramdas & Others Vs. State of Maharashtra, (2007) 2 SCC 170**, the Apex Court while dealing with the aspect of delay in reporting FIR observed in paragraph 24 as under:

“Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of

occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are case where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No straitjacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the

circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (see Pandurang and Others Vs. State of Hyderabad, AIR 1955 SC 216). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.”

74. In the present matter, except for one sentence by the victim that they did not lodge the FIR immediately since the accused ran away to his native place, there is no plausible explanation coming forward for such delay. Thus, the aspect of delay cannot lightly be brushed aside in view of the specific defence by the accused and the evidence laid by him as DW-1. While considering the defence the aspect of delay in lodging the FIR will have to be taken into account.

75. The material placed on record would clearly go to show that the entire case of the Prosecution rests on the testimony of the victim. The medical evidence as discussed earlier, though, suggests some sexual intercourse, there is no specific injury to prove about recent forceful sexual intercourse. This again will have to be considered with the defence raised by the accused and certain

admissions of the witnesses, which show that the victim was in a relationship with one boy and the accused being her father was against it.

76. On appreciation of evidence of PW-2, it is clear that her testimony is not at all reliable, consistent, cogent and more so to award conviction on her sole testimony. The proposition that the conviction could be awarded on the sole testimony of the victim is no doubt true, however, it is also necessary to consider that such testimony of the victim must be of sterling quality. If there are contradictions/omissions, material to the aspect and testimony is so cryptic that it cannot be believed with the other evidence, it is highly unsafe to rely only on the testimony of the victim.

77. In the case of **Santosh Prasad @ Santosh Kumar Vs. State of Bihar, (2020) 3 SCC 443**, the Apex Court while dealing with the question as to when can a conviction be passed solely relying upon the evidence of the prosecutrix, relied upon the earlier decision in the case of **Raju Vs. State of M.P., (2008) 15 SCC 133** and **Rai Sandeep Vs. State, (2012) 8 SCC 21**.

78. In the case of **Raju** (supra), the Apex Court observed that it cannot be lost sight that rape causes the greatest distress and

humiliation to the victim but at the same time, a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication. It must be borne in mind that the broad principle is that an injured witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. It is well settled that the prosecutrix is considered to be an injured witness.

79. In the case of **State of Punjab Vs. Gurmit Singh, (1996) 2 SCC 384**, the Apex Court observed that though the amendments to IPC and Evidence Act were incorporated with regard to the presumption, it is observed that it is significant that in case of rape, the evidence of prosecutrix must be examined as that of an injured witness whose presence at the spot is probable, but it can never be presumed that her statement should, without exception, be taken as the gospel truth.

80. In the case of **Rai Sandeep** (supra), the Court was considering the phrase “sterling witness”. In that context, the Apex Court observed that a sterling witness means a very high quality and calibre version of a witness, who is unassailable and

such a statement would have consistency right from the starting point till the end i.e. from the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the Prosecution qua the accused. Such a witness should be in the position to withstand the cross examination of any length and under no circumstance should give room for any doubt as to the factum of the occurrence. The witness must inspire confidence and should appear to be trustworthy, unblemished and of sterling quality.

81. Applying such proposition to the matter in hand and on re-appreciating the deposition of PW-2, PW-4, PW-6 and other witnesses, it is clear from the record that the allegations made against the accused and the manner in which the alleged acts were committed during night time and that too, in the presence of other family members are highly improbable. It is difficult to digest that in the presence of PW-4 i.e. the sister of the victim, the accused was performing such gruesome acts and unnoticed by her/PW-4. Similarly, it is also difficult to accept that even though, the victim used to shout, the mother and brothers sleeping in other rooms were totally unaware of such acts. Thus, the cryptic deposition of PW-2 and contradictions as discussed earlier makes the said witness as the most unreliable and untrustworthy witness

and therefore, her testimony alone could not have been accepted by the learned Sessions Judge for the purpose of awarding the imprisonment.

82. Apart from this, there is other material to show that the probable defence raised by the accused is more acceptable since the fact that PW-2/victim was in a relationship with some boy which the accused did not accept. There is also an admission on the part of PW-2 during cross examination that her brother (PW-5) assaulted the accused with a glass bottle after her sister (PW-4) told her brother (PW-5) about the incident on 25.04.2019, though she denied the suggestion that prior to lodging of the complaint by the victim, the accused was supposed to make a complaint against said PW-5. She showed ignorance about the fact that the accused was assaulted on the back with a knife by her elder brother.

83. PW-1 Dr. Andre Fernandes, who examined the accused found one stitched incised wound about 7 to 10 days old on the left outer aspect of the mid-torso upper end. The report of Dr. Andre Fernandes produced at Exhibit-12, revealed that the accused disclosed to him that he was stabbed by his family members. The examination of the accused was on 08.05.2019 and the opinion

again by Dr. Andre Fernandes that the injury was 7 to 10 days old would clearly relate back to 25.04.2019.

84. PW-4, the sister of the victim during her cross examination specifically deposed that her sister/victim got married about four months back as she was in love with the said boy. Though she denied the suggestion that her brother (PW-5) assaulted the accused, it is clear from the statement of PW-4 that the victim was in a relationship with one boy with whom she got married subsequently and the accused was against such relationship.

85. PW-5 denied the suggestion that he assaulted the accused with a glass bottle and knife, however, PW-6 i.e. the wife of the accused and the mother of the victim admitted that the accused had some injury, but she showed ignorance as to what happened between the accused and her son (PW-5). She admitted during cross examination that prior to the incident, the accused was contributing for the maintenance of the house.

86. The accused stepped into the witness box and claimed that he was the sole earning member in the family whereas his son (PW-5) was not contributing anything. Said (PW-5) was not answering properly to the questions of the accused. He used to

back answer the accused as well as abuse him. The relationship between the accused and PW-5 was completely strained. He claimed that he had gone to see one groom for his daughter (victim) and at that time, the victim disclosed that she was in love with someone else. With this material on record, the probability of the victim filing a false complaint against the accused cannot be ruled out for the simple reason that the accused was against the relationship of the victim with one boy. Besides this, the other evidence on record shows that there was some assault on the accused due to which he sustained injuries. Even though, he did not file any complaint, it has been rightly pointed out by Mr. Sawaikar that since the assault was by his son, though stepson, the accused decided not to file such a complaint in order not to spoil his life. The probability of such a thing by the accused being the father cannot be just brushed aside. Be that as it may, the evidence of the prosecutrix is not reliable, convincing and more so, believed solely for the purpose of holding the accused guilty.

87. In sum and substance, the material which is brought on record during the trial is not at all sufficient evidence to hold the accused guilty as it consists of improvements, contradictions and omissions as well as the fact that the allegations are highly improbable.

88. The impugned order, therefore, needs interference. Hence the following order:

O R D E R

- (a) The Appeal is therefore allowed.
- (b) The impugned order is hereby quashed and set aside.
- (c) The Appellant stands acquitted by giving the benefit of doubt.
- (d) The Appellant be set at liberty at once, if not required in any other offence.

89. The Criminal Appeal stands disposed of in the above terms. Pending Criminal Miscellaneous Application No. 863 of 2023 (F) also stands disposed of.

BHARAT P. DESHPANDE, J.

VAIGANKAR
ESHA SAINATH

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