

(1974) 09 BOM CK 0013

In the Bombay High Court

Case No : Criminal A. No. 258/72 with Cri. A. No. 51 /73

Bhimrao Harnooji Wanjari

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-09-1974

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66(1)(b), 85(1)(3)
Criminal Procedure Code, 1973 (CrPC) — Section 361, 366, 90
Penal Code, 1860 (IPC) — Section 323, 375, 376

Citation : (1975) MhLj 660

Hon'ble Judges : V.S. Deshpande, J;B.A. Masodkar, J

Bench : Division Bench

Advocate : G.V. Kalikar, for the Appellant; M. M. Qazi, Addl Govt. Pleader, For State, for the Respondent

Final Decision : Dismissed

Judgement

B. A. MASODKAR, J.—The accused Bhimrao son of Harnooji Wanjari, a police constable, stood charged for having committed rape on one Tulsabai (P. W. 2) at about 5 P. M. on March 12, 1971. near village Shjvangaon within the limits of Nagpur town, and having caused voluntarily hurt to two ladies Jaiwantabai (P. W. 5) and Shashikala P. W. 6) respectively and having found drunk contrary to the inhibitions of section 66 (1)(b) and section 85 (1)(3) of the Bombay Prohibition Act. He stands acquitted of the offence u/s 376 of the Indian Penal Code while has been found culpable u/s 323, Indian Penal Code as well u/s 66 (1) (b) and section 85 (1) (3) of the Bombay Prohibition Act. For these offences, he has been convicted and sentenced to rigorous imprisonment for one year, rigorous imprisonment for six months and a fine of Rs. 1,000 or in default R, I, for the month and further to a fine of Rs. 200 or in default R. I. for seven days, respectively.

2. The accused has appealed against the judgment of conviction and sentence, while the State has appealed against his acquittal of the charge u/s 376 of the

Penal Code,

3. It appears that the present accused Bhimrao was deputed on duty along with P. W. 7 Digambar, while he was attached as police constable to Sonegaon Police Station on March 11, 1971. They went, to village Jaitala on duty on that day and on the next day, i.e. the day of the incident, i.e. March 12, 1971, left Jaitala to come back to report to the Police Station at Sonegaon. It is the case of the prosecution that the present accused Bhimrao consumed liquor and was behaving in a manner completely disorderly, when they reached nearby the Airport area, which is shown in Exh. 5 the map of the locale. There is a suburb village, Shivangaon and the Police Station is attached to it. These two police constables, i. e., accused Bhimrao and P. W. 7 Digambar, started at about 4.30 P. M. from Shivangaon to go to Sonegaon Police Station and were riding on bicycles. While they were passing by the road, it is the prosecution case, that, near about the Airport's area they came across three women who were picking firewood near about the area of the Mr-field. Accused Bhimrao is said to have accosted these women by asking them to which village they belonged and further by directing abuses and saying that the persons from Shivangaon were all scoundrels and they should be arrested and kept behind bars. Followed by these abuses and threats, the accused is said to have taken a stick and given beating to two of the ladies, Jaiwantabai and Shashikala, who tried to run away from the spot. The accused chased these ladies and it is alleged that they were brought back towards the strip portion of the road nearby a square. One Janba (P. W. 8) was going on cycle at the same time with a bundle of grass and the accused is alleged to have scolded him too and he was allowed to go after remonstrations. The accused took all the women towards the Air-field side and made two of the ladies, i. e. Jaiwantabai and Shashikala, to sit at a distance, which is presumably shown by point No. 4 in Exh. 5, and asked Tulsabai to go and fetch Janba, the person who had left on cycle. Though Tulsabai was unwilling, the accused made her to go and as soon as she had gone for a short distance, he followed her. It is the further case of the prosecution that accused forced Tulsabai down near Hiwar-tree by the side of the road and had forcible intercourse against her will. The two ladies, Jaiwantabai and Shashikala, appear to have expressed their anxiety and, therefore, they started going towards the side by which Tulsabai had gone. Digambar, who was with the two ladies, went ahead and gave a call to the accused and thereupon Tulsabai and accused came to the road. Tulsabai was at that time weeping and she disclosed immediately that she was subjected to rape by the accused. People assembled and the accused wanted to run away from the spot, but people chased him and eventually he was arrested by P. W. 13, P. S. I. Kolwadkar. The report at Exh. 7 was immediately lodged by Tulsabai and it was duly recorded. Seizure of her clothes was effected as per Exh. 12. Both the accused as well as Tulsabai and other two ladies were sent for medical examination and the reports thereof were obtained. Blood was collected from the body of the accused and the report of the Chemical Analyser was also obtained. That report, Exh. 10, showed that there was alcoholic concentration to the tune

of .092% in the blood collected from the accused. Spot Panchanama Exh. 13 was drawn next day.

4. On these allegations and material, the charge was put up.

5. The main evidence in support of the charge for rape comes from the victim P. W. 2 Tulsabai and her two lady companions P. W. 5 Jaiwantabai and P. W. 6 Shashikala who were admittedly present at the place of occurrence. P. W. 7 Digambar who was on duty and accompanying the accused Bhimrao has also been examined. Medical evidence as far as the examination of the accused and the victim is that of P. W. 11 Dr. Bankar and P.W. 12 Dr. Seema.

6. Before we deal with the evidence of these material witnesses, we may indicate that the stand taken by the accused in his statement was, firstly, as far as the rape was concerned, to be one of total denial and as far as the other as well of alcoholic offences were concerned, was one of an explanation. He examined D. W. 1 Ruprao to explain his stand.

7. P. W. 2 Tulsabai states that she is a resident of Shivangaon since about a year and she is a lady of the family having two issues, one daughter and one son. She lives" with her husband and children. The family appears to be that of labourers. Her son goes to school. It was on the next day of Shimga festival, at about 3 P.M., she herself in the company of Jaiwantabai and Shashikala, had gone to pick up firewood stumps and all of them were nearby the Nagpur-Road when they met two police constables. They were in their official uniforms. Out of them a man who was of short stature accosted Jaiwantabai as to which village she belonged. Then he began to hurl abuses by saying that persons from Shivangaon were all scoundrels and they should all be kept behind the bars. That police then picked a small stump from Jaiwantabai's hand and beat her on her thigh as well as on her arm and elbow. Being afraid, all the three began to run, but the fellow chased Shashikala and beat her by that stick and also Tulsabai. Her bangles were broken due to beating. The accused took all of them towards the square portion of the road and while they were at that place, one Janba of Shiwangaom came riding on a bicycle and was carrying grass. The short statured police i. e. accused stopped him too and remonstrated Janba, It was the other companion police Digambar who pleaded that all of them should be allowed to leave the place without any obstruction. However, the accused refused and took all these ladies towards the Air-field side and asked Jaiwantabai, Shashikala and other constable, i. e. Digambar, to sit at a distance and directed Tulsabai to fetch Janba. She was unwilling, but the accused beat her and also threatened her and therefore she went by the road to call Janba. The accused immediately followed her and caught her from behind. She raised shouts, but the accused pressed her mouth. He took her at a short distance from the road under a Hiwar-tree and in that process she sustained an injury to her knee. He felled her down and pressed her mouth whenever she cried. He eventually ravished and committed rape on her by untying her saree. He was threatening that if she tried to raise a shout, he would stab her and in that he had actually made some gestures by putting his hand in

the pocket. The accused committed full act of intercourse and there was discharge of semen. The witness states that while the sexual act was going on, another constable Digambar came there and questioned accused Bhimrao as to why he was committing that act and gave a call that her husband was coming. Upon that the accused left her and she started to come towards her village. According to her, the accused disclosed his name as Bhimrao and also forced her to tell her name at the time of sexual act. She did this out of fear. The accused dressed up, and it was Digambar who then remonstrated him, though the accused beat Digambar even at that time. Later on Digambar brought the witness and the two Women upto the . road and the witness says that she disclosed the incident to these women immediately. Jaiwantabai raised shouts and began to weep. That is how people assembled there and the accused ran away leaving his bicycle there. Police came and they were all taken to Police Station. She gave the complaint Exh. 7. She states that the accused was smelling of alcohol. She was taken from Police Station to the Hospital along with Jaiwantabai and Shashikala for medical examination. Accused was also brought to Police Station and sent for medical examination. She identifies both accused Bhimrao and Police Constable Digambar who were shown to her in a parade.

8. In the cross-examination, attempt is made to indicate that she may be exaggerating the version and further that she had not sustained any injuries. It is not suggested throughout her cross-examination that at any Point of time she was knowing Bhimrao earlier to the day of the incident nor it is suggested that she was of loose character. We may briefly notice the cross-examinations. She is not shaken as to her purpose of going to that side which was collection of fire wood. As to the position of Hiwar-tree, she states that it is away by 50 feet from the cement concrete road, and the earth is not even near the Hiwar tree. Shashikala is related to her being sister's daughter and Jaiwantabai is sister of her husband. It was suggested to her that both Digambar and accused were drunk, which she has denied. It was suggested to her that the snatching of the stick was done by Digambar and it was he who beat Jaiwantabai and others, which she denies. She asserts that it was accused who beat by means of a stick even on her right hand and right leg and her bangles were broken. She has stated to the police that the bangles from her left hand were broken, but in the Court she says that bangles from her left hand were not broken. She identifies the stick, which is shown to her in cross-examination, as Article 4. It was suggested to her that while she was attempting to run away her leg got involved and she fell down and that is how she sustained an injury on the right hand, which she denies. She however admits that they tried to run in three different directions for a short distance but asserts that accused chased them all, while Digambar was standing at one place. She says that one Maniram came there hearing her shouts, though she did not tell Maniram that he should take them away to secure place. She has stated before the committal Court that the accused had told her to call a man who was cutting grass at a distance of 100 feet. The witness says that this was not said so by the accused. She states that

neighbouring persons from the land had assembled there and accused was asking her to go to call the person. She did not tell Digambar to go and call the person. The other two companions of hers were made to sit at a distance of about one rope from the wire fencing and Digambar was there. She had protested for going alone to Jaiwantabai and even asked her to accompany. While she was going, at a distance however of about 25 feet, as she could see the accused came from behind and caught her, and from that place she could not see the other two women nor the other constable. Accused had caught her in both his arms from behind and took her in that position to Hiwar tree. She had raised the shouts but immediately the accused had pressed her mouth. She had tried to free herself. She did not however scratch or bite Accused eventually felled her down under the Hiwar tree by force. Though she was trying to get up, he pressed her down and when she was trying to raise shouts, accused was trying to gag her by means of placing his hand. She goes on to assert that there were scratches and abrasions on the two arms and back as well portion of her legs. However, she had not shown those injuries to the lady doctor. At the time of intercourse, accused had taken out his pant and kept it aside and there was no underpant on his person. She had not herself loosened her sari and she described in cross-examination that whenever she used to raise shouts accused used to put his hand on her mouth. She had not pushed the accused by means of her legs when he sat on her chest nor scratched his face or any part of the body and, she says, she had no such courage to do. She did not catch nor pull his hair, though she asserts that there was a scuffle between accused and herself. The accused had complete intercourse once at that time and she puts the Time lag between 15 to 20 minutes. Some variations from her statement Exh. 7 is put to her as a contradiction because she asserted that there was only one intercourse while giving evidence in the Court. In Marathi, in which language Exh. 7 has been taken down, the rendering is that there was only one intercourse and probably the numerals "2 or 3" are referable to the jerks. Thus there does not appear to be any material contradiction between her version in the Court and that given in Exh. 7. As to the stains of semen she asserts that her sari got those stains. She had not seen any knife with the accused nor had told the accused that she would prefer death at his hand rather than yield to his overtures. She denies that she is tutored by the police in respect of the story of threats by knife She denies that she is telling Falsehood at the instance of police constable Digambar. She denies beating by Digambar so also alleged apologies said to have been tendered by Digambar. She admits that accused and Digambar were asking them not to disclose the incident of beating and they should ignore. She denies that Digambar had told her that he would satisfy her and she should not disclose anything about the beating.

9. We have extracted almost verbatim the entire cross-examination, for much emphasis was laid by the learned counsel appearing for the accused on that part of the version of Tulsabai as to the actual act of accused Bhimrao and inferences in his view that should be drawn from those facts. It was submitted that the way

in which narration has been made by Tulsabai is full of exaggerations and improvements and she is not worthy of credence. It is submitted that her story of shouts of having sustained injuries is not supported by other evidence and hence her consent to the sexual act should be assumed.

10. We will Examine this criticism after considering the other evidence on record and its effect on the present case along with other submissions. Suffice it to say here that if we accept the evidence of P. W. 2 Tulsabai, it clearly indicates that Bhimrao and Digambar, both police constables, had accosted when she was in company of two ladies and Bhimrao had created a row and made a show of his own prowess by beating, abusing and threatening. In fact they were chased, brought back, two of the ladies were made to sit away at a distance and Tulsabai was asked to leave the place on the pretext of calling Janba and while she was going towards the lonely road, the accused had pursued her and ultimately ravished her. She had only a minor injury on the right knee. It appears that there had been full and complete intercourse committed by the accused, as she says, inspite of her effort to resist and inspite of her attempt to get away. Her oath is that she was not at all willing nor had subjected willingly to that intercourse. In fact she was subjected to threats, preceded by the acts of beating both Jaiwantabai and Shashikala. In other words the evidence of Tulsabai is that she was neither willing nor consenting party to the act of the accused and in fact she was coerced and forced in it. It is true that her attempt in Court to say that she suffered injuries or did in fact struggle, appear not acceptable and has marks of exaggerations.

11. Evidence of Jaiwantabai (P. W. 5), who is a lady of about fifty years of age, is clear and categorical on the material matters involved in the trial. She states how three of them had gone on the next day of Shimga festival for picking up fire-wood and how they came across the two police constables. She was questioned by one of them about her whereabouts and purpose of going by the road and she having said they were from Shiwangaon and were collecting fire-wood. That police constable then had threatened them that he would put them in custody for the men and women from Shiwangaon were scoundrels. Jaiwantabai says that she protested by pointing out that they had not committed any crime and carried on her work of picking up firewood. Constable Bhimrao, i. e. the accused, took one stick from her hand and began to beat her. She identifies him. She began to run along with the other two women and the accused chased them. He also beat Shashikala. The accused then asked them to go to the Police Station, as he wanted to put them under arrest. Other constable companion intervened and remonstrated the accused. Tulsabai was beaten and her bangles broken. One Janba was seen by her going towards village side carrying a bundle of grass and accused stopped him and scolded him but let him off. The accused then took all the three by the side of the road at some distance nearby the wire fencing. He asked Jaiwantabai and Shashikala to sit there along with the other constable and asked Tulsabai to go and fetch Janba. Tulsabai was refusing to go alone but the accused threatened her. Thereafter Tulsabai went by the road to fetch Janba. She

might have gone some distance and the accused followed her. The witness could not thereafter see the accused nor Tulsabai from the place where she was made to sit. After sometime they became anxious as to why Tulsabai had not returned and therefore started to go by the road when Digamber went ahead of them bicycle, and gave a call to the accused saying what he was doing and that the husband of Tulsabai had come. The accused, Tulsabai and Digamber thereafter came towards them. Tulsabai immediately told her that the accused had subjected her to rape. Digamber scolded the accused and, it appears, he took the three ladies towards the road. Meanwhile, people assembled and the accused who was following them even tried to scold people. People tried to beat the accused who later ran away. Police then came and all the three were brought to Police Station, Sonegaon. Afterwards accused also similarly was brought by the police. Their statements were immediately recorded and they were sent for medical examination.

12. In cross-examination some other names of persons appear to have been introduced having met them on the road, one by name Bandyia who, the witness say, had come on bicycles. Bandyia and one Bhima had come on one cycle, Bhima being the name of the persons owning the bicycle, i. e. the accused. She is unable to say whether both the constables were drunk. When they were being beaten, constable Digamber was just behind at a short distance. She says that accused had asked that Bandyia about them. She denies however that Bandyia was present when the beating was going on. As soon as the beating began, she says, they began to run away. She denies about Maniram, Janba and others assessembling there. They had gone about half a field while the accused chased them and got them back. She says that she was given two blows by means of a stick and her bangles too were broken. Tulsabai, when she was asked to fetch Janba, was saying that she would not go to fetch him unless they two accompanied her but the witness did not go nor asked Digamber to accompany her. Tulsabai left the place but at that time Janba was not visible. Accused was asking Tulsabai to go to the village and fetch Janba. Digamber did not snatch away the stick from the accused's hand though he was orally protesting. The period of 10 or 15 minutes had lapsed before she met the Accused and Tulsabai again. She is sure that immediately, Tulsabai had made the disclosure about rape nearly the strip, i. e. the spot where they met by the side of the road. She denies the suggestion that she was deposing falsely at the instance of Digamber. She had stated before the police that Bhimrao was drunk and was smelling of alcohol which she does not accept while giving evidence in Court. She denies the suggestion that she is telling falsehoods.

13. Briefly stated, evidence of Shashikala is on the same line. The accused, according to her, had addressed abuses by calling names to the persons of Shiwangaon and had given beatings on the hand of Jaiwantabai and also beat her by means of a stick. Accused had chased all of them and in that process had beaten Shashikala on thigh and waist portions. They were all taken towards the Aerodrome road. The accused did not allow them to go by Nagpur road. She also

narrates about Janba's going by the road and accostations by the accused to him. She further says that the accused made them both i. e. Jaiwantabai and herself sit along with police constable Digamber nearby the road of Aerodrome and asked Tulsabai to go and fetch Janba. First Tulsabai was refusing to go alone but ultimately she consented due to threats given by the accused. As soon as Tulsabai left, Bhimrao followed and they could not be seen for some time. She and Jaiwantabai were sitting away as time lapsed. They became anxious and as they were starting to go Digamber went ahead on bicycle. They heard Digamber saying that what Bhimrao was doing and that the husband of Tulsabai had come. Meanwhile accused and Tulsabai were seen coming. As soon as Tulsabai met them near the Nagpur Road, she disclosed that accused Bhimrao had committed rape on her and she began to weep and people assembled there. A police van came and she saw that accused began to run away. They were all taken in the police van to the Police Station. Accused was also brought along with them to the Police Station.

14. In cross-examination, some variations are brought out from her police statement with respect to the position of the three ladies when they were picking up fire-wood and when they met the two police constables. She says that there was a road-roller near the slip, i. e. the strip portion of the road, and the road was under repairs, but there were no labourers working; that accused Bhimrao was ahead and Digamber was following him; that she was not aware whether both of them were drunk or not. At the time while the beating was going on, she says that they met Janba on the road. She denies that they were running away in different directions. She did not tell Janba that the accused had beaten them. She had not told Tulsabai not to go and fetch Janba nor told Digamber to accompany Tulsabai. She is sure that when Tulsabai had gone about a distance of 50 feet the accused left and followed her. She gives the estimate of half an hour as the time after Tulsabai left and again met them. Even in cross-examination she states that Tulsabai had immediately disclosed the incident of rape and she asserts that bangles of Tulsabai had broken near the slip. She denies that she is deposing falsely at the instance of Tulsabai. This is all the cross-examination of Shashikala. On material points no challenge is given as to the behaviour of police constable Bhimrao, his threats, his abuses, his remonstrances and making them sit away at a nearby place near the wire fencing and following Tulsabai when she was asked to go and fetch Janba.

15. These three witnesses clearly bring out that on March 12, 1971, they were accosted by these two police constables, i. e. accused Bhimrao and P. W. 7 Digamber, who were in their uniforms; that Bhimrao had threatened them and used a stick for beating both Jaiwantabai and Shashikala and also Tulsabai; further that after bringing them back by a brief chase it was he who made P. W. 5 Jaiwantabai and P. W. 6 Shashikala to sit away at a place near the wire fencing there, it was he who had commanded Tulsabai to go and fetch Janba which appears to be a ruse and as soon as she left alone, he followed and subjected her to intercourse nearby a Hiwar tree. The other police companion as if was

kept back to guard other two ladies. It is further clear that as Tulsabai did not return for some time these two ladies became restive and other police companion went ahead and gave a call to accused in the name of the husband of Tulsabai. That was heard by both Jaiwanti and Shashikala who narrate that after they met Tulsabai nearby the road the latter had disclosed about the rape and found her in tears. Her protestations or shouts were not heard by the other two ladies which fact does not affect the core of her case which is fully supported by the other two witnesses. No doubt, the evidence of P. W. 5 Jaiwantabai and P. W. 6 Shashikala does not disclose any hearing of the cries or shouts of Tulsabai.

16. Tulsabai's version is further reflected in the police report Exh. 7 and that by itself lends support to her oath that she was not nor could be a willing party to the intercourse to which she was subjected by accused Bhimrao. It is unnecessary to refer in detail to the complaint Exh. 7. Suffice it to say that it was a record made by P. W. 13 Kolwadkar, the Investigating Officer, immediately on reaching the Police Station at about 7.30 in the evening. Further Tulsabai was subjected to intercourse is also borne out by her medical examination conducted by P. W. 12, Dr. Seema. She states that Tulsabai was referred to her for medical examination and she examined her at 1.30 A.M. on 13-3 1971 and she had found mark of an injury on left knee along with an abrasion. She had not found on local examination any mark of injury. She had found cervix and vagina healthy and had also taken vagina smear for evidence of presence of sperms. She did not find evidence of forcible intercourse. Vaginal smear was taken and referred for pathological examination by her. That showed the presence of spermatozoa (Exh. 30).

17. P. W. 11 Dr. Bankar had examined the accused as well Jaiwantabai and Shashikala. He found contusions two in number on the right thigh, lower part, of Jaiwantabai and also found contusions on thigh left mid part of Shashikala and multiple contusions on the left side chest upto lower part and multiple abrasions superficial on the left elbow region. As to the examination of accused Bhimrao, he found that his general condition was good; that he had an abrasion on the left knee and he was of the opinion that the accused might have performed the sexual intercourse within 6 to 12 hours. He issued certificate Exh. 25. Accused was smelling of alcohol, his speech was incoherent, gait unsteady and pupils were dilated. He had consumed liquor, in his opinion. He collected sample of blood by taking it from the venous side without applying any spirit and put it in a phial containing citrate powder and got it sealed in his presence and made a requisition Exh. 27. He was asked about the medical preparations containing alcohol as a prescription for stomach ache. He mentioned one Livogeon as a liver tonic ; but he asserts that that does not give any smell of alcohol. As to the tablets "fersolate", they did not contain alcohol. He was asked about alcoholic coma and about .092% of alcohol and he says that that may not produce any intoxication in the person. He denies the suggestion that his certificate has been mechanically given. He proves the injury reports of Jaiwantabai at Exh. 23, of Shashikala at Exh. 24 and the medical examination report of the accused at Exh.

25. Exhibit 27 is the report regarding the collection of blood at 12.45 A.M. on 13-3-1971. This evidence also goes to support the say of Jaiwantabai and Shashikala about the incident and involves the accused.

18. There is evidence of Digambar the other police companion returning from duty along with accused and that may now be referred. We cannot but observe that as from the narration that has come from witnesses like P. W. 2 Tulsabai, P. W. 5 Jaiwantabai and P. W. 6 Shashikala and the circumstances appearing on record, it does appear that Digambar cannot be treated as fully disinterested. Firstly, Digambar was a companion of accused Bhimrao and both were on official duties on the day of incident. Secondly, in the presence of Digambar, all the accostations and acts of beating had taken place. Digambar, though a police official, had not subjected accused Bhimrao to any effective check and had allowed those acts. It appears that Digambar was kept to watch other two ladies, i. e. Jaiwantabai and Shashikala while accused followed Tulsabai when she left alone as directed by the accused. With this background, we have to appreciate the evidence of Digambar. His anxiety to extricate himself out of the whole affair and to explain his role is naturally present in his version.

19. Digambar states that on the day of the incident, he and the accused had left Jaitala to come to Police Station Sonegaon at about 4 P. M. and at that time accused Bhimrao was drunk. According to him, the accused was under the influence of liquor. At the place of one Nathu at Shiwangaon the accused had also consumed tonic. They started from Shiwangaon at 4.30 P. M. and while they were going by the road near the strip towards Airfield they had found women picking firewood. Digambar states that the accused alone went ahead while he and Nathu remained back and it was complained to them by the women that accused had beaten them when they met him. The women were weeping and the accused was threatening them to put behind bars. Digambar himself was asking the accused to allow them to go but the accused did not allow them. Accused continued to threaten them. Then those women were taken by the road that leads towards the Police Station. One Janba was going towards Shiwangaon on his bicycle with a bundle of grass. Accused had scolded him and had also asked him to come to Police Station where he would be lodged in custody. With great difficulty accused had allowed Janba to go. After crossing a short distance, Bhimrao (accused) had asked Tulsabai to go and fetch Janba and Tulsabai left to call him. Even at that time, Digambar says, he was persuading the accused to release the women but the accused said that he would do so after Tulsabai had fetched Janba. Accused followed Tulsabai and he along with two women remained back. Accused was carrying a small stick of babhul in his hand. Both of them were in uniform. As the other two women apprehended that accused would beat Tulsabai, they all started going towards that direction after sometime. When he came near the slip and Hiwar tree, he saw accused Bhimrao sitting on the chest of Tulsabai and committing rape on her. Digambar alerted Bhimrao by saying that husband of Tulsabai was coming on which the accused immediately got up and began to see whether really the husband of that woman had come.

Digambar went near Bhimrao and had hot exchange of words and also a little scuffle. Digambar says that he had seen Bhimrao having sexual intercourse with Tulsabai from a distance of about 20 to 25 paces. Tulsabai began to weep and cried loudly saying that the accused had molested her. Digambar on behalf of the accused tried to apologise and was asking to ignore the whole incident. Later on all the three women were brought near the road and all of them were weeping. Some milkmen from Shiwangaon came there and the women began to narrate the incident to them. Accused lagged behind and nearby a bus-stop enquiries were made by people from Tulsabai and she had pointed out to the accused. Accused came towards them and began to scold people who had asseabled there and asked the people to go away. People chased the accused but he ran in the compound of Airport office. Police van came. Accused was apprehended and along with those women everybody was brought in the Police Station. In cross-examination he states that he is serving as a police constable for the last 12 years and knows the accused since about a year. They were both on bandobast duty. It was their duty to apprehend the people indulging in drinks, gaming or otherwise behaving in disorderly manner. They were separately posted at Jaitala. They used to meet roughly after about an interval of half an hour. On the day of the incident too, he had met the accused at about 3 P. M. and he was normal. He had made a statement that 5-7 persons were there when the accused had returned, which statement he does not accept in the Court. Similar such statement he denies as to the condition of the accused at 1 P. M. on that day. He admits that it would be his duty to apprehend the accused in that state but says that as he was not behaving in a disorderly manner and hence did not apprehend him. He denies that accused had told him that he had some stomach ache and had therefore taken or consumed some medicine. They had reached Shiwangaon after an hour from Jaitala. He admits that when they reached, the women had already collected fuel and each of them were having fuel sticks. He denies that he was present when accused gave beating to these women or accosted them. He denies the fact that they went together near the women. He states that he had not said to the accused that if he was unnecessarily harassing these women, he would report against the accused. He says, in his presence no beating took place. There was a road-engine at the spot nor any work of repairs going on. He denies the suggestion that it was he who was saying that Shashikala was inviting. He denies the suggestion that upon this Jaiwantabai was saying that police were speaking at random being intoxicated. He denies the suggestion that it was on that he beat Jaiwantabai. He asserts that by about 5-30 P. M. the whole incident was over. He had not seen Janba cutting the grass. He similarly denies that Janba had come there hearing shouts of the women. He had not seen women running in any direction as they were being beaten by the accused nor being chased by the accused. He says that when accused asked Tulsabai to fetch Janba, she had not refused to go nor asked Jaiwantabai or Shashikala to accompany her. He admits that Janba was not visible when accused asked Tulsabai to fetch Janba. He had not uttered by saying that Tulsabai should not go and fetch Janba. He puts the timelag between Tulsabai's going and their

reaching the spot of about 5 minutes. He tries to assert that all of them, i. e. Jaiwantabai, Shashikala and himself went on foot. He identified point 5 in Exh. 5 as Hiwar-tree. It is about 50 to 60 feet from the slip road. He asserts that from point 3 he had seen the incident which is 10 to 15 paces, according to him. He says that when the act of sexual intercourse was carried on by the accused, the khaki shirt and khaki halfpant was on his person and he had merely opened his buttons. He does not remember whether after getting up, he had buttoned up his pant. He says that Tulsabai had not disclosed the incident of rape to these women when they were near her at the spot, but she told the incident after 10 to 15 minutes on the road. He asserts that the accused had even beaten him. When they had hot exchange of words, the accused had given him fist-blows. He denies that he had begged the apology of the women because he had given beating to those women.

20. Even Digambar's halting version affords material corroboration to the whole incident narrated by the three ladies. The effort in cross-examination on behalf of the accused is to put the entire incident at the doors of Digambar, excepting the act of intercourse. Digambar's say that Bhimrao was seen in having intercourse with Tulsabai is not at all challenged. Digambar appears to be clearly involved with the accused in the whole incident and is anxious to explain away his position. He therefore gives a garbled version of the incident which at times has a look of contradiction on some minor matters stated by the other three witnesses. As compared to this the evidence of these three witnesses is all natural, clear and entirely credible. That by itself along with medical evidence, is enough to hold that all the offences were clearly made out against the accused.

21. We may now turn to the comments which mostly found favour with the learned trial Judge while acquitting the accused of the charge u/s 376, Indian Penal Code and which were canvassed strenuously before us by the learned counsel appearing for the accused, Mr. Kalikar. Briefly stated, the reasons for acquittal as can be gathered from the judgment are that to the learned Judge the evidence of Tulsabai did not appear to be natural because of the place where the alleged act of rape was committed and because of the manner in which she is alleged to have been raped by the accused. He was further minded to reject the sole testimony of Tulsabai because he thought there was want of corroboration. Some exaggerations and unnatural conduct is commented upon by the learned Judge from the evidence of Tulsabai. He expected that there would be resistance from a lady like Tulsabai and that would also reflect in possible injuries being sustained by her body as she had come in contact with hard and uneven ground with force. There was want of clinical corroboration coming forth in that regard and in his view, the theory of threats could not be accepted and from this the learned Judge concluded that Tulsabai must have offered herself to the accused with her own will and consent. He gave a finding that no doubt there was a clear proof about the sexual intercourse between the accused and Tulsabai, but he was minded to infer free will and consent on her part.

22. The same said line in his submissions was taken by Mr. Kalikar appearing for the accused. He argues that Tulsabai was a lady in her forties and was in the company of two other ladies. It was unnatural to expect of such a lady to submit to the alleged threat given by Bhimrao or to yield without any resistance to the craving of his passions. Want of injuries on the body of Tulsabai or on her private parts and her version that she was shouting and trying to grapple with the accused, was pressed in aid to indicate that Tulsabai was not a reliable witness. He submits that the only natural inference was that Tulsabai must have willingly consented to the intercourse with the accused Bhimrao. The learned counsel relied on two decisions, one from Lahore High Court, *Mahla Ram v. The Crown* AIR 1927 Lah 669, where the Court observed that an unwilling woman would resist the act of rape and that may lead to tearing of clothes infliction of personal injuries and even injuries on her private parts. In want of such evidence of struggle from the complainant, the word of such a complainant was not sufficient to hold accused culpable. Another decision of this Court reported in *Sitaram v. State of Maharashtra* 1973 Mh.LJ 572 was cited to indicate that we should expect good evidence and guard ourselves against several angles of the human nature, including the animus of the prosecutrix against the accused and taking into account the absence of material showing an attempt to resist or marks of struggle, attempts at improvement or exaggerations in the version given during the trial, elements of artificiality or unnaturalness in the story of the prosecutrix and conduct on the part of the prosecutrix inconsistent with the credibility of the version as well as absence of signs of rape on medical or chemical examination and analysis, benefit should be given to the accused. Along with this, the learned counsel invokes the doctrine of our limits sitting as a Court of appeal against the judgment of acquittal in a criminal trial. He relies on the authority of *Bhim Singh Rup Singh Vs. State of Maharashtra*, as well as *Chandrakant Ganpat Sovitkar and Another Vs. State of Maharashtra*, and submits that here two views are possible and this Court should not interfere with the acquittal recorded by the trial Court taking one view of the matter.

23. Now as the evidence in the present case stands, the learned trial Judge has clearly overlooked certain basic factors that, in our view, speak for themselves. Tulsabai was not at all known to accused Bhimrao and was a stranger. It has not been even suggested that she was of any loose moral character. On the other hand she appears to be a lady of family living with her husband having two issues, one going to school. She had come to gather firewood in the Company of her two lady relatives on the day of incident. She appears no doubt drawn from labour class but that by no means can be a factor against her. The circumstances indicate she was accosted along with the two other witnesses to whom we have already made a reference by two police constables all in dress and one of them taking a stick and beating two of them and trying to chase and giving threats of arrest to all of them. All of them were immobilised and intimidated by use of force and threats. It is further clear that one of the police constable was kept along with the two of them and Tulsabai was separated by a design by the

accused to go and Fetch Janba and thereafter he had caught hold of her and felled her down under a Hiwar tree, away from the companion. It was all day time then. Tulsabai says that she was shouting, trying to resist and this policeman all in dress who had shown his temper and created a row was threatening her and in one place she attributes that he was threatening to cause injury by means of even knife by making some gestures. It was not very late in the evening but it was merely 5 O'clock in the evening. The place in which all this melodrama was taking place in which Tulsabai was subjected to intercourse appear to be away from the din of the locality and the accused whose passions had taken control of him appeared to be following Tulsabai with a design. All these facts by themselves which are clearly brought out are only consistent with the culpability of the accused and further are indicative that the woman like Tulsabai would not be a willing partner in the act of sexual intercourse at such a time and at such a place with a stranger like Bhimrao. These natural evidentiary facts that throw light on the murky crime are clearly lost sight of by the learned trial Judge while considering whether Tulsabai's word can be accepted. In fact the act of sexual intercourse was not seriously in dispute. The testimony of Tulsabai that accused by show of force both because he was dressed as a police constable and as well because he was giving beating indiscriminately and giving threats must have put her in such a position from which it is impossible to infer any free consent or will, was fully supported by evidence. There is hardly any other explanation or view possible. The only conclusion that could have been drawn under the facts and circumstances of the present case and inspite of the yielding of Tulsabai to the act of intercourse by accused Bhimrao, was that she was not and could not be a willing party to the act of the accused.

24. The learned Judge had tried to infer willingness and consent because of some unnatural and exaggerated versions and because of want of clinical evidence as to injuries on the body of Tulsabai. While doing so, it is clear, he failed to see that Tulsabai was deposing about the whole incident after some lapse of time and further was giving answers to the suggestions in cross-examination. It is not unnatural on the part of such witnesses to little exaggerate matters here and there. Though no doubt cautious approach is dictated because of the possibility of false involvement of innocent persons, that itself is not sufficient to discard the clear and unimpeachable evidence on material points fully supported by the circumstances available in a given case. The crucial point always is whether the prosecutrix was a willing party to the act of intercourse, and on that in the present case there can hardly be any doubt. Tulsabai's oath is absolutely clear on that aspect of the matter and there is inherent, independent, corroboration coming forth from the preceding and succeeding events available. Her immediate disclosure while she broke in tears as soon as she met the two ladies and her report to the police at Exh. 7 amply corroborate her that the act was consummated against her will. The antecedents of Tulsabai have not been shown to be in any manner dubious so that she will stoop so low that she would involve herself in a sexual act almost in broad-daylight by the road-side with a stranger

like Bhimrao. Sometimes the circumstances do lend valuable support and speak for themselves and we feel convinced that this is one of those cases where the weight of circumstances dispels away all the shadows of doubt that may assumably be raised by certain exaggerations pointed out by the defence. The fact that injury report does not show any injuries except to knee does not lead us to hold that Tulsabai submitted herself to intercourse as a willing partner. That may at the most indicate a meek, passive, submission where all the will is lost or crippled or even paralysed by intervening and supervening circumstances. The want of injuries therefore do not detract the truth of the story of Tulsabai nor it is possible to reject her oath on that point as exaggerated or incredible. The submissions that Tulsabai's evidence should thus be rejected or has been rejected upon reasonable grounds cannot be upheld.

25. It will now be useful to look to the clear premises of law in this regard. Here being a case of an adult woman subjected to intercourse, we may quote the relevant portions from section 375 of Indian Penal Code: -

"375. A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:-

First-Against her will.

Secondly- Without her consent.

Thirdly-With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With or without her consent, when she is under sixteen years of age.

* * * *

(Emphasis provided)

In the present case we are neither concerned with the Explanation nor with the fifth condition nor with the Exception to this section.

26. The ingredients of the offence are, firstly, the fact of sexual intercourse by a man with a woman and, secondly, that such woman having been subjected to the intercourse under any of the circumstances mentioned in the section itself from first to fifth. Reading together these circumstances and keeping in view the biological act of coition, i.e. intercourse between two human beings of different sex, we may at once observe that the law does not treat this act of two human beings as merely a meeting of two bodies. The act of sex, called coition between male and female, postulates by clear necessity a conscious participation of both of them. Human being is not merely a body but a mind endowed with eminent

faculties of will and desire. Conceptually Code contemplates an underlying conscious meeting of two human bodies while in sex act. The mention of "will" and "consent" in the portions indicated by emphasis above unmistakably indicate its clear significance. The legislative premise while defining "rape" by use in the first clause of the term "will" while in the second, third, fourth and fifth by use of the word "consent" are the matters of supreme purpose and cannot be easily overlooked. Neither the first clause which takes in a sexual intercourse between a man and a woman against the will of the latter can be treated as equivalent and covering the same field as involved under the second clause where the phrase "without her consent" has been used though in a given case both circumstances may be available. The distinction between these two sets of circumstances, contemplated by the first and second clause though sometimes may appear to be faint, is clear and should always be kept in mind. It may also be that in a given case all the conditions led down by these clauses be cumulatively satisfied or separately answered to bring home the guilt. But only because one of them does not appear to be satisfied that does not necessarily lead to the result that the other conditions are not established. It must be emphasized that between an act backed by desire and an act consummated in its opposition there is a real and relevant distinction. Similarly without desire to have the act the possibility of voluntary participation is not entirely ruled out but the latter case has to be considered and differently treated and understood. For mere passive surrender of body and its resignation to other's lust cannot be equated with the desire or will nor can furnish an answer by that mere fact that sexual act was not in opposition to such desire or volition,

27. As far as the matters of consent are concerned a reference to the provision of section 90 of the Code is necessary and that reads as follows :-

"90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

unless the contrary appears from the context, if the consent is Given by a person who is under twelve years of age."

The underlying principle of section 90 is obviously that it is only when the consent emanates out of a free cognisable mind it is recognized as a valid one and all those induced in the manner stated in the section are not "consent" for the purposes of the Code. Provisions of section 375 clearly take in all these elements and to be a consent spoken of by that section it must pass the test of section 90 itself as well the requirements of the circumstances enumerated in the third clause of that section. Here the state of mind which is agreeable or

accordable to that of other in the act of coition is clearly conceived and is relevant. "Consent" by itself means voluntary agreement or in the context of voluntary participation in the act of intercourse. It follows, therefore, for satisfying the second clause of section 375, if there is evidence to indicate that there was no voluntary participation by the woman with the man in the act of sexual intercourse the offence is answered. Even if there is date to indicate that there was such a consentaneous participation but that was the result of the circumstances in which the female was put in the fear of death or hurt, the third clause still treats it an offence. Fourth clause operates on deception and fifth eclipses such voluntary participation by a woman under the age of sixteen. Thus for the purpose of these four clauses, i. e. second to fifth, the subject of legislative consideration is the consent-the second dealing where there is want of voluntary participation and the later three dealing with the circumstances when that consentaneous participation cannot be legally recognized. Coming to the first clause and the circumstances, it uses the phrase "against her will". By the word "against" clearly the mental opposition as can be gathered from the circumstances and evidence is contemplated, while by referring to "will", intention, desire, volition or choice are contemplated. Normally, "will" is understood to be the faculty or function of mind which can direct conscious and intentional human action. That postulates a power of deliberate choice and directing human action. The will of a human being is the source of his intention, determination, wish and several motivations. The first clause thus is indicative of an intercourse which is consummated in opposition to female's desire or volition. If, therefore, a woman was not desirous nor inclined to cohabit or her faculties to choose or discriminate were clouded and under such circumstances she was subjected to intercourse, the first circumstance would make such act an offence. The circumstances enumerated in the section thus have to be understood in the context of human beings and their purposeful act of sexual coition. If one of the parties or partners, viz. the female one did not desire and the other forced her to submit against such opposition the act consummated is rape and as such culpable. Participation backed by desire and consummated not in opposition alone is excepted.

28. It follows that mere submission or helpless resignation or perforce yielding to the desire of a man, by a woman, cannot be conclusive as treating that the sex act was not against her will or was with her consent. That is the matter to be found out by appreciating the evidence of the victim in the light of the circumstances which may either lend valuable corroboration to the say of such complainant or may cast a cloud on her claim with regard to these vital matters.

29. The Full Bench of the Rangoon High Court in AIR 1933 98 (Rangoon) has noted the distinction between these vital phrases of the first and second circumstances by observing :

"Every act done "against the will" of a person, no doubt, is done "without his consent", but an act done "without the consent" of a person is not necessarily

"against his will" which expression, I take it, imports that the act is done inspite of the opposition of the person to the doing of it."

(Per page C. J., page 101).

That Court was dealing with the case of kidnapping of a child under the age of twelve and the provisions of sections 90, 361 and 366 of the Code and these observations came to be made referring to the provisions of section 375 and by alluding to the case in Beg v. Fletcher 7 WE 204. This observation indicates that the first clause of section 375 is treated as of wider import for it may take in an act done without the consent of the prosecutrix. These observations do indicate that there is overlapping between first and second clauses of section 375, for the first may contain the second, though the second may not contain the first. It is not necessary to closely examine all this distinction but suffice it to observe that the Legislature by stating in the first clause at "against her will" and in second clause by using the phrase "without her consent" wanted to cover every intercourse committed against the wish or desire of the female concerned. If the female on her own participated in the act of intercourse in a given case, second clause may not at all answer; but still it would be open to her to establish that the act itself was committed against her desire or wish, that is, in opposition to it.

30. We emphasise that a mere helpless surrender or passive submission induced by fear or threat to sex act by a female is not equivalent either to consent nor is capable of answering the wilful or desirous act. The distinction between consent and submission, between resignation and participation, between desire and compulsion, is noteworthy and well recognised. Tek Chand J. in Rao Harnarain Singh Sheoji Singh and Others Vs. The State, observed:

"A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defence to an allegation of a rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

This distinction brought out by the learned Judge has been quoted with approval in Arjan Ram Naurata Ram Vs. The State, : by Ramaswami J. in In Re: Anthony alias Bakthavatsalu, ; and by Chhangani J. in Gopi Shanker and Others Vs. State

of Rajasthan, .

31. No doubt, this passage from the judgment of Tek Chand J., followed by the later Punjab, Madras and Rajasthan decisions, appear to be concentrating on the legislative phrases available in second, third, fourth and fifth clauses of section 375 where the word "consent" is used. But it appears to us that these observations also take in the case of the circumstance mentioned in the first clause having reference to the faculty of the mind which can weigh the good and evil on each side and the Existing capacity and power to withdraw the assent according to one's will or pleasure, circumstance narrated in the first clause of section 375, in our view, is a clear inhibition against the sexual inter course by a man with a woman against her desire. As stated earlier, law postulates communion of the two minds in the sexual act between two opposite sexes and, therefore, if the female partner was not desiring to act and the same was achieved inspite of that we do not see why the requirement is not answered. She may give her body without any desire or mind in the act itself which may be accomplished inspite of that. We feel that in such matters if upon assessment of the evidence of an adult prosecutrix Court can find out in the setting of the circumstances the truth of her claim that coition was in fact committed in opposition to her desire and she was merely a passive participant, being either a helpless victim or compelled to be so, or her faculties of discretion and power to withdraw were by any means affected, the offence is made out. As a matter of prudence and caution, the quest for corroboration is fully justified looking to the human fallibilities and dangers of false involvement of innocent accused for several and varied motives for that is meant to assure support to the truth but its need may well be fulfilled by several factors like setting in which the crime is proved to have been committed, the antecedents of the victim and the accused, the status of criminal and his relation to victim, the condition of the, complainant and her character along with the antecedent and subsequent happening of events. These and other factors, including the signs of struggle, presence of injuries and such other medical evidence may all Feedback the needs of that requirement. In a given case, however, the acceptable truth may come to surface from the clear, clinching and credible evidence of the complainant herself and with materials to corroborate available in the circumstances, would be enough to satisfy the conscience of the Court in finding the guilt of the accused.

32. Thus it is not in every case that the marks of resistance must be of necessity be expected- If the human resistance itself is put an end to and there is yielding away of the body without any backing of the free mind to the act of intercourse from the side of women and if the facts and circumstances are enough to indicate such mental state of the victim, we fail to see why the terms of the first clause of section 375 are not answered. The Legislature advisedly put the matter of "consent" and "will" differently. "Will" postulates a power or faculty of deliberately choosing the direction in the manner of action itself. If that power or faculty is not directed by free choice towards the sex act by the female concerned nor her conduct is indicative of any such volition in participating in

that act, there should be no difficulty in accepting her case that she herself was subjected against her will to the act of intercourse.

33. Keeping all this in mind in the present case, both the circumstances indicated by first and third clauses of section 375 are fully answered. We have no manner of doubt that Tulsabai was not a willing participant in the act of intercourse. Her consent, even assuming that there was possibility of such consent, is only referable to the overt acts on the part of accused Bhimrao by which he had created a row and had cowed down all these ladies by abusing, beating and making all show of force. In fact he had caused culpable hurts to them is all clear from evidence. Even Digambar appears to be feeling the fright. The fact that accused Bhimrao was in drama and was making a show of his power and administering threats of arrest coupled together the use of stick, are enough circumstances that can put an end to Resistance on the part of a woman in the position of Tulsabai. Under such circumstances, the only inference that could have been reasonably drawn was that the sexual intercourse complained of by Tulsabai was against her will or, if it was with her consent, that consent was obtained by putting her in the clear fear for hurt for which there was ample and overwhelming evidence.

34. The decisions on which reliance was placed by Mr. Kalikar the learned counsel for the accused are not apposite because, as we have indicated already, the facts in the instant case tell their own tale. Nor we feel any inhibition on our power in the matter of appreciation of evidence and reaching to the only reasonable conclusion on its basis with respect to the culpability of Bhimrao, the present accused. We are fully conscious that in the matters of appeal against acquittal if there are two reasonable views possible, then we may lean in favour of not pre-empting our view for the other reasonable view taken by the lower Court while acquitting the accused. However, that is not the present case at all. Here Tulsabai's word has been rejected though it had ample corroboration and against the overwhelming weight of circumstances. After giving all our anxious consideration, therefore, we cannot treat the conclusion recorded by the learned Judge as one that fetters our power to hold otherwise.

35. That being the position, it has to be found upon the evidence of P. W. 2 Tulsabai, P. W. 5 Jaiwantabai and P. W. 6 Shashikala as well P. W. 7 Digambar, that it has been amply established that accused Bhimrao subjected Tulsabai to rape and as such he is culpable.

36. As a result of this finding Criminal Appeal No. 51 of 1973 will have to be allowed and acquittal of the accused u/s 376, Indian Penal Code will have to be set aside.

37. Coming to the appeal of the accused against his conviction u/s 323, Indian Penal Code and for violating the provisions of section 66 (1) (b) and 85 (1) (3) of the Bombay Prohibition Act, we have ample material on record. We have already referred to the evidence of P. W. 11 Dr. Bankar and P. W. 7 Digambar and the

result of the Chemical analysis as far as the alcoholic concentration in the blood was concerned. The defence of the accused had been that he had some stomach trouble and had taken some medicine. That defence did not find favour with the trial Court too. It is enough to observe that evidence of Ruprao (D. W. 1) is to the effect, that on 12-3-1971 some medicines like Livogean and Fersolate tablets were prescribed by him to the accused. According to him, Livogean is a liver tonic and there is 9% of alcohol in that tonic. He tries to put up Exh. 40 as his certificate. He is not a diploma holder even in Allopathy or Medicine nor a registered doctor. He goes on to assert that on 12-3-1971 the accused had come to him in morning when actually it has come on record that accused was away on his duty on that day and it was only in the evening he returned and was apprehended by the police and taken for the medical examination. Suffice it to say that Ruprao's evidence is clearly a got-up one. Story of the accused that either he was suffering from some malady and that he was prescribed any medicine or he consumed any such medicine has not at all been established. On the other hand, there is direct evidence of P. W. 7 Digambar that the accused had taken alcohol and that finds support from the evidence of P. W. 11 Dr. Bankar and the report showing the alcoholic concentration in the blood of the accused. As to his disorderly behaviour, there is ample testimony of the three lady witnesses i. e.. P. W. 2, P. W. 5 and P. W. 6 and as well of P. W. 7 Digambar. It is not necessary to repeat that the accused was behaving in a rowdy manner on a public road. That he gave beating to P. W. 5 Jaiwantabai and P. W. 6 Shashi-Kala by means of a stick borne out from their own evidence and by the injuries noticed by P. W. 11 Dr. Bankar who examined both of them immediately.

38. It is thus clear that there is no merit in the appeal of the accused. The conviction recorded by the learned Judge u/s 323, Indian Penal Code as well u/s 66 (1) (b) and section 85 (1)(3) of the Bombay Prohibition Act will have to be affirmed. Consequently the appeal of the accused, i. e., Criminal Appeal No. 258 of 1972, will stand dismissed.

39. Now, turning to the question of sentence, we find it difficult to take any lenient view of the matter. Here was a policeman all in dress and returning from duty. It was his function and obligation to detect the crimes of prohibition and gambling. By consuming liquor himself he had violated even the basic charge of his duty. Instead of policing he had participated in the process of crime. The narration we have on recorded coming from his companion indicates that high passions had caught the better part of his faculties and he was remonstrating and abusing people on the street. It is clear that he was moving in a rowdy mood and his base passions were evoked at the sight of these three women, and leaving all sense of decency and decorum had made all of them helpless by means of threats or duress. He was behaving like a gay-lord wielding a stick in his hand and giving beating to helpless persons and remonstrating the passers-by. It is noteworthy that in such an overpowering mood he cowed down the helpless woman and subjected her to satisfy his carnal desire. Here, therefore, Law has to contain a brute-in-uniform, a bundle of base passions bereft of all

decorum and dictates of conscience. We do not find any extenuating circumstances. The offence of rape contemplated by the Code is one of the offences affecting the human body and is separately treated in section 376. That provision in the matter of penalty requires us to take into account all the circumstances including the honour of the lady and her family and the social need of ethical discipline individual behaviour. Legal ethics commands that the man and woman can have the natural meeting of their two bodies only with free consent, desire or will. While considering the penalty, therefore, the intention of the Legislature as herein evidenced has to be kept in view and is required to be balanced by taking into account the complainant, the criminal as well the setting of the actual crime. We hasten to add that while imposing the sentence the Court need not be carried away by righteous indignation, for may indignation, either moral or otherwise, cuts at the root of justice itself. The choice for proper sentence for punishment necessarily should balance all its basic objectives, in that it should be retributive, deterrent, and should appear to be preventive and, at the same time, have a tendency to promote the spirit of reformation.

40. Taking all the relevant factors involved in the present case together along with the fact that we are dealing with a police official meant to serve the law and protect people from crime, the ends of justice dictate us to impose a penalty of five years" rigorous imprisonment for the offence u/s 376, Indian Penal Code.

41. As to the sentences under the other offences, we are inclined to modify the same by keeping only the sentence for rigorous imprisonment and deleting all the sentences of fine.

42. In the result Criminal Appeal No. 51 of 1973 allowed and Criminal Appeal No. 258 of 1972 is dismissed subject to modification in the sentence. Accused Bhimrao is found guilty of the offence punishable u/s 376 and also u/s 323, Indian Penal Code. He is similarly found guilty for the offences u/s 66 (1) (b) and section 85 (1) (3) of the Bombay Prohibition Act. He is sentenced to undergo rigorous imprisonment for five years for the offence u/s 376, Indian Penal Code, for one year for the offence u/s 323, Indian Penal Code and for six months for the offence u/s 66 (1) (b) of the Bombay Prohibition Act. We do not propose to impose a separate sentence for the offence u/s 85 (1) (3) of the Bombay Prohibition Act. All these sentences would run concurrently. The accused to surrender to his bail.

Appeal by accused dismissed; State appeal against acquittal u/s 376 allowed.