
(1994) 03 BOM CK 0016
In the Bombay High Court
Case No : Criminal Appeal No. 13 of 1993

Shri Shivaji Tukaram Kurle

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 04-03-1994

Acts Referred:

Penal Code, 1860 (IPC) — Section 170, 354, 375(5), 376

Citation : (1994) 3 BomCR 589

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : S.D. Lotlikar, for the Appellant; G.U. Bhobe, for the Respondent

Judgement

E.S. DA Silva, J.—The appellant is the accused in Sessions Case No. 32 of 1992 who has been convicted by the learned Additional Sessions Judge, Panaji, for offences under sections 170, 376 and 354 r/w Section 511 of the Indian Penal Code and cumulatively sentenced to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs. 2,500/- or in default to undergo Simple Imprisonment for a period of 1 month.

2. The prosecution case in short is that the accused on 14-1-1991, at about 6.30 p.m., by personating himself as Head Constable bearing Buckle No. 1048 and known as Mohammad Muzavar gained an entry into closed hospital premises of I.P.H.B. Altinho, Panaji and attempted to rape a female mental in-patient Zamila Muzavar in the Female Care Unit and also outraged her modesty. The accused pleaded not guilty to the charge. The learned Sessions Judge after recording evidence found him guilty for the aforesaid offences and sentenced him accordingly.

3. On behalf of the prosecution 11 witnesses were examined in this case. P.W. 1 Katarin Monteiro is a maid servant working for about 15 years in the Mental Hospital, Altinho, Panaji. According to her, her duty is of 24 hours. If it is day duty she has to report at 9.00 a.m. and the duty goes till 5.00 p.m. and if it is

night duty she has to report at 5.00 p.m. and her duty is till 9.00 a.m. On the date of the incident, i.e., 14th January, 1991 she was on duty at Ward No. 9. At about 6.00 p.m. she had been out to water the plants in front of Ward No. 9 which is normally called as lock-up. As there was no water in the tank she returned to the Ward and while returning when she turned her back she saw somebody passing that side towards the kitchen. The kitchen was already locked and as she felt that there was no way for anyone to go that side. She became curious to see as to where that person was going. So she went near Ward No. 8 and then saw the accused tightly embracing one in-patient of the hospital by name Zamila who was dressed in the hospital uniform. At that time she noticed that the uniform of Zamila had been lifted till above the knees. On seeing this she went and informed the Sister in Ward No. 8 who advised her to report the matter to the Sister of Ward No. 7 as she was busy in writing something for a patient. Accordingly she went and reported the fact to the Sister of Ward No. 7 who immediately went along with the servant of that ward to the spot. In cross-examination she denied having stated to the police that when she saw him the accused was having sexual intercourse with Zamila. In further cross she clarified that when she saw the accused it was he who was being embraced by Zamila. She also admitted that it was possible for the skirt of Zamila to having gone upto her knees in the process of embracing the accused.

4. P.W. 4 Tereza Fernandes is also an employee in the Mental Hospital working in Ward No. 6 as an attendant. According to her Zamila was an in-patient in her Ward. On 14-1-1991 she was on night duty and her timings were from 5.00 p.m. to 9.00 a.m. In the evenings all the patients from all the wards come out in the open and spend the time together. Hence all the patients of Ward No. 6 had also gone out in the open area which is surrounded by compound. At about 6.00 p.m. to 6.30 p.m. she was sitting along with the servant of her ward at the gallery and the Sister on duty Shaila was inside the ward. At that time she saw the accused entering the main gate coming into the compound containing the wards. She also saw him taking the patient Zamila by catching her hand towards Ward No. 7 in the passage. On seeing the accused taking Zamila with her hand held by him she got up and went to Sister Shaila Amonkar and asked her as to who she was. From the window Shaila saw him and told her that it might be her brother. She further stated that very shortly P.W. 1 Katarin who is attached to Ward No. 7 came there and told Sister Shaila Amonkar something regarding what she saw about the accused. Immediately thereafter Shaila along with servant of the ward left the ward and went rushing outside. There was notice about some incident that happened on the way to the kitchen of which everyone was talking about. In cross-examination she stated that she had not seen actually the accused entering the main gate and that she also could not specify who was holding whose hand, that is to say, whether it was the accused who was holding the patient's hand or the other way around.

5. P.W. 6 Shaila Amonkar is a Staff Nurse of the hospital who was on night duty at Ward No. 6 on 14.1.1991. According to her on that day at about 6.10 p.m. she

was busy with one more patient and at that time P.W. Katarin came and told that she had come running to inform her that a male person was in the female patients ward near the kitchen corner. She immediately left the patient whom she was attending and ran to the spot to verify the fact. When she went there were some two or three other patients also and she saw a male person catching hold of the hand of Zamila who was an inmate in Ward No. 6. He was not taking her anywhere but they were near a corner and he was pulling her hand. The witness identified the male person as being the person present in the Court. When she questioned the accused about his relationship with the patient he gave his name as Mohammad Mujawar and claimed to be the brother of Zamila. She further stated that at that time she noticed that the zip in his pant was half open and she could see the upper part of his penis inside. She also saw two cords hanging outside the pant through zip. She immediately clarified that what she could see through the opening in the zip of the pant was the public hair portion above the penis of the accused. She then called for detailed questioning of the accused. However, he did not come there and he walked outside of the ward in the passage. The accused told her that he was a policeman and that he was on duty at that time. When she told him that no male police would be ever on duty in the female ward the accused hit back saying that she could report the matter to the doctor if she wanted and that nobody could do anything to him. She then told the gatekeeper known as Menino to call the doctor who was nearby but outside the gate. She inspected the gate pass of the accused in which his name was given as Mohammad Mujawar. In the meantime she also sent for the night supervisor who came as also the doctor. She gave the gate pass to the doctor who took them in Ward No. 6 for further action. Dr. Atmaram Chodankar informed the senior resident doctor who came and was questioning the accused. At that time the accused tried to run away. However she and Dr. Vijaylaxmi caught hold of him. Thereafter she went to the ward and learnt that the police had taken him away. In the cross-examination she stated that when she saw the accused he had caught hold of Zamila's left hand by his right hand. She denied that it was Zamila who was pulling the accused. She also denied that it was Zamila who was embracing the accused. She said that no one was embracing the other when she saw them.

6. P.W. 7 who is the prosecutrix Zamila has stated in her deposition that she was admitted to the hospital consequent upon an order of a Magistrate at Panaji after having been rescued by the Betim Police when she was walking near the sea in which she had gone. She further stated that she was able to identify the accused person before the Court as he had come to see her at the Mental Hospital. She further stated that she remembers that on that occasion the accused took her to a corner in the hospital and told that they could go there to the kitchen side and so they went. She does not remember whether he held her hand or not while going. However, after taking her there the accused wanted to spoil her character (Bighandane ko Chahata Tha). As others saw and shouted he left. At that time when he had taken her there the accused half removed the front zip of his pant.

At the relevant time she was wearing the hospital uniform. It was a frock upto her knee. In cross-examination she stated that she had come to Goa in search of job two days prior to the incident and she had stayed one night at Valpoi and the other at Margao. It was in the afternoon that the incident at Betim happened. She was frustrated because she could not get a job and consequently there were frequent quarrels in her house and therefore, she wanted to end her life by suicide. She further stated that for the last six to seven years she was mentally sick. Because of her mental sickness her husband had left her. At the relevant time near the spot where she had been taken none else was present. She denied that it was she who caught hold of the hand of the accused on that day and took him to the kitchen side corner by pulling him. Though the accused tried to open the zip of his pant he had not opened. She further denied that on that day she tried to embrace the accused having taken him to the corner near the kitchen.

7. P.W. 8 Maria Luisa Fernandes is also a ward attendant in the hospital who has stated that on 14th January 1991, at about 6.15 p.m., she was sitting in Ward No.7 with staff nurse Vinna. At that time P.W. 1 Katarin came running and told them that one patient was doing something. Immediately they went closer to the window in Ward No. 7 and then saw the accused embracing a female patient who was in hospital uniform near the door of the kitchen side which could be seen therefrom. They could clearly see this because the accused was facing Ward No. 7. She is unable to say as to whether the female patient was also embracing the accused because that was not visible for them to be clearly observed. At that time P.W. 4 Tereza from Ward No. 6 came and took the female patient with her. In cross-examination she clarified that when the police recorded her statement she had then said that she saw through the window both the accused and the female patient embracing each other because in the position in which they were found it appeared to her to be so though she was sure that the accused was embracing the female patient.

8. P.W. 10 Dr. Vijayalakshmi Kashi is a doctor working in the Mental Hospital and she has deposed that on 14.1.1991, at about 6.20 p.m. to 6.30 p.m., one Amrui who was working as servant in the hospital came and told her that one outsider had come and meddled with the patient of the hospital and therefore she was being called by the Junior doctor Atmaram Chodankar. She immediately went to the place where the junior officer was and enquired from him as to what was the matter. He then told her that a male person was seen misbehaving with Zamila. On hearing him she told Dr. Chodankar to ring up their consultant Dr. Damodar Kunkolikar. The witness identified the accused as being the said male person. She enquired with him as to how he was related to Zamila to which he replied that she was his sister. When she enquired about the name of the accused she remembers he having told his name as Mohammad and that he was working in the Police Department. When she further enquired with him as to whether he had misbehaved with Zamila he denied having done such thing and asked her that he be allowed to go immediately. On further enquiries from P.W.6 Shaila Amonkar who was the Ward Sister at the relevant time she told her that the visitor had not

contacted her in the Ward upon his arrival and that one of the servants from Ward No. 7 came running and reported to her that the accused was seen with Zamila behind Ward No. 7. She called for servant from Ward No. 7 who told her that when she saw the accused with Zamila she found that her hospital gown was lifted up while the pant zip of the accused was loose open and having been pulled down. Then she called Zamila and enquired about her relationship with the accused. She first told that the accused was her brother but later told that he was her husband. When the accused was questioned for an explanation for having gone with a female patient behind Ward No. 7 he could not give any explanation and all the while he was repeatedly pleading with her to let him go. Suddenly the accused attempted to run away from Ward No. 6 where she was enquiring. But the sister-in-charge ran after him and caught him near the main gate of the female side. She also ran after the nurse and they managed to take the accused to Ward N. 6. In the meantime Dr. Cuncolienar came and advised them to report the matter to the police. The police then took charge of the accused as well as of the patient. She later on learnt that the name of the accused was S.T. Kurle in the Police Department. Accordingly she lodged a complaint which is the one marked Exhibit P.W. 10/A. This witness was cross-examined by the accused and she flatly refuted all the denials put to her about the material facts narrated by her.

9. This much insofar as the facts of the alleged incident are concerned. There is also evidence given by P.W. 9 Simon Viegas and the medical evidence of P.W. 2 Dr. D'Mello, P.W. 3 Dr. Usgaonkar, P.W. 5 Dr. Oswald Fernandes and P.W. 12 Dr. Pushpa Dhukle which, except for that of P.W. 5 Dr. Oswald, may not be that material for the purpose of ultimate adjudication of this appeal.

10. P.W. 9 Simon Viegas is a peon or attendant in the O.P.D. of the hospital who was on duty at the time the appellant gained entry in the hospital. It was he who issued the visitor's slip to the accused (Exhibit P.W. 9/A) on 14.1.1991. He identified the accused as the person who on that date came as a visitor. He stated that the accused told him that he was seeking entry in the female ward to visit his sister.

11. P.W. 2 Dr. D'Mello is a Senior Resident in the Casualty Department of Goa Medical College, Panaji. On 15.1.1991 he examined the accused who was referred to him by the police. On the basis of the examination he found that the accused had consumed alcohol but was not under the influence of alcohol at the time of his examination. A certificate for that purpose was issued by him and marked Exhibit P.W. 2/A.

12. P.W. 3 Dr. Usgaonkar is a Lecturer in the Forensic Medicine Department of Goa Medical College. On 15.1.1991 he examined both Zamila as well as the accused. As far as Zamila is concerned his opinion is that in the absence of any positive signs of recent forcible sexual intercourse no positive opinion to that effect could be given. With regard to the accused he also opined that on the basis of examination of his genital organs and the rest of his body there were

also no positive signs of recent forcible sexual intercourse and as such no definite opinion to that effect could be given.

13. P.W. 5 Dr. Oswald Fernandes is a Senior Resident in the I.P.H.B. He has stated that he knows Zamila whom he was treating in the hospital as she was suffering from paranoid schizophrenia. She was admitted in the hospital on 27th November, 1990 through the orders of the Sub-Divisional Magistrate, Panaji. She was so referred because of abnormal behaviour as she had attempted to commit suicide by jumping in the river. In cross-examination he stated that Zamila was under his treatment from 27-11-1990 till 14-6-1991 when she was discharged. Till her discharge she was talking irrelevantly at times and her behaviour was abnormal. There was therefore possibility for her to have hugged any person or visitor in the hospital without knowing what she was doing.

14. P.W. 12 Dr. Pushpa Dhukle is the Medical Superintendent of the Mental Hospital and it was she who had issued Exhibit P.W. 11/D which is the letter addressed by her to the Police Sub-Inspector in the month of June, 1991 wherein she has stated that Zamila has shown significant improvement and was in a condition to make a valid statement. Zamila had been admitted in the hospital for being a patient suffering from schizophrenia. In cross-examination she stated that she had concluded that Zamila was in a position to give valid statement after examining her. She further stated that a schizophrenia does not know what he does.

15. Shri Lotlikar, learned counsel appearing for the appellant, while challenging the impugned judgment of the learned Additional Sessions Judge has advanced basically 3 propositions:-

- (1) The charge framed against the appellant is defective and entirely vitiated;
- (2) Even assuming that the case of prosecution is true in its entirety no conviction for offences of impersonation, attempt to rape or outrage of modesty could have been recorded by the learned trial Judge as the ingredients of none of these offences are deemed to have been established by the prosecution;
- (3) The learned trial Judge has arrived at the finding of the appellant's guilt merely on the basis of surmises and conjectures and not on the strength of any valid evidence available on record.

16. While elaborating the first contention the learned counsel has submitted that section 375 defines the offence of rape as sexual intercourse maintained by a man with a woman under the circumstances falling under any of the six following descriptions, namely,

Firstly Secondly Thirdly
Fourthly

Fifthly with her consent when at the time of giving such consent by reason of unsoundness of mind she is unable to understand the nature and

consequences of the act to which she gives consent.

The learned counsel urged that in the charge none of the relevant facts regarding the specific features of this offence have been spelt out by the learned Sessions Judge so as to bring the conduct of the appellant within the purview of Clause Fifthly of Section 375 of I.P.C. According to the learned Counsel this goes to the root of the matter. Nowhere it is said in the charge that the alleged act of the appellant in attempting to maintain sexual intercourse with the prosecutrix has been done without her consent. In other words it is not said that Zamila did not consent or that her consent was invalid. Thus and unless the appellant was factually informed of this material aspect of the charge the same becomes defective because in such situation the appellant will not be in a position to effectively defend himself. The charge as it was framed is bound to mislead him and actual prejudice is likely to be caused to the appellant and on this ground alone the conviction is to be set aside. The learned counsel insisted that in case of Zamila assuming that she was a mental patient, it was necessary to show that although she might have not objected or had even given her consent to the sexual advances of the appellant the same was to be deemed as vitiated by unsoundness of mind. Therefore, the charge of attempt to rape framed against the appellant in such condition being highly defective and bad was obviously prejudicial to the appellant's defence rights.

17. The submissions of the learned counsel in this regard are no doubt misconceived and should not be therefore allowed to prevail. It is really difficult to accept the contention that the charge being defective has in fact prejudiced the appellant in his defence. Indeed and although the so-called details in respect whereof the learned counsel has found missing in the charge are not specifically disclosed therein, the fact remains that the charge clearly discloses that Zamila who was purportedly the target of his alleged sexual assault was under treatment in the Mental Hospital. This circumstance by itself is bound to bring the charge framed against the appellant within the purview of section 376 r/w section 375 (Fifthly) of the I.P.C. In this connection the evidence of P.W. 5 Dr. Oswald Fernandes and the medical report prepared by him, copies whereof were supplied to the appellant, clearly speak to the fact of Zamila having been admitted in the Hospital on 27th November, 1990 with the story of suffering from mental illness for the last 10 years which was never completely cured. At the time of her admission the patient was found to be talking irrelevant and was harbouring delusions of persecution, reference and thought broadcasting. She also had auditory hallucinations. Her mood was sad and she cried at times during the interview. Her judgment was impaired and she lacked insight. Although since admission she was being treated with some psychiatric treatment she did not show significant improvement. That was Zamila's condition when the certificate was issued and forwarded to police by letter dated 25.1.1991. It follows therefore, that on the day of the incident Zamila being a mental patient talking irrelevantly at times and showing abnormal behaviour, there was always a possibility for her to have allowed the appellant to make sexual advances or even

hugged him as contended by the appellant without obviously knowing what she was doing. Hence the appellant cannot be heard to claim that he was not able to know what charges he was facing before the learned Sessions Court and/or contend that on account of a deficient charge his right of defence rights has been impaired. In the facts and circumstances of the case it is clear that no defect can be said to exist in the charge framed by the trial Court and the criticism raised by the appellant is entirely unsupported by evidence. Under the said set of circumstances which flow from the record, it is impossible to accept that the appellant would think or presume that he was being charged for the offence of committing rape of Zamila under any other heads of section 375 of I.P.C. rather than Clause Fifthly. Hence the argument of a valid consent being missing from the charge and rendering it vitiated is bound to be summarily rejected.

18. In respect of the second contention to the effect that even assuming that the case of the prosecution is proved to the entirety no offence has been spelt out against the appellant neither u/s 170 nor u/s 376 r/w section 511 nor even u/s 354 of the I.P.C., the learned appellant's counsel's submission is that as far as the offence of attempt to commit rape is concerned no finding has been recorded by the learned trial Judge that Zamila has not consented to the sexual advances or that her consent if any was invalid due to unsoundness of her mind. It is the learned Counsel's grievance that the learned Judge has failed to address to this minimum requirement while discussing the evidence on record. It has been urged that the basic requirement for the verification of the offence of rape or for that matter for an attempt to commit rape in the absence of consent or of any valid consent. According to the learned Counsel consequent upon the prosecution failure to show that any finding in this respect has been given the medical evidence on this point is also insufficient as there is nothing to suggest that Zamila at the relevant time was incapable of giving her consent. The learned Counsel has argued that the testimony of Zamila by itself is irrelevant because there is hardly any material therein to make us to believe that she means that an attempt was seriously made by the appellant to have sexual intercourse with her or even to outrage her modesty. As such the finding of absence of her consent or at least the fact of an invalid consent having not been recorded it was for the prosecution to cogently establish the absence of such consent. No effort has been made by the prosecution in this direction and the entire case, Shri Lotlikar submits, appears to have been based on the question of the appellant's physical presence in the female ward of the Mental Hospital at the relevant time. Therefore, the learned counsel concludes that the conviction of the appellant seems to be based on mere conjectures or presumptions on account of his unexplained presence in the Hospital. The learned Counsel submits that this unexplained entry in the Hospital could at the most made the Court to infer that he had committed an offence of criminal house trespass and not certainly an offence of attempt to commit rape or outrage the modesty of Zamila. But since no/charge of house trespass was framed against him it is clear that on account of this infirmity the appellant could not be convicted u/s 376 r/w section 511 of

I.P.C.

19. As far as the offence of im-personification u/s 170 of I.P.C. is concerned it was contended by the learned Counsel that the learned trial Judge has totally misconstrued the aforesaid provision according to which the said offence can be said as occurring only when somebody pretends to hold any particular office as a public servant knowing that he does not hold such office or falsely personates any other person holding such office and in such assumed character does or attempts to do any act under the colour of such office Therefore, the learned counsel submits that in the facts and circumstances of the case the appellant who was admittedly a police officer could not be said to have committed the offence of personating a public servant when he allegedly secured to gain entry in the Mental Hospital for the purpose of meeting or eventually sexually assaulting Zamila who was the in-patient in the said Hospital.

20. The criticism of the appellant's learned Counsel on the aspect of the absence of a valid consent on the part of Zamila, in my view, appears to be wholly unjustified. The evidence of P.W. 5 Dr. Oswald Fernandes already mentioned above clearly speaks to the fact of Zamila from the time of her admission till she was discharged being unable to give a statement as she was talking irrelevantly at times and her behaviour being also abnormal and therefore, there was possibility for her to hug a person who was visiting the Hospital without knowing what she was doing. It is therefore, obvious that in such mental condition of the prosecutrix even if we have to assume that in the facts and circumstances of the case sexual intercourse with Zamila might have been actually attempted by the appellant the question of her having given a valid consent to this physical intercourse does not seem to arise at all. However, on the question as to whether on the basis of the material available on record the facts of the case are substantiating the required and essential ingredients of the offences under sections 170 and 376 r/w 511 of the I.P.C. there seems to be indeed a very valid point made out by the learned appellant's counsel in this regard.

21. Firstly and with regard to the offence u/s 170 we have to see that the appellant is admittedly a head constable in the Police Department and there is no evidence that Mohammad Mujawar which is the name he purportedly assumed in order to be allowed to enter the Mental Hospital premises is in fact also a member of the police force namely a Head Constable bearing buckle No. 1048. It is thus clear that the appellant has only pretended to be the Head Constable Mohammad Mujawar who is not a Head Constable at all with the sole purpose of concealing his own identity. Being so it cannot be said that while claiming to be the Head Constable Mohammad Mujawar he was pretending to hold any office of public servant knowing that he does not hold such office because he himself was a public servant holding the post he has claimed to hold although the name mentioned by him to the gate attendant was a different one. For the same reason it cannot be said also that the appellant while making such claim falsely personated to be any other person holding such office since we have seen that

Mohammad Mujawar was not and has never been a Head Constable or holding any office in the Police Department. Besides there is nothing to suggest that the appellant after claiming such identity assuming the character of Head Constable Mujawar has done or attempted to do any act under the colour of such office. The prosecution case in this respect is that by taking advantage of being a Head Constable the appellant gained entry in the Hospital and thereafter attempted to sexually assault or molest Zamila, an inpatient of the same Hospital. Indeed in order to rape, attempt to rape or outrage the modesty of an in-patient in the Hospital the appellant was not required to be a police officer or Head Constable. He could have done it irrespective of the office or position he was allegedly assuming. Hence Section 170 seems to be not at all attached in the special set of circumstances in this case. As rightly contended by Shri Lotlikar at the most the facts on record might suggest that the appellant could have been charged for an offence of cheating by personation punishable u/s 416 of I.P.C. But the appellant was not even charged for such offence and therefore, his conviction u/s 170 I.P.C. does not seem to be at all justified. Hence the alleged act of the appellant of pretending to be Head Constable Mohammad Mujawar and related to Zamila for the purpose of taking advantage of this relationship so as to enter in the Mental Hospital is to be held as totally irrelevant for the purpose of incriminating the said appellant for an offence u/s 170 of I.P.C.. This legal position has been already laid down in the case of *Emperor v. Umakant Balvant*, 1907 Cri.L.J . Reports Vol. 5-6 page 211, wherein it has been held that mere personation is insufficient to justify conviction u/s 170 of the Indian Penal Code. The section requires that the offender should be shown to have attempted to do or to have done in such assumed character some act under colour of such office. The phrase "an act under colour of such office" points to acts which could not have been done without assuming official authority or responsibility, and would not connote acts of a ministerial or mechanical character, which might be done without requiring the justification of office in the person doing them. Similar stand has been also taken in the case of *Biswanath Mukherjee Vs. The State*, , which was a case of alleged personation of a person as a Customs Officer for the purpose of extracting presents. The Court has then laid down that u/s 170 I.P.C. the prosecution must prove (1) that the accused falsely pretended to be or personated to be a public servant; (2) that he did so knowingly and (3) that when assuming such character he did or attempted to do something under colour of such office. Thus when the accused pretended to be a Customs Officer which he was not and received presents from the master of the ship, it was held that the demand or receipt of presents could not be said under colour of office as the act had no relation to the duties of the Customs Officer and the ingredients for an offence u/s 170 were not therefore satisfied.

22. Now and with regard to the offence of attempt to commit rape the learned appellant's counsel seems also to be right when he makes a grievance that in the facts and circumstances of the case no factual evidence on this attempt appears to have been cogently and effectively established. It is true that apart

from the reference made by most of the prosecution witnesses who are supposed to be eye witnesses of the incident to the effect that the appellant was seen holding the hand of Zamila and pulling her towards the corner of the corridor leading to the kitchen of the hospital and/or embracing her tight at which time the hospital dress(frock) of Zamila was raised above the knee there is also mention in the testimony of P.W. 6 Shaila Amonkar that when she went to the site she noticed that the zip of the appellant's pant was half open and she could see the upper part of his penis inside. She also saw two cords hanging out from inside the pant. However she immediately clarified that what she could see through the opening in the zip of the pant was not the penis but the public hair portion above the penis of the appellant. Indeed the prosecutrix Zamila in her deposition has also stated that when the appellant took her towards the kitchen side the accused half removed the front zip of his pant. However this part of evidence is not substantiated by the other witnesses who according to the prosecution itself seem to have arrived at the spot prior to P.W. 6 Shaila Amonkar. Therefore, the statement of P.W. 6 Shaila has not been corroborated by any other of the witnesses for the prosecution, namely, by P.W. 1 Katarina who apparently is the first person to detect the presence of the appellant in the Hospital while taking Zamila by holding her hand towards the corridor in the direction of the kitchen and thereafter embracing her tightly. But even assuming the fact of this zip of the appellant's pant having been seen half open by some other witnesses the fact remains that in the absence of any evidence to suggest that the appellant's penis was taken outside the pant so as to enable him to maintain sexual intercourse with Zamila it is obvious that this bare circumstance is to be visualized in the realm of an act of mere preparation rather than an act of attempt.

23. It is a well settled proposition that the distinction between an attempt to commit rape and an act of indecent assault or outrage of a woman's modesty is somehow thin and everything ultimately appears to depend on the facts and circumstances of the case. It is also said that the difference between mere preparation and the actual attempt to commit an offence lies in the greater degree of determination and an attempt is bound to occur only when the offender has done something which can be said to be beyond the mere stage of preparation. It is the element of force and determination which characterizes an attempt to commit rape. A person can be convicted for having attempted to commit rape only when he does an act which clearly discloses his intention to have or maintain sexual intercourse with a woman by force or without her valid consent and in spite of her resistance or interference from a third party he persists in his effort to maintain sexual intercourse although ultimately he might not be able to achieve his aim. In the instant case we have seen that irrespective of the fact that the appellant having held Zamila by hand and taken her to a remote corner in the corridor of the Hospital near the kitchen which was locked and probably embraced her by keeping at the same time the zip of his pant half open so that even his public hairs could be noticed, the fact remains that beyond

this nothing else suggests that there was on his part a determined effort to forcefully maintain sexual intercourse with Zamila at that relevant point of time. On the contrary the evidence shows that as soon as the staff of the Mental Hospital took notice of his presence in the female ward in Zamila's company and enquired with him what he was doing and who he was the appellant immediately freed Zamila from his physical hold and even sought to leave the place going to the extent of trying to run away although he did not succeed in this attempt. Similarly the medical evidence, namely, the examination of both Zamila and the appellant did not also point out to any physical effort or violence which the appellant might have made on Zamila to forcibly maintain sexual intercourse with her.

24. In the circumstances I am of the considered view that it is difficult to accept that on the basis of the evidence available on record the appellant might be said to be guilty of having committed an offence of attempt to commit rape on Zamila.

25. Lastly and with regard to the offence of outrage of modesty on Zamila it is Shri Lotlikar's contention that on this aspect also the evidence is unclear as to who was holding whom and therefore it was highly risky to base any conviction on such evidence. The learned counsel submitted that no evidence of use of criminal force was consistently made out by the prosecution against the appellant in order to assault or sexually abuse Zamila. However I see no merits in any of the submissions of the appellant's learned counsel. Undoubtedly, the cumulative effect of the evidence of P.W. 1 Katarina, P.W. 4 Tereza Fernandes, P.W. 6 Shaila Amonkar, P.W. 8 Maria Luisa and even P.W. 10 Dr. Vijaylaxmi Kashi clearly point out to the fact of the appellant having been found unauthorizedly inside the female ward of the Mental Hospital and seen holding Zamila by her hand and also embracing her at which time the uniform or frock that she was wearing was also raised above her knee. There is also some sort of evidence suggesting that on that occasion the zip of his pant might have been half open. The appellant himself has admitted his presence in the hospital although alleging that he had gone there to meet the woman cook of the hospital Jizabai Satardekar on account of some money matters which he wanted to get sorted out with her in connection with a loan given by him to her son. It is further the case of the appellant that on that occasion he met Zamila in the corridor of the hospital near the kitchen door and that Zamila started embracing him the reason why he immediately shouted for help. Admittedly no evidence was brought on record by the appellant to substantiate this last contention and instead the material available is consistently pointing out to the contrary, namely to the fact of the appellant having unduly gained entry in the compound of the hospital by pretending to be the brother of Zamila and having thereafter accosted her inside the hospital and taken her along with him towards the corridor in the direction of the kitchen which was then locked by holding her hand and also embracing Zamila obviously without her valid consent which otherwise she could not have given to him on account of unsoundness of her mind. Therefore, I have no hesitation in holding that this act by itself satisfies all the ingredients of the

offence of using criminal force to assault a woman with the intention to outrage her modesty which is qualified in terms of Article 354 of the I.P.C. In this regard, the submissions of the learned counsel pinpointing some inconsistencies or contradictions in the prosecution evidence is only a weak and unsuccessful exercise aimed at shaking its credibility which seems manifestly impermissible and unjustified and thus bound to be rejected.

26. On the other hand the proposition sought to be advanced by Shri Lotlikar that if the charge of attempt to rape is to be held as not proved the charge of outraging modesty would automatically fall flat and therefore, is bound to be dropped and the reliance placed by the learned counsel in the case of *Raghunath Beldar Vs. State of Maharashtra*, appears also to be totally misplaced. That was a case of a conviction u/s 354 after the accused was acquitted u/s 376 wherein the prosecutrix was a consenting party and the Court was examining the validity of such consent for the purpose of adjudicating the conviction imposed on him u/s 354. It was in that context that the Court observed that when the accused was acquitted u/s 376 and the prosecutrix was a consenting party in view of the medical evidence showing that there was no resistance at all and she was more than twelve years of age at the time of the incident, the conviction of accused for an offence u/s 354 would be invalid. The facts of our case are totally different wherein it is seen that the finding of acquittal which this Court chose to record against the appellant for an offence of attempt to commit rape is based on the circumstance that there is no sufficient material to point out some sort of persistence or determination on his part to make a serious attempt to maintain sexual intercourse with Zamila and therefore, whatever facts which were proved against him would amount at the most to an act of preparation to commit rape. This apart from the fact that there was ample evidence to suggest that while playing with the prosecutrix the question of a valid consent could not arise because she being a mental patient and therefore, unable to understand the meaning of his acts any lack of resistance on her part could not have been able to be construed as consent or atleast valid consent given by her to the appellant to encourage him to sexually assault or outrage her modesty. Hence in the particular facts of the case it is obvious that the ruling cited by Shri Lotlikar does not at all fit or support the defence case.

27. In the result the appeal is partly allowed and the conviction of the appellant for offences under sections 170, 376 r/w 511 of I.P.C. is hereby quashed and set aside. The appellant is instead convicted for an offence u/s 345 of I.P.C. However, bearing in mind the extreme gravity and seriousness of the crime, the circumstance of the appellant, a member of the police force who was particularly expected to uphold the discipline and the dignity of his office and thus act strictly according to the canons of morality and good behaviour, having instead committed the offence apparently seeking to take undue advantage of his position to satisfy his sexual lust, in my view, a fit and exemplary punishment seems to be justified in the special set of circumstances of the case. Accordingly, he is sentenced to undergo two years Rigorous Imprisonment and to pay a fine

of Rs. 5,000/-, or in default, to undergo plus six months Simple Imprisonment. If the fine is realized the said amount will be paid to the prosecutrix Zamila towards compensation for the moral damages suffered by her on account of the criminal action of the appellant.