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IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.1042 OF 2024 (F)

Mr. Alfred Fernandes
S/o Mr. Antonio Fernandes,
aged about 38 years,
r/o Porta Vado, Siolim,
Bardez Goa,
Presently lodged
in Central jail at Colvale

... APPELLANT

Versus

1. The State
Through The Public Prosecutor,
High Court of Bombay,
Porvorim - Goa.

2. Police Inspector,
Anjuna Police Station,
Anjuna, Goa.

... RESPONDENTS

Mr. Pradeep Sawaikar with Ms. Jay Sawaikar, Advocate under the Legal Aid Scheme for the Appellant.
Mr. S. Karpe, Additional Public Prosecutor along with Ms. S. Gaonkar and Ms. S. Parodkar, Advocates for the State.

CORAM:- ASHISH S. CHAVAN, J.

Reserved on : 16th March 2026
Pronounced on : 27th April 2026

JUDGMENT :

1. By way of the present Appeal, the Appellant has challenged the judgment and order dated 01.10.2024 and 05.10.2024 passed by the

Fast Track Special Court, POCSO, Panaji, Goa, in Sessions Case (ORS) No. 43/2023 convicting him for offences punishable under Sections 448, 354 and 376 of IPC. The substantive sentence under Section 448 of IPC is one year rigorous imprisonment with fine of Rs.1,000/- (Rupees One Thousand Only) and in default to undergo one month rigorous imprisonment. The substantive sentence under Section 354 of IPC is Five Year rigorous imprisonment with a fine of Rs. 10,000/- (Rupees Ten Thousand only) and in default to undergo one month rigorous imprisonment. The substantive sentence under Section 376 of IPC is 10 years of rigorous imprisonment with a fine of Rs.25,000/- (Rupees Twenty Five thousand only) in default to undergo one month rigorous imprisonment. If the fine amount is realized, the same is directed to be paid to the victim after the appeal period is over. All sentences are to run concurrently.

2. It is the case of the prosecution that on 15.05.2023 at about 14.30 hrs, the victim lodged a written complaint with the Anjuna Police Station. In the said complaint, she states that on 14.05.2023 at about 21.30 hrs., she had dinner in the living room of her house and at about 23.00 hrs., she went to sleep in the bedroom. At about 00.30 hrs., she sensed someone's presence in the bedroom and therefore woke up. Upon waking, she noticed that someone was crawling on the floor next to her bed. She panicked and screamed at the person. The

person jumped on her bed and tried to cover her face with the pillow and bedsheet. The victim continued screaming and tried to escape from his clutches. However, the Appellant further started removing his pants. He pulled the pants from the body of the victim and touched his hand on her vagina, trying to insert his fingers to which the victim screamed and begged him to stop. However, the Appellant did not stop and continued touching her private parts inappropriately. The victim in self-defence put up a scuffle with the Appellant while shouting for help loudly. In a couple of minutes, the victim heard someone banging at the main door. She pushed the Appellant, rushed towards the main door and opened it. Her neighbour along with three others were standing there. They all managed to apprehend the Appellant. In the complaint, the victim has identified the Appellant as someone who washed cars, including her car for a living.

3. Acting on the aforesaid complaint, the Anjuna Police Station registered FIR bearing No. 82/2023 under Sections 448 and 376 of IPC.

4. The accused was arrested on 15.05.2023 under an arrest panchanama. Medical examination of both the accused and the victim was conducted. The scene of offence panchanama was drawn up by the Investigating Officer and he also recorded the statements of the witnesses. The investigation was concluded and chargesheet was

filed before the Learned Judicial Magistrate First Class, Mapusa, Goa. The charge was framed against the Appellant for offences punishable under Section 448, 354 and 376 of IPC. The Appellant pleaded not guilty and claimed to be tried. The prosecution examined eight witnesses. No defence witness was examined by the accused.

5. PW1 victim, deposed in terms of her complaint. She stated that she had been residing in a flat situated on the second floor of the house belonging to PW7 on rental basis since February, 2023. She further stated that she runs a Beauty Parlour on the first floor and she resides on the second floor. She deposes that her flat consists of two bedrooms and one living room. The rooms have attached balconies. The door of the living room was kept open to allow her pet cats to move in and out of the balcony. While narrating the incident dated 14.05.2023 she stated that after having dinner in the living room, she went to sleep in her bedroom at about 11.00 p.m. Her bedroom door was locked. Each room had a separate balcony, and one could not access another balcony without passing through the bedroom or the living room. She further narrates that on 15.05.2023 at about 00:30 hours, she sensed someone presence in her bedroom. Upon waking up, she noticed that somebody was crawling on the floor next to her bed. When the victim screamed, the said person jumped on her bed and tried to cover her face with a pillow and bedsheet. She tried to

escape from the clutches of the accused, however, the accused continued touching her inappropriately and also tried to insert his finger into her private parts. The victim, in self-defence, tried to strangle him with the chain he was wearing around his neck, but the chain broke and the accused continued attacking her. Hearing her screams, the owner of the house, PW7 and other persons rushed to the door of her flat. She somehow managed to open the door of the house. When PW7 and others came inside the house and put on the lights than she realized that the person assaulting her sexually was none other than her car cleaner whom she identified as the Appellant, who was washing her car since March, 2023. When he tried to run away from the balcony, they caught him, and thereafter called the police, who took the Appellant with them to the Anjuna Police Station where she recorded her complaint. Thereafter the victim, at about 3.40 a.m., was sent for medical examination. After her initial medical examination at a Primary Health Center (PHC), she was taken to the Goa Medical College (GMC) for further medical examination. She deposed about the clothes, bedsheet and broken chain which were attached by the police under panchanama. Her statement was recorded under Section 164 CrPC. In her evidence, she has proved the same. In cross-examination, she admitted that she knew the accused since she started living in the said building, where he was doing odd jobs. She admitted that at the time of the incident there were no CCTV

cameras in the building, they were installed later subsequent to the incident. She also stated that it is possible for anyone to enter her living room balcony through the common wall of the PW7's house. She further stated that it is possible for anyone to climb the common balcony between the PW7's house and her living room balcony, and that she might not have noticed any person entering. She admitted that on the next day, male and female police officers came to her residence to conduct the panchanama. She further admitted that she saw the accused only on the day of the incident at the police station. She also identified one damaged silver-coloured, round-shaped metal chain.

6. PW2, Medical Officer, deposed in terms of hurt certificate issued by her. According to her, in the month of May 2023, while she was attached to PHC as a Medical Officer, on 15.05.2023 at about 3:45 a.m., she examined the victim who was brought by the police. Upon examination, the victim gave history of assault that (i) she was sexually assaulted by being touched inappropriately on her vagina (Appellant tried putting hand into her vagina) and (ii) she had suffered blunt trauma to the rest of her body. PW2, on examination, she did not notice any external injuries suggestive of forceful penetration on the person of the victim.

7. PW3, Senior Resident Doctor, attached to Department of OBG GMC, deposed in terms of the Medico Legal Examination Report along with the consent form of the victim and forwarding letters. She deposes that on 15.05.2023, after obtaining consent for medical examination of the victim, she examined the victim and referred her to the blood bank. She also produced on record the Medico Legal Examination Report in respect of sexual violence upon the victim. At the time of examination, the victim narrated the history of the incident. Upon gynecological examination, she noted that there were multiple old healed hymeneal tears. As per her opinion, there was evidence of vaginal penetration in consonance with the oral history of the victim. The narration of the incident is in consonance with the complaint of the victim, her statement under Section 164 of Cr.P.C. and her oral evidence before the Court. The oral history mentions digital penetration in the vagina by the Appellant. In cross-examination, save and accept for the admission that the victim was sexually active there are no other admissions elicited from this witness.

8. PW4, Lecturer, Forensic Medicine and Toxicology (FMT), attached to the Department of Forensic Medicine, GMC, deposed in terms of the Report of Medical Examination of the Appellant and the consent form. He deposed that on 16.05.2023, at the request of the

police, he examined the Appellant at about 4:00 p.m., after obtaining his consent. As per his opinion, (i) there were no signs suggestive of recent sexual intercourse; however, the same could not be ruled out, and (ii) there was nothing to suggest that the accused was incapable of performing sexual intercourse. He identified the accused as well as his signature. Except bare denials, there was no cross examination of the witness.

9. PW5, panch witness deposed in terms of the Arrest cum Attachment Panchanama. He deposed that on 15.05.2023, at the request of the police, he acted as a panch witness for a panchanama conducted at the police station, where one black coloured short having vertical lines was shown in the presence of the accused. The person present at the police station was given another set of clothes and the clothes worn by him were attached under the panchanama. He admitted that, in the presence of the Appellant and another person, the arrest panchanama was conducted. He identified the Appellant, following which the Appellant was arrested and one mobile phone was found in his possession. He stated that the contents of the panchanama were read over and explained to him in his language and they were correctly recorded. He identified the Appellant as well as one long-sleeved shirt, and one grey coloured long jeans pant seized under panchanama. Since the witness was deviating from the

panchanama, the learned Public Prosecutor has asked questions in the nature of cross examination to the witness. During cross examination although some suggestions were put up to the witness, nothing of substance was elicited from the witness.

10. PW6, panch witness to the Scene of Offence panchanama has deposed in terms of the said panchanama. He deposed that on 16.05.2023 he acted as a panch witness to the scene of offence panchanama conducted at the victim's bedroom situated on the second floor of the building. He has described the room of the victim which is the first room of the said flat. The room had one wooden bed, table, windows, air-conditioners, curtains and an attached balcony. He further deposed that on the bed, bedsheet, pillows and clothes were found scattered. He also noticed mud fingerprints on the wall of the balcony. During the panchanama, various articles including grey coloured underwear, pillow cover, blue and red bedsheet, short sleeves T-shirt with designs, underwear of the victim, one silver coloured chain of the Appellant and a crystal rosary with metal cross were seized, sealed and labelled, and his signatures were obtained. The panchanama was written at the scene of offence. He knows the owner as they are neighbours. He denied the suggestions put to him.

11. PW7, is the owner of the premises. He deposed that he knew the victim as she was residing in his flat on the second floor as a tenant

since February 2023 and had started a beauty parlour on the first floor of the same building. On the intervening night between 15.05.2023 and 16.05.2023 at about 12:00 to 12:30 a.m., he heard the victim screaming for help from her apartment while he was checking the doors and gates of his house. After confirming that the sound was coming from the victim's flat, he sought help from two unknown persons on the main road and went to the second floor with sticks. They then rushed to the second floor and tried to open the apartment door of the victim. PW7 then went to his house to get the spare key of the apartment of the victim, but by the time he reached her apartment, she had already opened the door. He saw that the victim was wearing only a top, was without pants, her lip was bleeding and she was crying. On entering the bedroom, they did not see the Appellant there, but upon checking the balcony they found the Appellant standing in one corner of the balcony without wearing pants. Neighbours gathered and he was apprehended and taken to the Police Station. He identified the Appellant as he used to do odd jobs in the vicinity and had also worked at the victim's parlour and washed her car. In cross-examination, he admitted that the victim's apartment had a separate entrance, that the parlour used to remain open till 9:00 p.m., the restaurant in the building remained open till about 1:00 a.m., and that the accused used to frequently come to work in the vicinity. He denied the defence suggestions.

12. PW8, Investigating Officer deposed that on 15.05.2023, she registered Crime No. 82/2023 under Sections 448 and 376 of IPC based on the complaint of the victim, who alleged that on 14.05.2023 at about 00:30 hours, the accused criminally trespassed into her bedroom and sexually assaulted her. PW8 further deposed that on the same day, the Appellant was arrested in the presence of panch witnesses under the arrest panchanama. All relevant articles, including his mobile phone, were seized. She also arranged for the medical examination of both the victim and the Appellant and collected all the necessary medical reports. She stated that the statement of the victim under Section 164 Cr.P.C. was recorded before the Judicial Magistrate First Class at her request, and upon completion of the investigation, she filed the charge-sheet before the Court. In cross-examination, she admitted that there were no eyewitnesses to the incident and that PW7 reached the spot after hearing the victim's shouts for help. She stated that CCTV cameras were installed in the surrounding area but not at the place of incident. She further admitted that the accused is a resident of the same area, works in the vicinity as a daily wage labourer, and that no documentary proof was produced to show that the accused had a low IQ, though she had inquired with the family members of the Appellant.

13. The Appellant, in his statement under Section 313 of Cr.P.C., took up a defence of denial and false implication.

14. The impugned judgment and order dated 01.10.2024 relies upon the oral testimony of PW1 (victim), the panchanama of the scene of offence, the medical evidence, and the material objects seized during investigation, to conclude that the accused committed the offences punishable under Sections 448, 354 and 376 of IPC. The learned Sessions Judge (Fast Track Special Court) has observed that the testimony of PW1 is cogent, consistent and trustworthy, and inspires confidence. The Court has further observed that conviction can be based on the sole testimony of the victim if the same is found reliable and free from material contradictions. The learned Sessions Judge has observed that the circumstantial and medical evidence clearly establishes the case of the prosecution beyond reasonable doubt. Dealing with the defence of the appellant, the learned Sessions Judge has observed that the defence put up by the appellant that he might have entered into the flat of the victim for committing theft cannot be believed. The contradictions and omissions as regards to the injury to the victim do not go to the root of the matter in view of the testimony of the victim and the medical evidence on record.

15. Heard Mr. Pradeep Sawaikar, learned Advocate with Ms. Jay Sawaikar, learned Advocate under the Legal Aid Scheme for the

Appellant. Mr. S. Karpe, learned Additional Public Prosecutor along with Ms. S. Gaonkar and Ms. S. Parodkar, learned Advocates for the State. Perused the records along with the paper book.

16. The rival submissions can be summed up as under.

17. On behalf of the Appellant, it was strenuously argued that the sole testimony of the victim is not reliable. The witnesses examined to support the case of the victim are either unreliable or have deposed falsely. The material evidence is not collected by the Investigating Agency. Elaborating further the Advocate for the Appellant has argued that charge under Section 376 of IPC was wrongly framed by the learned Sessions Judge. It is the case of the Appellant that the charge which is framed against the Appellant is framed for the offence of attempting to commit rape. It was also submitted that the offence of house trespass is not proved by the prosecution. Relying on certain parts of the deposition of the victim PW1, it was urged that considering the topography of the premises where the offence has taken place, it is not possible for any person to enter any other balcony to the premises unless he goes through the living room. In the light of the fact that the victim had specifically claimed that when she went to sleep, her bedroom door was locked, it is difficult to believe that the Appellant could have entered her bedroom from outside. Also, the evidence of the panch witness reveals that he saw finger prints on the

wall of her balcony, which is in consonance with the prosecution theory that the Appellant had entered the bedroom through the balcony of the bedroom. However, the victim has deposed that it is not possible for anyone to climb into the balcony of her bedroom, and hence, the case of the prosecution that the Appellant entered her bedroom through the balcony cannot be established. Thus, the offence of house trespass is not proved as per the submissions on behalf of the Appellant.

18. Further, an attempt was made to discredit the testimony of the victim on the basis of several inconsistencies between her testimony, her complaint and her statement under 164 Cr.P.C. The inconsistency is on the aspect of the time when the victim identified the Appellant. In her evidence, the victim states that when PW7 came inside, they put on the lights and then she identified the Appellant as her car cleaner. This is contrary to her 164 statement where she states that she noticed the Appellant and identified him immediately prior to the incident.

19. The Appellant has also assailed the prosecution case on the basis of the injuries on the body of the victim. It was sought to be argued on behalf of the Appellant that the evidence of PW2 the Medical Officer attached to the Primary Health Centre to examine the victim has not spoken about any external or internal injuries suffered

by the victim either in her opinion or in her testimony. However, the evidence of PW3 the Doctor attached to Department of OBG, GMC, who has prepared the Medico Legal Report of the victim, records the oral history given by the victim regarding digital penetration. The said Medico Legal Report further notes the presence of bruises on the inner aspect of the right arm, right elbow and swelling of the left knee joint. The Appellant has argued that the opinion given by PW2 is contrary to the opinion given by PW3 on the crucial aspect of digital penetration and external injuries to the victim.

20. On behalf of the Appellant it was also pointed out that there is a discrepancy between the ocular evidence of PW7 (the owner of the premises) and the medical evidence. PW7 deposes that when the victim opened the door, her lip was bleeding whereas this injury is not reflected in the evidence of either PW2 or PW3. The Appellant has also argued on the aspect of non-collection of material evidence. It was urged on behalf of the Appellant that the Investigating Agency has not made any attempt to collect the evidence which was material to the prosecution case. It is submitted that although the prosecution case rests on the foundation of vaginal penetration by the Appellant with his fingers, no efforts were made to take any swab/slide of the fingers of the Appellant. Similarly, although the panch witness deposes about the presence of human finger prints on the wall of the

balcony, the Investigating Officer has not made any effort to collect this valuable piece of evidence.

21. It is also argued on behalf of the Appellant that the testimony of the victim speaks only about 'attempt' at digital penetration and that the prosecution cannot establish its case merely on the basis of the medical evidence. It was also sought to be argued by the Appellant that the PW8 i.e. the Investigating Officer has admitted that she has inquired about the IQ level of the Appellant. It was argued that normally during the course of investigation, such inquiry is not made unless the Investigating Officer finds something strange about the accused or there was any material that prompted the Investigating Officer to make such inquiries. It was argued that despite having a doubt, the Investigating Officer did not refer the Appellant for medical examination. This creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the Appellant.

22. The Appellant has relied on the judgments of ***Prakash Nayi alias Sen Vs. State of Goa***¹ and in the case of ***Ajay Ram Pandit Vs. State of Maharashtra***². In conclusion the Appellant has submitted that the prosecution suffers from several inconsistencies

¹ 2023 (5) SCC 673

² 2022 SCC Online Bom 3920

and infirmities which raises a serious doubt on the genuineness of the prosecution case and leads to the conclusion that the Appellant has been falsely implicated. In view thereof, the Appellant has prayed that the Appeal may be allowed and the conviction may be set aside.

23. The learned Additional Public Prosecutor for the State has opposed the grant of relief in the Appeal. He has submitted that going by the statements of the victim and her oral evidence in Court, it is clearly established that the offence punishable under Section 376 of IPC is proved beyond reasonable doubt. From a conjoint reading of the complaint, the deposition and the statement under Section 164 Cr.P.C., it is evident that there is a clear act of digital penetration attributable to the Appellant, attracting the offence defined under Section 375(b) of the IPC which is punishable by Section 376 of the IPC. The learned APP has submitted that the victim has withstood the cross examination and her credibility is not shattered. The Appellant was found in the said Apartment in the balcony of the bedroom. The testimony of PW7 and other witnesses who rescued the victim also corroborates the case of the prosecution. The evidence of the victim is corroborated by the medical evidence in the nature of the medico legal examination report dated 15.05.2023 and the examination of PW3 who is the author of the said report. The Medico Legal Report and the findings therein have not been challenged by the Appellant in his

cross examination. Similarly, the opinion of the doctor has also not been controverted by the Appellant during cross examination. It was argued that when a particular witness is not cross examined on a material aspect of his testimony, the defence cannot subsequently dispute the contents of the medical reports or dispute the medical evidence on record. It was submitted that by its very definition the offence of rape defined under Section 375(b) of IPC extends to insertion “to any extent”, “any object” or “a part of the body” and is not restricted only to penile penetration as is sought to be argued by the Appellant. Dealing with the argument of the Appellant that the non collection of material evidence i.e. DNA is fatal to the case of the prosecution, learned APP has strenuously rebutted the same by pointing out that Section 53(A) of Cr.P.C. enables medical examination of a person accused of rape for the purpose of collecting scientific evidence such as semen, blood, hair samples or DNA profile. However, the provision is facilitative in nature and not mandatory and therefore, failure to conduct DNA profiling cannot by itself be treated as fatal to the prosecution case. It is a settled principle of criminal jurisprudence that defects or shortcomings of the investigation cannot by themselves be a ground for acquittal particularly when the prosecution has otherwise produced reliable and cogent evidence establishing the guilt of the accused. The learned APP has relied on the judgments of ***Karnel Singh Vs. State of***

M.P.³, Veerendra Vs. State of Madhya Pradesh⁴, Sunil Vs. State of Madhya Pradesh⁵ in support of the aforesaid submissions.

24. The learned APP submitted that the statement of the Investigating Officer as regards the mental status of the Appellant at the best establishes the fact that during the course of the investigation, the Investigating Officer had made inquiries with family members as well as the persons acquainted with the Appellant regarding his mental condition and IQ level. The Investigating Officer further states that none of them have produced any document suggesting that the Appellant was suffering from any mental illness or that his IQ level was low. This fact has been recorded by the Investigating Officer in his case diary. Under Section 84 of IPC the plea of insanity can be availed by an accused only when it is established that, at the time of the commission of the offence he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Learned Additional Public Prosecutor argued that even in this case the burden of proving the plea of insanity rests on the Appellant and the Appellant has failed to discharge this burden. Additionally, it was also argued that during his

³ (1995) 5 SCC 518

⁴ (2022) 8 SCC 668

⁵ (2017) 4 SCC 393

statement under Section 313 of Cr.P.C. the Appellant was given full opportunity to explain the circumstances appearing against him and to put forth his defence. However, the Appellant merely answered in the negative and did not raise any plea of mental illness and unsoundness of mind. Consequently, the benefit of Section 84 IPC cannot be extended to the Appellant. The learned APP has placed reliance on the judgments of ***Mohd. Anwar Vs. State (NCT of Delhi)***⁶ and ***Surendra Mishra Vs. State of Jharkhand***⁷ in support of his submissions.

25. Lastly, the learned Additional Public Prosecutor has refuted the argument of the Appellant on the aspect of house trespass by submitted that the suggestions put forth by the Appellant during the cross examination of the victim clearly admit and acknowledge his presence and hence, he cannot now conveniently argue that the fact of house trespass is not proved.

26. Appreciating the rival contentions, two fold issues arise for my consideration. Firstly, whether the conviction of the Appellant for offences punishable under Sections 448, 354 and 376 of IPC is in accordance with law and secondly, whether the sentence imposed by

⁶ (2020) 7 SCC 391

⁷ (2011) 11 SCC 495

the impugned judgment is proportionate to the offence for which the conviction is accorded.

27. To examine the first issue the evidence must be analyzed meticulously. At the very outset, it would not be out of place to reproduce the definition of Section 375 of the IPC.

[375. Rape.—A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, 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 her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

28. It is pertinent to note that after 2013 in the wake of the recommendations of Justice Verma Committee constituted post December, 2012 Delhi gang rape case recommending the broadening of the definition of rape. Section 375 underwent substantial amendments. In the post 2013 amendment scenario, the definition of rape includes insertion, to any extent, of any object or part of the body, not being the penis into the vagina the urethra or anus of a woman as is evident from a bare perusal of Section 375(b) of IPC.

29. Appreciating the evidence of PW1, the victim, while deposing about the incident she narrates that she sensed someone present in her bedroom. Upon waking up she noticed that somebody was crawling on the floor next to her bed. When she screamed, the said person jumped on her bed and tried to cover her face with a pillow and bedsheet. She tried to escape from the clutches of the assailant. However, the assailant tried to insert his finger into her private part. The victim, in self defence tried to strangle him with a chain that he wore around his neck but the chain broke and the assailant continued attacking her. Hearing her screams, the owner of the house, PW7 and other persons rushed to the door of her flat. The victim somehow managed to open the door of the house. When PW7 and others came inside the house and put on the lights then she realized that the person assaulting her sexually was none other than her car cleaner

whom she knew to be the Appellant who was washing her car since March, 2023. When he tried to run away from the balcony, they caught him, called the police and took the Appellant to the police Station where the statement of the victim was also recorded. Thereafter the victim was sent for medical examination.

30. PW7, the owner of the premises where the victim was residing on the second floor as a tenant is also an important witness. He heard the screams of the victim and after confirming that the sound was coming from the victim's flat, he along with other persons went to the second floor armed with sticks. They tried to open the apartment door of the victim's flat. PW7 went to his flat to get the spare key of the apartment of the victim but by the time he reached the apartment, the victim had already opened the door. On entering the bedroom, they did not see the Appellant but upon checking the balcony they found the Appellant standing in one corner of the balcony. He was apprehended and taken to the police station. PW7 has also identified the Appellant since the Appellant used to do odd jobs in the vicinity and had also worked at the victim's parlour and washed her car.

31. In the background of the oral deposition of the victim, it is pertinent to examine the medical evidence with respect to the medico legal examination of the victim. It is pertinent to note that the victim lodged the complaint at about 2.30 a.m. on 15.05.2023. The victim

was examined for injuries by PW2, a Medical Officer attached to the PHC at about 3.45 a.m. on the same day. The medical examination of the victim was conducted by PW3, Senior Resident attached to the Department of OBG, Goa Medical College. The examination was conducted on the same day at 5.45 p.m. PW2 deposes that there were no external injuries suggestive of forceful penetration or perineal tear. On behalf of the Appellant, the evidence of PW2 was relied upon to support his argument that the sexual assault was limited to the Appellant 'trying' to put his fingers in the private part of the victim and that such attempt could not fall within the definition of Section 375 of the IPC. It was on the basis of the deposition of this witness that the Appellant canvassed the theory that the allegations against the Appellant can be at the highest categorized as an attempt to commit rape.

32. It is in this light that the evidence of PW2 assumes significance. However, before advertng to the same, it would be necessary to examine the deposition of PW3, the Senior resident doctor who medically examined the victim on the very same day. She deposes that she was in receipt of a letter dated 15.05.2023 addressed by Anjuna Police Station requesting her to conduct the medical examination of the victim. She has proved and exhibited the medico legal examination report of sexual violence issued under her signature by

the Department of OBG, Goa Medical College. The deposition of PW3 corroborates the aforesaid medico legal report. In her deposition PW3 states that there was evidence of vaginal penetration. The victim was examined on the day of the incident. She further deposes that the victim had given the oral history of “inserting the finger in the vagina”. Co-relating this deposition with the medico legal report, it is seen that the chart at Point No.15(f) thereof titled “**Details regarding sexual violence**” clearly reflects that there was penetration by finger. Similarly, the checklist at Point No.17 titled “**Examination for injuries on the body if any**” mentions two bruises on the inner aspect of upper arms and swelling of left knee joint. Finally, the medical opinion reflected at Point No.22 clearly indicates evidence of “**vaginal penetration upon gynecological examination**”. Thus, the evidence of PW3 clearly establishes penetration by fingers co-relating to medical finding of vaginal penetration. On behalf of the Appellant, inviting the attention of this Court to the following excerpt from the deposition of PW1, it was sought to be argued that at the best the allegations would constitute an attempt to commit rape.

“On 15.05.2022 at about 00.30 hrs., I sensed someone present in my bedroom and I woke up and found that somebody was crawling on the floor next to my bed. When I screamed, the said person jumped on my bed and tried to cover my

fact with pillow and bedsheet. I tried to escape myself from his clutches. He continued touching inappropriately, he tried to put his fingers into my vagina. I managed to free myself and I continued screaming loudly. In my self defence, I tried to strangle him with his chain which he was wearing around his neck but the same broke and he continued attacking me. I continued fighting back and screaming.”

33. However, upon a holistic reading of the evidence of PW1 and PW3 i.e. the evidence of the victim and the Doctor who conducted medico legal examination on the victim, two aspects clearly stand out. Firstly, that the victim has described the sexual assault in vivid and clear details. She has described the shock which she underwent realizing that someone was crawling on the floor next to her bed in the dead of the night. She was further horrified when that person jumped up on her bed and smothered her with the pillow and bedsheet. Her desperate struggle to extricate herself from the clutches of the assailant is also described. She has clearly stated that the Appellant touched her inappropriately by trying to put his fingers into her vagina. This oral deposition cannot be read in isolation but must be read along with the medico legal report. As noted above the medico legal report establishes that there was penetration by finger into vagina and a clear opinion was given by PW3 that there is evidence of

vaginal penetration upon gynecological examination. By its very definition the offence of rape includes insertion of any part of the body, ***to any extent*** into the vagina of a woman. Thus, the very definition of the offence of rape includes penetration by fingers or ‘*digital penetration*’. The definition of the offence of rape does not stipulate any “*degree of penetration*”. In fact, even before the 2013 amendment, the Hon’ble Supreme Court has held in a catena of judgments that even partial or slightest penetration into the private part of the victim would be sufficient to attract the offence of rape. Useful reference can be made to the observations of the Hon’ble Supreme Court in the case of ***State of U.P. Vs. Babul Nath***⁸, ***Koppula Venkat Rao Vs. State of U.P.***⁹ and ***Aman Kumar Vs. State of Haryana***¹⁰. Thus, there is no hesitation in the mind of this Court to hold that the complaint, the oral deposition of the victim and the corroborating medical evidence clearly establish the offence of rape committed by the Appellant against the victim.

34. Dealing with the cross examination of the victim, it is pertinent to note that the Appellant has put up a case that the victim had falsely implicated him since there were arguments between the victim and the Appellant due to unpaid wages. This defence is not only

⁸ (1994) 6 SCC 29

⁹ (2004) 3 SCC 602

¹⁰ (2004) 4 SCC 379

improbable but also not in consonance with the 313 statement of the Appellant. Although it was suggested during cross examination that it is possible for any person to enter into the living room balcony of the victim through the common wall of the PW7, the very fact that the Appellant was apprehended on the spot in the corner of the balcony and identified by PW1 and PW7 demolishes the area of doubt sought to be created by the Appellant by way of the aforesaid suggestion.

35. Dealing with the alleged discrepancy between the evidence of PW2, a Medical Officer and PW3, Senior Resident Doctor, it is to be noted that PW2, the Medical Officer has not examined the victim for sexual assault. Hence, her gynecological examination was not done by PW2. This is borne out by the Hurt Certificate produced at the instance of PW2 *vis-a-vis* the Hurt Certificate. The medico legal examination report notes the gynecological examination done by PW3 in respect of sexual assault committed upon the victim. The said report is exhaustive inasmuch as it deals with the history of sexual violence, type and details of violence, examination of injuries on the body and finally opines that there is evidence of 'vaginal penetration'. Thus, the Hurt Certificate and the medico legal examination report are not at variance with each other as sought to be made out by the Appellant. They are opinions operating in different spheres. PW2 has examined the victim for external injuries. This examination was done

in a Primary Health Centre by a Medical Officer, whereas PW3 has gynecologically examined the victim for history of sexual assault and this examination was done by a Senior Resident Doctor attached to the Department of OBG i.e. Obstetrics and Gynecology. Needless to state, PW3 is not only competent but also qualified to undertake a gynecological examination of a victim of sexual assault. Hence, the opinion of PW3 is more relevant for the purpose of medical corroboration of the offence of rape. Here it would be relevant to add that the credentials of PW3 have not been assailed by the Appellant in his cross examination. Neither has the Appellant challenged the findings of the medico legal examination report.

36. Dealing with the ancillary arguments on behalf of the Appellant, *firstly*, that the non-collection of material evidence i.e. DNA is fatal to the case of the prosecution, I find force in the submissions of the learned APP that Section 53(A) of Cr.P.C. is facilitative in nature and not mandatory and therefore, failure to conduct DNA profiling cannot by itself be treated as fatal to the prosecution case. This is more so, in the wake of the evidence of the victim corroborated by medical reports. *Secondly*, it was sought to be argued by the Appellant that the Investigating Officer admitted that she has inquired about the IQ level of the Appellant and that normally such inquiry is not made unless the investigation finds something

strange about the Appellant that prompted his inquiry. This argument must be discarded for the reason that the deposition of the Investigating Officer, on the contrary, establishes that during the course of investigation she had made inquiries with the family members and the persons acquainted with the Appellant regarding his mental condition and IQ level. The Investigating Officer further states that none of them have produced any document suggesting that the Appellant was suffering from any mental illness or that his IQ level was low. This fact has been recorded by the Investigating Officer in her case diary. Under Section 84 of IPC the plea of insanity can be availed by an Accused only when it is established that, at the time of the commission of the offence he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Even in this case, the burden of proving the plea of insanity if any, rested with the Appellant and from a perusal of the record it is evident that the Appellant has failed to discharge this burden. It must be noted that the Appellant was given full opportunity to explain the circumstances appearing against him and to put forth his defence by way of his statement under Section 313 of Cr.P.C. However, the Appellant merely answered in the negative and did not raise any plea of mental illness or unsoundness of mind.

37. *Thirdly*, insofar as the argument on behalf of the Appellant that the charge framed against the Appellant is not framed for the offence of rape but for the offence of ‘attempt to rape’, a bare perusal of the charge indicates that it is, *inter alia*, framed for offence punishable under Section 376 of IPC. The offence punishable under Section 376 of IPC is proved by the prosecution. The Appellant has not demonstrated prejudice caused to him by the purportedly ‘incorrect’ framing of charge occasioning a failure of justice. It is a settled position of law that where there is substantial compliance with the requirements of law and the accused had a fair trial with full knowledge of the case against him, mere procedural errors or omissions would not vitiate the trial unless prejudice is demonstrated. Therefore, this argument of the Appellant also deserves to be rejected.

38. Lastly, examining the offences punishable under Section 448 (punishment for house trespass) and Section 354 of IPC (assault or criminal force on woman to outrage her modesty), it was sought to be argued on behalf of the Appellant that considering the topography of the premises where the offence has taken place, it is not possible for any person to enter any other balcony to the premises unless he goes through the living room and hence, it is difficult to believe that the Appellant could have entered the bedroom of the victim from outside. Analysis of the suggestions put forth on behalf of the Appellant during

the cross examination of the victim clearly admit and acknowledge the presence of the Appellant. Coupled with the fact that the Appellant was apprehended on the spot and except for denials the Appellant has not come out with any alternative explanation of his presence, the offence of house trespass is proved by the prosecution. Although the Appellant has not specifically assailed his implication for offence punishable under Section 354 of IPC in the submissions before this Court, an independent analysis of the evidence yields that the offence punishable under Section 354 has also been proved by the prosecution.

39. Examining the proportionality of the sentence imposed vide the impugned order and judgment it is to be noted that the learned Judge has heard arguments of rival sides on the point of sentence and then sentenced the Appellant to undergo substantive sentence of one year rigorous imprisonment for offence under Section 448 of IPC, five years rigorous imprisonment for offence under Section 354 of IPC and ten years rigorous imprisonment for offence under Section 376 of IPC. Since all sentences are directed to run concurrently, the proportionality of the sentence will have to be examined in respect of the sentence of ten years rigorous imprisonment. Section 376 of IPC which provides for the punishment of the offence of rape stipulates that the punishment shall not be less than ten years but can extend to

imprisonment for life. The learned Judge has considered the fact that there were no prior convictions against the Appellant and sentenced him to the minimum substantive sentence of rigorous imprisonment for ten years. Thus, the sentence imposed vide the impugned judgment and order is proportional to the gravity and heinousness of the offence.

40. In the light of the aforesaid facts and discussions, this Court has no hesitation in holding that the conviction of the Appellant for offences punishable under Sections 448, 354 and 376 of IPC is in accordance with law and that the sentence imposed by the impugned judgment is proportionate to the offence for which the conviction is accorded. In view thereof, the Appeal deserves to be dismissed.

41. Criminal Appeal No.1042 of 2024 (F) is dismissed.

42. The Registry to waive the office objections and register the matter.

ASHISH S. CHAVAN, J.