

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.599 OF 2019

Dilawar Hafiz Khan }

Age- 28 years, Occ: Business }

R/at Valvan Gaon, Near Jai Malhar
Mutton Shop, Nana Matanwale House,
Lonawala, Taluka-Maval, District-Pune, }

At present undergoing the sentence
imposed upon him at Yerwada Central
Prison, Yerwada. }

... Appellant

NILAM
SANTOSH
KAMBLE

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Versus

1. State of Maharashtra }

(At the instance of Senior Inspector of
Police Bhoari Police Station vide C.R.
No.I-148 of 2014) }

2. XYZ }

(At the instance of Bhoari Police Station) }

... Respondent

WITH

CRIMINAL APPEAL NO.926 OF 2021

Yasin Shakir Khan }

Age- 41 years, Occ: Service }

R/at "G" Ward, Table Land, Near Bazar
Post Office, Lonawala, Taluka-Maval,
District-Pune }

At present undergoing the sentence
imposed upon him at Yerwada Central
Prison, Yerwada. }

... Appellant

Versus

1. State of Maharashtra	}	
(At the instance of Senior Inspector of	}	
Police Bhoari Police Station vide C.R.	}	
No.I-148 of 2014)	}	
	}	
2. XYZ	}	
(At the instance of Bhoari Police Station)	}	... Respondent

**WITH
CRIMINAL APPEAL NO.1277 OF 2019**

Satish Chitbhal @ Ramaasare Gupta	}	
Age- 33 years, Occ: Driver	}	
R/at Netajiwadi, Near Sathi Asara Mandir,	}	
Near Water Lake, Khandala, Taluka-	}	
Maval, District-Pune.	}	
	}	
At present undergoing the sentence	}	
imposed upon him at Yerwada Central	}	
Prison, Yerwada.	}	... Appellant

Versus

State of Maharashtra	}	
(At the instance of Senior Inspector of	}	
Police Bhoari Police Station vide C.R.	}	
No.I-148 of 2014)	}	... Respondent

**WITH
CRIMINAL APPEAL NO.989 OF 2021**

Vijaypal Bakki Singh	}
Age- 24 years, Occ: Service	}

R/o.Village at Post : Jatauli Ratwan, }
 Chikasna, Tlauka-Bharatpur, }
 Rajasthan-321 025. }
 Convict No.C-18130 }
 Yerwada Central Prison, Pune } ... **Appellant**

Versus

State of Maharashtra }
 Through Bhosari Police Station }
 FIR No.148 of 2014. } ... **Respondent**

Mr.Nitin H. Sejpal a/w Mrs.Pooja N. Sejpal, Mr.Siddharth Gharat and Mr.Sahir Patel in Appeal No.599 of 2019 and 609 of 2019, for the Appellant.

Ms.Farhana Shah, (Appointed Advocate), for the Appellant in Criminal Appeal No.989 of 2021

Mr.A.S. Gawai, APP, for the Respondent-State.

Ms.Devyani Kulkarni, for Respondent No.2.

CORAM : R.M. JOSHI, J.

RESERVED ON : 15th DECEMBER 2025

PRONOUNCED ON : 24th DECEMBER 2025

ORAL JUDGMENT :

. These Appeals take exception to the judgment and order dated 27th February 2019 passed in Sessions Case No.609 of 2014 whereby the Trial Court convicted the Accused persons

for the offences punishable under Section 366 of Indian Penal Code ('IPC' for short) and sentenced to suffer RI for 5 years and fine of Rs.5,000/-, Section 376(2)(n) of IPC and sentenced to suffer RI for 10 years and fine of Rs.10,000/- and Section 376(2)(1) of IPC and RI for 10 years with fine of Rs.10,000/- each.

2. Since four Appeals involve similar question of facts and law, by consent of both sides Appeals are heard together and decided by this common judgment.

In short the case of the prosecution is that, victim who has moderate mental retardation left the house on petty quarrel with the family members on 20th October 2014. As she did not return, her brother lodged missing report with the Police on 1st May 2014. On 2nd May 2014 she came back home. Her mother took her to the Police Station where she disclosed about she being sexually assaulted initially at one lodge at Mumbai and thereafter being brought back to Pune by one boy to take her to agricultural farm where he called three other people and all of them committed sexual assault on her. On the basis of the report lodged by mother of the victim, offence came to be registered.

The victim was sent for medical examination. It was found later that she was pregnant and hence the relevant samples were obtained from the victim as well as from the Accused. Spot panchanma was done. Recoveries were undertaken. On conclusion of investigation, charge-sheet came to be filed. During the course of trial since the Accused abjured the charge, the prosecution examined the following eight witnesses.

Sr no.	Name of witnesses	No. of witnesses	Exhibits
1.	MEENA KHARAT (Complainant- Mother of Victim)	PW1	26
2.	Victim	PW2	31
3.	AVINASH KHARAT (Brother of Victim)	PW3	40
4.	DR. SUPRIYA RODE, Medical Officer	PW4	44
5.	NAMDEO KUNJIR (Punch witness)	PW5	47
6.	SUDHAKAR DESHMUKH (Punch witness)	PW6	49
7.	PANDURANG DIXIT - Panch Witness	PW7	51
8.	SPI CHANDRAKANT BHOSALE (I.O)	PW8	53

Apart from the oral evidence the prosecution placed reliance on following documentary evidence.

<u>Sr no.</u>	<u>Name of documents</u>	<u>Exhibits</u>
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9.	Statement of complainant u/s 161	27
10.	F. I. R	28
11.	Missing Report	41
12.	Medical Examination Report of Victim	45
13.	Memorandum Statement of Accused No. 4	48
14.	seizure panchanama of condom	48A
15.	Memorandum Statement of Accused No. 1	50
16.	Seizure Panchanama of Clothes of Accused No. 1 to 4	52
17.	Memorandum Panchanama of Seizure of Shawl	58
18.	Letter forwarded to Tahasildar for conducting TIP	64
19.	Report of Tahasildar for conduction TIP parade	65
20.	Forwarding Letter about the Medical Reports and Potency Test of the accused	60 to 63
21.	disability certificate and mental retardation certificate of the victim	Article 'X' and 'Y'
22.	DNA Reports	36 to 38

3. The learned Trial Court found the evidence led by the prosecution sufficient to bring home the guilt of the Accused beyond reasonable doubt and hence convicted them and sentenced them to suffer imprisonment as mentioned herein above.

4. The learned counsels for the Appellant/Accused submit that the evidence led by the prosecution before the Trial

Court is not conclusive in nature in order to prove the guilt of the Accused beyond reasonable doubt. It is submitted that having regard to the mental retardness of the victim, it would not be safe to rely upon the testimony moreover, when it is full of contradictions. It is submitted that the prosecution though claims about conducting of identification parade, the manner in which the same was conducted so also in view of the admission of the victim herself about the Accused being shown to her in the Police Station makes the said parade not reliable for convicting the Accused. To support this submission counsel for the Appellant placed reliance on judgment in case of ***Ravindra Alias Ravi Bansi Gohar V/s., State of Maharashtra & Ors¹***.

5. It is further argued that though the prosecution has sought to place reliance on DNA report in respect of Accused Nos.3 and 4 however since, there is no conclusive evidence in order to show that the samples were obtained by taking all care and caution so also the samples were retained tamper proof till its examination. It is his submission that the prosecution has failed

1 1998 CRI.L.J. 4059

to even examine the carrier who took the samples for chemical analysis. A reference is made to the evidence on record indicating that the samples were sent for Chemical examination after lapse of considerable time and hence it cannot be said that the DNA Test Report is conclusive in nature.

6. It is argued that though there is CA report filed on record allegedly showing the Accused No.3 as biological father of fetus of victim, however there is no evidence led about collection of samples of Accused, so also CA report is not proved through its author. Insofar as the Accused No.4 is concerned it is argued that there is alleged recovery of condom at his instance from the spot of the incident. It is submitted that having regard to the fact that the incident in question has allegedly occurred in the month of May, owing to the heat at the relevant time, it cannot be said that the said sample would remain intact for its analysis. It is submitted that in any case since the said alleged incriminating evidence is not put to the Accused person in the statement under Section 313, the same deserves to be kept out of consideration. To support this submission, he placed reliance on judgment in

case of *Kalicharan & Others V/s. State of Uttar Pradesh*², *Samsul Haque V/s. State of Assam*³ and *Rajkumar Alias Suman V/s. State (NCT of Delhi)*⁴. It is further argued that even otherwise the said recovery is not believable as the police had already visited the said spot earlier. In response to the contention of the counsel for Respondent No.2 with regard to the relegation of the matter back to the Trial Court for putting these incriminating circumstances to the Accused person, it is submitted that first of all there is no evidence which would be sufficient to hold that the sampling done was full proof so also that the seized samples were kept tamper free. It is his submission that, in such circumstances, there is no propriety in directing the Trial Court to put those questions to the Accused person by relegating a matter back. It is further submitted that having regard to the nature of evidence led by the prosecution, it cannot be held that the offence alleged against the Accused has been proved beyond reasonable doubt.

7. The learned APP and learned counsel for Respondent No.2 opposed the Appeal by contending that in case of offence

² (2023) 2 Supreme Court Cases (Cri.) 185 and 2023 (2) Supreme Court Cases 583

³ (2020) 3 Supreme Court Cases (Cri.) 596 and (2019) 18 Supreme Court Cases 1612

⁴ 2023) 17 Supreme Court Cases 95

of sexual assault on women, her sole testimony if found reliable would become ground of conviction without seeking any further corroboration. It is their submission that the evidence of victim is free from doubt as she in normal course narrates the occurrence of incidents in question. It is submitted that even otherwise the oral evidence of the victim is duly supported by the medical evidence on record. They also drew attention of the Court to the evidence of Medical Officer Dr.Rode, PW-4 who stated about history being given by the victim which is consistent with her substantive evidence before the Court. It is submitted that there is no reason for victim to falsely implicate the present Accused in the crime in question.

8. At the outset, this Court finds it appropriate to refer the judgment of the Hon'ble Supreme Court in case of *Nirmal Parmar (Supra)* wherein the law of appreciation of evidence in respect of sexual offence has been dealt with and summarized as under:-

11. Law is well settled that generally speaking, oral testimony may be classified into three categories, viz.: (i) wholly reliable; (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable. The first two category of

cases may not pose serious difficulty for the Court in arriving at its conclusion(s). However, in the third category of cases, the Court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

12. In *Ganesan v. State* (2020) 10 SCC 573, this Court held that the sole testimony of the victim, if found reliable and trustworthy, requires no corroboration and may be sufficient to invite conviction of the accused.

13. This Court was tasked to adjudicate a matter involving gang rape allegations under section 376(2)(g), I.P.C in **Rai Sandeep v. State (NCT of Delhi) (2012) 8 SCC 21**. The Court found totally conflicting versions of the prosecutrix, from what was stated in the complaint and what was deposed before Court, resulting in material inconsistencies. Reversing the conviction and holding that the prosecutrix cannot be held to be a 'sterling witness', the Court opined as under:

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries

made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

(underlining ours, for emphasis)

14. In **Krishan Kumar Malik v. State of Haryana (2011) 7 SCC 130**, this Court laid down that although the victim's solitary evidence in matters related to sexual offences is generally deemed sufficient to hold an accused guilty, the conviction cannot be sustained if the prosecutrix's testimony is found unreliable and insufficient due to identified flaws and lacunae. It was held thus:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.”

15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution’s case. While a victim’s testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.

9. The law on the point of appreciating testimony of the victim of sexual assault is settled to say that if the victim’s testimony is of sterling quality, the same can be accepted without asking for any corroboration thereto. Keeping in mind these observations and principles laid down by the Hon’ble Supreme Court, the evidence of prosecution needs examination.

10. The prosecution relies upon following evidence in order to connect the Accused with the crime in question and to prove their guilt:-

- (i) Testimony of victim.
- (ii) Corroborating evidence of mother of victim.
- (iii) Medical evidence, General Examination so also Genital Examination.
- (iv) Previous statements made by the victim to the Police and Medical Officer by giving history.
- (v) Identification of the Accused in Court as well as during the course of investigation in identification parade.
- (vi) DNA Profile Test connects Accused Nos.3 and 4.

11. The learned counsel for Accused made grievance about the incriminating circumstances such as DNA profile reporting not being put to the Accused person which according to them has led to miscarriage of justice. In this regard even the learned counsel for Respondent No.2 and learned APP do not dispute that the questions pertaining to the DNA Test Report were not put to the Accused persons. The Hon'ble Supreme Court in case of *Kalicharan & Others & Samsul Haque (Supra)*

has held that the circumstances which are not put to the Accused would be completely excluded from consideration. This Court therefore finds no hesitation to hold that the evidence with regard to DNA Test needs to be kept out of consideration for the purpose of the decision of the Appeal.

12. Now the question arises as to whether this is a fit case for relegating the matter back to the Trial Court for asking the questions in this regard to the Accused person. The Hon'ble Supreme Court in case of *Rajukumar (Supra)* has held that it is curable defect for the purpose of relegating the matter back to the Trial Court. The Court has taken into consideration other aspects such as the passage of time since the Trial is over so also the nature of evidence led before the Trial Court.

13. Perusal of the evidence led before the Trial Court indicates that there is no satisfactory evidence with regard to the collection of samples so also its preservation till the samples were sent to Chemical Analyzer for analysis. The prosecution has not led evidence to prove the collection of samples of Accused for DNA so also has not examined carrier in order to complete the

chain of events in this regard. There is specific suggestion made to the Investigating Officer about tampering of the muddemal. In light of these facts, it cannot be said that the prosecution has succeeded in proving the collection of samples, its preservation and its reference to the Chemical Analyzer without tampering. Thus there is no propriety in relegating the matter back to the Trial Court for permitting questions to be put to the Accused in that regard.

14. As far as the Test Identification Parade is concerned, the victim has admitted in her cross-examination about she being shown Accused persons at Police Station. Thus it cannot be said that the identification parade would be of any use for the prosecution to prove the guilt of the Accused. Even Trial Court has not accepted the said identification parade to be sufficient evidence in that regard.

15. It would however be material to take note that the identification parade is essentially for the purpose of ascertainment by the Investigating agency about the right person being charged for any offence. No doubt where the Accused and

the victim are unknown to each other, such ascertainment becomes necessary. Question arises as to whether such ascertainment would be a mandatory requirement in all cases.

16. Though in this case Accused persons were unknown to the victim. However, if victim had sufficient time to see the Accused persons during the commission of offence, the identification of Accused even in Court cannot be doubted. As far as Accused No.1 is concerned, he took victim from Pune to Mumbai and brought her back on the next day. Similarly the other Accused persons were called at a farm wherein she was sexually abused. From the cross-examination of the victim nothing is brought on record to indicate that she was not having sufficient opportunity to notice the Accused persons and remember them. Most importantly, in the case where the victim had no reason whatsoever to falsely implicate the Accused person in this crime, such identification cannot be discarded lightly. Thus in such case failure on part of prosecution to conduct the identification parade as per Rules will not lead to the automatic acquittal of Accused. From the Cross-examination of the victim

nothing could be elicited by the defense in order to discard the said identification. No questions are put to victim to hold that she had enough time to note the details/features of Accused and to identify them at later point of time. It is sought to be argued on behalf of the Appellant/Accused that the victim is suffering from mental retardation and therefore it could be said to place reliance on her identification of the Accused. In this regard evidence of medical officer indicates that the victim had moderate mental retardation. However, at the same time, from her evidence it can be seen that she was able to recollect even small things which occurred on the date of incident when she left the house. This clearly shows that the victim was capable enough to understand and even identify the Accused persons in the Court correctly.

17. In view of the substantial evidence of the victim which is fully consistent and reliable in respect of she being taken by Accused No.1 to Mumbai where forcible sexual intercourse came to be established by him with her. Thereafter, she being brought back to Pune and subjected to gang rape by the Accused

person. Apart from the fact that the sole testimony of the victim is sufficient to bring home guilt of the Accused, herein this case her version is duly supported by medical evidence on record. Medical Officer Dr.Rode specifically deposed about she having examined victim on 2nd May 2014 and recorded history given by victim as well as her mother. In the cross-examination Medical officer denied the suggestion that the history was given by mother and she consistently deposed about the history given by the victim in respect of penetrative sexual assault on her by the Accused No.1 and thereafter by all four Accused. On clinical examination Medical Officer found the following injuries on the person of victim.

- (i) Contusion of size 1.5 x 1.5 cm over interior aspect of left arm 7 cm. below shoulder joint tenderness present.
- (ii) Superficial abrasion of 3 x 05 cm and 2 x 0.5 cm. size on postero lateral aspect of left arm 5 cm. below shoulder joint.
- (iii) 3 x 1 cm size contusion over posterior left forearm 3 Cm below elbow joint.

(iv) 3 x 0.3 cm size superficial abrasion left lateral aspect of thoracolumbar tenderness present.

(v) Erythematous patch of 5 x 3 cm. over medial aspect of left thigh 7 cm. above knee joint.

18. The Medical officer also conducted genital examination and found that “I did her genital examination. Labia Majora was normal. Labia Minora was normal. Hymen tears present at 4 o’clock, 8 o’clock and 10 o’clock position. Fresh bleeding seen from 10 o’clock position. Tenderness present. Fouchette superficial laceration and inflammation present. Perihymenal inflammation present. Vaginal bleeding was present. Pubic hair normal not matted.”

19. The Medical Officer therefore has candidly opined about medical examination suggestive of penetrative sexual vaginal intercourse with evidence of injuries over genital area and other body parts. During cross-examination of the Medical Officer nothing is elicited by the defence in order to create doubt about testimony of this witness. No doubt it was accepted in the cross-examination that perihymenal inflammation can be

possible due to the infection of Gonorrhea and venereal diseases. It is however denied that there was no sexual assault on the Accused. The Medical Officer has further denied the possibility of injuries being caused while playing or by fall on the ground. It is thus clear from the evidence of Medical officer that she supports the version of victim about she being ravished by all four Accused persons.

20. As discussed herein above, the evidence of victim is worthy of acceptance and since it is coupled with the medical evidence on record, this Court has no hesitation to hold that the Accused persons have committed sexual assault on the victim and she was subjected to rape by them. The offence punishable under Section 376 and 376(d) of IPC therefore is rightly held to be proved against all the Accused persons.

21. Insofar as the offence punishable under Section 366 of IPC is concerned, the said offence is attributed only against Accused No.1 and the evidence on record does not suggest commission of the said offence by Accused Nos.2 to 4, consequently the conviction recorded by the Trial Court for the

offence punishable under Section 366 of the IPC is confirmed qua Accused No.1. Accused Nos.2 to 4 however are required to be acquitted for the said charge for want of any case being made out by the prosecution to that effect and for non availability of evidence on record.

22. As a result of the above discussion, following order.

ORDER

(i) The judgment and order passed by the Trial Court in Sessions Case No.609 of 2014 dated 27th February 2019 convicting the Accused Nos.1 to 4 for the offences punishable under Section 376 and 376(d) stands confirmed.

(ii) The conviction of Accused No.1 for the offence punishable under Section 366 of IPC is confirmed.

(iii) The Accused Nos.2 to 4 however stand acquitted for the offence punishable under Section 366 of IPC.

(iv) Any fine amount, if any paid by the

Accused Nos.2 to 4, in respect of the offence under
Section 366 of IPC be refunded to these Accused.

23. All pending Applications are disposed of.

(R.M. JOSHI, J.)

24. Learned counsel for the Appellant seeks four weeks
time for surrender of Appellant-Dilawar Hafiz Khan who is on
bail from 1st April 2021. Since this Appellant is on bail, time of
four weeks is granted for him to surrender before Jail Authority.

(R.M. JOSHI, J.)