

Prasad

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.830 OF 2022

Samin Iliyas Ansari ...Appellant
Versus
State of Maharashtra and Anr. ...Respondents

WITH
CRIMINAL APPEAL NO.869 OF 2017

Sonu Boloram Muramu ...Appellant
Versus
State of Maharashtra and Anr. ...Respondents

Mr. Aniket Vagal, for the Appellant in Cri. Appeal No.830 of 2022.
Mr. M.G. Shukla, for the Appellant in Cri. Appeal No.869 of 2017.
Mr. A.R. Kapadnis, APP for the Respondent No.1 – State in both Appeals.
Mr. M J Bhatt, for Respondent No.2 in Cri. Appeal No.830 of 2022.
Mr. Maitreya Girish Shukla, appointed Advocate for the Respondent No.2 through legal aid in Cri. Appeal No.869 of 2017.

CORAM : R. M. JOSHI, J.
RESERVED ON : 20TH APRIL, 2026.
PRONUNCED ON: 30TH APRIL, 2026.

JUDGMENT:-

1. Both these Appeals are filed by original Accused Nos.1 and 2, in Special Case (POCSO) No.108 of 2016, whereby they came to be convicted for offences punishable under Sections 363, 366-A, 376(D), 337 read with Section 34 of the Indian Penal Code, 1860 and Sections 9 and 10 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, by impugned judgment and order dated 6th September, 2017, passed by Special Judge Thane.

2. Since the facts and law involved in both Appeals are common, by consent of both sides Appeals were heard and now decided together by this common judgment.

3. In the instant case, law was set on motion on the basis of first information report at 1st February, 2016, lodged by the informant, who is the mother of the victim, a mentally challenged girl, aged about 11 years. The Informant reported to the police that the victim girl, is mentally challenged and she used to attend a special school named “Ummeed” situated at Mumbra. She claims that since the school van stopped coming to their place, for last 4 to 5 months, the victim is at home. According to the informant, victim used to go out of the house for the purpose of playing and used to return back home. On 1st February 2016, the victim was playing outside the house. At about 5:15 PM, Informant was required to go to a dispensary at Shilphata along with her elder daughter. At that time, she did not find victim playing near the house, however, she assumed that ordinarily victim plays in the village and hence did not pay attention to the same. When she went to the house of her sister Pinky, she received phone from her husband on the mobile of Pinky. He told her that the victim girl was seen going towards Kalyan Phata. Informant therefore went towards Kalyan Phata, however, could not find victim. Thereafter, her husband also joined the search with her. At about 6:00 PM, the victim girl was found sitting under a tree at the place called Munja Cha Tep. The girl was found with injuries on her person and her private part was bleeding. Informant had asked the victim girl as to what happened, at that time, she informed that **“Porane mala marli”** and that she was also assaulted on her private part so also

anus. It was found that she was bleeding from the private part and that her leggings was smeared with blood. On enquiry made by the Informant, a boy staying in the nearby chawl informed about he having seen one boy taking the victim along with him. Informant and others took victim to the concerned police station. The victim was then referred to the Government Hospital at Kalwa. Thus, offence came to be registered against unknown person for committing rape on the victim girl. On the basis of the said report offence came to be registered vide crime number I-22 of 2016, registered with Shil Daighar Police Station.

4. During the course of investigation, the spot of the incident was visited and Spot Panchanama was drawn in the presence of Pancha Witnesses. From Spot Panchanama recovery of various incriminating articles was done. Investigating Officer recorded statements of witnesses including statement of the victim which was recorded on 6th February 2016, while she was admitted in the hospital. The victim was medically examined and scratch marks were found on her face, lips and injuries were seen all over her body. Apart from this, there were injuries cause to the genitals of the victim. The medical certificate issued by the concerned doctor was included in the investigation papers. Accused No.1 Samin Ansari was arrested on 2nd February 2016 and in the medical examination, it was found that he had scratch marks on his face and back. Accused No.2 - Sonu Muramu came to be arrested on 11th February 2016. Arrest Panchanama of arrest of both accused came to be recorded in presence of Panch witnesses. Further, in the investigation, statements of witnesses came to be recorded, who had seen the victim going along with the accused

persons. One witness claims that he went to the spot at the relevant time, however, while he was driven away by the accused persons by pelting stone at him which caused hurt to his forehead. During the investigation, police used sniffer dog squad and according to the police, the sniffer dog took Police from the spot of the incident to the place where Accused No.2 was residing along with absconded accused Renga. Clothes of the victim, accused as well as their nail clippings and other samples were collected and the same were sent for chemical analysis. The report of the chemical analyser is included in the investigation papers. It is also claimed by the investigating agency that during the course of investigation, the identification parade Panchanama of the accused was carried out. On conclusion of investigation, charge-sheet came to be filed against present Appellants and absconded co-accused.

5. At the outset, it needs to be recorded that though there is allegation against three persons for having committed offence in question, though present Appellants came to be arrested and subjected to trial before the trial court, till date the third accused has not been apprehended and is absconding.

6. On 10th November, 2016 charges came to be framed against the present Appellants. On behalf of the prosecution, District Government Pleader of District Thane conducted the trial before the trial court. Prosecution examined following 18 prosecution witnesses:

PW No.	Name of witness	Exh. No.	Description
1	Sushma Rajaram Patil	15	Complainant and mother of victim.

2	Rajaram Dinkar Patil	25	Father of victim.
3	Pratik Kanchan Gholap	26	Student of T.M.C. school at Shilgaon.
4	Geeta Pravin Patil	28	Relative of informant.
5	Victim	30	Victim.
6	Chandrabhaga Hira Mhatre	31	Who noticed victim while going towards Daighar.
7	Rasul Nabi Mujawar	33	Who noticed the boys and thereafter, who heard voice of girl 'Aai, Aai', witness on I.P
8	Jagdish Ashok Patil	37	Who was in the company of police with dog squad on the spot.
9	Vallabh Madhukar Patil	38	Who visited the victim at hospital.
10	Savita Vinod Patil	40	Neighbourer of victim and accused.
11	Gopinath Mangal Mhatre	41	Panch to the identification parade.
12	Rahul Sheshrao Kamble	43	Who noticed victim in the company of accused.
13	Dr. Asmita Ravindra Patil	46	Medical officer.
14	Savita Avinash Khatal	49	Woman Police Constable who has carried the victim to the hospital.
15	Tejashri Suresh Mane	55	Teacher of Ummeed School, Mumbra, where victim was studying.
16	Shraddha Ashok Vaydande	61	Investigating officer.
17	Sunil Manohar Mohite	77	Investigating officer.
18	Sunil Bhaurao Wagh	84	Investigating officer.

7. Apart from examining these witnesses before the trial court, prosecution also placed reliance on the documents which read thus:

Sr.No.	Document
1	Proforma for determination of age
2	Seizure panchanama of clothes of victim
3	Letter to C.A. dated 03.02.13
4	Letter to C.A. dated 04.02.16
5	Arrest panchanama of accused Samin Ansari
6	Personal search and arrest panchanama of accused Sonu Boloram Muramu
7	Letter to C.A. dated 13.02.16
8	Psychological report dated 10.12.14
9	Birth certificate dated 14.06.11
10	Letter to C.A. dated 22.02.16
11	Letter to C.A. dated 11.03.16
12	Report of mental health expert dated 17.03.16
13	Seizure panchanama of Chocolate dated 11.02.16
14	Photographs of victim

8. On conclusion of the evidence of the prosecution, incriminating circumstances were put to the accused persons under section 313 of Cr.PC. During the course of the hearing of this Appeal, since it was revealed to this court, that there was no signature on statement recorded under 313 of Appellant – Accused No.2, and hence a report was called from trial court. The report indicates that the statement of this accused was recorded through video conferencing (VC) and therefore his signature does not appear thereon. During the course of the hearing of this Appeal, the Accused No.2 made statement in writing, confirming the fact that his statement under Section 313 of the Cr.PC was recorded.

9. After hearing the DGP and learned counsel for the accused, learned trial court by judgment and order dated 6th

September 2017 passed in Special Case (POCSO) No.108 of 2016, convicted Appellants for different offences, maximum sentence of 20 years with fine was imposed against them. The sentences in respect of the other offences proved, were directed to be run concurrently. Learned trial court, however, acquitted accused persons for the offence under Section 120 B by holding that the prosecution has failed to prove any conspiracy between present accused - Applicants and the absconded accused. There is no challenge raised to the said order of acquittal of Appellants by prosecution or victim/Informant. As such the said acquittal has attained finality.

10. Learned counsel for the Appellants/accused submitted that the burden is upon the prosecution to prove the guilt of the accused beyond shadow of reasonable doubt and said principle of criminal jurisprudence would apply even in cases wherein offences charged are under the provisions of POCSO Act. It is their submission by referring to the evidence laid by the prosecution on record that the prosecution has failed to prove the guilt of the accused persons beyond shadow of reasonable doubt. By referring to the first information report itself, it is their submission that initially case of the prosecution and the Informant was that the victim was subjected to the assault as well as forcible sexual acts by one person. To support this submission, they drew attention of the court to the specific statement of the victim made to her mother i.e. Informant, indicating that only one person was involved in the crime in question. It is their argument that since the perpetrator of the crime was not found by the police, present

Appellants were falsely implicated therein. It is argued that the suspicion was drawn against the present Appellants in view of the fact that one of the accused person was staying along with the absconded accused and that the sniffer dog from the spot of the incident took police to the place where they were staying i.e. the chawl wherein the sister of the informant was the owner. According to the learned counsel for Appellant – Sonu, use of sniffer dog during investigation may be justified, however the same cannot become a ground to convict the accused and burden was on Investigating Agency to collect reliable evidence to show involvement of Appellant – Sonu in this crime. They further argued by referring to the evidence laid before the trial court that the statements of important witnesses are recorded at belated stage and as there is no explanation provided thereafter, there is a clear-cut doubt in respect of the genuineness/correctness of the said statement. It is submitted that evidence of Chandrabhaga - PW6 indicates that the victim girl was seen walking along with the absconded accused and not the present Appellants. Reference is made to the evidence of Rasul - PW7 indicating that his evidence is not sufficient to prove the presence of the Appellants at the spot of the incident. It is argued that the statement of this witness is contrary to the statement recorded before the Magistrate under section 164 of Cr.PC (Exhibit 30). They further drew attention of the court to the fact that there was a CCTV footage of one shop indicating victim having being seen going along with the absconded accused and not present Appellants. It is their argument

that this evidence was suppressed by the prosecution and hence adverse inference deserves to be drawn in this regard.

11. According to them, the prosecution has failed to prove the Panchanama of test identification parade. They further argued that since the name of the perpetrator of the crime was not recorded, and since the first information report was lodged against unknown person, it was incumbent on the part of the investigating agency to undertake identification parade and substantiate the same before the trial court. It is argued that the identification of the Appellants in the court for the first time cannot be accepted. Apart apart from this, it is their submission that the manner in which the identification of the accused person is done, it makes it highly impossible to accept the same. It is pointed out that except for the Appellants i.e. original accused person, no one else was there in order to identify the Appellants to be the perpetrator of the crime. It is argued that more particularly when the victim is mentally not sound, such possibility of false identification ought to have been taken into account by the learned trial court and appropriate precautions should have been taken while seeking their identification. According to them these safeguards, essential for fair trial, has not been taken by trial court herein this case. Learned counsel for the Appellants/accused took strong exception to the manner in which the evidence of the victim was recorded. It is their contention that since the victim was mentally challenged, and as it appears from the evidence of witness No. 15 that the victim was required the assistance for interpretation, the evidence ought not to have been recorded by the trial court without seeking

help/assistance of interpreter or expert, who will understand what the victim wants to convey. It is argued that in absence of expertise in the said field, possibility of trial court committing error in interpreting sign, nodding and gesture is not ruled out. Apart from this, according to them doubt is created the way in which the evidence is recorded. In this regard, reference is made to the fact that as per the initial recording before the commencement of evidence of the victim, the said evidence was recorded in the chambers, however, in later part victim is said to have come towards dais. It is submitted that if the evidence is recorded in chambers, question of the victim rushing to the dais and telling the judge, something does not arise. On these amongst other submissions it is claimed that guilt of accused is not proved beyond reasonable doubt.

12. Learned APP oppose the said submission by pointing out that no such arguments were made nor any objection was raised at the time of recording of the evidence. It is the contention of learned prosecutor that the evidence as recorded by the trial court is required to be taken into consideration by this court.

13. Learned counsel for Appellants by referring to the medical evidence on record argued that the doctor who examined the accused persons after their arrest, was not brought before the trial court and his evidence is not laid. Thus, it is their submission that in such circumstances the alleged samples taken of the accused persons cannot be considered for the purpose of the conviction of the accused. In any case, according to them, the CA

reports are not supporting the case of the prosecution against the Appellant/accused. In this regard, reference is made to the evidence of the investigating officer who candidly accepts that CA reports are not against the accused person. They drew attention of the court to the evidence collected during the course of the investigation, such as the clothes of the Appellant/accused, victim and the samples collected, including nail clippings etc. It is their submission that if it was a case of the prosecution that there were scratch marks on the person of the victim, the nail clippings of the accused person ought to have shown blood therein. The learned counsel for accused Samin submits that though there is allegation with regard to there being scratch marks, found on the person of this accused after the occurrence of the incident, however, there is nothing on record to show that the said scratch marks were made by the victim as the nail clippings of the victim do not show any blood or tissues. It is their submission that thus, except for the inconsistent and unreliable statements of the victim as well as other witnesses, there is no conclusive evidence in order to prove the guilt of the Appellant accused. On these amongst other contentions they seek acquittal of both accused persons.

14. Learned APP and learned counsel for Respondent No.2 supported the impugned judgment and order passed by the trial court convicting present Appellants. It is argued that it is settled position of law that the evidence of the victim if found reliable and free from doubt, that by itself becomes a ground for conviction of the accused without requiring any corroboration thereto. By referring to the evidence of the Informant and victim, it is argued

that their evidence is consistent and that for want of any inconsistency, no doubt can be raised about the said evidence. Pointing out the evidence of the medical officer, it is argued that there is sufficient evidence to indicate that the victim was brutally assaulted and was subjected to forcible sexual intercourse. It is submitted that having regard to the nature of injuries found on the genitals of the victim, there is reason to believe that more than one person has committed the crime in question. In order to support the judgment of conviction, reference is made to the evidence of victim, PW5, Chandrabhaga - PW6, Rasul - PW7 and Jagdish Patil - PW 8. It is submitted that these witnesses have categorically stated as to what has occurred and happened at the spot of the incident at the relevant time. According to the prosecutor, the version of the victim with regard to she being taken to the spot by three accused persons gets support from the evidence of Rasul. It is argued that the alleged delay in recording of the statements of the witnesses is not sufficient to discard their veracity. It is submitted that the defence has not been able to bring anything on record to show as to the reason for which the witnesses are deposing falsely against them. As far as accused Samin is concerned, it is argued that there is evidence on record to show that this accused person sustained the injuries on his person not by dog attack but were caused by the human nails. It is submitted that the defence taken by the accused about injuries being caused by the dog is not sustainable. Thus, it is the submission of the prosecution that there is sufficient evidence on record which conclusively proves the guilt of the accused person beyond shadow of reasonable doubt. It is argued

that in view of the provisions of Section 29 of the POCSO act, the burden is upon the accused person to prove their innocence. On these amongst other contentions the prosecution seeks confirmation of the impugned judgment and order.

15. In the present case, the prosecution has sought to invoke the provision of POCSO Act against the Appellants/accused. It is therefore incumbent on the prosecution at the first instance to prove that the victim is a child within the meaning of Section 2(b) of the said Act. In this regard, the prosecution examined Informant (PW1), who is the mother of the victim girl who deposed about the date of birth of the victim to be 18.04.2005 and said oral evidence of the witness gets support from the birth certificate (Exhibit 17). The defence has not taken exception to the evidence of the Informant with regard to the age of the victim. Thus, the prosecution by leading cogent evidence has proved that the victim was aged about 11 years at the time of the occurrence of the incident and that she is a child within the meaning of Section 2(d) of the POCSO Act. The provisions of POCSO Act therefore are rightly invoked in the present case.

16. Needless to emphasise that even in the proceedings under the POCSO Act, the burden would always be upon the prosecution to prove the guilt of the accused beyond the shadow of reasonable doubt. It is only after the prosecution successfully proves the fundamental facts indicating the complicity of the accused in the crime, in view of Section 29 of the Act, there is no burden upon the accused to prove that he has not committed said

offence. Unlike other penal laws, this is exceptional provision which does not permit the accused to remain silent and there is burden cast upon the accused to prove that he is not guilty of the offence once the fundamental facts are established against the accused. The defence need not necessarily lead any independent evidence to prove that the accused is not guilty of the offence and the same can be demonstrated by way of cross-examination of the witnesses of the prosecution and pointing out the discrepancies in the evidence of the prosecution. Keeping in mind these principles, the evidence on record is evaluated/assessed hereinafter.

17. The incident in question has occurred on 1st February, 2016 wherein the victim was sexually assaulted. The prosecution by examining the victim (PW5), the Informant (PW1), Smt. Geeta (PW4) and Dr. Patil (PW13) has brought on record the nature of injuries caused to the victim in the said incident. The victim states about the injures being caused on her person including to her genitals. Her version gets support from the Informant and witnesses who had seen the victim at the spot of the incident and at that time she was found to be bleeding from her genitals with number of injuries on her person.

18. The victim was immediately referred to the government hospital at Kalwa. She was examined by the medical officer. On examination of the victim as deposed by Dr. Patil (PW13), it was found that the victim had a II perineal tear (2 cm) long and deep tear at 5 o'clock position extending inside the vagina. There was a lateral vaginal wall tear extending upto the

right fornix. The fornix of vagina was also found torn. The vaginal mucosa of the victim was also torn and the hymen was completely torn. It was also noticed that the injuries were fresh and bleeding. The medical officer has candidly opined with regard to their being evidence of genital penetration and that the victim was sexually assaulted. The medical officer has also opined that injuries caused to the victim indicate that she has been raped brutally.

19. The evidence of medical officer further shows that the victim was required to undergo surgery and she was subjected to surgeries i.e. genital exploration and diagnostic laparoscopy. The victim was required hospitalisation as an indoor patient for ten days. The medical officer proved medical papers (Exhibit 50) and medical certificate (Exhibit 51). According to this evidence, a questionnaire was received from the Investigating Officer and while replying the same it was opined that the victim is mentally challenged girl, who has been raped and was injured by the accused, which has resulted in multiple injuries being caused all over her person.

20. The above evidence led by the prosecution was not being able to be shattered by cross-examination of these witnesses. The prosecution thus has proved conclusively that on 1st February, 2016, the victim was sexually assaulted and was subjected to rape. In the said incident she has sustained severe injuries on the genitals so also on other parts of her person. The prosecution thus has proved beyond reasonable doubt that the victim girl was

subjected to forceful sexual intercourse which constitutes rape within the meaning of provisions of Penal Code.

21. Once the prosecution proves that the victim is a child and was subjected to sexual assault, the next burden upon the prosecution is to prove that the accused are the perpetrators of the said crime. In order to decide the said issue, it would be relevant to take into consideration and appreciate the evidence which has come on record through examination of the witnesses.

22. The Informant (PW1), who is the mother of the victim reported the incident to the police on the same day of the occurrence of the incident i.e. on 1st February, 2016. She reported the incident after she along with her husband and other went to the spot of the incident and found the victim to be in injured condition and bleeding from her genitals. The report came to be lodged on the basis of information given to her by the victim herself. It would be necessary to reproduce the relevant portion of the FIR reads thus:

“त्यावेळी आम्ही तीला काय झाले असे विचारले असता तीने आम्हाला सांगितले की, “पोराने मला मारली” व पुढे असे सांगितले की, तीने तीचा हात आपले गुप्तभागाकडे करून सांगितले की, मला इथे गुप्तभागावर तसेच गुद्दद्वारावर मारले व बोट लावून दुखावले असे सांगितले.

त्यावेळी आम्ही पाहीले असता आम्हाला तीच्या गुप्त भागातून सतत रक्त येत असल्याचे दिसले व तीची लेगीज रक्ताने भरलेली होती. त्यावेळी तीच्या अंगावरचा टॉप नव्हता. आम्ही अधिक चौकशी केली असता आम्हाला शेजारी चाळीत राहणा—या मुलाने सांगितले की, एक मुलगा हिला सोबत घेवून गेला असल्याचे त्याने पाहीले होते.”

23. Ultimately, it was claimed that some unknown boy has committed rape on the victim. This gets reflected from the following portion of the FIR:

‘‘माझी मुलगी हर्षदा हिने मला सांगितले की, कोणीतरी पोराने तीला हाताने चेह—यावर मारून व तिचेवर जबरी संभोग केला आहे व तीने ओरडू नये म्हणून तीच्या तोंडावर हाताने दाबल्याने तीचे ओठ सुजलेले आहेत.

तसेच माझी अल्पवयीन मुलगी हर्षदा हिचा अज्ञात इसमाने तीच्या गुप्तभागाला हात लावून तसेच मारून, लैंगिक छळ करून जबरी संभोग केला आहे. म्हणून मी माझे मुलीवर कळवा हॉस्पिटल येथे दवाउपचार करून झाले प्रकाराबाबत पोलीस ठाण्यात येवून फिर्याद देत आहे.’’

24. The victim was sent for medical examination and where the Informant i.e. the mother of the victim gave history to the medical officer stating that sexual assault being caused by unknown person.

25. The medical certificate dated 1st February, 2016 also records the history as:

‘‘H/o alleged rape/kidnapping given by victim in her own words.

As Pt's (victim) is mentally retarded since birth all the history is given by victim's mother. She only tells that the man had hurted her at her private parts & removed her clothes.’’

26. The above statements clearly indicate that initially the case of the victim/Informant was commission of the crime i.e. act alleged, by one person. The manner in which report came to be lodged with police and history given to medical officer, leaves no room for doubt that there was single perpetrator of crime.

27. According to the prosecution, on 2nd February, 2016 Accused No.1 Samin came to be arrested and it was found that there were scratch marks on his face and body. He was claimed to have been spotted near the spot of the incident on the next day of the occurrence thereof.

28. It is for the first time on 6st February, 2016, during the course of treatment, it was informed to the medical officer that few men assaulted the victim and such information was given by the parents of the victim.

29. It is pertinent to note that the FIR as well as the history given to the medical officer indicates that initially the victim disclosed to her mother about she being sexually abused and raped by one boy. It is thus clear that at the first instance the victim never disclosed to her mother about involvement of more than one person in the said incident. The said version is sought to be changed on 6th February, 2016 and for this purpose no explanation is provided by prosecution.

30. As per the case of the prosecution, thereafter a statement came to be recorded on 9th February, 2016, wherein witness Rasul (PW7) claimed that on 1st February, 2016, at the spot of the incident he saw two - three boys and further about he being assaulted by one of them by throwing stone at him and that resulted in causing injury to him over his forehead. He also claims to have taken treatment for the same from doctor and being prescribed medication.

31. During the course of investigation the dog squad was also used and the sniffer dog led the police party to the room in a chawl where Accused No.2 – Sonu was staying along with the absconded accused Renga. On the basis of these circumstances, Accused No.2 came to be arrested.

32. In order to prove the complicity of the Appellants in the crime the prosecution led evidence of the victim. Learned trial court recorded about evidence of the victim being taken in the chambers and that the victim answered the questions after asking her 2-3 times by way of nodding and gestures. The record does not indicate that aid of any expert being taken at the time of recording of the evidence. It becomes relevant in view of the evidence of Smt. Mane (PW15). In this regard, it would be necessary to take note of her deposing before the trial court. She is the teacher of Ummeed School, which is meant for mentally challenged children. She is a diploma holder in vocational rehabilitation from NIMH, Belapur, Navi Mumbai. She was therefore able to understand the communication by such special children. She admits that the police called her for recording statement of victim. Though she claims in her chief-examination that the victim used to communicate in such a way that even others could understand by and large, what she had to say, in the cross-examination however she accepted the fact that she was called because only she could understand what the victim was saying. From the evidence of this witness it is clear that the victim required assistance for correct understanding of what she wants to

communicate and this would be more so relevant when on the basis of her statement, fate of a criminal trial would be decided.

33. It is further matter of fact that the learned trial court did not take assistance of any expert in recording her statement but mentioned that the answers were given by nodding and gestures. Apart from this, it is mentioned that the evidence is being taken in the chambers, however, there is further recording to the effect that the victim even rushed to the dais to communicate with the learned judge. Without attributing anything against the learned judge, the evidence of the victim however needs to be appreciated with extra caution.

34. Victim was put questions and she answered them nodding or making gestures. She claimed that she was abused by three boys. By gesticulating and removing her inner-wear she claimed that the private part of the male was inserted into her private part and by gesturing three with fingers she indicated this act being committed by three boys. She identified the present Appellants/accused on VC. She claims that she was taken to prison by nodding to answer to the questions that she was taken to prison and had seen those boys in jail. It is however pertinent to note that the prosecution has not proved the conducting of Test Identification Parade of the accused before the trial court. Without being critical, it is necessary to note that the highest law officer of the district had conducted the said trial. In spite of the said fact, no pains were taken for proving the Test Identification Parade by examining the person who conducted the same. Ultimately it has resulted into non-proving of the Test Identification Parade.

35. Test Identification Parade assumes relevance and importance in the instant case because it was the case of the victim and Informant that the perpetrators of the crime were unknown person and hence accordingly the offence came to be registered against unknown person. It was in such situation absolutely necessary for the prosecution to prove that during the course of the investigation, the arrested accused were identified to be the perpetrators of the crime. No doubt, the Test Identification Parade is relevant for the purpose of investigation and to ascertain that the investigation being done in right directions, when the accused are unknown to the victim or the witnesses, conduct of Test Identification Parade would become essential and so also its proof before the trial court. No doubt PW11 – Gopinath, has stated that he was called to Thane Central Jail, on 10.03.2016 for identification parade and he having identified Appellants/accused, he being witness of prosecution for identifying the accused, cannot be considered as a witness to prove identification panchanama. Even otherwise, it does not claim drawing of panchanama or proof thereof. Thus, as a matter of fact in case where accused are unknown persons, on proving of Identification Panchanama proves fatal to the case of prosecution.

36. Apart from this, what is more disturbing is the manner in which the Identification of the accused persons was sought before the trial court. The accused were produced on VC. There is nothing on record to indicate that except for the accused person there was anyone else who was seen on the screen in order to lend any support to their identification as the perpetrators of the crime.

No doubt, the victim has identified them however question arises as to whether the said identification could be considered as clinching evidence to hold that the Appellants/accused have committed the crime in question, when the witness/victim's judgment to identify them is not tested with presence of others along with them.

37. The victim is aged about 11 years with her mental age of 5 years, and hence needless to say that she becomes susceptible to tutoring. It is the duty, responsibility and obligation on the Court to ensure that in all cases the identification even if the Court is taken in such a manner that it would give meaning thereto and not farce of identification. In the cross-examination of the victim it has come on record that the police asked her about what has happened on that day and at that time her mother as well as the Advocate representing victim was present. This suggests the possibility of tutoring. In the light of these facts and the manner in which evidence of victim is recorded, it cannot be said that the evidence of victim is reliable and trustworthy to record conviction without corroboration by other evidence.

38. At this stage, it would be relevant to take note of the judgment of the Hon'ble Supreme court in the case of ***Nirmal Premkumar and Anr. v. State represented by Inspector of Police***¹. This Court finds it appropriate to reproduce relevant portion of the said judgment, which reads thus:

1 (2024) 20 SCC 293

“20. 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.

21. In Ganesan v. State, 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.

22. This Court was tasked to adjudicate a matter involving gang rape allegations under Section 376(2)(g) IPC in Rai Sandeep v. State (NCT of Delhi). 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: (SCC p. 29, para 22)

"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."

(emphasis supplied)

23. In *Krishan Kumar Malik v. State of Haryana*, 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: (SCC p. 138, paras 31-32)

"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."

24. 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.

39. As recorded earlier, initially it was the case of the Informant on the basis of the incident being disclosed to her by the victim, one boy had committed the act of rape on her. There is consistent statement to that effect even before the medical officer when the victim was immediately taken for treatment to the government hospital. Apart from this, there is evidence of PW 3 – Pratik, who specifically states about he having seen the victim on the fateful day following one boy. He states in his testimony before the trial court that he was playing cricket in front of a bungalow near to his house. At around 06:00 p.m. he saw victim coming towards her house. She went and sat on the step of the bungalow. A boy came towards her house and he went ahead. The victim followed him by calling him “भैया भैया रुक”. He claims the acquaintance with the said boy and has also stated that he could identify the him if shown. This witness was however never asked to identify the Appellants/accused either during investigation or ever before the trial court. In the cross-examination, he accepted that the accused were arrested by the police, however, no boys were shown to him by the police. He also states that the boy who had kept his hand on the victim’s shoulder and taken her were not shown to him. It was very much possible for the prosecution to prove that the boy who took the victim is amongst the

Appellants/accused. Failure on the part of the prosecution to seek such identification leads to the inference that none present Appellants took victim along with them.

40. Similar is the evidence of PW4 – Geeta. No doubt, she has not seen personally the victim going along with anyone, however, deposed before the Court that about 05:15 p.m. she was told by her Bhoys that the victim was seen going towards Kalyan Phata with one boy. Similar is the evidence of PW6 – Chandrabhaga, who states about she having seen the victim along with one boy and they were proceeding towards village Daighar. She further states that she enquired with the victim as to where she is going. On this she responded by saying that this bhaiyya is going to give her “खात” i.e. something to eat. She saw both of them going towards Daighar. She also claimed that she would be in a position to identify the said boy since she used to reside at Shilphata. Pertinently, she was also not called upon to identify the present Appellants/accused. It is thus clear from the evidence laid by the prosecution that the victim was seen along with one boy and that more than one boy was never in reference of the witnesses at the first instance. The above evidence therefore is inconsistent with regards to the participation of of one person in commission of crime. Though the victim later on claims that three persons committed offence, the statement of victim and Informant cannot be said to be consistent at all stages of proceedings. This Court therefore has no hesitation to hold that the evidence of victim is not wholly reliable and it would be unsafe to

record/upheld conviction solely on the basis of her evidence. As a rule of prudence, Courts must seek corroboration.

41. It would be relevant at this stage to take into consideration the evidence of the Investigating Officer (PW16), Ms. Vaydande. During the course of cross-examination it was suggested to the witness that only absconding accused Renga is visible in the CCTV footage collected during the course of investigation and the present Appellants are not seen therein. Though the witness denied the said suggestion, she was unable to say whether the Appellants/accused are seen in the CCTV footage. She further admits candidly that in the said footage the victim can be seen running behind Renga with stone. The said evidence in the form the CCTV footage also indicates that the victim was seen going either with or behind one boy and the present Appellants/accused were not seen with the victim.

42. The presence of the Appellants is sought to be introduced with the evidence of Rasul (PW7). This witnesses claims about being at the spot of the incident at 05:15 p.m. When he reached the Munja Cha Tep, he heard noise of 2-3 boys coming from the bushes nearby. He asked them as to what is going on, one of them stood up and told him, "let us drink in peace". The said boy was said to be from Pinky Tai's chawl. He therefore started proceeding ahead, however, as he heard, the voice of young girl calling "Aai Aai" and crying he returned near the bushes and asked them again as to what is going on. He however does not state about having seen victim or any other girl at the spot. He claimed

that he hurled stone at him. He further claims that they hurled stones at him. He also claims that two boys also hurled stone at him and one stone caused injury to his forehead. He further claims to have taken treatment with doctor and also purchased medicines. Learned trial court on the basis of statement of this witness, without examination of the doctor who authorised the said prescription, exhibited the said document so also documents about purchase of medicines.

43. During the cross-examination it has come on record that this statement came to be record on 9th February, 2016. He admits that in these eight days he did not inform anybody about the incident. There is no explanation given by this witness as to the reason for which he has not gone to the police to inform about he having seen three boys at the spot of the incident. Similarly, the prosecution has not given any explanation for non-recording of the statement of this witness for a period of eight days after the occurrence of the incident. Needless to emphasise that mere delay in recording the statement of the witness would not become a ground to discard testimony of the victim. However, at the same time it was incumbent on the part of the prosecution to explain the said delay. In case no plausible explanation is provided by the prosecution, the Courts are required to be slow in accepting the evidence of the statement of such witness who is brought on record belatedly, as the doubt creeps in about its genuineness/authenticity.

44. This becomes more serious in view of the fact that there is evidence on record through more than one witness say that victim went along with a boy, who is not accused. Thus, there has to be evidence to indicate as to when the Appellants/accused joined them, if at all they were at the spot. There is no evidence to indicate that the present Appellants/accused joined absconded accused and victim after they left towards the spot of the incident. The introduction of such witness at the belated stage of the investigation therefore needs to be carefully considered, his evidence needs to be accepted with pinch of salt.

45. There is one more witness namely PW12 - Rahul Kamble, who states about he having seen the present Appellants and absconded accused accompanying the victim. Testimony of this witness recorded before the trial court indicates that at the relevant time, he saw three boys Sonu, Renga and one more boy purchasing chocolates from Gopinath's shop. He claims that the victim went behind them. He also states about he having seen them giving the chocolates to the victim. He saw the victim running behind these three boys. In this context, it would be relevant to take note of the evidence PW11 - Gopinath, who runs a stationary store. He claims that on the fateful day, the Appellants came to his shop and purchased strawberry candy toffees worth Rs.10/- from his shop. He does not make reference to the presence of the Renga i.e. the absconded accused. Thus, this evidence sought to be brought on record indicating presence of Appellant at the shop is wholly unreliable.

46. The prosecution is seeking to connect the present Appellants with the crime on the basis of the wrappers of the toffees collected from the spot of the incident. First of all it is necessary to note that inspite of the knowledge of the incident of the victim being raped on 1st February, 2016, the witness never goes to the police to inform the such important and relevant fact. His statement is also came to be recorded belatedly. No explanation is offered by the prosecution for non-recording of the statement of these witnesses immediately. In any case finding of wrappers at spot would not be enough to connect the Appellants to the crime, unless there is convincing evidence that they were at shop of Gopinath and purchased any toffees.

47. In any case, the statements of these witnesses i.e. Rahul and Gopinath came to be recorded belatedly on 12.02.2016 and 11.02.2016 respectively. Apart from the fact that there is no reason/explanation given for belated recording of statements, they are inconsistent to the statement of the other witnesses who never claim the victim being seen along with the present Appellants. There is material inconsistency in the evidence laid by these two sets of witnesses, which cannot be brushed side lightly.

48. Apart from the fact that there are inconsistencies in the statements of the prosecution witnesses with regard to involvement of the Appellants in the crime, the evidence of victim is not free from doubt for the reason that she was unable to understand and communicate in right way which could be understood by the people. When the police required assistance of

the expert of recording her statement, non seeking such assistance before the trial court, creates doubt statements recorded and intended to be communicated by victim. Moreover, the Identification Parade of the accused is sought to be done by showing them on VC in absence of any third person being present or could be seen on the screen. The evidence of the victim therefore cannot be called as sterling quality and hence would require corroboration. As held by the Hon'ble Court in the case of *Nirmal Premkumar (supra)*, in case the oral testimony of the victim neither wholly reliable nor wholly unreliable, the Court has to be circumspect and look for corroboration of material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

49. This Court therefore is required to see as to whether there is any other reliable evidence against the Appellants to show their involvement in the crime. As per the record, the involvement of the Accused No.2 – Sonu was sought on the basis that sniffer dog was went to the house wherein he was staying along with absconded accused Renga. As far as Accused No.1 – Samin is concerned, his complicity is sought on the ground that there were scratch marks on his person. With regard to the scratch marks on the person of Samin is concerned, it seems the case of the prosecution that during the resistance by the victim at the time of occurrence of the incident, the scratch marks appear on his person. The scientific evidence however does not support the said claim of the prosecution. Record indicates that the nail clippings of the victim were taken and sent for chemical analysis. The CA report

(Exhibit 102) however, does not indicate any blood or tissue in the nails of the victim. It is practically not possible that the such number of marks are caused by the victim to the accused however neither blood nor tissues were are found in the nail clippings of the victim. Thus even accepting the fact that the statement of the accused that the said marks were caused due to dog bite is not correct, the evidence laid by the prosecution does not show that they were caused by the victim.

50. Insofar as Accused No.2 – Sonu is concerned, there is no other material on record except inconsistent testimonies of witnesses in order to show his involvement in the crime save and except inconsistent statements of the witnesses as discussed hereinabove.

51. It is also necessarily to take note of the fact that though learned trial court accepted that this is a case of gang rape, there is however no evidence to indicate so. Insofar as the injuries on the thigh of the victim with the cigarette butt concerned, the medical officer in the opinion given at Exhibit-53 does not specifically state about the said injuries being caused for the said reason. The answer to relevant question No.4 is recorded by stating that:

“4. Can not comment on this injury.”

52. The medical officer thus was unable to state whether the mark on the thigh of the victim was on account of alleged act on the part of the accused of inflicting cigarettes burns to her. The

trial court however while recording the evidence of the victim states so. The said observation reads thus:

“The victim has pulled up her dress and shown the mark of cigarette butts which is still visible on her thigh.”

53. Thus, when the expert witnesses i.e. the medical officer is unable to comment upon it, the cause of injury/mark on thigh of victim, the observation of the trial court with regard to cause of the said mark does not deserve acceptance. Apart from this, there is specific query raised as to whether it is possible to opine as to how many person committed rape on the victim, no comment was offered by the medical officer in this regard. Thus, from the medical evidence it cannot be said that the act in question committed against the victim involve more than one accused. Needless to reiterate that there is no conclusive evidence to hold that this is a case of a gang rape, only for the reason that offence is heinous, conviction cannot be recorded against Appellants once it is found that their guilt has not been proved beyond reasonable doubt.

54. The above discussions therefore clearly indicates that the prosecution has failed to prove guilt of the accused beyond shadow of reasonable doubt. In view of the settled position of law that in case any reasonable doubt is created with regard to the case of the prosecution, benefit of the same must go to the accused person. By following the said principle of law Appellants/accused deserve to be acquitted by giving benefit of doubt. Hence, following order:-

ORDER

- i) Both Appeals stands allowed.
- ii) Impugned Judgment and order dated 6th September 2017 passed in Special Case (POCSO) No.108 of 2016, stands set aside.
- iii) Both Appellants stand acquitted of all charges.
- iv) They be set free forthwith, unless required in another crime.

(R. M. JOSHI, J.)