

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD.****CRIMINAL APPEAL NO.413 OF 2015.****(Jail Appeal)**

Suresh s/o Karbhari Wadge,
age 61 years, Occu. Agri.,
R/o Naigaon, Tq. Shrirampur,
Dist. Ahmednagar.

... APPELLANT.

VERSUS

The State of Maharashtra,
through Police Inspector,
Taluka Police Station,
Shrirampur, Tq. Shrirampur,
Dist. Ahmednagar.

... RESPONDENT.

...
Advocate for appellant : Mr.A.N. Nagargoje (Appointed).
APP for the respondent – State : Mrs.S.S. Raut.
...

CORAM : V.L. ACHLIYA, J.

13th JULY, 2017.

ORAL JUDGMENT:

Being aggrieved by the judgment and order dated 14.11.2014 passed in Sessions Case No.103/2012 by the Additional Sessions Judge, Shrirampur, District Ahmednagar convicting the appellant for the offence punishable under Sections 376 and 506 of IPC, the

appellant has preferred this appeal.

2. Before adverting to appreciate the submissions advanced, it is necessary to consider few facts leading to prosecution of the appellant. On 27.8.2012, the complainant Sau. Jyoti Chandrakant Lande (P.W.2) visited the Police Station, Shrirampur and lodged complaint to the effect that the appellant – accused has committed rape on her unmarried sister-in-law Janabai (hereinafter referred to as “the prosecutrix”) while she was grazing she-goats in the field adjoining to percolation tank. She reported that about 15 days prior to lodging of report, the prosecutrix complained of vomiting and loss of appetite. Therefore, she was taken to Dr. Shinde (P.W.4). He gave certain medicine. But, the prosecutrix continued to face same problem. Therefore, on 25.8.2012, she again took her to Dr. Shinde. On examination and particularly, after conducting urine test, Dr. Shinde disclosed that the prosecutrix was carrying pregnancy of two to two and half months. She, therefore, made enquiry with the prosecutrix. On

enquiry, prosecutrix disclosed that one day in the noon time, when she was grazing the she-goats near the percolation tank, the accused came close to her and asked her to accompany him for chitchatting. He took her to place nearby percolation tank. The accused committed sexual intercourse with her. After completing sexual intercourse, he told her that he has finished his work and asked not to disclose about incident to anyone, else he will kill her. She further disclosed that because of said act of accused, she was facing problem of vomiting and lost appetite. On the basis of the complaint lodged by Jyoti (P.W.2), offence punishable under Section 376, 506 of IPC came to be registered against the accused with Police Station, Shrirampur vide CR No.73/2012. Investigation of the case was entrusted to API Smt. Devyani Patil (P.W.9). She referred prosecutrix for medical examination to Medical Officer, Shrirampur. She further obtained permission from the Court of J.M.F.C., Shrirampur for conducting DNA test of victim and accused. During the course of investigation, she recorded statement of Kachru Maroti Lande and

Prayagbai – father and mother of the prosecutrix. She arrested accused. She directed her staff to take victim and accused to Civil Surgeon, Ahmednagar for obtaining sample of blood for DNA test. She issued request letter to that effect to Civil Surgeon, Ahmednagar. The clothes on the person of accused were seized. The accused was also referred for medical examination. Further investigation was entrusted to P.I. Kailas Fundkar (P.W.10). He got recorded the statement of prosecutrix through Smt. Sneha Mahajan (P.W.6), the Head Mistress of Deaf and Dumb School, Ahmednagar and also referred prosecutrix to Civil Surgeon, Ahmednagar for collecting blood sample. Later on, forwarded the clothes of victim and accused as well as samples collected to Chemical Analyzer. He also obtained the blood sample of the baby who was born during the course of investigation and sent it to Forensic Laboratory at Mumbai for DNA test.

3. On completion of investigation, charge-sheet was prepared and filed in the Court of J.M.F.C., Shrirampur. In due course, the case was committed to the Court of

Additional Sessions Judge, Shrirampur, District Ahmednagar. The accused was charged under Section 376 and 506 of IPC. The accused pleaded not guilty and claimed to be tried. The defence of the accused appears to be of total denial and false implication.

4. In order to prove its case, the prosecution has examined fifteen witnesses. The appellant - accused has not examined any witness in defence. On conclusion of trial, learned Additional Sessions Judge convicted the appellant under Section 376 and 506 of IPC. For committing offences punishable u/s 376 of IPC, the appellant is sentenced to suffer R.I. for ten years. For committing offence u/s 506 of IPC, the appellant is sentenced to suffer R.I. for one year. Being aggrieved, the appellant has preferred this appeal.

5. I have heard the submissions advanced at length by Mr.Nagargoje, learned Counsel appointed to represent the appellant and the learned APP appearing for the State and carefully perused the record and proceedings

of trial court as well as the judgment and order passed by th trial Court.

6. If, we consider the overall facts of the case and evidence as adduced by the prosecution, then there is no dispute as to the fact that at the time of commission of offence, the prosecutrix was major. So also there is no dispute as to the fact that the prosecutrix was suffering from speech problem. There is also no dispute as to the fact that the prosecutrix gave birth to female child. The appellant has disputed the case of prosecution that he has committed rape on prosecutrix.

7. Learned Counsel for the appellant contended that there is no cogent, convincing, reliable and sustainable evidence to convict the appellant for the offence punishable under Section 376 as well as 506 of IPC. By referring the overall evidence adduced by the prosecution, learned Counsel submits that the prosecution has not examined the prosecutrix. Although, the statement of the prosecutrix allegedly recorded by the

Head Mistress Smt.Sneha Mahajan (P.W.6) was produced on record, but prosecution has not examined the prosecutrix. He submits that in absence of examination of the prosecutrix, the statement of the prosecutrix alleged to be recorded by Smt. Sneha Mahajan (P.W.6) holds no evidentiary value and cannot be treated as substantive evidence. By referring the testimony of Jyoti (P.W.2), learned Counsel submits that her testimony cannot form basis to prove the guilt under Section 376 as well as section 506 of IPC. He submits that Jyoti (P.W.2) has not witnessed the incident. There is no eye witness to the alleged incident of rape. The conviction of the appellant is solely based upon the alleged statement of prosecutrix recorded by Sneha Mahajan (P.W.6) and DNA report. It is pointed out that prosecution has adduced no evidence to show that the blood samples of appellant and prosecutrix were drawn and sent to Forensic Laboratory for the purpose of conducting DNA test. It is pointed out that Dr. Vijaya Sardesai (P.W.15) the Medical Officer, who examined the accused has categorically stated that on 3rd September,

2012, the appellant – accused was referred to her for medical examination to opine as to whether he was capable of committing sexual intercourse as well as to obtain samples of blood, nail, semen and pubic hair for sending the same to Chemical Analyzer. On examination, she has given her opinion in writing vide Exh.90. She further deposed that she obtained sample for sending it to Chemical Analyzer. In the cross-examination, she has categorically admitted that she has not collected any blood sample of accused for conducting DNA test. She further admitted that the blood samples for the purpose of DNA test has to be collected in a separate DNA kit provided for the purpose of conducting DNA test. She has categorically admitted that the blood sample which was drawn by her was for sending it to Chemical Analyzer, at Nashik.

8. Learned Counsel for the appellant further contended that as provided under Section 118 of the Indian Evidence Act, all persons are competent to testify unless the Court considers that they are prevented from

understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. He submitted that the cause assigned in the instant case that the prosecutrix being mentally retarded was unable to depose before the court, is not sufficient to accept that she was not competent to depose. He submits that the fact that prosecutrix is able to depose or not can be decided by the court concerned dealing with the case. By referring Sec. 119, Indian Evidence Act the learned Counsel submits that provision deals with recording of evidence of persons who are unable to speak and give evidence. It provides for recording of such witnesses by taking assistance of interpreter or special educator in recording statement of such witness and video-graph such statement. It is contended that prosecution ought to have produced the prosecutrix before the Court as a witness. After assessing competence of witness to depose, the Court may have decided to seek assistance of interpreter or special educator to record her evidence. It is pointed out

that the testimonies of the sister-in-law of prosecutrix i.e. Jyoti (P.W.2) and her brother Chandrakant Lande (P.W.5), Sneha Mahajan (P.W.6) special educator and Dr. Shinde (P.W.4) reflect that the prosecutrix was able to speak with difficulty due to problem of stammering. It is, therefore, contended that the trial Court has grossly erred in treating the alleged statement of prosecutrix recorded by Sneha Mahajan (P.W.6) Head Mistress of Deaf and Dumb School as substantive evidence to form the basis to convict the appellant.

9. On the other hand, learned APP appearing for the respondent – State strenuously contended that the judgment and order passed by the trial Court is well reasoned and does not suffer from any infirmity to call for interference in exercise of appellate jurisdiction. By referring the testimony of Dr. Amit Gosavi (P.W.11) Psychiatrist, the learned APP submits that the prosecution has sufficiently proved that the prosecutrix was not able to depose before the Court due to mental retardation. It is contended that Dr. Amit Gosavi

(P.W.11) has categorically deposed that the behaviour of the prosecutrix was found to be childish and she was not able to answer the questions put to her. He has specifically stated that the prosecutrix was found to be grossly below average in intelligence which is suggestive of moderate to severe retardation.

10. In counter to submissions advanced by learned APP, learned Counsel for the appellant contended that the testimony of Dr. Amit Gosavi (P.W.11) cannot be taken into consideration to decide the competence of the prosecutrix to depose as the court alone holds the authority to decide the ability and competence of a person to depose. It is further contended that evidence of Dr.Gosavi (P.W.11) is not sufficient to hold that the prosecutrix was not able to depose, as the testimony of Dr. Gosavi (P.W.11) runs contrary to the testimony of P.W.2 Jyoti and P.W.5 Chandrakant i.e. sister-in-law and brother of the prosecutrix, respectively as well as Sneha Mahajan (P.W.6) Head Mistress of Deaf and Dumb School, Dr. Shinde (P.W.4), who have

categorically deposed that prosecutrix has narrated the incident to them and she was able to speak but with difficulty. It is pointed out that in cross-examination, Dr.Gosavi (P.W.11) has admitted that the specific form is provided to assess mental illness. Specific tests are to be conducted before drawing conclusion about the mental retardation of a person. Dr. Gosavi (P.W.11) has admitted that stammering speech is not the only criteria to conclude that the person is mentally retarded. He has also admitted that he has not examined I.Q. Level of prosecutrix.

11. In order to appreciate the submissions advanced by the learned Counsel for the appellant and the APP for the State, I have carefully perused the impugned judgment and order of the trial Court. The conviction of the appellant is mainly based upon the testimony of Jyoti (P.W.2) the Complainant, Sneha Mahajan (P.W.6) who alleged to have recorded the statement of the prosecutrix and the report of DNA test (Exh.65 & 66).

12. If, we consider the overall testimony of Jyoti (P.W.2) then her testimony cannot form the basis to prove the guilt of accused under Section 376 of IPC. Jyoti (P.W.2) has neither witnessed the incident nor she had personal knowledge about the incident. What she has deposed before the Court is on the basis of alleged disclosure made to her by prosecutrix. If, we consider the testimony of Jyoti (P.W.2) coupled with the FIR lodged vide (Exh.26), then it makes out that the prosecutrix was in a condition to remember and narrate the incident. Jyoti (P.W.2) has categorically deposed that after disclosure by Dr. Shinde, that victim was carrying pregnancy of 2½ to 3 months, she and her mother-in-law enquired with prosecutrix about her pregnancy. She disclosed to them that when she was grazing she-goats near the percolation tank, the accused called her for chitchatting by saying her “*Jana come here to chitchat.*” She therefore, went to the accused to chitchat with him. The accused while chitchatting, took her near Besharam tree and committed sexual intercourse. The fact deposed by Jyoti (P.W.2) reads, as under:

“3. Prior to 15 days of 25.8.2012, my mentally retarded sister-in-law disclosed to my mother-in-law that she has vomiting. My mother-in-law then took her to Dr.Shinde at village Naur. Said doctor gave medicines (tablets) to her but vomiting was continued.

4. On 25.8.2012 I took my sister-in-law who is mentally retarded to Dr. Shinde at village Naur. He examined her. He disclosed me that she has conceived 2½ – 3 months pregnancy. Therefore, I and mother-in-law inquired with my sister-in-law. She disclosed that when she was grazing she-goats near the percolation tank, at that time, accused Vadage called her to chit chat by saying “Janai come here to chitchat”, therefore, she went there. The accused Vadage while chitchatting took Janabai near besharam tree. Then he made her to fall down. Thereafter he removed his pant ad he done. Her nicker was removed by the accused Vadage. The accused also disclosed her that “Janai his work is done”. He also told her not to disclose anybody in her house or else she will be killed. Because of the said incident she had vomiting.”

13. Jyoti (P.W.2) has further deposed that she visited the police station along with her sister-in-law i.e. prosecutrix and lodged report. She further deposed that on 27.8.2012, when Police Inspector Fundkar (P.W.6) came to village. prosecutrix shown him the spot of incident. She further deposed that on 29.8.2012 statement of prosecutrix was recorded by the Head of

Deaf and Dumb School. Thus, if we consider the overall testimony of Jyoti (P.W.2) then it spells out that the prosecutrix had sufficient intelligence and capability to remember and narrate the incident and she was able to speak. In the cross-examination of Jyoti (P.W.2) it is brought on record that the victim used to attend religious functions such as *Saptah* with her mother. The victim also used to wash clothes, utensils and doing household work. She used to take goats for grazing and bringing them back. While speaking prosecutrix used to stammer.

14. Dr.Shinde (P.W.4) has stated in his cross-examination that prosecutrix was unable to speak fluently as her pronunciations were stammering.

15. Similarly, Chandrakant Lande (P.W.5) the brother of prosecutrix also deposed that his wife Jyoti (P.W.2) enquired with victim as to person responsible for causing pregnancy to her. He has admitted that the prosecutrix

studied in the school up to 2nd standard. He has also admitted that the victim was doing her day to day pursuits. She was able to understand what they used to tell her. She was able to disclose all the thing clearly. She was able to understand whatever happened with her. Thus, testimony Chandrakant (P.W.5) the brother of the victim also establishes that the prosecutrix was doing her daily pursuits and able to remember and narrate the incident through her mouth. So also it establishes that the prosecutrix had sufficient maturity and understanding to capitulate and narrate the incident committed by accused with her. She was doing her normal pursuits and not dependent on anybody. The facts deposed by Chandrakant (P.W.5) the brother of prosecutrix in his cross-examination being relevant reproduced, as under:

“8. Not true that accused illiterate and innocent. The age of the victim at the time of incident was 22 - 23 years. There is primary school in my village. The victim took education upto 2nd standard in primary school. Not true that she studied upto 5th - 6th standard. The victim understands what we speak. It is true that the victim was doing her day

today's pursuits. The victim was able to disclose all things clearly. She was able to understand whatever happened with her. Not true that the victim disclosed nothing to me. It is true that no medical treatment was given tot he victim about her mental illness. Not true that she was not medically treated as she was not mentally ill."

16. Prosecution has examined Smt. Sneha Mahajan (P.W.6) the Head Mistress of Deaf and Dumb School, Ahmednagar. She deposed that on 18.9.2012 she received letter from PI Fundkar (P.W.10) to record statement of victim who was reported to be deaf and dumb. She directed to keep the girl present on 21.9.2012 for recording her statement. On observation, she found the girl to be mentally retarded. By using the special techniques, she recorded her statement in question – answer form. Sneha (P.W.6) has further deposed that when she asked about her name she could not reply properly but replied stammeringly and told her name as Janabai. She made enquiry about her name, place of residence and her daily activities, to which she has responded and replied stammeringly as Vasti at Naygaon. She has also answered the questions relating

to the person with whom she resided, the school which she attended, about the animals etc. She narrated the incident and act committed with her by accused. The relevant text of examination-in-chief of Sneha Mahajan (P.W.6) reads, as under:

“3. I asked her name but she could not reply properly however, she replied stammeringly. She had speech problem. In stammeringly she disclosed her name as Janabai. She replied to my question stammeringly by saying vasti at Naygaon when I asked where she resides? When I asked her as to what she does whole day to which she replied sweeping, clearing of utensils and washing clothes.

4. I asked her with whom she resides, to which she replied that with Akka and Dada. I asked her whether she goes to school, but she replied in the negative. I asked her whether she can prepare herself to which she replied partly in the negative. When I asked her about pet animals, cow, she-goats etc. at home, she replied that she has she-goats. When I asked how much she-goats she has, she replied three in number. I asked her whether she takes those she-goats to graze to which she replied in the affirmative. I asked her whether somebody accompany with her to graze she-goats to which she replied that she goes alone in the land.

5. I asked her whether anybody met her there to which she replied Vadgebaba met her. I asked her what he told to her to which she replied that “come here” and accordingly she went to him. She further replied that initially he spoke with her and then

touched her body. He fell on her person. I asked her whether she raised shouts to which she replied in the affirmative. I asked whether anybody had come there but she replied in the negative. I asked her whether he touched her clothes to which she replied in the affirmative. I asked her whether her clothes were removed to which she replied that nicker was removed. On my question to her whether she disclosed the incident to any of her family members? She replied in the negative. When I asked the reason as to why she did not disclose about the incident to her family members, she replied that he had threatened her to assault. I asked her whether she identify the said person? She replied in the affirmative. I asked her whether he comes to her home, to which she replied in the affirmative.

6. *The witness was in a position to state about the incident stammeringly and by making gestures. While recording the statement of the witness, I noticed that her I.Q. Was in between 35 to 40. Jyoti, the wife of brother of the witness disclosed me that the witness is not in a position to take care in her menstruation period. She further disclosed me that the witness is carrying pregnancy of 2 months.*

11. *Not true that the witness is ugly in looking. It is true that I have not mentioned specific time of commencing recording of statement and completion thereof and time of my opinion on the said statement. It is true that I had not specifically mentioned in Exh.35 that initially I had observed the witness and come to the conclusion that she is mentally retarded. It is true that while recording the statement of the witness, I took assistance from Jyoti. It is true that some of the questions which were put to the witness were got answers from Jyoti. I never specifically marked the answers to the questions which were assisted by Jyoti. Some of the part of my opinion is based on the information given*

by Jyoti.

12. Not true that after tutoring the witness of whom I recorded the statement, she can state accordingly. It is true that witness was in a position to understand the questions put by me to her. It is true that while recorded the statement of witness except the difficulty of speech, I had no other difficulty. Not true that because of difficulty in speech it was difficult to ascertain her I.Q. It is true that witness understands land, tank, cow, bulls etc. It is true that during the statement of the witness she never makes mention about "tank" (tale). The witness understands where she resides and her family members. The witness understands washing of utensils, clothes etc. It is true that when I asked question to the witness as to what she does in a whole day, to which she replied that she goes for grazing she-goats."

17. Thus, if we consider the testimony of Sneha (P.W.6) coupled with the alleged statement of prosecutrix, then it again establishes the fact that the prosecutrix was not totally deprived of ability to understand and explain the incident which had occurred with her. The statement of prosecutrix i.e. Exh.35 recorded by Sneha (P.W.6) cannot be accepted as a substantive evidence so as to base the conviction. The statement of prosecutrix recorded by Sneha (P.W.6) have no evidentiary value in the eyes of law. The statement of the prosecutrix recorded by the

police through the assistance of Sneha (P.W.6) at the most can be termed as a statement recorded during the course of investigation as contemplated under Section 161 of Cr.P.C. and can be used for the limited purpose to corroborate or contradict the witness. In this context, the learned Counsel for the appellant has rightly placed reliance upon the decision of this Court in the case of ***Shaikh Mahemood Sk. Osman vs. The State of Maharashtra***¹ wherein, this Court has considered the evidentiary value of the statement recorded u/s 161 of Cr.P.C. during the course of investigation, as well as the statement recorded under Section 164 of Cr.P.C. On due consideration of law laid down by Apex Court in case of ***Ram Kishan Singh vs Harmit Kaur and another***² and ***R. Shaji vs State of Kerala***³ it is held that the statement recorded during the course of investigation as well as u/s 164 of Cr.P.C. can be used for limited purpose to corroborate the statement of the witness or to contradict witness. In para 19, the Court has observed,

1 2014 ALL MR (Cri) 1579;

2 AIR 1972 SC 468;

3 2013 AIR 651;

as under:

"19. As regards statement under Section 164 of Cr.P.C., reliance can be placed on the case of Ram Kishan Singh vs. Harmit Kaur and another, reported in A.I.R. 1972 Supreme Court, Page 468, where it has been observed that statement under Section 164 of Cr.P.C. is not substantive evidence and it can be used only to corroborate the statement of the witness or to contradict him.

. Reliance can also be placed on the case of R. Shaji vs. State of Kerala, reported in A.I.R. 2013 Supreme Court, Page 651. Relevant portion of Para 14 and Para 15 and 16 are as under:-

"14. Evidence given in a Court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction.....

15. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: Jogendra Nahak and Ors., v. State of Orissa and Ors. AIR 1999 SC 2566: (1999 AIR SCW 2736); and Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. And Ors. AIR 2000 SC 2901:(2000 AIR SCW 3150).

16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C. can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to

contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence."

18. The learned Counsel for appellant has further placed reliance on the judgment dated 18th March, 2015 delivered by this Court (**Coram: Smt.Sadhana S. Jadhav,J**) in the case of **Vishnu s/o Shankar Kate Vs. The State of Maharashtra** in Criminal Revision Application No.181 of 2012 wherein, this Court has held that even a complaint lodged by the prosecutrix and treated as FIR cannot be treated as evidence in a criminal trial and such statement can be used for a limited purpose of impeaching credibility of the witness. In para 15, the Court referred the decision of the Apex Court in the case of **Ram Swaroop and others Vs. State of Rajasthan**, reported in **2004, Vol. 13, Supreme Court Cases, 134**, and observed in paras 14 to 17, as under:

“14. The Hon'ble Apex Court, in the case of **Tahsildar Singh and another Vs. State of U.P.**, reported in **AIR 1959 SC 1012**, has held as follows :-

“ The object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under Section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose i.e. the interest of the accused. ”

It is further observed by the Hon'ble Apex Court, thus :

“ Section 162 of the Code of 1872 made it clear that except for a dying declaration and matters coming within the provisions of Section 27 of the Indian Evidence Act of 1872, no statement of any person made to a police officer in the course of investigation, if reduced into

writing, could be used as evidence against the accused. There was no restriction as to the extent of the right of an accused to cross-examine a prosecution witness concerning his statement to the police. Section 162 of the Code of 1898 prohibited the use of a statement reduced into writing, as evidence except any statement falling within the provisions of Section 32 of the Indian Evidence Act, 1872. The proviso to this section, however, expressly stated that in spite of the prohibition in the main provision, the accused could use such a statement to impeach the credit of the witnesses in the manner provided in the Indian Evidence Act of 1872. It will be seen therefore that until 1898 there was no restriction imposed upon the accused as to the extent of his right of cross-examination. ”

15. The statement of the prosecutrix (since deceased) which was reduced into writing in the proforma under Section 154 of the Code of Criminal Procedure, 1973, is not a substantive evidence. In the case of **Ram Swaroop and others Vs. State of Rajasthan**, reported in **2004, Vol. 13, Supreme Court Cases, 134**, Hon'ble Apex Court has observed thus :

“ It is well settled that a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. ”

16. The statement under Section 154 of the Code of Criminal Procedure, 1973, is only to set the law into motion. In the present case, supplementary statement was not recorded. It is further pertinent to note that the statement of the prosecutrix was also not recorded under Section 164 of the Cr.P.C. Statement under Section 164 of the Cr.P.C. would be in the

nature of confession and, therefore, same could have been relied upon in the absence of the prosecutrix.

17. Section 145 of the Indian Evidence Act casts a right in favour of the accused to confront the witness / complainant with his / her previous statement for a limited purpose i.e. for establishing a contradiction in his / her evidence or for the purpose of impeaching the credit of the witness. An exception is carved out only in respect of Section 32 of the Indian Evidence Act where the statement of the deceased can be relied upon for the purpose of convicting the accused without there being any substantive evidence. ”

19. In my view, the testimony of Dr. Amit Gosavi (P.W.11) is not sufficient to draw conclusion that the prosecutrix was not able to depose before the Court. As discussed, the authority to decide as to whether a person is competent to depose or not rests with none else than the court dealing with the case. Section 119 of the Evidence Act provides for the procedure to be followed in recording the evidence of witness who is unable to speak due to disability, which include taking of assistance of interpreter or special educator in recording statement of the witness. In the instant case, prosecutrix was neither cited nor produced before the Court as a witness. It is pertinent to note that Mrs. Sneha Mahajan (P.W.6) Head Mistress of Deaf and Dumb School, who allegedly

recorded statement of prosecutrix, has admitted in her cross-examination that some of the questions which were put to the prosecutrix were answered by Jyoti the sister-in-law of prosecutrix, who was present at the time of recording of statement of the prosecutrix. If prosecutrix was able to give statement before P.W.6 then her evidence could have been recorded in a manner provided u/s 119 of Evidence Act.

20. In the case of **Suresh s/o Yellaji Yerewar Vs. State of Maharashtra**⁴, a case based on facts similar to this case, the Court has considered the purport of sections 118 and 119 of the Evidence Act and held that the authority to decide the competence of witness to testify vests with court and none else. It is further held that non examination of victim deprives the accused of his right of cross-examination and to establish his innocence. In this context, it is useful to refer the observations made in para 5 of the judgment which reads, as under:

⁴ (2003)4 Mh.L.J.898;

“5. I, now intend to deal with each of the contentions raised on behalf of the appellant:--

(a) As regards non examination of the prosecutrix Sunita, it is true that P.W.-1 Dr. Savita Kadam in her cross-examination stated that she had put some questions to Sunita and had found that she was dumb, deaf and mentally retarded. The lower Court has also held that the non-examination of Sunita as a witness for prosecution did not adversely affect the prosecution case because Sunita was a retarded girl. Assuming for a moment that Sunita was retarded, that fact by itself would not render Sunita as an incompetent witness. In this connection, Section 118 of the Indian Evidence Act is relevant, and the same is reproduced as under:

“118. Who may testify. -- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.”

Scheme of Section 118 indicates that the witness has to be produced in Court and the Court has to consider the question as to whether the witness is unable to understand the questions put to the witness or from giving rational answers to those questions. The explanation of Section 118 makes it very clear that a lunatic would not be incompetent to testify unless he would be prevented by his lunacy from understanding the questions put to him and giving rational answers to them. It may be stated here that when Sunita was taken for medical examination to the doctor, her thumb impression was taken below a writing about her willingness to get her medically examined. This would indicate that at the time of medical examination, the doctor considered

Sunita to be a person who would be in a position to understand the writing relating to her consent made below the medical certificate. It is also relevant that there is nothing on record to indicate that Sunita was not a person who could understand questions put to her or give rational answers. Be that as it may, in view of Section 118 of the Evidence Act, the authority to decide whether such a person is competent witness, is a Court.

In the present case the provisions of Section 118 of the Evidence Act were lost sight of by the trial Court. The non-examination of Sunita, therefore is a fact which accrues to the advantage of the accused insofar as it deprived him of the right of cross examination the witness. It may also be mentioned that Sunita was also to be a dumb witness, it was contended on behalf of the appellant that a dumb witness was also not an incompetent witness, on the contrary Section 119 provided the manner in which the dumb witness could have given the evidence. It was pointed out that there was nothing on record to indicate that Sunita could not have made herself understood through intelligible signs. It was contended on behalf of the defence that the non examination of Sunita was a circumstance that deprived the defence from cross examining the material witness and to that extent was a circumstance which must held against the prosecution. There is substance in this contention made on behalf of the appellant at least insofar as the offence punishable under Section 376 of the Penal Code is concerned.

(b) Now, the second contention that the F.I.R. could not have to be used for any purpose as Gatu was also not examined by the prosecution as he died pending the trial. It was contended that the trial Court referred to the contents of the F.I.R. in paragraph 20 of the judgment and in fact the conviction was substantially based on the contents of the F.I.R. It was contended that the F.I.R. was not a substantial piece of evidence and it can be only

used through or contradict, who is maker under Section 145 of the Evidence Act or to corroborate under Section 157 of the said Act. In absence of the examination of the first informant, the contents of the F.I.R., cannot be used for any other purpose including the purpose of corroborating any other eye witness to the alleged crime. There is substance in this contention of the appellant. The Apex Court in the case of State of Bombay v. Rusy Mistry, held that, "The first information report is not substantive evidence, but can only be used to corroborate or contradict the evidence of the informant given in Court or to impeach his credit. It follows that a Judge cannot place such a report before the jury as substantive evidence but can only refer to that portion of it which had been used for one or other of the aforesaid purposes." Further the Apex Court in a case of Hasib v. State of Bihar, laid down the law relating to a F.I.R. as under :

"The object of first information report from the point of view of the informant is to set the Criminal law in motion. From the point of view of the investigating authorities, it is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The report does not constitute substantive evidence though it is important as conveying the earliest information about the occurrence. It can be used only as a previous statement for the purpose of contemplated Section 157 or Section 145 of the Evidence Act, that is for corroborating or contradicting its maker and not of other witnesses".

To my mind, once the first informant is not examined, even if the F.I.R. is proved and exhibited through the investigating officer, all that can be read from the evidence of the Investigating Officer is the fact that, F.I.R. was in fact recorded at the date and time mentioned by the Investigating Officer in his evidence. The contents of the F.I.R. cannot be used for any purpose to

base the conviction save and except in a situation where the F.I.R. is a statement as contemplated under Section 32 of the Evidence Act. In this view of the matter, no relevance can be placed on the contents of the F.I.R. of Gatu and the trial Court was in error in passing the conviction inter alia upon the contents of the F. I. R.”

21. Thus, on due consideration of the submissions advanced, I have no hesitation to hold that the trial Court has committed a serious error in treating the statement of prosecutrix (Exh.35) recorded by Sneha Mahajan (P.W.6) as a substantive evidence and further treated the testimony of Jyoti (P.W.2) and Chandrakant (P.W.5) as a basis to convict the appellant. The testimonies of Jyoti (P.W.2) and Chandrakant (P.W.5) as to disclosure made to them by prosecutrix can not be treated as substantive evidence. At the most same could have been used for the purpose of corroboration if the prosecution would have examined the prosecutrix. The material facts deposed by them as to incident of rape allegedly disclosed to them by prosecutrix being hearsay evidence same cannot form the basis to convict the accused. In this view, the view taken by trial Court to

accept the statement of prosecutrix Exh.35 recorded by P.W. 6 as substantive evidence being erroneous, the conviction of appellant is not sustainable in law.

22. On perusal of the reasons and findings recorded by the trial Court, it appears that the trial Court has referred and relied upon the decision in the case of **Niranjan Dharma Jadhav Vs. State of Maharashtra** reported in **(2012(3) Mh.L.J. (Cri.) 357)** and **Prashant @ Gopal Anandgiri Gosavi Vs. The State of Maharashtra** reported in **(2013 ALL MR (Cri) 1225)** However, it appears that the learned Judge has not taken pains to go through those judgments. It is rightly pointed out by the learned Counsel for the appellant that the facts of the case cited altogether different than the facts of the present case. In the case of **Niranjan Jadhav** (supra), the prosecution had examined the prosecutrix. Her evidence was recorded with the assistance of Ms. Poornima B. Khande, a special teacher. Not only her examination-in-chief but her cross-examination was also recorded

before the court through the assistance of special teacher. On due consideration of testimony of prosecutrix and other evidence, the Court has upheld the conviction. Where as in the instant case the prosecution has not at all cited and examined the prosecutrix/victim. Statement of prosecutrix recorded by a special teacher has been admitted in evidence as a substantive evidence without examining prosecutrix.

23. Similarly, in the case referred and relied by the trial Court in the case of Prashant @ Gopal Anandgiri Gosavi vs. The State of Maharashtra reported in 2013 ALL MR. (Cri) 1225 the evidence of prosecutrix was recorded before the Court with help of interpreter. Victim narrated the fact relating to incident before the court. On due consideration of overall evidence, adduced in the case, the conviction was upheld by High Court.

24. Thus, the rulings as referred and relied by learned Additional Sessions Judge have no bearing upon the facts of the present case. In absence of testimony of the

prosecutrix there is no question to look into the evidence of P.W.6 and other witnesses, which can be used only for the purpose of corroboration.

25. In the instant case, there is no direct as well as circumstantial evidence sufficient to prove the guilt of the accused. The reports of Chemical Analyzer, in no way help the prosecution to prove the guilt of the accused. If, we consider the C.A. report (Exh.62) as to examination of clothes of the prosecutrix and accused, then existence of blood and semen on the Pajama of the accused cannot be treated as an incriminating circumstance strong enough to operate against the accused. At the time of incident the age of accused was 57 years. He was a married person. It is not where the case of prosecution that immediately before the medical examination of the accused and prosecutrix, the accused committed forcible intercourse with prosecutrix. The act amounting to rape alleged to have been committed about 2½ to 3 months prior to lodging of complaint. Therefore, existence of blood and semen on the clothes of the accused after 2½

to 3 months after the incident cannot be treated as an incriminating circumstance to prove guilt against the accused. So far as the clothes of the prosecutrix is concerned, then as per C.A. report (Exh.62), neither any blood, nor semen was detected on her clothes. So also sample of pubic hair and nail clippings and vaginal swab sent for analysis, as per report Exh.63 neither any blood nor tissue matter was detected in the nail clippings of the prosecutrix. So also no semen detected on the pubic hair and vaginal swab sent for analysis. Similarly, as per C.A. report (Exh.64), neither blood nor tissue matter was detected in the nail clippings of the accused. So also, neither semen nor vaginal fluid was detected on the pubic hair and auxiliary hair. Thus, the reports of the C.A. are of no use to prove the guilt of accused.

26. So far as DNA report is concerned, the learned Counsel for the appellant has rightly pointed out that there is no evidence to prove that any point of time the accused was referred for obtaining sample for the purpose of conducting DNA test and actually the sample

of accused was obtained by following the procedure prescribed for obtaining the sample for DNA test. It is pointed out that the Investigating Officer i.e. Devyani Patil (P.W.9) could not depose with certainty that accused was taken to the Hospital and his blood sample was obtained for the purpose of conducting DNA test. It is also pointed out that the prosecution has not examined the Medical Officer to whom the prosecutrix and accused alleged to be referred for obtaining DNA samples. It is pointed out that the Medical Officer Dr. Sau. Vijaya Sardesai (P.W.15) has categorically deposed that on 3.9.2012 the accused was referred to her for medical examination to determine his capability to perform sexual intercourse as well as to obtain samples of blood, nail, semen and hair for the purpose of sending it to Chemical Analyzer. She has categorically deposed that on 3.9.2012 the accused was not referred to her for obtaining blood sample for the purpose of conducting DNA test. She has categorically stated that she had not collected blood sample of accused for the purpose of DNA test.

27. Similarly, the prosecution has not examined any witness to prove that the blood sample of prosecutrix was obtained for the purpose of DNA test that too, in a manner prescribed for collecting sample for DNA test. It is contended that in absence of evidence establishing the fact that the blood samples of the prosecutrix and accused were obtained for DNA test, that too, in the manner provided for collecting such sample for DNA test and same were properly sealed, labeled and reached to the laboratory in an intact condition, the report of DNA test at Sr. No. 65 and 66 cannot form basis to sustain conviction of appellant under section 376 of IPC.

28. It is further pointed out that as per the case of the prosecution, the accused and prosecutrix were referred for obtaining blood samples for DNA on 3.9.2012 along with requisition letter Exh.42. Samples were collected and deposited on 3.9.2012. Same were deposited with Forensic Laboratory at Mumbai on 4.9.2012. The blood sample of the baby girl given birth by prosecutrix claimed to be obtained on 19.3.2013 through Dr. Waghmare

(P.W.14) and later on sent to Chemical Analyzer. As per the report of DNA test (Exh.65), the analysis of sample was made on 10.12.2013 i.e. almost after a period of about 15 months of alleged collection of sample of prosecutrix and appellant. The prosecution has not examined the analyst who made the analysis and issued report vide Exh.65. It is further pointed out that the defence Counsel has objected to admit the C.A. report in evidence without examining the analyst by raising a specific objection to that effect during the course of recording of evidence. However, the report was admitted in evidence by recording that objection will be decided at the time of deciding the case. However same was not considered and decided by the trial court while dealing the case. It is, therefore, contended that non examination of the Medical Officer who alleged to have collected the samples, the person who carried and deposited the samples with C.A., and the analyst who analyzed the samples and issued reports, has caused serious prejudice to the accused . The accused was deprived of his right of cross-examination of such witnesses and to

bring material on record to prove his innocence.

29. So far as the report of DNA is concerned, as same being an expert opinion, can be used only for corroboration purpose. It can not be used as a conclusive proof to prove guilt of the accused. In order to place reliance on DNA report, it was incumbent upon the prosecution to prove that the samples for the purpose of DNA test were obtained in a manner provided for obtaining such samples and such samples were properly sealed, labeled and reached to the laboratory in sealed condition. Prosecution ought to have examined the Medical Officer to whom the accused and prosecutrix were referred for obtaining the samples for the purpose of obtaining blood samples for DNA tests, so as to prove that the samples were drawn of same persons. So also, it was incumbent upon prosecution to have established that the samples were drawn in a manner provided for obtaining the sample for the purpose of DNA test and same were properly sealed, labelled and forwarded along with requisite forms prescribed for the same, bearing

their photographs and their declaration.

30. It appears from record that the procedure which is required to be followed for obtaining sample for D.N.A test was complied only in respect of obtaining the blood sample of the female child given birth by the prosecutrix. Prosecution has examined Dr. Waghmare (P.W.14) to establish that the female child given birth by prosecutrix was referred for obtaining blood sample for the purpose of conducting DNA test and he obtained the same in the manner prescribed. Dr. Waghmare (P.W.14) has deposed the manner in which he obtained the sample in due observance of instructions provided for obtaining such sample. He deposed that the sample obtained was taken in two bottles specifically brought for the purpose of DNA test. He handed over the same to PHC Kanwade along with the prescribed identification form with photograph of the baby whose sample was obtained as well as the declaration obtained in the prescribed proforma of one Anita Balasaheb Bhosle. Whereas, in case of the prosecutrix and accused, the prosecution has adduced

no evidence to show that their blood samples were obtained for the purpose of DNA test in the manner prescribed. In absence of such vital evidence, the report of DNA test at Exh.65 cannot be relied to prove the guilt of appellant.

31. As per the case of prosecution, the blood samples of accused and prosecutrix were obtained on 3.9.2012 and reached to Forensic Laboratory at Nandurbar on 4.9.2012. The analysis of the samples sent to Forensic Laboratory to ascertain paternity of the female child given birth by the prosecutrix was started on 25.03.2013 and completed on 10.12.2013 i.e. almost after a period of fifteen months of alleged obtaining the blood samples of accused and prosecutrix. Although, the report of DNA, can be admitted in evidence without examination of analyst but examination of such witness depends on the facts and circumstances of each case. In the facts and circumstances of the instant case, it was desirable to have summoned the analyst to establish that the samples so received were lying in intact condition and

fit for analysis though the analysis was conducted after a period of fifteen months after receipt of those samples.

32. The learned APP has referred and relied upon the decision in the case of ***Dasu and others vs. State of Maharashtra***⁵, wherein, this Court has held that in absence of request made by the defence to summon the analyst and failure to show that the report was deficient, no fault can be found with the approach of court in admitting such document in evidence without summoning the chemical analyzer. In my view, the ruling as relied have no bearing upon the facts of the case as Sec.293(1) of Code of Criminal Procedure provides that such report issued for scientific experts of Government can be directly admitted in evidence and same can be used in evidence. The question is not of admissibility of such report but the prejudice caused to the accused due to non examination of the analyst in spite of objection raised by accused. Section 293(2) of Code of Criminal Procedure provides for summoning

5 1985 CRI.L.J. 1933;

such experts. The accused have a right to make application to summon such witness. In the instant case, as the report was admitted subject to objection raised by accused the trial ought to have heard the accused and decided such objection. However, same was not decided till delivering the Judgment by Trial Court. In view of the evidence brought on record that analysis of samples was done after a period of fifteen months of alleged reference of samples, for analysis it was expected on the part of learned Additional Sessions Judge to have summoned the analyst in exercise of its powers under section 293(2) of the Code of Criminal Procedure to seek clarification as to delay in analysis and suitability of samples for analysis after the period of about 15 months of drawing such samples.

33. It is quite settled position in law, the positive report of DNA test alone not sufficient to prove the identity of the miscreant though such evidence may be of significance, where there is supporting evidence. In this context it is useful to refer the decision of Apex Court in

the case of ***Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra*** reported in [2005 Cri.L.J. 2533(Supreme Court)], wherein in paragraph 93 the court has observed, as under :-

"93. In R. V. Watters (2000) ALL ER (D) 1469) it was held "

" DNA evidence may have a great significance where there is supporting evidence, dependent, of course, on the strength of that evidence."

" --- in every case one has to put the DNA evidence in the context of the rest of the evidence and decide whether taken as a whole it does amount to a prima facie case."

34. In the case of *Premjibhai Bachubhai Khasiya Vs. State of Gujarat And Another (2009 CRI.L.J. 2888)*, the Division Bench of High Court of Gujarath has extensively dealt with the evidentiary value of report of DNA test as an evidence in criminal case. In para 14, 15 and 16 the the Court has observed as under :

14. It is thus clear that positive DNA report can be of great significance, where there is supporting evidence, depending of course on the strength and quality of that evidence. If the DNA report is the sole piece of evidence, even if it is positive, it cannot

conclusively fix the identity of the miscreant, but, if the report is negative, it would conclusively exonerate the accused from the involvement or charge.

15. The science of DNA is at a developing stage and when the Random Occurrence Ratio is not available for Indian Society, it would be risky to act solely on a positive DNA report, because only if the DNA profile of the accused matches with the foetus, it cannot be considered as a conclusive proof of paternity. Contrarily, if it is solitary piece of evidence with negative result, it would conclusively exclude the possibility of involvement of the accused in the offence.

16. The DNA Science and Report is founded on probability theory. When the profiles of accused and foetus/child are consistent, it only shows a probability as per Random Occurrence Ratio. Obviously, it cannot be treated as conclusive proof and cannot be made use of as sole basis of conviction in a criminal case, more so when the Random Occurrence Ratio is not available of Indian Society".

35. Thus considering the overall evidence in the case and fact discussed as above that prosecution has adduced no evidence to establish the blood of accused and prosecutrix were obtained for conducting test, no much weightage can be given to report of DNA test at Exhibit No. 65 and 66. In this view also the reasons and findings recorded by trial court are not sustainable in law.

36. The learned APP lastly submitted that looking to the fact that the prosecutrix was not examined before the trial Court though her statement was recorded through Sneha Mahajan (P.W.6), prosecution be permitted to lead additional evidence.

37. The learned Counsel for the appellant opposed the oral application made to allow prosecution to lead further evidence. It is contended that prosecution has not cited the prosecutrix as a witness. So also it is not the case of non-examination of witness due to non availability of witness. It is pointed out that the prosecution has approached with the specific case that the prosecutrix is not able to depose before the Court. It is submitted that the appellant was arrested on 28.8.2012. Since then, he is behind bar. He has already spent about 5 years in jail and now he is more than 63 years old and unable to defend. In case the request of prosecution is entertained, the case will have to be remanded to trial court with direction to decide the case afresh by allowing

prosecution to lead further evidence, which will cause serious prejudice to accused.

38. I have duly considered the submissions made for remanding the case for the purpose of recording additional evidence. In my view, in the facts and circumstances of the case, such request deserves no consideration. There is no justification to entertain such request at such stage. In fact, the prosecution has not cited the prosecutrix as a witness. The testimony of the prosecutrix being vital in deciding the case, and it is not sufficient to record additional evidence on its own or to refer the case for said purpose to trial Court. In case, such request is entertained, the trial court will have to re-appreciate the entire evidence in the light of such testimony of prosecutrix. This can be done only by setting aside the judgment and order passed by trial court and sending the case back for fresh decision by allowing the prosecution to cite and examine prosecutrix and other witnesses and then to decide the case afresh. In my view, entertaining such request would amount to

allowing prosecution to fill up lacuna on its part. So also the court is unaware of the situation as exists now as to condition of the prosecutrix and her availability for recording evidence. At the time of incident the age of accused was 58 years. Now his age is about 63 years. He is a poor person and unable to defend himself. The present appeal was presented as a jail appeal. The court appointed lawyer has defended the appellant which reflects that the appellant has no means to defend himself. Therefore, entertaining such request would cause serious prejudice to appellant. I am therefore, not inclined to entertain the request for prosecution.

39. In view of the discussion made in the foregoing paras and conclusions to which I have reached, the prosecution has failed to adduce cogent and convincing evidence to prove the guilt of accused beyond reasonable doubt and the reasons and findings recorded by trial court are perverse appellant deserves to be acquitted by giving benefit of doubt.

40. I would like to place on record words of appreciation for Mr. A.N.Nagargoje, learned advocate appointed at the motion of Court, to defend the appellant lying in jail. He has meticulously prepared and presented the case of appellant with all force and vigour at his command and assisted the court in reaching to proper conclusion. In the result I pass the following order :-

: ORDER :

“(i) Criminal Appeal No.413/2015 is allowed;

(ii) The judgment and order dated 14.11.2014 passed in Sessions Case No.103/2012 by the Additional Sessions Judge, Shrirampur, District Ahmednagar convicting the appellant for the offence punishable under Sections 376 and 506 of IPC and sentencing him for the offence punishable under Section 376 of IPC to suffer R.I. for ten years and and for offence punishable under Section 506 IPC to suffer R.I. for one year, is set aside;

(iii) The appellant – accused is acquitted of the offences punishable under Sections 376 and 506 of IPC;

(iv) The appellant – accused be set at liberty, if not required in any other case;

(v) In case, the compensation amount is already deposited and paid to the prosecutrix, then same shall not be recovered;

(vi) The fees of the Advocate appointed for the appellant is quantified at Rs.5000/-. High Court Legal Services Sub Committee, Aurangabad is directed to pay the same to Mr. A.N. Nagargoje, Advocate (appointed) to represent the appellant.

(vii) Appeal is disposed of in above terms.

[V.L. ACHLIYA, J]