

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.504 OF 2013

1. Dattatraya Ramchandra Korde,
Age : 31 years.
2. Ganesh @ Manoj Somnath Pardeshi,
Age : 33 years,
Both R/at : Gadai, Tal.Trambakeshwar,
Dist.:Nashik.
3. Pintu Somnath Khoskar,
Age : 25 years,
R/at: Khoskar, Tal.Trambakeshwar,
Dist.: Nashik.
(All at present in Central Jail, Nashik.) ... **Appellants**
V/s.

The State of Maharashtra
(At the instance of Trambakeshwar
Police Station, District Nashik.) ... **Respondent**

WITH
CRIMINAL APPEAL NO.657 OF 2013

Ganesh Ramesh Zole,
Age : 20 years, R/at: Gadai,
Trambakeshwar, District : Nashik.
(Lodge in Nashik Road Central
Prison, District : Nashik. ... **Appellant**
V/s.

The State of Maharashtra
(Through Trambakeshwar
Police Station, District). ... **Respondent**

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Ms.Nasreen S.K.Ayubi, appointed Advocate for the Appellants in APEAL/504/2013.

Mr.S.A.Ghaisas, Advocate for the Appellant in APEAL/657/2013.

Mr.S.V.Gavand, APP for the Respondent/State in APEAL/504/2013.

Mr.Prashant Jadhav, APP for the Respondent/State in APEAL/657/2013.

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CORAM : A.M.BADAR J.

DATED : 3rd APRIL 2018.

ORAL JUDGMENT :

1 Criminal Appeal bearing No.504 of 2013 is preferred by appellants/accused Nos.1 to 3, whereas Criminal Appeal bearing No.657 of 2013 is preferred by appellant/accused No.4. By these appeals, the appellants/accused are challenging the Judgment and Order dated 24/04/2013 passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.127 of 2012 thereby convicting the appellants/accused of offences punishable under Sections 376(2)(g), 395, 342 read with Section 34, 323 read with Section 34, 504 read with Section 34 and 506 read with Section 34 of the Indian Penal Code. For the offence punishable under Section 376(2)(g) of the IPC, each of the appellants/accused is sentenced to suffer rigorous imprisonment

for ten years apart from imposition of fine of Rs.10000/- and default sentence of two years. For the offence punishable under Section 395 of the IPC, each of the appellants/accused is sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine of Rs.10000/- and default sentence of two years. For the offence punishable under Section 342 read with Section 34 of the IPC, each of the appellants/accused is sentenced to suffer rigorous imprisonment for one year apart from imposition of fine of Rs.1000/- and default sentence of two months. For the offence punishable under Section 323 read with Section 34 of the IPC, each of the appellants/accused is sentenced to suffer rigorous imprisonment for one year apart from imposition of fine of Rs.1000/- and default sentence of two months. For the offence punishable under Section 504 read with Section 34 of the IPC, each of the appellants/accused is sentenced to suffer rigorous imprisonment for one year apart from imposition of fine of Rs.1000/- and default sentence of two months. For the offence punishable under Section 506 read with Section 34 of the IPC, each of the appellants/accused is sentenced to suffer rigorous imprisonment for five years apart from imposition of fine of Rs.5000/- and default sentence of six months.

2 Facts in nutshell leading to the prosecution of the appellants/accused are thus :

- (a) According to the prosecution case, on 15/03/2012, the appellants/accused along with juvenile in conflict with law namely Anand Namdev Zole committed gang rape on the prosecutrix/P.W.No.1 near the road proceeding towards Bramhagiri from Trimbakeshwar after committing dacoity of cash amounting to Rs.7200/- and one cellphone after wrongfully confining P.W.No.2 Suken Kusuvah by restraining him and by causing hurt to the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah. The prosecution averred that the appellants/accused along with the juvenile in conflict with law caused criminal intimidation to the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah and intentionally insulted them knowing that the same would cause alarm in them leading to breach of public peace by them.
- (b) It is case of the prosecution that the prosecutrix/P.W.No.1 used to reside with her parents along with her son as well as her daughter at Satpur area of Nashik. She was separated from her husband since last eight years. P.W.No.2 Suken Kusuvah is her co-worker and they both used to serve at the same Company at Nashik.
- (c) According to the prosecution case, the prosecutrix/P.W.No.1 along with P.W.No.2 Suken Kusuvah came to Trimbakeshwar for *darshan* of Lord Shiva on 15/03/2012 in the morning

hours. After taking *darshan*, they both decided to visit another holy place Bramhagiri and, therefore, started climbing the mountain. At about 2.30 p.m., they took a halt for having lunch. At that time, the appellants/accused along with the juvenile in conflict with law came there and questioned them as to why they are sitting there. They had beaten the prosecutrix/P.W.No.1 as well as P.W.No.2 Suken Kusuvah. An amount of Rs.7200/- as well as cellphone came to be robbed from both of them by snatching their money purses and the cellphone.

- (d) According to the prosecution case, then three of them dragged the prosecutrix/P.W.No.1 to the nearby bushes while two of them had immobilized P.W.No.2 Suken Kusuvah by holding him. The prosecutrix/P.W.No.1 was then raped by the trio. She was threatened that if the incident is disclosed to anybody, they both shall be killed and thrown from the mountain.
- (e) After the incident of gang rape and after being the victims of the dacoity, the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah returned to the Trimbakeshwar bus stop and by bus they returned to Satpur. As the prosecutrix was frightened, she stayed in the house and had not disclosed the incident.

- (f) On 17/03/2012, the prosecutrix/P.W.No.1 informed the incident to her sister Jyoti as well as her sole brother named Banti Adhav (D.W.No.1). Both of them gave support to the prosecutrix/P.W.No.1 and took her to the Police Station Trimbakeshwar, where she lodged the report (Exhibit 17) on 17/03/2012 itself, which came to be recorded by P.W.No.9 Bhausahab Mali, Police Naik. Accordingly, Crime No.21 of 2012 for the offences punishable under Sections 376(g), 395, 342, 323, 504 came to be registered and wheels of investigation were set in motion. During course of investigation, the prosecutrix/P.W.No.1 was sent for medical examination to the Civil Hospital, Nashik, where she came to be examined by P.W.No.3 Dr.Mandakini Barve, Medical Officer. The accused persons came to be arrested. They were examined medically from P.W.No.4 Dr.Nareshkumar Bagul, Medical Officer of Civil Hospital, Nashik. The spot was inspected and seizure came to be effected vide panchnama (Exhibit 34) from the place of the incident. On the basis of voluntary disclosure statement of the appellants/accused Manoj Pardeshi and Dattatraya Korde, articles such as cellphone, wallet containing driving licence of P.W.No.2 Suken Kusuvah, ladies purse, cash etc. came to be seized in presence of panch witness P.W.No.6 Kailas Shinde by P.W.No.8 Kishor More, Police Inspector of Trimbakeshwar Police Station. The test identification parade came to be

conducted by P.W.No.7 Arun Awate, Special Judicial Magistrate, wherein, according to the prosecution case, the prosecutrix/P.W.No.1 as well as P.W.No.2 Suken Kusuvah had identified the appellants/accused on 30/03/2012. On completion of routine investigation, the appellants/accused persons came to be charge-sheeted.

- (g) Charge for offences punishable under Sections 376(2)(g), 395, 342, 323, 504, 506 read with Section 34 of the IPC came to be framed and explained to the appellants/accused persons. They abjured guilt and claimed trial.
- (h) In order to bring home the guilt to the appellants/accused, the prosecution has examined in all nine witnesses. The prosecutrix is examined as P.W.No.1. Her friend Suken Kusuvah is examined as P.W.No.2. Medical Officer Dr.Mandakini Barve, who had examined the prosecutrix/P.W.No.1 is examined as P.W.No.3. Exhibit 24 is the Medico Legal Certificate issued by P.W.No.3 Dr.Mandakini Barve. Dr.Nareshkumar Bagul, Medical Officer, who had examined the appellants/accused is examined as P.W.No.4. Exhibits 27 to 30 are the Medico Legal Certificates regarding medical examination of the appellants/accused persons. Panch witness Manoj Bodke is examined as P.W.No.5. Another panch Kailas Shinde is examined as P.W.No.6. He

proved the spot panchanama (Exhibit 34), memorandum statement and recovery panchnama (Exhibits 35 and 36) showing recovery of cellphone of Samsung made as well as clothes at the instance of appellant/accused No.2 Manoj Pardeshi. This witness also proved memorandum statement (Exhibit 37) and resultant recovery (Exhibit 38) showing recovery of clothes, ladies purse, gents purse containing driving licence of P.W.No.2 Suken Kusuvah, cash, clothes etc. at the instance of appellant/accused No.1 Dattatraya Korde. Arun Awate, Special Judicial Magistrate, who has conducted test identification parade is examined as P.W.No.7. Memorandum of test identification parade conducted on 30/03/2012 is at Exh.40. The Investigating Officer Kishor More, Police Inspector of Trimbakeshwar Police Station is examined as P.W.No.8. Exhibit 47 is the second spot panchanama prepared by him. Bhausahab Mali, Police Naik, who recorded the FIR (Exhibit 17) is examined as P.W.No.9. This witness had also ventured to conduct panchanama of condition of body of the prosecutrix/P.W.No.1 (Exhibit 32).

- (i) Defence of the appellants/accused persons is that of false implication in the crime in question by the First Informant/prosecutrix/P.W.No.1 as well as by P.W.No.2 Suken Kusuvah. They had also filed written statement (Exhibit 79). As per the defence version, the

prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah were found in compromising position by the villagers as well as the appellants. Therefore, they were being taken to the police station. However, both of them tendered apology and secured their liberty. Subsequently, in order to take revenge, the prosecutrix/P.W.No.1 lodged report alleging rape as well as dacoity. In addition, it is defence of appellant/accused No.4 Ganesh Zole that his father is working as a Security Guard at the Trimbakeshwar Temple and because of dispute over the issue of standing in a queue for *darshan*, Banti got him falsely implicated in the crime in question. The defence has examined Stiphen Antony Adhav @ Banti as defence witness to probabilize its version.

- (j) After hearing the rival submissions, the learned trial Court by the impugned Judgment and Order dated 24/04/2013 in Sessions Case No.127 of 2012 was pleased to convict the appellants/accused persons of the charges levelled against them and accordingly, they came to be sentenced as indicated in the opening paragraph of the Judgment.

3 I have heard Shri.Ghaisas, the learned Advocate appearing for appellant/accused No.4 Ganesh Zole as well as Ms.Nasreen Ayubi, the learned Advocated appointed to represent appellants/accused Nos.1 to 3 at sufficient length of time.

Shri.Ghaisas, the learned Advocate has also tendered written submissions on record and the same are carefully perused by me. In submission of the learned Advocate appearing for the appellants/accused, the prosecution has failed to bring on record common intention as well as the motive behind the crime in question. The learned Advocates made following submissions :-

Though the prosecutrix/P.W.No.1 has averred that she came to be gang-raped in the bushes on the way to Bramhagiri, there were no injuries on her person. The so called injury to her hand caused by breaking of the bangle was also not shown by her to the Doctor nor she has deposed about the same in her substantive evidence. Even before conducting the test identification parade, the appellants/accused were shown to the prosecutrix/ P.W.No.1 on 18/03/2012. The prosecutrix/P.W.No.1 has stated that she has not disclosed the incident to anybody, and therefore, evidence of P.W.No.2 Suken Kusuvah is an hearsay evidence. His evidence that the incident was disclosed to him when they were returning by the bus is untrustworthy. There is delay in lodging the FIR, which is not explained. The spot panchanama was prepared after 6.00 p.m., when there was no street lights at the place, as seen from the evidence of Investigating Officer P.W.No.8 Kishor More, Police Inspector. There is discrepancy and contradiction in respect of the timing of the alleged incident. In the FIR, it is stated that the incident took place at about 2.30 p.m., whereas in her evidence, the prosecutrix/P.W.No.1 has stated the timing as 12.30

noon. In the chief-examination, she has stated that she was scared, whereas in the cross-examination, she has stated that she was not scared. The prosecutrix/P.W.No.1 has stated that five young persons rushed on the spot, whereas P.W.No.2 Suken Kusuvah deposed that initially, two persons rushed on the spot and they were followed by three young persons. The prosecutrix/P.W.No.1 has stated in her evidence that she disclosed the incident for the first time to her sister Jyoti and to D.W.No.1 Banti on 17/03/2012, whereas P.W.No.2 Suken Kusuvah has stated that the incident was narrated to him by the prosecutrix/P.W.No.1 during their return journey. All these contradictions make the prosecution case unreliable. The prosecutrix/P.W.No.1 has stated that P.W.No.2 Suken Kusuvah was having Rs.4200/-, whereas the P.W.No.2 Suken Kusuvah has deposed that he has not disclosed the amount which was being carried by him to the prosecutrix/P.W.No.1. Interested panch witnesses are used by the investigating agency and one of the panch witness is a Home Guard. The defence witness named Banti has stated that the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah were seen in compromising position by the villagers and the villagers along with the appellants/accused caught them red-handed. This indicates false implication. The learned Advocate further pointed out the printed form of the charge-sheet and submitted that Model number of the cellphone stated in the printed form of the charge-sheet is not matching with the Model

number reflected from the Seizure Panchanama and Muddemal receipt. Even evidence of the prosecutrix/P.W.No.1 shows that appellant/accused No.3 Pintu Khoskar had committed rape on the prosecutrix/P.W.No.1. There were no injuries on person of the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah and therefore, the appellants/accused are entitled for acquittal.

4 The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction as well as resultant sentence by contending that evidence of the prosecutrix/P.W.No.1 is gaining corroboration from other evidence collected by the prosecution and the same is reliable and trustworthy. The learned trial Court, as such, rightly convicted the appellants/accused and sentenced them according to law.

5 I have carefully considered the rival submissions and also perused the entire Record and Proceedings including depositions of prosecution witnesses as well as the documentary evidence.

6 As stated in foregoing paragraphs, case of the prosecution is that of a gang rape with dacoity after causing criminal intimidation to the prosecutrix/P.W.No.1 and of causing hurt to her as well as her companion by the appellants/accused persons along with the juvenile in conflict with law. In any case of

rape, evidence of the prosecutrix is of prime importance and fate of the prosecution case to a large extent hinges on testimony of the prosecutrix. From evidence of the prosecutrix/P.W.No.1 as well as from that of P.W.No.2 Suken Kusuvah, who was companion of the prosecutrix/P.W.No.1 and more particularly from cross-examination of these witnesses, certain material is brought on record. The position which was emerging on record, rather undisputedly, from this material needs to be put on record, at the outset itself, in order to have better understanding and proper appreciation of the evidence of the prosecutrix/P.W.No.1. The prosecutrix/P.W.No.1 is a married lady having responsibility of two children. She was residing separately from her husband since last eight and half years of the incident. She along with her children was residing with her parents and brother. In order to earn her livelihood, the prosecutrix/P.W.No.1 was serving in some private Company and P.W.No.2 Suken Kusuvah was her co-worker. He was acquainted with the prosecutrix/P.W.No.1 since last one and half years prior to the incident, as they both were serving with the same employer. P.W.No.2 Suken Kusuvah, at the relevant time, was unmarried adult person. The prosecutrix/P.W.No.1 accompanied by P.W.No.2 Suken Kusuvah had been to Trimbakeshwar on 15/03/2012 and that excursion was without knowledge of the parents and brothers of the prosecutrix/P.W.No.1. It is, thus, clear from the evidence on record that the prosecutrix/P.W.No.1, who is a matured married lady residing

separately from her husband since last more than eight years was on a secret tour to Trimbakeshwar along with her co-worker with whom she had developed acquaintance while working together at the Company. The Court is expected to bear in mind these facts as they relate to human psychology and behavioural probabilities of the prosecutrix. How evidence of the victim of a rape case is required to be evaluated and assessed is the issue which is settled by the Honourable Apex Court in catena of Judgments. In case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***¹, relevant observations of the Honourable Apex Court found in paragraphs 9 and 10 of its Judgment read thus :

“9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach

1 *AIR 1983 SC 753*

made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different.....

“10.... Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :-

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred,

(2) She would be conscious of the danger of being

ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours,

- (3) She would have to brave the whole world.
- (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.
- (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.
- (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.
- (7) The fear of being taunted by others will always haunt her.
- (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10)The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11)The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12)The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent.”

7 Similarly, in the case of *State of Punjab vs. Gurmeet Singh*¹ the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity and it is observed that :

“It is an irony that while we are celebrating women's

1 1996 Cr.L.J. 172.

rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

8 Keeping in mind these principles of appreciation of evidence of the victim of the rape case, let us examine evidence of the prosecutrix/P.W.No.1 as well as that of P.W.No.2 Suken Kusuvah, who was accompanying her in the tour to Trimbakeshwar on 15/03/2012.

9 Congruous evidence of the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah is to the effect that, as decided, they both visited Trimbakeshwar – a holy place in Nashik District on 15/03/2012. After taking *darshan* of Lord Shiva, they both proceeded towards Bramhagiri mountain by purchasing water bottle etc. On the way to Bramhagiri, they took a halt for taking lunch. As per version of the prosecutrix/P.W.No.1, then five boys of age group of 20 to 25 years came there and started questioning them as to why they are sitting there. In the words of P.W.No.2 Suken Kusuvah, initially, two boys came there followed by three other boys and after questioning both of them, they started assaulting both of them. Both these witnesses in unison have stated that those five young boys assaulted them by means of sticks and robbed them of their money purses and cellphone. The prosecutrix/P.W.No.1 had stated that her money purse was containing an amount of Rs.4200/-, whereas money purse of P.W.No.2 Suken Kusuvah was containing an amount of Rs.3000/-. As stated by both these witnesses, then two persons caught hold of

P.W.No.2 Suken Kusuvah, whereas three persons dragged the prosecutrix/P.W.No.1 to the nearby bushes. P.W.No.2 Suken Kusuvah had stated that the prosecutrix/P.W.No.1 and those three persons returned after about half an hour. What happened to her after she was taken to the bushes by three persons is stated by the prosecutrix/P.W.No.1. She stated that by taking her to nearby bushes, she was denuded and was raped by those young persons one by one.

10 Evidence of the prosecutrix/P.W.No.1 and that of P.W.No.2 Suken Kusuvah shows that on return to P.W.No.2 Suken Kusuvah, the prosecutrix/P.W.No.1 requested the rapists to return her cellphone and then they obliged. They had threatened both of them not to disclose the incident to anybody else or they will kill them. As per version of P.W.No.2 Suken Kusuvah as well as that of the prosecutrix/P.W.No.1, then they both returned to the bus stand and by bus they went to Nashik. P.W.No.2 Suken Kusuvah has stated that on the way, the prosecutrix/P.W.No.1 disclosed him that she was raped. The prosecutrix/P.W.No.1 further told him that she is not in a position to narrate the incident to her family members as they would suffer a shock.

11 The prosecutrix/P.W.No.1 has stated in her statement before the Court that she had disclosed the incident to her sister and her sole brother on 17/03/2012 and then she had lodged

report (Exhibit 17) about the incident on the very same day. While in the witness box, the prosecutrix/P.W.No.1 has identified appellant/accused No.3 Pintu Khoskar and appellant/accused No.4 Ganesh Zole as the persons, who had caught hold of P.W.No.2 Suken Kusuvah. She identified appellant/accused No.1 Dattatraya Korde and appellant/accused No.2 Ganesh @ Manoj Pardeshi as the persons, who had raped her along with the juvenile in conflict with law.

12 So far as P.W.No.2 Suken Kusuvah is concerned, he has stated before the Court that on 17/03/2012, the prosecutrix/P.W.No.1 had informed him that she is going to the police station and he also went to the police station. Thereafter, he showed the spot of the incident to police. As per his version, his locket having pendant of *Saibaba* with red colour thread, one handkerchief and pieces of bangles were found lying on the spot of the incident. This witness identified money purses belonging to him as well as the prosecutrix/P.W.No.1 and his cellphone. Cross-examination of both these witnesses viz. the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah is focused principally towards alleged immoral behavior of both these witnesses. It was suggested to both of them that they were indulging in obscene act in lascivious manner and they were caught while in the act by the appellants/accused and villagers. It was suggested to both of them that then they were being taken to the police station by the

appellants/accused as well as the villagers. Then, both of them apologized and secured their liberty. Therefore, they were freed by the appellants/accused as well as villagers and to take revenge of this fact, they all are falsely implicated in the crime in question by lodging the FIR after two days. Both these witnesses have categorically denied all these suggestions. Similarly, an attempt was made to show that the place where both these witnesses were sitting was visible to the passersby. From cross-examination of both these witnesses attempt was made to elicit that police outpost as well as the police station is situated at the foot of the Bramhagiri mountain and Trimbakeshwar respectively, and as such, they both had ample opportunity to lodge the FIR, had such incident actually occurred with them. One may assume that police outpost as well as the police station was situated in the vicinity of the scene of occurrence and the place being a holy place might have been visited by many other persons. Further cross-examination of P.W.No.2 Suken Kusuvah shows that he along with the prosecutrix/P.W.No.1 were sitting at such a place from which they were unable to see people passing from nearby area.

13 At this stage, human psychology, normal human conduct and behavioural probabilities of both these witnesses will have to be kept in mind. As indicated in foregoing paragraphs, it was rendezvous without disclosing parents of the prosecutrix/P.W.No.1, who herself was a married woman

separated from her husband. She along with her two children had taken shelter of her parental house. In that meet, unexpectedly, she along with her companion P.W.No.2 Suken Kusuvah met with the horrendous incident in which two persons over powered P.W.No.2 Suken Kusuvah and three persons dragged the prosecutrix/P.W.No.1 to the nearby bushes, where she was raped one by one by the trio. Evidence of the prosecutrix/P.W.No.1 is specific to the effect that she was frightened because of the incident. In cross-examination, she has denied the fact that as she was frightened, she could not see persons, who came there. This sentence cannot be construed to mean that the prosecutrix was not frightened at all. The incident was certainly shocking and traumatic for both these witnesses, particularly when the meeting was without knowledge of the parents of the victim married woman. Therefore, I see no substance in the submission of the learned Advocate for the appellants/accused that the prosecutrix/P.W.No.1 was not frightened in the incident and there was ample opportunity to her as well as to her companion to lodge report on the very same day, either at the police out post or with the police station. The psychological impact of such horrendous incident must have prevented the prosecutrix/P.W.No.1 and her companion from approaching the law enforcing agency immediately. Similarly, it is seen from the evidence of the prosecutrix/P.W.No.1 that she hails from the traditional bond of non-permissive society and as such, she must be extremely

reluctant to admit even happening of such incident, which was likely to have reflection on her chastity. She had fear of being looked down by the society including her parents. On the backdrop of the fact that she was separated from her husband since long, she must have been extremely embarrassed in such situation. Being overpowered by a feeling of shame on account of gang rape on her, her non-approaching to police station immediately after the incident cannot be said to be a conduct which is abnormal and throwing doubt on her version. Because of her secret excursion with a male colleague, she must have harboured the fear of she being considered to be promiscuous and responsible for the incident. Therefore, leaving the place of incident by her immediately instead of going to the Police Station reflects a normal conduct of the victim of such offence. The act of the prosecutrix/P.W.No.1 of immediately leaving Trimbakeshwar and taking shelter of sanctuary of her house indicates that her conduct is a natural conduct of a married lady in a given situation.

14 From cross-examination of P.W.No.2 Suken Kusuvah, it was attempted to demonstrate that his evidence in respect of the incident is coming on record by way of omissions. This fact cannot be given any overbearing importance in the wake of evidence of P.W.No.8 Kishor More, Police Inspector, who had recorded statement under Section 161 of the Code of Criminal Procedure of this witness i.e. P.W.No.2 Suken Kusuvah. Evidence of P.W.No.8

Kishor More, Police Inspector makes it clear that omissions are occurring in the statement of P.W.No.2 Suken Kusuvah because while recording his statement under Section 161 of the Code of Criminal Procedure instead of writing the date of incident as “15/03/2012”, the date of incident is written as “17/03/2012”. This makes it clear that substantive evidence of P.W.No.2 Suken Kusuvah in respect of incident is not coming on record by way of omission. It was merely a lapse on the part of the Investigator in writing the date of incident as “17/03/2012” instead of “15/03/2012”. What is effect of lapses or fault on the part of the investigator on the fate of the criminal case can be found from the Judgment of the Honourable Apex Court in the matter of ***Dhanraj Singh alias Shera v. State of Punjab***.¹ Relying on earlier decision, the Honourable Apex Court has reiterated that if the lapse or omission is committed by the investigating agency because of negligence, the prosecution evidence should be examined *dehorse* such omissions to find out whether said evidence is reliable or not. It is further held that if primacy is given to negligent investigation, the faith and confidence of the people would be shaken.

15 Some inconsequential discrepancies are sought to be capitalized from evidence of the prosecutrix/P.W.No.1 and that of P.W.No.2 Suken Kusuvah. It is sought to demonstrate that the prosecutrix/P.W.No.1 has stated that she has not disclosed the

¹ 2004 SCC (Cri.) 851.

incident to anybody till 17/03/2012, but evidence of P.W.No.2 Suken Kusuvah shows that during return journey she has disclosed the incident to him. Similarly, attempt is made to demonstrate that evidence regarding mental condition of the prosecutrix is at variance as in her chief-examination, she has stated that she was frightened, but in cross-examination she has stated that she was not frightened. The discrepancy regarding timing of the incident also sought to be made use of by arguing that in chief-examination of the prosecutrix/P.W.No.1, she has disclosed the timing of the incident as 12.30 noon, whereas in her FIR, the timing is given as 2.30 p.m. The law on this aspect is very clear. Minor discrepancies on trivial matters not touching to the core of the case does not make evidence of the prosecution witness untrustworthy warranting its rejection. What is required to be seen is whether basic version of the prosecution is shaken or not. In depositions of witnesses there are always normal discrepancies. Those discrepancies may be due to normal error of observation, normal error of memory due to lapse of time, error due to mental disposition such as shock or horror at the time of the occurrence etc. In the case in hand, the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah met with a sudden horrendous experience in their life and the FIR, therefore, came to be lodged after two days. Subsequently, after considerable time, the prosecutrix/P.W.No.1 has stepped into the witness box. If cumulative effect of her evidence and that of P.W.No.2 Suken Kusuvah is considered, then

it is seen that their evidence as a whole is having ring of truth and therefore, such minor discrepancies sought to be made use of are of no consequence. Mental state of victim of such incident can be well understood by the way in which the incident has taken place.

16 Let us now examine whether the evidence of the prosecutrix/P.W.No.1 is gaining corroboration from other evidence on record, though in such cases the Court is not bound to insist for corroboration to the version of the prosecutrix. It is seen from evidence of P.W.No.6 Kailas Shinde, panch witness, that the spot of the incident came to be inspected on 17/03/2018 itself. It was shown by P.W.No.2 Suken Kusuvah. His evidence shows that the spot was near Bhatkheda building and beneath the *umbar* tree. The locket with red thread and pendant of photograph of *Saibaba* belonging to this witness was found lying on the spot of the incident where he was overpowered by the dacoits and rapists. The spot on which the accused persons had taken the prosecutrix/P.W.No.1 was found to be at a distance of 25 feet from the first spot where P.W.No.2 Suken Kusuvah was overpowered. At the second spot, pieces of bangles, one handkerchief and a stick was found lying. The spot panchanama (Exhibit 34) which is proved by P.W.No.6 Kailas Shinde shows that the grass on the spot where the prosecutrix/P.W.No.1 was taken was pressed.

17 It was attempted to demonstrate that there was no visibility on the spot of the incident by relying on the cross-examination of P.W.No.6 Kailas Shinde. This witness has stated in his cross-examination that the street lights were not available on the way and at the spot of the incident, there was no street light. However, recitals in the spot panchanama (Exhibit 34) makes the position clear. It is seen from the spot panchanama that spot was inspected in the light of batteries as well as search light from 6.05 p.m. to 7.30 p.m. of 17/03/2012. Hence, such half-hearted cross-examination is not sufficient to doubt the spot panchanama and seizure effected thereunder.

18 Congruous evidence of P.W.No.8 Kishor More, Police Inspector, Investigating Officer and that of P.W.No.6 Kailas Shinde, panch witness shows that on 19/03/2012 appellant/accused No.2 Manoj Pardeshi had made a disclosure statement (Exhibit 35) which has resulted in recovery of cellphone of Samsung on 19/03/2012. Similarly, evidence of these witnesses shows that on the basis of voluntary disclosure statement of appellant/accused No.1 Dattatraya Korde made on 20/03/2012, ladies purse and gents purse containing driving licence of P.W.No.2 Suken Kusuvah with his three photographs and cash came to be recovered. These articles were duly identified by P.W.No.2 Suken Kusuvah to be belonging to him as well as the prosecutrix/P.W.No.1. P.W.No.2 Suken Kusuvah has stated in his

evidence that the mobile cellphone of Samsung make belongs to him, so also the gents money purse belongs to him. He has stated that ladies money purse belongs to the prosecutrix/P.W.No.1. He had also identified the seized locket of red thread with pendant of *Saibaba*, so also the pieces of bangles seized from the spot of the incident.

19 Evidence of P.W.No.6 Kailas Shinde, panch witness is sought to be criticized on the ground that he is associated with police as Home Guard. However, careful scrutiny of cross-examination of P.W.No.6 Kailas Shinde shows that he was earlier working as guide at Trimbakeshwar and when his evidence was being recorded he was working as Home Guard. He was not questioned any further to demonstrate that at the time of inspection of the spot as well as effecting recovery, he was in fact serving as the Home Guard. Therefore, merely because at the time of recording of his evidence, P.W.No.6 Kailas Shinde was working as Home Guard, he cannot be termed as a partisan witness. His testimony cannot be disbelieved on this count only. Moreover, Investigating Officer P.W.No.8 Kishor More, Police Inspector is vouching about recording of the disclosure statement and the resultant recovery of the fact which resulted in seizure of incriminating articles at the instance of appellant/accused No.2 Manoj Pardeshi and appellant/accused No.1 Dattatraya Korde. Thus, this evidence of recovery of articles of day-to-day use

belonging to the prosecutrix/P.W.No.1 and P.W.No.2 Suken Kusuvah corroborates the version of the prosecutrix/P.W.No.1 in respect of incident in question.

20 Attempt was made to discredit this evidence regarding recovery by stating that in the charge-sheet, Model number of the seized cellphone is different than what is reflected in the recovery panchanama and muddemal receipt. The Model number mentioned in the format of the charge-sheet may be different, but the recovery panchanama (Exhibit 36) clearly demonstrate the Model number of the cellphone as 2652 and the same is the number mentioned in the muddemal receipt by which it was deposited with the police station. Moreover, P.W.No.2 Suken Kusuvah has duly identified the said cellphone as belonging to him. Knowledge of these two accused with regard to the place where money purses and cell phone belonging to the victims of the offence were kept, makes their involvement in the crime clear.

21 P.W.No.3 Dr.Mandakini Barve, Medical Officer had examined the prosecutrix/P.W.No.1 medically on 17/03/2012 i.e. after two days from the date of the incident of rape of the prosecutrix. This witness has not found any injury on person of the prosecutrix/P.W.No.1. She deposed that hymen of the prosecutrix/P.W.No.1 was found absent and accordingly, Medico Legal Certificate (Exhibit 24) came to be issued by this witness. The question is whether non-finding of injuries on the body of the

victim of the gang rape constitutes material for granting benefit of doubt to the accused. As per version of the prosecutrix/P.W.No.1, she was raped by three persons one after another. Prior to that she and her companion were overpowered by five young persons of age group of 20 to 25 years when they had taken a stop for having lunch at the secluded place. Cross-examination of P.W.No.8 Kishor More, Police Inspector makes it clear that the spot of the incident was 500 meters inside the road. Thus, the prosecutrix/P.W.No.1 and her companion were not having any hope that they would be saved by somebody from the clutches of the rapists. That is how in her entire evidence the prosecutrix/P.W.No.1 has not stated that she has offered resistance to the acts of the rapists. It is seen that she meekly submitted her chastity to the rapists, who were three in number rather than choosing to offer resistance to them. P.W.No.2 Suken Kusuvah, who was accompanying her was already overpowered by two of the accused persons. Therefore, non-finding of injuries on the body of the victim does not render her version improbable or untrustworthy. Even otherwise, it is well settled that when the ocular evidence is inconsistent with the medical evidence, then the ocular evidence if found to be trustworthy shall always prevail over the medical evidence. In the case of ***Ranjit Hazarika v. State of Assam***¹ because of absence of rupture of hymen and injury over the private parts of the prosecutrix, the Medical Officer had opined that no rape appears to have been committed on her.

¹ (1998) 8 SCC 635.

However, the Honourable Apex Court had taken a view in that matter that the medical opinion cannot throw over board otherwise cogent and trustworthy evidence of the prosecutrix. Similarly, in the matter of *B.C.Deva v. State of Karnataka*¹ in spite of the fact that there were no injuries on person of the prosecutrix, on finding that version of the prosecutrix is reliable and trustworthy, the Honourable Apex Court upheld the conviction by observing that :

“18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

With this, it needs to be held that the appellants/accused are not successful in dislodging the case of prosecution merely because no injuries were found on person of a married women two days after the incident of the gang rape on her. Even otherwise, two days time is sufficient to heal superficial abrasion, if any, caused by rough surface or broken bangle.

¹ (2007) 12 SCC 122.

22 Now let us examine whether evidence regarding identity of the appellants/accused persons as perpetrator of the crime in question is duly established or not. It is seen from evidence of the prosecutrix/P.W.No.1 as well as that of P.W.No.2 Suken Kusuvah that they both were in company of the dacoits-cum-rapists for a fairly long period of time. Initially, they both were assaulted and looted by the dacoits-cum-rapists. Subsequently, by immobilizing P.W.No.2 Suken Kusuvah by two of them, three others took the prosecutrix/P.W.No.1 at a distance of about 25 meters where she was subjected to the gang rape. They, then, returned after about half an hour. Thus, long period of time which the victims spent with the appellants/accused naturally granted them an ample opportunity to witness the dacoits as well as rapists. The long time spent by these victims with the accused persons granted them an opportunity to have features and gate of accused persons impressed in their mind and memory. The dock identification is the substantive piece of evidence and while in the witness box, the prosecutrix/P.W.No.1 has categorically ascribed specific role played by each of the appellant/accused during the course of the incident. Similarly, appellants/accused were duly identified by P.W.No.2 Suken Kusuvah while in the witness box. The prosecution has conducted test identification parade through P.W.No.7 Arun Awate, Special Judicial Magistrate. However,

so far as the prosecutrix/P.W.No.1 is concerned, as the accused persons were already shown to her on 18/03/2012 at the police station, evidence of test identification parade and identification of the accused persons by the prosecutrix/P.W.No.1 needs to be rejected. However, so far as P.W.No.2 Suken Kusuvah is concerned, his evidence coupled with evidence of P.W.No.7 Arun Awate, Special Judicial Magistrate makes it clear that the accused persons were duly identified by him in the test identification parade conducted on 30/03/2012, memorandum of which is at Exhibit 40. Evidence of P.W.No.7 Arun Awate, Special Judicial Magistrate shows that he has taken all necessary precautions while conducting test identification parade. At one point of time, he called twelve panchas to stand with two accused persons and opportunity was given to the accused persons to change their clothes. There seems to be no procedural lapses while conducting the test identification parade by P.W.No.7 Arun Awate, Special Judicial Magistrate. Thus, evidence of dock identification of the appellants/accused by P.W.No.2 Suken Kusuvah is gaining further corroboration from the evidence of test identification parade.

23 The prosecution case is sought to be doubted because of delay in lodging the FIR. The incident of 15/03/2012 was reported to police on 17/03/2012 by the

prosecutrix/P.W.No.1. The effect of delay in lodging the FIR in rape case was examined by the Honourable Apex Court in several cases. In the matter of *State of Himachal Pradesh v. Shree Kant Shekari*¹ it is held thus in paragraph 18 by the Honourable Apex Court :

“18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the Court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle. These aspects were highlighted in **Tulshidas Kanolkar Vs. State of Goa (2003 (8) SCC 590)**.

1 2004 ALL MR (Cri.) 3145 (S.C.).

24 In the matter of *Harpal Singh v. State of Himachal Pradesh*¹ it is held by the Honourable Apex Court that it is not uncommon that honour of the family is such a consideration, which delay action on the part of the near relations of the girl, who is raped. In that case, the delay in lodging the FIR was ten days. In the matter of *Karnel Singh v. The State of Madhya Pradesh*² it was held by the Honourable Apex Court that merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police can be because of society's attitude towards such woman. It casts doubt and shame upon her rather than comfort and sympathy with her. It is already put on record that the prosecutrix appears to be a deserted married woman having two children to maintain and she was on excursion with her co-worker without knowledge of her parents with whom she was staying. In such situation, delay of two days in lodging the report is not at all fatal to the prosecution case; particularly when the prosecutrix was not having an axe to grind against the appellants/accused, who were totally unknown to her.

25 By examining the defence witness, an attempt is made to demonstrate that after being caught in compromising position by the appellants/accused and other villagers, the

1 AIR 1981 SCC 361.

2 AIR 1995 SCC 2472.

appellants/accused are falsely implicated in the instant case. Evidence of D.W.No.1 Stiphen Antony Adhav @ Banti is interesting. In chief-examination, he claimed to be a sympathizer of the prosecutrix and stated that the prosecutrix/P.W.No.1 disclosed him that when she was engaged in love making with P.W.No.2 Suken Kusuvah, the villagers came there and objected their activities.

26 Upon her request, villagers left her and then the police declined to accept her report. This witness claims to be the member of R.P.I. party and had stated that he met the police and insisted to take report of the prosecutrix/P.W.No.1. That is how the police registered the crime at his instance. In cross-examination, this witness stated that the prosecutrix/P.W.No.1 had not stated anything to him in respect of the incident in question. He claims to have accompanied the prosecutrix/P.W.No.1 to Trimbakeshwar Police Station for lodging the report, as seen from his cross-examination. However, on the next breath, he states that he is not aware about what report is lodged by the prosecutrix/P.W.No.1 with police. Thus, it is seen that Defence Witness Stiphen Antony Adhav @ Banti has scant regards for truth and he is not the witness of truth. He has modulated his version to suit his own convenience and therefore, his evidence leads us nowhere.

27 Thus, the cumulative effect of evidence adduced by the prosecution makes it clear that by acting in concert, the appellants/accused along with the juvenile in conflict with law raided the secluded spot where the the prosecutrix/P.W.No.1 and her co-worker P.W.No.2 Suken Kusuvah had taken a stop for having lunch and then by beating both of them, they were robbed of their valuables. Subsequently, by acting in league, two of the dacoits-cum-robbers along with the juvenile in conflict with law committed gang rape on the prosecutrix/P.W.No.1 by taking her at a short distance from her co-worker P.W.No.2 Suken Kusuvah. They both were threatened by the appellants/accused persons. These facts are established by the cogent evidence of the prosecution witnesses. Hence, no fault can be found in the impugned Judgment and Order and resultant sentence which is also in tune with the offences held to be proved against the appellants/accused persons. The appeals are therefore, devoid of substance and hence, the Order:

ORDER

- (i) Both the appeals are, therefore, dismissed.

(A.M.BADAR J.)