

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1038 of 2002

STATE OF MAHARSHTRA

)...APPELLANT

V/s.

1) NAKUL TRIMBAK BHANGARE

**Age 25 years, R/o.Aaklolim,
Taluka Bhiwandi**

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2) ULHAS SHANKAR BHANUSHALI

Age 24 years

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3) SURESH BUDHAJI RAUT

Age 24 years

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4) PRAKASH SHANKAR BHANUSHALI

Age 25 years

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Accused nos.2 to 4 are residing at

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Gaurapur, Taluka Wada, District Thane

)...RESPONDENTS

Mr.H.J.Dedhia, APP for the Appellant – State.

None for Respondent Nos.2 to 4.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 10th SEPTEMBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 10th January 2002 passed in Sessions Case No.11 of 1995 by the Additional Sessions Judge, Thane, for offences punishable under Section 395, 376(2)(g) and 336 read with 34 of the Indian Penal Code.

2 Factual matrix of the case is that the prosecutrix and her husband, at the relevant time, were employed as labourers with one Narendra Mehta (PW6) at his farm situate at Gaurapur, Khanivali, District Thane. On 17th May 1994, the prosecutrix, her husband and other labourers viz., Trimbak Gunya Vartha, Gangubai Trimbak Vartha, Yamunabai Trimbak Vartha and Mangala Trimbak Vartha were throughout the day working in the said farm house. Mehta Shet (PW6) came at about 3.00 p.m.

3 According to the prosecutrix, there are two constructed rooms in the said farm, out of which, prosecutrix and her husband

reside in one room and the said Vartha family had residence below the tamarind tree. In the night hours, Mehta Seth slept near the prosecutrix and her husband and the said Vartha family slept at a distance of about 70 feet, under the said tamarind tree.

4 The prosecutrix then contends that, at about 1.00 a.m., they got up after hearing the commotion and saw fifteen persons in the age group of 22 to 25. All of them came near them and started beating her husband and Mehta Seth, as a result of which both of them fled away. Thereafter, those persons started pelting stones at Vartha family who had also awakened and made them run away. The prosecutrix, then alleged that, all the said persons caught hold of her, removed her clothes despite resistance and took her under a mango tree situate in the farm house and forcibly raped her. As she became unconscious, she does not know how many persons raped her. In the early morning, she regained consciousness and saw her husband and Mehta Seth, who put a *chaddar* on her person.

5 It is, then contended that, she revealed her ravishment at the hands of those persons to her husband and Mehta Seth, to which Mehta Seth replied that out of those fifteen persons, he knows three and revealed their names as Ulhas Shankar Bhanushali (A-2), Surya Budhaji Raut (A-3) and Prakash Shankar Bhanushali (A-4). However, he expressed ignorance as to rest of ten to twelve persons. Later on, the prosecutrix, Mehta Seth and her husband went inside the room and found her clothes and clothes of her husband, as also an amount of Rs.10,000/- kept in a bag missing.

6 It is then seen that, on 18th May 1994, at about 21.15 hours, they approached Police Station Wada and lodged the report on the basis of which First Information Report (FIR) was registered vide Crime Register No.I-53 of 1994 for offences punishable under Section 376(g), 336, 395, 323 read with 34 of the Indian Penal Code. Investigation was taken up by PW7 Nilesh Mainkar, Police Sub-Inspector whereas the charge-sheet came to be filed by

Assistant Police Inspector Shri. Satpute. PW7 Investigating Officer Nilesh Mainkar prepared Spot panchnama, Seizure panchnama and seized the clothes of the prosecutrix and accused, recorded statement of witnesses and sent all the articles to the Forensic Science Laboratory. PW1 Dr.Vijay Deshpande and PW2 Dr.Balkrishna Kamble, Medical Officers, examined all the accused whereas PW8 Dr.Jamil Shaikh, Medical Officer, examined the prosecutrix and found evidence of forceful intercourse and resultant injuries on the person of the PW5 / prosecutrix. On completion of investigation, police filed charge-sheet against the appellants/accused under Section 376(g), 395, 336, 323 read with 34 of the Indian Penal Code and the case was committed to the Court of Sessions, Thane.

7 To substantiate the charges against the appellants/accused, the prosecution has examined as many as eight witnesses and exhibited number of documents. The appellants/accused were questioned under Section 313 of the Code of Criminal Procedure about the incriminating evidence and circumstances and the

appellants/accused denied all of them. Their case is of total denial. All the appellants/accused submitted that PW6 Narendra Mehta and PW5 / prosecutrix are friends. The prosecutrix / PW5 was working for PW6 Narendra Mehta. They (accused) were not giving way to the farm house of PW6 Narendra Mehta as PW6 Narendra Mehta was not paying labour charges to labourers. He was compelled to pay labour charges. On the day of the incident, there was a Pooja and function and all of them were present in their respective houses. According to them, the prosecutrix /PW5 has deposed at the instance of PW6 Narendra Mehta.

8 Mr.Dedhia, the learned APP, while assailing the impugned judgment and order of acquittal, submitted that the learned Sessions Judge failed to consider the evidence of the prosecutrix / PW5 in proper perspective and lost sight of the fact that the appellants/accused were duly identified in the Test Identification Parade. Moreover, there being overwhelming medical evidence, the learned Sessions Judge ought to have given due weightage to the evidence led by the prosecution in its entirety. Since it has not

been done so, resultantly, an erroneous order of acquittal came to be passed which deserves to be set aside by this court.

9 Appellants/accused and their counsel absent when called.

10 We would like to refer to the judgment of the Hon'ble Apex Court with regard to appreciating the evidence in case of sexual offence. The Hon'ble Apex Court in the case of **Mukesh vs. State of Chhattisgarh**¹ held that the sole testimony of the prosecutrix is sufficient to establish the offence of rape even in the absence of corroborative evidence.

11 Similarly, the Hon'ble Apex Court in **State of Himachal Pradesh vs. Manga Singh**², in paragraphs 11 and 12, has held as under :

“11 The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be

1 (2014) 10 SCC 327 = 2014 CRIL.L.J. 4900 (SC)

2 2018 SCC Online SC 2886

required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.”

“12 It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the ‘probabilities factor’ does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.”

12 Keeping in mind the proposition laid down in the judgments referred supra, we propose to assess the material available on record and also the facts and circumstances of the case.

13 PW5/prosecutrix stated in her evidence (Exhibit 85) that in the year 1994, she was residing in Village Gaurapur, Taluka Wada along with her husband. It was a chikoo farm belonging to Narendra Gujarathi (PW6). There were two girls and their parents working in the said farm house, besides herself and her husband. Their surname was Vartha and were from Vartha family. On 17th May 1994, PW6 Narendra Shet came to the said chikoo farm at about 3.00 p.m. It is her further evidence that, at about 9.00 p.m., she and her husband slept on a cot whereas her employer Narendra Mehta slept on another. The members of Vartha family were sleeping under a tamarind tree, at a distance of about 70 to 80 feet.

14 The evidence of the prosecutrix /PW5 then shows that, at about 1.00 a.m., fifteen persons came. The girls from Vartha family raised shouts and somebody was throwing / pelting stones. She woke up by the shouts and saw about ten persons standing near her while five persons near Shri. Narendra Shet. Those persons started beating Narendra Shet and her husband. Since

they were beating her husband, she stood in between her husband and those persons. Narendra Shet and her husband then ran away after getting opportunity. Those persons then caught her. They also ensured that the persons from Vartha family should be made to run away before her husband and Narendra Shet ran away. Those persons had started pelting stones towards the tamarind tree because of which Vartha family people ran away.

15 Deposing further, she stated that, after her husband and Narendra Shet had gone / ran away, those culprits took her to a mango tree, removed her clothes and forcibly laid her on the ground. One of them took hold of her hands, other one of her head, the third one of her legs and ensured that she became immobile. The fourth person then committed rape. It is her further evidence that all the four accused then forcibly committed sexual intercourse with her, one after another. Thereafter, she became unconscious.

16 Her evidence then shows that she regained consciousness at about 6 to 7 a.m. and found her person covered with a *chaddar* and her husband and Narendra Shet were standing beside her.

17 According to her, from amongst those who committed illicit work, one was Prashant Bhanushali (A-4) and other was his brother (A-2). They used to come in wadi (farm) and therefore, she knew them before hand. The culprits were calling the third person as Surya. They were so calling when the culprits were taking her from near the bore room to the tree. She had seen said Surya in the light which was burning just outside the door of the bore room. She had seen Prashant Bhanushali (A-4) and his brother (A-2) in the burning electricity light at the boring room. She expressed her inability to tell the name of the fourth accused person but identified him by pointing finger at Nakul Trambak Bhangare (A-1) and stated that he was the fourth culprit. She also identified rest of the accused before the court.

18 Lastly, her evidence shows that she was carried from the tree to the other farm by her husband along with Narendra Shet. She took bath and rest for about four to five hours. In the evening, at about 7 to 8 p.m., she and her husband went to Wadi Police Station and lodged the report. She then proved the report at Exhibit 86.

19 If the substantive evidence of the prosecutrix/PW5 is juxtaposed to the contents of the FIR, then the inconsistencies and infirmities galore. To begin with, the semblance from the substantive evidence of the prosecutrix/PW5 is that she was atleast knowing A-2 and A-4, as according to her they used to come to wadi (farm). Disturbingly enough, if the FIR is read carefully, then it would be seen that nowhere she has revealed that she was knowing A-2 and A-4 from any point of time. Rather, it would be seen that it was Narendra Shet (PW6) who revealed names of A-2, A-4 and A-3. Now, as far as A-3 is concerned, according to the prosecutrix / PW5, the culprits were calling the third person as "Surya Surya" and therefore, she could know that

one of them was Surya. But then, again this material fact is conspicuously absent in the FIR.

20 Next important and tangible aspect emerging from the testimony of the prosecutrix / PW5 is that she was able to see all these accused in the light of a bulb, but again the prosecution has not come out with such a specific case in the FIR. It is quite apparent from the bare reading of the FIR that the prosecutrix / PW5, at the first place, had not noticed the physical features of the accused and, secondly, was also not knowing them either by their face or by their respective names. What is precisely clear from the FIR is that it was PW6 Narendra Shet who was knowing the accused.

21 But then again there is a serious question in the light of cross-examination where as PW6 Narendra Shet himself had seen all the appellants/accused, as is claimed by the prosecutrix / PW5 in her FIR. The prosecutrix / PW5 in her cross-examination admitted that there is jungle all around Mehta farm. She further

admitted that there were no lights on that day in the open land of compound of Mehta farm. She further admitted that at the time of lodging of complaint, she had not revealed the names of accused persons. From the above sorry state of affairs, it does not take much prescience to note that, not only the prosecutrix / PW5 was unaware of the accused persons, but the said Mehta Shet also could not have seen them as there was total darkness. How the names of accused find their way to the FIR is quite intriguing, in the light of admission given by the prosecutrix / PW5 that she had not revealed or disclosed the names of accused at the time of lodging of the FIR. Needless to say, this introduces an element of doubt in her testimony.

22 There are other convincing and discernible reasons as well to cloud the testimony of the prosecutrix / PW5 with suspicion. The prosecutrix / PW5 in her cross-examination stated that when she was being dragged up to the mango tree, she was lying on the ground facing sky. She was trying to extricate herself from the clutches of those persons. Her skin was somewhat peeled at the

backside of buttocks and legs due to dragging. She then admitted that blood was coming because of that and that the earth from bore room to the mango tree was stained with blood.

23 If the above piece of evidence is to be believed, then one can imagine the nature of injuries sustained by the prosecutrix /PW5 because of the dragging, right from the bore room to the mango tree. It may be immediately noted here that before dragging the prosecutrix / PW5 by those persons up to the mango tree, she was completely undressed and that means she was dragged nakedly throughout, right from the bore room to the mango tree. In her own words, not only there were bleeding injuries on her back, buttocks and legs but also there were trail of bloods from the bore room to the mango tree. We are sheerly disappointed when we do not find medical evidence to that effect. It seriously casts doubt to the version of the prosecutrix/ PW5. In her own words, on the next day, she did not go to hospital, and rather, she, her husband and Narendra Shet went to Tansa farm by car. Had there been such serious injuries sustained by her because of the dragging, she

ought to have gone to hospital immediately, or atleast, to the Police station. But nothing of that sort was done. Therefore, the doubt persists.

24 The version of the prosecutrix/PW5 regarding she suffering bleeding injuries on the back portion of her body, as also trail of blood, spreading right from the place where she was sleeping uptill the mango tree, does not find corroboration from the mouth of PW7 Nilesh Mainkar, Investigating Officer, and rather, it appears that her lies stood exposed when PW7 Nilesh Mainkar, Investigating Officer, stated in the cross examination that the prosecutrix/PW5 did not tell him that she suffered bleeding injuries at the time of the incident. She even did not tell him that the place, where she slept and the place where she was dragged upto, was smeared throughout with blood. He did not collect sample of blood as she had not stated anywhere that blood was oozing from her body. Even the Spot panchnama in this regard i.e. lying of blood from the place where she had slept up to the mango tree is totally silent.

25 In her further cross-examination, she admitted that she had become unconscious while she was being dragged to the mango tree. If she became unconscious during the course of dragging, then there was no occasion for her to see which accused did what. We say so, because in the examination-in-chief she has clearly pointed out the role played by all the accused persons. This is not enough. Quite surprisingly, the examination-in-chief shows that after she was carried, she was made to lie on the ground and one of them took hold of her hands, other her head, the third one of her legs and the fourth one committed rape on her. This is absolutely missing from the complaint, as she herself stated that at the time of dragging itself she became unconscious, and as has already been noted by us, there was no occasion for her to attribute the role played by the accused, there was no reason for her to describe the incident of rape so vividly.

26 In Budhsen and another vs. State of Uttar Pradesh³, the Hon'ble Apex Court has held that facts which establish the identity of an accused person are relevant under Sec. 9. As a general rule,

3 AIR 1970 SUPREME COURT 1321 (SC)

the substantive evidence of a witness is a statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to

identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Cr.P.C.

27 In Kanan and Others vs. State of Kerala⁴ it has been held by the Hon'ble Apex Court that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous Test Identification Parade to test his powers of observations. The idea of holding Test Identification Parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question

⁴ AIR 1979 SC 1127

of his capability to identify an unknown person whom the witness may have seen only once. If no Test Identification Parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.

28 In the present case, it appears to us that the investigation has been done in a slipshod manner. We are sorry to note that though the Test Identification Parade was carried out by PW3 JaiBharat Laxman Mali, Executive Magistrate, but to our dismay, we notice that the informant did not take part in the said Test Identification Parade, for the best reasons known to the investigation machinery. No explanation, much less, the plausible explanation, is forthcoming from the side of the prosecution. We also fail to understand as to why a thought or two was not spared on this count by the Investigating Officer by withholding the prosecutrix /PW5 and keeping her away from the exercise of Test Identification Parade, prosecution has caused serious damage to its case.

29 In the obtaining situation of the present case, we, therefore, feel that it was incumbent on the prosecution to have arranged the Test Identification Parade and get the identification made, before the prosecutrix/PW5 was called upon to identify the appellants/accused in the Court. On this ground alone, leaving apart the other very serious infirmities and inconsistencies noted by us during the course of re-appreciation of evidence, the testimony of the prosecutrix/PW5 becomes unworthy of credence and must be excluded from consideration.

30 Although the prosecution has examined PW8 Dr.Jamil Shaikh (Exhibit 160) to substantiate that on the day of the alleged incident the prosecutrix/PW5 was ravished, but as we have noted in the preceding paragraphs as to how the credibility of the prosecutrix/PW5 is not reliable and, therefore, though the evidence of the Medical Officer suggests that the prosecutrix/PW5 was subjected to forcible intercourse, the same will not be useful to the prosecution.

31 PW6 Narendra Mehta is another important witness from the prosecution point of view. He has stated in his evidence (Exhibit 110) that on 17th May 1994, at about 3 p.m., he had gone to his farm house. In the night, he slept in front of the room of the farm house, on a cot. Shabbir (husband of the prosecutrix/PW5) and the prosecutrix/PW5 had slept at some distance. At about 1.00 a.m. of 18th May 1994, twelve to thirteen persons came in the farm house and four to five persons out of them started beating him. Some of them also started beating Shabbir i.e. husband of the prosecutrix/PW5. According to him, out of twelve / thirteen persons, A-4, A-2, A-3, A-5 and A-1 were there. He also identified those persons before the court. According to him, A-3 and A-4 reside in front of his farm house, and therefore, he knows them by their names. A-1 resides by the side of Gaurapur and A-5 at Village Gaurapur. It is his further evidence that he and Shabbir then ran away from the farm house. At about 5.00 a.m., both of them returned and found the prosecutrix/PW5 lying unconscious below a mango tree. She was naked and, therefore, he put a *chaddar* on her person. On regaining conscious, she told them

that she was raped by accused persons and others. It is his further evidence that he had kept Rs.10,000/- in the farm house room which was stolen. Lastly, he stated that he was called by the police for Test Identification Parade and he identified all the accused.

32 It is also seen from the record that the Test Identification Parade was carried out by PW3 Jaibharat Laxman Mali, Executive Magistrate (Exhibit 64). It is also seen from his evidence that in the said Test Identification Parade, PW6 Narendra Mehta identified the accused persons. A moot question before us is that if PW6 Narendra Mehta was knowing all the accused since beginning of the incident, which is quite clear from his examination-in-chief, then, in our considered opinion, why PW6 Narendra Mehta was summoned to join the Test Identification Parade, is something which is very baffling. Since all the accused persons were known to PW6 Narendra Mehta, he could not have attended the Test Identification Parade conducted by the prosecuting agency. Therefore, in such circumstances, the whole

exercise involving PW6 Narendra Mehta in the Test Identification Parade, appears to us, to be futile.

33 While discussing the evidence of the prosecutrix/PW5, we have noted with caution from her evidence that at the time of the alleged incident, there was total darkness, and therefore, neither the prosecutrix/PW5 nor for that matter PW6 Narendra Mehta, could have been in a position to identify the accused persons.

34 Interestingly, this witness also contradicted the very contents of the FIR when he stated that he does not know whether the prosecutrix/PW5 was knowing any of the accused persons and then denied that he had told the names of the accused persons to the prosecutrix/PW5. On the contrary, the FIR gives a semblance that it was this witness who had revealed the names of accused persons and on the basis of it, the FIR came to be lodged by the prosecutrix/PW5 against the present appellants/accused and other persons. It is another matter that the prosecutrix/PW5, in her substantive evidence, has also gone contrary to the contents of the

FIR, which is already discussed by us. Suffice to say, the evidence of this witness takes nowhere the case of the prosecution and as noted, the evidence of this witness cannot be read with a sense of satisfaction.

35 There is one more serious and questionable aspect – delay in lodgment of FIR. In the matter of State of **Himachal Pradesh vs. Shree Kant Shetkari**⁵ it is held thus in paragraph 18 by the Hon'ble 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 satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution

5 2004 ALL MR (Cri) 3145 (S.C.)

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.”

36 Reverting back to the examination-in-chief of the prosecutrix /PW5, it is seen that as she did not have strength to move, she went to the police station only in the evening (of 18th May 1994) at about 7.00 p.m., but no such explanation or reason is forthcoming in the FIR. What is explained in the FIR is that as she was frightened, there was delay in lodging the FIR, which is again not substantiated in the substantive evidence. Thus, what is stated in the FIR is not deposed in the substantive evidence and vice versa. On the contrary, in the cross-examination in paragraph 13, she admitted that in the morning, she, her husband and PW6 Narendra Shet had gone to Tansa farm by a car and she took rest there from morning till evening. If she was not in a position to

move, which is clear from her examination-in-chief and as noted above, then how she went to Tansa is beyond apprehension. It is also not her specific case that her husband and PW6 Narendra Shet put her in the car and instead of going to the police station, they all thought it proper to go to Tansa farm and take rest.

37 We have very clearly noted the conduct of the prosecutrix/PW5 throughout and have suitably put our remarks to that effect. If the conduct of the prosecutrix / PW5 is anything to go by, then, in all fairness, the delay in lodging the FIR does matter and affect the prosecution case. Delay, certainly, is not in consonance with the natural human conduct. Having regard to the factual scenario and the catastrophe which had befallen to her, it was expected of her to immediately or within a reasonable time approach the police station, but that was not to be. Therefore, there is a blow to the prosecution theory.

38 Evidence of the prosecutrix/PW5 in a case of offence of rape, as held in the judgments referred supra, does not inspire

confidence, for the reasons enumerated hereinabove. Looking from any angle, the evidence which has been adduced by the prosecution, is not cogent and acceptable, so as to bring home the guilt of the accused. It is settled proposition of law that if the trial court, after careful and cautious consideration of the evidence and material placed on record, has exercised its discretionary power and has acquitted the accused, the Appellate court should be slow in interfering in such orders. Such orders can be interfered or taken exception to, only if there is any illegality or perversity in the findings of judgment of the trial court. On close reading of the impugned judgment, it is neither perverse nor illegal, so interference at our hands is unwarranted.

39 Keeping in view all the above facts and circumstances, the appeal sans merit is liable to be dismissed. Hence, the order :

ORDER

The appeal is dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)

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