

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.754 OF 2018**

1) Jaggu Pradip Wankhede
2) Keru @ Pramod Sitaram Garude
3) Tushar @ Khushya Bhagwan
Bhadarge .. Appellants

Versus

The State of Maharashtra .. Respondents

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Mr.Aniket Vagal for the appellants.
Mr.S.V. Gavand, APP for the State.

**CORAM : BHARATI DANGRE, J.
RESERVED ON : 14th JUNE, 2021
PRONOUNCED ON : 5th JULY 2021**

JUDGMENT :-

1 The present Appeal calls in question the judgment delivered in Sessions Case No. 143 of 2014, (*State of Maharashtra Vs. Jaggu Pradip Wankhede*) where accused persons were tried for the offence punishable under Section 376-D, 307 IPC, 394, 323, 506 and 506 read with Section 34 of the IPC. On culmination of the trial, the accused nos.1,

2 and 3 came to be convicted for the offence punishable under Section 376D read with Section 34 IPC and sentenced to suffer RI for 20 years and fine of Rs.1,000/- each in default to suffer SI for one month. The Appeal is preferred by three appellants assailing the said conviction, and also their conviction along with other accused persons for the offence punishable under Section 323, 504, 506 read with Section 34 of the IPC, for which they are sentenced to suffer RI for six months and pay fine of Rs.1,000/- each, on being convicted under each of the aforesaid provision of IPC. Since all the sentences were directed to run concurrently, the three appellants have already undergone the said sentence and therefore, the learned counsel concede that he do not propose to assail their conviction on the said count. All the accused were acquitted for the offence punishable under Section 307 and 394 read with Section 34 of the IPC.

2 I have heard learned counsel for the appellants Mr.Aniket Vagal and Mr.S.V. Gavand, learned APP for the State.

3 By virtue of the sentence imposed by the judgment of the Sessions Court dated 17th May 2018, the appellants were unsuccessful in seeking suspension of their

sentence though the Appeal was admitted by this Court. That is the precise reason by order of this Court on 13th March 2019, the preparation of paper book was expedited. Accordingly, the Record and Proceedings (R & P) with paper book was received by the Registry and the Appeal was made ready for final hearing and by consent of the respective counsel, was heard finally, in view of the incarceration of the appellants since their date of arrest.

4 The wheels of the investigation were set rolling, when the prosecutrix, aged 26 years (PW 1) approached Upnagar, Nashik City on 27th February 2014 at 17.00 hours alleging that she was raped on 26th February 2014. The complaint alleged that three unknown persons were involved in the act of rape and the sexual intercourse was against her consent. She also reported to have been assaulted along with her lover (PW 2), aged 26 years with whom she was present at the spot of incident. She narrated that she accompanied PW 2 on his motorcycle on the fateful day between 6.00 to 6.30 pm and by parking the motor vehicle at some distance, they walked towards a Ganpati temple. After that, they took some pictures on the mobile phone in the twilight and proceeded towards another temple nearby where they indulged in twaddling outside. By that time, it was getting

dark and since the couple felt an urge to fornicate, they started walking towards a field, where they discovered a small inclined area, and while they were engaged in foreplay, unexpectedly three unknown persons arrived and began teasing her. At this moment, PW 2 offered resistance to their conduct and one person whom she described, assaulted PW 2 and injured him and he rushed towards her, which prompted her to run away from the spot, she found her way towards the field, when she stumbled 2 – 3 times and sustained injuries on her hands and legs. The person chased her and caught hold of her and dictated her to follow his instructions, else threatened that PW 2 would be eliminated. It was narrated by her that the said unknown person fell her on the ground, snatched her mobile, removed her undergarments and forcibly committed sexual intercourse with her. At that very moment, a person named Vijay arrived, who rescued her from the person who had sexually abused her. Two other persons also arrived on the spot and she gives detailed description of the three persons. She allege that the person named Vijay was pushed aside and the person wearing black clothes committed forcible sexual intercourse, whilst the other person pinned her to the ground. Thereafter, the third person repeated the same act. When PW 2 arrived

at the spot and made attempts to freed her, the accused who committed rape with her assaulted him by hands and kicks and blow and also abused him. She alleged that the two persons asked her to leave the place immediately after wearing the clothes properly and they were brought to the main road by a pathway. When she checked her bag, she noticed that her Samsung Mobile phone was removed.

5 The complaint further narrate that thereafter they approached one hospital in Bitco where PW 2 received treatment for his injuries by projecting that he had met with an accident. She, was however, made to stand outside the hospital. They went to Lahivit where the house of PW 2 was located. The prosecutrix narrated the incident to her younger sister on mobile, who consoled her and advised her to go to the hospital. When they started approaching the hospital, PW 2 stopped the motorcycle at one desolate place since he was feeling weak and feverish. Since the prosecutrix was exhausted, she took a nap and as it was cold, PW 2 collected the surrounding dreck and lit a fire. PW 2 asked her whether he should warm her when she was partly in consciousness, she consented. Physical relationship was established between them and then she went to sleep. When she became awake at 3.30 am, they again went to his house and stayed there for

the night and after having deliberations, reported the incident to the police in the evening hours. It is this complaint which was taken up for investigation.

6 The Investigating Officer (PW 13) forwarded PW 1 and 2 for medical examination in the Civil Hospital. Spot panchnama was conducted through PW 4. The articles i.e. Saree pin, knicker, buttons of the shirt, found on the spot also came to be seized under the seizure panchnama. Clothes of PW 1 and PW 2 came to be seized vide panchnama. The accused persons came to be arrested on 2nd March 2014. Statement of PW 2 was recorded during investigation. The accused persons were subjected to Test Identification Parade after 86 days of their arrest in presence of the Tahsildar – PW 6, wherein PW 1 and 2 identified all the accused. After obtaining the medical case papers from Civil Hospital as well as from the Cantonment Hospital where PW 2 underwent the examination, on completion of investigation, charge-sheet came to be filed and the case was committed to the Court of Addl. Sessions Judge, Nashik.

On 14th October 2015, the charge was framed against seven accused. Accused nos.1 to 3 (appellant nos.1 to 3) were charged for committing rape on the complainant in furtherance of common intention while she was present with

PW 2, against her will and without her consent, and thereby committing offence punishable under Section 376D r/w Section 34 of the IPC. The accused nos.1, 2 and 3 and in particular, accused no.2 was charged with offence punishable under Section 307 read with Section 34 of the IPC for committing sexual intercourse with the prosecutrix, as accused no.2 was affected by HIV. Further, accused nos.1 to 7 were also charged for committing the offence punishable under Section 323, 394, 504, 506 r/w Section 34 of the IPC. All the accused pleaded not guilty and preferred to be tried.

7 In order to establish the charges, prosecution proceeded to examine 14 witnesses. Statement of all the accused persons were recorded under Section 313 of the Cr.P.C where they pleaded denial and took a stand that they were falsely implicated. On appreciation of the evidence of the witnesses and the documents brought on record, the Sessions Court held the charge against the accused nos.1 to 3 under Section 376-D to be established and resultantly convicted them and sentenced to suffer RI for 20 years, Accused nos.1 to 7 were convicted under Section 323, 504, 506 of IPC and acquitted under Section 307 and 394 of the IPC.

8 Mr. Aniket Vagal, learned counsel for the appellants would urge that the impugned judgment is grossly erroneous as it has wrongly convicted the appellants under Section 376D on the accusation of gang rape, speciously in the backdrop of the evidence brought on record. He would submit that the prosecutrix was carrying extra-marital relationship with PW 2 and she accompanied him to an isolated place and it is admitted by PW 1 and PW 2 that they were in foreplay in the ditch in the agricultural land. According to Mr.Vagal, the story narrated by the prosecutrix is improbable and hard to be believed, apart from the fact that there are inconsistencies in her deposition and the complaint lodged by her to the police station. The conduct of the prosecutrix, post the alleged act of rape is subjected to condemnation as Mr.Vagal argue that PW 1 along with PW 2 who had approached the police station in the evening of the next day and it is admitted by them, that this was after due deliberation with each other. Mr.Vagal would submit that there are inconsistencies in the version of the prosecutrix and PW 2 on material particulars, which would make the story of the prosecution dubious and in absence of any consistency in their version, the Sessions Court ought to have rejected the same. Referring to the version of PW 1 and 2, Mr.Vagal

would also clamp the conduct of the prosecutrix who inspite of gang rape as alleged, instead of reporting the incident immediately to the police or seeking any help, permitted PW 2 to indulge with her physically and this conduct of the prosecutrix, according to Mr.Vagal, appear quite unnatural and bizarre. The conviction of the appellants on the basis of the evidence brought on record overlooking the glaring contradictions, omission as well as improvements, Mr.Vagal would submit that the impugned judgment is liable to be set aside. In any case, his submission is that the evidence does not inspire confidence which would sustain a conviction under Section 376D which is a serious offence and the appellants stand convicted for the same and sentenced to suffer RI for 20 years and therefore, in light of the gravity of the offence and the punishment imposed, the prosecution was duty bound to prove its case beyond reasonable doubt and not merely on the basis of assumptions and presumptions. He would, therefore, urge that the impugned judgment deserve a reversal and the appellants be set at liberty particularly when they have already undergone imprisonment for more than seven years.

9 Per contra, the learned APP would support the impugned judgment and submit that the appellants have been convicted for a serious offence of gang rape and he would urge that there is no flaw in the impugned judgment which has rightly appreciated the evidence brought on record and even though there are contradictions or embellishments, they are minor in nature and do not affect the truthfulness of the prosecution case. He would submit that the prosecutrix was a married lady and therefore, merely because there are no signs of rape being committed, it could not be assumed that the case of the prosecution is based on mere assumptions and according to Mr.Gavand, it is settled position of law that the sole testimony of the prosecutrix would lead to a conviction if her evidence is found to be trustworthy and inspiring confidence. According to him, it is not only the version of the prosecutrix but corroboration from PW 2 who was present along with her, coupled with the surrounding circumstances including the spot panchnama, the prosecution has established its case based on cogent and reliable evidence and minor discrepancies or inconsistencies in the evidence of PW 1 and PW 2, in any manner, do not distort its case. The learned APP, therefore, seek dismissal of the Appeal in absence of any legal lacunae.

10 It is accepted position of law that the version of the prosecutrix, if found reliable and trustworthy, the corroboration is not warranted.

I would briefly refer to the settled position of law about whether the conviction can be based on the sole testimony of the prosecutrix/victim, where the testimony of the victim is found to be reliable and trustworthy and the law is that the conviction on the basis of her sole testimony is permissible.

11 The Apex Court in case of Madho Ram vs. State of Uttar Pradesh, (1973) 1 SCC 533, led the way for appreciation of evidence of the prosecutrix. In paragraph 11 of the judgment, it was held as under :-

“The principles that have to be borne in mind by Courts when considering evidence of the prosecutrix, have been clearly laid down by several decisions of this Court. It has been held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence, however, it has been emphasized that Courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person, accused of abduction or rape, has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible has not been accepted. The only rule of law is the rule of prudence namely the advisability of corroboration should be present in the mind of the Judge or the Jury, as the case may be. There is no rule of practice that

there must in every case, be corroboration before a conviction can be allowed to stand. As to what type of corroboration may be required when the Court is of the opinion that it is not safe to dispense with that requirement, it has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged.

12 In case of State of Rajasthan vs. N.K., 2000 (5) SCC page 13, the three Judges Bench of the Apex Court further strengthened the position of law on the said point while dealing with a case of rape of a girl above 16 years of age and to ascertain whether she was a consenting party in absence of marks of external injuries, and expressed that no father of a young girl would put the life of a daughter at stake on a false case. In para-11, it held as under:-

11 It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend

assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions, We may quote from the last of the above said decisions where the rule for appreciating the evidence of the prosecutrix in such cases has been succinctly summed up in the following words :-

“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.

13 The Courts are expected to be alive to the fact that in case of rape, no self respecting woman would come forward just to get herself humiliated at the hands of the members of the Society, against her honor. Seeking corroboration when the prosecutrix is found to be truthful and lend complete credence to the case of the prosecution, would be adding insult to her injury and to her woes including the mental trauma which she has suffered at the time of the assault.

If the Court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial by way of assurance. Assurance, short of corroboration, as understood in the context of an accomplice is sufficient. The evidence of a prosecutrix has to be accorded more weightage and to be considered as more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration and the Court should find no difficulty in acting on the testimony of a victim of sexual assault to convict an accused if her version is reliable and inspire confidence. Minor contradictions or insignificant discrepancy should be no ground for throwing out an otherwise reliable prosecution case, is the position of law as it stands.

14 This position of law being well settled on one hand, it is also equally well accepted position that her testimony cannot always be presumed to be a gospel truth. The possibility of exaggeration or embellishment or false implication, at times, cannot be ruled out.

In Rajoo & Ors vs. State of M.P. (2008) 15 SCC 133, the Apex Court expressed a word of caution in the following words:-

The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

15 In the recent judgment of the Apex Court in Ganesan Vs. State reported in 2020 (10) SCC 573, the Hon'ble Apex Court reinforced the earlier law, being that the sole testimony of prosecution can result in conviction if her evidence is absolutely trustworthy, unblemished and should be of 'sterling quality'. Their Lordships reiterated the existing law on the said point and defined "who is a sterling witness in para 9.3 of the report.

“Who can be said to be a “sterling witness”, has been dealt with and considered by this Court in the case of Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21. In paragraph 22, it is observed and held as under:

“22. In our considered opinion, the “sterling witness” should be of a very high quality and caliber whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which

the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

16 The case of the prosecution will therefore have to be appreciated in the backdrop of the aforesaid prevailing legal position as expounded through the various authoritative pronouncements.

It will have to be first ascertained from the evidence brought on record, whether where the prosecutrix has satisfied the test of being a ‘Sterile Witness’ and whether her evidence inspire confidence. A reference is necessary to the exhaustive complaint lodged by the prosecutrix on 27th February 2014. The alleged incident of rape as per PW 1 occurred after 6.30 p.m, at an isolated place near Ganpati temple which is located in Rockadoba wadi and the spot is on the bank of river at eastern side of Ganpati temple and as deposed by PW 4, it was in the agricultural land belonging to one Mr.Andole at the side of baandh. The allegation is that the prosecutrix was raped by three unknown persons who arrived on the spot where she was in the company of PW 2. The incident is reported on 27th February 2014 at 5.00 p.m.

The delay in lodging the FIR, which according to Mr.Vagal, is unexplained by the prosecution.

Before going to the aspect of delay, it will have to be first ascertained whether the story narrated by the prosecutrix to the police is consistent with her version before the Court and whether it finds corroboration in the testimony of PW 2 who was also present at the time when the incident took place.

17 Before the Court, the prosecutrix depose that on reaching the Ganpati Mandir in Rokado Bandi area in village Deolali in the evening hours, she and PW 2 came close to each other and intended to have sex. She deposed that when they were outside the temple of Rokadoba, one unknown person came there and caught hold of her, whereas PW 2 attempted to prevent it. She deposed that the said person assaulted PW 2 with stone, resulting into an injury to his forehead. She state that she ran away towards the agricultural land situated far away from the temple, with the unknown person chasing her and he managed to catch hold of her in the agricultural land. Her version is that he assaulted her and she fell down on the baandh of agricultural land and her mobile also fell down, and the unknown person picked up her mobile and put it in his pocket and then he took her in

the wheat crop, removed her clothes and forcibly had sex with her. While he was in the act, another person came on the spot within five minutes and this person was referred to by the unknown person as Vijay. She deposed that Vijay asked the person who had sex with her whether he is done and then Vijay caught her and brought her in the mid of the road. There two other persons were beating PW 2 and they brought PW 2 near her. Thereafter, the two accused took turns with her and one of them is described by her as wearing black colour clothes and she was also subjected to anal sex.

18 This version of the prosecutrix is deviating from her complaint where she has stated that while she was in foreplay with PW 2, three unknown persons came on the spot and started misbehaving with her which was sought to be restrained by her lover. In the complaint, she state that a person named Vijay came there and he rescued her from the assailant. At that time, two other persons arrived at the spot. She describes one person but is unable to give the colour of his clothes on account of the darkness. Another person, she state, was wearing black colour clothes and the two persons forced themselves upon her. PW 2 was brought on the spot and the two assaulted him, is her version in the complaint.

19 There is a variation in the story of PW 1, as to what had happened later on. In the complaint, PW 1 had stated that the two persons who had raped her, told her to leave the spot, as some other miscreants would come and cause harm to her and thereafter, they were reached her upto the road by a pathway. In the dock, her version is that they started to go by the side road along with the prosecutrix and her friend and five persons were walking with them and two were riding PW 2's motorcycle. The key of the motorcycle was taken by them from PW 2 and her mobile phone was also removed from her purse. They were then taken near a tree and made to sign on one paper and PW 2 was asked to perform marriage with her and threatened that if anything happened to her, they would involve PW 2. The first accused, threatened her that she should come again and at that time, the person named Vijay took her and made her sit on the Bench on the way of Vihitgaon and told her not to report the incident and go to the house of PW 2. Her version is PW 2 was sent for fetching petrol in the motorcycle and when he came back, she accompanied him on motorcycle to village Lahavit and for some time, they waited there. This entire sequence is found missing from the complaint. There is omission about PW 2 being send to fill up the petrol or that

the accused persons accompanied them till the way out to Vihitgaon.

20 There is also further inconsistency in her statement when she deposed that from the spot of the incident, she was taken by PW 2 to a house in village Lahavit and her sister had contacted him on his mobile as she was late and she informed her sister about the incident, who consoled her and asked her to go to the police and to the hospital. The prosecutrix further deposed in the Court that they started towards the hospital, but since PW 2 had sustained injuries, they first went to the Cantonment hospital where Sagar was offered treatment and she kept waiting outside, and thereafter, they went to his house where she received a call from her sister. There is consistency in her version about the sexual intercourse committed by her consent by PW 2 in the open ground but omission is that she went to sleep after having sex and that she was in half unconscious condition. At around 3.30 am, she awoke and from this point, the inconsistency in her version surfaces.

21 In her complaint, she narrate that after becoming awake, they went to PW 2's house and stayed there throughout the night and on the next day evening, after due

deliberation proceeded to Upnagar Police Station for lodging complaint and the complaint was lodged at 17.00 hours. In the witness box, her version is totally different. PW 1 depose that they went to Deolali Camp police station, but police did not take her complaint by stating that she was telling false because PW 2 was with her and was suspected that they both were conspiring. She narrate that the police brought them to Nashik Road Police station but the said police station did not register any case on the pretext that the place of incidence did not fall within their jurisdiction and therefore, she was taken to Upnagar police station, where her complaint was recorded as per her say and after reading the contents, she had put her signature on the same. Thus, the version of the prosecutrix is contrasting the complaint.

22 In light of the inconsistencies in the statement before the Court and in the complaint lodged before the police, it would be apropos to refer to the evidence of PW 2, who was accompanying her when she underwent the alleged ordeal. PW 2 deposed that the complainant is his fiancée. He corroborate the prosecutrix on their visit to the temple and admit that they proceeded to a dark isolated place with ditches and admit that they proceeded there with an intention to commit sex. PW 2's version is that one of the accused

came there and he abused them and questioned them as to what were they doing there. He deposed that a scuffle took place thereafter and the accused assaulted him by fist and kicks, and pelted stones on his forehead. The victim then started to run away to save herself when she stumbled and while she ran, the accused persons holded him on the spot. Two other persons arrived and caught hold of him and two persons proceeded to trace out the victim. He was threatened that they would kill them. He identified the person who first committed rape as appellant no.1 – Jaggu. He deposed that thereafter two persons committed rape on her one after another and he identified Pramod Garud – appellant no.2 in the dock but could not identify the third person. The explanation of PW 2 is, he was being assaulted and therefore, his mental condition was not proper. He deposed that the remaining accused were also on the spot where the other three committed rape and they were assisting the main culprit and they warned that if they care for their life, they would go away from the spot and therefore, they moved away from the spot on the motorcycle. PW 2 do not corroborate the prosecutrix on her version either given to the police in her complaint or before the Court about the manner in which they were brought on the road or that PW 2 being asked to

fetch petrol and she being detained by the accused persons and threatened.

23 PW 2 corroborate PW 1 about visiting the Cantonment Hospital on the way, where he walked inside and took preliminary treatment. Thereafter, as per PW 2, he took the victim and went to his home at Lahavit. From this point, the version of PW 2 is in stark contradiction of that of PW 1, where he deposed that when he went to his home at Lahavit, his family members did not allow them to come in the house and therefore, he took PW 1 to the ground near the house and the time given by him when he reached the ground is between 10 to 10.15 p.m. He corroborate her version about establishing physical proximity with her and of receiving phone call from the sister of PW 1, when he narrated the incident to her sister who consoled them, in contrast to version of PW 1 who has deposed that it was she who narrated the incident to her sister. As per PW 2, they remained on the ground for half an hour or 45 minutes and thereafter, went to Deolali Camp police station, but the complaint was refused and they were sent to Nashik Road police station and even at that place, the complaint was not recorded. PW 2 state that he kept waiting there and next day,

was brought to Upnagar police station. He elaborate that when they went to Deolali police station, it was midnight. When they came to Nashik Road police station, it was early morning and at around 9 to 10 am, from where they were sent to Upnagar police station where the victim lodged the complaint.

The narration of the same incident which PW 1 and PW 2 has undergone is antithetical.

24 Even on the aspect of identification of the accused persons in the Test Identification Parade, PW 2 state that he had identified all the accused persons. PW 1 and PW 2 assert so in the examination in chief but the defence counsel has scathily cross-examined both, in an attempt to shake their credibility and cross examination reveal that the counsel succeeded to a great extent.

In the cross-examination, PW 1 admit that she was having an extra-marital affair with PW 2 and she was not divorced from her husband when the incident took place. A specific question was put to the prosecutrix as to why no complaint was lodged from 10.00 pm of 26/2/2014 to 6.00 pm of 27/2/2014 and she respond by stating that she had given the complaint but the police had not recorded. When further questioned as to whether she has narrated this to

Upnagar police station, she assert in positive but state that police did not note the same in her complaint. She maintain that she had stated too many things to the police but they were not recorded in her complaint. She admit that she had not stated to the police about their visit to the hospital near Bytco where Sagar – PW 2 took treatment. In the cross, she admit that after the incident, she went to the house but do not state as to whose house and deny the suggestion that after making discussion, the complaint was filed. She admit that she went to the house in the morning at 5.00 am on 27th and offer explanation that Nashik Road police had sent her there, where she was present till 10.00 am and took rest.

25 PW 1 give an admission in the cross-examination that she had difficulties in identifying the persons and she gave description of the persons who had raped her but not their colour, height and body structure and that the complaint is lodged against unknown persons and admit that three out of seven accused had committed rape on her. She stated that out of these three, one had carnal intercourse with her but this fact is not mentioned in her complaint for some unknown reason. In the cross-examination, her earlier version is again shattered when she state that when they reached the Cantonment Hospital at 11.00 pm, and she was

present along with PW 2 and was aware that he had told the Doctor that he had met with an accident and had taken treatment, but she did not disclose that she was raped, either to Doctor or to the police present in the hospital. Further, in the cross-examination, she state that she had given the history of sexual assault to the Medical Officer examining her but did not recollect whether she described the place where the incident occurred and did not recollect whether she narrated that rape was committed on her on two different spots. She also admit that she had not narrated that she had sexual intercourse with PW 2 and that he had committed sexual intercourse with her twice. In the further portion of the cross-examination, the defence has brought on record several omissions and contradictions from PW 1, which are material to the case of prosecution. The whole incident about snatching of her mobile from her hand and that the first person referring to another person by name Vijay Vijay, is an omission. Vijay inquiring from the first person about whether he had completed sex and then, bringing her in the middle of the road is also an omission. She deny the suggestion that Vijay rescued her from clutches of the first person and the third person arrived there and asking Vijay why he was interfering. The portion marked 'A' in the

complaint was read over to her and that was also put to the Investigating Officer who had denied that she had stated the said portion to him. There is also omission on the aspect that the remaining persons assaulted PW 2 and that two persons came subsequently and one person kept holding her and another committed rape and subsequently the said person holding her and the first person committing rape.

26 The version of the prosecutrix start losing its credibility and it is further damaged when she is put to cross-examination on the aspect of Test Identification Parade. She does not remember whether police had brought the accused persons to the police station on 27th February 2014 but depose that she has seen accused when the police brought them. She deposed that when she was called by the police, she went to the police station but was not sure how many times she went. She deny the suggestion that she had seen the accused persons in the police station and state that she had not seen the accused after the incident till T.I. Parade.

In the examination in chief, PW 1 has deposed that she had identified total six accused in the T.I. Parade conducted in jail. She claim that one of the accused who was not present at the time of identification earlier is now identified by her in the Court and that is how she identified

all the 7 accused persons present in the Court. In contrast, PW 2 who also participated in the T.I. Parade on the very same day, state that he has identified all the seven accused persons during the T.I. Parade.

27 At this juncture, it would be appropriate to turn attention to the T.I. Parade, the conduct of which is seriously criticized by by the learned counsel for the appellants, as in utter violation of the norms for Test Identification. PW 6 is the Naik Tahsildar who conducted the Test Identification Parade in the canteen of Sanjay Jain. While deposing, he state that he was directed to keep six dummy persons to each accused bearing similarity with description of larger face, height etc. and that is how 42 dummy persons were brought for 7 accused. After arranging a dummy, the accused were directed to take their positions, PW 6 deposed that PW 1 had shown all the accused by touching to their person and showing the accused out of the row and that if she identified each of the accused separately. PW 1 herself in her cross-examination admit that she has identified only six accused persons as one was not present at the time of identification earlier i.e. earlier to the time when she identified him in the Court. PW 6 deposed that thereafter, PW 2 came on the spot and he identified all the seven accused persons standing in

the row along with 49 dummies and this he did so by touching each accused by hand. The Memorandum of T.I. Parade is exhibited through the said witness as Exhibit-74. He has also been extensively examined about the niceties of cross-examination and confronted that the manual for conduct of T.I. Parade. What emerges from his deposition and the panchnama is violation of direction no. (v) of Criminal Manual which mandate that not more than two accused should be placed in any single T.I. Parade. In the present situation, PW 6 has paraded all the seven accused persons, going by his version by placing 42 dummies (6 x 7) whereas PW 1 has categorically deposed that she identified only six accused, since one of them was not present. If he was not present in the T.I. Parade, PW 6 could not have had 42 dummies. The whole T.I. Parade therefore, becomes suspicious and create a doubt and do not inspire confidence. In any case, failure of T.I. Parade would not fail the prosecution if the witnesses have identified the accused in the dock as the Test Identification Parade can merely be used as corroboration and if the case of the prosecution otherwise stands, it would not loose its credibility only by pointing out to a procedural flaw in the conduct of T.I. Parade.

28 The next important point to be deliberated is on what basis the seven accused persons came to be arrested and whether the testimony of the prosecutrix – PW 1 could have sufficiently led to the arrest of the accused persons. PW 1 has deposed that she came to know the name of one of the accused persons as Vijay since the person who had first committed sex with her was referring to him by that name. While describing the pair of accused who had committed rape upon her one after another by taking turns, she described one of them as wearing black colour shirt and the other person as the one who committed intercourse with her from back. In her complaint, she had given description of these two persons by describing his physique as tall, lean and by further stating that he had his hair combed on one side, his face was elongated and he was having dark colour complexion. In the complaint, PW 1 state that he could not describe their clothes, as it was dark. The second person is described as tall wearing black colour clothes but PW 1 could not give his further description as it was dark. If the place was dark and if she was not able to throw any light upon colour of the clothes worn by the accused on the pretext that it was dark, it is unfathomable for her to give the description of the accused with minute particulars like his hairstyle, cut size of

his face whereas PW 1 has admitted in cross-examination that she along with PW 2 went to a dark place, where nobody could see them. In light of the said admission, her description of the accused persons becomes doubtful. On what basis the accused persons have been arrested in connection with the said C.R also do not become clear from the version of the Investigating Officer. This makes the case of the prosecution more suspicious and vulnerable.

29 The statement of prosecutrix under Section 164 is also on record but rather than lending any strength to the case of the prosecution, it causes more damage to it. In her statement under Section 164, she take name of one person by name Keru who is stated to have assaulted PW 2 and followed her. She suspected that Keru must be accompanied by some other persons and she concealed herself behind her house and then ran into a field. In her 164 statement, she, for the first time, state that she received phone call from Sagar PW2 who told her that she should not be afraid since one of his friend has reached on the spot. She state that she continued to hide behind a bush and again received a phone call from a person named Vijay Ugle who was calling from Sagar's phone who said to her that how can she run away,

leaving Sagar who was injured. It is her version in the said statement that Keru caught hold of her and assaulted her, threw her on the *baandh* and took her in a field with high grass and committed rape on her. She narrate that while Keru was committing the act, Vijay was standing next to him and objected to Keru, but Keru said that he can also take his chance. She further state that after Keru committed rape on her, Vijay offered to take her home but at that time, PW 2 arrived at the spot along with other accused persons and Sagar inquired from her whether he had committed any illegal act with her. At this place, Sagar was assaulted, is her version. Thereafter, Sagar was pushed aside in one field and two persons committed rape on her and she named the persons as Tushar and Jaggu. She narrated that Tushar had stuffed grass straw in her mouth to prevent her from shouting and he also raped her from behind. Her version in statement under Section 164 is in utter contrast to her deposition and her complaint. She narrate that after the incident of rape, when they were returning back, they met some of Sagar's friends who admitted Sagar in Cantonment Hospital and after treatment, they returned home where Sagar's mother wiped away the blood stains on his person. She state that Sagar was receiving phone calls from Nashik Road and she

also received phone call from her sister while she was sleeping in Sagar's house. Thereafter, they went into an open place where physical relationship was established by Sagar with her. She state that on the next day morning at 5.00 clock, she went to Nashik Road Police Station and thereafter, she went to Upnagar Police Station where she lodged a complaint in the morning hours between 8.30 to 8.45. This is another version of the prosecutrix. Thereafter, she named Kailash, Deepak as the persons who asked her to wear her clothes properly.

30 The prosecution case is that PW 1 was subjected to sexual assault by three persons in an isolated place and the FIR was registered against unknown persons. The T.I. Parade, as observed above, is equally doubtful and do not inspire confidence at all. The prosecution has relied upon the spot panchnama and there is also seizure of some articles alleged to be belonging to the prosecutrix being her stole, saree pin, knicker and one shirt button. The presence of the prosecutrix on the said spot is not doubted, and therefore, the seizure of these articles from the spot do not lend any credence to the case of the prosecution. She has admitted that she was indulged into foreplay with her lover – PW 2

and therefore, the recovery of her articles from the said spot is possible. As far as medical examination, the prosecution also rely upon the evidence of PW 8 who has examined PW 1 and PW 2. As far as PW 2 is concerned, on the history of assault being narrated, he noted injuries which were certified by him in the certificate at Exhibit-81. He also examined PW 1 on 27th February 2014 at about 11.57 p.m where the prosecutrix narrated brief description of the incident as described by the police. On examination, two abrasions were noted on her leg, in nature of simple injuries along with the presence of blunt trauma, again a simple injury. In the certificate proved by the said witness vide Exhibit-85 in the column of history, it is transcribed as under :-

“As described by police”.

On local examination of genital parts, no injury is mentioned. The hymen is described as ‘Torn’. The vagina is described as ‘Admit two fingers with minimal tenderness’. In the very same report, in column no.12-E as regards the condition of anus, it is recorded ‘No history of anal intercourse and no injury’. This certificate is issued by Dr. Chaudhary, Gynecologist, who is examined as PW 9, who deposed in sync with the certificate at Exhibit-85. In cross-examination, PW 9 admit that the MLC register copy of

concerned page shown to him did not narrate any history of gang rape by unknown or known persons. In the cross-examination, he state in MLC register the entry in history column mention as 'snake bite'. He also categorically admit that there was no injury i.e. bleeding, tear, discharge, odema, tenderness to anus.

The medical examination of the prosecutrix also do not further the case of the prosecution that the prosecutrix was subjected to sexual assault. She is a married woman who has given birth to a child, and accustomed to sexual assault. Not only this, in her cross-examination, she has given an admission that she had a sexual intercourse with PW 2 and it was done twice on the very same night, after the alleged incident of rape. The medical evidence, therefore, do not support the case of the prosecution though the medical certificate issued by PW 8 vide Exhibit-81 and 84, the injuries are noted on the body of PW 2 which include a sutured wound on the left side of the forehead, simple injury and a bruise at left side of face below left eye. As regards the first injury, PW 8 did not cite its age but qua the 2nd injury, it was opined to be more than 24 hours. Other injuries in the said certificate being injury nos.3 to 7, the age of injury was not opined. The prosecution, therefore, did not prove that

the injury sustained by PW 2 was on account of the incident of his assault on the evening of 26th February. The prosecution has, therefore, failed to connect its case as narrated by PW 1 and 2 to the injury sustained by them in the alleged incident and as certified by the medical experts.

31 The prosecution has failed to justify the delay in lodging the FIR. True it is that delay itself may not be fatal to the case of the prosecution and, in particular, when a woman alleges that she has been raped by multiple persons, a gang rape, on account of the trauma and the ignominy suffered by her. However, at the same time, delay in lodging the complaint is always looked with suspicion as the time lag may give rise to a possibility of concoction of evidence. In the present case, there is no satisfactory explanation offered by the prosecutrix as to why the complaint was filed on the next day i.e. on 27 evening at 5.00 p.m. and. particularly, when the version of PW-1 and PW-2 is at variance, apart from her own version about what transpired after the incident, which took place in the evening of 26th February. This lapse in the case of the prosecution is sufficient to discredit its truthfulness.

32 Reliance of the prosecution on the evidence of PW 11 to establish that denture of one of the accused Pramod was recovered from the spot which prove his presence, is also not of any significance once the identification of the accused persons by PW 1 and PW 2 is vacillating with uncertainty, on account of the admissions given by PW 1 that since it was dark, she is not able to give the details of the clothes worn by the accused persons and her evidence fall short of being, reliable evidence, to affix the act of rape to accused persons. The prosecution, has therefore, utterly failed to prove its case beyond reasonable doubt and the conviction of the three appellants out of seven accused persons on the basis of such shaky evidence cannot be sustained. It is the prosecution which has to prove its case beyond reasonable doubt and when the identification of the witnesses through the identification parade or even before the Court, itself is doubtful/dubious.

33 It is settled position of law that the prosecutrix is not an accomplice, but a victim of crime and her evidence must receive the same weight as is attached to an injured witness. It can be accepted without corroboration if the court, keeping in mind that it is dealing with the evidence of a

person, who is interested in the outcome of the charge levelled by her and can satisfy that it can safely act on her evidence. However, if the court is hesitant to place implicit reliance on the same, it will have to turn around and search for evidence, which may lent assurance to her testimony, short of corroboration required in the case of an accomplice. Where the prosecutrix is an adult of a full understanding, the court is entitled to base the conviction on her evidence unless the same is shown to be infirm and not trustworthy. After noticing that the testimony of the prosecutrix does not inspire confidence and even the circumstantial evidence does not remotely lend any support to the case of the prosecution, in absence of both the above elements being established, the conviction of the Appellant cannot be sustained. The conclusion arrived at by the Sessions Court are totally unsupported by the evidence on record. On account of the aforesaid shortcomings, irregularities and lacunae in the case of the prosecution, in my considered opinion, the impugned judgment cannot receive the stamp of approval and, in my opinion, the conviction of the accused deserves an interference on re-appreciation of evidence.

34 Resultantly, the Appeal is allowed.

Judgment dated 17th May 2018 in Sessions Case No. 143 of 2014 is set aside.

The appellants have earned their liberty and entitled to be released forthwith, if not required to be detained in any other crime.

SMT. BHARATI DANGRE, J