

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH
AT AURANGABAD**

CRIMINAL APPEAL NO. 274 OF 2017

Laxman s/o Madhavrao Chamalwar,
Age : 21 years, Occu: Agriculture,
R/o. Village Bennal, Taluka : Mukhed,
District : Nanded.
(At present the Appellant is in
Nashik Road Central Prison, Nashik,
Taluka and District : Nashik)

... Appellant
(Orig. Accused No.2)

Versus

1. The State of Maharashtra
Through Police Station, Merkhel,
Taluka : Degloor, District : Nanded.

2. XYZ

... Respondents
(R 2-Original Informant)

.....
Mr. Rajendra S. Deshmukh, Senior Advocate a/w Mr. G. A. Kulkarni
i/by Mr. D. R. Deshmukh, Advocate for the Appellant.
Mr. S. D. Ghayal, APP for Respondent No.1 – State.

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**WITH
CRIMINAL APPEAL NO. 294 OF 2017**

Anil Maruti Jadhav,
Age : 21 years, Occ : Laborer,
R/o: Village Merkhel, Tq. Degloor,
Dist. Nanded.
(At present the Appellant is in
Nashik Road Central Prison, Nashik,
Taluka and District : Nashik)

... Appellant
(Orig. Accused No.1)

Versus

1. The State of Maharashtra
Through Police Station, Merkhel,
Taluka : Degloor, District : Nanded.

2. XYZ
... Respondents
(R 2-Original Informant)

.....

Mr. Sudarshan J. Salunke, Advocate for the Appellant.
Mr. S. D. Ghayal, APP for Respondent No.1-State.

.....

**WITH
CRIMINAL APPEAL NO. 436 OF 2022**

Maksood s/o Pashamiya Pathan,
Age : 37 years, Occu: Auto Driver,
R/o: Merkhel, Tq. Degloor,
Dist. Nanded.
(At present the appellant is in
Aurangabad Central Prison,
Tq. and Dist. Aurangabad)

... Appellant
(Orig. Accused No.3)

Versus

1. The State of Maharashtra,
through Police Station, Merkhel,
Taluka : Degloor, District : Nanded.

2. XYZ
... Respondents
(R 2-Original Informant)

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Mr. D. M. Hange, Advocate for the Appellant.
Mr. S. D. Ghayal, APP for Respondent No.1-State.

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**CORAM : SARANG V. KOTWAL
BHARAT P. DESHPANDE, JJ.
RESERVED ON : 11 JULY 2022
PRONOUNCED ON : 19 JULY 2022**

JUDGMENT (PER BHARAT P. DESHPANDE, J.) :-

1. All these appeals are decided by this common judgment as they are arising out of the same judgment and order passed by the learned Additional Sessions Judge, Biloli, District Nanded in Sessions Case No. 43 of 2016.

2. Criminal Appeal No. 274 of 2017 is filed by Laxman Madhavrao Chamalwar (original accused no.2). Criminal Appeal No. 294 of 2017 is filed by Anil Maruti Jadhav (original accused no.1) and Criminal Appeal No. 436 of 2022 is filed by Maksood Pashamiya Pathan (original accused no.3)

3. All the above accused persons were tried for the offence punishable under Sections 376D, 392, 506 r/w 34 of IPC, Section 3(1)(xii), Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "Atrocities Act") and Sections 5 and 6 punishable under Section 17 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act") vide Sessions Case No. 43/2016, on the basis of crime no. 106/2016 lodged on 30.08.2016 by the Victim.

4. All above accused persons are convicted for the offence punishable under Section 376D of IPC and sentenced to suffer rigorous life imprisonment and to pay compensation of Rs.5,000/- each. They are further directed to pay fine of Rs.5,000/- each, in default, to suffer simple imprisonment for three months. All accused are also convicted for the offence punishable under Section 392 r/w 34 of IPC and sentenced to suffer rigorous imprisonment for five years. Accused are also convicted and sentenced to suffer two years rigorous imprisonment under Section 506 r/w 34 of IPC.

5. All the accused are acquitted of the offence punishable under Sections 3(1)(xii) and Section 3(2)(v) of the Atrocities Act. They are also acquitted of the offence under Sections 5 and 6 punishable under Section 17 of the POCSO Act. State did not file appeal challenging above acquittal.

6. In nutshell, it is the case of the prosecution that in the night of 29.08.2016, all the accused committed rape on the victim by

pointing a knife to her husband and removed cash of Rs.5,000/- from the pocket of the husband. The victim belongs to scheduled caste.

7. Charges were framed vide Exhibit 11 and upon explaining the same, all the accused persons pleaded not guilty and claimed to be tried.

8. During trial, the prosecution examined in all 14 witnesses.

9. Heard Mr. Rajendra Deshmukh, learned senior counsel for accused Laxman Chamalwar, Mr. S. J. Salunke, learned counsel for accused Anil Jadhav, Mr. D. M. Hange, learned counsel for accused Maksood and Mr. S. D. Ghayal, learned APP for the respondent State.

10. It has been forcefully submitted by learned counsel that the conviction awarded to the accused by learned trial court is based on no evidence and there are glaring inconsistencies in the deposition of the victim. He submitted that there is no definite

opinion given by the Doctor with regard to commission of such offence. There are no injuries found either on the private parts or on any other part of the informant thereby ruling out any such incident. He submitted that accused Anil has been roped in only because of rivalry between the father of victim and the father of accused Anil with regard to some property. He pointed out contradictions in the deposition of husband and father of the victim and claimed that such contradictions go to the root of the matter thereby disbelieving their version. Finally, he claimed that there is absolutely no material against accused Anil in connection with such offence.

11. Learned counsel appearing for Maksood and Anil reiterated same arguments and claimed that the material brought on record by the prosecution is not at all sufficient to conclude without any doubt to hold the accused persons guilty of such offence.

12. Reliance is placed on the following decisions:

1. *Narender Kumar v. State (NCT of Delhi)* [AIR 2012 SC 2281]
2. *Tameezuddin alias Tammu v. State (NCT of Delhi)* [(2009) 15 SCC 566]
3. *Rai Sandeep alias Deepu v. State of NCT of Delhi* [AIR 2012 SC 3157]
4. *Paramjeet Singh @ Pamma v. State of Uttarakhand* [AIR 2011 SC 200]
5. *Dola alias Dolagobinda Pradhan and another v. State of Odisha* [(2018) 18 SCC 695]
6. *Rajoo and Ors v. State of M.P.* [AIR 2009 SC 858]
7. *Dilip and another v. State of M.P.* [AIR 2001 SC 3049]

13. Learned APP appearing for the State strongly supported the reasons in the impugned judgment and claimed that deposition of the victim itself is sufficient enough to prove the case beyond all reasonable doubts. He submitted that absence of injuries on the person of the victim cannot be considered in the circumstances when such offence is committed under the threat of a knife and therefore, the victim and her husband were unable to protest or resist due to fear of their life. Learned APP further pointed out that

the C.A. reports clearly corroborate the version of the victim and therefore, once the seizure of clothes of the victim and the accused is proved through the Deputy Superintendent of Police, there is material to conclude that the accused are the perpetrators of such crime. He placed reliance on following decisions:

1. ***Phool Singh v. State of Madhya Pradesh*** [(2022) 2 SCC 74]
2. ***Kishor Bhau Shinde v. State of Maharashtra*** [2006 All M.r. (Cri) 2277]

14. We have considered these submissions. We have perused the evidence. PW1 Dadarao Ramrao More is the Circle Officer who deposed that on 31.08.2016, he was present at Degloor. The Tahsildar, Degloor issued directions to him and accordingly he remained present at the spot in crime no. 106/2016 at Merkhel. He approached the Merkhel Police Station and along with him one Dnyaneshwar Dudhbhate, the Talathi of Merkhel was present. The victim along with her father and relatives were present. All of them, along with the Deputy Superintendent of Police, proceeded to Sawali road as per the directions of the Victim. The victim

pointed out the spot of incident and accordingly, spot panchanama was prepared in their presence. The panchanama along with sketch is proved through this witness at Exhibit 21.

15. PW2 is the victim who deposed that she, along with her husband left village Halad Wadhwana at around 2.00 p.m. to proceed to Sawali where her parental home exists. They reached Merkhel S. T. stand at around 9.30 p.m. They asked one hotel owner about auto rickshaw and told him that they wanted to go to Sawali. Accordingly, the hotel owner called one auto rickshaw in front of his hotel and fixed the fare at Rs.150/-. They occupied the back seat whereas the accused persons sat on the front seat, who were three in numbers. When the auto rickshaw reached near bridge of Merkhel, two accused from the front seat came on the back seat and sat near the victim. Those accused, who sat near her, started pressing her chest. The auto rickshaw stopped on the road and two accused pulled her on the road. Both of them committed rape on her. Accused Anil pointed knife towards her husband and gagged his mouth and took away Rs.5,000/- from his pocket. After

committing rape by two accused, they caught hold of her husband and the third accused Anil committed rape on her. While Anil was committing rape on her, one vehicle came from Sawali side and on seeing lights of the said vehicle, all the accused ran away. To save their lives, she along with her husband stayed in a hut in the field for the whole night. In the morning at 6.00 a.m. they proceeded and reached her parental home where she narrated the incident to her father and they came to Merkhel. Her father asked the hotel owner about names of the persons who were present in the auto rickshaw during the earlier night. The hotel owner told names of the said persons as Maksood, Laxman and Anil. Thereafter, they proceeded to the police station wherein she narrated the incident to the lady police, who typed her complaint. The said complaint is identified by her at Exhibit 25. She identified the accused persons in the Court. She then stated that on the day of registration of crime, accused were brought in the police station and shown to her and she identified them at the police station itself. After identification of the accused, her supplementary statement was recorded as per her say. During cross-examination, the victim

denied the story regarding loss of her *zumke* (ear-rings) near the hotel at Merkhel and demand by them from the hotel owner towards such loss of *zumke*. She denied the suggestion regarding any enmity between her father and Anil so as to falsely implicate the accused in the case of rape. She specifically deposed that her statement under Section 164 of Cr.P.C. was recorded before a Judge, wherein she deposed against the accused persons.

16. PW3 Vishal Suryawanshi is the husband of the victim who deposed that on that day they left at around 2.00 p.m. to proceed to Sawali and reached Merkhel at around 9.00 p.m. After alighting from the bus, they made inquiry with the hotel owner whether any vehicle was available to go to Sawali. The hotel owner called one auto rickshaw and the fare was fixed at Rs.150/-. There were three boys already occupying the front seat and therefore, they sat on the back seat of the rickshaw in order to proceed to Sawali. After the rickshaw came outside Merkhel village, two boys sitting on the front seat came on the rear seat and sat beside his wife. They started pressing her chest. On questioning, one of them pointed

knife to him. At some distance, the auto rickshaw stopped and the boys sitting on the back seat and the boy sitting on the front seat pulled his wife out of the rickshaw. One boy pointed knife to him and gagged his mouth. The other two boys pulled his wife from the rickshaw and committed rape on her. Thereafter, the boy, who was showing knife to him, committed rape on his wife. The said boy, who pointed knife to him, forcibly removed Rs.5,000/- from his pocket. Some vehicle came from the front side and on seeing lights, boys ran away. Thereafter, both of them took shelter in one hut during night time and then went to Sawali during early morning. The victim narrated the incident to her father and thereafter, all of them went to Merkhel and asked the hotel owner about names of the boys. The hotel owner disclosed their names and thereafter, all of them went to the police station and lodged the complaint. PW3 Vishal identified the accused persons in the Court.

17. During cross-examination, he denied the suggestion with regard to loss of *zumke* (ear-rings) of his wife in front of the hotel

at Merkhel and their demand of money from the hotel owner on the next day morning. Two contradictions are recorded during cross-examination of this witness which are insignificant.

18. PW4 Dnyaneshwar Dudhbhate acted as panch witness on 02.09.2016 as per the request of Merkhel police. Accused no.1 Anil Maruti Jadhav made a voluntary disclosure in presence of this witness and accordingly, accused Anil led the panchas and the police team to Merkhel and at his instance, a knife and Rs.5,000/- were recovered vide recovery panchanama at Exhibit 32. He stated that accused Anil took them to Merkhel bus stand and thereafter to Gurukrupa Sweet Home and pointed to the knife which was concealed below a refrigerator. He also pointed out cash of Rs.5,000/- kept in a cupboard. Both these articles were attached. He identified the knife as well as the currency notes in the Court and more specifically, accused Anil, while deposing. During cross-examination, nothing adverse has been brought on record to disbelieve or discredit this witness.

19. PW5 Gangaram Kamble is father of the victim. He deposed that on the eve of Pola festival, victim along with her husband- PW3 were coming to Sawali. Victim along with her husband reached at Sawali at around 6.00 a.m. and thereafter, victim disclosed to him about the incident which happened with her on the earlier night. He along with the victim and her husband then came to Merkhel police station. However, before visiting Merkhel police station, they visited the hotel belonging to Chamulwar and the owner of the hotel told names of three boys who were present in the auto rickshaw on the earlier night i.e. Maksood, Anil and Laxman. Thereafter, they visited Merkhel police station and lodged their complaint.

20. PW6 Balaji Namawar, PW7 Shirkant Mukhede, PW8 Linggonda Rajure are the pancha witnesses who turned hostile and did not support the prosecution story about seizure of the clothes of the victim and the accused persons.

21. PW9 Dr. Sk. Anis Ahmed examined all accused persons as per the request of Merkhel Police Station vide Exhibit 38 and he opined that all the accused persons were capable of performing sexual act (intercourse). Certificates issued by PW9 are at Exhibits 39, 40 and 41 respectively.

22. PW10 Dr. Aparna Uppalwar, Medical Officer at Sub-District Hospital, Degloor examined the victim on 30.08.2016 and opined that sexual assault cannot be ruled out. However, final opinion was reserved pending report from the forensic lab. After receipt of such report vide Exhibit 44, she gave her final opinion vide Exhibit 45 stating that according to her, “neither confirmed nor refused sexual intercourse or assault”.

23. PW11 Hullappa Dhunde was the Headmaster of the school wherein the victim studied and he issued admission form vide Exhibit 48 in order to confirm the age of the victim. PW12 Ravindra Ghule was the police constable of Merkhel Police Station and he took the articles/muddemal on 21.09.2016 and handed it over to the C.A. office at Nanded vide Exhibit 51.

24. PW13 Vishal Khambe, Deputy Superintendent of Police at Biloli Division, took over the investigation in the matter from P.I. Ashok Mali of Merkhel Police Station and he reached Merkhel Police Station at around 8.30 p.m. on 30.08.2016 and received papers in crime no. 106/2016 vide Exhibit 85. He called the complainant/victim to confirm the contents of her complaint, made inquiry with the father of the victim and the husband of the victim, who was present at the time of the incident. On the same day, he arrested all the accused persons, seized the clothes on the person of the victim and the clothes worn by the accused persons under the seizure panchanama in presence of two pancha witnesses, which are at Exhibits 53, 54, 55, 56 and 57 respectively. On the disclosure made by accused Anil, he recovered the knife and cash of Rs.5,000/- from the home in presence of two pancha witnesses.

25. PW14 Ashok Mali, the P.I. of Merkhel Police Station, registered crime vide C.R. No. 106/2021 on the basis of the statement of the victim recorded through L.P.C. and then handed

over investigation to the Deputy Superintendent of Police Vishal Khambe.

26. Statements of the accused persons were recorded under Section 313 of Cr.P.C. wherein all the accused persons denied the entire case. However, no defence witness was examined. Accused no.2 Laxman filed written statement under Section 313 (5) of Cr.P.C., which is at Exhibit 67, claiming therein that his father is the owner of Gurukrupa Hotel at Merkhel. On previous day of the incident, husband of the victim by name Vishal came in front of the hotel along with his wife. At that time, he was under the influence of liquor and he started shouting loudly. The hotel owner told him to keep quite. On the next day i.e. on 30.08.2016, at around 8.00 to 8.30 a.m., PW3 Vishal, PW2 Victim and PW5 Gangaram came at the said hotel and questioned his father regarding loss of *zumke* (ear-rings) of the victim in front of their hotel and started demanding money. At that time, there was hot discussion between his father and PW2, 3 and 5. PW2, 3 and 5 then threatened his father and left the spot. He then claimed that

he was not knowing the victim prior to the date of incident. He was arrested from the hotel and when he was in the police station, the victim, her husband and father were also present. Finally he claimed that due to loss of *zumke* (ear-rings), the victim filed a false case against him.

27. The prosecution has relied upon the examination reports/C.A. reports which are at Exhibits 68A, 69A, 70A respectively, in connection with the clothes of the victim and the accused persons.

28. On the basis of the above material, learned Additional Sessions Judge found that the accused committed gang rape on the victim at the point of knife and also forcibly removed cash of Rs.5,000/- from the pocket of husband of the victim and accordingly, sentenced them for life as discussed earlier.

29. Having heard learned senior counsel Mr. Rajendra S. Deshmukh for the appellant in Criminal Appeal No. 274 of 2017 as well as Mr. S. J. Salunke and Mr. D. M. Hange, learned counsel

appearing for other two appellants and the learned APP Mr. S. D. Ghayal appearing for the State, and after giving anxious consideration to the submissions, it is observed that, main contention of the learned counsel appearing for all the accused persons is that the deposition of victim does not inspire confidence and her testimony is not supported by medical evidence and hence, it is not reliable. The testimony of the victim is not of sterling quality and therefore her testimony needs to be discarded. Secondly, it has been claimed that the accused persons are falsely implicated since the victim lost her *zumke* on the previous night in front of the hotel of the father of accused Anil and on the next date, they created hue and cry and demanded money from the hotel owner. Thirdly, it is claimed that the C.A. report cannot be relied upon to corroborate the version of the victim as prosecution failed to rule out other possibilities. Fourthly and in alternative, it is claimed that punishment awarded by the learned Sessions Court is harsh and without any reasons for awarding maximum imprisonment.

30. Learned APP placed reliance on the judgment in the case of ***Phool Singh v. State of Madhya Pradesh*** (supra). The Hon'ble Apex Court, in paragraph 10.3, placed reliance on the earlier decision in the case of ***Rai Sandeep v. State (NCT of Delhi)*** [(2012) 8 SCC 21] wherein the Apex Court in para 22 observed thus:

“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 everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in

material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

31. The Hon’ble Apex Court in the above decision of ***Phool Singh v. State of Madhya Pradesh*** (supra), in para 5.4 placed reliance in the case of ***Sham Singh v. State of Haryana*** [(2018) 18 SCC 34], wherein paragraphs 6 and 7 read thus:

“6. We are conscious that the courts 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 the 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 court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See State of Punjab v. Gurmit Singh [State of Punjab v. Gurmit Singh, (1996) 2 SCC 384] (SCC p. 403, para 21).]

7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The

testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (See Ranjit Hazarika v. State of Assam [Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635].”

32. Applying the law laid down by the Apex Court in the above decisions to the facts of the case in hand, it is necessary to look into the evidence of the victim and also of her husband who is the eye witness to the incident, in order to find out whether testimony of the victim inspires confidence and it is of sterling quality so as to award conviction relying upon such testimony alone.

33. As discussed earlier, PW2, aged 19 years at the time of incident, married, firmly deposed that the incident occurred about five months back. The deposition of the victim is not at all shaken

during the cross-examination and in fact it is fully supported by PW3 on material particulars. PW5-father of the victim also supported the contention of the victim as he got knowledge of the incident from the victim immediately on her reaching his house. PW2-victim is not having any personal enmity with the accused persons or even with the father of accused no.2 so as to falsely implicate all the accused.

34. Cross-examination of PW2, PW3 and PW5 did not put any dent on the testimony of these witnesses as far as the aspect of rape is concerned and the nature in which, as well as the sequence in which, the offence took place. These witnesses are consistent, reliable and cogent in their testimony. Minor discrepancies with regard to timing is not going to affect the credibility of the deposition of these witnesses.

35. Thus, not only the victim but her husband, who is the eye witness of the said incident, deposed firmly and fully corroborated the version of the victim. The story put forth in defence with

regard to some dispute between Anil and the father of the victim is not at all reliable. Similarly, the story put forth regarding loss of *zumke* is also not established as the hotel owner is not examined in defence. Besides suggestions and taking this stand in their statements under Section 313 of Cr.P.C., no material was brought on record by the accused. It was possible to get some witness who had seen the alleged quarrel regarding ear-rings.

36. PW1 Dadarao Ramrao More acted as pancha witness. He was working as Circle Officer for Merkhel Division. The Tahsildar of Degloor issued directions vide his letter to remain present at the spot in crime no. 106 of 2016. The Deputy Superintendent of Police Vishal Khambe and his staff members were present along with the other pancha witnesses as well as the victim, her father and relatives. All of them visited the spot as shown by the victim and thereafter, the victim showed the place where the offence of rape was committed. She also showed the hut wherein she along with her husband took shelter during the night time after the accused ran away from the spot. There is hardly any cross-

examination on this aspect of the spot of incident. The presence of hut near the spot also corroborates her story.

37. It is necessary to note that learned counsel appearing for the accused persons vehemently argued that the spot of incident was on a tar road which was found rough and having potholes. On this basis, it has been claimed that it is impossible not to have injuries on the person of the victim in case the offence of rape on her is committed on such tar road by three persons. However, in absence of any cross-examination on this aspect to PW1-victim, it cannot be accepted that the spot of actual incident of rape was on a rough road having potholes. The spot panchanama was conducted on the very next day i.e. on 31.08.2016 and in presence of the victim, her father and the relatives. She even showed the hut wherein she took shelter during the night time after accused ran away from the spot on seeing another vehicle coming from Sawali side. Thus, the panchanama and the deposition of PW1-Dadarao clearly corroborates the version of the victim and PW3-husband of the victim as far as spot of incident is concerned. The spot panchanama

gives general description of the area. It does not mean that the rape was committed exactly at the spot where the road was rough and damaged.

38. It was further argued that the investigating agency failed to conduct test identification parade as the accused persons were not known to the victim and that all the accused persons were shown to the victim in the police station immediately after the FIR was registered. Thus, identification of the accused persons by the victim in the Court is tainted.

39. First of all, it is found from the record that the FIR discloses names of all the accused persons. PW2-victim specifically deposed in her examination-in-chief that she knew the accused persons. She knew them by face, however, their names were confirmed from the hotel owner before filing the FIR. Thus, it is clear from the FIR itself that accused nos. 1, 2 and 3 were identified by their names by the victim. It is consistent case of the victim, PW3-husband of the victim and PW5-father of the victim that names of all the accused

persons were disclosed by the hotel owner when they inquired about it before going to the police station. Thus, prior to filing of the FIR, the victim knew the names of the accused persons and therefore, narrated it in the FIR.

40. In the cross-examination of PW2-victim and PW3-husband of victim, it has been specifically put to these witnesses that they visited the hotel on the next day morning and created hue and cry about loss of *zumke* of the victim on the earlier night and demanded money from the hotel owner. Thus, presence of the victim, her husband and father at the hotel on the next day of the incident is admitted by the defence. It therefore supports the version of the victim that she went to hotel only to confirm the names of said three boys who committed rape on her on the earlier night. In such circumstances and more specifically when names of the accused persons are disclosed in the FIR, it was not necessary for the investigating agency to conduct test identification parade.

41. Be that as it may, the offence took place during the intervening night of 29.08.2016 and 30.08.2016 and the statement of the victim was recorded before the Sessions Court on 21.01.2017. Right from sitting in rickshaw till going away of the accused after committing the offence, she had sufficient time to see the accused persons properly. Identification of the accused persons by the victim in the Court is also significant as it was within a period of five months from the date of incident. Hence, absence of identification parade does not affect the victim's version in this case.

42. In the case of ***Rajoo and Ors v. State of M.P.*** (supra), the Hon'ble Apex Court has observed in para 9 as under:

“9. 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. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a

presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

43. Learned senior counsel invited attention to paragraph 12 of the above decision in order to buttress his submissions regarding

identification of the accused by the victim. However, on reading paragraph 12, it is clear that it turns on the facts of that case itself. In that matter, the cross-examination clearly goes to show that PW8 was unsure as to the identification of the accused but she conceded that she was not knowing any of the accused at the time of the incident, but after police had inquired about their names in her presence, she came to know who they were. The matter in hand is clearly showing that at the time of filing FIR, names of the accused were mentioned and the victim deposed that she knew the accused persons.

44. In the case of *Dilip and another v. State of M.P.* (supra), the Hon'ble Apex Court disbelieved the statement of the victim on the ground that the incident which she narrated was highly improbable as it was committed in her own house situated in a populated village, by the side of main road where people were moving on account of Holi festival. Thus, above decision is not of help to the accused persons.

45. In the case of *Narender Kumar v. State (NCT of Delhi)* (supra), the proposition that 'the onus is always on the prosecution to prove each ingredient of the offence' is a settled proposition of law and there is no quarrel about it.

46. In the case of *Tameezuddin alias Tammu v. State (NCT of Delhi)* (supra), again the Hon'ble Apex Court has reiterated the proposition that in case of rape, the evidence of prosecutrix must be given predominant consideration, however, to hold that the evidence of prosecutrix has to be accepted even if story is improbable and belies logic, would be doing violence to the principles which govern the appreciation of evidence in a criminal matter.

47. In the case of *Paramjeet Singh @ Pamma v. State of Uttarakhand* (supra), the Hon'ble Apex Court has cautioned that when and where the offence alleged to have been committed is a serious one, the prosecution must provide grater assurance to the Court that its case has been proved beyond reasonable doubt.

More serious the crime, more stricter proof is required. Again there is no quarrel with regard to the above proposition.

48. Keeping in mind the settled proposition of law and the submissions advanced, it is also necessary to look into the aspect of lapses or omission committed by the investigating agency and its effect on the case. In *Kernel Singh v. State of M.P.* [(1995) 5 SCC 580, the Hon'ble Apex Court has observed that if the evidence and the attendant circumstances establish that the accused have committed the crime, giving benefit of the collusion or negligence of the investigation to the accused would not be in the interest of justice. In the case of defective investigation, the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. If the lapse or omission is committed by the investigating agency or because of negligence, the prosecution evidence is required to be examined *de hors* such omission to find out whether the said evidence is reliable

or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the Courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

49. The submissions of the learned counsel appearing for the accused persons with regard to the C.A. reports and the absence of examination of blood report of the husband of victim are important. No doubt, at Exhibit 2, which is the petticoat of the victim, semen stains of 2 cm. in diameter were found and the C.A. report shows that such semen detected on Exhibit 2 is human and its blood group is "A". It is also found on record that the blood group of accused no.3 Maksood is "A". Therefore, such circumstantial evidence points out finger against accused no.3 Maksood. However, it also needs to be taken into account that the victim is a married lady, her husband's blood group has not been obtained by the investigating agency so as to rule out that the semen found on Exhibit 2 is not that of the husband of the victim. Therefore, the C.A. report is not conclusive against accused no.3-

Maksood. Hence, the said C.A. report cannot be considered as one of the circumstances against the accused.

50. Recovery of knife and cash of Rs.5,000/- at the instance of accused no.1-Anil is proved through the panchanama at Exhibit 31. In this respect, PW4 Dnyaneshwar stated that on 02.09.2016, he acted as pancha witness at the request of Dy.S.P. Vishal Khambe and at that time accused no.1-Anil was brought before them from the custody who made a statement which was reduced in writing and thereafter, as per the direction of accused no.1-Anil, they proceeded to Merkhel and after reaching near bus stand, accused Anil laid them to Gurukrupa Sweet Home. He pointed out the knife which was concealed below a refrigerator and Rs.5,000/- kept in a cupboard. Both these articles were attached during the panchanama. PW4 identified these articles shown to him during his deposition.

51. It is necessary to note that these articles were not shown to PW2-victim and PW3-husband of the victim while recording their

depositions. However, as far as cash is concerned, it could be considered as incriminating evidence against accused Anil since it was recovered at his instance.

52. Learned counsel appearing for the accused persons strongly contended that the timing of the panchanama and the place where disclosure is made makes it improbable. Admittedly, the disclosure was made by accused no.1 Anil at Degloor whereas, the recovery is from Merkhel. However, the cross-examination of PW4 Dnyaneshwar is clearly silent on this aspect. Not a single question was put to him with regard to the place of disclosure and the place of recovery and the time consumed for travelling to such place. Therefore, such aspect cannot be considered. On perusal of the panchanama at Exhibit 31, it is clear that the first part of the panchanama started at 8.35 hours in the police station at Degloor when the disclosure was made by accused Anil and after recording the said first part, the police party along with the accused and the panchas left Degloor. All of them arrived at Merkhel in the hotel and after recovery of the knife and the cash amount, the second

part of the panchanama concluded at 22.18 hours. Thus the argument advanced on behalf of the accused persons, that it is impossible to reach Merkhel from Degloor within five minutes, is of no substance. PW13 Dy.S.P. has explained this aspect during cross-examination and claimed that they reached Merkhel from Degloor within thirty minutes. This explanation is sufficient enough to reject such argument, as second part started when police left the police station at 19.05 hours and concluded at 22.18 hours at Merkhel.

53. Learned counsel appearing for the accused persons then tried to submit that PW13 Dy.S.P. Vishal Khambe claimed that recovery of knife and the cash was from the house of the accused. It is necessary to note here that PW4 specifically disclosed that it is Gurukrupa Sweet Home and therefore the discrepancy cropped up during deposition of PW13 Dy.S.P. Vishal Khambe by saying the word “house” is insignificant. In this respect, there is no cross-examination on the part of the accused persons to the investigating officer. The panchanama itself shows it was from the hotel.

Therefore, the contention of the victim as well as her husband that a knife was pointed to them and Rs.5,000/- were snatched from the pocket of PW3 is further corroborated. Recovery of Rs.5,000/- at the instance of the accused no.1 -Anil is also established.

54. The next contention raised is regarding delay in lodging the FIR. It is their contention that the victim went to her father's place, took bath, had breakfast and then went to Merkhel during morning time. However, the FIR was lodged during the evening time. First of all, it is clear from the record that the FIR was lodged on the next day itself and in such cases, it is not expected from the victim to immediately visit police station due to shock. Some time is required to discuss with the relatives for approaching the police. In such circumstances, it cannot be concluded that there is delay in lodging the FIR.

55. The next contention is regarding absence of injuries on the person of victim, which is certified by the Doctor. In this regard it is necessary to note that the victim is a married lady and the said overt act was committed by the accused persons at the point of

knife. Thus, there was absolutely no resistance from the victim. In such circumstances, absence of injuries is insignificant.

56. The defence raised by the accused persons in the cross-examination of the witnesses is highly improbable and it did not put any dent on the depositions of the victim, her husband and her father. There was no reason to implicate all the three accused together when they had no common factor between them.

57. Looking to the depositions of PW2-victim and more specifically that of her husband-PW3, it is clear that such depositions are required to be accepted without any hesitation. To test the quality of such witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such witness. The consistency of the statement right from the starting point till the end needs to be considered. It must be natural and consistent with the case of the prosecution *qua* the accused. Both these witnesses were cross-examined at length and there is no room for any doubt as to the factum of the occurrence, the persons involved as well as the sequence of it.

Thus, the deposition of PW2-victim is considered to be trustworthy, cogent, reliable and giving sequence of events in natural way. Her deposition is corroborated by PW3-husband of the victim on material particulars. There is no room for doubt with regard to deposition of the victim as tried to be projected. Therefore, the testimony of PW2-victim is certainly coming within the category of sterling nature in order to rely on it.

58. The finding of the learned Sessions Court in connection with the offence punishable under Section 376-D of IPC *qua* accused persons thereby holding them guilty for the said offence are therefore fully justified and need no interference. Similarly, the observations of the learned Sessions Court in connection with the offence punishable under Section 392 *qua* the accused persons are also fully justified and proved beyond all reasonable doubt and thus need no interference.

59. The last submission of the learned counsel appearing for the accused persons is with regard to punishment awarded by the

learned Sessions Court. It is their contention that the observations in para 29 of the impugned judgment are not correct as discretion was available with the trial court, however, same has not been properly exercised.

60. On perusal of paragraphs 28 and 29 of the impugned judgment, it is clear that the learned trial court failed to take into consideration the aspect of discretion though it is observed that the punishment provided for the offence punishable under Section 376-D of IPC is rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life. The observations of the learned trial court that there is no discretion to the court once charge is proved *qua* the punishment, is therefore improper. The discretion is available either to award life imprisonment or imprisonment which shall not be less than twenty years. The learned trial court observed in para 29 of the impugned judgment as under :

“29. If after considering oral evidence and proved

facts before the Court, I also expressed my opinion that accused Nos. 1 to 3 are young age, from middle class family and doing agricultural work, Court having sympathy with them, however, if we considered Section 376(D) which provide where a person is sexually assaulted by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be dealt to have committed offence of sexual assault regardless of gender shall be punished with rigorous imprisonment which shall not be less than twenty years, but which may extend to life and shall pay compensation to the victim which shall be reasonable to meet the medical expenses and rehabilitation of the victim. Section 376(D) has not given any scope to the Court, once charge is proved under that section, though, Court having sympathy with the accused or express any opinion to lenient view but law is not permitted to do such act to the Court.”

61. In the present matter, there is no criminal record of the accused persons and considering their age, i.e., accused no.1-Anil 21 years, accused no.2-Laxman 20 years and accused no.3-Maksood 32 years, as on the date of the incident, the learned trial

court had expressed that sympathy can be shown and lenient view can be taken in this case.

62. The circumstances requiring sympathetic approval as discussed by the trial Judge invites us to take a lenient view by awarding minimum sentence provided under Section 376-D of IPC instead of imprisonment for life.

63. Thus, we intend to modify the sentence of imprisonment awarded against accused nos. 1, 2 and 3 for the offence punishable under Section 376-D of IPC and accused nos. 1, 2 and 3 shall be punished with rigorous imprisonment for twenty years. The fine amount imposed by the learned trial court shall be maintained. Similarly, the punishment awarded against accused nos. 1, 2 and 3 for the offence punishable under Section 392 r.w. 34 of IPC is also maintained. The sentence awarded against accused nos. 1, 2 and 3 for the offence punishable under Section 506 r.w. 34 of IPC is also maintained.

64. With these observations and maintaining the conviction of accuse nos. 1, 2 and 3 for the offence punishable under Sections 376-D, 392, 506 r.w. 34 of IPC, we modify only the imprisonment awarded to accused nos. 1, 2 and 3 as discussed above. Hence the order:

ORDER

I. The appeals are therefore partly allowed.

II. While maintaining conviction of the accused persons under Section 376-D, 392, 506 r.w. 34 of IPC, the sentence under Section 376-D of IPC only is hereby modified to the extent that accused nos. 1, 2 and 3 shall be punished with rigorous imprisonment for twenty years.

III. In this view of the matter, all the appeals stand disposed off.

BHARAT P. DESHPANDE, J.

SARANG V. KOTWAL, J.