



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

CRIMINAL APPEAL NO.425 OF 2018

- 1) [Vishnu @ Tukya Haridas Dake,
Age 19 years, Occu. Education]

**Appellant No.1 has filed separate
Appeal No.386/2022**

- 2) Dhananjay @ Dhanya Yogiraj Rasal,
Age 19 years, Occu. Labourer

- 3) [Balaji @ Balya Vilas Kamble,
Age 20 years, Occu. Labourer]

**Appellant No.3 has filed separate
Appeal No.162/2020**

- 4) Dadasaheb @ Dadya Bhausahab Janrao,
Age 21 years, Occu.

All R/o Bembli, Taluka and
District Osmanabad

... APPELLANTS

VERSUS

- 1) The State of Maharashtra
through Police Station Officer,
Bembli Police Station,
Tq. & Dist. Osmanabad

(Copy to be served on Public
Prosecutor, High Court of Judicature
of Bombay, bench at Aurangabad)

- 2) X Y Z

... RESPONDENTS

.....
Mr. Z.H. Farooqui, Advocate holding for
Mr. N.V. Gaware, Advocate for appellants
Mrs. V.S. Choudhari, A.P.P. for respondent No.1 – State
Mr. A.Z. Zaidi, Advocate for respondent No.2 (appointed)

.....

WITH

CRIMINAL APPEAL NO.386 OF 2022

Vishnu @ Tukya Haridas Dake,
Age 22 years, Occu. Student,
R/o A/p Bembli, Taluka and
District Osmanabad

... APPELLANT

VERSUS

- 1) The State of Maharashtra
through its Police Officer
Bembli Police Station,
Tq. & Dist. Osmanabad
- 2) X Y Z
- 3) Dhananjay @ Dhanya Yogiraj Rasal,
Age 19 years, Occu. Labourer,
R/o A/p Bembli,
Tq. & Dist. Osmanabad
- 4) Balaji @ Balya Vilas Kamble,
Age 23 years, Occu. Labour,
R/o A/p Bembli,
Tq. & Dist. Osmanabad
- 5) Dadasaheb @ Dadya Bhausahab Janrao,
Age 24 years, Occu. Labourer,
R/o A/p Bembli,
Tq. & Dist. Osmanabad

... RESPONDENTS

.....
Mr. Ajinkya Kale, i/b Talekar & Associates for appellant
Mrs. V.S. Choudhari, A.P.P. for respondent No.1 – State
Mr. A.Z. Zaidi, Advocate for respondent No.2 (appointed)
Mr. N.V. Gaware, Advocate for respondents No.3 & 5
Mr. S.J. Salunke, Advocate for respondent No.4
.....

WITH

**CRIMINAL APPEAL NO.162 OF 2020 WITH
CRIMINAL APPLICATION NO.3448 OF 2023**

Balaji @ Balya Vilas Kamble,
Age 22 years, Occu. Labour,
R/o Bembli, Taluka and
District Osmanabad

... APPELLANT

VERSUS

- 1) The State of Maharashtra
(Copy to be served on Public
Prosecutor, High Court of Judicature
of Bombay, Bench at Aurangabad)

- 2) X Y Z

... **RESPONDENTS**

.....
Mr. S.J. Salunke, Advocate for appellant
Mrs. V.S. Choudhari, A.P.P. for respondent No.1 – State
Mr. A.Z. Zaidi, Advocate for respondent No.2 (appointed)
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 12th February, 2024

Date of pronouncing judgment : 27th February, 2024

JUDGMENT (PER R.G. AVACHAT, J.)

This group of three appeals is being decided by this common judgment since the challenge therein is to the judgment and order of conviction and consequential sentence, dated 5/5/2018, passed by learned Special Judge, Osmanabad in Special (POCSO) Case No.02/2016. The details of the offences for which the appellants have been convicted and consequential sentence are given below.

Section	Imprisonment	Fine (Rs.)
Accused No.1 to 4 376(D) r/w 34 IPC	Life imprisonment for 20 years	50,000/- each, in default R.I. for 2 years each

<u>Accused No.1 to 4</u> 354(C) r/w 34 IPC	R.I. for 1 year	1000/- each, in default R.I. for 2 months
<u>Accused No.1 to 4</u> 324 r/w 34 IPC	R.I. for 1 year	1000/- each, in default R.I. for 2 months
<u>Accused No.2:</u> 377 IPC	R.I. for 5 years	2000/-, in default R.I. for 3 months
The substantive sentences have been directed to run concurrently.		

FACTS :-

2. The appellants are numbered serially as per their numbers in the Charge (Exh.15) framed by the Trial Court.

3. P.W.1 (victim) was resident of village Bembli, Taluka and District Osmanabad. The appellants were also residents of the very village. They used to tease the victim whenever she used to go to common water tank to fetch water. The victim went to agricultural field of one Pandu Mama to answer nature's call by 7.00 in the evening of 26/12/2015. Balaji @ Balya (A/3) caught hold of her hand, covered her mouth and fell her on the ground. A/4 stood on the road as a guard. Dhananjay @ Dhanya (A/2) and Vishnu @ Tukya (A/1) undressed the victim. All the appellants except Dadasaheb @ Dadya (A/4) too undressed themselves. They committed rape of the victim by turn. A/2 put his private part in the mouth of the victim. The victim was let go by 12.00 midnight. She stayed overnight at her neighbour, Vimal Aunt. She went her

residence following morning and related her grandparents the incident. Grandfather accompanied her to Police Station. She lodged First Information Report.

4. Based on the First Information Report (F.I.R. - Exh.18), a Crime vide C.R. No.116/2015 was registered. The victim was medically screened. She was also subjected to radiological examination to ascertain her age since she claimed to have been of the age of 15 years at the relevant time. Victim's statement was also recorded under Section 164 of the Criminal Procedure Code (Cr.P.C.). During medical screening of the victim and appellants, samples of their certain things were obtained for chemical analysis and D.N.A. profiling. Clothes on the person of the victim at the relevant time were also taken charge of. A/1 to A/3 made disclosure statements, pursuant to which the clothes on their person were seized under panchanamas (Exhs.102, 103, 104, 105, 110 & 111). School record of the victim was obtained. All the things seized or taken charge of during the investigation were submitted to Forensic Science Laboratory for chemical analysis and D.N.A. profiling. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of the investigation, the appellants were proceeded against by filing charge sheet before the Special Court constituted for trial for offences under the Protection of Children from Sexual Offences (POCSO) Act. The trial Court framed the charge (Exh.15). The

appellants abjured the guilt. Their defence was of false implication.

5. The prosecution examined 11 witnesses and produced in evidence certain documents, to bring home the charge. The trial Court, on appreciation of the evidence in the case, convicted the appellants and consequently sentenced to various terms of imprisonment as stated hereinabove. The appellants were, however, acquitted of the offence punishable under Section 376(2) (i) of the Indian Penal code and Section 4 and 6 of the Protection of Children from Sexual Offences Act. The State did not prefer appeal against acquittal.

6. Heard. Learned counsel for the appellants would submit that, the F.I.R. was lodged 12 hours after the incident. The medical examination report of the victim does not reinforce the prosecution case. A/4 even did not do any overt act. He has also been sentenced to suffer 20 years life imprisonment. Vimalbai, at whose residence the victim allegedly stayed overnight, was not examined. The victim was a married woman. Due to marital discord, she was residing at the house of her grandparents. Procedure regarding sealing, sampling and preserving the articles for DNA profiling has not been strictly followed. The DNA profiling was done by the concerned experts very late. According to learned counsel, the sole testimony of the victim inspired no confidence to sustain the sentence of life imprisonment. According to learned

counsel, the appellants were in the age group of 19 – 21 years at the relevant time. They are in jail for little over 8 years. The offence being serious, the standard of proof necessarily was very high. A reliance has been placed on host of authorities to ultimately urge for allowing the appeals.

7. The learned A.P.P. would, on the other hand, submit that, no leniency be shown to the appellants. It is a serious offence. Honour of a woman in the age group of 18 years was at stake. The history given by the victim to the Medical Officer reinforces the prosecution case. The victim's evidence is consistent with the averments in the F.I.R. The C.A. reports to some extent and the D.N.A. reports go long way in establishing the case of the prosecution. The prosecution evidence has not been shattered. The learned A.P.P. relied on the following two judgments of the Apex Court, and submitted for dismissal of the appeals.

- (1) Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat
AIR 1983 SC 753
- (2) Phool Singh Vs. The State of Madhya Pradesh
(Criminal Appeal No.1520/2021, decided on 1/12/2021)

8. Learned counsel appointed for respondent No.2 reiterated the submissions made by learned A.P.P.

9. Considered the submissions advanced. Perused the entire evidence. Let us advert to the evidence in the case and

appreciate the same.

The victim, in her evidence, testified that, she was 15–16 years of age at the relevant time. The trial Court, on appreciation of the evidence in the case, held the prosecution to have not proved the victim to have been a child at the relevant time.

10. The evidence of the victim indicates she was married. Since her husband was ill-treating her, she left the matrimonial home and started residing at the house of her grandparents (parental). She has two younger siblings. Her mother was serving as a Sweeper at Osmanabad. The father stays in Pune. It is further in her evidence that, she would reside in a hutment. There was a common water tank at the village Bembli. The appellants would tease her by taunts, playing obscene songs etc. whenever she would be on her way to fetch water from the water tank and back.

11. It is further in her evidence that, by 7.00 p.m. on 26/10/2015, she went to the land of Pandu Mama for bathroom (literally means for urinating). There was a standing crop in the field. The appellants came to her. A/3 caught hold of her hand and covered her mouth and fell her on the ground. A/4 stood on the road as a guard. A/2 and A/1 undressed the victim. All the appellants except A/4 too undressed themselves. They committed rape of the victim by turn. A/2 put his private part in the mouth of

the victim. A/2 assaulted on her back with a belt (Injury Certificate - Exh.59). She was threatened for not disclosing the incidence. It was 12.00 midnight. She went to a house of Vimal Aunt (neighbour). On the following morning, she went to her house and related her grandparents and aunt about the incidence. The grandfather then took her to the Police Station. A lady constable recorded her statement-cum-F.I.R. (Exh.18).

12. It is further in her evidence that, she was medically screened by Medical Officer at Rural Hospital, Bembli. She pointed out the scene of offence. Her statement made under Section 164 Cr.P.C. was also recorded by a Magistrate. It is further in her evidence that, she was sporting a yellow colour pant and top of the same colour. She had put on black knicker. She handed over those clothes to the police. It is further in her evidence that, on her pointing out, a scene of offence panchanama (Exh.32), was drawn.

13. The victim was subjected to a searching cross-examination. In response to the questions put to her, in defence, it has come on record that she resided with her husband only for a period of two months. No coitus (sexual intercourse) did take place between the couple. She did not reside with her mother. She is illiterate and unable to read and write. She could, however, recollect the date of incident as the same has remained on her mind. She was residing in a hutment at village Bembli. It is a small

village. Appellants were residing in the nearby of her residence. Vimal Aunt, at whose residence she stayed overnight, was not her relative. She claimed ignorance about the Grampanchayat to have developed latrine in the hutment, she was residing at. She admitted that, at Dalit Vasti, there is a latrine, in dilapidated condition. She did not lodge complaint or made any grievance about the appellants to have teased her many a time. The investigating officer Mr. Dandge brought her to the Court on the day on which her evidence was recorded. She denied to have lodged a false F.I.R.

14. P.W.2 Arun is a witness to the scene of offence panchanama (Exh.32). He is also witness to the panchanama of seizure of clothes of the victim (Exh.33). Nothing fruitful has been brought on record by the defence in his cross-examination. It was, however, brought to our notice that, the witness gave evidence inconsistent with the happenings. Clothes seizure panchanama was drawn first at 11.30 in the morning and the scene of offence panchanama was drawn at 11.45 p.m. to 12.45 p.m. The witness in his examination-in-chief changed the timings of the order in which those were made.

15. P.W.3 Dr. Shrikant was a Medical Officer on duty at P.H.C., Bembli on the given day. It is in his evidence that, the victim was referred to him for medical examination. He did examine her to

find following two injuries on her person :-

- (1) Contusion 1 x 1 cm. on right side back near to center.
- (2) Contusion 2 x 1 cm. on right lateral back.

The age of injuries was within 24 hours and the injuries were simple in nature.

The victim gave history of sexual assault while she had been to toilet in a nearby field. He narrated the history given by the victim. The medical examination report is at Exh.56 and the injury certificate and Medico-legal Examination Report of Sexual Violence is at Exh.57. After referring C.A. reports, he opined that there was sexual assault on the victim.

16. P.W.3 Dr. Shrikant, during his cross-examination, testified that, swelling over fourchette and introits of a victim can be possible by infection. He admitted to have had not given a prima facie opinion about possibility of sexual assault on the victim, when he examined her medically. He admitted to have had not issued any final opinion regarding the same even after receipt of F.S.L. reports. He admitted that, the C.A. reports indicate no detection of blood or semen in the sample relating to the victim. It is further in his evidence that he issued certificate (Exh.58) stating that no marks of resistance appeared on the private part or on the person of the victim. He, however, opined that, injuries on the back of the

victim were possible by an assault with a belt.

17. His evidence further indicates that, he examined all the appellants to find them potent. He obtained blood samples of A/1, A/2 and A/3. We do not propose to refer to the evidence of P.W.4 Dr. Ramesh, a Radiologist who examined the victim to ascertain her age since her age is not in issue now. Same is the case of P.W.7 Sunita, Head Mistress (who produced school record of the victim in proof of victim's date of birth).

18. P.W.5 Davit is a witness to the disclosure statement (Exh.102) made by A/2, pursuant to which his clothes came to be seized under panchanama (Exh.103). He is also witness to similar disclosure statement made by A/1, pursuant to which his clothes came to be seized under panchanama (Exh.105).

19. During cross-examination, P.W.5 Davit was categorical to state that the panchanamas are silent to state from which place the clothes were seized.

20. P.W.6 Anant is another panch witness to the disclosure statement made by A/3, pursuant to which his clothes came to be seized under the panchanama (Exh.113). His evidence indicates that, the clothes were seized from an open place.

21. P.W.8 Salim and P.W.9 Rajaram were the Head Constables who carried muddemal articles to F.S.L., Kalina

(Mumbai) and Aurangabad respectively. The office copies of the forwarding letters are at Exhs.124 and 129.

22. P.W.10 Suhas was a Circle Officer, who drew the sketch of the scene of offence. P.W.11- Kiran did the investigation of the crime. His evidence indicates that the victim gave supplementary statement, alleging A/2 to have oral sex with her. He, therefore, invoked Section 377 of the Indian Penal Code. His evidence further indicates that he recorded statement of Vimal Aunt, wherein she disclosed that the victim had related her to have come to her residence as her grandfather harassed her. His evidence further indicates that the scene of offence was at a nearby thickly populated hutment area.

23. C.A. reports and D.N.A. reports are at Exh.60, 61, 62 and 63.

APPRECIATION :

24. The question is, as to whether, based on the aforesaid evidence, the offence/s gets established. Gang rape is a serious offence. Section 376(D) speaks of gang rape. The offence is punishable with imprisonment for a term which shall not be less than 20 years, but which may extend to life, which shall mean imprisonment of that person's natural life and with fine. Serious is the offence, strict shall be the proof.

25. In the case of Bharwada Bhoginbhai, the Apex Court observed in paragraph Nos.7 and 9 thus :

“7. This Court, in *Rameshwar V. State of Rajasthan*, (1952) 3 SCR 377 at p. 386 : (AIR 1952 SC 54 at p. 57), has declared that corroboration is not the sine qua non for a conviction in a rape case. The utterance of the Court in *Rameshwar* may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J., who spoke for the Court -

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the Jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.”

9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for

corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons”

26. The Apex Court, in case of Phool Singh (supra), made similar observations. It observed that, there can be a conviction on the sole testimony of the victim/ prosecutrix when the deposition of the prosecutrix found to be trustworthy, unblemished, credible and her evidence is of sterling quality.

27. We would also like to refer to the judgment of the Apex Court in case of Santosh Prasad @ Santosh Kumar Vs. The State of Bihar (Criminal Appeal No.264/2020, decided on 14/2/2020), wherein it has been observed thus :

“5.4.2 In the case of Rai Sandeep alias Deepu (supra), this Court had an occasion to consider who can be said to be a “sterling witness”. 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 calibre 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 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.”

5.4.3 In the case of Krishna Kumar Malik v. State of Haryana (2011) 7 SCC 130, it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.”

Keeping on mind the aforesaid observations, we need to appreciate the evidence in the case.

28. The victim was a married girl/ woman. She claimed to have left her matrimonial home as to have been ill-treated by her husband. The defence has disputed the same and put the blame on the victim herself. For want of evidence, it can only be observed that, it is not known as to for really what reason the victim was staying away from her husband. The victim testified to have had no physical/ sexual relationship with her husband during her stay at her matrimonial home. This indicates that, she appears to have not

been speaking truth. Her evidence indicates that, she went to the field of Pandu Mama for bathroom (urinating). It is not known as to whether such facility was not available at her residence. It was a full moon day. The victim claims to have been to the scene of offence by 7.00 in the evening. According to her, the appellants detained her for 5 hours. She meant to say that the incident lasted for that much time. The same also does not stand to reason or appeal to us. It also does not appeal to us that A/4 stood guard on the road for 5 hours. According to the victim, A/1, A/2 and A/3 undressed her and then they undressed themselves. The evidence indicates that the scene of offence was in the nearby of a populated area. Will it be logical to accede that for committing rape the persons would undress themselves (completely remove all the clothes from their person). According to the victim, the appellants assaulted her. True, the injury certificate indicates two injuries on her back. As per her version, she was fell on the agricultural field. According to her version, clothes on her person were removed. There is nothing to indicate her to have suffered any scratch or injury on her back. According to the Medical Officer, the injuries noticed on the victim's back were of the age of 24 hours. It is evidence in the nature of opinion. According to the victim, she was let go by 12.00 midnight. When the appellants assaulted her and subjected her to an offence of gang-rape, and the Police Station being available in the village, she did not prefer to go either to the

Police Station or to her house. None of her family members appears to have taken search for her since she did not return home after answering nature's call. The victim went to the house of one Vimal Aunt, her neighbour. She was no way related to the victim. Vimal Aunt has not been examined as a witness in the case. Attention of the investigating officer (P.W.11) Kiran was drawn to Vimal's statement under Section 161 of the Cr.P.C. True, the trial Court ought not to have allowed the same since Vimal was not examined as a witness. However, since the same has been brought on record in the evidence of investigating officer, we refer to the same, wherein he has stated that, Vimal disclosed in her statement that the victim had stated to her to have come to stay at her residence overnight since her grandfather was harassing her.

29. It is only on the following morning the victim went to her residence and related her grandparents. The F.I.R. has been registered little past 12 hours of the incidence. According to the victim herself, the appellants used to tease and trouble her. She did not make any complaint in that regard. The appellants have every reason to claim to have been falsely implicated since the victim has grievance against them.

30. True, the medical examination report of the victim (Exh.57) indicates that she gave history of sexual assault. The Medical Officer noticed that, swelling over survival region besides

swelling over fourchette. The victim was medically screened little past 24 hours after the incident. On examination, the Medical officer reserved his opinion pending receipt of the FSL reports. The same indicates that he was doubtful about the say of the victim.

31. The C.A. reports (Exh.60) also run counter to the prosecution case since no semen was detected on her vaginal and survival swabs. Same is the case about the C.A. reports (Exhs.67, 68 and 69) (A/1, A/2 and A/3). Neither blood nor semen was detected on the survival swab or public hair.

32. The learned A.P.P. has strongly relied on the D.N.A. reports (Exhs.80, 81 and 82).

The report at Exh.80 indicates the interpretation, "Male haplotypes obtained from semen stains cutting from kurta **matched** with the male haplotypes of control blood sample of accused Vishnu Haridas Dake" and opinion, "Male haplotypes obtained from semen stain cutting from kurta and control blood sample of accused Vishnu Haridas Dake is **from the same paternal progeny.**"

The report at Exh.81 indicates the opinion,

"(1) DNA profile obtained from scalp hair of victim x x x exactly **matched** with hair detected on cloth of Vishnu Haridas Dake and hair detected on baniyan at crime scene.

(2) DNA profile obtained from hair detected on cloth of victim x x x exactly matched with public hair and control blood sample of Dhananjay Yogiraj Rasal.”

The result of analysis at Exh.82 shows :-

“For comparative DNA profiling results of ex.15 semen stain cutting from kurta refer F.S.L. M.L. Case No.DNA-1939/16 -----

No male DNA is detected on ex.6 vaginal swab from labia majora, ex.7 vaginal swab from labia minora and ex.8 vaginal swab of victim x x x . No amplifiable DNA is obtained from ex.1 urethral swab (Ba-3636/15, ex.1 urethral swab (Ba-3637/15), ex.1 urethral swab (Ba-3638/15) and ex.1 urethral swab (Ba-3639/15).”

33. We do not propose to rely on the DNA reports for more than one reason. It is not the prosecution case that one of the appellant left behind his banian or piece thereof before leaving the scene of offence. There is no evidence to indicate the clothes which came to be seized pursuant to the disclosure statement made by A/1 to A/3 were on their person at the relevant time. The disclosure statement allegedly made by these appellants indicate that they did not disclose the place whereat the clothes were hidden. The recovery panchanamas indicate that the clothes were seized from open place, accessible to all. The Medical Officer has recorded in the history that the victim reported to have dipped her kurta in a water after the incident, meaning thereby, she washed

her kurta. It is surprising how cum a kurta even thereafter had semen stains.

34. When all these articles were seized within four days of registration of the F.I.R., it is not known as to why the DNA profiling was done very late. The DNA report (Exh.80) indicates that the DNA analysis started on 21/10/2016 and concluded on 24/11/2016. The articles were received for DNA profiling on 20/10/2016 i.e. 11 months after the crime in question. Exh.81 indicates that the analysis started on 21/11/2015 and completed on 24/11/2016. It took little over one year for analysis. The said report pertains to P.S. Reference letter dated 19/11/2015. Exh.82 indicates the analysis started on 10/6/2016 and concluded on 24/11/2016. It took 5 months for analysis. In case of **Manoj and others Vs. State of Madhya Pradesh (2023) 2 SCC 353**, it has been observed in paragraph No.151 and 154 as below :

“Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving. DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be

tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA Profiling.

154. In *Dharam Deo Yadav V. State of U.P.* (2014) 5 SCC 509 this Court discussed the reliability of DNA evidence in a criminal trial, and held as follows : (SCC pp. 528-29, para 36)

36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every lie. DNA is made up of a double stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. ... DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory.”

35. There is no evidence on record to indicate proper documentation, packaging and preservation of the articles seized

and then submitted for DNA profiling.

36. In short,

- (1) There is delay of little over 12 hours in lodging of the F.I.R.,
- (2) The victim did not return her home post incident,
- (3) She stayed overnight at a house of her neighbour Vimal Aunt,
- (4) Victim told Vimal Aunt to have come to stay overnight as her grandfather harassed her.
- (5) Vimal aunt has not been examined,
- (6) The Medical Officer, on examination of the victim, reserved his opinion pending F.S.L. report,
- (7) C.A. report does not support the prosecution case,
- (8) No evidence as regards proper documentation, packaging and preservation of the articles seized and then submitted for DNA profiling,

lead us to find the prosecution evidence to have not been inspiring confidence to sustain the conviction of the appellants for the offence of gang rape and related offences. In the result, the appeal succeeds. Hence the order :

ORDER

- (i) The Criminal Appeals are allowed.

- (ii) The order of conviction and sentence dated 5/5/2018, passed by learned Special Judge, Osmanabad in Special (POCSO) Case No.02/2016 is quashed and set aside. The appellants are acquitted of the offences for which they have been convicted by the learned Special Judge, Osmanabad. The appellants shall be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to them.
- (iii) Criminal Application No.3448/2023 stands disposed of.
- (iv) Fee of Mr. Zaidi, learned Advocate appointed for respondent No.2 is quantified at Rs.8,000/- (Rupees eight thousand).

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-