



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 522 OF 2003

1. Dnyanoba S/o Dattaram Babar
Age 28 years, Occu. Driver,
R/o Navha, Tq. Palam,
District – Parbhani.

2. Sk. Rasul S/o Sk. Farid,
Age 32 years, Occu. Service,
R/o Navha, Tq. Palam,
District – Parbhani.

... Appellants
[Orig. Accused Nos.
3 & 4] Versus

The State of Maharashtra

... Respondent

.....

Mr. Joydeep Chatterji, Advocate for the Appellants.
Mrs. Chaitali Choudhari Kutti, APP for the Respondent-State.

.....

**WITH
CRIMINAL APPEAL NO. 509 OF 2003**

1. Keshav s/o Laxman Rupnar
Age – 30 years, Occu – Driver,
R/o. Navha, Taluka Palam,
District Parbhani.
2. Sanjay s/o Motiram Fasge,
Age – 30 years, Occu – Agriculturist,
R/o. Kerwadi, Taluka Palam,
District Parbhani.

... Appellants
[Orig. Accused Nos.
1 & 2]

Versus

The State of Maharashtra
Through Police Station,
Kandhar, District Nanded.

... Respondent.

.....

Mr. Vikram S. Kadam, Advocate for the Appellants.
Mrs. Chaitali Choudhari Kutti, APP for the Respondent-State.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 14.06.2024

Pronounced on : 02.07.2024

JUDGMENT :

1. Both above appeals are directed against common judgment and order of conviction passed by learned 2nd Ad-hoc Additional Sessions Judge, Nanded dated 02.07.2003, thereby convicting applicants in Criminal Appeal No. 522 of 2023 i.e. original accused nos. 3 and 4 for offence punishable under Section 366 r/w 34 of Indian Penal Code [IPC], whereas, applicants in Criminal Appeal No. 509 of 2003 i.e. original accused nos. 1 and 2 are convicted for offence under Sections 376, 366 r/w 34 of IPC.

PROSECUTION STORY LEADING TO TRIAL IS AS UNDER

2. Mother-in-law of victims PW2 and PW3 accused both of them for stealing and eating groundnuts and “*teel*” (sesame). Their husbands and mother-in-law scolded them. Therefore, getting upset, both PW2 and PW3 left house on 04.06.2000 under the pretext of

answering call of nature, but to go to their house. PW3 also carried her son along with her. They decided to go to Kurula and after walking some distance, they signaled and boarded a tempo. Accused nos. 1 to 4, who were occupying the said tempo, assured to take the ladies free of charge and made them sit in the cabin.

3. On the way, PW4, also a passenger, alighted from the tempo at Bodkha. However, accused did not halt the vehicle at Kurula and it was rather taken ahead, in spite of PW2 and PW3 raising shouts and cries. Vehicle was further taken towards a kaccha road. There, accused Keshav took and accused Sanjay took turns in raping both, PW2 and PW3. Later on they were taken and dropped to the outskirts of Gangakhed.

4. Meanwhile, father of PW2, learnt from husband of PW2 that she and PW3 have not returned home. Thereafter brother of PW3 lodged missing report. During their search, PW4 informed father of PW2 about ladies being traveling in the vehicle owned by Keshav and Sanjay and therefore, he approached police on 20.06.2000 and lodged report, on the strength of which, crime was registered for offence under Sections 363, 366 r/w 34 of IPC.

5. After investigation was over and on gathering sufficient evidence, accused persons were chargesheeted and tried by 2nd Adhoc Additional Sessions Judge, Nanded, who held all four accused guilty and sentenced them to suffer imprisonment as spelt out in the operative part of the order.

Precisely such judgment and order of conviction is now taken exception to by all four accused, by filing distinct appeals, on various grounds spelt out in the respective appeal memo.

SUM AND SUBSTANCE OF THE EVIDENCE IN TRIAL COURT

6. In order to establish its case, prosecution has examined following 12 witnesses. Their role and sum and substance of their evidence is as under:

PW1 is the father of victim PW2. In his evidence at Exhibit 32, he deposed that PW2 was married to Tejerao. When he returned on 06.06.2000, he learnt that his daughter and her sister-in-law (PW2 and PW3) along with child of PW3, had left the house on the pretext of answering call of nature and thereafter, they did not return home. Thereafter brother of

PW3 approached police and reported the incident. During search, it was learnt from PW4 Sangram that on 04.06.2000 around 7.30 p.m., two women and a boy were seen traveling in the tempo which proceeded towards village Kurula. Accordingly, on 20.06.2000, this witness approached accused Keshav and brought him and his three associates to Kandhar police station and lodged report Exhibit 33.

PW2 is one of the victims. In her evidence at Exhibit 34 she stated that on 04.06.2000, in the evening, mother-in-law quarreled with herself and other victim PW3, alleging that they had consumed groundnuts and “teel”. Husband of PW3, namely, Dnyanoba threatened to beat and husband of PW2, i.e. Tejerao also scolded her. Therefore, on the pretext of answering call of nature, they left house along with son of PW3.

At around 7.30 p.m., a tempo came in which accused nos. 1 to 4 were traveling. They promised to take both PW2 and PW3 with the child to Kurula without charging fare. Victims boarded the tempo. When the tempo reached Bodkha, accused persons declared that tempo will not take passengers to village Kartala. At Bodkha, PW4 alighted the tempo. The tempo was taken towards Kurula, but instead of stopping it there, accused carried the tempo ahead of village Kurula. When they tried to raise cries, they were prevented. According to her, all four accused were referring to each other by their names, i.e. Sanjay, Keshav, Gyanoba and Rasool. They took the tempo

towards Palam, District Parbhani and then it was taken further towards a kaccha road and was stopped there. Accused Keshav dragged PW2 out of the tempo, took her to a spot and had forcible sexual intercourse with her after threatening to kill her. Thereafter, accused Sanjay came there. Accused Keshav asked Sanjay to see her and then Sanjay also had sexual intercourse with her by threatening and brandishing knife. When she came back towards the tempo, PW3 was forcibly taken by accused Keshav to the nearby land and he had forcible intercourse with PW3. After Keshav, accused Sanjay also had forcible intercourse with PW3. Thereafter they were dropped at Gangakhed. She alleged that accused nos. 3 and 4 assisted accused nos. 1 and 2 in committing rape on herself and PW3. PW2 and PW3 hired a room at Parbhani and spent 15 days there. Thereafter parents of PW3 came and brought them to their house. Their statements were recorded and they were made to identify accused in Test Identification [TI] parade.

PW3 another victim also reiterated as like PW2, about allegations raised by mother-in-law and on being scolded by husbands, they left the house with the child, boarded the tempo, but were raped by accused nos. 1 and 2 and finally, they went to Parbhani and stayed there for 15 days. Her parents came and they were brought back. Their statements were recorded and they were made to identify accused.

PW4 Sangram Murude stated that on the day of incident, he had been to Kinni and while returning, when he was at village Kartala and was waiting for a bus, he boarded a tempo and travelled 1 km. At that time two married girls along with a child boarded the tempo. He got down at village Bodkha and thereafter took a bus to go to Kurula. He identified PW2 and PW3, who allegedly travelled with him.

PW5 Suryakant acted as pancha to spot panchanama Exhibit 38.

PW6 Hulaji is the pancha to seizure of Tempo vide Exhibit 40.

PW7 Bhujangrao | Both acted as pancha to spot panchanama.
and | However, both did not support prosecution.

PW8 Bandu |

PW9 Dr. Rahul Yende, who examined PW2 and PW3 and issued certificates Exhibits 45 and 46.

PW10 Dagdu acted as pancha to Test Identification Parade.

PW11 PSI Ashok Patil is the Investigating Officer.

PW12 Anusaya Giri, Tahsildar, who conducted Test Identification parade on 03.08.2000.

SUBMISSIONS

On Behalf of accused nos. 1 and 2.

7. Learned counsel Mr. V. S. Kadam for accused nos. 1 and 2 submitted that there is apparently false implication. There is no convincing, reliable evidence on the point of kidnapping or offence under Section 366 or even under Section 376 of IPC. According to him, at the outset the alleged occurrence has taken place on 04.06.2000 and FIR is lodged on 20.06.2000 i.e. after more than 15 days. That, the alleged victims, who were married women, have allegedly travelled in the tempo of accused even after alleged forcible rape and spent almost 15 days outside, but never reported anything to anyone. That, thus their testimonies are not worthy of credence. That, only when they were brought back, they gave false statements and narrated a false and fabricated story.

8. Learned counsel pointed out that, accused persons were not known to victims PW2 and PW3. They are from distinct village. Their Test Identification [TI] parade was also conducted almost two months after arrest and meanwhile, there were several occasions and

opportunities for victims to see accused persons. Therefore, identification has lost its significance. He further pointed out that TI parade was also conducted in the vicinity of Tahsil office which is at proximate and immediate neighbourhood of the jail. Therefore, there is every possibility of the Investigating Officer, who took them for TI parade, confronting accused persons to victims and they being shown to victims. He further pointed out that even the authority who conducted TI parade has deviated from the procedure and guidelines laid down by law. Consequently, for above reasons, according to him, identification is also rendered doubtful.

9. It is his further submission that medical evidence does not suggest forceful rape. Therefore, according to him, there was no convincing evidence about victims being taken and forcibly raped by accused nos. 1 and 2. According to him, learned trial court has not considered the lapses and lacuna on the part of the investigating machinery and has straightway accepted the belated versions of victims and other witnesses. According to him, therefore, such judgment cannot be allowed to be sustained.

On behalf of accused nos. 3 and 4 :

10. Learned Advocate Mr. Joydeep Chatterji, while arguing on behalf of accused nos. 3 and 4, would submit that there is apparently false implication of his clients and in absence of any convincing, reliable or legally acceptable evidence. He also took this Court through the testimony of PW2 and PW3 and would submit that both ladies have categorically stated that accused nos. 3 and 4 had left the tempo before the alleged incident and such both accused had never returned. They were not present when alleged act of rape was committed by accused nos. 1 and 2. He also pointed to the testimony of PW4 and would strenuously submit that this witness has not marked presence of accused nos. 3 and 4. PW2 and PW3 have not identified them both in TI parade. He pointed out that merely their presence is alleged by the ladies and learned trial court has accepted their version without any iota of evidence, regarding their participation or involvement. Thus, it is his submission that their implication itself is false.

11. Learned counsel further invited attention of this Court to para 15 and 19 of the judgment and would submit that trial court itself held that testimonies of victims PW2 and PW3 are neither wholly reliable nor wholly unreliable, and still accused nos. 3 and 4, without

any participation or active role, are held guilty along with main accused. Findings reached by learned trial court being erroneous and not sustainable in the eyes of law, he prays to indulge by allowing the appeal.

On behalf of the State :

12. Per contra, learned APP would submit that it is a serious offence. That, accused were traveling in the same tempo in which PW2 and PW3 travelled that day. They have categorically narrated that accused no.1 Keshav and accused no.2 Sanjay took turns in raping both victims i.e. PW2 and PW3. Learned APP pointed out that PW2 and PW3 have identified accused persons in the T.I. parade. That, only out of fear of family and out of societal fear and shame, the ladies did not report immediately after getting down at Gangakhed. That, after they were brought home, they narrated the ordeal faced by them. Their statements to that extent are recorded.

13. Learned APP further submitted that, investigating machinery arranged TI parade wherein both accused nos. 1 and 2 are categorically identified. According to learned APP, accused nos. 3 and 4 were companions of accused nos. 1 and 2. That, ingredients of

Sections 363, 366 and 376 of IPC are clearly available in the prosecution evidence. Testimonies of PW2 and PW3 are lending support and corroborating each other. Their testimonies have remained unshaken and intact. Consequently, according to learned APP, learned trial court committed no error whatsoever in accepting their version and returning guilt. She pointed out that no convincing ground is made out in appeal to interfere in the impugned judgment and hence she prays to dismiss both the appeals.

ANALYSIS

14. The trial court held all four appellants guilty of offence under Section 366 r/w 34 of IPC and appellants accused nos.1 and 2, i.e. Keshav and Sanjay, are also held guilty of offence under Section 376 of IPC.

The fundamental objection raised by both learned counsel representing each of the accused is that firstly, there is inordinate delay in reporting. Secondly, accused appellants being strangers, prompt TI ought to have been conducted, but here, there is immense delay in conducting the same, creating several opportunities of accused persons being confronted to victims, and lastly, there is no convincing oral and medical evidence.

15. Evidence of victims PW2 and PW3 being crucial, is only of relevance. On carefully analyzing the evidence of PW2 and PW3, it is emerging that they both are consistent and lending support to each other on the point of mother-in-law and their husbands scolding them for eating groundnuts and *teel*. They both are sisters-in-law of each other. They have both left the house together. They both are speaking about having planned to reach Kurula and therefore they boarded tempo from Kartala.

16. PW2 testified that accused persons promised to take them without charging fare. After the vehicle reached Bodkha, Murude Guruji (PW4) got down from the tempo and only they both ladies, son of PW3 and accused persons remained in the tempo. It was rushed towards Kurula, but instead of halting there, vehicle was taken ahead of said village, and when they tried to raise cries, they were prevented. This witness also deposed about accused persons addressing each other as Sanjay, Keshav, Dnyanoba and Rasul. The vehicle was taken on a kachha road and there, accused no.1 Keshav pulled her out of the tempo, took her to a no mans land and forcibly had sexual intercourse with her after threatening to kill her. Then accused Sanjay came there and he also, on knife point, had sexual intercourse with her. She further deposed that while she was being

raped by Keshav, that time PW3 was raped by accused no.2 Sanjay and she learnt about it from PW3. It is her further evidence that after reaching tempo, Keshav took PW3 to a nearby land and had forcible intercourse with her. They were thereafter taken to a tanda and offered food but they refused and then they were left at Gangakhed. According to her, accused Dnyanoba and Rasul helped and assisted accused Keshav and Sanjay in committing rape on herself and PW3. She gave the number of tempo as MH 22/455. Then she deposed about spending 15 days in a rented room at Parbhani and father of PW3 arriving there and bringing both ladies back. After two months, they being called for TI parade and they identified accused Keshav and Sanjay amongst 11 persons. She also identified them in the court saying that such accused persons travelled in the tempo at the time of incident. She further categorically stated that accused Keshav and Sanjay are the two, who committed forcible sexual intercourse on her and PW3.

Above witness is subjected to extensive cross on the point of quarrel with mother-in-law and places they passed through till reaching road. In cross, again she confirmed that they left the house on the pretext of answering call of nature. She answered that nobody met them on the road nor any vehicle passed by them. She answered

that she told accused Keshav that they had no money for the fare and further answered that apart from accused, there were other five to six passengers including Murude Guruji, and she stated that she knew him. She answered that when vehicle reached Bodkha, except herself, PW3, her son and accused persons, rest of the passengers got down. She answered that at Bodkha accused asked herself and PW3 to sit in the cabin. She answered that they did request accused to stop the tempo, however, according to her, accused did not stop it. She answered that when they raised cries, they were threatened to be killed by knives. She is unable to state why portion marked "A" is appearing in her statement. She is further questioned about quarrels with her husband. She gave distance between tempo and spot of incident i.e. rape, as 500 feet. She answered that after she was raped and brought to the tempo by Keshav, PW3 told her that Sanjay raped her. Again in cross she answered and stated that when accused Keshav raped her, accused Sanjay raped PW3 and when accused Sanjay raped her, accused Keshav raped PW3 near the tempo. At that time, **accused no.3 and 4 had left the spot where the tempo was parked.** She answered that she did resist both the incidences of rape by accused nos. 1 and 2, but she did not sustain any injury and on reaching the spot, she told PW3 that accused nos. 1 and 2 raped her. She admitted that they did not visit police station at Gangakhed. She

further stated that due to fear of father they did not approach police station for giving information of the incident and they both ladies stayed at Parbhani for 15 days. In further cross she admitted that she had not seen accused persons prior to the incident, she denied names of accused being given at the time of TI parade. She denied that police showed accused nos. 1 and 2 immediately prior to the TI parade and also denied that they saw accused nos. 1 and 2 in Tahsil premises. She also denied that PSI Patil said anything to them. After identification by her was over, PW3 was called. She admitted that during their stay at Parbhani, they did not narrated the incident to any one or to the medical officer. She answered that while they were at Parbhani, father of PW3 had learnt about the incident of rape. She answered that police recorded the statement on 28.07.2000. Rest is all denial.

17. On visiting testimony of PW3 at Exhibit 35, she too, like PW2, deposed about husband and mother-in-law quarreling for eating groundnuts and *teel* and alleging theft and therefore, out of anger they leaving the house to go to their parents and halting tempo on the road to proceed to Kurula, where sister of PW2 was residing. Even she stated that from Bodkha to Kurula only she, her son, PW2 and accused were in the tempo. The tempo was not halted at Kurula

inspite of asking. Accused threatened to kill and took the vehicle ahead towards Palam and further took it to a kachha road and after parking vehicle, they were made to get down. She stated that at that time, accused nos. 3 and 4 left the spot. She stated that accused no.1 Keshav forcibly carried PW2 to a distance. The place where tempo was parked, accused Sanjay had forcible intercourse with this witness against her wish and consent. It being lonely place, nobody came to help. After some time, Keshav and PW2 came near the spot where tempo was parked and from PW2 she learnt that PW2 was forcibly raped by him. Thereafter accused Sanjay forcibly took PW2 to a little distance, whereas accused Keshav raped this witness at the spot where tempo was parked. They were further taken to a *tanda* and were offered food, which she refused, and thereafter they were dropped at the outskirts of Gangakhed and from there they went to Parbhani and stayed for 15 days, where her parents came and they were brought to Kandhar Police station. Even she deposed that she was called for TI parade and she identified accused Keshav and Sanjay who committed rape on herself and PW2

Even above witness is subjected to cross, initially about journey in the tempo and number of other passengers. Questions are put about stay at Parbhani and she admitted that they did not narrate

about the incident of rape to lady relative of PW2. She answered that when her father and brother came, they abused her. She answered that even they did not ask her anything and she too, on her own, did not narrate the incident to them. She also answered that from Kandhar, she went to her parents' place and PW2 went to her parents' place. In para 5 of the cross itself, she again confirmed that first, accused Sanjay raped her and Keshav did not rape her first. She answered that as it was dark, she could not see accused Keshav committing rape on PW2.

18. On re-evaluation of above evidence of both victims, in the considered opinion of this Court, both victims are consistent and lending support to each other on the point of they both leaving the house on the pretext of answering call of nature and thereafter they boarding tempo to reach Kurula to the place of sister of PW2. The very testimony of PW2 in chief itself shows that both ladies were offered journey free of cost. PW2 has identified PW4, who got down at Bodkha. PW4 confirmed presence of PW2 and PW3 to be traveling in the tempo that day. Both are again consistent about vehicle not halting at Bodkha and rather it being rushed ahead in spite of their cries. It is evening time and it being a rural area and witnesses having categorically answered in cross that they did not come across any

other person or vehicle on the road, their such attempt of raising cries was futile. They both are consistent about vehicle taken towards Palam and 500 feet away from main road to a kachha road.

PW2 categorically deposed that accused Keshav first forcibly pulled her down and had forcible intercourse with her at a distance away from the spot where the tempo was parked. When she was taken back to tempo, then she alleged that accused Sanjay raped her. She has identified accused both, in TI parade as well as in the court.

Likewise, PW3 also deposed that after PW2 was taken away by accused Keshav, she herself was forcibly raped by accused Sanjay near the tempo, and after arrival of accused Keshav and PW2, Keshav raped her while Sanjay raped PW2.

19. It is to be noted that both victims had left the house in anger. They deposed about being raped forcibly and dropped at Gangakhed. Under such circumstances and it being evening time, they did not report it to anyone and rather chose to go to PW2's sister's place. Again out of fear and shame, they must not have informed said relative and further they spent 15 days at Parbhani. It is but obvious that having left the house in anger and having met with unfortunate

incidence, the ladies refrained from informing anyone or approaching police because they had invited this situation by leaving their house.

20. Only after they were traced and brought by father of PW3, they gave statements on 28.07.2000 disclosing the act of accused Keshav and accused Sanjay. Consequently, there is delay in reporting. The circumstances faced by both victims and the precarious situation in which they had landed, resulted in delayed reporting. No doubt, there is delay in both, lodging FIR as well as reporting the occurrence of rape, but merely on such count, benefit would not go to the accused against whom there is convincing and truthful version. There is no reason for false implication. There is no previous enmity. Even there is no suggestion to both victims about they falsely implicating accused for some reason.

21. The Hon'ble Apex Court in umpteen judgments has categorically held that in cases of such nature, there is bound to be delay and delay, if any, if found to be supported by plausible reason, it becomes insignificant. Here, as discussed above, both ladies have silently left the house on the pretext of answering call of nature out of annoyance and anger for being accused of stealing and due to quarrel with husband and mother-in-law. Having met and faced with

unfortunate incident in the evening, out of fear, they did not return back or inform anybody. Therefore, in the peculiar circumstances, there is delay on their part in disclosing the incidence.

22. As regards to objection of delay of two months caused in conducting TI parade, no doubt it is lapse, but on the part of the Investigating Officer in not getting TI arranged and conducted in spite of accused being arrested and statements of victims being recorded. For lapse on the part of Investigating Officer, the serious occurrence would not get eclipsed. Even otherwise, there is no time limit or prescribed period in law for conducting TI parade and this has been clarified by the Hon'ble Apex Court in the case of ***Raja v. State by Inspector of Police*** [Criminal Appeal No. 740 of 2018 with Criminal Appeal Nos. 1608-1609 of 2018 decided on 10.12.2019] wherein, it has been observed in para no, 16 that there is no hard and fast rule about the period within which TIP must be held since arrest of the accused.

23. As regards to effect of delayed TI is concerned, in above judgment itself, referring to the law laid down in the judgments of ***Sk Hasib v. State of Bihar*** (1972) 4 SCC 773, ***Bharat Singh v. State of U.P.*** (1973) 3 SCC 896, ***Wakil Singh v. State of Bihar*** (1981) Suppl.

SCC 28, *Soni v. State of U.P.* (1982) 3 SCC 368, *Pramod Mandal v. State of Bihar* (2004) 13 SCC 150 and, *Anil Kumar v State of U.P.* (2003) 3 SCC 569, delay is held to be insignificant, more particularly, when there is no effort to cross examine Investigating Officer by posing a question and seeking explanation as to why, at earlier point itself, since arrest of accused, no TI was conducted. Here also, on visiting cross of Investigating officer it is noticed that there is no pointed question to Investigating Officer as to why he did not take prompt steps in conducting TI and therefore, now it is not open for learned counsel for accused appellants to agitate that there is delay and so it is adverse to the prosecution.

24. Even otherwise, it is also settled position that TI parade falls in the domain of investigating machinery and it is a mere corroborative piece of evidence. What court needs and looks for is substantive evidence and therefore, identification in the court is considered as substantive piece of evidence. Law to this extent has been dealt in various cases like *Malkhansingh v. State of M. P.* (2003) 5 SCC 746 ; *Mulla v. State of U.P.* (2010) 3 SCC 508 ; *C. Muniappan v. State of T.N.* (2010) 9 SCC 567 ; *Sheo Shankar Singh v. State of Jharkhand* (2011) 3 SCC 654 and *Shamlal Ghosh v. State of W.B.* (2012) 7 SCC 646.

25. Here, both victims have categorically identified accused persons in the TI parade. They have denied that accused were confronted to them earlier to TI parade or even in Tahsil premises. Both victims have identified accused in the court itself i.e. accused Keshav and accused Sanjay.

26. It is also an objection raised by learned counsel representing main accused Keshav and Sanjay that there is no medical evidence to support forceful rape. There is no substance in such argument. Law does not insist corroboration in cases of rape. Prosecution is not obliged to bring evidence in that regard. The sole testimony of victim, if inspires confidence, even in absence of medical evidence, is itself sufficient to accept said version. Here, PW2 has, in cross itself, admitted that she did not suffer any injury. They both are consistent about forcibly raped without their consent. Therefore, the curtain falls once victim speaks that it was against their wish. Moreover, occurrence has come to light only when victims gave statements after they were traced and brought by their relatives. Therefore, due to lapse of time, it is but natural that there may not be medical evidence suggesting resistance or marks of force. Consequently, even such objection pales into insignificance.

27. To sum up, testimonies of PW2 and PW3, who are victims of rape, are inspiring confidence. Their testimonies to the extent of forceful rape are not rendered doubtful. They are apparently exploited due to the situation in which they had landed. They have named accused Keshav and Sanjay for forcibly raping them and have also identified them both, in TI parade as well as in court. There is no suggestion for namesake regarding false implication on any count.

28. However, on carefully sifting testimonies of both victims, it is evident and palpable that no role whatsoever in commission of offence of either 363, 366 or 376 of IPC is made out against accused nos. 3 and 4 i.e. Dnyanoba and Rasul. PW2 as well as PW3 are consistent that after the vehicle was parked ahead of Palam, i.e. before rape, both such persons left the place and did not return. Though PW2 stated that accused nos. 3 and 4 helped and assisted accused nos. 1 and 2, in what manner and how, has not come in her evidence. Therefore, for want of overt act attributable to them, they cannot be held guilty for any charge. Consequently, their indictment as well as guilt recorded against them is unwarranted.

29. Resultantly, there is no merit in the appeal of Keshav and Sanjay bearing Criminal Appeal No. 509 of 2003 and the same deserves to be dismissed. Whereas, appellants in Criminal Appeal No. 522 of 2003 succeed and their appeal deserves to be allowed. Hence, I proceed to pass the following order :

ORDER

- I. Criminal Appeal No. 509 of 2003 is dismissed.
- II. Criminal Appeal No. 522 of 2003 is allowed.
- III. The conviction awarded to the appellant nos. (1) Dnyanoba s/o Dattaram Babar and (2) Sk. Rasul S/o Sk. Farid (in Criminal Appeal No. 522 of 2003), by learned 2nd Adhoc Additional Sessions Judge, Nanded in Sessions Case No. 195 of 2000 under Section 366 r/w 34 of IPC on 02.07.2003 stands quashed and set aside.
- IV. The appellants Dnyanoba s/o Dattaram Babar and Sk. Rasul S/o Sk. Farid stand acquitted of the offence punishable under Section 366 r/w 34 of IPC.

- V. The bail bonds of the appellants Dnyanoba s/o Dattaram Babar and Sk. Rasul S/o Sk. Farid stand cancelled.
- VI. Fine amount deposited, if any, be refunded to the appellants Dnyanoba s/o Dattaram Babar and Sk. Rasul S/o Sk. Farid after the statutory period.

[ABHAY S. WAGHWASE, J.]

30. On pronouncement of this judgment, learned counsel for the appellants in Criminal Appeal No. 509 of 2003 prays for four weeks time to surrender so as to enable them to approach the Hon'ble Apex Court.

31. Learned APP strongly opposes the same.

32. Considering the above request, four weeks time is granted to surrender for the appellants in Criminal Appeal No. 509 of 2003.

[ABHAY S. WAGHWASE, J.]