



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 737 OF 2023

Akash s/o Gopinath Kale
Age : 18 years, Occupation Education,
R/o. Sarangpur, Taluka Gangapur,
District Aurangabad.

... Appellant
[Orig. Accused]

Versus

1. The State of Maharashtra
Through Police Station Pachod,
Taluka Paithan, District Aurangabad.

2. X Y Z.

... Respondents

.....
Mr. S. B. Bhapkar, Advocate for the Appellant.
Mrs. Ashlesha S. Deshmukh, APP for Respondent No.1-State.
Ms. Pratibha Suryawanshi, Advocate for Respondent No.2
(appointed)

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 10.04.2024

Pronounced on : 02.05.2024

JUDGMENT :

1. The correctness, legality and maintainability of judgment and order of conviction passed by learned Special Judge (POCSO), Aurangabad in Special Case (POCSO) No. 171 of 2017 dated 02.08.2023, recording guilt for offence under Section 376(2) of the Indian Penal Code [IPC], is challenged herein by the convict.

PROSECUTION STORY IN SHORT IS AS UNDER

2. Victim had come to stay with her aunt PW5 as there was a proposal for her marriage. Accused no.1, who was prospective groom, and other accused i.e. his family members, as well as brother of victim had come to see victim. She found accused to be of dark complexion and therefore she rejected the proposal and it was accordingly conveyed. By that time it was late evening and therefore accused persons, who are already in relation, requested to spend night for want of conveyance to go back. Their such request was accepted and they decided to spend the night at the place of maternal aunt of victim i.e. PW5. According to prosecution, around midnight time, accused nos. 1 to 4 lifted victim while she was sleeping and took her to the field. PW5 was obstructed and prevented by accused nos. 5, 6 and 7. While accused nos. 2, 3 and 4 held the victim, accused no.1 present appellant raped victim. Victim narrated the occurrence to PW5 who brought her home. Next day they approached police and on the statement of victim, crime was registered.

After registration of crime, case was investigated and on completion of investigation, accused were charge-sheeted and tried before learned Special Judge, Aurangabad, who, on appreciating the

oral and documentary evidence, held the charge proved against accused no.1 for offence punishable under Section 376(2) IPC and against accused nos. 2, 3 and 4 for offence punishable under Section 341 r/w 34 of IPC. Accused nos. 5, 6 and 7 are acquitted from all offences.

Precisely the above judgment of conviction has been challenged by accused no.1 Akash by filing instant appeal.

SUBMISSIONS

On behalf of the appellant :

3. Learned counsel for the appellant would point out that this is apparent case of false implication. According to him, there was no such occurrence as is alleged by the informant. He pointed out that at the threshold, prosecution is unable to establish exactly when alleged incident took place. He further submitted that there is no independent evidence suggesting even arrival of accused persons to the house of PW5. He pointed out that even prosecution was unable to demonstrate exactly on which day and which night alleged incident took place i.e. whether it took place on 09.07.2017 or 10.08.2017.

4. Learned counsel pointed out that, PW5 aunt was keen in performing marriage of victim with her own son and hence, there is false implication on a concocted and fabricated story, and victim is tutored to lodge false report to frame the accused. There was no incident of rape.

5. Learned counsel further submitted that apart from several lapses which are fatal in nature, very Investigating Officer did not step into the witness box. It is his submission that because of non examination of Investigating Officer, accused has been prejudiced. He further pointed out that material witnesses like grandmother, other children of PW5, a person who was alleged approached by PW5 before visiting police station, are not examined.

6. He further pointed out that it is difficult to accept that a full grown girl could be lifted from the house and taken to a field and then raped without injuries, either internal or external.

7. He further submitted that though accused were charge-sheeted for commission of offence under the provisions of POCSO Act, prosecution miserably failed to establish that victim was minor on the alleged day and so there is acquittal from said charge.

8. It is next submitted that, this is a peculiar case where there can be no credence laid on testimony of victim, or her aunt PW5. He pointed out that even medical evidence is mere opinion and examining doctor is not sure about offence of rape to be committed. According to him, even forensic evidence is lacking in the instant case, in which there are allegations of rape.

9. He pointed out that, mere victim and her aunt are examined. Panchas have not supported, Investigating Officer did not step into the witness box and under such circumstances, he vociferously and forcefully submitted that, case of prosecution was apparently weak and as such, learned trial court ought not to have accepted the prosecution case and ought not to have recorded guilt. Hence, he prays to set aside the impugned judgment and order.

On behalf the the State :

10. In answer to above, learned APP pointed out that evidence of prosecutrix has remained unshaken. Merely because she rejected the marriage proposal, accused persons had lifted her from the house of PW5 and she was raped. Testimonies of prosecutrix and her aunt PW5 are consistent. Learned APP pointed out that victim was incapacitated

by accused nos. 2, 3 and 4 and they facilitated the rape at the hands of accused no.1. Therefore, there may not be injuries, more particularly when she was lifted and taken out of the house. That, her evidence has remained undisturbed and unshaken. Learned APP pointed to the opinion issued by PW4 doctor. She hasten to add that absence of injuries itself is not sufficient to discard the credible evidence of victim. That learned trial court has correctly appreciated the evidence of PW1, PW4 and PW5 and has correctly applied the settled law while recording guilt. Lastly she submits that there is no merit in the appeal and so she prays to dismiss the same.

On behalf of respondent no.2 victim :

11. Learned counsel for the victim also supported the judgment pointing out that occurrence has been proved through victim's testimony. The same inspires confidence. There is no reason for false implication. That, statements of victim as well as her aunt were recorded under Section 164 of Cr.P.C. Their versions are consistent. Medical evidence clearly suggests rape. Therefore, there being cogent, reliable and convincing evidence, learned trial court rightly recorded guilt and she too prays to dismiss the appeal for want of merits.

STATUS OF THE PROSECUTION WITNESSES

12. Prosecution has examined following five witnesses in support of their case.

PW1 is the victim/informant.

PW2 Chand Pasha is the pancha to spot panchanama, but he did not support.

PW3 Amol is the pancha to recording of statement of victim. He also did not support.

PW4 Dr. Rasika Mahajan is the doctor who examined victim and issued opinion.

PW5 Aunt of victim.

Apart from above oral testimonies, prosecution relied on FIR, statements under Section 164 Cr.P.C., panchanamas, medical report and C.A. report.

13. Being first appellate court, and in view of settled law, this court is called upon to re-examine, re-appreciate and re-analyze the entire oral and documentary evidence.

14 Heard.

15. Alleging false implication, learned counsel for the appellant put forth following grounds, thereby challenging the judgment under challenge;

- i. Prosecution failed to establish exactly when alleged incident took place, i.e. either on 09.07.2017 or 10.08.2017.
- ii. No distinct evidence about visit of accused to informant's place.
- iii. Apart from tutored testimony of victim, her version is failing to inspire confidence.
- iv. Prosecution failing to cogently establish age of victim.
- v. Belated FIR.
- vi. Material witnesses like grandmother and cousins of victim not examined.
- vii. Scene of occurrence panchanama not proved.
- viii. No forensic and scientific evidence corroborating prosecution version.
- ix. Inconsistent version of victim and informant.
- x. Investigating Officer not examined coupled with defective and faulty investigation.

xi. Implication of accused by PW5 informant with sole intention of performing marriage of victim with her own son.

16. The gist of prosecution story is that, accused no.1-appellant had come to see victim as a prospective bride. She refused and rejected the marriage proposal. That night itself, according to prosecution, victim was initially kidnapped by accused nos. 1 to 4 and taken to the field, while accused nos. 5 to 7 obstructed PW5 from going to her rescue. In the field, when accused nos. 2 to 4 held victim, accused appellant forcibly raped her. Hence the charge.

In the light of above respective cases and grounds of challenge, the evidence is put to careful scrutiny.

17. Before analyzing the evidence, it needs to be stated that, though there were charges for commission of offence under the POCSO Act, learned trial Judge has acquitted all seven accused from charge under Sections 4, 6, 7, 8 and 17 of POCSO Act. In the judgment, learned trial court has taken up issue of age of victim, kidnapping and commission of offence under Sections 4, 6, 8 and 17 of POCSO Act in para 10 to 14 of its judgment, and has held that

prosecution has failed to prove that at the time of incident victim was a child, and thereby answered point nos. 1, 2 and 5 to 8 in negative.

Resultantly, only accused no.1 appellant is held guilty for offence under Section 376(2) of IPC, whereas accused nos. 2 to 4 only are convicted for offence under Section 341 r/w 34 IPC. Consequently accused nos. 5 to 7 are let off from all offences.

In this appeal, accused no.1 alone has taken exception to the judgment by filing instant appeal.

18. Evidence of victim is at Exhibit 65. The sum and substance of her version in witness box is that, she resides with her grandmother at Dhangaon Takli. She had come to her maternal uncle's place at Mard Gevrai. That time, her brother Bashya, sister-in-law Patika, her brother Krishna, appellant Akash, his mother Meerabai and father Gopinath and their son-in-law Vishwanath (i.e. accused persons) had come to the place of her aunt to see her. She was to be shown to accused Akash for prospective marriage. Her aunt PW5 asked victim whether she liked the boy i.e. accused. She testified that she disliked him as he was of dark complexion and it was accordingly conveyed by her aunt to the accused persons and she had asked accused persons to

leave, upon which accused said that it being night time, and as they would not get conveyance to return back, they intended to stay that night there itself, and accordingly they stayed. Further, according to her, while she was sleeping around 10.00 p.m. after taking dinner, around 12.00 midnight accused Krishna, appellant Akash, accused Bashya i.e. her real brother and accused Patika i.e. her sister-in-law lifted her and took her to the field. Her aunt intervened but accused Vishwanath, Gopinath and Meerabai came in the way and prevented her. After taking her to the field, appellant Akash forced himself on her while accused Patika caught her by her hair and accused Krishna held her hands. Appellant forcibly removed her sari, slept on her, and forcibly raped her and all accused went away. She gave call to her aunt who came crying. Her aunt lifted her and took her to the house, gave her medicine for fever. On the next morning, phone call was made to grandmother, who came and they approached Pachod Police Station and lodged report which she identified to be at Exhibit 66. That, she was referred to GHATI hospital, her statement was recorded before learned Magistrate Court, Paithan and she identified the same to be at Exhibit 67. According to her, thereafter she was shifted to *bal sudhar gruh* (borstal).

Victim is subjected to extensive cross which commences from para 4 onwards. She is unable to state when she lost her mother and since when she was put up with her grandmother. She stated that she stayed at her maternal uncle's place for 15 days. She denied love relations with Dixit i.e. son of informant, but admitted that she was married to him later on and she had a baby boy from him. She admitted that her aunt filed complaint against her brother Bashya and father. Omission is brought in para 5 regarding beating to her aunt. She had denied all suggestions about falsely deposing regarding accused persons coming to see her, she being asked about her decision, she disliking appellant and conveying it through aunt, accused persons requesting to stay that night for want of conveyance it being night time and they stayed and spent that night, and she being taken out of the house to the field and raped.

19. At Exhibit 67 is the statement of victim under Section 164 Cr.P.C. recorded before learned Magistrate, Paithan. The same seems to be recorded on 10.11.2017 i.e. almost after three months of the alleged occurrence. The mandate of prompt recording of statement under Section 164 Cr.P.C. has been apparently frustrated by the investigating machinery. Be it so.

20. Now, on visiting testimony of PW5 informant, i.e. maternal aunt of victim, she is found to have deposed at Exhibit 105 that victim was staying with grandmother who is her mother-in-law. Victim was brought to her place and accused persons had come to her house for settling marriage of victim and accused no.1 Akash. She claims that she questioned victim whether she liked appellant. Victim told that she does not like appellant. She accordingly informed it to accused persons and asked them to go back. It was evening time and accused said that they would stay during night and go back in the morning. Between 11.00 p.m. to 12.00 midnight, appellant Akash, Krishna and Patika lifted victim and took her out of the house. Vishwanath, Meerabai and Gopinath caught hold of her. Appellant and others had taken victim to **field of Dharma Dhakne**. She went to the field. Accused ran away. She lifted victim and brought her and inquired, upon which victim told that Krishna caught her hand, Patika hold her head and appellant raped her. Message was passed to grandmother. Thereafter they all approached police.

In cross, informant has admitted that they are all in relation. She admitted that Dixit is her son and that victim is her daughter-in-law. Marriage of her son and victim has been performed. She denied

false implication. She denied that as she had to perform marriage of her son with victim, she made victim lodge false complaint and implicate accused persons.

21. Investigating machinery has got statement of PW5 also recorded under Section 164 of Cr.P.C. But as like that of victim, it is recorded on 10.11.2017 in spite of FIR being of 10.08.2017. Before learned Magistrate, aunt deposed about victim being taken to the **jungle**, and not field of Dharma Dhakne, regarding which she has deposed in substantive evidence.

22. Now medical evidence also needs to be analyzed. PW4, who is examined at Exhibit 98, deposed about victim being brought to GMCH Aurangabad at 2.10 p.m. on 11.08.2017. She claims to have recorded history of sexual assault. She deposed that history given was that, on **10.08.2017** when she was sleeping at about 2.00 a.m., appellant took her to the farm and had forcible intercourse with her. On physical examination, this witness noticed contusion injuries on legs and on genital examination, notice hymenal rupture at 6 O'clock and 8 O'clock position. She collected samples.

In cross, medical witness denied history being reported by PW5 and not victim. However, she admitted that injuries noticed on the leg are possible on account of fall on stone.

ANALYSIS

23. It is emerging that victim was put with PW5 that night. In witness box, she deposed that after dinner, she was sleeping around 10.00 p.m. with her aunt PW5 and her children. Around 12.00 midnight, accuse Krishna, Akash, her real brother Bashya and her sister-in-law Patika lifted her from the house and took her to the field. When her aunt PW5 came to her rescue, she was prevented by accused nos. 5, 6 and 7. Said field is owned by Dhakane. At how much distance is the said field from the house where victim slept, has not come on record. It is her evidence that Patika held her head, Krishna caught her hands and present appellant, after removing her clothes, raped her, left her there and they went away. In cross she has denied all suggestions.

24. PW5 is found to be deposing that she went to look for victim. When exactly she went, has not been stated by her. She merely claims that she went towards victim, where victim narrated the incident and then she claims that she alone lifted victim and brought her home.

Even she does not state where was the said field exactly located and how far was it from her house. Question arises is when victim is lying in the field, how PW5 knew that she was lying at a particular spot, because her evidence is that she went to the field and accused ran away. What had happened to accused nos. 5, 6 and 7, who had held her captive, is not getting clear.

In cross, she admitted that victim is her daughter-in-law and her son Dixit is married to victim, but she denied that as she had to perform marriage of her son with victim, she made complainant lodge false complaint and falsely implicated them. This witness PW5, whose statement is recorded after three months of the occurrence before learned Magistrate, as discussed earlier, seems to have informed that victim was taken by accused to the jungle. She did not inform about taking victim to field of Dharma Dhakane, which is the spot she herself named in her substantive evidence.

25. It is also noticed that in report lodged with police, victim had stated about she being taken to the orchid of sweet lime. As stated above, PW5 informed learned Magistrate that victim was taken to jungle, but spot panchanama Exhibit 86 shows *tur* crop standing in

the said field. Such material shows that there is variance on exact scene of occurrence. Victim and PW5 are not lending support to each other. It is also noticed that investigating machinery has not bothered to draw spot panchanama of the very house of PW5 from where victim was allegedly kidnapped. Spot panchanama shows spot field surrounded by fields of other farmers. None of them are examined. Immediate neighbour of PW5 is also not examined. Therefore, above is the only evidence of victim and PW5.

26. Medical evidence discussed above, shows that opinion has been issued about “there are signs of use of force, however, sexual intercourse cannot be ruled out”. Such opinion is thus not concrete, as mere possibility has been expressed. In cross doctor has admitted that injuries noticed on the leg are possible on account of fall on stone. No injuries are noticed by medical expert on the back of victim.

Except above evidence of PW1 victim, PW5 aunt, there is no other evidence in support of arrival of accused persons to village of PW5.

27. Now let us deal with the grounds in appeal. The fundamental ground, questioning the prosecution story of rape, raised before this

Court is that, prosecution is not sure as to exactly on which date alleged incident took place. Learned counsel for appellant would strenuously submit that prosecution's own evidence shows two distinct dates of occurrence. In support of such contention, he invited attention of the Court to the very FIR recorded at the instance of victim PW1. On carefully going through the same, it is noticed that it is in question-answer form. The same is at Exhibit 66. Date over said FIR is apparently 10.08.2017.

It is noticed that the PSO who recorded the FIR has put pointed question by virtue of question no. 13 which, in translated version, is as under:

Que. No.13:- Yesterday dated **09.07.2017** in the evening what had happened?

Ans. :- Brother Bashya, sister-in-law Patika, her brother Krishna, Akash, his mother Meerabai, father Gopinath and their son-in-law Vishwanath r/o Vaijapur had come to see her.

While answering question no. 18 as to "then what did you do?", she has answered :

Myself, maternal aunt, son of aunt, namely, Sharad, daughter Rani took meals and at 10.00 p.m. they all went to sleep in the shed near aunt.

While answering question no. 20 as to “what happened in the night?”, she answered :

Around 12.00 midnight, Krishna Patika, Akash, her brother Bashya lifted her from the house. That time her aunt intervened and so Gopinath, Meerabai, Vishwanath caught her aunt, four of them lifted her and took her to orchid of **sweet lime**.

To further questions she answered that she was raped by accused appellant.

Therefore, above contents of FIR categorically show that alleged occurrence has taken place in the night of 09.07.2017 but date on FIR, is 10.08.2017. It is not known as to what is the date on the copy which was dispatched to concerned jurisdictional Magistrate as required under Section 157 of Cr.P.C. Surprisingly, it is pertinent to note that very PSO or police personnel, who allegedly recorded the above report is not examined by prosecution in the trial court. In the considered opinion of this Court, at that point of time, when

provisions of POCSO Act were invoked by investigating machinery, then mandatory guidelines contemplated under the said statute were expected to be followed. But, this seems to have not been done. Similarly, witnesses Ashabai Kale, whose name appears on the FIR and is shown to be from women cell, as well as the lady constable LPC 968 S. B. Bharate are also not examined by prosecution for the best reasons known to it. None seems to have noticed that there is variance in the date, i.e. either occurrence is of 09.07.2017 or on the date of FIR dated 10.08.2017. If it is 10.08.2017, then as submitted before this Court by learned counsel for accused appellant, there is obviously delay of a month in lodging report.

28. Though before this Court strenuous efforts are made by both APP as well as learned counsel for victim to attribute date to typographical mistake, on visiting Exhibit 51, which is the charge, the following material is found to be emerging. It is the charge which is framed and explained and made known to the accused to record their plea. The contents of Exhibit 51 are as follows :

*“That on **09.07.2017** at about 12.00 hours in midnight in the house of Nandabai Raju Chavan at mauje Georai Marda, Tq. Paithan, District Aurangabad, kidnapped*

*victim, about 14 years old from lawful guardianship of her **parents** and thereby committed an offence punishable under Section 363 r/w 34 of the Indian Penal Code, and within my cognizance.*

*That you accused no.1 on above **date, time and place** committed rape on victim and at that time she was under sixteen years of age and thereby committed an offence punishable under Section 376(2)(i) of the Indian Penal Code and within my cognizance.*

That you all accused on above date, time and place in furtherance of your common intention wrongfully restrained victim and thereby committed an offence punishable under section 341 r/w 34 of the Indian Penal Code and within my cognizance.

That you accused on the above date and place committed penetrative sexual assault upon victim and thereby committed offence punishable under Section 3(a) r/w 4 of POCSO Act, 2012, and within my cognizance.

That you on the above date and place committed aggravated penetrative sexual assault on victim and thereby committed an offence punishable under Section 5 r/w 6 of POCSO Act, 2012, and within my cognizance.

That you on the above date, time and place committed sexual assault upon victim and thereby committed offence punishable under Section 7 r/w 8 of POCSO Act, 2012, and within my cognizance.

That you on the above date, time and place accused no. 2 to 7 committed abetment to accused no.1 for doing above said offences and thereby committed an offence punishable under section 17 of the POCSO Act, 2012, and within my cognizance.”

29. Consequently, in FIR as well as charge, occurrence is shown to have taken place on 09.07.2017, but crime is registered on 10.08.2017. Hence, there is force in the submissions put forth before this Court that prosecution is unsure as to on which date alleged incident took place.

30. Second ground of attack is that material witnesses are not examined. There is substance in said submission also. There is no distinct evidence about visit of accused to the house of PW5 except of version of PW5 and prosecutrix. Grandmother of victim with whom she was staying and who was summoned on the next day, is not examined. Children of PW5 who were sleeping with victim, are also not examined to strengthen the testimony. Field owner in whose field

incident took place i.e. Dharma Dhakane is also not examined. Therefore, there is no independent evidence apart from victim and PW5, in spite of it being a case of rape.

31. Equally important ground raised before this Court is failure to examine very Investigating Officer. Case advanced is of prejudice being caused to the appellant on account of non examination of Investigating Officer. According to him, it is not mere major lapse, rather it has also caused serious prejudice to the accused. There is confusion and doubt over date of actual occurrence as well as actual spot of incident. Resultantly, it is his submission that prosecution case itself has come under serious doubt.

It is true that, here, in this case, very Investigating Officer who carried investigation has not been examined by the prosecution for the best reasons knows to it. No plausible reason about non examination of Investigating Officer or reason for his non availability is put forth. It is true that law is fairly settled that mere lapses or defects in prosecution case does not erode the prosecution story. However, once plea of prejudice is put forth, then court is called upon to be on guard and ascertain whether there is substance in such allegation.

In the considered opinion of this Court, considering the grave nature of offence and severity of the crime, evidence of Investigating Officer was essential, more particularly, when there are two dates of occurrence emerging from the very prosecution evidence as discussed in aforesaid para. Offence of rape is a grave offence and punishment provided is minimum 07 years. Of late, by virtue of amendment in POCSO Act, quantum of sentence has gone beyond two decades. For the more reason, in cases of such nature and case of defence being put to prejudice, Investigating Officer was a necessary witness.

32. In the case ***Birinder Rai v. State of Bihar*** ; AIR 2005 SC 1284 the Hon'ble Apex Court observed that, "the investigating officer was not examined in this case and that has resulted in prejudice to the accused".

Similar views are echoed in the case of ***Baldev Singh v. State of Haryana*** ; 2015 (17) SCC 554, wherein it has been held that, "Mere non examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of prosecution case", however it is further added, "Whether or not any

prejudice has been caused to the accused is a question of fact to be determined in each case.”

Likewise in the case *Habeeb Mohammed v. State of Hyderabad* ; AIR 1954 SC 51, the Hon’ble Apex Court pointed out that, “it was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events in which the prosecution is essentially based and that the question depends on the circumstances of each case.

In the case of *Jamuna Chaudhary v. State of Bihar* ; AIR 1974 SC 1822, it is held “The duty of investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but it is his duty to bring out the real unvarnished truth”.

Very recently the Hon’ble Apex Court in the case of *Munna Lal v. The State of Uttar Pradesh* ; AIR 2023 SC 634, in para 39 observed as under :

39. The missing links could have been provided by the Investigating Officer, who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having

regard to the facts and circumstances obtaining in each case.”

33. Bearing in mind the above legal position and consequences of non examination of Investigating Officer, if the facts of case in hand are meticulously studied and tested, it is noticed that here, appellant has specifically pointed out from the very evidence of prosecution that there is variance in the actual date of occurrence. As stated above, in FIR date of occurrence is reported as 09.07.2017. But FIR itself is noted on 10.08.2017 i.e. after one month. Even in charge framed and explained to the accused, date of occurrence is shown as 09.07.2017. Therefore, as pointed out, there are variances regarding very actual date of occurrence.

Secondly, in this case, victim and her aunt PW5 are giving different versions about actual scene of occurrence, which is also already discussed in foregoing para.

Thirdly, other incumbents of the house like grandmother of victim and children of PW5, who were also in the company and said to be sleeping near prosecutrix when she was allegedly lifted, as well as the person to whom PW5 approached after reaching Aurangabad

i.e. before approaching police, regarding whom prosecutrix has made reference to, are not examined. They were all material witnesses. Defence had come up with a case of false implication as PW5 was keen in performing marriage of victim with her own son. She has admitted that victim was married to her son. Therefore, above ground of false implication to avoid marriage of present appellant with victim cannot be brushed aside lightly.

34. For all above reasons, in the opinion of this Court, testimony of Investigating Officer was very much essential. Defence is apparently deprived of the opportunity to cross examine the Investigating Officer who has chargesheeted accused, and prosecution has rather examined only prosecutrix, her aunt and medical officer. The PSO who noted date on the report and FIR as well as the Investigating Officer who undertook investigation thereafter, were crucial witnesses. They both being not examined, definitely defence has been put to prejudiced.

35. It is settled position that sole evidence of prosecutrix, if it inspires confidence, can be straightway accepted without insisting for corroboration from independent corner or even medical evidence. However the rider is that prosecutrix's story should be free from doubt and should be unblemished. The following are the rulings in

which the Hon'ble Apex Court refused to rely on the sole testimony of prosecutrix.

In *Dilip v. State of M. P.* (2001) 9 SCC 452, it is held that, it is well settled that the sole testimony of the prosecutrix could be acted upon and made the basis of conviction without being corroborated in material particulars. However, the rule about the admissibility of corroboration should not be ignored by the courts in sexual offences. In view of the infirmities present in the sole testimony of the prosecutrix, which was contradicted by the medical evidence as well as by the version given by PW3 (aunt) to whom the prosecutrix narrated the incident soon after the commission of rape, it is held that implicit reliance could not be placed upon her sole testimony.

Similar view is echoed in *State of Rajasthan v. Kishanlal* (2002) 5 SCC 424 ; *Rai Sandeep v. State (NCT of Delhi)* (2012) 8 SCC 21 ; *Kaini Rajan v. State of Kerala* (2013) 9 SCC 113 ; *Munna v. State of M.P.* (2014) 10 SCC 254 and *Manoharlal v. State of M.P.* (2014) 15 SCC 587, wherein considering the infirmities in the version of prosecutrix and doubting the veracity of prosecution case, finding the same not inspiring confidence, it is held unsafe to convict accused relying on uncorroborated version of prosecutrix.

36. It is also submitted that forensic evidence is not supporting. CA reports at Exhibit 117 show that blood group of victim is “B” but no semen is detected in Exhibit 4, 5, 6 and 7 i.e. pubic hair, vulval swab, vaginal swab and vaginal smear. It is to be noted that victim was produced before Medical Officer, regarding occurrence taking place at midnight of 10.08.2017, at 2.10 p.m. of 11.08.2017 as per examination-in-chief of the Medical Officer. Clothes of victim like sari, petticoat and blouse, are forwarded to analyzer on 22.08.2017, in spite of clothes shown to be seized on 11.08.2017 during house search panchanama, i.e. exactly after 11 days of seizure. Result on analysis is that there is neither blood nor semen detected on any of the clothes of victim or even clothes of accused. Likewise, samples of accused which are shown to be dispatched on 19.08.2017, are negative as regards to exhibit 3 and 2 i.e. pubic hair and nail clippings. Hence, even scientific evidence is not lending support to the prosecution.

37. To sum up, for above reasons, here, there is serious doubt about actual date of occurrence. Spot is not cogently proved. There is variance in the testimony of prosecutrix and her aunt as regards to actual date of incidence is concerned. Owner of the field where actual incident took place is not examined. Panchanama of the spot house

from where prosecutrix was allegedly picked up is not at all drawn. There is no evidence about arrival of accused to the place of PW5. Medical evidence is not concrete and firm. Material witnesses like other incumbents of the house are not examined. For all above reasons, case of prosecution being not free from doubt, it is a case of benefit of doubt.

38. Studied the judgment passed by learned trial court which is taken exception to. In the considered opinion of this Court, learned trial court straightway relied on the testimony of prosecutrix and her aunt. This Court has not noticed any discussion regarding variances in the actual date of occurrence, spot, non examination of material witnesses and above all, impact of non examination of Investigating Officer. Therefore, such judgment cannot be allowed to be sustained. Case of prosecution is full of doubts and therefore, case not being proved beyond reasonable doubt, this is a fit case for extending benefit of doubt. Hence, I proceed to pass the following order :

ORDER

I. The appeal is allowed.

- II. The conviction awarded to the appellant Akash s/o Gopinath Kale, by learned Special Judge (POCSO), Aurangabad in Spl. Case (POCSO) No. 171 of 2017 under Section 376 (2) of IPC on 02.08.2023 stands quashed and set aside.
- III. The appellant stand acquitted of the offence punishable under Section 376 (2) of IPC.
- IV. He be set at liberty, if not required in any other case.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.
- VII. Fees of learned Advocate Ms. Pratibha Suryawanshi, appointed to represent the cause of respondent no.2, is quantified at Rs.10,000/- [Rupees ten thousand only] to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]