



Judgment

403 apeals173.23 & 283.23

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

**CRIMINAL APPEAL NO.178 OF 2023
WITH
CRIMINAL APPEAL NO.283 OF 2023**

CRIMINAL APPEAL NO.178 OF 2023

Bablu s/o Mohan Katole (in jail),
aged about 21 years, occupation driver,
r/o Vishwas Nagar, Radha Krishna
Mandir, Nagpur. **Appellant.**

:: VERSUS ::

1. State of Maharashtra,
through Police Station Officer,
Jaripatka Police Station.

2. XYZ
Crime No.980/2020 Jaripatka
Police Station, Nagpur. **Respondents.**

Shri R.M.Daga, Counsel for the Appellant.
Shri A.M.Ghogre, Additional Public Prosecutor for the
Respondent/State.

CRIMINAL APPEAL NO.283 OF 2023

Shamshad Ansari Rafique Ansari,
aged 21 years, occupation electrician,
r/o Vishwas Nagar, Radhakrishna

Mandir, Nagpur.

..... Appellant.

:: VERSUS ::

State of Maharashtra,
through Police Station Officer,
Jaripatka Police Station, Nagpur.

2. XYZ

Crime No.980/2020 Jaripatka
Police Station, Nagpur.

..... Respondent.

**Shri A.S.Mardikar, Senior Counsel assisted by Shri
S.K.Bhandarkar, Advocate for the Appellant.
Shri A.M.Ghogle, Additional Public Prosecutor for the
Respondent/State.**

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 17/04/2025

PRONOUNCED ON : 09/05/2025

COMMON JUDGMENT

1. By these appeals, appellants (the accused persons) have challenged judgment and order dated 30.1.2023 passed by learned Extra Joint District Judge and Additional Sessions Judge, Special Court No.2

3

(POCSO), Nagpur (learned Judge of the trial court) in Special POCSO Case No.8/2021.

2. By the said judgment impugned in appeals, the accused persons were convicted for offence under Section 363 read with 34 of the IPC and sentenced to undergo rigorous imprisonment for 5 years and to pay fine Rs.500/-, in default, to undergo simple imprisonment for 1 month.

The accused persons were also convicted for offence under Section 376(2)(i) read with 34 of the IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay fine Rs.1000/-, in default, to undergo simple imprisonment for 3 months.

The accused persons were also convicted for offence under Section 376(2)(j) read with 34 of the IPC and sentenced to undergo rigorous imprisonment for 10

4

years and to pay fine Rs.1000/-, in default, to undergo simple imprisonment for 3 months.

The accused persons were also convicted for offence under Section 376(d) of the IPC and sentenced to undergo rigorous imprisonment for 20 years and to pay fine Rs.2000/-, in default, to undergo simple imprisonment for 6 months.

The accused persons were also convicted for offence under Section 506 read with 34 of the IPC and sentenced to undergo rigorous imprisonment for 6 months and to pay fine Rs.100/-, in default, to undergo simple imprisonment for 10 days.

Learned Judge of the trial court directed that all sentences shall run concurrently.

3. Brief facts of the prosecution case emerged from the police papers and recorded evidence are as under:

5

The informant victim, a minor girl, who is intellectual disabled child, aged about 14 years, on 12.11.2020, at about 3:15 pm, when was proceeding to meet her friend, the accused persons approached her at Khopbragade Square, took her along with them in Gorewada Forest, and subjected her for forceful sexual assault. They have committed rape on her by threatening her and after the incident, they again dropped her at Martin Bridge, Nagpur. The victim narrated the incident to her mother and, thereafter, approached the Jaripatka Police Station and lodged report. On the basis of the said report, the crime was registered.

4. After registration of the crime, the victim was immediately referred to the medical examination. She has shown the spot of incident to the investigating officer and panchanama as to the spot was drawn. The accused persons were arrested and referred for medical

6

examination. The clothes of the victim and the accused persons are seized. The CCTV Footage was also collected. Relevant statements of witnesses are recorded. The samples collected are forwarded to the Chemical Analyzer and after completion of the investigation, chargesheet is submitted against the accused persons.

5. Learned Judge of the trial court framed charge vide Exh.5. The contents of the charge are explained to the accused persons and they pleaded not guilty and claimed to be tried. In support of the prosecution case, the prosecution has examined in all 22 witnesses, which are as follows:

PW Nos.	Names of Witnesses	Exh. Nos.
1	The victim	27
2	Arun Awade, pancha on spot panchanama	34
3	The mother of the victim	42

4	Mukesh Gajbhiye, pancha on seizure memo	44
5	Sanjay Khobragade, pancha on seizure of clothes of the accused persons	46
6	The aunt of the victim	48
7	Satyajit Gotmare, Naib Tahsildar	51
8	Dr.Yash Agarwal	73
9	Dr.Shreya Dahiwade	77
10	Dr.Durga Bang	81
11	Dr.Atikul Khan	93
12	Amol Taiwade, pancha on seizure memo	109
13	Sunita Thakare, pancha on identification parade panchanama	113
14	Vishwajit Fartade, PSI	123
15	Shahin Khan, Investigating Officer	125
16	Baliram Rewatkar (PW14 is already marked as Exh.123 and therefore this witness is noted as Exh.123A for the purpose of convenience)	123A
17	Jaishree Gire	138
18	Sandip Choudhary	139
19	Vishwas Bhaskar, Investigating Officer	148
20	Karishma Pushpakar, friend of the victim	162
21	Sachin Uke, photographer	163
22	Gaurav Binkar	154

8

6. Besides the oral evidence, the prosecution placed reliance on report Exh.28, FIR Exh.29, CA Reports Exhs.31, spot panchanama Exh.35, seizure memo Exh.44, seizure memo of clothes of accused Shamshad Exh.47, seizure memo of clothes of accused Bablu Exh.49, letter to the executive magistrate for holding Test Identification Parade Exh.52, Test Identification Parade panchanama Exh.59, letter to the Medical Officer Exh.74, forensic medical examination of accused Shamshad Exh.75, forensic medical examination of accused Bablu Exh.76, letter to the Medical Officer Exh.78, medical certificate of victim Exh.79, prescription given by PW10 Dr.Durga Bang Exh.82, information as to the birth of the victim Exh.94A, birth certificate Exh.95, letter to obtain birth certificate Exh.96, letter to the CA Exhs.101, 102, and 104, seizure memo Exh.110, video analysis report Exh.130, arrest

panchanamas Exhs.149 and 150, seizure memos Exhs.151 to 154, and 158.

7. On the basis of the oral as well as documentary evidence, the prosecution claimed that it has proved the case against the accused persons. All the incriminating evidence is put to the accused persons in order to obtain their explanation regarding the evidence appearing against them by recording their statements under Section 313 of the CrPC. The defence of the accused persons is of total denial and of a false implication.

8. Heard learned Counsel Shri R.M.Daga for the accused (in Criminal Appeal No.173/2023), learned Senior Counsel Shri A.S.Mardikar for the accused (in Criminal Appeal No.283/2023), and learned Additional Public Prosecutor Shri A.M.Ghogre for the State. They have also taken me through the entire record.

9. Learned Senior Counsel for the accused submitted that, to prove the offence under Section 376(2)(i) of the IPC, the prosecution has to prove that the victim was below 18 years of age at the time of the incident. Though the mother of the victim has narrated her birth date as 28.11.2006, the birth certificate issued by the Municipal Authority, Nagpur shows contrary evidence. The registration number mentioned by the investigating officer is also not supporting the prosecution case. He further submitted that Exh.94 extract of birth certificate loses credibility as the registration number is different. The prosecution has to prove beyond reasonable doubt that the victim was below 18 of years of age by adducing cogent evidence.

Besides the evidence of PW3 the mother of the victim and PW11 Dr.Atikul Khan, as to the birth date of the victim, the prosecution placed reliance on the

11

evidence of the victim to prove that she was taken from the lawful custody of the parents by the accused.

The cross examination of the victim shows that though she was having an opportunity to resist the act of the accused persons by making hue and cry, when she was proceeding on the crowded road, she has not resisted the act of the accused who were taking her away. The evidence of the victim shows that when she was taken by the accused persons, at one place, they stopped for obtaining the parcel of Maggie and the victim was sitting on the motorcycle. She has not made any attempt to disclose the fact to the persons present near the shop.

The evidence of PW22 Gaurav Binkar who is Maggie stall owner also shows that the co-accused approached him for obtaining the parcel for a considerable period. The accused and the victim were

12

there. But, there was no attempt by the victim to raise voice against the accused as they have taken her forcefully.

The CCTV Footage and the photographs on record show that for some period, the victim was sitting on motorcycle between two persons and for some period, she was sitting at the last on the seat. At that time also, she never raised any alarm to save herself. The prosecution has made an attempt to show that she is not a normal person, but considering her conduct that immediately she has disclosed the incident to her mother means she is aware as to the act committed with her. Therefore, it cannot be said that she is intellectually disabled. Moreover, family members of the victim are sending her to drop tiffin of her father allowing her to visit her friend's house alone itself, which is sufficient to show that she was carrying her activities as a normal person. The entire

13

evidence on record sufficiently shows that the victim went along with the accused at her own.

He further submitted that as far as evidence as to the sexual assault is concerned, the same is not supported by the medical evidence as she specifically stated that she was forced to lie down on thorny surface, but she has not received a single injury. Admittedly, the injuries are not *sine qua non*, but in the light of the facts and circumstances of the present case, the injuries ought to have been there. The forensic evidence is also not supporting as no blood or semen is detected on clothes of the accused. Thus, the prosecution failed to prove the charges against the accused beyond reasonable doubt. Therefore, benefit will go to the accused.

10. Learned counsel Shri R.M.Daga, adopted the submissions of learned Senior Counsel Shri A.S.Mardikar

14

and also invited my attention towards the cross examination of the victim and submitted that the cross examination shows that the victim was taken from the crowded place. She has not made any hue and cry or attempted to save herself when she was knowing that the accused are taking her using force. The cross examination further shows that she halted along with the accused at the Chinese Stall approximately for an hour and the accused who was sitting behind her approached the stall owner for obtaining parcel. The spot was surrounded by many shops and people were there for a walk. The area is residential area, but the victim has not taken any efforts to inform anybody as far as forceful act of taking her is concerned. The victim has admitted during cross examination that at the time of incident, her age was 18 years old. In the light of the said submission, the prosecution failed to prove that she was child at the

15

time of the incident. The evidence of the victim further shows that at the relevant time, the accused persons have covered their faces by masks. Then, there was no opportunity for the victim to identify the accused. While conducting the test identification parade, Naib Tahsildar PW7 Satyajit Gotmare has not followed due procedure and conducted the test identification parade by taking help of police. The test identification parade is not substantial evidence and liable to be discarded. For all above these reasons, the judgment impugned in the appeals deserve to be quashed and set aside.

11. *Per contra*, learned Additional Public Prosecutor for the State submitted that the age of the victim is proved by the prosecution by examining PW3 the mother of the victim and PW11 Dr. Atikul Khan who has explained discrepancy as to the registration number. He specifically stated that though police have mentioned wrong

16

registration number, he has issued birth certificate on the basis of their record. It is further submitted that evidence of PW10 Dr.Durga Bang shows that the victim was not mentally sound and by taking disadvantage of the same, she was taken by the accused and subjected for the forceful sexual assault. The evidence of the victim corroborated by the medial evidence and immediate disclosure to her mother sufficiently establishes the case against the accused. Injury on the person of the victim is not *sine qua non*. The prosecution has established the charges against the accused and, therefore, no interference is called for.

12. The charges were framed against the accused under Sections 363, 376(2)(i)(j), and 376(D) of the IPC. To prove the charges, the prosecution has adduced the evidence of PW1 the victim, PW3 the mother of the victim, PW6 aunt of the victim, PW20 friend of the victim,

17

and PW22 Gaurav Binkar. To corroborate the version of the victim, another set of evidence adduced is the medical evidence by examining PW8 Dr.Yash Agrawal who examined the accused persons. PW9 Dr.Shreya Dahiwade examined the victim, and PW10 Dr.Durga Bang who treated the victim for her mental disability. Naib Tahsildar PW7 Satyajit Gotmare has conducted the test identification parade and PW13 Sunita Thakare acted as a pancha on the said test identification parade. PW2 Arun Awade, PW4 Mukesh Gajbhiye, PW5 Sanjay Khobragade and PW12 Amol Taiwade acted as panchas on various panchanamas. PW16 Baliram Rewatkar and PW21 Sachin Uke are photographers and PW18 Sandip Choudhary is the CCTV Technician. Whereas, PW14 Vishwajit Fartade, PW15 Shahin Khan and PW17 Jaishree Gire and PW19 Vishwas Bhaskar are police witnesses.

18

13. As per the allegations, when the victim was proceeding to her friend's house and was standing near Martin Nagar Church, the accused persons came on motorcycle and asked her to come along with them to eat noodles and took her forcibly by closing her mouth and taken her in a forest at Gorewada. Thus, as per the allegations, she was taken forcefully from the custody of her parents. The evidence of the victim shows that both the accused persons came on motorcycle when she was sitting near Martin Nagar Church and was waiting for her friend and took her on pretext to eat noodles on their motorcycle. During her cross examination, it came on record that the accused persons have covered their faces by masks and only their eyes were visible. For the first time, she has seen the accused. She has not sustained any injuries though the accused forcefully put her on the motorcycle. When she was taken on the motorcycle,

19

people were using the said road for proceeding towards Mankapur, Koradi and Jaripatka. The accused persons have not tied her hands and legs when taking her forcibly. The motorcycle was kept on motorcycle stand. When they stopped to obtain parcel of noodles, the customers were present on the noodles shop. There were many shops as well as people were present at the said spot. The area is residential area. People were using the said place where she stopped along with the accused. She has not informed to anybody that the accused persons are taking her forcibly. When she was taken by the accused on motorcycle and though there were many signals, she had not called anyone informing that the accused persons are taking her forcefully.

14. Section 359 of the IPC deals with the offence of “kidnapping” which is of two types: kidnapping from India and kidnapping from lawful guardianship.

20

15. In view of Section 361 of the IPC, whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

16. Thus, the prosecution has to prove that the victim girl was below 18 years of age at the relevant time. To prove the age, the prosecution mainly placed reliance on the evidence of the victim. She has stated that her birth date is 28th November. She has not narrated the exact year. During her cross examination, she admitted that at the time of lodging of the report, her age was 18 years old.

21

17. Besides the evidence of the victim, the evidence of PW3 mother of the victim shows that at the time of incident the victim was 14 years old and her birth date is 28.11.2006. During her cross examination, the date of birth is not challenged by the defence.

18. To corroborate the version of the mother of the victim, the prosecution has examined PW11 Dr. Atikul Khan who was serving in NMC as Medical Officer and holding the charge of the Sub-Registrar, Births and Deaths Registration Department since November 2018. As per his evidence, he received information in prescribed form i.e. Form No.1 regarding birth of child from the Government Medical College. As per the said information, the child is born in the Government Medical College and Hospital and name of parents was mentioned in the said form. On the basis of the said information, the entry was taken in the municipal record. He has

22

produced on record original register and extract of the same. Exh..94 is information received from the Government Medical College and Hospital, Nagpur as to birth of the victim. The name of the parents is mentioned in the said information. On the basis of the said information, the birth of the victim was recorded as 26.11.2005. The said birth date is registered on 29.12.2005. The place of birth is mentioned as the Government Medical College and Hospital. The format received by the Municipal Corporation from the Government Hospital also discloses date of birth as 28.11.2005.

19. Learned Senior Counsel vehemently submitted that PW11 Dr.Atikul Khan has admitted during his cross examination that registration number mentioned in the letter issued by the investigating officer and registration number mentioned in the certificate is different. The

23

explanation given by PW11 Dr. Atikul Khan shows that the registration shown in the letter is different than documents provided by them. He further stated that he has issued birth certificate on the basis of the record available with the Municipal Corporation. The birth entry was taken on the basis of the information received from the Government Medical College and Hospital.

20. Thus, though the mother of the victim girl has narrated the birth date of the victim as 28.11.2006, but the documents on record sufficiently show that birth year of the victim is of year 2005. Admittedly, the mother of the victim is not cross examined on the age part.

21. PW11 Dr. Atikul Khan though cross examined, nothing incriminating is brought on record which would shatter the evidence of PW11. Admittedly, no radiological examination was carried out. The birth entry was taken

24

by the official of the Municipal Corporation in view of the provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969.

22. As per Rule 9 of the Maharashtra Births and Deaths Registration Rules 1976, this certificate is issued by the Sub Registrar acting under the provisions of the Registration of Births and Deaths Act, 1969.

23. Section 7 of the said Act thereof deals with appointment of registration for each local area comprising the area within the jurisdiction of a municipality, panchayat or other local authority or any other area or a combination of any two or more of them. It is duty of the Registrar to register every birth which took place in his jurisdiction. This Act mandates that the Registrar should discharge his duties carefully.

25

24. Section 8 of the said Act mandates that each head of the house to report birth in the family to the Registrar.

25. As per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969 the birth certificate as such is issued by the public officer and it is a document forming record of the acts of the public officer and, therefore, the same is a public document within the meaning of Section 74 of the Indian Evidence Act and the same is admissible in evidence in view of Section 77 of the Indian Evidence Act. Section 17 of the said Act provides for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or other authorized Officer. Section 17 of the said Act provides that such extract shall be admissible in evidence for the purpose of proving birth or death to which the entry relates. The birth certificate is in fact the extract of Birth Register in respect of entry of birth of the victim child and

26

as such, admissible in evidence. Section 35 of the Evidence Act makes it clear that if entry is made by public servant in the official book in discharge of his official duty, such entry becomes the relevant fact and admissible in evidence. Section 35 of the Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law.

27

26. It is, thus, clear that the birth certificate issued by the public officer or by the competent authority under the provisions of the Registration of Births and Death Act and the Rules framed thereunder is required. The birth certificate of the victim girl is issued in compliance with the above said provisions.

27. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 reads thus:

“Rule 12(3) : In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) i. the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

ii. the birth certificate given by a corporation or a municipal authority or a panchayat;

28

iii. the matriculation or equivalent certificates, if available;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

28. The Hon'ble Apex Court in the case of **Jarnail Singh vs. State of Haryana, reported in 2013 ALL MR (Cri) 2946** observed that even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of

29

the prosecutrix. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is

30

available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat.

29. Thus, the birth certificate issued in the present case is in compliance with the provisions of the Registration of Births and Deaths Act and therefore the evidence is acceptable.

30. Thus, the evidence as to the birth date of the victim and as to her age is probable and proved by the prosecution. The evidence shows that on the day of the incident she was below 18 years of age i.e. of 15 years.

31. Now, let us examine the evidence of the victim girl as to she was taken by the accused persons from lawful guardianship of her parents. Before referring her

31

evidence, it is necessary to refer the evidence of PW10 Dr.Durga Bang examined vide Exh.81. As per her evidence, the victim is intellectually disabled child with behaviour problem. Her IQ is at the border line of intellectual disability. It is above 70%. Then it is border line intellectual disability. The evidence of the mother of the victim shows that the victim is not the normal child.

32. In the light of the above evidence, if the evidence of the victim is considered, it shows that on the day of the incident, she was proceeding towards her friend's house and, therefore, waiting for her friend near Martin Nagar Church. At the relevant time, both the accused approached her and asked her to come along with them to eat noodles and she went along with them. They obtained parcel from one place and, thereafter, took her in the forest and subjected her for sexual assault. Her cross examination shows that the boys were unknown to

32

her. They were covering their faces by putting masks at the relevant time and only the eyes of the accused persons were visible. When they stopped to obtain parcel, the accused who was sitting behind her on the motorcycle went to the stall to take the parcel and she was sitting on the motorcycle. She further admitted that there were many shops and people were also there. She has not made an attempt to disclose the fact that she is taken by the accused by force. After obtaining parcel also, they proceeded on motorcycle and there was an opportunity for her to raise an alarm, but she has not raised alarm and went along with the accused persons.

33. Thus, the submissions of learned Senior Counsel and learned counsel for respective accused is that though the victim was having an opportunity to make hue and cry, she has not made the same and, therefore, it can be inferred that she at her own went along with two boys. It

33

is further submitted that as far as abnormality is concerned, only evidence of PW10 Dr.Durga Bang is not sufficient to show that she is not normal person. On the contrary, the evidence on record shows that she was discharging all her domestic duties as per the normal person. She was sent to drop the tiffin of her father and she is allowed to visit her friend's house alone and, therefore, the same itself is sufficient to show that she is a normal person. Even, the prescription given by PW10 Dr.Durga Bang nowhere shows the type of disability she is suffering from. The alleged incident has occurred on 12.11.2020 and the prescription is of 3.7.2020. She disclosed the incident immediately to her mother which sufficiently shows that she is aware about the act committed with her. Moreover, the evidence of the victim and her friend PW20 is contradictory. As per the evidence of the victim, she had been to near Martin Nagar Church

34

to meet her friend and was sitting there. Whereas, the evidence of PW20 shows that the victim was about to visit her house on the day of the incident, but she had not visited. It is further submitted that there are several kinds of tests to calculate IQ. PW10 Dr.Durga Bang has not clarified which test is conducted on the victim to ascertain her IQ. The problem the victim suffering from is only to the extent of behaviour problem.

34. Thus, perusal of the evidence of the victim, her mother, and PW10 Dr.Durga Bang shows that the victim was facing the behaviour problem and her IQ was at the border line. The evidence further shows that she knows consequences of the act committed with her. She is also aware as to what action to be taken if she is taken forcefully by somebody. Despite the opportunity she was having, she has not taken the help of any other person, if she was taken forcibly. Moreover, the evidence as to the

35

identity of the present accused persons is also suspicious as the victim states that the accused persons were covering their faces by putting masks and only their eyes were visible.

35. The evidence of Naib Tahsildar PW7 Satyajit Gotmare, who conducted the test identification parade, shows that he has asked the Superintendent of Central Prison to select the dummy persons. The panchas were also selected by the police. The test identification parade was also held without following due process. He specifically admitted that 12 dummy persons were different in appearance. He had not enquired with the pancha witnesses whether they have seen the accused persons earlier at any time. He had not asked the police whether for identification of the accused persons they have taken CCTV Footage. Out of 10 dummies, 8 dummies were of similar age, whereas two dummies were

36

of higher age. He has not enquired whether any photographers were shown to the witnesses before the test identification parade. The evidence of the test identification parade is to be appreciated in the light of the fact that the victim especially stated that the faces of the accused person were covered by masks and only eyes were visible. She has not narrated any description of the accused persons.

36. In the light of the above evidence, the evidence on the test identification parade is a weak type of evidence.

37. The identification parade belongs to the stage of investigation and there is no provision in the CrPC which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. It is not substantive evidence and these parades are essentially governed by Section 162 of the CrPC. It is well

settled that the substantive evidence is the evidence of identification in court and test identification parades provide corroboration to the identification of the witness in the court, if required. The identification of the accused either in test identification parade or in court is not *sine qua non* in every case, if from the circumstances available on record the guilty is otherwise established.

38. To prove the offence under Section 363 of the IPC, “taking or enticing” away a minor out of keeping of lawful guardian is an essential ingredient of the offence of “kidnapping.”

39. The definition of Section 361 of the IPC shows that “taking” or “enticing” away a minor out of the keeping of lawful guardian is of the offence of “kidnapping”. What amounts to “taking” is dealt with by the Hon’ble Apex Court in the case of **S.Varadrajan vs. State of Madras**,

reported in AIR 1965 SC 941 wherein it is held that when the victim girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is minor college student) herself telephoned to the accused to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord and the accused takes her to various places and ultimately to the Sub Registrar's Office where they got an agreement to marry registered and there is no suggestion that this was done by force or blandishment or on the part of the accused but it is clear from the evidence that insistence of marriage came from her side. The accused by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. The fact of her accompanying the accused is quite consistent with her own desire. there is a distinction between "taking" and

allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. Where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person, the accused cannot take her away from keeping of her lawful guardianship. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

40. In the light of the aforesaid legal position, if the evidence of the victim is appreciated, it shows that she

went along with the boys. Thus, ingredient “taking” is not established by the prosecution. The evidence on test identification parade is also not acceptable in the light of the fact that the victim specifically stated the faces of the boys were covered with masks and she has not given any description of the persons who have taken her and especially when they are unknown to her.

41. The accused persons are further charged for the offence under Section 376(2)(n)(j) of the IPC and under Section 4 of POCSO Act.

42. The evidence adduced by the prosecution can be divided into three parts. First part is, the evidence of PW1 the victim vide Exh.27, PW3 mother of the victim vide Exh.42, PW6 aunt of the victim vide Exh.48A, PW20 friend of the victim vide Exh.162 and PW22 Gaurav Binkar vide Exh.165, the Maggie stall owner.

41

43. If the evidence of the victim is taken into consideration, it shows that two persons, on the pretext of having Maggie at the Maggie stall, have taken her and obtained parcel and took her at Gorewada Forest and administered beer and subjected her for forceful sexual assault. She testified that they forced her to lie down on thorny surface in jungle and subjected her for the forceful sexual assault and again brought her near the Martin Nagar Church and dropped her there. She specifically stated that the accused persons have done this act by disrobing her. She further stated that when she was crying, her mouth was closed and she was threatened. This evidence, if considered, in the light of the cross examination, the cross examination shows that the accused persons forcibly took her on their motorcycle and she could not see their faces clearly and also could not clearly identified. She further stated that though she

42

refused, the accused took her for having noodles. Though she refused them, both accused persons forcibly took her on motorcycle. They used force for putting her on their motorcycle. Though they forcibly took her on their motorcycle, she has not got any scratches. She admitted that Martin Nagar and Martin Nagar Church are crowded locality. The people were always going from that locality towards Mankapur, Koradi, and Jaripatka. The ring road is also passing towards Gorewada from that locality. The accused persons have not tied her legs and hands when they took her on motorcycle. The people have seen this incident when the accused persons forcibly took her on their motorcycle. The accused initially took her on noodles shop and, thereafter, at Gorewada. The noodles shop was near Dayanand Park. When they reached at Dayanand Park, one of the accused got down from the motorcycle for obtaining parcel and the other accused

43

kept his motorcycle on motorcycle stand. She was also with the accused who was driving the motorcycle. The accused who was sitting behind her got down for purchasing the noodles. One hour was required for obtaining parcel. One or two persons were on the noodles stall. There were other shops and people were there who were taking walk. It is a residential area. She specifically admitted that she has not disclosed to anyone informing that the accused persons are forcibly taking her. Her evidence further shows that they proceeded from Martin Nagar to Dayanand Park and Jaripatka and there were many traffic signals and their motorcycle passed by observing the signals. She has not called anyone by informing that the accused persons are forcibly taking her on motorcycle. Her cross examination further shows that they proceeded to Gorewada by ring road which is traffic road. As to the incident, her evidence shows that the

44

accused persons subjected her for forceful sexual assault. She was forced to lie down on thorny surface, but there were no scratches on her hands. At the time of purchasing noodles, she was sitting in middle on the motorcycle.

44. Thus, her cross examination shows that she was taken by the accused persons from the traffic road, but she has not made any hue and cry though she was taken forcefully. Though she was forced to lie down on thorny surface, no injuries are found on her person. The evidence of the victim further shows that registration number of motorcycle is not visible and she is shown to be between two persons. Thus, the evidence on record sufficiently shows that she proceeded along with the accused persons on a traffic road. They have also halted at noodle stall approximately for one hour. Though the people were there, she has not disclosed to any of them

45

that she is taken forcefully by the accused persons. The faces of the accused persons were covered by masks. Though they observed signals, she has not made any hue and cry to get help. She has also not stated that she was called for the test identification parade to identify the accused persons when identification parade was held.

45. To corroborate the version of the victim, the prosecution has examined PW3 the mother of the victim, who has stated that on the day of the incident, she had been to the house of mother-in-law and she came to know that the victim went to meet her friend, but as she did not return, she searched for her. When they were returning, they met the victim near Martin Nagar Bridge and she observed that the victim was covered with dirt and as soon as she saw her mother, she disclosed that she was subjected for the sexual assault. PW6 aunt of the victim, was also along with her. The victim has also narrated the

46

history to the medical officer when she was medically examined. Her cross examination shows that the victim is abnormal and mental patient since her childhood. The medical treatment was also given to the victim. She disclosed that the victim became annoyed because of her mental abnormality. She disclosed the police about this mental ailment. Her cross examination further shows that the dust and grass were found on her scarf. The victim has narrated the description of the accused persons to her. She has also not narrated as to the description of the motorcycle.

46. PW6 is the aunt of the victim with whom the victim was residing. As per her evidence, on 12.11.2020, she was in her office at about 4:00 pm to 4:30 pm. She received call from her mother informing that the victim had been to the house of her friend and did not return back. Immediately, she left the office and searched the

47

victim. She also visited the house of her friend and her friend was not at home. On telephonic call, the friend of the victim informed that the victim did not visit her house. Her cross examination also shows that the victim is suffering from mental disorder, but they have not paid any attention to her and since last one year treatment was given to the victim. She specifically admitted that the victim is not of unsound mind or lunatic, only she becomes annoyed immediately.

47. To corroborate the version of the victim that she left the house to visit her friend's house, the prosecution examined PW20 friend of the victim. Her evidence shows that the victim is residing at Martin Nagar and she was residing in Krushi Nagar. As she was not keeping well on the day of the incident, she was at home. She received phone call of the victim and the victim disclosed to her that she is coming to her house. But, the victim did not

48

come to her house. At about 4:00 pm, she received a call from grandmother of the victim and she explained that the victim did not come to her house. Her cross examination shows that though the victim informed her that she is coming to her house, she did not come.

48. The evidence of PW22 Gaurav Binkar, who is Maggie stall owner, is only to the extent that his Chinese Stall is in front of Dayanand Park. His cross examination shows that on the Chinese Stall, there used to be crowd from afternoon till night and various customers are visiting his stall including young boys and girls.

49. On the basis of the above said evidence, the prosecution claimed that the evidence of the victim consistently shows that she left the house to proceed to her friend's house, however she was taken forcefully by the accused persons and was subjected for the forceful

49

sexual assault. Whereas, it is submitted by the defence that the evidence of the victim itself is not inspiring the confidence on the count that there is variance in the evidence of victim and PW20 the friend of the victim. As per the evidence of the victim, she was waiting for her friend. Whereas, PW20 the friend of the victim stated that the victim informed by telephonic call that she is visiting her house, but she did not come. The evidence of the victim shows that she was taken in the forest and forced to lie down on thorny surface, but not a single scratch was found on her person.

50. To corroborate the version of the victim, the prosecution further placed reliance on the medical evidence by examining PW8 Dr.Yash Agrawal. PW8 Dr.Yash Agrawal has examined both the accused persons and testified that there was no sign of intoxication by them. No injuries are found on their person. He collected

the samples. PW9 Dr.Shreya Dahiwade, is another Medical Officer examined vide Exh.77. As per her evidence, she was working in the Government Mayo Hospital. On 12.11.2020, the victim was referred to her by Jaripatka Police. The victim narrated the history of sexual assault. On her examination, there was no external injury. Hymenal tear was at 5:00 to 7:00 O'clock position. She collected the samples. Her cross examination shows that history narrated by the victim is, two unknown persons have committed sexual assault on her. The victim is mentally disturbed. She further admitted that the victim has narrated different history to her family members and different history to her. She has not suggested any IQ Test of the victim. It further shows that at the time of the incident, the victim was having her menstrual cycle. She stated during cross examination that it is not necessary that injury should occur every time

51

if any one is lying on thorny and hard surfaces. She further admitted that she has not mentioned specifically in her report regarding reasons of hymenal tear. She has also not mentioned whether tear was fresh or old. The possibility of hymenal tear because of cycling is also admitted by her. She further admitted that in rare case, the hymen may have tear at 5:00 O'clock to 7 O'clock position. She has not given final opinion. Thus, the cross examination of this witness shows that there are other reasons for hymenal tear. No injury was found on labia minora or labia majora. At the time of the alleged incident, the victim was having her menstrual cycle.

51. The CA Report Exh.31 shows that vulva swab and vaginal swab contain human blood of Group "B". As per the CA Report Exh.31/5, the full jeans pant and nicker of the victim bear human blood.

52

52. Another set of evidence, on which the prosecution placed reliance, is CA Report Exh.31, which shows that Exh.3 underwear of Shamshad bears human semen, but the blood group is not detected.

53. As per the prosecution case, the accused persons were unknown to the victim. The victim has also narrated not only during her chief examination but also during her cross examination that the accused persons were not known to her. She has not described the description of the accused while lodging the report and her mother also admitted that the victim has not described the description of the accused persons to her.

54. In the light of the above facts, the prosecution placed reliance on evidence of Naib Tahsildar PW7 Satyajit Gotmare, examined vide Exh.51, who testified that he received letter from Jaripatka Police Station

53

requesting him to conduct test identification parade. As per his evidence, he received letter from Jaripatka Police Station to hold test identification parade on 2.12.2020. The letter is pertaining to conducting of test identification parade of the accused. He issued letter to the police station requesting them to serve summons to the complainant for the purpose of identification parade of the accused persons. The said letter is at Exh.53. He also issued letter to the Jaripatka Police Station to keep available pancha witnesses from the Government Department. He received letter from Jaripatka Police Station informing that the Government officials are not available to act as pancha. He had issued summons to the complainant to remain present. The summons is duly served on the victim which is signed by her, Exh.56. The date 10.12.2020 was fixed for conducting test identification parade. Accordingly, he conducted test

54

identification parade in presence of pancha witnesses. The jail authority has provided 123 dummy persons having similar appearance with the accused persons, then he called the victim with the help of lady police constable. He directed the Jail Authority to keep all dummy persons with two accused. He informed the accused that they can occupy the place as per their choice in the row. The accused persons were asked to remove their masks. The victim identified accused No.2 Bablu who was standing at Sr.No.3 and accused No.1 Shamshad who standing at Sr.No.11. Accordingly, he prepared memorandum. He admitted during cross examination that the police have brought pancha witnesses and complainant before the Jail Authority for conducting test identification parade. There is no entry which was referred by him in memorandum No.2 particularly in memorandum No.1 of the test identification parade. He further admitted that though in

55

memorandum form No.2 there is specific column No.2 where he had stated that the victim has identified the accused persons in test identification parade, in memorandum No.1 there is no entry referred by him. It further shows that 12 dummy persons were of different appearance. He had not enquired with the pancha witnesses whether they have any seen the accused persons earlier at any time. Personally, he has not selected dummy persons. Out of 10 dummies, 2 were of different descriptions. He has not mentioned the height and weight of dummy persons. On the basis of the said cross examination, defence attempted to bring on record that Naib Tahsildar PW7 Satyajit Gotmare has not followed due process while conducting the test identification parade.

55. The next part of the evidence is as to the various panchanamas. The evidence of PW2 Arun Awade, acted

56

as pancha on spot panchanama, shows that the spot is shown by the victim. At the spot, they have seen an empty liquor bottle and other articles. According, panchanama Exh.35 was drawn. He stated that whatever he saw on the spot is narrated to the police and the police recorded the same.

56. PW4 Mukesh Gajbhiye, is pancha on seizure of nail samples and other samples of the victim. The panchanama is at Exh.45.

57. PW5 Sanjay Khobragade, acted as a pancha on seizure of clothes of accused No.1 and accused No.2. He has not supported the prosecution case and stated that panchanama was ready and nothing was written in his presence. He is unable to recollect panchanama as to the motorcycle.

57

58. PW12 Amol Taiwade, is the pancha on seizure of Pen-Drive whose evidence is only to the extent that one Pen-Drive was seized in his presence.

59. PW18 Sandip Choudhary, is the CCTV Technician, who testified that he completed his education in Computer Technology. There are 3600 cameras of CCTV fixed in Nagpur at various places. The CCTV reflects the traffic as well as depicts scenario of road and square. He is professional supervisor in Smart City Microscope Company. The footage was asked by the police authority pertaining to New Chanduram Chowk, Dayanand Park on 12.11.2020 between 15:30 till 15:45. The police provided Pen-Drive along with letter. He has obtained CCTV Footage and handed over the same to the police. His cross examination shows that there is no specific timing given to him by the police. On the basis of request made by police, he has taken footage in Pen-Drive which

is maintained by CISCO Company. The folder No.4611 in the Pen-Drive reflects one video file and files regarding photos. The video file at serial No.1 is given name New Dayanand Park. The photographs of image pertaining to new Dayanand Park and particularly at the time on 12.11.2020 at about 15.31.29 (i.e. 3:00 pm and 31 minutes and 29 seconds). The image No.3 is pertaining Pagalkhana Square of 15:46.28. The four images and video files were handed over to the police in Pen-Drive taken from computer where the same are saved. He admitted that he has not annexed certificate of his qualification at the time of handing over the certificate.

60. Perusal of the video files and photographs shows that motorcycle is proceeding and two boys are riding on the motorcycle and one girl is sitting between them. As far as faces of the accused persons are concerned, the same are not visible from the CCTV Footage.

61. PW21 Sachin Uke, the photographer, has obtained photographs of the victim girl and he has taken photographs of the victim by all angles.

62. The last set of the evidence is of the police witnesses. PW14 Vishwajit Fartade, is the police officer who has recorded FIR of the victim. He has also obtained samples brought by the lady police constable who was along with the victim during medical examination.

63. PW15 Shahin Khan, is lady police constable, who took the victim for medical examination and obtained samples from the medical officer and handed over the same to PW14 Vishwajit Fartade.

64. PW17 Jaishree Gire, is the investigating officer who carried out the investigation partly. She obtained birth certificate of the victim and also issued letter to Magistrate for conducting the test identification parade

and filed chargesheet in the court. She admitted that she has not referred the victim to ascertain her mental status to show that she was abnormal.

65. PW19 Vishwas Bhaskar, is another investigating officer who has narrated about the investigation carried out by him. During the cross examination PW19 Vishwas Bhaskar admitted that Exh.21 was recorded on the basis of statement given by the victim. He further admitted that Pen-Drive was purchased by him for collecting CCTV Footage. He has seized the said Pen-Drive which was handed over to Technician PW18 Sandip Choudhary for copying the CCTV Footage. He admitted that Pen-Drive Exh.157 bears receipt No.1628 having Sr.No.619659129743. Whereas, Pen-Drive No.200853431W is at Exh.110. He admitted that image reflects motorcycle, but not shown number on the plate. The colour of the motorcycle is not clearly shown. The

61

model of the motorcycle is also not shown. Two male members and one female member having scarf on her face were sitting on the motorcycle. He admitted that clear faces of persons do not show. It also shows that people are walking on the road. There are many motorcycles on the road. Date of videos as 12.11.2020 and timing as 154628 are shown. He has not recorded statement of any pedestrians.

Thus, his cross examination shows that faces of persons who are proceeding on the motorcycle are not visible.

66. On appreciation of the evidence, it shows that the entire case is based on the evidence of the victim.

67. It is well settled that evidence of victim is to be appreciated and accepted if it inspires confidence and if it inspires confidence, sole evidence of victim is sufficient to

warrant conviction against the accused. It is also well settled that evidence of victim of sexual assaults stands on par with evidence of an injured witness. The evidence of the victim of sexual offence is entitled to great weight and corroboration is not required if it inspires confidence. In physical assault case, there may be evidence of eyewitnesses, but such type of evidence cannot be expected in sexual assault case. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of crime. The Evidence Act nowhere states that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and appreciates the evidence, Illustration (b) of Section

63

114 of the Indian Evidence Act which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.

68. In the light of above well settled legal principles, the evidence of the victim is to be appreciated. The prosecution has come with a case that the victim is having intellectual caution of borderline and, therefore, PW10 Dr.Durga Bang, who has treated the victim from last one year, was examined. Her evidence is only to the extent that the victim was having behaviour problem. PW3 the mother of the victim and PW6 aunt of the victim nowhere stated that the victim is of unsound mind or lunatic. On the contrary, the evidence shows that she was doing her day to day activities as normal person does it. She was

64

sent to drop tiffin of her father and was also allowed to visit her friend's house at her own. The evidence is only to the extent that she is having behaviour problem. Coming to her evidence, as to her incident, it shows that she was proceeding to her friend's house and the accused approached her and asked her to come along with them to eat noodles. The accused were unknown to her. As per her evidence, they took her forcefully. They stopped near noodle stall approximately for one hour, but she has not made any hue and cry. Her cross examination shows that the accused sitting behind her on the motorcycle went to bring parcel. There were other stalls and the people were walking on the road. She has not stated that the accused persons brought her forcefully. Her evidence further shows that she was taken from crowded road. The people have also seen the accused forcefully putting her on the motorcycle. She has not made any hue and cry

65

and not called any person for her help. Not only her evidence but also the evidence of CCTV Footage and investigating officer PW19 Vishwas Bhaskar shows that the alleged incident has occurred at a crowded road.

Thus, it shows that though she was having opportunity, she has not made any hue and cry and has not taken the help of any person.

The evidence further shows that the accused persons have covered their faces by masks and only their eyes were visible. The evidence of PW3 the mother of the victim and PW6 aunt of the victim is regarding disclosure to them immediately after the incident by the victim. The evidence also shows that the victim was fully aware about the act committed with her.

Thus, her evidence shows that though she travelled along with the accused and her hands and legs were not

tied, she has not made any hue and cry and not shown any displeasure though she was having an opportunity.

69. The evidence of the victim is to be appreciated in the light of the medical evidence. Her evidence shows that she was taken in a forest area and forced to lie down on thorny surface. Though she was forced to lie down on thorny surface, not a single scratch was found on her person. Only injury was found that hymen was torn at 5:00 O'clock to 7:00 O'clock position. Whether hymenal tear was fresh or old is not disclosed though the victim was examined immediately after the incident. As per the prosecution evidence, the victim was having her menses at the time of incident and her nicker and jeans pant were having blood stains. But, the spot panchanama nowhere shows finding of any blood stains at the spot of the incident. Though her clothes are seized during the investigation, the clothes nowhere disclose any grass or

soil on the said clothes. Exh.31/5 is the analysis of her clothes which shows human blood on nicker and jeans pant and reason appears to be due to the mensus. The accused persons are also examined on 14.11.2020. No blood stains are found on their person.

70. Admittedly, injuries are not *sine qua non*, but when an incident occurs at a hard and rough surface, and especially when victim states that she was forced to lie down on thorny surface and two persons subjected her for forceful sexual assault, absence of injuries on the person of the victim assumes importance. Rape is a crime and not medical condition. Rape is a legal term. The only statement that can be made by medical officer is that there is evidence of recent sexual activity.

71. The evidence of PW9 Dr.Shreya Dahiwade also nowhere discloses that it was the recent sexual activity

with the victim. In every case, absence of physical injuries does not negate commission of rape, but when the circumstances show that the alleged incident has taken place at hard and rough surface especially by evidence of victim that it occurred at thorny surface, the absence of injuries assumes importance.

72. On scrutiny of the evidence, it reveals that not a single scratch was found on the person of the victim and, therefore, the evidence of the victim requires corroboration.

73. The prosecution has adduced evidence of Naib Tahsildar PW7 Satyajit Gotmare. Criminal Manual, at page No.1.20, speaks about procedure for holding identification parade. It shows that an executive magistrate should remember that he is person who conducts parade and he will be in full and sole charge of

the entire proceedings. The Executive Magistrate/Honorary Magistrate should first acquaint himself, very briefly, with the facts of the case and find out who is to be put in the parade for identification and who are the witnesses to be called up for identification. The parade should be arranged in a room or a place which is such that the identifying witnesses, as well as the persons connected with the Police, should not be able to look into it. For the identification parade of one accused, there should be at least half a dozen persons placed in the parade. Not more than two accused should be placed in any single identification parade. The executive magistrate shall choose dummy persons identical with the personality of the suspected accused who is to be identified.

74. Thus, the scrutiny of the evidence of Naib Tahsildar PW7 Satyajit Gotmare shows that he has not followed due

70

process while conducting the test identification parade. He has not given proper instructions to the accused persons and panchas are also not selected by the executive magistrate. The identification has by itself no independent value. During the investigation of a crime committed by persons unknown to the witnesses, the persons arrested on suspicion of their complicity in the crime have got to be confronted by the investigating authority with the witnesses so that they can find out whether they are the persons who committed the crime or not. Before the investigating authorities send up a case to Court, they must be satisfied that the persons arrested by them are the persons accused of having committed the crime. The purpose of conducting a test identification parade is that persons who claim to have seen the offender at the time of the occurrence identify them from amongst the other individuals without tutoring or aid

71

from any source. A test identification parade should ordinarily be conducted soon after the arrest of the accused, so as to preclude a possibility of the accused being shown to the witnesses.

75. The alleged incident has taken place on 12.11.2020. The accused persons are arrested on 14.11.2020. The test identification parade was held on 10.12.2020 approximately after one month.

76. Thus, test identification parade is also not held immediately after the incident. When the evidence of victim itself shows that the accused were covering their faces by masks, question is whether she was having any opportunity to see the accused. The prosecution evidence nowhere shows that at any point of time the accused removed their masks and the victim was having an opportunity to see their faces and, therefore, she was able

72

to identify their faces. The test identification parade under Section 9 of the Evidence Act is not substantial evidence but it is only corroborative evidence. The purpose of holding a test identification parade during the stage of investigation is, firstly, to ensure that the investigating agency is proceeding in the right direction where the accused is unknown and, secondly, to serve as a corroborative piece of evidence when the witness identifies the accused during trial. The evidence of identification merely corroborates and strengthens the oral testimony in Court which alone is the primary and substantive evidence as to identity.

77. The evidence of the test identification parade is specifically to be appreciated in the light of fact that the victim has admitted during her cross examination that faces of accused persons or his face are not shown in

73

video footage. The faces of the accused were covered by masks.

78. Thus, nothing is on record to show that the victim was having an opportunity to see faces of the accused neither she has given description of the accused immediately after the incident.

79. In the present case, the evidence of the victim shows that she was taken by the accused persons on motorcycle forcefully, but she has not made any attempt to get any help from anybody though she was having an opportunity. The medical evidence also not corroborative as no single injury was found on her person though she was forced to lie down on thorny surface and the accused persons subjected her for sexual assault. The clothes of the victim analyzed by the Chemical Analyzer nowhere show any soil or grass on her clothes. The seizure

panchanama also nowhere discloses any forensic articles on the clothes of the victim. The admission of PW9 Dr.Shreya Dahiwade shows that history narrated by the victim to her and her parents is different. The Chemical Analyzer's Report shows blood stains on her clothes, but no blood stains are found at the spot of the incident. Though she was forcefully taken by the accused persons, not a single scratch was found on her person. The evidence of the victim shows that she was waiting for her friend. Whereas, the friend of the victim stated that the victim informed her by telephonic call that she is coming to her house and not reached there, which creates doubt. The evidence of CCTV Footage is also not helpful as the investigating officer has specifically admitted during his cross examination that faces of the persons proceeding on motorcycle are not visible. The victim has also admitted the same. Merely because semen stains were found on

the undergarments of the accused No.1, the same is not sufficient to connect him with the alleged offence as blood group of semen stains is not analyzed.

80. The legal position, therefore, is, quite unambiguous, that evidence of prosecutrix, in a case of rape, is ordinarily to be believed, and may form sole basis for conviction, unless cogent reasons, for court to be hesitant in believing statement at its face value, and to seek corroboration thereof, exist.

81. In the present case, the victim's evidence is neither corroborated by the medical evidence nor by the other circumstantial evidence. The accused person were unknown to her when their faces were covered and her evidence nowhere shows that she was having an opportunity to see faces. The identification during the test identification parade is also not helpful to the

76

prosecution to connect the accused with the alleged offence. Though she immediately disclosed the incident to her mother, she has neither described the description of the accused persons nor described description of the motorcycle. She has halted at the noodle stall wherein other persons were there and she was having an opportunity to disclose the act of the accused persons. However, she has not disclosed the same. Though she was subjected for forceful sexual assault by two persons by forcing her to lie down on thorny surface and she has not received a single scratch on her person, when she specifically stated that she was disrobed by the accused persons, the same falls short to inspire confidence about her evidence.

82. In the light of the above said facts, independent corroboration to the evidence of the victim was required. The evidence of the victim is not corroborated by the

77

independent corroboration. When evidence of person like victim is appreciated, if it inspires confidence, independent corroboration is not required, but evidence of such nature, like in the present case, adduced by the prosecution requires independent corroboration, which is absent in the present case.

83. In the light of the above discussion, learned Judge of the trial court has not taken into consideration all these aspects and, therefore, judgment impugned in appeals calls for interference as the evidence of the victim falls short for inspiring confidence.

84. In this view of the matter, I proceed to pass following order:

ORDER

(1) The Criminal Appeals are **allowed**.

78

(2) The judgment and order dated 30.1.2023 passed by learned Extra Joint District Judge and Additional Sessions Judge, Special Court No.2 (POCSO), Nagpur in Special POCSO Case No.8/2021 is hereby quashed and set aside.

(3) The accused persons are acquitted of offences for which they were charged.

(4) The accused persons be set at liberty forthwith, if not required in any other case.

(5) Fine amount, if paid, be refunded to the accused persons.

Appeals stand **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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