2026:BHC-AUG:54617

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.295 OF 2025

Sharad Bhiva Ahire (Thakare)
Age: 21 years, Occu.: Labour,
R/o. Bhendwa Nala, Near Water Tank,
Dondaicha Road, Shahada, Tq. Shahada,
Dist. Nandurbar. .. Appellant

Versus

1. The State of Maharashtra
Through Police Station Officer,
Shahada, Tq. Shahada, Dist. Nandurbar.

2. X.Y.Z. .. Respondents

...

WITH

CRIMINAL APPEAL NO.666 OF 2026

Suraj @ Suresh s/o Uddhar Vasave (Bhil)
Age: 26 years, Occu.: Labour,
R/o. Bhendwa Nala, Near Water Tank,
Dondaiyacha Road, Shahada .. Appellant

Versus

1. The State of Maharashtra

2. X. Y. Z. .. Respondents

...

Mr. Parag P. Shahane, Advocate for the appellant in Criminal Appeal No.295 of 2025.

Mr. Shaikh Nasimoddin Rafiyoddin, Advocate for the appellant in Criminal Appeal No.666 of 2026.

Mr. S. M. Ganachari, Advocate for the respondent/State in both the matters.

Ms. Divya P. Khandelwal, Advocate for respondent No.2 (Appointed).

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 26.10.2026
Pronounced on : 04.11.2026

JUDGMENT :-

1. Both above appeals are directed against the judgment and order dated 05.02.2024 passed by the learned Additional Sessions Judge, Nandurbar in Special Case No.66 of 2020, thereby convicting all three accused for offence under Sections 376 (2)(j)(l), 376-D read with Section 34 of the Indian Penal Code [IPC] and under Section 5(g)(k) punishable under Section 6 of Protection of Children from Sexual Offences Act [POCSO Act].

BRIEF FACTS OF THE PROSECUTION CASE

2. In brief, case of prosecution in trial Court was that, victim, a mentally retarded girl, aged 16, went missing and was searched and finally, brother of the victim learnt that, victim was followed by accused since 9.30 p.m. and PW1 had seen them going towards Sarangkheda road. Victim was spotted beneath the bridge and accused persons were seen fleeing from the spot. Victim reported that, three persons made her lie down, touched her private parts and had sexual intercourse with her. Mother lodged report thereby setting law into motion. Registered crime was investigated and three accused

persons were charge-sheeted and tried by learned Additional Sessions Judge/Special Judge, Shahada, who, on appreciating oral as well as documentary evidence adduced by prosecution, accepted the case of prosecution and convicted accused including both appellants, who are before this Court, for above charges and sentenced them to suffer rigorous imprisonment for ten years and twenty years respectively and to pay fine. Said judgment is now the subject matter of present appeals.

BRIEF ACCOUNT OF EVIDENCE BEFORE THE TRIAL COURT

3. **PW1**, who ran Biryani Stall, in his evidence at Exhibit-36, deposed that he knew accused. On 09.01.2019 at around 9.30 p.m., he saw one girl proceeding towards Bhendwa Nala on Shahada-Doindaicha road and she was followed by the accused. He claims to have questioned them, where are they taking the girl, upon which he was asked to do his own work. He claims that accused being three, he did not interfere and went home. Same night, at 3.00 a.m., brother and mother of victim as well as other 2-3 persons came to his house and asked him whether he has seen the girl and he accordingly told them about seeing her proceeding towards Shahada-Dondaicha road. He also described colour of the clothes of victim as pink colour. In the next morning, he was called at police station at around 10.00 a.m.

and he identified accused on being asked by police. His statement was recorded on **11.01.2019.** His statement was also recorded under Section 164 of the Code of Criminal Procedure. In further examination-in-chief, he stated that victim was wearing pink colour dress on her body and had worn green colour *dupatta* and one pink *salwar*. He also described the clothes of accused No.1 Suresh to be wearing black colour shirt, white pant, having tear and the holes on the pant, accused No.2 Sharad wearing blue colour jeans shirt and blue colour jeans pant also having holes on the pant, whereas accused No.3 Kailash had worn blue colour jeans pant and jeans shirt. He identified accused before the Court.

3.1. While under **cross-examination,** he answered that he was working in the shop of his uncle. He admitted that the place where he conducted his business was a busy locality with traffic. **He admitted that at the time of incident there was no street lights.** In paragraph No.8 of his cross-examination, he admitted that accused Kailash wanted to open pan stall near his shop and in that backdrop, **there was quarrel between them.** He also admitted that he is giving evidence at the say of brother of victim.

4. **PW2**, the medical expert, is examined at Exhibit-38. He attended the victim, who was brought for medical examination

accompanied by her brother and mother. He noted history given by mother. That, child was mentally retarded since birth and in the company of gynecologist, namely, Dr. Girish Tamboli and staff nurse Ruma Gavit, he examined the girl. History given by mother was forceful sexual intercourse by use of condom and victim was found near the bridge at 3.30 a.m. He deposed that, as per general physical examination of the victim, victim was mentally retarded from birth and her clothes were stained with soil and dry grass. He noted abrasion injury over back, right inner thigh, right knee joint antenorly and right foot medially. He gave colour of the injuries as red and injuries to be simple in nature. On internal examination he noted fresh injury and rupture to hymen at 6 O'clock edges and bleeding with oedema. There was no perineal tear or injury on anus or oral cavity. He collected vaginal blood sample and issued provisional opinion, that there was recent forceful penetration of vagina of victim minor child. He identified certificate Exhibit-39. He claims to have suggested psychiatric evaluation.

4.1 While under **cross-examination**, he denied that mentally retarded person can harm herself. He denied injury noticed in column No.5 to be possible by fall on stone. He admitted recording history as narrated by mother and brother.

5. **PW3** brother deposed at Exhibit-40 that his sister was mentally retarded since birth and she had attained age of 16 years in 2019. That, on 09.01.2019, around 8.00 p.m., he received phone call from his mother that his sister is not in the house since 7.00 p.m. and so he and his friends went in search of his sister. Message of details were put up on WhatsApp group and announcement was also made over loudspeaker of mosque. While taking search, at around 3.00 a.m., he and his friends happened to ask PW1, who told about seeing victim going towards Bhendwa Nala and that accused persons had followed her around 9.00 p.m. Therefore, he and his friends went in that direction and after reaching the Nala, they heard sound of his younger sister from under the bridge and his sister was crying. When they reached near her, accused persons saw them and ran in the dark and they were chased, but not found and on his inquiry, he told that those persons had raped her, touched her private parts and accordingly, he and his friends, mother, victim all approached police station, where his mother lodged police complaint. Even according to him, at the time of incident, his sister was wearing pink colour full sleeves *punjabi* top, faint pink colour and blue colour *salwar* with green *dupatta*. He identified accused before the Court.

5.1 While under **cross-examination**, he answered that

message of missing was uploaded on WhatsApp at 8.30 p.m. He denied quarrel with accused. He also denied that as his sister was mentally retarded she was not allowed to wander. He admitted that when he reached under the bridge, there was darkness, but he volunteered that there was police station near Bhendwa Nala and there was a high mast lamp and as such, there was no darkness under Bhendwa Nala. Rest is all denial.

6. **PW4,** medical practitioner, deposed that she had acquired Diploma in psychological medicine. That, on 16.01.2019, victim minor aged 16, was referred for medical examination in respect of IQ. She deposed that, accordingly, Dr. Pravin Dongre examined her and her IQ was found in the range of 25 to 34 and that, he comes to the conclusion that victim was severe mentally retarded and accordingly, she and civil surgeon issued medical certificate, which she identified at Exhibit-52.

6.1 While under **cross-examination,** she admitted that person with IQ within 25 to 34 is not able to say what he has done and that said person cannot explain what he does and what was done with him. She is unable to state since when there was IQ issue. She also admitted that the said person cannot be able to depose before the

Court.

7. **PW5** is the victim, who in her evidence at Exhibit-53, deposed that she has studied up to 5th standard and she resided with her mother and brother. That, incident occurred 3 years back. She knew accused present before the Court. The incident occurred under the bridge of Bhendwa Nala of Shahada-Sarangkheda road at **3.00 p.m.** All accused met her on the road, but she is unable to remember the year of the incident and further according to her all accused committed forcible rape on her, **after which police came on the spot** and then she was accompanied by her mother and brother to civil hospital, as she has sustained injuries on left hand, right thigh, right leg and back of the body. According to her, at the time of incident she was wearing blue colour top, *salwar* and green colour *odhani*.

7.1 While under **cross-examination,** she answered that in her statement before the police she has stated that incident had occurred in the afternoon. She also admitted that her mother and brother told repeatedly how to depose before the police and in the Court while recording the statement. She also admitted that today for the first time she had seen the accused and also admitted that she heard name of the Nala from her brother and mother. She denied suffering

injuries by fall and that she falsely deposed about accused committing rape on her.

8. **PW6,** mother of the victim, in her evidence at Exhibit-55, after giving details of her children and her own occupation, gave date of birth of victim daughter as 22.06.2002 and that she was mentally ill since her birth. According to her, the incident occurred on 09.01.2019. That, around 6.00 p.m. she returned from the work, but did not find her daughter and, therefore, she informed her son and she was searched. At the time of search, **friend** of her son, namely, Aarif Shah told her son that three boys were chasing victim on Sarangkheda road at 9.30 p.m. Around 3.30 a.m. she herself, both sons with their friend had been towards Nala and when they reached near the bridge, victim was present there with three boys and seeing them, her victim daughter started crying and the boys fled and she questioned her daughter, who told her that three boys made her fall down on the ground, opened her *salwar* and committed sexual intercourse one by one. The names of the boys are Sharad, Suraj and Kailash. Therefore, she and her sons took victim to the police station, where she lodged complaint Exhibit-56. She also deposed that victim daughter was referred for medical examination and she had sustained injuries on leg, back, thigh and **blood was oozing from the private part** and private parts were swollen. She described the clothes on the

person of a daughter as pink colour punjabi top, one *salwar* and a *mehendi* colour *odhani*.

8.1 While under **cross-examination**, she answered that they met Aarif Khan at 9.30 p.m. Omission is brought to the extent that she informed in her statement to the police that Aarif met them and told about the incident. Rest is all denial.

9. **PW7** is the Investigating Officer, who deposed about all steps taken by him during investigation.

SUBMISSIONS

On behalf of appellants in both the matters :-

10. Pointing to the above evidence, learned Counsel for the appellants would submit that prosecution has failed to prove its case beyond reasonable doubt. That, very foundational facts are not proved by prosecution. They pointed out that though it is the case of prosecution that victim was mentally retarded, there is no convincing or conclusive evidence on that count.

11. They further submitted that, here, victim has deposed by stepping into the witness box. She has reiterated the prosecution case and has also faced cross-examination conducted by defence and has

given rational answers. That, in cross-examination when she had admitted that she was tutored by her mother and brother, hence, her testimony ought not to have been straightaway relied by the learned trial Court while accepting the case of prosecution, moreover, when she is changing version regarding time of occurrence.

12. It is pointed out that case of prosecution is primarily based on circumstance of last seen together and that on such circumstance, evidence of PW1 is relied. However, it is pointed out that firstly, this witness is a got up witness or planted witness and he happens to be the friend of brother of victim. That, even otherwise, he had merely seen deceased proceeding in a direction and according to him, three boys were chasing the victim and he claims to have questioned them, however, learned Counsel pointed out that this conduct is very unnatural, as though he claims to have seen the victim being followed, he has not bothered to promptly inform mother or brother of the victim even when he was residing in their neighbourhood. Further, according to him, the time gap about seeing victim at about 9.30 p.m. and victim being found at 3.30 a.m. is huge to connect the accused persons, more particularly, when it is admitted that at relevant time, there was darkness and no source of light.

13. It is further pointed out that here prosecution machinery failed to conduct Test Identification parade. Moreover, identity of accused is fixed by witness, that too at police station. Such identification according to learned Counsel has no probative value in the eyes of law.

14. As regards to evidence of brother and mother is concerned, it is submitted that they have hearsay information and their testimony cannot be solely relied in absence of medical evidence.

15. Learned Counsel for the appellants took this Court through the CA report Exhibit-93 and would point out that no semen was detected on articles like vaginal swab, hymen swab and as such, he raises doubt over the prosecution story of rape.

16. Learned Counsel for the appellants would also criticize the scientific evidence by pointing out that though some reports like DNA are positive, DNA analyzer is not examined for getting DNA reports exhibited. According to them, law in such cases mandates examination of DNA analyzer for executing the DNA and for exhibiting the report. That, according to them, even otherwise, DNA evidence is mere opinion evidence and nothing beyond it. They also

pointed out that, here, chain of custody is not established to rely on the integrity of scientific evidence. That, there is no evidence that dispatch was itself in sealed condition.

17. Their next submission is that here, trial itself got vitiated for not putting all circumstances in the evidence of prosecution to the accused, while they faced Section 313 of Cr.P.C. According to them, no questions were put to the accused regarding injury on the person of accused.

18. In support of above contention of not putting entire material to the accused under Section 313 of Cr.P.C., learned Counsel for appellant in Criminal Appeal No.666 of 2026 seeks reliance on the judgment of Hon'ble Apex Court in the case of **Indrakunwar v. State of Chattisgarh, AIROnline 2023 SC 839**. On the point of importance of DNA and requirement of testimony of analyzer, he seeks reliance on the judgment of Hon'ble Apex Court in the case of **Rahul vs. State of Delhi Ministry of Home Affairs and Anr., [2022 AIR SC 5661]**. On the point of failure to conduct TI parade and its impact, he seeks reliance on the judgment of in the case of **P. Sasikumar v. State Rep. By The Inspector of Police, AIROnline 2024 SC 564.** On the point of circumstance of last seen together, he seeks reliance on the judgment of Hon'ble Apex Court in the case of **Kattavellai @ Devakar v. State of**

Tamilnadu, 2025 SCC Online SC 1439 and on the point of credibility of prosecutrix, who is mentally retarded, in a case of gang rape, he seeks reliance on the judgment in the case of **Jagannath Ojha alias Jaga v. State of Odisha,** *AIROnline 2023 ORI 158.*

On behalf of respondent No.1 State and respondent No.2 victim :

19. Per contra, learned APP as well as learned Counsel for respondent No.2, who strongly justified the conviction, would point out that here is an unfortunate girl, whose mental IQ was deficient and taking disadvantage of the same, she has been gang raped. They pointed out that prosecution evidence is full proof, credible and trustworthy. That, victim was seen by PW1 being followed by accused persons, whom he has identified. They submitted that mother and brother, who went in search of victim, have also spotted accused persons in the company of victim daughter, who was crying and to whom there was disclosure about rape. That, shortly thereafter within few hours, there is lodgment of complaint. They submitted that girl is not only to be proved as minor, but also in the form of medical experts like psychiatrist proved her to be mentally deficient. Such experts are examined by prosecution. That, grave and serious offence is proved to be committed by accused. There is evidence in the form of DNA, which is a public document and no need to get it exhibited by

examining analyzer. There being strong overwhelming evidence, learned trial Court has rightly convicted the accused and they pray to dismiss the appeal for want of merits.

ANALYSIS

20. Apart from above oral account, prosecution seems to be relying on statements under Section 164 of Cr.P.C., forensic medical examination reports of victim and accused, certificate of IQ issued by civil surgeon, C.A. reports, Birth Certificate, Leaving Certificate, where victim undertook education etc.

21. Case of prosecution in trial Court was that victim was 16 years of age and moreover, she was mentally retarded. Record comprises of birth certificate issued by local body Exhibit-59 showing date of birth of victim as 22.06.2002. This certificate is issued by local body. There is no serious challenge on the minority of victim. Alleged occurrence being of 09.01.2019, resultantly, at such time, victim was 16 years, 06 months and 18 days of age. Therefore, victim is proved to be below 18 years of age.

22. The next aspect that needs to be ascertained is whether, as submitted by prosecution, victim was medically proved to be

differently abled child i.e. mentally deficient.

22.1 Mother and brother both deposed before the Court that victim was mentally retarded since birth. Attempt is also made to support such contention by examining PW4, a medical officer, whose evidence is already discussed in aforesaid paragraph. This witness has stated that the child was referred for medical examination in respect of her IQ and, accordingly, one **Dr. Pravin Dongre** examined her and her IQ was found in the range of 25 to 34. For general person, IQ range is above 75. Witness deposed that accordingly, she herself and civil surgeon issued medical certificate after reaching to conclusion that victim was severe mentally retarded and she identified certificate Exhibit-52.

22.2 What is discerned from evidence of PW4 is that she has named Dr. Pravin Dongre for examining and noting IQ in the range of 25 to 34, but surprisingly, Dr. Pravin Dongre, who tested her IQ, is not examined. Therefore, what is emerging is that this witness has merely signed Exhibit-52 along with civil surgeon. While carefully going through the medical certificate Exhibit-52, it is also noted that PW4 claims that examination of the victim was done on 16.01.2019, however, on the very certificate, **date of examination is noted as**

16.01.2018. It would be profitable to reproduce the cross-examination of PW4, which reads as under :-

> *"2. It is true to say that a person whose IQ level is within 25 to 34 he is not able to say what he does. It is true to say that the above person cannot say anything what was done with him he cannot explain. I cannot state the IQ level of victim is begin since when. It is true to say that the above said described person cannot be able to depose before the Court."*

22.3 Thus, this medical expert is found to be admitting that person with IQ level within 25 to 34 is unable to state what he or she has done and is also unable to state what was done with him or her. This expert is also unable to state since when the victim suffered low IQ level. She has rather candidly answered in cross-examination that person with above range of IQ is not in position to depose in the Court.

22.4 Consequently, when the very psychologist Dr. Pravin Dongre, who actually assessed the victim, is not examined in the witness box and he is not also shown to be the signatory to Exhibit-52, mere certificate Exhibit-52 cannot be taken into account to attribute any significance to it. Further, it is noted that though brother and mother of the victim claim that the victim was mentally

deficient since birth, there is no evidence to that extent. On the contrary, as pointed out by learned Counsel for appellants, investigation officer has gathered school leaving certificate of the victim showing her to be taking education in 7th standard in June 2017. As pointed out, there is remark of "fair progress". This is not a special institution, but regular educational institution having school as well as junior college. Therefore, academic record also does not carry any remark of mental deficiency. Yet again when victim has deposed in the Court, faced the cross-examination, there is strong presumption that she understood the purport of the testimony and she has coherently deposed without any difficulty.

23. Learned Counsel for the appellants would also attack and criticize the case of prosecution on the ground that, **victim was tutored** to depose. For ascertaining such assertion, victim's evidence is visited and put to minute scrutiny.

23.1 Victim's testimony is at Exhibit-53 and after stating that incident occurred at 3.30 p.m., she deposed that, all accused met her on road. She does not remember the year of the incident and all accused had forcibly laid her down and forcibly raped her. According to her, thereafter, police came on the spot. To ascertain whether she was tutored and there is admission to that extent, her cross-

examination is reproduced as under :-

> *"...While recording my statement before the police I had stated that the incident occurred in the afternoon. It is true to say that my brother and mother told me repeatedly how to depose before the police and in the Court while recording my statement. It is true to say that today I first time seen the accused. It is true to say that I had heard the name of Bhedva nala from the mouth of my brother and mother..."*

23.2 Thus, as pointed out, victim has categorically admitted that she deposed as repeatedly tutored by her brother and mother. Resultantly, there is also force in the above ground raised by learned Counsel for the appellants that victim was tutored.

24. It is also a case put forth by appellants that, there is no corroboration from medical evidence. It is submitted that victim was subjected to medical examination immediately after reporting to police in the morning and though medical expert has gathered swabs of vagina and hymen of the victim, scientific evidence has ruled out any semen over the said samples. On this count, attention of this Court is invited to Exhibit-93. It is thus forcefully submitted that when there are allegations of gang rape, it is necessary that there has to be

semen detected in the vaginal swab, but here, it is not so and moreover, when there is medical examination of accused on the same day, during which even penal swab were collected, therefore, doubt is raised about prosecution story to the extent of rape.

24.1 In the light of above challenge, evidence of PW2 is put to scrutiny. PW2, in his evidence, at Exhibit-38, deposed that, after noting the history, along with gynecologist Dr. Girish Tamboli, examined the victim at 11.30 a.m. and noticed abrasion marks on back, right inner thigh, right knee joint antenorly and right foot medially and then opined that there were fresh injuries and hymen was ruptured at 6 O'clock position and he found bleeding and oedema and he further claims to have obtained vaginal swabs and blood sample and thereafter, issued opinion about recent forceful penetration of vagina of minor victim and he identified Exhibit-39.

24.2 While under **cross-examination,** he has admitted noting history as provided by mother and brother of the victim.

24.3 As pointed out by learned Counsel for appellants, **Exhibit-93** is the description of articles collected from victim including vaginal swabs, hymen swabs and cervical swabs. However, its analysis revealed that, neither blood nor tissue matter is detected on Exhibit-

04 i.e. nail clippings, no **semen** is detected on articles Exhibit-05 **pubic hair**, Exhibit-06 **labia minora swab**, Exhibit-07 **labia majora swab**, Exhibit-08 vaginal swab, Exhibit-09 hymen swab and Exhibit-10 cervical swab. Above analysis is on the basis of samples allegedly collected immediately on 10.01.2019.

24.4 Therefore, though there is evidence of medical expert regarding rupture to hymen, scientific evidence does not support the oral account of this doctor. This doctor PW2 deposed in examination-in-chief that mother reported history about forceful sexual assault/intercourse **by use of condom**. However, unfortunately no such contraceptive/condom is seized by prosecution. Further, this doctor though speaks about gynecologist accompanying him, namely, Dr. Girish Tamboli and, in fact, in view of the nature of the case it is this gynecologist, who was expected to personally examine and issue the opinion, but the same has not happened and rather PW2, the male doctor, seems to have undertaken the exercise of examination.

25. Learned Counsel for appellant would also challenge prosecution story on the point of time of exact occurrence. He pointed out that different timings are coming from the victim as well as mother. That, according to victim, alleged incident is of 03.30 p.m., but prosecution case is of occurrence taking place on the intervening

night of 09.01.2019 to 10.01.2019 at around 3.30 a.m.

25.1 On such lines, if evidence is put to minute scrutiny, indeed, it does emerge that, victim in her examination-in-chief itself has stated about incident occurring in the afternoon at 3.00 p.m, whereas in statement before learned Magistrate recorded under Section 164 Cr.P.C., which is at Exhibit-54, she gave timing as 2.00 pm. However, mother and brother claim to have come across their daughter beneath the bridge at 3.30 a.m on the intervening night of 09.01.2019 and 10.01.2019.

25.2 Therefore, indeed various timings are coming on record about time of actual occurrence.

26. Learned Counsel for the appellants have also submitted that, here, victim has admitted that she is seeing the accused for the first time in the Court and that **no Test Identification parade** was conducted.

26.1 Consequently, evidence of victim is put to minute scrutiny and indeed in paragraph No.4 of the cross-examination, victim did answer that for the first time, she is seeing accused in the Court and even about hearing the name of Nala for the first time from

her brother and mother.

26.2 As pointed out, no Test Identification parade seems to have been conducted and moreover, PW1, who had allegedly spotted victim proceeding towards Sarangkheda road and she being followed by accused, in paragraph No.7 of his cross-examination, has admitted that at the time of incident there were no street lights.

26.3 Again, though PW1 claims in examination-in-chief that, in the next morning i.e. on 10.01.2019 at 10.00 a.m. he was summoned at police station and there he identified accused, surprisingly, his statement is not recorded on that very day by police. Rather, his statement is shown to be recorded on the next day i.e. on 11.01.2019.

26.4 Yet again, from testimony of PW1, it is emerging that accused were confronted to him at police station and there he claims to have identified them. This identification is questioned by learned Counsel for appellants by pointing out that identification of accused in police station has no legal sanctity.

26.5 Indeed, PW1, in examination-in-chief itself, has stated that on the next day i.e. on 10.01.2019 he was called at police station and he identified accused there. Thus, no separate Test Identification

parade is admittedly conducted by Investigating Officer even when the incident has allegedly taken place in the night time.

26.6 Law is fairly settled that identification done in police station has no significance. On this point, reliance can safely be placed on the judgment of Hon'ble Apex Court in the case of **Jafar vs. State of Kerala, 2024 LiveLaw (SC) 238,** wherein, in paragraph Nos.6 and 7, it has been observed that :-

> *"6. Anil Kumar (PW-8) who is the Investigating Officer (IO), has also admitted that PW-1 identified the accused persons by seeing them at the police station. He has further admitted that no identification parade was conducted. As such, it can be seen that the identification of the applicant herein by PW1 is quite doubtful as no identification parade has been conducted. PW-1 clearly states that he has identified the accused persons since the police had shown him those two people.*
>
> *[Emphasis laid]*
>
> *7. In the absence of proper identification parade being conducted, the identification for the first time in the Court cannot be said to be free from doubt. We find that the other circumstance that the Courts relied for resting the order of conviction is with regard to the recovery* of an iron rod. An iron rod is an article which could be found anywhere. It is not the case of the prosecution that any stolen article was recovered from the appellant

herein."

26.7 For all above reasons, even identity of accused indeed comes under shadow of doubt.

27. PW1 was star witness for prosecution. Learned Counsel for the appellants have raised question about credibility and veracity of his testimony and that his conduct to be unnatural. Here, mother claims that PW1 was friend of her son. Even son PW3, in his cross-examination, has admitted that PW1 resides in his neighbourhood. Even PW1 has claimed that he knew accused persons as they were his customers. If at all this is a fact situation, then indeed it was expected of this witness to promptly get in touch with PW3 or mother PW6 to alert them that victim is being chased by boys in the night hours. Brother has claimed that message about victim missing was disseminated through WhatsApp and even announcement was said to be made by making use of loudspeaker on the mosque. Under such circumstances, indeed, it was expected of PW1 to update brother and mother, but instead he seems to have gone home and had retired to sleep. It is indeed unnatural conduct on his part, which raises doubt about veracity of his seeing the victim.

28. Though learned Counsel for the appellants tried to submit that description of clothes on the person of victim do not tally

with the seizure, this Court does not find any force in such submission, as there is similarity in the colour of dresses seized on the person of victim.

29. Apart from above oral account, prosecution seems to be relying on circumstances of last seen and in support of it, reliance is placed on the evidence of PW1 and this witness in his testimony at Exhibit-36 stated that on 09.01.2019 at around 9.30 p.m. he saw one girl proceeding towards Bhendwa Nala along Shahada Dondaicha road. According to mother and brother, victim was found around 3.30 a.m. Indeed, there seems to be huge gap since PW1 allegedly spotted victim and she being further spotted by brother and mother.

30. Here, issue of chain of custody/link evidence is equally raised.

30.1 In simple terms, chain of custody means a mechanism for ensuring authenticity of the evidence. This principle of chain of custody demands meticulous documentation of control and transfer of physical evidence collected during investigation. The chain must with transparency disclose or demonstrate all vital details of the individual who gathers and collects the physical evidence as well as the person who receives the evidence. Not only this, but even names and details

of the custodians of the seizure with particular dates and receipt of dispatch to the analyzer is equally important. The process of handling its safe storage must rule out its quality degradation or contamination. Thus, in recent criminal jurisprudence, in serious matters like rape and murder, the chain of custody works as a vital safeguard against tampering. As courts base their decisions also relying on scientific evidence, there is indeed need for robust chain of custody for appreciation, its admissibility and reliance.

31. Specific objection of learned Counsel for the appellants is that only DNA report is placed on record and directly also exhibited without examining analyzer or expert.

31.1 True it is, that, here prosecution does not seem to have taken efforts to call upon the experts, who conducted DNA test. Prosecution record shows that Mr. D. Y. Kudekar was the analyzer to DNA reports dated 27.09.2019 and 06.10.2019 respectively, but such analyzer is not made to step in the witness box. Rather, reports appear to be got marked as exhibits through Investigating Officer directly.

31.2 In serious cases like rape and murder wherein there is high degree of punishment, law expects that DNA analyzer should

also be examined to afford an opportunity to defence as well as Court to comprehend and appreciate the outcome of the results, as interpretation is made on medical terms. It also affords opportunity to the Court to ascertain whether the articles received by analyzer were indeed in sealed and intact condition, thereby ruling out the possibility of its tampering or contamination.

31.3 It is trite law that mere exhibiting document would not prove its contents. One finds law to this extent expounded in the recent judgment of Hon'ble Apex Court in the case of ***Rahul v. State of Delhi Ministry of Home Affairs and Anr., [2022 AIR SC 5661].*** Resultantly, in the considered opinion of this Court, examining analyzer, who did DNA analysis, was imperative. But, here, analyzer has not stepped in the witness box.

32. Learned Counsel for the appellant has also questioned the credibility and reliability of scientific evidence i.e. DNA evidence. Its integrity itself is challenged for want of link evidence or chain of custody.

32.1 The importance of chain of custody is also highlighted by Honble Apex Court in the case of ***Prakash Nishad alias Kewat Zinak Nishad vs. State of Maharashtra, (2023) 16 SCC 357,*** wherein it has

been observed that :-

"64. Even otherwise, on the value of DNA evidence, we may refer to an observation made by this Court, in ***Pattu Rajan v. State of T.N., (2019) 4 SCC 771,*** *as under:*

> *"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. [Emphasis laid] This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.*

65. Referring to the above case, a three-Judges bench in ***Manoj v. State of M.P., (2023) 2 SCC 353*** *through S. Ravindra Bhat J., observed;*

> *"158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused*

was sought to be established. Notably, the reliance was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."

[Emphasis laid]

66. In the present case, even though, the DNA evidence by way of a report was present, its reliability is not infallible, especially not so in light of the fact that the uncompromised nature of such evidence cannot be established; and other that cogent evidence as can be seen from our discussion above, is absent almost in its entirety."

[Emphasis laid]

32.2 Similarly, the Hon'ble Apex Court in the case of ***Abdul Rajik Vs. State of M.P., 2026 INSC 1001***, touched upon the **importance of chain of custody** and observed as under :-

"27. Ramnath Pandey (PW-2) exhibited the maalkhana register (Exhibit P-2C) for proving the deposit of the muddamal articles. A careful perusal of the said document makes it clear that, though the same records the entry regarding deposit of the samples on 29th November, 2004, no corresponding entry exists in the maalkhana register regarding the exit of the samples from the police station for being carried to the FSL. Apparently, thus, none of the

witnesses examined by the prosecution stated about the sanctity, safekeeping, or condition of the samples in oral evidence nor did the prosecution prove any document, viz., the forwarding letter of the police station, the road certificates, etc., which are essential documents pertaining to the link evidence necessary for lending credence to the prosecution case regarding safe custody of the samples from the time of seizure till the same reached the FSL.

28. The only document produced by the prosecution evidencing the transit of the samples was the forwarding letter prepared at the Office of CRL. APPEAL NO(S). 1561/2014 with connected matter Superintendent of Police (Exhibit P-45) which bears the date 1st December, 2004 and names Constable Ramkrishna, Badge No. 414, as the carrier of the samples. However, as noticed above, there is no evidence on record to establish the movement of the samples from the maalkhana at Police Station Gorakhpur for being carried to the FSL, Sagar, on 1st December, 2004. The prosecution has thus failed to account for the custody and movement of the samples from the date of deposit in the maalkhana and their eventual receipt at the FSL.

29. There is yet another material inconsistency in the prosecution case which further undermines the prosecution's case regarding the chain of custody. The forwarding letter issued from the Office of Superintendent of Police (Exhibit P-45) bears the date 1st December, 2004 whereas the FSL report (Exhibit P-46) records that the

samples were received through Constable Ramkrishna on 6th December, 2004. Even Ramnath Pandey (PW-2) in his oral evidence, stated that the samples were sent to the FSL on 6th December, 2004. The prosecution has offered no explanation whatsoever as to where and in whose custody the samples remained during the period CRL. APPEAL NO(S). 1561/2014 with connected matter between 1st December, 2004 and 6th December, 2004. This grave discrepancy and the gap of five (5) days, completely breaches the link in the chain of custody, which was required to be established if the prosecution was desirous of placing reliance on the FSL report (Exhibit P-46). However, neither was the carrier Constable Ramkrishna examined in evidence nor did the prosecution offer any plausible explanation for the discrepancy referred to supra.

30. It is trite that the prosecution has to prove, by proper link evidence, that the samples extracted by seizure officer from the recovered contraband were properly sealed and remained in safe and secure condition from the time of seizure till their receipt at the FSL. Needless to say, for the FSL report to be admitted in evidence, the prosecution would have to establish, by credible oral and documentary evidence, the complete chain of custody essential to establish the integrity and sanctity of the samples…"

[Emphasis laid]

32.3 Likewise, recently also in the case of ***Pooranmal vs. State of Rajasthan and Anr., 2026 INSC 217,*** the Hon'ble Apex Court

referred to its own judgment in ***Karandeep Sharma alias Razia alias Raju v. State of Uttarakhand***, *2025 SCC OnLine SC 773,* and observed as under :

> *"43. This Court emphasised that for a DNA/FSL report to be acceptable and reliable, the prosecution must establish an unbroken chain of custody and demonstrate that the samples remained duly sealed and untampered throughout, and held as follows:-*
>
> > *"54. In order to make the DNA report acceptable, reliable and admissible, the prosecution would first be required to prove the sanctity and chain of custody of the samples/articles right from the time of their preparation/collection till the time they reached the FSL. For this purpose, the link evidence would have to be established by examining the concerned witness.*
> >
> > *55. Evidently, there is not even a semblance of evidence on record to satisfy the Court that the samples/articles collected from the dead body of the child-victim and those collected from the appellant which were later forwarded to the FSL were properly sealed or that the same remained in a self-same condition right from the time of the seizure till they reached the FSL. No witness from the FSL was examined by the prosecution to prove that the*

samples/articles were received in a sealed condition. Hence, there is every possibility of the samples being tampered/manipulated by the police officers so as to achieve a favourable result from the FSL, thereby, inculpating the appellant in the crime."

[Emphasis laid]

32.4 Bearing in mind the above-said judicial precedent on the point of chain of custody and link evidence, evidence in the case in hand is subjected to scrutiny.

32.5 Indeed, papers show that accused as well as victim were examined medically on 10.01.2019. PW2 seems to have examined victim at 11.10 a.m. at Civil Hospital, Nandurbar and he collected samples like vaginal swabs, cervical swabs, blood of the victim and handed it over to Shahada Police Station, but specifically to whom and when exactly it was handed over has not come on record.

32.6 Further, record shows that all three accused were subjected to medical examination at Rural Hospital, Masawad, Taluka Shahada, District Nandurbar. Medical examination reports are at Exhibits 45 to 47, which show that samples like blood, nails, pubic hair, penile swabs, were collected at the said hospital, but by another doctor at Masawad Rural Hospital, however, in spite of such

examination being done on 10.01.2019, name of the medical expert is not clear and even when the samples were exactly collected and taken is not established.

32.7 Further, record shows that on same day Investigating Officer effected seizure of clothes of victim vide Exhibit-65 and clothes of accused vide Exhibits 66 to 68.

32.8 It also appears on scrutiny of documentary evidence that, above referred seized samples were in **custody of Shahada Police Station till 13.01.2019 i.e.** from 10.01.2019 to 13.01.2019, but who exactly was the custodian of muddemal is also not substantiated, as muddemal clerk was himself not examined on the point of its safe custody.

32.9 Vide Exhibit-84 it appears that Shahada Police on 13.01.2019 dispatched articles Nos.1 to 22 i.e. clothes of the victim and accused along with articles like hair, earth and quilt as well as samples collected from the person of victim and accused i.e. to C.A. analyzer. The record shows that Exhibit-84 was sent through PC Shitole, B.No.249. However, this is contrary to the testimony of the Investigating Officer, who claims that the said articles were dispatched through the carrier, PC Naik.

32.10 Record also shows that vide Exhibit-92, articles 1 to 18 i.e. clothes of victim and accused and samples collected from the spot were only received by the FSL on 14.01.2019 and article Nos.19 to 22, which comprises of samples collected from the person of victim as well as accused, were received by FSL on 15.01.2019 and this is clear from Exhibits 93 to 96. Thus, seized samples does not seem to be dispatched same day, but on subsequent day. This shows that till dispatch to analyzer since seizure dated 10.01.2019, muddemal was lying in the police station, but in whose custody and whether it was safe, is not clear.

32.11 Further, record shows that Exhibits 92 to 96, which are C.A. reports, were received by Investigating Officer on 09.03.2019 and the analysis report shows that analysis commenced on 16.01.2019 and was completed on 13.02.2019. Exhibit-93 confirmed blood group of victim, **but no semen detected on her pubic hair, labia minora/majora, vaginal/hymen/cervical swab of victim**. Similarly, Exhibits 94 to 96, which relates to accused Nos.1 to 3, show that no semen detected on pubic hair and penile swabs of all accused, of which analysis had commenced on 18.01.2019 and was shown to be competed on 28.01.2019.

32.12 Further, surprisingly, record also shows that Exhibit-99 is the examination report of semen stains, blood stains of victim as well as accused, however, said exhibit does not demonstrate the date. Further, result of analysis is that control DNA profiles were obtained from semen detected on the top, *salwar* and *odhani* of victim and pant of accused No.1 alone. Even blood stain of victim and all accused were shown to be prepared, **but there is a remark that there is no amplifiable DNA** which could be obtained from the semen stains found on the clothes of victim as well as blood stains found on the pant of accused No.1. Further, in Exhibit-92 of which analysis is completed on 13.02.2019, there was no complete analysis and rather further analysis appears to have been done on 24.09.2019, which is shown to be a continuation of analysis dated 13.02.2019. Even analysis of this report revealed that DNA profile obtained from semen detected on top, *salwar*, *odhani* of the victim are found to be identical and from one source of unknown male, **but it failed to match with DNA profiles obtained from all three accused.** The above discussion shows that analysis was not done in continuity, but was done in piecemeal.

32.13 On minute scrutiny of record it also surprisingly emerges that, investigating officer preferred application on 05.08.2019 to the

Court of Additional Sessions Judge, Shahada seeking permission to allow them to collect blood samples of all accused persons and this application seems to have been allowed by the learned trial Court by order dated 04.09.2019. However, record does not show that after such order of learned trial Court, investigating machinery took steps to approach or engage medical practitioner to extract blood samples of the accused. Therefore, it is not clear on what basis report dated 06.10.2019 is issued by analyzer. Such material also shows that **twice samples of accused are extracted** i.e. first time on **10.01.2019** and second time after receipt of order of learned trial Court dated 04.09.2019.

32.14 It is now fairly settled position that safe retention and preservatin of DNA samples is of vital significance. Even there is a protocol for extracting DNA samples and preserving it. On this point, it would be useful to refer to the judgment of Hon'ble Apex Court in the case of ***Manoj (supra)***, wherein there is observation and discussion about collection and preservation of DNA samples and the same are as under :-

> **"C. Collection and Preservation of Evidence**
>
> If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and

scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling."

32.15 Further, observations of Law Commission of India in its report also reflected in paragraph No.140 of the above judgment and the same are reproduced as under :-

“140. The Law Commission of India in its report, observed as follows:

"DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1

> person in every 100,000: This is described as the random occurrence ratio' (Phipson 1999),
>
> Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law."

32.16 In the light of above discussion, here, in view of above shortcomings and missing links and for proper interpretation of the results, in the considered opinion of this Court, examining analyzer was imperative as, more particularly, here there is repeated collection of samples of accused. As noted above authorities like PSI Bagul, who took accused for medical examination and was the recipient of their blood samples, LPC Tayade, who had taken victim for medical examination, must be the recipient of her samples, PC Naik and PC Shitole, who were carriers to the FSL, are unfortunately not examined to establish link evidence or to ensure that the seizure with them was intact and free from tampering or contamination. It is not known where the seized samples were exactly stored and even whether the storage was maintained in proper atmosphere and condition that vulnerability of the samples was not compromised.

33. Learned Counsel for the appellants have also vehemently submitted that even otherwise DNA evidence on which prosecution

evidence is heavily banking, is not conclusive evidence so as to hold accused as guilty.

33.1 There is equal force in the above submission as it is now fairly settled position that, DNA evidence is not conclusive proof of guilt and it is mere opinion evidence.

33.2 It would be appropriate to refer to the judgment of Hon'ble Apex Court in the case of ***Rahul (supra),*** wherein it has been observed as follows :-

> "31. The learned Amicus Curiae has also assailed the forensic evidence i.e., the report regarding the DNA Profiling dated 18.04.2012 (Exhibit P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the Appellants-accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case.

33.3 Thus, merely by exhibiting DNA reports, its contents would not get proved and it is thus required to be proved through analyzer, which has not happened here.

34. Defence has taken a stand in the trial Court that there is false implication on account of quarrel with one of the accused namely Kailash with PW1. On visiting cross-examination of PW1, in paragraph No.8, this witness who is the witness on last seen together has in paragraph No.8 admitted that accused Kailash wanted to open pan stall near his shop due to which there was quarrel between them. He has candidly admitted in cross, that he is giving evidence at the say of brother of the victim. Therefore, there are reasons to hold that this witness was not in good terms with accused. Therefore, possibility of implication in such background cannot be completely ruled out.

35. To sum up, prosecution case fails to inspire confidence for following reasons :-

Firstly, victim is not conclusively proved to be mentally deficient;

Secondly, victim is shown to be tutored;

Thirdly, no Test Identification parade, as acknowledged by law, is conducted;

Fourthly, on the point of rape, there is no corroboration to medical evidence from scientific evidence as C.A. reports negatives semen ;

Fifthly, evidence of PW1 star witness seeing victim being followed by accused not credible and trustworthy rendering circumstances of last seen together doubtful;

Sixthly, chain of custody broken and there is no established link evidence;

Seventhly, DNA examiner not examined for proving DNA report and its contents;

35.1 Thus, case of prosecution in the considered opinion of this Court is not proved beyond reasonable doubt.

36. Visited the judgment impugned herein and it is noticed that learned trial Court in its judgment has merely dealt with the examination-in-chief of the witnesses and answers given by the witnesses in cross-examination are not correctly or at all appreciated. As rightly pointed out, though it was the case of prosecution that accused persons had consumed alcohol while committing the alleged act, it was scientifically proved through alcohol examination certificate Exhibits 48 to 50 that, there was no alcohol consumed by any of the accused. However, learned trial Court in paragraph No.37 of its judgment has reached to a finding that all three accused had been examined medically and all three accused had consumed liquor

at that time. Therefore, findings of trial Court apparently are perverse and against the very record.

36.1 Similarly, case of prosecution in trial Court was that alleged occurrence was between 09.30 p.m. to 3.30 a.m. Defence had raised issue of identity as there was darkness and it was dead night and there to be no source of light rendering identity of the accused doubtful. On going through the judgment of trial Court, more particularly, paragraph No.41, while answering the ground that there was darkness and there was no possibility of accused being seen with victim, learned trial Court has recorded a finding that PW3 brother of the victim had volunteered that too in cross-examination, paragraph No.5, that there was police station near the Bhendwa Nala and there was also high mast lamp and as such there was no darkness.

36.2 But if spot panchanama Exhibit-61 is carefully put scrutiny, one does not come across any reference about police station nearby or even availability of high mast lamp so as to accept the version of PW3 to that extent in cross-examination. Resultantly, this finding of trial Court about availability of light source is also against the record. Hence, there being perversity in the impugned judgment to the above extent, interference is called for.

37. For above reasons, appellants succeed. Hence, I proceed to pass the following order :-

O R D E R

I. The Criminal Appeals are allowed.

II. The conviction awarded to the appellant in Criminal Appeal No.295 of 2025 i.e. **Sharad Bhiva Ahire (Thakare)** and appellant in Criminal Appeal No.666 of 2026 i.e. **Suraj @ Suresh s/o Uddhar Vasave (Bhil)** by learned Special Judge (POCSO) and Additional Sessions Judge, Shahada, District Nandurbar in Special Case No.66 of 2020 vide judgment and order dated 05.02.2024, for offence under Sections 376 (2)(j)(l), 376-D read with Section 34 of IPC and under Section 5(g)(k) punishable under Section 6 of the POCSO Act, stand quashed and set aside.

III. The appellant in Criminal Appeal No.295 of 2025 i.e. **Sharad Bhiva Ahire (Thakare)** and appellant in Criminal Appeal No.666 of 2026 i.e. **Suraj @ Suresh s/o Uddhar Vasave (Bhil)** stand acquitted of the offence punishable under Sections 376 (2)(j)(l), 376-D read with Section 34 of IPC and under Section 5(g)(k) punishable under Section 6 of the POCSO Act.

IV. The appellants be set at liberty forthwith, if not required in any other case.

V. Fine amount deposited, if any, be refunded to the appellants after the statutory period.

VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.

VII. Fees of the learned counsel appointed to represent respondent no.2, which is to be paid by the High Court Legal Services Sub-Committee, Aurangabad, is quantified at Rs.10,000/- (Rupees Ten Thousand only).

[ABHAY S. WAGHWASE, J.]

scm