



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

CRIMINAL APPEAL NO.1248 OF 2019

Shaikh Tayyab Shaikh Babulal,
Age : 36 years, Occu.:
R/o.: Sunderwadi, Aurangabad,
Taluka & District : Aurangabad

.... APPELLANT
(Ori. Accused No.1)

VERSUS

1. The State of Maharashtra,
Through the Officer Incharge
Chikalthana Police Station,
Aurangabad, Taluka &
District : Aurangabad

2. X.Y.Z. (Victim)

.... RESPONDENTS

....
Senior Advocate Mr. Rajendra Deshmukh a/w Mr. Vishal Chavan
i/b Mr. Devang Deshmukh, Advocate for the Appellant
Mr. A. S. Shinde, APP, for Respondent No.1-State
Mrs. Kalpana S. Kulkarni (Sonpawale), Advocate for Respondent
No.2 (Appointed through Legal Aid)

...
WITH
CRIMINAL APPEAL NO.1141 OF 2019

1. Taleb Ali s/o Shaukat Ali,
Age : 23 years, Occu.: Nil
R/o.: Hinanagar, Chikalthana
Taluka & District : Aurangabad
2. Shaikh Jamil s/o Shaikh Husain Bagwan,
Age : 22 years, Occ.: Nil,
R/o.: Hinanagar, Chikalthana
Taluka & District : Aurangabad
3. Shaikh Ashpaq s/o Shaikh Husain,

Age : 25 years, Occu.: Nil
 R/o.: Hinanagar, Chikalthana
 Taluka & District : Aurangabad APPELLANT
 (Ori. Accused Nos.2 to 4)

VERSUS

1. The State of Maharashtra,
 Through the Officer Incharge
 Chikalthana Police Station,
 Aurangabad, Taluka &
 District : Aurangabad
2. X.Y.Z. RESPONDENTS

....
 Mr. Imran G. Durani, Advocate for the Appellant
 Mr. A. S. Shinde, APP for Respondent No.1-State
 Mr. S. P. Salgar, Advocate for Respondent No.2 (Appointed through
 Legal Aid)

....
WITH
CRIMINAL APPEAL NO.174 OF 2024

Shaikh Jamil Shaikh Husain Bagwan,
 Age : 26 years, Occu.: Nil
 R/o.: Heena Nagar, Chikalthana,
 Taluka & District : Aurangabad APPELLANT
 (Ori. Accused No.3)

VERSUS

1. The State of Maharashtra,
 Through the Officer Incharge
 Chikalthana Police Station,
 Aurangabad, Taluka &
 District : Aurangabad
2. X.Y.Z. (Victim) RESPONDENTS

....
 Mr. Sudarshan J. Salunke, Advocate for the Appellants
 Mr. A. S. Shinde, APP for Respondent No.1-State

**CORAM : NITIN B. SURYAWANSHI AND
SANDIPKUMAR C. MORE, JJ.**

RESERVED ON : 12/08/2025

PRONOUNCED ON : 22/09/2025

JUDGMENT : (Per Sandipkumar C. More, J.)

1. The original accused in Sessions Case No.263 of 2015, have filed all these appeals challenging their conviction recorded by the learned Additional Sessions Judge, Aurangabad (hereinafter referred to as 'the learned trial judge') for the offence under Section 376(D), 323, 504 & 506 read with Section 34 of the Indian Penal Code (IPC for short) vide judgment and order dated 18/10/2019. The learned trial judge has convicted all these appellants – accused as follows :

- i) *The accused No.1 Shaikh Tayyab Shaikh Babulal, Age : 32 years, R/o.: Sunderwadi, Tq. Dist. Aurangabad, No.2 Taleb Ali Shaukat Ali, Age : 20 years, No.3 Shaikh Jamil Shaikh Husain Bagwan, Age : 19 years, and No.4 Shaikh Ashpaq Shaikh Husain, Age 22 years, all R/o.: Hinanagar Chikalhana, Tq. Dist. Aurangabad are hereby convicted as per section 235(2) of the Code of Criminal Procedure for the offence punishable under section 376(D) 323, 504 & 506 of the Indian Penal Code, 1860.*

- ii) *The accused No.1 Shaikh Tayyab Shaikh Babulal, No.2 Taleb Ali Shaukat Ali, No.3 Shaikh Jamil Shaikh Husain Bagwan and No.4 Shaikh Ashpq Shaikh Husain are convicted for the offence punishable under section 376(D) of I.P.C. and sentenced to suffer rigorous imprisonment for life each and to pay fine of Rs.50,000/- (Rs. Fifty Thousand only) each.*
- iii) *The accused No.1 Shaikh Tayyab Shaikh Babulal, No.2 Taleb Ali Shaukat Ali, No.3 Shaikh Jamil Shaikh Husain Bagwan and No.4 Shaikh Ashpq Shaikh Husain are convicted for the offence punishable under section 323 r.w. 34 of I.P.C. and sentenced to suffer rigorous imprisonment for six months each.*
- iv) *The accused No.1 Shaikh Tayyab Shaikh Babulal, No.2 Taleb Ali Shaukat Ali, No.3 Shaikh Jamil Shaikh Husain Bagwan and No.4 Shaikh Ashpq Shaikh Husain are convicted for the offence punishable under section 504 r.w. 34 of I.P.C. and sentenced to suffer rigorous imprisonment for one year each.*
- v) *The accused No.1 Shaikh Tayyab Shaikh Babulal, No.2 Taleb Ali Shaukat Ali, No.3 Shaikh Jamil Shaikh Husain Bagwan and No.4 Shaikh Ashpq Shaikh Husain are convicted for the offence punishable under section 506 r.w. 34 of I.P.C. and sentenced to suffer rigorous imprisonment for one year each.*

2. Criminal Appeal No.1248 of 2019 is filed by the original accused No.1, whereas Criminal Appeal No.174 of 2024 is filed by

original accused No.3. Likewise, Criminal Appeal No.1141 of 2019 is filed by original Accused Nos.2 & 4.

3. Prosecution case can be summarized as follows :

The victim (PW-1) i.e. present respondent No.2 lodged a report on 28/08/2015 at about 2.30 a.m. to 3.00 a.m. with Chiklathana Police Station, Aurangabad alleging that on 27/08/2015 at about 8.30 p.m. she had gone with her friend Maruti Waghmare (PW-5) in the instant case, for roaming on Cambridge School road on motorcycle. When they were chatting after parking their motorcycle on the side of the road, all the appellants – accused came on one motor bike. They passed the victim and Maruti and went ahead. However, all of them again returned back to the victim and Maruti. They parked their motorcycle bearing Registration No.MH-20-CD-7980. Then all of them started assaulting her. Out of the appellants- accused, two started beating Maruti (PW-5) and took him aside. Rest of the two appellants dragged her to Bajra crop and tore her clothes. When the victim protested, one of them gagged her mouth and one of them threatened her to kill on the point of knife. Thereafter, they forcibly removed her clothes and committed forcible sexual intercourse with her. Somehow, the victim escaped and came to Maruti and thereafter they went to

Cambridge Square for help. Fortunately, they noticed a patrolling van of police. Thereafter, when they again went to the spot in search of the appellants – accused, but by then the appellants – accused had fled from the spot. Then the victim and Maruti came to MIDC CIDCO Police Station and the police authorities of that police station after inquiry brought them to Chikalthana Police Station, where the victim lodged the report. Accordingly, Chikalthana police authorities registered a crime against unknown accused persons initially for the offence punishable under Section 376(D), 323, 504, 506, 109 & 114 of IPC. After lodging the initial report on 28/08/2015, the victim also gave supplementary statements from time to time and contended that all the appellants – accused had in fact committed gang rape on her and that registration number of their motor bike was in fact MH-20-CD-7989 and not MH-20-CD-7980.

API, Kalpana Rathod (PW-13) from Chikalthana Police Station took over the investigation of the crime and sent the victim for medical examination, where her samples were collected by the medical officer Dr. Shamalee Mistry (PW-10). During the investigation, API Kalpana Rathod arrested the appellants – accused and held Test Identification Parade through Executive

Magistrate- Ms. M. B. Varade. API, Kalpana Rathod then drew necessary panchanamas including the spot panchnama and other seizure panchanamas. The samples of the appellants – accused were also obtained and their bike bearing Registration No. MH-20-CD-7989 was also seized. On completion of investigation, the appellants – accused were charge sheeted as mentioned above.

The learned trial judge conducted the trial by examining as many as 14 witnesses and thereafter convicted all the appellants – accused as mentioned above on the basis of evidence.

4. Learned senior counsel Mr. Rejendra Deshmukh raised so many doubts about the evidence of prosecution and pointed out loop holes therein. According to him, the victim (PW-1) and her friend Maruti (PW-5) are the main witnesses in the instant crime. He submits that both of them were not knowing the appellants / accused prior to the incident and therefore, the report was lodged by the victim against unknown persons. He further submits that the victim has made improvement in her statement to implicate the appellants – accused. According to him, the victim was not able to see the appellants – accused as she admitted in her cross-examination that there was no sufficient light on the spot of incident. He contended that there was no full moon night on the

day of incident as claimed but it was in fact after two days of the incident. He further, pointed out that Maruti (PW-5) admitted in his cross-examination that there was shower after the incident and therefore, it can easily be inferred that there was cloudy condition at the time of incident and thus, the possibility of having moon light was very much doubtful. He further submitted that only details of bike of the appellants – accused were given and not of Maruti (PW-5). Initially, the registration number of bike of the appellant – accused was wrongly stated, which was corrected thereon and therefore, the involvement of all the appellants-accused in the present crime, is doubtful. He further submitted that even in spite of allegation of gang rape by four persons, no injuries are found on her person. As such, obvious inference can be drawn that there was no resistance on her part and therefore, it cannot be said that forceful sexual intercourse was committed by all the appellants – accused with her. He pointed out that spot panchanama is also doubtful since how the police machinery was able to give correct measurement as mentioned therein when it has come on record that they have not carried any measurement tape. He pointed out that all the panchanamas of seizure of clothes of appellants – accused are stereo type. Further, on the spot of

incident everything was within 24 fits but Maruti (PW-5) deposed that he was 100 meters away from the victim when the alleged act of gang rape was being committed. The investigating officer did not seize mobiles either of the appellants – accused or the victim and Maruti (PW-5) to establish their proximity with the spot of the incident at the relevant time. He further submitted that the victim has stated that motorcycle of the appellants – accused was with milk cans but Maruti (PW-5) is silent on this aspect. Moreover, the photographs of the said motor bike of the appellants – accused do not show any fixtures or arrangement to attach such milk cans. He also raised doubt about place where Test Identification Parade of the appellants – accused was conducted. According to him, there were open windows to the wall where the Test Identification Parade was conducted and therefore, possibility of watching the accused was very much there for the victim and Maruti (PW-5) prior to the Test Identification Parade. Moreover, the medical history given by the victim to Medical Officer Dr. Shamalee Mistry is different from the contents of the FIR. He further submitted that there were no marks of dragging the victim on the spot and despite cutting the petrol tube of bike of Maruti (PW-5), no residues of petrol were found on the spot. He further submitted that the investigating

officer did not bother to call sketch artist even after the victim had given descriptions of all the appellants – accused. He accused the investigating officer for sending the samples and clothes of the victim as well as appellants – accused for chemical analysis and for matching DNA profiles belatedly and thus, raised doubt that the samples of the victim could have spread on the clothes of the appellants -accused to connect them with the crime. Thus, the learned senior counsel Mr. Deshmukh submits that the appellant i.e. accused No.1, has been falsely implicated in the present crime. He also relied on following judgments :

***Kattavellai @ Devakar vs. State of Tamilnadu,
2025 LiveLaw (SC) 703;***

5. Learned counsel for appellant Nos.2 & 4 also supported the submissions made on behalf of accused No.1 and additionally submitted that the victim has given two different statements in respect of her clothes. He, thus, pointed out possibility of planting of clothes. He also pointed out that Maruti (PW-5) has admitted that after the incident there was rain and therefore, there could not be any marks of scuffle. He pointed out that in the seizure of clothes of accused No.2, nothing is mentioned that on the clothes of accused No.2 long and short hair were found. He specifically

pointed out that there was delay of 8 to 9 days in conducting Test Identification Parade of the appellants – accused and in between there was every possibility that the victim and Maruti (PW-5) must have seen them. He also pointed out that the samples collected by the investigating officer were in her custody for about three days and no semen of accused No.2 and 4 were forwarded. Thus, he submitted out that there is no trustworthy evidence in respect of alleged act of the gang rape at the hands of the all the appellants – accused.

6. Learned counsel Mr. S. J. Salunke for accused No.3 i.e. appellant in Criminal Appeal No.174 of 2024, vehemently submitted that the victim has improved her statements from time to time and therefore, her evidence cannot be treated as of starling quality. He pointed out that though the victim stated that all the four appellants / accused committed forcible sexual intercourse with her, but after considering evidence the learned trial judge has come to the conclusion that only two persons committed sexual intercourse with the victim and other two only facilitated for the same. He pointed out that since beginning the victim is not consistent in respect of the manner in which the incident had taken place. He pointed out that the story of the victim is

unbelievable since despite dragging her on the spot incident, there were no injuries found on her person. He pointed out that opinion of Dr. Shamalee Mistry (PW-10), who examined the victim after the incident, has erred in giving opinion about sexual assault on the victim since no reasons are given by her to that effect. He also pointed out that the Test Identification Parade held to identify the appellants – accused is doubtful and conducted against the guidelines laid down in Criminal Manual. According to him, only two persons at one time are to be identified but in the instant case, the victim initially identified one accused and subsequently identified three accused in the same Test Identification Parade. He further pointed out that in spite of seizure of the clothes of the appellants – accused, only 10 minutes gap is there in all the panchanamas. Therefore, it can be inferred that the investigating officer must have prepared all these panchanamas while sitting in the police station only. He, thus, submitted that due to such doubtful panchanamas, scientific evidence namely chemical analysis and matching of DNA profile, cannot be believed. He also expressed doubt of planting of evidence against the appellants – accused. According to him, the learned trial judge definitely erred in awarding life imprisonment to the appellants when minimum

punishment for the offence is only 20 years imprisonment. In support of his submissions, he relied on following judgments.

- A) *Paramjeet Singh @ Pamma vs. State of Uttarakhand*, 2011 AIR (SC) 200;**
- B) *Suraj Mal vs. The State (Delhi Administration)*, 1979 Cri.L.J. 1087;**
- C) *Rai Sandeep @ Deepu and another vs. State of NCT of Delhi*, 2012 AIR (SC) 3157;**
- D) *Lalliram and another vs. State of M.P.*, 2009 Supp.AIR (SC) 902;**
- E) *Mayur Panabhai Shah vs. State of Gujarat*, AIR 1983 SC 66;**
- F) *Mahindra vs. Sajjan Galpha Rankhamb*, AIR 2017 SC 2397;**
- G) *Lalchand Cheddilal Yadav vs. State of Maharashtra*, 2000 ALL MR (Cri) 1485;**
- H) *State of Goa vs. Sanjay Thakran and another*, (2007) 3 SCC 755 &**
- I) *Umesh Chandra and others vs. State of Uttarakhand*, 2021 Supreme (SC) 1190.**

7. As against this, the learned APP Shri. A. S. Shinde supported the impugned judgment and pointed out that the evidence of eye witness, Maruti (PW-5), has supported the evidence of the victim. Moreover, recovery during the course of investigation is also proved by Dinkar Wagh (PW-3). Further, the procedure adopted for Test

Identification Parade, is also proved by Narayan Bomble & Avinash Chobe (PW-6 & 7). According to him, the DNA Report on record supports the allegations against the appellants – accused. He pointed out that the prosecutrix has given minute details about the incident and immediately lodged the FIR. He further submitted that on the very next day of lodging of the FIR, her statement under Section 164 of Cr.P.C. and supplementary statement were recorded. He pointed out that though there was mistake in respect of stating the correct registration number of motor bike of the appellants – accused by the victim, but in the statement of Maruti (PW-5) recorded during the course of investigation, correct number of the motorcycle of the appellants – accused, is mentioned. He pointed out that the defence counsel though gave suggestions about having no source of light at the time of incident, but the victim as well as Maruti (PW-5) have straight way denied those suggestions. Further, he contended that when the alleged act of gang rape was committed on the point of knife, then obviously the victim must have remained silent and without any resistance. However, he pointed out that Bajra crop on the spot of the incident was found destructed as mentioned in the spot panchanama. So far as allegation of tampering of sample as levelled by the learned counsel

for the appellants – accused is concerned, the learned APP submitted that when the appellants- accused were not having criminal antecedents and the victim was also not known to the investigating officer, then there was no reason for the investigating officer for such tampering of sample to implicate the appellants/ accused.

8. He further pointed out that all the recovery panchanamas in respect of seizure of clothes of the appellants / accused, were recorded one by one within the similar time gap since all the appellants / accused were residing in the same area. Moreover, Dinkar Wagh (PW-3) and Kalpana Rathod (PW-13) were not given such type of suggestions in the cross-examination rendering recoveries doubtful. He pointed out that no illegality was conducted in holding Test Identification Parade of the appellants / accused, which was in fact conducted after due permission from the concerned Magistrate. The witnesses have specifically denied the suggestions given by the defence counsel that they had already seen photographs of the appellants / accused and that they were aware of their names after the same were disclosed on TV and in newspapers. He pointed out that the appellants / accused through their defence counsel never raised any objection in respect of

manner in which Test Identification Parade was conducted. He pointed out that semen of accused Nos.2 & 4 was detected on the clothes of the victim and the history given by the victim immediately on the next day to the Medical Officer, indicates that four persons committed rape on her. Thus, he pointed out that all the incriminating circumstances against these appellants / accused, are properly established by the prosecution and therefore, no interference is required in the impugned judgment. Thus, he prayed for dismissal of all the appeals. The learned APP relied on following judgment.

Laxman Madhavrao Chamalwar vs. State of Maharashtra and another in Criminal Appeal No.274 of 2017 & Criminal appeal No.294 of 2017, delivered by this court on 19/07/2022.

9. On the other hand, the learned counsel for respondent No.2 – victim in Criminal Appeal Nos.1141 of 2019 supported the impugned judgment and adopted the submissions of the learned APP. The learned counsel Mr. S. P. Salgar for the victim in Criminal Appeal No. 1141 of 2019 has added that Maruti (PW-5) also stated correct number and make of the vehicle i.e. motor bike on which all the appellants – accused had come on the spot. He submitted that minor contradictions and lapses in the procedure conducted in Test

Identification Parade can be ignored, since those are not on material aspect. Learned counsel Mr. S. P. Salgar relied on following judgments.

- A) *Rafiq vs. State of U.P., (1980) 4 SCC 262;***
- B) *State of Punjab vs. Gurmit Singh and others, (1996) 2 SCC 384;***
- C) *Wahid Khan vs. State of Madhya Pradesh, (2010) 2 SCC 9;***
- D) *State of Maharashtra vs. Suresh, (2000) 1 SCC 471 &***
- E) *Mohammed Ashfaq Dawood Shakh @ Baba vs. State of Maharashtra in Criminal Appeal No.210 of 2015, delivered by this court at Principal Seat, on 25/11/2021.***

10. The learned counsel Ms. Kalpana Kulkarni - Sonpawale for respondent No.2 victim in Criminal Appeal No.1248 of 2019 also submitted that the learned trial judge has rightly convicted all the appellants / accused. She pointed out that the victim has stated everything about the incident by specifically mentioning that the act of gang rape was committed by all the appellants / accused. She further added that the evidence of the victim as well as eye witness – Maruti (PW-5) is reliable and trustworthy and there was no proper explanation by the appellants / accused in respect of

their false involvement as alleged by prosecution. Thus, she prayed for dismissal of their appeals.

11. Heard rival submissions. Also perused the entire material on record alongwith record and proceedings of the original case.

12. The prosecution has in all examined 14 witnesses. So far as main incident is concerned, the evidence of victim (PW-1) and Maruti (PW-5) i.e. her boyfriend is of utmost important. Further, there are other witnesses i.e. panch witnesses of the spot of the incident, seizures of clothes of accused and in respect of Test Identification Parade. The evidence of Medical Officers, who examined the victim, Maruti (PW-5) and the accused is also there. Apart from the aforesaid oral evidence, the prosecution has also relied on following documentary evidence.

Sr. No.	Name of the document	Exhibit No.
1.	FIR	35
2.	Statement of victim under Section 164 of Cr.P.C.	38
3.	Spot panchanama	51
4.	Seizure panchanama of clothes of PW-5 Maruti Waghmare	52
5.	Seizure panchanama of clothes of victim	53
6.	Memorandum statements, discovery panchanamas	56 to 63
7.	The medical examination of accused No.1 Sk. Tayyab	66 & 67

8.	Test identification parade panchanamas	89, 93 and 94
9.	House search panchanama and seizure panchanama of bike	102
10.	Medical certificates of PW-5 Maruti Waghmare	114 & 115
11.	Letters issued to Medical Officers	119, 120, 122, 134, 135, 136, 145, 146 & 147
12.	Identification forms of victim	196
13.	Identification of accused persons	123 to 126
14.	Medical examination of victim	131 & 132
15.	Forensic Medical Examination of accused	121
16.	Printed FIR	141
17.	The correspondence made by the investigating officer for providing panch witnesses and report of dog squad, property receipts, arrest panchanamas of accused persons, correspondence made with J.M.F.C., Aurangabad and Forensic Sciences Lab, letter to Tahsildar, letter to G.M.C.H. for vaccine carrier and letters to FSL were also exhibited by the prosecution during the evidence of PW-13 Kalpana Rathod.	-
18.	Station diary extract of MIDC CIDCO	180
19.	Letter to Talathi Sunderwadi	181
20.	7/12 extract of spot filed	182
21.	Letter for registration particulars of motorbike No. MH-20-CD-7989 and insurance particulars of said vehicle	183 & 184
22.	Registration particulars of motor bike No. MH-20-BS-1754	-
23.	Spot map	187
24.	The reports of Chemical Analyser	181 & 191

13. On perusal of record it appears that police had recorded statements of the victim many times. Initially, victim had stated commission of rape on her only by two accused but during supplementary statement, she came with the case that all four accused committed forcible sexual intercourse with her. On perusal of evidence of victim (PW-1) it is evident that on 27/08/2015 at about 8.30 p.m. she alongwith Maruti (PW-5), her boyfriend, had gone to bypass road behind Cambridge School on his motorcycle. After parking the motorcycle there, they stayed there for some time. At the relevant time, four persons came on one Discover motorcycle bearing No. MH-20-CD-7989. Though they crossed them, but returned back and came near them. Two of them caught hold of Maruti (PW-5) and started beating him. The remaining two started outraging her modesty and they forcibly took her to nearby field. One was around 28 - 29 years of age having little beard and other was 20 to 23 years old having fair complexion and height around 5 feet. Further one of the accused also cut the petrol pipe of their motorcycle. At the time of incident, victim was wearing a green Patiyala dress. Those accused persons tried to remove her clothes and also removed their pants and committed rape on her. The accused having beard, committed rape on her

and thereafter other accused committed rape on her when first one had caught hold of her hands. The third accused person having age of 20 - 22 years with fair complexion came there and committed rape on her. Some of them also performed oral sex with her. When all three of them committed forcible sexual intercourse with her, fourth person having age of 28 to 29 years and 5.5 fit height also came there and committed rape on her. However, upon seeing the police jeep, they fled from the spot. According to the victim (PW-5) they were speaking in Hindi language.

14. Victim (PW-1) further stated that police jeep then came near her and Maruti (PW-5) was accompanying with the police and his shirt was torn. Police tried to trace the accused persons, but could not succeed. Victim and Maruti were taken to CIDCO, Police Station and thereafter Chikalthana Police Station where the victim lodged report of the incident i.e. FIR Exhibit-35. The offence was accordingly registered with Chikalthana Police Station at 2.30 to 3.00 a.m. on the next day i.e. 28/08/2025. She got medically examined at Ghati Hospital by Dr. Shamalee Mistry (PW-10). She was admitted in the hospital, wherein police seized her clothes, consisting green Kurta, red Patiyala, red-green Othani, Mehendi

coloured nicker. She also stated about recording of her statement before concerned Judicial Magistrate First Class on 29/08/2025 under Section 164 of Cr.P.C.

15. Then she has deposed about Test Identification Parade in Harsool Central Jail for which she was directed to remain present on 01/09/2015. According to her, the Test Identification Parade was conducted between 1.00 to 1.30 p.m. and at that time Maruti (PW-5) was taken out side and thereafter she was taken to a hall where Tahsildar Warade was present. Seven persons of a similar age group were made to stand in a queue, and Warade Madam asked her to identify the accused from among them. Accordingly, she identified one of them. Thereafter, on 09/09/2015, she was again called to Harsool Jail and during the Test Identification Parade held at that time, she identified three persons who committed rape on her from among the 21 persons standing in the queue. She also admitted about her signatures on both panchanamas dated 01/09/2015 and 09/09/2015. Her DNA samples were also taken in Ghati Hospital. She identified accused No.1 Shaikh Tayyab and accused No.3 Shaikh Jamil as the persons who were holding Maruti (PW-5), assaulted her and damaged pipe of their motor bike. She deposed that accused No.4 had committed

rape on her by pressing her mouth and threatening her at the point of knife. She identified accused No.2 Taleb Ali as a person, who attempted to remove her clothes. She also identified her clothes consisting Article-1 green torn piece of top, Article-2 Mehendi colour nicker, Article-3 red Salar, Article-4 Red-green Odhani and Article-5 green top.

16. In her cross-examination, she admitted her affair with Maruti (PW-5) and that she had mentioned only two assailants in the FIR and the bike number stated as MH-20-CD-7980 instead of 7989. However, it seems that she has clarified later on the number of bike as MH-20-CD-7989. Though she admitted that there was some darkness and no street lights on Swangi bypass road but according to her it was a day of full moon night. She denied the height of Bajra crop wherein she was taken by the accused was less than her height. She denied as that it was raining on the day of incident. She specifically denied the suggestion that she alongwith Maruti (PW-5) had gone to Swangi bypass road for having sex but since people noticed them in compromising position, they went to Cambridge Chowk.

17. To support the version of the victim (PW-1), the prosecution has examined her boyfriend Maruti (PW-5), who was with her at the time of the incident. According to Maruti (PW-5) they had gone near Cambridge School at about 8.00 to 8.30 p.m. and when they had stopped there, four persons came on a bike and started assaulting them. According to him, the bike of assailants was Discover and two of them dragged the victim in Bajra crop and other two started assaulting him. He has deposed that accused were tearing clothes of the victim and the victim was shouting as ‘*वाचवा वाचवा*’. One of the two accused who was assaulting him, went to two others who dragged the victim. He also gave description of the accused as having black face and the person who was assaulting him was thin and fair in complexion. He was wearing a peacock coloured shirt. He further stated that he somehow escaped from the accused and ran towards Cambridge School. He disclosed the incident to police and went towards victim in the police vehicle thereafter. Victim was lying in Bajra crop who told him that two of the accused committed rape on her and further told that after noticing the police vehicle, all four fled from the spot. He further stated that they were taken to MIDC CIDCO Police Station and since the spot of incident was within the limit of Chikalthana Police

Station, they were taken to Chikalthana Police Station. He then showed the spot to police on 28/08/2015. His clothes were also seized. He stated about recording of his statement on 29/08/2015 by Judicial Magistrate (First Class), Aurangabad.

18. Like victim, he has also stated about Test Identification Parade held on 01/09/2015, wherein he identified one of the accused persons as standing at serial No.4 in the queue. He admitted his signature on the panchanama to that effect on Exhibit-83. He also deposed about second Test Identification Parade dated 09/09/2015, wherein he identified remaining three accused persons standing at serial Nos.5, 10 & 16 in the queue. He specifically deposed that when all the accused committed rape on victim, she was frightened and therefore, could tell him about two persons only. He specifically identified Accused No. 2, Taleb Ali and Accused No. 3, Shaikh Jamil, as the persons who caught hold of him and assaulted him. He further admitted that accused No.1 Shaikh Tayyab and and accused No.4 Sk. Ashafak being the persons who committed rape on the victim. He identified the clothes he was wearing at the time of the incident namely, a T-shirt and a banian at Article -31.

19. In the cross-examination, he stated that he was at a distance of 100 meters from the victim when some of the accused were assaulting him. He spoke about raising shout by him and also admitted that he was having a mobile handset at the time of the incident. According to him, police remained at the spot of incident for about 20 to 25 minutes and then they were taken to MIDC Police Station. He admitted that police from MIDC CIDCO Police Station did not enter in Bajra crop, but only verified the spot from the road. He then stated that there was rain after the incident and on the next day he noticed the condition of Bajra crop. According to him, the victim was not in condition to speak when the police persons arrived at the spot. Further, according to him on 28/08/2015 he went to G.M.C.H. Aurangabad alongwith the victim in one vehicle and there he was confronted with the history given by him before Medical Officer i.e. PW-4. He specifically denied that he had gone to Test Identification Parade alongwith the victim and her parents. He also denied that he changed his statement before the police and Judicial Magistrate First Class to avoid falsity.

20. Then comes the evidence of PW-3 Dinkar Wagh, who is a panch witness. According to him, the memorandum statements of all the accused persons, were recorded and the accused showed

their willingness to produce their clothes and bike used in the crime. Accused No.4 had in fact shown willingness to produce vehicle. Accordingly, memorandum panchanama and discovery panchnama Exhibits-56 to 62 were carried out, which are duly proved by Dinkar Wagh (PW-3). Despite searching cross-examination, nothing adverse to the prosecution case, has been brought on record. Though this witness admitted that accused were seated at the back side of the vehicle, but he remained firm on the point that at the instance of accused persons, police persons and panch witnesses went to their respective houses and recovery panchanamas were prepared. Though the learned counsel for all the accused raised suspicion that all these discovery panchanamas are stereotype and were made successively by leaving short time gaps in between. However, it is pertinent to note that all the accused are resident of one and the same area and therefore, the recovery at the instance of accused persons cannot be doubted. This witness has specifically denied that he deposed falsely only out of acquaintance with API Rathod and that the bike was seized from accused No.1 in his presence. It is to be noted that Maruti (PW-5) was having best opportunity to note the number of the bike which according to him was MH-20-CD-7989. This witness has

also deposed that API Rathod seized one Bajaj motorcycle bearing No. MH-20-CD-7989 from accused No.1. As such, the evidence of this witness in respect of memorandum and discovery panchnamas appears reliable and trustworthy.

21. Narayan Bomble (PW-6) and Avinash Chobe (PW-7) are the witnesses on Test Identification Parade. Both of them supported the prosecution's case stating that Test Identification Parades of the accused persons were held on 01/09/2015 and 09/09/2015 at Harsul Central Jail by Executive Magistrate Warade. According to Narayan (PW-6), victim (PW-1) and Maruti (PW-5) had identified the accused on 01/09/2015. He has given specific details about the manner in which the Test Identification Parade was conducted and also admitted the panchanama to that effect. Despite searching cross-examination, nothing adverse which could render Test Identification Parade doubtful, is brought on record through these two witnesses. Avinash (PW-7) has also given details of the Test Identification Parade and stated as to how the victim and Maruti (PW-5) identified all the three accused on 09/09/2015. Thus, it appears that the prosecution has definitely proved the panchnamas in respect of Test Identification Parades.

22. The learned counsel for the appellants - accused raised serious doubt in respect of procedure adopted for holding the Test Identification Parade. They specifically pointed out that the Test Identification Parade held on 09/09/2015 was in fact contrary to the guidelines for holding Test Identification Parade as mentioned in Criminal Manual under Chapter- I para / clause 16. They specifically pointed out that a separate Test Identification Parade has to be conducted for separate accused or at the most two accused can be identified in one Test Identification Parade, but in the instant case, three accused persons were asked to stand in the queue at once. However, learned counsel Mr. Suresh Salgar for respondent No.2 victim submits that considering the object of holding Test Identification Parade the above said irregularities i.e. identifying three persons in one Test Identification Parade, cannot be said to be illegal or preserve. For that purpose, he heavily relied on judgment of the Hon'ble Apex Court in the case of **State of Maharashtra vs. Suresh, (2000) 1 SCC 471**, wherein it is held in para 22 as follows:

“22. If potholes were to be ferreted out from the proceedings of the Magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is

made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witness to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held.”

Thus, in view of the above discussion, there might be irregularity in holding the Test Identification Parade of 09/09/2015, but it cannot be said totally perverse and illegal since the victim as well as other eye witness Maruti (PW-5) had identified three accused being the persons who committed forcible sexual intercourse with the victim. As such, the submission of the

learned counsel for the appellants in respect of Test Identification Parade being conducted illegal has to be discarded.

23. The prosecution has further examined PW-4 Dr. Syed Aqeeb, who had examined accused No.1 Shaikh Tayyab Shaikh Babulal on 29/08/2015. According to this witness, he collected samples of accused No.1 and forwarded to Chikalthana Police Station. He also issued a medical certificate as per Exhibit-67 in respect of accused No.1. Though faced searching cross-examination, but nothing beneficial to the accused has come on record from this witness. This witness has also examined Maruti (PW-5) and issued injury certificates at Exhibits-114 & 115. The injury certificate Exhibit-114 indicates history of assault on 27/08/2015 at back side of Cambridge School, Jalna Road. The injuries sustained by Maruti (PW-5) in the said certificate, are in nature of abrasion and blunt trauma. Though the colour of the injury is not mentioned by this witness, but he has specifically stated the age of injuries within 24 hours before examination. Further, as per Exhibit-114 there was simple injury to Maruti (PW-5) and it has also mentioned in the history about the place of assault being at back side of Cambridge School. Thus, nothing doubtful is found in the evidence of this witness Dr. Syed Aqeeb (PW-4).

24. Pratik Jain (PW-9) is the person, who had examined accused No.4 Shaikh Ashfak. During examination, he also collected samples of accused No.4 and samples for DNA. According to him, he sealed these samples and sent to investigating officer Kalpana Rathod. The form Exhibits-120 & 121 indicate that examination of accused No.4 was conducted and samples were taken out with his consent. He also deposed that on 02/09/2015 API Kalpana Rathod forwarded the letter Exhibit-122 for collection of samples of accused in DNA kits and also provided four DNA kits to him. Accordingly, this witness filled identification form of all accused persons and collected blood samples of all accused persons in DNA kits and after sealing it handed over it to concerned constable. This witness has denied that DNA kit was expired. This witness had collected eight samples during the examination of accused No.4 Shaikh Ashafak and noticed one planter injury to him.

25. Thereafter, the prosecution has examined Dr. Shamalee Mistry (PW-10), who had examined the victim on 28/08/2015. According to her, she recorded history narrated by the victim, examined her and thereafter collected her samples. From her evidence, it transpires that she noticed signs of penetrative sexual assault on the victim and there was also possibility of oral

intercourse with the victim. She examined the victim with her consent and prepared the medical report Exhibit-132. She has admitted that Exhibit-130 does not bear endorsement of G.M.C. Hospital. The entry recording arrival of the victim, was also not taken in the hospital record. She deposed that she had given counseling to the victim and also emergency contraception. She was unaware whether the victim had taken a bath before medical examination. Further, according to her, signature of examining doctor does not necessary on survivor's consent form. According to her the victim was habituated to sexual intercourse since four months and the last intercourse with the victim was one month before the incident which was with Maruti (PW-5).

26 Dr. Priya Salve (PW-14) had collected the samples of the victim for DNA purpose and according to her on 09/09/2015 she collected those samples with the consent of the victim and also admitted identification form to that effect at Exhibit-196. She collected the samples and then sealed and handed over to LPC Badge No.1242. According to her, she had conducted general examination of the victim on 09/09/2015. Though she stated that 2ml blood was to be collected for DNA purpose but the investigating officer did not provide the DNA kits. However, it appears that she

had sealed the samples and same were handed over to police. She had also verified the identity of the victim and according to her, it was not necessary to mention the blood group in identification form at Exhibit-196. She has specifically denied that she deposed falsely at the instance of police. It is extremely important to note that though this witness admitted that DNA kit was not provided to her, but the letter Exhibit 172 clearly indicates that API Rathod had sent the victim to GMCH Aurangabad through LPC Rukhmini alongwith DNA kits for collection of DNA samples of the victim. Therefore, the aforesaid admission on the part of Dr. Priya Salve (PW-14) cannot be given any significance.

27. Prosecution has examined Dr. Somya Siraj (PW-11), who had examined accused No.3 Shaikh Jamil Shaikh Hussain. From her evidence it transpires that she had received a letter for medical examination of accused No.3 and collection of samples. API Rathod also requested to verify the age of accused No.3. This witness examined accused No.3 and collected his samples namely venous blood, pubic hair, nails, scalp hair, swab from glans and swab from urethral orifice. She sealed collected samples and forwarded the same under her letter Exhibit-135 to the police station. According to this witness, accused No.3 Shaikh Jamil was competent for

committing sexual intercourse. She also issued medical certificate to that effect as per Exhibit-136. Though she admitted that she did not mention the age of injury of accused No.3, the colour of injury which denotes the age of injury is mentioned. According to her, injuries such as contusions and abrasions are possible while doing mason work or due to a fall on a rough surface. She specifically admitted that semen sample of accused No.3 was not collected. The defence has not seriously disputed the medical examination of accused no.3. The X-ray for his age verification was also taken.

28. Evidence of Dr. Farhana Khan (PW-12) is in respect of examination of accused No.2 Taleb Ali Shaukat Ali on 31/08/2015. According to her, two abrasions on left elbow and forearm were found on the person of accused No.2. She also noticed some scars. According to her, accused had taken a bath after the incident and changed his clothes. She forwarded the samples of accused in a sealed condition to CA. As per her opinion and certificate issued by her as per Exhibit-147, accused No.2 Taleb Ali was competent to perform sexual intercourse. According to her the semen sample of accused No.2 could not be obtained for want of discharge. She admitted that if a person takes a bath, then any incriminating

circumstance is not possible. Thus, it appears that semen samples of accused No.2 and accused No.3 were not collected.

29. Then comes the evidence of Kalpana Rathod, API (PW-13), who has investigated the present crime. This witness has deposed about her entire investigation. At the relevant time, she was serving as API at Chikalthana Police Station and on 28/08/2015 investigation of this crime was handed over to her. According to her, she prepared spot panchanama Exhibit-51, seized petrol tube of bike of witness Maruti (PW-5), foot wear, one single chappal and piece of dress of the victim. She also snapped pictures of the spot and called dog squad and searched accused with the help of dog squad. Admittedly, accused persons could not be traced with the help of dog squad. She then sent the victim and Maruti (PW-5) for medical examination, seized their clothes and prepared receipts. During the investigation, she arrested the accused persons, seized bike bearing registration No. MH-20-CD-7989, clothes and knife. She also arranged Test Identification Parade, wherein the victim and Maruti (PW-5) identified the accused on 01/09/2015 and 09/09/2015. She then sent the victim and accused for medical examination and collected samples and forwarded the same to FSL, Kalina. She then collected the reports after filing the charge sheet.

She has also identified the articles, panchanamas letters shown to her. She has specifically stated that FSL Kalina had returned the sent up in muddemal articles except DNA samples, which might have used for analysis.

30. In the cross-examination she has given certain admissions such as she was handed over the investigation of offence under Section 376(d) of IPC for the first time, except accused No.3 she did not verify age of other accused. According to her, the victim was having affair with Maruti (PW-5). She admitted that, at the time of lodging the report, the victim was not wearing the clothes she had worn at the time of the incident and also that she did not record the statement of LPC of MIDC CIDCO Police Station, who had provided clothes to the victim. She also admitted that the foot wear found on the spot did not belong to any of the accused persons and that the victim and Maruti (PW-5) were using mobile phones, but she did not seized the same. She admitted that from 28/08/2015 to 03/09/2015 the samples of the victim were in her custody and the mental condition of victim was not proper when she came to lodge the report.

31. Learned senior counsel Mr. Rajendra Deshmukh argued that the evidence of the victim as well as her boyfriend Maruti (PW-5) appears doubtful. He pointed out that the victim stated in her testimony that it was dark on Swangi Bypass Road, and therefore, the possibility of recognizing the appellants-accused was very dim. However, it is significant to note that the victim has stated that at the relevant time, there was full moon night and in the light of moon, she had seen the appellants – accused. It is to be noted that the learned senior counsel upon verifying calendar of the relevant date, submitted that it was not actual full moon night but the full moon night was after two days from the day of the incident. Even considering that also the inference can safely be drawn that on the day of incident also there was sufficient moonlight as stated by the victim. Learned senior counsel further pointed out that Maruti (PW-5) admitted that there was rain just after the incident and therefore, possibility of not having moonlight on that night due to cloudy weather cannot be ruled out. However, it is important to note that even though it was admitted by Maruti (PW-5) that after the incident there was rain but he has not specifically stated that heavy clouds were there and no moonlight was available. Therefore, it cannot be inferred that the sky was totally cloudy.

Admittedly, the victim had stated registration number of the bike of the appellants – accused incorrectly at initial stage. However, she later on corrected the same by changing only last digit of the said number. Moreover, Maruti (PW-5), who had an opportunity to see registration number of that bike has correctly stated the same. Therefore, mistake at initial stage in stating the number cannot be said to be adverse to the case of the prosecution. Learned senior counsel further pointed out that the police have admitted the fact that they were not carrying any measurement tape at the time of spot panchanama but still the distance in meter has been stated in the spot panchanama itself. Thus, he stated that the spot panchanama must have been prepared without going to the spot. However, the spot panch Mr. Umakant Dhatinge (PW-2) supported the story of the prosecution that the spot panchanama was drawn at the spot of incident. The distance in meters is mentioned only at one place in the spot panchnama; otherwise, the actual spot where the rape was committed is described only with approximate dimensions. Moreover, it has come in the evidence of spot panch that Bajra crop on the spot was destructed. Therefore, in the light of this evidence, the spot panchanama cannot be doubted. Learned senior counsel also pointed out that the victim stated that

there are milk cans attached to the bike of the appellants – accused but in the photo of said bike, no such arrangement for affixing milk cans is shown. Admittedly in the photograph of the said bike no such arrangement can be seen but merely because of absence of such arrangement the testimony of victim cannot be doubted since the milk cans can be tied with the help of strings to that bike which can be removed after untying those milk cans. Moreover, this cannot be treated as doubtful circumstance and cannot wash out the entire story of prosecution since it is not on the material aspect. Therefore, the prosecution story cannot be doubted on the basis of aforesaid discrepancies.

32. The learned counsel Mr. S. J. Salunke, as well as the learned senior counsel Mr. Rajendra Deshmukh, vehemently argued that the victim has been found improvising her version from time to time since the beginning, and therefore, her testimony cannot be relied upon. They further contended that, due to this aspect, the prosecutrix cannot be considered a witness of sterling quality, and as such, her entire evidence deserves to be discarded. For that purpose, learned counsel Mr. S. J. Salunke relied on judgment of ***Rai Sandeep @ Deepu and another vs. State of NCT of Delhi***

(supra), Delhi, wherein it is observed in para Nos.15 & 16 as follows :

“15. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have correlation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence

committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

16. *In the anvil of the above principles, when we test the version of PW- 4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated*

in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants”.

33. To determine the nature of evidence being of sterling quality, the facts of each case are to be considered. Here it is a case of gang rape and therefore, the evidence of victim needs to be considered with utmost sensitivity. The Hon’ble Apex Court in the case of **State of Punjab vs. Gurumit Singh and others** (*supra*) and others, has discussed as to how the evidence of victim of gang rape, is to be appreciated. It is observed in para No.8 & 21 of the said judgment as follows :

“8. *The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was a student of Xth Class. It*

was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the Bus Adda is travesty of justice. The court over-looked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. Trial Court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The

courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Trilok Singh PW6, father of the prosecutrix came to know from his wife, PW7 about the incident he went to the village sarpanch and complained to him. The sarpanch of the village also got in touch with the sarpanch of village Pakhowal, where in the tube well kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Trilok Singh PW6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Trilok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears

that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the story of the prosecutrix that she was left near the examination center next morning at about 6 a.m. was "not believable" as "the accused would be the last persons to extend sympathy to the prosecutrix" are not at all intelligible. The accused were not showing "any sympathy" to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been addicted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination center so as to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the center and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court over-looked that a girl, in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination center under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others

over-powered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy. Therefore her informing to her mother only on return to the parental house and no one else at the examination center prior thereto is an accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of

her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain, J. (1990 (1) SCC 550)

Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and 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 feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 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. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve

the person charged, the court should ordinarily have no hesitation in accepting her evidence."

21. *Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive*

to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

34. Though it appears that the investigating officer has recorded statements of the victim repeatedly and that though the victim initially stated that rape was committed by two persons, but thereafter, stated that all the four appellants – accused committed rape on her. Further, she has also given description of the appellants – accused and in the manner in which they assaulted her and raped her. It is also to be borne in mind that after such incident of gang rape, she must have gone into shocked state and therefore, it is quite possible for her to take some time to recollect the entire incident and for that purpose she must have taken time to state before the police machinery about involvement of all the appellants – accused in the crime. Therefore such improvisation on the part of the victim cannot be said as unreliable or not of sterling quality. As such, we discard the submissions of learned counsel Mr. Salunke to that effect.

35. On going through the evidence of the victim (PW-1) and eye witness Maruti (PW-5) it appears that the victim has specifically stated that the appellants had torn her top and the piece of the top was recovered from the spot when the spot panchanamam was

carried out. Umakant Dhatinge (PW-2) i.e. the panch witness of the spot panchanamma, has already stated about the seizure of such piece of cloth. It is extremely important to note that as per the Chemical Analyser Report (Exhibit-181) the piece of top of the victim and the piece of cloth seized from the spot of incident, were found same. Therefore, it is clearly established that the appellants – accused had torn the clothes of victim. Moreover, she has minutely described the manner in which all the appellants – accused committed rape on her. We have already mentioned the said fact earlier while discussing the evidence of victim, wherein she deposed as to how the incident took place. Moreover, the victim as well as Maruti (PW-5) have identified all the appellants – accused in Harsool Jail, wherein Test Identification Parades of the appellants – accused were conducted. Their evidence in respect of identification of the accused is also supported by PW-6 & 7, who were the panch witnesses to those Test Identification Parades. We have already discarded the objection of the learned counsel for the appellants in respect of conducting those Test Identification Parades contrary to the Criminal Manual. Therefore, the evidence of the victim, PW-5, PW-6, PW-7 and PW-13 has clearly established

the identification of the appellants – accused persons in the aforesaid Test Identification Parades.

36. Learned counsel for the appellants – accused strenuously argued that despite such forceful sexual intercourse with the victim by the appellants – accused, not a single injury was found either on the private part of the victim or rest parts of her body. Learned counsel Mr. S. J. Salunke heavily relied on the judgment of the Hon'ble Apex Court in the case of **Lalliram and another vs. State of M. P.** (*supra*), wherein it is observed that it is true that injury is not a *sine qua non* for deciding whether rape has been committed, but it has to be decided on factual matrix of each case. Thus, relying on this observation, the learned counsel Mr. Salunke submitted that the victim must have resisted for the criminal act of accused and while dragging her, certain injuries must have sustained to her, but in the absence of such injuries, the prosecution's case has certainly become doubtful and raised suspicion. However, considering the fact of this case it is extremely important to note that all the appellants – accused committed rape on the victim at the point of knife. The said knife is also recovered at the instance of one of the appellants and therefore, it is quite possible that due to fear of life, the victim must have remained

silent. Moreover, the appellants – accused must have overpowered her and therefore, there was no resistance. Under such circumstance absence of injury on the person of the victim cannot be treated as doubtful circumstance since Dr. Shamalee Mistry (PW-10) has clearly stated that the victim had given history of sexual assault by four persons coupled with allegations of oral sex also. Dr. Shamalee Mistry (PW-10) has also opined that there was forceful intercourse with the victim. Even though there was an old tear to her hymen, which could be possible due to her physical relations with Maruti (PW-5) earlier to the incident, but it does not lead to the inference that no rape was committed on her. Besides, the scientific evidence also supports the case of the prosecution.

37. The evidence of witnesses from medical profession namely PW-4, 9, 10, 11, 12 and 14, who had examined the victim and the appellants – accused persons and collected their respective samples, reveals that the same were separately collected and duly sealed. Further the identification forms in respect of all the appellants – accused are duly proved by PW-9, whereas PW-14 has proved the identification form of the victim at Exhibit-196. All the samples of the appellants–accused and the victim were sealed while being forwarded to the police, from where they were sent for

chemical analysis and DNA profiling. Though the semen samples of accused Nos.2 & 3 were not collected by PW-2 & 3 but blood samples of all the accused and the victim were sent for DNA profiling after duly collected by PW-9 and PW-14. The report Exhibit-191 issued by FSL, Kalina Mumbai is also important one. In fact clothes of the victim consisting nicker and Salwar at Articles-2 & 3 alongwith her samples namely oral swab, vavinal awab, nail clipping and swab, pubic hair and DNA samples of the appellants – accused were sent to examination to FSL, Kalina, Mumbai. The report Exhibit-191 indicates that hair found on nicker of the victim was of accused No.4 Shaikh Ashpak Hussain. Hair found on underwear of Shaikh Tayyab and accused No.2 Shaikh Taleb Ali, accused No.3 Shaikh Jamil and the hair of the victim, were found identical and from the same female origin. The report further indicates that semen detected on nicker and Salwar of the victim and the blood sample of accused No.4 Shaikh Ashpak and accused No.2 Taleb Ali were from same paternal progeny. It is to be noted that the victim has stated that all the appellants – accused committed rape on her but samples of accused Nos.1 & 3 were not traced on her clothes. However, the hair found on underwear of accused Nos.1 & 3 found identical with the hair of

the victim. Therefore, the DNA report Exhibit-191 has definitely proved the proximity of accused No.1 and 3 with the prosecutrix at the time of the incident. It is to be noted that the learned Trial Judge opined that only Accused Nos. 2 and 4 committed rape on the victim, while Accused Nos. 1 and 3 were treated merely as facilitators. However, when the prosecutrix has stated that all four accused committed rape on her, then in the light of observation of the Hon'ble Apex Court in the case of State of **Panjab vs. Gurumit Singh and others** (*supra*) the testimony of the prosecutrix needs to be believed being reliable and trustworthy. Other minor discrepancies in her evidence has to be kept aside. Therefore, merely because samples of accused Nos.1 & 3 did not match with the samples of the victim, it cannot be finally concluded that they did not commit rape on her. The testimony of the victim definitely inspires confidence and therefore, it can safely be inferred that all the appellants- accused must have committed gang rape on the victim.

38. Further, the evidence of the victim and Maruti (PW-5) clearly indicates that two accused persons had first caught hold of Maruti (PW-5) and remaining two dragged the victim in Bajra crop and committed rape on her. Further, it is also evident that Maruti (PW-

5) was beaten initially by the appellants – accused persons, who had caught hold him and thereafter they both committed rape on the victim. The medical certificate Exhibit-115 issued by PW-4 has indicted that Maruti (PW-5) had sustained contusions and abrasion and trauma to his stomach. According to Syed Aqeeb (PW-4) those injuries were caused within 24 hours of his examination. As such, it is established that Maruti (PW-5) was beaten by those appellants – accused in furtherance of their common intention. The knife used for threatening the victim at the time of incident, is also recovered at the instance of accused No.2 Taleb Ali. Moreover, the victim herself has given description of all the appellants – accused to police and also subsequently identified them in Test Identification parades. The ocular evidence in the instance case is well supported by medical as well as scientific evidence.

39. Thus, considering all these aspects, the prosecution has definitely established the presence of all the appellants – accused on the spot. It is also established that the appellants – accused threatened the victim and Maruti (PW-5) by assaulting them and thereafter by dragging the victim in Bajra crop committed gang rape on her. The conduct of all the appellants – accused definitely indicates that they shared common intention to commit the offence.

Thus, the prosecution has clearly established the guilt of all the appellants – accused beyond all reasonable doubts. The learned trial judge by rightly appreciating the entire evidence on record has convicted the appellants – accused as mentioned above. On independent scrutiny of the entire evidence and material on record, we are also of the same opinion. In view of the same, there is no reasons to interfere with the impugned judgment and order. In the result, all the appeals stand dismissed.

40. The fees of both learned counsel appointed through Legal Aid to represent the victim shall be quantified as per the rules and paid to them as expeditiously as possible.

(SANDIPKUMAR C. MORE, J.)

(NITIN B. SURYAWANSHI, J.)

VS Maind/-