



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
: NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 618 OF 2018

with

CRIMINAL APPEAL NO. 616 OF 2018

with

CRIMINAL APPEAL NO. 545 OF 2018

.....

CRIMINAL APPEAL NO. 618 OF 2018

APPELLANT : Sandip S/o Ravindra Talande,
Aged 26 years, Occu. Labour,
R/o Durgapur, Ward No.1, Gond Mohalla,
Tah. & Dist. Chandrapur.

VERSUS

RESPONDENT : State of Maharashtra,
through Police Station Officer,
Police Station, Ram Nagar, Chandrapur,
Tah. and Dist. Chandrapur.

with

CRIMINAL APPEAL NO. 616 OF 2018

APPELLANTS : 1] Kunal S/o Manohar Ghodam,
Aged 22 years, Occu. Labour,
R/o Ghanta Chowki, Tah. & Dist. Chandrapur.

2] Shubham S/o Bapuji Ghodam,
Aged 21 years, Occu. Labour,
R/o Ghanta Chowki, Tah. & Dist. Chandrapur.

VERSUS

RESPONDENT : State of Maharashtra,
through Police Station Officer,
Police Station, Ram Nagar, Chandrapur,
Tah. and Dist. Chandrapur.

with
CRIMINAL APPEAL NO. 545 OF 2018

APPELLANT : Ashok s/o Namdeo Kannake,
Aged about 28 years, Occu. Labour,
R/o Durgapur, Ward No.1, Gond Mohalla,
Tah. & Dist. Chandrapur.

VERSUS

RESPONDENT : State of Maharashtra,
through Police Station Officer,
Police Station, Ram Nagar, Chandrapur,
Tah. and Dist. Chandrapur.

Mr. Y. B. Mandape, Advocate for the appellants in Appeal Nos.618/18
and 545/18

Mr. A. C. Jaltare, Advocate for the appellants in Appeal No.616/18
Mrs. S. V. Kolhe, A.P.P. for the respondent-State

CORAM : G. A. SANAP, J

DATED : JULY 04, 2024.

ORAL JUDGMENT

1. These three appeals arise out of the judgment and order, dated 20.08.2018, passed by learned Additional Sessions Judge, Chandrapur in Sessions Case No. 93/2015 and therefore, the same are being disposed of by this common judgment.

2. The appellants in Appeal No. 616/2018 are the original accused nos.1 and 2; the appellant in Appeal No. 618/2018 is the original accused no.3

and the appellant in Appeal No. 545/2018 is the original accused no.4. They have been convicted for the offences punishable under Sections 376-D, 394, 201 read with Section 34 of the Indian Penal Code. They are sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay fine of Rs.2,000/-, in default to suffer simple imprisonment for three months for the offence punishable u/s 376-D of the IPC ; suffer rigorous imprisonment for 5 (five) years and to pay fine of Rs.1,000/-, in default to suffer simple imprisonment for two months for the offence punishable u/s 394 r/w Section 34 of the IPC ; and suffer rigorous imprisonment for 1 (one) year and to pay fine of Rs.500/-, in default to suffer simple imprisonment for 15 days for the offence punishable u/s 201 r/w Section 34 of the IPC.

3. BACKGROUND FACTS :

The victim is a resident of village Rajoli, Tah. Mul, Dist. Chandrapur. Her friend Akash Maroti Mohite is a resident of Wani, Dist. Yavatmal. The incident occurred on 14.06.2015. The First Information Report has been registered in this case on the report of the victim (PW1). It is the case of the prosecution that the victim and Akash, on 13.06.2015, decided to meet at Vishnu Temple near village Ghanta Chowki. The victim and Akash met on 14.06.2015. On the motorcycle of Akash, they went to Vishnu Temple. After offering prayers, they were sitting under a tree. At around 2.30

p.m. while they were sitting under a tree, three boys came there and questioned them as to what they were doing there. Those three boys told them that they are from Forest Department. They demanded Rs.10,000/- (Rupees Ten thousand only) from them. The victim and Akash expressed their inability to pay the money. Those three boys snatched the mobile phones of the victim and Akash. They made a phone call from the mobile phone of the victim to another person. As a result of this, the fourth boy/accused came on the spot. They gave thrashings to the victim and Akash. Akash handed over Rs.2,000/- to them due to fear. At that time, the victim wanted to attend nature's call and therefore, she went to attend nature's call behind a tree. It is the case of the prosecution that two boys followed her and the remaining two boys caught hold and overpowered Akash. The two boys, who followed the victim, threatened to kill her if she resisted for the sexual intercourse. The victim with folded hands requested those boys not to outrage her modesty, however, to no avail. The two accused, one after another, committed forcible sexual intercourse with the victim by removing her legging and underwear. It is further the case of the prosecution that when this was happening, one forest Guard was seen coming to them and after seeing the forest Guard, all four accused fled from the spot. The victim and Akash narrated the unfortunate incident to the Forest Guard. The Forest Guard took them to village Ghanta Chowki. They went to one shop and took water. The Forest Guard, the

victim and Akash narrated the incident to the shopkeeper and gave description of the miscreants. The shopkeeper, on the basis of the description narrated by them, identified those four persons and told that they are from his village. The Forest Guard and Akash searched for the accused in the village, but they could not find them out. The victim and Akash went to the Police Station at Chandrapur and there the victim lodged report (Exh.35).

4. On the basis of the report (Exh.35), a crime bearing No. 299/2015 was registered at Police Station, Ram Nagar, Chandrapur. PSI S.T. Parmar (PW14) registered the FIR. Under a requisition, the victim was referred to the hospital for medical examination. She was medically examined by PW13. The samples were collected. The Investigating Officer (PW14) conducted the investigation. During the course of investigation, he drew the spot panchanama and collected the samples from the spot. Accused Kunal and Shubham were arrested on 16.06.2015 and accused Sandip and Ashok were arrested on 17.06.2015. They were sent for medical examination. The recovery of their clothes was effected. The mobile phone of the victim was recovered from accused Sandip and the mobile phone of Akash was recovered from accused Shubham. An amount of Rs.300/- was recovered from Akash. Their blood samples and DNA samples were collected. The investigation transpired commission of a dreadful crime, which ultimately led to filing of

charge-sheet by the police.

5. On committal of the case to the Sessions Court, learned Additional Sessions Judge, Chandrapur framed charge against the accused vide Exhibit-13. The accused pleaded not guilty. Their defence is of false implication. The prosecution, in order to bring home the guilt against the accused, examined 17 witnesses. Learned Judge, on consideration of the evidence, found the accused guilty of the charge and sentenced them as above. The appellants/accused are before this Court in appeal.

6. I have heard Mr. Y. B. Mandape, learned advocate for the appellants in Cri. Appeal Nos. 618/18 and 545/18, Mr. A.C. Jaltare, learned advocate for the appellants in Cri. Appeal No. 616/18 and Mrs. S.V. Kolhe, learned Additional Public Prosecutor for the respondent/State. Perused the record and proceedings.

7. The prosecution in order to bring home the guilt against the accused, relied upon the evidence of the victim (PW1), her friend Akash (PW3) and other two witnesses. The medical evidence and the report of DNA analysis has been relied upon as corroborative evidence. The evidence of the witnesses, who conducted the test identification parade has also been relied

upon as a corroborative piece of evidence to establish the identity of the accused. In this case, the main evidence taken into consideration by the learned Additional Sessions Judge is the evidence of the victim (PW1), her friend Akash (PW3) and the forest Guard (PW5), who went to the spot while discharging his duties and other witnesses. Undisputedly, prior to the incident, the accused persons were not known to the victim and her friend Akash. The test identification parade was conducted during the course of investigation to establish the identity of the accused involved in the crime. Learned Additional Sessions Judge, on appreciation and analysis of the oral evidence as to the incident, has found the said evidence concrete, cogent and reliable. Learned Judge has recorded the reasons in support of his finding as to the credibility of these witnesses.

8. Learned advocates appearing for the accused submitted that the evidence of the victim about sexual intercourse with her by the two accused is inconsistent. Learned advocate pointed out that in her oral evidence, the victim has not attributed any role in the incident of rape to accused Sandip Talande, whereas the DNA analysis report shows that the semen of accused Sandip was found on the salwar kurta of the victim. Learned advocate submitted that while identifying the accused in the Court, the victim has stated that sexual intercourse was committed with her by accused Shubham and

Ashok. Learned advocate submitted that PW3 at the time of the test identification parade could not identify accused Sandip Talande. It is pointed out that at the time of his evidence, he could not identify accused Shubham. Learned advocate submitted that therefore, this discrepancy in the evidence of the victim as well as in the evidence of PW3 is major and if appreciated in totality of the facts and circumstances, is sufficient to discard her evidence.

9. Learned Additional Public Prosecutor submitted that at the time of the test identification parade, the victim girl had identified all four accused. Learned APP pointed out that the fact with regard to the identification of the accused has been recorded in the memorandum of test identification parade. However, while identifying them, the role attributed to each one of them by the victim girl, has not been recorded. Learned APP submitted that the possibility of a mistake while identifying the accused involved in the incident of actual sexual intercourse, at the time of evidence, cannot be ruled out. Learned APP submitted that there is ample evidence on record to indicate that while attributing role to each one of the accused at the time of their identification in the Court, a mistake has occurred at the behest of the victim. In order to make good this submission, learned APP pointed out that in the report (Exh.35), the victim has stated the description of all four accused. It is pointed out that in the report the victim has stated the description and the

clothes worn by the accused, who had committed sexual intercourse with her. Learned APP submitted that the description of accused and the description of the clothes worn by them, provided in the report, matches with his description of accused Sandip and Shubham being the perpetrator of the crime of sexual intercourse with the victim.

10. It is necessary to state that in such cases, identification of the accused is very vital. Failure to establish the identity of the accused can be detrimental to the case of the prosecution. Learned APP, relying upon the decision of the Hon'ble Apex Court in *Bharwada Bhoginbhai Higjibhai .vs. State of Gujarat*, reported at *(1983) 3 SCC 217*, has submitted that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, cannot be annexed with undue importance. Such discrepancies cannot be given undue weightage more so when all important 'probabilities factor' echos in favour of the version narrated by the witnesses.

11. I have minutely perused the evidence of the victim (PW1), her friend Akash (PW3) and the corroborative evidence in the form of DNA analysis reports. In the report (Exh.35), the informant has stated that 2nd accused, who had committed rape on her, was slim built with height about 5½ feet, wearing a blue jeans pant and a T-shirt. It has come on record that accused

Sandip was arrested on 17.06.2015. The clothes which were worn by him on the date of the incident were recovered at his instance. The recovery panchanama is at Exh.61. This recovery was made pursuant to the confessional statement made by accused Sandip. One T-shirt and one blue colour jeans pant were recovered at his instance. The recovery panchanama of clothes of accused Shubham is at Exh. 57. One green-colored jeans pant and one full shirt were recovered from him. While narrating the description of another accused, who committed sexual intercourse with her, the victim has stated in her report that he was slim built with bluish eyes, height 5½ feet, wearing green colour jeans pant and T-shirt. This description of the accused matches with Shubham. The clothes recovered at the instance of accused Sandip and Shubham, match with the description stated in the report. The blue coloured jeans pant was not recovered at the instance of any other accused. The victim at the time of the identification parade, identified all accused. Their description provided in the report based on her observations at the time of commission of the offence, fully matches with the description of Shubham and Sandip. It needs to be stated that this mistake might have been committed due to lapse of time or due to pressure of the Court atmosphere. In my view, such a mistake could have been enured to the benefit of the accused, provided there was no identification of all the culprits involved in the crime by the victim. The Hon'ble Apex Court in *Bharwada Bhoginbhai Hirjibhai (supra)*, while dwelling on the issue of

importance to be attached to the minor discrepancies, has made pertinent observations in paragraph 5. The same are extracted below :

“(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on

the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

12. In my view, all these facts are required to be taken into consideration. The crime committed was a serious one. The victim was subjected to rape by two accused, one after another, in the presence of her boy friend, who was overpowered by the remaining two accused. The DNA report, in my view, is the most important corroborative piece of evidence to explain this discrepancy. If accused Sandip had not committed sexual assault, then the semen would not have been detected on the salwar kurta of the victim. In my view, this is the most vital and important piece of evidence to connect accused Sandip with the offence of rape along with accused Shubham. In my view, therefore, on the basis of this mistake committed by PW1, it cannot be held that accused Sandip was not involved in the actual offence of rape.

13. The victim (PW1) was subjected to gruelling and searching cross-examination. In the report (Exh.35), the victim has narrated a first hand account of the incident. She has categorically stated in the report that four persons were involved in commission of the crime. She has stated that her mobile phone as well as the mobile phone of Aakash were snatched by the

accused. The mobile phone of the victim was recovered from accused Sandip and the mobile phone of Akash was recovered from accused Shubham. The CDR of the mobile phone used by the victim has been placed on record. It is the case of the victim that her mobile phone was used by one of the accused to make a phone call to their friend to come to the spot. The CDR fortifies the contention that at the relevant time, a call was made from phone number 9763808647 to phone number 7741872878. The date of the call is 14.06.2015 and the time is 13:03:53 hours. The second call was made on the same day at 13:50:26 hours to the same mobile number. This fact has been proved with the help of CDR of the mobile phone used by the victim. The victim (PW1) in her evidence before the Court has placed on record the first hand account of the incident. She has stated that two accused, whose description was provided in the report, committed forcible sexual intercourse with her. She has stated that two accused caught hold of Akash and prevented him from extending any kind of help to her. She has stated that her friend Akash was robbed off by them. It has also come on record that they gave a thrashing to Akash. The evidence of the victim as to the occurrence of the incident, arrival of the Forest Guard at the spot, subsequent visit to the pan shop and from the pan shop to the police station at Chandrapur, is consistent. It has not been shaken in the cross-examination. On minute perusal of her evidence, I do not find any infirmity, discrepancy or inconsistency in the

evidence of the victim as to the occurrence of the incident as well as the involvement of all the accused in the incident as stated by her. Her evidence has been corroborated by other evidence. The credibility and trustworthiness of the evidence of the victim has to be tested by keeping in mind the corroborative evidence namely, the evidence of PW3 and PW5.

14. PW3 Akash Mohite has narrated the account of the incident. He has stated that after offering prayer at Vishnu temple, he and the victim were sitting under a tree. At that time, three persons came there. The account of the incident narrated by the victim and this witness is consistent. He has stated that he was having 'Max' company mobile phone. Admittedly, this mobile phone was snatched by the accused and during the investigation, it was recovered from accused Shubham. The mobile phone of the victim was of 'Samsung' company and it was also taken away by the accused. It was recovered at the instance of accused Sandip. In his evidence, Akash has stated that the boy wearing black scarf was heavily drunk. He has stated that the said boy gave him a slap on the cheek. That boy thereafter broke a stick and beat him. He was having pain. The said boy demanded money from him. He was having only two thousand rupees, which were taken away by three boys. He has stated that one of the boys said that he does not want money, but he wants to have sex with the victim. He has stated that thereafter he caught hold of the hand of the

victim and with his companion, took the victim into the forest. He has deposed that he requested them to leave her, but they did not pay any heed to him. He has stated that his hands were caught by the remaining two accused. He has stated that he could hear the cries of the victim when she was taken by the side of the tree by the accused. He has stated that thereafter, the Forest Guard came there and therefore, all the accused fled from the spot. It is true that at the time of the test identification parade, he could not identify accused Sandip, but before the Court, he has identified all four accused. Failure to identify accused Sandip in the test identification parade may not go against the overall case of the prosecution and affect the credibility of this witness. On the contrary, this will lend an assurance to the case of the prosecution that before the test identification parade was conducted, Akash and the victim had no occasion to see the accused. If they had an occasion to see the accused, then he would have easily identified accused Sandip. In his evidence, he has stated that when the Forest Guard came, the accused fled from the spot. He has stated that after the incident, when the victim came to them, they found that her clothes were stained with blood and she was crying. PW3 Akash was also subjected to searching cross-examination. Perusal of his cross-examination would show that his presence at the spot has not at all been disputed. He was cross-examined with regard to the procedure followed at the time of the test identification parade. It was suggested to him that he had seen the accused in the police

station. He has admitted that he saw the accused in the police station. It needs to be stated that if he had seen the accused in the police station, he would have easily identified accused Sandip at the time of the test identification parade. I do not see any reason to disbelieve and discard his evidence. Evidence of this witness is consistent with the evidence of the victim on the point of occurrence of incident and involvement of all accused in the incident.

15. The next important witness is the Forest Guard (PW5). He is an independent witness. On the given date, he was on duty in the forest area of Ghanta Chowki. He has stated that on that day, he was doing patrolling in compartment nos.415 and 416. He has stated that he saw a motorcycle on the line of compartment no. 415 and 416 under a tree. He has stated that someone called him saying "*bhau, bhau*". He saw one boy and one girl there. They came to him. The girl was crying and the boy told him that out of four persons, two had committed rape on the victim and the remaining two accused overpowered him and helped those persons to commit rape on the victim. He has stated that the girl was asking for water, but there was no water. Therefore, he took them to the village. He went with them to a pan shop of Murari Pandav (PW4) and the owner of the pan shop gave water to the victim. He has stated that he had narrated the incident to Murari Pandav (PW4). PW4 on the basis of the description provided of the miscreants, told them that they are residents of the

same village. It is to be stated that the Forest Guard is an independent witness. He went to the spot while discharging his duties. He has stated that the boy narrated the incident to him. The girl was crying. He has stated that thereafter the boy and girl left for Chandrapur to lodge the report. Perusal of his cross-examination would show that nothing significant has been brought on record to discard and disbelieve his version. The evidence of this witness corroborates the presence of the victim and Akash at the spot. His evidence corroborates the evidence of the victim and Akash on other aspects as well.

16. PW4 Murari Pandav, a pan shop owner, did not fully support the case of the prosecution. However, his evidence is significant on certain aspects. He has stated that at 3.30 p.m. on 14.06.2015, a forest Guard, a girl, and one boy had come to his pan stall. He gave water to the girl. The girl was wearing green payjama, white salwar and white dotted dupatta. Her face was pale and nervous. Though, this witness has not reiterated the incident narrated to him by the Forest Guard and the girl, but he has admitted that the victim, her friend Akash and the Forest Guard had come to his pan shop at 3.30 p.m. on 14.06.2015. The evidence of PW4 partly corroborates the evidence of PW1, PW3 and PW5. I have minutely scrutinized the oral and documentary evidence. The oral and documentary evidence cannot be discarded and disbelieved. The evidence of the victim and her friend Akash has been

corroborated by the evidence of independent witnesses. The evidence is sufficient to prove the incident and involvement of the accused in the incident.

17. The next important piece of evidence is with regard to the test identification parade. As far as the test identification parade is concerned, it has been suggested to PW1 and PW3 that during the course of investigation, they had an occasion to see the accused at the police station. PW3 has stated that he had seen the accused persons in the police station. He has further stated that every time when the victim went to the police station, he accompanied her. It was suggested to the victim that she had seen the accused in the police station. She has denied this suggestion. No material has otherwise been brought on record to discard and disbelieve this part of the evidence of the victim. The victim identified the accused in the prison at the time of the test identification parade, which was conducted on 24.06.2015 i.e. 10 days after occurrence of the incident. The test identification parade was conducted by Naib Tahsildar (PW10) Dr. Kanchan Jagtap. In the evidence, she has narrated the procedure followed by her while conducting the test identification parade. She has stated that in the test identification parade, initially, two accused had been put for identification with the dummies. She has stated that when the victim (PW1) and Akash (PW3) identified those accused, namely, Kunal and Shubham, in the second round, the remaining two accused were subjected to a

test identification parade with the same dummies, but with the changed positions. In the second round, the victim identified accused Ashok and Sandip. PW3 Aakash could identify only Ashok. He could not identify Sandip. It is to be noted that PW3 has identified three accused persons, particularly the two accused, who overpowered him and one accused who dragged the victim behind the tree.

18. PW7 Rahul Shende is the panch witness to the test identification parade. He has deposed that he was called as a panch witness. He has narrated the procedure followed at the time of test identification parade. I have perused the cross-examination of this witness and PW10 Naib Tahsildar. Perusal of the same would show that except for one procedural non-compliance, the remaining basic procedural compliance while conducting the test identification parade has been made. PW10 was expected to change the dummies while conducting the second round of the test identification parade with regard to the two accused. He did not change the dummies. In my view, since the witness (PW3) failed to identify accused Sandip in the second round, it cannot be said that failure to change the dummies has in any manner facilitated identification of the accused by the victim and PW3. It needs to be stated that the evidence of the test identification parade conducted by the competent officer has to be used as a corroborative piece of evidence. It is not substantive

evidence. The substantive evidence of identification is the actual identification of the accused by a witness in court. In this case, the victim girl has identified all four persons during the test identification parade as well as in Court. In my view, therefore, it is another piece of corroborative evidence to the oral evidence of the victim and other witnesses.

19. The next important piece of evidence is the evidence of PW13, the Medical Officer, who had examined the victim. A few facts having bearing with the evidence of PW13 Dr. Dipti Shirame need to be stated at the outset. The incident occurred on 14.06.2015 at about 14.30 hours. The report was lodged on 14.06.2015 at 18.15 hours. The victim was examined by PW13 at 22.30 hours. It shows that the victim was examined within eight hours of the occurrence of the incident. PW13 Dr. Shirame has stated that the victim narrated the history of assault to her. The history of assault recorded by her in the medical certificate is consistent with the facts stated in the report. She has stated that on examination of the clothes of the victim, she found blood stains on the back side of the salwar and also on the nicker. The blood was also present on pubic hairs. She has stated that on local examination, blood stains were found present with matting on pubic hairs. The labia majora, minora and clitoris were stained with blood. Small tear was present on posterior commissure. There was swelling over the introitus and hymen injury. Bleeding

was present and the position of tear was 12, 3 and 7 O'clock position. She has stated that the victim's hymen was ruptured and there was swelling over the torn part of hymen along with tenderness. There was tear on forchett along with bleeding. On the basis of her examination and the injuries found on the person of the victim, she opined that the injuries were fresh as the colour of the tear over forchett and ruptured hymen was bright red. She has opined that overall findings were consistent with the sexual intercourse with the victim. She did not collect the clothes of the victim. She was subjected to searching cross-examination. As far as the injuries noticed by PW13 on the person of the victim and the blood on her clothes is concerned, no dent has been caused to her evidence. This evidence, in my view, is the most vital corroborative piece of evidence. It is to be noted that the victim in an offence of rape is in a position of injured witness in case of physical violence. The corroboration expected and required is not of the standard required in case of the evidence of an accomplice. The evidence of an accomplice is required to be corroborated in material particulars. The victim could not be equated with an accomplice and therefore, some corroboration to positively indicate that the victim was subjected to sexual intercourse would be sufficient. In my view, this is the most important evidence to corroborate the evidence of the victim. I do not see any reason to discard and disbelieve this evidence.

20. The next important piece of evidence relied upon is the DNA report. PW17 Neha Bhale is the Chemical Analyser, who had prepared the DNA report. Perusal of her evidence would show that her examination-in-chief was too cryptic. On perusal of her evidence, I am constrained to observe that neither the learned Additional Sessions Judge nor the learned Public Prosecutor took proper care while recording the examination-in-chief of this witness. This witness was expected to state all the material facts in her examination-in-chief. Those facts may be with regard to the receipt of samples, the date of analysis of the samples, the preservation of the samples during the process of analysis etc. It needs to be stated that when a sample is sent for DNA analysis to the DNA section, initially it is analysed in Biological Section and after analysis by the biological section, it is forwarded to DNA Section. The reports placed on record indicate that initially, the samples were analysed in Biological Section and then the same were forwarded to the DNA section, where samples were analysed by this witness (PW17). It needs to be stated that the learned Additional Sessions Judge and the learned Public Prosecutor appear to have lacked the basic knowledge in this regard or their approach was too casual. There was no fault on the part of the witness. The witness was in the hands of the Prosecutor and under the control of the Judge. Be that as it may, the cross-examination of PW17 would show that the accused persons have understood the significance of the evidence of PW17. This witness has

been thoroughly cross-examined on all relevant aspects. A probing cross-examination was conducted. However, despite probing and searching cross-examination, no material has been elicited to pin point any drawbacks in the DNA analysis procedure and ultimately in the report. It needs to be stated at this stage that during cross-examination, no grievance was made about the proper preservation etc. of the samples.

21. As far as evidentiary value of the DNA report is concerned, it would be useful to refer to the decision of the Hon'ble Apex Court in *Mukesh and another .vs. State (NCT of Delhi) and others*, reported at *(2017) 6 SCC 1*. The Apex Court has observed that DNA Technology as a part of Forensic Science and Scientific discipline not only provides guidance to investigation but also supplies the Court accurate information about tending features to establish identification of criminals. After the amendment in the Criminal Procedure Code by the insertion of Section 53-A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. It is held that the DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted. In the case in hand, the prosecution has adduced the evidence with regard to the

sampling, sealing and packing. There is evidence of dispatch of samples through the carrier to CA FSL, Nagpur. The sample was initially analysed in a Biological Section of DNA Department. The DNA analysis was carried out by PW-17. He has deposed about the proper packing and sealing of samples when the same were received in the lab. This evidence has established the quality control and quality assurance. Therefore, the DNA report cannot be discarded. The DNA report is the most important corroborative piece of evidence to establish the involvement of the accused in the crime.

22. In the above context, it would be necessary to mention in brief the journey of samples from its collection to its deposit with the Forensic Laboratory. The clothes of the victim were seized on 14.06.2015 at about 23.40 hours by the Investigating Officer. The samples of the victim and the blood samples of Shubham for DNA purposes were drawn by the Medical Officer (PW12). The identification forms of the victim and accused Shubham, prepared by PW12, are at Exh.122 and Exh.125, respectively. As far as collection of sample of Sandip is concerned, it was collected on 17.06.2015 by PW11 Dr. Meshram. His identification form prepared by PW11 is at Exh.116. He was arrested on 17.06.2015 at 5.00 p.m. The sample was collected at 8.45 p.m. On the basis of Exh.112, which is an OPD paper of the first examination of accused Sandip, it is submitted that it was done at 4.05 p.m. It is pointed out

that this fortifies the case of the prosecution that accused Sandip was arrested at 5.00 p.m. on 17.06.2015. It is to be noted that the Doctor had no reason to examine the accused before his arrest and before his production by the police. This, in my view, appears to be a mistake. In any case, on the basis of this examination, nothing turns out to make good the submission of the learned advocate for the accused to discard the evidence of the Doctor. The samples were collected. Samples were seized. PW2 has deposed about seizure of the sample. Perusal of evidence of PW2 would show that he was an omnibus panch from the government office for various panchanamas. The samples of the victim and accused Shubham for DNA purposes were forwarded to the Regional Forensic Science Laboratory (RFSL), Nagpur, under requisition (Exh.153) dated 17.06.2015 and the sample of Sandip for DNA was forwarded under requisition letter (Exh.154) dated 18.06.2015. The invoice from the office of RFSL shows that these three samples was received at RFSL on 18.06.2015. The invoice is at Exh.157. The remaining samples were forwarded on 21.06.2015 under requisition letter (Exh.155). Exh.156 is the invoice challan issued from the office of RFSL in token of receipt of the samples. It is, therefore, evident that DNA samples were forwarded without wasting any time. The remaining samples were received in RFSL on 22.06.2015. As far as DNA samples are concerned, the possibility of manipulation or planting has been completely ruled out. Learned advocate for accused Sandip, on the basis

of his DNA report, which detected semen of accused Sandip on the salwar of the victim, has pointed out his 313 statement, wherein he has stated that he was called to the police station on 15.06.2015 and he was made to ejaculate and then his semen was spread on the salwar of victim. In my view, this defence cannot be accepted at all because the evidence on record would show that the clothes of the victim were collected, seized, packed and sealed on 14.06.2015 at 23.40 hours. It is, therefore, apparent that there was no scope for manipulation of the sample as sought to be contended. The chain from the time of collection of the samples till the samples were handed over at RFSL, Nagpur, has been fully established on the basis of the evidence of the Investigating Officer and other documentary evidence. The contemporaneous documentary evidence with regard to the visit of the carrier with the samples to the office of RFSL corroborates this chain.

23. In this context, it is now necessary to consider the Chemical Analyser reports as well as the DNA reports. Three DNA samples were received in the forensic laboratory on 18.06.2015. The report dated 03.07.2015 shows that the analysis had started on 18.05.2015 and it was completed on 30.06.2015. As far as analysis of the remaining samples is concerned, the same were received at RFSL on 22.06.2015. The report dated 14.10.2016 shows that the analysis of samples in the biological section of the

DNA Division was started on 24.04.2016 and completed on 30.09.2016. Similarly, another report dated 14.10.2016 shows that the analysis of the samples of the victim in the biological section of the DNA division was started on 22.06.2015 and completed on 30.09.2016. The DNA analysis report is the most reliable scientific evidence. The DNA analysis report dated 10.08.2016 is very important. The Chemical Analyser has opined that the DNA profile obtained from blood detected on ex.1 Odhni, ex.4 Knickers and ex.7 underwear is identical and from the same source of female origin and matched with the DNA profile obtained from blood of the victim. He has further opined that the mixed DNA profile obtained from blood mixed semen detected on ex.2 Kurta contains DNA profile of the victim and Sandeep Ravindra Talande. In my view, this is a very vital piece of evidence. It needs to be stated at this stage that after the arrest of accused Sandip, he led the police to his house and as per his statement, his clothes were recovered. The underwear (ex.7) was part of those clothes. The blood was detected on his underwear. It was found to be the blood of the victim. In my view, this clinching evidence is very crucial. It corroborates the evidence of the victim with regard to the involvement of accused Sandip and his companion Shubham in the actual commission of the offence of rape. As far as evidence of PW1 and PW3 is concerned, the same is also sufficient to establish involvement of accused Ashok and Kunal in the crime.

24. Learned advocate for the appellants submitted that even if it is assumed for the sake of argument that accused Sandip and Shubham played an actual role in commission of rape, the remaining two accused cannot be held guilty of the offence under Section 376-D of the IPC. Learned advocate submitted that there is no evidence to establish that they shared a common intention with accused Sandip and Shubham. It is submitted that common intention presupposes prior concert. It is submitted that there must be meeting of minds to commit rape, which has to be determined from the conduct of the offenders, which is revealed during course of action. Learned advocate submitted that mere presence of Kunal and Ashok will not be sufficient to establish that they shared common intention with co-accused to rape the victim. In order to seek support to his submission, learned advocate has relied upon the decision in the case of *Om Prakash .vs. State of Haryana*, reported at *(2011) 14 SCC 309*. As far as the legal position is concerned, in this case it is held that the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused. The prosecution must adduce evidence to show that more than one accused has acted in concert and in such an event, if rape had been committed by even one of the accused, all will be guilty irrespective of the fact that she has not been raped by all of them. It is held that it may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the

accused. The provision embodies a principle of joint liability and the essence of that liability is the existence of common intention. That common intention presupposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action.

25. In the case on hand, the prosecution has proved that the actual rape was committed by accused Sandip and Shubham. The victim has placed on record a vivid account of rape committed on her by accused Sandip and Shubham. As held by Hon'ble Supreme in *Om Prakash .v. State of Haryana (supra)*, before deeming fiction is invoked, there must be sufficient evidence to establish a common intention, which presupposes prior concert. Learned Additional Sessions Judge, on appreciation of the evidence on record, recorded a finding that accused Kunal and Ashok are equally responsible for this offence of gang rape. I am in full agreement with this observation of the learned Additional Sessions Judge. It is based on proper analysis and appreciation of the evidence. The victim and her friend Akash had been to the place of occurrence to spend some time together. After offering prayer in the temple, they were sitting under a tree. At that time, three accused came there. They pretended that they were forest officers. They demanded Rupees Ten thousand from them. One of them snatched the mobile phone of the victim, made a call

to another person pretending to be the senior forest officer and called him at the spot. They thrashed Akash. At that time the victim went beside a tree to attend nature's call. When she came back, the accused changed their mind and asked for sexual favour from the victim. She denied the same. This has happened in the presence of all four accused. Accused Shubham and Sandip forcefully dragged the victim behind a tree. The evidence on record shows that she pleaded before them to release her. Akash also requested them not to trouble her, but they did not listen to them. Two accused dragged her behind a tree. The remaining two accused Kunal and Ashok overpowered Akash. They did not allow him to move. PW3 Akash has stated that the victim was crying for help. In their presence, one of the accused, who had taken the victim behind the tree, said that he does not want money, he wants to commit intercourse with the victim. In my view, this is sufficient to attribute the knowledge and intention to accused Kunal and Ashok. They could have been saved from the tentacles of the law, provided they had not overpowered Akash. If Akash was not overpowered by them, then he would have tried to save the victim. He would have raised hue and cry. He could have prevented the accused from committing this ghastly act with the victim. The commission of actual sexual act by one of the accused is sufficient to rope in the remaining accused in the offence of gang rape, provided there is material to show that they shared a common intention. In my view, the act of Kunal and Ashok

facilitated the commission of offence of rape by accused Shubham and Sandip. It has come on record that Akash had motorbike with him. If he was not overpowered, then he would have moved from the spot and tried to secure the help of someone or by these accused from the village. When the Forest Guard came on the spot and the victim and Akash narrated the incident to him, it was too late. By that time, accused nos.2 and 3 i.e. Shubham and Sandip, had ravished the victim and satisfied their lust. I do not see any substance in the contention that on the basis of the evidence on record, accused nos.1 and 4, i.e., Kunal and Ashok, could not be roped in and convicted for the offence of gang rape.

26. Before parting with the matter, I must place on record my appreciation for the assistance rendered by the learned advocate for the appellant and learned APP for the State.

27. On re-appreciation of the evidence, I am fully satisfied that the evidence is sufficient to prove the charge against all the accused. In view of above, I conclude that there is no substance in the appeals. Accordingly, the Criminal Appeals are dismissed.

(G. A. SANAP, J.)