



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 884 OF 2019**

Parvej Khan s/o Rafik Khan,  
Age 21 years, Occu. Labour,  
R/o Village Pusegaon,  
Taluka Sengaon,  
District Hingoli.  
At present Jamjam Colony,  
Jintur, Taluka Jintur,  
District Parbhani.

... Appellant  
[Orig. Accused]

Versus

1. The State of Maharashtra,  
through the Bori Police Station,  
District Parbhani.

2. XYZ

... Respondent

.....

Mr. Rajendra Deshmukh, Senior Advocate i/by Mr. Devang R.  
Deshmukh, Advocate for the Appellant.

Mr. S. D. Ghayal, Advocate for Respondent No.1-State.

Mr. Anil M. Gaikwad, Advocate for Respondent No.2.

.....

**CORAM : SMT. VIBHA KANKANWADI AND  
ABHAY S. WAGHWASE, JJ.**

Reserved on : 30.11.2023

Pronounced on : 19.12.2023

**JUDGMENT [ABHAY S. WAGHWASE, J.] :**

1. Instant appeal arises out of the judgment and order of  
conviction passed by learned Sessions Judge, Parbhani in Special Case

(POCSO) No. 01 of 2019 dated 03.07.2019 by which appellant is held guilty for commission of offence punishable under Sections 376AB, 506, 323 of the Indian Penal Code [IPC], Section 3(i)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 [SCST Act] and Section 4 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act] and sentenced to suffer rigorous imprisonment for life till remainder of his natural life and to pay fine as enumerated in the impugned order.

#### **FACTS LEADING TO TRIAL ARE AS UNDER**

2. The conspectus of the prosecution case is that, PW6 victim, a six years old girl studying in 1<sup>st</sup> standard, appeared for drawing exams on 01.11.2018 and she was returning back home by walk. On the way, she was intercepted by unknown person, who posed himself as friend of her father and offered her chocolate as well as lift and so she accompanied him. Instead, he took her to an abandoned building near MSEDCL office and there he committed forceful sexual assault. Victim returned home. Seeing her condition, PW1 i.e. her father made inquiries with her and she promptly reported the events which took place with her and was taken by parents to their landlord, who himself is a doctor. He also made inquiries with the victim and

thereafter he made telephone call to police, who came and took victim as well as her parents to police station where PW1 father set law into motion and crime was duly registered which was investigated by PW20 API Alewar and PW21 SDPO Gherdikar respectively. Investigation revealed involvement of appellant herein and so he was duly arrested and after carrying out investigation, he was challaned.

Charge was explained to the appellant and on denial of charge, his trial was conducted by learned Sessions Judge, Parbhani, who, on appreciation of evidence and on hearing both sides, held the charges proved and sentenced the appellant as above.

### **SUBMISSIONS**

#### **ON BEHALF OF APPELLANT**

3. By instant appeal, the above judgment is questioned by learned senior counsel primarily on following grounds:

1. Firstly, failure of prosecution to establish identity of real culprit.
2. Secondly, inordinate delay in conducting Test Identification [TI] parade.

3. Thirdly, utter disregard to the collection of biological and non-biological evidence rendering the scientific evidence doubtful, coupled with major lapses further rendering the DNA evidence inadmissible and doubtful for want of link evidence or establishing chain of custody.
  
4. Pleading false implication, learned senior counsel would submit that cardinal principle of proving the case beyond reasonable doubt has not been complied by prosecution. He reiterated the story of prosecution and would submit that apparently and admittedly appellant is a stranger, unknown to any witness including victim and therefore, it is his submission that, at the outset it was incumbent on the part of the investigating machinery to first get identity of the real perpetrator fixed and confirmed. That, no such initial steps are taken and according to him, though implication is claimed on the basis of photograph and hand sketch, he would strenuously submit that neither the victim nor any other witness had provided any description of the culprit and therefore, it is his submission that, case of prosecution about appellant alone to be the perpetrator has no foundation at all. He further submitted that alleged occurrence is of 01.11.2018 whereas accused, who is resident of other village, is arrested on 08.11.2018 and further, even Test Identification parade is held almost one month after the occurrence. Therefore, according to

him, possibility of confrontation of arrested accused to the victim cannot be ruled out.

5. He next submitted that prosecution claims that there was CCTV footage and even witness has been examined but according to learned senior counsel, still the footage did not reveal true identity of the person appearing in the footage and therefore, it is his submissions that, very identification of accused has come under shadow of doubt.

6. He further submitted that victim is subjected to medical examination at three different places and investigating machinery claims to have gathered biological evidence but said samples are not properly collected, maintained or preserved in safe custody and as such, possibility of tampering of evidence has thereby not been completely ruled out. Further, according to him, so called seizure has been dispatched to the analyzer after inordinate delay and even the person in whose custody samples were kept or the person who actually carried muddemal has not been examined. Such major lapses, according to him, contribute to the very veracity and credibility of evidence. He emphasized that even otherwise DNA evidence is mere opinion evidence or at the most corroborative piece of evidence and not substantive piece of evidence. According to him,

here, there is no other clinching incriminating material to establish that appellant alone is the perpetrator of the crime on the minor.

7. Lastly, he submitted that in spite of such weak evidence, learned trial court has unfortunately accepted the case of prosecution as proved and so he seeks indulgence of this court for setting aside the impugned judgment by allowing the appeal.

#### **ON BEHALF OF STATE**

8. Per contra, refuting the above submissions, learned APP would submit that the victim of six years has been sexually assaulted in a brutal manner. According to him, victim has identified accused in TI parade as well as in court and so he questions as to what more is required and further according to him, there is no reason for false implication. He further submitted that all medical experts, who had occasion to subject victim to physical examination and who had collected biological evidence, have been examined by prosecution. They are all unanimous about sexual assault. He submitted that even biological evidence of victim and accused was picked up from the crime scene by forensic experts. DNA analysis of the gathered evidence was conducted and the results are positive confirming

involvement of none other than appellant. There is no major deviation or lapses on the part of police or medical experts. Their evidence has remained intact and therefore, according to him, learned trial Judge has committed no error whatsoever in returning the guilt. Consequently, it is his submission that, there being no perversity or illegality in the findings, appeal be dismissed.

#### **ON BEHALF OF RESPONDENT NO.2-VICTIM**

9. Learned counsel representing victim, while supporting the findings and judgment, would submit that there is overwhelming evidence regarding involvement of none other than appellant. Forensic evidence confirms his complicity and culpability and as such, learned trial Judge has rightly convicted him.

10. Here is an unfortunate case, of which there is no dispute, where a minor of six years old has been sexually ravished while she was returning from school. This being first appellate court and as we are exercising powers under Section 374 of the Code of Criminal Procedure [Cr.P.C.], we are called upon to re-appreciate, re-examine, re-analyze and re-evaluate the entire oral and documentary evidence adduced by prosecution in trial court and to further see whether the

findings arrived at by learned trial Judge are legally sustainable or are required to be interfered with.

11. Before, dealing with the credibility and veracity of prosecution evidence, we wish to give a brief account of the status of the prosecution witnesses and the sum and substance of their testimony in the witness box by categorizing the witnesses as under :

#### **FIRST SET OF WITNESSES**

##### **[Informant, landlord, neighbour, school teacher and victim]**

**PW1** Informant and father of victim, who is a shop-keeper, in his evidence at Exhibit 10 gave her date of birth, standard in which she was taking education and name of the school. According to him, on 01.11.2018 around 3.30 p.m., he had returned from the shop to his house for some work. His neighbour Dashrath brought his daughter up to the gate and then he noticed condition of his daughter, her clothes having blood stains and injuries on her person and therefore he and his wife made queries and according to him, their daughter told that she was taken by a person on motorcycle while she was returning from school after offering her a chocolate and also on assurance to drop her at home and that, his daughter told the acts committed on her forcibly and thereafter said person running away and she returning home. Then, he stated about approaching police, who referred his daughter to Rural



Hospital Bori and from there to Parbhani Civil Hospital and further to Nanded Civil Hospital where she was admitted and treated from 02.11.2018 to 04.11.2018. He identified the clothes of his daughter which were on her person. He stated that approximately after one month, he was called at Parbhani District Prison for identification.

In cross, learned defence counsel in trial court questioned him about timings of his shop and he duly answered that there is no such fixed timing. He answered that when he reached home that day, his daughter came home 10 to 15 minutes thereafter. He admitted that he had not communicated with PW3 Dashrath Nitnavare. He answered that they were at police station for one hour and thereafter reached hospital by 6.00 to 6.30 p.m. and were there for three to four hours. He is unable to give timing at which they reached Parbhani Civil Hospital. He admitted that at police station, statement of his daughter was not recorded, but he volunteered that she was in scared condition and was not communicating at that time. He admitted that her statement was recorded after returning from Nanded i.e. on 5<sup>th</sup> or 6<sup>th</sup> of November. Regarding TI parade, he answered that there was no written intimation by police to him. In para 16 certain omissions are brought. Rest is all denial.

**PW2** Landlord as well as an Ayurvedic doctor stated about hearing cries around 04.15 p.m. from the house of his tenant on 01.11.2018. He deposed about raising queries and PW1 and his wife bringing their daughter to his cabin. He also narrated

condition of her clothes, injuries on her person as well as private part. He claims that even victim narrated him the incident which allegedly took place with her. According to him, hearing her, he realized it to be a medico legal case and therefore claims to have given call to Police Constable Sanap, who came along with police officer Alewar to the clinic and took victim and her parents with them. He also identified the clothes of victim shown to him.

This witness in his cross is merely asked as to what happened after police took victim from his clinic. He answered that victim and her parents were in his cabin for 20 to 25 minutes and he denied that victim did not narrate him regarding the incident.

**PW3** Dashrath stated that on Thursday, which was first day of the month, between 3.00 to 3.30 p.m. while he was walking to his house, he saw the girl with dry blood stains on her legs. He claims that he took the girl initially to the shop of her father and thereafter he followed her up to her house and he claims hearing shouts and cries from the house of victim.

While facing cross, this witness admitted that he does not know about the actual incident and that he did not communicate with the father of victim. Portion marked "A" is confronted to him which he denied but he is unable to state how it is appearing in his statement.

**PW4** school teacher, in her evidence at Exhibit 16, confirms victim to be student of 1<sup>st</sup> standard at her school and about she appearing for exam on 01.11.2018 and leaving school at 2.30 p.m. She claims that around 4.00 p.m. she learnt about the incident and therefore made inquiries with PW2, who narrated her about the incident with victim. She further deposed about visiting victim at Nanded Civil Hospital and further claims about victim giving description of the accused.

In cross she is asked about functioning of school, its shifts, timings, about maintenance of attendance register. She was unable to give the name of hospital at Nanded where she met victim and who all were present when she interacted with the girl. Omission is brought about victim disclosing that the said person was addressed as “*mama*”.

**PW6** is the victim and at Exhibit 22 she narrated that she appeared for drawing exam and while she was proceeding back home alone, she met one person who she claims was unknown to her. According to her, he was having black complexion, beard on his chin and he had come on black two wheeler and he offered to drop her at her father’s place and also promised to give her chocolate and so she went with him and he took her in one house which was under construction behind *bijli ghar* (MSEB office). Regarding the occurrence, she deposed that he removed her clothes and inserted his finger in her urinal place, blood was oozing from her urinal place, he inserted his penis into her private place, she started weeping, he put his foot on her face, he pulled her hair, he pressed her neck also,

he inserted his penis into her mouth, therefore she omitted and that she sustained injury on her right hand elbow, left side cheek and left side eyebrow.

Further, she stated that the person ran away after the incident. She wore clothes and returned home by walk. On the way, another person brought her home but she is unable to give his name and deposed about narrating the incident to her parents, who took her to the hospital where again she narrated the incident to the medical officer and then further being taken to Civil Hospital Parbhani and Nanded. She claimed that she saw the person in jail and that she had identified him standing at 4<sup>th</sup> position in a row comprising of six persons and that she identified him by touching him.

Her evidence goes to show that the accused was confronted to her on video conferencing before Court.

PW6, who is star witness, seems to be cross-examined extensively by posing questions regarding strength of students in her class; names of her friends; their residence; about examinations she appeared for; timings of the school; timing of drawing examination; whether all children walk home; which road they use and whether they all came together; whether shop of her father is on the way to road going to school to which she answered in affirmative. To a question whether she visited shop after appearing for drawing exam, she answered in negative. She is questioned who takes her studies. She is asked whether the person who brought her

home entered her house and she answered in negative. She affirmed that she narrated to her father who dropped her at home. Then she is questioned as to which all places was she taken and she answered as she was taken to hospital, police station, Parbhani Civil Hospital and Hospital at Nanded. She is asked whether she informed anything to police but she answered in negative. She is further questioned about days spent in Parbhani Hospital and Nanded Hospital. She is asked when she narrated to police, to which she answered that she narrated after she returned from Nanded Hospital. She is specifically asked where she narrated and she answered that she narrated the incident at the house of Dr. Bakan. She is put questions regarding her visit to Jintur court, whether police accompanied her, how many times, and whether police constable was in uniform. She is asked whether she can tell about hair, mustache and beard on the person who took her on motorcycle and she answered that he was having small hair, mustache and beard only on chin. She gave description of clothes as pink colour shirt and blue colour pant. Then she is questioned about TI parade. She is unable to state whether at the time of identification, persons standing were also having beard or not.

### **SECOND SET OF WITNESSES**

**[Examining Doctor, treating Doctor, Doctor assisting Examining Doctor and the Doctor who collected blood samples for DNA analysis]**

**PW7** Dr. Pradnya, a medical officer posted at Rural Hospital Bori is examined at Exhibit 23 wherein she narrated that on

01.11.2018, Bori police referred victim for medical examination vide communication Exhibit 24 and the victim girl to be brought by LPC 1189 M. R. Paithane attached to Bori Police Station. Doctor stated that victim narrated the history and about being taken on motorcycle by offering her chocolate and further saying that if she denies to come, he would kill her and so the victim went on motorcycle with him, who took her to a building under construction, removed her clothes and that victim told acts done with her. Doctor claims that she noted the history in the words of the victim and thereafter subjected victim to physical examination after obtaining consent of her father at Rural Hospital Bori. Doctor has reproduced injuries noticed by her in para 3, 4 and 5 i.e. both, internal and external. She even gave description of the clothes on the person of the victim in para 6 and 7 and opined that the signs suggested recent use of force with recent forceful vaginal penetration.

This medical expert in para 9 stated about collecting vaginal swab, vulvul swab, blood, nail clippings and hair found over genital region. Victim was given treatment and referred to higher center for gynecological examination and forensic examination. She identified the injury certificate Exhibit 25 issued by her. Witness stated that all samples were handed over to police in sealed condition. She further stated that on the basis of FSL [Forensic Science Laboratory] report, it is her opinion that the girl was sexually assaulted by accused as semen detected on the swab collected from the crime scene matched with the male haplotypes obtained from controlled

blood samples of accused-appellant. She was carrying form by which samples were forwarded to the police i.e. on the day of her evidence and that she is ready to place it on record and it was duly taken on record as Exhibit 27. She further claimed about request letter from police for handing over samples and she identified it at Exhibit 28. She also identified clothes of victim.

**PW8** Dr. Dhokte, posted as Assistant Professor at Government Medical College, Nanded, in his evidence at Exhibit 29 gave evidence that victim was referred on 02.11.2018 with complaint of perennial tear in the posterior wall of vagina. She was admitted for three days. After giving general anesthesia, she was treated for the perennial tear and even sutures, prescribed medicines and was discharged on 04.11.2018. He claims that he opined that victim girl has perennial tear due to sexual assault on the basis of his examination. He identified discharge card and medical treatment papers Exhibits 30 and 31. On the basis of FSL report, he opined that victim was subjected to penetrative sexual assault by accused.

**PW10** Dr. Chandane, claims that he was attached to Rural Hospital Bori on 05.11.2018. He claims that on 01.11.2018 he assisted Dr. Alne [PW7], who called him for medical examination regarding sexual assault. He deposed that after examination, Dr. Alne handed over clothes of victim girl to this witness for sealing the same and so he further took assistance of two staff

members of the hospital namely, Deepak Samcharan and Shrinivas Kanthe, who acted as panchas, and he claims that he kept the clothes in one box and sealed it by noting the MLC number. He further claims that he personally sealed it on 01.11.2018 and police have drawn panchanama on 05.11.2018.

**PW11** Dr. Pawar, another doctor posted at Rural Hospital, Bori, at Exhibit 35 deposed that on 13.11.2018, victim was referred for collection of blood samples in DNA kit. According to him after obtaining consent of father of victim, he collected blood sample in a dispovan syringe and transferred it in DNA kit and then sealed it and he further claims to have kept it in one cold box and even the said box was sealed by him. He claims that he handed over the DNA kit to API Alewar and constable of Bori police Station. He further deposed that on same day, accused was also referred to him for obtaining blood sample for DNA. He deposed about collecting blood sample of accused in two tubes. He also collected his pubic hair, nail clippings, sample from the entry portion of penis and sealed all the samples by labeling it and further handed over it to the police on the same day.

### **THIRD SET OF WITNESSES**

**[Panchas]**

**PW12** Ramrao, who acted as pancha, at Exhibit 40 gave evidence that on 01.11.2018 he was called at Bori police station and from there they went in a Government vehicle to the spot of



incident. According to him, forensic lab van was parked at the spot, the spot was a building which was under construction, at a distance of 100 meters from Jintur-Parbhani road, the building had no roof. For entering the building, stones were kept and they all entered. **There was darkness at the relevant time** and therefore, headlights of forensic lab van were kept on. Police personnel were carrying batteries and in the light of van headlights and batteries they saw the spot and he claims that they observed **blood stains in the right side room and blood stains, semen stains and omit portion** in the back side room. A hair pin and hair were found lying there. Forensic experts collected the samples from the spot. All samples were sealed at the said place by police and forensic team. He claims that his signature was obtained and police drew panchanama. He identified panchanama Exhibit 41 as well as his signature over it. He identified the articles confronted to him in the witness box. He deposed that blood samples were collected from the cement concrete and kept in **polythene bag**. He also identified articles E, F, G, H i.e. omit sample, blood sample, hair pin. He identified labels affixed on the seizure envelop Exhibits 42, 43, 44, 45. This witness has also identified panchanama of seizure of motorcycle caused on 15.11.2018 as well as photographs snapped from the scene of occurrence.

**PW13** Deepak is the pancha to seizure of clothes of accused. He deposed that on 05.11.2018 he and another pancha Shriniwas Kanthe were called to act as pancha. Learned trial court has noted his demeanor that witness is unable to say anything and thereafter, in para 3 he deposed that he was called in police

station and in their presence clothes of accused which were on his person were removed and seized by police. He gave description of clothes as pink full shirt and blue jeans. According to him, police seized and sealed the clothes by drawing panchanama Exhibit 48 which he identified alongwith his signature over it.

**PW15** Johnathan Daund is the witness who has acted as pancha to disclosure and verification panchanama Exhibit 58 done at Bori police station on 15.11.2018.

#### **FOURTH SET OF WITNESSES**

##### **[Investigating Officers and Police Personnel]**

**PW9** PC Dilwale is the carrier of muddemal and he deposed regarding muddemal being directed on 13.11.2018 by PW20 to be taken to FSL, however, he took possession of the muddemal on 14.11.2018.

However, in cross he answered that outward letter bearing no. 1213/2018 is of 06.11.2018. Such date shows that in spite of police preparing communication for dispatch for analyzer on 06.11.2018, this witness has collected muddemal actually on 14.11.2018 and the delay so caused has not at all been explained. He is unable to state in cross as to who was in-charge of the muddemal section at Bori Police Station when he collected muddemal.

Evidence adduced by prosecution goes to show that in spite of gathering biological and non-biological evidence on 01.11.2018 i.e. both, found at crime scene as well as on examination of victim, muddemal is dispatched directly after almost two weeks and it was apparently kept lying at Bori police station.

**PW18** Parmanand Gawande, Naib Tahsildar, held the TI parade on 04.12.2018.

**PW20** API Alewar and **PW21** S.D.P.O. Gherdikar are the Investigating Officers [IO]. They have deposed regarding carrying out investigation at respective times. It transpires that subsequently when it was revealed that the victim belonged to Scheduled Caste, further investigation was handed over to PW21 being a Dy.S.P. ranking officer.

PW20 referred victim to medical examination and he himself proceeded to spot in the evening and with the help of forensic experts, claims to have got incriminating physical evidence collected and himself sealed it, drew scene of occurrence panchanama and thereafter carried out further investigation like gathering CCTV footage, arresting accused, collecting its panchanama, collecting biological samples from medical experts, gathering medical papers to form it a part of chargesheet.

Similarly, after taking over investigation by PW21, he seized clothes of accused, took steps for procuring DNA kit, got blood samples of victim and accused collected through doctor, sent seizure to FSL Aurangabad on 14.11.2018, included papers like logbook extract, caused seizure of motorcycle, sought information from RTO, directed holding of TI parade, gathered injury certificate and chargesheeted accused.

Both IOs are subjected to extensive cross by learned defense counsel. PW20 admitted in cross that for the first time he met victim girl and her parents in the house of PW2 landlord. He admitted that at said place he did not make inquiry with the victim. He admitted that when he reached the spot, it was dark. He is unable to give names of the forensic experts, their strength and that he did not record their statements as well as did not obtain their signature on the samples collected by them. He admitted that sketch of the suspect was prepared in the night but it is not made part of the chargesheet and that he did not take note of drawing sketch in the station diary. He admitted that there is no document to show that by way of written communication LCB was deputed to search for accused and that he did not record statement of the LCB officer from whom custody of accused was taken nor any report to that extent is made part of chargesheet. He admitted that he did not record statement of the person from whom he obtained CCTV footage and no distinct panchanama was drawn regarding procedure of obtaining CD of the CCTV footage. He admitted that he did

not seize school bag, tiffin bag of the victim and that he did not note description of clothes on the person arrested and remanded i.e. in the arrest panchanama. He admitted that hand sketch was got drawn on the basis of CCTV footage. He is unable to give name of the employee with whom muddemal was forwarded on 06.11.2018 and he did not record the statement of carrier.

While under cross PW21 IO answered that clothes of the accused were seized from his house. He too admitted that he did not file hand sketch of the accused along with the chargesheet.

12. The other witnesses are either photographer, owner of the shop from whom CCTV footage is obtained, police staff who arranged DNA kit and who guarded the spot etc. However we do not feel their evidence to be that important.

### **ANALYSIS**

13. Learned senior counsel for appellant has raised several objections which are taken note of in para 3, 4, 5, 6 and 7 i.e. regarding false implication on the ground of failure to fix identify of real perpetrator; and secondly, lapses and deviations by both, medical experts, police machinery, forensic experts who allegedly participated in collection of biological and non-biological evidence, thereby

rendering forensic evidence doubtful. His specific accusation is that possibility of tampering has not been ruled out.

In the light of above submissions and objections, following questions arise for our consideration:

1. Whether appellant is identified alone to be the perpetrator of crime?
2. Whether there are infractions in collection and preservation of biological and non-biological evidence?
3. Whether possibility of contamination and tampering of evidence has been completely ruled out.

We proceed to answer the above questions here as under:

14. The fundamental objection raised before us is about identity of real perpetrator of crime. Learned senior counsel has not disputed offence committed on the minor but he has raised issue as to who committed it. He is very emphatic that at the threshold prosecution utterly failed in establishing the very identity of the accused.

15. Admittedly, neither informant father, nor victim has provided detailed description of real culprit. Only description given by victim is

that the person was of black complexion and he was sporting beard only on the chin. Description of the clothes is given as pink shirt and blue jeans. Except such description, no further details about age or other physical features were disclosed by the victim.

16. PW20-first Investigating Officer claims that he got hand sketch drawn on the basis of CCTV footage. In para 22 of his evidence, PW20 deposed that as per instructions of his superior, he searched for persons who were having criminal records and that time he came across name of one Allauddin Sandal and he was accordingly called, interrogated, confronted with CCTV footage and said person Allauddin revealed the identify of present appellant and he to be resident of Jintur and therefore, LCB team was informed, who caught appellant on 08.11.2018, and thereafter arrested him.

But while under cross, PW20 has admitted that hand sketch is not made part of chargesheet. He has not recorded statement of so called person interrogated on the basis of criminal record, namely, Allauddin. PW19 Sandip, who retrieved CCTV footage which was made the basis of drawing hand sketch, has candidly admitted that, person seen in the footage is not identifiable. PW20 in cross para 32 answered that there is no document to show that information was

passed on to LCB, he has not recorded statement of any of the LCB officers and no report was forwarded by LCB. He admitted that he has not recorded statement of the person from whom he obtained CCTV footage and that he did not draw panchanama of preparing CD.

Therefore, such material shows that there was no concrete foundation or material with either PW20 or PW21 confirming appellant alone to be the culprit.

17. Though PW21 took steps of getting TI parade arranged, it is apparently conducted on 04.12.2018 i.e. almost after one month of the occurrence and more than three weeks since arrest of appellant dated 08.11.2018. No explanation has been given for inordinate delay caused in conducting TI parade even when investigating machinery was clearly aware that appellant was a stranger.

Though TI parade was got conducted through PW18 Naib Tahsildar, we are astonished to find that in a case where provisions of POCSO Act are attracted, a minor of six years old and victim of sexual assault is made to appear in a jail premises and further made to identify culprit amongst a line of dummies by making her touch the person. In fact, POCSO Act itself provides detailed mechanism



regarding precautions to be taken to, as far as possible, avoid direct confrontation of accused and victim. However, here, such precaution has apparently not been taken, thereby frustrating the very object of the statute like POCSO Act. Therefore, we are compelled to express our serious concern as regards the procedure adopted by the Special Executive Magistrate i.e. Naib Tahsildar and wish to deal with the same at appropriate stage.

Evidence of PW18 Naib Tahsildar shows that he himself did not draw the panchanama, rather a Talathi accompanying him scribed it and said Talathi is not examined and secondly, Naib Tahsildar has admitted in cross that he did not mention in the panchanama that dummy persons used were of similar features and personality like that of suspect. He has not mentioned whether the dummy persons were sporting mustache or beard. Therefore, even the belated exercise of identification comes under shadow of doubt as guidelines required to be followed while conducting TI parade, i.e. arranging dummies of similar age, physical features matching to that of accused, are not followed thereby rendering the exercise doubtful. It has also come in the evidence that victim as well as appellant were called at Rural Hospital, Bori on one and the same day for collection of blood sample for DNA. Such circumstance creates possibility of confrontation of

appellant to the victim before her testimony in the witness box where she had identified him on the video conferencing.

Therefore, in the light of above discussed material, as pointed out by learned senior counsel, here, very identification of real culprit has not been established beyond reasonable doubt.

Hence this point is answered in negative.

18. Now let us deal with the second criticism regarding non-compliance of Standard Operating Procedure [SOP] for collection, maintenance, safe custody of both, biological and non-biological evidence allegedly gathered during investigation. He also questioned the very aspect of integrity of the evidence on the ground that link evidence and chain of custody is not proved.

In the light of above objection, we have meticulously visited the evidence of IOs, pancha to spot panchanama, medical witnesses PW7, PW8 and PW11. What is emerging is that though evidence is claimed to be gathered from crime scene on 01.11.2018 itself, apparently evidence of IO and pancha clearly shows that the process of collection was done in dark allegedly by use of light of vehicle i.e. van of Forensic Science Laboratory and torch. Even collection seems to have been done and kept in polythene bags which is in deviation to the

SOP drawn by Government prohibiting storing of biological samples in polythene bag to avoid its contamination. Secondly, forensic experts who allegedly collected and picked up samples are not examined, nor are signatories to the label over samples as well as spot panchanama. Samples collected from crime scene are also not dispatched immediately.

Biological Samples allegedly collected by PW7 Dr. Pradnya are surprisingly retained by either herself at her home and some samples are kept in Rural Hospital itself. No documentation has been drawn by PW7 on 01.11.2018. She has handed over biological samples collected by her on 01.11.2018 to police on 05.11.2018. There is no material or evidence that samples were properly preserved to avoid its degradation and maintain its integrity.

Even it is surprising and shocking to note that, PW11 Dr. Pawar has not collected very semen of appellant in spite of being requested. Further, the treating doctor PW8 Dr. Dhokte has not issued MLC certificate/injury certificate. As per guidelines, PW7 was expected to forward examination report forthwith to the police along with biological evidence, however her evidence shows that on the day of her testimony in the court, she was carrying the form.

Further, investigating machinery took possession of biological samples on 05.11.2018 and 13.11.2018 and kept the same at Bori police station up to 14.11.2018 till its dispatch to the laboratory. However, according to carrier, he was called by IO to forward and deposit muddemal on 13.11.2018 and he further collected it on 14.11.2018. Such timeline shows that since 01.11.2018 till 14.11.2018, muddemal was lying in Bori police station but muddemal clerk has not been examined to demonstrate its safe custody.

Evidence of IO PW20 goes to show that muddemal was not deposited and accepted by Forensic Science Laboratory, Aurangabad as the same was said to be closed for Diwali vacation and therefore carrier allegedly brought the muddemal back to Bori police station. A mere entry to that extent has been taken in station diary, however, Investigating Officers in cross are unable to give the name of the carrier who subsequently took muddemal for FSL and DNA. Such are the sorry state of affairs in handling muddemal in a serious case of rape on a minor.

Therefore, the objection raised by learned senior counsel regarding improper collection and question about safe custody of

seized muddemal i.e. both, biological and non-biological evidence, is required to be sustained. Hence this point is answered accordingly.

19. It needs to be noted that Central Forensic Department, Home Ministry, Government of India as well as Ministry of Health have issued guidelines for proper collection, documentation, preservation of both, biological and non-biological evidence. The guidelines are meant to be followed by both, Government hospitals as well as private hospitals. However, above discussed material on record clearly shows that neither medical experts nor investigating machinery has taken due care to follow the guidelines. Their failure affects the credibility of prosecution evidence. PW7, who collected biological evidence, has not deposed about use of SAFE kit i.e. a kit specially meant to maintain Sexual Assault Forensic Evidence. Samples are not shown to be distinctly sealed. Therefore, very question of quality of samples crops up.

20. At this juncture, we also wish to deal with the issue of link evidence/chain of custody evidence raised before us by learned senior counsel.

The three Judges Bench of the Hon'ble Apex Court in the case of *Rahul v. State of Delhi* ; (2023) 1 SCC 83 has elaborately dealt with

the issue of DNA profiling methodology, statistical analysis and also **emphasized the importance of proper collection and preservation of DNA evidence.** We wish to borrow and reproduce the observations made in para 37 to the extent of collection and preservation of evidence, which are as under;

*“37. .... If DNA evidence is not properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, grater attention to contamination issues is necessary while locating, collecting and preserving DNA evidence as it can be contaminated from other source getting mixed with DNA relevant in the case. This can happen even when someone sneezes or coughs over the evidence or touches his/her mouth, nose or other parts of the face and again touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA profiling.....”*

Likewise, in the case of ***Manoj v. State of Madhya Pradesh*** ; (2023) 2 SCC 353, the Hon'ble Apex Court refused to rely on DNA evidence *inter alia* and the genuineness of its recovery was suspected.

Again in the recent judgment of Hon'ble Apex Court in the case of *Prakash Nishad v. State of Maharashtra* ; MANU/SC/0613/23, in para 54 , it is observed as under;

*“54. perusal of these documents reveals that samples of the blood and semen of the Appellant were sent for forensic analysis. Importantly though, there is nothing on record to establish as to who took such samples, on what date, on how many occasions and why were they not sent all at once, we notice that none of the police officials have testified to the formalities of keeping the samples safe and secure being complied with.”*

Further, in para 60 of the same judgment, the Hon'ble Apex Court observed as follows;

*“60. We may observe that the Maharashtra Police Manual, when speaking of the integrity of scientific evidence in Appendix XXIV states-*

*The integrity of exhibits and control samples must be safeguarded from the moment of seizure upto the completion of examination in the laboratory. This is best done by **immediately** (emphasis laid) packing, sealing, labeling and to prove the continuity of integrity of the samples, the messenger or bearer will have to testify in the court that what he had received was sealed and delivered in the same condition in*

*the laboratory. The laboratory must further certify that they have compared the seals and found them to be correct. Articles should always be kept apart from one another after packing them separately and contact be scrupulously avoided in transport also.”*

The Hon’ble Apex Court in the said judgment, in observing the need for expedition in ensuring that samples when collected were sent to the concerned laboratory as soon as possible, has referred to the “Guidelines for collection, storage and transportation of Crime Scene DNA samples For Investigating Officer – Central Forensic Science Laboratory, Directorate of Forensic Science Services, Ministry of Home Affairs, Government of India”.

In para 62, it has been further observed, “the document also lays emphasis on the ‘chain of custody’ being maintained. Chain of custody implies that right from the time of taking of the sample, to the time its role in the investigation and processes subsequent, is complete, each person handling said piece of evidence must duly be acknowledged in the documentation, so as to ensure that the integrity is uncompromised. It is recommended that a document be duly maintained cataloguing the custody. A chain of custody document in other words is a document, **“which should include name or initials of**



the individual collecting the evidence, each person or entity subsequently having custody of it, dated the items were collected or transferred, agency and case number, victim's or suspect's name and the brief description of the item”.”

21. In the light of above law settled by the highest court of this land, here, it is noticed that apart from failure to follow Standard Operating Procedure for collecting biological and non-biological evidence, issue about its collection, handling, preservation, documentation and safe custody also arose.

Above rulings mandate proving chain of custody. Here, the chain is not shown to be complete since collection of biological and non-biological evidence dated 01.11.2018, 05.11.2018 till 14.11.2018. In view of Judgment of Hon'ble Apex Court in the case of *Rahul v. State of Delhi* (supra), the observations made in para 37, reproduced in aforesaid para 20 herein, clearly show that precautions are directed to be taken to prevent contamination from other sources and even possibilities of sneeze or cough over the evidence, touching the nose, mouth are some of the eventualities which, according to the Hon'ble Apex Court, are likely to contaminate the DNA evidence. Here, pancha PW12 Ramrao in cross went to the extent of stating that

he has taken smell of the semen sample allegedly picked from crime scene. Such answer clearly suggests that evidence has been handled by pancha.

Therefore here, there are clear possibilities of contamination of the evidence. Coupled with above, when actual persons who were custodians of the muddemal till it reached Forensic Science Laboratory, having not being examined, the very aspect of chain of custody also come under cloud.

Resultantly, as claimed by learned senior counsel for appellant, here, possibility of tampering with biological and non-biological evidence is not completely ruled out. Said point is also answered accordingly.

#### **DNA EVIDENCE**

22. PW14 CA, who carried out DNA analysis, narrated the steps taken by her since receipt of samples till drawing of its results and reports. Her reports upon analysis and interpretation/opinion/results are as under :

##### **Report (A) - Interpretation :**

1. The DNA profile obtained from vulval swab, vaginal swab and hair found on genital area of victim and blood stains detected on full open shirt of Parvej Khan

Rafiz Khan matched with the control DNA profile obtained from blood of victim.

2. The DNA profile obtained from semen detected on swab stated to be collected from crime scene matched with control DNA profile obtained from blood of Parvej Khan Rafiq Khan.

**Report (B) – Opinion :**

Male haplotypes obtained from blood of Parvej Khan Rafiq Khan and semen detected on swab stated to be collected from crime scene are from the same paternal progeny.

Consequently, here, though above opinion has been reached by PW14 CA, the DNA evidence, which is without semen control sample of accused, is even otherwise only corroborative piece of evidence. There is no other independent incriminating evidence or circumstance. Solely on the basis of DNA evidence, guilt cannot be fastened.

23. On the point of evidentiary value of DNA and in support of our above view, we wish to quote observations of the Hon'ble Apex Court in the very recent case of *Manoj v. State of M.P.* ; (2023) 2 SCC 353 wherein, after dealing with what is meant by DNA profiling methodology, procedure of statistical analysis, importance of

collection and proper preservation of evidence, on consideration of 185<sup>th</sup> report of Law Commission of India, following observations are made in para 153 :

“153. The Law Commission of India in its Report (185<sup>th</sup> Report on Review of the Indian Evidence Act, 2003), observed as follows:

*“DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and an sample of genetic material from a known person. If the samples do not “match”, then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. **If the samples match, that does not mean the identity is conclusively proved.** (emphasis laid) Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA “profile” or “fingerprint” is found. It may be, for example, that the relevant profile is found in 1 person in every 1,00,000: This is described as the “random occurrence ratio” (Phipson 1999, 15<sup>th</sup> Edn., Para 14.32).*

*Thus, DNA may be more useful for purposes of investigation **but not for raising any presumption of identity in a court of law.**” (emphasis laid)*

Further in para 158, the Hon'ble Apex Court held as under :

*“158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. **Notably, the reliance, was to corroborate.** (emphasis laid) This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case.”*

24. Keeping above legal propositions propounded by the Hon'ble Apex Court in mind and applying the same here, we have already discussed in aforesaid paras that apart from failure to confirm identity of the real perpetrator of crime, very collection, safe preservation of samples both, biological and non-biological, has come under serious doubt in the light of available material on the point of collection and safe custody. Chain of custody has not been established which was essential in a case of such magnitude and gravity.

25. We have noticed that in spite of directions issued by the Hon'ble Apex Court time and again regarding meticulous compliance of Standard Operating Procedure to be adopted during collection of biological and non-biological evidence and its preservation to avoid

its degradation and to further maintain its integrity, the stakeholders like medical experts, who conducted physical examination of both, victim and accused, and retrieved samples, so also the police machinery and the forensic experts have shown utter disregard to the procedure contemplated and spelt out in the form of guidelines, more particularly in respect of evidence which is in the biological and non-biological form. There is inordinate delay in sending muddemal to the FSL coupled with the non-acceptance of muddemal by FSL on the count of Diwali holidays and again samples being brought back to police station and kept lying there till its further dispatch. This reflects a very insensitive attitude of all stakeholders like medical experts, police machinery etc. In the very case in hand, we have also noticed that in spite of claim of investigating machinery about engaging forensic lab experts for picking up biological and non-biological evidence from the crime scene and in spite of availability of forensic lab van at the crime scene, evidence so picked up has not been retained by forensic experts and is rather allowed to be taken by Investigating Officer to the police station, a place which, here we are doubtful, was itself suitable for preserving the quality of the evidence.

26. Consequently, here, we take opportunity to bring it to the notice of the State as well as prosecution that, all stakeholders like police,

medical experts, forensic experts and even prosecutors to be sensitive to the need of proper collection, sampling, preservation and safe custody to rule out possibility of diminishing and/or degrading the quality of evidence. Such authorities need to keep themselves well informed and updated on the guidelines issued by Health Ministry/Home Ministry. We expect periodic sensitization of all stakeholders by conducting regular workshops and seminars of all such stakeholders at one venue and one and the same time. Such platform could be used for interactions amongst themselves to meet the legal requirements.

27. Here, appellant was also chargesheeted for commission of offence under Section (3)(2)(v) of the SCST Act. However, on meticulously going through the charge framed by learned trial Judge as well as in the operative part of the judgment, it seems that inadvertently provision is quoted as 3(i)(v) of SCST Act in stead of 3(2)(v). Be it so. This provision provides for penal action when one deliberately and knowing that the victim is belonging to Scheduled Caste or Scheduled Tribe category, commits atrocity. For the sake of convenience, we wish to reproduce Section 3(2)(v) as under:

**“3. Punishment for offences of atrocities.-**

*(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -*

*.....*

*(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.”*

On going through the above provision, it is evident that the focal point of above provision is that when atrocity is committed on a victim purposefully and knowing that the victim belongs to Scheduled Caste or Scheduled Tribe and thereby commits offence. Here, going by the story of prosecution, there is no material to show that appellant since previously knew that victim belongs to Scheduled Caste or Scheduled Tribe. Prosecution case is admittedly that victim was lured by a person, who was neither known to victim nor anybody else and was rather required to be got identified from so called footage or hand sketch. Therefore, the very essence of prior knowledge about category of victim being not known and there being no distinct material about his knowledge to that extent, in our opinion, said offence cannot be made out. We seek support to our



such opinion and conclusion from the recent judgment of the Hon'ble Apex Court in the case of ***Shashikant Sharma and others v. State of Uttar Pradesh and another*** arising out of SLP (Criminal) No(s). 5323 of 2023 reported in 2023 INSC 1036. Here also, *prima facie* ingredients to attract Section 3(2)(v) are patently missing and therefore, in our considered opinion, said charge is misplaced and the learned trial Judge failed to consider and appreciate the settled legal position and rather inflicted punishment for commission of said offence and so it cannot be allowed to sustain.

#### SUMMATION

28. To sum up, here, firstly, very identity of real culprit has not been established. Appellant is shown to be arrested on weak material like hand sketch. The very source from whom information regarding present appellant is claimed to be gathered, namely, Allauddin Sandal, who stated to have consumed liquor with appellant and one Mazhar, is surprisingly not examined as witness. Neither said Mazhar is also examined. In fact, on the point of identity, these persons were crucial witnesses. No investigation seems to have been made on alleged disclosure by said Allauddin regarding all three of them consuming liquor together. Further, apparently TI parade was got

arranged after inordinate delay of a month or so resulting into belated TI parade. Secondly, there is utter disregard to the procedure of collection/preservation of crucial biological and non-biological evidence, i.e. both, by medical experts as well as police machinery. Thirdly, integrity of the evidence has not been retained and available material shows that possibility of tampering has not been ruled out as a result of lengthy retention of samples at a place like police station. There is no examination of handlers and custodians of muddamal to establish chain of custody. For all above reasons, though a serious offence is proved to be committed on a minor, the major lapses and defects have rendered the entire evidence doubtful and so cannot be made the basis of conviction.

29. Though actual occurrence has been proved to have taken place, except DNA evidence, there is no full proof or legally acceptable evidence. Mere DNA evidence cannot be made the sole basis of conviction. Moral conviction has no legal sanctity and what law requires is legally acceptable evidence ruling out innocence of the accused. Here, such quality of evidence is not available and therefore, we are constrained to hold, for the reasons discussed herein, that unfortunately, case has not been proved beyond reasonable doubt as

against the appellant and hence, we are further constrained to extend benefit of doubt to the appellant.

30. We have noticed that learned trial Judge has directed payment of total amount, i.e. in all Rs.46,000/- by way of fine, to be paid to the victim but in our considered opinion, the amount so directed is apparently meager and inadequate for the simple reason that the victim, who resides in a village, has suffered mental and physical pain, agony and trauma. Evidence shows that the six years old victim was required to be taken to various places for examination and treatment and resultantly suffered academic loss too. Compensation has to be paid under Section 357-A of Cr.P.C.

In a case *Suresh and another v. State of Haryana* ; (2015) 2 SCC 227, the Hon'ble Apex Court has expected scrupulous compliance of granting compensation under Section 357-A of Cr.P.C. in deserving cases, even including in cases of acquittal.

For above reasons, we find it a fit case to compensate her adequately and hence we direct the District Legal Services Authority (DLSA), Parbhani to conduct thorough enquiry of the current status of the victim i.e. both, physical, mental and educational and also enquire

whether she is recipient of compensation available from the State Government authorities. Further, if on inquiry it is revealed that something has not been done or something more is required to be done, then, we direct DLSA to suggest to the Government authorities to take appropriate steps which are required for meaningful rehabilitation. Hence, we proceed to pass the following order:

### ORDER

- I. The Appeal is allowed.
- II. The conviction of the appellant Parvej Khan s/o Rafik Khan in Special Case (POCSO) No. 1/2019 dated 03/07/2019 by learned Sessions Judge, Parbhani for the offences punishable under Sections 376AB, 506, 323 of IPC, Section 3(i)(v) of the SCST Act and Section 4 of the POCSO Act stands quashed and set aside.
- III. The appellant stands acquitted of the offence punishable under Sections 376AB, 506, 323 of IPC, Section 3(i)(v) of the SCST Act and Section 4 of the POCSO Act.
- IV. The appellant be set at liberty if not required in any other case.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI. We clarify that there is no change as regards the order in respect of *muddemal* seized in the matter.

VII. District Legal Services Authority, Parbhani to undertake enquiry as directed in para 30 and report compliance to this Court within one month from the date of receipt of copy of this judgment and record and proceedings.

VIII. Registrar (Judicial) to send copy of this judgment and record and proceeding immediately to District Legal Services Authority, Parbhani.

IX. We direct State to formulate suitable guidelines to be adhered to, while conducting TI parade in cases attracting provisions of Protection of Children from Sexual Offences Act, 2012 and to further suggest Standard Operating Procedure to be adopted, keeping in mind the aspect of confidentiality of details of victim and also suggest necessary precautionary measures to be taken while making victim participate in TI parade for identifying perpetrator, with requisite infrastructural set up for the same.

X. We also direct State to organize periodic sensitization programme of all the stakeholders underscoring need of performing respective roles whenever they are participating and aiding each other during investigation process as dealt in para 26 of the judgment.

**[ABHAY S. WAGHWASE, J.]**

**[SMT. VIBHA KANKANWADI, J.]**