



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

**CRIMINAL APPEAL NOS. 336/2016, 352/2016, 325/2016 & 346/2016**

**CRIMINAL APPEAL NO. 336/2016**

1. Maksud Sheikh Gaffur Sheikh,  
Aged about 46 years, Occ. Labourer  
R/o. Samta Colony, Tukum,  
Chandrapur, District Chandrapur.
2. Sheikh Kadir Sheikh Jakir,  
Aged about 32 years, Occ. Auto Driver,  
R/o. Tukum Talav, Near Usmaniya Masjid,  
Chandrapur, District Chandrapur.

... **APPELLANTS**

**// VERSUS //**

State of Maharashtra through  
Police Station Officer, Ramnagar Police Station,  
Chandrapur.

... **RESPONDENT**

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Shri R. K. Tiwari, Advocate for appellant.  
Shri S. S. Doifode, APP for respondent/State.  
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**WITH**

**CRIMINAL APPEAL NO. 352/2016**

Wasim Khan S/o. Ajim Khan,  
Aged about 31 years, Occ. Mechanic,  
R/o. Sarkar Nagar, Near Khanke Wadi,  
Chandrapur, District Chandrapur.  
(IN JAIL)

... **APPELLANT**

**// VERSUS //**

The State of Maharashtra through  
Police Station Officer, Police Station Ramnagar,  
District Chandrapur.

... **RESPONDENT**

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Shri Arjun V. Bobde a/w. Ms. Shubhangi Jadhao, Advocate for appellant.

Shri S. S. Doifode, APP for respondent/State.

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**WITH**

**CRIMINAL APPEAL NO. 325/2016**

Jobi Ashokan Welythan,  
Age 35 years, Occ. Private,  
R/o. Vinayak Apartment,  
Urja Nagar Ward, Chandrapur,  
Dist. Chandrapur.

**... APPELLANT**

**// VERSUS //**

State of Maharashtra through its  
Police Station Officer, Police Station, Ramnagar,  
Chandrapur, Dist. Chandrapur.

**... RESPONDENT**

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Shri R. R. Vyas, Advocate for appellant.  
Shri S. S. Doifode, APP for respondent/State.

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**AND**

**CRIMINAL APPEAL NO. 346/2016**

Sirajkhan Pathan @ Raja S/o. Shahadat Khan  
Pathan, Aged about 36 years,  
Occ. Water Filter Plant,  
R/o. Hanuman Khidki, Dadmahal Ward,  
Chandrapur, Dist. Chandrapur.

**... APPELLANT**

**// VERSUS //**

The State of Maharashtra through  
Police Station Officer, Police Station, Ramnagar,  
District Chandrapur.

**... RESPONDENT**

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Shri R. M. Daga, Advocate for appellant.  
Shri S. S. Doifode, APP for respondent/State.

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**CORAM :- NITIN B. SURYAWANSHI &  
M. W. CHANDWANI, JJ.**

**RESERVED ON :- 28.04.2025**

**PRONOUNCED ON :- 06.05.2025**

**JUDGMENT (PER: M. W. CHANDWANI, J.):-**

These four appeals have been filed by the convicts challenging the conviction recorded by the learned Additional Sessions Judge, Chandrapur in Sessions Case No. 22/2015 against the appellants in these appeals under different Sections of the Indian Penal Code (hereinafter referred to as “the IPC”) and the Information Technology Act, 2000 (for short, “the IT Act”). Since, the appeals are arising out of the same judgment of conviction, therefore, they are being disposed of analogously. The learned Additional Sessions Judge, Chandrapur, by the impugned judgment, convicted the appellants in all the appeals and sentenced them as follows :-

<b>Name of the appellants</b>	<b>Convicted under Sections</b>	<b>Punishment Awarded</b>	<b>Fine to be paid</b>
Maksud Sheikh Gaffur Sheikh	Section 506-II of IPC	R. I. For 7 years	Rs. 3000/-
	Section 450 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 326 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 66E of the Information Technology Act, 2000 r/w. Sections 34, 149, 109, 114 of IPC.	R. I. For 3 years	Rs. 1000/-
	Section 452 of IPC r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 7 years	Rs. 3000/-

	Section 354A r/w. Section 34, 109, 114 of IPC	R.I. for 3 years	Rs. 1000/-
	Section 354B r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 3 years	Rs.1000/-
Wasim Khan Ajim Khan	Section 450 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 326 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 66E of the Information Technology Act, 2000 r/w. Sections 34, 149, 109, 114 of IPC.	R. I. For 3 years	Rs. 1000/-
	Section 452 of IPC r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 7 years	Rs. 3000/-
	Section 366 r/w. Section Section 34, 109, 114 of the IPC	R. I. For 10 years	Rs. 4000/-
	Section 354A r/w. Section 34, 109, 114 of IPC	R.I. for 3 years	Rs. 1000/-
	Section 354B r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 3 years	Rs.1000/-
	Section 354C of the IPC	R.I. for 3 years	Rs. 1000/-
	Section 376D r/w. Section 34, 109, 114 of IPC	R. I. For life (remainder of natural life)	Rs.50000/-
	Section 506-II r/w. Section 34, 109, 114 of IPC	R. I. For 7 years	Rs. 3000/-
	Section 307 r/w. Section 34, 109, 114 of IPC	R. I. For life	Rs. 5000/-
	Section 394 r/w. Section 34, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 201 of IPC	R.I. For 21 months	Rs. 750/-
Sheikh Kadir Sheikh Jakir	Section 450 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 326 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 66E of the Information Technology Act, 2000 r/w. Sections 34, 149, 109, 114 of IPC.	R. I. For 3 years	Rs. 1000/-
	Section 452 of IPC r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 7 years	Rs. 3000/-
	Section 366 r/w. Section Section 34, 109, 114 of the IPC	R. I. For 10 years	Rs. 4000/-

	Section 354A r/w. Section 34, 109, 114 of IPC	R.I. for 3 years	Rs. 1000/-
	Section 354B r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 3 years	Rs.1000/-
	Section 376D r/w. Section 34, 109, 114 of IPC	R. I. For life (remainder of natural life)	Rs.50000/-
	Section 506-II r/w. Section 34, 109, 114 of IPC	R. I. For 7 years	Rs. 3000/-
	Section 307 r/w. Section 34, 109, 114 of IPC	R. I. For life	Rs. 5000/-
	Section 394 r/w. Section 34, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
Siraj Khan Pathan @ Raja Shaadatkhan Pathan	Section 450 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 326 r/w. Section 34, 149, 109, 114 of IPC	R. I. For 10 years	Rs. 4000/-
	Section 66E of the Information Technology Act, 2000 r/w. Sections 34, 149, 109, 114 of IPC.	R. I. For 3 years	Rs. 1000/-
	Section 452 of IPC r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 7 years	Rs. 3000/-
	Section 354B r/w. Section 34, 149, 109 and 114 of IPC	R. I. For 3 years	Rs.1000/-
Jobi Ashokan Welythan	Section 212 r/w. Section 34, 109, 114 of IPC	R. I. For 3 years	Rs. 1000/-
Salim Khan Pathan @ Goldi Karim Khan Pathan (deceased)	Section 212 r/w. Section 34, 109, 114 of IPC	R. I. For 3 years	Rs. 1000/-

## **PROSECUTION'S CASE**

2. The prosecution's case can be culled out as under:-

i) The prosecutrix, estranged wife of one Afroz Pathan, due to irreconcilable differences with her husband, started residing in a live-in-relationship with Dinesh (PW2) in a rented room owned by

Shabbir. Knowing this, accused- Wasim and Kadir had been to the house of the prosecutrix in absence of Dinesh and questioned her as to why being a Muslim girl, she is residing with Dinesh, a Hindu. They insisted her to have a relationship with them instead of Dinesh. They tied both the hands of the prosecutrix. When Dinesh arrived, Wasim and Kadir left the house after threatening the prosecutrix.

ii) The genesis of the incident dated 05.11.2014 and dated 06.11.2014 is an altercation between Maksud, the brother of Shabbir and the prosecutrix on account of use of water for washing their “Activa” vehicle. As a result of use of filthy language by Maksud against the prosecutrix, he received two slaps from her. Maksud continued abusing the prosecutrix as well as Dinesh. Landlord- Shabbir pacified them. The prosecutrix and Dinesh went inside the room. Thereafter, Maksud banged the door and when Dinesh opened the door, Maksud who had an Axe in his hand, tried to assault Dinesh. Dinesh gave him a jolt, resulting into Maksud falling on the ground. After some time, Maksud called Wasim and Kadir. They barged into the room of the prosecutrix. Whereas, Siraj and a juvenile in conflict with law, Wasim’s other colleague were standing outside the room. Kadir assaulted Dinesh on his head and on other parts of the body with a Baton whereas, Wasim slapped the prosecutrix. Dinesh sustained injuries on his head and legs. Meanwhile, Rakesh (PW-3), a common

friend of the prosecutrix and Dinesh arrived there. He was also beaten up by Kadir. Liquor was brought there. Wasim made the prosecutrix and Dinesh drink the liquor and smoke cigarettes. Wasim asked the prosecutrix and Rakesh to strip themselves. When Rakesh protested, Kadir assaulted him with a knife. Ultimately, they obeyed. They were made to kiss each other and to get into various compromising positions in naked condition. Wasim took photos and recorded videos of those poses in his mobile phone. They allowed Rakesh to go home. Maksud was asked to leave. Thereafter, Wasim, Kadir and the Juvenile in conflict with law took the prosecutrix and Dinesh in an Indica Car to Nandori Railway track beyond Bhadrawati village. Dinesh was put on the Railway track twice to get run over by a train. He was also beaten there by means of an iron rod. Somehow, he saved himself and fled away from there. However, the prosecutrix was taken away by Wasim, Kadir and the juvenile in the said vehicle. All three of them committed rape on her one by one at different places. Lastly, she was taken to Shegaon village. When they got to know that the Police was searching for them, they took the prosecutrix into a jungle. Initially, they decided to kill the prosecutrix however, they left the prosecutrix at Vidya Vihar Convent.

iii) The prosecutrix went to her house and after that to the Police Station and lodged the report. Meanwhile, Dinesh after

rescuing himself had reached the Police Station in an injured condition and he was sent to the hospital for treatment. On complaint of the prosecutrix, law was set into motion and the offences under Sections 450, 506-II, 326, 452, 366, 354-A, 354-B, 354-C, 376-B, 426, 307, 394, 201 and 212 r/w. Section 34 and 149 of the IPC and Sections 67 and 67-A of the Information Technology Act, 2000 r/w. Sections 109 and 114 of the IPC came to be registered against the appellants and the juvenile in conflict with law. Maksud, Wasim, Kadir, Siraj, Salim and Jobi were arrested and after completion of the investigation, charge-sheet came to be filed.

iv) The appellants were charged for commission of the above referred offences. They abjured the charge and claimed to be tried. The prosecution in all examined 24 witnesses. Whereas, Maksud examined landlord- Shabbir Gaffur Sheikh (DW-1) in his defence. The Trial Court on conclusion of the trial found the appellants guilty under different offences and sentenced them for the same as referred above in para no. 2. Feeling aggrieved with the judgment of conviction, these appeals came to be filed.

### **EVIDENCE**

3. Before appreciating the arguments advanced by the learned counsel appearing on behalf of the respective appellants and

the learned APP appearing on behalf of the State in different appeals, we intend to see what has been brought on record by the prosecution to prove the charges against the appellants. We propose to categorize the witnesses examined by the prosecution and the evidence adduced in the following four categories:-

- i) Eye-witnesses/victims;
- ii) Medical Evidence;
- iii) Recovery witnesses;
- iv) Other witnesses;
- v) Forensic Evidence;
- vi) Identification of the accused persons and
- vii) Electronic evidence

#### **EYE-WITNESSES/VICTIMS**

4. The prosecutrix, a star witness of the prosecution has deposed that in the month of October-2014, Wasim alongwith Kadir had been to the house of the prosecutrix. They tied her hands and Wasim reiterated his request to leave Dinesh and maintain physical relations with him instead. However, due to the arrival of Dinesh, they left after threatening both of them. With regard to the incident dated 05.11.2014, she deposed that when she was washing the vehicle with the help of Dinesh, Maksud switched the water pump off and as a result of that, an altercation took place between them. Maksud abused

her saying “Tu Bhadkhao Hai, To Bin Shadi Kiye Rahti hai”. Therefore, she slapped him. Thereafter, Maksud brought an Axe and tried to hit Dinesh but Dinesh pushed him and Maksud fell down. Maksud then made a call to Wasim from his mobile phone and asked him to come. Wasim and Kadir alongwith the other accused persons came there and barged into the house of the prosecutrix. Kadir unleashed a blow of Bamboo stick on the head of Dinesh. The prosecutrix made a call to Rakesh who then reached there. They beat Dinesh and Rakesh mercilessly, whereas Wasim slapped the prosecutrix. Wasim asked the prosecutrix to have physical relations with Rakesh. Liquor was brought there. They removed the clothes of the prosecutrix and Rakesh. Rakesh told that he considers the prosecutrix as his sister. They made Dinesh, Rakesh and the prosecutrix drink liquor and also beat Rakesh. Wasim was recording videos of the prosecutrix and Rakesh while they were asked to make different poses in compromising positions. When Rakesh refused to remove his clothes, Wasim beat him by means of a stick. Eventually, they allowed Rakesh to go home. They brought the prosecutrix and Dinesh out of the house, lifted injured Dinesh and put him in the Indica car. Wasim, Kadir and the juvenile in conflict with law took Dinesh and the prosecutrix towards Nandori Bifurcation. They put Dinesh on the Railway track and the prosecutrix was taken to Nagpur Road near a Dhaba. When Wasim and Kadir alighted from the

vehicle, the juvenile in conflict with law made physical relations with the prosecutrix. Thereafter, they took her into a jungle. At about 4:30 am, they made her descend from the vehicle and Wasim committed sexual intercourse with her. Thereafter, Kadir repeated the same act. They took the prosecutrix to a village called small Shegaon and thereafter, towards Tadoba Road. At about 9:00 to 9:30 am, she was made to get down from the vehicle and Wasim and Kadir committed sexual intercourse with her. Wasim and Kadir had a long knife and a rod and they were discussing whether to kill the prosecutrix or let her go. When they got to know that the Police had found Dinesh, Wasim and Kadir alighted from the vehicle. They took the knife and left the rod in the vehicle. Kadir left the prosecutrix near Vidya Vihar Convent.

5. This witness on 17.11.2014 identified the juvenile in conflict with law and on 25.11.2014 she identified accused- Kadir and Siraj respectively. She further deposed that she sustained injuries below her right eye and right elbow, whereas Dinesh sustained injuries on his head and legs and Rakesh suffered injuries on his legs and hands.

6. Dinesh (PW2) is an injured and also an eye-witness. This witness also deposed on the same lines except the incident of October-2014. His evidence regarding the incident with Maksud is on the same

lines as that of the prosecutrix but in detail. According to him, there was an altercation between the prosecutrix and accused Maksud on account of washing of the vehicle. Maksud was worried about the electricity bill due to usage of the boring for extracting water from the bore. On this count, he started hurling abuses and even assaulted the prosecutrix. Shabbir tried to pacify Maksud but still, he abused the prosecutrix in filthy language and therefore, the prosecutrix slapped him. He even deposed about Maksud bringing an Axe in order to assault him. About the main incident, he also deposed that accused Maksud, Wasim and Kadir alongwith one more person entered into the house of the prosecutrix. Kadir banged the mobile phone of this witness on the floor to break it and removed its SIM to take it with him. Kadir gave a blow of the Baton on his head and he sat on the Cot. Kadir continued to beat this witness with a Baton. At that time, Rakesh came there. He was made to sit between this witness and the prosecutrix. Wasim forcibly made them drink liquor. Wasim asked Rakesh and the prosecutrix to remove their clothes. When Rakesh refused, he was given a blow on his legs. Kadir also slapped him and the prosecutrix. Wasim asked Maksud to go out. It appears from the version of this witness that he was made to drink a full bottle of liquor and was feeling dizzy. Rakesh was also assaulted with a knife and was made to kiss the prosecutrix on the cheek and lips. Various types of

poses of the two of them were snapped and recorded in the mobile phone. Wasim, Kadir and an 18 year old boy lifted him and the prosecutrix and put her in the vehicle on the middle seat whereas, this witness was put on the back seat. At the instance of Wasim and Kadir, the juvenile removed the wallet of this witness containing Rs.3,000/- and kept it with him. They took them to Chandrapur- Bhadrawati road and after the toll plaza at Nandori, they alighted from the vehicle. They lifted this witness from the vehicle and made him lay on the Railway track and waited for the train for 15-20 minutes. When this witness tried to hide himself in the bushes, Kadir and the juvenile pulled him out of the bushes. The juvenile gave two blows of the iron pipe on the backside of his head and they again pulled him over the Railway track and made him lay there. They kept his neck on the track and gave a blow of the pipe on his head. For the next 15 minutes, he was laying there. A train came and he turned turtle. He then went to the opposite side of the track, started walking through the hidden road towards a field and went to village Vislon. After borrowing a mobile phone from a Railway personnel, he called his brother-in-law who reached there after 1½ to 2 hours and took him to Ramnagar Police Station, Chandrapur from where he was referred for medical examination to the Government Hospital. Thereafter, he was admitted

to the ICU of a private hospital for two days. He also identified the juvenile and two other accused persons.

7. Rakesh Hiranman Bhovte (PW3), another injured has also testified that on a call made by the prosecutrix, he went to the house of the prosecutrix. A boy was standing outside her house. He went inside the room. A man and a boy, whom he later identified as Kadir and Maksud were present there. Kadir unleashed a blow of the baton on his hand and Maksud pushed him. Kadir again gave a blow of the Baton on his leg and Wasim asked him to remove his clothes. When he denied, Kadir gave a knife blow on his hand. Wasim made him remove his clothes and kiss the prosecutrix on her lips. Before that, Wasim had beaten the prosecutrix and made her drink liquor and remove her clothes. At the time when the kissing was taking place, Wasim took photos and videos on his mobile. Wasim asked this witness to have sexual intercourse with the prosecutrix. He denied and then Wasim made the prosecutrix put her face on his private part. Dinesh was badly beaten up and was made to drink liquor forcibly. Thereafter, Kadir pushed him outside of the room and he was directed to go home. Before that, Kadir had removed the battery and the SIM from the mobile phone of this witness. On the next day, he stated the incident to Vijay Gurnule.

**MEDICAL EVIDENCE**

8. Dr. Dipti Shrirame (PW10), who examined the prosecutrix has deposed that she examined her and found that blood stains were present over the right and left sleeves of her shirt. She found the following injuries over her person:-

- 1) Abrasion over right elbow approximate 2 X 2 cm well defined, reddish brown in colour, swelling was present and non grievous.
- 2) Contusion, below right eye, size approx. 3 X 2 cm, margin is well defined, colour reddish brown swelling was present, non-grievous.
- 3) She found the injuries over her person to be inflicted within 24 hours and they were to heal within seven days.
- 4) On genital examination she found that her hymen was torn. There was an old injury over her hymen. Two fingers were easily inserted. Overall findings were that she was subjected to sexual intercourse.
- 5) She obtained her sample of blood, vaginal swab, pubic hair for chemical analysis. She was asked some questions as per Exh.157. On questionnaires put to her, this witness could not say whether she was subjected to gang rape. She did not find injuries over her private parts. She did not find any evidence related to forcible sexual intercourse.

9. Dr. Morarji Kusnake (PW-15) examined Rakesh (PW3) and accused Wasim and Kadir. He found following injuries on the person of Rakesh (PW3) :-

- i) Abrasion over left leg down the knee admeasuring 5 cm X 4 cm.
- ii) Abrasion over left shoulder admeasuring 4 cm X 4 cm.
- iii) Abrasion over fingers of both palms admeasuring 1 cm X 1 cm.

10. He opined that the said injuries might have been inflicted using a hard and blunt object. No injury was found on the person of Kadir however, Wasim suffered an abrasion over his left scapula admeasuring 5 cm X 5 cm. He further deposed that accused Wasim and Kadir were capable of sexual intercourse.

11. Dr. Digambar Rathod (PW20), a Medical Officer attached to Civil Hospital, Chandrapur examined Dinesh (PW2) on 06.11.2014, found the following injuries on his person and issued medical report at Exh.258.

- i) Abrasion of 2 X 0.5 cm on his forehead.
- ii) Abrasion of 0.5 X 0.5 cm on the back of the head.
- iii) Laceration of 2 X 1 cm on right wrist.
- iv) Laceration of 2 X 1 cm on left wrist.
- v) Laceration of 1 X 1 cm on right knee joint.

This witness also examined the Baton and the steel rod and opined that injury nos. i) and ii) may be caused due to these weapons and death may also occur.

12. Dr. Amal Potdar (PW14), the surgeon in whose hospital Dinesh (PW2) was admitted for two days has been examined by the prosecution. He also found the following injuries on the person of Dinesh (PW2):-

- i) Abrasion over right forehead, admeasuring 2 X ½ cm
- ii) Abrasion over back side of head, admeasuring 1 X ½ cm
- iii) Laceration over right wrist, admeasuring 2 X 1 cm
- iv) Laceration over left wrist admeasuring 2 X 1 cm.
- v) Laceration over right knee.

#### **RECOVERY WITNESSES**

13. The prosecution examined Vaibhav Vasantrao Donadkar (PW11), a panch who had been to the spot of the incident i.e. the house of the prosecutrix, the Railway Track and the spot at Tadoba road. This witness has deposed that on 06.11.2014, he had been to the house of the prosecutrix from where bottles of liquor, pieces of cigarette and water bottles were seized under seizure panchnama Exh. 173 and Exh.174. The recovery of the seat cover from the vehicle in which the prosecutrix was taken away was done in the presence of the

prosecutrix (Exh.175) after she identified the vehicle. It is further the version of this witness that the clothes of Dinesh and Rakesh with medical samples were seized in his presence under panchnana Exh. 178 to 185 and this witness claimed to be present at the time of preparing the spot panchanama of the Railway Track and seizure of the shoe from a nearby place under panchnama Exh.186 and 187. Thereafter, this witness also went to the spot at Tadoba Jungle and panchnama at Exh. 175 was prepared. Apart from this, this witness has also testified that the statement of appellant- Kadir was recorded at the Police Station pursuant to which, a knife and a 'Zara' were recovered at the instance of appellant- Kadir, under panchnama Exh.188 and 189. It appears from the tenor of cross-examination that this witness alongwith the Police went to the room of the prosecutrix and seized articles which were relevant to the investigation. This witness identified those articles in the Court. So far as recovery of the shoe belonging to Dinesh near the Railway track is concerned, in the cross-examination this witness has identified the shoe and admitted recovery of the shoe from the bushes near the Railway track. Though, this witness has shown acquaintance with Dinesh and Rakesh but considering the tenor of cross-examination and corroboration of his version with the version of Pralhad Rupgir Giri (PW23) coupled with

production of the articles before the Court, the Trial Court rightly held that the recovery of articles deposed by this witness is proved.

14. This takes us to the version of Vijay Jagdish Sharma (PW13), one of the panchas to the seizure of clothes of appellant – Wasim, seizure of two mobiles phones and one rod at the instance of appellant- Wasim. He deposed that on 16.11.2014, appellant- Wasim admitted in his presence that he will produce the weapon and the clothes. The said statement was recorded at Exh.199 and thereafter, he took them to his Garage and produced clothes, two mobile phones and one rod which were seized under panchnama Exh.200. According to this witness, on the next day, at the instance of appellant- Wasim, a wheel spanner was seized under Exh.192. This witness identified all these articles seized in his presence. The cross-examination does not suggest that the mobile phone and iron rod were not seized from the house of Wasim, only the identity of the mobile phone is questioned in his cross-examination. This evidence is corroborated by Pralhad Giri (PW-23), the investigating officer and production of the Nokia mobile phone (Article – 4) in the trial Court.

15. The prosecution also came up with recovery of the Axe by which appellant- Maksud tried to assault Dinesh during the initial quarrel. For this purpose, the prosecution has relied upon the version

Feroz Gafur Sheikh (PW24), a Panch Witness who has testified that on 9.11.2014, appellant- Maksud disclosed that he has kept the Axe used in the incident in his house which was recorded under Exh.267 and pursuant to which, he took this witness and other panchas including the photographer to his house and took out the Axe which was seized under panchnama Exh.268. Nothing elicited in the cross-examination of this witness to disbelieve his version that the Axe was recovered from the house of Maksud.

#### **OTHER WITNESSES**

16. We will now examine the versions of Gangadhar Nagorao Bhoyar (PW-16), Ganesh Gajanan Dethe (PW-17) and Vivek Zade (PW21).

17. The testimony of Ganesh (PW-17) and Vivek (PW-21) reveals that they are employees of the Railways. On 05.11.2014, they were on night paroling duty between location No. 837.0 to 839.0. In the morning, at about 5:00 to 5:30 am, they went to the boring-pump to fetch water near Zilla Parisad School, Vilson. According to them, they saw a boy in an injured condition having injuries on his head and his shirt was blood-stained. He asked them for water. On his request, Vivek (PW21) lent his mobile phone to the said boy. He talked to his Bhauji and told him that he was beaten up and also disclosed his

location. This witness also talked to the said person on the mobile phone and requested him to pick up the injured.

18. Gangadhar Bhoyar (PW16), the employer of Dinesh with whom he was working, is the person to whom Dinesh (PW2) made a call from the mobile phone of Vivek (PW21) from village Vilson. This witness testified that he talked to Dinesh (PW2) and the person to whom the mobile phone belongs. Vivek (PW21) told Gangadhar (PW16) that Dinesh is lying in an injured condition at village Vilson and after asking for the exact location, Gangadhar (PW16) reached village Vilson and found Dinesh lying there. Dinesh had injuries on his back and head and his clothes were stained with blood. This witness further testified that on the way to the hospital, Dinesh informed him about the incident.

19. We shall now discuss the evidence of other two witnesses which is relevant to decide these appeals. Rupesh Pande (PW19), the owner of the Tata Sumo vehicle and Kashinath Nigot (PW22), the owner of the Tata Indica vehicle wherein, the alleged incident took place.

20. Rupesh Pande (PW19), the owner of the Tata Sumo bearing registration No. MH34/M-9740 has testified that on

06.11.2014, Goldi and Jobi came to his house at about 11:00 in the night. They requested this witness to let them borrow his vehicle in order to take Wasim's mother to the hospital. Therefore, this witness accompanied them in the said Tata Sumo vehicle and he also consumed liquor. Thereafter, Jobi started driving the vehicle. Appellant- Jobi took them to Sindewahi where appellants Wasim, Kadir and the juvenile in conflict with law arrived in a Maruti Car and boarded the Tata Sumo. They went towards Chandrapur where Joby and Goldi got down from the vehicle and others proceeded towards Adilabad. At Adilabad, Wasim and Kadir got down and this witness and the juvenile in conflict with law proceeded back to Chandrapur when the Police vehicle started chasing them on the way. The juvenile in conflict with law fled and this witness was apprehended.

21. Kashinath (PW22), is the owner of the Tata Indica vehicle bearing registration no. MH-01/Y-1943, who testified that on 05.11.2014 at about 9:00 am in the morning he handed over the Tata Indica Car to appellant- Wasim for repair work and Wasim assured that he will deliver the vehicle in the afternoon. When in the afternoon, he enquired about the vehicle, Wasim said that the vehicle is yet to be repaired. In the evening when this witness made a phone call to Wasim, he told that after the repair work is done, he will drop the vehicle to the house of this witness. Wasim did not return the vehicle

to this witness as promised. On the next day i.e. on 06.11.2014, Wasim informed this witness that there was a quarrel and thereafter, Wasim sent the vehicle to this witness through one Bhurya. Wasim, in his statement under Section 313 of the CrPC admitted that the vehicle was with him on 05.11.2014 and 06.11.2014.

### **FORENSIC EVIDENCE**

22. The DNA report, Exh.330 shows that the full shirt and the jeans pant seized from Dinesh (PW2), which he was wearing at the time of the incident, were stained with blood as well as the seat cover and the shirt seized from the prosecutrix was also stained with the blood of Dinesh (PW2). That apart, the DNA report also depicts that the wall scrapping seized from the School at Vilson also contained the blood of Dinesh (PW2). No semen was detected either on the clothes of the prosecutrix or on the clothes of appellants- Wasim, Kadir and the juvenile in conflict with law. Apart from that, burnt cigarette butts contained the DNA profile of the prosecutrix.

23. The prosecution has also relied on the reports of chemical analysis at Exh. 333. The CA report reveals the presence of blood on the clothes of the prosecutrix; full shirt and jeans pant of Dinesh (PW2); full shirt of Wasim and scrapping of the wall as well as on the

seat cover. The CA reports Exh. 275 and 276 depict the presence of Alcohol in the blood of the prosecutrix and Dinesh (PW2).

### **IDENTIFICATION OF THE ACCUSED PERSONS**

24. It is the case of the prosecution that the prosecutrix, Dinesh (PW2) and Rakesh (PW3) identified appellants- Kadir and Siraj in the test-identification parade conducted by Pramod Kulte (PW9), the then Naib Tahsildar. He has been examined at Exh.161. He testified about the requisition by the Police for conducting test-identification parade; and accordingly, he conducted the test-identification. This witness has testified that Rakesh (PW3) identified accused- Shaikh Kadir and Siraj. Likewise, Dinesh (PW2) and the prosecutrix also identified appellant- Shaikh Kadir and Siraj in the presence of panchas and therefore, memorandum panchnamas at Exh. 164 and 165 were prepared. The version of Pramod Kulte (PW9), Circle Officer, who conducted the test identification and Rahul Jagdish Shende (PW12), witness to the test identification parade, reveals that the test identification was conducted wherein Kadir and Siraj were identified.

### **ELECTRONIC EVIDENCE**

25. It is to be mentioned here that the Nokia mobile phone seized at the instance of Wasim was sent for Cyber Forensic

examination and 69 images and 10 videos were retrieved. The said 69 images and 10 videos were produced before the Court in the form of a CD containing the photos and videos of the prosecutrix and Rakesh in compromising positions, which is palpable from the panchnama prepared at the time of running of the said CD before the Trial Court.

26. No doubt, the mobile phone in which the alleged videos were recorded and photos were snapped has been produced before the Court but the CD which was run before the Court consists of the videos and the photos, poses a question whether in absence of the certificate mandated under Section 65B of the Evidence Act, the Court could have relied on the contents of the CD that contained copies of the videos and the photos.

27. Section 65B of the Indian Evidence Act provides for admissibility of copy of electronic records on production of a certificate in compliance with the conditions mentioned in the Section. Section 65B contemplates issuance of a certificate by the person having lawful control and use of the said electronic records mentioning that the conditions under Section 65B of the Indian Evidence Act have been complied with. Here accused- Wasim, the accused in the crime, was the person having lawful control and use of the Nokia mobile phone in which naked photos and videos of the prosecutrix and Rakesh in

compromising positions were recorded. The electronic record sought to be proved is against Wasim, therefore, as contemplated under Section 65B of the Indian Evidence Act, a certificate issued by Wasim would be required. Obviously, the electronic record which is sought to be proved is against Wasim and therefore, the prosecution could not get the certificate under Section 65B of the Indian Evidence Act for two reasons: Firstly, Wasim will never agree to issue a certificate under Section 65B of the Indian Evidence Act and Secondly, an accused in a crime cannot be compelled to give incriminating evidence against himself.

28. In the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal***<sup>1</sup>, the Supreme Court after discussing two maxims: Firstly *ex non cogit ad impossibilia* i.e. the law does not demand the impossible; Secondly *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused, has held in para no. 51 of the judgment as under:-

“51. On an application of the aforesaid maxims to the present case, it is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the Respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third-party over whom the Respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.”

29. In wake of the two reasons stated above, it was not possible for the prosecution to obtain the certificate provided under Section 65B of the Indian Evidence Act from Wasim, who was having lawful control over the electronic device i.e. the Nokia mobile phone. Therefore, non-production of the certificate under Section 65B of the Indian Evidence Act by the prosecution will not be fatal to the case, provided that the prosecution is able to prove the authenticity of the electronic record which has been produced in the Court.

30. This takes us to the report of the Cyber Forensic Lab Exh.328, which describes how the data was retrieved from the mobile phone having IMEI 1- 353637065232250 and IMEI 2- 353637069731711. It was firstly copied on the hard disk and thereafter in the CD/DVD, which came to be produced in Court. That apart, the 'Hash Value' of the original as well as the copy of the said electronic record was verified and it matched as per the report. Hence, the 'Hash Value' of the copies produced in the Court matches with the 'Hash Value' of the videos and the photos retrieved from the mobile phone of Wasim.

31. The Supreme Court in the case of ***Zakia Ahsan Jafri Vs. State of Gujarat***<sup>2</sup> has held in para no. 278 as under:-

*“278. Insofar as the CD record submitted by Mr. Rahul Sharma, as aforesaid, he had failed to handover the case property to the investigating officer (of Naroda Police Station), dealing with the case concerned nor got it entered in the register of case property (Muddamal) or informed the Court of jurisdiction about seizure of such case property. He had instead produced the CD on 31-5-2008, which came to be seized by the investigating officer and taken as evidence. These two CDs were collected by the investigating officer from the records of Nanavati-Shah Commission of Enquiry. Mr. Rahul Sharma had submitted the same before the Commission. Additionally, one CD containing the same information was submitted by Mr. Amresh Bhai N. Patel, Jansangharsh Manch, which was obtained by him from the Commission of Enquiry. That was also produced before the investigating officer. In absence of the original CDs which were never produced by Mr. Rahul Sharma, it was not possible for SIT to obtain the certificate of authenticity under Section 65-B of the Evidence Act, 1872 and at the same time, it had been noticed that the CDs were copied by Mr. Rahul Sharma in his computer and format changed, by changing it in zipped format. The SIT has analyzed all these aspects and opined that MD<sub>5</sub> Hash value of the files in all the three CDs was found same. Further, the files containing call detail records or fragments of the files could not be found on the computer storage media. Moreover, due to lapse of time, no fruitful purpose would have been served in seizing the mobile phone of the user concerned after seven years to undertake roving enquiry. All these aspects have been duly considered by SIT while dealing with Allegation No. (xxiii) as reproduced hitherto, in paragraph No. 60. The opinion so recorded by the SIT commended to the Magistrate, as well as, the High Court. We find no reason to deviate therefrom.”*

32. In light of the observations made above, the Trial Court was justified in relying on the electronic record without the certificate mandated under Section 65B of the Indian Evidence Act.

### **APPRECIATION OF EVIDENCE**

33. Considering the number of accused and the number of offences alleged to have been committed by the appellants, we deem it fit to consider the evidence of prosecution's witnesses in sequence and

therefore, for the sake of convenience, we divide the case of the prosecution in three parts:-

- i) The incident near the room.
- ii) The incident inside of the room of the prosecutrix; and
- iii) The incident which occurred outside the room of the prosecutrix.

#### **INCIDENT NEAR THE ROOM OF THE PROSECUTRIX**

34. We now deal with the incident which occurred near the room where the prosecutrix and Dinesh were residing. It has come in many words in the evidence of the prosecution's witnesses that the prosecutrix was residing with Dinesh in a rented room owned by Shabbir, the brother of Maksud. Rather, this aspect has not been disputed by the defence. For this purpose, the prosecution relied on the version of the prosecutrix, Dinesh and Rakesh.

35. The quarrel between the prosecutrix and Dinesh on one side and Maksud on the other is palpable from the evidence of the prosecutrix and Dinesh. The statement of Maksud recorded under Section 313 of the CrPC also reveals that a quarrel took place between him and the prosecutrix. The prosecutrix and Dinesh have deposed about the quarrel between them and Maksud on account of increase in the electricity bill due to washing of her vehicle with the help of motor. In that quarrel, Maksud abused the prosecutrix by calling her

“Bhadkhau”. The Trial Court relied on the version of these two witnesses and held that Maksud has committed the offence of criminal intimidation with threat of causing grievous injury and convicted and sentenced him for seven years imprisonment.

36. Criminal intimidation has been defined under Section 503 of the IPC, which reads as under:-

***“503. Criminal Intimidation.-** Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.*

*Explanation.- A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.”*

37. Thus, to bring the accused within the ambit of criminal intimidation, the ingredients of Section 503 of the IPC will have to be considered. Section 503 of the IPC states that, a person must threaten another with injury to his person or reputation or to the property with intent to cause alarm to that person or cause that person to do or to omit an act which he is not legally bound to do. There is nothing on record to show that Maksud threatened the prosecutrix and Dinesh with intent to cause alarm to the prosecutrix to do any act which the prosecutrix or Dinesh were not legally bound to do. Utterance of the word “Bhadkhau” by Maksud by no stretch of imagination is

threatening so as to bring him under the gamut of criminal intimidation, that too punishable under Part-II of Section 506 of the IPC. Therefore, the finding of the Trial Court holding Maksud guilty for the offence punishable under part - II of Section 506 of the IPC is erroneous. We accordingly set it aside.

### **INCIDENT INSIDE THE ROOM OF PROSECUTRIX**

38. The deposition of the prosecutrix and Dinesh further depicts that after the quarrel was pacified by Shabbir, Maksud went to his house, brought an Axe, barged into the room of the prosecutrix and even tried to assault Dinesh but he could not succeed due to the push given by Dinesh. The version of Pralhad Rupgir Giri (PW-23) reveals that at the instance of Maksud, an 'Axe' was recovered at Exh.268.

39. It is further the version of the prosecutrix as well as Dinesh that Wasim, along with Kadir and some unknown persons also barged into the room of the prosecutrix along with Maksud. The prosecutrix and Dinesh in chorus have categorically deposed that the moment they opened the door after Wasim knocked, Kadir assaulted Dinesh by means of a baton on his forehead and other parts of the body. It is also the version of the prosecutrix, Dinesh and Rakesh that Rakesh was assaulted by Kadir and Wasim after he reached there. Moreover, Wasim made the prosecutrix and Dinesh drink liquor and he

also forced the prosecutrix to smoke cigarettes. Their version is also corroborated by the spot panchnama and seizure of cigarettes butts, empty liquor bottles, water bottles and seizure of baton from the spot of the incident. The DNA report Exh.330 also shows that cigarettes butts carry the DNA of the prosecutrix. The CA report also reveals that the blood of the prosecutrix and Dinesh contains Alcohol. The injury certificate Exh.213 and Exh. 258 issued by Dr. Amal Potdar (PW14) and Dr. Digambar Rathod (PW20), who examined Dinesh reveals that Dinesh had an injury on his forehead and other parts of the body. The CA report and the DNA report reveal that the clothes seized from the person of Dinesh had stains of blood which belongs to Dinesh. Injury certificate (Exh-215) and evidence of Dr. Morarji Mohan Kusnake (PW-15) also corroborates with the version of the prosecutrix, Dinesh and Rakesh that Kadir also assaulted Rakesh with a baton and a knife and inflicted injuries on him.

40. It has been submitted by Mr. Tiwari, learned counsel for Kadir that the parading procedure for conducting the Test Identification (TI) Parade contemplated under the Criminal Manual has not been followed and therefore, the TI Parade stands vitiated and cannot be relied upon. We are hastened to add that TI Parade assures that the investigation is in the right direction. It is a rule of prudence

which is required to be followed where the accused is not known to the victim.

41. In the present case, the initial incident occurred inside the room of the prosecutrix in close proximity with the eye-witnesses/victim. The prosecutrix, Dinesh and Rakesh had ample opportunity to identify Kadir as he was with them inside the room for more than two hours. Rather, Rakesh was acquainted with the friend of Kadir. Thereafter, Kadir was with Dinesh till they reached the Railway track and with the prosecutrix for the whole night. Therefore, even if there are procedural lapses in conducting the TI Parade, the evidence of the prosecutrix, Dinesh and Rakesh cannot be doubted. These witnesses identified Kadir not only in the TI Parade but also in the Court. Above all, the conviction of Kadir is not solely based on the TI parade but there is ample corroborative evidence in the form of recovery of weapon, travelling back to Chandrapur along with Wasim and the juvenile in conflict with law in the vehicle of Rupesh Pande (PW19).

42. There is consistency in the version of the prosecutrix, Dinesh and Rakesh regarding the fact that accused Wasim made the prosecutrix and Rakesh strip themselves and get into compromising positions and for that purpose, Wasim and Kadir beat Rakesh whereas,

Wasim slapped the prosecutrix. Wasim videographed and snapped photos of the prosecutrix and Rakesh in compromising positions. Their version is supported by electronic evidence i.e. the images and videos found in the Nokia mobile phone belonging to Wasim wherein, the prosecutrix and Rakesh were seen in compromising positions. Thus, the versions of the prosecutrix, Rakesh and Dinesh corroborate with each-other and is also corroborated by other evidence including electronic evidence as discussed above. The depositions of the prosecutrix, Dinesh and Rakesh inspire confidence of the Court and the Trial Court has rightly appreciated and relied on the versions of the prosecutrix, Rakesh and Dinesh.

43. Needless to mention that, considering the role played by each accused, i.e. Wasim calling Maksud and asking him to come to the room of the prosecutrix; Wasim accompanying Kadir who brought the baton with him; Maksud, Wasim and Kadir entering the room of the prosecutrix; Kadir assaulting Dinesh and Rakesh at the instance of Wasim and Maksud; and recording of pornography inside the room indicates sharing of common intention amongst them.

44. Thus, from the above material available on record, the Trial Court was completely justified in holding that accused Maksud, Wasim and Kadir committed criminal tress-pass in the room occupied

by the prosecutrix with intent to commit offences punishable for imprisonment for life i.e. with preparation for hurt, assault or wrongful restrain and thereby committed the offences punishable under Sections 450, 452, 354A, 354B, 354C of the IPC and Section 66E of the IT Act, 2000.

45.           Sofar as Siraj is concerned, it has been claimed by the prosecution that Siraj also accompanied Wasim and Kadir while trespassing into the room of the prosecutrix and remained inside the room and hence, he has common intention. It will be worthwhile to mention here that, though the prosecutrix has identified Siraj in the test-identification parade conducted by Pramod Kulte (PW9) but the scrutiny of evidence of the prosecutrix, Dinesh and Rakesh goes to show that none of these witnesses have deposed that Siraj also entered the room of the prosecutrix. Rather, their version goes to show that only three persons were inside i.e. Maksud, Wasim and Kadir baring one person aged about 18 years who brought liquor at the instance of Wasim who perhaps appears to be a juvenile. Therefore, it will be difficult to rely on the version of the prosecutrix, who identified Siraj on the basis of guesswork as the person who accompanied Wasim and Kadir, who entered in her room. I find force in submission of Mr. Daga, learned counsel that the Trial Court missed this aspect and erroneously convicted Siraj for the offences punishable under Sections 450, 452,

326, 354B r/w 34, 109, 114 and 149 of the IPC. The benefit of doubt goes in favour of Siraj. Accordingly, we set aside the conviction of Siraj for the aforesaid offences.

46. This takes us to the findings of the Trial Court convicting appellants- Maksud, Wasim, and Kadir for the offence punishable under Section 326 of the IPC and sentencing them to suffer rigorous imprisonment for 10 years.

47. To accord a conviction under the offence punishable under Section 326 of the IPC, grievous hurt defined under Section 320 of the IPC is a *sine qua non*. The Trial Court relied on the Query Report (Exh-259) issued by Dr. Digambar Rathod (PW-20) wherein he opined that if complications arise, the injury caused to Dinesh may cause death. Relying on Clause VIII of Section 320 of the IPC, the Trial Court held that any hurt which endangers life will come under the sweep of grievous hurt. Query Report (Exh-259) shows that if complications arise, only then the injuries caused to Dinesh will endanger his life. It is a matter of record that both the Doctors recorded that the injuries on the person of Dinesh and Rakesh are simple injuries. It cannot be disputed that if complications arise even simple hurt may endanger life. The purport of Clause VIII of Section 320 of the IPC is that hurt caused by the offender must endanger life and it does not depend on

the condition of future complications that are likely to arise. For invoking Clause VIII of Section 320 of the IPC, the offender must cause injury which itself endangers the life of the victim, which is absent in this case. The finding of the Trial Court that grievous hurt was caused is not correct. The injuries caused to the person of Dinesh and Rakesh do not come under the ambit of grievous hurt/injury. The conviction recorded by the Trial Court against Maksud, Wasim and Kadir under Section 326 of the IPC does not stand for the reason that simple hurt has been caused by the baton and knife which is punishable under Section 324 of the IPC and not under Section 326. We, therefore, set aside the conviction of Maksud, Wasim and Kadir for the offence punishable under Section 326 of the IPC and instead, we hold them guilty for the offence punishable under Section 324 of the IPC.

#### **INCIDENT OUTSIDE THE ROOM OF THE PROSECUTRIX**

48. We now turn to the incidence which occurred thereafter. It is the version of the prosecutrix and Dinesh that Wasim, Kadir and the juvenile in conflict with law brought them out of the room and put them in the Tata Indica car. Dinesh was put on the back seat of the Tata Indica car in an injured condition whereas, the prosecutrix was made to sit on the middle seat of the car and they took them to Nandori Bifurcation. It is also the version of Dinesh that the juvenile in conflict with law as per direction, removed the wallet containing

Rs.3,000/- from the person of Dinesh. The prosecutrix's version is that they put Dinesh on the Railway track. The version of Dinesh shows how he, who was in a drunken condition, was kept on the Railway track by Wasim, Kadir and the juvenile in conflict with law twice and when the train came, he succeeded in saving his life by removing himself from the Railway track. His version gets corroboration by recovery of his shoe from the bushes near the Railway track. His version that he was assaulted on the back of his head is also corroborated by the version of Dr. Morarji Kusnake (PW-15) and Dr. Digambar Rathod (PW-20), who found an injury on back of the head of Dinesh and opined that the injury may be caused with the help of an iron rod. The consistent version of Dinesh also gets support by the discovery of blood from the wall of a School on the way to village Vilson where he stayed. The DNA report also reveals that his blood was found on his shirt, seat cover of the Tata Indica car as well as on the clothes of the prosecutrix. Ganesh Gajanan Dethe (PW-17) and Vivek Zade (PW-21), the employees of the Railways who were on patrolling duty in wee hours of 06.11.2014 met Dinesh in an injured condition and under the influence of liquor. Dinesh succeeded to contact his employer Gangadhar Nagorao Bhoyar (PW-16) through these witnesses who deposed that Gangadhar Nagorao Bhoyar (PW-16) came there, took him to Chandrapur and got him admitted to the Hospital.

The version of Dinesh is corroborated in many words by Ganesh Gajanan Dethe (PW-17), Vivek Zade (PW-21), Gangadhar Bhoyar (PW-16) and other evidences.

49. At this juncture, it will also be proper to state that Rakesh, after returning from the room of the prosecutrix again went to the room of the prosecutrix alongwith Mahesh Gurunule, Mangesh Uke and Dewa at about 2:30 am in the night. They found nobody inside the room of the prosecutrix. This also corroborates the abduction of the prosecutrix and Dinesh and the incident that occurred in the jungle with Dinesh. In view of the voluminous evidence available on record, the Trial Court did not err in relying on the version of the prosecutrix and more particularly, Dinesh.

50. Mr. Arjun Bobde, learned counsel for Wasim vehemently submitted that the injuries on the person of Dinesh were simple injuries. If it had been the intention of Wasim and the other accused persons to commit the murder of Dinesh, they would have left Dinesh with severe injuries to make sure that he dies. According to him, this aspect has not been considered by the Trial Court. To buttress his submission, he seeks to rely on the decision of the Supreme Court in

the case of *Sivamani and another Vs. State Represented by Inspector of Police*<sup>3</sup>, wherein it is held as under :-

“10. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, this Court is convinced that the Impugned Judgment of the High Court requires to be interfered with. Admittedly, there is no allegation of repeated or severe blows having been inflicted. Even the injuries on PW1 and PW2 have been found to be simple in nature, which is an additional point in the appellants’ favour.

11. We are further inclined to accept the submissions of the learned counsel for the appellants that from the materials on record, only offences under Sections 323 and 324 of the IPC can be made out. As such, the conviction under Section 307, IPC is unsustainable.”

51. It is a settled principle of law that for recording conviction under Section 307 of the IPC, injury is not a *sine qua non* and it is not necessary that bodily injury capable of causing death should have been inflicted. The Court has to see whether the act, irrespective of its result, was done with intention or knowledge and in accordance with the circumstances mentioned in sub-Section 307 of the IPC. In the case of *Jage Ram Vs. State of Haryana*<sup>4</sup>, it has been held that just because a fatal injury was not sustained, that alone does not dislodge Section 307 of the IPC. What is material is the intention of the accused which can be gathered from surrounding circumstances including the actual injury, nature of weapon and severity of the blow. We must state here that it has been proved that the accused persons put Dinesh,

<sup>3</sup> 2023 SCC Online SC 1581

<sup>4</sup> 2015 (11) SCC 366

who was under the influence of liquor as proved in the CA report, on the Railway track to make sure that he gets crushed under the Train and does not survive. When he managed to save himself inspite of being under the influence of liquor, the accused persons particularly, Kadir and the juvenile in conflict with law again brought him on the Railway track to make sure that he gets killed but fortunately, again he succeeded in saving himself. Thus, from the facts which have been brought on record, it is clear that Wasim and Kadir alongwith the juvenile in conflict with law tried to kill Dinesh by putting him on the Railway track to make sure that he gets crushed under the wheels of the Train. Therefore, we see no infirmity in the conviction recorded by the Trial Court holding Wasim and Kadir guilty for the offence punishable under Sections 307, 366 and 394 read with 34 of the IPC.

### **GANG RAPE**

52. As per the IPC, where a woman is raped by one or more persons constituting a group or acting in furtherance of common intention, all those persons shall be deemed to have committed the offence of gang rape. It is the case of the prosecutrix that in the intervening night of 05.11.2014 and 06.11.2014 Wasim, Kadir and the juvenile in conflict with law committed rape on her.

**SUBMISSIONS**

53. Mr. Arjun Bobde, learned counsel appearing on behalf of Wasim vehemently submitted that there was no injury on the private parts of the prosecutrix. Though, hymen was ruptured but it was an old injury and no signs of force or restraint to penetrative assault were seen. All these rule out the possibility of forceful rape much less gang rape. The material on record also does not suggest any injury except injury on her elbow and below the right eye. According to him, if the alleged incidents of gang rape occurred on the ground in the jungle and if a person is raped on an earthy surface, particularly, if it is a case of gang rape then injuries on other parts of the body, more particularly on the back of the victim are bound to be present. Even the nail clippings of the prosecutrix suggest that no attempts were made by the prosecutrix to resist the accused. Therefore, all these suggest that no incident of rape occurred, much less gang rape. He further went on to submit that if forceful gang rape is committed then injury on the private part of the prosecutrix is one of the determining factors which is conspicuously absent in this case.

54. A strong reliance has been placed on the admission of the prosecutrix in her cross-examination that during sexual intercourse, semen spilled over her private parts and on her clothes. Taking help of this admission, Mr. Arjun Bobde, learned counsel vehemently

submitted that the DNA report (Exh.333) emphatically mentioned that no semen was found on the leggings of the prosecutrix which she wore at the time of the alleged incident. According to him, this itself goes to show that the prosecutrix is deposing falsely about the incident and the fact that she was repeatedly raped by Wasim, Kadir and the juvenile in conflict with law. He further went on to submit that the DNA report of the vaginal swab and the pubic hair of the prosecutrix is also inconclusive. Therefore, Wasim and Kadir are entitled for benefit of doubt at the least. According to him, the version of the prosecutrix is not corroborated with the DNA report and therefore, it will not be safe to rely on the version of the prosecutrix particularly, in light of the fact that the prosecutrix formerly had an intimate relationship with Wasim. Therefore, possibility of the prosecutrix deposing falsely cannot be ruled out. Hence, the present accused persons, particularly Wasim should be given the benefit of doubt by recording the order of acquittal against the charge of gang rape.

55. Mr. Bobde would submit that even the Doctor was not sure and she has answered question no. 2 of the query report by stating that she cannot comment whether the prosecutrix was subjected to gang rape. He further went on to submit that even the clothes of the prosecutrix did not have traces of earth of the jungle. Therefore, all these rule out the possibility of forceful sexual

intercourse, more particularly gang rape. Therefore, the version of the prosecutrix in this regard is doubtful and cannot be believed. To buttress his submission, he seeks to rely on para nos. 11 and 12 of the judgment in the case of ***Raju and others Vs. State of Madhya Pradesh*** <sup>5</sup>, which reads as under :-

*“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.*

*12. Reference has been made in Gurmit Singh's case [(1996) 2 SCC 384] to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”*

56. He also relied upon the judgment in the case of **Santosh**

**Prasad @ Santosh Kumar Vs. State of Bihar**<sup>6</sup>, which reads thus :-

“6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the alleged incident has taken place as per the version of the prosecutrix is not believable. In the examination-in-chief, the prosecutrix has stated that after jumping the fallen compound wall accused came inside and thereafter the accused committed rape. She has stated that she identified the accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 O'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4:00 p.m. In her deposition, the prosecutrix has referred to the name of Shanti Devi, PW 1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW 5 - prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of “sterling witness”. There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/dispute between both the parties with respect to land. The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix – PW 5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and accused is to be given the benefit of doubt.”

57. Reliance is also placed on the case of **Rai Sandeep @**

**Deepu Vs. State (NCT of Delhi)**<sup>7</sup>, wherein in para no. 31 it is observed

as under:-

“31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the implication of the accused to the alleged offence of gang

<sup>6</sup> (2020) 3 SCC 443

<sup>7</sup> (2012) 8 SCC 21

*rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix's original version, the appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the appellants. Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution."*

58. Conversely, learned APP for the State vehemently submitted that the evidence of the prosecutrix is entitled to great weightage even in absence of corroboration. She is not an accomplice but her evidence is to be scrutinized as the evidence of an injured witness. The prosecutrix cannot be disbelieved even if the Doctor found no sign of injury or restraint. According to him, the prosecutrix was habitual to sexual intercourse and therefore, absence of injury on her private parts would not ruled out rape, more particularly, when the prosecutrix was under the influence of liquor which was forcefully administered to her by Wasim. To buttress his submission, he seeks to rely on the judgment in the case of ***State of Rajasthan Vs. Biram Lal*** <sup>8</sup>, wherein in para no. 15, the Supreme Court has held as under:-

*"15. We, therefore, find it difficult to sustain the order of acquittal passed by the High Court in respect of the offence under Section 376 IPC. It is not the law that in every case version of the prosecutrix must be corroborated in material*

*particulars by independent evidence on record. It all depends on the quality of the evidence of the prosecutrix. If the Court is satisfied that the evidence of prosecutrix is free from blemish and is implicitly reliable, then on the sole testimony of the prosecutrix, the conviction can be recorded. In appropriate cases, the court may look for corroboration from independent source or from the circumstances of the case before recording an order of conviction. In the instant case, we find that the evidence of the prosecutrix is worthy of credit and implicitly reliable. The other evidence adduced by the prosecution, in fact, provides the necessary corroboration, even if that was considered necessary. The High Court on a clear misreading of the evidence on record, acquitted the respondent of the charge under Section 376, IPC while upholding his conviction under Section 450, IPC.”*

### **CONSIDERATION**

59. Having heard Mr. Bobde, learned counsel appearing for appellant- Wasim and Mr. Tiwari, learned counsel appearing on behalf of Kadir as well as the learned APP, we have gone through the record. As per medical report, more particularly according to Dr. Dipti Shrirame (PW10), there was no injury on the private part of the prosecutrix as well as other parts of the body except on the left elbow and below the right eye. As per the DNA report, no semen was detected on the leggings of the prosecutrix which she wore at the time of the incident and no DNA came to be amplified from the public hair, vaginal swab and sputum sample of the prosecutrix.

60. Evidently, there is no injury on the private parts of the prosecutrix inspite of having deposed that she was subjected to repeated sexual intercourse by Wasim, Kadir and the juvenile in

conflict with law during the intervening night of 05.11.2014 and 06.11.2014. However, at the same time, we cannot ignore the fact that the prosecutrix was made to drink large quantity of liquor and she was under the influence of it. This is evident from the CA report reflecting the presence of Alcohol in the blood of the prosecutrix, the sample of which was taken by Dr. Dipti Shrirame (PW10) in the afternoon of 06.11.2014. The counsel for the appellants have themselves admitted that Wasim and the prosecutrix knew each other prior to the incident which suggests that they were well acquainted with each other prior to the alleged incident. Apart from that, the prosecutrix was surrounded by three strong men and she was inebriated. These factors are self explanatory as to why the prosecutrix did not resist when she was being subjected to sexual assault. Rather, it was not the case that physical force was used by each one of them while committing sexual intercourse. The seizure panchnama of the leggings shows that it was soaked with dust which proves that she was made to lie down on an earthy surface. The absence of injury on the back and other parts of the body of the prosecutrix inspite of repeated sexual intercourse by the three of them has been sufficiently explained by the learned APP as the prosecutrix was habitual to sexual intercourse. Therefore, absence of injury on the body of the prosecutrix is already explained and it would not be of any advantage to the accused.

61. It will be appropriate to refer the case of ***State of Uttar Pradesh Vs. Chhotelal***<sup>9</sup>, wherein the Supreme Court in para no. 32 has held as under:-

*“32. Although the lady doctor, PW 5 did not find any injury on the external or internal part of body of the prosecutrix and opined that the prosecutrix was habitual to sexual intercourse, we are afraid that does not make the testimony of the prosecutrix unreliable. The fact of the matter is that the prosecutrix was recovered almost after three weeks. Obviously the sign of forcible intercourse would not persist for that long a period. It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim. The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by two adult males. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim. She did not and could not inform the neighbours where she was kept due to fear.”*

62. In the case of ***Rajendra @ Raja Bhat Vs. Bajrang Shankarpale Vs. State of Maharashtra***<sup>10</sup> it has been held as under:-

*“a] Absence of injury on private part of prosecutrix who is a mother of grown up child, therefore absence of injuries on the private part of the prosecutrix would not rule out the rape.*

*b] When evidence of prosecutrix is cogent, convincing and true, it can be acted upon without corroboration.*

*c] Non-examination of doctor Cannot be fatal to prosecution case when the evidence led otherwise is sufficient, reliable and cogent and there is no good reason to disbelieve.”*

63. In the case of ***Vijay @ Chinee Vs. State of M. P***<sup>11</sup>, it has been observed that non resistance on the part of the prosecutrix cannot be relied upon to demonstrate that the conduct of prosecutrix was

<sup>9</sup> (2011) 2 SCC 550

<sup>10</sup> 2009 ALL MR (CRI) 3534

<sup>11</sup> 2010 ALL MR (CRI) 3326

unnatural as it could be due to fear. It could not be assumed that the prosecutrix consented to the act, even if she was a major. Conviction of the accused was held to be proper.

64. In the case of ***Maroti Domaji Sadmake Vs. State***<sup>12</sup>, it has been held that while appreciating evidence in a case of rape, mere absence of medical evidence to prove sexual intercourse would not be enough to reject strong, truthful and reliable evidence of the prosecutrix.

65. In the case of ***Radhakrishna Nagesh Vs. State of Andhra Pradesh***<sup>13</sup> in para nos. 19 to 22 of the judgment, it has been held as under:-

*“19. It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.*

*20. The absence of injuries on the back and neck of the victim girl can safely be explained by the fact that she was lured into the offence rather than being taken by using physical force on her. The preparation, attempt and actual act on the part of the accused is further clear from the fact that he had purchased bangles which he had promised to her and thereafter had taken her into the tennis court store room, the key of which was with him. This is also corroborated from the fact that even vide Ext. P-3, the lehenga as well as the bangles, coated with golden colour were recovered by the Investigating Officer, S.M. Khaleel, PW11.*

\* \* \* \* \*

<sup>12</sup> 2012 ALL MR (CRI) 575

<sup>13</sup> (2013) 11 SCC 688

*22. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation. The absence of injuries on the body of the prosecutrix, as already explained, would not be of any advantage to the accused.”*

66. Concededly, the prosecutrix has admitted in her cross-examination that semen spilled over her private part and on her clothes. Whereas, the DNA report indicates absence of semen on the leggings which the prosecutrix wore during the intervening night of 05.11.2014 and 06.11.2014. The DNA report further exhibits that the DNA could not be amplified from the pubic hair, vaginal swab and sputum sample of the prosecutrix. Further cross-examination of the prosecutrix reveals that she has in categorical terms deposed that after each sexual intercourse, she put on the leggings. This indicates that before every sexual intercourse, the leggings were removed. In that scenario, there is no question of presence of semen on the leggings which has been duly dealt with by the Trial Court. Lastly, perhaps the semen might have spilled on the inner-wear/underwear of the prosecutrix which was not seized during the investigation and therefore, it was not subjected to DNA analysis. Thus, in wake of the version of the prosecutrix that on every occasion of sexual intercourse, the leggings were removed, absence of semen on the leggings will not be beneficial to Wasim and Kadir. Just because the underwear of the

prosecutrix was not seized, which is the fault of the Investigating Officer, the benefit of doubt cannot be extended to the appellants. So far as inconclusive DNA report of pubic hair, vaginal swab or sputum sample are concerned, just because the DNA could not be amplified, the prosecutrix cannot be blamed for it. Here is not a case of contradiction between ocular and medical evidence so as to doubt the testimony of the prosecutrix. Reference can be made to para 19 of the decision in the case of **Radhakrishna Nagesh** (supra).

67. Before considering whether the sole testimony of the prosecutrix can be relied upon, we must refer to the decisions of the Supreme Court on this aspect. In the case of **Deepshikha Vs. Vibha**<sup>14</sup>, the Supreme Court has held as under:-

*“a] Evidence of prosecutrix is entitled to great weight, even in absence of corroboration. She is not an accomplice. Corroboration is not a sine quo non for conviction in rape case.*

*b] Testimony of prosecutrix cannot be disbelieved even if the doctor, in a given case, finds no sign of rape.*

*c] Court must deal such cases with utmost sensitivity. They should examine insignificant discrepancies in the statement of prosecutrix.*

*d] If totality of the circumstances appearing on record discloses that prosecutrix does not have strong motive to falsely involve the person charged, court should ordinarily have no hesitation in accepting the evidence.”*

68. In **State of Maharashtra v. Chandraprakash Kewalchand Jain**<sup>15</sup>, the Supreme Court held that a woman who is the victim of

<sup>14</sup> 2008 ALL MR (CRI) 2583

<sup>15</sup> (1990) 1 SCC 550

sexual assault is not an accomplice to the crime but is a victim of another person's lust and therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, para 16)

*"16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."*

69. In ***State of U.P. v. Pappu***<sup>16</sup>, the Apex Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl is habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that

consent was given by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. The Apex Court further held that conviction can be based on the sole testimony of the prosecutrix and in case the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court further held as under: (SCC p. 597, para 12)

*"12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."*

70. In ***State of Punjab v. Gurmit Singh***<sup>17</sup>, the Supreme Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of a victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial

conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court observed as under: (SCC pp. 394 96 & 403, paras 8 & 21)

*"8. ... The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. ... Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. ... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. ...*

\* \* \* \* \*

*21. ... The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."*

*(emphasis in original)*

71. In *State of Orissa v. Thakara Besra*<sup>18</sup>, the Supreme Court held that rape is not mere a physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, even non-examination of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

72. In State of *H.P. v. Raghubir Singh*<sup>19</sup>, the Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by the Supreme Court in *Wahid Khan v. State of M.P.*<sup>20</sup> placing reliance on an earlier judgment in *Rameshwar v. State of Rajasthan*<sup>21</sup>.

73. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence

18 (2002) 9 SCC 86

19 (1993) 2 SCC 622

20 (2010) 2 SCC 9

21 AIR 1952 SC 54

and is reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

74. In the case of **Krishan Kumar Malik v. State of Haryana**<sup>22</sup>, it is observed and held by the Supreme Court that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

75. Who can be said to be a “sterling witness”, has been dealt with and considered by the Supreme Court in the case of **Rai Sandeep alias Deepu v. State (NCT of Delhi)**<sup>23</sup>. In paragraph 22, it is observed and held as under:

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

22 (2011) 7 SCC 130

23 (2012) 8 SCC 21

*each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”*

76. What is deduced from the decisions of the Supreme Court referred above is that in case of rape, the Court must while evaluating the evidence stay mindful of the facts of the case. The evidence of the victim is on the highest pedestal and is to be treated at par with that of an injured witness. Corroboration is not a *sine qua non* for recording conviction in a rape case. The conviction can solely be based on the evidence of the victim, if it is trustworthy, unblemished and of a sterling quality.

77. In the light of the legal principles discussed above, we will now consider whether it is safe to convict the accused solely on the evidence of the prosecutrix in absence of supporting medical evidence

and whether the evidence of the prosecutrix inspires confidence, is trustworthy, unblemished and of a sterling quality.

78. From the version of the prosecutrix, it is revealed that after putting Dinesh on the Railway track, Wasim, Kadir and the juvenile in conflict with law took her to Nagpur Road and halted their vehicle near a Dhaba. Wasim and Kadir alighted from the vehicle and went towards the Dhaba. The juvenile in conflict with law made physical relations with the prosecutrix and thereafter, proceeded ahead. At about 4:30 am in the jungle, they made the prosecutrix descend from the vehicle. Wasim committed sexual intercourse with the prosecutrix and thereafter, Kadir also committed sexual intercourse with her. The third incident of rape, according to the prosecutrix, was at about 9:00 to 9:30 am between chhota Shegaon and Tadoba road where they made her get down from the vehicle and thereafter, Wasim and Kadir had sexual intercourse with her. Dr. Dipti Shrirame (PW10), who clinically examined the prosecutrix has found two injuries on the person of the prosecutrix i.e. abrasion over right elbow and contusion below right eye with swelling. On genital examination of the prosecutrix, she found that her hymen was torn as a result of an old injury and two fingers were easily inserted. Ultimately, she opined that the prosecutrix was subjected to sexual intercourse. She also took

blood sample, vaginal swab and pubic hair of the prosecutrix and sealed it.

79. The incident inside the room has been duly proved by the prosecution wherein the prosecutrix and Rakesh were stripped and were made to give poses in sexually compromising positions. Rakesh was asked to go and Dinesh and the prosecutrix were abducted by Wasim, Kadir and the juvenile in conflict with law and they were taken away in the car. They put Dinesh on the Railway track and thereafter, took the prosecutrix along with them towards to Nagpur- Chandrapur road, in particular, Tadoba.

80. Further, the version of Rupesh Pande (PW19), who on 06.11.2014, at the instance of Goldi and Jobi took the Tata Sumo car to Sindewahi and brought Wasim, Kadir and the juvenile in conflict with law reveals that at Adilabad, Wasim and Kadir alighted whereas, the juvenile in conflict with law, after noticing that the Police vehicle was following their Tata Sumo, fled away whereas Rupesh Pande (PW19) Goldi and Jobi were caught by the Police squad which was searching for them after receipt of the information of the incident. All this material cogently establishes that after putting Dinesh on the Railway track, Wasim, Kadir and the juvenile in conflict with law took the prosecutrix in their car.

81. The prosecutrix narrated the incident of repeated sexual intercourse by the three and gave a detailed account of the possible events. The version of the prosecutrix on the incident that happened prior to the gang rape is fully corroborated by other clinching and cogent evidence. There is no reason to doubt her testimony over the incident of gang rape. The factum of snapping photographs and recording videos of the prosecutrix and Rakesh in naked and compromising positions by Wasim clearly establishes that Wasim and Kadir took the prosecutrix into the jungle, leaving Dinesh on the Railway track, with a perverted mindset to exploit her sexually. This also supports the constant version of the prosecutrix on gang rape committed by the three of them. Just because she could not tell the route and the place of incident of rape in the jungle, her evidence can not be discarded. One cannot remain oblivious to the fact that the prosecutrix was taken into the dense forest near Tadoba and chhota Shegaon in the night. That apart, she was inebriated and therefore, was not fully conscious. The incident happened at night in a dense forest near Tadoba. In such a scenario, it cannot be expected from a frightened woman to remember the route and the spot of incident in a dense forest, more particularly at night. Though, there are some minor contradictions and discrepancies in the version of the prosecutrix but they do not make her version unreliable.

82. In the case of ***Sham Singh Vs. State of Haryana***<sup>24</sup>, the Supreme Court has held as under:-

*“6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [see State of Punjab vs. Gurmit Singh, [(1996) 2 SCC 384] (para21).”*

83. We find that the prosecutrix has passed the test of a sterling witness as held in the case of ***Rai Sandeep @ Deepu*** (supra). The version of the prosecutrix on repeated sexual intercourse is reliable and can be safely acted upon particularly, considering the fact that the prosecutrix lodged the first information report on the very next day. The version of the prosecutrix is found to be consistent right from the incident near the room; inside the room and outside the room. Her version matched with the version of every other witness and other evidence. The Trial Court has rightly considered her evidence as worthy of credit.

**“NO MEANS NO”**

84. An attempt has been made to question the morals of the prosecutrix. No doubt, the prosecutrix was an estranged wife and without getting divorced from her husband, she was residing with Dinesh. Even from her evidence, this material was brought in her cross-examination to suggest that she had an intimate relationship with Wasim before she started residing with Dinesh in a live-in-relationship inspite of the fact that her previous marriage was subsisting. Even then, a person cannot force a woman to have intercourse with him without her consent.

85. We feel it appropriate to state that rape in its simplest term is “Ravishment of a woman without her consent by force, fear or fraud.” Sexual violence diminishes law and thus, unlawfully encroaches on the privacy of a woman. Rape cannot be treated only as a sexual crime but it should be viewed as a crime involving aggression which leads to the domination of the prosecutrix. It is a violation of her right of privacy. Rape is the most morally and physically reprehensible crime in society, as it is an assault on the body, mind and privacy of the victim. Rape objectifies a woman and thereby shakes the very core of her life. Sexual intercourse on one hand gives pleasure to the participants including a woman but if it is done without consent of the woman, it is an assault on her body, mind and privacy.

Therefore, it is an offence if sexual intercourse is done without the consent of a major woman of the age of 18 years and above. A woman who says “NO” means “NO”. There exists no further ambiguity and there could be no presumption of consent based on a woman’s so called “immoral activities”. Therefore, even though there may have been a relationship between the prosecutrix and Wasim in the past but if the prosecutrix was not willing to have sexual intercourse with Wasim, his colleague Kadir and the juvenile in conflict with law, any act without her consent would be an offence within the meaning of Section 375 of the IPC. A woman who consents to sexual activities with a man at a particular instance does not *ipso facto* give consent to sexual activity with the same man at all other instances. A woman’s character or morals are not related to the number of sexual partners she has had in wake of Section 53A of the Indian Evidence Act. The intimacy, if any, will not absolve Wasim, at the most, this will be relevant while considering the punishment. Thus, we are of the opinion that the Trial Court was right in holding that the prosecution has proved that Wasim and Kadir have committed the offence of gang rape punishable under Section 376D of the IPC.

86.           Sofar as conviction recorded by the Trial Court against Wasim and Kadir for the offence punishable under Section 506-II of the IPC is concerned, the learned Judge relied on the version of the

prosecutrix that Wasim and Kadir were discussing amongst themselves that the prosecutrix will go to the Police and will lodge a complaint against them. Therefore, it is better to kill her. From this version it is not clear whether they really threatened her as they were merely discussing amongst themselves. Even otherwise, the fact deposed by the prosecutrix does not suggest that they threatened her with an intention to cause her not to lodge the complaint against them. Therefore, the ingredients of criminal intimidation are not made out. We hold that the conviction recorded by the Trial Court against Wasim and Kadir for the offence punishable under Section 506-II of the IPC is not sustainable.

87.           Sofar as the material against Jobi is concerned, the version of Rupesh Pande (PW19) is abundantly clear on the fact that he, on the pretext of medical emergency, asked him to accompany them to pick up Wasim, Kadir and the juvenile in conflict with law with intent to protect them from arrest. The reason for visiting Sindewahi is itself evident that he was harboring Wasim, Kadir and the juvenile in conflict with law with intention of protecting them from legal punishment.

### **CONCLUSION**

88.           To conclude, the Trial Court has rightly held Maksud guilty for the offence punishable under Sections 450, 452, 354A and 354B

r/w Section 34 of the IPC and Section 66E of the IT Act except for the offence punishable under Sections 506-II and 326 of the IPC.

89. The conviction of Wasim for the offence punishable under Sections 450, 452, 366, 354A, 354B, 354C, 376D, 307, 201, 394 r/w. 34 of the IPC as well as conviction under Section 66E of the IT Act r/w. Section 34 of the IPC is completely justified except for the offence punishable under Section 506-II and 326 of the IPC. Conviction under Section 326 of the IPC is converted into Section 324 of the IPC.

90. Likewise, the conviction of Kadir for the offences punishable under Sections 450, 452, 366, 354A, 354B, 376D, 307 and 394 r/w. 34 of the IPC as well as Section 66E of the IT Act is upheld. His conviction under Section 326 of the IPC is converted into Section 324 of the IPC and he is acquitted under Section 506-II of the IPC. Thus, Maksud, Wasim and Kadir are guilty for the offence punishable under Section 324 of the IPC.

91. We also concur with the findings of the Trial Court convicting appellant- Jobi for the offence punishable under Section 212 r/w Section 34 of the IPC. However, we could not endorse the conviction imposed by the Trial Court on Siraj. We give him the benefit of doubt.

## **PUNISHMENT**

92. Now, we propose to examine the punishment imposed by the Trial Court. In the case of ***State of M.P. Vs. Munna Choubey***<sup>25</sup>, in para nos. 12 and 13, it has been held as under:-

*“12. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.*

*13. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGDautha v. State of Callifornia: [402 US 183] that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.”*

93. Maksud, Wasim and Kadir have already undergone the sentence imposed for the offences punishable under Sections 450, 452, 354A, 354B, 354C and 366 of the IPC. The defense has also not

pressed much for reduction of the sentence in these offences but Mr. Bobde, learned counsel appearing on behalf of Wasim and Shri Tiwari, learned counsel appearing on behalf of Kadir submitted that there are mitigating circumstances which require consideration for reduction in the sentence imposed by the Trial Court. Mr. Bobde, learned counsel appearing on behalf of Wasim submitted that the prosecutrix was known to Wasim, rather there was an intimate relationship between them. Also, Wasim has a daughter who needs her father around. When the offence was committed, he was in his thirties and has suffered the sentence for more than 10 years. Nothing has been reported by the Jail Authority regarding the conduct of Wasim and Kadir. There are no criminal antecedents of Wasim and Kadir. This is their first offence and therefore, the incident which occurred was not pre-planned and because of the peculiar circumstances, Wasim and Kadir committed the act. Therefore, it is submitted that a lenient view may be taken and their punishment be reduced to the extent of the period which they have already undergone.

94. The Trial Court sentenced Wasim and Kadir for imprisonment for life for the offence punishable under Section 307 of the IPC and for remainder of their natural life for the offence punishable under Section 376D of the IPC. We are mindful of the fact that rape is a heinous crime much less gang rape and it is an offence

against the vulnerable section of the society i.e. woman hence, the offender of such a crime is to be dealt with heavy hands.

95. One of the principles of punishment is that punishment should be proportionate with the crime and shall be awarded according to the offence. For deciding the appropriate sentence, a balance has to be maintained between the aggravating and mitigating circumstances in which the crime has been committed. Imposition of punishment in a rape case depends upon the degree of atrocity of crime, conduct of the criminal and the defenseless and unprotected state of the victim.

96. Turning to the present case, from the tenor and version of the prosecutrix, it is revealed that Wasim and the prosecutrix knew each-other. Rather, it appears that there was an intimate relationship between the prosecutrix and Wasim due to which Wasim's family life was disturbed. The prosecutrix started residing with Dinesh due to which Wasim got jealous and every now and then an attempt was made by Wasim to make sure that the prosecutrix should be physically involved only with him and nobody else. He could not succeed and the incident of the prosecutrix with Maksud gave him a reason to give a design to the crime, which he then committed. It is also a matter of record that Wasim and Kadir did not cause any grievous injury to the

prosecutrix during the incident. Considering the above facts and the fact that Wasim has a daughter who needs her father around; and that no incident of misbehavior or cruelty is reported by the Jail Authority, we propose to reduce the imprisonment of Wasim and Kadir from imprisonment for remainder of their natural life to rigorous imprisonment for 20 years.

97. Likewise, considering the facts and circumstances of the case as well as the injury on the person of Dinesh, we also reduce the sentence of imprisonment for life to rigorous imprisonment for 10 years for the offence punishable under Section 307 of the IPC.

98. Sofar as Jobi is concerned, Mr. Vyas his learned counsel prayed for leniency. Considering his age and the fact that he was working under Wasim due to which he obeyed the orders of his master, imprisonment for 3 years is reduced to the period of the imprisonment which he has already undergone. Resultantly, we proceed to pass the following order:-

i) Criminal Appeal Nos. 325/2016, 336/2015, 346/2015 and 352/2016 are partly allowed.

ii) The conviction of Maksud Sheikh Gaffur Sheikh and the sentence as well as the fine imposed upon him for the offence

punishable under Section 450, 452, 354A and 354B r/w. Section 34 of the IPC and under Section 66E of the IT Act are maintained. His conviction under Section 326 r/w Sections 34, 149, 109 and 114 of the IPC is altered to Section 324 r/w. 34 of the IPC and he is sentenced to suffer rigorous imprisonment for 3 years with fine as imposed by the Trial Court. All the sentence shall run concurrently.

iii) The conviction of Wasim Khan Ajim Khan and the sentence and fine imposed upon him for the offence punishable under Sections 394, 201, 450, 452, 366, 354A, 354B and 354C r/w. 34 of the IPC and Section 66E of the IT Act are maintained. His conviction under Section 326 r/w. Sections 34, 149, 109 and 114 of the IPC is altered to Section 324 r/w. 34 of the IPC and he is sentenced to suffer rigorous imprisonment for 3 years with fine as imposed by the Trial Court. All the sentence shall run concurrently.

iv) The conviction of Sheikh Kadir Sheikh Jakir and the sentence as well as fine imposed upon him for the offences punishable under Sections 450, 452, 354A and 354B, 366 and 394 r/w. Sections 34 of the IPC and under Section 66E of the IT Act are maintained. His conviction under Section 326 r/w. Sections 34, 149, 109 and 114 of the IPC is altered to Section 324 r/w. 34 of the IPC and he is sentenced

to suffer rigorous imprisonment for 3 years with fine as imposed by the Trial Court. All the sentence shall run concurrently.

v) The conviction of Wasim Khan Ajim Khan and Sheikh Kadir Sheikh Jakir for the offence punishable under Section 307 r/w. 34 of the IPC is maintained. However, rigorous imprisonment for life is reduced to rigorous imprisonment for 10 years with the fine imposed by the Trial Court.

vi) The conviction of Wasim Khan Ajim Khan and Sheikh Kadir Sheikh Jakir for the offence punishable under Section 376D of the IPC is also maintained. However, the sentence is reduced from rigorous imprisonment for remainder of their natural life to rigorous imprisonment for 20 years with fine as imposed by the Trial Court.

vii) Appellant Sirajkhan Pathan @ Raja Shaadat Khan Pathan is acquitted of the offences punishable under Sections 326, 450, 452, 354B r/w Sections 34, 149, 109, 114 of the IPC alongwith Section 66E of the IT Act r/w Sections 34, 149, 109 and 114 of the IPC.

viii) The conviction and sentence imposed on Jobi Ashokan Welythan for the offence punishable under Section 212 r/w. 34 of the IPC is maintained. However, his sentence of rigorous imprisonment

for 3 years is reduced to the period which he has already undergone.

ix) The conviction of Maksud Sheikh Gaffur Sheikh, Wasim Khan Ajim Khan and Sheikh Kadir Sheikh Jakir and the sentence and fine imposed upon them for the offences punishable under Section 506(II) r/w Sections 34, 109 and 114 of the IPC is hereby set aside and they are acquitted of the said offences.

x) Accused are entitled for set off in terms of Section 428 of the Criminal Procedure Code, for the period already undergone.

xi) Needless to mention that the juvenile in conflict with law has been tried separately and therefore, the observations with regard to the juvenile in conflict with law are limited to the extent of deciding the present appeals and will not affect his case.

In the above said terms, the appeals are disposed of.

(M. W. CHANDWANI, J.)

(NITIN B. SURYAWANSHI, J.)