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(2021) 03 BOM CK 0034

In the Bombay High Court

Case No : Criminal Appeal No.1029, 1071 Of 2017

Salim Noorhasan Shaikh And Others — APPELLANT

Vs

State Of Maharashtra — RESPONDENT

Date of Decision : 31-03-2021

Acts Referred:
Indian Penal Code, 1860 — Section 34, 363, 366, 376(D), 376(2)(1), 506
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 03 BOM CK 0034

Hon'ble Judges : Revati Mohite Dere, J

Bench : Single Bench

Advocate : Yogesh S. Palve, Machhindra Bodke, Santosh M. Deshpande

Final Decision : Allowed

Judgement

Revati Mohite Dere, J

1. Since both the aforesaid appeals arise out of the same Judgment and Order dated 8th November 2017, they are being disposed of by a common Judgment.

2. Vide Judgment and Order dated 8th November 2017, passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.415 of 2015, the aforesaid two appellants alongwith another co-accused – Panchu Ganesh Dhaki have been convicted and sentenced, as under:-

- The appellant – Salim Noorhasan Shaikh, for the offence punishable under Section 376(2)(l) of the Indian Penal Code, to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/-, in default, to suffer simple imprisonment for 1 month;

- The appellants – Salim Noorhasan Shaikh and Rahul Rafiq Mandal and co-accused – Panchu Ganesh Dhaki, for the offence punishable under Sections 363 r/w 34 of the Indian Penal Code, to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/-each, in default, to suffer simple imprisonment for 15

days;

- The appellants – Salim Noorhasan Shaikh and Rahul Rafiq Mandal and co-accused – Panchu Ganesh Dhaki, for the offence punishable under Sections 366 r/w 34 of the Indian Penal Code, to suffer rigorous imprisonment for 4 years and to pay a fine of Rs.2,000/-each, in default, to suffer simple imprisonment for 1 month;

The aforesaid sentences were directed to be run concurrently.

- The aforesaid appellants – Salim Noorhasan Shaikh and Rahul Rafiq Mandal and co-accused – Panchu Ganesh Dhaki, were however acquitted of the offence punishable under Section 376D of the Indian Penal Code.

3. It is the prosecution case that the incident took place on 2nd February 2015 at about 11:00 p.m. within the jurisdiction of Kalachowky Police Station. It is alleged by the prosecution, that the prosecutrix (PW 7) , an intellectually challenged girl, aged about 21 years, had gone to one Dargah at Reay Road on 2nd February 2015 at about 3:30 p.m.; that at around 10:30 p.m. she left the Dargah and was waiting at Reay Road Railway Station for boarding the Andheri local train, when the appellant – Salim approached her, offered her tea and assured to leave her home. Appellant – Salim is alleged to have been accompanied by his two friends, appellant - Rahul and co-accused - Panchu Dhaki. It is alleged that on reaching the Cotton Green Railway Station, the prosecutrix/complainant (PW 7) and the 3 accused got down to have tea. It is alleged that the accused took PW 7 near a parking area, at Cotton Green, where trucks were parked. It is alleged that appellant – Salim asked PW 7 to board a truck, after which he sexually assaulted her. Thereafter, the other 2 accused are also alleged to have sexually assaulted PW 7. The police who were on patrolling duty, saw the 3 accused and the prosecutrix (PW 7) standing behind the truck, pursuant to which all the 3 accused and the prosecutrix (PW 7) were taken to the police station for enquiry. The paternal aunt of the prosecutrix (PW 7) was also called to the police station. The prosecutrix (PW 7) is alleged to have disclosed that she was sexually assaulted by the accused. The statement of the prosecutrix was recorded on 3rd February 2015, pursuant to which, C.R. No.36 of 2015 was registered with the Kalachowky Police Station, as against the accused alleging offences punishable under Sections 363, 366, 376D, 506 r/w 34 of the Indian Penal Code.

During the course of investigation, spot panchanama was drawn; the prosecutrix was sent for medical examination; and the accused were arrested. The accused were sent for medical examination and their clothes were also seized. After investigation, charge-sheet was filed as against the appellants and co-accused – Panchu Dhaki in the Court of the learned Metropolitan Magistrate, 15th Court at Mazgaon (Sewree), Mumbai. The case being sessions triable, was committed to the Court of Sessions, for trial.

Charges were framed as against the appellants and co-accused – Panchu Dhaki,

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to which they pleaded not guilty and claimed to be tried. The prosecution in support of its case, examined as many as 16 witnesses i.e. PW 1 - Ganesh Rajaram Deshmukh, police staff who was on patrolling duty on the day of the incident; PW 2 – Shanta Keshav Raut, panch to the clothes of the prosecutrix, which were seized under a panchanama; PW 3 – Kiran Hari Ghanekar, panch to the Test Identification Parade panchanama; PW 4 – Sandeep Yashwant Shetye, panch to the spot panchanama and seizure of clothes of the accused; PW 5 - Prakash Ganpat Bhosale, Nayab Tehsildar, who conducted the Test Identification Parade of the accused; PW 6 – Anand Ashok Kale, watchman, who was present at the godown/spot where the alleged incident took place (hostile); PW 7 - the prosecutrix and the complainant; PW 8 - aunt of the complainant/ prosecutrix; PW 9 – Dr. Nishikant Manikrao Thorat. The said witness was discharged (as he was not a relevant witness); PW 10 – Anita Nandkumar Menkar, Women Police Sub-Inspector, who was on patrolling duty on the date of the alleged incident. PW 11 – Dr. Swapnil Vasudeo Bhopi, was examined to show that the prosecutrix was intellectually challenged; PW 12 – Balkrishna Narayan Deshmukh, Police Inspector (Investigating Officer), who conducted part investigation, in the said case; PW 13 – Hemant Ramchandra Rade, Police Inspector and Investigating Officer; PW 14 – Dr. Nikhil Subhash Jagtap who conducted the medical examination of the prosecutrix and the accused; PW 15 – Dinesh Dagdu Rokde, Police Sub-Inspector/SHO, who registered the FIR, and was part of the investigation; and PW 16 – Anand Bharat Jaiswal, IT Engineer with respect to the CCTV footage, collected at the railway station.

The defence of all the accused was that of denial and false implication.

The learned Additional Sessions Judge, Greater Mumbai, after hearing the parties and after considering the evidence on record, convicted and sentenced the appellants and co-accused - Panchu Ganesh Dhaki, as stated aforesaid in Para 2.

4. Learned Counsel for the appellant – Salim submitted that the prosecution had failed to prove its case beyond reasonable doubt. He submitted that the evidence of the complainant/prosecutrix, who was intellectually challenged, shows several discrepancies in her evidence and that there is no corroboration to her evidence. He submitted that even the DNA report cannot be accepted having regard to the evidence that has come on record. He submitted that the clothes of the accused were sent belatedly and as such the possibility of tampering with the said clothes cannot be ruled out. He submitted that no question has been put to the accused, in particular, accused – Salim, under Section 313 of Code of Criminal Procedure, on the DNA Report, which was allegedly incriminating against accused – Salim.

5. Learned Counsel for the appellant - Rahul assailed the impugned judgment and order on several counts. He submitted that a false case was foisted by the police on the accused. He submitted that a perusal of the medical case papers of the accused shows that no blood stains/semen stains were found on their clothes, when they were examined on 3rd February 2015, however, when the clothes were seized on 4th February 2015, semen stains were found on the

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clothes, thus rendering the same suspect. He submitted that even the medical case papers of the prosecutrix do not support the case of the prosecution, that the prosecutrix was sexually assaulted on 2nd February 2015. He submitted that the prosecutrix - PW 7 was sent immediately for medical examination, however, no fresh injuries nor any abrasion or bruises were found on her person, which is highly improbable, if 3 persons are alleged to have sexually assaulted her, in a truck. He submitted that the prosecution had not proved its case as against the appellants, beyond reasonable doubt and as such the appellants be acquitted.

6. It is pertinent to note that co-accused - Panchu Dhaki has not filed any appeal, challenging his conviction and sentence.

7. Learned APP supported the impugned judgment and order of conviction and sentence and submitted that no interference was warranted in the same. He submitted that the appellants had taken advantage of an intellectually challenged girl by taking her to a secluded spot and thereafter, by sexually assaulting her. Learned APP submitted that the DNA report shows that the appellant – Salim had sexually assaulted the prosecutrix - PW 7.

8. Perused the papers with the assistance of the learned counsel for the parties. PW 7 (prosecutrix), aged 21 years was intellectually challenged. Although, learned counsel for the appellants questioned and disputed the fact, that PW 7 – prosecutrix was intellectually challenged, a perusal of the evidence of the witnesses including the doctors and the medical case papers clearly show that PW 7 – prosecutrix was intellectually challenged.

9. The prosecutrix was examined as PW 7. As the learned APP had submitted that the prosecutrix was intellectually challenged, certain introductory questions were put to her by the Court. The learned trial Judge after putting certain questions, noted that the prosecutrix could answer the said questions i.e. her name, address, residence. The learned Judge however noted that she was laughing while answering the said questions without any reason and was looking down without paying much attention to the questions. In her examination-in-chief, PW 7 – prosecutrix has stated that the incident of sexual assault took place about 3 years prior. She has stated that she had gone to one Dargah at Reay Road to offer Namaz as she was not feeling well. She has stated that some black-magic was performed on her and hence she had gone to the Dargah. She has stated that whilst returning home at about 11:00 – 11:30 p.m., 3 boys chased her; that their names were Rahul, Panchu and Salim; and that they were chasing her as they wanted to rape her at Cotton Green near a railway station. She has stated that the place was a lonely and dark place like a forest and that the police had come and taken away those 3 boys. She has stated that she fell unconscious and did not know what had happened after she became unconscious. When the Court put the question 'what happened to become unconscious?', the learned Judge noted that the witness kept mum and was reluctant to answer. PW 7 – prosecutrix then stated that she had made a complaint as those 3 persons had followed her and committed rape on her and that it was a place which looked like

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a tempo or a truck. The learned Judge at this stage noted that the witness was laughing without any reason and appeared to be disturbed. PW 7 has stated that she had made a complaint against those persons. She has stated that she did not know them earlier and that she would identify them if she saw them. She has identified the said persons in the Court. She also identified her signature on the complaint/FIR, which is marked at Exhibit – 43. When asked 'whether police had taken her any where after lodging of the complaint?', she answered after thinking over for some time and stated that 'I do not remember'. The learned Judge noted that when PW 7 was asked 'whether police had taken anything from her and whether she had produced anything to the police?', the said witness was looking down, was not replying, was only smiling and ultimately nodded in the negative.

10. In her cross-examination, PW 7 admitted that she was not acquainted with the accused and therefore she did not know their names.

She has also admitted that the police told her that she has to identify the accused persons today before the Court and that she was deposing as per the say of the police. She has denied the suggestion that she was deposing false that she was sexually assaulted 3 years prior. The learned Judge noted that the witness was murmuring to herself and was looking down continuously without paying attention to the questions. The witness was also given an understanding that she should pay attention to the questions. PW 7 in her cross-examination has admitted that it was true that she used to go to the Dargah for namaz, as her family was suspecting that she was under the influence of black-magic. The learned Judge noted that the witness was laughing loudly. PW 7 was also asked whether she understands the meaning of oath, to which she replied that it was a crime, if one tells false on oath. The learned Judge noted that the witness was laughing loudly while answering the said question. PW 7 has further admitted that she used to go to the Dargah many times and that she used to go alone. When asked 'how much time it takes to reach the Dargah from her residence?', the witness laughed and stated that it must be about 15 – 20 minutes distance. Learned Judge noted that the witness is found murmuring to herself. When a question was put in cross to PW 7, that whether the complaint was written by her aunt, she replied in the affirmative. When questioned whether she knew what was written in the complaint, she again answered in the affirmative. When questioned whether her aunt had asked her to put her signature on the complaint, she again replied in the affirmative. When questioned whether her aunt told her what to say before the Court, as per the complaint, she replied in the affirmative. The learned Judge noted that the witness was laughing and shutting her mouth with her palm. Again when questioned whether she was mentally and physically fit and was not deposing under any pressure, she answered in the affirmative. The learned Judge has noted that while answering the said question, the witness was laughing and looking down. Again when she was asked whether she identified the accused before the Court as accused were shown to her today outside the Court by police, she replied in the affirmative.

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11. As noted earlier, there is evidence on record as well as documents to show that PW 7 – prosecutrix was intellectually challenged. Her IQ was '48', according to the Clinical Psychologist, Psychiatry Department, Nair Hospital. She had significant problems in concept formation as well as visual attention. It appears from the certificate that her intelligence was below average and she had an impaired test judgment.

12. There can be no dispute that the evidence of an intellectually challenged victim can be relied upon even without corroboration, however, that would depend on the facts of each case, after considering the evidence on record. In the facts, having considered the evidence of PW 7 as stated in detail aforesaid and having regard to the demeanor noted by the learned Judge, it would be prudent to look for corroboration to PW – 7's evidence of alleged sexual assault by the appellants and co-accused - Panchu Dhaki.

13. It is the prosecution case that PW 7 – prosecutrix was found with the appellants and co-accused - Panchu Dhaki near a truck. In this regard, prosecution examined 2 witnesses i.e. PW 1 - Ganesh Deshmukh and PW 10 – Anita Menkar. The evidence of PW 10 – Anita Menkar, shows that she was attached to the Kalachowky Police Station at the relevant time as a Probationary Officer. She has stated that on 2nd February 2015, she was on night duty on Mobile – I of the said police station and that lady PN – Malkar and Head Constable Deshmukh (PW 1) were also on duty with her. She has stated that when they were on patrolling duty at night in the Cotton Green area between 11:30 p.m. – 12.30 a.m. (midnight) on a mobile van, she saw a girl and 3 boys standing behind a truck in the Cotton Green godown area. She has stated that the girl was in a frightened condition and on making enquiry with her, she was unable to answer properly. PW 10 – Anita Menkar has stated that considering the situation, they brought the girl and 3 boys to the police station. The girl was made to sit in the ladies room and the boys were made to sit separately. She has stated that on enquiring with the girl, the girl stated about some incident like molestation but as she was not speaking frankly, they called her paternal aunt (PW 8). She has stated that they asked her aunt PW 8 to come to the police station and that when PW 8 came to the police station, they made enquiry with the girl in front of her aunt, pursuant to which, the girl narrated the incident which took place in the truck. She has stated that she recorded the girl's statement in the presence of her aunt, which was treated as an FIR (Exhibit – 43).

14. PW 10 – Anita Menkar, in her cross-examination has admitted that the clothes of PW 7 – prosecutrix were seized on 3rd February 2015 during the day. She has admitted that on making enquiry with the girl for about 5 minutes at the spot, they suspected that some incident of molestation may have taken place with her; and hence she was brought to the police station. She has admitted that the aunt of PW 7 had come to the police station at about 3:00 - 3:30 a.m and that they were making enquiry with the girl (PW 7) for about 1 ½ hour, thereafter.

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15. PW 1 - Ganesh Deshmukh who was also present along with PW 10 – Anita Menkar, has stated that he was on duty at the Kalachowky Police Station on 2nd February 2015. He has stated that at about 11:30 – 11:45 p.m. when they reached the Cotton Green area, they found some persons standing behind the truck; that the said persons told them that they were watchman and members of the truck union ; that they saw that there were 3 boys and a girl with them; that on enquiring with the 3 boys (appellants and co-accused - Panchu) they avoided giving any reply; that they gave evasive replies when asked about the girl with them; and that as they suspected something serious, they brought the boys and the girl to the police station in a Mobile – I van.

16. In his cross-examination, PW 1 - Ganesh Deshmukh admitted that neither the boys nor the girl stated in his presence about any offence having taken place. He has also admitted that neither any police complaint was made against the said boys by them nor any complaint was received by him or his colleagues from the girl. The said witness has also admitted that till the boys were taken to the police station, he was not knowing why they were present at the spot nor did he know anything about the girl except her name. PW 1 - Ganesh Deshmukh has admitted that there was no conversation between the girl and the lady police constable till he left the spot again for patrolling.

17. A perusal of the aforesaid evidence of PW 10 – Anita Menkar and PW 1 - Ganesh Deshmukh shows that whilst patrolling on night duty, they saw the prosecutrix (PW 7) and the appellants and co-accused - Panchu Dhaki, behind a truck. It appears that as the girl could not answer properly and her presence with 3 boys at 11:30 p.m., being suspicious, all of them were brought to the police station. The evidence of PW 1 - Ganesh Deshmukh shows that since no satisfactory answers were given by the boys with respect to the girl’s presence with them, they were all taken to the police station. The evidence of PW 10 – Anita Menkar also shows that the girl and the boys were seen standing behind a truck and since the girl was unable to answer properly and appeared to be frightened, she (PW 7) and the 3 boys (accused) were brought to the police station. PW 10’s evidence shows that on enquiry, the girl disclosed about molestation, but was not speaking frankly, hence her aunt (PW 8) was called.

18. PW 8, prosecutrix's aunt, has stated that PW 7 - prosecutrix was suffering from mental illness and that she was taking medical treatment at Nair Hospital. She has stated that PW 7 - prosecutrix left home at 3:30 p.m. to go to a Dargah at Reay Road. She has stated that she (PW 7) would return back at the most till 9:30 p.m., however, on that day, she did not return till 2:00 a.m. She has stated that sometimes PW 7 - prosecutrix used to stay at the Dargah only. She has stated that in the night she received a call from one Rokde (PW 15) of Kalachowky Police Station, who informed her about her niece (PW 7). She has stated that when she reached the police station, PW 10 – Menkar and PW 15 – Rokde were present in the police station. She has stated that PW 7 was weeping and that the police had arrested 3 accused. She has stated that PW 7 disclosed

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to her that when she was returning home from the Dargah, 3 accused had taken her at a parking spot where the trucks were parked and that the said accused sexually assaulted her and also threatened her. The said witness has not identified the accused, as she did not know the accused.

19. The said witness has denied the suggestion that she was forced by the police to make a statement and to give a false complaint of rape against the accused, if she wanted to take her niece (PW 7 - prosecutrix) home; that she was deposing falsely at the instance of PW 15 - PSI Rokde; and, that PW 7 - prosecutrix had not disclosed the incident to her. An omission was brought on record with respect to the fact that she had not stated in the police statement that PW 7 - prosecutrix was crying in the police station.

20. The evidence of the aforesaid witness i.e. PW 8 shows that she had no personal knowledge of the incident of sexual assault and has stated what was allegedly disclosed by PW 7 – prosecutrix to her. PW 8 had categorically stated that her niece (PW 7 - prosecutrix) was intellectually challenged and was taking treatment at Nair Hospital. The evidence of PW

11 – Dr. Swapnil Vasudeo Bhopi, doctor attached to J.J. Hospital shows that he was attached to the said hospital as clinical psychologist, at the relevant time. He has stated that PW 7 was brought to their hospital on 20th February 2015 and that his colleague, Richi Patil, a clinical psychologist had examined her and opined about mild mental retardation of the patient. The said witness being acquainted with Dr. Richi’s signature and handwriting produced the OPD Case papers (Exhibit – 49). The opinion of Dr. Richi shows that the patient's IQ level was '55' thereby showing that she was suffering from mild mental retardation. He has stated that considering such IQ, the mental age of the patient was about 8 – 9 years and that the mental retardation was by birth.

21. The said witness was cross-examined to show that he had no personal knowledge about the examination conducted by Dr. Richi, which fact was admitted by PW 11 – Dr. Swapnil in his cross-examination.

22. As noted above, the evidence on record, both oral and documentary as well as the tenor of PW 7 - prosecutrix recorded by the trial Court, whilst recording her evidence clearly shows that PW 7 - prosecutrix was intellectually challenged and as such the submission of the learned counsel for the appellants that she was normal with no intellectual disability needs to be rejected outright. PW 7 was found behind the truck with the accused as stated aforesaid. Admittedly, PW 7 was not known to the accused. The question that arises for consideration having regard to the aforesaid evidence that has come on record is, whether in the facts, it would be safe to convict the accused on the sole testimony of the prosecutrix (PW 7) in the absence of any corroboration. The fact, that the accused were found with the prosecutrix is proved by the prosecution i.e. by PW 1 - Ganesh Deshmukh and PW 10 – Anita Menkar, however, the question is, whether PW 7 was sexually assaulted by the appellants ?

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23. In this regard, the prosecution has examined PW 14 – Dr. Nikhil Subhash Jagtap. PW 14 – Dr. Nikhil Jagtap has stated that he was attached to J.J. Hospital as a Resident Doctor at the relevant time. He has stated that on 3rd February 2015, Kalachowky police station referred PW 7 for medical examination and that the girl was about 18 years of age. He has stated that he along with Dr. Suvarna Mane and Dr. Pritam Singh examined the patient. He has stated that the patient was referred with history of sexual assault. During her medical examination, the doctor found that there was an injury to her hymen; that there were hymenal tears at 3, 6, 9 and 12 o'clock position. The doctor also noted that there was no evidence of fresh injuries on the body. The medical examination of PW 7 - prosecutrix was conducted on 3rd February 2015 at about 2:30 p.m., within 16 hours of the incident. The samples of vaginal and cervical swab, urethral swab, blood were also collected and referred to the FSL. PW 14 – Dr. Jagtap has stated that overall finding after the examination was consistent with sexual intercourse/ assault, however the final opinion was reserved. He has identified the medical examination report of the patient signed by all the 3 doctors. The same is at Exhibit – 58. After FSL report was received, PW 14 – Dr. Jagtap opined that the findings were consistent of sexual assault on the victim.

24. PW 14 – Dr. Jagtap also examined the 3 accused referred by the police station on the very same day. He has stated that he did not find any injuries on their body. The blood samples as well as other samples of the accused were taken for FSL. The medical examination reports of all the 3 accused were shown to the said witness, who admitted his signatures on the same. Accordingly, the said reports were exhibited as Exhibits - 59, 60 and 61 respectively. The final opinion given in the examination-in-chief, after seeing the CA report dated 29th October 2015 was exhibited as Exhibit – 62.

25. In the cross-examination, the said witness i.e PW 14 – Dr. Jagtap was asked whether Exhibit – 62, was only 'whether the blood and semen matched or not?' to which the witness replied 'it is true that report is about it'. PW 14 – Dr. Jagtap was again cross-examined by putting the following question that Exhibit – 62 does not refer to his opinion of 'overall finding consistent with sexual intercourse/ assault' to which he replied 'it is true that such reference is not there in the report'. The said witness has denied the suggestion that he was falsely deposing and that he has not examined the victim. The said witness has admitted that they proceeded with the examination of the victim after seeing the memo received from the concerned police station and after reading the brief history of the incident mentioned in the said memo. The said witness has in his cross-examination, stated that it was true, that the facts revealed in the history given by the victim were similar to the facts, mentioned in the memo. The said witness has admitted in his cross-examination that he could not say from the finding that the hymen injury was healed or that the victim was accustomed to sexual intercourse. PW 14 – Dr. Jagtap had admitted that the finding that no evidence of fresh injures mentioned in the column no. V of Exhibit – 58 is written on the basis of questions to the victim as well as the physical examination conducted by

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them at the relevant time.

26. A perusal of the Exhibit – 58 shows that the Doctor on examination of the victim's clothes, found that the clothes were the same, but there was no evidence of tear or stains. As far as the injuries mentioned in the body column is concerned, it is stated that 'no evidence of fresh injuries were seen.' As far as Local Examination of Genitals, Anus and Oral cavity is concerned, Labia Majora, Labia Minora, Clitoris, Fourchette and Introitus/vagina were found to be normal. The injury to the hymen was found to be present, however edges were healed and bleeding was absent and the position of tears was stated to be 3, 6, 9 and 12 o'clock. No perineal tear was seen, urethra was normal. As far as Provisional Opinion was concerned, in column of evidence of injuries to the genitals/anus, it was stated that 'no evidence of fresh injuries'. As far as evidence relating to non-penetrative assault, it was stated that 'no evidence of fresh injuries'. As far as injuries suggestive of application of force/restraint, 'no evidence was seen'.

27. The evidence on record shows that the prosecutrix was examined within 16 hours of being found by the police and what was disclosed in the said examination, is stated hereinabove. As noted earlier when PW 1 - Ganesh Deshmukh and PW 10 – Anita Menkar were on patrolling duty, the victim was seen in the company of 3 accused. If the incident of rape by the accused had taken place in the truck as alleged, injuries would certainly have been found on the prosecutrix's person. In all probability, the accused would have also fled from the spot and not seen standing with her, when the police reached the spot or would have offered some resistance when taken to the police station. This is not the case.

28. A perusal of the medical certificates of the appellants shows that on examination of their clothes, no tears nor any stains or other foreign materials seen. No injuries were also seen on their body. Admittedly, the accused were sent for medical examination on 3rd February 2015 itself at about 3:00 p.m. when the aforesaid observations were made.

29. Learned Counsel for the appellants submitted that having regard to the aforesaid, when no stains or other foreign materials were seen on the appellants clothes on 3rd February 2015, how semen stains were found on the clothes of the appellant - Salim on the next day i.e. on 4th February 2015, when his clothes were seized under a panchanama, alongwith the clothes of other accused. He submits that the prosecution evidence in this regard is not free from blemish and suspicion and that the possibility of planting of the same on 4th February 2015, cannot be ruled out. There is no plausible answer as to why, when no stains or other foreign materials were seen on the clothes of the appellants and co-accused – Panchu Dhaki on 3rd February 2015, how semen stains were found on appellant – Salim's underwear on the next day i.e. on 4th February 2015, when his clothes were seized, under a panchanama. He submits that even PW 4 – Sandeep Shetye, panch to the seizure of clothes, has not deposed with respect to stains being seen on Salim's underwear.

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30. Learned Counsel for the appellant – Salim submitted that only the appellant - Salim has been convicted under Section 376(2)(l) of Indian Penal Code because of the DNA report, which revealed that 'DNA profile of blood detected on ex2 salwar of victim Gulshan A. Shaikh, one of the mixed DNA profile obtained from semen stain detected on ex6 underwear of accused Salim Noor Hasan Shaikh in F.S.L.M.L. Case No.DNA-184/15 and ex10 blood sample of Gulshan A. Shaikh are identical and from one and same source of female origin'. He submitted that although the clothes of the appellant – Salim, i.e. underwear, pant and shirt, were seized, only Salim's pant (Article - 'F/1') and Shirt (Article - 'F') were produced by the prosecution through PW 4 – Sandeep Shetye. He submitted that the incriminating underwear of the appellant – Salim on which allegedly semen stains were found was not produced by the prosecution. Learned APP also does not dispute the said fact.

31. In the light of what is stated aforesaid, it would be difficult to place implicit reliance on the DNA report. Infact, no question has been put to the accused – Salim under Section 313 of Code of Criminal Procedure, with respect to the DNA report, an incriminating circumstance as against the appellant – Salim. It is well settled principle of law that the circumstances which according to the prosecution lead to proof of the guilt against the accused must be put to him, on his examination under Section 313 of Cr.PC. (Reference: Vikramjit Singh @ Vicky vs State of Punjab (2006) 12 SCC 306,)

32. Thus, the evidence on record at the highest shows that the appellants were seen with the prosecutrix near Cotton Green, behind a truck, by the police, in a suspicious manner. No evidence has come on record, as to how PW 7 reached the said spot, whether accidentally or whether she was enticed by the appellants .

33. The Apex Court in the case of Sadashiv Ramrao Hadbe vs State of Maharashtra and Anr. (2006) 10 SCC 92 observed as under:-

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

34. In the facts of the present case, having regard to the evidence as has come on record and as stated aforesaid, it would be unsafe to convict the appellants for the offences which they are tried and as such the appellants deserve to be acquitted of the charges levelled against them, since the prosecution has not proved its case beyond reasonable doubt.

35. The Appeals are accordingly allowed and the Judgment and Order dated 8th November 2017, passed by the learned Additional Sessions Judge, Greater

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Mumbai, in Sessions Case No.415 of 2015, convicting and sentencing the Appellants as set out in para 2, is hereby quashed and set aside and they are acquitted of all the offences. The Appellants if in jail, they be released forthwith, if not required in any other case. Fine, if paid, by them, to be refunded to them. Bail bonds, if any, stand cancelled.

36. It may be noted, that co-accused - Panchu Dhaki has not filed any appeal challenging his conviction and sentence. Co-accused - Panchu Dhaki's role is identical to that of appellant – Rahul. Having regard to the same and the judgments of the Apex Court in Raja Ram and Others v/s State of M.P. (1994) 2 SCC 568; Dandu Lakshmi Reddy v/s State of A.P. (1999) 7 SCC 69, and Sahadevan and Another v/s State of Tamil Nadu, 5 (2012) 6 SCC 403 co-accused - Panchu Dhaki is also entitled to the benefit of this judgment. Accordingly, the benefit of this decision is also extended to co-accused - Panchu Dhaki. Accordingly, co- accused - Panchu Dhaki also stands acquitted of the offences for which he is convicted. Co-accused - Panchu Dhaki, if in jail, be released forthwith, if not required in any other case. Fine, if paid, be refunded to him.

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