



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

CRIMINAL APPEAL NO. 155 OF 2022

APPELLANT : Puranlal Sakaru Dhurve, Aged 25
Years, Occu. Labour, R/o. Garpatha,
Tq. Bhaidehi, Dist. Baitul (M.P).

//VERSUS//

RESPONDENT : The State of Maharashtra, through
Police Station Officer, Police Station
Shirajgaon-Kasba, Tq. Chandur-
Bazar, Dist. Amravati.

Mr. R.R. Vyas, Advocate (appointed) for the Appellant.
Ms. S.V. Kolhe, APP for the Respondent/State.

WITH
CRIMINAL APPEAL NO. 352 OF 2022

APPELLANT : Premlal Raisingh Dhurve, Aged
about 35 Years, Occu. Labour, R/o.
Saledhana, Tq. Bhaidehi, Distt.
Baitul (M.P)

//VERSUS//

RESPONDENT : The State of Maharashtra, through
Police Station Officer, Police Station
Shirajgaon-Kasba, Tq. Chandur-
Bazar, Dist. Amravati.

Mr. Sharad Thakre, Advocate (appointed) for the Appellant.
Ms. S.V. Kolhe, APP for the Respondent/State.

CORAM : G. A. SANAP, J.

DATED : 30th SEPTEMBER, 2024.

ORAL JUDGMENT

. These two appeals arise out the judgment and order dated 26th August, 2021, passed by the learned Additional Sessions Judge-1, Achalpur, whereby the learned Judge convicted the appellants for the offences punishable under Sections 452, 324, 366 and 376(D) read with Section 34 of the Indian Penal Code, 1860 (for short, "IPC"), and sentenced them to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for two months for the offence punishable under Section 452 r/w Section 34 of the IPC; rigorous imprisonment for one year and to pay a fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for two months for the offence punishable under Section 324 r/w Section 34 of the IPC; rigorous imprisonment for seven years and to pay a fine of Rs.2,000/- each and in default to suffer rigorous imprisonment for six months for the offence punishable under Section 366 r/w Section 34 of the IPC; and rigorous imprisonment for twenty years and to pay a fine of Rs.10,000/- each and in default to suffer rigorous imprisonment for one year for the offence

punishable under Section 376(D) r/w Section 34 of the IPC. The appellant in Criminal Appeal No.155/2022 is the original accused No.2, and the appellant in Criminal Appeal No.352/2022 is the original accused No.1.

02] BACKGROUND FACTS:

PW-4 is the informant. On her report, the crime was registered against the accused (hereinafter referred to as “the appellants”). The prosecution case, which emerges from the report and other materials, is that the informant, with her husband, on 5th April, 2016, after dinner, went to sleep in their room on the field. In the night, at about 12:30 to 4:00 hours, some unknown persons broke open the door of the room. The victim and her husband woke up and saw that two persons had entered into their room with sickles. Their faces were covered with towels. Those two persons are the appellants. The appellants put the sickle on the neck of the husband of the informant. The informant tried to rescue her husband. At that time, the appellants assaulted the informant with sickle on her hands. She sustained injuries. The husband of the informant then tried to save her. The appellants at that time inflicted blows on his hand with sickle, which resulted in

the cutting of his finger. Out of those two persons, one was tall and another was short, having blackish complexion.

03] It is further case of the prosecution that the appellants forcefully brought the informant and her husband out of the house. They put a sickle on the neck of the husband of the informant. The short person caught hold the hands of the informant. They threatened to kill her husband if she refused to sleep with them. It is stated that, at this very moment, the husband gave jerk and ran away from the spot. The appellants, taking advantage of this situation, committed forceful sexual intercourse with her against her wish one by one. During this unfortunate incident, she shouted for help. The appellants gagged her mouth.

04] It is further case of the prosecution that they were having a motor-cycle. The appellants made her sit on motor-cycle between them and took her to Shirajgaon Road. The appellants were thirsty on the Shirajgaon Road. They saw a watchman near the orchard, Wadi, and stopped the motor-cycle on the road. The tall person went to the watchman and brought water. They drank the water. The watchman came towards them and made an enquiry. At that

time, the appellants removed the towels from their faces. The informant at that time saw their faces. Thereafter, on the way, they went with the informant to the petrol pump near Shirajgaon for filling the petrol. At that time, they were talking that, after filling the petrol, again they would commit sexual intercourse with the informant. The tall person went to the room of the petrol pump and woke up the employee at the petrol pump. The employee was reluctant to give the petrol and, therefore, the tall person told the employee that a woman is with them and therefore they need petrol urgently. The employee at the petrol pump came towards the informant to verify the factual position, and at that time the informant started crying and narrated the incident to the said employee. The appellants fled from the spot. The informant, during the night, stayed at the petrol pump till 6:00 a.m. The employee, at the petrol pump, gave Rs.20/- to her and sent her to her village, Kharpi, by auto. The informant went to the field and disclosed the entire incident to her husband. The husband of the informant called the landowner on the phone. They disclosed the incident to the landowner, and thereafter they went to the police station with the landowner and lodged the report about the incident against the appellants at Shirajgaon-Kasba Police Station. On the basis of this report, a crime bearing No.85/2016 was

registered.

05] The investigation in the crime was carried out by PW-10. He visited the spot of the incident and drew the spot panchanama in the presence of the panchas. He recorded the statements of the witnesses. He collected the samples from the spot of the incident. He arrested the appellants. The informant and her husband were referred for medical examination. The cloths of the appellants and other samples were seized. The articles and samples had been sent to R.F.S.L., Amravati. The Test Identification Parade of the appellants was conducted. After completion of the investigation, PW-10 filed the charge-sheet against the appellants in the Sessions Court.

06] The learned Judge framed the charge against the appellants. The appellants pleaded not guilty to the charge. Their defence is of false implication in the crime. The prosecution, in order to bring home the guilt of the appellants, examined 10 witnesses. The learned Judge, on consideration of the evidence, held the appellants guilty of the charge and convicted and sentenced them as above. The appellants have come before this Court by way of their separate appeals.

07] I have heard Mr. R.R. Vyas, learned advocate appointed to represent the appellant in Criminal Appeal No.155/2022 and Mr. Sharad Thakre, learned advocate appointed to represent the appellant in Criminal Appeal No.352/2022, and Ms. S.V. Kolhe, learned APP for the respondent/State. Perused the record and proceedings.

08] Learned advocate Mr. R.R. Vyas took me through the entire record and pointed out the material flaws in the case. Learned advocate submitted that, on the date of the evidence of the informant, the appellants were not produced before the Court. It is submitted that the evidence recorded in the absence of the accused was contrary to the mandate of Section 273 of the Code of Criminal Procedure, 1973 (for short, "Cr.PC"). Learned advocate submitted that the learned Judge, without insisting for the production of the appellants while recording the evidence of such a star witness, showed some photographs of the appellants from the record to the informant to establish their identification. Learned advocate further submitted that the trial conducted against the appellants was not a fair trial. Learned advocate pointed out that, from the date of framing of the charge in 2016, the learned Judge took 2 years and 4 months to complete the recording of the

evidence of the witnesses. It is submitted that it was against the mandate of Section 309 of the Cr.PC as well as against the spirit of Article 21 of the Constitution of India. Learned advocate submitted that, in this case, the prosecution has not examined important witnesses, and the learned Judge, in the absence of the evidence of these witnesses, has held the accused guilty of the charge. Learned advocate submitted that the Chemical Analyzer has not been examined. Similarly, the DNA Expert has not been examined. It is submitted that the vital incriminating evidence was not put to the appellants in their examinations under Section 313 of the Cr.PC. Learned advocate submitted that the conviction and sentence awarded by the learned Judge has been vitiated.

09] Learned advocate Mr. Sharad Thakre appointed to represent the appellant (accused No.1) in Criminal Appeal No.352/2022 adopted the submissions advanced by learned advocate Mr. R.R. Vyas.

10] Learned APP Ms. S.V. Kolhe, in all fairness, conceded that there are material flaws and lacunas in the case of the prosecution. Learned APP, in all fairness, submitted that, in the absence of the appellants, the learned Judge should not have

recorded the evidence of the informant, who is the star witness for the prosecution. Learned APP submitted that this novel method adopted by the learned Judge to establish the identification of the accused by showing some photographs on record is unheard-of. Learned APP pointed out that even those photographs, which were shown to the informant at the time of her evidence, were not either given article numbers or exhibit numbers. Learned APP pointed out that, as far as the record and proceedings is concerned, only two pages of the DNA report are on record, and the two important pages, where the DNA Expert has recorded his opinion, are missing from the record. Learned APP further pointed out that, while conducting the trial, proper care was not taken either by the Court as well as by the In-charge Prosecutor. Learned APP submitted that the entire trial has been vitiated. Learned APP submitted that the unfortunate informant could not be held responsible for this situation, which has ultimately resulted in miscarriage of justice. Learned APP, therefore, submitted that this is a fit case to order retrial.

11] I have given my thoughtful consideration to the submissions advanced by the learned advocates for the parties. Perused the record and proceedings. In my view, at the outset, with

a great sense of responsibility and pain, I must place on record that all the principles of fair trial, had been thrown to the wind by the Presiding Officer as well as by the Prosecutor. It is to be noted that, in a crime, the investigation must be carried out very carefully. Each and every piece of evidence must be collected and preserved. After filing the charge-sheet, the role of the In-charge Prosecutor of the criminal trial becomes very important. The In-charge Prosecutor must take care and see that legally admissible evidence is placed on record. The learned Judge, while conducting the trial and recording the evidence, is required to be very diligent. The learned Judge cannot afford to be a silent spectator. The learned Judge is required to conduct the trial and record the evidence strictly in accordance with the mandate of the law. The learned Judge shall not admit any evidence, which is not legally admissible and shall not admit any document, which is not proved in accordance with law. If the evidence is recorded mechanically or the document is exhibited mechanically, then it may not put the Prosecutor to the notice that for making the evidence legally admissible or for proving the contents of the particular document, he has to adduce some other evidence. The Hon'ble Apex Court in the case of *Rahul Vs. State of Delhi, Ministry of Home Affairs and Another with connected appeals [(2023) 1 SCC 83]* has

highlighted the powers and duty of the learned Judge *qua* examination and cross-examination of the witnesses and conduct of the overall proceeding. In this context, it would be profitable to extract paragraph 44 of this judgment. It reads thus:

“44. This Court while not accepting the submission that it was improper for the Court to have interjected during the course of cross-examination of the witness, had observed in State of Rajasthan v. Ani [(1997) 6 SCC 162] thus:

“11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put “any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant” in order to discover relevant facts. The said section was framed by lavishly studding it with the word “any” which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words “relevant or irrelevant” in Section 165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for

reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised.

13. In this context it is apposite to quote the observations of Chinnappa Reddy, J. in *Ram Chander v. State of Haryana* [(1981) 3 SCC 191]:

“2. The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. (emphasis in original)”

12] In my view, the Hon’ble Apex Court and this Court, on more than one occasion, have been constrained to make similar observations. It appears that, despite addressing this situation in numerous cases by the Hon’ble Apex Court as well as by this

Court, the message has not been percolated down to the concerned. In my view, it is high time to wake up from deep slumber and see that the criminal justice administration, being the important branch of the progressive State, is not made a mere farce. All concerns, at every stage of the case/crime, need to take proper care.

13] In the above background, it is necessary to point out the patent illegalities committed by the learned Judge, while recording the evidence. It is to be noted that Section 309 of the Cr.PC (Section 346 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short, “BNSS”) provides a mandate to the Court to conduct the trial on a day-to-day basis, after the commencement of the hearing. Section 309 of the Cr.PC has its roots through Article 21 of the Constitution of India, which recognizes a speedy trial in a criminal case as a fundamental right. This mandate cannot be ignored. If the mandate of Section 309 Cr.PC is ignored, then it would tantamount to ignoring the mandate of Article 21 of the Constitution of India. In this case, the record reflects a very sorry state of affairs.

14] In this case, the two learned Judges recorded the

evidence. The charge was framed by learned Judge Mr. V.P. Patkar on 4th August, 2016. He would be hereinafter referred to as the “first Judge”. The first Judge recorded the evidence of PW-1 on 4th July, 2017. The case was pending before the first Judge up to 24th May, 2018. The record shows that the first Judge from 4th July, 2017 till 24th May, 2018 did not record the evidence of the next witness. The evidence of PW-2 was recorded by learned Judge Mr. H.M. Deshpande on 22nd January, 2019. He would be hereinafter referred to as the “second Judge”. So, after recording the evidence of the first witness on 4th July, 2017, the second witness stepped into the witness-box on 22nd January, 2019. The evidence of the remaining witnesses was recorded by the second Judge. The evidence of PW-3 was recorded on 20th February, 2019. The evidence of PW-4 informant was recorded on 18th September, 2019. The evidence of PW-5 was recorded on 26th June, 2019. The evidence of PW-6 was recorded on 10th July, 2019. The evidence of PW-7 was recorded on 24th July, 2019 and 7th August, 2019. The evidence of PW-8 was recorded on 7th August, 2019. The evidence of PW-9 was recorded on 7th November, 2019. The last witness examined is the Investigating Officer. The Investigating Officer was examined on 22nd November, 2019. The evidence of 10 witnesses was recorded between 4th July, 2017 and 22nd November,

2019. The 313 Cr.PC statements of the appellants were recorded by the learned second Judge on 10th January, 2020. The judgment was delivered by learned Judge Mr. M.H. Pathan. He would be hereinafter referred to as the “third Judge”. It is apparent that the learned Judges took 2 years and 4 months for recording the evidence of 10 witnesses. In my view, this was contrary to the mandate of Section 309 of the Cr.PC and Article 21 of the Constitution of India.

15] The accused were arrested on 6th April, 2016. The accused has a fundamental right to a speedy trial. Similarly, the speedy trial is necessary for the victim as well as for the orderly society. The crime of rape is not only against the victim but also against womanhood. On going through the record, I do not find any reason for the delay of 2 years and 4 months for recording the evidence of 10 witnesses. Perusal of the roznama as well as the record do not show that the learned Judge took all necessary steps consistent with the mandate of Section 309 of the Cr.PC. In my view, this is a very vital aspect. This aspect appears to have been neglected in most cases. In the old good days, as far as the sessions trial are concerned, the Prosecutor would submit the programme for recording the evidence of the witnesses. The evidence would be

recorded in those days within a period of one week or 10 days, depending upon the number of witnesses. It needs to be stated that Section 309 of the Cr.PC has been framed consistent with the mandate of Article 21 of the Constitution of India. Article 21 of the Constitution of India guarantees a speedy and fair trial. It needs to be reiterated that failure on the part of the Court to respect the mandate of Section 309 of the Cr.PC would directly violate the provisions of Article 21 of the Constitution of India. It is to be noted that Section 309 of the Cr.PC (Section 346 of the BNSS) provides that, if the matter has to be adjourned on some other date, then the Judge concerned shall record the reasons. It provides that the adjournment must be an exception and not a rule. It needs to be mentioned that, while hearing more than 60 appeals, I have noticed that the mandate of Section 309 of the Cr.PC has not been complied with even in a single trial. The mandate has been thrown to the wind. It is further noticed that the evidence was recorded in a piecemeal manner. The recording of the evidence in a piecemeal manner and that too after adjournment can cause prejudice to the parties. It is not a healthy practice followed by the Courts. The provisions of Section 309 of the Cr.PC are intended for speedy disposal of the trial. In my considered opinion, this aspect has been totally neglected. In my opinion, in the long term, it can cause

failure of justice to the parties in the case. This is an alarming situation. This situation has to be attended to on a priority basis; otherwise, the situation would arise that the fate of the common man on this august institution would get further eroded.

16] In the above backdrop, a useful reference can be made to the decision of the Hon'ble Apex Court in the case of *Abdul Rehman Antulay and Ors. Vs. R.S. Nayak and Another [(1992) 1 SCC 225]*. In this case, the Hon'ble Apex Court has held that the right to speedy trial is part of fair, just and reasonable procedure implicit in Article 21 of the Constitution of India and the same is reflected in Section 309 of the Cr.PC. This right comprehends all stages viz. investigation, inquiry, trial, appeal, revision and retrial. Apart from the above decision, the Hon'ble Apex Court in number of decisions has held that a speedy trial is the fundamental right and laid down the principles and guidelines to protect this right. On the same point, a useful reference can be made to the decisions in the cases of *Hussainara Khatoon and Ors. Vs. Home Secretary, State of Bihar [AIR 1979 SC 1369]*, *Raj Deo Sharma Vs. State of Bihar [AIR 1998 SC 3281]* and *Kartar Singh Vs. State of Punjab [1994 (3) SCC 569]*.

17] PW-4 is the informant and the star witness for the prosecution. The husband of the informant died before recording her evidence. The victim of such a diabolical crime was the most important witness. It is to be noted that, while recording the evidence of the important witness like PW-4, the above-stated legal position needs to be borne-in-mind by the Courts. The learned Judges, while conducting the trial and more particularly while recording the evidence, should not be oblivious of the settled position laid down by the Hon'ble Supreme Court. There are reasons behind the concern expressed by the Hon'ble Supreme Court. The Apex Court, while making the above-stated observations, was at great pains. The Hon'ble Apex Court noticed the mechanical and careless approach of the Court. It needs to be stated that the learned Judge cannot handover the reins of the trial either to the Prosecutor or to the witness. The learned Judge must always be in a commanding position. He shall not sit there as a silent spectator. The learned Judge must remind himself of his powers under Section 165 of the Evidence Act and mandate of Section 309 of the Cr.PC.

18] The identification of the accused in the Court through the informant was the most vital part of this case. The Test

Identification Parade of the appellants was conducted. The evidence of the Test Identification Parade, conducted by the Revenue Officer, could not be said to be a substantive piece of evidence. It could be used for the purpose of corroboration. The substantive evidence of the identification of the accused in the Court by the witness is corroborated by the evidence of the Test Identification Parade of the culprits conducted at the stage of the investigation. The object of the Test Identification Parade is to establish the identity of the culprits, when the incident, the description, and the faces of the culprits are fresh in the minds of the victim as well as the witnesses. The evidence of the identification of the accused in the Court is a substantive piece of evidence. The identification of the accused in the Court has to be strictly proved in such cases. The learned second Judge, who recorded the evidence of PW-4, did not even bother to secure the presence of the appellants. The learned Judge adopted a shortcut method. The learned Judge, instead of securing the presence of the appellants, showed some photographs from the record to the informant. On going through the record, I am shocked that the full-size photographs of the appellants are not on record. The learned Judge has not made a note as to which photographs had been shown to the appellants. It is further seen that those

photographs have not even been marked as articles or exhibits.

19] Learned APP pointed out that the evidence of PW-3 was recorded on 20th February, 2019. Learned APP further pointed out that PW-4 (informant) was present before the Court on 6th March, 2019 and 28th March, 2019. On both these dates, she was bound over to remain present before the Court. The record shows that on 6th March, 2019 and 28th March, 2019, the accused were produced from the jail before the Court. It is seen that the reason for adjournment of the case on these two dates has not been recorded by the learned Judge. The evidence of the informant recorded on 5th April, 2019 shows that the appellants were not produced from the jail. Her evidence further shows that her cross-examination was recorded on 18th September, 2019. At the time of recording of her cross-examination, the learned Judge did not make a note as to whether the appellants were produced or not. The cross-examination of PW-4 was partly recorded on 5th April, 2019. It is to be noted that the learned Judge adopted the novel procedure of identification of the appellants through such an important and star witness of the prosecution. It is to be noted that the learned second Judge has failed to consider the mandate of Section 273 of the Cr.PC. As per the mandate of Section 273 of the Cr.PC, the

evidence is required to be taken in the presence of the accused. Section 299 of the Cr.PC is the only exception where the evidence can be taken in the absence of the accused. In this case, Section 299 of the Cr.PC was neither applicable nor invoked. The record shows that the video conferencing facility was available in the jail as well as in the Court. The learned Judge could have directed the Jail Authorities to produce the appellants *via* video conferencing for the purpose of identification. The record does not show that there was any difficulty in securing the presence of the appellants *via* video conferencing.

20] In this case, recording of the evidence of the prosecutrix/informant (PW-4) was necessary in the presence of the appellants because the identification of the appellants was to be established through this witness. The advocate, appearing for the appellants, throughout disputed the identification of the appellants being the perpetrators of the crime. The presence of the accused was, therefore, necessary to ensure the compliance of Section 273 of the Cr.PC. On both these counts, proper care was not taken. In view of this, the evidence of PW-4 has been rendered inadmissible.

21] It is to be noted that the crime committed by the

appellants is very serious. The appellants, at the point of sickle, committed rape of the victim. The appellants have crossed all the bounds of humanity. In this beastly act, they have satisfied their sexual lust. They took advantage of the situation and the helplessness of the prosecutrix. In my view, failure to observe the provisions of Section 273 of the Cr.PC is a serious flaw in this case. This flaw in the case of the prosecution has caused miscarriage of justice. If the evidence of the informant is excluded from consideration, then there would hardly be any evidence on record to establish the direct complicity of the appellants in this crime. The Court has to bear-in-mind that the trial of criminal case must be fair not only for the accused but also to the victim of such a beastly crime. Such a crime is against the womanhood and, as such, against society. Great care is required to be taken. The Presiding Officer, in any case, cannot afford to be a silent spectator. In this case, the learned second Judge completely glossed over the mandatory provisions of the law as above.

22] In this context, it may be noted that failure to produce the accused on time could be one of the reasons for delay. In my view, the learned Presiding Officer has all the powers to ensure timely production of the accused. The learned Judge is not

supposed to show leniency either to the Police Authorities or to the Jail Authorities, in case there is failure to produce the accused on time. It is to be noted that in the case of under-trial prisoners, the jail warrant contains the specific date. It is an order to the Jailer to ensure production of the accused. The Jailer depends upon the police for escort. It is to be noted that, in such matter, there has to be co-ordination between the Police Authorities and the Jail Authorities. If there is no co-ordination between these two Authorities, then the Court can take both these Authorities to task and, in a given case, can saddle them with heavy costs or penalties. It is to be noted that, on account of delay in disposal of the cases of the under-trial prisoners, an extraordinary situation has been created. It needs to be stated that the extraordinary situation cannot be tackled with ordinary measures. The extraordinary situation has to be tackled by adopting the extraordinary measures. The learned Judge, in this case, while establishing the identification of the appellants, adopted a shortcut. It is said that a shortcut always cuts one short. In my view, this is one major flaw in this case.

23] There is another important flaw in this case. It is to be noted that learned APP Mr. Navale, who was the in-charge of this

case, did not take proper care. He did not summon important witnesses. The prosecution has not examined a single panch witness present at the time of the Test Identification Parade. The evidence of the witnesses recorded with regard to the identification of the appellants by the witnesses has not been properly recorded. The substantive evidence of the witnesses identifying the appellants and the evidence of the Naib-Tahsildar, who had conducted the Test Identification Parade, has not been properly recorded. It was the duty of the Prosecutor to properly study the relevant provisions and place on record the proper evidence. It is further pertinent to note that it was the duty of the learned Judge to ensure the meticulous recording of the evidence on this point.

24] The Prosecutor has not examined the carrier, who had deposited the samples with R.F.S.L., Amravati. The Investigating Officer did not produce on record the extract of the Malkhana register. Malkhana in-charge was not examined. It is to be noted that the samples had been collected on or before 6th April, 2016. The samples had been forwarded to the R.F.S.L., Amravati, *vide* Exh.106 on 11th April, 2016. The prosecution has failed to place on record the evidence with regard to the custody of the samples and the care taken to preserve the samples during this period. If the

carrier had been examined, then he would have highlighted the relevant aspects. The CA reports, in this case, are very important. The CA reports had been tendered in the evidence at the time of the examination of the Investigating Officer (PW-10). The learned Judge did not pass a specific order under Section 293 of the Cr.PC and admitted these reports in evidence. The CA reports are very important. On the basis of the CA reports, a case is sought to be made out that the blood sample and the semen samples matched with the blood samples of the appellants.

25] The DNA report is at Exh.115. It is shocking to note that only two pages of the DNA report are part of the Court record. The DNA report is consisting of four pages. The last two pages, where the DNA profiling, analysis, and opinion has been recorded, are not part of the record. On being confronted with this factual position, the In-charge of the concerned Police Station, the Deputy Director of R.F.S.L., Nagpur, and the APP, Mr. Navale, were directed to file their affidavits by this Court. The affidavit filed by the Deputy Director of R.F.S.L., Nagpur, shows that all the reports, which included the DNA report, had been forwarded to the police station. It is stated in the affidavit that the complete DNA report was forwarded to the police station. The affidavit of the In-charge

of the Police station, Shirajgaon-Kasba, shows that on receipt the entry of the CA reports and the DNA report was not taken in the Muddemal register. It is stated that, after the order passed by the Court, the In-charge of the police station obtained the duplicate copy of the DNA report. He has produced the same on record with his affidavit. The APP Mr. Navale, in his affidavit, has stated that the entire DNA report was produced on record. The enquiry made by the Registrar (Judicial) revealed that the DNA report, which consists of four pages, was not part of the record. The two pages of the DNA report were forwarded with the record. The record shows that the learned third Judge discussed the DNA report without looking into the DNA report. If he had really perused the DNA report, then he would have noticed that the two pages of the DNA report are missing. It is to be noted that this is a very serious lapse on the part of the prosecution as well as the learned Judge. Perusal of the record would show that even the order granting permission for production of the DNA report was not signed by the learned Presiding Officer.

26] The Prosecutor failed to examine the Chemical Analyzer, Amravati, to prove the contents of the CA reports. Similarly, he has failed to examine the DNA Expert from R.F.S.L., Nagpur. It is to

be noted that DNA evidence is a scientific opinion. It has to be proved like any other document. The prosecution has to establish the link by adducing cogent and concrete evidence from the time of the collection of the samples till the samples are finally analysed by the F.S.L. In this case, the carrier has not been examined. The Chemical Analyzer has not been examined. Similarly, the DNA Expert has not been examined. In this context, it would be appropriate to make a useful reference to the observations of the Hon'ble Apex Court in the case of ***Rahul Vs. State of Delhi, Ministry of Home Affairs and Another*** (supra). It reads thus:

“The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case.

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

The DNA may be more useful for purpose of investigation but not for raising any presumption of identity in a court of law.”

27] In this case, the important witnesses have not been examined. There is no evidence with regard to the packaging, storage, handling, and preservation of the samples to rule out possibility of tampering or contamination. Perusal of the record would show that there is no reason for non-examination of these witnesses. The learned Judge has placed implicit reliance on the CA reports and the DNA report. The complete DNA report is not part of the record. Therefore, the finding recorded by the learned Judge that the DNA report fully corroborates the testimony of the prosecutrix is without application of mind. It is to be noted that it was the duty of the learned Judge at least to question the Prosecutor with regard to the evidence to prove the contents of these reports. The record shows that the learned Judge, while recording the examination-in-chief of the Investigating Officer, exhibited the CA reports and the DNA report. I fail to understand as to how the Investigating Officer could be the author of the CA reports and the DNA report. The evidence of the Investigating Officer could not be said to be legally admissible evidence to prove the contents of the CA reports and the DNA report. The evidence of the Investigating Officer could be relevant to the extent of the procedural part with regard to forwarding of the samples, preservation of the samples, and the receipt of the DNA report. In

such a case, the learned Judge was required to pass a separate order under Section 293 of the Cr.PC and admit such scientific evidence in the case. It is to be noted that the helpless prosecutrix had no control over this. The acceptance of the submissions advanced by the learned advocates for the appellants, highlighting the drawbacks and lacunas, would cause miscarriage of justice. The helpless prosecutrix would be deprived of her right to get justice. In my view, this is a very serious matter.

28] Before parting with this subject, I must mention that while admitting the CA reports and the DNA report, without examining the Chemical Analyzer and the DNA Expert, the Court has to pass an appropriate order. First and foremost, the learned Presiding Officer shall insist for the examination of the Chemical Analyzer and the DNA Expert to prove the contents of the reports. The examination of the Chemical Analyzer and the DNA expert, in such a case, can take care of the custody, preservation, and handling of the samples from the time of the receipt till the final analysis of the samples. In my view, this is a very vital flaw in the case of the prosecution, which has been crept in on account of the casual and careless approach of the Prosecutor and the learned Presiding Officer.

29] I have perused the 313 Cr.PC statements of the appellants recorded by the learned Judge. While recording the 313 Cr.PC statements of the appellants, the learned Judge did not frame proper questions. The material part of the incriminating evidence adduced by the prosecution was not put to the appellants. In this context, it is necessary to see some of the questions framed by the learned Judge. As stated above, the proof of the identity of the appellants, being the perpetrators of the crime, was the fact in issue. The learned Judge was required to frame proper questions on the basis of the available evidence of the witnesses with regard to their identification. As stated above, the identification of the appellants was established by pointing out their photographs to the prosecutrix. It was not put to the appellants that they were identified by the victim before the Court in a particular manner. The incriminating part of her evidence with regard to the identification of the appellants in the Test Identification Parade was not specifically put to the appellants. It is further seen that the CA reports and the DNA report, being the important pieces of evidence, ought to have been put to them specifically in their 313 statements. Question No.35 is common for both the appellants. It needs to be extracted. It is as follows:

“Q. No.35. It has come in the evidence of PW-10 Satish K. Farkade (Ex.97) during investigation he prepared spot panchanama, seizure panchanama. He seized motor cycle, sickle, chapple, godahdi, clothes on the person of victim and muddemal sent for C.A. and obtain C.A. report. What do you have to state about it ?”

30] Perusal of this question would show that the incriminating material in the form of CA reports was put to the appellants in this manner. Perusal of 313 Cr.PC statements of the appellants would show that the DNA report was not at all put to them. Even if the appellants had admitted the DNA report, the learned Judge was required to put the same to the appellants in their 313 Cr.PC statements. It needs to be stated that, in this case, the appellants have not admitted the DNA report. It is pertinent to mention that, time and again, it has been observed that proper care is not taken while framing the questions in the 313 Cr.PC statement of the accused on the basis of the incriminating material. Sometimes, the composite questions are framed. The answer to the part of the question may be in the affirmative and the answer to the part of the question may be in the negative. Such a composite question needs to be avoided. The appellants are the rustic villagers. Similarly, the victim is also a rustic villager. The incriminating circumstances related to the CA and DNA reports

had not been put to them. Failure of the learned Judge to follow the provisions of law has caused miscarriage of justice. It has prejudiced not only the appellants but also the victim.

31] In this case, the DNA report has not been put to the appellants. The Hon'ble Apex Court in the case of *Sharad Birdhichand Sarda Vs. State of Maharashtra [AIR 1984 SC 1622]* has held that incriminating piece of evidence, if not put to the accused in his 313 Cr.PC statement, cannot be made the basis of the conviction of the accused. It has to be excluded from consideration. It is to be noted that, while recording the evidence, the learned Prosecutor and the learned Judge adopted a very casual and careless approach. The DNA Expert and the Chemical Analyzer have not been examined. The learned Judge, while examining the accused under Section 313 of the Cr.PC, did not even care to frame a proper question and put the DNA report to the accused so as to enable them to explain it. This has caused prejudice to the appellants. Similarly, it has proved prejudicial to the prosecutrix, who had suffered the ordeal of a horrible incident. She was not at fault. This has resulted into miscarriage of justice.

32] It is to be noted that all the above-stated facts, if

encapsulated together, would show that these inherent lacunas, defects, and drawbacks have caused miscarriage of justice. It has vitiated the entire trial. Now, there are two options before the Court: either to order retrial or to give a clean chit to the appellants. In my view, in such a crime, my conscience does not permit me to give a clean chit to the appellants. The informant/prosecutrix deserves a fair trial and justice. Similarly, the appellants also deserve a fair trial. The learned Judges and the Prosecutor, in-charge of the case, have failed to ensure a fair trial to the victim of such a beastly crime as well as to the appellants. In the facts and circumstances, in my view, it would be appropriate to exercise the powers under Section 386(b)(i) of the Cr.PC. In view of the above, the finding with regard to the conviction and sentence is required to be reversed. It is also necessary to order retrial of the appellants before the Sessions Court at Achalpur.

33] Before parting with this matter, I deem it appropriate to make some observations, which, in my view, can take care of the grave situation. The mandate of Section 309 of the Cr.PC (Section 346 of the BNSS) needs to be followed in letter and spirit. In order to ensure the compliance of Section 309 of the Cr.PC, the Prosecutor, in-charge of the case, and the learned Judge seized with

the case are required to ensure the strict compliance of Section 309 of the Cr.PC (Section 346 of the BNSS). The learned Prosecutor, in-charge of the case, is expected to submit a weekly programme for recording the evidence of the witnesses in the case. The learned Judge, seized with the case, is required to ensure the presence of the witnesses in terms of the schedule/weekly programme of the trial submitted by the Prosecutor. Once such a weekly programme is submitted and the case is fixed for recording the evidence, the learned Presiding Officer is required to ensure the production of the accused. This procedure, if followed scrupulously, can help in disposing of the old cases as well as the cases of under-trial prisoners. The facts noted in this case and other appeals show that this issue has been completely neglected.

34] As far as this issue is concerned, certain observations/directions need to be issued. It is expected from the Registrar General and Registrar Inspection-I, High Court of Bombay, to bring this order to the notice of the Judges in Maharashtra. Similarly, in order to ensure the compliance of this order, they have to put in place appropriate mechanism. The Registrar General and Registrar Inspection-I shall, therefore, ensure that by putting a proper mechanism in place, the

compliance of the mandatory provisions of Section 309 of the Cr.PC (Section 346 of the BNSS) is ensured in letter and spirit. In this context, necessary directions can be issued to the Principal District and Sessions Judges to comply the directions.

35] Before parting with the matter, this Court appreciates the able assistance rendered by Mr. R.R. Vyas and Mr. Sharad Thakre appointed to represent the appellants and also the assistance rendered by the learned APP. Hence, the following order:

ORDER

- i] The Criminal Appeals are **partly allowed**.
- ii] The judgment and order of conviction and sentence of the appellants/accused dated 26.08.2021, passed by the learned Additional Sessions Judge-1, Achalpur, in Sessions Trial Case No.60/2016, is quashed and set aside.
- iii] Sessions Trial Case No.60/2016 is restored to file of the learned Additional Sessions Judge-1, Achalpur.
- iv] Appellants/accused Nos.1 and 2 are remanded to judicial custody from the date of this judgment and order. On receipt of the

record and proceedings, the learned Trial Judge shall regulate their custody.

v] The learned Judge shall conduct retrial by following the procedure, keeping in mind the above-stated observations. The learned Judge shall take proper care while conducting retrial.

vi] The learned Judge shall complete the trial within two months from the date of the receipt of the record from this Court, consistent with the mandate of Section 309 of the Cr.PC (Section 346 of the BNSS).

vii] The learned District Government Pleader, Amravati, shall see that a proper Prosecutor having rudimentary knowledge of the procedure and law shall be made the in-charge of this case for the purpose of retrial. Any lapse on the part of the prosecution shall not be tolerated.

viii] It is made clear that, while conducting retrial, the learned Judge and the learned Prosecutor shall see that the witnesses are not put to any unnecessary inconvenience.

ix] The learned Judge shall ensure production of the appellants/accused on every date of the hearing.

x] It is made clear that if the appellants/accused are not in a position to an engage advocate, then the learned Judge shall see that an experienced advocate is appointed at the cost of the State to represent the appellants/accused in the trial.

xi] The copy of this order be forwarded to the Registrar General, High Court of Bombay, for taking note of the observations made in paragraphs 33 and 34 and for ensuring the compliance in future.

xii] The Criminal Appeals stand disposed of accordingly.

(G. A. SANAP, J.)

Vijay