

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/CRIMINAL APPEAL NO. 599 of 2013**  
**With**  
**R/CRIMINAL APPEAL NO. 487 of 2013**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE A.S. SUPEHIA** Sd/-

**and**

**HONOURABLE MR. JUSTICE M. R. MENGDEY** Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	<b>NO</b>
2	To be referred to the Reporter or not ?	<b>YES</b>
3	Whether their Lordships wish to see the fair copy of the judgment ?	<b>NO</b>
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	<b>NO</b>

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**GOVINDBHAI VELSHIBHAI @ VIRJIBHAI PARMAR**  
**Versus**  
**STATE OF GUJARAT**

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**Appearance:**

MR FB BRAHMBHATT(1016) for the Appellant(s) No. 1 (CR.A No.599/2013)  
 MR HARDIK RAVAL for the Appellant(s) No. 1 (CR.A No.487/2013)  
 MS KRINA CALLA, APP for the Opponent(s)/Respondent(s) No. 1  
 RULE SERVED for the Opponent(s)/Respondent(s) No. 2

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**CORAM: HONOURABLE MR. JUSTICE A.S. SUPEHIA**  
**and**  
**HONOURABLE MR. JUSTICE M. R. MENGDEY**

Date : \_\_\_/07/2023

**COMMON CAV JUDGMENT**  
**(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)**

1. The present appeals arise out of the judgement and order of conviction dated 18.08.2011 passed by learned Additional Sessions

Judge, Amreli in Special Atrocity Case No.33 of 2009 and 56 of 2009, convicting the appellants for the offences punishable under Sections 323, 392, 376(2)(g) and 114 of the Indian Penal Code, 1860 (IPC) and under Section 3(1)(11) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (Atrocities Act).

2. The appellants have been sentenced for the offences punishable under Section 323 of the IPC to undergo simple imprisonment of six months and fine of Rs.1,000/- and in default to undergo simple imprisonment of one month, for the offences punishable under Section 392 of the IPC to undergo rigorous imprisonment of five years and fine of Rs.5,000/- and in default to undergo further simple imprisonment of six months, for the offences punishable under Section 376(2)(g) of the IPC to undergo rigorous imprisonment of life and fine of Rs.10,000/- and in default to undergo further rigorous imprisonment of one year and for the offences punishable under Section 3(1)(11) of the Atrocities Act, rigorous imprisonment of five years and fine of Rs.5,000/- and in default rigorous imprisonment of six months and it was ordered to run the sentence concurrently.

3. The prosecution emanate from the F.I.R., which was registered on 02.02.2009, which

culminated into Charge being framed below Exh.10. The case of the prosecution, in nutshell is that on 02.02.2009 in the night at about 1:30 hours, PW-1 i.e. prosecutrix was raped by four accused by forcibly taking her in the open field for six times, after they tied her husband PW-2 on a cot. The accused also looted a Nokia mobile phone and a battery.

4. Initially, the investigation was carried out by PW-26, Police Sub-Inspector, Shri Balwantbhai Prabhatbhai Sonara. Thereafter, the same was undertaken by PW-27, Deputy Superintendent of Police, SCST Cell since the complainant was found to be scheduled tribe.

5. After examining 29 witnesses as well as the documentary evidence, the Trial Court has convicted the accused for the aforementioned offences and accordingly, ordered sentence and fine.

5.1 The jail remarks dated 04.07.2023 reveals that convict-Govindbhai Velshibhai @ Virjibhai Parmar has undergone 13 year and 1 month and 16 days of sentence, whereas convict-Vira @ Virko Velshibhai @ Virjibhai Parmar has undergone 12 years, 9 months and 13 days of sentence.

**SUBMISSIONS:**

6. Learned advocate Mr. Brahmhatt and learned advocate Mr. Raval appearing for the accused have submitted that the evidence of the prosecutrix is required to be disbelieved and discarded in view of the medical evidence, more particularly the deposition of Doctor PW-3, who examined the victim and has found that no injury marks were found on her private parts. It is submitted that the prosecutrix has specifically narrated that she was subjected to forcible sexual intercourse by four persons for six times in an open field and looking to such allegations, the medical evidence becomes very relevant for convicting the accused. It is submitted that the trial Court has not appreciated the medical evidence in its true perspective and hence, the conviction is required to be quashed.

7. While inviting the attention of this Court with regard to the identification of the appellants, it is contended that the trial Court has fallen in error in appreciating the veracity of the Test Identification (TI) Parade for convicting the accused for the offences. It is submitted that the victim as well as her husband were not knowing the accused before the alleged offence. It is submitted that the victim was taken at Lathi for identification where she did

not identify the accused but subsequently, she identified them at Amreli and prosecution has not brought on record any identification undertaken at Lathi. It is submitted that when the victim herself has stated that there was dark in the filed and she did not see the accused who have committed rape since they had covered their faces with handkerchief and even if her version is believed that the handkerchief of one of the accused was removed, it was so dark at 1:30 a.m. that she could not have identified the appellants. It is submitted that in fact, the deposition of the prosecutrix reveals that she has admitted that she could not even describe as to whether a person is fair or dark or his height etc.

8. It is further submitted by the learned advocates that so far as evidence of PW-2 i.e. husband of the victim is concerned at Exh.17 that he had seen the accused in light of the lamp also does not inspire confidence since, light of the lamp cannot extend to the field. It is also submitted that all the four accused persons have covered their faces, as per the deposition of PW-2 and he was tied to a cot and hence, there was no occasion for PW-2 to identify the accused. It is further submitted that PW-2 has in fact deposed that the Police personnel showed the accused, and hence, they identified them. Thus,

it is submitted that the TI parade cannot be held to be reliable.

9. Learned advocate Mr. Brahmhatt, while referring to the deposition of PW-2, husband of the victim, has submitted that in fact, he has deposed that after arrest of the accused No.1, he and his wife were called at Amreli Taluka Police Station and at that time, the accused No.1 was showed to them and subsequently, the accused No.1 was identified before the Mamlatdar. He has submitted that in fact it is deposed and admitted by PW-2 that when they went to the Police Station, the accused-Govindbhai was in lock-up. While referring to the arrest panchnama below Exh.51 of the accused - Govindbhai, learned advocate has submitted that in fact it is admitted that the said accused could have been identified in the TI parade as on 09.04.2009 since he was arrested and arrest panchnama below Exh.51 shows that he was arrested between 7:45 and 8:30. It is further submitted that so far as the accused-Virabhai is concerned, he was arrested on 14.06.2009 and Panchnama was made on 14.06.2009 and both the panchas have not supported the case of the prosecution. He has further submitted that so far as accused-Virabhai is concerned, the victim has specifically deposed that after returning from their native, they went to the Police Station and she was informed that

they have apprehended the second accused. It is submitted that she has specifically stated that the Police informed her that the accused is sent to the second office and accordingly she has identified the accused-Virabhai in the Court. Thus, it is submitted that the entire TI Parade undertaken by the Executive Magistrate does not inspire confidence and it cannot be said to be a reliable piece of evidence for convicting the accused. It is submitted that in fact, PW-2, husband of the victim, has made improvement in his deposition and for the first time he has deposed that he had seen the accused in the light of lamp. While referring to the scene of panchnama, it is submitted that in fact, scene of offence panchnama does not refer any light or lamp and on the contrary, the pancha of scene of panchnama PW-13, Jayantibhai Bhimjibhai Gajera, at Exh.45 has deposed that there was no light. It is submitted that the second panch PW-14 below Exh.48, Vitthalbhai Bachubhai Gajera, has also deposed that room (ordi), which he has seen, has no facility of light and in the panchnama also, there is no reference of light. It is thus, submitted that despite such evidence, the trial Court has made incorrect observations with regard to seeing the accused in natural light since it was night of *shukla paksha*. While referring to the deposition of PW-21, Ramaben Ratanbhai Bhuriyabhai, (Exh.79), who has specifically

stated that there was no light in the room as well as in the field, it is urged by learned advocate that there was no presence of light on the day of incident.

10. Learned advocate Mr.Brahmbhatt has further placed reliance on the deposition of PW-20, Dr.Ram Lakhan Nunman Baranval, who has prepared the serological report. He has submitted that in fact, it is admitted that so far as convict Govind is concerned, no semen sample was taken and only blood sample and saliva sample was taken and his blood group is 'B', which is found on the clothes of the prosecutrix however, so far as convict-Virabhai is concerned, no semen sample was taken and no blood group is identified in the serological report. It is further submitted that the Investigating Officer has not collected semen or blood sample of the husband of the victim and furthermore looking to the depositions of the prosecutrix and her husband reveals that they have admitted that she had washed away the clothes and bed-sheet after the alleged offence was committed by the accused; the serological report even otherwise cannot be relied upon.

11. With regard to the recovery of Nokia mobile and battery is concerned, learned advocate Mr.Brahmbhatt has placed reliance on the deposition of PW-27, Deputy Superintendent of



Police, SCST Cell, who has subsequently taken over the investigation from 09.04.2009 from Police Inspector, Balwantbhai Prabhatbhai Sonara, who arrested the convict-Govind. It is submitted that this witness has stated that he has not arranged for the TI Parade for him and the same was held by Police Inspector, Mr.Sonara (PW-26). He has submitted that Deputy Superintendent of Police, SCST Cell (PW-27) has deposed that he has recorded the statement of Manganbhai Tejabhai resident of Sedubhar to whom Nokia mobile was sold, which was subsequently found from the convict-Govind. It is submitted by him that looking to the evidence of PW-23, the shop owner at Exh.82, who has produced the mobile bill below Exh.83 shows that the said mobile was sold to one Maganbhai Tejabhai on 11.11.2008. It is submitted that though the Investigating Officer has recorded the statement of Maganbhai Tejabhai however, he is not examined as a witness. It is submitted that no evidence has been collected to show ownership of mobile and hence, such evidence could not have been placed reliance by the trial Court to convict the accused for such a serious offence.

12. In response to the aforesaid submissions, learned APP, while referring to the evidence of the victim, has submitted that in fact, her statement gets corroborated with the statement of

the owner of the farm (PW-6), where victim and her family were working as well as the statement of her husband (PW-2). She has submitted that in fact the medical evidence as well as other evidence collected by the Investigating Officer reveal that the accused have committed the offence. She has further submitted that the trial Court, after appreciating the evidence - both oral as well as documentary has precisely convicted the accused for the offences for which they are charged. She has specifically stressed on the evidence that the mobile of the husband as well as the battery, which was stolen by the accused are found in their possession. She has placed reliance on the deposition of PW-26, who was Investigating Officer at Exh.89 and it is submitted that from the call records, it was found that the sim card, which was used by the accused-Govind was used in the mobile phone, which was belonging to the husband of the victim (PW-2). She has placed reliance on the certificate issued in this regard at Exh.118 by the Nodal Officer of the Vodafone Essar Gujarat Ltd. She has submitted that the IMEI number of Nokia phone matches with the call details of Mobile No.9712183224 and the said sim card was used by the convict-Govind. Thus, it is submitted that PW-2, husband of the victim, has also identified battery, which was stolen by the accused and hence, it cannot be said that the

entire story has been concocted by the prosecutrix as well as her husband in order to rope the accused in the false offence. She has further placed reliance on the evidence of Executive Magistrate who has undertaken the TI Parade and has submitted that the accused were identified by the prosecutrix. She has submitted that in fact, the evidence of PW-2, husband of the prosecutrix reveals that there was light when the accused has assaulted him and hence, the accused were precisely identified by the prosecutrix in the TI Parade thus, it is submitted that the impugned judgement and order passed by the trial Court convicting and sentencing the accused-appellants does not require any interference.

**ANALYSIS AND CONCLUSION:**

13. After scaling the evidence and the observations of the Trial Court, we are of the considered opinion that the Trial Court has failed to appreciate the evidence which is established on record. In fact this is a case, where the prosecution has been ineffective to prove the complicity of the appellants in the offence.

14. The case of the prosecution, as per the charge below Exh.10, is that four accused on the night of 02.02.2009 at 1:30 hours tied the PW-2,

husband of the prosecutrix on the cot and thereafter they committed rape on prosecutrix repeatedly. It is also alleged that four accused were armed with scythe, sticks and pipe and they had also looted phone of PW-2, Kanubhai-husnabd of prosecutrix, as well as one battery. The prosecutrix PW-1, who is the complainant, in her evidence below Exh.14 in her examination-in-chief stated that there was four boys, who had raped her in the night of 02.02.2009 at 1:30 hours repeatedly for six occasions.

15. We may emphasize, at this stage that though the prosecutrix and her husband have maintained that there were four accused, who committed the offence, the entire evidence does not in any manner reveal anything about two other accused, and only the present appellants are convicted. There is no investigation done in this regard.

16. The prosecutrix, PW-1 lodged an F.I.R. (Exh.15), which culminated in charge, Exh.10. Her evidence is recorded at Exh.14. In her deposition, she has specifically narrated that in the night hours, at around 1 a.m. of 02.02.2009, four boys entered their hut and accordingly they started abusing her husband. It is further narrated that they assaulted her husband with sticks and accordingly tied him with ropes on the cot. It is further stated that they also tied his

legs and muffled his mouth and accordingly took her away in the field on pretext of showing a way in the field. It is further alleged that she was taken to the field and accordingly they forcibly committed sexual assault. She has narrated that when she was asked to lie down on the field she informed the accused that she was in periods however, they forcibly made her lie on the field and four accused repeatedly committed rape for six times. After committing rape, the accused made her lie on the cot and accordingly pressed her mouth as well as tied her hands to the cot and thereafter by placing mattress on her, the accused went away. The complainant has also deposed that she got free from the cot and accordingly freed her husband and she and her husband went to the field and talked about the incident to other daily wagers about the incident and thereafter accordingly the land owner was also informed by phone who came in the morning at 4 a.m. It is further asserted by her that the act was committed by the accused at about 1:30 in the night. A specific statement is made by her, in her examination-in-chief that she had given clothes, which was worn by her at that time, to the police and she was also taken to the doctor for examination, where the doctor had also accordingly inquired about the act. She has also identified two accused in the Court however, it is pertinent to note that in the examination-in-

chief, she has categorically mentioned that when she was taken at Lathi, for identifying the accused, at that time she did not recognize the accused however, when she was taken to Amreli, and when the accused were shown to her, at that time she recognized them. She has deposed that the farm owner visited the field in the morning at around 4 a.m. and she narrated the incident to him and accordingly at 6 a.m., they went to the nearest village Police Station, the name of which is not known to her and accordingly the incident got recorded. In her cross-examination, it is elicited by her that at the time of incident, in the field there was no light and it was dark and she could not see the accused since it was dark. It is further elicited that the place of committing the act was around 300 mtrs. from her hut (ordi). She has in fact, admitted that at that time in the field, there was dark and she could not see faces of the accused since there was no light. She has further asserted that when the act was committed by the accused, the accused were wearing scarf on their faces, but the same got removed from the face of one of the accused committing the act. It is further elicited that due to the darkness, she cannot tell whether he was fair or dark, his height etc. and she could not also say about his age. It is further elicited that she did not inform her husband about the act committed by four accused and

husband did not see the rape being committed on her. It is pertinent to note that in her cross-examination, it is elicited that there were some spots on her clothes and undergarment as well as shawl and she had washed away the clothes after she had taken bath.

17. We may at this stage refer to the deposition of the Doctor PW-3 below Exh.18, who has examined the prosecutrix. Dr.Kishorbhai Ravjibhai Rathod has deposed that there were three injuries found on the prosecutrix and as per history recorded by him, the prosecutrix has stated that unknown persons had beaten her. Those three injuries are referred as under:

Injury No.1 - 2 cm\* 1 cm scratch on the right wrist

Injury No.2 - 2 cm \* 1 cm scratch on temporal area

Injury No.3 - Pain in the back

18. In cross-examination, PW-3 has specifically stated that the prosecutrix has narrated the history that some unknown persons have committed rape on her. She has not stated that how many time she was raped. It is further deposed by him that at the time of her medical examination, neither any bleeding was found, nor any injury

was found and on examination of her private parts. She has also not named any accused.

19. The medical history below Exh.20 recorded by the doctor in fact, if perused, will reveal that the same bears name of one Gitaben Kanubhai and not of the prosecutrix. However, the certificate below Exh.22 refers to the name of the prosecutrix. The certificate specifically narrates that no external marks or injuries on body were found and there was pain and tenderness on breasts.

20. A close scrutiny of the evidence of the prosecutrix and the medical evidence reveals, that she has alleged that she was raped by four accused repeatedly for six times in dark place in a field at 1:30 hours at night. She did not see the faces of the accused. The medical evidence does not reveal any injuries on her private parts.

21. The husband of the prosecutrix (PW-2) is examined below Exh.17. He has narrated the version that around 1:30 in the night, four persons had assaulted him with sticks, scythe and tied him to the cot and looted away the money as well as mobile and one battery. It is stated that after the accused escorted his wife on the pretext of showing the way to the open field and committed rape on her. In the examination-in-



chief, it is stated that he was tied to the cot by four accused. It is further narrated by him that she was taken to the field by the accused and after the act was committed, they returned along with her to the hut and her hands were tied at the back and thereafter they ran away. It is further narrated by him that thereafter his relatives had come and they headed in the field and accordingly he had informed the farm owner by his phone and accordingly, at 3:00 hours in the morning, the farm owner arrived, and on his inquiry about the stolen articles, he has informed him about his mobile and battery. It is deposed that in the morning at 8:00 hours, they went to the farm owner, who had stated that if they want to register a complaint, they may do so and thereafter, they registered the F.I.R. accordingly. It is also elicited from his cross-examination that his wife informed about the rape committed on her in the morning at 8:00 hours and the offence was committed in the night at 1:30 hours.

22. In his deposition, PW-2 has further stated that there was a lamp, which was burning in the hut and accordingly, he recognized the accused. It is stated that the accused-Virabhai Velshibhai was having scythe in his hand and the second accused-Govnd Velshi was having pipe. He had also recognized scythe and stick in the Court. It is

also deposed that the accused had stolen his mobile phone and battery. In the cross-examination, it is elicited that he had given bill of the mobile phone of Nokia brand to the Police. It is further elicited that the electricity connection was also taken from the outside in the hut and accordingly, there was light from the bulb. It is also elicited that the accused had covered their faces with scarfs and he could only see the eyes. In the cross-examination, it is further elicited that the Police had taken his wife to Lathi for identifying the accused but she could not do so and he was accompanying her at that time. It is further stated that when the Police had taken them to Lathi to identify the accused, there were 40 to 50 persons in the lock-up and thereafter his wife - prosecutrix had identified the accused No.1 before the Mamlatdar and at that time, he was present there. It is further elicited that at the time when they went to the Taluka Police Station, the accused No.1 was already present in the lock-up and it was instructed to him by the Police that he should not come along with his wife till he is called and he was present outside the Mamlatdar office.

23. The owner of the farm PW-6, Bhikhabhai Govindbhai Dholariya, who is examined below Exh.35 has deposed that on the day of incident,

in the morning around 8 O'clock, the prosecutrix along with her husband visited and narrated the incident which had happened at around 1:30 a.m. He has specifically stated that the husband of the prosecutrix (PW-2) had narrated that there were four persons who had assaulted them with pipes and sticks and had looted them by taking away some money as well as mobile. He has further deposed that the prosecutrix had narrated that rape was committed by such four accused on six occasions repeatedly. Thus, the evidence of the present witness does not get corroborated with the version of the prosecutrix and her husband who have deposed that in fact they informed the farm owner in the night on his mobile who came at 3:00 - 4:00 a.m.

24. PW-4, who is the Executive Magistrate, who had undertaken the TI Parade is examined below Exh.28. He has narrated the manner in which the TI Parade has been undertaken. In the cross-examination, it is elicited by him that he has not verified from the prosecutrix whether she had seen the accused prior to the TI Parade. The trial Court, while placing reliance primarily on the evidence on mobile phone and battery being recovered from the accused and also the TI Parade has convicted hem for the offences charged against them.

25. At this stage, we may reiterate that the medical evidence, does not in any manner indicate the commission of aggravated sexual assault. The medical evidence does not in any manner suggest that the prosecutrix is raped by four accused by six times. Such a gravity of forceful sexual intercourse will leave exacerbating injuries, and could have definitely heavily traumatized the victim. The demeanor of the victim does not indicate that she had undergone such a high degree of sexual assault and ordeal. The husband of the prosecutrix, PW-2 has admitted that the offence of rape was committed on her wife in the night at 1:30 hours, and her wife informed him in the morning at 8:00 hours. He has also admitted that his wife had washed the clothes, she was wearing at the time of the incident. Such an evidence cannot be made substratum to record conviction in a serious offence of rape.

26. The trial Court has emphasized on the identification of the accused while recording conviction. In cases where the victim does not have prior acquaintance with the accused, their proper identification becomes very crucial piece of evidence. The prosecution has to see that the identification of the accused is not blemished by any element and the evidence in this regard remains pristine. In the present case, the

evidence reveals that in fact PW-1 victim was first taken to Lathi by the Investigating Officer, who was accompanying by her husband PW-2 for identification of the accused. She has deposed that she was initially taken to Lathi where she could not identify the accused, but she has identified them in Amreli. The prosecution is blissfully silent with regard to the identification done at Lathi. It is also deposed by her that when the accused - Govind Velshi was brought to her village by police, she had identified him and said that he (Govind Velshi) had committed rape on her. In her cross-examination, it is elicited from her that she did not name the accused to the Doctor, at the time of her medical examination. Thus, if the version of the prosecutrix is believed she knew him, and she identified him when she was brought to the village by police, however, it is surprising that she did not name him before the Doctor or in her medical history. Her deposition also reveals that after returning from their native, she and her husband went to the Police Station, where she was shown the second accused i.e. Vira and accordingly, she has identified him in the Court. Thus, in the circumstances, the purpose of TI Parade becomes futile, and the same cannot be relied upon so far as identification of the both the accused is concerned. As discussed, herein above, the evidence of the prosecutrix itself

reveals that when the alleged act was committed on her, it was very dark and it is elicited in her cross-examination that she cannot describe the colour of skin of the accused whose scarf was removed. The trial Judge has discarded such evidence by imparting his own knowledge that on the day of incident since there was "*satam of shukla paksha*" and hence, the prosecutrix could have seen the accused in natural light. The trial judge has also misdirected himself by holding that there was ample light at the place of offence, after appreciating the evidence of panchas of scene of offence. The scene of offence, Exh.46 does not make reference to electricity connection or bulb or lamp. The scene of panchnama panch, PW-13, Jayantibhai Bhimjibhai Gajera in his deposition at Exh.45 has stated that he did not go inside the hut (ordi). It is also stated by him that in the field where he saw some foot prints, there was no light. Further, he has deposed that the prosecutrix informed him that she was raped by four accused for six times. The second panch, PW-14 of the, Exh.46 panchanma in his deposition at Exh.48, has stated that "*it is not true that there is no facility of light at the scene of offence*". Simultaneously, he has admitted that there is no provision of light outside the hut(ordi). Thus, in wake of the evidence of the prosecutrix that there was darkness and she did not see the faces of the

accused, and the deposition of the panchas and the contents of the scene of panchnama, Exh.46, it can be said that there was no possibility of seeing the accused, and subsequently identifying them. It is also surprising to note that though the prosecutrix has maintained that there were four accused, who committed rape on her but, the investigation does not reveal anything about other two accused and there is nothing shown on record that any attempts are made to trace out the other accused.

27. We may with profit refer to the evidence of PW-20 at Exh.76. PW-20, Dr.Ram Lakhan has examined the accused-Govindbhai for collecting his semen sample but the same could not be collected and only blood sample and saliva sample was collected which ultimately was found to be of blood group 'B'. The serological report also reveals that the blood group 'B' has been found on the clothes of the prosecutrix, but the same cannot be relied upon for convicting the accused-Govindbhai as victim was married to PW-2 and prosecution has failed to take semen and blood sample of her husband. Moreover, the evidence of PW-1 herself reveals that she has admitted that after the alleged act was committed on her, she had washed away her clothes and had taken bath. PW-2, her husband has also admitted that she had washed the clothes and the bed-sheet after the

offence. Thus, so far as accused-Govindbhai is concerned, the serological evidence also does not in any manner implicate him in the offence. With regard to serological evidence of accused-Virabhai is concerned, in fact no blood group is identified in the serological report. Thus, the evidence of serological report becomes untrustworthy and the same does not in any manner suggest complicity of both the accused in the offence.

28. The trial Court has very heavily placed reliance on the identification of mobile and battery by PW-2 and the recovery of the same from the accused. In the deposition of PW-2 has specifically stated that he was having Nokia mobile phone, which he had bought from the shop from Amreli and he has deposed that he had given bill to the Police and his mobile number was 925936136. The shop owner Jagat Karia. PW-23, who had sold the Nokia mobile phone, is examined at Exh.82. He has deposed that Nokia mobile number having EMI No.356853024128949 was sold to one Maganbhai Tejabhai resident of Shedubhar as per bill No.2122 dated 11.11.2008. The bill is produced below Exh.83, which names Maganbhai Tejabhai however, though the Investigating Officer has taken his statement, he is not examined him as a witness. The trial Court in fact has recorded the finding that the



prosecution is unable to prove that how the mobile bought by Maganbhai Tejabhai landed with the husband of the prosecutrix. Despite the aforesaid finding, only because the husband of the victim PW-2 has identified his mobile in the Court, it is recorded that the same was stolen by the accused and subsequently used by him. Thus, the evidence does not reveal that the bill, which has been referred by PW-2 in his deposition is recovered or brought on record and bill at Exh.83 does not reveal that the mobile either belonged to PW-2 husband of the prosecutrix or to the accused. Similarly, in the identification of the battery is also not reliable as the evidence does not reveal that the battery, which was stolen in fact was the same. The Investigating Officer, who initially investigated the evidence i.e. PW-26 Mr.Sonara below Exh.89, has not also specifically stated that the mobile was used by the accused-Govindbhai on the contrary it is elicited that he was arrested and detained in another offence by him and he called the accused-Govindbhai by making a phone call and since he was having his phone number. It is also admitted by him that he has not procured any bill, which shows the ownership of husband of the prosecutrix, PW-2, Kanubhai. PW-27, the Deputy Superintendent of Police, SCST Cell, who has subsequently investigated the offence has admitted that he has not collected any evidence to show the ownership

of mobile and sim card was alleged to have been stolen by the accused belong to PW-2. Thus, the prosecution has also failed to establish and identify the actual owner of the Nokia mobile phone.

29. The trial court is also influenced with recovery of stolen article and the weapons used in offence. So far the discovery panchnama Exh.63 is concerned, the same is inadmissible in evidence, since the same does not satisfy the requirement of section 27 of the Evidence Act. The exact statement of accused-Vera Velshi is not recorded in the panchnama. The discovery panchnama only records that the accused Vera Veslhi wants to tell something, and on inquiry he said that he wants to show the pipe and battery. The trial Court also does not record that the contents of the panchnama are read over to the panchas PW-19, Atulbhai who is one of the panchas. The discovery panchnama shows the colour of battery as orange and make of "Kiran Torch Ahmedabad", however, PW-2 in his deposition has admitted that the same was of red colour, and he knows the difference in red, orange and black colour. The discovery panchnama, Exh.38 of scythe also suffers from same defect. Thus, the discovery panchnama cannot be made the basis for convicting the accused in serious offence of rape.

30. Thus, the over all appreciation of evidence which is established on record, does not inspire any confidence in the version of the prosecutrix PW-1 or the story narrated by her or by PW-2, her husband. The trial Court has misdirected itself in appreciating the evidence in its true perspective.

31. On the bedrock of the aforesaid analysis of the evidence, we do not agree with the findings recorded by the Trial Court in convicting the accused for the offence for which they are charged. Hence, the impugned judgement and order of conviction is hereby quashed and set aside. The appellants-convicts are hereby acquitted of the offences punishable under Sections 323, 392, 376(2)(g) and 114 of the IPC and under Section 3(1)(11) of the Atrocities Act. Since the convict of Criminal Appeal No.599 of 2013 is on bail, his bail bonds stand cancelled, whereas the convict of Criminal Appeal No.487 of 2013 is in jail, he shall be released forthwith, in case his custody is not required in any other offence.

32. Before, we part, we would like to highlight those cases, such as present one in which the convicts are convicted on the basis of inappropriate appreciation of evidence or the conviction is premised on such evidence which does not inspire any confidence or creates doubt,

and the convicts have to undergo incarceration for a long period. In the present case, the convict - Govindbhai Velshibhai @ Virjibhai Parmar has undergone 13 year and 01 month and 16 days of sentence, whereas convict - Virabhai Velshibhai @ Virjibhai Parmar has undergone 12 years, 9 months and 13 days of sentence. Such cases as the present one which are pending before the High Court need to be identified so that the conviction can be set aside at the earliest even if the sentence of the convicts is suspended. We request the State Government to do the needful in this regard by forming a Committee. Though, we are not suggesting that the State may admit that the conviction is not proper, however, evenly, the State may, in its wisdom, suggest that such appeals can be heard on priority basis.

33. The Criminal Appeal stands allowed.

34. Record and proceedings, if any, if received, be transmitted back forthwith.

Sd/-  
(A. S. SUPEHIA, J)

Sd/-  
(M. R. MENGDEY, J)

NVMEWADA