

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.903 OF 2015

Mr.Nitin Ashok Shewale,
An adult age about 24 years,
Occ.- Agriculturist,
R/o.Village-Mokbhangi,
Taluka-Kalwan, Dist.-Nashik. ... **Appellant**
V/s.

The State of Maharashtra,
through Senior Inspector of Police,
Kalwan Police Station, Kalwan,
Dist.-Nashik. ... **Respondents**

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Mr.B.K.Barve, Advocate for the Appellant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 15th FEBRUARY 2019.

Oral Judgment :

1 By this appeal, appellant/accused No.3 Nitin Shewale is challenging the Judgment and Order dated 12/01/2015 passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.23 of 2012 thereby convicting appellant/accused No.3 Nitin Shewale of the offence punishable under Section 376(2)(g), 363 read with Section 34, 366-A read with Section 34 as well as under Section 341 read with Section 34 of the Indian Penal Code. For the offence punishable under Section 376(2)(g) of the Indian

Penal Code, appellant/accused No.3 Nitin Shewale is sentenced to suffer rigorous imprisonment for ten years apart from payment of fine of Rs.1,000/- and default sentence of rigorous imprisonment for six months. For the offence punishable under Section 363 read with Section 34 of the Indian Penal Code, appellant/accused No.3 Nitin Shewale is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.1,000/- and default sentence of rigorous imprisonment for six months. For the offence punishable under Section 366-A read with Section 34 of the Indian Penal Code, appellant/accused No.3 Nitin Shewale is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.1,000/- and default sentence of rigorous imprisonment for six months. For the offence punishable under Section 341 read with Section 34 of the Indian Penal Code, appellant/accused No.3 Nitin Shewale is sentenced to suffer rigorous imprisonment for one month apart from payment of fine of Rs.500/- and default sentence of rigorous imprisonment for seven days. Co-accused No.1 Vicky @ Vikesh and accused No.2 Vishal were also convicted and sentenced in similar manner by the learned trial Court. The learned trial Court had directed that substantive sentences shall run concurrently.

2 Facts in brief leading to conviction and resultant sentences imposed on appellant/accused No.3 Nitin Shewale as well as the co-accused are thus :

- (a) The P.W.No.2 is the alleged victim of the crime in question. Alleged incident of gang rape on her took place at about 9.30 a.m. of 04/10/2011 by the side of Darebhangi to Mokbhangitar road, when she along with her classmate P.W.No.7 Alka Dhumse were proceeding to attend their school viz. Mahatma Phule School situated at village Mokbhangi. They both were studying in 10th Std. in the said school.
- (b) According to the case of prosecution, accused No.1 Vicky @ Vikesh, accused No.2 Vishal and appellant/accused No.3 Nitin Shewale were having evil-eyes on the prosecutrix/ P.W.No.2. When the prosecutrix/ P.W.No.2 accompanied by her friend P.W.No.7 Alka Dhumse were proceeding by foot from their village Dalya Ambapada towards Mokbhangi for attending the school by Darebhangi to Mokbhangitar road, all accused persons came on one motorcycle. They accosted the prosecutrix/ P.W.No.2 on that road. Accused No.1 Vicky @ Vikesh questioned the prosecutrix/P.W.No.2 as to what is her answer to his love towards her. The prosecutrix/ P.W.No.2 replied that she belongs to Kokna caste. Then accused No.1 Vicky @ Vikesh caught hold of the prosecutrix/ P.W.No.2. Then her friend P.W.No.7 Alka Dhumse ran towards village Mokbhangitar by shouting. Accused No.2 Vishal and appellant/accused No.3 Nitin Shewale also caught hold of the prosecutrix/ P.W.No.2. She was taken by the side of the road in an

uncultivated field. The prosecutrix/ P.W.No.2 was trying to extricate herself from clutches of the accused persons. She suffered injury on her left hand by nail of accused No.1 Vicky @ Vikesh. He then grounded the prosecutrix/ P.W.No.2, opened the string of her slacks, removed her knicker and committed forcible sexual intercourse with her when co-accused Vishal and appellant/ accused No.3 Nitin Shewale were standing near the teak tree. Thereafter, co-accused Vishal removed his pant and committed forcible sexual intercourse with her when the prosecutrix/ P.W.No.2 was still lying on the ground. After accused No.2 Vishal finished the act, appellant/accused No.3 Nitin Shewale committed forcible sexual intercourse with her. Because of kiss of accused No.1 Vicky @ Vikesh, lips of the prosecutrix/ P.W.No.2 were swollen. After finishing the act, all accused persons went by motorcycle towards village Mokbhangi.

- (c) The prosecutrix/ P.W.No.2 then proceeded towards school at village Mokbhangi by wearing her clothes. On the way, Sarita and Sunita, who were her classmates met her. She disclosed the incident to them. On reaching the school, the prosecutrix /P.W.No.2 disclosed the incident to P.W.No.6 Arun Gujar, Headmaster, class-teacher B.Y.Sonawane and other teachers named Sawant and Pawar. She was then sent to Police Station, Kalwan on 04.10.2011 itself by informing her parents. At the said police station, the prosecutrix/

P.W.No.2 lodged her report (Exhibit 34), which resulted in registration of Crime No.I-51 of 2011 for the offences punishable under Sections 376(2)(g), 363, 366-A, 341, 323, 506 of the Indian Penal Code as well as under Section 3(2) (x), 11 and 12 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'Atrocities Act' for the sake of brevity). During the course of investigation, the prosecutrix/ P.W.No.2 was sent to Government Medical Hospital, Nashik, where she was examined by P.W.No.10 Dr.Vasant Jamdhade on the very same day i.e. on 04/10/2011. The prosecutrix/ P.W.No.2 showed the spot of incident to police on 04/10/2011 itself and accordingly, spot panchanama (Exhibit 31) came to be drawn in presence of panch witnesses P.W.No.1 Shankar Chaure and P.W.No.4 Vishwanath Jagtap. On the day of alleged incident i.e. on 04/10/2011, clothes of the prosecutrix/ P.W.No.2 came to be seized vide panchanama (Exhibit 40) in presence of P.W.No.4 Vishwanath Jagtap. Accused persons including appellant/ accused No.3 Nitin Shewale came to be arrested on the very same day and their clothes came to be seized vide panchanamas (Exhibits 42 to 44) in presence of P.W.No.5 Waman Jagtap. Statements of witnesses came to be recorded. Ossification test was conducted on the prosecutrix/ P.W.No.2 by P.W.No.9 Dr.Trimbak Chavan on 05/10/2011. During the course of

investigation, nail clippings of the prosecutrix/ P.W.No.2 as well as accused persons, samples of their pubic hairs, samples of semen of accused persons, samples of vaginal swab and vaginal smear of the prosecutrix/ P.W.No.2 came to be drawn and seized. Thus, these samples so also seized clothes came to be forwarded vide letter (Exhibit 69) for chemical analysis by Investigating Officer P.W.No.11 Pradnya Jedge, Deputy Superintendent of Police, Malegaon Rural. On completion of investigation, the accused persons including appellant/accused No.3 Nitin Shewale came to be charge-sheeted.

- (d) The learned trial Court framed the charge for the offences punishable under Sections 363 read with Section 34, 366-A read with Section 34, 341 read with Section 34, 323 read with Section 34, 506 read with Section 34 and 376(2)(g) of the Indian Penal Code as well as under Section 3(2)(x) of the Atrocities Act.
- (e) In order to bring home the guilt to appellant/accused No.3 Nitin Shewale along with other co-accused, the prosecution has examined in all eleven witnesses. Shankar Chaure , a spot panch is examined as P.W.No.1. Exhibit 31 is the spot panchanama dated 04/10/2011. The prosecutrix is examined as P.W.No.2. Report lodged by her on 04/10/2011 is at Exhibit 34. Her father Vasant is examined as P.W.No.3.

Panch witness to the spot panchanama as well as seizure of clothes of the prosecutrix/P.W.No.2 namely Vishwanath Jagtap is examined as P.W.No.4. Exhibit 40 is the seizure panchanama dated 04/10/2011 by which slacks, white shirt, blue frock and knicker of the prosecutrix/ P.W.No.2 came to be seized. Waman Jagtap – a panch witness to seizure panchnamas (Exhibit 42 to 44) by which clothes of accused persons came to be seized, is examined as P.W.No.5. Arun Gujar, Headmaster of Mahatma Phule School is examined as P.W.No.6. Alka Dhumse, who was accompanied the prosecutrix/ P.W.No.2 on the day of the incident is examined as P.W.No.7. Yogesh Shewale, Police Patil of Mokbhangi is examined as P.W.No.8. Dr.Trimbak Chavan, radiologist working at the Government Medical Hospital, Nashik is examined as P.W.No.9. Exhibit 56 is the report of ossification test. Dr.Vasant Jamdhade, Medical Officer working at Government Medical Hospital, Nashik is examined as P.W.No.10. His report of medical examination of the prosecutrix/ P.W.No.2 is at Exhibit 59. Investigating Officer Pradnya Jedge, Deputy Superintendent of Police, Malegaon Rural is examined as P.W.No.11. Exhibit 69 is the letter forwarding seized articles including samples to the Forensic Laboratory, Mumbai for chemical analysis. Chemical Analysis Reports are at Exhibit 14, 15 and 16.

(f) Defence of the accused persons was that of total denial. They,

however, did not enter in defence. According to them, they are falsely implicated in the crime in question.

- (g) After hearing the parties, by the impugned Judgment and Order, the learned trial Court was pleased to held that there is ample material on record to hold that the accused persons are guilty of the offences of gang rape on the prosecutrix/P.W.No.2 after wrongfully restraining her and then kidnapping her with an intention to subject her to illicit intercourse. Accordingly, all accused persons came to be convicted and sentenced as indicated in the opening paragraph of this Judgment.

3 I heard the learned Counsel appearing for appellant/accused No.3 Nitin Shewale. He argued that as per Medico Legal Certificate issued by P.W.No.10 Dr.Vasant Jamdhade, the victim of the subject crime had given history of rape on her by one person whereas in the FIR she has implicated three persons as an accused. The FIR itself so also evidence of the alleged victim shows that she tried to rescue herself from accused persons. However, in submission of the learned Counsel for the appellant/accused No.3 Nitin Shewale, medical evidence is not supportive to this version of the prosecutrix. Though the prosecutrix/P.W.No.2 had deposed that she suffered injuries on her hand, leap and back, P.W.No.10 Dr.Vasant Jamdhade has not noticed any injury on the victim, who complained of gang rape by

three adult persons on rough surface of the field. The learned Counsel further argued that the spot panchanama so also evidence of the prosecutrix/P.W.No.2 and panch witnesses to the spot panchanama, the alleged incident took place by the side of the road having traffic. He argued that it is case of the prosecution that three accused persons successively raped the prosecutrix, however, still neither prosecutrix suffered the injury nor any passerby had noticed the incident. With this, the learned Counsel argued that appellant/accused No.3 Nitin Shewale deserves benefit of doubt.

4 As against this, the learned Additional Public Prosecutor argued that the prosecutrix/P.W.No.2 as well as her classmate P.W.No.7 Alka Dhumse are star witnesses and their version is sufficient for recording conviction against appellant/accused No.3 Nitin Shewale and other co-accused.

5 I have considered the submissions so advanced and perused the Record and Proceedings including oral as well as documentary evidence adduced by the prosecution.

6 The prosecutrix/ P.W.No.2 along with her family members including her father P.W.No.3 Vasant used to reside at village Dalya Ambapada in Kalwan Taluka of Nashik District. According to the prosecution case, on the date of alleged incident i.e. 04/10/2011, she along with her schoolmate P.W.No.7 Alka

Dhumse were proceeding by Darebhangi to Mokbhangi tar road for attending Mahatma Phule School where they were studying in 10th Std. On the way to the school, they were accosted by accused persons and then the prosecutrix/ P.W.No.2 was subjected to rape by all three accused persons. In order to bring on record the situation prevalent on the scene of occurrence, the prosecution has placed reliance on spot panchanama (Exhibit 31), which came to be recorded soon after the incident i.e. at about 2.30 p.m. of 04/10/2011. It was got proved through panch witness P.W.No.1 Shankar Chaure and P.W.No.4 Vishwanath Jagtap who had actually inspected the spot. As per version of P.W.No.1 Shankar Chaure, the spot of the incident was at Darebhangi *shihar* in an uncultivated field adjacent to the road. In words of P.W.No.4 Vishwanath Jagtap, the spot of the incident was at a distance of 20 to 25 feet from Darebhangi to Mokbhangi road. P.W.No.4 Vishwanath Jagtap has categorically deposed that the spot of the incident was shown to them as well as police by the prosecutrix/P.W.No.2 and on inspection of the spot, panchanama (Exhibit 31) came to be recorded. P.W.No.4 Vishwanath Jagtap has candidly stated that the soil at the spot of the incident was wet and there were signs of rubbing of legs. As per version of both these witness, one ear ring was found lying on the spot. Both these panch witnesses have stated that spot of the incident was visible from the tar road. P.W.No.1 Shankar Chaure has stated that many bullock-carts as well as people used that road. As per

version of P.W.No.4 Vishwanath Jagtap, the said road leading from Darebhangi to Mokbhangi is a road with traffic. The prosecutrix/PW-2 who used to go to her school daily by that road has stated in her cross-examination that buses as well as other vehicles used to pass from that road. On this backdrop, recitals in the spot panchanama (Exhibit 31) shows that the spot of the incident where the prosecutrix/ P.W.No.2 was subjected to rape by accused persons was at a distance of 25 feet from the tar road proceeding from Darebhangi to Mokbhangi village. The soil at that place was wet. Same situation of the spot of the incident is reflected from the sketch map of the scene of occurrence which is at Exhibit 66. Thus evidence adduced by the prosecution makes it clear that the place where the prosecutrix/ P.W.No.2 was allegedly subjected to rape by three adult persons successively was clearly visible from the Darebhangi to Mokbhangi road which was a busy road having traffic of people vehicles as well as bullock-carts. The soil at that place was wet probably because of rain. Recitals in the spot panchanama prepared within few hours of the incident shows that the soil on the spot of the incident was wet. One ear ring was found lying on the spot of the incident which came to be seized during the course of preparation of the spot panchanama. With this, let us now ascertain what the victim of the crime in question is deposing about the incident.

7 Before actually advertng to evidence of the alleged

victim of the crime in question, it needs to be put on record that in sexual offence, if version of the prosecutrix is found credible and consistent, then the same can form basis of conviction without any corroboration thereto. Evidence of a victim of sexual assault stands on a higher pedestal than the evidence of an injured witness. If evidence of the victim of sexual offence does not suffer from basic infirmities and the probability factor does not render it unworthy of credence, then corroboration cannot be insisted except from medial evidence, where, having regard to the circumstances of the case, availability of medical evidence can be expected. The alleged victim of the crime in question i.e. the prosecutrix/ P.W.No.2 and her classmate P.W.No.7 Alka Dhumse were taking education in 10th Std. at Mahatma Phule School of Village Mokbhangi, as seen from their evidence as well as evidence of Headmaster of the school P.W.No.6 Arun Gujar. The prosecutrix/ P.W.No.2 as well as P.W.No.7 Alka Dhumse deposed that on 04/10/2011, they were proceeding to school by walk and on the way, all three accused persons including appellant/accused No.3 Nitin Shewale came by one motorcycle and accosted them. Both these witnesses stated that accused No.1 Vicky @ Vikesh questioned the prosecutrix/ P.W.No.2 about his proposal of love and the prosecutrix/ P.W.No.2 replied that her caste is Kokana. While in the dock, the prosecutrix/ P.W.No.2 has stated by way of improvement to her version that she answered that proposal in negative. As stated by the prosecutrix/P.W.No.2 and her

classmate P.W.No.7 Alka Dhumse, then accused No.1 Vicky @ Vikesh caught hold of hand of the prosecutrix/ P.W.No.2 and started dragging her by the side of the road. The prosecutrix/ P.W.No.2 as well as P.W.No.7 Alka Dhumse then started shouting. Both these witnesses are unanimous in stating that then P.W.No.7 Alka Dhumse ran away towards her school.

8 As per version of the prosecutrix/P.W.No.2, then accused persons by holding her hands, took her in an uncultivated field by the side of the road. Though, she made hue and cry nobody helped her. She tried to rescue herself, but the accused persons held her by force. Then, as stated by the prosecutrix/ P.W.No.2, accused No.1 Vicky @ Vikesh fell her down. He then untied string of her slacks and removed her knicker. Thereafter, accused No.1 Vicky @ Vikesh removed his pant and committed rape on her. The prosecutrix/ P.W.No.2 further testified that then accused No.2 Vishal removed his pant and committed rape on her. Thereafter, as stated by the prosecutrix/ P.W.No.2, appellant/ accused No.3 Nitin Shewale also committed rape on her. As per her version, due to her resistance, her ear ring fell down and because of kiss by accused No.1 Vicky @ Vikesh her lips were swollen. She suffered injury to her left hand by nails of accused No.1 Vicky @ Vikesh. The prosecutrix/ P.W.No.2 stated that then accused persons went towards village and she immediately put on her clothes and started walking towards her

school while weeping and at that time her friend Sarita and Sunita came and asked her as to why she is weeping. She disclosed the incident to them and they took her to her school at village Mokbhangi. The prosecutrix/ P.W.No.2 categorically deposed that she disclosed the incident to her Headmaster - P.W.No.6 Arun Gujar so also her class-teacher - D.Y.Sonawane. She was then sent to Police Station Kalwan where she lodged report (Exhibit 34). The prosecutrix/ P.W.No.2 further stated that then she was sent to Civil Hospital, Nashik for medical examination.

9 It is seen from cross-examination of the prosecutrix/ P.W.No.2 that prior to entering into witness box, she sought several adjournments on the ground of her illness as well as other reasons. She stated that on all those dates, she as well as her relatives had come to the Court. She further denied the suggestions that she and her relatives demanded money from accused persons for giving favourable evidence. However, her cross-examination suggests that she along with her relatives used to come to the Court for adducing evidence on several dates, but she used to seek adjournments on various pretext rather than entering in the witness box. P.W.No.3 Vasant is father of the prosecutrix/P.W.No.2. His cross-examination also shows that he was attending the Court for adducing evidence since last eight to ten dates prior to entering into the witness box. He also denied that there was demand of money from accused persons and their

relatives, but they refused to pay him. P.W.No.3 Vasant was informed about the incident and he saw his daughter at the Police Station with a swollen lips as deposed by him.

10 As per version of P.W.No.7 Alka Dhumse, after she left the spot, she went to her school and narrated the incident to the girls, who in turn told teachers about the said incident. P.W.No.7 Alka Dhumse has stated that after some time, the prosecutrix/ P.W.No.2 was brought to the school by two girls and at that time, hair of the prosecutrix/ P.W.No.2 were scattered and her lips were swollen. This witness identified accused persons while in the dock. She stated that the incident was told to P.W.No.6 Arun Gujar, Headmaster by girl students. As per her version in the cross-examination, she never used to go to school with the prosecutrix/P.W.No.2 nor she used to come back to her house with the prosecutrix/ P.W.No.2.

11 Careful scrutiny of evidence of P.W.No.7 Alka Dhumse shows that it was only on the day of alleged incident i.e. on 04/10/2011, she claimed to have accompanied the prosecutrix/ P.W.No.2 to the school. She seems to be a chance witness. Though she noticed the incident of accused No.1 Vicky @ Vikesh dragging her friend after all accused persons accosted them, she had not chosen to disclose that incident directly either to the Headmaster or to their class-teacher. Her cross-examination shows that prior to the incident, she was not even knowing names

of appellant/accused/accused. Therefore, her claim that she was knowing the accused persons as they used to give call to the prosecutrix/P.W.No.2 and they used to pelt stones at the prosecutrix/P.W.No.2 when she used to go by S.T. bus seems to be doubtful. Conduct of P.W.No.7 Alka Dhumse does not seem to be a normal and natural conduct of a human being. Her evidence fails to explain as to why after noticing the act of kidnapping of her classmate and her friend, she has not reported the incident to either to the Headmaster to their class-teacher for providing help to her friend.

12 P.W.No.6 Arun Gujar, Headmaster of the school where the prosecutrix/ P.W.No.2 was taking education has stated that on 04/10/2011, relatives of the prosecutrix/P.W.No.2 as well as others gathered at the school and then he came to know that the prosecutrix/P.W.No.2 was harassed at the place away from the school. This Headmaster showed his inability to state names of those boys, who harassed the prosecutrix/P.W.No.2, but has stated that she came weeping and at that time, her hair were scattered. He testified that there was abrasion on her hand and she was breathing fast. P.W.No.6 Arun Gujar, Headmaster has not supported the prosecution case so also version of the prosecutrix/P.W.No.2, that she narrated the incident of commission of rape on her by accused persons to him. As per version of this witness all that he heard about the incident is

harassment of the prosecutrix/P.W.No.2 by some boys at a place away from the school. He has also spoken about meeting of the School Committee convened for taking action against rowdy boys, who used to tease girls from the school. This evidence of P.W.No.6 Arun Gujar is not reflecting any recitals allegedly made by the prosecutrix/P.W.No.2 to him after the incident about the incident which took place with her. In other words, evidence of this witness is not corroborating evidence of the victim so far as her former statement allegedly made to him by her.

13 Case in hand is that of a gang rape by three males on a virgin girl, who was taking education in 10th Std. at the relevant time. As per prosecution case, the victim was dragged in an uncultivated field by the side of the road and by pinning her down and removing her slacks and knicker, she was subjected to forcible sexual intercourse by accused persons. In foregoing paragraphs, situation prevalent on the spot of the incident is already stated. Suffice to state that it was a spot visible from the road. The soil at the place of the incident was wet as seen from the recitals of the spot panchanama as well as evidence of P.W.No.4 Vishwanath Jagtap. On this backdrop, it is case of the prosecution that clothes of the prosecutrix/P.W.No.2 came to be sized on the day of the incident itself i.e. on 04/10/2011 vide seizure panchnama (Exhibit 40). Clothes seized were white colour slacks, white shirt, blue frock with white belt and a knicker.

Neither seizure panchanama (Exhibit 40) nor evidence of P.W.No.4 Vishwanath Jagtap, a panch witness shows that any of these clothes were having stains of mud. Even the prosecutrix/P.W.No.7 has not spoken of staining her clothes with mud. Even if it is assumed that while doing forcible sexual intercourse with her, slacks and knicker of the prosecutrix/P.W.No.2 were removed by the accused persons then also she was wearing blue colour frock with white colour shirt. The prosecutrix/P.W.No.2 claimed to be subjected to rape after felling her down to the ground by accused persons. She stated that she was subjected to forcible sexual intercourse one by one by three accused persons, after untying string of her slacks and by removing her knicker meaning thereby that she was still wearing a frock and shirt during the act. When the ground was wet and spot of the incident was in an uncultivated field, it was but natural to have her frock and shirt stained with mud from backside. Evidence on record shows that clothes of the prosecutrix/P.W.No.2 were sent for chemical analysis. However, CA report Exhibit 40 is not showing any stains of mud on clothes of the prosecutrix. During chemical analysis, no mud was found on her clothes. Thus, version of the prosecutrix/ P.W.No.2 that she was raped after pinning her down by all three accused persons successively seems to be improbable and contrary to the contemporaneous documentary evidence adduced by the prosecution.

14 Next important circumstance emerging from the record which is making the version of the prosecutrix/P.W.No.2 highly doubtful is result of her medical examination. The prosecutrix/ P.W.No.2 claimed to have suffered gang rape at about 9.30 a.m. of 04/10/2011. She stated that after felling her down by accused No.1 Vicky @ Vikesh, all three accused persons have successively committed forcible sexual intercourse on her one by one. On the very same day she lodged FIR and immediately she was sent to Civil Hospital, Nashik, where she was examined by P.W.No.10 Dr.Vasant Jamdhade. The prosecutrix/P.W.No.2 in her evidence has categorically stated that because of forcible sexual intercourse by three accused persons, she suffered injuries to her hand as well as back. Her FIR (Exhibit 34) contains an averment that she was raped by all three accused persons. However, when on the very same day, she was taken P.W.No.10 Dr.Vasant Jamdhade, Medical Officer of Civil Hospital, Nashik, she gave history of forcible vaginal intercourse by one person only. Medico Legal Certificate at Exhibit 59 shows that the prosecutrix/P.W.No.2 was examined by P.W.No.10 Dr.Vasant Jamdhade at about 9.30 p.m. of 04/10/2011 though P.W.No.10 Dr.Vasant Jamdhade had wrongly stated before the Court that he examined the prosecutrix/P.W.No.2 at about 9.00 a.m. of 05/10/2011. Ignoring this discrepancy, evidence of P.W.No.10 Dr.Vasant Jamdhade so also contemporaneous Medico Legal Certificate at Exhibit 59 containing the record of medical

examination the prosecutrix/ P.W.No.2 shows that her medical examination was conducted within twelve hours from the alleged incident. There was not a single visible external injury on the person of the prosecutrix/P.W.No.2. P.W.No.10 Dr.Vasant Jamdhade had not noticed any injury on the genitals or private parts of the prosecutrix/P.W.No.2. He did not notice any active bleeding or tenderness in the vagina, vulva, perineum or forchtte of the prosecutrix/P.W.No.2.

15 Medical evidence shows that there was no injury to vulva, vagina, perineum or forchtte of the prosecutrix/P.W.No.2, though she claimed to have been raped by three adult males on the very same day of her medical examination. If a girl aged about 16 to 17 years was really subjected to forcible sexual intercourse by three adult male boys by feeling her on the ground at the open uncultivated field, then she would have suffered some external injuries as well as internal injuries. Swelling, bleeding and tenderness in private part of the school going girl who is victim of the instant crime can be expected if such incident takes place in the manner shouted by the victim and if victim is medically examined within few hours of the incident. P.W.No.10 Dr.Vasant Jamdhade has accepted this fact in his cross-examination. He also admitted in cross-examination that if such incident took place at uncultivated field, then the rapist also get injuries into the nature of abrasion or other kind on his knee.

However, in the incident in question the prosecutrix/P.W.No.2 had not suffered a single scratch and even report of medical examination of accused No.3 shows that he has also not suffered any external injury. P.W.No.10 Dr.Vasant Jamdhade had not noticed the fact of swelling on lips of the prosecutrix/P.W.No.2. Non-finding of any injury either external or internal on the person of the prosecutrix/P.W.No.2 and negative medical evidence makes her version about commission of gang rape on her highly doubtful. In somewhat similar situation, following are the observations of the Honourable Apex Court found in paragraphs 12 and 13 in its judgment in the matter of *Dola @ Dolagobinda Pradhan & Anr. v. The State of Odisha*¹

“12. Curiously, the victim has not sustained any injury except some bruises on her cheeks. Her clothes were not even soiled with mud. In her cross-examination, she admitted that there was a tussle at the time of the alleged incident, and that she tried to save herself. She also stated that both the accused persons physically lifted her from the spot, and her bangles had been broken, by which she had sustained bleeding injuries on her hands. Furthermore, she said that she also sustained marks of violence on her hands. She did not sustain any injury on her knee, breasts and buttocks. She stated that she has no acquaintance with the accused persons and she did not have any kind of dealings with them. She further admitted that she had worn eight bangles on

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each of her hands and all her bangles on the right hand were broken and only one bangle of the left hand remained unbroken, and that all the bangles were broken at the spot of offence.

13. Although the prosecutrix admitted that she sustained bleeding injuries on her hand because of the shattering of eight bangles worn by her on her right hand and seven bangles on her left hand, and had marks of violence present on her body, the medical records do not support the said version. The report of the medical examination is at Ext. 4. It is clearly mentioned in the said report that there is a bruise mark measuring half a centimeter, which can be caused by a hard and sharp object, on the right cheek. No other mark of injury was seen anywhere on the body. There is no injury on the breasts, there is no internal injury on any part of the body and no injury was found on the vulva, pelvis and vagina. There are no signs of injury on the thighs as well. Except for one bruise on cheek which measures half a centimeter, no other injury was found on the victim and the same is clear from the medical report (Ext. 4)."

16 Despite the fact that the prosecutrix/P.W.No.2 had reported to police in the FIR (Exhibit 35) lodged on the day of the incident that she was subjected to gang rape by three accused persons, why she has stated to P.W.No.10 Dr.Vasant Jamdhade that she was subjected to forcible vaginal intercourse by one person on that day is not explained by the prosecutrix/P.W.No.2 in

its evidence. Cross-examination of this P.W.No.10 Dr.Vasant Jamdhade shows that this history was given by the prosecutrix/P.W.No.2 to him when she was examined by him. She was examined by this Medical Officer on the day of the incident itself and this narration of the prosecutrix/P.W.No.2 to the Medical Officer even after lodgment of the FIR creates a serious doubt on her version which is regarding gang rape by three accused persons.

17 The prosecutrix/P.W.No.2 has stated in her evidence that all accused persons committed rape on her successively and after that incident was over, she immediately put her clothes and started proceeding towards her school. This is happened on 04/10/2011 and after lodgment of the FIR immediately, her clothes were seized on 04.10.2011 itself vide seizure panchanama (Exhibit 45). On the very same day of the incident, at the time of her medical examination sample of public heir, vaginal swab as well as vaginal smear of the prosecutrix/P.W.No.2 were taken. Report of medical evidence of the the prosecutrix/ P.W.No.2 which is at Exhibit 59 shows that the prosecutrix/ P.W.No.2 have not taken bath prior to drawing those samples which has done the very same day of the incident itself. Seizure panchanama (Exhibit 40) shows that at about 4.30 p.m. of 04/10/2011, clothes of the prosecutrix/P.W.No.2 including her knicker and slacks came to be seized before the P.W.No.1 Shankar Chaure. All these articles

were sent for chemical analysis by Investigating Officer P.W.No.11 Pradnya Jedge with a forwarding letter (Exhibit 69). If really the prosecutrix/P.W.No.2 was subjected to rape in an uncultivated field successively by three accused persons and as claimed by her if she had immediately put on her knicker and slacks after the act and started proceeding towards her school, then because of vaginal discharge, there ought to be some stains of semen on her pubic hair, knicker and slacks. As the sample were drawn on the day of the incident itself, in every probability her vaginal swab ought to have contain spermatozoa. However, forensic evidence like medical evidence is not supporting the case of the prosecution in any manner. Chemical Analysis report at Exhibit 15 shows that no semen was found on either vaginal swab or vaginal smear of the prosecutrix/P.W.No.2. Chemical Analysis report at Exhibit 16 shows that no semen was found on knicker, petticoat or frock of the prosecutrix/P.W.No.2. Thus, medical evidence as well as the forensic evidence is an contradiction with evidence of the prosecutrix/P.W.No.2.

18 In foregoing paragraphs of this Judgment I have also stated situation prevalent on the spot of the incident. It was just adjacent to Darebhangi to Mokbhangi tar road which, according to the version of the prosecutrix/ P.W.No.2, is a road having vehicular traffic. Even P.W.No.1 Shankar Chaure has stated that many bullock-carts as well as people to use that road. The spot of

incident was clearly visible from the adjoining road having heavy traffic. The incident alleged was that of gang rape by three adult persons by kidnapping and restraining the prosecutrix/ P.W.No.2 and her friend P.W.No.7 Alka Dhumse. Thus, on this backdrop, how the incident went unnoticed by anybody else is a question which is not getting answer from evidence of the prosecution.

19 In my considered opinion, the trial Court has convicted appellant/accused No.3 Nitin Shewale without considering all these circumstances in their proper perspectives. The learned trial Court failed to consider all the circumstances meticulously in the wake of the fact that the medical and forensic evidence is totally in contradiction with evidence of the prosecution. Inconsistencies the case of prosecution were lurking from documentary evidence adduced by the prosecution itself. However, it is seen that the learned trial Court has proceeded on the basis of assumptions and presumptions by concluding that there is ample evidence on record to prove the guilt. Evidence adduced by the prosecution is not of a standard required in criminal trial to prove the guilt. Principle of criminal jurisprudence requires that the prosecution must establish its case by cogent and convincing evidence. No matter how serious and heinous the crime is, the burden always rests on prosecution to prove guilt of the accused beyond all reasonable doubts. The same principle is equally applicable to the case of gang rape on the female victim. No doubt, allegations

made against the accused persons by the prosecutrix/ P.W.No.2 is very serious in nature, but the Court is duty bound to analyze the evidence in its proper perspective and if evidence of the prosecution does not prove the case beyond all reasonable doubts, the benefit thereof needs to be granted to the accused. Perusal of entire evidence adduced by the prosecution including oral as well as documentary shows that for reasons stated in foregoing paragraphs, case against the appellant/accused No.3 Nitin Shewale was not proved beyond reasonable doubts and, therefore, he could not have been convicted and sentenced as has been done by the learned trial Court.

20 In the result, the following Order :

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned Judgment and Order dated 12/01/2015 passed by the learned Additional Sessions Judge, Nashik in Session Case No.23 of 2012 so far as it relates to conviction of the appellant/accused No.3 Nitin Shewale of the offences punishable under Sections 376(2)(g), 363, 366-A, 341 read with Section 34 of the Indian Penal Code as well as resultant sentences is quashed and set aside.
- (iii) Appellant/accused No.3 Nitin Shewale is acquitted of the

offences with which he was charged. He be released from the custody forthwith, if not required in any case.

(iv) The fine amount, if any, paid by appellant/accused No.3 Nitin Shewale be refunded to him.

(v) The Appeal is disposed of accordingly.

(A.M.BADAR J.)