

Uday S. Jagtap

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 210 OF 2015

Mohammed Ashfaq Dawood Shaikh	]	
@ Baba, Age 25 years,	]	
Occ. Service, R/at Om Sai Guru	]	
Apartment, 2 nd Floor, Room No.202,	]	
Samart Nagar, Mumbra, Dist. Thane	]	
(At present in Nashik Central Prison)	]	.. Appellant
V/s.		
The State of Maharashtra	]	
(at the instance of N.M. Joshi	]	
Marg Police Station, C.R. No. 253 of	]	
2013 in C.C. No. 782/PW/2013	]	.. Respondent

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Ms. Anjali Patil a/w Mr. Aashay Topiwala, Mr. Abdeali Kothawala,
Ms. Mallika Sharma, Mr. Nouman Shaikh for the appellant

Mr. D.N. Salvi, Spl. PP a/w Mr. J.P. Yagnik, APP, Mr. Sahil Salvi, Mr.
Sagar Redkar for the respondent – State

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, J.J.**

**RESERVED ON : 14th OCTOBER, 2021
PRONOUNCED ON : 25th NOVEMBER, 2021**

JUDGMENT :- *(Per Prithviraj K. Chavan, J.)*

1. By this appeal, the appellant-original Accused no.1 – Mohammed Ashfaq Dawood Shaikh @ Baba has challenged the judgment and order of conviction dated 21st March, 2014 and sentence rendered by the Sessions Judge, Greater

Mumbai in Sessions Case No. 914 of 2013 by which he along with other three accused viz. Accused no.2 – Mohd. Kasim Mohd. Hasim Shaikh @ Bangali, Accused no.3 – Mohd. Salim Mohd. Abdul Kaddus Ansari, Accused no.4 – Vijay Mohan Jadhav @ Nanu have been convicted. Accused nos. 2 to 4 have not challenged the judgment and order of conviction.

2. The appellant – original Accused no.1 – Mohd. Ashfaq Dawood Shaikh *alias* Baba and other accused have been convicted by the learned Sessions Judge for having committed offences punishable under Sections 376(D) read with 120-B, 377 r/w 120-B, 354(B) r/w 120-B, 323 r/w 120-B and 506(II) r/w 120-B and 120-B of the Indian Penal Code.
3. Though distinct sentences have been awarded under each head, they have been sentenced to suffer Rigorous Imprisonment for life, which shall mean imprisonment of remainder of their natural life with fine of Rs.10,000/- each, in default further R.I. for one year each. The substantive sentences of imprisonment are directed to run concurrently.
4. It is the pathetic plight of the prosecutrix who, in her teens, had been subjected to gang rape, unnatural sex after wrongfully restraining and confining her in an abandoned and dilapidated premises of *Shakti* Mills by the appellant and rest of the accused on the fateful evening of 31.07.2013.
5. The prosecution case, as emerged from the record, can be

stated as follows :-

6. The prosecutrix was a telephone operator, working with “*Parivaratan Sandesh Foundation*” at Bhandup. PW-19 Krishna was her boyfriend. On 31.07.2013, they decided to visit Mahalaxmi Temple. They boarded a local train from Bhandup and alighted at Mahalaxmi Railway Station at about 7.30 p.m. They started walking towards Mahalaxmi temple. On the way, the prosecutrix stumbled upon a stone resulting into an injury to her left foot. Her left foot again entangled with creepers, which aggravated the pain and, therefore, they decided to return home instead of going to the temple. They were appraised of the shortest route by the passers-by to the Mahalaxmi Railway Station which was, unfortunately through the abandoned and dilapidated premises of *Shakti* Mills.

7. Due to her injured foot, she was unable to walk speedily and, therefore, the distance between passers-by ahead of them increased. The prosecutrix and PW-19 Krishna were walking slowly. Since the prosecutrix was experiencing unbearable pain in her foot, they decided to take a short break and sat upon a cement platform. At that point of time, two persons came over there and started assaulting both of them. They were later identified as Accused no.2 – Mohd. Kasim Mohd. Hasim Shaikh @ Bangali and Accused no.3 – Mohd. Salim Mohd. Abdul Kaddus Ansari. They accosted the prosecutrix and PW-19 Krishna and started assaulting them. When PW-

19 Krishna resisted their act, they tried to tie his both hands with her *odhani*. While strongly resisting the assailants, PW-19 Krishna pushed one of them aside, however, third person appeared at the scene suddenly and thereafter the first person started dragging the prosecutrix inside the shrubs. The second and third person thereafter succeeded in tying both hands of PW-19 Krishna behind with the said *odhani*. At that time, fourth person also reached at the spot and he too started assaulting the prosecutrix. When prosecutrix raised a hue and cry, the fourth person had gagged her by inserting his handkerchief in her mouth. It was the appellant who gagged the mouth of prosecutrix by means of a handkerchief by assaulting her. It is alleged that the appellant had also threatened the prosecutrix with dire consequences.

8. Despite repeated requests by the prosecutrix to the assailants to set her free, as she had been suffering from severe pain to her left foot, it fell on deaf ears. The first assailant held her hands and removed her clothes. In that process, the prosecutrix torn off his shirt. The prosecutrix was pinned down over a thick cloth and thereafter the first accused committed forcible sexual intercourse with the prosecutrix. She suffered tremendous pain, however, she could not raise shouts due to the handkerchief in her mouth and had experienced suffocation.
9. Thereafter, the second accused removed his clothes and he

too raped the prosecutrix. The second person thereafter called some one on his mobile by saying “मेरा काम हो गया तु आ जा”. He also said “माल आला आहे स्पॉट पे आजा फटाफट”. It was Accused no.3 – Mohd. Salim who gave his mobile to Accused no.2 – Mohd. Kasim, who said the above sentence. The third person arrived at the scene who has been identified as Accused no.4 – Vijay Mohan Jadhav.

10. After Accused no.3 – Mohd. Salim and the appellant – Mohd. Ashfaq came out, accused no.2 – Mohd. Kasim went inside and raped the prosecutrix. By that time, accused no.4 – Vijay M. Jadhav and juvenile-in-conflict-with-law had also arrived there. They too, in turn, subjected the prosecutrix to forcible sexual intercourse and also committed unnatural sex by inserting penis in her anus and forcing her to take penis in her mouth.
11. Thereafter, they brought her out from the shrubs to the place where PW-19 Krishna was held up with his hands tied. They untied his hands and brought both the prosecutrix and PW-19 Krishna to Mahalaxmi Railway Track. Before leaving them, the appellant and the accused had threatened the prosecutrix and PW-19 Krishna of dire consequences if they disclose the incident to anyone and thereafter went in the opposite direction. The prosecutrix and PW-19 Krishna returned to Mahalaxmi Railway Station.
12. On the way, the prosecutrix narrated entire incident to

PW-19 Krishna. When PW-19 Krishna suggested that they should inform her mother about the said incident, the prosecutrix restrained him from doing so as she had an apprehension that her mother might commit suicide. PW-19 Krishna assured that he would marry her even after such an episode. However, the prosecutrix was not willing to return home as she was mentally devastated and shocked. She had a feeling of humiliation and awkwardness.

13. After a deliberation, they decided to go to the State of Chattisgarh at the house of PW-19 Krishna's friend. As the knicker, undergarments and *odhani* of the prosecutrix, which were removed by the culprits, remained on the spot, PW-19 Krishna had purchased a T-shirt from a footpath vendor at Mahalaxmi bridge. Since PW-19 Krishna did not possess sufficient money for buying railway tickets, he borrowed Rs.1,500/- from his friend PW-4 Dipesh Pumbhalia. They boarded an early morning Geetanjali Express from C.S.M.T. for village Dohatra in Chattisgarh. They stayed in the house of PW-6 Manojkumar Satnami, Krishna's friend for a month or so and returned to Mumbai on 01.09.2013.
14. Here, at Mumbai, since the prosecutrix did not return home on the night of 31.07.2013, obviously, her worried mother PW-10 after making inquiries with the Manager of "*Parivartan Sandesh Foundation*" had lodged a missing report at Bhandup Police Station on 01.08.2013. On 02.08.2013, she received a phone call from the prosecutrix appraising her

that she was with her boyfriend PW-19 Krishna *inter alia* requested her mother to cancel / withdraw the missing report. When her mother went to the Police Station, Bhandup for cancelling / withdrawing the report, the police informed her that report would be cancelled only if she brings her daughter to the police station.

15. Upon their return to Mumbai on 01.09.2013, the prosecutrix narrated the entire incident of gang rape to her mother, due to which, her mother was mentally shattered and became unwell. After regaining normalcy, she took the prosecutrix to the Police Station, Bhandup, on the night of 02.09.2013 at about 10.30 p.m. for cancelling the missing report. During an inquiry by PW-22 – PSI, Yashwant V. Baravkar and PW-23 Deepali Kulkarni – a lady police officer, as regards her whereabouts for a period of one month, the prosecutrix disclosed everything to the police officers right from what had happened on 31.07.2013.
16. On the basis of what had been disclosed to the police, a complaint came to be recorded at Bhandup Police Station on the same night of the offences punishable under Sections 376(D), 323, 504 r/w 34 of the Indian Penal Code. Accordingly, a crime was registered at 02.10 a.m.
17. Since the spot of incident, as narrated by the prosecutrix i.e. defuncted *Shakti* Mills premises was falling within the jurisdiction of N.M. Joshi Marg Police Station, the

prosecutrix, PW-19 Krishna and mother of the prosecutrix were taken to N.M. Joshi Marg Police Station by PW-22 – Mr. Barawkar, PSI, along with the complainant. A crime came to be registered being C.R. No.253 of 2013 of the offences punishable under Sections 376(D), 377, 120B, 341, 342, 354(B), 506(II) r/w 34 of the Indian Penal Code at about 5.30 a.m. A supplementary statement of the prosecutrix also came to be recorded at N.M. Joshi Marg Police Station by PW-29 Nitu Tayade – PSI, explaining further details of the incident.

18. PW-25-Arun Mane – Police Inspector, took the prosecutrix and PW-19 Krishna to *Shakti* Mills premises. The spot of incident was shown to the police. A knicker, brassiere, *odhani*, beads of her bracelet which she was wearing at the time of incident and her water bottle were recovered from the spot under *panchanama*, which was drawn at about 10.30 a.m. Photographs of scene of occurrence were also snapped at that time.
19. The prosecutrix was referred for medical examination at about 01.00 p.m. on the same day to the Nagpada Police Hospital and thereafter to J.J. Hospital. The medical examination revealed that hymen was torn and she was suffering from Post Traumatic Stress Disorder as a result of a brutal gang rape committed upon her.
20. The juvenile-in-conflict-with-law–Akash, came to be arrested

on 03.09.2013 and during interrogation he had spilled the beans by disclosing the names of the other accused.

21. Astonishingly, within the premises of the same abandoned and dilapidated premises of *Shakti* Mills, similar incident of a gang rape had been committed upon a young intern Photojournalist on 22.08.2013 wherein these persons were the culprits and were already arrested.
22. A C.R. No.244 of 2013 was initially registered at N.M. Joshi Marg Police Station on 22.08.2013. On 25.08.2013, the investigation was transferred to DCB, CID, Crime Branch, Unit III, Mumbai and it was registered as DCB, CID, C.R. No.83 of 2013. In the said C.R. persons namely; (i) Vijay Mohan Jadhav (ii) Siraj Rehmat Khan @ Sirju (iii) Mohd. Kasim Mohd. Hasim Shaikh @ Bengali, (Accused no.2 in this crime) (iv) Mohd. Salim Mohd. Abdul Kaddus Ansari (Accused no.3 in the present case) and one juvenile-in-conflict-with-law (the trial Court withheld the full name to protect his identity) were arrested and remanded to the Custody of Crime Branch, Unit III in Byculla Jail.
23. Thus, having considered the description of the suspects as narrated by the prosecutrix in this case, the manner of commission of offence of gang rape, the spot of incident and other factors having similarity to a considerable extent *qua* the incident, which had occurred on 22.08.2013 coupled with the fact and the statement of juvenile-in-conflict-with-

law namely Akash revealed involvement of those accused persons in this crime also. As such, investigation of this C.R. was also handed over to DCB, CID, Crime Branch, Unit No.III, Mumbai on 05.09.2013 and it was registered as DCB, CID C.R. No.87 of 2013.

24. A test identification parade *qua* the appellant – Mohd. Ashfaq and other 4 accused namely; Mohd. Kasim, Mohd. Salim, Vijay Jadhav and Siraj Shaikh, who were arrested in C.R. No. 83 of 2013, was conducted in order to verify whether those accused were also involved in the present incident of gang rape.
25. During test identification parade conducted in Byculla Jail on 14.09.2013, the prosecutrix of this case and PW-19 Krishna identified accused no.2 Mohd. Kasim, accused no.3 Mohd. Salim and accused no.4 – Vijay Jadhav.
26. The appellant – Mohd. Ashfaq was arrested on 14.09.2013 pursuant to a secrete information received by the police. He too was identified by the prosecutrix and PW-19 Krishna during a test identification parade held at Thane Jail on 17.09.2013.
27. During investigation, the call detail records of the mobile phones used at the time of commission of offence by the appellant – Mohd. Ashfaq, accused no.2 – Mohd. Kasim and accused no.3 – Mohd. Salim which were already recovered at

their instance under Section 27 of the Evidence Act, were called from Vodafone and Tata Teleservices which established the exchange of calls between appellant – Mohd. Ashfaq, *vis-a-vis* accused no.2 – Mohd. Kasim and accused no.3 – Mohd. Salim during the incident as stated by the prosecutrix and PW-19 Krishna.

28. The Investigating Officer had recorded statements of witnesses including the mother of the prosecutrix, PW-19 Krishna's friend namely PW-6 Manojkumar Satnami, Krishna's employer – PW-4 Dipesh Pumbhalia. They seized *muddemal* articles including mobile handsets, medical samples and clothes of prosecutrix and accused. Those articles were sent for chemical analysis to the Forensic Science Laboratory.
29. After completing the investigation, a charge-sheet came to be filed against the appellant – Mohd. Ashfaq and the other accused in the Court of Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai on 08.10.2013. A separate charge-sheet was filed against juvenile-in-conflict with-law – Akash, in the Juvenile Justice Board.
30. After committal of the case to the Sessions Court by the Additional Chief Metropolitan Magistrate and having heard the learned Special Public Prosecutor and the four defence Counsel, the learned Sessions Judge framed a charge below **Exh.11** on 18.10.2013 against all the accused of the offences

punishable under Sections 120-B, 376(D), 377, 354(B), 341, 323, 506(II) r/w 120-B in the alternative r/w 34 of the Indian Penal Code. The charge was read over and explained to all the four accused. They pleaded not guilty and claimed a trial. Their defence was denial of the offences alleged and false implication due to the pressure from media and Senior Police Officers, as according to them, they were already in the custody of Crime Branch in C.R.No.83 of 2013. To substantiate the charge, prosecution examined as many as 31 witnesses. The learned Sessions Judge categorized the evidence of witnesses in 15 categories, as stated hereinbelow :-

“(I) Witnesses as regards actual incident :-

- 1) PW11 – Prosecutrix (Exh.46)
Complainant Exh.47
- 2) P.W. 19 – her friend, Pankaj @ Krishna Ramesh Kamble (Exh.68)

(II) Witnesses as regards subsequent conduct :

- 1) P.W. 4 – Dipesh Nathala Pumbhalia (Exh.29) from whom P.W. 19 – Krishna has borrowed the money.
- 2) P.W. 6 – Manojkumar Jagdishkumar Satnami (Exh.32) in whose house at Chattisgarh, prosecutrix and P.W. 19 – Krishna stayed for a month after the incident.

(III) Witnesses on the point of missing complaint :

- 1) P.W. 5 – P.I. Sanjay Ananda Baswat (Exh.30) who has recorded Missing Complaint and proved the entry in Missing Register (Exh.31)
- 2) P.W. 10 – prosecutrix’s mother (Exh.44)
Missing Complaint – Exh.45
- 3) P.W. 9 – Ms. Vaishali Jadishsingh Bons (Exh.39)

Bio-Date of prosecutrix – Exh.40
Attendance Register for the month of July and August, 2013 - Exh.41 and 42.

(VI) Witnesses as regards registration of complaint at Bhandup Police Station :

- 1) P.W. 22 – P.S.I. Yashwant Vitthal Baravkar (Exh.73), Complaint – Exh. 47, Proforma of FIR Exh.47A
- 2) P.W. 23 – W.P.S.I. Deepali Bhushan Kulkarani (Exh.74)

(V) Witnesses as regards registration of complaint at N.M. Joshi Marg Police Station

- 1) P.W. 25 – P.I. Arjun Shivaji Mane (Exh.77)
- 2) P.W. 29 – P.S.I. Neetu Rahul Tayade (Exh.99)

(VI) Witnesses relating to spot panchanama :

P.W. 1 – Sandeep Sharad Kanvinde (Exh.18), Interior Designer who has drawn sketch of the spot Fair Sketch (Exh.21)

P.W. 2 – Santosh Dharma Jadhav (Exh.23) who has clicked the photographs of the spot. Photographs – Exh.25/1 to 25/14 and their enlarged copies – Exh. 26/1 to Exh.26/14

P.W. 3 – Subhash Shamrao Deshmane (Exh.27) panch to the spot panchanama Spot Panchanama (Exh.28)

(VII) Witness as regards Medical Examination of Prosecutrix

P.W. 26. - Dr. Ms. Kiran Yadav (Exh.82) who conducted physical examination of prosecutrix Medical Certificate (Exh.84)

P.W. 24 – Dr. Maithili Shailesh Umate (Exh.75) who conducted psychological examination of prosecutrix. Mental Health Report of prosecutrix (Exh.76)

(VIII) Witnesses as regards arrest and recovery of accused No.1

P.W. 7 – Sunil Anant Madyalkar (Exh.33), panch witness

Memorandum Panchanamaa (Exh.34)

Seizure Panchanama (Exh.35)

P.W. 14 – Pravin Tukaram Marchande (Exh.59), panch witness concerning to personal search of accused no.1 – Mohd. Ashfaq, Search and Seizure panchanama (Exh.60)

P.W. 16 – A.P.I. Avinash Bhupal Kavthekar (Exh.64) who arrested accused no.1 and made inquiry.

IX) Witnesses regarding arrest and recovery evidence relating to accused No.2.

P.W.8-Pravin Amardas Parmar (Exh.36), panch witness

Photocopy of Memorandum panchanama of accused No.2-Mohd. Kasim (Exh.37) (Original in S.C. 846/13)

Photocopy of Recovery panchanama of accused No.2-Mohd. Kasim (Exh.38) (Original in S.C. 846/13)

P.W.12-Ravi Nagnath Dandagule (Exh.57) to whom accused No.2-Mohd. Kasim has sold his mobile.

P.W.15-A.P.I Vinod Tukaram Tawade (Exh.62) who arrested accused No.2-Mohd. Kasim and made inquiry with him.

Copy of panchanama (Exh.63) (Original in S.C.846/13)

X)Witnesses regarding arrest and recovery evidence relating to accused No.3.

P.W.18-Mr. Ajaykumar Laltuprasad Gautam (Exh.66), panch witness

Panchanama (Exh.67) (Original in S.C 846/13)

P.W.20-PI. Gulabrao Arjun More who arrested accused No.3-Mohd. Salim and made inquiry with him.

XI) Carriers of Muddemal to C.A.

P.W.13-PH Prakash Gajanan Shivkar (Exh.58)

P.W.17- PN Vijay Atmaram Desai (Exh. 65)

XII)Witnesses relating to Test Identification Parades

P.W.21-Tanaji Shivaji Patole (Exh.70) who has conducted Test Identification Parade at Byculla Jail wherein accused No.2-Mohd. Kasim, accused No.3-Mohd. Salim and accused No.4-Vijay were identified.

TI parade memorandum panchanama (Exh.72)

P.W.30-Vijay Mahadev Shete (Exh.113) who has conducted Test Identification Parade at Thane Jail wherein accused No.1-Mohd. Ashfaq was identified.

TI parade memorandum panchanama (Exh.116)

XIII) Witnesses relating to evidence of call detail records

P.W.27-Changdev Haribhau Godse (Exh.85), Nodal Officer from Vodafone Company

Call Detail Records – Exh.88

P.W. 28 – Mr. Baby John (Exh.90), Nodal Officer from Tata Teleservices

Call Detail Records – Exh.98

XIV)Investigating Officer

P.W.31-PI. Sanjay Devram Nikumbe (Exh.118)

XV) Defence Witness

D.W.1-Dayanand Shreenivas Kamat (Exh.158) Spl.

Correspondent D.N.A newspaper through whose evidence E-newspaper dated 04/09/13 is mareked as Art.X-3.”

31. The learned Sessions Judge, after evaluating the evidence on record adduced by the prosecution and after having heard the learned Counsel for the appellant and the other accused found that the prosecution has proved the charge against all the accused beyond all reasonable doubts and by the impugned judgment and order, convicted and sentenced the appellant and other accused as under :-

“1. Accused No.1 Mohd. Ashfaq Dawood Shaikh @ Baba, accused no.2 – Mohd. Kasim Mohd. Hasim Shaikh @ Bangali, accused no.3 – Mohd. Salim Mohd. Kaddus Ansari and accused no.4 – Vijay Mohan Jadhav @ Nanu are convicted as per section 235(2) of Cr.P.C. for the offence punishable under Section 376(D) r/w 120-B of IPC and sentenced to suffer Rigorous Imprisonment for life each, which shall mean the imprisonment of remainder of their natural life and to pay fine of Rs.10,000/- (Rs. Ten Thousand only) each, in default R.I. for 1 (one) year each.

2. Accused Nos. 1 to 4 are further convicted as per Section 235(2) of Cr.P.C. for the offence punishable under Section 377 r/w 120-B of IPC and sentenced to suffer Rigorous Imprisonment for 10 (Ten) years each and to pay fine of Rs.5,000/- (Rs. Five Thousand only) each, in default R.I. for 1 (one) year each.

3. Accused Nos. 1 to 4 are further convicted

as per section 235 (2) of Cr.P.C. for the offence punishable under section 354(B) r/w 120-B of IPC and sentenced to suffer Rigorous Imprisonment for 5 (five) years each, and to pay fine of Rs.3,000/- (Rs. Three Thousand only) each, in default R.I. for 6 (six) months each.

4. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offence punishable under section 323 r/w 120-B of IPC and sentenced to suffer Rigorous Imprisonment for 1 (One) year each, and to pay fine of Rs.1,000/- (Rs. One Thousand only) each, in default R.I. for 3 (Three) months each.

5. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offences punishable under Section 341 and 342 r/w 120-B of IPC and sentenced to suffer Rigorous Imprisonment for 1 (One) year each and to pay fine of Rs.1,000/- (Rs. One Thousand only) each, in default R.I. for 3 (Three) months each.

6. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offences punishable under Section 506(II) r/w 120-B of IPC and sentenced to suffer Rigorous Imprisonment for 5 (Five) years each, and to pay fine of Rs.1,000/- (Rs. One Thousand only) each, in default R.I. for 3 (Three) months each.

7. Accused Nos. 1 to 4 are further convicted as per section 235(2) of Cr.P.C. for the offence punishable under section 120-B of IPC and sentenced to suffer Rigorous Imprisonment for life each.

8. *All the substantive sentences of imprisonment of all the accused to run concurrently.*

9. *As per the proviso laid down under Section 376(D) of IPC, the entire fine amount, if recovered, shall be paid to the prosecutrix to meet the medical expenses and rehabilitation of the prosecutrix, after appeal period is over.*

10. *All the accused are in jail, hence, they are entitled to set off under Section 428 of Cr.P.C. for the period already undergone in jail for the punishments of other offences except for punishment under Section 376(D) as it implies that life imprisonment shall mean the imprisonment for remainder of their life.*

11. *As regards Muddemal Property, it shall be required for the case in respect of juvenile-in-conflict-with-law, hence, it may be preserved till the decision of that case and thereafter, it being worthless be destroyed except for mobiles of accused (Muddemal Article Nos. 11, 12, 13 and 20) and cash amount of Rs.1,550/- (Muddemal Article No.15), cash of Rs.300/- (Muddemal Article No.21) which may be confiscated to State, after appeal period is over.*

12. *Issuance of certified copy of judgment is expedited.”*

32. We have extensively heard Ms. Anjali Patil, learned Counsel for the appellant as well as the learned Special Public Prosecutor Mr. Salvi.

33. We have also perused the written submissions tendered on record on behalf of the appellant.
34. At the outset, Ms. Patil would argue that there is an inordinate delay of one month in registering the F.I.R which goes to the root of the matter and derails the case of the prosecution. She argues that identity of the appellant has not been established by the prosecution. Incident alleged in C.R No.87 of 2013 took place on 31.07.2013 and the incident alleged in C.R. No.83 of 2013 took place on 22.08.2013 and the F.I.R came to be registered in immediate subsequence of the alleged incident. According to the learned Counsel, accused No.2 to 4, in the present case, were arrested after the alleged incident of 22.08.2013 and the appellant herein was a suspect in C.R. No.83 of 2013 but due to lack of evidence he was not shown as an accused in C.R. No.83 of 2013. It is only due to the public outcry and due to the incident of 22.08.2013 and also in view of the media coverage of the same and also in view of the fact that sketches of the accused in C.R. No.83 of 2013 came to be widely published and circulated by different newsrooms, including the sketches of the appellant herein is nothing but a testimony of flawed investigation.
35. In short, it is submitted that implication of the appellant in the present case is nothing but manifestation of the means to substantiate public outrage and also to compensate for the infirmities and the crevices in the roles played by the

Investigating Officers and the Police. Test Identification Parade of the appellant, therefore, was a futile exercise as the identity of the appellant was already revealed through media publication.

36. So far as spot of incident is concerned, learned Counsel would argue that it was a secluded space devoid of any civilized amenities and had no recourse to light. Evidence reveals that there is a compound wall that segregates the railway tracks from the spot of the incident and, therefore, there is no possibility of any light from the moving trains to penetrate through the compound wall and provide illumination to the spot of the incident and aid the prosecutrix to notice and register the faces and identities of the accused in the sheer darkness of the night. The learned Counsel would further argue that use of torches of mobile by the accused is, in fact, a material improvement made by the prosecutrix in the course of her examination-in-chief in the trial Court.
37. As regards description of the appellant, learned Counsel would argue that prosecutrix had stated that the appellant was thin and attributed his role as the person who gagged her with a handkerchief. However, in her cross-examination, she states that in none of her statement before the Police she had stated that one of the accused was fat. Description of the accused who had put handkerchief in her mouth has been as a thin person with slight dark complexion, thin mustache and

height of 5'x5'. In the witness box, according to the learned Counsel, it was asked to the prosecutrix to say as to whether the appellant is thin, to which, she denied and, therefore, physical appearance of the appellant does not match with what has been stated by the prosecutrix in her statement before the Police.

38. On the aspect of Test Identification Parade, it is submitted that as per P.W.30-Vijay Shete-Naib Tahsildar it was conducted in a closed room at Thane Jail. However, the prosecutrix testified that it was conducted in an open ground. As such, Test Identification Parade was not carried out as per the prescribed rules and guidelines. As such, identity of the appellant has not been established by the prosecution.
39. So far as call detail records are concerned, it is submitted that a black Nokia phone was recovered from the custody of wife of the appellant. SIM card of the said mobile bearing No.7208834042 allegedly used by the appellant at the time of offence actually was registered in the name of one Vitthal B. Salunke who has not been examined by the Investigating Officer. Even statement of the wife of the appellant has not been recorded. The Investigating Officer had not collected CCTV footage of the railway station marking presence of the prosecutrix and her boyfriend P.W.19-Krishna on the date of the alleged incident and any proof of their departure to Chattisgadh by Gitanjali Express on the following day.

40. No train tickets were produced on record to substantiate the contention of their travel from Chattrapati Shivaji Maharaj Terminus, Mumbai to Chattisgarh. Our attention has been drawn by the learned Counsel to the spot *panchanama* recorded in C.R. No.83 of 2013 which came to be conducted on the very same day i.e on 22.08.2013. F.I.R in C.R No.87 of 2013 was registered on 03.09.2013 and spot *panchanama* was conducted on the same day. Distance between the two spots of the alleged incidents is 75 feet. During spot *panchanama* of 03.09.2013, articles of the prosecutrix namely; bracelet (Article -2 colly), a red coloured condom (Article 3 colly), a quilt (Article 4 colly), a knicker (Article 5 colly), a brassiere (Article 6 colly), half bush shirt (Article 7 colly), footwear (Article 8 colly), plastic bottle (Article 9 colly) and an *odhani* (Article 10 colly) were seized. The learned Counsel argues that none of the above articles were seized or recovered from the spot in the spot *panchanama* in C.R. No.83 of 2013 conducted on 22.08.2013. There is no medical evidence supporting prosecution case as no DNA of the appellant was detected on the spot or seized from the spot of incident. No external injuries were found on the private part or the person of the prosecutrix which disproves the case of the prosecution as against the appellant. Learned Counsel further argues that Dr. Nigam, who had medically examined the prosecutrix in the immediate aftermath of the alleged incident, has not be examined by the prosecution. As per the narration of the prosecutrix, she was bleeding from

her private parts and had sustained injuries, yet the statement of Dr. Nigam was not recorded to verify the authenticity of the imputations of rape.

41. It is further argued by the learned Counsel that the Sessions Judge declined to grant permission for the CDR and tower location of prosecutrix and her friend P.W.19 from 31.07.2013 to find out the truthfulness of the allegations of the prosecution. Right of the accused in view of section 315 of the Cr. P.C to have recourse to all material to prove his innocence is allowed only to the extent of CDR and the tower location of P.W.19-Krishna but denied of the prosecutrix.
42. As such, learned Counsel would conclude by submitting that the prosecution has miserably failed to prove its case beyond all reasonable doubts. Evidence on record is quite shaky and the chain of links connecting the appellant with the crime appears inconclusive. She, therefore, prayed for setting aside the conviction and acquitting the appellant of all the charges levelled against him.
43. On the other hand, Mr. Salvi, learned Special Public Prosecutor supported the impugned judgment and order by taking us through the record and evidence of various witnesses. Mr. Salvi would argue that investigation of this case has been carried out so meticulously and in a professional manner that there is hardly any room for doubt. He submits that there is no reason to disbelieve the

testimony of the prosecutrix which is corroborated by material particulars given by her boyfriend P.W.19-Krishna and other evidence on record in the form of spot *panchanama*, discoveries and other material on record.

44. To support his contention, Mr. Salvi has pressed into service a few case laws only on the point of procedural law, which cannot come in the way of imparting substantial justice. Mr. Salvi has invited our attention to a judgment of the Hon'ble Supreme Court in case of ***Rani Kusum Vs. Smt. Kanchan Devi & Ors. AIR 2005 SC 3304*** . An order passed by a learned Single Judge of Patna High Court was the subject matter of challenge in the appeal before the Hon'ble Supreme Court. By the impugned order, the learned Single Judge found no substance in the plea of the appellant that there was non-compliance with the requirements of Order VIII, Rule 1 of the Code of Civil Procedure, 1908 as amended by the Code of Civil Procedure (Amendment) Act, 2002. It would be apposite to extract the ratio laid down by the Hon'ble Supreme Court, which reads thus :-

“Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII, C.P.C. is circumscribed by the words – shall not be later than ninety days but the consequences flowing from non-extension of time are

not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.”

45. There can be no dispute about the principle that the object prescribed in procedure is to advance the cause of justice. All the Rules or Procedures are the handmaid of justice. This ratio takes care of the argument of the learned Counsel for the appellant that there were several procedural flaws committed by the trial Court.
46. Even though, accused No.1- Mohd. Ashfaq is the only appellant before this Court, it would be essential to scan and evaluate the entire evidence on record *qua* rest of the accused also to grasp clearly the role and sequence of events in light of the fact that charge under sections 376 (D), 120 (B) and 34 of the Indian Penal Code has been framed by the trial Court.
47. Oral evidence of the prosecutrix indicates that at the relevant time, she was studying in 9th standard in the Night School at Bhandup. Her school timings were from 6.00 p.m to 9.00 p.m and after the school hours, she used to work as a Call Operator in *Parivartan Sandesh Foundation*. Her widowed

mother was working as watchwoman in Thane. Indubitably, P.W.19-Pankaj @ Krishna Ramesh Kamble is her boy friend and lover. They met for the first time in the year 2008 while working for a caterer.

48. Turning to the incident, evidence of the prosecutrix indicates that after her duty hours as a Telephone Operator at *Parivartan Sandesh Foundation* on 31.07.2013, she and P.W.19-Krishna decided to go to Mahalaxmi temple and, therefore, boarded a local train to Mahalaxmi Railway Station. By 7.30 p.m, they reached Mahalaxmi Railway Station. However, on the way, the prosecutrix misstepped and stumbled upon a stone resulting into an injury to her foot. As the pain was unbearable, she asked P.W.19-Krishna that they would postpone the visit to Mahalaxmi Temple and would return home. Since she had been experiencing severe pains in her foot, they asked some passers-by for the shortest route to Mahalaxmi station. Passers-by asked them to follow as they too were going to Mahalaxmi Railway Station and, therefore, both prosecutrix and P.W.19-Krishna started following them. They were passing through the abandoned and deserted *Shakti* Mills compound covering shrubs, grass and trees. Left foot of the prosecutrix again entangled with the creeper resulting into increase in the pain. It has been specifically testified by the prosecutrix that since she had undergone a bone operation of her left foot about a month prior to the incident and, therefore, the wound was still unhealed. For the said reason, they started walking slowly,

as a result, passers-by to whom they were following, went much ahead of them.

49. Due to severe pain, the prosecutrix sat on a cement platform to drink some water from the water bottle which she was carrying with her. While she was drinking water and P.W.19-Krishna was standing beside her, two boys came over there and after holding her hand started dragging her and Krishna inside the shrubs. She got scared and started shouting "सोडा सोडा" (leave me) "बाचवा बाचवा" (save me). However, those two boys started assaulting her. One of them pulled her *odhani* (dupatta) and started tying hands of Krishna with it. When Krishna resisted, first person to whom the prosecutrix later identified as accused No.3-Mohd. Salim gave his mobile to the second person who was later identified as accused No.2-Mohd. Kasim and the said Mohd. Kasim spoke to someone on mobile by saying "माल आला आहे, स्पॉट पे आ जा फटाफट". Thereafter one more boy came over there to whom the prosecutrix later identified as present appellant accused No.1-Mohd. Ashfaq Dawood Shaikh @ Baba. Her evidence further indicates that accused No.2-Mohd. Kasim and accused No.1-Mohd. Ashfaq - present appellant, assaulted Krishna by tying his hands with her *odhani*. Mouth of Krishna was tied with remaining portion of *odhani* by accused No.2-Mohd. Kasim Mohd. Hasim Shaikh. However, when Krishna pushed him aside, accused No.2-Mohd Kasim Mohd. Hasim Shaikh threatened that if he shouts, he would be killed then and there. Thereafter, accused No.3-Mohd.

Salim Mohd. Abudl Kaddus Ansari forcibly dragged the prosecutrix inside the shrubs by holding her hands despite her request not to do so. She was shouting and crying.

50. Her evidence further reveals that fourth person to whom the prosecutrix later identified as Vijay Mohan Jadhav-accused No.4 also came over there and assaulted her. Appellant-Ashfaq then put his handkerchief in her mouth as she was shouting. Accused No.3- Mohd. Salim and appellant – Ashfaq thereafter took her inside the shrubs. Despite her resistance, they dragged her inside. They asked her to remove her clothes. When she refused, they assaulted her. In that process, she held shirt of accused No.3-Mohd. Salim. His shirt was, therefore, torn. In the said scuffle, his locket and her bracelet were broken.
51. Appellant – Ashfaq then held her hands and removed her clothes. Accused No.3-Mohd.Salim removed all his clothes, pushed and fell her on the ground. She testified that Accused No.3-Mohd.Salim asked her to take his penis in her mouth. When she refused, he forced his penis in her mouth. At that time, he was standing and he had made her to kneel. Then he made her to lie down on the ground and inserted his penis in her private part. Thereafter, appellant – Ashfaq removed his clothes and did the same thing. Her evidence further reveals that appellant - Ashfaq made a phone call and said "मेरा काम हो गया, अभी तु आ जा". Third person to whom the prosecutrix later identified as accused No.2- Mohd. Kasim

came over there. He too removed his clothes. She requested him to leave her as she was suffering from pains, however, he did not listen and said that she was complaining a lot. Thereafter, he beat her and inserted his penis in her private part. Her repeated requests to leave her alone fell on deaf ears.

52. Fourth person to whom the prosecutrix later identified as accused No.4 – Vijay Mohan Jadhav arrived at the scene. He too removed his clothes, lied on her body and inserted his penis in her private part. Thereafter, fifth person to whom the prosecutrix later identified as juvenile-in-conflict-with-law, Akash came over there by saying "किधर है किधर है" and the fourth person namely accused No.4-Vijay Jadhav told him "इधर है इधर है आ जा". The fifth person i.e juvenile-in-conflict-with-law Akash also came near her and removed his clothes. He inserted his penis in her mouth. She had a sensation of vomiting. Thereafter, the juvenile had put a condom on his penis and forcibly inserted his penis in her private part.
53. Her evidence further reveals that accused No.3-Mohd. Salim and appellant – Ashfaq again came over there and made her stand in a nude condition. Accused No.3- Mohd. Salim pressed her breast. He was nude and in standing position inserted his penis in her private part. After him, appellant - Ashfaq in the standing position itself inserted his penis in her anus. At that time, he was fully naked. Evidence further indicates that when appellant - Ashfaq inserted his penis in

her anus while in standing position, accused No.3 - Mohd. Salim had held her. Both appellant – Ashfaq and accused No.3 - Mohd. Salim have been identified by the prosecutrix during trial by deposing their specific roles at the time of the incident. She had also identified Accused No.4-Vijay Jadhav and Accused No.2-Mohd. Kasim, who had tied hands of P.W.19-Krishna with her *odhani*. She had identified appellant – Ashfaq being the same person who had put a handkerchief in her mouth. She identified Accused No.2 – Mohd. Kasim as the person who made a phone call and said "माल आला आहे, स्पॉट पे आ जा फटाफट". It is quite apparent from the aforesaid evidence that exchange of calls by the appellant - Ashfaq and the other accused *inter se* and the words uttered by them are sufficient enough to attract Section 10 of the Indian Evidence Act which opens with the words “where there is reasonable ground to believe that two or more persons have conspired together to commit an offence”. This is *prima facie* evidence of existence of the conspiracy between the appellant *vis-a-vis* the other accused. A statement made by one conspirator is admissible as against another conspirator *albeit* restricts to the statement made during the relevant period when the conspiracy subsists.

54. According to the prosecutrix, she started wearing her clothes over which she could lay her hands. She noticed blood oozing from her private part. She could not find her knicker and brassier. She, therefore, could wear only her *salwar* and *kurta*. She was brought to the place where Krishna was

sitting with hands tied. She noticed Krishna with several injuries which were bleeding. Krishna was freed by the accused and both were brought to Mahalakshmi Railway track. The accused threatened both of them that they should not disclose anything and if they do so, they would be killed. All the five accused thereafter went in opposite direction. The prosecutrix was crying and was undergoing tremendous pains and agony. She had narrated the entire incident to Krishna. The learned Additional Sessions Judge observed in the judgment that she could notice tremendous agony and pains of the prosecutrix while recording her evidence. The prosecutrix had, in graphic details, deposed about the incident including specific roles played by each of her tormentors.

55. The testimony of the prosecutrix has been substantially corroborated by her friend P.W.19-Krishna. It is needless to reiterate the evidence which would be nothing but repetition of what has been testified by the prosecutrix right from their plan to visit Mahalaxmi temple till hands of P.W.19-Krishna were tied and the prosecutrix was dragged into the shrubs by the accused. It is pertinent to note that the spot where the prosecutrix was dragged by the accused was not visible from the place where Krishna was tied. However, he noticed first accused No.3 – Mohd. Salim returning to him and then accused No.2 – Mohd. Kasim entering into the bushes. Thereafter, he noticed accused No.3 – Mohd. Salim and appellant – Ashfaq and also the fifth person i.e accused

No.4 – Vijay Jadhav and juvenile-in-conflict-with-law Akash were going and coming outside one after other. He had also identified all of them as that of the prosecutrix. He had categorically testified that the prosecutrix was in a frightened condition and was crying. Her clothes were torn. Her bracelet was missing. Her hair were in disordered condition. Accused persons brought them towards railway track. Accused threatened P.W.19-Krishna and the prosecutrix not to inform the Police as they knew where the prosecutrix stays and they would kill her. In a frightened condition, they started proceeding towards Mahalaxmi Railway Station. He testified that at Mahalaxmi Railway Station, he made her sit, gave her water to drink and thereafter she had narrated the entire episode as to how those five persons committed forcible rape on her and also did dirty things.

56. The evidence of the prosecutrix *vis-a-vis* P.W.19-Krishna, if juxtaposed, is found to be quite consistent in so far as time, mode, place and manner of occurrence. There is hardly anything to disbelieve the version of these two witnesses as even the defence could not make any dent, rather substantial dent during cross-examination, in the sense, their testimonies could not be rebutted save and except bringing on record minor omissions and contradictions, which are quite natural. The spontaneity and immediacy of the statement of PW-19 Krishna *qua* the relevant facts is so natural and relevant that there is hardly any scope of doubt its truthfulness. It is indeed a *Res gestae* evidence of PW-19 Krishna in view of

Section 6 of the Indian Evidence Act.

57. It is pertinent to note that the prosecutrix had immediately disclosed about the incident to P.W.19-Krishna which will have to be given necessary credence and assurance to her testimony coupled with the fact that even the subsequent conduct of both of them further lends assurance to her testimony as regards occurrence of the incident. In the words of Hon'ble Justice V.R. Krishna Iyer, in a judgment reported in ***AIR 1981 SC 559 (Rafiq Vs. State of U.P)*** on the aspect of corroboration as a condition for judicial reliance on the testimony of a prosecutrix, it has been observed thus :-

“Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioral complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed.”

Needless to add anything more on the aspect of seeking corroboration to the testimony of the prosecutrix.

58. Now, coming to the evidence as regards the stay of the prosecutrix and P.W.19-Krishna in the house of his friend in village Dohatra in the State of Chattisgad. h.
59. When P.W.19-Krishna suggested the prosecutrix that they should inform about the incident to her mother upon which the prosecutrix refused by contending that her widowed mother, who had already suffered a trauma in her life, would be mentally so shocked that she might commit suicide. However, it appears from the evidence that despite all these happenings, P.W.19-Krishna was firm on his assurance to marry out with the prosecutrix and, therefore, consoled her. P.W.19-Krishna, therefore, suggested that for the time being they can go to the house of of his friend Manoj at Chattisgarh and stay there for some time to which prosecutrix agreed.
60. P.W.19-Krishna had bought a T-shirt for the prosecutrix as she was without *odhani* and under garments. P.W.19-Krishna even did not have sufficient money to buy tickets to go to Chattisgarh and, therefore, he called on his *Seth* Dipesh Pumbhalia. He informed him that his father was sick and, therefore, he wanted to go to his village urgently for which he requires money. Accordingly, P.W.4-Dipesh Pumbhalia called P.W. 19-Krishna at Ghatkopar Railway station to collect money. Prosecutrix and P.W.19-Krishna went to Ghatkopar Railway Station. The prosecutrix stood near ticket counter and Krishna went to meet Dipesh Pumbhalia. Dipesh

Pumbhalia gave him Rs.1500/-.

61. The couple returned to VT station and spent a night on the platform. They boarded early morning Mumbai Hawrah Geetanjali Express to proceed to village Dohatra. His evidence further reveals that after reaching Dohatra, the prosecutrix made a phone call to her mother and told her that she is with Krishna and she should not take tension.
62. They went to the house of P.W.6-Manoj. P.W.19-Krishna introduced the prosecutrix as his wife and they had come there for outing. They stayed in the house of P.W.6-Manoj for about a month. It is specifically testified by P.W.19-Krishna that the prosecutrix used to cry daily by recalling the incident as she was suffering from pain. There is full support to the version of Krishna by P.W.4 - Dipesh Pumbhalia with whom Krishna was working as a labourer in caterer business from January, 2013 till July, 2013. In short, it has come in the evidence of P.W.4 - Dipesh Pumbhalia that on 31.07.2013 between 8.30 p.m and 9.00 p.m, he received a call from Krishna that his father was ill and he wanted to go to his village in Chattisgarh. He required some money and, therefore, this witness called Krishna at Ghatkopar Railway Station around 11.30 p.m to 12.00 p.m in the midnight and gave him Rs.1500/-. Naturally, PW-19 Krishna did not disclose the real facts to PW-4 Dipesh Pumbhalia. No sane man would expect that.

63. P.W.6 – Manojkumar Satnami, Krishna's friend has also supported the evidence of P.W.19-Krishna and prosecutrix as regards their visit to his house at Village Dohatra and their stay for about a month. According to P.W.6-Manojkumar, P.W.19-Krishna and the prosecutrix came to his house on 2nd August, 2013 at about 7.00 a.m. P.W.19-Krishna introduced the prosecutrix as his wife and told him that they had come to his village for outing. After staying for a month, they left for Mumbai on 31.08.2013. He identified P.W.19-Krishna and the prosecutrix when he was confronted with their photographs **Exh. 26/1, 26/2 and 26/8** which were clicked at the time of drawing spot *panchanama*. Merely because in the cross-examination, he had stated that both Krishna and the prosecutrix were happy does not *ipso facto* mean that they were not undergoing trauma, pain and sufferings during and after the incident. As it has been elicited in the cross of P.W.19-Krishna itself that whenever they used to be alone, the prosecutrix used to cry recalling the incident of gang rape upon her. P.W.19-Krishna had clarified in his cross-examination by the defence that in the presence of his friend Manojkumar and his family members, the prosecutrix used to show that she was happy but in fact, whenever they were alone in the room, she used to cry. The cross-examination also reveals that whenever the family members of P.W.6-Manojkumar used to ask the prosecutrix as to why she was always sleeping, the prosecutrix used to tell them that due to severe pain in her foot and waist, she is required to sleep. These aspects further strengthen the prosecution case as

regards the fact of committing the offence of gang rape upon her. The anguish and extreme pains of the prosecutrix can be unmistakably indicated from the evidence.

64. We do not find any reason to disbelieve the evidence of the witnesses in respect of missing report lodged by P.W.10 - mother of the prosecutrix, whose evidence indicates that the prosecutrix left the house at 9.30 a.m on 31.07.2013, in order to go to her job as a Telephone Operator in *Parivartan Sandesh Foundation*. She did not return home and, therefore, P.W.10 made a phone call to *Parivartan Sandesh Foundation* and inquired about her. She was informed from the said office that the prosecutrix had attended the office on 31.07.2013 but she did not attend the office on 01.08.2013. P.W.10 therefore, lodged a missing report with Bhandup Police Station with a description as well as clothes of the prosecutrix which were on her person when she left the house for the office in the morning of 31.07.2013. Missing report is at **Exh.45**. It reveals that the prosecutrix was wearing punjabi suit with a black coloured *odhani* having silver border. The bracelet with blue and white beads. P.W.10 had identified muddemal-Article 10 during the course of the trial i.e *odhani* which was recovered from the spot of the incident.
65. When P.W.10 received a phone call of her daughter on 02.08.2013 at about 7.00 a.m in the shop near her house and when the prosecutrix informed her that she was with Krishna

and asked her mother not to worry, P.W.10 went to the Police Station to withdraw the report. The evidence reveals that despite repeated requests, the prosecutrix did not disclose her whereabouts to P.W.10 but she informed her mother (P.W.10) that she would come soon as she was suffering from pain. When P.W.10 went to withdraw the missing report, the Police asked her to bring the prosecutrix to the Police Station and then they would cancel the missing report. The prosecution has tendered, apart from the missing report **Exh.45**, extract of missing register, **Exh. 31** which is proved by P.W.22-Yashwant Baravkar, P.S.I attached to Bhandup Police Station. The missing register **Exh.31** also depicts the photograph of the prosecutrix and, therefore, it appears that on the missing complaint **Exh. 45**, no separate photograph of the prosecutrix was affixed.

66. P.W.9-Vaishali Bons, was Proprietor of a NGO by name *Parivartan Sandesh Foundation* at Bhandup (West). She has corroborated the evidence of the prosecutrix to the effect that the prosecutrix had been to the office on 19.07.2013 for the job of telemarketing. At that time, she had given her bio-data (**Exh.40**) which was in the handwriting of the prosecutrix. The prosecutrix had joined the said Institution and was on training from 20.07.2013. On 21.07.2013, it was Sunday and, therefore, she was absent, however, she was present in the office from 24.07.2013 to 31.07.2013. Her oral evidence is corroborated from the original register/muster of attendance of the employees maintained by her in

the regular course of business. It is at **Exh.41**.

67. During their stay at Village Dohatra, the prosecutrix was taken to one lady Doctor Nigam by P.W.19-Krishna as she was suffering from pain. Doctor Nigam gave some tablets which she was taking during her stay in the house of Krishna's friend, namely, Manojkumar. It has come in her evidence that neither Doctor asked her about the incident nor she on her own disclosed anything to the Doctor. The prosecution could not summon Dr. Nigam, however, P.W.31-Mr. Sanjay Nikumbe, PI, DCB, CID Unit-III testified that he had talked with Dr. Nigam on telephone number which was given by P.W.19-Krishna and that Dr. Nigam informed P.W.31-Sanjay Nikumbe that she had not asked anything to the victim about the rape. She had prescribed certain medicines and accordingly the prosecutrix had been taking those medicines. Thus, it has been sufficiently brought on record about the stay of the prosecutrix with P.W.19-Krishna at his friend's house at Dohatra and also the fact that she was examined by a lady Doctor Nigam who has prescribed certain medicines, however, Doctor Nigam was not appraised about the rape by the prosecutrix. Naturally, prosecutrix again would not appraise Dr. Nigam about the incident, for, once having come to the house of Krishna's friend as a married couple for an outing, she would not be expected to reveal everything, especially such a horrific incident. It is not the case of prosecution that the prosecutrix was examined internally by Dr. Nigam. Therefore, there was no occasion for the Doctor

to say anything in respect of rape or unnatural sex. There was obviously a danger of being criticized and looked down by the society.

68. There is evidence of both prosecutrix and P.W.19-Krishna in respect of return journey from Dohatra on 31.08.2013. They reached Bhatapara Railway Station near Bilaspur. From Bilaspur, they reached Mumbai on 01.09.2013 at about 12.00 p.m in the noon. The prosecutrix made a phone call to her mother. Instead of going to her house, the prosecutrix asked her mother P.W.10 to meet her at Chintamani Garden at Mulund. At home, after dinner when P.W.10 again inquired with the prosecutrix as to where she was for so many days, the prosecutrix thereafter narrated the entire incident. Hearing the same, P.W.10 was so shocked that she started feeling unwell. She took rest on the next day. On the same day, in the evening the prosecutrix with her mother went to Bhandup Police Station at about 10.00 p.m. Their signatures were obtained in the register of missing complaints by the Police Officer. However, when the lady Police Officer asked the prosecutrix as to where she was for such a long period, the prosecutrix burst and ultimately narrated the entire incident of rape on her by the five accused in the evening of 31.07.2013. The complaint to that effect came to be recorded at **Exh.47** at Bhandup Police Station. Thereafter, P.W.19-Krishna, lady officer and the prosecutrix's statements came to be recorded and in the morning they were brought to N.M. Joshi Marg Police Station where again their

statements came to be recorded.

69. According to the evidence of P.W.22-Yashwant Baravkar, P.S.I who was attached to Bhandup Police Station on 02.09.2013, the prosecutrix, P.W.10 and P.W.19-Krishna came to the Police Station at 10.30 p.m. After inquiry, he cancelled the missing report and made an entry to that effect in the register. The prosecutrix was weeping at that time and, therefore, P.W.22-Yashwant Baravkar had called P.W.23-Mrs. Deepali Bhushan Kulkarni – Woman P.S.I who made inquiry with the prosecutrix. The statement so made by the prosecutrix was subsequently treated as a complaint (**Exh. 47**).
70. During the course of inquiry by P.W.23-Deepali Kulkarni, Woman P.S.I, the prosecutrix was not in a position to narrate the exact place of incident, therefore, with the help of google map, place could be pinpointed as defunct *Shakti* Mills premises. The printed proforma **Exh.47-A** has a mention of the place of the incident which was in the jurisdiction of N.M. Joshi Marg Police Station. As such, an F.I.R under 00 number was registered and thereafter P.W..22-Yashwant Baravkar took the prosecutrix, P.W.19-Krishna and P.W.10-mother of the prosecutrix to N.M Joshi Marg Police Station.
71. At N.M Joshi Marg Police Station, P.W.29-Ms. Neetu Rahul Tayade-Woman Police Sub Inspector who was on the night duty registered the offence in view of the report given by P.W.22-Yashwant Baravkar. It was registered as C.R. No.253

of 2013 for the offences punishable under sections 376 (d), 377, 341, 342, 323, 504, 506 (II) r/w 34 of the I.P.C.

72. So far as spot *panchanama* is concerned, it has come in the evidence of P.W.25-Arun Shivaji Mane that he had been to the spot along with the prosecutrix, photographer and the team of chemical analyzers along with dog squad and P.W.19-Krishna. The spot of the incident was shown both by the prosecutrix and P.W.19-Krishna. They had also shown the first spot where she had sustained injuries to her foot and Krishna had shown the spot where he was tied with *odhani*. Photographs of all the places were snapped. The prosecutrix had shown the spot to the *panchas* and the Police Officer where she was gang raped by the accused. There was a quilt, beads of her bracelet spread over there, one used condom, one footwear of red and black border which, according to the prosecutrix was of one of the accused. One bra and knicker which she identified as her own and a plastic water bottle with "Nimbus" displayed over it. P.W.25-Arun Mane had collected all the articles from the spot under a *panchanama*. There was one half shirt of ash coloured and grey coloured *odhani* which was hanging over the tree. *Panchanama* is at **Exh.28**. All these articles were identified by the prosecutrix, P.W.19-Krishna and P.W.25-Arun Mane. Entries of all those articles were taken in *Muddemal* register. *Muddemal* was handed over to *Muddemal* clerk in a sealed condition. P.W.3-Subhash Deshmane, an independent *panch* to the spot *panchanama* had corroborated testimonies of the

prosecutrix, P.W.19-Krishna and P.W.25-Arun Mane.

73. P.W.2-Santosh Jadhav was a photographer who was summoned by P.W.25-Arun Mane to the spot of the incident. He took 14 photographs of the premises and articles from the different angles which were shown by the prosecutrix. Photographs have been duly proved at **Exh. 25/1** to **Exh. 25/14** and enlarged copies are at **Exh. 26/1** to **Exh. 26/14**. P.W.2-Santosh Jadhav has also produced memory card vide Article No.1 and the bill of charges of the photographs at **Exh. 24**.

74. The prosecutrix was examined at Nagpada Police Hospital who was accompanied by P.W.29-Ms. Neetu Rahul Tayade, W.P.S.I along with forwarding letter **Exh.52**. She was examined by Medical Officer of Gynecological Department. Since there was no lady Doctor, prosecutrix refused to get herself examined by a male Doctor. Accordingly, she made an endorsement which is at **Exh.52** with her signature. She was, therefore, taken to J.J. Hospital along with a requisition letter where she was examined by a lady Doctor. P.W.26-Dr. Ms. Kiran Yadav at J.J. Hospital examined the prosecutrix along with Dr. Ashok Anand on 03.09.2013 at 3.00 pm after obtaining consent and willingness of the prosecutrix. The prosecutrix had given history of the gang rape by five unknown persons on 31.07.2013 about 8.30 pm at *Shakti* Mills Compound while she was accompanied with her boyfriend P.W.19-Krishna. History is noted in the

certificate at **Exh. 84**.

75. On examination, it was noticed that her Hymen was already torn at 2, 6 and 9 o'clock position and admitting two fingers. After collecting various swabs and samples a certificate was issued at **Exh.84**. This evidence may not be of much importance in view of the fact that she was examined nearly after a month after the incident and in view of the fact that she had stayed with her boyfriend, PW.19-Krishna at Village Dohatra. What is important in this case is the psychological examination of the prosecutrix conducted by a team of Doctors.
76. In that regard, evidence of a team of three Doctors comprising of Dr. Kale – Professor and Head of the Department, Dr. Ashish Kuthe and PW.24 - Dr. Maithili Shailesh Umate, Assistant Professor in the Department of Psychiatry at Grant Medical College, would be important.
77. As per the evidence of PW.24 – Dr. Maithili Shailesh Umate, after examining the prosecutrix by the team on 04.09.2013 and 06.09.2013, they noticed that she was suffering from Acute Post-traumatic Stress Disorder. Her mental status examination revealed that her mood was sad and affect was appropriate. She has ideas of helplessness and worthlessness. Her concepts and judgments were intact and insight was present. At the time of interview, she seemed to be sad and was crying. She was interviewed mainly in respect of her

psychological status and the incident which occurred with her, so also the team had taken into account the result of psychological test showing hyper sensitivity to traumatic incident with depressive features. Accordingly, a certificate was issued which is proved at **Exh. 76**.

78. Statement of the prosecutrix recorded under section 164 (5) of the Cr. P.C by the Metropolitan Magistrate corroborates the aforesaid findings arrived at by the team of experts, in material particulars, as also the complaint of the prosecutrix and her evidence.
79. Turning to the aspect of assailment of the judgment by the defence on delayed F.I.R. Much stress has been given by the defence that there was an inordinate delay of about a month which creates doubt about veracity of the prosecution case as, according to the defence, it has been brought on record that there is possibility of the present appellant being made a scapegoat along with other accused by the Police just to show their efficiency due to the pressure of the media and the superior officers. The law on the aspect of delay in lodging the F.I.R in such cases is no more *res integra* and by a catena of decisions, it has been held that if delay has been properly explained, then there should not be any reason to suspect any embellishment or afterthought. The learned Sessions Judge has, therefore, referred various case laws on that subject. The Hon'ble Supreme Court in the case of ***Amar Singh Vs. Balwinder Singh and others, (2003) 2 Supreme***

Court Cases 518 held thus;

"Mere delay by itself is not enough to reject prosecution case unless there are clear indications of fabrication. Delay by itself is not a circumstance to doubt the prosecution case. At the most, it will call upon the court to subject the evidence to a closer scrutiny. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters of appreciation and much depends on the facts and circumstances of each case and for this a host of circumstances like the condition of the informant, the nature of offence, the circumstances in which the incident has taken place etc. have to be taken into consideration".

In the words of the Apex Court;

"There is no mathematical formula by which a inference can be drawn either way, merely on account of delay in lodging the FIR".

80. In case of ***Ravindra Kumar and another Vs. State of Punjab (2001) 7 SCC, 690***, the Apex Court has held as under;

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It is to be noted that the law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course, a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is

that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. Even a promptly lodged FIR is not an unreserved guarantee for the genuineness of the version incorporated therein. Hence, when there is a criticism on the ground that FIR in the case is delayed, the court has to look into the reason, why there was such a delay.

“There can be a a variety of genuine causes for FIR lodgment to get delayed. Hence the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodgment cannot be approved as a legal corollary. In any case, where there is delay in making the FIR, the Court has to look into the causes for it and if such causes are not attributable to any effort to concoct a version, no consequence shall be attached to the mere delay in lodging the FIR”.

81. In the case of sexual offence, law is more than well settled and it is very common to come across the delay in lodging the FIR. In the words of the Hon'ble Supreme Court in the landmark decision in the case of ***State of Punjab Vs. Gurmit Singh and others, AIR 1996 Supreme Court, 1393:-***

"In sexual offences delay in lodging of the FIR can be due to variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a

complaint of sexual offence is generally lodged. Hence, even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter".

82. It was further observed by the Hon'ble Supreme Court;

"In the normal course of human conduct, an unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to others over-powered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy".

As per the Apex Court, the girl in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society.

83. Reverting back to the facts in the case at hand, it is apparent that the incident had occurred when the prosecutrix was passing through *Shakti* Mills premises along with P.W.19-Krishna and landed accidentally in a deserted and dilapidated place. There is no doubt that she was subjected to the most humiliating, horrendous and embarrassing form of sexual assault by the five accused, that too, in the presence of her boyfriend with whom she was to marry. It is

unfathomable to evaluate and experience the feelings of helplessness and worthlessness of a small girl who was in her late teens, could not resist such brutal assault which fact has already been substantiated through the experts of the medical field hereinabove.

84. Be it noted that the prosecutrix and her boyfriend were not only assaulted but were threatened of dire consequences, if they approach the Police or disclose the incident to anyone. In such condition, no sane man would expect that a couple from such a lower strata at such a young age, after having undergone such brutality would immediately approach the Police. It is difficult even to visualize the mental state of both of them who were totally overpowered by the event and must be in a bewildered state of mind. It is worthwhile to note that the prosecutrix had immediately disclosed the incident to P.W.19-Krishna in whom she had full faith and Krishna, having realized the gravity and seriousness of the incident could not have thought of approaching the Police immediately. Even a well built person with a sound background, if confronted with such a situation, would find himself helpless and confused and would not be in a position to take immediate and prompt decision in approaching the Police. Moreover, in view of our tradition bound non permissive society where the reputation and honour of the family of a victim of sex assault is at stake, it is not expected that an immediate report would be lodged.

85. Moreso, as already stated hereinabove, it has come in the evidence of the prosecutrix that if the incident is made known to her mother, she would go to the extent of committing suicide. The learned Sessions Judge has, therefore, rightly observed that the prosecutrix was the best person to know the effect of reporting the incident to the Police which might result not only in committal of suicide by her mother who is a widow but about the reputation of the family putting in stake. This is significant in light of the fact that elder sister of the prosecutrix had already married out of religion with a Bengali Muslim and, therefore, her mother had totally snapped relations with her elder sister. It appears from the impugned judgment that even the learned Special P.P had rightly argued before the trial Court that we cannot sit over her judgment as regards feelings of the prosecutrix or it's impact.
86. It is evident from the record that after returning from village Dohatra on 01.09.2013, the prosecutrix had disclosed about the incident to her mother, due to which, her mother suffered a mental shock and became unwell. After taking rest on 02.09.2013, she along with P.W.19- Krishna and her daughter i.e. the prosecutrix went to Bhandup Police Station, not to lodge a report about the incident of rape but to cancel the missing report as has been testified by P.W.22-Yashwant Baravkar - P.S.I and P.W.19-Krishna. It is apparent that till the last moment, they had not thought of lodging the complaint with the Police even after returning to Mumbai. It is only

when the prosecutrix started crying during her inquiry, P.W.22-Yashwant Baravkar - P.S.I with the assistance of P.W.23-Deepali Bhushan Kulkarni - Woman P.S.I could gather the reasons for her cries and then, accordingly recorded her statement as stated hereinabove as regards the incident.

87. Obviously, the prosecutrix wanted to go away not only from the place of the incident but perhaps wanted to forget such horrendous act of a gang rape. Thus, conduct of the prosecutrix and P.W.19-Krishna leaving for Dohatra in the State of Chattisgarh without disclosing about the incident cannot be viewed as something which is unnatural or uncommon. It was rather a natural conduct and reaction of the prosecutrix and her boyfriend P.W.19-Krishna.
88. For the reasons stated hereinabove, we find that delay has been properly explained by the prosecution. A suggestion put forth by the defence that the couple had eloped as mother of the prosecutrix was against her marriage rather fortifies the fact that they had been to village Dohatra where they resided at the house of Manojkumar Satnami, friend of P.W.19-Krishna, for a month.
89. In case of *Tarun Bora Vs. State of Assam, 2002 SCC (Cri.) 1568* as well as in case of *State of Maharashtra Vs. Bharat Fakira Dhiwar, AIR 2002 S.C 16*, it has been held that suggestions given in the cross-examination are under the instructions of the client and hence have different

dimensions. Suggestions though are not defined in the Evidence Act, they can be stated in common parlance as putting up story by one party to witness of another party. Especially, when suggestion is of a fact, it has different colour and contour. Law presumes that implied facts are also admitted by the defence whether suggestions are admitted by witness or not.

90. In so far as challenge to the medical evidence by the defence is concerned, it is contended that having subjected the prosecutrix to such a brutal sexual assault and unnatural sex by five accused, there ought to have been injuries both on her private part, body and anus. It would be far-fetched to think about any fresh injury marks on the person of the prosecutrix, as admittedly, she was examined after a period of one month. As per the evidence of P.W.26 – Dr. Ms. Kiran Yadav, hymen was torn at 2, 6 and 9 o'clock position admitting two fingers. There were no other visible injuries. There is an admission of Dr. Kiran Yadav that hymen can be torn by any penetration where sexual intercourse is with or without consent. Argument of the learned Counsel for the appellant that if medical evidence does not corroborate the version of the prosecutrix, in such cases, her sole testimony should not be relied upon cannot be accepted for the simple reason that medical examination was not conducted immediately after the incident. Secondly, injuries such as scratches and abrasions, which the prosecutrix might have sustained must have been healed without leaving any visible

marks. The marks could be visible only if the injuries had been skin-deep. It is not the evidence of the prosecutrix that she had sustained such skin-deep injuries on other parts of her body. What has come in her evidence is that she was dragged in the shrubs and was pinned down.

91. P.W.26-Dr. Ms. Kiran Yadav had admitted during the cross-examination that it was possible to penetrate penis by a person in the vagina as well as anus by another person when the woman is in the standing position, simultaneously. It is the evidence of the prosecutrix that Accused No.3-Mohd. Salim and appellant - Ashfaq had committed such unnatural sex with her in such standing position. Injuries, if any, sustained to her vagina and anus obviously got healed by the passage of time. As such, absence of the injuries on the body of the prosecutrix can be easily explained. Even, the prosecutrix and P.W.19-Krishna have spoken about medical treatment given to the prosecutrix by Dr. Nigam at Village Dohatra. In such situation, it would be difficult to construe that the prosecutrix had no injuries at all at the time of the incident.
92. In case of *Wahid Khan State of Madhya Pradesh, (2010) 2 SCC, 9* which was relied on in case of *Ganga Singh Vs. State of Madhya Pradesh, (2013) 7 Supreme Court Cases 278*, it has been held thus :-

"Even though there was no medical evidence to

corroborate the testimony of the prosecutrix, such corroboration is not necessary where the evidence of the prosecutrix was otherwise consistent and stood corroborated by other circumstances and the FIR".

93. Thus, it can be seen that medical evidence is not *sine qua non* for proof of prosecution case relating to sexual offence. *Sine qua non* is the testimony of the prosecutrix. The litmus test is her credibility, her veracity, her truthfulness and how far she has withstood the test of cross-examination. If she has, then her sole testimony is sufficient, absence of medical evidence notwithstanding to prove the occurrence of incident. Here, in the case at hand, there is sufficient cause shown for the absence of such medical evidence.
94. Having carefully analyzed the evidence of the prosecutrix as well as PW-19 Krishna, we find that their testimonies are reliable, truthful and inspire full confidence. Small infirmities in the evidence of the prosecutrix and PW-19 Krishna, in fact, do not make any serious dent in the fabric of the entire prosecution story of the witnesses. The Supreme Court in the case of ***Gurmit Singh and Ors. (supra.)***, which was a landmark judgment, observed thus :-

"In cases of sexual assault and rape, the Courts shoulder a great responsibility while trying an accused. They must deal with such cases with utmost sensitivity. The Court should examine broader probabilities of case and not swayed by such minor inconsequential details. The Court should not search for contradictions and variations

microscopically so as to disbelieve the version of the prosecutrix”.

The ratio is squarely applicable to the case in hand.

95. As regards some of the details not appearing either in the complaint of the prosecutrix or in her further statement recorded in N.M. Joshi Marg Police Station, it can be seen that the prosecutrix was subjected to brutal and horrendous sexual assault even in an unnatural manner by the accused. It cannot be lost sight of the fact that the complaint came to be lodged after more than a month and that too, when she had been to the police station not with an intention to lodge the complaint but to withdraw the missing report lodged by her mother PW-10. Obviously, in the presence of a male police officer the prosecutrix could not have spelt out all the details, including the fact that one of the accused has forced his penis in her mouth. The embarrassment of the prosecutrix at the relevant time can be understood. As such, that can hardly be a reason to disbelieve her otherwise cogent and acceptable version in the trial Court. As already stated above, in such cases, it is incumbent upon the Court to examine the broader probabilities of the case and should not get swayed away by minor inconsequential details. Even otherwise, the first information report is not an encyclopedia so as to contain all the minutest details of an incident. Its object is only to set the criminal law into motion.

96. In the case of ***Chandrashekhar Sureshchandra Bhatte Vs.***

State of Maharashtra, 2001 SCC (Cri.) 1504, it has been observed by the Hon'ble Supreme Court that;

“it is a prerogative of the public prosecutor to elicit such points from a witness as he deems necessary for the case. No public prosecutor can be nailed to the statement recorded under Section 161 of the Criminal Procedure Code.”

97. A statement recorded under Section 161 of the Cr.P.C. *vis-a-vis* evidence recorded in the Court is bound to be somewhat different. The public prosecutor is expected to stick up to the police statement. His object is to get proper explanation from the witness to bring true facts before the Court and to assist the Court in arriving at just decision. The clarification, elucidations or explanations obtained by the Public Prosecutor by asking questions to the witnesses, while discharging his duty towards the Court, as an officer of the Court, cannot affect credibility of the witness. During the process of examining the witness in order to ascertain the truth, if the Public Prosecutor puts some questions to the witness, the witness is bound to depose and give details of the incident, which were not elucidated from the witness, would he or she was interrogated by the police. The trial Court has, therefore, rightly placed useful reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Narayan Chetanaram Chaudhary & Anr. Vs. State of Maharashtra, 2000 SCC (Cri.) 1546***, which was pressed into service by the learned public prosecutor, which read thus :-

“If the so called improvements are in fact the details of narration extracted by the Public Prosecutor and the defence Counsels in the course of examination in chief and cross examination of the witness, then they cannot be considered as dishonest improvements made by the witness in his or her testimony. It is always necessary for the Court while assessing the alleged omissions or improvements to see whether they are dishonest improvements capable of dislodging the prosecution case, creating doubt about his veracity and whether they are on vital point to brand such witness as a got up witness. If the omission is totally irreconciling with the prosecution story, then only omission amounts to contradiction.”

98. The Hon’ble Supreme Court in the aforesaid judgment clarified as to when an omission amounts to contradiction. It has further been held in the said judgment, which reads thus :-

“Marginal variations on certain aspects as between the statement of the witness recorded by the police under Section 161 Cr.P.C. and his testimony in the Court can not be dubbed as improvements made with any sinister motive. They are elaborations elicited by the Public Prosecutor during the examination-in-chief.”

99. In the case of ***Esher Sing Vs. State of Andra Pradesh, (2004) 11 SCC 585***, it has been observed that though some statements were made for the first time in Court and not during the investigation, it has to be seen as to what extent they diluted the testimony of prosecutrix or other witnesses. A mere elaboration cannot be termed as discrepancy. When

the basic features are stated, unless the elaboration is of such nature that it creates a different contour or colour of the evidence, the same cannot be said to have totally changed the complexion of case.

100. In the case of ***Esher Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753*** it has been observed thus :-

“5. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen;

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect

people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.”

101. It would be unrealistic to expect that the prosecutrix and PW-19 Krishna would remember each and every minute details without committing any error or mistake, for, a normal human being is not expected to possess a photographic memory and his brain should be like a tape recorder. It is quite obvious that in the given circumstances, it would be extremely difficult to recollect each and every aspect, the version and the acts committed by the accused and to reproduce it in sequence. It is of common knowledge that power of observation differs from person to person. What one may notice, other may not. Here is the prosecutrix – a young girl, who had undergone such a horrendous experience and trauma that it is hardly expected from her to

explain all minute details when subjected to a searching cross examination by the defence. It is quite obvious for the witness to get confused due to nervousness and the atmosphere of the Court and to miss some details here and there. The earlier witnesses who had psychologically examined the prosecutrix had already testified in that regard.

102. PW-21-Tanaji Shivaji Patole, who was then Tahasildar and Executive Magistrate and PW-30 Mr. Vijay Shete, Nayab Tahasildar had conducted test identification parade. PW-21 Tanaji Shivaji Patole conducted the test identification parade of accused no.2 - Mohd. Kasim, accused no.3 – Mohd. Salim and accused no.4 - Vijay Mohan Jadhav at Byculla Jail on 12.09.2013 (**Exh.71**).

103. We are concerned with the testimony of PW-30 Vijay Shete, who had conducted test identification parade *qua* the appellant – Ashfaq in Thane jail on 17.09.2013 vide letter dated 16.09.2013 (**Exh.114**) issued by the Senior PI. Crime Branch. The prosecutrix and PW-19 Krishna had duly identified the appellant – Ashfaq in the said test identification parade. The appellant – Ashfaq was arrested on 14.09.2013 and immediately thereafter his test identification parade was conducted by PW-30 – Vijay Shete on 17.09.2013. Despite searching cross-examination of PW-30 Vijay Shete by the defence, nothing can be elicited which would render his testimony unworthy of credit. PW -

30 Vijay Shete had no axe to grind against the appellant – Ashfaq. Normally, the test identification parade is conducted to ascertain that the investigation is proceeding in the right direction. The substantive evidence as regards involvement of the accused in the case is their identification in the dock by the witnesses at the time of trial. What is required to be seen by the Court while evaluating the evidence relating to the test identification parade of an accused is whether there were sincere efforts on the part of the Magistrate to get himself assured that the ability of the witnesses to recognize the suspect has been fairly and adequately decided which is the object of the test identification parade and further whether the test identification parade, in general, can be called as fair so as not to cause any prejudice to the accused. Naturally, some laxity in the manner of conducting the test identification parade is bound to occur when 4 test identification parades were held and that too of 4 accused and 2 witnesses. These minor discrepancies do not go to the root to wipe out its evidence and its value totally from the record. The Hon'ble Supreme Court in the case of ***State of Maharashtra Vs. Suresh 2000 SCC (Cri.) 263*** held thus :-

“If potholes were to be ferreted out from the proceedings of the Magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable. We remind ourselves that identification

parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to testify the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parades is achieved. If he permits dilution of the modality to be followed in a parade, he should seen to it that such relaxation would not impair the purpose for which the parade is held”

104. One more important aspect of the case is that in cases of such nature, it is not necessary to say that the victims of sexual offences, especially of gang rape, had more than sufficient opportunity and proximity with the accused to identify them later in the Court. It would be apposite to extract the observation of the learned Sessions Judge as regards the identification of the accused. Para 199 of the said judgment reads as below :-

“199. First and foremost circumstance is the nature of the offence which is of sexual assault and molestation. It is absolutely not necessary to say that victims of sexual offences especially of gang rape, had more than sufficient opportunity and proximity with the accused to identify them later in the Court. Moreover, the nature of offence is such that it is simply inconceivable and would be in flagrant disregard of

human psychology to hold that the prosecutrix or victim will forget the faces of her tormentors. Those faces must have been imprinted forever on her mind. Therefore, whenever she remembers or recalls the incident or even without doing so, those faces must come vividly before her eyes. She will identify them out of hundreds and even after lapse of years. To hold otherwise or disbelieve the prosecutrix on this aspect, hence will be defying the logic and reason. One has to take realistic and sensitive approach in such case. Therefore, the nature of offence which provided utmost opportunity for the prosecutrix to observe the accused, coupled with the psychological impact it has made on her makes it necessary to believe her evidence to prove identification of the accused made by her in the Court”.

105. Here is a case where not only the prosecutrix but also her boyfriend PW-19 Krishna had an equal opportunity to observe each of the accused as his evidence to that effect is quite consistent when he testified as to how the accused were going one after another to commit rape upon the prosecutrix and rest of the accused continued detaining him till another comes back. PW-19 Krishna had also full opportunity to observe each of them. It is equally important to note that the prosecutrix had categorically testified about the use of mobile torch light by the accused which they held at the relevant time. *Muddemal* Article no.11, a mobile which was recovered from the appellant had such a torch as deposed to by the *panch* witness also. The evidence of the prosecutrix also revealed that there was light from the bogies of the train also at the relevant time as well as from the

adjoining buildings as testified by PW-19 Krishna. How the prosecutrix would forget face of the appellant who had put handkerchief in her mouth when she raised shouts.

106. There is a recovery of mobile at the instance of appellant – Ashfaq by PW-16- Avinash B. Kavthekar, A.PI attached to DCP, CID, Unit No.II. PW-31-Sanjay D. Nikumbhe, PI DCB CID Unit-III after receiving the papers from N.M. Joshi Marg Police Station on 05.09.2013 noticed that the appellant – Ashfaq was absconding. A search team was formed to arrest him. When his house was searched at Mumbra as well as houses of his parents, friend's and relative's, he was not found. On 14.09.2013 PW-16 API-Avinash Bhupal Kavthekar received a secrete information that the appellant – Ashfaq Dawood Shaikh was likely to come to Girgaon Chowpatty behind the statue of Lokmanya Tilak. He informed in-charge-officer, PI. Raje and along with a printer, laptop and other material, the team went to Girgaon Chowpatty and laid a trap. Around 4.30 p.m. a person was found in a suspicious condition who was identified as the appellant – Ashfaq. On inquiry, he confirmed his name and, therefore, in the presence of PW-14 – Pravin T. Marchande and *panch* Yogesh Vaishya, a personal search was taken wherein a black coloured mobile of Nokia company along with a wallet containing Rs.1,550/-, one attendance card, 3 visiting cards, two railway tickets dated 06.09.2013 from Ajmer to Bandra and dated 14.09.2013 from Vadodra to Mumbai Central were recovered. The mobile was sealed in a separate envelope

and the *panchanama* (**Exh.60**) was drawn on the spot. There was no effective cross-examination of PW-16 API-Avinash Bhupal Kavthekar, PW-14 – Pravin Tukaram Merchande and a *panch* Yogesh Vaishya. Those two railway tickets explain the absence of the appellant – Ashfaq after the incident as a result of which, there was some delay in his arrest though his role had transpired in the incident immediately just like roles played by each of the other accused.

107. As per the evidence of PW-31 Sanjay Devram Nikumbe. PI , the appellant – Ashfaq while in custody, on 22.09.2013 expressed his desire to give a disclosure statement. In the presence of PW-7 Sunil Anant Madyalkar and another panch-Narendra Mhadalkar, his memorandum statement in Hindi came to be recorded. He had stated that mobile which he had on 31.07.2013 is with his wife and he is ready to produce the same if they accompany him. The memorandum statement was recorded (**Exh.34**). He led the police party and the witnesses in the Scorpio vehicle near Mumbra Railway Station in front of a Masjid. Thereafter, he took the team to the third floor in Kothari building at Jeevan Baug. He took them to Room No.303. His wife namely Nasrin Mohd. Ashfaq was present in the house. At the instance of the appellant - Ashfaq, she produced mobile of Nokia company having a torch. When the mobile was sealed in the presence of the *panch* witnesses, it had a sim card. The Police Officer had noted the IMEI number as well as Sim card

in the *panchanama*. The sim card was again placed into the mobile along with the battery and it was then kept in a brown cover, which was sealed and affixed with the labels and signatures of the *panchas*. Thus, a *panchanama* was drawn at **Exh.35**. The witnesses had identified the said mobile handset. In the cross-examination, it has been surfaced that the said mobile was having sim card of Vodafone company and its IMEI number is 353751049773860. We are only concerned with the mobile number of the appellant – Ashfaq, which was 7208834042. The Call details record vide **Exh.98** is in respect of Mobile No.7208834042, which is standing in the name of one ‘Vitthal Salunkhe’ along with Certificate **Exh.97** and also the information relating to cell ID of 24242 i.e. Mahalaxmi, Mumbai and Cell I.D of 1311 i.e. E. Moses Road. The summary of mobile calls exchanged between these three mobile numbers is as under :-

DATE	TIME	DURATION	LOCATION OF CALLING PARTY	LOCATION OF CALLED PARTY
31/07/2013	20.08	25	9920465351 (Accused No.3- Mohd. Salim) Cell I.D No.24242 Mahalaxmi	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24242 Mahalaxmi
31/07/2013	20.10	11	9920465351 (Accused No.3- Mohd. Salim) Cell I.D No.24242 Mahalaxmi	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.1311 Opp. E. Moses Road
31/07/2013	20.18	13	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D.	9920465351 (Accused No.3- Mohd. Salim) Cell I.D No.1311

			No.24242 Mahalaxmi	Opp. E. Moses Road
31/07/2013	20.24	11	9769125965 (Accused No.2- Mohd. Kasim) Cell I.D. No.42251 J.R. Boricha Marg	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24242 Mahalaxmi
31/07/2013	20.25	22	9920465351 (Accused No.3- Mohd. Salim) Cell I.D No.24242 Mahalaxmi	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24242 Mahalaxmi
31/07/2013	20.26	12	9920465351 (Accused No.3- Mohd. Salim) Cell I.D No.24242 Mahalaxmi	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24242 Mahalaxmi
31/07/2013	20.36	122	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24242 Mahalaxmi	9920465351 (Accused No.3- Mohd. Salim) Cell I.D No.24242 Mahalaxmi
31/07/2013	20.41	11	9769125965 (Accused No.2- Mohd. Kasim) Cell I.D. No.42251 J.R. Boricha Marg	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24242 Mahalaxmi
31/07/2013	20.44	26	9769125965 (Accused No.2 – Mohd. Kasim) Cell I.D. No. 41532 J.R. Boricha Marg	7208834042 (Accused No.1 – Mohd. Ashfaq) Cell I.D. No. 24242 Mahalaxmi
31/07/2013	20.55	25	9920465351 (Accused No.3- Mohd, Salim) Cell I.D. No.24243 Mahalxmi	7208834042 (Accused No.1- Mohd. Ashfaq) Cell I.D. No.24243 Mahalaxmi

108. A bare look at the aforesaid call detail records with exchange of calls *vis-a-vis* location of calling party and location of called party on 31.07.2013 fully supports and corroborates the testimony of both the prosecutrix and PW-19 Krishna. Nothing more is required to be discussed as regards the exchange of calls between accused, their respective mobile numbers as well as the appellant – Ashfaq and the tower locations. This is a clinching evidence pointing out towards the guilt of the appellant - Ashfaq. The evidence is quite inspiring in proving the fact that all the accused were not only present on the spot, but were consistently in touch with one another, as deposed to by the prosecutrix and PW-19 Krishna.
109. As regards contention of the defence that mobile handsets of the appellant – Ashfaq and accused no.2 – Mohd. Kasim are not standing in their names, it can be seen that the CDR containing IMEI number of each mobile handset over which the call is generated and received, PW-27 Changdev Godse, Nodal Officer, Vodafone Company, who has deposed that each mobile handset has a unique 15 digit IMEI number. The IMEI numbers of all the three handsets recovered from the appellant – Ashfaq, accused no.2 – Mohd. Kasim and accused no.3 – Mohd. Salim are reflected in CDR. Thus, the sim card standing in their names or not is totally irrelevant. It has been identified by PW-27 Changdev Godse and PW-28 Baby John, Nodal Officer from Tata Teleservices that call details are recorded automatically and there is no human

intervention. Even the call sites from which call is made and call is received are noted automatically. There is no question of any manipulation of this data. A call by appellant – Ashfaq by saying “मेरा काम हो गया तु आ जा” and then accused no.2 – Mohd. Kasim coming inside and committing rape upon the prosecutrix and lastly the fifth person i.e. juvenile-in-conflict-with-law coming there and saying “किधर है किधर है” and the fourth person namely accused no.4 Vijay Jadhav saying “इधर है इधर है आ जा” also points towards the only inference that the entire incident had happened pursuant to a criminal conspiracy hatched by the appellant and rest of the accused who were always in search of helpless girls entering into the premises and then subjecting such girls to gang rapes.

110. We say so for the reason that how all of a sudden all of them landed over there immediately after the calls. The utterances of accused no.2 – Mohd. Kasim to accused no.3 – Mohd. Salim that “माल आला आहे स्पॉट पे आ जा फटाफट” and then arrival of the other accused is quite sufficient to hold that it was a well hatched conspiracy. The learned Sessions Judge has, therefore, rightly placed reliance on a judgment of the Hon'ble Supreme Court in the case of **“Firozuddin Basheeruddin and Ors. Vs. State of Kerala, 2001 SCC (Cri.) 1341.** wherein it is observed thus :-

252. As regards conspiracy, law is well settled that as generally conspiracy is hatched in secrecy, it may be difficult to adduce direct evidence of the same. As

held in the authority of Firozuddin Basheeruddin and Ors. V. State of Kerala, 2001 S.C.C. (Cri.) 1341 relied upon by Spl. P.P. to infer about criminal conspiracy, the prosecution will often rely on evidence of act of various parties to infer that they were done in reference to their common intention. Though the offence requires some kind of physical manifestation of agreement, the law does not require that the fact of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties ‘actually came together and agreed in terms’ to pursue the unlawful object, there need never have an express verbal agreement it being sufficient that there was a tacit understanding between conspirators as to what should be done.”

111. Insofar as defence witness Mr. Dayanand S. Kamat – the Special Correspondent in DNA Newspaper of its electronic edition of ‘Mumbai Mirror’, dated 04.09.2013 is concerned, it is in respect of a news publication in view of the press conference held by the Police. It is the contention of the defence that it was published much prior to the Test Identification Parade of the appellant – Ashfaq and other accused and hence, the prosecutrix and PW-19 Krishna could easily identify the appellant – Ashfaq in the said parade. We are afraid we cannot buy the arguments for the simple reason that even though there was a news item published in the DNA newspaper on 04.09.2013, photographs of none of the accused, much less, photograph of appellant – Ashfaq appeared in the said newspaper. Thus, there is no question of identifying the appellant – Ashfaq in the Test Identification

Parade on the basis of the said publication of the news. The prosecutrix as well as PW-19 Krishna have specifically denied the suggestion as regards watching any news to that effect either in the newspaper or watching the television. The trial Court has not exhibited the news article for want of its proper proof and, therefore, it even cannot be looked into as an admissible evidence.

112. We are afraid we cannot buy the arguments of the learned Counsel for the accused that the prosecution has failed to prove the charge beyond reasonable doubts. Even if there are some minor defects in the investigation or negligence of the Investigating Officer, it would not affect the credibility of evidence of the prosecutrix and other witnesses. There are several case laws on this aspect. The learned Sessions Court has, therefore, rightly placed useful reliance upon a judgment in the case of ***Dhanaj Singh alias Shera and Ors. V. State of Punjab, 2004 SCC (Cri.) 851*** and ***C. Muniappan and Ors. Vs. State of Tamil Nadu, 2010 (3) SCC (Cri.) 1402*** wherein it has been categorically held that :-

“If primacy is given to such designed or negligent investigation, to the omissions or lapses by perfunctory investigation, the faith and confidence of the people would be shaken, not only in the law-enforcing agency but also in the administration of justice as doing so would tantamount to playing into the hands of the Investigating Officer.”

113. The Hon'ble Supreme Court of India in ***Writ Petition (C) No. 565 of 2012*** titled as ***Nipun Saxena v/s. Union of India***, opined that :-

“It would be appropriate if NALSA sets up a committee of about 4 to 5 persons who can prepare Model Rules for Victim Compensation for Sexual Offences and Acid Attack taking into account the submissions made by the learned Amicus.

The learned Amicus as well as learned Solicitor General have offered to assist the committee as and when required. The Chair person or the nominee of the Chair person of National Commission of Women should be associated with the Committee.”

In view of the above directions of the Supreme Court, NALSA set up a committee consisting of the experts from various fields for preparation of model scheme. The NALSA has submitted the compensation scheme for women victims / survivors of sexual assault / other crimes and submitted the report before the Supreme Court on 24.04.2018. According to that scheme, the schedule applicable to Women victims of Crimes shows that survivor of gang-rape would be entitled to Rs.10 lakhs. Besides this, the survivor would also be entitled to compensation under the Maharashtra State Victim Compensation Scheme. Accordingly, this judgment be sent to the District Legal Service Authority (DLSA) forthwith and the DLSA shall issue notice to the survivor and disburse the said amount within 30 days from the date of receipt of the judgment.

114. Having considered the entire facts and circumstances and evidence on record and the impugned judgment, we are of the firm opinion that the prosecution has proved its case beyond all reasonable doubts as regards the complicity and the role played by the appellant – Ashfaq along with rest of the accused in committing the offences with which he has been charged. Even otherwise, sole testimony of the prosecutrix itself is sufficient to establish the guilt of the accused, however, it finds support from her boyfriend PW-19 Krishna and her mother. The prosecution has collected all the incriminating articles from the spot as well as the call detail records.
115. The learned Sessions Judge, before parting with the judgment had observed certain disturbing features in respect of medical examination of rape victim by the doctors of J.J. Hospital who had followed the degrading and unscientific archaic “two finger test” in examination of prosecutrix though the Hon'ble Supreme Court in case of ***Lilu @ Rajesh and Anr. V. State of Haryana, MANU/SC/0369/2013*** has taken a serious note of it and condemned it by observing in para 12 and 13, which read thus :-

“In view of International Covenant on Economic, Social and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize

them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with her privacy.

Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.”

116. We hope that the State of Maharashtra would take necessary steps to shun all such unscientific and heavily criticized “two finger tests”. It appears that the Government of Maharashtra has formulated some guidelines. We expect and hope that the State will strictly adhere to the same.
117. Corollary of the entire discussion made hereinabove is that the impugned judgment and order of conviction dated 21st March, 2014 and sentence rendered by the Sessions Judge, Greater Mumbai in Sessions Case No. 914 of 2013 does not warrant interference in appeal. The appeal is devoid of merits and hence, stands dismissed.

(PRITHVIRAJ K. CHAVAN, J.)

(SMT. SADHANA S. JADHAV, J.)