

(2009) 03 GUJ CK 0086
In the Gujarat High Court

Case No : Criminal Appeal No's. 2258 and 2275 of 2004 and 266 and 955 of 2005

Nitin alias Nitu Ramprasad Bachicha (Dhobi)

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 377
Evidence Act, 1872 — Section 114A
Penal Code, 1860 (IPC) — Section 114, 328, 342, 354, 363

Citation : (2009) CriLJ 2330 : (2009) 2 GLH 242 : (2009) 2 GLR 1223 : (2010) 6 RCR(Criminal) 1177

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : R.J. Goswami, for the Appellant; M.A. Patel, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—All these appeals arise out of a judgment and order rendered by learned Additional Sessions Judge, Fast Track Court No. 6, Vadodara on 29.10.2004 in Sessions Case No. 40 of 2004. The appellants in Criminal Appeal No. 2258 of 2004, Criminal Appeal No. 2275 of 2004 and Criminal Appeal No. 266 of 2005 were original accused Nos. 2, 3 and 1, respectively. Criminal Appeal No. 955 of 2005 came to be filed by the State of Gujarat u/s 377 of the Criminal Procedure Code, for enhancement of sentence.

2. The learned Additional Sessions Judge, by virtue of the impugned judgment and order dated 29.10.2004, convicted all the above referred three appellants being original accused Nos. 1, 2 and 3 along with original accused Nos. 4 and 5, who are respondents No. 4 and 5 in State appeal bearing Criminal Appeal No. 955 of 2005 for the offences punishable under Sections 328, 354, 342, 363, 366, 376(2)(g) read with Section 114 of the Indian Penal Code ("IPC. for short), and

each of them was sentenced to undergo R.I for five years and fine of Rs. 250/-, in default of payment of fine, imprisonment for one month for the offence punishable u/s 328 of the IPC; R.I for one year and fine of Rs. 250/-, in default of payment of fine, imprisonment for one month for the offence punishable u/s 354 of the IPC; R.I for six months and fine of Rs. 250/-, in default of payment of fine, imprisonment for one month for the offence punishable u/s 342 of the IPC; R.I for four years and fine of Rs. 500/-, in default of payment of fine, imprisonment for two months for the offence punishable u/s 363 of the IPC; R.I for five years and fine of Rs. 500/-, and in default of payment of fine, imprisonment for two months for the offence punishable u/s 366 of the IPC; and R.I for ten years and fine of Rs. 1000/-, in default of payment of fine, imprisonment for one month for the offence punishable u/s 376(2)(g) of the IPC. All the substantive sentences of imprisonment were ordered to run concurrently and the period of judicial custody was ordered to be given as set-off. It was further directed that out of the amount of fine realized, Rs. 10000/- to be paid to the victim -Naynaben by way of compensation. Feeling aggrieved and dissatisfied with the order of conviction and sentence recorded by the trial Court, the original accused Nos. 1, 2 and 3 preferred the above referred three appeals and State of Gujarat preferred Criminal Appeal No. 955 of 2005 u/s 377 of the Criminal Procedure Code, for enhancement of sentence, feeling inadequacy in the sentence already awarded by the trial Court to the appellants as well as to co-accused.

3. The prosecution case in nutshell is that on 26.10.2003, at about 14.00 hours, first informant Naynaben Mohanbhai was waiting for her mother on the road, which was situated in the area called Nava Bazar, behind police chowki in the city of Vadodara, at that time, the three appellants along with co-accused persons came near Naynaben in rickshaw, and one of them showed one chit to Naynaben, inquiring about some address contained in the chit, and at that time, one another accused put an handkerchief on her nose and made her to inhale some intoxicant and she lost her consciousness. Thereafter, at about 10 p.m., she regained her consciousness and she found herself in a room, wherein glass bottles, including broken glasses were stored. At about 11 p.m., the accused came inside the room and took her from said room to one flat. It is the case of the prosecution that in said flat, she was gangraped by original accused Nos. 1, 2 and 4, one by one. She was undressed by the accused persons. However, subsequently, she was able to escape from the flat, and in a naked condition, she knocked the door of one neighbour called Revaben. Revaben gave her shelter and provided her clothes to wear and at about 7 a.m. to 7.30 a.m. on next day morning i.e. on 27.10.2002, she came to her house and narrated the incident to her mother Kapilaben Mohanbhai, PW-10. Immediately, no FIR came to be lodged. However, on 31.10.2003, press-reporters of one local TV news channel Rudresh Jagdish-chandra (PW-12) and Hiren Rajendrabhai came to her house and met her parents, and thereafter, both the press-reporters took first informant - victim Naynaben and her parents to the Commissioner of Police,

Vadodara and narrated the incident, and Commissioner of Police asked them to go to PCB police station, Vadodara for lodgment of FIR and the FIR came to be lodged by first informant - victim Naynaben in PCB police station, Vadodara. Investigation was commenced. During the course of investigation, medical examination of victim Naynaben was performed. Statements of material witnesses were recorded. In the FIR, names of two accused persons, namely original accused Nos. 1 and 2 were referred, and therefore, they came to be arrested. During the course of investigation, three more accused persons came to be arrested. Medical examination of all the five accused persons were carried out. Panchnama of scene of offence was drawn in presence of panchas. Articles recovered were forwarded to FSL for examination, test identification parade ("TIP", for short) was arranged in presence of Executive Magistrate Pahadsinh Rathwa (PW-13) and in presence of panchas. After collecting required material for the purpose of lodgment of chargesheet, chargesheet came to be filed against all the five accused persons in the Court of Judicial Magistrate First Class, Vadodara. Since the offences were exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions, Vadodara, which came to be registered as Sessions Case No. 40 of 2004.

4. The trial Judge framed charge against the appellants and the co-accused persons at Exh.8, for the offences punishable under Sections 328, 354, 342, 363, 366, 376(2)(g) read with Section 114 of the IPC and Section 135 of the Bombay Police Act, to which they did not plead guilty and claimed to be tried. Therefore, the prosecution adduced its oral and documentary evidence. After the completion of the oral evidence adduced by the prosecution, the learned trial Judge recorded further statements of the accused persons u/s 313 of the Code of Criminal Procedure, to which they denied generally all the allegations levelled against them and stated that they were falsely implicated in this case. After considering the evidence on record and the statements made on behalf of both the sides, the learned trial Judge recorded acquittal of all the accused persons for the offence punishable u/s 135 of the Bombay Police Act, but, convicted them for the offences punishable under Sections 328, 354, 342, 363, 366, 376(2)(g) read with Section 114 of the IPC and awarded sentences, as referred to in the earlier part of this judgment.

5. In connection with Criminal Appeal Nos. 2258 and 2275 of 2004 and Criminal Appeal No. 266 of 2005, learned advocates Mr. R.J. Goswami. Mr. R.N. Singh and Ms. Rekha Kapadia submitted that the trial Court erred in recording the conviction of the appellants. That as a matter of fact, FIR came to be lodged after about five days from the date of so-called incident. Neither first informant Naynaben nor her parents were prepared to file FIR, but, at the instigation of the press-reporters of local TV news channel, false and concocted FIR came to be filed. That, the very factum of rape has not been proved by the prosecution. The medical evidence reveals that the victim did not give history of rape to the Medical Officer and that the medical examination did not reveal the factum of rape. The story itself narrated by the first informant Naynaben in her FIR, is

unnatural and concocted. During the course of her evidence, she made material improvements regarding such material facts, which were not narrated in her FIR.

5.1 It is submitted that the prosecution failed to establish the involvement of the appellants and the two co-accused persons in the incident. That in the FIR, names of accused Nos. 1 and 2 were referred to by the first informant Naynaben, stating that she came to know that those were co-accused persons involved in the incident. Admittedly, she was not knowing any of the accused persons prior to the incident by his name or by his appearance. Even in the FIR, no description of any of the accused persons came to be narrated. The accused came to be arrested on 31.10.2003 and the TIP was arranged on 4.11.2003, during the meantime, the local TV news channel had published the news about the incident along with the names etc. of the accused persons. Even at the time of TIP, Executive Magistrate did not take precautions to see that Naynaben may not see the accused persons before the TIP.

5.2 In the FIR, as a suspect, Naynaben referred name of one Vinod Narayan Machi, but, no investigation was made by the investigating Police Officer about said Vinod Machi nor he was arrested in connection with this incident. The investigation is also faulty, no investigation was made by the investigating Police Officer to find out how the press-reporters of local TV news channel came to know about the names of the accused persons. The handkerchief or any intoxicant liquid or material allegedly used to make Naynaben unconscious has not been recovered. That it has come in evidence that the flat in which Naynaben was allegedly detained, belongs to one lady, and no investigation whatsoever regarding such lady came to have been made. That according to victim Naynaben, the incident was over by 11 p.m., but; considering the evidence of Police Constable Mahipatsinh Karansinh, examined at Exh.31, witness Mahipatsinh deposed that at about 2 p.m., on 27.10.2003, he intercepted one Scooty, which was driven by one boy, and one girl was pillion-rider and he inquired to the boy and the boy replied that the girl was his fiancée, as their engagement was performed, they were going to the house of their relative. That said witness Mahipatsinh neither identified any of the accused persons. However, according to him, he intercepted the boy and the girl at 2 a.m. in the night hours, whereas, as per the evidence of Naynaben, the incident was over by 11 p.m. It is submitted that even if for the sake of argument, it is believed that the girl, who was a pillion-rider was Naynaben, yet, according to the evidence of Mahipatsinh, no complaint of kidnapping, abduction etc. came to be made by the girl. That, thus, the evidence adduced by the prosecution itself, is not cogent and convincing. The important independent witness Revaben Himatbhai, examined at Exh.32, turned hostile and did not support the case of the prosecution that Naynaben in naked condition, had come to her house and she had provided clothes to Naynaben to wear, and Naynaben was taken to her house on next day morning. Thus, the very important witness Revaben did not support the case of the prosecution.

5.3 It is submitted that as per the prosecution case, Naynaben was kidnapped from a market area, having thick population, during broad day light, yet, no independent witness came to be examined by the prosecution, supporting the theory of kidnapping. It is further submitted that right of cross-examination of the accused came to be closed by the trial Court.

5.4 It is submitted that the appeals preferred by original accused Nos. 1, 2 and 3 may be allowed. However, the original accused No. 4 Mitesh @ Nicky Prakashrao Shinde and original accused No. 5 Dilip Hiralal Chandwani did not prefer any appeal challenging their conviction, but, the State has preferred Criminal Appeal No. 955 of 2005 u/s 377 of the Code of Criminal Procedure for the enhancement of sentence, wherein the original accused Nos. 4 and 5 are respondents No. 4 and 5, and in the State appeal, original accused Nos. 4 and 5 can plead for acquittal, and it is submitted that so far as original accused Nos. 4 and 5 are concerned, the same arguments advanced for and on behalf of original accused Nos. 1, 2 and 3 shall apply to them. Therefore, it is submitted that the original accused Nos. 4 and 5 may be acquitted by setting aside their conviction. It is submitted that since all the original accused persons, including the three appellants and original accused Nos. 4 and 5 deserve acquittal, and therefore, the Criminal Appeal No. 955 of 2005 preferred by the State u/s 377 of the Criminal Procedure Code deserves to be dismissed.

6. Learned APP Mr. Patel for the State vehemently opposed the Criminal Appeals preferred by original accused Nos. 1, 2 and 3 and submitted that the learned trial Judge, after duly appreciating the oral and documentary evidence on record, rightly recorded conviction of the appellants for the offences charged against them. It is submitted that even the original accused Nos. 4 and 5 Mitesh @ Nicky Prakashrao Shinde and Dilip Hiralal respectively, rightly came to be convicted for the offences charged against them. The evidence adduced by first informant and victim Naynaben acquires great importance, and considering her evidence, it has been proved beyond reasonable doubt that all the five accused persons, in furtherance of common intention to rape Naynaben, kidnapped her by compelling her to inhale such substance so that she became semi-unconscious, and was initially taken to one room and she was confined in the room and then she was removed to another place, where the original accused Nos. 1, 2 and 4 gangraped her, and the original accused Nos. 3 and 5, in furtherance of their common intention of gangrape, aided and abated the offence. It is, therefore, submitted that the learned trial Judge rightly convicted the original accused Nos. 1, 2 and 4 for the offence of gangrape, as they actually raped the victim, and rightly convicted the original accused Nos. 3 and 5 for the offence of gangrape, taking recourse of Explanation 1 attached to Sub-section 2 of Section 376 of the IPC. That the evidence of prosecutrix is duly supported by medical evidence on record and the FSL evidence. Even all the five accused persons, when they were medically examined by the Medical Officer, in the history given to the Medical Officer by each of them, admitted the factum of rape having been committed upon the prosecutrix. That during the course of TIP, the prosecutrix identified all

the five accused persons, and there is nothing on record to doubt the genuineness of the TIP. It is true that the incident occurred on dated 26.10.200i and on 27.10.2003, at about 7 a.m. in the morning, the prosecutrix returned to her home and the FIR came to be lodged by her on 31.10.2003. It is true that some news-reporters of local TV news channel of Vadodara gathered some information about the incident and contacted the prosecutrix and her parents and took them before the Police Commissioner, Vadodara, and thereafter, the FIR came to be lodged. However, considering the evidence of prosecutrix and her mother Kapilaben, it has come on record that immediately the FIR was not lodged, for the reason that the future of the prosecutrix may not be marred, and to save her reputation. Under such circumstances, mere 3 to 4 days delay in lodgment of FIR will not make the entire case of the prosecution doubtful. There is nothing on record that there was any enmity or rivalry between the prosecutrix or her parents with all or any of the accused persons. In other words, there is nothing on record, even to presume that there was any motive for false implication of the accused in this crime. The serological report corroborates the version of the prosecutrix. Therefore, it is submitted that the Criminal Appeals preferred by the original accused Nos. 1, 2 and 3 deserves to be dismissed.

6.1 It is submitted that the sentence awarded by the trial Court is disproportionate to the gravity of offence committed by the accused and it is unduly lenient. Therefore, it is submitted that the Criminal Appeal No. 955 of 2005 preferred by the State u/s 377 of the Cr.P.C. may be allowed and the sentence awarded by the trial Court may be enhanced.

7. We have considered the record and proceedings of the trial Court in context with the submissions made by the rival sides.

8. Considering the evidence of prosecutrix recorded at Exh.56, she stated that on the day of the incident, at about 2 p.m., she was waiting for her mother on the road near her house and at that time, she was in punjabi dress. One rickshaw came from Fatehpura side and it stopped near her, and in the rickshaw there were four persons and one driver, and out of them, one person came near her and showed her one chit and inquired for some address. She was about to open the chit, at that time, one another person put a handkerchief on her nose and she became semi-unconscious. She was compelled to sit in the middle of the seat of the rickshaw. She was taken to one room and she was confined in it till about 11 p.m. to 11.30 p.m. Then, two persons came in the room. During the course of her evidence, she identified those two persons as accused No. 1 Vinayak @ Pakiyo Krishnabhai Chikne and accused No. 5 Dilip Hiralal. Both the accused told her that they have come to take her to her home. Therefore, she went with both of them on a Scooty, but, they were intercepted by one policeman. That policeman made inquiry to those two accused persons, but she was not inquired by the policeman. She deposed that those two accused gave Rs. 100/- to the policeman, and therefore, he allowed them to go. Thereafter, she was taken to one flat. However, she does not know the area where the flat was situated. She

stated that on the way, when they were coming to said flat, one accused person had alighted from the Scooty. In the flat, all the five accused persons came. Her duppatta was laid down on the floor and she was compelled to lie down on it and she was raped by original accused No. 1 Vinayak, after undressing her. Thereafter, he took away all her clothes. Thereafter, she was raped by original accused No. 4 Mitesh @ Nicky. Then the original accused No. 3 Jeetubhai Manubhai came near her, however, he did not rape her. Then she was about to come down from the flat, covering her body with her duppatta, at that time, the original accused No. 2 Nitin Ramprasad met her and she was taken by him to one Ottla. The accused No. 2 Nitin was armed with a sword and she was also raped by the accused No. 2 Nitin. She further stated that, at that time, the other accused persons told accused Nitin to make hurry, so that their turn comes. She deposed that then the accused No. 2 Nitin took her to one nearby place and again raped her. She deposed that thereafter, she was again raped by accused No. 4 Mitesh @ Nicky. She deposed that, thereafter, she became unconscious and she regained her consciousness at about 3 a.m. to 3.30 a.m., and she was naked, and in said condition, she came out and knocked the door of nearby house. One lady called Revaben opened the door and she narrated the incident to her. Revaben provided her the clothes of her daughter, which she had put on. Revaben told her that she would be taken to her home in the morning. She deposed that one Jeevanbhai Rajji is residing near her house, and brother-in-law of said Jeevanbhai named Ramabhai was residing near the house of Revaben, and said Ramabhai identified her, and therefore, Ramabhai took her to her home at about 7 a.m. to 7.30 a.m. in the morning, and thus she reached her home. She narrated the incident to her mother Kapilaben and Kapilaben informed about the incident to her father. She stated that her parents told her that, if they would file police complaint, then nobody would marry her, and therefore, for about 4 to 5 days they did nothing. Thereafter, reporters of news channel came to her house and told her parents that the police complaint must be filed, because this time Naynaben has become victim and tomorrow someone else's daughter may become victim. Thereafter, those reporters of the TV news channel took them before Police Commissioner, Vadodara. Naynaben was accompanied by her parents. Those reporters informed Police Commissioner about the incident. Thereafter, they came to City police station, and she lodged her FIR. Her FIR is produced at Exh.61. She stated that she was then sent to hospital for medical examination. After about two days, she was called to Police Bhavan, and there she identified all the five accused persons. She categorically stated that she was not the consenting party to the sexual intercourse. She stated that her further statement was also recorded by the police.

8.1 She was cross-examined at length by the defence. It transpires that after the lodgment of the FIR, her further statement was recorded by the police on 3.11.2003. That fact is revealed from her cross-examination made on behalf of the accused. It further transpires from her cross-examination that in her further statement recorded by the police on 3.11.2003, she had stated some more

details to the police. Therefore, during the course of her cross-examination on behalf of the accused, questions were asked, regarding certain details she did not mention in her FIR, but had mentioned in her further statement. Considering her overall evidence, it clearly transpires that in her further statement recorded by police on 3.11.2003, the incident was somewhat elaborately described by her. There is nothing that is emerging from her cross-examination, that there was any material improvement in her further statement than what was narrated by her in her FIR. In other words, the basic story of the prosecution case, as narrated in the FIR remains the same, but, in her further statement, she elaborately describes the incident.

8.2 Considering the evidence of Investigating Police Officer, PSI Rathod, Exh.62, he stated that on 3.11.2003, he recorded further statement of the prosecutrix - first informant Naynaben. I.O. Mr. Rathod was also cross-examined at length by the accused, and considering his evidence, nothing emerges on record to come to the conclusion that in her further statement dated 3.11.2003, the first informant Naynaben had given complete go-by to her FIR or that something different or contradictory facts were stated by her in her further statement, than the facts stated by her in her FIR.

8.3 Considering the cross-examination made on behalf of the accused of prosecutrix Naynaben, it was asked to her as to when she was proceeding on Scooty along with accused person, they were intercepted by a policeman and at that time, she did not complain to said policeman about her kidnapping and confinement, to which she categorically replied that she was threatened by the accused to the effect that if she would disclose about the incident to anybody, she would be done to death. She denied the suggestion that before the TIP, the police had shown her all the five accused persons. She was also asked during the course of her cross-examination as to whether she provided any resistance at the time when she was sexually attacked, to which she stated that the accused were five in number, and therefore, she could not resist. In her cross-examination, she admitted that the five accused persons did not at a time rape her, but, they raped her one after other. She further clarified in her cross-examination that she was frightened, but had not become fully unconscious. She further stated in her cross-examination that when accused Nos. 1 and 5 were taking her to the flat on the Scooty, in the meanwhile, on the road, the accused No. 5 had alighted from the Scooty. 8.4 Thus, considering the evidence of first informant Naynaben, it clearly transpires that she implicates all the five accused persons in the incident. She explained the delay in lodgment of FIR. It is further pertinent to note that if she wanted to falsely implicate the accused persons, she would not have sat silent for five days, but, she" would have immediately filed the FIR. There is nothing on record that there was any previous enmity between herself and any of the accused persons or between her parents and any accused. Thus, there is no motive whatsoever to implicate innocent persons. As a matter of fact, she was not knowing the accused persons. Under such circumstances, once the factum of commission of rape is established, the minor discrepancies pale into

insignificance.

9. On behalf of the appellants, it was submitted that the evidence of prosecutrix does not get corroboration by the evidence of Medical Officer. The prosecutrix was examined by Dr. Jhanvi Rajesh Nimbalkar, whose evidence is recorded at Exh.27. According to the deposition of the Medical Officer, the prosecutrix was brought before her for medical examination on 31.10.2003. According to her evidence, the prosecutrix gave history of abduction by four young males by making her unconscious, by inhaling sedatives, by pressing a cloth on her nose forcefully, at 2.30 p.m. on 26.10.2003 from Nava Bazar, Vadpdara. She was unconscious since then and when she recovered her senses, she was in a closed room, with broken glass pieces and glass bottles, where she was allegedly captivated. At about 11.30 p.m. on 26.10.2003, she was allegedly carried to flat and she was repeatedly sedated. She came to senses at around 3.30 a.m. of 27.10.2003 and she found herself completely naked and had no injury anywhere on body and no pain and no bleeding per vaginum. She escaped from there and found shelter in some neighbouring house. She was unable to recall of any sexual harassment or assault. She returned to her house at 7 a.m. on 27.10.2003.

9.1 According to the evidence of the Medical Officer, the secondary sexual characters were well developed. There was no cut injury or laceration on vagina. However, there was small reddish raw area on her private part. Irregular old hymen tear was present. According to the opinion of the Medical Officer, the patient seems habitual to sexual intercourse, however, reddish raw lower end of vestibule was suggestive of sexual intercourse having occurred during recent few days back. Medical Certificate was issued accordingly, which is produced at Exh.30. However, in cross-examination on behalf of the accused, Doctor stated that in a case, when a girl is raped by four to five persons, then there may be injury or swelling on her private part. In her cross-examination, Medical Officer Dr. Nimbalkar stated that she cannot definitely say that the prosecutrix was not raped.

9.2 Under such circumstances, considering the evidence of Medical Officer Dr. Nimbalkar and the medical certificate, Exh.30, the factum of rape can be said to have been established. The medical opinion was suggestive of sexual intercourse having occurred during recent few days back from her medical examination. The prosecutrix was medically examined on 31.10.2003. According to the version of the prosecutrix, the incident of rape occurred on the night falling between 26.10.2003 and 27.10.2003. She came to be medically examined after five days. It is true that in the history given by the prosecutrix to the Medical Officer, specifically she did not state about the rape or involvement of any accused by his name. However, according to the deposition of the prosecutrix Naynaben, immediately after returning to her home, she narrated the incident to her mother Kapilaben. She lodged the FIR before the police and in her FIR, she narrated the incident regarding the gangrape. Even in her history before the Medical Officer,

she clearly stated that the assailants had made her undressed. Along with this, the certificate regarding her medical examination and the evidence of Dr. Nimbalkar, suggest rape having been committed on the prosecutrix. Neither in the deposition of Dr. Nimbalkar nor considering the certificate, Exh.30, it clearly reveals that the prosecutrix was not at all subjected to any sexual intercourse.

10. Prosecution examined mother of the prosecutrix named Kapilaben Maganbhai @ Mohanbhai at Exh.34. Considering her evidence, she stated that on the day of the incident, she returned to her home at about 4 p.m., Naynaben was not found in the home. Inquiries were made, but, Naynaben could not be traced out. On the next day morning, at about 7 a.m. to 7.30 a.m. Naynaben was brought to her home by three persons, including one lady. Naynaben was in a different dress, and therefore, she inquired as to why she had worn different clothes, and thereupon, Naynaben narrated the incident to her mother Kapilaben. She narrated the incident regarding her kidnapping and she was compelled to inhale some sedative, and the rape was committed, and the threat was given to her. She stated that they did not immediately approach the police only with a view to save the reputation of Naynaben, because, if they approach the police, the incident would be publisized and the reputation and image of Naynaben would be jeopardized and her marriage prospect would be marred. She stated that some days thereafter, some reporters of local news channel came to her house and the reporters told her that the police should be informed, because, today such misdeed happened to Naynaben, tomorrow it would happen to other such innocent girls, and therefore, it is better to inform the police. Thereafter, they took them (Kapilaben and her daughter Naynaben) before Commissioner of Police, Vadodara and Commissioner was informed by them, and thereafter, they went to the police station and Naynaben lodged the FIR On behalf of the accused, Kapilaben was at length cross-examined. Even in her cross-examination, she admits that after Naynaben narrated the incident to her, and thereafter, when the reporters came to her house, during the interregnum, they did not inform the police nor any relative. However, she has clearly explained in her evidence as to why the police was not immediately informed. She sticks to her version, about the facts narrated to her about the incident, by her daughter Naynaben, even during the entire cross-examination. Under such circumstances, it becomes clear that soon after the incident, the prosecutrix informed her mother about the incident. Even the delay in lodgment of FIR can be said to have been satisfactorily explained by Kapilaben.

11. The prosecution examined Rudresh Jagdishchandra at Exh.42 and according to his evidence, he is a reporter in a private local TV news channel of Vadodara. He stated that Rajubhai Parmar and Hiren Patel are also reporters, working in the news channel. Rajubhai Parmar and Hiren Patel informed him about the incident. He immediately informed the Commissioner of Police about such incident and he was told by the Commissioner of Police to consult the victim-girl and her family members. Thereafter, he himself along with other reporters went to the house of victim and then took the victim and her family members before the

Commissioner of Police, and thereafter, the victim and her relatives went to the police station. It is true that in his cross-examination, he admitted that he had no personal knowledge about the incident, but, he was informed by reporters Rajubhai and Hiren bhai. It is true that the prosecution did not examine Rajubhai Parmar and Hiren Patel as witnesses in this case. However, considering the evidence of prosecutrix and her mother Kapilaben, it is clear that those press-reporters came to their house and they suggested that police complaint should be filed. Thus, the role of the press-reporter is required to be considered, in the sense that the prosecutrix and her family members were told by the reporter that for the benefit of society at large, police should be informed. What sort of investigation was made by the reporters in connection with this incident, can never be said to be a relevant aspect of the matter, because, it is the duty of the police to investigate the offence and not that of the reporters. Under such circumstances, according to us, the arguments advanced on behalf of the appellants - accused that the prosecution failed to examine press-reporters Rajubhai Parmar and Hiren Patel and that the prosecution failed to adduce evidence about any investigation made by the reporters in this case, and therefore, adverse inference should be raised regarding the case of the prosecution, does not require consideration. Only the relevant aspect of the evidence of this witness Rudresh Jagdishchandra is that at his instance and at the instance of his co-reporters, the victim and her family members were persuaded to report the incident to the police, and ultimately, the offence was reported in form of first information report before the police.

11.1 This witness Rudresh Jagdishchandra was cross-examined at length on behalf of original accused Nos. 1 and 3, and considering the evidence, Exh.42, it transpires that the request for adjournment made on behalf of original accused Nos. 2, 4 and 5 was turned down by the learned trial Judge, and therefore, right of the cross-examination of the original accused Nos. 2, 4 and 5 of this witness was closed. Therefore, a grievance was ventilated on behalf of the appellants that the right of cross-examination was closed, and therefore, the evidence of this witness may not be considered. It is pertinent to note that this witness Rudresh Jagdishchandra was cross-examined at length on behalf of the accused Nos. 1 and 3. There is nothing on record that there was any conflicting interest amongst the five accused persons. Even, there is nothing on record to come to the conclusion that the interest of accused Nos. 1 and 3 was conflicting with the interest of accused Nos. 2, 4 and 5. The relevance of witness Rudresh Jagdishchandra is very limited, as described above, and therefore, the very fact that the accused Nos. 2, 4 and 5 could not cross-examine this witness, will not render his evidence untenable.

12. Prosecution examined witness Revaben Himatbhai at Exh.32. According to the prosecution case, at about 3 a.m. to 3.30 a.m. on 27.10.2003, the prosecutrix in a naked condition, came to the house of this witness Revaben. Revaben provided her clothes and the prosecutrix narrated the incident to Revaben. Revaben in her evidence did not support the prosecution case, and was

treated as hostile witness by the prosecution. The fact that Revaben did not support the prosecution case, was pressed into service by the appellants, that a reasonable doubt is created in the prosecution case, and giving benefit of reasonable doubt to the appellants. It is true that Revaben did not support the prosecution case. It is equally true that Revaben was not examined by the prosecution in capacity as eyewitness to the incident of gangrape. Considering the evidence of the prosecutrix, at the time when she was gangraped, except herself and the accused persons, no witness was present. The prosecutrix elaborately described the incident in her evidence supported by the medical evidence. The evidence as a whole is required to be appreciated. It is pertinent to note that at the time when the prosecutrix was kidnapped, she had worn new punjabi dress and when she returned to her home, during the morning hours of 27.10.2003, she was wearing different clothes. According to the case of the prosecution, when the prosecutrix came to the house of this witness Revaben, she was in a naked condition and the new clothes were provided to her by Revaben. Though Revaben, in her evidence did not support the prosecution case, but, the above circumstances regarding the change of dress, duly suggest the role of Revaben. Be it as it is, the fact remains that merely because Revaben turned hostile, will not make any adverse effect to the prosecution case.

13. The prosecution examined witness Mahipatsinh Karansinh at Exh.31. According to his evidence, at the relevant time, he was serving as Police Constable and was on patrolling duty, during the night hours falling between 26.10.2003 to 27.10.2003, and at about 2 a.m., on 27.10.2003, during his night patrolling, near RTO office, he intercepted a Scooty, which was driven by one boy and one girl was a pillion-rider. He inquired the boy, as to who he was and who is the girl and where they were going, thereupon, the boy said that the girl was his fiance, and that they had gone to the house of their relative. Thereupon, he permitted the duo to go. However, he did not identify any of the accused person and more particularly, the boy, who was driving the Scooty. In his cross-examination, he admitted that the girl did not try to run away, seeing him.

13.1 According to the evidence of the prosecutrix, during night hours, the accused Nos. 1 and 5 Vinayak @ Pakiyo Krishnabhai Chikne and Dilip Hiralal respectively, shifted her from a room to a flat on a Scooty. Prosecutrix admits in her evidence that when she was carried to the flat on a Scooty, one policeman intercepted them. She further admits that at that time only accused No. 1 Vinayak @ Pakiyo Krishnabhai Chikne was with her, as before the policeman intercepted them, the accused No. 5 Dilip Hiralal had got down from the Scooty. It is further pertinent to note that the prosecutrix did not make any complaint to the policeman Mahipatsinh, regarding her kidnapping etc., and did not even try to escape from the clutches of the accused, seeking intervention of the policeman Mahipatsinh, but, perusal of the evidence of the prosecutrix suggests that while she was shifted from the room, wherein she was initially confined, the accused Nos. 1 and 5 had told her that they were taking her to her home. Under such circumstances, when she was told that the accused were taking her to her

home, she did not complain before the policeman. It is pertinent to note that according to the evidence of the prosecutrix, the incident of gangrape occurred subsequently to the meeting of the policeman Mahipatsinh. However, prosecutrix in her evidence says that when they were intercepted by the policeman, it was 11 a.m., whereas, the policeman Mahipatsinh in his evidence says that it was 2 a.m. However, it has come in" evidence that the prosecutrix was not wearing any wristwatch. She was compelled to inhale some sedative, and therefore, she was almost semi-conscious. Under such circumstances, the minor difference between the time factor, pales into insignificance. However, the fact remains that the incident occurred during the night hours.

14. According to the prosecution case, TIP was arranged on 4.11.2003. Considering the evidence of Executive Magistrate, Mr. Rathwa, Exh.43, in his office the TIP was arranged on 4.11.2003. Twelve dummies were called and all the five accused were called. The accused were kept in a separate room. The prosecutrix was called. The prosecutrix identified all the five accused persons during the course of the TIP. TIP panchnama was drawn, which is produced at Exh.45. The Executive Magistrate was at length cross-examined on behalf of the original accused Nos. 1 and 3. However, in his cross-examination, the Executive Magistrate clearly stated that he had taken due precaution to see that before the TIP, the prosecutrix may not see the accused persons. He had kept the prosecutrix in a separate room in his office. Considering the deposition of Executive Magistrate, Exh.43, it is true that on behalf of accused Nos. 2, 4 and 5, adjournment was requested and the said request was turned down by the learned trial Judge and their right of cross-examination was closed. As stated earlier in this judgment, there is nothing that the interest of the accused Nos. 1 and 3 is conflicting to the interest of accused Nos. 2, 4 and 5. The Executive Magistrate was cross-examined at length on behalf of the accused Nos. 1 and 3. The Executive Magistrate is independent witness and his role was confined to arrange TIP, which he arranged and according to his evidence and the TIP panchnama, Exh.45, during the course of the TIP, the prosecutrix identified all the five accused persons. Proper precautionary measures were taken to see that before the TIP, the prosecutrix may not see the accused. Under such circumstances, the evidence adduced by the Executive Magistrate carries great importance.

14.1 At the time of the incident, the accused persons belonged to the age-group between 20 to 22 years, whereas some of the dummies were aged about 35 to 40 years. Therefore, it was submitted that all the dummies were not of the age group of 20 to 22 years, and therefore, no reliance should be placed upon the TIP evidence. However, merely because some of the dummies were of the age group of 35 to 40 years, that itself will not vitiate the entire TIP proceeding. The fact remains that the victim identified all the five accused persons. Out of them, the two were named in the FIR. However, in the FIR, the two accused persons were named on basis of some information, but, the fact remains that even those two accused persons named in the FIR also came to be identified during the TIP,

by the prosecutrix.

14.2 On behalf of the appellant, it was submitted that the accused came to be arrested on 31.10.2003 and 1.11.2003 respectively and after their arrest, almost in all local newspapers and on TV channel, the news was published. However, there is nothing on record to come to the conclusion that the news in the local newspaper and on TV channel was published along with the photographs of the accused persons. Nothing emerges from the cross-examination of the prosecutrix that before the TIP, she had seen any photograph of all or any of the accused persons. Even, there is nothing on record to come to the conclusion that before the TIP, the prosecutrix has seen all or any of the accused persons, either while they were in police custody or in the office of the Executive Magistrate.

15. On behalf of the appellant, considering the evidence of I.O. PSI Rathod, Exh.62, it was submitted that though the prosecutrix in her FIR, Exh.61, involved one Vinod Narayan Machi as a suspect, still however, the I.O. did not make any investigation regarding the suspect Vinod Narayan Machi. However, it is pertinent to note that at the time when the FIR came to be lodged, the prosecutrix was not knowing any accused by name. The name of original accused Nos. 1 and 2 came to be referred in the FIR on the basis of some information. However, she stated in the FIR that if the assailants are shown to her, she could definitely identify them. Under such circumstances, mere fact that no investigation was made regarding the suspect Vinod Narayan Machi, the entire case of the prosecution does not become suspicious. The irregularities committed by the I.O. do not adversely affect the evidence of the prosecutrix.

16. Considering the birth certificate of the prosecutrix, Exh.48, it is true that her date of birth is 22.11.1986 and the incident occurred on 26.10.2003 and, therefore, at the time of the incident, she was aged about 16 years and 11 months i.e. not below the age of 16 years. However, considering the overall evidence on record, there is nothing to suggest that the prosecutrix was consenting party. She was kidnapped and was gangraped. Even, considering her evidence, Exh.56, in her examination-in-chief, she categorically stated that she had not consented for the act by the accused persons. Considering her cross-examination, nothing emerges, which would suggest that she was a consenting party.

16.1 Section 114A of the Indian Evidence Act runs as under:

114A-Presumption as to absence of consent in certain prosecutions for rape - In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of Sub-section (2) of Section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Thus, the trial Court rightly concluded that there was no consent of the

prosecutrix for whatever act done by the accused.

17. All the five accused came to be medically examined on 2.11.2003. Their medical certificates are produced from Exh.51 to Exh.55. Considering the endorsement made on behalf of the accused in the list containing the documents produced by the prosecution, those medical certificates came to be exhibited, as they were consented to be exhibited on behalf of the accused persons. In paragraph 39 of the impugned judgment, rendered by the learned trial Judge, it is also observed that those medical certificates came to be exhibited, because on behalf of the accused persons, consent was given for exhibiting those documents. Thus, it can be said that there is no dispute so far as the contents of those certificates are concerned. In those medical certificates, the accused persons gave history before the Medical Officer, to the effect that on 26.10.2003, in the Government quarter of Vima Hospital, Varasiya, one Rajput girl was raped. In the impugned judgment, in paragraph 39, the learned trial Judge elaborately discussed this aspect of the matter regarding the history given by the accused persons to the Medical Officer. This evidence can be used as a corroborative piece of evidence to the deposition of the prosecutrix.

17.1 Considering the panchnama, Exh.16, the place of offence was shown by accused No. 1 Vinayak @ Pakiyo Krishnabhai Chikne, and that was a Vima Hospital vacant quarter. Considering the panchnama, Exh. 17, it transpires that accused No. 2 Nitin Ramprasad discovered in presence of panchas, clothes of the prosecutrix being her pyjama, dupatta and underwear, together with her chappal. It is true that panchas of the panchnamas turned hostile, but, considering the evidence of Investigating Police Officer, the contents of those panchnamas are proved. Moreover, the prosecutrix, during her deposition identified her clothes. Considering the FSL report, Exh.68, and the serological report of the FSL, Exh.69, it transpires that the semen group of all the accused persons is "O". On the dupatta as well as on the underwear of the prosecutrix, semen stains were of group "O". It has come in the evidence of the prosecutrix that when she was gangraped, she was compelled to lie down on her dupatta. It is further pertinent to note that sample of her vaginal swab was collected and during the FSL examination, semen of group "O" was detected. Thus, the FSL report corroborates the deposition of the prosecutrix.

18. On behalf of the appellants, it is submitted that so far as original accused No. 3 Jeetubhai Manubhai and original accused No. 5 Dilip Hiralal are concerned, even prosecutrix herself in her evidence, clearly states that she was not raped by these two accused persons. To deal with this submission, it is necessary to consider Explanation 1 in Sub-clause 2 of Section 376 of the IPC. Explanation 1 runs as under:

Explanation 1. - Where a women is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

18.1 Thus, in the instant case, as per the evidence of the prosecutrix, she was kidnapped in a rickshaw by four accused persons. The fifth accused was the rickshaw driver. Considering the panchnama, Exh. 18, original accused No. 3 Jeetubhai Manubhai, in presence of panchas and Police Officer, produced his auto-rickshaw GJ-6V-9187. Thus, while kidnapping the prosecutrix on 26.10.2003 from near her house, all the five accused persons played their role. She was made to inhale some sedative and she was compelled to sit in the rickshaw and was taken to room, wherein broken glasses were scattered. She was confined in the room. It has come in evidence that thereafter, the original accused No. 1 Vinayak @ Pakiyo Krishnabhai Chikne and original accused No. 5 Dilip Hiralal came in the room and under the false pretext that they are carrying her to her home, they took her to a flat (vacant quarter of Vima Hospital) on a Scooty. It has come in the evidence of the prosecutrix that in the flat, all the five accused persons had come and she was raped one by one by original accused No. 1 Vinayak @ Pakiyo Krishnabhai Chikne, original accused No. 2 Nitin @ Nitu Ramprasad and original accused No. 4 Mitesh @ Nicky Shinde. It has also come in evidence that the original accused No. 2 Nitin Ramprasad was armed with a sword and she was threatened by him. In view of this, if the Explanation 1 is considered, it becomes clear that it is not necessary that in case of a gangrape, the victim should have been raped by all the accused persons. If, she is raped by one or more in a group of persons, each of the persons shall be "deemed to have committed gangrape", provided those persons are acting in furtherance of their common intention. The common intention of all the five accused persons can be gathered from their conduct, prior to the incident and during the course of the incident. We need not repeat here the evidence regarding their conduct, as it has been discussed at length in this judgment. Therefore, viewed from any angle, the conviction of the accused persons, for the offence alleged against them, cannot be said to be unsustainable. In the impugned judgment, the learned trial Judge has dealt with the legal provisions contained in Section 376 of the IPC and has rightly come to the conclusion that all the accused persons, including the original accused No. 3 and 5 are liable for the offence of gangrape. All the accused persons shared their common intention to commit rape.

19. In view of the entire above discussions, the Criminal Appeal Nos. 2258 and 2275 of 2004 and Criminal Appeal No. 266 of 2005 preferred by convicted accused -appellants Nitin @ Nitu Ramprasad, Jeetubhai Manubhai and Vinayak @ Pakiyo Krishnabhai Chikne respectively, deserve dismissal.

20. The State preferred Criminal Appeal No. 955 of 2005 u/s 377 of the Cr.P.C. against all the five accused persons for enhancement of sentence. It is submitted that considering the age of the prosecutrix and the manner in which the incident of gangrape was committed, the sentence of R.I for ten years and fine of Rs. 10000/- appears to be unduly lenient and disproportionate to the gravity of offence. It is submitted that R.I for ten years is the minimum sentence of imprisonment and this is a fit case, wherein more than minimum sentence of imprisonment should have been awarded by the trial Court.

20.1 It is true that the offence of gangrape is punishable with R.I for a term, which shall not be less than ten years, but it may be for life and shall also be liable for fine. In the impugned judgment, while fixing the quantum of punishment, the learned trial Judge, after considering the submissions made on behalf of the accused persons took into consideration the fact that none of the accused persons had any criminal antecedence. All the accused persons, at the time of the commission of the offence belonged to the age group between 19 years to 22 years. Considering the facts and circumstances of the case, we are of the considered opinion that it cannot be said that the learned trial Judge exercised his discretionary powers, while fixing the quantum of sentence either illegally or arbitrarily. The sentence awarded to the accused persons cannot be said to be either unduly harsh or unduly lenient. Under such circumstances, we do not find any merit in the State appeal.

20.2 However, original accused No. 4 Mitesh @ Nicky Shinde and original accused No. 5 Dilip Hiralal have not preferred any appeal, challenging their conviction. It was submitted that in the State appeal, the original accused Nos. 4 and 5 are respondents No. 4 and 5 respectively and, therefore, considering Sub-section 3 of Section 377 of the Cr.P.C., the respondents - convicted accused are entitled to plead for their acquittal. Reliance was placed on the case of Pawan Kumar Vs. State of Haryana, . It was observed by Honourable the Apex Court that - "if the Court comes to a conclusion that no conviction of any accused is possible, then, benefit of said decision must be extended to non-appealing accused, though he has not challenged the judgment of his conviction." Same view was followed subsequently in the case of Anjlus Dungdung v. State of Jharkhand reported in AIR 2005 SC 1394.

21. Considering the provision contained u/s 377 of the Cr.P.C. as well as the principles established in the above referred decisions of Honourable Apex Court, it is clear that in a State Appeal u/s 377 of the Cr.P.C., respondent - convicted accused can plead for his acquittal. Even while hearing an appeal, filed by one of the convicted - accused persons, if the Court comes to a conclusion that no conviction of any accused is possible, benefit of such decision deserves to be extended, even to non-appealing accused, though he has not challenged judgment of his conviction. However, in the instant case, as stated above, there is nothing on record, which would suggest that the conviction recorded by the trial Court of the original accused Nos. 4 and 5 (non-appellants) can be said to be illegal or contrary to the evidence on record. Even, the appeals preferred by the convicted - accused persons, deserve dismissal. Considering the overall evidence on record, there is nothing to come to the conclusion that no conviction of any accused was possible.

22. For the foregoing reasons, all the four Criminal Appeals, stand dismissed.