MANDIRA MILIND SALGAONKAR Digitally signed by MANDIRA MILIND SALGAONKAR Date: 2023.10.26 17:38:04 +0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.118 OF 1999

Santosh Vishnu Sable .. Appellant

Versus

The State of Maharashtra & Anr. .. Respondents

...

Mr.Amit Mane i/b Kirankumar Phakade for the Appellant.

Mr.S.R.Agarkar, A.P.P. for the State/Respondent.

Ms.Megha Bajoria, Appointed Advocate for the Respondent No.2.

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CORAM: BHARATI DANGRE, J.
DATED : 20th OCTOBER, 2023

ORAL JUDGMENT:-

1. The Appellant questions his conviction under Section 376 of the Indian Penal Code (for short, "**the IPC**") at the hands of the Additional Sessions Judge, Satara in Sessions Case No.233 of 1995 alongwith the sentence imposed upon him, to suffer R.I. for five years and to pay fine of Rs.1,000/-, in default to undergo further R.I. for two months.

2. The Appellant came to be arrested on 20/09/1995, in connection with the F.I.R. registered with Satara Taluka Police Station, when one Prakash Shinde lodged a complaint with the police station alleging that on 12/09/1995, his daughter aged 8

years, was sexually abused by the Accused. The complaint lodged on 20/09/1995 specifically named the Appellant as the person aged 17 to 18 years, who committed act with her by taking her to an obscure place on his bicycle, when she was returning from the school.

Upon this complaint, the offence was registered invoking Section 376 of the IPC and the Accused was arrested.

The victim was forwarded for medical examination and on being examined, a certificate was issued, which reflect existence of an old healed tear at fourchette with edematous. Tenderness was also recorded.

The certificate also mentioned about rupture of hymen at posterior aspect 6 o'clock position.

The Accused was also examined and on collecting the necessary material, the charge-sheet was filed.

3. On the case being committed to Additional Sessions Judge, Satara, when the Accused pleaded not guilty, a charge was framed against him, which reads thus :-

> "That you on 12-9-1995, at about 5.00 p.m. to 7.00 p.m., in a streamlet, situated within a village Saidapur, Taluka-Satara, committed Rape on Kumar Sunita Prakash Shinde, aged eight year & thereby committed an offence punishable under Sec. 376 of Indian Penal Code and within my cognizance."

In support of the prosecution case, eight witnesses came to be examined, which include the victim girl, being examined as PW 6 and the complainant being examined as PW 1. To support the case of the prosecution, the Doctor who had

examined the victim, stepped into the witness box as PW 2 alongwith the Investigating Officer as PW 8. The two witnesses i.e. PW 4 and PW 7, were examined since they had seen the Accused committing the act and had brought him alongwith the victim to the house of PW 1. PW 4 and PW 7 have not supported the case of the prosecution and what is it's effect shall be seen a little later.

4. The victim, by this time aged 11 years, stepped into the witness box and considering her tender age and inability to understand the implication of oath, no oath was administered to her. She deposed about the incident, by stating that while she was returning to the house by footpath at around 5.30 p.m., when the Accused approached her on his bicycle and asked her to pillion ride. She was taken towards the streamlet and was told by the Accused that they shall have some fun and, thereafter, in clear words, she narrated the act committed by the Accused.

After the incident, when she wore her undergarments and she noticed panpattiwala (PW 4) and one woman on the upper portion of streamlet and she specifically told the Court that even they noticed them and then when they came up on the upper portion of the streamlet, the two persons brought them to her house. After coming home, she narrated the incident to her parents and she was medically examined.

She identified the Accused in the dock and also identified the clothes worn by her on the date, when the incident took place. She also identified the clothes of the Accused.

The victim was subjected to cross-examination, but she remained consistent on her version and just a few discrepancies have surfaced, being about the time when her father returned home on that day and in any way it is not sufficient to impeach her credibility. She denied the specific suggestion that the Accused did not commit sexual assault and she is deposing falsely at the instance of her father. She also denied that she did not notice Panpattiwala and Sulabai, PW 4 and PW 7 on the date of incident.

5. In order to corroborate her version, her father stepped into the witness box, who deposed that on 12/09/1995, when he returned to his house at around 6.30 to 7.00 p.m., panwale mama alongwith the Accused and the victim arrived at his house and mama inquired with him as to who was the Accused. Upon which, PW 1 informed him that he is son of one Sabale, the Police Constable. Thereafter, Mama told him that the Accused and the victim were sleeping together near the streamlet and they were in a naked condition and he was seen committing rape upon the girl.

Upon such revelation, PW 1 and his wife went to the house of the Accused, where his mother was present and she was informed about the Accused having committed rape upon the girl.

Before the Court, the Informant also offered an explanation for delay in lodging of the FIR, as he has stated that, since the father of the Accused was Police Constable and since they were fearing being defamed on account of the said act, he lodged the complaint on 20/09/1995.

The complaint (Exh.11) is proved by him, where he reiterate the version narrated to him by his daughter, aged 8 years. He is consistent on his version that his daughter was brought to the house by panpattiwale mama and the Accused was the son of the Police Constable. He had reported about the incident in the manner, which was narrated to him by his daughter.

Even the Complainant is subjected to extensive cross-examination and there are some discrepancies in his statement, for example as regards, whether it was raining on that day and by what time, the rain started and the time when he returned home etc.

I do not think that these minor contradictions have affected his testimony, as it is not uncommon that a witness may not remember the ancillary events in great details, but as far as the sequence of events and the manner in which the incident of sexual assault was reported to him by PW 4, and his daughter, he is consistent and his version is not at all shaken.

He has also offered an explanation about the delay, which appears to be probable, as definitely three decades back and, particularly in the rural background, the family would be required to gather all their guts to lodge a complaint in respect of such act, and, particularly when the Accused was the son of the Police Constable. Moreover, merely the delay cannot be construed as a ground to disbelieve the prosecution case, when the witnesses have clearly established it, with cogent evidence and when the evidence of the prosecutrix is truthful and gives no rise to suspicion.

6. The prosecution case, that the girl aged 8 years was ravished by the Accused stands fortified by PW 2, the Medical Officer, Civil Hospital, Satara who examined her, when she was brought to the hospital on 20/09/1995 alongwith Police Constable. He examined the victim in presence of the Gynecologist and one lady sister in the backdrop of the history of alleged rape on 12/09/1995. On examination of a private part and general examination, he has deposed as under :-

> "2. Examination of private part and general examination was done by Dr.Desai S.P. Gynaecologist and myself. Per speculeam exam- evidence of old healed teat at fourohette. oedemataus tenderness present. Hymen ruptured at posterior aspect 6 O'clock position. P.V. admits tip of little finger, painful, tenderness present. Blood, vaginal swab taken for chemical examination. X ray wrist, elbow, knee and illeac creast. Plate No.5796 to 99 dated 20/9/95 done for determination of age. I am shown the certificate. It bears my signature. It is at exh.13.
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> 3. Opinion :-
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> 1) Physically undeveloped. 2) Old healed tear at fourchette oedemataus tenderness present. Hymen ruptured at posterior aspect in 6 O'clock position.
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> 3) Finding :- suggestive of old intercourse.
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> 4) From X-ray examination of ossification status, age is between 8 to 10 years.
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> 5) No external injury seen over body. That opinion also bears my seal and signature. It is at exh.14."

7. The Accused whose age was given between 16 to 18 years, was also examined. PW 2 thus proved Exhs.14 and 15.

Though a suggestion given to him that if a foreign substance of rough edge is inserted in the vagina, hymen could be ruptured is admitted, the said suggestion will have to be appreciated in the light of the certificate issued by him, which has indicated several factors, suggestive of old intercourse.

Apart from this, the Medical Officer in his opinion from the x-ray examination of ossification has certified her age to be between 8 to 10 years, though he did not notice any external injury on the body.

8. The spot panchnama is brought on record through the panch witnesses.

PW 3 is the Police Head Constable, who registered the subject crime, upon it being reported by PW 1.

Coming to the two witnesses, who have been declared hostile i.e. PW 4 and PW 7 and, since, it is vehemently argued by the learned counsel for the Appellant that since these witnesses have not supported the case of the prosecution, it loses it's ground, I have perused the evidence of these two witnesses.

PW 4 in his examination-in-chief, has categorically stated that on 12/09/1995, it was raining and he was returning to Saidapur. While he was returning, he noticed one woman alongwith two children, out of them, one was a boy and the other was a girl. He deposed that the woman called him and told him that the boy and girl were seen together in the streamlet, but he refused to intervene, as he was not feeling well.

It is by this time a trite position of law that the witness having been declared hostile need not be completely discarded and in this background, when his examination-in-chief and cross-examination is carefully perused, it emerges that he was present on the spot of incident and, hence, the presence of the

victim and the Appellant is sufficiently proved. Apart from this, he was confronted with the statement given to the police, being marked as portion 'A' and when in cross-examination, he deny of this statement being given him by police, but PW 8, the Investigating Officer has deposed that the statement of PW 4 was recorded as per his say, which included portion mark 'A' in his statement and the statement came to be exhibited as Exh.30. The gist of the statement read thus :-

> "At around 7 in the evening, when I came out of the house to answer the natures' call and was returning back, on the road going towards the crusher, one woman was standing, who called me. When I approached her, I could notice the woman to be Sulabai Nalwade and when I inquired with her, she told me that one boy was sitting on the body of a girl near the stream and she requested that we should find out who they are. At that time, a small girl aged about 8 years, walked towards us and when she was asked what happened, she did not say anything. At that time, one boy aged 15 to 16 years, holding his bicycle, came upstream and even he refused to respond to the question. Sulabai disclosed that the boy was of police Sabale, whereas the girl was from the family of the hawker and, therefore, we decided to reach them to their house. When they were returning, from midway, the boy left on his bicycle and the girl was reached at her house and we left for home."

On perusal of the statement, though it contradict the version of the Complainant that the Accused was brought to the house, on the aspect that the girl was reached to her home after the incident on being noticed by PW 4, is corroborated through the said witness.

Similar is the case of PW 7, the lady, who noticed the victim in the company of the Accused at the streamlet on the given date at around 7.00 p.m., though she has denied her presence and the knowledge about the incident in totality. The portion mark 'A' in her statement is also proved through PW 8, by marking the same as Exh.31.

9. The Investigating Officer (PW 8) has deposed about the investigation carried out by him upon registration of the subject C.R. under Section 376 of the IPC. He makes reference to the panchnama as regards the scene of offence (Exh.22), which is drawn by him. He also talks about the incriminating articles, being the clothes of Accused and the victim being forwarded for analysis. He specifically deny the suggestion that there was no evidence against the Accused and he is falsely arrested in the case and the false charge-sheet is filed.

10. The case of the prosecution about the victim girl, aged 8 years, being sexually ravished by the Accused is proved through the three witnesses, PW 1, PW 6 and PW 2, the Medical Expert who has fortified the version of the victim girl. Though PW 4 did not support the case of the prosecution, the consistent version of the victim girl and her unshattered testimony before the Court about the act, which was performed by the Accused on the particular date, when she was returning from the school, has come on record and inspire confidence.

It is not uncommon, to rely on her, since if prosecutrix's evidence inspires confidence, she has to be believed and the Court may not seek corroboration as it normally does, for the reason that there cannot be an eye witness to the incident of sexual assault and in such cases, the surrounding circumstances will have to be taken into account.

In this particular case, the doctor has clearly supported the case of the prosecution that she was ravished some days back, by referring on the injuries, which were noticed by him in form old hymenal tear.

Mere delay in lodging the FIR cannot be proved fatal to the prosecution case and the explanation offered is definitely of worth consideration, taking into account the background of the family of the victim and that of the Accused.

In such circumstances, I do not find any legal infirmity in the finding of conviction recorded by the Additional Sessions Judge, Satara in his judgment dated 26/02/1999, as all the loopholes which were attempted to be projected to create a dent in the prosecution case, were brushed aside by the learned Judge by holding that the case of the prosecution has been sufficiently proved through the evidence brought on record and which appear to be a truthful version. The omissions and contradictions, which were not so relevant, were held to be not affecting the truthfulness of the prosecution case. It was thus rightly concluded that the prosecution has proved it's case beyond reasonable doubt, that the Accused has committed rape on the girl, aged about 8 to 10 years.

On recording the finding of guilt, the Accused is sentenced to suffer R.I. for five years and to pay fine of Rs.1,000/-, in default of payment of fine, to undergo R.I. for two months. The amount of fine was directed to be recovered and to be paid to the Complainant , by way of compensation.

11. On hearing the learned counsel for the Appellant on the grounds, which are raised in the memo of Appeal, I cannot take any view different than the one which is recorded in the judgment and I am fully satisfied on the conviction of the

Appellant under Section 376 of the IPC, as based on the rightful appreciation of the evidence placed before the learned Judge.

The imposition of sentence, would also require no interference, but for the argument and a valid one, advanced by the learned counsel for the Appellant.

By inviting my attention to an essential fact, it is submitted by the learned counsel, Mr.Mane, for the Appellant that the incident, which has resulted in his conviction is alleged to have taken place on 12/09/1995 and at the relevant time, the Juvenile Justice Act, 1986 was in force.

The detailed order passed by the Chief Judicial Magistrate, Satara dated 08/12/1995, on his production, recorded the date of birth of the Accused as 13/03/1978 and the Magistrate recorded that on the date of the incident, the Accused was about 17 years and 5 months of age and in the wake of the existing Juvenile Justice Act, 1986, which defines the term "juvenile" as a boy who has not attained the age of sixteen years or a girl who has not attained the age of 18 years, the CJM ordered that he shall be tried as an adult and not as "juvenile" and the case thereafter was committed to the Sessions Court for trial.

Upon being tried as an adult, a judgment of conviction and imposition of sentence is awarded upon him on 26/02/1999. Being aggrieved by the same, he preferred an Appeal in the year 1999 and on 09/03/1999, the Appeal was admitted and he was directed to be released on bail and this order continued till date.

12. The learned counsel for the Appellant has invited my attention to Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, **"The Act of 2000"**), which repealed the existing Juvenile Justice Act, 1986. The provision on which he lay emphasis, is a special provision in the Act, to deal with pending cases.

The learned counsel would submit that the Appellant is entitled for benefit of explanation, appended to the said Section, as on the date of incident, his age was more than sixteen years, but less than eighteen years and he has placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Devilal & Ors. Vs. State of Madhya Pradesh***[1], which has applied the explanation appended to Section 20 and in a similar scenario, by recording that the age of Accused was less than 18 years, has extended the benefit of the same and though affirmed the conviction, the matter was directed to be referred to the Juvenile Justice Board for issuance of appropriate direction.

13. The Juvenile Justice Act, 1986 enacted by the Parliament came into force from 03/12/1986, being an enactment to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles.

The enactment defined the term "juvenile" and a distinction was drawn as regards the age of a boy and a girl and a boy, who has not attained the age of sixteen years was

1 (2021) 5 SCC 292

referred to as juvenile, for the purposes of the Act of 1986, whereas as far as the girl is concerned, she was to be treated as juvenile if she has not attained the age of eighteen years.

Section 21 of the Act provided for the orders that may be passed regarding delinquent juveniles and Section 22 imposes a prohibition in imposing sentence of death or imprisonment or being committed to prison, in default of payment of fine or in default of furnishing security, notwithstanding anything to the contrary contained in any other law for the time being in force.

The Act of 1986 was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000 and the new Act came into effect from 01/04/2001. The said Act defined the term "juvenile" or a "child" in Section 2(k) to mean a person who has not completed eighteenth year of age.

The said Act broadened the conspectus as regards the "juvenile in conflict with law" and also brought within it's ambit the children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs and by adopting a child-friendly approach, in the adjudication and disposition of matters in the best interest of children and also provide for their rehabilitation. The salient feature of the enactment was it's approach towards the children/juvenile and the "juvenile" or "child" for the purposes of the said Act, irrespective of gender, was a person, who has not completed eighteenth year of age.

14. This necessitated the Parliament to introduce a special provision dealing with the pending cases in form of Section 20, which reads thus :-

> "**20. Special provision in respect of pending cases.**-Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court or in any area on the date on which this Act comes into force n that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as it it had been satisfied or inquiry under this Act that a juvenile has committed the offence;
>
> Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.
>
> Explanation. - In all pending cases including trial, revision, appear or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

It is thus evident from reading of the said provision, that in terms of the Act of 2000, in all cases where the Accused was above the sixteen years, but below the eighteen years on the date of occurrence of the event/incident, the proceedings pending in the Court would continue and the benefit of the Act of 2000 shall be extended. The explanation appended to Section 20 expanded the scope of the proceedings, by including the trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law in any Court and it is made clear that all the juvenile cases instituted or or before the commencement of the Act of 2000, shall be governed by the Act of 2000, for all purposes and at all material times when the alleged offence was committed.

15. Their Lordships of the Apex Court had an occasion to deal with this special provision in the case of ***Mumtaz Vs. State of U.P.***[2]and in paragraph 18, it is held as under :-

> "18. The effect of Section 20 of the 2000 Act was considered in Pratap Singh v. State of Jharkhand MANU/SC/0075/2005: (2005) 3 SCC 551 and it was stated as under: (SCC p. 570, para 31)
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> > 31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with a non obstante clause. The sentence
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> > > notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act came into force
> >
> > has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or the girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that court as if the 2000 Act has not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

16. Similarly in the case of ***Kalu Vs. State of Haryana***[3], impact of Section 20 upon the proceedings pending when the Juvenile Justice Act, 1986 continue to hold the field has been analysed and paragraph 21 of the said decision needs a reproduction, as it deal with the contention of the Appellant as regards the impact of the explanation appended to Section 20.

> "21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the

2 (2016) 11 SCC 786
3 (2012) 8 SCC 34

Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (1) of Section 20, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed."

17. The learned counsel has placed reliance upon the decision of ***Devilal*** (supra) and the said decision, after referring to the earlier decisions, record thus :-

"22. It is thus well settled that in terms of Section 20 of the 2000 Act, in all cases where tes Accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the court would continue and be taken to the logical end subject to an exception that upon finding the juvenile to be guilty, the court would not pass an order of sentence against him but the juvenile would be referred to the Board for appropriate orders under the 2000 Act. What kind of order could be passed in a matter where claim of juvenility came to be accepted in a situation similar to the present case, was dealt with by this Court in Jitendra Singh v. State of U.P. MANU/SC/0679/2013: (2013) 11 SCC 193 in the following terms: (SCC pp. 210-11, para 32)

32. A perusal of the "punishments" provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the Appellant, advising or admonishing him [Clause (a)] is hardly a "punishment" that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the Appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [Clause (b)]. For the same reason, the Appellant cannot be released on probation of good conduct under the care of a fit institution [Clause (c)] nor can he be sent to a special home. Under Section 10 of the Juvenile Justice Act, 1986 which is

> intended to be for the rehabilitation and reformation of delinquent juveniles [Clause (d)]. The only realistic punishment that can possibly be awarded to the Appellant on the facts of this case is to require him to pay a fine under Clause (e) of Section 21(1) of the Juvenile Justice Act, 1986."

18. As far as the facts are concerned, in paragraphs 20 and 22, on analysis of the material which has been brought on record, based on which the sentence of conviction was imposed, the finding rendered by the court below is confirmed by recording that the Appellants are guilty of the offence with which they are charged, however, considering one of the Appellants, who was a juvenile, the benefit of the Act of 2000 has been extended to him and the sentence imposed upon him, on being convicted, is set aside, directing the matter to be remitted to the Juvenile Justice Board for determining the appropriate quantum of fine that should be levied upon him, keeping in mind the directions issued in the case of ***Jitendra Singh Vs. State of U.P.*** [4] of which the reference is made in para 23 of the said Law Report.

The aforesaid authoritative pronouncement makes it evidently clear that the present case is a situation, where the benefit of Section 20 alongwith explanation appended thereto deserve to be extended to the Appellant and, since, I am of the firm opinion that though his conviction imposed by the learned Additional Sessions Judge in Sessions Case No.233 of 1995 deserve to be upheld in the wake of the rightful appreciation of the evidence brought on record, and on finding no legal infirmity in exercise of the power by the Sessions Court, as far as the sentence is concerned, I deem it appropriate to relegate

4 (2013) 11 SCC 193

the Appellant to the Juvenile Justice Board for taking an appropriate call, as Section 20 contemplates that instead of passing any sentence in respect of the juvenile, he shall be forwarded to the Juvenile Justice Board, which shall pass necessary orders in respect of the juvenile, in accordance with the Act, as the juvenile has committed an offence, but no sentence could be imposed upon him.

19. In the wake of the above, upholding the conviction of the Appellant, I deem it appropriate to direct the Appellant that he shall remain present before the Juvenile Justice Board, Satara on 30/10/2023 and, thereupon, the Board shall follow the procedure contemplated under the Act of 2000 and take appropriate steps, by considering the above observations as regards the guilt of the Appellant for committing an offence under Section 376 of the IPC.

20. At this stage, I must also expressed my appreciation for the learned counsel Ms.Megha Bajoria, who was requested to represent Respondent No.2 and who has rendered an effective assistance to the Court. The Legal Services Authority shall make payment of the legal remuneration due and payable to her within a period of six weeks from today.

Appeal is disposed off, in above terms.

(SMT. BHARATI DANGRE, J.)

M.M.Salgaonkar