



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 1177 OF 2019

Shashikant @ Dada S/o Bhaurao Garad,
Age : 21 years, Occu : Labour,
R/o. Dahiwadi, Tq. Sinnar,
Dist. - Nashik.

...Appellant

Versus

1. The State of Maharashtra

2. Victim X

...Respondents

.....

Mr. S. G. Ladda and Mr. Sunny S. Khinvasara – Advocate for the
Appellant

Mrs. Vaishali S. Chaudhari – APP for respondent/State

Mr. D. R. Dhumal – Advocate for Respondent No. 2 (*Absent*)

.....

**CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, J.**

RESERVED ON : 03rd JANUARY, 2024
PRONOUNCED ON : 17th JANUARY, 2024

JUDGMENT [Per Neeraj P. Dhote, J.] : -

1. This is an Appeal under Section 374(2) of the Code of Criminal Procedure [for short ‘CrPC’] against the conviction of the Appellant for the offences punishable under Sections 376 (2)(i), 506 of the Indian Penal Code, 1860 [for short “IPC”], under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 [for short “POCSO Act”] and under Sections 3(1) (r) (s) (w) and 3(2) (v) of the

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as “the SC ST Act”], recorded by the learned Additional Sessions Judge, Kopargaon vide Judgment and Order dated 16.10.2019 passed in Spl. Case No. 26 of 2018 arising out of the Crime No. 33/2018 registered with Kopargaon City Police Station on the report lodged by Victim’s father – Balu Popat Gangurde (PW5).

2. Prosecution’s case as revealed from the Police report is as under : -

2.1. The informant is the father of the Victim girl and belongs to Scheduled Tribe category. He resides with his family comprising wife, two daughters including Victim girl and son, at Gaware Vasti, Kopargaon. On 18.02.2018, the informant had gone to Mukhed, Taluka Yeola, Dist. Nashik for attending the wedding of one of his relatives. His wife and elder daughter had gone for labour work. The Victim girl and her younger brother were at home. When the informant returned to his home in the evening at about 04:00 p.m., the Victim informed him that when she had gone in the Sorghum (Jowar) crop standing in the field of one Mr. Kolhe at about 03:00 p.m., an unknown person wearing blue colour shirt and jeans pant came to her, forcibly caught hold of her hands, gagged her mouth, threatened her and committed rape on her.

2.2. The father of Victim informed about the said incident to the persons from his area, namely, Ganesh Gaware, Suresh Wagh, Pinu More

and other 10-15 persons. The informant and the said persons went to the field of Mr. Kolhe to trace out the accused. They caught hold of the Appellant in the field. The matter was reported to the police and the Crime as referred to above, came to be registered.

2.3. During the course of investigation, the Investigating Officer recorded the statement of Victim girl and got her medically examined, got the Appellant medically examined, seized their clothes, conducted spot panchanama, collected the blood samples, sent the muddemal for chemical analysis, recorded the statement of witnesses and on completion of investigation, submitted the charge-sheet against the Appellant. The learned trial Court framed the Charge against the Appellant at Exh.15 to which the Appellant pleaded not guilty and claimed to be tried. To establish the Charge, the prosecution examined in all fourteen (14) witnesses and brought on record relevant documents. After the prosecution closed its evidence, the learned trial Court recorded the Statement of Appellant under Section 313 (1) (b) of the Cr.P.C. and thereafter passed the impugned Judgment and Order.

3. Heard learned advocate for the Appellant and the learned APP for the State.

4. It is submitted by the learned advocate for the Appellant that the prosecution failed to prove that the Victim girl was minor and, therefore, the conviction under the POCSO Act falls down. He

submitted that, it is clear from the evidence available on record that the Appellant and the Victim were knowing each other since long and there was consensual relationship between them, therefore, the offences under the IPC and the SC ST Act are not made out. It is also submitted that the learned trial Court has erroneously appreciated the evidence available on record and the Appeal be allowed. In support of his submissions, he cited the following judgments and submitted that the Appeal be allowed.

- i] **Aman Kumar and Another Versus State of Haryana,**
(2004) SCC (Cri) 1266
- ii] **Sanjeev Kumar Gupta Versus State of Uttar Pradesh and Another,** (2019) 4 SCC (Cri) 379
- iii] **Rajak Mohammad Versus State of Himachal Pradesh,**
(2018) 3 SCC (Cri) 753

5. Per contra, it is submitted by the learned APP that the evidence brought on record by the Prosecution has proved the Charge against the Appellant. She submitted that considering the evidence on record the learned trial Court has rightly convicted the Appellant and the impugned Judgment and Order does not call for any interference by this Court.

6. The case of the prosecution is that the Victim was the minor. One of the Charges against the Appellant was framed under the POCSO Act. As per Section 2(d) of the POCSO Act, 'Child' means, any

person below the age of 18 years. Insofar as the age of the Victim is concerned, PW5 – father of the Victim deposed in his evidence that at the time of incident the age of his daughter was 15 years 9 months and 30 days. He has nowhere deposed the date of birth of Victim. The Victim, who is examined as PW6, deposed that she was unable to tell her date of birth. The PW12 – Dr. Ashlesha Kashinath Dongare, who was the Dental Surgeon in the Civil Hospital at Ahmednagar, deposed that on 20.02.2018, the Victim girl was referred to her for seeking opinion of her dental age and the Victim told her date of birth as 19.04.2002. This evidence with regard to the date of birth of the Victim as deposed by PW12 is required to be seen with doubt for the reason that before the learned trial Court the Victim girl in her substantive evidence deposed that she was unable to tell her date of birth. So far as the evidence of this PW12 – Dr. Ashlesh Dongare is concerned, she deposed that after examining the oral cavity of the Victim girl and the number of teeth therein she concluded that the Victim's age was below 17 years. In her cross-examination, it has come on record that she opined the age of the Victim girl on the basis of date of birth given by the Victim girl and on the basis of examination of her teeth. Her evidence goes to show that she did not take a X-ray of the teeth of the Victim nor had measured the teeth of the Victim.

7. The other evidence brought on record by the prosecution to

prove the age of the Victim is in the form of testimony of PW10 – Balasaheb Sukhdeo Gangurde, who was the Headmaster of Kopargaon Municipal Council School No. 9, Khadaki, where the Victim girl completed her education upto 5th Std. His evidence show that in the School Register No.1 the details in regard to the pupil, age, date of birth, place of birth, Caste and Religion, date of admission, date of leaving the school are mentioned and entry at Sr. No. 836 in the said register was in respect of the Victim, wherein the date of birth of the Victim is mentioned as 19.04.2002 and the date of her admission is referred as 31.07.2009. The evidence show that, in reference to the letter received from the Kopargaon Police Station, he issued the Transfer Certificate (T.C.) and the said T.C. was at Exh. 76. In the cross-examination of this witness, it has come on record that the entries in Register No. 1 are effected only on the basis of the birth date certificate of the pupil and he denied the suggestion that no admission is given in the first std of the School without production of Birth Certificate.

8. The provisions of the Section 34 of the POCSO Act reads as under : -

34. Procedure in case of commission of offence by child and determination of age by Special Court. – (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of '[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)]'.

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

This clause provides for procedure in case of commission of offence by child and determination of age by the Special Court. It provides that where any offence under the proposed legislation is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.

It further provides that if any question arises in any proceeding before the Special Court where a person is child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination and no order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by the Special Court was not the correct age of that person. (Notes on Clauses).

9. In **P. Yuvaprakash v. State Rep. By Inspector of Police**, AIR 2023 SC 3525, the Hon'ble Apex Court on the point of determination of age of the Victim girl has considered the above referred provisions of Section 34 of the said Act and the provisions of Section 94 of the Justice Juvenile (Care and Protection of) Act, 2015 and observed as follows : -

13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

14. [Section 94](#) (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in [Section 94\(2\)\(i\)](#) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. In a recent decision, in [Rishipal Singh Solanki vs. State of Uttar Pradesh & Ors.](#), this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i),

- (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94 (2) of the JJ Act, this court held in *Sanjeev Kumar Gupta vs. The State of Uttar Pradesh & Ors.* that:

“Clause (i) of Section 94 (2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the 2021 (12) SCR 502 [2019] 9 SCR 735 concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. In *Abuzar Hossain @ Gulam Hossain v State of West Bengal*⁵, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.
18. Reverting to the facts of this case, the headmaster of M’s School, CW- 1, was summoned by the court and produced a Transfer Certificate (Ex.C-1). This witness produced a Transfer Certificate Register containing M’s name. He deposed that she had studied in the school for one year, i.e., 2009-10 and that the date of birth was based on the basis of the record sheet given by the school where she studied in the 7th standard. DW-2 TMT Poongothoi, Headmaster of Chinnasoolipalayam Panchayat School, answered the summons [2012] 9 SCR 224 served by the court and deposed that ‘M’ had joined her school with effect from 03.04.2002 and that her date of birth was recorded as 11.07.1997. She admitted that though the date of birth was based on the birth certificate, it would normally be recorded on the basis of horoscope. She conceded to no knowledge about the basis on which the document pertaining to the date of birth was recorded. It is stated earlier on the same issue, i.e., the date of birth,

Thiru Prakasam, DW-3 stated that the birth register pertaining to the year 1997 was not available in the record room of his office.

19. *It is clear from the above narrative that none of the documents produced during the trial answered the description of “the date of birth certificate from the school” or “the matriculation or equivalent certificate” from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim’s age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating “that the age of the said girl would be more than 18 years and less than 20 years”. In the cross-examination, she admitted that M’s age could be taken as 19 years. However, the High Court rejected this evidence, saying that “when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor”. This finding is, in this court’s considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94 (2) (i) mandates; nor are they in accord with Section 94 (2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim’s bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.*

10. In the case in hand, the evidence led by the prosecution to prove the age of the Victim is considered above. In the light of the provisions of the aforesaid Acts of 2012 and 2015 and observations in the above referred case, the prosecution evidence fall short of proving the age of Victim. Needless to state that the burden to prove the age of the Victim girl was on the prosecution by bringing in evidence the documents as required under the law. The testimony of PW10 - Headmaster of the School wherein the Victim had taken her education is

of no assistance for the prosecution due to his cross-examination, which show that admission in the first std can be given without Birth Certificate. The evidence in respect of Victim's age is not concrete. Resultantly, the above discussed evidence of the prosecution do not conclusively establish that on the date of offence the Victim was a child.

11. Considering the charges framed against the Appellant, the testimony of the Victim assumes importance. The Victim is examined as PW6. The scrutiny of her testimony show that she was residing at Sai Laxmi Nagar, Kopargaon with her parents, Sister and Brother. On the date of incident, her father had gone to another village i.e. Mukhed in Nashik District to attend the marriage of their relatives and her mother and elder sister had gone for work. She and her younger brother were at home. At about 03:00 p.m. she went to the field of one Sulochana Kolhe for bringing the grass where the Sorghum (Jowar) crop was standing. While she was collecting the grass in the said field, one unknown boy came from back side, gagged her mouth, caught hold of her hands, caused her to lay on the ground, thrust handkerchief in her mouth, threatened her to kill if she tries to raise alarm and committed rape on her after removing clothes. Meanwhile, Victim's brother came in the field and on seeing him, the unknown boy ran away and hid himself in the Sorghum crop standing in the field. Thereafter, she and her brother went to their house and when her father returned home at

04:00 p.m., she narrated the incident to him. Her father called the villagers and went along with them to search for the said boy and they apprehended the Appellant. The villagers beat the Appellant. In the evening, the Victim along with her father went to the Kopargaon Police Station and lodged Report against the Appellant.

11.1. The Victim further deposed that the Police referred her for medical examination and treatment to the Rural Health Centre, Kopargaon and on the following day, to the Civil Hospital at Ahmednagar. Her clothes were at Article A, B and C. Her statement was recorded. She had shown the spot of incident to the police and the photographs of the spot of incident which are marked as Article G-1 to G-6. She identified the appellant as the said unknown boy.

12. In her cross-examination, it is suggested that she used to give missed calls to the accused from the phone of her elder sister and also used to talk with him for hours together and on the day of incident she gave a missed call to the accused and called him and thereafter on his arrival, she went to the Chikoo garden along with the Appellant. Though the Victim denied the said suggestions, she deposed that the photos at Exh.38 to 43 were that of herself and the appellant which were taken in the Chikoo Garden. The said photographs were taken by the accused through his mobile phone. Her further cross-examination go to show that though she was holding a sickle in her hand at the time

of incident, she did not try to assault the Appellant by means of said weapon. She admits that it was possible for her to give a kick on the private part of the Appellant at the time of incident. It has further come in her cross-examination that the Appellant had not tied her hands and legs while making her fall on the ground. It has further come in her cross-examination that when the Appellant was removing his pant, she was sleeping on the ground. It has further come in the evidence of the Victim that the contents in her statements were told by her father to the Police.

13. The above discussed evidence of the Victim show that though she was having an opportunity to run away by resisting the act of the Appellant that too while she was holding a Sickle in her hand, she did nothing. The defence is that the Victim and the Appellant were knowing each other and she had willingly accompanied the Appellant in the farm, appears probable. Though it has come in her evidence that she sustained injuries on her arms, lips, breast (bosom), bleeding injury to her private part/vagina during the incident and she told about the injuries to the Medical Officer, the evidence of PW8 – Dr. Anuradha Kamalkishor Rathi show that she examined the Victim on 19.02.2018 and the Mother of the Victim girl gave the history of sexual assault on the Victim girl. On examination of the Victim girl, she found scratch marks on her both thighs and opined that the said marks are probably

due to nails and found no other positive finding. In her cross-examination, she deposed that in the medical examination of the Victim girl it did not reveal to her that there was rape on the Victim girl. It has further come that if there is itching on the thighs, there is likelihood of having nail scratches on the thighs.

14. There is evidence of PW2 – Dr. Kundan Kisan Gaikwad, who was the Medical Officer at the Rural Hospital, Kopergaon. His evidence show that on 19.02.2018, he was discharging the duties at the said hospital and the Victim was brought to him by the Kopergaon Police for examination and he examined her from 12:05 a.m. till 01:30 a.m. He found three injuries on the person of Victim which were in the nature of *abrasion over right arm near cubital – fossa adm. 7 x 03 cm red in colour, abrasion over left thigh anterior part multiple injuries red in colour, abrasion over right thigh anterior surface oblique in directions adm. 7 x 03 cm red in colour* and the Victim gave him history of sexual assault. In his cross-examination, it has come that he did not find nail scratch injuries on the neck, chest and shoulder of the Victim girl, did not find any marks of injury on her back, did not find the wearings of the Victim girl in torn condition at the time of her examination, did not find blood stains on her knicker or other wearing of the Victim girl at the time of her examination, did not find Semen stains on the body of the Victim girl, did not find hair on her knicker or other clothes. It has

further come in his cross-examination that the injuries found on the body of the Victim were possible due to itching.

15. There is evidence of PW9 – Dr. Pratap Haribhau Salve, which show that he was Medical Officer attached to the Civil Hospital at Ahmednagar, at the relevant time. He examined the Victim, who was brought to him with a history of sexual assault, at around 07:30 p.m. on 19.02.2018. He admitted the patient/Victim in the hospital for her further management and for examination by Gynecologist and also for her age estimation by Radiologist and by Dental Surgeon. The X-rays of right elbow and right iliac crest (pelvic hip bone) of the Victim were taken. The medical examination papers are brought on record at Exh. 69 and 70. Except this, there is nothing in his evidence. In his cross-examination, he deposed that he did not mention the injuries which were found on the body of the Victim. He deposed that he mentioned in Exhibit 70 the details as per MLC book which contains the injuries found on the persons of the concerned patient. His evidence show that he did not bring with him the MLC book.

16. The evidence of PW11 – Dr. Durgadas Dnyandeo Dhas, who, at the relevant time, was working as Medical Officer – Radiologist at Civil Hospital, Ahmednagar, show that on 20.02.2018, he examined the Victim and conducted sonography of stomach / abdomen of the

Victim girl and he found it in normal condition.

17. Evaluation of the testimony of PW6 Victim girl, undoubtedly show that it is not trustworthy and cannot be relied. Her cross-examination has destroyed her testimony given in examination-in-chief. The medical evidence discussed above clearly indicate that there were no signs of rape on her. As seen in the medical evidence, the injuries on her thighs were possible due to itching. The evidence of PW6 Victim girl itself is sufficient to discard the prosecution case. Though there is medical evidence brought on record, it rules out the sexual assault on the Victim.

18. The other evidence brought on record by the prosecution is that of father and brother of the Victim, who are examined as PW5 – Balu Popat Gangurde and PW13 – Vanesh Balu Gangurde, respectively. The evidence of PW5 – father of Victim show that after he returned home at about 04:00 p.m. on 18.02.2018, the Victim was weeping and she told him about the incident and so he along with the neighbours went to the field in search of the boy and caught hold of the Appellant and beat him by taking him out of the field and thereafter he went to the Police Station along with the Victim and lodged the report, which is at Exh. 37. In his cross-examination, it has come that when he went in the field along with the villagers to trace out the accused, he did not

take the Victim with them. It is really strange that, when the Victim was not accompanying them when they went in the field to trace the accused, on what basis they apprehended the Appellant as the said unknown boy. Further, according to PW6 - Victim, her elder sister had a cell phone whereas PW5 - father denies the said suggestion. Thus, there is contradiction on the point of possession of mobile phone by the elder daughter of PW5. His cross-examination further go to show that the photographs at Exh. 38 to 43 which were exhibited in the evidence of PW6 – Victim in which she was seen with the Appellant, were confronted to him and he admitted that the Victim daughter and the Appellant were seen in the photographs. He admits that before lodging the complaint of the incident the Police came to his house and took the appellant in their custody. Suggestion is given to him in the cross-examination that he pressurized the Victim and got mentioned the contents in Exh. 37, which was the FIR by him. As referred above, while dealing with the evidence of PW6 – Victim, she admitted in her cross-examination that her statement was told by her father i.e. PW5.

19. The evidence of PW13 – brother of the Victim show that on the day of incident the Victim left the house and went to the field at about 02:00 p.m. to bring fodder. Since she did not return home for a long time, he called his relatives and went along with them in search of the Victim in the field where Sorghum crop was standing. When he

entered the said field, he found a boy running away from the field and found his sister standing in the crop and weeping. The villagers apprehended the boy i.e. Appellant. In his cross-examination, it has come that he did not see the Appellant with his sister in the field. It has further come in his cross-examination that he saw the Victim for the first time in the field, she was in naked condition. He found her clothes in torn condition and he being her brother, gave her clothes/wearings to be put on by her. The evidence that her clothes were in torn condition, is required to be seen with doubt for the reason that the PW4 – Panch witness before whom the Victim's clothes were seized has deposed that her clothes were not found torn. This evidence of the Victim's brother is also of no assistance to the prosecution to prove the charge.

20. The other evidence is in the nature of investigating machinery and panchas in respect of the spot panchama, seizure of clothes of Victim girl and that of the Appellant. The evidence of PW2 – Dr. Kundan Kisan Gaikwad, Medical Officer of the Rural Hospital at Kopargaon, show that he also examined the Appellant on 21.02.2018, who was brought by the Police for medical examination and on local examination, he found three injuries on his person in the nature of blunt trauma over left side of his face, bruise over his back of the chest and CLW over left leg which were found more than 24 hours old. His cross-examination show that he did not find nail abrasion marks on the body

of the accused. It has come in his further cross-examination that the said three injuries found on the body of the Appellant were possible due to stick assault and were possible if a mob of persons assaults the accused. This medical evidence further rules out the case of sexual assault by the Appellant.

21. The evidence of PW1 – Annasaheb Karbhari Gaware is in respect of apprehending the Appellant from the field after PW5 informed him and other villagers about the incident is concerned. The evidence of this witness is relevant only to the extent of apprehending the Appellant.

22. The evidence of PW4 – Gorakhanath Dinkar Mahajan show that he acted as a panch i.e. spot panchanama and also for the seizure of clothes of the Victim girl. In his cross-examination, he deposed that there were no blood stains on her clothes and those were not found torn. The cross-examination of said panch witness go to show that he was not having criminal antecedents. Even if this aspect of criminal antecedent is ignored, his testimony is nothing beyond conducting spot panchanama and seizure of clothes of the Victim and the Appellant.

23. Thereafter, there is evidence of PW7 – Deepak Jaywant Shinde, who took the photographs of the spot of incident and the

evidence of PW14 – Investigating Officer in which he deposed about conducting the investigation. The Chemical Analysis Reports are brought on record and they are marked as Exhibits 102 to 105. Perusal of the CA report shows that the blood group of the Victim was 'O'; whereas the blood group of accused was 'A'. The CA report at Exh. 102 show that the blood was found on Article A-1 (Condom), Article B-3 (Elastick Knicker) and Article C-1 (Full Jeans Pant). The blood found on the condom was of 'A' group and blood on knicker and jeans pant was inconclusive. The said CA report further show that no blood was detected on A-2 (Earth), B-1 Half top (torn), B-2 Legging pant, C-2 Full shirt (torn) and C-3 Underwear (torn).

24. The above discussed evidence available on record show that there is no credible evidence to prove the Charge against the Appellant. As seen earlier, the testimony of Victim girl is not at all trustworthy and therefore, it is discarded. The other evidence which is in the nature of corroboration also rules out the possibility of any sexual assault by the Appellant on the Victim girl. What is gathered from the evidence available on record is that the Victim and the Appellant were acquainted with each other. The evidence available on record do not prove the Charge against the Appellant and hence the Appellant deserves to be acquitted. The judgments cited by the learned advocate for the Appellant are based on the facts of those respective cases and there is no

dispute in respect of ratio of those judgments. In this view of the matter, the following order is passed : -

ORDER

- [i] The Criminal Appeal is allowed.
- [ii] The Judgment and Order dated 16.10.2019 passed by learned Additional Sessions Judge, Kopargaon in Spl. Case No. 26 of 2018 convicting the Appellant for the offence punishable under Sections 376 (2) (i), 506 of the Indian Penal Code, 3 and 4 of the Prevention of Children from Sexual Offences Act and 3 (1)(r)(s)(w) and 3 (2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, is set aside.
- [iii] The Appellant stands acquitted of the offences punishable under Sections 376 (2)(i), 506 of the Indian Penal Code, Sections 3 and 4 of the Protection of Children From Sexual Offences Act and under Sections 3 (1)(r)(s)(w) and 3 (2) (v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act.
- [iv] The Appellant is already released on bail by order dated 03.01.2024.
- [v] The Appellant is set at liberty and the bail bond stands cancelled.
- [vi] The fine amount, if deposited, be refunded to the appellant after the statutory period of Appeal is over.

[vii] The Record and Proceedings be sent back to the learned trial Court.

[viii] The muddemal property be dealt with in accordance with law.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE