

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.482 OF 2015

Baburao s/o Marotrao Dakhore,
Age-50 years, Occ:Labour,
R/o-Navi Abadi Jamgavan,
Tq-Kalamnuri, District-Hingoli.

...APPELLANT
(Ori. Accused)

VERSUS

- 1) The State of Maharashtra,
through, Police Station,
Balapur Tq-Kalamnuri,
District-Hingoli,
- 2) Miss.- S. (See Appeal Memo for name)
Age-16 years, Occ:Nil,
R/o-Jamgavan, Tq-Kalamnuri,
District-Hingoli,
At present - Child Remand Home,
At Hingoli.

...RESPONDENTS

...

Mr. S.S. Choudhari Advocate holding for
Mr. S.N. Rodge Advocate for Appellant.
Mrs. V.N. Patil-Jadhav, A.P.P. for Respondent
No.1.
Mrs. Anjali Bajpai-Dube Advocate for Respondent
No.2.

...

WITH

CRIMINAL APPEAL NO.181 OF 2016

Miss.- S. (See Appeal Memo for name),
Age-16 years, Occ:Labour,
R/o-Navi Abadi Jamgaon,
Tq-Kalamnuri, District-Hingoli.

...APPELLANT
(Ori. Complainant)

VERSUS

- 1) The State of Maharashtra,
through, Police Station,
Balapur Tq-Kalamnuri,
District-Hingoli,
- 2) Baburao S/o. Marotrao Dakhore,
Age-53 years, Occ:Nil,
(At present in Jail)

...RESPONDENTS

...

Mrs. Anjali Bajpai-Dube Advocate for Appellant.
Mrs. V.N. Patil-Jadhav, A.P.P. for Respondent
No.1.
Mr. S.S. Choudhari Advocate holding for
Mr. S.N. Rodge Advocate for Respondent No.2.

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CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 8TH AUGUST, 2016

DATE OF PRONOUNCING JUDGMENT: 25TH AUGUST, 2016

JUDGMENT :

1. Criminal Appeal No.482 of 2015 has been

filed by the Appellant - original accused who has been convicted by the Additional Sessions Judge, Hingoli in Special Child Case No.1 of 2013 on 29th April 2015 under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("the Act" in brief) and has been sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.35,000/- (Rupees Thirty Five Thousand) and in default of payment of fine to suffer further simple imprisonment for one year. The trial Court directed that if fine is recovered, Rs.25,000/- (Rupees Twenty Five Thousand) from the same be paid to the Complainant as compensation. The case of the prosecutrix (without naming, and hereafter referred as "victim") has been referred to the District Victim Compensation Board, Hingoli with recommendation to give adequate compensation to the victim.

2. Criminal Appeal No.181 of 2016 has been filed by the victim seeking enhancement in the

compensation to the tune of Rs.1,00,000/-
(Rupees One lakh).

3. The case of prosecution, in short, is as follows:-

(A) On 25th September 2013 at about 5.00 p.m. the victim filed F.I.R. (Exhibit 37) at Akhada Balapur Police Station. She mentioned her age as 16 years and occupation to be labour, residing at Nai Abadi, Jamgavan, Tq-Kalamnuri. The F.I.R. mentioned that she was doing labour work to support herself as well as her younger sister. She does not have her parents or brother and she only has a sister as named in the F.I.R. (examined as PW-14). (I will refer to PW-14 Only as - sister of victim). The parents died when the victim and her sister were children and both the sisters were then residing with their grand-mother at Jamgavan. The grand-mother died two years back and thereafter both the sisters have continued to

reside in the house of the grand-mother. In the same village, she has maternal uncle Khandu (PW-2) and maternal aunt but they never visit the victim. Her paternal uncle and aunt reside at Khambala but they never visit the victim and her sister. Gangubai Khude (PW-5) is neighbour and beyond the house of Gangubai, the accused Baburao Dakhore lives.

. The F.I.R. mentions regarding the incident that about eight months before, accused Baburao came to the house of victim and made allegation expressing suspicion that the victim had stolen his ring and he told both the sisters that they should not reside there. So saying, the accused drove out the two sisters outside their house. Both the sisters went to maternal uncle Khandoji at Jamgavan and told him as to what has happened and he explained to the accused and helped them to re-enter their house. After this incident, after about eight days, in the

night at about 9.30 p.m., sister of victim went to the house of accused to watch T.V. At that time victim was alone at home. The accused came to the house of the victim which is a room made of tins and moment he came, without letting her understand anything, he took out handkerchief from his pocket and pressed it against her mouth and tied the same to her mouth. She tried to resist but accused did not let her succeed. The F.I.R. then give details as to how rape was committed on the victim and it is stated that the accused then threatened her that if she tells the incident to anybody, she and her sister would be killed. When the rape was committed, the accused had, with the help of *Odhani* of the victim, tied both her hands behind. After the rape and after giving threat, the accused went away. After some time her sister came back home and she opened the handkerchief which was tied to the mouth of the victim and the *Odhani* by which her hands had been tied. She told the incident to her sister. Out of fear they did not

tell the incident to anybody. The F.I.R. stated that as they did not tell the incident to anybody, the accused started coming to places where the victim went for labour work and used to signal her to come aside and took opportunities to further forcibly rape her, every 8-10 days. In the last eight months, the accused took opportunities to rape her when nobody was at her home or in the field. Her stomach started showing and she consulted a mid-wife in the village and the lady told her that she was pregnant by five months. She gave this information to the Sarpanch and the villagers brought the victim at the Police Station. She has told the facts to lady Constable Dalvi and Madhuri Dhule (PW-4) of Mahila Dakshata Committee. Thus, the F.I.R.

(B) On receiving the F.I.R. to above effect the offence was registered at the Police Station and investigation was taken over by PW-16 A.S.I. Sayed Irshad Ali. He went and arrested the

accused. The statements of witnesses were recorded. As the relatives and villagers were not ready to accept the victim girl, she was sent to Remand Home. It appears her sister was also sent off to Remand Home. The spot Panchnama(Exhibit 25) was recorded on 29th September 2013. The clothes of the victim were seized on 29th September 2013 (Panchnama Exhibit 39). The clothes of the accused were also seized (Panchnama Exhibit 40). Police collected extract from the school admission register (Exhibit 44). When the victim was examined by the medical officer, it transpired that she was carrying twenty weeks pregnancy. There were no external injuries found.

4. On completing the investigation, charge-sheet came to be filed.

5. Charge was framed by the Additional Sessions Judge under Section 4 of the Act and under Section 376 (2) (h) (i) of the Indian Penal

Code, 1860 ("I.P.C." in brief). The accused pleaded not guilty. His defence is of denial.

6. The prosecution examined in all sixteen witnesses to bring home the guilt. The trial Court after considering the oral and documentary evidence brought on record by the prosecution, decided to convict the accused only under Section 4 of the Act and not under Section 376 of I.P.C. as it was of the opinion that punishment under Section 4 of the Act is of greater degree. Thus, the conviction and sentence as mentioned above.

7. I have heard learned counsel for the Appellant-accused. He has taken me through the whole evidence of witnesses. According to him, the trial Court did not appreciate the evidence properly and came to wrong and erroneous conclusions. The offence of rape had not been established. The sister of the victim should have

been treated as a tutored witness. It should have been seen that there was delay of more than eight months in reporting the matter to the Police. The accused has been implicated in the offence at the instance of politically rival group. According to learned counsel the offence should have been held as not proved and the accused deserves to be acquitted. According to him, regarding the age of the victim there is no other evidence other than her own evidence and the evidence of PW-11 Sulochana Mukhade, Head Mistress of the school. The ossification test was not done. Due to earlier incident of theft of ring the accused wanted the victim to leave the area and because of this victim filed false case. The basis on which school entry was made regarding date of birth of victim was not brought before the Court. D.N.A. test was not done. There was no witness of alleged multiple sexual assault. There was no evidence of resistance, shouting etc.

. With regard to the Criminal Appeal No.181 of 2016 the counsel for accused submitted that the accused has not been able to pay even the fine of Rs.35,000/- which was imposed and he would not be in a position to pay any enhanced compensation.

8. Advocate Mrs. Bajpai in Criminal Appeal No.181 of 2016 submitted that if the facts of the present case are perused, the accused really deserved to be convicted under Section 6 and not under Section 4 of the Act. The victim had been kept in the Remand Home after the incident came to light and now as she has become major, she has been asked to leave the Remand Home and she is facing hardships of the life as she has no support and the amount of compensation deserves to be increased. Relying on Section 29 of the Act it is stated that there is presumption that the accused committed the offence and thus according to the counsel, no interference in the Judgment is called for.

9. Against the Appeal of the accused, the learned A.P.P. submitted that the prosecution brought on record all the necessary evidence to prove the offence. It is stated that the reasons recorded by the trial Court to convict the accused are correct and proper and should be upheld. The A.P.P. submitted that in the matter of **Jarnail Singh vs. State of Haryana reported in (2013) 7 Supreme Court Cases 263**, the Hon'ble the Supreme Court discussed Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007 ("Rules of 2007" in brief). Rule 12 (3) gives list of documents and the provision is that the age of the child can be ascertained by adopting first available basis out of number of options postulated in Rule 12 (3) of the Rules of 2007. According to the learned A.P.P. in the present matter victim deposed that her date of birth is 10th June 1997 and she is supported by the school record. When the evidence from school was

available, then if ossification test was not done, it would not make any difference looking to the higher value given to school record in Rule 12 of the Rules of 2007 which the Hon'ble Supreme Court applied even in the case of determining the age of the prosecutrix. Thus according to the A.P.P., the Appeal of the accused deserves to be dismissed.

10. In the present matter, the prosecution examined the two maternal uncles of the victim as PW-2 Khandoji and PW-3 Topaji. Two neighbours of the victim i.e. PW-5 Gangubai Khude and PW-6 Devidas Tambhare were also examined. All these four persons turned hostile and were cross-examined by the prosecutor and have been discredited. PW-7 Uttam Jadhav is husband of the Sarpanch of the village. The victim appears to be referring to PW-7 Uttam as if he himself was the Sarpanch. The evidence shows that when the incident came to light, this PW-7 Uttam collected the villagers and the victim was taken to the

police station. At the police station, PW-16 P.S.I. Sayed Irshad Ali called lady police constable Dalvi and PW-4 Madhuri Dhule of Mahila Dakshata Committee and the F.I.R. shows that these ladies made the victim comfortable so as to register the offence and F.I.R. came to be filed.

11. Going through the material available, some of the facts are almost unchallenged and can be treated to be admitted. These facts are as follows:-

. There is no dispute regarding the fact that the victim was doing labour work and taking care of herself and her younger sister. Parents of these sisters died when they were still younger children. Both the sisters were earlier residing with their grand-mother in the house at New Abadi, Jamgavan. This Abadi is at short distance from the main village Jamgavan. The grand-mother Janabai died about two years before the incident

came to light and after the death of the grand-mother, both the sisters alone continued to stay in the house left by the grand-mother. The maternal uncle PW-2 Khandoji and PW-3 Topaji reside in the same village Jamgavan but the evidence is that they have not been taking care of these two girls i.e. PW-8 victim and her sister PW-14. The evidence brought on record shows that when the incident came to light, neither the relatives nor the villagers wanted to help the victim and her sister and consequently the police sent them off to the Remand Home.

12. Keeping such unsympathetic relatives and villagers in view, it would be appropriate now to refer to the evidence of the victim PW-8 herself. The victim has deposed and in evidence mentioned that her date of birth is 10th June 1997. She deposed that her parents died in her childhood and she was living with her grand-mother and her sister who was 13 years old. Her uncles PW-2

Khandoji and PW-3 Topaji along with aunts reside at Khambala. She does not visit them. Grand-mother died two years ago and since then she and her sister were residing in the house. She and her sister were doing labour work and maintaining themselves. The uncles and aunts refused to maintain them. PW-5 Gangubai is their neighbour and so is the accused. The house of accused is after one house. The victim further deposed that the accused had once come to her house and made allegations that she has stolen his gold ring and he suggested that the victim and her sister should not reside in that house and in the village. Victim deposed that she then went to her maternal uncle Khandoji and told him about the incident and came along with her uncle who assured that he would convince the accused. Victim deposed that her uncle convinced the accused and thereafter she and her sister continued to reside in their house. Her evidence is that eight days thereafter at about 9.00 p.m. her sister had gone to the house

of the accused. The F.I.R. shows that sister had gone to watch T.V. Evidence of victim is that at such time accused entered her house when she was alone and he took out handkerchief and pressed the same on her mouth and gagged her mouth with the help of handkerchief. He took out *Odhani* from her person and tied both her hands. The evidence then gives details as to how the accused forcibly removed her clothes and forcibly committed intercourse on her. Her evidence is that she attempted to shout but the accused over-powered her. He then threatened to kill her and her sister if the incident was disclosed to anybody. Then he went away. Victim PW-8 deposed that after some time her sister came home and freed her mouth and her hands. She told the incident to her sister but the incident was not told to any other person out of fear of accused. This evidence clearly proves rape and age is immaterial.

13. The above evidence of the victim

regarding the first encounter with the accused regarding rape, is corroborated by the evidence of PW-14, the sister of victim. This sister of the victim deposed that on the day concerned, she had gone to the house of accused to watch T.V. and she came back at about 10.00 p.m. and found that the mouth of her sister was gagged and that her hands had been tied. She untied the mouth and hands and inquired as to who tied her. She deposed that the victim told her that the accused had come to their house. The evidence of PW-14, the sister shows that the victim did told her at that time that the accused had committed forcible intercourse on her. Noting in the recording of evidence shows that the sister of victim PW-14, at the time of her evidence, appeared to be frightened and the evidence was adjourned for 2-3 days. In her further evidence, PW-14 deposed that when she went back home, she found that there were no clothes on the person of her sister and the victim did tell her that the accused had threatened to kill them

if the incident is disclosed. Her evidence is that because of this, they did not inform anybody. PW-14 has corroborated the victim even regarding the earlier incident of allegation of stealing of gold ring and the accused trying to force them to leave the house and the uncle intervening.

14. The evidence of victim then shows that after the first incident, when she started going for labour work in the fields of others, the accused would follow her and used to give signals to her to come aside and that he used to forcibly commit intercourse with her with intervals of about eight days. Evidence is that this continued for about eight months and such incidents occurred from time to time either in the field or at her house. Victim deposed that consequently she became pregnant and her evidence shows that she did consult a mid-wife who told that victim was carrying pregnancy of five months. Her evidence further is that Sarpanch came to know about the

incident and came to her house and collected some persons from the village and made inquiries from her in presence of those persons. Thereafter the victim says that she disclosed about the acts of the accused. Consequently, she was taken to the police station and she gave the details to the police. She has proved the F.I.R. Exhibit 37.

15. The evidence of PW-7 Uttam Jadhav shows that actually his wife Parwatibai is the Sarpanch. The village Jamgavan is about 1 k.m. from New Abadi. According to him, on 25th September 2013 he came to know about pregnancy of the victim and he collected 10 - 12 people and went to the house of the victim. The two sisters were sleeping. They were woken up and brought to the square of the village and inquiries were made from the victim. His evidence shows as to how at that time victim disclosed about the acts of the accused in forcibly committing intercourse on her. He deposed that the victim along with her sister and the

villagers was taken to the police station and complaint of the victim came to be recorded. His evidence shows that police had gone to the house of the accused and brought him also to the police station.

16. The evidence of PW-4 Madhuri Dhule of Mahila Dakshata Committee and PW-16 P.S.I. Sayed Irshad Ali shows that on 25th September 2013 the villagers had brought along the victim to the police station and as the victim made the allegations of rape, the P.S.I. called PW-4 and a lady constable and these ladies talked to the victim. The F.I.R. was then recorded and the same came to be registered. The evidence of PW-16 Sayed Irshad Ali shows that the victim was then sent to PW-13 Dr. Manjusha Adhav at the Government Hospital, Nanded and the victim was examined. The evidence of PW-13 Manjusha shows that on examination the victim was found to have uterus size of 20 weeks, external ballotment present,

relaxed. No external injuries were found. The observations are noted in O.P.D. Papers Exhibit 51. On the police asking for opinion, this witness gave provisional medical certificate Exhibit 53. The witness deposed that X-ray could not be advised in the situation because the victim was pregnant. Looking to this if ossification test was not done, fault cannot be found with prosecution.

17. The prosecution examined PW-11 Sulochana Mukhade, Head-Mistress of Shri Shivajirao Moghe Primary Residential School at Kandli Phata, Akhada Balapur. This Head-Mistress deposed that on request of police, she had issued extract of school admission register of the victim, which the witness has proved at Exhibit 44. The witness deposed that as per entry recorded in the school record, date of birth of victim is 10th June 1997 and that the contents were true as per the school admission register and that it bears her

signature. The witness admitted that the entry in the school record had been made on the basis of transfer certificate received from the earlier residential school, Shirali. Thus, as per this evidence, the date of birth recorded in the school records maintained in ordinary course showed that the victim was born on 10th June 1997.

18. The prosecution seized clothes of the victim as well as of the accused vide Exhibits 39 and 40 and examined PW-9 Arvind Tarfe as well as PW-10 Devidas Kurude in this regard and Investigating Officer PW-16 has deposed about the same and C.A. Reports are also proved. However, the C.A. Reports have not brought on record any incriminating material against the accused on this count. This is natural looking to the fact that there was a gap between the various incidents of forceful intercourse and incident coming to light.

19. PW-2 Khandoji, the maternal uncle

of the victim did not support the prosecution and was declared hostile and his earlier statement to police was proved at Exhibit 63. PW-3 Topaji, the other uncle of the victim also turned hostile and he was confronted with his statement to police at Exhibit 66. PW-3 Topaji went further to give all admissions sought by the accused in the cross-examination to the extent of even saying that the character of the victim was not good. Without any semblance of regret, he admitted that it was true that he was not maintaining the victim and her sister.

20. No doubt PW-8 victim in her cross-examination deposed that she had to leave the Ashram school as there was nobody to look after her grand-mother and nobody was providing food to her grand-mother, and her uncles and aunts were not looking after her and her sister and they had totally neglected them. She deposed that she had not told about the incident to her aunts and

uncles and added that even if she would have told the same to them, it would have been in vain. The evidence of PW-2 and PW-3 read with evidence of other hostile neighbour PW-5 Gangubai shows that while Gangubai had good relations with the accused, she admitted that the relatives of the accused and the victim had compromised the case. It is apparent that the victim did not compromise but these witnesses who are relatives and neighbours of the victim, appear to have decided between them that the matter should be treated as compromised. This PW-5 Gangubai also turned hostile to her statement to police which came to be proved at Exhibit 68. Same is the condition of evidence of PW-6 Devidas. He was also confronted with his police statement. PW-2, PW-3, PW-5 and PW-6 thus deserved to be ignored as it is apparent that they do not have any regard for truth, leave aside having sympathy for two young girls like PW-8 and PW-14 struggling to survive on their own in such hostile set up.

21. I have gone through the cross-examination of PW-8, the victim. Regarding the incident, she stated that she had sustained injuries to her hands but accepted that she had not sustained injuries because of forcible intercourse to her private part. She deposed that at that time after the first incident, she did not intend to tell about the same due to the threats which had been given by the accused. Her evidence is that she did not attend the labour work for a day and thereafter she had started going for labour work. The cross-examination then shows suggestions from the accused denying the incident which the victim did not agree. Reading the evidence as a whole of PW-8 the victim, it cannot be said that she was shattered in her evidence in any manner. So is the condition of cross-examination of PW-14, the sister of the victim. There is no material to hold that she was tutored as claimed by counsel for Accused.

22. There is no substance in the argument that there was delay of eight months in filing of the F.I.R. The evidence shows that the victim along with her still younger sister was herself a minor at the time of incident and did not have any support from any side and appears to have become the victim of the circumstances. She did not have the courage to go and seek help. The evidence rather shows that the villagers forcibly took her and her sister to the police station once the victim talked to a local mid-wife regarding her difficulty as she became pregnant. Possibly victim may have anticipated hostile villagers and thus kept quiet till it became unavoidable. The victim became pregnant is not in dispute. In the circumstances as appearing from the evidence in this matter, there is no reason to disbelieve the victim PW-8.

23. The accused has tried to vaguely claim

that there was rival political group because of which the case has been filed. In the cross-examination of PW-7 Uttam Jadhav he accepted that there was a group Gram Panchayat for village Jamgavan, Jamgavan Tanda and Jamgavan New Abadi. He accepted that there are separate panels in election of Gram Panchayat. He accepted that his wife had contested election in a ward from Nai Abadi and one Sawarnmala Baban Khude has contested election from opposite panel. He accepted that one Baban Khude is brother of son-in-law of accused. On the basis of drawing such remote relations, the accused is trying to show that he is being made the victim. In the democratic set up as is existing, elections are bound to be there and there are bound to be opposite panels and the candidates are bound to have relatives or friends. This does not mean that helpless girls like the victim and her sister would come forward to depose against the accused only because he happens to be some distant relative of opposite candidate of the

wife of PW-7 Uttam Jadhav. In fact the evidence rather shows that this PW-7 Uttam Jadhav had forced and taken the victim along with her sister to the police station and put them before the police after having questioned them in the square of the village. The sisters rather landed up in Remand Home due to PW-7 Uttam's initiative. There is no substance in the defence taken by the accused that he was being made a victim due to politics in the village.

24. The A.P.P. has relied on the case of **Jarnail Singh vs. State of Haryana**, cited supra. In Para 28 of the Judgment, the Hon'ble Supreme Court reproduced Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 and further observed as under:-

"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the

basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In

case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."

25. In the present matter, the victim did not reach the level of matriculation. The date of birth from school record is no doubt not from the first school attended but it appears to be from entry in the school record maintained in ordinary course and going through the evidence of PW-11 Sulochana Mukhade, I do not find any reason to doubt the entries made in the school record. It

cannot be said that the entries have been manipulated or changed or corrected or that they had been made in anticipation. Thus there is no reason to not accept the oral evidence of the victim supported by the school record that her date of birth was 10th June 1997. Accepting this, it is clear that at the time when complaint was filed on 25th September 2013 the victim was about 16 years and three months old and the first incident of rape occurred eight months before the date of filing of complaint. Clearly the victim was less than 16 years of age at that time. Criminal Law Amendment Act 2013 amending the I.P.C. was implemented with effect from 3rd February 2013 when the age became 18 years with regard to the question of consensual sex. In the present matter firstly there is no evidence that it was a case of consensual sex. Rather, the evidence shows that the accused managed to commit forcible intercourse on the victim on first occasion and when victim did not gather courage to

make the incident public, he continued to take disadvantage so as to keep on violating her from time to time. The very nature of such acts is that the accused would take care to quietly reach the victim for the purpose. Circumstances in which victim was caught cannot be construed as consent. Thus looking at the incident from point of view of Section 375 of I.P.C. or the provisions of the Protection of Children from Sexual Offences Act 2012, in any case the accused must be held to have committed the offence as charged.

26. The accused was charged also with Section 4 of the Act. Section 29 of the Act raises presumption that where the person is prosecuted for committing offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume that such person has committed the offence unless the contrary is proved. In the present matter, the trial Court framed charge referring to Section 4 of the Act instead of Section 6 of the Act

although the charge mentions that the accused had eight months before 25th September 2013 till the said date from time to time committed penetrative sexual assault/rape on the victim. Thus particulars explained were of Section 5 (1) read with Section 6 of the Act, while erroneously Section 4 was referred. Although Section 4 of the Act has been mentioned and even conviction imposed is under Section 4 of the Act, learned counsel for the victim in Criminal Appeal No.181 of 2016 has rightly submitted that actually offence proved in this matter was aggravated penetrative sexual assault. Although I am finding this from the present record, I am not proceeding to disturb the conviction order as has been passed which would be under lesser Section which is Section 4 of the Act. This is because there is no Appeal for punishment under higher Section.

27. I have gone through the Judgment of the trial Court as regards of the merits of the matter

and found that the trial Court correctly discussed the evidence and came to the right conclusion regarding the incident. The trial Court concluded from the evidence that the victim was 16 years and about three months old at the time of filing of the complaint; that there was no substance in the defence of the accused; that the evidence of the victim and her sister was consistent and corroborative to each other; that the accused had failed to impeach the evidence of these sisters; that the New Abadi was about a Kilometer away from the main village and was having less population (thus giving opportunity to the accused to reach out to the victim for repeated acts of violation); that the accused was in a position to take precaution to conceal his activities; that the evidence of PW-7 Uttam was natural where he deposed that he collected people and took the victim to the police station; and that the offence against the accused had been established.

28. Going through the material, there is no substance in the Appeal of the accused. As there is no Appeal from the State that the conviction should have been under Section 6 of the Act, I am not disturbing the order of the trial Court on that count.

29. As regards Criminal Appeal No.181 of 2016 filed by the victim to enhance the amount of fine, the trial Court has discussed the aspects and considered the income of the accused and his living standard and social status and observed that the accused would not be able to pay huge amount of fine and therefore the trial Court settled the amount at Rs.35,000/-. I do not find any reason to disturb this. Even the amount of Rs.35,000/- as imposed against the Appellant – accused has not been deposited by him as yet.

30. Criminal Appeal No.181 of 2016 however may have to be partly allowed. In the eventuality

of the fine being recovered, the amount of Rs.35,000/- (Rupees Thirty Five Thousand) should be paid to the victim as compensation instead of Rs.25,000/- as ordered by the trial Court. The District Legal Services Authority, Hingoli can however be directed to pursue the matter regarding giving adequate compensation to the victim.

31. For the above reasons, I pass the following order:-

O R D E R

(I) Criminal Appeal No.482 of 2015 seeking setting aside of the conviction and sentence imposed vide impugned Judgment and Order, is rejected. However, as regards direction No.5 in the impugned Judgment and order of the trial Court, the amount of Rs.35,000/- shall be substituted in place of Rs.25,000/- as mentioned by the trial

Court. Thus if fine is recovered, the whole of the fine shall be paid to the victim as compensation.

(II) As regards Criminal Appeal No.181 of 2016, the same is partly allowed in view of the above directions whereby the fine of Rs.35,000/- (Rupees Thirty Five Thousand) if recovered, would fully go to the victim. In addition, looking to facts of the matter specially that victim is helpless orphan with no support, I hereby direct/request the District Legal Services Authority of Hingoli District under Section 357-A of the Code of Criminal Procedure, 1973, to take up the matter of compensation as well as rehabilitation of the victim, keeping in view the direction No.6 in the impugned Judgment and order of the trial Court.

(III) If the fine is recovered, at the time of payment of fine as compensation, the same shall be paid by depositing the amount in fixed deposit in Nationalized Bank in the name of victim for six months, which at the end of the period shall be transferred by the Bank to her Savings Account. Registry of the District Court shall assist victim to open Savings Account in Bank if help is necessary.

(IV) Both the Appeals, i.e. Criminal Appeal No.482 of 2015 and Criminal Appeal No.181 of 2016 are disposed of, accordingly.

[A.I.S. CHEEMA, J.]