

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 341 OF 2015

Baban Pandurang Gaikwad

Age : 23 years,

R/at Palshi, Vankuta, Taluka Parner,

District Ahmednagar.

(At present serving the sentence of
Rigorous Imprisonment at Nashik Jail)

... Appellant
(Ori. Accused)

Vs.

The State of Maharashtra

Through Mankhurd Police Station,

District Mumbai.

... Respondent

.....

Ms. Savita M. Yadav, Advocate for the Appellant.

Ms. V. S. Mhaispurkar, APP for the Respondent-State.

.....

CORAM : A. M. BADAR, J.

DATE : 22nd November 2016

ORAL JUDGMENT :

1. By this Appeal, the appellant/accused is challenging the judgment and order dated 26.03.2014 passed by the learned Additional Sessions Judge, City Civil & Sessions Court, Greater Mumbai in Sessions Case bearing No.80/2013 thereby convicting the appellant/accused for the offences punishable under Sections

363, 366 and 376 of the Indian Penal Code. The appellant/accused is sentenced to suffer R.I. for a period of five years and to pay fine of Rs.2,000/-, in default to further undergo R.I. for a period of one year for the offence punishable under Section 363 of the Indian Penal Code. For the offence punishable under Section 366 of the Indian Penal Code, the appellant/accused is sentenced to undergo R.I. for a period of 5 years and to pay fine of Rs.2,000/-, in default to further undergo R.I. for a period of one year. For the offence punishable under Section 376 of the Indian Penal Code, the appellant/accused is sentenced to suffer R.I. for a period of 7 years and to pay fine of Rs.2,000/-, in default to further undergo R.I. for a period of one year.

2. It is the case of the prosecution that the minor female victim of the crime in question is the original resident of Village Vankute in Parner Taluka of Ahmednagar District. From the year 2010 she started residing at the house of her uncle/informant Bashir Shirfuddin Shaikh at Mankhurd, Mumbai. She was assisting wife of her uncle Bashir in household chores and was looking after his children. In May 2012, because of vacation to the schools,

informant Bashir, his wife, their children and the minor female victim had been to their native place village Vankute. On commencement of academic session, his wife and children returned back to Mumbai. The minor female victim returned to the house of the informant Bashir on 05.08.2012.

3. According to the prosecution case, on 13.08.2012, the minor female victim of the crime in question went missing from the house of informant Bashir Shaikh. He therefore lodged a missing complaint bearing complaint No.55 of 2012. It was found that there were several missed calls on the cell phone of the wife of the informant Bashir. Upon inquiry, it was found that those missed calls were from the cell phone number belonging to the appellant/accused. He was also found to be missing from his house at village Vankute. Pursuant to the inquiry of missing complaint, during search by the Police, the minor female victim of the crime in question was found in company of the appellant/accused at Shrirampur on 18.08.2012. The couple was brought back to the Police Station at Mankhurd. Informant Bashir Shaikh made inquiry with the minor female victim and found that she was enticed by

the appellant/accused by promising to marry her and then rape was committed on her. Therefore, the informant Bashir Shaikh lodged a report to the Police Station Officer, Mankhurd Police Station, Mumbai on 19.08.2012. This report has resulted in registration of crime bearing CR No.237 of 2013 under Sections 363, 366 and 376 of the Indian Penal Code against the appellant/accused. After investigation, charge sheet came to be filed, and on committal, trial was held, which ultimately ended in conviction of the appellant/accused and imposition of sentence on him as indicated in the opening paragraph of this judgment.

4. Heard the learned counsel appearing for the appellant/accused. By taking me through the statement of PW-2 i.e. the minor female victim of the crime in question, the learned counsel for the appellant/accused argued that evidence of the minor female victim shows that in company of the appellant/accused she went to Kolhapur, where they married in a temple. By drawing my attention to the evidence of the minor female victim of the crime in question, the learned counsel for the appellant/accused further argued that as per the version of the

minor female victim of the crime in question, sexual intercourse by the appellant/accused with her was after performing marriage with her. History stated by the minor female victim to the medical officer is also pressed in service. By relying of the evidence of PW-6 Sanjay Harishchandra Rathod, it is argued that date of birth of the minor female victim, according to the prosecution case, is 28.10.1996 and therefore, on the date of the alleged rape i.e. on 14.08.2012, the minor female victim of the crime in question was about 15 years 9 months and 18 days old. Therefore, in submission of the learned counsel for the appellant/accused, the case falls under *Exception 2* to Section 375 of the Indian Penal Code as the alleged sexual intercourse by the appellant/accused was with his own wife i.e. PW-2/minor female victim and as at the time of commission of the alleged offence, the PW-2/minor female victim was more than 15 years of age, the alleged act cannot be termed as rape. Therefore, the appellant/accused deserves acquittal.

5. The learned counsel for the appellant/accused further argues that there is no sufficient evidence to conclude that the minor female victim of the crime in question was below the consenting

age. The evidence on record indicates that she might be more than 16 years of age, and therefore, as the alleged act of sexual intercourse was a consensual act, the offence of rape is not made out by the prosecution. To buttress this submission, the learned counsel pointed out that the PW-2/minor female victim in her evidence has disclosed her date of birth as 29.10.1996 whereas the informant/PW-1 Bashir Shaikh has disclosed her date of birth as 18.10.1996. The learned counsel argued that in such a situation, margin of error of two years needs to be considered and benefit of doubt needs to be granted to the appellant/accused.

6. The learned counsel for the appellant/accused further argued that the spot panchanama was recorded on the basis of voluntary disclosure statement of the appellant/accused and the spot panchanama also supports the case of the defence that the alleged minor female victim is legally married wife of the appellant/accused. By relying on the evidence of PW-3 Shabbir/father of the minor female victim, it is argued that birth of the minor female victim was recorded at Karjat Municipal Council, whereas, evidence of PW-6 Sanjay Rathod shows that her birth was

recorded at village Vankute. Therefore, according to the learned counsel for the appellant/accused, benefit of doubt needs to be granted to the appellant/accused and he deserves acquittal from the charges leveled against him.

7. I have heard Ms. Mhaispurkar, learned APP appearing for the State. She conceded to the arguments advanced by the learned counsel for the appellant/accused that the appellant/accused married the minor female victim who was more than 15 years of age at the time of the alleged act and therefore the case falls in the exception to the definition of the term 'rape'. However, the learned APP stated that this fact of marriage was denied by the appellant/accused in his statement under Section 313 of the Code of Criminal Procedure.

8. I have carefully considered the rival submissions and perused the record and proceedings. The offence allegedly took place on 13.08.2012. The charges leveled against the appellant/accused are for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. Therefore, for proper appreciation of the evidence adduced by the prosecution, it is apposite to put on

record the relevant provision of Sections 361, 363, 366 and 375 of the Indian Penal Code as they stood prior to substitution by Section 9 of the Criminal law (Amendment) Act, 2013.

"361. Kidnapping from lawful guardianship.-

Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.-The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping.- *Whoever kidnaps any person from [India] or from lawful guardianship,*

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.- *Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.]*

375. Rape.- *A man is said to commit "rape" if he-*

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

9. According to the prosecution case, the appellant/accused enticed the minor female victim to leave company of her lawful guardian and took her to Kolhapur with him. For making out the offence defined under Section 361 of the Indian Penal Code, the prosecution will have to show that the minor female victim (PW-2) was under 18 years of age at the time of the alleged offence. Similarly, for making out the offence as defined under Section 375 of the Indian Penal Code, the prosecution is enjoined to show that the minor female victim (PW-2) was below 16 years of age at the time of alleged rape on her by the appellant/accused. This is so because according to the prosecution case there was enticing of the minor female victim by assurance of marriage and then there was sexual intercourse with her. Before adverting to the aspect whether commission of offences of kidnapping from lawful guardianship and consequential rape are committed by the appellant/accused, one will have to examine whether the minor female victim is proved to be below 18 years of age for the offence punishable under Section 363 of the Indian Penal Code and below 16 years of age for the offence punishable under Section 376 of the Indian Penal Code.

10. The evidence on record shows that PW-1 Bashir is the uncle of PW-2/minor female victim and PW-3 Shabbir is her father. PW-1 Bashir is in employment of the BEST as a Driver, whereas, PW-3 Shabbir is running a chicken shop in village Vankute, Taluka Parner, District Ahmednagar. The PW-2/alleged minor female victim of the crime in question appears to have studied up to 8th standard and then she left village Vankute to join the company of her uncle and aunt at Mumbai for helping her aunt. This material borne from the other evidence shows the background of the prosecuting party. They appear to be rustic and uneducated persons from rural background. PW-3 Shabbir, who is the father of the minor female victim, is not even knowing whether the minor female victim (PW-2) was born at the house or in the hospital. He was not even in a position to disclose the date of birth of his daughter PW-2/alleged minor female victim. The PW-2/minor female victim of the crime in question has disclosed her date of birth as 29.10.2016, whereas her uncle/PW-1 Bashir stated that his niece PW-2/minor female victim was born on 18.10.1996. This is the oral evidence regarding the age of the alleged minor female victim. It is well settled that oral evidence is hardly sufficient for determining the age of a

person.

11. In order to prove the age of PW-2, the prosecution has examined one Sanjay Harishchandra Rathod, Village Development Officer, village Vankute as PW-6. He is the authority to register births and deaths which take place at Taluka Parner, and as such, the custodian of the record. Section 8 of the Registration of Births and Deaths Act, 1969 casts duty on citizens to inform any birth or death in a house. The head of the house or the nearest relative of the head of the house present in the house or the oldest adult member present in the house is required to report birth in the family as per the provisions of this Act. PW-6 Sanjay Rathod appears to be the Registrar for the local area inclusive of village Vankute for recording births and deaths. His evidence shows that as per the record maintained by his office, on 02.11.1996 one Sharfuddin Jamal Shaikh had reported birth of the PW-2 occurring in the family on 28.10.1996. The birth certificate issued by PW-6 Sanjay Rathod is at Exhibit 31. PW-6 Sanjay Rathod had brought with him the original register of births maintained as per the provisions of the Registration of Births and Deaths Act, 1969. A

photocopy of the relevant extract of the said register is at Exhibit 32-A. The birth certificate at Exhibit 31 is in consonance with the entries made in the birth register at Exhibit 32-A. Both these documents show that the date of birth of the minor female victim (PW-2) is 28.10.1996. There is no iota of evidence on record to disbelieve either version of the PW-6 Sanjay Rathod or to infer that the birth certificate at Exhibit 31 is not that of the minor female victim (PW-2) but may be of some other person with identical name. Even there are no suggestions to that effect to the witnesses examined by the prosecution. Rather, the evidence on record coming from the mouth of the minor female victim (PW-2) as well as her father PW-3 Shabbir goes to show that she is the eldest daughter of PW-3 Shabbir.

12. At this juncture, the provisions of Section 35 of the Evidence Act become relevant. The extract of the birth register at Exhibit 32-A shows entry of birth of the PW-2/minor female victim and her date of birth recorded in the said register is 28.10.1996. This entry can be taken as positive proof of the date of birth of PW-2/minor female victim, in respect of whose birth this Court is required to

give findings. The Registrar, who acts or purports to act in pursuance of the provisions of the Registration of Births and Deaths Act, 1969, is deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. The certificate of date of birth Exhibit 31 recording birth of the PW-2/minor female victim issued by him is admissible under Section 35 of the Evidence Act because that entry is made in the public record, stating the fact in issue and it was made by a public servant in discharge of his official duty. Therefore, it needs to be held that the date of birth of PW-2/minor female victim is 28.10.1996. The incident of her alleged kidnapping took place on 13.8.2012 and it is alleged that she was subjected to rape by the appellant/accused in the night intervening 13th and 14th August 2012. As such, it needs to be held that at the time of the alleged offence, the minor female victim was about 15 years 9 months and 18 days old. Therefore, the prosecution has proved that at the time of the alleged offence, the minor female victim i.e. the PW-2 was below 16 years of age.

13. Now let us examine whether PW-2/minor female victim was kidnapped by the appellant/accused from her lawful guardian for

the purpose of forcing or seducing her to have illicit intercourse with him and then whether the appellant/accused had committed rape on her. Considering the nature of the averments made by the prosecution, the evidence of PW-2/minor female victim of the crime in question assumes great importance in this matter. Her uncle PW-1 Bashir's evidence is relevant only to conclude that when he woke up in the morning hours of 13.08.2012, he found his niece i.e. PW-2 missing from the house, and therefore, he lodged a missing report on 13.08.2012 itself. He further disclosed that as the cell phone of his wife was showing several missed calls, he made inquiry about the cell number from which the said missed calls were received and came to know that those were from the appellant/accused. PW-3 Shabbir, who is the father of the minor female victim, stated that his daughter/PW-2 was residing with his brother PW-1 Bashir at Mumbai and he was informed by his brother in the month of August 2012 that his daughter had went missing. How the minor female victim of the crime in question went missing and what happened with her can be seen from her evidence.

14. PW-2/ minor female victim of the crime in question is examined and her evidence is at Exhibit 14. Her evidence discloses the following facts:-

The appellant/accused used to work as a labourer on a tempo owned by her family. The minor female victim (PW-2) was residing with her uncle PW-1 Bashir at Mumbai since last about two years from the incident. Just prior to the incident, the minor female victim (PW-2) had been to her native place i.e. village Vankute, where the appellant/accused used to reside. During her stay at village Vankute, she used to meet the appellant/accused frequently. Even during her stay at Mumbai, she used to call the appellant/accused frequently from the cell phone of her aunt. She was receiving phone calls from the appellant/accused and the appellant/accused used to request her to return back to her native place i.e. village Vankute. The appellant/accused used to tell the minor female victim that he wants to marry her.

This is the evidence regarding relationship of the minor female victim with the appellant/accused which undoubtedly indicates that the couple was in love. Now, let us see what she

states about the alleged offences.

15. It is in the evidence of PW-2/ minor female victim that the appellant/accused telephonically contacted her and told her to come to Pune station. In her cross-examination, she admitted the fact that she had telephonically contacted the appellant/accused from the cell phone of her aunt and told him that she is coming to Pune railway station and that he should meet her. She further deposed that she left the house without disclosing this fact to her uncle and went to Pune by a jeep. From there, she accompanied the appellant/accused and they went to Kolhapur. As per the version of the minor female victim, there they went to a temple and performed marriage. The minor female victim (PW-2) further deposed that then the appellant/accused took her to his friend's house where they stayed for one night. In that night, according to the minor female victim, the appellant/accused had committed forcible sex with her and then she was taken to Shrirampur where also she was subjected to forcible sexual intercourse by the appellant/accused. Three days thereafter, the Police came and took her as well as the appellant/accused to Mankhurd Police Station.

16. During the course of investigation, the minor female victim (PW-2) was subjected to the medical examination and at that time also, she has disclosed the attending medical officer that she eloped with the appellant/accused to Kolhapur, married him on in a temple on 14.08.2012 and then went to Shrirampur. She disclosed to the medical officer that she had sexual intercourse with the appellant/accused willingly on 13.08.2012, 17.08.2012 and 18.08.2012. The medical case paper reflecting the history disclosed by the PW-2/minor female victim is at Exhibit 22.

17. During the course of investigation, PW-4 Amit Rohidas Maner, the Investigating Officer has recorded confessional statement of the appellant/accused and according to the prosecution case, the appellant/accused has disclosed the spot of his marriage with the PW-2 i.e the temple where he married the PW-2. The spot panchanama was accordingly recorded and the same is at Exhibit 17.

18. The question which needs to be answered is whether such marriage makes the appellant/accused husband and the PW-2 as his wife so as to exclude sexual relations between them from the

purview of definition of the term 'rape' as found in Section 375 of the Indian Penal Code. It will have to be seen whether the case is falling in exception to Section 375 of the Indian Penal Code, as the minor female victim (PW-2) was more than 15 years of the age at the relevant time. For giving finding on this aspect, how the appellant/accused had taken the minor female victim shall have to be examined first. Undisputedly, the PW-2 was less than 18 years of age at the time of commission of the alleged offence. She was just about 15 years 9 months and 18 days old. She was under the lawful guardianship of her uncle PW-1 Bashir Shaikh. Evidence of the PW-2 that the appellant/accused used to allure her by assuring marriage with her is not shattered in the cross-examination. On the contrary, there were suggestions to her that her parents learnt about her affair with the appellant/accused. The evidence of PW-2 shows that there was some communication between her and the appellant/accused prior to she leaving the house of her uncle PW-1 Bashir Shaikh. It is thus seen from the evidence of the PW-2 that on assurance of marriage given to her by the appellant/accused, she left the house of her lawful guardian uncle PW-1 Bashir. Taking or enticing away a minor out of the keeping of a lawful guardian is an

essential ingredient of the offence of kidnapping. The object of Section 361 of the Indian Penal Code is to protect minor children from being seduced for improper purposes and to protect the right and privilege of a guardian having lawful charge or custody of minor ward. The words *“takes or entices any minor.....out of the keeping of the lawful guardian of such minor”* found in Section 361 of the Indian Penal Code are significant. Persuasion by a person which creates willingness on the part of a minor to be taken out of the keeping of the lawful guardian of such minor would be sufficient to attract the penal provisions of Section 363 of the Indian Penal Code. In this case, assurance of marriage by the appellant/accused to the teen aged minor female prompted her to leave the company of her uncle PW-1 Bashir. The word 'entices' used in Section 361 of the Indian Penal Code is in the context of inducement or allurement by giving rise to hope or desire to the victim. In the case in hand, as seen from the evidence of the PW-2/minor female victim, hope of marriage resulted in enticing her by the appellant/accused, compelling her to leave company of her lawful guardian. As such, from the evidence on record, the

prosecution has certainly proved the offence punishable under Section 363 of the Indian Penal Code. The appellant/accused had certainly enticed the PW-2/minor female victim out of the keeping of her lawful guardian and then by going to Kolhapur, he allegedly performed marriage with her in a temple.

19. Now, let us examine whether by such marriage, the appellant/accused can become husband of the PW-2. At this juncture, the provisions of The Prohibition of Child Marriage Act, 2006 (for the sake of brevity, referred to as “the Act of 2006”) become relevant. Section 2(a) of this Act of 2006 defines 'child' to mean a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. Contracting party in relation of a marriage, as per the provisions of Section 2(c) of this Act of 2006 means either of the parties whose marriage is or is about to be thereby solemnised. Section 3 of this Act of 2006 provides that a child marriage is voidable at the option of the contracting party being a child. A petition challenging such marriage can be filed by the child within two years of attaining majority. This makes it clear that the child marriage is not *void ab*

initio, rather it is voidable at the option of the child. However, for our purpose, what is relevant is Section 12 of this Act of 2006. It reads thus:

"12. Marriage of a minor child to be void in certain circumstances.- Where a child, being a minor-
(a) is taken or enticed out of the keeping of the lawful guardian; or
(b) by force compelled, or by any deceitful means induced to go from any place; or
(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes,
such marriage shall be null and void."

Bare perusal of Section 12 of this Act of 2006 makes it clear that where a child, being a minor, is taken or enticed out of the keeping of a lawful guardian, then such marriage shall be null and void. In the case in hand, the PW-2/minor female victim of the crime in question is proved to have been enticed out of the keeping of the lawful guardianship of PW-2 Bashir Shaikh and as such, the marriage allegedly performed between the appellant/accused Baban Pandurang Gaikwad and the PW-2/minor female victim

cannot be said to be a legal marriage making the appellant/accused as husband of PW-2/minor female victim. Hence, by no stretch of imagination, it can be said that as the appellant/accused had performed marriage with the minor female victim and then committed sexual intercourse with her, his case falls under the Exception 2 to Section 375 of the Indian Penal Code as the minor female victim was more than 15 years of age at the time of the alleged sexual intercourse and as the appellant/accused was her husband. Exception 2 to Section 375 provides that sexual intercourse by a man with his wife, the wife not being under 15 years of age, is not rape. This exception is certainly applicable when the marriage is legal and not a void marriage. The reason for this is that on marriage, which is a legal marriage, the wife consents to the husband exercising the marital right of intercourse during such time as the ordinary relations created by marriage subsists between them. The marital right of the husband in such a situation exists by virtue of the consent given by the wife at the time of the marriage and as the child marriage is not *void ab initio* by virtue of provision of Section 3 of the Act of 2006. However, in

the case in hand, the alleged marriage of the appellant/accused with the minor female victim (PW-2) by enticing her is *void ab initio*, and therefore, the case of the appellant/accused does not fall within the Exception 2 to Section 375 of the Indian Penal Code. In this view of the matter, the sexual intercourse committed by the appellant/accused on the PW-2, who was not of consenting age, amounts to rape. Hence, the prosecution has successfully brought home the guilt of the accused for the offence punishable under Section 376 of the Indian Penal Code. Similarly, the evidence of the minor female victim shows that she was taken away by enticing her with an intention as well as knowledge by the appellant/accused that she will be seduced by him to have illicit sexual intercourse with him and as such, the offence punishable under Section 366 of the Indian Penal Code committed by the appellant/accused, is also proved by the prosecution. In this view of the matter, no infirmity can be found with the finding of conviction of the appellant/accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code recorded by the learned trial Court.

20. The last question that remains to be answered is the quantum of sentence. The sentences imposed on the appellant/accused as indicated in the opening para of this judgment are directed to run concurrently except the sentences imposed in default of payment of fine amount. It is seen from the evidence of the PW-2/minor female victim that with passage of time, she has already married another person. The appellant/accused is seen to be an under-trial prisoner since beginning and he was arrested on 18.08.2012. The evidence of the minor female victim, as discussed *supra*, goes to show that she was having love affair with the appellant/accused, who, as seen from the charge sheet, was 23 years of age. He seems to be an unmarried person. The PW-2/minor female victim, as discussed in the foregoing paragraphs, was 15 years, 9 months and 18 days old at the time of the incident. She was below 16 years just by few months and as her consent was meaningless because she had not attained the consenting age, which was at that time 16 years, the appellant/accused is convicted. However, the fact remains that the evidence of the PW-2/minor female victim goes to show that she as well as the appellant/accused went to Kolhapur from Pune and

from Kolhapur they went to Shrirampur and the couple stayed together up to detection by the Police on 18.08.2012. Since then, the appellant/accused is behind the bars. Thus, the appellant/accused is behind the bars for about 4 years and 3 months. In such a situation, age of the appellant/accused, which is stated to be 23 years in the charge sheet, becomes relevant. Similarly, the conduct of the minor female victim in joining the company of the appellant/accused and then continuing his company with no protest by roaming with him at different places also becomes relevant. In a pre-planned manner, the minor female victim eloped from the house of her lawful guardian and joined the company of the appellant/accused. It is also apparent that while undergoing sentence for about 4 years and 3 months, the appellant/accused must have earned some remissions. It is also clear from the evidence of the PW-2/minor female victim that the appellant/accused was working as a labourer on a tempo owned by her family. Section 376(1) of the Indian Penal Code deals with punishment for the offence of rape. Prior to amendment to the said Section by virtue of Section 9 of the Criminal Law (Amendment) Act, 2013, the offence of rape was punishable with imprisonment

of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to 10 years apart from imposition of fine. It also provides that, for adequate and special reasons to be mentioned in the judgment, the Court is empowered to impose sentence of imprisonment for a term less than 7 years. In somewhat same situation, in the matter of *Mohammed Nisar Riyaz Khan vs. The State of Maharashtra*, reported in 2007 Cri.L.J. 562, this Court, by maintaining the conviction, had reduced the quantum of sentence to the period of sentence already undergone by the accused for the offence punishable under Section 376. The appellant/accused in the case in hand also deserves the same treatment in the light of the fact that the appellant/accused was also unmarried young person at the time of commission of offence and that the PW-2/minor female victim had joined his company by eloping from her lawful guardian because of the subsisting love affair between them. He was a labourer on the tempo owned by family of the minor female victim. His economic condition is reflected from the job he was doing. In this view of the matter, the following order is passed by modifying the sentence imposed on the appellant/accused:-

ORDER

- I. The appeal is partly allowed.
- II. The impugned judgment and order recording finding of guilt of the appellant/accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code is confirmed.
- III. It is ordered that for the offence punishable under Section 363 of the Indian Penal Code, the appellant/accused should undergo R.I. for a period of three years and to pay fine of Rs.200/-, and in default to further undergo R.I. for a period of one month.
- IV. The appellant/accused is directed to undergo R.I. for a period of three years and to pay fine of Rs.200/-, in default to further undergo R.I. for period of one month for the offence punishable under Section 366 of the Indian Penal Code.
- V. The appellant/accused is sentenced to suffer R.I. for a period of four years and six months for the offence punishable under Section 376 of the Indian Penal Code and he is also directed to pay fine of Rs.200/-, and in default to further undergo R.I. for period of one month.

- VI. The substantive sentences of imprisonment imposed on the appellant/accused to run concurrently and he is entitled for set off for the period of imprisonment already undergone.
- VII. The fine amount recovered, if any, shall be paid to the victim PW-2 as a compensation.
- VII. The Appeal is disposed of accordingly.

(A. M. BADAR, J.)