

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.195 OF 2016

SIDDHARTH DAGADU SONDE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Yashpal Thakur, Appointed Advocate for the Appellant.

Ms.N.S.Jain, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

**DATE : 24th AUGUST 2017 &
28th AUGUST 2017**

ORAL JUDGMENT :

1 By this appeal, the appellant / accused is challenging the judgment and order dated 20th May 2015 passed by the learned Special Judge, Pune, in Special Child Sessions Case No.42 of 2013 thereby convicting him of offences punishable under Section 376 and 354 of the Indian Penal Code (IPC). The appellant / accused is also held guilty under Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act

hereinafter). On each count for the offence punishable under Section 376 of the IPC as well as that under Section 4 of the POCSO Act, he has been sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.5,000/-, in default to undergo further rigorous imprisonment of 1 year. For the offence punishable under Section 354 of the IPC, the appellant / accused is sentenced to suffer rigorous imprisonment for 1 year, apart from directing him to pay fine of Rs.1,000/- and in default, to undergo further rigorous imprisonment for 1 month. Substantive sentences imposed on these three counts are directed to run concurrently by the learned trial court.

2 Brief facts leading to the institution of the present proceedings are thus :-

(a) Informant PW2 Suman Gaikwad is a widow. She was having responsibility of maintaining four daughters. The PW1 / prosecutrix is one amongst them. PW2 Suman Gaikwad used to

reside at Dattawadi area of Pune along with her mother-in-law PW3 Kamal Gaikwad as well as her daughters.

(b) PW3 Kamal Gaikwad is having a daughter named Vandana. The appellant / accused is husband of said Vandana – daughter of PW3 Kamal Gaikwad. Thus, the appellant / accused is husband of paternal aunt of the PW1 / prosecutrix.

(c) According to prosecution case, as father of the PW1 / prosecutrix died and her mother was suffering from penury, it was decided to send the PW1 / prosecutrix to the house of the appellant / accused at Yerwada area of Pune for further education. Accordingly, the PW1 / prosecutrix started residing with her paternal uncle i.e. the appellant / accused and her paternal aunt Vandana as well as their children and took admission in 7th Standard at Netaji Subhashchandra Bose High School, Yerwada, Pune.

(d) The prosecution alleged that during her stay at the house of the appellant / accused at Yerwada, Pune, the appellant / accused used to take her to the terrace and used to outrage her modesty. He used to attempt to commit sexual intercourse with her by putting his penis in her vagina.

(e) After completion of academic session 2012-2013, on 9th April 2013, the PW1 / prosecutrix was brought back to her mother's house by her grandmother – PW3 Kamal Gaikwad. As there was urus of God Mhasoba at Dattawadi, Pune, on 14th May 2013, the appellant / accused along with his family members visited house of PW1 prosecutrix and stayed there for one day. On 15th May 2013, when the appellant / accused along with his family members was returning to his house at Yerwada, Pune, the PW1 / prosecutrix did not accompany him. She was questioned by her mother PW2 Suman Gaikwad. Thereafter, the PW1 / prosecutrix disclosed her mother that the appellant / accused used to call her at the terrace of the house and used to outrage her modesty so also he used to attempt to penetrate her. She disclosed

that he used to threaten her that if she dares to disclose the incident to anybody, he would kill her mother.

(f) After hearing narrations of the PW1 / prosecutrix, PW2 Suman Gaikwad was frightened and therefore, immediately she did not disclose the incident. Subsequently, she told the incident, as narrated by the PW1 / prosecutrix, to her mother-in-law i.e. PW3 Kamal Gaikwad. Then, PW2 Suman Gaikwad accompanied by her mother as well as PW3 Kamal Gaikwad, went to the house of the appellant / accused on 18th May 2013 and questioned him. At that time, the appellant / accused threatened them that if the complaint is lodged, he would commit suicide. Ultimately, with the aid of PW5 Lilatai Sonawane, PW2 Suman Gaikwad lodged report of the incident with Police Station Yerwada on 20th May 2013, which resulted in registration of Crime No.241 of 2013 for offences punishable under Section 376 as well as Section 4 of the POCSO Act.

(g) Wheels of investigation were set in motion due to report lodged by PW2 Suman Gaikwad. PW1 prosecutrix was sent for medical examination to Sassoon hospital, Pune, where she came to be examined by PW4 Dr.Swati Kagne. Statement of witnesses came to be recorded and spot panchnama of the spot of the incident came to be recorded. On completion of necessary investigation, the appellant / accused came to be charge-sheeted.

(h) After committal of the case, charges for the offences punishable under Sections 376 and 354 of the IPC as well as under Section 4 of the POCSO Act came to be framed and explained to the appellant / accused, who abjured guilt and claimed trial.

(i) In order to bring home guilt to the appellant / accused, the prosecution has examined in all six witnesses. The prosecutrix came to be examined as PW1 whereas her mother came to be examined as PW2. Report lodged by PW2 Suman Gaikwad is at Exhibit 10. PW3 Kamal Gaikwad is grandmother of the PW1 /

prosecutrix. Dr.Swati Kagne, gynecologist from Sassoon Hospital, Pune, is examined as PW4. Lilatai Sonawane – social worker, came to be examined as PW5 whereas, the Investigator Amol Nandekar, A.PI., Yerwada Police Station, is examined as PW6.

(j) Defence of the appellant / accused, as gathered from the line of cross-examination from the prosecution witnesses as well as from his statement under Section 313 of the Code of Criminal Procedure (Cr.P.C.) is that of false implication. According to the defence, at the time of marriage ceremony, the appellant / accused had a quarrel with one Ravi Gaikwad and PW2 Suman Gaikwad had illicit relations with said Ravi Gaikwad. Hence, he has been framed in the crime in question.

3 I have heard Shri Yashpal Thakur, the learned advocate on the panel of Legal Aid of High Court and appointed by this court to represent the appellant / accused at the cost of the State. By taking me meticulously through the entire record, Shri Yashpal Thakur, the learned advocate argued that case of the prosecution

becomes suspect because of inordinate delay in lodging the First Information Report (FIR). He argued that though according to the prosecution case PW2 Suman Gaikwad – mother of the PW1 / prosecutrix came to know about the alleged incident on 15th May 2013, still no action came to be taken by the prosecuting party and ultimately, the FIR came to be lodged belatedly on 20th May 2013. This indicates false implication of the appellant / accused in the crime in question by concocting against him. It is further argued that the PW1 / prosecutrix had ample opportunity to complain against the appellant / accused. Evidence on record indicates that she was continuously in contact with her mother PW2 Suman Gaikwad and her grandmother PW3 Kamal Gaikwad, during the course of her stay at the house of the appellant / accused. The learned advocate pointed out that the PW1 / prosecutrix had a brief stay at her own house at Dattawadi, in company of her mother and grandmother during Diwali vacation. Still, she failed to make any grievance against the appellant / accused. The learned advocate further drew my attention to evidence of PW3 Kamal Gaikwad to point out that PW3 Kamal

Gaikwad was continuously visiting the house of the appellant / accused for meeting her daughter as well as grandchildren. At that time, the PW1 / prosecutrix used to interact with PW3 Kamal Gaikwad. Still, the prosecutrix did not complain about the alleged act of the appellant / accused. This, according to the learned advocate appearing for the appellant / accused, makes the prosecution case doubtful and improbable.

4 Shri Thakur, the learned advocate further argued that evidence of the prosecution suffers from several inconsistencies and discrepancies making it unworthy of credit. Evidence of PW4 Dr.Swati Kagne shows that she had jotted down the history of the alleged incident given jointly by PW1 prosecutrix as well as her mother PW3 Kamal Gaikwad. Evidence of PW4 Dr.Swati Kagne does not make it clear that as to which witness has stated which history, and therefore, the contemporaneous medical record cannot be used against the appellant / accused for inferring the guilt. It is further argued that even if evidence of prosecution is accepted as it is, then also, no offence either under Section 376 of

the IPC or under Section 4 of the POCSO Act is made out. Shri Yashpal Thakur, the learned advocate, to buttress this contention placed reliance on evidence of PW1 prosecutrix so also, evidence of her mother PW2 Suman Gaikwad and the FIR lodged by her to submit that, evidence on record shows that the appellant / accused had only attempted to penetrate the PW1 / prosecutrix, and therefore, offence punishable under Section 376 of the IPC as well as offence punishable under Section 4 of the POCSO Act, is not made out by the prosecution. According to him, considering this quality of evidence, the appellant / accused is entitled for benefit of doubt. He placed reliance on the judgment of the Hon'ble Apex Court in the matter of Tarkeshwar Sahu vs. State of Bihar¹.

5 I have heard the learned APP who argued that evidence of PW4 Dr.Swati Kagne duly corroborates version of the PW1 / prosecutrix and therefore, offences as alleged against the appellant / accused are proved by the prosecution.

¹ 2006 (8) SCC 560

6 I have carefully perused the record and proceedings including the deposition of witnesses, so also the documentary evidence placed on record. I have also considered the rival submissions.

7 At the outset, let us put on record the undisputed position. It is not disputed by the defence that the date of birth of the PW1 / prosecutrix is 11th February 2001, and as such, the appellant / accused has not disputed the fact that at the time of the alleged incident, the PW1 / prosecutrix was below 18 years of age. Undisputedly, this female child was residing at the house of the appellant / accused during the academic session 2012-2013 and she left his house on 9th April 2013 for joining company of her mother. It is not in dispute that during the academic year 2012-2013 by staying at the house of the appellant / accused, the PW1 / prosecutrix was taking education at Netaji Subhashchandra Bose High School, Yerwada, Pune. Similarly, it is not in dispute that the appellant / accused is husband of paternal aunt of the PW1 / prosecutrix and that PW3 Kamal Gaikwad is mother of his

wife Vandana. The defence has also not disputed that PW2 Suman Gaikwad is daughter-in-law of PW3 Kamal Gaikwad and mother of PW1 prosecutrix. With this undisputed position on record, let us examine whether the prosecution is successful in making out the offence punishable under Section 376 of the IPC, as well as the one punishable under Section 4 of the POCSO Act.

8 Undisputedly, the victim of the crime in question, at the relevant time, was a minor female child, she being below 18 years of age. As such, the appellant / accused cannot put forth the theory of consent. PW1 prosecutrix had not attained the consenting age.

9 Evidence on record coming from cross-examination of PW3 Kamal Gaikwad so also from evidence of the PW1 / prosecutrix and her mother PW2 Suman Gaikwad reflects the reason for the PW1 / prosecutrix joining the company of the appellant / accused for residing in his house at Yerwada, Pune. From cross-examination of PW3 Kamal Gaikwad it is brought on

record by the defence that the father of PW1 prosecutrix passed away and the responsibility of maintaining the PW1 / prosecutrix and her three sisters thereafter rested on shoulders of their mother i.e. PW2 Suman Gaikwad. Cross-examination of PW3 Kamal Gaikwad further shows that it was the appellant / accused who asked PW3 Kamal Gaikwad and PW2 Suman Gaikwad to send the PW1 / prosecutrix to his house for further education. Evidence of PW2 Suman Gaikwad shows that because of death of her husband and as she was required to shoulder the responsibility of maintaining all her four daughters, hoping that the PW1 / prosecutrix would get good education while staying at the house of the appellant / accused, she had consented for sending PW1 prosecutrix for residing at the house of the appellant / accused. Evidence of PW2 Suman Gaikwad, which is unchallenged in the cross-examination, goes to show that she was not in a position to provide educational facilities to her daughters. As seen from the cross-examination of PW3 Kamal Gaikwad, then PW1 prosecutrix was admitted at Netaji Subhashchandra Bose High School, in Yerwada area of Pune, and she started residing in the house of the

appellant / accused, which is also located at Yerwada, Pune. This evidence, which is brought on record mostly from cross-examination of PW2 Suman Gaikwad and PW3 Kamal Gaikwad needs to be accepted and this court will have to keep in mind the situation in which the PW1 / prosecutrix was constrained to join company of the appellant / accused by residing with him and his family members at his house at Yerwada, Pune. This evidence unerringly points out that the appellant / accused who himself obtained custody of the minor female child (PW1) was in a position of dominating her while she was in his custody. In these established facts, now let us examine what PW1 prosecutrix says about the incident, as considering the nature of allegations made against the appellant / accused, fate of the prosecution case to a large extent depends on her version about the incident.

10 The PW1 / prosecutrix deposed that during her stay at the house of the appellant / accused, he used to take her to the terrace and he used to ask her to massage his private part by oil. The PW1 / prosecutrix further stated that the appellant / accused,

at that time, used to press her breast and he also was trying to insert his penis into her vagina. The PW1 / prosecutrix further deposed that the appellant / accused was sleeping on her body. At that time, wife of the appellant / accused used to be in the kitchen of the house and there used to be nobody at the terrace. The PW1 / prosecutrix further deposed that the appellant / accused used to give threats to her that if his acts were disclosed to anybody, then he would kill her mother and due to this fear, she had not disclosed the incident to anybody else.

11 PW2 Suman Gaikwad in her deposition before the court has stated that while studying in 7th Standard, her daughter i.e. the PW1 / prosecutrix used to reside with the appellant / accused and his family. After completion of examination, her daughter was brought back by her mother-in-law PW3 Kamal Gaikwad to her own house on 9th April 2013. On this aspect, evidence of PW3 Kamal Gaikwad is also in tune with evidence of PW2 Suman Gaikwad.

12 PW2 Suman Gaikwad and PW3 Kamal Gaikwad in their statements have disclosed narrations made to them by the PW1 / prosecutrix after the appellant / accused left their house, after attending urus of God Mhasoba, on 15th May 2013. As per version of both these witnesses, at the time of visit of the appellant / accused to their house, the PW1 / prosecutrix showed disinclination to go back to the house of the appellant / accused. She was questioned by both of them. Then, as per version of PW2 Suman Gaikwad, the PW1 / prosecutrix disclosed her that the appellant / accused was sexually harassing her by asking her to massage his private part, by touching her breast as well as her private part, at the terrace of the house. In words of PW3 Kamal Gaikwad, the PW1 / prosecutrix disclosed her that the appellant / accused used to ask her to massage his private part, he used to pull the PW1 / prosecutrix near him and used to kiss her.

13 It is, thus, clear from version of both these witnesses that though the PW1 / prosecutrix had disclosed that the appellant / accused was trying to insert his penis in her vagina,

PW2 Suman Gaikwad and PW3 Kamal Gaikwad are not stating that this fact was disclosed by the PW1 / prosecutrix to them. PW2 Suman Gaikwad has stated that her daughter had disclosed to her each and every thing about misbehavior of the appellant / accused with her. However, nothing more than giving massage to the private part of the appellant / accused and touching breast and private part of the PW1 / prosecutrix, is stated by her before the court.

14 Now let us examine whether an element of improbability creeps in the prosecution case because of non-disclosure of alleged sexual harassment to her by the PW1 / prosecutrix to her mother PW2 Suman Gaikwad and her grandmother PW3 Kamal Gaikwad. No doubt, during the period of about one academic session, the PW1 / prosecutrix resided at the house of the appellant / accused, but in the foregoing paragraphs of this judgment, I have also disclosed circumstances in which she was required to take shelter of the house of the appellant / accused. Evidence on record disclosed that the PW1 /

prosecutrix was hailing from a penury stricken family, after passing away of her father. She was the victim of circumstances after death of her father and as such helpless. From cross-examination of PW2 Suman Gaikwad, it is elicited by the defence that the PW1 / prosecutrix was required to do work of washing utensils, clothes, as well as other work allotted to her at the house of the appellant / accused. The PW1 / prosecutrix was hardly 13 years of age at that time. Apart from taking school education, she was also required to do household work at the house of the appellant / accused. Considering poverty of the family of PW1 prosecutrix, so also the fact that she was virtually in custody of the appellant / accused for all practical purposes, coupled with the fact that her evidence shows that the appellant / accused had threatened her not to disclose anything to anybody or else her mother would be killed, conduct of the PW1 / prosecutrix in keeping mum and to shut her mouth during her entire stay with the appellant / accused is not abnormal. A girl of tender years, who was virtually left at the mercy of the appellant / accused, is not expected to speak against the appellant / accused, particularly when she had lost her

father and there was no male member at her house. Hence, even though evidence on record shows that the PW1 / prosecutrix had ample opportunity to disclose her woes and sufferings to her mother as well as her grandmother during telephonic talks, during her brief stay at her mother's house, as well as during visits of her grandmother to the house of the appellant / accused, non-disclosure of the same cannot be said to be a factor which creates doubts in version of PW1 prosecutrix. Her conduct appears to be normal conduct of a helpless girl of tender age enmeshed in cobweb of adverse circumstances and as such, this fact does not cast shadow of doubt on version of the PW1 / prosecutrix. Because of fear and terror of the appellant / accused, she was virtually prohibited from disclosing anything to her other relatives.

15 Now let us examine, whether there is delay in lodging the FIR and whether that delay is fatal to the case of the prosecution. The case in hand is a case of sexual assault on minor female child by her paternal uncle, and that too, when the minor female child was in his custody for a period of one year. Sexual

offences are not reported to police because of tradition bound Indian society. There are several reasons for such non-disclosure of sexual offences, either to the relatives or to the law enforcing agencies. The Hon'ble Apex Court, in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**² has categorized reasons for non-reporting sexual offences in Indian settings and those are as under :

- (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred;
- (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours;
- (3) She would have to brave the whole world;
- (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered;
- (5) If she is unmarried, she would apprehend that it would be, difficult to secure an alliance with a suitable match from a respectable or an acceptable family;

² 1983 AIR 753

- (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself;
- (7) The fear of being taunted by others will always haunt her;
- (8) She would feel extremely embarrassed in relating the incident to others being over powered by feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo;
- (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy;
- (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour;
- (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence;
- (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

16 One will have to appreciate the evidence of the prosecution in the backdrop of this position of law, keeping in mind the fact that the prosecuting party and the appellant /

accused are closest relatives. PW2 Suman Gaikwad is the First Informant. Her evidence indicates that she came to know about the incident of sexual assault of her daughter i.e. the PW1 / prosecutrix on 15th May 2013. Her evidence further shows that then accompanied by her other relatives, she had been to the house of the appellant / accused to question him on 18th May 2013 and then with the help of PW5 Lilatai Sonawane, she lodged report of the incident with police on 20th May 2013. This witness deposed that she was thinking about the matter and about the further course of action to be taken in the matter. She further deposed that the fact that close relative was involved in the matter is one of the consideration before her. PW3 Kamal Gaikwad, who is mother-in-law of the appellant / accused indicated in her evidence that mental condition of PW2 Suman Gaikwad was disturbed after getting knowledge of the incident and ultimately, PW2 Suman Gaikwad was required to threaten her to take action in the matter. In words of PW3 Kamal Gaikwad, PW2 Suman Gaikwad has questioned her that though life of a granddaughter is ruined, she (PW3 Kamal Gaikwad) is not taking any action in the

matter. It was in these circumstances, ultimately, PW2 Suman Gaikwad was required to take help of PW5 Lilatai Sonawane to lodge report against the appellant / accused.

17 Delay in lodging the FIR cannot be used as ritualistic formula to suspect or discard case of the prosecution. The court is required to search for explanation, if any, given by the First Informant for lodging the FIR belatedly. If explanation is found to be satisfactory, then the prosecution case cannot be discarded on this ground. The court is also required to consider whether the evidence on record indicates adding of embellishments or exaggeration because of the delay in lodging the FIR, or whether the prosecuting party was attempting to bolster up its case by deliberately delaying the lodging of the FIR. Unless and until such factors are established, even by preponderance of probability, mere delay in lodging the FIR cannot render the case of the prosecution brittle. The appellant / accused has not made out any such contingency from cross-examination of witnesses of the prosecution and evidence of the First Informant / PW2 Suman

Gaikwad coupled with evidence of her mother-in-law PW3 Kamal Gaikwad gives satisfactory explanation of this short delay in a case where serious allegations are leveled against their own relative. Hence, I hold that the case of the prosecution is not suffering from any delay in lodging the FIR.

18 Now let us examine whether evidence of the prosecution establishes that the appellant / accused had committed penetrative sexual intercourse on the PW1 / prosecutrix by indulging in atleast slightest penetration. In this regard, submission of the learned advocate appearing for the appellant / accused, as reiterated earlier, is to the effect that the offence cannot travel upto the one punishable under Section 376 of the IPC or under Section 4 of the POCSO Act, as there is no evidence of penetration. He relied on chief examination of the victim of the crime in question to the effect that the appellant / accused was trying to insert his penis in her vagina. Therefore, according to the learned advocate for the appellant / accused, there is no evidence of penetration.

19 Section 375 of the IPC prescribes six categories which constitute basic ingredients for the offence of rape punishable under Section 376 of the IPC. In the case in hand, undisputedly, the victim of the crime in question is a minor female child, who at the relevant time, was of tender years. She was taking school education in 7th Standard by residing at the house of the appellant / accused. On this backdrop, it needs to be kept in mind that Section 375 of the IPC or explanation attached thereto does not require that there should be complete penetration in order to constitute offence of rape. Even partial or slightest penetration into the private part of the victim would be quite enough to sustain conviction under Section 376 of the IPC. The offence punishable under Section 376 of the IPC postulates sexual intercourse by a man with a woman. The word “intercourse” means sexual connection. It can be slightest and not necessarily complete. What is sine-qua-non for constitution of this offence is penetration and to convict the accused for this offence the requirement is that of clear and cogent evidence to establish that some part of the virile member of the accused was within the labia

of the victim of the crime in question. No matter how little. In the wake of this legal position, one will have to assess the evidence adduced by the prosecution in order to prove the guilt of the appellant / accused on this count. No doubt, the victim of the crime in question, who is a minor female child of tender years had explained the act of the appellant / accused as that of 'trying to insert his penis into her vagina', but the victim was subjected to medical examination after lodging the FIR. The offence alleged against the appellant / accused continued for entire academic session 2012-2013 when the victim was residing at his house. Because of her tender age, the victim of the crime in question i.e. the PW1 / prosecutrix is not aware about the meaning of sexual intercourse or sexual acts. Therefore, in her words, she deposed what happened to her at the hands of the appellant / accused. Considering the fact that the victim was of tender years, she is not expected to have knowledge of sex and meaning of sexual intercourse. Description of the act in detail cannot be expected from her. However, result of such acts committed on her by the appellant / accused are reflected on her body and those

constitutes evidence against the appellant / accused. In this backdrop, it is in the evidence of PW4 Dr.Swati Kagne, a gynecologist, resident doctor working with Sassoon hospital, that she examined the PW1 / prosecutrix at about 2.00 a.m. of 21st May 2013. In medical examination of the PW1 / prosecutrix, PW4 Dr.Swati Kagne found that hymen of the PW1 / prosecutrix was completely torn and it was having old healed tears at 8 O'Clock and 10 O'clock position. On clinical examination of the PW1 / prosecutrix, PW4 Dr.Swati Kagne came to the conclusion that there was possibility of sexual vaginal intercourse with the PW1 / prosecutrix. She further stated that tearing of the hymen, presence of old healed tears at 8 O'Clock and 10 O'clock positions reflects the case of sexual vaginal intercourse. The defence has attempted to demonstrate that there are several other reasons for tearing of hymen and it can be caused by cycling, athletic running and sports. However, halfhearted cross-examination of PW4 Dr.Swati Kagne does not go beyond these suggestions which are answered in affirmative by her. Moreover, there is no cross-examination of the PW1 / prosecutrix to the effect that she was

involved in vigorous sport activities such as cycling, athletic running or other sports. In absence of such suggestions to the PW1 / prosecutrix, one cannot infer that tearing of hymen of the PW1 / prosecutrix can be attributable not to the activities of the appellant / accused but to the other activities in sports undertaken by the PW1 / prosecutrix. Hence, evidence of the PW1 / prosecutrix to the effect that the appellant / accused was trying to insert his male organ in her private part, coupled with the fact that upon medical examination of PW1 prosecutrix, her hymen was found to be torn and presence of old healed tears, is definitely suggestive of penetrative sexual intercourse with her constituting the offence punishable under Section 376 of the IPC as well as the one under section 4 of the POCSO Act. Ultimately, it is trite that evidence in the case of sexual offence against minor female child is required to be considered in broader probabilities of the prosecution case. Hence, non-description of the specific act in its entirety by PW1 prosecutrix, who happens to be a minor female child, is of no consequence as the prosecution has established that there was penetration constituting the offence of

rape and penetrative sexual intercourse. Ultimately, what is required in the case of rape is not rigid proof of mathematical precision, but proof beyond reasonable doubt considering broad probabilities of the prosecution case. In this view of the matter, it cannot be said that the learned trial court erred in holding the appellant / accused guilty of offence alleged against him.

20 It needs to be mentioned here that evidence of the PW1 / prosecutrix in respect of sexual assault on her by the appellant / accused is well corroborated by evidence of her mother PW2 Suman Gaikwad and grand mother PW3 Kamal Gaikwad. These two witnesses proved previous statement made to them by the PW1 / prosecutrix about the sexual assault on her by the appellant / accused and such evidence is admissible under Section 157 of the Evidence Act to corroborate version of the PW1 / prosecutrix. PW3 Kamal Gaikwad is mother-in-law of the appellant / accused and grandmother of the PW1 / prosecutrix. She being close relative of both of them would be the last to screen the real culprit and falsely implicate an innocent person.

21 However, as rightly pointed out by the learned advocate for the appellant / accused, in the wake of conviction of the appellant / accused for the offence punishable under Section 4 of the POCSO Act and consequent sentence, the learned trial court ought not to have sentenced him again for the offence punishable under Section 376 of the IPC. He argued that sentence imposed upon the appellant / accused for the offence punishable under Section 376 of the IPC is not warranted. It needs to be noted that Section 42 of the POCSO Act provides that where an act or omission constitutes an offence punishable under the said Act, so also the offence punishable under Section 376 of the IPC, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under the POCSO Act or under the IPC, as provided for punishment which is greater in degree. In the case in hand, the appellant / accused is sentenced to suffer rigorous imprisonment for 10 years apart from directing him to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment for 1 year, for the offence punishable under Section 376 of the

IPC. Similar sentence is imposed upon him separately for the offence punishable under Section 4 of the POCSO Act. The appellant / accused, in the light of provisions of Section 42 of the POCSO Act, cannot be awarded separate sentence for the offence punishable under Section 376 of the IPC. In the result, the following order :

ORDER

- i) The appeal is partly allowed.
- ii) Maintaining the conviction of the appellant / accused for the offence punishable under Section 376, in the wake of his conviction and sentence for the offence punishable under Section 4 of the POCSO Act, sentence of rigorous imprisonment for 10 years as well as direction to pay fine of Rs.5,000/- and in default, to undergo further rigorous imprisonment for 1 year, for the offence punishable under Section 376 of the IPC, is quashed and set aside.

iii) Conviction and resultant sentence on rest of the counts is maintained. Needless to mention that sentence imposed on the appellant / accused for the offence punishable under Section 4 of the POCSO Act is maintained.

iv) The appeal is disposed of accordingly.

(A. M. BADAR, J.)