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. The appellant/accused has challenged the judgment and order dated 23.02.2017 passed by the Special Judge & Additional Sessions Judge, Ambejogai thereby convicting him for the offence punishable under Section 354 of the Indian Penal Code (for short "IPC") and under Section 8 of the Protection of Children From Sexual Offences Act, 2012 (for

short "POCSO Act") and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs.1500/- (Rs.One Thousand Five Hundred), in default, to suffer simple imprisonment for 15 (fifteen) days for the offence punishable under Section 354 of the IPC, to suffer rigorous imprisonment for three years and to pay a fine of Rs.2500/- (Rs.Two Thousand Five Hundred), in default to suffer simple imprisonment for 25 (Twenty Five) days for the offence punishable under Section 8 of the POCSO Act. Both the substantive sentences were ordered to run concurrently. The accused was given set off for the period i.e. from 18.09.2014 till 30.09.2014 which has undergone by him as under-trial prisoner against the sentence. On deposit of fine amount, an amount of Rs.3000/- (Rs.Three Thousand Only) is ordered to be given to the victim as a compensation as per Section 357 of the Code of Criminal Procedure. The accused has deposited the fine amount on the same day.

2. The appellant/accused is in jail. The appeal was fixed for final hearing as per order dated 01.02.2018 in Criminal Appeal No.148/2017.

3. Facts leading to the institution of the present appeal, in short, are as under:-

A. The victim girl aged 14 years (at the time of incident) was residing along with her parents and one sister. She was taking education. On 18.09.2014 at about 10.30 am when the victim was proceeding towards her school and when she was passing from front of shop of one Vijay Pawar, the accused had given chocklet to her and moved his both hands on her shoulders and breast and pressed her breast and thereby outraged her modesty. The accused also asked the victim not to tell the said incident at her home and had given oath of her father. At that time victim pushed accused and returned to home crying due to fear. She told the incident to her mother. Thereafter, mother of the victim (PW-2) informed the incident to the father of the victim (PW-1). Father of victim also came to know the incident from the victim after he returned to his house. He also came to know from his maid that on 17.09.2014 the accused also outraged modesty of his maid's daughter. The father of victim on the same day went to Ambejogai City Police Station and lodged the complaint. Treating the said complaint as First Information

Report, the police registered crime No.193/2014 for the offence under Section 354 of the IPC and Section 8 of the POCSO Act against the accused and the investigation was commenced.

B. During the investigation the then ASI Rathod (PW-4) the Investigating Officer arrested the accused on the same day. On the next day he visited the spot of incident and prepared spot panchanama (Exh.27). He recorded statements of witnesses. So also, statements of victim and complainant/father of the victim were recorded under Section 164 of the Code of Criminal Procedure by the Judicial Magistrate First Class, Ambejogai on 20/22.09.2014. Accused was released on bail as per order dated 22.09.2014. After completion of the investigation the police submitted charge-sheet in the Court of Additional Sessions Judge, Ambejogai against the accused for the aforesaid offences being trial Court for trial of the said offences.

C. The learned Special Judge framed charge against the accused for the offences punishable under Section 354 of the IPC and Section 8 of the POCSO Act. The accused pleaded not guilty to the

said charge and claimed to be tried. The defence of the accused was that the victim narrated the incident before the Court on the instructions of her father and further his defence as it appears from the trend of cross-examination of the prosecution witnesses and particularly the victim is that the accused was not in a position to understand anything as he was suffering from mental ailment at the relevant time of incident. Thus he claimed that due to unsoundness of mind his case falls under exception in Section 84 of the IPC. The accused has examined two witnesses in defence.

D. To prove guilt of the accused, the prosecution has examined four witnesses namely Shivaji Maroti Gange (PW-1), Anjali Shivaji Ganage (PW-2) respectively father and mother of the victim, Shital Shivaji Ganage (PW-3) victim and Investigating Officer ASI Rathod (Retired) (PW-4) and it has relied upon Exh.33/c and Exh.39/c respectively the statements of father and victim recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure. Upon considering the said evidence adduced by the prosecution and the defence evidence, the trial Court held that the

prosecution has proved both the offences against the accused with which he was charged and accordingly convicted and sentenced him for the said offences as referred in detail in opening para of this judgment by the impugned judgment and order which is assailed in this appeal by the accused.

4. Mr.Chaukidar, learned counsel for the appellant/accused submitted that the trial Court has held the appellant guilty for the offence under Section 8 of the POCSO Act. But, if the allegations made against the accused by the prosecution and the evidence adduced are considered the act alleged against the accused is not of aggravated form. It is submitted that there is no consistency in the evidence of victim (PW-3) and her mother (PW-2) as the victim says that she was going by bus to the school and her mother says that the victim was going to school by rikshaw. Learned counsel further submitted that on the basis of the circumstances brought on record in the cross-examination of the prosecution witnesses and the defence witnesses, the accused has brought on record the material to grant benefit under Section 84 of the IPC to him that his case falls under exception under the said provision.

To support the said submissions reliance is placed on the decision in the case of *Hari Singh Gond Vs State of Madhya Pradesh 2008 (7) Supreme 351*. In the said decision, it was held that the legal insanity has to be distinguished from medical insanity. The burden of proof rests on an accused to prove his insanity. That burden is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. Further it was held that mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within section 84 of the IPC. In the said decision the Apex court observed in paragraph Nos.6,8,9 and 11 as under:-

6. Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might

know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

8. Section 84 embodies the fundamental maxim of criminal law, i.e., *actus non reum facit nisi mens sit rea*” (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur, but in the case of insane persons, no

culpability is fastened on them as they have no free will (furios is nulla voluntas est.)

9. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in 'History of the Criminal Law of England, Vo.II, page 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but

incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section. This Court in *Sherall Walli Mohammed V. State of Maharashtra*, 2 (1972 Cr.LJ 1523 (SC), held that the mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in *M Naughton's case*, 3 (1843) 4 St.Tr. (NS)847. Behavior, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the

precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or perfect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

11. The trial Court and the High Court have, on the facts of the case, rightly held that Section 84 IPC has no application.

5. Learned counsel further submitted that the prosecution has failed to prove both the offences against the accused and therefore, he is entitled to be acquitted of the offences with which he was charged. It is also submitted that even if the case of the prosecution is accepted as it is, at the

most offence under Section 354 of the IPC would be attracted and in any case offence under Section 8 of the POCSO Act cannot be attracted against the accused. Alternatively, it is submitted that in case, it is held that the accused is not entitled to be acquitted the sentence recorded against him be reduced to the period undergone by him and said period would be sufficient sentence.

6. Learned counsel for the accused has also relied upon the following decisions.

a. In the case of John @ Vivek Ramesh Jadhav Vs State of Maharashtra 2015 ALL.M.R. (Criminal) 4053 the appellant was convicted for the offence punishable under Section 10 of the POCSO Act and under Section 506 of the IPC and as he was convicted for the aggravated sexual assault under Section 10 of the POCSO Act, no separate sentence was imposed under Section 354 of the IPC and also under Section 8 of the POCSO Act. The victim girl (PW-2) was aged about 8 years on the day of incident. It was alleged that on the day of incident

when she had come out of her house for collecting some leaves of a tree for playing, the appellant/accused called her in his room and closed the door from inside. He made the victim to sit on Sofa by the side and told her to take his penis in her mouth and also touched the breast of the victim. He also gave threats to the child that if she would disclose the things to anybody, he would kill her family members. He also told the child to come his house everyday and removed the clothes. The victim narrated all the contents of the FIR during her substantive evidence. Her mother (PW-1) in the cross-examination admitted that the appellant/accused is landlord of Chawl where in one of the rooms the parents of the victim girl reside as tenants. It was suggested that there were arrears of rent and the landlord was demanding arrears of rent to the father of the girl and also the landlord had asked the father of the girl to vacate the premises and on this count there was dispute. On holding that this was probable defence raised on behalf

of the appellant/accused and that it would be risky to rely upon the evidence of the child when there is no other corroborative evidence the conviction recorded against appellant was set aside and he was acquitted.

b. In the case of Sachin Baliram Kakde VS State of Maharashtra 2016 ALL.M.R. (Criminal) 4049 the appellant was convicted for the offences punishable under Sections 376, 292 and 506 of the IPC and under Section 6 and 12 of the POCSO Act by the trial Court. In the appeal the appellant was acquitted of all the offences. Medical report showed hymen was intact while victim deposed that at least for one month, time and again, accused committed sexual intercourse either by stupefying her or there after under threat to make video clip public. Secondly, allegation of stupefying victim is belied by very video clip which does not show her in anyway stupefied. International Mobile Equipment Identity (IMEI) number of mobile

handset from which video clip was taken was different from one seized. It was held that a reasonable doubt has arisen regarding holding of mobile handset by accused and that presumption under section 29 of the POCSO, Act stands rebutted by the accused and he was acquitted. It was observed in paragraph Nos. 17,18,19 of the said decision as under:-

17. The provisions of section 29 of the POCSO Act runs as under:-

29. Presumption as to certain offences-
Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

18. Thus, when a person is persecuted for commission of the offence specified in the said section, the Court is required to presume that the said person has committed the said offence unless the contrary is proved.

19. The presumption, however, cannot be said to

be irrebuttable. Infact, no presumption is irrebuttable in law, as this cannot be equated with conclusive proof. The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved.

c. In the case of Vishal @ Sagar Vasant Waghmare and others Vs State of Maharashtra 2015 ALL M.R.(Criminal) 301 the appellant/original accused Nos. 1 to 3 were convicted for offence punishable under Sections 363, 366, 376(D) of the Indian Penal Code and sentenced to rigorous imprisonment and fine as detailed in the judgment. In the appeal conviction and sentence recorded against them was set aside and they were acquitted of all the offences with which they were charged. In paragraph Nos. 10 and 11 it was observed as under:

10. The trial Court also, in our opinion, erred in relying on the presumption under Section 29 of the Protection of Children From Sexual Offences, Act, 2012. The prosecution, in the present case, had utterly even failed to

remotely connect the appellants with the commission of the offence. The substantive evidence also does not disclose that the prosecutrix/victim had named the accused as the offenders. In the absence of that, therefore, the presumption cannot be drawn. Such is not the scope of presumption under Section 29 of the Protection of Children From Sexual Offences, Act, 2012.

11. It would thus be seen that there is no substantive evidence at all that the appellants were the offenders who had forcibly taken the victim alongwith them and had committed forcible sexual intercourse. Mere narration of history given by the victim to the Medical Officer and which is reflected in the medical certificate at Exh.27 by itself would not constitute evidence nor does it established a nexus between the said person and the accused before the Court. For sustaining the conviction of an accused, there has to be substantive evidence and the prosecution is not absolved from proving the offence against the accused beyond reasonable doubt. In the present case

there is no evidence whatsoever to prove the offence against the appellants beyond reasonable doubt. The appellants, in our opinion, therefore, are entitled to be given the benefit of doubt.

d. In the case of Mukesh @ Vicky S/o. Suresh Dendule Vs State of Maharashtra 2018 DGLS (BOM)5 the appellant was convicted for the offence punishable under Section 376 of the IPC and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.3000/- and under Section 6 r/w Section 5(m) of the POCSO Act he was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5000/-. In the appeal the conviction and sentence under Section 376 of the IPC and under Section 6 read with Section 5(m) of the POCSO Act was set aside and instead the accused is convicted for the offence under Section 354 of the IPC and under Section 9 r/w Section 10 of the POCSO Act considering the evidence of the child victim that the accused rubbed his male organ on her private part and observing that there is

absolutely no evidence on record to show that there was any penetration, to any extent even in the labia majora of the child victim and he was sentenced to suffer rigorous imprisonment for three years for the offence punishable under Section 354 of the IPC and to suffer rigorous imprisonment for five years for the offence punishable under Section 9 read with Section 10 of the POCSO Act and sentence of fine imposed by the trial Court was maintained.

e. In the case of Sunil Soma Bhamble Vs State of Maharashtra 2016 ALL.M.R. (Cri)2950 the appellant/accused was convicted for the offence punishable under Section 9(m) read with Sections 10 and 18 of the POCSO Act. The allegation against the appellant was that he attempted to commit an aggravated sexual assault on girl aged 4 years. CA report taken on record under Section 293 of Cr.P.C. showed finding of semen stains of 'O' group on underwear of appellant and also undergarments of child victim. Admittedly, it was not a case

of penetrative sexual assault. The evidence of PW-6 Doctor shows that there was no injuries on the private parts of the victim. Therefore, it was held that mere finding of the semen stains of "O" group allegedly on under garments of the victim/child cannot be considered as such a clinching material so as to come to the conclusion that even the attempt to commit forcible sexual intercourse has been committed by the appellant. Considering the said fact and other evidence, it was held that the trial Court erred in coming to the conclusion that the prosecution has established the charges under Section 9 (m) and Section 10 read with Section 18 of the POCSO Act and the prosecution had not gathered the evidence of that standard which is required to establish the guilt of the appellant/accused, even for the attempt of forcible sexual intercourse. Accordingly, the appeal was allowed and the conviction and sentence recorded against the appellant was set aside.

7. On the other hand learned APP for the respondent/State submitted that there is presumption under Section 29 of the POCSO Act in favour of the prosecution. Said presumption is rebuttable and the accused has not rebutted the said presumption. Therefore, there is no reason to disbelieve the case of the prosecution. The defence witness Dr. Ashok Giri (DW-2) is a general practitioner and is not an expert. Therefore, probability of the defence of the accused that he is suffering from mental disorder is not proved. The consecutive instances of committing the same act on 17.09.2014 and 18.09.2014 are proved against the accused. Thus, learned APP has claimed to dismiss the appeal.

8. I have carefully considered the submissions made on behalf of the accused and the respondent/State and with assistance of learned counsel appearing for the accused and learned APP for the respondent I have perused the evidence adduced by the prosecution and the defence. So also, I have gone through the impugned judgment and order.

9. To hold that the prosecution has proved the offence under Section 354 of the IPC, the

prosecution has to establish that the accused assaulted or used the criminal force to victim girl intending to outrage or knowing it to be likely that he will outrage her modesty by the act i.e. by touching to her breast as alleged against him and to hold that the prosecution has proved offence under Section 8 of the POCSO Act, the prosecution has to establish that the accused has committed sexual assault i.e. with sexual intent he has touched the breast of the victim girl which involves physical contact without penetration, on 18.09.2014 at 10.30 am. To prove these facts, the prosecution has mainly relied upon the evidence of victim girl (PW-3), her mother (PW-2) and father (PW-1).

10. Now coming to the evidence of the victim girl (PW-3), her evidence is that the incident occurred on 18.09.2014. On that day at about 10.30 am she alongwith younger sister Shivani were standing on the road for going to school. There is V.T Pati, where they were standing. At that time Kulkarni Baba/the accused gave chocklet to her by his hand and asked her whether she is eating or not. Then after he caught her both shoulders and moved his hands on her breast. Therefore, she was weeping

by the side of the road and asked her not to tell the incident to anybody and had given oath of her father. Thereafter, she went to house by weeping. She narrated the incident to her mother. Her mother told the incident to her father (PW-1). Her evidence shows that her statement under Section 164 of the Code of Criminal Procedure (Exh.39) was recorded on 20.09.2014 by the Judicial Magistrate First Class, Ambejogai. In the cross-examination she has stated that on the day of incident she and younger sister were standing on the road at 10.30 am. Bus always comes from the side of Ambedkar Nagar to take them. When the bus reaches to their stop, 15 to 20 girls always used to be sitting in the said bus. From their stop, only she and her sister sit in the bus. She has denied that no incident as stated by her took place. She also denied that at the time of said incident the accused was not in a position to understand anything and suffering from mental illness and that her father has lodged false complaint on the say of Sarkate. Thus, nothing is found in favour of the accused in the cross-examination of the victim girl. Therefore, there is no reason to disbelieve her evidence. Her evidence is corroborated by her statement (Exh.39) recorded

by Judicial Magistrate First Class, Ambejogai which shows that the incident as deposed by the victim girl had taken place. Exh.39 statement shows that age of the victim girl at the time of incident was 14 years and her evidence which was recorded on 20.09.2015 before the trial Court shows that her age was 16 years. Thus, it is clear that on the date of incident the victim girl was a child within the meaning of Section 2(d) of the POCSO Act as she was below the age of 18 years. Thus, on the basis of evidence of victim girl and her statement Exh.39, it can be said that on 18.09.2014 at about 10.30 am the accused held her shoulders and moved his hands on breast of the victim girl.

11. The evidence of PW-2 the mother of the victim shows that on 18.09.2014 her elder daughter Shital (PW-3) went to school at 10.30 am and after 10 minutes she returned to home. While she returned to home, she was weeping. She returned home from place where auto-rikshaw is parked. When she returned to home she was very much frightened and she was weeping. Therefore, she asked her what had happened and while weeping she was saying 'Kulkarni Baba', 'Kulkarni Baba', she pacified her and again

asked her as to what had happened and at that time she told her that when she was waiting for auto-rikshaw Kulkarni Baba came there and moved hand on her hand, gave chocklet to her and asked her whether her father used to give her food or not.

12. In the cross-examination PW-2 admitted that she knows Kulkarni and they were residing in the same lane. She was residing in the house of Beedkar as a tenant. Said house of Kulkarni and house of Beedkar are in front of each other. She stated that at the time of incident she was working with Sarkate. Anariya is a daughter of Sarkate. She admitted that at the time of incident her younger daughter was present at the spot of incident where her elder daughter was waiting for rikshaw. Her younger daughter returned to home with her elder daughter and that grocery shop of Vijay Pawar is situated to East side of her house and in another lane. She has denied that some months prior to the incident accused was behaving in abnormal way. She has denied that incident in respect of daughter of Sarkate has occurred prior to the incident of her daughter. She has denied that accused Kulkarni could not understand what he was doing at the time of

attack of his mental ailment and further denied that on the say of Sarkate they have filed case against the accused. From the evidence of PW-2 it is clear that she has no direct knowledge of the incident and the victim girl narrated the incident to her. Therefore, and as this witness does not specifically claim that the victim girl had disclosed her that the accused moved his hand on her breast as deposed by the victim, it cannot be said that mother of the victim girl has corroborated the evidence of victim girl on material particulars of the incident.

13. PW-1 who is father of the victim girl has deposed that he came to know about the incident in question from his wife (PW-2) and he asked the victim girl who narrated him the incident as told to him by his wife and that then he lodged the report in the police station. In the cross-examination he has denied that Laxmikant is suffering from mental illness, that he has lodged complaint after knowing the incident of daughter of Sarkate, that no alleged incident took place and he has denied that alleged incident took place during the mental attack of the accused. He has also denied that he lodged the complaint at the instance of Sarkate where his wife

is doing household work. He has not deposed that victim girl told him incident as deposed by her. Thus, on the basis of his evidence only inference that can be drawn is that he lodged the complaint (Exh.32) against the accused, but his evidence is not sufficient to state that he has corroborated the evidence of the victim girl as regards material particulars of the incident in question.

14. There is no dispute that PW-2 mother of the victim girl is doing household work with one Sarkate and allegedly the accused outraged modesty of daughter of said Sarkate and committed said act on earlier day i.e. on 17.09.2014, of the incident in this case on 18.09.2014. But, when as referred earlier PWs,1,2 and 3 have denied that falls case/complaint is filed against the accused on the say of Sarkate there is no substance in the suggestion on behalf of the accused to the above witnesses that false case is filed against him on the say of Sarkate.

15. Learned counsel for the accused submitted that as per the evidence of victim girl (PW-3) she was going to the school by the bus and as per the

evidence of her mother (PW-2) the victim girl was going to school by rikshaw and as such evidence of these witnesses is not consistent and therefore, the evidence of victim girl is liable to be rejected. It is true that there is no consistency in the evidence of victim girl and her mother as regards mode of transport used by the victim girl to go to the school. But, said inconsistency is not sufficient to reject the evidence of the victim girl which is quite natural and when her evidence about the incident is not shattered during her cross-examination as observed earlier. Another reason to hold this is that the accused claims that said incident took place during his mental attack when he was unable to understand what he was doing, which shows that he does not deny the incident.

16. For the forgoing reasons on the basis of evidence of the victim girl (PW-3) which is corroborated by her statement Exh.39, I hold that the prosecution has established the ingredients of the offences under Section 354 of the IPC as well as of the offence of sexual assault as defined under Section 7 punishable under Section 8 of the POCSO Act.

17. Now, it is to be seen whether the accused has established that his act does not amount to an offence by reasons of his unsoundness of mind at the time of commission of offence and as such his case falls under the general exception in Section 84 of the IPC. It is settled law that the burden of proving the existence and circumstances bringing the case within purview of Section 84 lies upon the accused under Section 105 of the Indian Evidence Act. To prove above facts the accused has adduced evidence of his son Prasad Kulkarni (DW-1) and Doctor Ashok Giri (DW-2) and has relied upon prescription and letter given by Doctor Giri respectively Exh.46 and 47.

18. Now coming to the evidence of Prasad Kulkarni (DW-1) who is admittedly son of the accused, he has stated that in the year 2014 the accused his father was 64 years old. According to him in the said year his parents used to visit and stay with him at Hingoli at the place of his service. He further stated that his parents were residing with him since May, 2014 at Hingoli and he observed that his father used to, scold without any

reason, remain in anger continuously for two to three days and suddenly become very calm and cool. He stated that they have not taken any action for the same. He stated that his father had outraged modesty of one girl aged of 14 to 15 years at Hingoli and said incident occurred on 18.07.2014 and at that time his father/ accused was taken to Dr.Giri. Dr.Giri examined his father and spell out the possibility of psychological problem to his father and asked to take treatment from Dr. Kalkar, Psychiatric and given medicine for 7 to 10 days. He stated that due to their problem they could not come to Dr. Kalkar. In the cross-examination on behalf of the prosecution he stated that he has not told to police that such kind of act took place at the hands of his father/accused, as police did not allow him to speak. He stated that he did not file any written application either to Police Station or Superior Authority of Police in respect of not allowing him to speak at Police Station. He has denied that he is deposing false that his father used to outrage modesty of girl due to his psychological problem and that firstly in the Court he is deposing that his father was suffering from psychological problem. Thus, it is clear from the evidence of DW-1 that he

did not disclose to police that his father/ accused had psychological problem and he was of unsound mind in the year 2014.

19. The evidence of Dr. Giri (DW-2) is that on 21.07.2014 the accused had come to him and he collected history of patient. He felt that patient was suffering from depression disorder, parimania hypomania and he advised him to take medicine and to undergo some tests including CBC, blood sugar lever, KFT and again asked the accused to visit in hospital on 28th. He stated that on 28th as there was no any positive improvement, he referred the accused to Dr.Kelkar from Akola by letter. The photo copy of which is at Exh.47. He stated that Mania and hypermania are kinds of mental illness. Bipolar disorder includes the patient's extreme mood changes. The patient is not in a position to understand the consequences of his conduct. In the cross-examination on behalf of the prosecution he stated that he is MBBS. He has examined one thousand patients approximately of such kinds of ailments. He could not tell the expected conduct of a patient of Bipoler mental disorder. He has denied that he did not examine the accused at any time and issued false

prescription and referral letter (Exh.46 and 47). These prescription and letter are dated 21.07.2014 and 28.07.2014 respectively. As Dr.Giri is not Psychiatric and according to him he had referred the accused to Dr. Kelkar Psychiatric from Akola the evidence of Dr.Giri (DW-2) regarding examination of the accused on 21.07.2014 and issuing above said prescription and letter about the mental illness of the accused, in the absence of evidence of expert doctor is not sufficient to state that the accused was suffering from mental ailment and he was of unsound mind on the date of incident i.e. on 18.09.2014.

20. In view of the order dated 10.08.2017 of this Court in the Criminal Application No. 3739/2017 the Superintendent, Nashik Road, Central Prison, Nashik along with his report dated 04.09.2017 submitted photo copy of medical certificate dated 01.09.2017 and conclusion in the said certificate shows that the patient is suffering from moderate depression and advised regular treatment. But as said certificate was called to see whether accused needs any specialized treatment and as it appears that opinion of the expert was solicited by the

accused with a view to consider his case for releasing him on bail, conclusion and observation in the medical certificate dated 01.09.2017 are of no help to the defence of the accused that at the relevant time of incident in September, 2014 he was of unsound mind.

21. For the reasons discussed above, above referred evidence adduced on behalf of the accused is not sufficient to infer that at the time of commission of offence the accused by reason of unsoundness of mind, was either incapable of knowing, the nature of the act, or that he was doing what is either wrong or contrary to law. On the contrary it has come on record that at the material time of incident the accused told the victim girl not to tell incident to anybody and gave oath of her father to her which shows that he was normal person at the time of incident and he was not insane as observed by the trial Court. Therefore, I hold that the accused has failed to prove his defence that the act alleged against him does not amount to an offence by reason of his unsoundness of mind at the time of commission of offence and as such his case falls under general exception under Section 84 of

the IPC. In view of this it can also be said that the accused has not rebutted the presumption under Section 29 of the POCSO Act, in favour of the prosecution about his committing the offence under Section 7 of the POCSO Act.

22. In view of above discussion, I hold that the prosecution has proved offence under Section 354 of the IPC and Section 8 of POCSO Act against the appellant/accused beyond reasonable doubt. The trial Court has rightly held so and rightly convicted and sentenced the appellant/accused for the said offences. The victim girl was aged 14 years at the time of incident and as such she was a child within the meaning of Section 2(d) of the POCSO Act. Therefore, it cannot be said as argued by the learned counsel for the appellant/accused that only offence under Section 354 of the IPC is proved against the accused. The decisions referred earlier relied upon by the learned counsel for the accused are not applicable to the present case, since the facts of the said decisions are different than the present case, to state that the prosecution has not proved the aforesaid offences against the accused. Considering the punishment provided for the offence

under Section 354 of the IPC and Section 8 of the POCSO Act sentence recorded against the accused for the said offences by the trial Court as per the impugned judgment and order is correct. Therefore, argument advanced by the learned counsel for the accused that the sentence be reduced to period under gone by the appellant/accused is not acceptable.

23. In view of above discussion, there is no ground to interfere with the impugned judgment and order. Therefore, the appeal being devoid of merits, the same is liable to be dismissed. Accordingly, the appeal is dismissed.

[S.M.GAVHANE, J.]