

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

CRIMINAL APPEAL NO.148 OF 2017

Laxmikant S/o. Nagorao Kulkarni,	...APPELLANT
Age-65 years, Occu-Pensioner,	[Ori.Accused]
R/o.Vidhyut Nagar, Morewadi,	
Tq.Ambajogai, Dist. Beed	

VERSUS

State of Maharashtra	...RESPONDENT
through Police Station Officer,	[Ori.Prosecution]
Ambajogai City Police Station,	
Taluka Ambajogai, Dist. Beed	

Mr.S.R.Chaukidar, Advocate for the appellant
Mr.C.S.Kulkarni, AGP for the respondent/State

CORAM : S.M. GAVHANE, J.

RESERVED ON : 30.10.2018

PRONOUNCED ON : 19.12.2018

JUDGMENT [PER: S.M. GAVHANE, J.]

. The appellant/accused has challenged the judgment and order dated 21.03.2017 passed by the Special Judge & Additional Sessions Judge, Ambejogai thereby convicting him for the offences punishable under Sections 354,354-A of the Indian Penal Code (for short "IPC") and under Sections 8,10 & 12 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.2000/- (Rs.Two Thousand), 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 one year and to pay a fine of Rs.1000/- (Rs.One Thousand), in default to suffer simple imprisonment for 10 (ten) days for the offence punishable under Section 354-A of the IPC, to suffer rigorous imprisonment for three years and to pay a fine of Rs.1000/- (Rs.One Thousand) in default, to suffer simple imprisonment for 10 (ten) days for the offence punishable under Section 8 of the POCSO Act, to suffer rigorous imprisonment for five years and to pay a fine of Rs.1000/- (Rs.One Thousand) in default, to suffer simple imprisonment for 10 (ten) days for the offence punishable under Section 10 of the POCSO Act and to suffer rigorous imprisonment for three years and to pay a fine of Rs.1500/- (Rs.One Thousand Five Hundred) in default to suffer simple imprisonment for 12 (twelve) days for the offence punishable under Section 12 of the POCSO Act. All 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.

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

A. The victim girl aged 9 years was residing alongwith her parents, her sister and brother at Morewadi, Ambajogai. On 17.09.2014 at about 07.00 am while the victim was returning to house from grocery shop of Vijay Pawar and reached in front of house of one Ambad, the accused Lakshmikant Nagorao Kulkarni came from her behind and on saying her of whose big size footwear she wore took her near to him and touched the breast of the victim and said her what

is this, it would become big when she would enter into 5th standard and on saying her to allow him to touch her breast pressed the breast of the victim by both the hands. At that time while the victim was attempting to rescue from him as soon as accused saw one person coming, he left the victim. Then after the victim went to her house informed the incident to her mother (PW-3) in frightened condition. The mother of the victim told the incident to her husband the complainant (PW-2) when he returned to house. The complainant father of the victim confirmed incident from victim and tried to find out said person on the basis of description of said person given by the victim as fat, short, big berry with spect, but said person was not found. Then PW-2 traced out the said person and came to know that on 18.09.2014 the said person committed similar act with the daughter of his maid, due to which the father of the said victim girl had lodged complaint against the accused. Thereafter, the complainant went to Ambajogai (City) Police Station on 19.09.2014 and gave information about the incident which was reduced into writing by ASI Borse, on the basis of the same police registered crime No.194/2014 for the offences under Sections 354,

354-A of the IPC, Sections 8,10 & 12 of the POCSO Act and Sections 3(w)(i), 3(2)(v)(a) of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act against the accused and the investigation was commenced.

B. During the investigation Dr.Kakasaheb Adinath Dole (PW-6) the Sub Divisional Police Officer/the Investigating Officer on 19.09.2014 visited the spot of incident and prepared spot panchanama (Exh.25). He recorded statements of father, mother, sister and maternal aunt of victim. So also, the statements of the victim and her father were recorded by the JMFC, Ambajogai under Section 164 of the Code of Criminal Procedure on 22.09.2014. The accused was arrested on 23.09.2014 and was subsequently released on bail as per order dated 29.09.2014. 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 Sections 354 and 354-A of the IPC, Section 8,10 and 12 of the POCSO Act and Section 3(w)(i) and 3(2)(v)(a) of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act. The accused pleaded not guilty to the said charge and claimed to be tried. The defence of the accused was that false case is filed against him. 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 six witnesses namely Yeshpal Ashokrao Sonwane (PW-1), Rajendra Mahadeorao Sarkate (PW-2) father of the victim, Pranita Rajendra Sarkate (PW-3) mother of the victim, Dnyaneshwar Bhimrao Bhise (PW-4), Anariya Rajendra Sarkate (PW-5) the victim and Dr.Kakasaheb Adinath Dole (PW-6) the Investigating Officer and it has relied upon Exh.54 and Exh.55 respectively the

statements of the victim and father 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 the offences except offence under the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act against the accused 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 appellant/accused.

4. Mr.Chaukidar, learned counsel for the accused submitted that the trial Court has held the accused guilty for the offence punishable under Sections 354 & 354-A of the IPC and under Sections 8,10 & 12 of the POCSO Act. The evidence adduced by the prosecution is not sufficient to establish the aforesaid offences for which accused has been convicted. It is submitted that to attract the offence punishable under Section 10 of the POCSO Act aggravated sexual assault as defined under Section 9 of the POCSO Act has to be proved by the prosecution. In the present case, if the allegations

made against the accused and evidence of the victim girl are considered, no inference can be drawn that the accused has committed aggravated sexual assault, because the only allegations made against the accused is that on the day of incident the accused allegedly outraged modesty of the victim girl by touching to her breast. Therefore, according to learned counsel for the accused no offence is proved against the accused. It is submitted that if the evidence adduced by the prosecution is believed, at the most, the act alleged against the accused would fall under Section 354 of the IPC i.e. outrage of modesty of the victim girl. But, the same also cannot be accepted as at the relevant time of incident on 17.09.2014 the accused had a mental attack and therefore, due to unsoundness of mind he was not in a position to understand what he was doing and hence he has committed no offence as his case falls under exception under Section 84 of the IPC in the light of his defence. It is submitted that the accused has established his defence. To support the said submissions the reliance is placed on the decision in the case of *Hari Singh Gond Vs State of MP 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 for the appellant/accused further submitted that thus, the accused is entitled to be acquitted of all the offences for which he has been convicted. Alternatively, it is submitted that if the defence is not accepted then at the most offence under Section 354 of the IPC would be attracted and the sentence recorded against the accused be reduced to the period undergone by him and said period would be sufficient sentence.

6. Learned counsel for the appellant/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 thus on holding 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 allegations 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 appellant. 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 offence under Section 354 of the IPC, the prosecution has to establish that the accused outraged modesty of the victim girl by touching to her breast. To attract the offence under Section 354-A of the IPC the prosecution has to prove that the accused did the act of physical contact to the victim girl by touching to her breast and advances involving unwelcome and explicit sexual overtures. Moreover, to hold that the accused has committed the offence under Section 8 of the POCSO Act, the prosecution has to prove that he has committed

sexual assault i.e. with sexual intent he touched breast of the victim girl which involves physical contact without penetration within the meaning of Section 7 of the POCSO Act on 17.09.2014 at about 07.00 am on the road of Vidyut Nagar, Morewadi, Ambajogai. Similarly, to hold that the accused has committed the offence punishable under Section 10 of the POCSO Act, the prosecution has to establish that the accused touched to breast of victim girl of 9 years old and also said her that seize of the breast would be increased after going to 5th class and thereby committed the offence of aggravated sexual assault on child below 12 years. As regards offence under Section 12 of the POCSO Act the prosecution has to prove that accused with sexual intent pointing finger to the breast of the victim girl uttered words that it would become big when she would go in 5th standard and followed her and committed sexual harassment to her. To prove these facts, the prosecution has mainly relied upon the evidence of the victim girl (PW-5), her mother (PW-3) and father (PW-2).

10. Now coming to the evidence of the victim girl (PW-5) at Exh.40, which was recorded on

15.06.2016, her evidence is that the incident occurred on 17.09.12014 at about 07.30 am to 08.00 am in Vidyut Nagar. On that day she went to the house of her aunt to return saree. She went to shop of Pawar alongwith Harsh son of her aunt. One person came from her back side and asked her of whom she wore big size footwear. He asked her in which standard she is studying. She told him that she is studying in 4th std. He pointed out finger to her breast and asked her what is it. Thereafter, he came near her and touched her breast and said it would become big when she would go in 5th std. Thereafter, he caught hold her. She tried to rescue herself, one another person went from there, therefore, he released her and she went away. Thereafter, she went to the shop of Neha as shop of Pawar was closed. The said person had taken some articles from Neha shop and was standing talking with Istriwala. Thereafter, she took cheaps packet from Neha shop and by another road went to her aunt's house. That person followed her. As that person followed them they ran and rushed to aunt's house and dropped Harsh in aunt's house and went to her house. Her father went out side of the house and she told to her mother. When her father returned to home from outside, her mother

told to her father. Her father asked her whether she knows that person?. She told her father that she did not know the said person and told that said person was fat, with big berry, short and with spect. She belongs to Mahar community. She can identify the said person, if she saw him. She stated that, the accused present before the Court is the same person. Thereafter, she went to one place and at that place there was Judge. There these questions were recorded.

11. In the cross-examination the victim girl has stated that now she is studying in 6th std. She has admitted that in her statement before police there is no reference that she visited Pawar's shop on that day. She has denied that her family members interpreted the incident otherwise and therefore, asked her to give her statement on record. She has denied that she is deposing false. She has denied that the person who committed the above said act does not understand what he was doing. Her evidence regarding role attributed to the accused regarding material incident of outraging her modesty, that the accused followed her, that the accused touched her breast and about the words uttered by the accused, pointing finger to her breast and regarding

identification of the accused by her before the Court has gone unchallenged in the course of her cross-examination on behalf of the accused. Therefore, there is no reason to disbelieve the evidence of the victim girl regarding happening of the incident.

12. The evidence of victim girl is corroborated by her statement Exh.54 recorded by the JMFC, Ambajogai under Section 164 of the Code of Criminal procedure which shows that on 17.09.2014 prior to 08.00 am she had gone to her maternal aunt's house to give saree. Maternal aunt had given 10 rupees to her. Then she went to the shop. Then one person came from behind and uttered the words as further:

"त्याने माला विचारले की तु चप्पल कोणाची घातली मी म्हणाले मम्मीची. तो छातीला हात लावून म्हणाला की, येथे काय आहे, पाजू दिले तर मोठे होते. मी एस.टी.डी. च्या दुकानात जायले होते ते दुकान बंद होते, रस्त्यावर कोणीही नव्हते तो जाताना म्हणाला एकदा छातीला हात लावू दे व त्यांनी पकडले, मागून एक माणूस आल्याने तेव्हा सोडले, तेव्हा ते दुकान बंद होते त्याच्यामुळे मी दुसऱ्या दुकानाकडे गेले, तेव्हा तो दुकानातून येत होता, तो इसत्रीच्या दुकानात थांबला. मी चिप्स व सामान घेतले मी वापस दुसऱ्या रस्त्याने जायला लागले तेव्हा तो माझे मागे येवू लागला. तेव्हा मी हर्षुला म्हणाले पळत जावून रेष लावू

म्हणून आम्ही घराकडे पळालो. तो माणूस निघून गेला. घरी
आल्यावर रात्री आईला सर्व घटना सांगितली."

13. The above statement Exh.54 of the victim girl shows that she was aged 10 years when said statement was recorded on 20.09.2014. Thus, on the basis of above evidence of victim girl, it is clear that she was a child within the meaning of Section 2-d of the POCSO Act as she was below the age of 18 years. Moreover, on the basis of her evidence and her statement Exh.54, it can be said that on 17.09.2014 at about 08.00 am the accused touched the breast of the victim girl followed her and caught hold her and uttered the words as referred earlier.

14. PW-3 mother of the victim has stated that on 17.09.2014 her daughter the victim went to her sister to return her saree and returned to home at about 08.30 am. She found the victim silent. After her husband went away, the victim told her that when she was returning from house of her maternal aunt alongwith her son Harsal, one person came from her backside and asked her of whom she wore big footwear and also further asked her in which standard she was studying. At that time she replied that she was in

4th std. Then he came close to her and pointed towards her breast and asked what is that. He also told her that breast becomes big when she would enter in 5th std. He also touched her breast. He also caught hold her at that time, she attempted to escape from him. He left her as soon as he saw one person going from the road. Thereafter, she went to shop of Pawar. As said shop was closed, she went to Neha Grocery shop. She found that said person was talking in the laundry and she observed that she was returning from another road, at that time same person was chasing her. The victim gave description of the accused as recorded earlier. PW-3 stated that she narrated the incident to her husband (PW-2). Though PW-3 has been cross-examined at length nothing is found in favour of the accused. She has denied that accused does not remember what happened on that day at the relevant time. She stated that she does not know whether he is suffering from Polar disorder with manificie disease. She has denied that nothing has happened as deposed by her about conduct of accused on 17.09.2014. She also denied that what is committed by the accused is not committed by him with his sound condition. Thus, nothing is found in favour of the accused in the cross-examination of

PW-3 mother of the victim girl and she has corroborated the evidence of the victim girl on the material particulars of incident and her evidence is in the nature of previous statement made to her by the victim girl about the incident admissible under Section 157 of the Evidence Act.

15. The evidence of PW-2 father of the victim girl is that on the day of incident his wife (PW-3) narrated about the incident that has taken place with the victim girl as referred earlier while referring the evidence of victim girl. So also, he has stated that he asked the victim girl as to who was said person and she had given description of the accused. Moreover, he stated that he came to know from the victim girl that similar incident has taken place with daughter of their house maid Gangabai and said Gangabai also told him that the said person resides in Vidyut Nagar, Ambajogai and his name is Laxmikant Kulkarni. Thereafter, he had gone to the accused and the victim girl had identified him. Then he lodged the complaint (Exh.27) on 19.09.2014. In the cross-examination on behalf of the accused he has stated that house of the accused is at a distance of about 400 to 500 mtrs. from his house. He has denied that he is deposing false that his

daughter narrated the incident to her mother and her mother narrated the incident to him. He has stated that he has no idea whether accused was suffering from Polar disorder with manificie. Thus, nothing is found in favour of the accused in the cross-examination of father of the victim. Exh.55 statement under Section 164 of the Code of Criminal Procedure recorded by JMFC, Ambejogai of PW-2 father of the victim girl also shows that the incident as deposed by the victim girl has taken place on 17.09.2014 and he came to know about the said incident from his wife and that on enquiry the victim girl had told him description of the accused.

16. From the evidence of father of the victim girl, it is clear he came to know about the incident from his wife and he has no direct knowledge of the incident. On the basis of evidence of PW-2 father of the victim, it can be said that he lodged the complaint (Exh.27) in the Police Station (City) Ambejogai and that the victim girl had given him description of the accused.

17. For the forgoing reasons, on the basis of evidence of victim girl (PW-3) and her statement (Exh.54) recorded by JMFC, Ambejogai and evidence of

PW-3 mother of the victim girl, I hold that the prosecution has established the ingredients of offences of outraging modesty punishable under Section 354, offence of sexual harassment punishable under Section 354-A of the IPC and the offence of sexual assault as defined under Section 7 punishable under Section 8 of the POCSO Act. Moreover, on the basis of said evidence, it can be said that prosecution has established the offence of aggravated sexual assault under Section 9 of the POCSO Act punishable under Section 10 of the POCSO Act. So also, on the basis of said evidence, it can be said that the prosecution has proved the offence of sexual harassment of the victim girl under section 11 which is punishable under Section 12 of the POCSO Act. Another aspect to be noted is that since the defence of the accused is of unsound mind at the relevant time he does not deny the happening of the incident.

18. Learned counsel appearing for the accused submitted that the prosecution has not proved that the alleged act attributed to the accused amounts to aggravated sexual assault within the meaning of Section 9 of the POCSO Act and therefore, finding of the trial Court that the prosecution has proved

offence punishable under Section 10 of the POCSO Act is not correct. Section 9(m) of the POCSO Act says that whoever commits sexual assaults on a child below twelve years is aggravated sexual assault. Sexual assault is defined under Section 7 of the POCSO Act which says that whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault. As referred earlier the victim girl was aged 10 years on the day of incident i.e. 17.09.2014, the said fact is not disputed by the accused. Thus, it is obvious that on the day of said incident the victim girl was below 12 years. As mentioned earlier, while referring the evidence of victim girl, she deposed that the accused has touched her breast and caught hold her. The said act of the accused amounts to sexual assault. Therefore, it can be very well said that the accused has committed sexual assault on the victim who is a child below 12 years of age and therefore, the said act of the accused amounts to aggravated sexual assault within the meaning of

section 9 of the POCSO Act which is punishable under Section 10 of the POCSO Act. Therefore, the argument advanced by the learned counsel for the accused that the prosecution has not proved the offence under Section 10 of the POCSO Act or that the act alleged against the accused does not amount to aggravated sexual assault is not accepted.

19. 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.61 and 62.

20. 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 and in May, 2014 the accused was residing with him at Hingoli. According to him, his father used to scold without any reason, remain in anger continuously for two to three days and suddenly become very calm and cool, talking irrelevantly, and used to become calm and quite, but at that time they could not recollect. He stated that on 18.07.2014 at Hingoli his father outraged modesty of one girl of 14 to 15 years. They met parents of the victim and they had forgiven his father and there was possibility of psychological problem to his father, therefore, he took his father to Dr. Giri on 21.07.2014. Dr. Giri examined his father and advised him to take his father to Dr. Kalkar, Psychiatric of Akola and given medicine for seven days and again called for follow up after seven days. But, as the delivery date of his wife was coming soon and positive effect of medicine observed on his father, he did not take his father to any doctor. Dr. Giri gave him a referral letter of Dr. Kalkar. Thereafter, for religious function of his son he came to Ambajogai on 09.09.2014 alongwith his family. Then they came to Hingoli and his father remained at Ambajogai with his another brother Mayur. On 18.09.2014 he came to know from his

brother Mayur that his father again outraged modesty of one girl. According to him at that time medicine of his father was over. The incidents of outraging modesty of the girls at the hands of his father took place due to psychological problem of his father. In the cross-examination on behalf of the prosecution he has admitted that in spite of advise given by Dr. Giri, till date he had not taken to his father to any Psychiatric Doctor and on the basis of advise of doctor he has deposed that the incident of outraging of modesty of girls at the hands of his father took place due to psychological problem of his father. He has denied that he is deposing false that incident of outraging of modesty which took place at the hands of his father, took place, due to his psychological problems. He admitted that as his father was mentally and physically fit, therefore, he could stay with his brother independently. As DW-1 is not Psychiatric his evidence that incident took place due to psychological problem of his father is not believable. Moreover, as he has admitted that his father was mentally and physically fit and therefore he was independently staying with his brother it cannot be said on the basis of evidence of DW-1 that incident in the present case

of 17.09.2014 took place while the accused his father was unsound.

21. 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 report him after five days. He stated that on 28th when accused visited Hospital 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.62. 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 not expert Psychiatric. He admitted that his hospital is not equipped with Psychiatric's In-door Patient Department. He admitted that whatever may be the test advised by him to the accused are general and routine. He admitted that in order to conclude exact diagnosis of psychological ailment or disease, a

specific tests are to be performed by expert Psychiatric. He admitted that he has referred the accused to Psychiatric by observing his abnormal behavior only. He admitted that one cannot conclude that the person having abnormal behavior can understand a specific act and its consequences and otherwise. He has denied that due to increase in blood pressure the symptoms of abnormal behavior can be observed in a person. He denied that he is deposing false that he has examined the patient and issued prescription and accordingly he (accused) had taken treatment in order to get benefit of the patient in the form of acquittal. He has no idea what kind of treatment was advised by Dr. Kelkar, to accused and similarly what kind of test was performed by Dr. Kelkar. He denied that the patient is having no any kind of mental disorder and he is deposing falsely at the instance of accused. In the absence of evidence of expert doctor the evidence of Dr.Giri 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 17.09.2014.

22. 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.

23. 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 act or that he was doing what is either wrong or contrary to law. 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 reasons 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. The trial Court has rightly held so. 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 offences under Sections 7 and 9 of the POCSO Act.

24. In view of above discussion, I hold that the prosecution has proved the offences under Sections 354, 354-A of the IPC and Section 8,10 and 12 of the POCSO Act against the accused beyond reasonable doubt. The trial Court has rightly held so and rightly convicted and sentenced the accused for the said offences. The victim girl was aged 10 years at the time of incident and as such she was a child within the meaning of Section 2-d of the POCSO Act. As discussed earlier in detail, the prosecution has established the ingredients of offences punishable under Sections 8,10 and 12 of the POCSO Act and therefore, it cannot be said as argued by the learned counsel for the 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 appellant/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 offences under Sections 354 and 354-A of the IPC and Sections 8,10 and 12 of the POCSO Act the sentence recorded against the appellant/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 the period undergone by the accused is not acceptable.

25. 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.]