

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.930 OF 2015

WITH

CRIMINAL APPLICATION NO.1826 OF 2018

Mr. Laxman Namdeo Gangurde,
Age about 22 years,
Occupation : Agriculture/Labour,
R/o. Dudhkhed, Tal. Chandwad,
District : Nashik.
(At present Nashik Road Central
Prison, Nashik)

.....Appellant

V/s.

1. The State of Maharashtra & Anr.
Through Wani Police Station,
Tal.Dindori, District : Nashik.
Vide C.R.No.43/2014.
(Notice to be served on the A.P.P.),
High Court, Mumbai.

....Respondents

Mr. Sharad Bhosale a/w. Mr. Nakul K. Vane i/by Mr. Dilip Bodake,
Advocate for the Appellant.

Mr. S.V. Gavand, APP for respondent No.1/State.

CORAM : A.M.BADAR, J.

DATED : 28th NOVEMBER 2018.

ORAL JUDGMENT :

1. By this appeal, the appellant/accused is challenging the judgment and order dated 27.08.2015 passed by the learned Special Judge & Additional Sessions Judge, Nashik in Sessions Case No.156 of 2014, thereby convicting the appellant/accused of the offence punishable under Section 376(2)(i) of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for the sake of brevity).

2. For the offence punishable under Section 376(2)(i) of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from imposition of fine of Rs.30,000/- and default sentence of rigorous imprisonment for three years. No separate sentence was imposed for the offence punishable under Section 4 of the POCSO Act in view of the provisions of Section 42 of the said Act.

3. Brief facts leading to the prosecution of the

appellant/accused can be summarized thus :

(a) The victim of the crime in question, according to the prosecution case is a girl below 16 years of age (PW-1). The incident in question took place on 04.04.2014 in the agricultural field owned by the father of the applicant/accused in the vicinity of Village Vani in District Nashik. According to the prosecution case, on that day in the morning hours, the female victim child/PW-1 had been to the house of PW-2 Anita Gavit. The appellant/accused who is an agriculturist by occupation came there as he was in need of labourer. One Sangita who happens to be sister of PW-2 Anita was also present in the house of Anita. The minor female victim/PW-1 was also in need of work and therefore, she became ready to go to the field for agricultural work in order to earn livelihood. The appellant/accused asked all of them to gather near the school in the village in order to enable him to take all of them to the field by his motorcycle.

(b) When the minor female victim/PW-1 and others assembled near the school in village Vani, the appellant/accused came on motorcycle and informed them that initially he will take small

children with him for dropping then at the field and then he will take PW-2 Anita and Sangita to the field. That is how the minor female victim/PW-1 alongwith Sahil, Didi and Ganesh, who happen to be small children of PW-1 Anita and Sangita were taken first by the appellant/accused to the field by the motorcycle.

(c) According to the prosecution case, after reaching the field, the appellant/accused dragged the minor female victim/PW-1 in the hut situated in the field. There he committed forceful sexual intercourse with her. After some time, he left the spot for bringing other labourers in the field. Thereafter when the appellant/accused brought PW-2 Anita and Sangita to his agricultural field, the minor female victim/PW-1 disclosed the incident, which took place with her to them. The same was thereafter disclosed to the parents of the appellant/accused. Father of the appellant/accused then took the minor female victim /PW-1 as well as PW-2 Anita to Wadner-Bhairav Police Station. The PW-8 Walimik Aute, who happens to be Police Station Officer of the said police station then deputed PW-9 Ramkrishna Jagtap, Police Constable with the female victim child/PW-1 and others to

visit the spot. As it was noticed that the spot of the incident is falling within the territorial jurisdiction of the Wadner Police Station, PW-9 Ramkrishna Jagtap, Police Constable reached the minor victim child/PW-1 and others to the Wadner Police Station. At that police station, PW-6 Meera Admane, PSI recorded the FIR lodged by the minor female victim/PW-1. Wheels of investigation were then set in motion.

(d) On 04.04.2014 itself the minor female victim/PW-1 was sent for medical examination to the Civil Hospital, Nashik where she was examined by PW-5 Dr. Nareshkumar Shivajirao Bagul, Medical Officer. The spot came to be inspected in presence of PW-3 Ravindra Chavan by PW-6 Meera Admane, PSI on 04.04.2018 itself. A quilt found in that hut came to be seized. Cloths of the minor female victim/PW-1 came to be seized by preparing panchnama Exh.31 in the presence of PW-4 Rajendra Gaikwad. The appellant/accused was said to be absconding and ultimately, he was arrested on 20.04.2014. Sample of blood and semen of the appellant/accused so also sample of vaginal swabs etc. and blood of the minor female victim/PW-1 came to be collected. Seized

articles were sent for chemical analysis. On completion of routine investigation, the appellant/accused came to be charge-sheeted.

4. The learned trial Court framed charge for the offences punishable under Sections 376 and 506 of the Indian Penal Code as well as under Section 4 of the POCSO Act against the appellant/accused. He abjured his guilt and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. The minor female victim of the crime in question is examined as PW-1 and the report lodged by her on the day of the incident is at Exh.16. Anita Gavit is examined as PW-2. Ravindra Chavan, a Panch to the spot panchnama is examined as PW-3, Rajendra Gaikwad, a Panch Witness to the seizure of clothes is examined as PW-4. Both these Panch witnesses turn hostile to the prosecution. Medical Officer of the Civil Hospital, Nashik, Dr. Nareshkumar Bagul is examined as PW-5. Exhibit 27 is the report of Medical Examination of the PW-1 whereas the documents at Exh.28 are comprising of medical case record of the minor female victim. Investigation Officer

Meera Admane, PSI of Wadner Police Station is examined as PW-6, Dr. Anand Pawar, Medical Officer of the Civil Hospital, Nashik is examined as PW-7, Exh.28 is the document in respect of the ossification test. Walimik Aute, Officer of Wadner Police Station is examined as PW-8 whereas Ramkrishna Jagtap, Police Constable of the said police station is examined as PW-9.

5. The defence of the appellant/accused was that of total denial. According to the defence version, Anita and Sangita had left his work relating to onions plantation incomplete and therefore, he did not pay money to them. As the appellant/accused refused to pay money to PW-2 Anita and Sangita, with the help of the female victim child/PW-1, they had falsely implicated the appellant/accused in the crime in question. He however did not enter in the defence.

6. After hearing the parties, by the impugned judgment and order, the learned trial Court came to the conclusion that the appellant/accused had mercilessly ravished the victim girl of 16

years of age and then it proceeded to convict him for the offence punishable under Section 376(2)(i) of the Indian Penal Code, so also for the offence punishable under Section 4 of the POCSO Act, for which no separate punishment was imposed. The appellant/accused was sentenced to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.30,000/- and in default to undergo further rigorous imprisonment for three years for the offence punishable under Section 376(2)(i) of the Indian Penal Code. He was acquitted of the offence punishable under Section 506 of the Indian Penal Code.

7. I heard the learned counsel appearing for the appellant/accused at sufficient length of time. He argued that even as per case of the prosecution, the minor female child was accompanied by three children, but their statements were not recorded by the police. Those are not examined by the prosecution. It is further argued that the evidence of the medical officer shows that there can be several reasons for rapture of the hymen and the hymen can be ruptured even by doing heavy

agricultural labour work. The alleged victim femal child of the crime in question was doing the agricultural work, and therefore, rapture of hymen is not conclusive in this matter.

8. The learned counsel further argued that father of the victim child so also the police officers are not examined by the prosecution. The spot panchnama is not proved as the Panch witness has turn hostile to the prosecution. It is further argued that the Chemical Analyzer is not examined in order to prove report of chemical analysis. Therefore, the appellant/accused is entitled for acquittal.

9. As against this, the learned APP supported the impugned judgment and order of conviction and resultant sentence by contending that the offence stood proved by congruous evidence of prosecution witnesses.

10. I have carefully considered the submissions so advanced and have also perused record and proceedings including oral as

well as documentary evidence adduced by the prosecution. At the outset, let us put on record the principles of appreciation of evidence in rape cases as it is argued on behalf of the appellants/accused that because of non-examination of some of the witnesses and as hymen of a woman can be ruptured due to several reasons, the appellant/accused is entitled for acquittal. In the case of ***State of Punjab v. Gurmeet Singh***¹ the Hon'ble Apex Court took a view that the Courts dealing with the rape cases shoulder a great responsibility and they must deal with such cases with utmost sensitivity and it is observed that :

“It is an irony that while we are celebrating woman's rights in all spheres we show little or no concern for her honour. It is a sad reflection on the attitude or indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature,

1 1996 Cr.L.J. 1996 172.

to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations”.

11. This makes it clear that if evidence of the victim of sexual offence inspires confidence, then it can be relied upon without seeking any further corroboration.

12. It is settled legal position that medical evidence is a corroborating piece of evidence. In the case of **Ranjit Hazarika v. State of Assam**² the opinion of the doctor was that no rape appears to have been committed because of absence of injuries on the private part of the prosecutrix. The Hon'ble Apex Court in that matter took a view that the medical opinion cannot throw overboard otherwise cogent and trustworthy evidence of the prosecutrix. It is apposite to quote the relevant observations of the

² (1998) 8 SCC 635

Hon'ble Apex Court as found in Paragraph 6 of that judgment, reads thus:-

“The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In State of Punjab v. Gurmit Singh, to which one of us (Anand, J.) was a party, while dealing with this aspect observed:

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to

injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

We are in agreement with the aforesaid view.

13. Similarly, in the matter of *B.C.Deva v. State of Karnataka*³ in spite of the fact that there were no injuries on person of the prosecutrix, the Honourable Apex Court has upheld the conviction of the appellant/accused by holding that evidence of the victim is reliable and trustworthy. By now, it is well settled that evidence of the victim of the sexual offence stood on higher footing than that of the injured witness as such victim suffers not only physical but also psychological injury and the trauma lasts throughout her life.

14. Keeping in mind these principles of appreciation of evidence of the victim of the rape case, let us examine version of the minor female victim/PW-1. It is in her evidence that on the date of incident, she had been to the house of PW-2 Anita. The appellant/accused also came there as he was to hire labourers for agricultural work. The minor female victim/PW-1 testified that Sangita was also there. The minor female victim/PW-1 disclosed to PW-2 Anita that she also wants to come for work. As testified by the female victim child/PW-1, the appellant/accused then asked

³ (2007) 12 SCC 122.

all of them to gather near the school in village Vani for taking them to the agricultural field. The female victim child/PW-1 then deposed that they went near the school. From there, the appellant/accused took her and small children for dropping them at the agricultural field by his motorcycle. What happened in the agricultural field is also disclosed by the female victim child/PW-1 in clear terms. As per her version, the appellant/accused on reaching the agricultural field dragged her inside the hut and asked children named Ganesh and Didi to stay outside. He latched the door of the hut. She then shouted, but as there was nobody in the agricultural field, nobody came to help her. As testified by the female victim child/PW-1 then the appellant/accused removed her clothes and committed rape on her. He then left the place after some time. The female victim child/PW-1 categorically deposed that in the said incident, her clothes get stained by blood. After some time, as stated by the female victim child/PW-1, the appellant/accused brought PW-2 Anita and Sangita to the agricultural field and then she disclosed the incident to both of them. The female victim child/PW-1 further stated that then she

was taken to the house of the appellant/accused where she narrated the incident to her parents. Thereupon, father of the appellant/accused brought her to the police station and PW-2 Anita had also accompanied her. The female victim child/PW-1 proved the FIR lodged by her, which is at Exh.16.

15. In order to ascertain whether the female victim child/PW-1 is the witness of truth, let us examine what she has stated in her cross-examination. Her cross-examination reveals that Sangita had obtained the contract of plantation of onions from the appellant/accused, but after part performance thereof she had left their work causing loss to the appellant/accused. Sangita had told this witness that the appellant/accused is not paying money to her and he is not a good person. The female victim child/PW-1 has admitted in her cross examination that Sangita had threatened the appellant/accused that she will teach a lesson to him. This witness further admitted that PW-2 Anita as well as Sangita had forced her to make allegations of rape against the appellant/accused. Thereafter, she initially accepted the

suggestion given by the defence that no such incident took place, but then immediately corrected herself by denying the fact that no such incident took place. The learned trial Court had taken a note in her deposition that she had not understood the question correctly.

16. The female victim child/PW-1 was examined without administering oath to her by the learned Special Judge. The reason for not administering oath to her as recorded by the learned Special Judge under the POCSO Act is to the effect that the female victim child/PW-1 is unable to tell her birth date and age, so also she is illiterate, and therefore, oath is not administered to her.

17. Perusal of deposition of the female victim child/PW-1 shows that she has stated her age as 16 years while in the witness box. Section 118 of the Indian Evidence Act, 1872 deals with competency to testify. As per provisions of this Section, all persons are competent to testify unless the Court considers that

they are prevented from understanding the questions put to them, or from giving rational answers to those questions because of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation to Section 118 of the Indian Evidence Act, 1872 makes it clear that even a lunatic is not incompetent to testify, unless he is prevented because of his lunacy from understanding the questions put to him and giving rational answers to them. Without judging competency of the female victim child/PW-1 to testify, the learned trial Court proceeded to record her evidence without administering oath to her, by ignoring the provisions of Section 118 of the Indian Evidence Act, 1872.

18. As per Section 4 of the Oaths Act, 1969, oath or affirmation shall be made by all witnesses, who may lawfully be examined or who are required to give evidence before the Court of law. However, where the witness is a child under twelve years of age, and the court is of opinion that, though the witness understands the duty of speaking the truth, such witness does not understand

the nature of an oath or affirmation, the oath is not required to administer to the said witness. Section 7 of the Oaths Act, 1969 provides that no omission to take any oath shall invalidate any proceeding or render inadmissible any evidence. Therefore, in the light of the provisions of Section 7 of the Oaths Act, 1969, evidence of the female victim child/PW-1 cannot be ignored as inadmissible, due to non-administration of oath to her. This aspect cannot held to be affecting obligation of the PW-1 to state the truth.

19. Perusal of evidence of the female victim child/PW-1 shows that she was competent to testify and had given rational answers to the questions put up to her. Her version that PW-2 Anita and Sangita forced her to make allegations of rape on the appellant/accused cannot be construed to mean that she was compelled to make false allegations of rape against the appellant/accused. The female victim child/PW-1 had categorically denied the suggestion that no such incident of commission of rape on her by the appellant/accused took place.

Mere forcing the female victim child/PW-1 to take recourse to the provisions of law by reporting the incident to police does not mean that whatever the female child discloses to the police is false. This material in the cross-examination of the female victim child/PW-1 at the most indicates that after the incident, it was because of persuasion of PW-2 Anita and Sangita, she had chosen to lodge report against the appellant/accused. By no stretch of imagination it can be said that merely because the report was lodged by the female victim child/PW-1 as PW-2 Anita and Sangita had compelled her or forced her to make the allegation of rape, the entire prosecution case is rendered suspect. It is seen that evidence of the victim child is clear, constant and reliable. The same is gaining corroboration by the FIR lodged by her with promptitude.

20. Now let us examine what happened soon after the incident of commission of rape as alleged by the female victim child/PW-1. As stated by the female victim child/PW-1, after the incident of rape on her, the appellant/accused left and subsequently brought

PW-2 Anita and Sangita to the field for work. She claims to have disclosed the incident to them. Evidence of PW-2 Anita is fully corroborating the entire version of the female victim child/PW-1. She has spoken about visit of the female victim child/PW-1 to her house in the morning hours, joining the company of the appellant/accused by her for going to the agricultural field for the work and then subsequent disclosure about the incident by the female victim child/PW-1 to her. This makes it clear that the victim female child was in company of the appellant/accused.

21. The PW-2 Anita has seen condition of the female victim child/PW-1 on reaching the agricultural field. As disclosed by PW-2 Anita at that time the female victim child/PW-1 was weeping and her clothes were stained with blood. She was in frightened condition. Upon enquiry, as stated by PW-2 Anita, the female victim child/PW-1 disclosed her that by dragging her inside the hut, the appellant/accused committed rape on her. This witness has also claimed that then she alongwith female victim child/PW-1 went to the parents of the appellant/accused and apprised them

about the incident.

22. Cross-examination of PW-2 Anita shows that another lady named Sangita is her sister. The PW-2 Anita admitted that she used to take contract of agricultural work. Apart from this, there is no other material in her cross-examination. She denied the suggestion that she along with Sangita had obtained contract from the appellant/accused. Thus, cross-examination of PW-2 Anita does not show that she had any reason to falsely implicate the appellant/accused in the crime in question. I see no reason to disbelieve her version regarding condition of the victim female child soon after the incident and the recitals made by the female victim child/PW-1 to her. Her evidence to the effect that she saw stains of blood on clothes of the female victim child/PW-1 after the incident speaks volumes. It is seen from evidence of the female victim child/PW-1 and PW-2 Anita that after the incident, they went to the parents of the appellant/accused and disclosed the incident to them. As per version of the female victim child/PW-1, father of the appellant/accused accompanied them to

the police station. On this backdrop, evidence of PW-8 Walimik Aute, PSO of Vadner Police Station and that of PW-9 Ramkrishna Jagtap, Constable of the said Police Station makes it clear that one Namdeo Gangurde visited the police station along with the female victim child/PW-1 and others for lodging the report. Thus, on this aspect also, evidence of the female victim child/PW-1 is gaining full corroboration from the evidence of official witnesses. Otherwise, there was no reason for the father of the appellant/accused to visit the Police Station of Vadner alongwith the victim. Evidence of PW-9 shows that as it was noticed that the spot of the incident was within the jurisdiction of the Police Station Vani, he had reached the female victim child/PW-1 to that police station.

23. After recording the report Exh.16 lodged by the female victim child/PW-1 with Vani Police Station, as per version of PW-6 Meera Admane, PSI, the victim girl was immediately sent to the Civil Hosptial, Nashik for medical examination. On the day of the incident i.e. on 04.04.2014 itself, PW-5 Dr. Nareshkumar Bagul

had medically examined the victim child/PW-1 at Civil Hospital, Nashik. Evidence of this medical officer shows that on local examination of genital parts of the victim girl, he observed Labia Majora of the victim was swelling and edematous. Her Labia Minora was having scratch and bruising. The Fourchette was having bleeding and tears. There was bleeding and discharge from the vulva. Perineum of the victim child was edematous and her hymen was found torn and congested with tenderness. There was reddish discharge from vagina and cervix. All these finding are unerringly pointing out penetrative sexual assault on the PW-1 by the appellant/accused as claimed by her.

24. PW-5 Dr. Nareshkumar Bagul further deposed that clothes of the female victim child/PW-1 were stained with blood. PW-5 Dr. Nareshkumar Bagul in his cross-examination admitted that if the girl do hard work like agricultural labour or any other labour work, there is possibility of hymen torn. He denied the suggestion that hymen of the victim girl was having old tear. Evidence of this medical officer is gaining corroboration from medical record,

which is at Exh.27 and 28.

25. There can be more than one reason for tearing of the hymen of a woman. However, in the case in hand, the victim child/PW-1 is categorically averring rape on her by the appellant/accused. Within few hours, the medical officer is noticing the fact that there was swelling, scratches, bruising, tears and bleeding at the private parts of the victim. It was noticed that her hymen was in torn condition and perineum edematous. With this finding, argument of the learned counsel for the appellant/accused that these external injuries can be caused because of agricultural work, is totally indigestible. The external injuries on the private parts of the victim are definitely attributable to the act of commission of rape on her by the appellant/accused. Thus, medical evidence is supporting the case of prosecution fully. Though reliance is placed by the learned counsel for the appellant/accused on the judgment in *Madan Gopal Kakkad Vs. Naval Dubey*⁴ there is nothing in the said judgment which supports the cause of the appellant/accused.

4 1992 DGLS(SC) 347

26. In the case in hand, panch witness to the sport panchnama namely PW-3 Ravindra Chavan has turn hostile to the prosecution, but the prosecution has proved the said panchnama through evidence of PW-6 Meera Admane, PSI, who is the author of the said panchnama. Similarly, this witness has proved panchnama of seizure of clothes of the female victim child/PW-1, which is at Exh.31. Both these documents are executed on the day of the incident itself. From the spot of the incident, quilt came to be seized by PW-6 Meera Admane. There is nothing in cross-examination of the investigating officer to disbelieve her evidence regarding inspection of the spot, seizure of the quilt as well as seizure of clothes of the female victim child/PW-1. Version of PW-6 Meera Admane so also recital of the spot panchnama Exh.31 shows that clothes of the female victim child/PW-1 were stained with blood at the time of seizure. PW-4 Rajendra Gaikwad deposed about finding of bloods on clothes of the female victim child/PW-1 soon after the incident. Seized articles were then sent for chemical analysis and the reports of Chemical Analyzer is at Exh.11 and 12. Human blood was found on the clothes of the

female victim child/PW-1 whereas the quilt found on the spot was found to be stained with human blood and human semen. Human blood was detected in the vagina swabs of the female victim child/PW-1. Thus, forensic evidence of finding blood and semen on the seized articles corroborates the version of the victim child/PW-1 in respect of commission of rape on her by the appellant/accused. In view of provisions of Section 293 of the Code of Criminal Procedure, 1973, I find no substance in the argument of the learned counsel for the appellant/accused that because of non-examination of the Chemical Analyzer, the C.A. reports cannot be looked into. With this voluminous evidence, which is of unimpeachable character adduced by the prosecution makes out the offence of commission of rape by the appellant/accused on the female victim child/PW-1.

27. The learned trial Court had convicted the appellant/accused for the offence punishable under Section 376(2)(i) of the Indian Penal Code and he was sentenced accordingly. Section 376(2)(i) deals with commission of rape of a

woman when she is under 16 years of age. In the instant case, the prosecution has relied on oral evidence of the female victim child/PW-1 to prove her age. She had deposed her age as 16 years while in the witness box, but the learned Special judge observed while recording her evidence that she is unable to tell her birth date and age. Even otherwise oral evidence in respect of age of a person is hardly of any assistance in determining the age. The female victim child/PW-1 was subjected to the ossification test in order to determine her age and evidence of PW-7 Dr. Anand Pawar shows that upon conducting ossification test of the minor victim female child/PW-1 he came to the conclusion that she was more than 16 years of age, but less than 18 years of age at the time of her ossification test. It is conducted on the day of the incident i.e. 04.04.2014. Therefore, with this evidence, it cannot be said that the female victim child/PW-1 at the time of commission of the offence was below 16 years of age. However, it needs to be concluded that she was certainly below 18 years of age as PW-7 Dr. Anand Pawar has categorically denied the suggestion that the female victim child/PW-1 was more than 18

years of age. There is nothing on record to suggest that she was more than 18 years of age at the time of the incident. Resultantly, the appellant/accused cannot be convicted of the offence punishable under Section 376(2)(i) of the Indian Penal Code, but he needs to be convicted for the offence punishable under Section 376 of the Indian Penal Code by maintaining his conviction for the offence punishable under Section 4 of the POCSO Act as recorded by the learned Special Judge. As the appellant/accused is found guilty of the offence punishable under Section 376 of the Indian Penal Code, sentence of 7 years of imprisonment would serve the interest of justice. In the result, the following order.

- : ORDER : -

- (i) The appeal is partly allowed.
- (ii) Conviction and resultant sentence imposed on the appellant/accused for the offence punishable under Section 376(2)(i) of the Indian Penal Code is quashed and set aside.
- (iii) Instead, the appellant/accused is convicted for the offence punishable under Section 376 of the Indian Penal

Code. The appellant/accused is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.30,000/- and in default to undergo further rigorous imprisonment for three years.

(iv) Rest of the impugned judgment and order of the learned trial Court is maintained.

(v) The appeal stands disposed of accordingly.

28. In view of disposal of this Appeal, the Criminal Application bearing No.1826 of 2018 stands disposed of.

(A.M.BADAR J.)