

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

CRIMINAL APPEAL NO.90 OF 2016

Rajudan Gemardan Charan,
Age: 26 years, Occ.:- Nil,
R/o. Mulia, Tq. Fattegarh,
District Jaisarmal (Rajasthan)
At present residing at Shikshak
Colony, Kaij, Tq. Kaij, Dist. Beed **...APPELLANT**

VERSUS

The State of Maharashtra **...RESPONDENT**

Mr. N.S. Ghanekar, Advocate for the appellant
Mr. P.N. Kutti, APP for the respondent/State.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 18.04.2019
PRONOUNCED ON : 19.07.2019

J U D G M E N T :-

. This appeal is directed against the judgment and order dated 13-01-2016 passed by the Additional Sessions Judge I/c District Judge-2 and Special Judge, Ambajogai in Special (POCSO) Case No.18/2014 thereby convicting and sentencing the appellant

(hereinafter referred to as 'accused) for the following different offences under the Indian Penal Code (for short IPC), Protection of Children from Sexual Offences Act (for short 'POCSO Act) and under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for short Atrocities Act).

(a) He was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- (Rs. Two Thousand), in default to suffer rigorous imprisonment for fifteen days for the offence punishable under Section 376(2)(i) of the IPC.

(b) He was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- (Rs. Two Thousand), in default to suffer rigorous imprisonment for fifteen days for the offence punishable under Section 376(2)(n) of the IPC.

(c) He was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- (Rs. One Thousand), in default to suffer rigorous imprisonment for seven days for the offence punishable under Section 506 of the IPC.

(d) He was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/- (Rs. One Thousand), in default to suffer rigorous imprisonment for seven days for the offence punishable under Section 4 of the POCSO Act.

(e) He was sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.1,000/- (Rs. One Thousand), in default to suffer rigorous imprisonment for seven days for the offence punishable under Section 3(1)(w)(i) of the Atrocities Act.

(f) He was sentenced to suffer rigorous imprisonment for one year and to pay a fine of

Rs.1,000/- (Rs. One Thousand), in default to suffer rigorous imprisonment for seven days for the offence punishable under Section 3(2)(va) of the Atrocities Act.

The substantive sentences were directed to run concurrently. Accused was given set off for the period undergone by him i.e. from 27-04-2014. On depositing fine amount of Rs.8,000/- by the accused, an amount of Rs.5,000/- was directed to be paid to the victim girl (PW-6) (hereinafter referred to as victim) as a compensation under Section 357(3) of the Code of Criminal Procedure.

2. Facts of the prosecution case giving rise to this appeal are as under:

(A) At the material time of the incident Limbaji Yadav Vetel who is cobbler, was residing at Kaij, Taluka Kaij, District Beed in a hut alongwith his son Krushna and daughter the victim (PW-6). Accused is friend of said Krushna and he used to visit house of

the victim. The mother of the victim expired during the childhood of the victim.

(B) It is alleged that in January, 2014 at about 9.00 p.m. the victim went behind Panchyat Samiti office, Kaij to attend nature's call lonely. At that time the accused went behind her and pressed her mouth with the handkerchief and caught hold her hand. Accused asked her to remove her clothes. As the victim refused, the accused torn her clothes and committed sexual assault on her and had given threat to her that he would kill her and her family if she discloses the same to anybody and he left the spot. The victim wore torn clothes and returned to home. The victim did not narrate the incident to anybody out of fear.

(C) It is further case of the prosecution that thereafter the accused committed sexual assault on the victim again after two days and after eight days after the first incidence at the same spot against

the will of the victim and he had given threat to her that he would set her hut on fire on her disclosure of incidence to anybody. Therefore, the victim kept mum.

(D) It is further case of the prosecution that on 24-04-2014 when the victim went in the shop of one Vinod in the Kalamb square one Ratnamala Munde reporter came there and said the victim how her stomach was inflated. Therefore, the victim narrated incidence as above to said Ratnamala Munde and further told her that she had no menstruation since last four months. Said Ratnamala had taken the victim to the victim's father. Thereafter, the victim's father had taken the victim in the hospital of Dr.Chate who told that the victim was pregnant and said doctor told them to take the victim in the Government Hospital. Thereafter, the victim was taken in the Government Hospital at Kaij. On 27-04-2014 the victim lodged complaint (Exh.55) in Police Station, Kaij. The Crime No.67 of 2014 was registered against the accused for the different offences under the IPC,

POCSO Act and Atrocities Act stated earlier and the investigation was commenced.

(E) During the investigation the victim was referred in the Government Hospital at Kaij. Dr. Yogita Kadam (PW-3) examined the victim and issued report Exh.36. She recorded history as given by the patient/ victim that accused committed rape on her and that she is pregnant of four months. Accused was arrested on 27-04-2014 and since then he is in jail. Both accused and the victim were taken to hospital at Ambajogai and their blood samples as well as sample of blood of Limbaji Yadav Vetel, brother of the victim were taken for DNA test. The investigating officer prepared panchanama of spot of incident Exh. 19. He also recorded the statements of witnesses. After completion of the investigation he submitted charge-sheet in the Court of JMFC, Kaij for the aforesaid offences against the accused. The learned Magistrate committed the case to the Additional Sessions Judge, Ambajogai as the offences alleged

against the accused were triable by the Sessions Court.

(F) Charge was framed against the accused for the offences punishable under Sections 376(2)(i), 376(2)(n) and 506 of the IPC, under Section 4 of the POCSO Act and under Sections 3(2)(i) and 3(2)(va) of the Atrocities Act. Accused pleaded not guilty to the charge and claimed to be tried.

(G) To prove charge against the accused the prosecution has examined following nine witnesses:

- (1) PW-1 - Digambar Nagorao Dangat
- (2) PW-2 - Sau. Ratnamala Shivdas Munde
- (3) PW-3- Dr. Yogita Devidasrao Kadam
- (4) PW-4 - Dr. Mohd. Sultan Hussain Mohd. Abbas
- (5) PW-5 - Ravindra Maruti Sangale
- (6) PW-6 - Sushma Limbaji Vetel
- (7) PW-7- Anandrao Apparao Ningdale
- (8) PW-8- Raghunath Ramrao Dongare
- (9) PW-9 - Abhay Mulchand Dongre

Besides the above witnesses the prosecution has relied upon the medical examination report of the victim, DNA report, record of the school regarding birth date of the victim and panchanama of spot of incident.

(H) Statement of accused under Section 313 of the Criminal Procedure Code was recorded. He denied to have committed the alleged offences. According to him he has been falsely implicated. He has not examined any defence witness. He has relied upon Exh. 93 complaint dated 02-08-2007 of the victim, Exh.94 deposition of the victim in Special Sessions Case No. 4 of 2008 and Exh.95 deposition of father of the victim in the said case.

(I) On considering the evidence adduced by the prosecution and defence of the accused the learned Special Judge held that the prosecution has proved offences under Sections 376(2)(i), 376(2)(n), 506 of the IPC, under Section 4 of the POCSO Act and under

Sections 3(1)(w)(i) and 3(2)(va) of the Atrocities Act and accordingly convicted and sentenced the accused for the said offences by the impugned judgment and order, as referred earlier in detail in the opening paragraph of this judgment. Therefore, this appeal by the accused challenging the said conviction and sentence recorded against him.

3. I have heard Mr.Ghanekar, learned counsel for the accused and Mr.Kutti, learned APP for the respondent/State and with their assistance I have perused the evidence adduced by the prosecution and the impugned judgment and order.

4. Mr. Ghanekar, learned counsel for the accused submitted that considering the conviction of the accused for the offences punishable under Sections 376(2)(i), 376(2)(n) of the the IPC and under Section 4 of the POCSO Act, the age of the victim at the time of incident which took place as per the prosecution case during January, 2014 to

24-04-2014, is material to sustain conviction of the accused for the said offences. It is submitted that as per prosecution case date of birth of the victim (PW-6) is 02-02-2001. To prove the fact that victim was below 16 and 18 years of age at the time of incident to attract the aforesaid offences. The prosecution has relied upon the evidence of PW-8 teacher of Kanya Secondary School, Zilla Parishad Beed in which the victim was admitted in the 1st standard and the copy Exh.73 of extract of admission register of the said school. Mr. Ghanekar, learned counsel submitted that PW-8 is not Head Master of the school who generally takes entries in the admission register of the school of the students admitted in the school. Admittedly the prosecution has not examined Head Master of the school to prove the truth of contents of extract Exh.73. Therefore, it cannot be said that the prosecution has proved truth of the contents of extract Exh.73. It is further submitted that PW-8 teacher has admitted in the cross examination that he has personally not taken entries

in the admission register of the school and he cannot tell the source or base of contents of entries in the original admission register. This admission shows that PW-8 has not personally taken entry Exh.73 in the admission register of the school and so also he can not tell the source or base of said entry. His evidence thus shows that he can not tell on what basis said entry Exh.73 was taken in the original admission register. Mr. Ghanekar, learned counsel inviting my attention to Exh.73 submitted that as per this extract entry No.4013 regarding admission of the victim was taken in the admission register of the school and as per said entry victim was admitted on 16-06-2008 in the said school and her birth date is 02-02-2001. She was admitted in the 1st standard in the said school. It is submitted that when PW-8 has not stated that who had given birth date of victim as 02-02-2001 to mention in the admission register of the school, when the prosecution has not examined father of the victim to bring on record that date of birth of the victim is 02-02-2001 and produced birth

extract of the victim showing that her birth date is 02-02-2001 and when it is not the case at all of the prosecution that ossification test of the victim was conducted to determine age of the victim the evidence of PW-8 and extract Exh.73 of admission register of the school, though extract Exh.73 is admissible in evidence under Section 35 of the Evidence Act, are not sufficient to state definitely that the age of the victim at the time of incident was below 18 years. To support his aforesaid submissions that the learned counsel has relied upon the following decisions:

(a) In the case of Alamelu and another Vs. State, Represented by Inspector of Police and with two others, AIR 2011, Supreme Court 715, the appellants in Criminal Appeal No.1053 of 2009 were convicted for offences punishable under Sections 366 and 376 read with Section 109 of the IPC, the appellant No.1 in Criminal Appeal No.1063 of 2009 was convicted under Section 366 and 376 of IPC and appellant No.2 in the said appeal was convicted under Sections 366 and 376 read with Section 109 of IPC and both the appellants in Criminal Appeal No.1062 of 2019 were convicted under Sections 366 and 376 read with Section

109 of IPC and were sentenced accordingly. The conviction recorded against the appellants as above by the trial Court was maintained by the High Court. In the appeals against the said conviction and sentence the Apex Court while considering the age of the prosecutrix on the basis of transfer certificate issued by a Government School duly signed by the Headmaster observed that said certificate would be admissible in evidence under Section 35 of the Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. It was held that in absence of examination of Headmaster of school who made entry in transfer certificate, transfer certificate is not reliable to definitely fix age of girl. It was held that it would not be possible to give a opinion that girl was definitely below 18 years of age. The expert evidence does not rule out the possibility of the girl being major and it was held that prosecution has failed to prove that girl was a minor on the relevant date. Ultimately, it was held that prosecution has failed to beyond reasonable doubt any of the offence with which the appellants had been charged and that the entire prosecution story has been concocted for reasons based known to the prosecution.

Accordingly, appellants were held entitled to benefit of doubt and the appeals were allowed and all the appellants were acquitted.

(b) In the case of Prakash Jaganath Pawar Vs. State of Maharashtra, 2015 All MR (Cri) 3898, the appellant/accused was convicted for the offence punishable under sections 376, 451 and 506 of the IPC by the trial Court. It was case of the prosecution that the appellant allegedly committed forcible sexual intercourse with prosecutrix one year prior to filing of complaint on 07-03-2011. Subsequently also he came to her house on several occasions when she was alone and had forcible sexual intercourse with her. Regarding age of victim the School Leaving Certificate was relied upon by the prosecution. Said certificate was not proved. As per evidence of prosecutrix, she was above age of 16 years at the time of incident. Various admissions given by prosecutrix which were held to be sufficient to rule out possibility of forcible sexual intercourse, but spell out the possibility of consensual sex. After prosecutrix became pregnant several meetings were held in the village to convince the appellant to accept prosecutrix and as he refused the complaint was lodged. It was held that School Leaving Certificate is admissible in evidence under Section 35 of the Evidence Act. However the evidentiary value of the contents therein will always depend on the

material on the basis of which the entire were recorded therein. Unless the person who made the entry or the person who gave the information about the date of birth is examined the School Leaving Certificate cannot have much evidential value. The medical evidence shows prosecutrix's bony age as 17 to 18 years. It was observed that even assuming that the alleged incident of forcible sexual intercourse had taken place one year prior to the FIR and examination of prosecutrix by doctor, even at the time of incident, prosecutrix age has to be held as 16 to 17 years. It was observed that when the age ascertained on the basis of ossification test, the benefit of marginal error of one or two years always has to be extended to the accused. It was held that even on the basis of this report, the age of prosecutrix at the time of the incident was above 16 years and she cannot be treated as minor. Thus, the criminal appeal was allowed. The conviction and sentence of the appellant was set aside and he was acquitted of the offences for which he was convicted. The incident in the said case has taken place prior to amendment in Section 375 of the IPC on 03-02-2013 and prior to the coming in to force of the POCSO Act, 2012.

(c) In the case of Mani Kumarswamy Mudliyar Vs. State of Maharashtra, 2000 All MR (Cri)315, in the appeal against conviction of the appellant for the offence punishable under Section 376 of the IPC there was entry in school

register of the prosecutrix not based on birth certificate. It was held that said entry cannot be accepted. There was medical evidence giving age of girl between 14 1/2 or 16 1/2 years. There was no evidence to show that accused had taken prosecutrix in the hotel room, no evidence of her offering resistance. There was evidence of the prosecutrix that she went to accused house of subsequent occasions and was repeatedly raped. Prosecutrix not complaining about them to her grand mother or police. It was held that prosecution had failed to prove that prosecutrix was minor and had sexual intercourse without her consent.

(d) In the case of Birad Mal Singhvi Vs. Anand Purohit, AIR 1988 Supreme Court 1796, it was held that, if the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents such as extract of school register, mark list or certificate of Education Board etc. are proved, it does not mean that the contents of documents are also proved. Mere proof of such documents would not tantamount to proof of all the contents or the correctness of date of birth stated in the document.

(e) In the case of Dipak Ambadas Gaikwad Vs. State of Maharashtra,

2013(3) Mah.L.J.(Cri)645, the complainant victim girl stated that she was 11 years old at the time of incident whereas according to the school leaving certificate she was 14 1/2 years old at the time of the incident. There was no evidence to show as to how this date of birth was recorded in the school record. Proof of entry in the admission register will prove that a particular date of birth was recorded. However, the correctness of the same cannot be established mere by proof of the entry. There no evidence to prove the correctness of date of birth recorded in the admission register. It was held that prosecution has failed to prove the age of complainant. There was the medical officer was unable to give any exact opinion about penetration or intercourse. The evidence of complainant not found reliable and her evidence was found to be highly doubtful. Conviction and sentence of the appellant/accused for offence under Section 366A and 376 of the IPC was set aside.

(f) In the case of Balu Baburao Kadam Vs. State of Maharashtra and another, 2016(10) LJSOFT 13, in the appeal against the conviction for the offence punishable under Section 376 of the IPC exact age of the victim has not been established by the prosecution except the school leaving certificate which had no basis. There was report of ossification test. There was no evidence to show as to whether the victim was a minor and was incapable of

giving consent. Order of conviction and sentence set aside. The incident in the said case had taken place in 1992 i.e. prior to amendment in Section 375 of the IPC on 03-02-2013 and prior to coming in to force of the POCSO Act, 2012.

(g) In the case of Sandeep Janaji Konde Vs. State of Maharashtra, 2016(3) Mah.L.J.(Cri)766, the incident of rape had taken place about five to six months, prior to 18.01.2008. The appellant was convicted for offence punishable under Section 376 of the IPC by the trial Court. Date of birth was not given by parents of victim. Date of birth was given by the victim herself. There was no justification for not doing the ossification test. Father of the victim says that victim was 16 years and the police report also refers that victim was 16 years of age at the material time. The relations between victim and the accused came to light only because the victim had become pregnant. It was held that entry relating to date of birth made in a school register would be relevant and admissible but such entry would not have much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. The appellant was acquitted and conviction was set aside.

5. Mr. Ghanekar, learned counsel for the accused further submitted that in the above

circumstances even evidence of the victim regarding her age is not sufficient to state that she was below 18 years at the time of incident. Referring to her evidence it is submitted by the learned counsel that as per her evidence she was sexually assaulted for three times by the accused prior to one and half year of her evidence which was recorded on 14-07-2015 and only after she was pregnant of five months she disclosed incident and lodged complaint Exh.55 on 27-04-2014 in the police station, which shows that she was consenting party to the sexual intercourse and therefore her evidence is not at all sufficient to attract the offences for which accused has been convicted. The learned counsel has further submitted that the victim has admitted that her father had filed complaint against one Sandip as there was quarrel between them and in the said case she had given evidence. She also admitted that in the said case there was allegations against Sandip that he outraged modesty of other girl who was with her and therefore according to learned counsel evidence of

the victim cannot be believed. Mr. Ghanekar, learned counsel for the accused referring to certain omissions in the statement before police of the victim as recorded in paragraph Nos.10,16,18 and 19 of her deposition submitted that the evidence of victim that the accused had sexual intercourse with her repeatedly is not trustworthy. It is submitted that the accused is in jail since date of his arrest. Thus, according to learned counsel prosecution has failed to prove offences alleged against the accused. Therefore, conviction and sentence recorded against the accused by the impugned judgment and order is not sustainable and the same may be set aside by allowing the appeal.

6. Mr. Kutti, learned APP, on the other hand submitted that it is clear from the evidence of victim (PW-6) which was recorded on 14-07-2015 that incident had taken place one and half year prior to said date and when her evidence was recorded according to her her age was 17 years. Therefore,

according to learned APP at the material time of incident in January to April 2014 age of the prosecutrix was 15 years and as such prosecution has proved that she was child being below 18 years of age at the time of incident as per Section 2(d) of POCSO Act. It is submitted that incident took place in 2014 after amendment in Section 375 of the IPC on 03.02.2013. As per clause Sixthly under Section 375 of the IPC the act alleged against the accused even with or without consent of woman who is under eighteen years age amounts to rape and therefore submission made on behalf of the accused that there was possibility of consent of the victim to the sexual intercourse is not acceptable and even if there is consent of the victim it is immaterial. It is submitted that the trial Court has rightly considered the evidence of the prosecution and rightly convicted the accused for the offences said earlier by the impugned judgment and order. According to learned APP there is no merit in the appeal and thus he has prayed to dismiss the same.

7. To support his submissions that entry in school register of the victim as per Exh.73 is admissible and sufficient to prove age of the victim the learned APP has relied upon the decision in the case of **Motiram Govindrao Kamdi Vs. State of Maharashtra, 2006 ALL MR (Cri) 1002**). To support his submissions that the evidence of victim regarding her age is sufficient to conclude that the victim was below 18 years of the age at the time of incident the learned APP has relied upon the decision in the case of **Kundan s/o. Nanaji Pendor Vs. The State of Maharashtra 2017 ALL MR (Cri) 1137**. In the case of **Kundan Nanaji (Supra)** prosecutrix had stated on oath that her date of birth was 5th January, 1997 when accused committed sexual intercourse with her. There was no cross-examination, whatsoever, to such specific assertion made by the prosecutrix in her examination-in-chief. It was held that said statement of prosecutrix being remained unchallenged, is required to be accepted. In the case of **Rajesh**

Namdeo Mhatre Vs. State of Maharashtra, 2003 ALL MR(Cri) 298, of gang rape it was held that the character and reputation of the victim has no bearing or relevance in the matter of adjudging guilt of accused for imposing punishment under Section 376.

8. To hold that the accused has committed offence under Section 376(2)(i) of the IPC the prosecution has to establish that the accused has committed rape on a victim when she was under 16 years of age and further to hold that the accused has committed offence under Section 376(2)(n) the prosecution has to establish that the accused committed rape repeatedly on the victim. As regards definition of rape under Section 375 of the IPC as per clause Sixthly, a man is said to commit rape if he (a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person and clause Sixthly under the said Section 375 of the IPC says that with or without her consent, when she is under

eighteen years of age. For proving offence under Section 4 of the POCSO Act the prosecution has to establish that the accused has committed penetrative sexual assault on the victim who is child being below the age of eighteen years as per definition of child under Section 2(d) of the POCSO Act. As per Section 3 of the POCSO Act a person is said to commit penetrative sexual assault if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person. Thus, considering the ingredients of offences under Sections 376 (2)(i), 376(2)(n) of the IPC and under Section 4 of the POCSO Act the age of the victim at the material time of incident in January, 2014 to 24-04-2014 is material. To prove age of the victim the prosecution has relied upon the evidence of Raghunath Ramrao Dongare (PW-8) teacher of the school, Exh.73 extract of admission register of victim maintained in the school, the evidence of Dr. Yogita Kadam (PW-3) and victim (PW-6).

9. The evidence of Raghunath Ramrao Dongare (PW-8) who was teacher in Kanya Secondary School, Zilla Parishad at Beed is that Head Master of said school had given him authority letter Exh.72. He deposed that in the original admission ledger book of the school which is from 2003 there is entry No.4013 regarding admitting the victim in the school on 16-06-2008 in the 1st standard and as per said record date of birth of the victim is 02-02-2001. The extract of aforesaid entry regarding admission of the victim in the school produced by this witness which is tallied with the original entry in the admission register is Exh. 73. In the cross-examination on behalf of the accused PW-8 has stated that personally he had not taken entries in the admission register of the said school. So also, he stated that he could not tell the source or base of contents of entries in the original admission register. Thus, it is obvious from his evidence that he has not taken entries in the admission register regarding admitting the victim in the school and her birth date. So also, it is clear

from his evidence that he had no knowledge of source or base of contents of entry in the original admission register regarding birth date of victim. In such circumstances the prosecution was required to examine either Head Master of the school or the staff member/clerk who had taken entry in the admission register about the birth date of the victim to prove that entry regarding birth date of the victim in the register is correct. Admittedly prosecution has not examined Headmaster or staff member/clerk. The prosecution has not examined father of the victim. In fact, the prosecution should have examined him to bring on record the fact that he had admitted the victim in the school and that he had told the date of birth as above of the victim to the school authorities. Father of the victim could have told about the exact date of birth of the victim. So also he could have told as to whether afore mentioned birth date of the victim which is recorded in the school was mentioned on the basis of birth extract of the victim issued by Grampanchayat or otherwise. For

these reasons the evidence of PW-8 is not sufficient to infer that date of birth of the victim is 02-02-2001.

10. Exh.73 extract of school admission register shows that the victim was admitted in Kanya Secondary School, Zilla Parishad, Beed on 16-06-2008 and her birth date is 02-02-2001. This extract further shows that the name of victim was cancelled as she was continuously absent and her name was cancelled on 30-04-2010. As observed above this extract of original school admission register is produced by PW-8 and PW-8 had no knowledge about the entries in the school admission register including the entries of date of admission of the victim and date of birth of the victim as he had personally not taken the said entries. So also, he has no knowledge about the source of date of birth of victim mentioned in the original school admission register. Therefore, even if entries in the school record are admissible under Section 35 of the Evidence Act entry regarding birth

date of the victim mentioned in extract Exh.73 cannot be said to be reliable entry to state that birth date of the victim is 02-02-2001. Therefore, applying the ratio laid down in the decisions in the case of ***Alamelu and another (Supra), Prakash Jaganath Pawar (Supra), Mani Kumarswamy Mudliyar (Supra), Birad Mal Singhvi (Supra), Dipak Ambadas Gaikwad (Supra), Balu Baburao Kadam (Supra) and Sandeep Janaji Konde (Supra)*** relied upon by the learned counsel for the accused the evidence of PW-8 and Exh.73 extract of admission register of school are not sufficient to prove the exact age of the victim at the time of incident.

11. Exh.83 residence certificate issued by Sarpanch of Grampanchayat of the victim shows her birth date as 18-02-1998. It appears that said certificate has been produced by PW-9 the investigating officer. Author of the said certificate is also not examined by the prosecution. Therefore,

it cannot be said that prosecution has proved truth of contents of this certificate regarding birth date of the victim. This certificate is also of no help to the prosecution to state the exact age of the victim at the time of incident.

12. The evidence of Dr. Yogita Kadam (PW-3) who had examined the victim on 28-04-2014 is that the history was stated by the patient and she recorded the same. As per the say of patient her age was 15 years. In the cross-examination said evidence is not challenged. Thus, on the basis of evidence of doctor it can be said that when the victim was examined on 28-04-2014 she was 15 years old.

13. Now coming to the evidence of the victim (PW-6), whose examination-in-chief and some cross-examination was recorded on 14-07-2015, she has stated that the incident took place prior to one and half year at 9.00 p.m. At the time of recording said evidence she stated that her age is 17 years. The

evidence of victim that her age was 17 years when her evidence was recorded and that the incident took place one and half year prior to recording of her evidence has gone unchallenged in the course of her cross-examination on behalf of the accused. So also, she has denied that she filed complaint, made statement and gave evidence against the accused due to pressure of her father. Considering the evidence of victim regarding her age i.e. 17 years on the date of recording her evidence on 14-07-2015 and that the incident took place one and half year prior to the said date it can be inferred that at the time of incident her age was fifteen and half years and as such she was below 16 years of age at the time of incident which took place between January, 2014 to 24-04-2014. The above referred evidence of the victim is sufficient to prove age of the victim since it has gone unchallenged by the accused in view of the decision in the case of **Kundan s/o. Nanaji Pendor (Supra)**.

14. For the reasons discussed above, I hold that the prosecution has proved that at the time of incident between January, 2014 to 24-04-2014 age of the victim was below 16 years. As her age was below 18 years she can be said to be child within the meaning of Section 2(d) of the POCSO Act.

15. Case of the prosecution is that the accused committed rape on the victim during January, 2014 to 24-04-2014 and therefore the victim girl was pregnant and as such the accused has committed offences under Sections 376(2)(i), 376(2)(n) of the IPC and under Section 4 of the POCSO Act. For proving this fact the prosecution has relied upon the evidence of victim, Dr. Yogita Kadam (PW-3), medical examination report (Exh.36) of victim and DNA report (Exh.26).

16. The evidence of victim (PW-6) as regards the incident is that as referred earlier she has stated that the incident took place one and half year prior to recording her evidence. She further stated that on

that day at 09.00 p.m. except her there was nobody in their hut. When she went to attend nature's call to the back side of Panchayat Samiti the accused was present there. He asked her to remove her cloths. Then he removed her clothes. He pressed her mouth and tied her hands and legs. He sat on her person. He climbed over her. He did on her urinal place. He inserted his penis in her vagina. He left her on the spot and went away. Then she returned to her hut. She was waiting for her father. Her father came to home at about 01.00 a.m. She did not narrate the incident to her father as the accused had given her threat of killing. The victim has further stated that after fifteen days from the first incident, when her father went to village, second time incident took place. On that day, it was 08.00 p.m. and she was standing near Babul tree and was waiting for her father. Accused came there and caught her hand, pressed her mouth and took her to back side of Panchayat Samiti at Kaij. He asked her to remove the clothes and as she refused, he tied up her mouth and removed her clothes and

again inserted his penis in her vagina. He threatened to kill her and to set her hut on fire, if she tells the said incident to anybody. She further stated that the same kind of incident with her at the hands of accused took place after a gap of about 20 to 25 days from second incident. Thus, according to victim for three times referred to above the accused committed sexual intercourse with her. She further stated that she was pregnant of five months and she disclosed to one Mundekaku, the worker of Shivsena and mother of Vinod who runs grocery shop that she had no menstruation since last five months and narrated incident to them. She stated that thereafter she disclosed incident to her father who had taken her to Dr.Chate for medical treatment who told that she was pregnant of five months and thereafter she lodged complaint (Exh.55) in Kaij Police station. She has further stated that she had given birth to a male child in the Civil Hospital, Jalna.

17. In the cross-examination the evidence of

victim that the accused had sexual intercourse with her for three times as deposed by her has gone unchallenged. She has admitted that Tahsil office is situated towards eastern side of Police Quarter and southern side of road. Panchayat Samiti office is situated towards one side of the Court. As she had not made inquiry about other offices situated in Panchayat Samiti office she cannot tell about other offices. She stated that all the incidents took place on the same spot i.e. site behind Panchayat Samiti. There was bleeding from her private part after the incident. She did not visit any dispensary in spite of bleeding. She did not feel to tell all the incidents to anybody. She denied that her father stated the contents of complaint (Exh.55) to the police. Referring to above evidence of the victim learned counsel for the accused submitted that the spot of incident is behind Panchayat Samiti, Kaij and it was accessible to public and there were different offices around the spot of incident and therefore it was possible for the victim to make shout but she did

not make shout. So also, the victim admitted that she did not disclose incident to anybody and she did not go to dispensary in spite of bleeding. According to learned counsel all above conduct of the victim shows that she was quite matured girl and therefore possibility of her consent for sexual intercourse cannot be ruled out and therefore it cannot be said that the accused committed rape on her. As mentioned earlier the victim was below 16 years of age when the incident took place. Thus she being minor her consent for sexual intercourse is immaterial. It is observed that accused threatened to kill her. Therefore, argument as above advanced by the learned counsel for the accused about consent of victim is not acceptable.

18. The victim in the cross-examination on behalf of the accused in paragraph 16 of her deposition stated that, she stated before police who had recorded her statement that the accused tied her

hands and legs, then after he sat on her body, he climbed over her, he did on her urinal place, he inserted his penis in her vagina. So also, she stated that she stated before police that after fifteen days, the second incident took place. Moreover she stated that on that day she was standing under Babul tree, the accused came there, caught her hand and pressed her mouth and took her to the back side of Panchayat Samiti and committed rape. She has also stated that she stated before police that accused asked her to remove her cloths and as she refused, he tied up her mouth and removed her clothes and again inserted his penis in her vagina and he threatened to kill her and to set her hut on fire, if she discloses the incident to anybody. Moreover, she stated that she stated before police that third incident took place after gap of about 20 to 25 days from second incident. She could not assign reason of absence of all above facts in her statement before police and thus all these omissions in her statement before police are proved. When in the complaint (Exh.55)

lodged by the victim she made aforesaid allegations against the accused the above referred omissions in her statement before police are not sufficient to reject her evidence, particularly when she has denied suggestion on behalf of the accused that the physical relationship with the accused took place due to her consent. Thus, there is no reason to disbelieve the evidence of the victim and on the basis of her evidence an inference can be drawn that accused had sexual intercourse with her repeatedly when she was below 16 years of age.

19. The evidence of Dr. Yogita Kadam (PW-3) who had examined the victim on 28-04-2014 and issued medical examination report (Exh.36) is that the victim had stated history of sexual assault by the accused. So also, doctor has stated that the victim had told that the accused committed rape on her in open space and that she is pregnant of four months and accordingly she issued medical examination report (Exh.36). According to doctor no any injury marks

over body of the victim were noticed. Exh.36 medical examination report also shows that the victim had given history to the doctor as deposed by the doctor regarding committing rape on her by the accused and that she was pregnant of four months. Thus, the evidence of doctor and medical examination report have corroborated the evidence of victim that the accused committed rape on her and that she was pregnant.

20. The prosecution has relied upon DNA report (Exh.26) dated 11-10-2014. This report shows that the accused and the victim are the biological parents of male baby of the victim. As mentioned earlier it was suggested on behalf of the accused that the victim was consenting party to the sexual intercourse with the accused and as such the accused does not dispute the fact that he had sexual intercourse with the victim. Considering said aspect and the DNA report (Exh.26) that the accused and the victim are the biological parents of male baby of the

victim, who was delivered in the Civil Hospital, Jalna it can be said that the victim was pregnant due to rape committed by the accused on the victim and as such she delivered male child. Thus, DNA report corroborates the evidence of victim that the accused committed rape on her.

21. For all the reasons discussed above, on the basis of evidence of the victim, Dr.Yogita Kadam (PW-3), medical examination report (Exh.36) issued by her and DNA report (Exh.26), I hold that the prosecution has proved that the accused has committed rape on the victim below 16 years, he committed rape repeatedly on the victim and that he committed penetrative sexual assault on victim the child below 18 years of age and as such committed offences punishable under Sections 376(2)(i) and (n) of the IPC and under Section 4 of the POCSO Act. The trial Court has rightly held that the prosecution has proved these offences against the accused.

22. As regards the offence under Section 3 of the POCSO Act it is pertinent to note that there is a presumption under Section 29 of the POCSO Act as to certain offences. Said provision says that 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. In the present case accused is charged for the offence punishable under Section 4 of the POCSO Act and he has been convicted for the said offence by the impugned judgment. The offence under Section 3 i.e. penetrative sexual assault is punishable under Section 4 of the POCSO Act. Thus, presumption can be raised under Section 29 of the POCSO Act that the accused has committed offence under Section 3 of the POCSO Act which is punishable under Section 4 of the said Act. Defence of the accused that he has been falsely implicated at the instance of father of the victim is not

acceptable as the victim has denied suggestions in the light of defence of the accused as observed earlier. Thus, the accused has not proved that he has not committed offence punishable under section 4 of the POCSO Act. Thus, he has not rebutted the presumption under Section 29 of the POCSO Act.

23. As regards the offence under Section 506 of the IPC as referred earlier the victim has stated that when the accused had sexual intercourse with her he threatened to kill her and set her hut on fire in case she discloses incident to anybody and so also she stated that she did not narrate the incident to her father as the accused had threatened to kill her. In her report/complaint (Exh.55) also the victim has stated that the accused had threatened to kill her and her family members and therefore she did not disclose incident to her father and further it is stated that the accused used to threaten her and therefore she did not disclose to her father. Thus, on the basis of above evidence it can be said that

the accused had threatened the victim and committed the offence of criminal intimidation punishable under Section 506 of the IPC the trial Court has rightly held that the prosecution has proved said offence against the accused.

24. As regards the offences under Sections 3(1)(w)(i) and 3(2)(va) of the Atrocities Act the prosecution has to establish that the accused not being a member of Scheduled Caste or Shouldered Tribe intentionally touched the victim knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent to attract offence under Section 3(1)(w)(i) of the Atrocities Act and the prosecution has to prove that the accused not being a member of Scheduled Caste or a Scheduled Tribe committed any offence specified in the Schedule, against a person or property, knowing that such person is member of Scheduled Caste or Scheduled Tribe to attract offence under Section 3(2)(va) of

the Atrocities Act. The victim in her evidence stated that she belongs to cobbler (Chambhar) community and that the accused was residing in teacher's colony. Said evidence of the victim is not specifically challenged in the cross-examination on behalf of the accused. Exh. 73 extract of admission register of school shows that caste of victim is Hindu Chambhar. Thus, on the basis of above evidence it can be said that the victim belongs to Scheduled Caste. The victim as well the investigating officer have not specifically stated about caste of the accused and they have not specifically stated that accused is not a member of Scheduled Caste or Scheduled Tribe. It has come in the evidence of the investigating officer Dy.S.P. Dongare (PW-9) that he had sent letters Exh. 78 and 80 to Gramsevak, Mulia, Rajasthan to get details of caste and residence of accused. He has stated that he received letter of Gramsevak, Adbala (Exh.82) dated 21-04-2014 disclosing caste and residence of the accused. Said evidence of the investigating officer has not been challenged on

behalf of the accused in his cross examination. Said letter (Exh.82) shows that the accused belongs to Other Backward Class. Thus, it is clear from this letter that the accused does not belong to Scheduled Caste or Scheduled Tribe and as such he is not a member of Scheduled Caste or Scheduled Tribe within the meaning of Section 3 of the Atrocities Act. As observed earlier it has come in the evidence of the victim that the accused has sexually assaulted her on three times. So also, it is held that the prosecution has proved offences under Sections 376(2)(i) and 376(2)(n) of the IPC and under Section 4 of the POCSO Act. Therefore, it can be said that the accused not being a member of Scheduled Caste or Scheduled Tribe intentionally touched the victim knowing that she belongs to Scheduled Caste and said touching was of a sexual nature and without the consent of the victim and further it can be said that the accused committed offence specified in the schedule against the victim and thus committed offences under Sections 3(1)(w)(i) and 3(2)(va) of the Atrocities Act. Thus, I hold that

the prosecution has proved said offences against the accused. The trial Court has rightly held so.

25. For all the reasons discussed above, I hold that the prosecution has proved offences under Sections 376(2)(i), 376(2)(n) and 506 of the IPC as well as under Section 4 of the POCSO Act and offences under Sections 3(1)(w)(i) and 3(2)(va) of the Atrocities Act against the accused. The trial Court has rightly convicted accused for said offences. Considering the punishments provided for the offences under Sections 376(2)(i), 376(2)(n) and 506 of the IPC and offences under Sections 3(1)(w)(i) and 3(2)(va) of the Atrocities Act the trial Court has properly sentenced the accused for the said offences and there is no ground to interfere with the conviction and sentence for said offences.

26. The trial Court has sentenced accused rigorous imprisonment for ten years and to pay a fine of Rs.2,000/-, in default to suffer rigorous

imprisonment for fifteen days each for the offences punishable under Sections 376(2)(i) and 376(2)(n) of the IPC. The punishment provided for the said offences is rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The trial court sentenced the accused to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/-, in default to suffer rigorous imprisonment for seven days for the offence punishable under Section 4 of the POCSO Act. The punishment provided for the offence punishable under Section 4 of the POCSO Act is imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. Thus, it is clear from the above sentences that for the same offence i.e. one under Section 376 of the IPC and another under Section 4 of the POCSO Act, the accused

has been punished twice once for the offence punishable under Section 376 of the IPC and another for the similar offence punishable under Section 4 of the POCSO Act. As per provision of Section 42 of the POCSO Act, where an act or omission constitutes an offence punishable under the POCSO Act as well as under Section 376 of the IPC, then, notwithstanding anything contained in any law for the time being in force, the offender/accused found guilty of such offence is liable for punishment under the POCSO Act or under the IPC, as provided for punishment which is greater in degree. Considering this provision under Section 42 of the POCSO Act regarding alternate punishment and punishment provided for the offences under Sections 376(2)(i) and 376(2)(n) of the IPC as referred earlier which is greater in degree, I am of the view that conviction and sentence recorded against the accused for the offences under Sections 376(2)(i) and 376(2)(n) as well as conviction of the accused for the offence punishable under Section 4 of the POCSO Act is to be maintained. However, there

cannot be separate sentence for the offence punishable under Section 4 of the POCSO Act which is equivalent to offence under Section 376 of the IPC and therefore sentence recorded against the appellant/accused for the offence under Section 4 of the POCSO Act needs to be quashed and set aside maintaining the conviction for the said offence. Therefore, appeal needs to be partly allowed only to the extent of setting aside sentence recorded against the appellant/accused for the offence punishable under Section 4 of the POCSO Act. Therefore, following order is passed.

ORDER

(i) Appeal is partly allowed.

(ii) The impugned conviction and sentence of the appellant/accused for the offences punishable under Sections 376(2)(i), 376(2)(n) and 506 of the IPC and under Sections 3(1)(w)(i) and 3(2)(va) of the Atrocities Act is maintained.

(iii) Conviction of the appellant/accused for the offence punishable under Section 4 of the POCSO Act is also maintained. However, sentence imposed on the accused for the offence punishable under Section 4 of the POCSO Act i.e. rigorous imprisonment of seven years as well as directions to pay fine of Rs.1,000/- (Rupees One thousand), in default to suffer rigorous imprisonment for seven days is quashed and set aside. Fine, if paid in respect of said offence shall be refunded to the accused.

(iv) Rest part of the impugned judgment regarding set off and directions to pay compensation to the victim etc. is also maintained.

(v) Record and proceeding in Special (POCSO) Case No.18/2014 be sent to the trial Court for compliance.

[S.M.GAVHANE, J.]