

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

CRIMINAL APPEAL NO.466 OF 2016

Bhagwat Munjabhau Hoge, **...APPELLANT**
Age-24 years, Occu-Driver,
R/o.Nagarjawala, Tq. Manwat,
Dist. Parbhani

VERSUS

1. The State of Maharashtra **...RESPONDENTS**
through Police Station Manwat,
Tq.Manwat, Dist. Parbhani
2. Dinkar S/o. Baburao Hoge,
Age-Major, Occu-Agri,
R/o.Nagarjawala, Tq. Manwat,
Dist. Parbhani

Mr.Kailas B. Jadhav, Advocate for the appellant
Mr.P.N.Kutti, APP for the respondent/State
Mr.Hemant U. Dhage, Advocate for respondent No.2

CORAM : S.M.GAVHANE, J.
RESERVED ON : 05.04.2019
PRONOUNCED ON : 07.06.2019

J U D G M E N T :

. By this appeal the appellant/accused challenges the judgment and order dated 15.12.2015 passed by the Additional Sessions Judge, Parbhani in Special Case (POCSO) No.14 of 2014 thereby convicting him for the following different offences under the Indian Penal Code

(hereinafter referred to as 'the IPC') and the Protection of Children from Sexual Offences Act (hereinafter referred to as 'the POCSO Act').

a] He was sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.5,000/-, in default of payment of fine amount to suffer simple imprisonment for three months for the offence punishable under Section 366-A of the IPC.

b] He was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine to suffer simple imprisonment for six months for the offence under Section 376 of the IPC.

c] He was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/-, in default of payment of fine to suffer simple imprisonment for six months for the offence under Section 6 of the POCSO Act.

d] The appellant was given set off under Section 428 of the Code of Criminal Procedure for the period from 12.12.2013 to 29.01.2014 and from 02.08.2014 till date of judgment i.e. 15.12.2015.

2. The appeal was admitted on 08.08.2016. As the appellant is in jail and his application seeking bail was rejected on 16.09.2016, the appeal was fixed for final hearing.

3. Facts of the prosecution case, in short, are as under:-

A] The informant Dinkar Hoge (PW-1) father of the victim girl (PW-2) lodged the complaint (Exh.13) in the Police Station, Manwat, Dist. Parbhani contending that the victim girl aged 16 years was studying in 11th std at Manwat at the relevant time of incident. It was alleged that on 03.12.2013 at about 08.00 p.m. after taking meals he and his family members went to sleep. At that time the victim girl took his mobile for charging. Thereafter, at about 03.00 a.m. when wife of the informant woke up, it was noticed that the victim girl was not in the house. His wife told the said fact to the informant. Thereafter, informant, his brother Shivaji, uncle Rambhau and Shamrao Dengde took search of the victim girl, but she was not found.

B] It is further case of the prosecution that in the morning at about 06.00 a.m. informant found his

mobile outside the door and saw that there were calls on his mobile from mobile No.9011415927 at about 00.06 hours. After enquiry he came to know that the said mobile number is of appellant/accused. The informant made an enquiry with the parents of the appellant in respect of mobile and he came to know that the said mobile is of the appellant. Father of the appellant told that the appellant is not at home. After calling on his mobile, it was noticed that the said mobile was switched off. The informant ascertained that the appellant has kidnapped the victim girl. Thereafter, he went to the police station and lodged the complaint as above. Treating it as FIR police registered crime No.199/2013 on 04.12.2013 against the appellant for the offence punishable under Section 366-A of the IPC and the investigation was commenced.

C] On 13.12.2013 the informant came to know from the notice of Police Station, Manwat that the victim girl is in custody of police. After enquiry with her she informed him that on 03.12.2013 the appellant kidnapped her by giving her promise of marriage with her. She further informed that the appellant had taken her to Karde Shivar, Tq. Shirur, Dist. Pune. He took one room on rent and told to Sunil Jagdale owner of the room that

they are husband and wife. She also informed that they resided there till 11.12.2013 and that the appellant was misguiding her that they will get marry and he committed sexual intercourse with her for 4 to 5 times. Thereafter, the police had brought them to the police station, Manwat.

D] During the investigation offences under Section 376 of the IPC and under Section 6 of the POCSO Act were added and after completion of the investigation, the charge-sheet was submitted in the court of JMFC, Manwat, who committed the case to the Sessions Court, Parbhani as the offences against the appellant were exclusively triable by the Sessions Court being a Special Court.

E] Charge was framed against the appellant/accused for the offence punishable under Section 366-A, 376 of the IPC and under Section 6 of the POCSO Act. He pleaded not guilty to the charge and claimed to be tried.

F] The prosecution has examined following 9 witnesses besides the documentary evidence referred in paragraph No.9 of the judgment of the trial Court to prove the charge against the appellant.

1. Dinkar Baburao Hoge-informant/father of victim
2. Durga D/o.Dinkar Hoge-Victim
3. Jankiram S/o. Sopanrao Morey-witness
4. Sunil S/o. Prabhu Jagdale-Witness
5. Balaji S/o. Saudagar Jadhav-Carrier of Muddemal
6. Dr.Deepali D/o. Shivajirao Shinde-Medical Officer
7. Pradeepkumar Namdeorao Jondhale- Investigating Officer.
8. Dr.Md.Faizal Md.Razalu Rahema-Medical Officer
9. Dr.Sudam Tulshiram Mehate-Medical Officer

G] Thereafter, statement of the appellant under Section 313 of the Code of Criminal Procedure was recorded. He denied to have committed the offences with which he was charged. His defence was that the victim was major at the time of incident and sexual intercourse is committed with her consent. The appellant/accused examined himself on oath at Exh.69.

H] Considering the evidence adduced by the prosecution and the defence of the appellant the learned judge of the trial Court has held that the prosecution has proved the offences against the appellant with which he was charged and convicted and sentenced him by the impugned judgment and order as mentioned in the opening para of this judgment. Therefore, this appeal by the appellant.

4. I have heard Mr.Jadhav, learned counsel for the

appellant, Mr.Kutti, learned APP for respondent/State and Mr. Dhage, learned counsel for respondent No.2 the informant and with their assistance I have perused the evidence adduced by the prosecution, defence and impugned judgment and order.

5. Mr.Jadhav, learned counsel for the appellant/accused has submitted that age of the victim girl on the date of incident was more than 16 years and she was major. She stayed with the appellant from 03.12.2013 to 11.12.2013. But, she did not make complaint against the appellant. As such, according to the learned counsel for the appellant there was love affair between victim girl and the appellant. It is submitted that the evidence of PWs-1 to 3, 6 and 9 and the defence witness is material on the age of the victim girl. According to the learned counsel as per the evidence of Headmaster (PW-3) date of birth of the victim girl is 08.07.1997 and the date of incident is 03.12.2013. Thus on the date of incident age of the victim girl was 16 years 4 months 25 days. The victim girl was admitted in the school of PW-3 Headmaster in the 7th std. Prior to the said school she was admitted in the Zilla Parishad School, Nagarjawala in the 1st std. Admittedly the prosecution has not examined Headmaster of Zilla Parishad School at Nagarjawala. In

the absence of evidence of Headmaster of Zilla Parishad School it cannot be said that date of birth i.e. 08.07.1997 deposed by the Headmaster (PW-3) is correct and authenticated birth date of the victim girl. It is submitted by the learned counsel for the appellant that ossification was carried by PW-9 and Radiological opinion as per Exh.65 is that age of the prosecutrix was 15 to 16.5 years. Thus, according to the learned counsel for the appellant the prosecution has not proved that the victim girl was below 16 years and below 18 years to attract the offences alleged against the appellant. It is submitted that the appellant has examined himself as defence witness and on the basis of said evidence it is proved that the victim girl was 18 years. Thus, it is submitted that the prosecution has not proved the age of the victim girl below 16 years.

6. Mr.Jadhav, learned counsel for the appellant thus submitted that age of the victim girl was more than 16.5 years and hence her consent was material and hence no offence under Section 376 of the IPC is made out against the appellant. So also, it is submitted that the victim girl left her house at her own and accompanied the appellant and hence no offence under Section 366-A IPC is attracted. So also, no ingredients of offence under

Section 366-A of the IPC have been proved by the prosecution. It is submitted that as the victim girl was not below 16 years presumption under Section 29 of the POCSO Act cannot be raised in favour of the prosecution. Thus, according to the learned counsel for the appellant the impugned conviction and sentence recorded against the appellant is not sustainable and the same is liable to be quashed and set aside by allowing the appeal and the appellant may be acquitted of the offences for which he has been convicted and sentenced by the impugned judgment.

7. Mr.Jadhav, learned counsel for the appellant alternatively submitted that if the appellant is not acquitted of the offences for which he has been convicted, the sentence imposed upon him be reduced to period i.e. 4 years 9 months and 19 days undergone by him as the victim has already married and the appellant was young boy of 23 years when the offence was committed and it is the case arising out of the love affair.

8. Mr.Jadhav, learned counsel for the appellant to support his submissions has relied upon the following decisions:

a] In the case of Kundan S/o. Nanaji Pendor VS The State of Maharashtra 2017 ALL MR (Cri) 1137 in paragraph Nos.11 and 13 it was observed as under:

“11. Since the appellant has been charged with having committed offence under Sections 3(a), 5(j)(ii) and 5(1) of the Act of 2002, as per Charge at Exh.4, it would be necessary to first record a finding as to the age of “S”. As per provisions of Section 2(1)(d) of the said Act, a child means a person below the age of eighteen years. As noted above, the prosecutrix had stated on oath that her date of birth was 5th January, 1997. There is no cross-examination, whatsoever, to this specific assertion made by the prosecutrix in her examination-in-chief. Her said statement has gone totally unchallenged. It is a settled position of law that if a witness is not cross-examined on a particular portion of her deposition in her Examination-in-chief, said statement is required to be accepted as the same is not challenged by the defence. Reference in this regard can be made to the observations of the Hon'ble Supreme Court in Paragraphs 13 and 14 of its decision in State of UP Vs Nahar Singh (dead) & others [(1998) 3 SCC 861]: [1998 ALL MR (Cri) 1308 (SC)] which are quoted below:

13. It may be noted here that that part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence PW-1 remained unchallenged and ought to have been believed by the

High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provisions is enlarged by Section 146 of the Evidence Act by a allowing a witness to be questioned. :

(1) to test his veracity.

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Hershell, L.C. in Browne Vs Dunn clearly elucidates the principle underlying those provisions. It reads thus:

I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to

explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

Similarly, in Sarwan Singh Vs State of Punjab [(2003)1 SCC 240]: [2003 ALL MR (Cri)156 (SC)], the Hon'ble Supreme Court reiterated this position by observing in paragraph 9 of its judgment as under:

9. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.....”

Hence, following aforesaid position of law, there would be no difficulty in accepting the unchallenged version of the prosecutrix that her date of birth was 5th January, 1997. Though it is true, as urged by the learned counsel for the appellant, that the initial burden to prove the age of the prosecutrix lies on the prosecution, it is also true that if the relevant

version of the prosecutrix as regards her date of birth has gone unchallenged, it means that the defence has accepted said statement made on oath by the witness. Hence, there is no reason to discard the unchallenged version of “S” that her date of birth was 5th January, 1997.

13. From the deposition of PW-10, it is clear that the last menstrual period was stated to be on 8th January, 2013. The baby was actually born on 23rd September, 2013 through a normal delivery. It is, thus, obvious that the prosecutrix was hardly aged 16 years when on account of sexual intercourse by the appellant, she had conceived. Once her date of birth is accepted to be 5th January, 1997, it is clear that on 5th January, 2013 she was aged sixteen years of age. It is, thus, clear from the evidence on record that she was less than sixteen years of age when the appellant had sexual intercourse with her. In this backdrop, therefore, the endeavor on the part of the learned counsel for the appellant to urge that the relationship between the parties was consensual in nature falls to the ground. As per provisions of Section 375 sixthly of the Penal Code where the age of the victim is less than sixteen years, aspect of consent becomes irrelevant. Reference in that regard can be made to the decision of Hon'ble Supreme Court in Satish Kumar Jayantilal Dabgar Vs State of Gujrat [(2015) 7 SCC 359]: [2015 ALL SCR 1293]. In that view of the matter, the decisions relied upon by the learned counsel for the appellant to indicate consent on the part of the prosecutrix cannot be made applicable in the present facts. For the same reason, the alternate argument made on behalf of the appellant by

referring to Section 42 of the said Act that a lesser punishment as per the provisions of Section 376 of the Penal Code deserves to be imposed, also cannot be accepted.”

b] In the case of S. Varadrajan Vs State of Madras 1965 AIR (SC) 942 it was held that the girl herself telephoning the accused and accompanying him to office of Sub-Registrar for marriage. A distinction between taking a minor or allowing a minor to accompany. It was observed as under:

“There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natrajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the

insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him.

There is a distinction a between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what

she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

c] In the case of Mukarrab and others Vs State of Uttar Pradesh (2017) 2 Supreme Court Cases 210 it was held that courts have always held that evidence afforded by radiological examination is no doubt a useful guiding factor for determining age of a person, but evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances. Ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, appellant-accused herein have certainly crossed the age of thirty years, which is an important factor to be taken into account, as age cannot be determined with precision. In fact, in the medical report of appellants, it is stated that there was no indication for dental x-rays since both accused were beyond 25 years of age. Therefore, the age determination based on

ossification test though may be useful is not conclusive x-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and days of a persons life.

9. Mr.Kutti, learned APP, on the other hand, submitted that on the basis of evidence of PWs-1,2,3,6 and 9 the prosecution has proved that the age of the victim girl/prosecutrix was below 18 years and therefore, her consent is immaterial. The medical evidence adduced by the prosecution also supports the case of the prosecution regarding committing rape on the victim girl by the appellant. As the victim girl was below 18 years age on the date of incident she was a child within the meaning of Section 2(d) of the POCSO Act. The act of the appellant of having sexual intercourse with her has been proved beyond doubt on the basis of evidence of victim girl and the medical evidence. Not only this but while answering the question Nos. 37, 38 and 48 in the statement under Section 313 of the Code of Criminal Procedure the appellant in clear terms admitted that he had sexual intercourse with the victim girl. Thus, it is sufficiently proved that the appellant had committed aggravated penetrative sexual assault on the victim girl and his said act is punishable under Section 6 of the

POCSO Act. Learned APP thus submitted that the prosecution has proved all the offences against the appellant with which he was charged and the trial Court has rightly convicted and sentenced the appellant for the said offences by the impugned judgment and therefore, as the appeal sans merit, the same may be dismissed.

10. Learned APP submitted that in case it is found that the ingredients of offence under Section 366-A of the IPC are not proved by the prosecution against the appellant then in that case on the basis of evidence of prosecution it has established offence under Section 366 of the IPC and the appellant can be convicted of the offence under Section 366 of the IPC even in the absence of charge under said section. To support his said submission learned APP has relied upon the decision in the case of Bhagwan Laxman Rakshe Vs the State of Maharashtra 2016 ALL MR (Cri) 4414 wherein in paragraph Nos.16 and 17 it was observed as under:

“16. The learned counsel for the appellant- accused relied on the case of Mohd. Nisar Vs State of Maharashtra [2006 ALL MR (Cri) 3046] (supra) and referring to observations of this Court in para 12 of that judgment, stated that, Section 366-A of the IPC could be applied only if the minor girl was taken so as to force or

seduced her to illicit intercourse with “another person” and could not be applied if the accused had taken her to himself commit the forcible intercourse.

17. In the present matter, the accused was charged with Section 366-A of the IPC. Even if the submission is to be accepted that Section 366-A would get attracted if a minor girl is kidnapped with intention that she should be forced or seduced to illicit intercourse with “another person” still there appears no reason why Section 366 of IPC should not be applied. The basic ingredients are included in Section 366 of IPC also. Section 366 of IPC, apart from abduction or inducing a woman to compel her marriage, inter alia, deals with offence of kidnapping with intention that the woman may be forced to illicit intercourse. Even for such offence, the punishment prescribed is of 10 years. In Section 366-A also, the punishment prescribed is of 10 years. It would be thus, appropriate to convert the conviction awarded by trial Court under Section 366-A into a conviction under Section 366 of IPC and otherwise maintain the sentence as was passed by the trial Court.”

11. Mr.Dhage, learned counsel for respondent No.2/ informant adopted the argument advanced by the learned APP and claimed to dismiss the appeal.

12. I have carefully considered the submissions made by the learned counsel for the appellant, the learned APP and learned counsel for respondent No.2.

13. Considering the ingredients of offences under Section 366-A, 376 of the IPC and under Section 6 of the POCSO Act and conviction of the appellant for the said offences the age of the victim girl /prosecutrix on the date of incident i.e. on 04.12.2013 would be material. Therefore, I would like to consider the said aspect at the first place. To prove the age of the victim girl the prosecution has mainly relied upon the evidence of PWs-1,2,3,6 and 9, age certificate (Exh.37), Radiological report (Exh.65) and copy of register of extract (Exh.66/2) produced with certificate (Exh.66/1).

14. Coming to the evidence of above witnesses the evidence of informant (PW-1) who is father of the victim girl is that the age of the victim girl at the time of incident was 16 years and she was studying in 11th std. in K.K.M. College, Manwat. His said evidence has gone unchallenged in the course of his cross-examination. Therefore, there is no reason to disbelieve his evidence. In the complaint (Exh.13) lodged by him on 04.12.2013 in the police station also it is stated that age of the

victim girl was 16 years. The evidence of victim girl (PW-2) which was recorded on 30.07.2015 is that her age was 18 years. The incident took place on 04.12.2013 and therefore, her age was more than 16 years and less than 18 years on the date of incident. In the cross-examination she denied that at the time of incident her age was 17 years 6 months to 18 years. Thus, nothing was found in favour of the appellant in her cross-examination to reject her evidence about her age.

15. The next is the evidence of Jankiram Morey (PW-3) Headmaster of Smt. Shakuntalabai Kanchanrao Katruwar, Primary School, Manwat. His evidence is that the victim girl was the student of their school. As per the admission and general register, date of birth of the victim girl is 08.07.1987. She took admission in their school in 7th std. She came from Zilla Parishad Primary School, Nagarjawala. He had brought original school leaving certificate issued by Zilla Parishad Primary School Nagarjawala of the victim girl. He has also stated about Exh.25 school leaving certificate issued by his school after victim girl had passed SCC examination in the March, 2013. In the cross-examination on behalf of the accused he stated that initially admission of the victim girl was in Zilla Parishad School, Nagarjawala and

further stated that he does not know what evidence was given by the victim girl about her date of birth at the time of her school admission in the Zilla Parishad Primary School, Nagarjawala. He stated that whatever evidence given in the said school, it may be available in the said school. He has denied that date of birth mentioned in the leaving certificate issued by Zilla Parishad, Manwat is wrong. From the evidence of PW-3, it can be said that his evidence is based on the school leaving certificate of the victim girl issued by Zilla Parishad School, Nagarjawala and the victim girl was admitted in school in 7th std and her initial admission in 1st std was in Zilla Parishad School, Nagarjawala. Therefore, record in the said Zilla Parishad School regarding date of birth of the victim girl was required to be produced and proved by the prosecution. But admittedly, said record is not produced and proved by the prosecution. Therefore, the school record in the form of school leaving certificate (Exh.25) of the victim girl when she left school of PW-3 after she passed 10th std examination which shows her birth date as 08.07.1997 is not conclusive proof of birth date of the victim girl.

16. The evidence of PW-6 as regards the age of the victim girl is that on 13.12.2013 the victim girl came in

the said hospital with police person. She carried radiological test of the victim girl and as per the said test her age was within 15 to 16.5 years and radiological test was conducted and OPD papers were prepared. Said OPD papers are at Exh.39. In the cross-examination she stated that she sought opinion from Radiologist about the age. Two X-rays were given for determination of age of the victim girl and that she has not brought those x-rays, but she can produce the same. She has denied that by radiological test, no accurate age can be determined. They can give the span of the age. Error of age is already given i.e. between 15 to 16.5 years. In radiological test, for determination of age there may be error of 1 to 2 years. There was no fusion of lower ends of radius and ulna, therefore age is determined below 17 years. If that fusion would have found out, the age would have been 17 or above. Radiologist has given opinion about x-ray examination. She has not brought the same. She has taken entries of x-ray examination from the report of radiologist (Exh.37). It is not true to say that the person who has taken x-ray should give an opinion about x-ray examination. She has denied that fusion is depend on nutrition and that due to nutrition only, there will not be length of bones. She deposed that they had determined the age on the basis of ossification

centres and not on the length of bone. She has denied that the age of the victim girl was 18 and above and further denied that she has shown the age of the victim girl wrongly as 15 to 16.5 years. Thus, nothing is found in favour of the accused in the cross-examination of PW-6. Therefore, there is no reason to disbelieve the evidence of PW-6. The evidence of PW-6 is further corroborated by (Exh.37) report of the radiologist as it shows that on 13.12.2013 probable radiological age of the victim girl was between 15 to 16.5 years. Even considering the error of one or two years age of the victim girl at the material time of incident was 15 to 16.5 years and as such her age was below 18 years at the time of incident.

17. Next evidence on the age of the victim girl is of Dr. Mehatre (PW-9) who was working as Class-I Radiologist Civil Hospital, Parbhani on 13.12.2013. According to him on the said date X-ray of the victim girl was taken by technician and same was forwarded to him for determination of age. He perused the x-ray and gave his radiological opinion that the age of the victim girl is in between 15 to 16.5 years and accordingly he issued certificate and he recorded findings as per Exh.65 and extract of original register is at Exh.66. He stated

that the margin is itself included between age 15 to 16.5 years. In the cross-examination he denied that when he recorded findings the age of the victim girl was more than 18 years and that he recorded wrong findings. Thus nothing is found in favour of the appellant in the cross-examination of Dr.Mehatre and thus there is no reason to disbelieve his evidence. His evidence is corroborated by his findings Exh.65 and extract of register/certificate Exh.66/1 and Exh.66/2 entries in the said register. Exh.65 and Exh.66/1-66/2 corroborate the evidence of Dr.Mehatre (PW-9) regarding the age of the victim girl on 13.12.2013. Thus, on the basis of evidence of Dr.Mehatre it can be said that including the margin the age of the victim girl at the time of incident was between 15 to 16.5 years and as such it can be said on the basis of his evidence that age of the victim girl at the time of incident was less than 18 years.

18. For all the reasons discussed above on the basis of evidence of PWs-1,2,6,9 and age certificate (Exh.37), Radiological report (Exh.65) and copy of register of extract (Exh.66/2) produced with certificate (Exh.66/1), I hold that the prosecution has proved that the age of the victim girl at the time of incident was between 15 years to 16.5 years and as such she was below 18 years of

the age i.e. child within the meaning of Section 2-d of the POCSO Act.

19. Now coming to the evidence of PWs-1,2,4 and 6 and Medical Examination Report and General Physical Examination Report of the victim girl, the evidence of victim girl (PW-2) is that the appellant is from her brotherhood. Before six months of incident they got acquainted with each other. The appellant was calling her at Manwat. Their friendship turned into love. Appellant taken oath to marry with her. On 03.12.2013 he telephoned on her mobile and told her that they have to go and they have to marry. Her father came to house at 08.00 pm. She took mobile of her father. All members of family went to sleep. In the midnight at 12.00 hours the appellant/accused telephoned her. After receiving phone, she came out of the house. The appellant told her to come with him. He had stopped one Indica car near Maruti temple in the village. As he told her to come, she went to him. He asked her to sit in the car. He also sat in the car. They went to village Karde of Taluka Shirur in Pune District. He was having his friend there. They stayed two days at the house of his friend. He took one room on rent in the field of village Karde. While taking room on rent, he told to Sunil Jagdale (PW-4) that they

are husband and wife. They resided there till 11.12.2013. The appellant was talking with her sweetly and misguiding that they will get marry. He performed sexual intercourse with her. He removed her clothes. He removed her top, pant and nicker. He removed his clothes. He removed his pant and underwear. He laid her on ground. Thereafter, he inserted his urinal part into her urinal part. Therefore, she was getting pain. He committed sexual intercourse on 05.12.2013. Again after two days, he committed sexual intercourse. Again on 09.12.2013 he committed sexual intercourse with her. On 11.12.2013 they were at house. Police brought both of them to Shirur. She was to be medically examined and she had menstruation. Again she was called to hospital on 17.12.2013 and Doctor examined her. In the cross-examination she reaffirmed that on the date of incident while she was sleeping in the house with her parents and sister, the appellant called her and therefore at her own she came out of the house and sat in the Indica car standing near Maruti temple and that the appellant seated her in the Indica car and that she had not refused to sit in the car. She also stated that she went with the accused from her house till Maruti temple on her own accord and she had not informed the same to her parents. She stated in the cross-examination that the appellant/accused has not performed marriage with her.

She denied that the appellant has not committed sexual intercourse with her as per her will during 05.12.2013 to 10.12.2013. She has denied that the appellant has not committed sexual assault on her. She has not denied that her mother and father have brought pressure on her and therefore, she has deposed false. Thus nothing is found in favour of the appellant in the cross-examination of the victim girl. Thus, the evidence of the victim girl is not shattered in her cross-examination.

20. The evidence of informant (PW-1) father of the victim girl is to the effect that the incident took place on 03.12.2013 and in the night on that day the victim girl was sleeping in the house and in the night at about 03.00 am when his wife Suman got up she noticed that the victim girl was not in the house and thereupon he informed the same to his neighbour Shamrao Damodhar Dendge, his brother Shivaji and uncle Rambhau and finally he filed complaint (Exh.13) in Manwat Police Station. His evidence also shows that after the victim girl was found he enquired with her and she informed him that the appellant had kidnapped her inducing her by giving promise of marriage. So also, according to him the victim girl informed him that the appellant has taken her to Karde Shivar, Tq. Shirur, Dist. Pune and there the

appellant committed sexual intercourse with her. In the cross-examination he has denied that he is deposing false. Thus, from his evidence, it can be said that the victim girl informed him about kidnapping her by the appellant and about committing sexual intercourse with her.

21. The evidence of Sunil Jagdale (PW-4) in whose room the victim girl and the appellant stayed nearly for 7 to 8 days has deposed that one room of his brother was given to the appellant and the victim girl and he asked the appellant his name and he told his name as Bhagwat and that the victim girl was his wife. According to him they were residing as husband and wife for 7 to 8 days and all of sudden police came and carried them. In the cross-examination he has stated that the victim girl had told that their marriage was solemnized and that she is wife of the appellant. The appellant was going to job in SVS company. He was going to company at 08.00 am and he was returning at 05.00 to 05.30 pm. After the appellant went to attend his job, the victim girl alone was staying in the room and she has not made any complaint during her stay. She has not made any grievance to his mother and brother Dattatraya about the appellant. From the evidence of this witness, it is clear that the appellant and the

victim girl (PW-2) resided as husband and wife in the room of brother of this witness on rent at Karde, Tq. Shirur for 7 to 8 days.

22. The evidence of Dr. Deepali Shinde (PW-6) who was Medical Officer in Civil Hospital, Parbhani is that on 13.12.2013 the victim girl was brought in the Civil Hospital for examination and the victim girl gave history that she was kidnapped by the appellant and she was kept for 10 days and during said period the appellant had sexual intercourse for 2 to 3 times. She conducted medical examination and asked the victim girl to come after completion of her menses. Doctor further stated that on 17.12.2013 the victim girl came in the hospital. She examined her and on clinical examination she found that hymen was ruptured and admit two fingers with tenderness. There were no any scratches or abrasions or any bleeding from genitals. No any injury on other body part. She collected sample of blood, nails, pubic hairs, vaginal swab and nail scrapings and accordingly issued report (Exh.35). In the cross examination on behalf of the appellant she stated that if a forcible sexual intercourse is made against the will of the victim girl, certainly there will be injury on external body and on genital. Rest of the evidence of the Doctor referred to

above regarding finding that hymen was ruptured and admit two fingers with tenderness, there were no any scratches or abrasions or any bleeding from genitals, no any injury on other body party and that the victim girl gave history that she was kidnapped and the appellant had sexual intercourse with her for 2 to 3 times during 10 days has gone unchallenged.

23. Exh.35/1 is the Medical examination report for sexual assault issued by Dr.Deepali Shinde (PW-6) and it also shows the history given by the victim girl to PW-6 as deposed by PW-6. Moreover, Exh.35/2 General Physical Examination report of the victim girl issued by PW-6 also shows that the hymen was torn and vagina admit two fingers with tenderness as deposed by PW-6. Thus, these two documents corroborate the evidence of PW-6 about the history given by the victim girl to PWs-6 about the incident of sexual assault on her by the appellant on 2 to 3 times during 10 days period.

24. Thus, on the basis of evidence of victim girl (PW-2), Medical Officer Deepali Shinde (PW-6), Medical Examination Report for sexual assault (Exh.35) and General Physical Examination (Exh.35/2) of the victim girl, it can be said that the appellant had sexual

intercourse with the victim girl who was between 15 to 16.5 years i.e. below 18 years and it amounts to rape within the meaning of clause *Sixthly* of Section 375 (a) of the IPC, which says that 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; With or without her consent, when she is under eighteen years of age which is punishable under Section 376(1) of the IPC. The trial Court has rightly held so.

25. Moreover, on the basis of aforementioned evidence of the victim girl and Dr. Shinde (PW-6) and two reports of examination issued by her, it can be said that the appellant committed aggravated penetrative sexual assault within the meaning of Section 5 of the POCSO Act which is punishable under Section 6 of the POCSO Act as the victim was child below 18 years of age within the meaning of Section 2-d of the POCSO Act. The trial Court has rightly held so.

26. Now, it is to be seen whether the above referred evidence of the victim girl (PW-2), her father (PW-1) and Sunil Jagdale (PW-4) is sufficient to state that the prosecution has proved the offence under Section 366-A of

the IPC against the appellant. Here it is useful to refer the decision in the case of Iqbal Vs State of Kerala (2008) Cri.L.J. 436 wherein the Hon'able Apex court in para 9 to 11 observed as under:

“9. The residual question is of applicability of Section 366-A IPC. In order to attract Section 366-A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act.

10. In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction u/s 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366-A has no application.

11. In the result, the conviction for offence punishable u/s 366-

A IPC is set aside while the conviction and sentence imposed in respect of offence punishable u/s 376 IPC is maintained.

The appeal is allowed to the aforesaid extent.”

27. On considering the evidence of the victim girl (PW-2) her father (PW-1) and Sunil Jagdale (PW-4) it is clear that out of five ingredients of the offence under Section 366-A of the IPC referred to above the prosecution has not proved ingredient No.4 that such intercourse must be with a person other than the accused, because in the present case on the basis of evidence of the victim girl, her father and evidence of Dr.Shinde (PW-6), it can be said that the appellant had sexual intercourse with the victim girl and it is not at all the case of the prosecution that the victim girl was induced to force or seduce her to illicit intercourse with a person other than the appellant/accused. Therefore, even if the victim girl below 18 years of age was kidnapped out of the lawful custody of her parents which amounts to kidnap within the meaning of Section 363 of the IPC, it cannot be said that she was induced with intent that she may be forced or seduced to illicit intercourse with another person within the meaning of Section 366-A of the IPC. Therefore, applying the ratio laid down in the case of *Iqbal* (supra) I hold that the prosecution has failed

to prove the offence under Section 363 of the IPC of the appellant. Thus, finding recorded by the trial Court that the prosecution has proved the offence under Section 366-A of the IPC against the appellant is incorrect and not sustainable.

28. Relying upon the decision in the case of *Bhagwan Laxman Rakshe* (supra) learned APP submitted that in case, it is held that the prosecution has failed to prove offence under Section 366-A of the IPC against accused then accused be convicted for the offence under Section 366 of the IPC by altering the conviction from Section 366-A into a conviction under Section 366 of the IPC though no charge is framed under Section 366 of the IPC. In the said case in paragraph No.17 as referred earlier in detail it was observed that Section 366 of the IPC, apart from abduction or seducing a woman to compel her marriage, interalia, deals with offence of kidnapping with intention that the woman may be forced to illicit intercourse. The punishment is prescribed of 10 years for both the offences under Section 366-A and Section 366 of the IPC and hence it would be appropriate to convert conviction awarded under Section 366-A into conviction under Section 366 of the IPC and as such sentence as passed by the trial Court was maintained.

29. Here, it would be appropriate to refer three judges decision of the Hon'ble Apex Court in the case of Shamnsaheb M. Multtani Vs State of Karnataka (2001) 2 Supreme Court Cases 577 wherein in paragraph Nos.16,17 and 18 of the said judgment the aspect what is meant by a minor offence for the purpose of Section 222 of the Code of Criminal Procedure is considered. Said paragraph Nos. 16,17 and 18 read as under:-

“16. What is meant by “a minor offence” for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.

17. The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-a-vis the latter. However, the position would

be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a women subjecting her to cruelty). As the word “cruelty” is explained as including, inter alia.

“harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”

18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?”

30. Moreover, it is necessary to refer Section 222 of the Code of Criminal Procedure and it reads as under:

Section 222. When offence proved included in offence charged-

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
- (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
- (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

31. From the decision in the case of *Shamnsaheb M. Multtani* (supra) it is clear that the test of minor offence is not merely that the prescribed punishment is less than the major offence and that two illustrations provided in Section 222 of the Code of Criminal Procedure would bring the said point home well. So also, it is clear from the said decision that only if the two offences are cognate offences, wherein main ingredients

are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence. The ingredients of offence punishable under Section 366-A are five as referred earlier in paragraph No.24 (supra) and the ingredients of offence punishable under Section 366 of the IPC are that; 1. Kidnapping or abducting of any woman, 2. Such kidnapping or abducting must be- (i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or (ii) in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse; or (iii) by means of criminal intimidation or otherwise by inducing any woman to go from any place with intent that she may be, or knowing that she will be, forced or seduced to illicit intercourse. The main ingredients of these two offences are not appearing common. The material ingredients of offence under Section 366-A of the IPC is the inducement of a girl under the age of 18 years with intent that she may be or knowing that it is likely that she would be forced or seduced to illicit intercourse and such intercourse must be with a person other than the accused, while material ingredients of offence under Section 366 is kidnapping or abducting of any woman with

intent that she may be compelled or knowing it to be likely that she would be compelled to marry any person against her will or she may be forced or seduced to illicit intercourse, or knowing it to be likely that she may be forced or seduced to illicit intercourse. Moreover, the punishment provided for both the offences is the same and the punishment of either of these offences is not less than the other offence. Considering these aspects and applying the aforementioned observations of the Hon'ble Apex Court regarding a minor offence in the case of *Shamnsaheb M. Multtani* (supra) I hold that the offence under Section 366 of the IPC cannot be regarded as minor offence to Section 366-A of the IPC. In view of this decision of the Hon'ble Apex Court as it appears that the decision in the case of *Bhagwan Laxman Rakshe* (supra) is given on facts of the said case is of no assistance to the prosecution to accept the argument advanced by the learned APP that the offence under Section 366 of the IPC is minor to the offence under Section 366-A of the IPC to convert conviction under the latter offence under the former in the absence of charge.

32. For the reasons discussed above, I hold that the prosecution has failed to prove the offence under Section 366-A of the IPC against the appellant and therefore, the

conviction and sentence recorded against the appellant for the said offence as per the impugned judgment is not sustainable and the same is liable to be set aside and the appellant is entitled to be acquitted of the said offence.

33. For the reasons discussed above as the prosecution has proved the ingredients of the offence punishable under Section 376 of the IPC and Section 6 of the POCSO Act against the appellant the conviction and sentence recorded against the appellant for the said offences is proper as it is seen that sentence imposed on the appellant for the said offences is the minimum punishment provided for the said offences. Thus, there is no reason to interfere with the said conviction and sentence.

34. Thus, the appeal needs to be partly allowed in the light of conclusion in paragraph No.32 (supra). Therefore, in the result, the following order is passed:

ORDER

i] Appeal is partly allowed.

ii] The impugned judgment and order dated 15.12.2015 passed by the Additional Sessions Judge, Parbhani in Special Case (PCSO) No.14 of 2014 convicting and sentencing the appellant/accused for the offence punishable under Section 366-A of the IPC is quashed and set aside and the appellant/accused is acquitted of the said offence. Fine, if paid, by the appellant in respect of said offence shall be refunded to him.

iii] The impugned conviction and sentence against the appellant for the offences punishable under Section 376 of the IPC and Section 6 of the POCSO Act is confirmed.

iv] Rest part of the impugned judgment regarding the set off given to the appellant/accused under Section 428 of the Code

(43)

criapl466.16

of Criminal Procedure is maintained.

v] Record and proceeding in the Special Case
(PCSO) No.14/2014 be sent to the trial Court
forthwith.

[S.M. GAVHANE, J.]