

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

**CRIMINAL APPEAL NO.713 OF 2016
WITH
CRIMINAL APPLICATION NO.6642 OF 2016**

1. Jishan S/o. Basir Qureshi, ...**APPELLANTS**
Age-22 years, Occu-Agri, [Ori.accused Nos.1 to 3]
2. Don @ Shakir Shabbir Sayyad,
Age-22 years, Occu-Agril,
3. Shoyeb S/o. Taher Qureshi,
Age-23 years, Occu-Agril,

All R/o. Khadkat, Tq. Ashti,
Dist. Beed

VERSUS

State of Maharashtra

...**RESPONDENT**

Mr.N.B.Narwade, Advocate for the appellants
Mr.V.S.Badakh, APP for the respondent/State

CORAM : S.M.GAVHANE, J.
RESERVED ON : 25.03.2019
PRONOUNCED ON : 12.04.2019

J U D G M E N T :-

. The appellants (hereinafter referred to as 'accused Nos.1 to 3') have challenged the judgment and order dated 11.11.2016 in Special (Child Protection) Case

No.49/2014 passed by the Additional Sessions Judge and Special Judge, Beed whereby convicting and sentencing them as under:

a] Accused No.1 Jishan Bashsir Qureshi and accused No.2 Don @ Shakir Shabbir Sayyed are convicted for the offence punishable 363 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'the IPC') and sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/- each, in default to suffer further RI for fifteen days.

b] Accused Nos.1 and 2 are further convicted for the offence punishable under Section 366-A read with Section 34 of the IPC and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1000/- each, in default to suffer further RI for one month.

c] Accused Nos.1 and 2 are further convicted for the offence under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred

to as 'the POCSO Act') and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/- each, in default to suffer further RI for 15 days.

d] Accused No.3 Shoeb Taher Qureshi is convicted for the offence punishable under Section 363 read with Section 109 of the IPC and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.300/-, in default to suffer further RI for 15 days.

e] Accused No.3 is further convicted for the offence punishable under Section 366-A read with Section 34 of the IPC and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default to suffer further RI for 15 days.

f] Accused No.3 is further convicted for the offence under Section 7 punishable under Section 8 and Section 16 punishable under Section 17 of the POCSO Act and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default to suffer further RI for

15 days.

g] All the sentences were to run concurrently.

h] Accused Nos.1 to 3 were given set off under Section 428 of the Code of Criminal Procedure for pre-detention period i.e.

- . Accused No.1 from 20.11.2014 to till the date of judgment.
- . Accused No.2 from 20.11.2014 to till the date of judgment.
- . Accused No.3 from 20.11.2014 to 27.07.2015.

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

A] Accused Nos.1 to 4, complainant Balu Baburao Bhalerao (PW-2) and his daughter the victim girl (PW-1) are the residents of village Khadkat, Tq. Ashti, Dist. Beed. On 20.11.2014 the complainant lodged the complaint/report in the Police Station, Ashti that his minor daughter/victim girl aged 16 years had left home for attending her school on 19.11.2014. In the recess period she had returned home as usual for lunch.

Thereafter, the victim girl demanded Rs.100/- to him and he gave said amount to her and at that time she was having file in her hand and on saying that she is going to school she left the house. Thereafter, she did not return to home up to 06.30 pm. Therefore, the complainant, his son Akshay and wife searched the victim girl in the village, but she was not found. Thereupon, he contacted on phone to teachers and they had informed that she had not come to the school since afternoon. Thereafter, at about 09.30 pm one Bashirbhai (PW-3) phoned the complainant and informed that the victim girl is at Pimparkhed and that she has been frightened. Thereupon, the complainant alongwith his brothers and two others went to Pimparkhed and on seeing them the victim girl started weeping and she was very much frightened.

B] Further, it is the case of the prosecution that thereafter on asking the victim girl she told the complainant that on 19.11.2014 while she was proceeding towards the school from the house in the afternoon near the dilapidated house of Sanjay Shamrao Jewe on the road one white colour Omni car came from her behind. The door of said car was suddenly opened. Accused No.1 alighted from the car and accused No.1 snatched her file which was in her hand and torn the same and after sitting in the

car accused No.1 closed the door of the car. Accused No.1 pressed her mouth. Accused No.2 showed knife and pointed the knife to the neck of the victim girl and said her not to cry else, she would be killed. Therefore, she kept mum. The Omni car proceeded by the road. After half an hour the Omni car was stopped on tower road. Thereafter, on laying down the victim girl on the seat in the car accused No.1 initially committed rape on her. Thereafter, accused No.2 committed rape on her. Thereafter, one who was driving the car to whom the victim girl was knowing has also committed rape on her. Then the victim girl was left on the road near brick-kiln. Accused No.2 had given one mobile number to her and told her that she should tell that it was mobile of her father Aba Suryawanshi and then the accused went away. On recording the complaint as above of the complainant crime No.180/2014 under Section 363, 366-A, 376-D and 506 read with Section 34 of the IPC, under Section 4 of the POCSO Act and under Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribe Prevention of Atrocities Act (hereinafter referred to as 'the Atrocities Act') was registered against the accused and the investigation was commenced.

C] During the investigation Mr.Chopde, the then Dy.S.P., Ashti (PW-9) visited the spot of incident and

prepared spot panchanama on 20.11.2014 and seized certain articles from the spot of incident. On the said date he also seized the clothes of the victim girl. Omni car was also seized. Moreover, he arrested all the four accused on 20.11.2014 and seized clothes on their persons. The victim girl was medically examined by the doctor. Seized clothes were sent to the Chemical Analyzer for examination and report. Moreover, statements of the victim girl and her father were recorded under Section 164 of the Code of Criminal Procedure by the Magistrate. The Investigating Officer collected the school record pertaining to the birth date of the victim girl. Accused Nos.3 and 4 were released on bail. Accused Nos.1 and 2 are in jail since the date of their arrest on 20.11.2014. After completion of the investigation the charge-sheet was submitted in the Sessions Court, Beed being a Special Court for trial of the offences against all the accused.

D] Charge (Exh.18) against accused Nos. 1 to 3 for the offences punishable under Sections 363 and 366-A read with Section 34 of the IPC, under Section 376-D read with Section 34 of the IPC against accused Nos. 1 to 4, under Section 4 of the POCSO Act against accused Nos.1 and 2, against accused Nos.3 and 4 for the offence under Section 16 of the POCSO Act, against accused Nos. 1 to 3 under

Section 3(1)(xii) of the Atrocities Act, under Sections, 3(2) (v) of the Atrocities Act against all the accused was framed and altered charge (Exh.124) under Section 5(g) and 16 punishable under Sections 6 and 17 of the POCSO Act was framed against accused Nos.1 to 3. Accused pleaded not guilty and claimed to be tried.

E] To prove guilt of the accused the prosecution has examined following 12 witnesses namely:

1. PW-1 - Sonali Balu Bhalerao
2. PW-2- Balu Bhaburao Bhalerao
3. PW-3- Bashir Chand Shaikh
4. PW-4- Rahul Babanrao Tekade
5. PW-5- Dr.Prakash Madhukarrao Shivnikar
6. PW-6- Kunal Govind Nikalje
7. PW-7- Rupesh Pradeep Kamble
8. PW-8- Atul Tukaram Shinde
9. PW-9- Ramesh Nagnath Chopde
10. PW-10- Sulochana Mohan Walvi
11. PW-11- Vilas Haribhau Tarange
12. PW-12- Balu Sakharam Kale

. Besides the above witnesses the prosecution has relied upon the complaint/FIR (Exh.72), school record regarding birth date of the victim girl, as well report of the Chemical Analyzer and report of identification parade conducted by Tahasildar (PW-11) and statements under Section 164 of the Code of Criminal Procedure of the victim girl and her father the complainant.

F. The statements of the accused under Section 313 of the Code of Criminal Procedure were recorded. Defence of accused Nos.1 to 3 as it appears from the trend of the cross-examination of the material witnesses is that the victim girl was having love affair with accused No.4 and there was political rivalry between the mother of the victim girl and brother of accused No.1 as brother of accused No.1 had contested the Grampanchayat election against the mother of the victim girl. Father of the victim girl filed false case against the accused. No evidence in defence was led by the accused.

G] On considering the evidence adduced by the prosecution and defence of the accused the trial Court held that the prosecution has proved the offences against accused Nos. 1 to 3 and convicted and sentenced them as mentioned in the introductory paragraph of this judgment and acquitted all the accused of rest of the offences in the charge. Therefore, this appeal by the appellants/accused Nos.1 to 3 challenging the conviction and sentence recorded against them.

3. Appeal was admitted as per order dated 20.12.2016 and the substantive sentences recorded against the accused No.3 were suspended and he was released on

bail. Accused Nos. 1 and 2 are in jail.

4. I have heard Mr.Narwade, learned counsel for the appellants/accused Nos. 1 to 3 and Mr.Badakh, learned APP for the respondent/State and with their assistance I have perused the impugned judgment and order and the evidence led by the prosecution.

5. Mr.Narwade, learned counsel for the accused Nos.1 to 3 submitted that the trial Court has acquitted accused Nos.1 to 4 for the offence stated earlier. It is submitted that when the trial Court has not accepted the evidence of the prosecution for the offences for which accused Nos. 1 to 3 have been acquitted, the trial Court should not have relied upon the same evidence to convict accused Nos. 1 to 3 for the offences mentioned earlier. Mr.Narwade, learned counsel further submitted that the trial Court has based the conviction on the basis of evidence of the victim and her statement (Exh.70) under Section 164 of the Code of Criminal Procedure. It is submitted that there are contradictions and omissions in the evidence of victim (PW-1), her father (PW-2) and witness Bashir (PW-3) and said contradictions and omissions in the evidence of these witnesses falsify case of the prosecution of abducting the victim by accused

Nos.1 to 3 by Maroti Omni car. Father of the victim and Bashir (PW-3) are not eye witnesses to the incident of kidnapping the victim from the lawful custody of her guardian and therefore their evidence is of no help to the case of the prosecution. On the basis of cross-examination of father of the victim (PW-2) and Bashir (PW-3) accused Nos.1 to 3 have sufficiently brought on record their defence. So also, in the cross-examination the victim (PW-1) had admitted that her mother had contested the Grampanchayat election from Ward No.2 and the victim has shown her ignorance that cousin brother of accused No.1 namely Mohammad Ali Qureshi had contested the election in the said Grampanchayat election against the mother of the victim and as such there is political enmity between accused No.1 and the family of the victim and as such defence in this respect of the accused is established by the accused. According to the learned counsel for the accused when Bashir (PW-3) has admitted in his cross-examination that on his asking the victim had told him that she had come to Pimparkhed alongwith accused No.4 Aba Suryawanshi for a ride and he had left her and therefore, she had come to his residence it can be said that there is substance in the defence of the accused that the victim (PW-1) was having love affair with accused No.4 Aba Suryawanshi and to save from being

defamed about her said conduct the victim and her father have falsely implicated accused Nos.1 to 3. Thus, learned counsel submitted that prosecution has not proved beyond doubt the ingredients of offences for which accused Nos.1 to 3 have been convicted by the trial Court by the impugned judgment and order which is assailed in this appeal. More particularly, it is submitted by the learned counsel that the prosecution has not proved the ingredients of offence under Section 366-A of the IPC.

6. To support his submissions Mr.Narwade, learned counsel has relied upon the following decisions.

a] In the case of Iqbal Vs State of Kerala (2008) Cri.L.J. 436 the Hon'ble Apex Court in paragraph Nos.9,10 and 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.”

b] In the case of Babloo and others Vs State of Maharashtra Criminal Appeal No.237 and 318 of 2013 decided on 01.09.2015 Bombay High Court (Nagpur Bench), the appellants were convicted for the offences punishable under Section 363, 366-A read with Section 34 of the IPC and the victim girl in the said case had not attained the age of 14 years. There were three accused. The Babloo was accused No.1, Rajesh in Criminal Appeal No.318/2013 was

accused No.2 and Panchfula accused No.3 were convicted and sentenced for the offences under Section 363 and 366-A read with Section 34 of the IPC. In paragraph Nos. 15,16 and 17 it was observed as under:

“15. As seen from the charge, it is clear that no specific charge was framed against appellant Babloo that he has committed the offence punishable under Section 366-A, Indian Penal Code. Further, there is no evidence available in the prosecution case that he induced the minor girl, the victim. Evidence of victim girl is completely silent in respect of talk between her and the appellant Babloo. That reminds me of an authoritative pronouncement of a Division Bench of this Court in State Vs. Gopichand Fattumal and others. Para 7 of the said judgment, which is apt in this case, is quoted below.

“(7) The next question is whether any of the accused is guilty under Sec.366-A of the Indian Penal Code. This section requires that a minor must be induced to go from any place or to do any act with the intention or knowledge that such minor may be forced or seduced to illicit intercourse with another person. There is no evidence of any direct talk between any of the accused and the girl nor even of any inducement offered through Patilba. Even so far as accused No.3 is concerned, there is no direct talk

between Anusaya and accused No.3 which can be regarded as an inducement to her to move either from the house of Patilba or from the theatre to the room in question. His case also, therefore, does not come directly within the terms of this Section. They cannot, therefore, be convicted under Sec. 366-A.”

Further, in the evidence of the prosecutrix, she has stated that when she had been in the house of appellant Babloo for three to four days, she was sleeping with mother of Babloo and Babloo was sleeping in a separate room. Thus, there is no physical contact between them. Further, the appellant Babloo is already acquitted of the offence punishable under Section 376, IPC. In that view of the matter, I am of the view that the appellant Babloo cannot be convicted of the offence punishable under Section 366-A also and he requires to be acquitted of both the charges, namely Sections 363 and 366-A, IPC.

16. In so far as appellant Rajesh is concerned, it is clear that he is the husband of the absconded accused Babybai. His presence at the house of the Panchibai on the day of incident is established. Further, according to the evidence of the preosecutrix, after regaining consciousness, she found herself in the company of Babybai and appellant Rajesh. She regained consciousness at an unknown place. Thereafter, it is the appellant and his wife who

took away the victim girl to the place of Babloo. Thus, it is clear that the appellant is responsible for keeping away a minor girl from the lawful guardianship. In this regard, Section 366-A, which is relevant, reads thus:

“366-A. Procuration of minor girl. Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine”

A bare reading of the aforesaid Section, in my view, shows that if a minor girl is induced to go from one place to another with an intent that such girl may be, or knowing that it is likely that she will be forced to have a sexual intercourse, then such person can be punished under Section 366-A. In my view, the ingredients of Section 366-A are also fulfilled against the appellant-Rajesh.

17. Since the girl was not physically ravished, some leniency can be shown to the appellant- Rajesh. He is sentenced for a period of five years for the offence punishable under Section 366-

A. He is in jail since 15th April, 2011. Thus, as on date, he has already completed the jail sentence of four years and four months. Thus, the appellant Rajesh can be sentenced for the period which he has already undergone in jail. Accordingly Criminal Appeal No.237 of 2013 of Babloo was allowed and Criminal Appeal No. 318 of 2013 of Rajesh was partly allowed.

7. Mr.Badakh, learned APP for the respondent/State on the other hand submitted that the prosecution has proved offence under Section 363 on the basis of evidence of PWs-1 and 2 and PW-7 and 9 have proved seizure of car by which the victim was kidnapped by accused Nos. 1 to 3. It is further submitted that the evidence of PWs-1,2 and 5 is material to prove the offence under Section 366-A of the IPC and under Section 7 read with Section 8 of the POCSO Act. It is submitted that the evidence of PW-11 Nayab Tahasildar is sufficient to prove identification of accused Nos.1 to 3 who had kidnapped the victim from lawful custody of her parents from the spot where torn file of the victim was laying and the said spot has been proved by PW-8 Panch Atul of Panchanama of spot of incident. Thus, according to the learned APP prosecution has proved the offences for which accused Nos.1 to 3 have been convicted by the trial Court by the impugned judgment and order and there is no ground to interfere

with the same and as such the appeal being devoid of merits the same is liable to be dismissed.

8. Alternatively the learned APP further submitted that in case it is held that the prosecution has not proved the offence under Section 366-A of the IPC against accused Nos. 1 to 3, these accused may be convicted and sentenced for the offence under Section 366 by altering the conviction under Section 366-A into 366 of the IPC relying upon the decision in the case of Bhagwan Laxman Rakshe Vs The State of Maharashtra 2016 ALL MR (Cri) 4414. In the said case the appellant/accused was convicted and sentenced under Section 363 and 366-A of the IPC by the trial Court. In the appeal, 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.”

. As per the above decision the conviction and sentence of the appellants/accused under Section 363 of the IPC and under Section 4 of the POCSO Act as imposed by the trial Court was maintained. The conviction imposed by the trial Court under Section 366-A of the IPC was converted into conviction under Section 366 of the IPC and appellant was sentenced to suffer rigorous imprisonment for five years and to pay a fine of

Rs.1,000/- and in default, to suffer simple imprisonment for one month for said offence. The appellant/accused was held entitled to set off the period of imprisonment suffered since 14.05.2013. Order of trial Court was accordingly converted and the appeal was disposed of in these terms.

9. Learned APP relying upon the decision in the case of Prem Prakash @ and Anr Vs State of Haryana 2011 Cri.L.J. 4281 (SC) submitted that the evidence of PW-2 father of the victim though he is not eye witness to the occurrence, has corroborated the evidence of victim regarding kidnapping her by accused Nos. 1 to 3 by Maroti Omni car and said evidence cannot be disbelieved. Moreover, it is submitted by the learned APP that the offence of sexual assault under Section 7 punishable under Section 8 of the POCSO Act is not only restricted to touching of vagina only but also touching of any part of the body of the victim with sexual intent and therefore, in the present case on the basis of evidence of victim PW-1, her father (PW-2) and medical evidence of PW-5 it can be very well said that the prosecution has proved the offences under the POCSO Act particularly under Section 7 punishable under Section 8 against accused Nos. 1 and 2 and under Section 7 punishable under

Section 8 and under Section 16 punishable under Section 17 of the POCSO Act against accused No.3. This submission was made by the learned APP relying upon the decision in the case of Bijoy @ Guddu Das Vs The State of West Bengal 2017 ALL MR (Cri) Journal 409 (Calcutta High Court).

10. I have carefully considered the submissions made by the learned counsel for accused Nos.1 to 3 and the learned APP. Since the respondent/State has not filed appeal challenging the acquittal of accused Nos. 1 to 3 for different offences as mentioned in the impugned judgment and acquittal of accused No.4 for the offence under Section 16 read with Section 17 of the POCSO Act and this appeal is only for challenging the conviction and sentence recorded against the appellant accused Nos.1 to 3 for the offences punishable under Sections 363, 366-A of the IPC and Section 7 read with Section 8 and Section 16 punishable under Section 17 of the POCSO Act as mentioned earlier the only aspect which is required to be considered is whether the prosecution has proved the offences against accused Nos. 1 to 3 for which they have been convicted, beyond reasonable doubt.

11. Considering the ingredients of offences under

Section 363, 366-A of the IPC and Section 7 punishable under Section 8 and Section 16 punishable under Section 17 of the POCSO Act the age of the victim on the day of incident would be the relevant factor. Case of the prosecution is that, birth date of the victim is 01.11.1999. The incident has taken place on 19.11.2014. To prove the age of the victim girl the prosecution has relied upon the evidence of victim girl (PW-1), evidence of Dy.S.P. Chopde the Investigating Officer (PW-9) and certified copy of the school register (Exh.101). In her evidence at Exh.69 the victim girl has sated that her birth date is 01.11.1999. In the cross-examination she stated that her birth certificate has been submitted in the school by her parents. Her evidence that her birth date is 01.11.1999 has gone unchallenged in her cross-examination on behalf of the accused. Even it was not suggested to her that she is deposing false about her birth date. The evidence of Dy.S.P.Chopde (PW-9) the Investigating Officer is that he collected the proof regarding the age of the victim girl from the concerned school and letter (Exh.100) was issued to Ramchandra Dhas Vidyalaya and he collected admission form (Exh.101). Exh.101 shows that date of birth of the victim girl is 01.11.1999. His evidence about collecting above said proof of date of birth of the victim girl has gone

unchallenged in his cross-examination. Even there is no suggestion to him that he is deposing false about collecting the proof of birth date of victim girl. Learned counsel for the accused Nos. 1 to 3 has also not seriously disputed birth date of the victim girl as deposed by the victim girl. Thus, on the basis of above evidence an inference can be drawn that birth date of the victim girl is 01.11.1999 and on the day of incident i.e. on 19.11.2014 the age of the victim girl comes to 15 years and 18 days. Thus, it is obvious that on the date of incident the age of the victim girl was less than 18 years and therefore, the victim girl was minor under 18 years of age which is one of the ingredients of offence under Section 363 and 366-A of the IPC and she was child within the meaning of Section 2(d) of the POCSO Act.

12. To attract offence under Section 363 of the IPC the prosecution has to establish that accused No.1 to 3 had taken or enticed a victim girl under 18 years of age out of keeping of the lawful guardianship of such minor victim girl without consent of her guardian. So also, the prosecution has to establish the ingredients of offence under Section 366-A of the IPC referred earlier in the case of *Iqbal* (supra) relied upon by the learned counsel for the accused Nos.1 to 3.

13. Now, let us consider the evidence of material witnesses relied upon by the prosecution to prove the aforesaid offences and the offences under the POCSO Act for which accused Nos. 1 to 3 have been convicted. The evidence of victim (PW-1) is that the incident had taken place on 19.11.2014. On that day she had gone to school at 10.00 a.m. as usual and returned home for taking lunch at 01.00 p.m. After taking lunch she had taken Rs.100/- from her father as she had to give the same to Waghmare Sir as charges for the papers required for the project work. She was also having with her a file of project work. After taking the said file with her, she was going to the school and she had come to the house of Sanjay Jewe. At that time one white Maroti Omni car came from behind. From said Maroti Omni car one boy by name Jishan alighted and he forcibly took her inside Maroti Omni car by pressing her mouth. In the Maroti Omni car one boy namely Don had shown her a knife and made her to sit in between two seats. They had also asked her to have her neck downward. Thereafter, the car started. One healthy fat boy was driving the car. The car was driven for quite sometime. Then the vehicle was stopped. Thereafter, Don asked Jishan whether he will do first or he should do first. Thereafter, Jishan removed her clothes. He had

also removed his clothes and he committed rape on her. He inserted his private part in her private part. After him Don had committed rape on her. Thereafter, she was asked to wear her clothes. When she got up for wearing clothes, she saw a tower. Thereafter, again the vehicle was started and in the car Jishan had given one mobile number to her and asked her to remember the same as the number of her father and to disclose the name as Aba Suryawanshi (accused No.4). Thereafter, she was left near brick-kiln where she went to the house of the Bashir (PW-3). Further she deposed that she told the name of her father to Bashir who phoned her father. Thereupon, her father, mother, parental uncle and Sarpanch of village came. Then they went to Khadkat. Then her father lodged the FIR in the police station.

14. In the Cross-examination some inconsistencies and omissions in her evidence and in her statement before police have been brought on record. Those, inconsistencies and omissions are as referred earlier in the examination-in-Chief she stated that Don accused No.2 had shown knife to her. She stated that she had not stated before police that Jishan accused No.1 had shown knife to her. She stated that it might have happened that because at that time she was frightened, she might

have stated accused No.2 had shown her knife. So also, she stated that it did not happen that Jishan and Don accused Nos. 1 and 2 had removed clothes from her person. She has denied that she is deposing false that she was taken in Maroti Omni car. Moreover, she had denied all the suggestions given to her in the light of defence of accused Nos. 1 to 3 that there was enmity between accused Nos. 1 and her parents on account of Grampanchayat election and that she was having love affair with accused No.4. She identified accused Nos.1 to 3 in the Court during the trial and so also she had identified said accused during the course of the identification parade conducted by PW-11 Nayab Tahasildar. Thus, there is no reason to disbelieve the evidence of PW-1 the victim girl as regards taking her away by accused Nos.1 to 3 amongst whom accused No.3 was driving the Maroti Omni car, out of lawful custody of her parents.

15. Aforesaid evidence of the victim girl is also corroborated by her statement Exh.70 recorded by learned JMFC, Ashti under Section 164 of the Code of Criminal Procedure as this statement shows that the incident as deposed by the victim girl had taken place.

16. Now, coming to the evidence of Balu (PW-2)

father of the victim girl, who is of course not eye witness to the incident and whatever he has deposed is based on the information given by his daughter the victim girl (PW-1). According to him after he was informed about the incident by Bashir (PW-3) when he went to Pimparkhed the victim girl told him that after taking lunch on the day of incident while she was going to school near the house of Sanjay Jewe one Maroti Omni car came from her behind. She was by the side of the road, Maroti Omni car stopped and its door was opened. One person came out from the car and pushed her inside by keeping his hand on her mouth and by putting knife on her neck. Said two persons were Don accused No.2 and Jishan accused No.1. She further disclosed to him that Don had put the knife on her neck. According to him his daughter the victim girl further told him that both accused Nos.1 and 2 had committed rape on her in the car and third person was driving the car and that she was given one mobile number asking her to remember said number as the number of Aba Suryawanshi (accused No.4). Though he has been cross-examined at length on behalf of the accused nothing has been found in favour of the accused. Moreover, in the light of defence of the accused suggestions were put to him, but he has denied all those suggestions and he has denied that no incident as deposed by him has taken place

and that he is deposing false. Thus, there is no reason to disbelieve his evidence and his evidence corroborates the evidence of his daughter the victim girl (PW-1) regarding kidnapping her from lawful custody of her parents by the accused Nos.1 to 3 by the Maroti Omni car.

17. Evidence of PW-3 Bashir is that after the victim girl (PW-1) was kidnapped by the accused and she was sexually assaulted by accused Nos.1 and 2, she was left near the brick-kiln at Pimparkhed and she met him (PW-3) and he informed PW-2 father of the victim girl that his daughter is at Pimparkhed and that he called him. As he did not support the prosecution, he was cross-examined by the learned APP and in the said cross-examination he admitted that from the police he had received the information that as per the report lodged by the victim girl she was taken in a Maroti Omni car by three persons and two of them committed rape on her in the said vehicle and that all the three persons were from Khadkat belonging to Muslim community. Moreover, in the cross-examination on behalf of accused Nos.1 to 3 he admitted that on his asking the victim girl she told that she had come to Pimparkhed, that she had come alongwith Aba Suryawanshi (accused No.4) for a ride and he had left her and therefore, she had come to his residence (residence

of witness). Thus, the evidence of PW-3 Bashir is of no assistance to the prosecution to prove kidnapping of the victim girl by accused Nos. 1 to 3.

18. Thus, it is clear from the evidence of victim girl (PW-1), her father (PW-2), her statement (Exh.70) recorded by the JMFC, Ashti under Section 164 of the Code of Criminal Procedure and the panchanama of seizure of Omni car (Exh.89) that on 19.11.2014 accused Nos. 1 and 2 in furtherance of their common intention kidnapped the victim girl below 18 years of age out of lawful custody of her parents and as such, I hold that the prosecution has proved offence under Section 363 read with Section 34 of the IPC against accused Nos.1 and 2 beyond reasonable doubt and further the prosecution has proved beyond doubt that accused No.3 who was driving omni car has abetted accused Nos.1 and 2 to commit offence under Section 363 and as such proved offence under Section 363 read with Section 109 of the IPC against accused No.3. The trial Court has rightly held so.

19. Now, coming to the evidence of Dr. Shivnikar (PW-5) who examined the victim girl, his evidence is that on 20.11.2014 the victim girl was referred to him for examination. He had examined the said victim girl and

found abrasion at right dorsum of hand mentioned in Col.No.v. As per Col.No.vi after local examination of genital of the victim he found that the hymen was ruptured and torn, position of tear 1 O'clock, age of tears 24 hours, tenderness present, vagina admitting two fingers. As per column No.ix he had found that hymen torn, age of tears 24 hours and tenderness inflame and accordingly issued medical report Exh.83. The abrasion at right dorsum of hand, tenderness of tear and inflame suggest forcible sexual intercourse. In the cross-examination on behalf of the accused Nos. 1 to 3 he stated that the victim had stated before him that rape has been committed four days back. According to this witness he examined the victim girl on 20.11.2014. As per the prosecution case incident took place on 19.11.2014. The trial Court did not accept above evidence of the Doctor to hold that the prosecution has proved the offence under Section 376-D read with Section 34 of the IPC and under Section 3 read with Section 4 as well as under Section 5(g) read with Section 6 of the POCSO Act against accused Nos.1 and 2. As observed in paragraph No.42 of the judgment according to the trial Court the prosecution has failed to prove the act of penetration on the victim girl by accused Nos. 1 and 2 alone beyond reasonable doubt. As according to the trial Court though

it was found that sexual intercourse had taken place with the victim girl sometime before she was medically examined but the time span when the said incident could have taken place is not clear from the evidence on record, as tenderness of tear and inflame was found as she was undergoing MC. As mentioned earlier, there is no appeal by the State against the acquittal of accused Nos.1 and 2 of the aforesaid offences therefore, it is not necessary to discuss the aspect whether acquittal of the accused of the aforesaid offence is proper or otherwise. However, fact remains that on the basis of medical evidence i.e. evidence of Dr. Shivnikar (PW-5) and medical report (Exh.83) given by him, it can be inferred that the victim girl who was a child being below 18 years of age was sexually assaulted by accused Nos.1 and 2, as with sexual intent accused Nos. 1 and 2 in furtherance of their common intention pushed her in the Maroti Omni car which act involves their physical contact with the victim girl and accused No.3 abetted them to commit sexual assault on the victim girl.

20. For the above reasons, I hold that the prosecution has established that accused Nos.1 and 2 sexually assaulted the victim girl who was child below 18 years on the day of incident and as such committed

offence of sexual assault under Section 7 punishable under Section 8 of the POCSO Act beyond reasonable doubt. Similarly, I hold that accused No.3 who was driving the Maroti Omni car when accused Nos.1 and 2 sexually assaulted the victim girl has instigated accused Nos.1 and 2 to commit the offence of sexual assault under Section 8 of the POCSO Act and as such the prosecution has proved the offence of abetment of offences under Sections 8 and 16 punishable under Section 17 of the POCSO Act against accused No.3 beyond doubt. The trial Court has rightly held so.

21. As regards the offence under Section 366-A read with Section 34 of the IPC which is held to be proved against the appellants/accused Nos.1 to 3 by the trial Court is concerned, as referred earlier at the cost of repetition in order to attract offence under Section 366-A of the IPC the 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.

22. As discussed earlier on the basis of evidence of victim girl (PW-1), her father (PW-2) and her statement (Exh.70) under Section 164 of the Code of Criminal Procedure the prosecution has proved that accused Nos.1 and 2 had kidnapped the victim and accused No.3 abetted accused Nos.1 and 2 to kidnap the victim girl. As referred earlier the evidence of victim girl as regards the incident is that at the material time omni car came, accused No.1 alighted from the said car, he forcibly pushed the victim in the car and then accused No.2 was in the car and accused No.3 drove car and further her evidence shows that accused Nos.1 and 2 committed rape on her. Of course as mentioned earlier, the trial Court did not accept the case of the prosecution of committing rape on her by accused Nos.1 and 2. The victim has not stated that she was forced or seduced to illicit intercourse with a person other than the accused, she has not stated so even in her statement (Exh.70) under Section 164 of the Code of Criminal Procedure. Moreover, her father (PW-2) has also not stated that the victim was induced by the accused to force her to have illicit intercourse with a person other than the accused. Thus, essential ingredient of the offence under Section 366 of the IPC that

intercourse must be with a person other than the accused has not been established by the prosecution and hence relying upon the decision of the Apex Court in the case of *Iqbal* (supra) I hold that the prosecution has failed to prove the offence under Section 366-A read with Section 34 of the IPC against accused Nos.1 to 3.

23. The trial Court has not properly considered the evidence adduced by the prosecution. Even the trial court has not specifically assigned the reasons how and on what basis the prosecution has proved the offence under section 366-A read with Section 34 of the IPC against accused Nos.1 to 3. The trial Court had framed point No.1, whether prosecution has proved that on 19.11.2014 at about 02.00 pm at village Khadkat, Tq. Ashti, Dist. Beed accused Nos.1 to 3 in furtherance of their common intention had kidnapped minor victim and compelled her to have sexual intercourse with another person?. The trial Court answered the said point No.1 as "Proved". There is no discussion at all by the trial Court as to how the prosecution has proved that the victim girl who was kidnapped was compelled to have sexual intercourse with another person. The trial Court ought to have framed separate points in respect of offence of kidnapping from lawful guardianship punishable under Section 363 and in

respect of offence of procurement of minor girl under Section 366-A of the IPC, but instead the trial Court had framed only point No.1 as above and answered it as "proved" without assigning any reason at least in respect of offence under Section 366-A of the IPC. Thus, I hold that the finding of the trial Court holding the appellants/accused Nos.1 to 3 guilty for the offence punishable under Section 366-A read with Section 34 of the IPC and sentencing them for the said offence is not legal, proper and sustainable.

24. 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 read with Section 34 of the IPC against accused Nos.1 to 3 then accused Nos. 1 to 3 be convicted for the offence under Section 366 read with Section 34 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.

25. 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?”

26. 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.

27. 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 Nos.6 and 21 (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.

28. However, considering the essential ingredients of offence punishable under Section 366 of the IPC and the evidence of the victim girl that on the date of the incident at 01.00 pm while she was going to school, Maroti Omni Car came from her behind and accused No.1 forcibly took her inside the said car by pressing her mouth and accused No.2 had shown her knife and made her to sit in between two seats and that accused No.3 was driving the said car and as such she was forcibly taken away for committing illicit intercourse, the offence under Section 366 read with Section 34 of the IPC would be attracted against accused Nos. 1 to 3 and they can be convicted for the said offence. Moreover, on the basis of aforesaid evidence and the evidence of the victim girl that accused No.1 removed her clothes and both accused Nos.1 and 2 committed rape on her, although offence under Section 376 of the IPC is not proved by the prosecution as observed by the trial Court, still the aforesaid act proves offence under Section 354 read with Section 34 of the IPC of outraging modesty of the victim girl against accused Nos.1 and 2 and under Section 354 read with Section 109 of the IPC against accused No.3. As such,

even in the absence of charge against accused Nos.1 to 3 for the offences under Sections 366 and 354 of the IPC they can be convicted and sentenced for the aforesaid offences as said two offences are minor offences to the offence under Section 376-D of the IPC under which the charge was framed against accused Nos.1 to 3 in view of the decision of the Hon'ble Supreme Court in the case of Tarkeshwar Sahu Vs State of Bihar (Now Zarkhand) 2006 8 SCC 560 wherein the appellant in the said case had at about 1.30 am forcibly taken the prosecutrix to his Gumthi with intention of committing illicit intercourse with her and then the offence was committed by the appellant. The trial Court and the High Court convicted the appellant for the offence punishable under Section 376 read with Section 511 of the IPC. In the appeal the Hon'ble Apex Court held that the offence under Section 376 read with Section 511 of the IPC was not proved and the conviction of the appellant for the said offence was wholly erroneous and unsustainable and consequently, the judgments of the High Court and trial Court were set aside and further it was observed that on evaluation of entire evidence and the documents on record, the appellant was held guilty for the offences under Section 366 and Section 354 of the IPC though no charge was framed under Section 366 and Section 354 of the IPC.

29. Conclusion of the above discussion is that, I hold that the prosecution has failed to prove the offence under Section 366-A read with Section 34 of the IPC against accused Nos.1,2 and 3 and therefore, the finding of the trial Court that said offence is proved against accused Nos.1 to 3 is not sustainable and the same is liable to be set aside and these accused are entitled to be acquitted of the said offences. However, as the offence under Section 366 read with Section 34 of the IPC is proved against accused Nos.1 to 3, offence under Section 354 read with Section 34 of the IPC is proved against accused Nos.1 and 2 and under Section 354 read with Section 109 of the IPC is proved against accused No.3, they are to be convicted and sentenced for the said offences. Considering the punishment provided for the offence punishable under Section 366 of the IPC imposing of rigorous imprisonment for three years and to pay a fine of Rs.1,000/-, in default, further sentence of simple imprisonment for six months on each of accused Nos. 1 and 2 and imposing of two years rigorous imprisonment and to pay a fine of Rs.1000/-, in default, further simple imprisonment for six months on accused No.3 for the offence punishable under Section 366 read with Section 34 of the IPC would be proper sentence and

considering the punishment provided for the offence punishable under Section 354 of the IPC, imposing sentence of rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default, to suffer simple imprisonment for six months on accused Nos.1 and 2 for the offence punishable under Section 354 read with Section 34 of the IPC and imposing of sentence of rigorous imprisonment for one year with fine of Rs.1,000/-, in default, simple imprisonment for six months for the offence under Section 354 read with Section 109 on accused No.3 would be the proper sentence.

30. As observed in paragraph 20 (supra) the prosecution has proved the offence under Section 7 punishable under Section 8 of the POCSO Act against accused Nos. 1 and 2 and offence punishable under Section 8 read with Section 16 punishable under Section 17 of the POCSO Act against accused No.3. Considering the punishments provided for these offences proved against accused Nos. 1 to 3 sentence of five years rigorous imprisonment with fine imposed on accused Nos. 1 and 2 for the offence under Section 8 of the POCSO Act and punishment of three years rigorous imprisonment with fine imposed on accused No.3 for the offence under Section 8 read with Section 16 punishable under Section 17 of the

POCSO Act as per the impugned judgment and order is proper sentence and therefore conviction and sentence recorded against accused No.1 to 3 for the aforesaid offences by the impugned judgment and order needs no interference and the same is liable to be confirmed.

31. As discussed earlier, the prosecution has failed to prove the offence under Section 366-A of the IPC and on the basis of evidence adduced by the prosecution the ingredients of offence under Section 366 read with Section 34 of the IPC are proved against accused Nos.1 to 3 and they are liable to be convicted and sentenced for the said offence even in absence of charge under Section 366 read with Section 34 of the IPC. In such circumstances, as the offence under Section 363 of the IPC is minor offence in relation to the offence under Section 366 of the IPC, which is proved against accused Nos.1 to 3, no separate sentence can be awarded for the offence under Section 363 read with Section 34 of the IPC against accused Nos.1 and 2 and under Section 363 read with Section 109 of the IPC against accused No.3. Therefore, the sentence imposed by the trial Court on accused Nos.1 to 3 for the offence under Section 363 of the IPC as per the impugned judgment needs to be set aside, maintaining the conviction of accused Nos.1 to 3

for the said offences in the light of decisions in the case of Rajendra Vs State of Maharashtra 1997 Supreme Court Cases (Cri) 840 and in the case of Vishml S/o. Parmeshwar Yadav and others Vs State of Maharashtra 1997 CRI.L.J. 1724.

32. In the light of above discussion, the appeal is to be partly allowed accordingly and hence in the result following order is passed.

ORDER

i. Appeal is partly allowed.

ii. The impugned judgment and order dated 11.11.2016 passed in Special (Child Protection) Case No.49/2014 by the Additional Sessions Judge and Special Judge, Beed convicting accused Nos. 1,2 and 3 for the offence punishable under Section 366-A read with Section 34 of the IPC is quashed and set aside. Accused Nos.1,2 and 3 are acquitted of the said offence.

iii. However, the appellants/accused Nos.1 and 2 are convicted for the offence punishable

under Section 366 read with Section 34 of the IPC and each is sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for six months. So also, they are convicted for the offence punishable under Section 354 read with Section 34 of the IPC and each is sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for six months.

iv. Accused No.3 is convicted for the offence punishable under Section 366 read with Section 34 of the IPC and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for six months. So also, accused No.3 is convicted for the offence punishable under Section 354 read with Section 109 of the IPC and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default to suffer simple imprisonment for six months.

v. The conviction of accused Nos. 1 and 2 for the offence punishable under Section 363 read with Section 34 of the IPC and of the accused No.3 for the offence under Section 363 read with Section 109 of the IPC as per the impugned judgment and order is confirmed. However, sentence recorded against accused Nos.1 and 2 for the offence punishable under Section 363 read with Section 34 of the IPC and under Section 363 read with Section 109 of the IPC against accused No.3 as per the impugned judgment and order is set aside as they have been convicted and sentenced as above for the offence under Section 366 of the IPC and as such no separate sentence is imposed on accused Nos.1,2 and 3 for the offence under Section 363.

vi. The conviction and sentence recorded against accused Nos.1 and 2 for the offence punishable under Section 7 read with Section 8 of the POCSO Act and under Section 7 punishable under Section 8 and under Section 16 punishable under Section 17 of the POCSO Act against accused No.3 as per the impugned judgment is confirmed.

vii. Fine, if paid by accused Nos.1,2 and 3 as per the impugned judgment and order for the conviction under Section 366-A read with Section 34 of the IPC and for the offence under Section 363 of the IPC as per the impugned judgment be adjusted towards the fine, now imposed on them for the offence punishable under Section 366 and Section 354 of the IPC as mentioned in clauses (iii) and (iv) supra.

viii. Rest part of the impugned judgment that the substantive sentences recorded against appellants/accused Nos.1 to 3 to run concurrently and regarding giving set off to them for pre-detention period mentioned in the clause-H of the operative order of the impugned judgment is maintained.

ix. Accused No.3/appellant No.3 Shoyeb S/o. Taher Qureshi shall surrender before the trial Court forthwith to undergo remaining sentence recorded against him.

x. In view of the final decision in the

(50)

criapl713.16

appeal, Criminal Application No.6642/2016 to the extent of accused Nos.1 and 2 requesting to suspend the sentence recorded against them and to release them on bail is disposed of.

[S.M.GAVHANE, J.]

VishalK/criapl713.16