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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

***CRIMINAL APPEAL NO.437 OF 2016
(THROUGH JAIL)***

Bapu Shahaji Gaikwad
Age:30 years, Occupation Driver,
R/o. Puluji, Taluka Pandharpur.
(Presently lodged at Kolhapur Central Prison,
Kalamba – 416007.

...Appellant

Versus

The State of Maharashtra
At the instance of Madha Police Station,
District – Solapur.
(In respect of C.R.No.24 of 2014)

...Respondent

THROUGH

Superintendent,
Kolhapur Central Prison, Kalamba,
Kolhapur – 416 007.

Mr.Abhaykumar Apte, Appointed Advocate for the Appellant.

Mr.P.H.Gaikwad, A.P.P. for the Respondent - State.

CORAM : REVATI MOHITE DERE, J.

DATE : 5th APRIL, 2019

ORAL JUDGMENT :

1. The Appellant vide Judgment and Order dated 10th April, 2015,
passed by learned Special Judge, Solapur, in Sessions Case No.178 of

2014, has been convicted and sentenced as under:-

- for the offence punishable under Section 363 of the Indian Penal Code to suffer rigorous imprisonment for 5 years and to pay fine of Rs.500/- in default, to undergo rigorous imprisonment for 3 months;
- for the offence punishable under Section 366A of the Indian Penal Code to suffer rigorous imprisonment for 5 years and to pay fine of Rs.500/- in default, to undergo rigorous imprisonment for 3 months;
- for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 5,000/- in default, to undergo rigorous imprisonment for 6 months;

All the substantive sentences were directed to run concurrently.

Out of the fine amount, compensation of Rs.5,000/- was directed to be paid to the prosecutrix under Section 357(1) (b) of the Code of Criminal Procedure.

2. The prosecution case in brief is as follows:-

According to the PW7 – API, Ashok Shirke, he was attached to the Madha Police Station, Solapur, at the relevant time. He has stated

that on 31st March, 2014, Station Officer, Raigude, registered C.R.No.24 of 2014 at the instance of PW2 – mother of the prosecutrix, for the alleged offences punishable under Sections 363, 366 of the Indian Penal Code and under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO). According to PW2 – mother of the prosecutrix and complainant, her entire family including PW1 (prosecutrix) was working with one Taty Pandhare, a contractor, who was doing the work of Sugarcane Crushing. She has stated that on the day of the incident i.e. on 29th March, 2014, they were all resting in the field, when the prosecutrix told her that she wanted to answer the nature's call. She has stated that the prosecutrix went to the sugarcane field, however, did not return and hence they searched for her but could not find her. According to the complainant (PW2), the appellant was also found to be missing. She has stated that they went in search of the prosecutrix to the appellant's village, however, the appellant was not present at home. Accordingly, PW2 lodged a complaint, as against the appellant on 31st March, 2014 with the Madha Police Station (Exhibit – 20/A to 20/D). After a month, the prosecutrix was tracked down at Tasgaon. She has stated that the Tasgaon Police Patil and the Police brought the prosecutrix to Madha Police Station and informed them. She

has stated that the prosecutrix disclosed to her that the appellant had sexually assaulted her. During the course of investigation, statements were recorded, clothes were seized and after investigation, charge-sheet was filed, as against the appellant and one Sachin Gorakh Gaikwad in the court of the learned J.M.F.C. Although, initially the FIR was registered under Sections 363 and 366A of the Indian Penal Code, subsequently, during the course of investigation, Section 376 of the Indian Penal Code was added. Since the offences were sessions triable, the case was committed to the Court of Sessions.

Charge was framed as against the appellant for the offences punishable under Sections 363, 366A, 376 of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, to which the appellant pleaded not guilty and claimed to be tried.

The prosecutrix in support of his case examined 7 witnesses. PW1 – the prosecutrix ; PW2 – mother of the prosecutrix; PW3 – Sarjerao Gadekar, panch to the seizure of clothes of the prosecutrix; PW4 – Dr.Chandrakant Jadhav, the doctor who examined the prosecutrix, PW5 – Jabbar Tamboli, Head Master of the Zilla Parishad Primary School, Anjangaon(Kheloba), Madha, where the prosecutrix was studying; PW6-

Narendra Patil, where the appellant and the prosecutrix were working in his field and PW7 – API Ashok Shirke, the Investigating Officer.

The defence of the Appellant was that of total denial and false implication. The tenor of the cross examination was to suggest that the appellant and the prosecutrix were in a relationship and were in love with each other and that the prosecutrix had run away with the appellant.

The learned Special Judge, after considering the evidence on record was pleased to convict the appellant as aforesaid in paragraph 1 of this Judgment. The learned Special Judge, was however pleased to acquit co-accused - Sachin Gorakh Gaikwad of all the offences.

3. Learned Advocate, appointed for the Appellant submitted that the Appellant has been falsely implicated in the said case. He submitted that the evidence on record will suggest that the prosecutrix had run away with the appellant on her own accord and that they were staying together at Tasgaon, Sangli as husband and wife, and were working together in the field of PW6 – Narendra Patil. He submitted that the evidence on record will show that it was a case of a love affair between the appellant and the prosecutrix. He submitted that in the alternative the sentence imposed on

the appellant be reduced to the period undergone.

4. Learned APP supported the impugned Judgment and Order of conviction and sentence. He submitted that the prosecution had proved its case beyond reasonable doubt, including the fact, that the prosecutrix was a minor at the relevant time. He submitted that the question of consent would not arise, since the prosecutrix was a minor at the relevant time, aged about 16 years.

5. Heard learned counsel for the parties at length and perused the evidence with the assistance of the learned counsel.

6. A perusal of the evidence of PW1 – prosecutrix shows that she was residing with her parents and brother and that the entire family was working with one Taty Pandhare, a contractor, who was doing the work of sugarcane crushing. PW1 – prosecutrix has stated that the appellant was working as a driver of the Tractor. She has stated that on 29th March, 2014 at around 3 to 4 p.m., when her entire family was resting in the sugarcane field, she told her mother that she wanted to answer the nature's call and

accordingly went to the sugarcane field; that she saw the appellant in the sugarcane field; that the appellant asked her to accompany him; that she went alongwith the appellant; that on the road, 3 persons were standing with a four wheeler vehicle, out of which one was original accused no.2- Sachin Gaikwad. PW1 – prosecutrix has stated that the appellant took her to his native place, i.e. to his grandmother's house, where they halted for a day; that thereafter the appellant took her to another village, where they stayed; that thereafter the appellant took her to Tasgaon, Sangli, where PW6 – Narendra Patil, employed the appellant for agricultural work. She has stated that PW6 – Narendra provided a room for their stay. According to PW1 – prosecutrix, during their stay in the field of PW.6 – Narendra, the appellant had sexual relations with her. She has stated that on 28th April, 2014, i.e. almost after a month of her leaving her parents's house, her parents had come to the field of PW6-Narendra alongwith the police, however the appellant took her to the standing sugarcane crop. She has stated that the appellant did not allow her to meet her parents and that by the time she reached the house of PW6 – Narendra, her parents and the police had left. She has stated that she disclosed to PW6 – Narendra that she wanted to meet her parents, pursuant to which PW6 – Narendra called

the Police Patil of Tasgaon and she was taken to Madha Police Station and her custody was handed over to her parents. According to the prosecutrix, she was thereafter referred for medical examination and her clothes were seized. She has stated that her date of birth is 23rd March, 1999 and she had completed 7th standard, when the incident took place. The tenor of PW1's cross examination is to show that the prosecutrix was a consenting party to all the events that took place and that it was at her instance that the appellant had taken her to Tasgaon, where they resided as husband and wife. Several omissions were also brought on record in the cross examination of the said witness i.e. non-disclosure by her of the incident to her parents on her return; non-disclosure about hiding in the sugarcane field on 28th April, 2014, when her parents and police had come; non-disclosure of the information given by PW6 – Narendra to the Police Patil of Tasgaon at her instance; and non-disclosure of the fact that she had gone to answer the nature's call, where she found the appellant present in the sugarcane field. PW1 – prosecutrix in her cross examination has admitted that the appellant was working as a driver on the tractor of Tatya Pandhare with whom, she and her parents were working. She has also admitted that she was acquainted with the appellant, however, has denied that their

acquaintance turned into a love affair. She has also admitted that the appellant and her parents had mobile; that her parents would scold her when she would talk with the appellant and that her parents and the appellant were not on good terms for the said reason. Although suggestions were made to PW1, that on the day of the incident, she had called the appellant; that it was a one sided love affair; that she had threatened the appellant on the day of the incident on his mobile asking him to take her away, failing which, she would commit suicide, she has denied the said suggestions. She has denied the suggestion that she forced the appellant to have sexual relations with her.

7. The evidence of PW2 – mother of the prosecutrix and the complainant shows that she and her family were working with one Tatya Pandhare, a contractor, doing the work of Sugarcane Crushing. She has stated that the appellant was a driver of the tractor. According to PW2, on the day of the incident, they were resting in the field, when the prosecutrix told her that she wanted to go to answer the nature's call. She has stated that since the prosecutrix did not turn up, they searched for her, but she could not be traced. She has further stated that as the appellant was also

found missing, her husband called the appellant on his mobile, however his mobile was found to be switched off. She has stated that thereafter they went to the appellant's house, however, did not find him home and on enquiring with the appellant's parents, learnt that the appellant had not returned the home. According to PW2, she was sure that the appellant had kidnapped her daughter and hence she lodged an FIR as against the appellant on 31st March, 2014, alleging offences punishable under Sections 363, 366A of the Indian Penal Code. The complaint/FIR is at (Exhibit – 20/A to 20/D). PW2 has further stated that her daughter (prosecutrix) was traced out after a month from Tasgaon, Sangli. She has stated that they had been to Tasgaon, however, the appellant had eloped with her daughter from Tasgaon. She has stated that the police informed her later that her daughter was brought to Madha Police Station, pursuant to which, they went to the Police Station and the custody of the prosecutrix was handed over to them. According to the complainant, PW2, her daughter (prosecutrix) disclosed to her that the appellant had committed rape on her.

8. In her cross examination, PW2 has admitted that she did not made any enquiry with PW6 – Narendra of Tasgaon. She has also admitted

that they did not find the appellant and the prosecutrix in the field of PW6 – Narendra and had learnt that their daughter had left from there. She has also admitted that PW6 – Narendra's wife had called and told them that their daughter was safe. She has also admitted that when the prosecutrix was brought to Madha Police Station, the police had asked her, whether she used to beat the prosecutrix. PW2 has however denied the suggestion that the prosecutrix had told the police that she did not want to stay with her. According to PW2, the police handed over the custody of her daughter to her after almost after 10 to 12 days of finding her. PW2 has denied the suggestion that her daughter was in love with the appellant and that her family members were well aware of the said fact; that she disliked the interaction between the appellant and her daughter and that she used to abuse and assault her daughter to ensure that she did not talk with the appellant and that her daughter had told the police, that she herself had taken the appellant.

9. The evidence of PW6 – Narendra Patil, shows that he was living in Taluka - Tasgaon in his field. He has stated that he knew the appellant as he was working with him on his field since 2nd April, 2014 to

28th April, 2014. According to PW6 – Narendra, the appellant and his wife (prosecutrix) were living in his field. He has stated that the appellant and the prosecutrix came to him on 2nd April, 2014 and disclosed to him that there was a difference of opinion with their family members and that they were thrown out of the house and as such requested him to provide work to them. He has stated that he retained them and gave them one room in his field to stay. He has stated that on 28th April, 2014, he received a call from his friend, who told him that there was something suspicious about the appellant and the prosecutrix and that the police were on their way to his house. He has stated that after hearing the said mobile conversation, the appellant and his wife (prosecutrix) fled from the spot. He has stated that the police personnel from Madha and the parents of the prosecutrix and two police from Tasgaon Police Station had come to his field to make enquiry about the appellant and his wife (prosecutrix). He has stated that they made efforts to trace the appellant and his wife (prosecutrix), however, could not find them. He has stated that on the next day in the morning, the appellant wife (prosecutrix) came to his house for drinking water and for fetching clothes, pursuant to which, she was handed over to the Tasgaon Police Station. He has stated that on 28th April, 2014, he learnt from the

police that the appellant and his wife (prosecutrix) had no relations between them as husband and wife and that the appellant had enticed the prosecutrix. In his cross examination, PW6 – Narendra has admitted that the appellant was working in his field from 10.00 a.m. to 1.00 p.m.; that the appellant's wife (prosecutrix) would assist his wife in domestic chores; that his wife would talk with the prosecutrix; that before providing work, he had made enquiry with the appellant and his wife (prosecutrix) and that the prosecutrix had told that she had married the appellant; and that the prosecutrix was wearing a mangalsutra to show the same. From the evidence and few admissions of PW6 – Narendra, it is evident that there was some love affair between the appellant and the prosecutrix. It appears that the prosecutrix and the appellant had gone to Tasgaon, where they were living as husband and wife. There is no reason to disbelieve the testimony of PW6, who is an independent witness.

10. The question that arises is whether the prosecutrix (PW1) was a minor at the relevant time. The evidence on record clearly shows that the prosecutrix (PW1) was about 16 years of age, at the relevant time. Not only has PW1 given her date of birth as 23rd March, 1999 but even PW2,

her mother had deposed that her daughter (PW1) was 16 years at the relevant time. The prosecution in order to prove the prosecutrix's date of birth has examined PW5 – Jabbar Tamboli, Head Master of the Zilla Parishad Primary School, Anjangaon(Kheloba), Madha. PW5 - Jabbar has produced the School Register as well as School Leaving Certificate to show that the date of birth of the prosecutrix is 23rd March, 1999. The School Leaving Certificate was exhibited as Exhibit – 25. The evidence of Doctor also shows that after performing ossification test it was opined that the prosecutrix was aged between 14 to 16 years. Infact learned appointed Advocate does not dispute the age of the prosecutrix. The law is well settled, once the Court comes to a conclusion that the prosecutrix is a minor i.e. below the age of 18 years, the question of consent does not arise. The evidence on record suggests and shows that the prosecutrix and the appellant were in a relationship, which fact was also known to the prosecutrix's parents. The evidence of PW6 – Narendra, an independent witness shows, that the prosecutrix and the appellant were living together as husband and wife, that the prosecutrix was helping his wife with household chores, however, at no point of time in that one month, the prosecutrix complained to his wife, against the appellant. However,

considering the age of the prosecutrix, consent is immaterial.

11. In this view of the matter, there is no infirmity in the impugned Judgment and Order of conviction. However, as far as sentence is concerned, having regard to the peculiar facts and circumstances of the case, the sentence for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, is reduced from 10 years to 7 years, which is the minimum sentence provided under Section 4 of the Protection of Children from Sexual Offences Act. The sentence imposed under Sections 363, 366A of the Indian Penal Code, as well as fine imposed for all the offences i.e. under Sections 363, 366A of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, is however maintained.

12. The Appeal is partly allowed in the aforesaid terms and is accordingly disposed of.

13. I would like to record a word of appreciation for the able assistance provided and the efforts taken by Mr.Abhaykumar Apte, as an appointed advocate, in conducting the appeal. High Court Legal Services Committee to award fees of the learned Appointed Advocate, as per Rules.

REVATI MOHITE DERE, J.