

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.477 OF 2015

Pramod Dattatraya Jadhav,
Age 34 years, R/o.Behind Hotel
Ketki, Dindori, Dist.: Nashik,
(Presently lodged at Nashik Road,
Central Prison, Nashik)

... **Appellant**

V/s.

The State of Maharashtra,
(Through Dindori Police Station
Tal : Dindori, Nashik)

... **Respondent**

.....

Mr.Ganesh Gole with Mr.Ateet Shirodkar, Advocate for the
Appellant.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 31st JANUARY 2019.

ORAL JUDGMENT :

1 By this appeal, appellant/accused No.1 Pramod Jadhav, is challenging the Judgment and Order dated 16/02/2015 passed by the learned Additional Sessions Judge, Nashik thereby convicting the appellant/accused No.1 Pramod Jadhav of the offences punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual

Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' for the sake of brevity). For the offence punishable under Section 376 of the Indian Penal Code, appellant/accused No.1 Pramod Jadhav is sentenced to suffer rigorous imprisonment for ten years apart from imposition of fine of Rs.10,000/- and in default to undergo further rigorous imprisonment for two years. For the offence punishable under Section 4 of the POCSO Act, appellant/accused No.1 Pramod Jadhav is sentenced to suffer rigorous imprisonment for seven years apart from direction to pay fine of Rs.10,000/- and in default to further undergo rigorous imprisonment for one year. The substantive sentences are directed to run concurrently by the learned trial Court.

2 Facts leading to the prosecution and resultant conviction of appellant/accused No.1 Pramod Jadhav are thus :

- (a) According to the case of prosecution, the victim of the crime in question/P.W.No.2 is a school going girl taking education in 9th Std. at Janata Vidyalaya, Dindori, at the relevant time. She was residing along with her parents, brothers and other family members. P.W.No.1 Ganpat is her father. She was born on 28/10/1999 and, as such, on the day of the incident i.e. on 23/12/2013, she was about fifteen years of age and, as such, a child.

(b) Appellant/accused No.1 Pramod Jadhav was residing in the neighbourhood of the house of the victim female child/P.W.No.2. Families of the prosecution party and that of accused were sharing cordial relations and were on visiting terms. The victim female child/P.W.No.2 was taking tuition from appellant/accused No.1 Pramod Jadhav. With passage of time, she started liking appellant/accused No.1 Pramod Jadhav and love relations developed between them. On 22/12/2013, family members of the victim female child/P.W.No.2 sensed the love affair between the victim female child/P.W.No.2 and appellant/accused No.1 Pramod Jadhav. They became angry with the victim female child/P.W.No.2 and had beaten her. She then went to the house of appellant/accused No.1 Pramod Jadhav and informed this fact to him. She made it clear to appellant/accused No.1 Pramod Jadhav that she is in deep love with him and it is not possible for her to live without him. She disclosed him that she is leaving her parental house on the next day and if he fails to accompany her, she will commit suicide. Appellant/accused No.1 Pramod Jadhav agreed and then the victim female child/P.W.No.2 returned to her house.

(c) On the next day i.e. on 23/12/2013, as agreed, the victim female child/P.W.No.2 left the house by disclosing her

parents that she is going to the school. She went to Nashik and joined company of appellant/accused No.1 Pramod Jadhav. Then they went to Surat and stayed at a lodge. On the next day, they went to Ahmedabad and stayed in some lodge. There they had sexual relations. Thereafter, the couple went to Udaypur and stayed at Raj Lodge. Then, the victim female child/P.W.No.2 as well as appellant/accused No.1 Pramod Jadhav stayed at Champalal Dharmshala, Suraj Pol. Thereafter, they stayed in a rented room at Ambaneri as husband and wife.

(d) In the meanwhile, as the victim female child/P.W.No.2 went missing, her father P.W.No.1 Ganpat lodged missing report (Exhibit 23) on 25/12/2013 after frantic search for the victim yielded no result. As P.W.No.1 Ganpat came to know that his neighbourer i.e. appellant/accused No.1 Pramod Jadhav is also missing, he subsequently lodged FIR (Exhibit 24) suspecting that appellant/accused No.1 Pramod Jadhav had enticed her minor daughter/P.W.No.2. That is how, crime No.1 of 2014 for the offences punishable under Section 363 and 366 of the Indian Penal Code came to be registered at Police Station, Dindori, District Nashik. Wheels of investigation were then set in motion.

(e) Ultimately, on 19/02/2014, relatives of appellant/accused

No.1 Pramod Jadhav came to know regarding whereabouts of the couple and that is how they brought the couple back to Dindori town on 20/02/2014. Statement of the victim female child/P.W.No.2 came to be recorded on that day and provisions of Section 376 of the Indian Penal Code as well as that of the POCSO Act were added to the case diary of crime in question. Clothes of appellant/accused No.1 Pramod Jadhav came to be seized vide panchanama (Exhibit 35). Birth Certificate of the victim female child/P.W.No.2 (Exhibit 25) came to be collected. The victim female child/P.W.No.2 was got examined by P.W.No.4 Dr.Deepak Rajput, Medical Officer of Civil Hospital of Nashik. On completion of investigation, appellant/accused No.1 Pramod Jadhav came to be charge-sheeted along with other accused persons, who, according to the prosecution case, had aided and abetted appellant/accused No.1 Pramod Jadhav in commission of the crime in question.

- (f) The learned trial Court framed the charge for the offences punishable under Sections 363 read with Section 34, 376 and 506 of the Indian Penal Code as well as under Section 4 of the POCSO Act against the appellant/accused No.1 Pramod Jadhav and other accused persons. They abjured their guilt and claimed trial.

- (g) In order to bring home the guilt to appellant/accused No.1 Pramod Jadhav and the co-accused, the prosecution has examined in all four witnesses. First Informant-father of the victim namely Ganpat is examined as P.W.No.1. Missing report lodged by him on 25/12/2013 is at Exh.23 whereas the FIR lodged by him on 02/01/2014 is at Exhibit 24. Exhibit 25 is Birth Certificate of the victim female child dated 11/02/2014. The victim female child is examined as P.W.No.2. Investigating Officer Sanjay Shukla, Police Inspector of Dindori Police Station is examined as P.W.No.3. Exhibit 35 is the seizure panchanama of the clothes of appellant/accused No.1 Pramod Jadhav. Dr.Deepak Rajput, Medical Officer of Civil Hospital of Nashik, who had medically examined the victim female child/P.W.No.2, is examined as P.W.No.4. Papers of medical examination of the victim female child/P.W.No.2 are at Exhibit 49.
- (h) Defence of appellant/accused No.1 Pramod Jadhav was to the effect that the victim female child/P.W.No.2 was having love affair with him. She had threatened him that if he refuses to take her, she will commit suicide. She was beaten by her father.
- (i) After hearing the parties, learned trial Court by the impugned Judgment and Order came to the conclusion that the victim of

the crime in question, at the relevant time, was below eighteen years of age. Appellant/accused No.1 Pramod Jadhav had committed penetrative sexual assault on her at various places and that is how he had committed the offence punishable under Section 4 of the POCSO Act as well as under Section 376 of the Indian Penal Code. Accordingly, appellant/accused No.1 Pramod Jadhav came to be convicted and sentenced as indicated in the opening paragraph of this Judgment.

3 I heard Shri.Gole, the learned Counsel appearing for appellant/accused No.1 Pramod Jadhav. He vehemently argued that evidence of the victim female child/P.W.No.2 is totally unbelievable and unacceptable. She is thoroughly discredited by her former statement made to the Investigating Officer. It is further argued that the prosecution has failed to prove age of the alleged victim of the crime in question. The prosecution has relied on Birth Certificate at Exhibit 25. In submission of the learned Counsel for the appellant/accused No.1, said Certificate is not relating to the alleged victim of the crime in question. There is variance in the name of father of the child as per evidence led by the prosecution as well as name of father of the child shown in Birth Certificate (Exhibit 25). No link evidence is adduced by the prosecution to co-relate the Birth Certificate at Exhibit 25 with that of the victim of the crime in question. Therefore, in absence

of proof of age, it cannot be said that appellant/accused No.1 Pramod Jadhav has committed the offence punishable under Section 376 of the Indian Penal Code and under Section 4 of the POCSO Act. Evidence of the alleged victim is indicating her consent and, therefore, the prosecution has failed to prove that alleged sexual intercourse with the victim was without her consent and against her will. Shri.Gole, the learned Counsel placed reliance on the Judgment in the matter of *Paryanibai v. Bajirao*¹ delivered by the learned Single Judge of this Court to substantiate his contention that despite filing of Birth Certificate, link evidence to establish that the Birth Certificate relates to the victim is required to be adduced by the prosecution.

4 As against this, the learned Additional Public Prosecutor argued that age of the victim female child/P.W.No.2 is undisputed. Oral evidence in that regard adduced by the father of the victim as well as the victim herself is not challenged by the defence. Moreover, in answer to Question No.7 found in examination of appellant/accused No.1 Pramod Jadhav under Section 313 of the Code of Criminal Procedure, the appellant/accused has candidly admitted the fact that birth date of the victim female child/P.W.No.2 is 28/10/1999. Therefore, now, appellant/accused No.1 Pramod Jadhav cannot dispute age of the victim female child/P.W.No.2. The learned Additional Public Prosecutor submitted that as the age of the victim female

¹ AIR 1963 Bom. 25.

child/P.W.No.2 was less than 18 years, at the relevant time, her consent is not of no consequence. The learned Additional Public Prosecutor placed reliance on *Kundan s/o. Nanaji Pendor v. The State of Maharashtra*² to demonstrate that unchallenged oral evidence regarding age of the victim can be accepted. The learned Additional Public Prosecutor further argued that evidence of the victim female child/P.W.No.2 is gaining corroboration from medical evidence coming on record from mouth of P.W.No.4 Dr.Deepak Rajput, Medical Officer of Civil Hospital of Nashik, who had examined the victim female child/P.W.No.2.

5 I have considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence.

6 By now, it is well settled that victim of rape is not an accomplice, but she is victim of lust of another person. Her evidence stands on higher pedestal than that of an injured witness. Evidence of victim of rape case is required to receive same weight as is attached to evidence of an injured witness. If totality of circumstances emerging on record discloses that the victim of such crime does not have any motive to falsely implicate the accused, then evidence of such victim does not require any corroboration and the Court is required to accept such evidence. Broader probabilities of the prosecution case is required to be examined in

² 2017 ALL MR (Cri.) 1137.

such crimes and the Court is not expected to get swayed by minor contradictions and insignificant discrepancies in evidence of prosecution. At the same time, principle of criminal jurisprudence requires that the prosecution must establish its case by clear, cogent and trustworthy evidence. No matter how shameful and antisocial the crime is, the burden always rests on the prosecution to prove guilt of the accused beyond all reasonable doubt. The same principle is equally applicable to the cases of sexual offences. In such cases also, the prosecution is enjoined to prove all ingredients constituting the offence. Keeping in mind, these principles, let us examine whether it is proved by the prosecution that appellant/accused No.1 Pramod Jadhav had committed penetrative sexual assault on the victim female child/P.W.No.2 during the period from 23/12/2013 to 20/02/2014 at various places including Surat and Ahmedabad.

7 Considering nature of allegations, case of the prosecution to a large extent depends on testimony of the victim female child/P.W.No.2. She, undisputedly, was a school going girl taking education in 9th Std. at Janata Vidyalaya at Dindori. This fact is not disputed by the defence in any manner. As per version of the victim female child/P.W.No.2 before the Court, appellant/accused No.1 Pramod Jadhav was staying near her house with his parents, brothers and sister and she was taking tuition from him by visiting his house. Even her father P.W.No.1

Ganpat has deposed that his daughter used to attend tuition classes at the house of appellant/accused No.1 Pramod Jadhav and his family was having cordial relations with family of appellant/accused No.1 Pramod Jadhav. P.W.No.1 Ganpat testified that appellant/accused No.1 Pramod Jadhav was unmarried person at the time of commission of alleged offence. On this factual backdrop, it is in evidence of the victim female child/P.W.No.2 that on 23/12/2013, as usual she went to her school and at that time, appellant/accused No.1 Pramod Jadhav and his brother Sunil (acquitted accused) followed her. Appellant/accused No.1 Pramod Jadhav gave black coloured handkerchief to her and thereafter she lost her senses and was not aware as to what happened to her. The victim female child/P.W.No.2 has spoken that then she came to know that appellant/accused No.1 Pramod Jadhav had taken her to Surat. There she was taken in one room where appellant/accused No.1 Pramod Jadhav had committed forcible sexual intercourse with her. The victim female child/P.W.No.2 further deposed that then she was taken to Ahmedabad by bus and they stayed at Balaji Lodge. From there, they went to Udaypur and stayed there for few days in a lodge as well as in a room. As per her version, thereafter they stayed for about five days at one Dharmshala. She was then taken to a rented room where they stayed for a period of twenty days. As per her evidence, at all these places appellant/accused No.1 Pramod Jadhav had forcible sexual intercourse with

her. The victim female child/P.W.No.2 further narrated that then one four-wheeler vehicle came and she was brought to her native place by co-accused Sunil Jadhav and other persons. As per version of the victim female child/P.W.No.2 which is also corroborated by version of her father P.W.No.1 Ganpat and that of P.W.No.3 Sanjay Shukla, Investigating Officer, the victim female child/P.W.No.2 was in company of appellant/accused No.1 Pramod Jadhav from 23/12/2013 to 20/02/2014.

8 Now, let us examine theory of handing over of black handkerchief and resultant losing of senses by the victim female child/P.W.No.2 making her unaware as to what was happened to her. Cross-examination of the victim female child/P.W.No.2 unerringly points out that this theory which is set up by way of omission by her does not deserve a moment consideration. Material elicited from cross-examination of this victim shows that main road having heavy traffic leading to Vani town proceeds from the front of her school and the area of her school is always crowded with students, parents as well as staff of the school. Adjacent to her school, Tahsil office as well as Police Station of Dindori town is situated. A traffic constable or police constable is always available at the gate of her school. Several shops are situated adjacent to her school. The victim female child/P.W.No.2, as stated by her, attended her school as usual and then appellant/accused No.1 Pramod Jadhav along with co-

accused kidnapped her by giving black handkerchief to her. Situation prevalent on the spot, as stated by the victim female child/P.W.No.2 herself in her cross-examination, does not allow this Court to accept her theory that by merely passing a black handkerchief to her, she was made unconscious by appellant/accused No.1 Pramod Jadhav and then she was taken away by him from that crowded place initially to Surat and then to other places and that too by public transport vehicle.

9 Further cross-examination of the victim female child/P.W.No.2 shows that she travelled with appellant/accused No.1 Pramod Jadhav by bus of the State Transport Corporation. So-called black handkerchief was not tied on her eyes. In the evening, she reached Surat accompanied by appellant/accused No.1 Pramod Jadhav by the crowded bus which was halting at several places on the way. She admitted that during this journey she has not raised any protest nor she has shouted. Her cross-examination further reveals that even in Surat where she stayed at the rented room, she did not disclose anybody that she is kidnapped by appellant/accused No.1 Pramod Jadhav.

10 On the next day, during her journey by a bus to Ahmedabad, she did not protest. During her entire stay of two months with appellant/accused No.1 Pramod Jadhav at various places such as Ahmedabad, Amba Vihar, etc., as admitted by the

victim female child/P.W.No.2, she never attempted to extricate herself from clutches of appellant/accused No.1 Pramod Jadhav. She was undergoing her routine chores and never tried to escape from the custody of appellant/accused No.1 Pramod Jadhav. The couple was visiting the Ashram of Asaram Bapu and even visited the market for purchasing dress for her, as seen from evidence of the P.W.No.2. Still the victim female child/P.W.No.2, as seen from her cross-examination, never made any hue and cry for getting herself separated from company of appellant/accused No.1 Pramod Jadhav. The victim female child/P.W.No.2 wants this Court to believe that she went to various places accompanied by appellant/accused No.1 Pramod Jadhav after she lost her senses. This statement on the face of it is meaningless and absurd. To crown this all, the defence has got proved contradictions from her former statement recorded under Section 161 of the Code of Criminal Procedure and those contradictions proved through P.W.No.3 Sanjay Shukla, Investigating Officer are at Exhibits 43 to 45. These duly proved contradictions proved from the former statement of the victim female child/P.W.No.2 are to the following effect :-

"The victim female child/P.W.No.2 started liking appellant/accused No.1 Pramod Jadhav because he was her neighbourer. One year prior to the incident, she told him that she loves him and they shall marry. Appellant/accused No.1 Pramod Jadhav accepted this proposal and they use to

meet at his house. On 22/12/2013, parents of the victim female child/P.W.No.2 came to know about her love relations with appellant/accused No.1 Pramod Jadhav and, therefore, they had beaten her. She then went to the house of appellant/accused No.1 Pramod Jadhav and told him about the fact that her parents came to know about their love relations. She then told appellant/accused No.1 Pramod Jadhav that she loves him a lot and she is leaving her own house tomorrow. She warned appellant/accused No.1 Pramod Jadhav that if he fails to join her, she will commit suicide. Then, on 23/12/2013, she left her house and appellant/accused No.1 Pramod Jadhav took her by bus to Surat and on the next day they went to Ahmedabad and thereafter to Udaypur. At Ahmedabad, they stayed like husband and wife.'

11 Above noted contradictions brought on record by the defence make it highly improbable to accept version of the victim female child/P.W.No.2 that as she lost her senses, she was taken by appellant/accused No.1 Pramod Jadhav at various places and then she was subjected to forcible sexual intercourse by him. Being a female, the victim was supposed to develop reasonable mental capacity to know consequences of joining company of appellant/accused No.1 Pramod Jadhav and staying with him at various places far away from her own house. She must have

contemplated and anticipated the probable happenings right at the moment she joined company of appellant/accused No.1 Pramod Jadhav and still she continued to stay with him for a period from 23/12/2013 to 20/02/2014. In all probabilities, the victim female child/P.W.No.2 was desirous of being in company of appellant/accused No.1 Pramod Jadhav, but only so long as she along with appellant/accused No.1 Pramod Jadhav were brought back to the Police Station, Dindori. If all that which had taken place during her cohabitation with appellant/accused No.1 Pramod Jadhav, was taking place against her wish, the victim female child/P.W.No.2 had ample opportunities to report the matter to the neighbours or even to the police. Her testimony gives an impression that she went with appellant/accused No.1 Pramod Jadhav voluntarily and she was, in fact, anxious to go with him and had found opportune time to leave her house for joining company of appellant/accused No.1 Pramod Jadhav. It is not possible to believe her version that because of black handkerchief she failed to understand what is right for her and what is wrong for her and under the magic spell of black handkerchief, she was taken by appellant/accused No.1 Pramod Jadhav.

12 It is thus clear that the victim female child/P.W.No.2 was consenting party to what was happening with her from 23/12/2013 to 20/02/2014 and she had willingly submitted herself to the appellant/accused No.1.

13 In legal sense, the age of eighteen years is termed as age of majority. A female below eighteen years of age is considered as 'child' as per provisions of Section 2(d) of the POCSO Act. Even as per provisions of Sections 375 of the Indian Penal Code, age of consent is eighteen years. Sexual intercourse by a male with a female even with or without her consent when she is under eighteen years of age amounts to offence of rape as defined by Section 375 of the Indian Penal Code. Committing penetrative sexual assault on a female below eighteen years of age makes a person liable for offence punishable under Section 4 of the POCSO Act. Thus, in order to make out the offence of rape so also that of penetrative sexual assault as defined by Section 3 of the POCSO Act, the prosecution is duty bound to establish by cogent and trustworthy evidence that the victim female child/P.W.No.2, at the time of commission of alleged offence, was below eighteen years of age. Otherwise her evidence is indicative of the fact that what was happening with her was with her active will and with her consent. In order to prove age of the victim female child/P.W.No.2, the prosecution is heavily relied on oral evidence of her father P.W.No.1 Ganpat so also oral evidence of the victim female child/P.W.No.2. Both of them have unanimously stated that the victim female child/P.W.No.2 was born on 28/10/1999 and the at the time of incident, she was studying in 9th Std. at Janata Vidyalaya of Dindori. In addition to this oral evidence, prosecution has placed on record Birth

Certificate (Exhibit 25) issued by the Registering Authority i.e. Kopargaon Municipal Council, Kopargaon. This Certificate at Exhibit 25 is issued as per provisions of Sections 12 and 17 of the Registration of Births and Deaths Act, 1969. This Certificate at Exhibit 25 shows that Sunita is mother and Ganesh is father of the female child born on 28/10/1999.

14 The learned Additional Public Prosecutor has pointed out answer given by the appellant/accused No.1 Pramod Jadhav to Question No.7 from his statement under Section 313 of the Code of Criminal Procedure. This is done in order to demonstrate that date of birth of the victim female child/P.W.No.2 is 28/10/1999 and the same is not disputed by the defence. Question 7 in statement of appellant/accused No.1 Pramod Jadhav recorded under Section 313 of the Code of Criminal Procedure as well as answer given thereto by appellant/accused No.1 Pramod Jadhav reads thus :

“Q7.It has further come in the evidence of PW 2 victim girl that her birth date is 28/10/1999. She studied up to 9th Std. You accused no.1 was staying near her house along with you-accused nos. 2 to 4. What to you want to say about it ?

A. It is true.”

15 It is well settled that statement of accused under Section 313 is not evidence of concerned accused. It is merely stand or version of concerned accused, which is not on oath. If long series of facts are strung together and accused is asked what he has to say about it, the same amounts to non-compliance of provisions of Section 313 of the Code of Criminal Procedure. In examination of accused under Section 313 of the Code of Criminal Procedure, the questions must be framed in a form which an ignorant or illiterate person will be able to appreciate and understand. Fairness requires that each material circumstances is put simply and separately in a way that an ordinary ignorant person can readily understand it in order to give correct answer. Confusing, long and rolled up questions joining various facts are required to be avoided as accused cannot answer such questions precisely and properly.

16 In case in hand, the defence was not disputing the fact that accused was residing near house of the victim female child/P.W.No.2. Appellant/accused No.1 Pramod Jadhav had not disputed the fact that the victim was studying in 9th Std. These are different circumstances, which ought not to have been clubbed with the date of birth of the victim, by the learned trial Court during course of examination of accused under Section 313 of the Code of Criminal Procedure. In fact, in cross-examination of P.W.No.1 Ganpat, the defence had put to him that his daughter

i.e. the alleged victim was attending the tuition class at the house of appellant/accused No.1 Pramod Jadhav, who was residing in the vicinity of their house. Chief-examination of P.W.No.1 Ganpat so also that of the victim shows that house of the prosecution party as well as that of appellant/accused No.1 Pramod Jadhav were situated near each other. In the light of this undisputed factual situation, as different circumstances were mixed together and were put to appellant/accused No.1 Pramod Jadhav in Question No.7, it is but obvious that he has answered this question in affirmative. However, that doesn't mean that appellant/accused No.1 Pramod Jadhav has admitted birth date of the victim female child/P.W.No.2 as 28/10/1999. This is particularly so when in cross-examination of P.W.No.1 Ganpat, the defence has put a categorical question to him that name of this witness is Ganpat and not Ganesh and it was further suggested to him that Birth Certificate at Exhibit 25 is not in respect of birth of his female child. Oral evidence in respect of date of birth of the victim never went unchallenged. Therefore, no overbearing importance can be given to affirmative answer given by appellant/accused No.1 Pramod Jadhav to bundled up and rolled question framed at Serial Number 7 by the learned trial Court. Even otherwise oral evidence is hardly any assistance to determine age of the person.

17 Now coming to the Birth Certificate at Exhibit 25 which is reflecting date of birth as 28/10/1999 of a female child born to Sunita wife and Ganesh and Ganesh son of Rangnath.

This Birth Certificate at Exhibit 25 was issued by Registering Authority under Registration of Births and Deaths Act, 1969 i.e. Municipal Council of Kopargaon. It is reflecting birth of a female child at Kopargaon to mother named Sunita wife of Ganesh and father named Ganesh son of Rangnath. P.W.No.1 Ganpat has candidly stated in his cross-examination that his name is not Ganesh, but his name is Ganpat. The prosecution has not adduced any evidence to show that the victim female child/P.W.No.2, who is alleged victim of the crime in question was born at Kopargaon. It is not deposed by P.W.No.1 Ganpat that his wife had given birth to his female child (the victim female child/P.W.No.2) at Kopargaon nor the victim female child/P.W.No.2 has deposed that she was born at Kopargaon. Name of father of female child in Birth Certificate (Exhibit 25) is Ganesh and not Ganpat. Evidence of P.W.No.1 Ganpat is conspicuously silent about name of his wife. Similarly, evidence of the victim female child/P.W.No.2 is conspicuously silent about name of her mother. Why name of mother of the victim female child/P.W.No.2 is suppressed by the prosecution is not understood in the light of cross-examination of very first witness P.W.No.1 Ganpat whereby it was sought to be demonstrated that the Birth Certificate (Exhibit 25) is not of the P.W.No.2. It was necessary on the part of the prosecution to bring on record name of mother of P.W.No.2 so as to demonstrate that the Birth Certificate (Exhibit 25) relates to the victim female child/P.W.No.2.

18 At this juncture, it is apposite to quote observations of the learned Single Judge of this Court in the matter of ***Paryanibai (supra)***. It was an appeal filed by Paryanibai widow of Raghoji whose suit for a declaration that respondent Bajirao was not a validly adopted son of her deceased son Baliram had been dismissed by Courts below. The ground on which the adoption was challenged as invalid was that the adoptive mother Mathurabai was of an immature age and had not attained the age of discretion. In the light of these facts, following observations of this Court found in paragraph 9 of the said Judgment :

“9. It must be observed at the outset that a certain conclusion as to the issue involved has been lost sight of because the contention was that the boy was adopted by both the widows and what was put in issue was the age of discretion of the widows of Baliram. It is no longer disputed and could not be disputed that the only widow of Baliram who had a right to adopt was the senior widow viz., Mathurabai and that whether or not the other widow viz. Dhrupatabai consented or did not consent to the adoption would not affect its validity one way or the other. Thus the evidence introducing to show the age of the other widow, viz., Dhrupatabai or the argument that both the widows had attained the age of discretion really clouds the issue which is whether Mathurabai had attained the age of discretion and what was the age of Mathurabai. It is not disputed here that it was Mathurabai who took the defendant in adoption and what had to be established was the age of Mathurabai and whether she was competent to

adopt and whether the adoption effected by her was a conscious act on her part. The learned Judges of both the Courts below have assumed that Ext. D-8, which purports to be an entry of date of birth of a daughter called Gajri born to one Gunaji is proved to be the entry relating to the date of birth of the adoptive mother Mathurabai. Unfortunately there is no basis for such assumption. It is no doubt true that the entry regarding the birth maintained in the kotwari book like birth register is receivable in evidence under Section 35 of the Indian Evidence Act. But it is wrong to assume that mere filing of a copy of an entry in the birth register or the kotwari book proves *ipso facto* that the entry relates to or proves the birth of the person concerned; evidence has to be introduced to connect that entry with the person whose date of birth has to be established. Thus the learned Judges of the Courts below were wrong in finding that merely because a certified copy of the entry of the date of birth from the kotwari book was filed at Exh. D-8, and P. W. 1 Paryanibai admitted that Mathurabai was called Gajari and that her father's name was Gunaji. This much material on record automatically established that Mathurabai was born on the date mentioned in Exh. D-8. It was necessary for the defendant to further lead evidence to prove by calling relations or some other persons that Mathurabai was born at the village from which the Kotwari book entry is produced, that she was born to Gunaji, the number of children that Gunaji had and that the report of the birth was made in respect of the birth of Mathurabai. If this necessary and vital link is missing in the chain of evidence,

then the defendant must be taken to have failed to connect the entry in the kotwari book register as the entry with respect to the date of birth of Mathurabai which fact had to be proved by the defendant. It is only necessary to invite attention in this case to a few decisions such as *State of M. P. v. Kamruddin*, 1955 Nag LJ 799 : (AIR 1956 Nag 74), *Hemanta Kumar Das v. Alliantz Umd Stuttgarter Life Insurance Co., Ltd.* and *Eiseswar Misra v. The King*, AIR 1949 Orissa 22. It is now the established rule that connection of the identity of the person under the entry must be established by other evidence. Entries of names of persons in a register of birth or deaths or marriages cannot be that evidence by itself and the identity of the persons with the entry should be fully proved. I, therefore, hold differing from the Courts below, that the defendant has failed to establish that Mathurabai was born on 20th June, 1935, as is assumed in the lower Courts relying on Exh. D-8."

19 It is thus clear that mere filing of Birth Certificate of a person is not of any assistance to the prosecution unless and until link evidence is adduced to demonstrate that such Birth Certificate relates to the female whose age is sought to be proved by the prosecution. Identity of the person under the Birth Certificate must be established by adducing corroborative evidence by the prosecution. Mere Birth Certificate cannot be evidence to prove age of a particular person unless and until it is established that the Birth Certificate is in respect of particular person whose age is sought to be proved by the prosecution.

20 In the case in hand, no such link evidence is produced by the prosecution. On the contrary, reasonable doubt arose in the judicial mind as to how name of father of the female child in Birth Certificate (Exhibit 25) is mentioned as Ganesh instead Ganpat. The doubt gets further strengthened because though the prosecution was aware that the Birth Certificate is being disputed, no evidence regarding name of mother of the victim female child/P.W.No.2 was adduced by the prosecution. By bringing name of the P.W.No.2 on record, the prosecution could have demonstrated that the same name is reflected as name of mother of the female child in the Certificate (Exhibit 25). That apart, though it is case of prosecution that the victim female child/P.W.No.2 was taking education in 9th Std. in Janata Vidyalaya, Dindori, the prosecution has not taken any efforts to collect General Register of that school in order to adduce evidence regarding recorded date of birth of the victim female child/P.W.No.2 in her school.

21 The learned Additional Public Prosecutor has relied on Judgment in the matter of *Kundan s/o. Nanaji Pendor (supra)*. The facts of that case can be distinguished. In the said case report of ossification test of the victim was relied upon by this Court by holding that oral evidence of the victim is in tune with her bony age. Such is not the case in hand as evidence in respect of age of the victim female child/P.W.No.2 lead by the prosecution is totally

unsatisfactory and though other evidence in the form of recorded date of birth in school in which the victim was taking education was available, the same is suppressed from the Court by the prosecution. This leads to drawing adverse inference against the prosecution. With such evidence, it cannot be held that the victim/P.W.No.2 was below eighteen years of age at the time of the incident in question.

22 In the result, it cannot be said that the sexual intercourse between appellant/accused No.1 Pramod Jadhav and the victim female/P.W.No.2 was amounting to rape or penetrative sexual assault. On the contrary, it seems to be consensual sex. The appellant/accused No.1 is, therefore, entitled for benefit of doubt.

23 Net result of foregoing discussion requires me to hold that the impugned Judgment and Order of the learned trial Court cannot be sustained and, as such, the Order :

ORDER

(i) The Appeal is allowed.

(ii) The impugned Judgment and Order of conviction and resultant sentence dated 16/02/2015 passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.121 of 2014 is quashed and set aside.

- (iii) Appellant/accused No.1 Pramod Dattatraya Jadhav is acquitted of offences punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act.
- (iv) He be set at liberty if not required in any case.
- (v) Fine amount, if any, paid by him be refunded to him.
- (vi) The Appeal is accordingly disposed of.

(A.M.BADAR J.)