

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.249 OF 2020

- 1) Gopal s/o Shivaji Bhosale,
Age 26 years, Occupation Agri.,
R/o Kherda (Kh), Tq. Majalgaon
Dist. Beed.
- 2) Sachin s/o Asaram More,
Age 29 years, Occupation Driver,
R/o Talkhed Tq. Majalgaon Dist.Beed. **...Appellant**
(Accused No.1 & 2)

VERSUS

The State of Maharashtra. **...Respondent**

.....
Advocate for Appellants : Mr. S. J. Salunke &
Mr. M. P. Kale.
APP for Respondent -State : Ms. Vaishali Patil Jadhav
.....

WITH

CRIMINAL APPEAL NO.252 OF 2020

Audumbar s/o magan Ringane,
Age 25 years, Occupation Education,
R/o Kherda (Kh) Tq. Majalgaon,
Dist. Beed. **...Appellant**
(Accused No.3)

VERSUS

The State of Maharashtra. **...Respondent**

Advocate for Appellants : Mr. S. J. Salunke &
Mr. M. P. Kale.
APP for Respondent -State : Ms. Vaishali Patil Jadhav

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Judgment :
29-09-2020.**

**Date of Pronouncing The Judgment :
02-12-2020.**

JUDGMENT :

1. Criminal Appeal No.249 of 2020 is filed by original accused No.1 and 2 and Appeal No.252 of 2020 is filed by original accused No.3; challenging their conviction by learned Special Judge, Majalgaon, Dist. Beed in Special (CHILD) Case No.06 of 2016, on 12-02-2020, for the offence punishable under Section 354-A of the Indian Penal Code and Section 363, 511 read with 34 of the Indian Penal Code and Section 8 of The Protection of Children from Sexual Offences (POCSO) Act, 2012. Accused No.2 has been held guilty for committing offence punishable under Section 363, 511 read with 34 of the Indian Penal Code with other two accused.

2. The prosecution had come with a case that, informant who is girl aged 16 lodged First Information Report (FIR) on 26-01-2016

stating that as it was Republic Day, she got up early and she along with her cousin sister started for their school at about 06.30 a.m. for Flag Hoisting. When they were at a distance of about 200 meters away from their school on Kherda to Ekdara road, they found that one white Indica car was parked by the side of the road. When they reached near that spot, it was 06.55 a.m. When she and her cousin were walking by the side of the road, suddenly accused No.1 and 3 got down from the said car. Accused No.1 caught hold of the hand of the informant and started to drag her towards the car with ill intention. The cousin sister of the informant was resisting accused No.1 but at that time accused No.3 caught hold of her hand and started to drag her also towards the car. They both were resisting and manhandling took place, they were shouting for help and, therefore, by hearing their voice, their school teachers and other students came towards them running. At that time accused No.1 and 2 shouted to one Sachin that, he should start the vehicle and, thereafter, accused No.1 and 3 got in the car and the car went speedily towards Talkhed village. The informant went to Police Station and then lodged the report which was then registered vide Crime No.17 of 2016 and the investigation was taken up.

3. During the course of the investigation the statements of the witnesses were recorded by police. So also their statements were got recorded under Section 164 of the Code of Criminal Procedure. Panchanama of the spot was carried out. Certain documents appears to have been collected. Accused persons came to be arrested and after the completion of the investigation, charge-sheet was filed before the Special Court.

4. Charge was framed against all the three accused persons vide Exhibit 30. Nine witnesses have been examined by the prosecution to support its case. Taking into consideration the incriminating evidence, the statement of the accused persons under Section 313 of Code of Criminal Procedure has been recorded. After considering the evidence on record and hearing both the sides, the learned Special Judge has convicted all the three accused persons under different sections. They have been sentenced thus ;

“1] Accused nos.1 and 3 are hereby convicted as per Section 235(2) of Criminal Procedure Code for the offence punishable under Section 354[A] of Indian Penal Code and sentenced to suffer rigorous imprisonment for 1 [one] year and and fine of Rs. 2,000/- each, in default to suffer one month simple imprisonment.

2] The accused nos. 1 to 3 are convicted for the offence

punishable under Section 363, 511 r.w. 34 of Indian Penal Code and sentenced to suffer rigorous imprisonment for 3 [three] years and to pay fine of Rs. 3,000/- (Rupees Three Thousand Only) each in default to suffer two month simple imprisonment.

3] The accused nos. 1 and 3 are convicted for the offence punishable under Section 8 of the POCSO Act and sentenced to suffer rigorous imprisonment for 3 [three] years and to pay fine of Rs. 3,000/- (Rupees Three Thousand Only) each in default to suffer two month simple imprisonment.”

Further accused No.2 has been acquitted of the offence punishable under Section 354-A of Indian Penal Code and Section 8 of the POCSO Act. All the sentences have been directed to be run concurrently. This appeal has been filed by the accused persons to challenge conviction awarded against them.

5. Heard learned Advocate Mr. S. J. Salunke and Mr. M. P. Kale for appellants and learned Additional Public Prosecutor Ms. Vaishali Patil Jadhav for respondent-State.

6. It has been vehemently submitted by learned Advocate Mr. S. J. Salunke for appellant that though the informant girl has stated that her age is 16 in her FIR Exhibit 53, yet her age is not proved by the prosecution. She had not given date of birth in her FIR nor it was stated in her statement under Section 164 of Code of Criminal

Procedure, however she has stated her birth date in her examination-in-chief. It is omission and even after giving an opportunity to explain the said omission in her cross-examination, she has not assigned any reason. P.W.2 is the father of the informant. He has given her age and not birth date. Same is the case with P.W.3 who is the cousin sister of the informant. She has not given her birth date in her statement under Section 161 of Code of Criminal Procedure so also in her statement under Section 164 of Code of Criminal Procedure, therefore it is also an omission. Prosecution has only filled the lacunae those were left in the course of investigation. School record Exhibit 71 and 72 are the extracts of admission in which their birth date is mentioned, however the original source of the information for the birth date was not produced. P.W.5 Dattatraya Dnyanoba Walaskar, who proved those documents i.e. Exhibit 71 and 72, has not produced the original birth certificate or any such information to support the said date of birth. In his cross-examination he has specifically stated that at the time of admissions of the girls, their birth certificates of the Grampanchayat or Government Hospital or any private hospital were not submitted. Therefore, when the basis for their birth date in the register is not proved, then it cannot be stated that the girls are

“child” within the definition of POCSO Act. The presumption under Section 29 of the POCSO Act will not arise. He placed reliance on the decisions in,

- i) *Madan Mohan Sing and Ors. v. Rajni Kant and Anr.*, reported in 2010 AIR SCW 4932,
- ii) *Prakash Jaganath Pawar v. State of Maharashtra*, reported in 2016 (1) ABR (CRI) 201 :: 2015 ALL MR (CRI) 3898,
- iii) *Sujoy alias Sanjay Laltu Chakravarty v. State of Maharashtra*, reported in 2018 (2) ABR (CRI) 307, and
- iv) *Mohan Ambadas Meshram v. State of Maharashtra*, reported in 2018 (2) ABR (CRI) 947.

All these decisions are on the point that the authenticity of the entries in the school record should be proved and in absence of the same, the age of the prosecutrix cannot be said to have been proved or the minority of the victim is not proved, and therefore, presumption under Section 29 of the POCSO Act will not arise.

7. Learned Advocate Mr. S. J. Salunke would further submit that P.W.4 Tulshiram Sakharam Khote, though has been posed as eye-witness, yet he has also been examined in the capacity as spot panch. In fact, he has told that he was not knowing the accused persons, yet then went on to say their names. He has stated that he came to know about the names of accused No.1 and 3 through one

Sikandar who was present there. P.W.7 Sikandar Kishanrao Shejul who has been posed as eye-witness is the relative of the informant, and therefore, he was bound to support the prosecution story. P.W.8 Balaji Anantrao More, the Head Master of the primary school where the girls had taken education earlier, was not serving in the same school when the girls had taken admission and, therefore, the entries in Exhibit 71 and 72 were not done by him nor they were within his personal knowledge. Medical examination of the child has not been conducted in this case as per Section 27 of the POCSO Act, so also the test of identification parade has not been conducted as contemplated under Section 54-A of the Code of Criminal procedure. With this kind of legal flaw it cannot be said that the offence has been proved against the accused persons beyond reasonable doubt. Alternatively he submitted that accused No.1 is aged was 23 and accused No.3 was aged 22 when the offence was committed. They were on bail throughout the trial, however after their conviction, they are in jail. Accused No.1 is in jail since 107 days (when the arguments were heard) and accused No.3 is in jail since 96 days. They have surrendered before the Trial Judge after this Court refused to suspend their sentence and it was so directed by the Hon'ble Supreme Court while dismissing their SLP (Criminal) Diary

No.12667 of 2020. Since the accused persons are not habitual, the sentence be reduced to already undergone.

8. It has been submitted by learned Advocate Mr. M. P. Kale representing appellant No.2 – original accused No.2 that the evidence adduced by the prosecution would show that the girls had not seen accused No.2. When they alleged that accused No.1 and 3 shouted that Sachin should start vehicle, then they had heard only the word 'Sachin' and not the entire name. The question then arises as to how, when the FIR was lodged the surname of the accused No.2 is also taken. The test of identification parade has not been carried and the girls or any other witness has not identified accused No.2. Only suspicion appears to be raised that when name of Sachin was taken, it would be accused No.2 only, however suspicion cannot take place of proof. The prosecution states that the girls had identified the accused persons with the help of photograph. It cannot be the proper mode of proof. Advocate Mr. M. P. Kale has supported the points raised by Advocate Mr. S. J. Salunke and alternatively also he submitted that accused No.2 had surrendered on 01-07-2020 and now he is in jail, therefore his sentence also be reduced to already undergone.

9. Learned Additional Public Prosecutor Ms. Vaishali Patil Jadhav has vehemently submitted that from the testimony of the prosecution witnesses it can be gathered that there is no, much dispute raised by the accused persons about the incident, spot and date. It was the Republic Day and, therefore, girls were proceeding for attending Flag Hoisting ceremony. They were near about 200 meters from the school where the incident took place. It was around 06.55 a.m. and the time of Flag Hoisting was 07.30 a.m. Presence of teachers and students would be natural under the said circumstance. P.W.4 Tulshiram Khote is the Teacher in the school of the girls and he has supported the prosecution story. Though he was not knowing the names of the accused persons, it was told by Sikandar, and Sikandar has been examined as P.W.7. Son of Sikandar is taking education in the same school and, therefore, his presence near the gate of the school would be natural. All the prosecution witnesses were corroborating with each other. Even the number of the car was given. The said car has been seized in presence of P.W.6 Yunus Kabirkhan Pathan. In order to prove the birth date, the record of the primary school is also produced and, therefore, the basis on which the birth date in Exhibits 71 and 72 is

taken, has also been proved. Therefore, the girls are "child" as contemplated under POCSO Act, therefore presumption under Section 29 would arise which is not rebutted by the accused persons. Except denial they have offered no other defence, therefore the appellants have been rightly convicted. When there was an attempt to kidnap the minor girls, then such accused persons should be dealt with firmly and there is absolutely no necessity to reduce the sentence awarded to them.

10. At the outset the contents of the First Information Report are well supported by the testimony of P.W.1 and P.W.3 who are the victims. Their testimony is further supported by P.W.4 Tulshiram Khote who was their teacher and an eye-witness, P.W.7 Shikandar Shejul who was also eye-witness. All these persons have supported each other in stating that when both the victims were coming towards the school for flag hoisting, when they were near the school, the girls had shouted and it was seen by the eye-witnesses that they were being dragged in the Indica car. P.W.7 has identified accused No.1 and 3 and all of them say that when teachers and students started rushing towards the said spot, accused No.1 and 3 sat inside the car, and before that one of them had shouted that, "Sachin to

start car.” Now as regards the initial part of the incident is concerned, the victims are corroborating with each other in saying that when they were walking towards school, they saw a car standing on the road and when they were near the car, suddenly P.W.1 was dragged by accused No.1 towards car, and when she shouted, P.W.3 resisted and at that time accused No.3 started dragging her also towards the car. The initial part till the victims started shouting has not been told by P.Ws.4 and 7 as they could have noticed the incident only after the shouts of the girls were heard, this is natural. Another fact that can be seen from the cross-examination of all these witnesses that there was absolutely no enmity between the family of the victims with the family of the accused persons. Point of false implication of the accused is absolutely not involved taking into consideration the fact that there was no such incident that had taken place which would prompt the victims or P.W.2 the father of P.W.1 to implicate the accused persons. No doubt, it has been suggested to P.W.1 and it is also stated in the statement of the accused under Section 313 of Code of Criminal Procedure that P.W.1 had love affair with the boy from their village and her parents thought the said rumour has been spread by accused No.1, and therefore, due to the pressure from the parents,

she has lodged report. Those suggestions have been denied by P.W.1 and also by P.W.2. Except the suggestions there is nothing. It is not the case of accused No.1 that P.W.2 the father of the informant had called him and scolded him for spreading the said rumour. How accused No.1 got the knowledge that P.W.2 is carrying the impression that accused No.1 has spread the rumour itself is a question and we cannot get the answer to this in the statement of accused No.1 under Section 313 of Code of Criminal Procedure. Even if for the sake of arguments it is so accepted for a moment, then it would lead to a ground for implicating accused No.1. But then what about accused No.2 and 3 ? They have not set up any separate or independent defence for themselves. Merely because they are the friends of accused No.1, it cannot be imagined that they would have been also implicated. Another fact to be noted is that, there was no enmity between the accused and P.W.4 Tulshiram and P.W.7 Shikandar Shejul. Presence of P.W.4 Tulshiram in the school where he is serving as a teacher, that too on the occasion of flag hoisting in the morning on 26th January is but natural, and he has given the entire story supporting the First Information Report. The cross-examination is mostly covering the denials. The only improvement which he appears to have made is

giving the number of the car which will not make his testimony untrustworthy. Further as regards P.W.7 Shikandar Shejul is concerned, his presence is also but natural. He has stated that his son was studying in the same school and he was present at the gate of the school on that day. Though he is not said in specific words that he had gone there to drop his son at the school for flag hoisting, but that can be inferred. There are some improvements made by him in his examination-in-chief, however they are not material improvements to discard his testimony. He has stated in the cross-examination that, he was not acquainted with Sachin. There was no suggestion put to him that he had not seen Sachin at the spot. Therefore, even if he might not be knowing Sachin i.e. accused No.2 earlier, that does not mean that presence of accused No.2 at the spot has not been proved by the prosecution. The testimony of P.W.9 Suresh Chate, the Investigating Officer, would show that he had not conducted any test of identification parade, but the failure on his part to conduct the said parade will not give any kind of advantage to the accused persons as in the cross-examination of the victims and the eye-witnesses it has not come on record that they were not knowing the accused persons earlier. Identification of accused with the help of photographs by the minor victims would be

permissible, which would be only supporting fact. When there is no suggestion to the witnesses in their cross that they were not knowing accused persons earlier, then non-holding of identification parade is not at all fatal. There was an opportunity to the accused persons to bring it on record as to how those witnesses had identified the accused. That opportunity has not been utilized by the accused. Now, they cannot raise such point for the first time in appeal.

11. P.W.2 who is the father of the informant though supported the contents of the First Information Report, yet it can be seen that he was not present at the spot when the incident took place, and therefore, his testimony is hearsay. The panchanama of the spot has been proved through P.W.4 Tulshiram. In fact, the Investigating Officer ought to have taken precaution to get some other witness than the eye-witness as panch, however that will not give any kind of advantage to the accused as in the present case the spot panchanama was very much formal in nature. There was nothing which could have been seized from the spot. Any way the situation of the spot could have been brought on record through the testimony of the witnesses, and therefore, posing the eye-witness as

panch to the spot panchanama also is not fatal to the prosecution in this case. P.W.6 Yunus Pathan is the panch witness to the seizure of the Indica car.

12. Thus taking into consideration the above said evidence, it can be said that the incident has been proved by the prosecution beyond reasonable doubt. The prosecution witnesses are trustworthy. Now the question arises as to whether the prosecution had proved that the victims are "child" within the definition of Section 2 (d) of POCSO Act. In order to prove the age of the victims the prosecution has led evidence. P.W.1 in her testimony has given her birth date, however it was not given by her in her FIR as well as in her statement under Section 164 of Cr.P.C. Stating the said birth date for the first time in her examination-in-chief may not be fatal for the simple reason that she had stated her age in her FIR as well as statement under Section 164 of Cr.P.C. Giving birth date apart from the age would be giving more particulars. Therefore, the said improvement cannot be said to be going to the root of the case as such. Further, the age of the victim can also be proved by the prosecution independently. P.W.2 in his examination-in-chief itself has stated that he will not be able to tell the date of birth of P.W.1 but then he has also given the

age of his daughter. Same is the case with P.W.3 who has given her birth date in her examination-in-chief but omitted to say so in her statement under Section 161 as well as 164 of Cr.P.C. In all those documents it can be seen that she had given her age.

13. Prosecution has examined P.W.5 Dattatraya Walaskar who is the Headmaster of the school where the victims were studying at the time of incident. He has produced certificates at Exhibits 69 and 70, and extract of school admission register at Exhibits 71 and 72. No doubt it appears that Exhibits 71 and 72 were not collected by the Investigating Officer during the course of investigation and they were not produced along with the charge-sheet, however it appears that those documents came to be produced by virtue of Section 173 (8) of Cr.P.C. It is to be noted that Exhibits 69 and 70, which are in the nature of certificate, were collected on 09-02-2016 and they were produced along with the charge-sheet. All these documents mention the same birth date for both the victims respectively, which were given by them in their respective examination-in-chief. However it is to be noted that prior to the present school, both the victims were taking education at a different school and in order to bring the said fact on record, prosecution examined P.W.8 Balaji

More. He was the Headmaster of Z.P. Primary School, Kherda. He has produced extract of admission register of both the victims at Exhibit 82 and 83, however both these documents have been issued during the pendency of the trial. It appears that he was called to depose by exercising the powers of the Court under Section 311 of Cr.P.C.. He had brought the original register along with him and then produced the extracts containing those entries. These extracts would show that both the victims had taken admission in the said school in 1st Standard and at the time of their admission, their birth date was given as 21-06-2000 and 15-03-2002 respectively. It has come in the cross-examination of P.W.8 Balaji More that he is not the person who had made the entries in the register and it is not mentioned in the said register as to on which basis those birth dates have been recorded. He was not having document as birth certificate issued by Grampanchayat, Hospital or Anganwadi. He has also told that on that day he had not brought the application which was filled at the time of admission of both the victims, but it is to be noted that he has denied the suggestion that as no such document is available with the school, he has not brought. Fact is required to be noted that he would have brought only those documents which were called upon him to be produced. The defence had not asked at the

time of issuing summons to this witness that he should bring additional documents also. Care was not even taken by the learned Advocate representing the accused to make a request while the cross-examination was going on to adjourn the matter and to give direction to the witness to bring those relevant documents on the next date. When the opportunity to bring all those things was available and it has not been utilized by the accused, advantage cannot be given to the accused for the non production of those documents. Even if the entries were not taken by P.W.8 Balaji More, yet he was the custodian of the said register. He might have come to that school at a later stage. The law does not require that the person who had taken that entry should be searched and then be called. When the document is coming from the proper custody, and it can be explained by the witness, then further formal proof to prove that entry, will not be necessary. Certain signatures were not on the extract, that does not mean that they were not there on the original. No specific question to that effect has been asked. It is to be noted that he has admitted that in column No.20 of school admission register, there is signature of Headmaster pertaining to Exhibit 82. When original bears the signature; extract will not, as the extract would be prepared later on. How the same person would

be available to sign column No.20 of the extract also, would be the practical question. For the purpose of Court proceedings, the extract has been produced instead of producing the original one. Therefore, the said primary documents have been proved by the prosecution in this case.

14. In catena of Judgments viz. *Ravinder Singh Gorkhi v. State of U.P.*, reported in 2006 (5) SCC 584, after referring to earlier decisions and also in *Madan Mohan Singh (Supra)*, the Hon'ble Apex Court held that,

“Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. In the absence of any statutory provision dealing with the manner in which the age has to be proved in a proceedings, the age has to be proved by producing any document falling within the scope of Section 35 of the Evidence Act. Section 35 of the Evidence Act makes a record or entries in a record/ register maintained in the ordinary course of business by a public servant in discharge of his official duty as a relevant fact. Different standard of proof cannot be adopted when it comes to proof of a relevant fact as contemplated under Section 35 of the Evidence Act in case of a criminal or a civil. However, a balance is required to be struck while appreciating the evidence taking into consideration the scope of the case.”

Therefore, if the extract of the school admission register is

produced; it is proved in accordance with law by examining the person who issued the same and also by producing the original register. So also when it is coming from the proper custody, then such document can be accepted as conclusive evidence regarding date of birth. In respect of such extract of school register the proof of the primary evidence i.e. the register itself is necessary, which has been followed in the present case. The facts and evidence in *Prakash Jaganath Pawar (Supra)* were different. That is the case which has been relied by the learned Advocate for the appellants. In that case there was absence of primary document on the basis of which age was recorded in the certificate. Here, the source in the form of admission register where the victims were admitted in the school in the 1st Standard has been produced. Merely because P.W.8 had not brought the application for admission of the victims, we cannot say that there was no source of information for the register. In *Prakash Jaganath Pawar (Supra)* this Court had also considered the cross-examination of the parents of the victim who were silent in their evidence that while taking admission of their wards they disclose to the school authorities the date of birth. In that matter what was produced was the admission register of high school, extract of admission register of junior college and bonafide certificate. The

primary document was not produced, and therefore, those observations have been made.

15. One more pronouncement of Hon'ble Apex Court needs to be considered here if we consider for the sake of argument that primary documents are not coming forward in this case. That pronouncement is *Jarnail Singh v. State Of Haryana*, reported in (2013) 7 SCC 263, wherein it has been held that,

“While determining the age of prosecutrix, rules framed under the Juvenile Justice Rules should be the basis for such determination.”

Now in view of *Section 94* of Juvenile Justice “Care and Protection of Children” Act, 2015,

“Primary importance should be given to the date of birth certificate by school or matriculation certification and in absence of them the birth certificate issued by the Corporation or the Municipal Authorities or by Panchayat and if anything is not available then the medical examination.”

Therefore, after taking into consideration this legal position in the alternate also, it will have to be held that the prosecution has proved that the victims are “child” defined under Section 2 (d) of POCSO Act. In *Mahadeo v. State of Maharashtra*, reported in (2013) 14 SCC 637, wherein it was the case of rape of a minor aged 15 years, Hon'ble

Apex Court had accepted the certificate issued by the school where that prosecutrix had pursued her studies as also her school leaving certificate as proof of her date of birth in the light of provisions contained in the Rules framed under Juvenile Justice (Care and Protection of Children) Rules, 2007. Further in *Arjun Singh v. State of H.P.* reported in AIR 2009 SC 1568, school register is held to be admissible evidence to prove date of birth. It has been observed thus : -

“In State of Chhattisgarh v. Lekhram, reported in 2006 (5) SCC 736 it was held that the register maintained in a school is admissible evidence to prove the date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act, 1872 . It may be true that in the entry of the school register is not conclusive but it has evidentiary value.”

Thus, taking into consideration all these pronouncements and the facts and evidence adduced in the present matter, it can be concluded that the learned Trial Judge was justified in holding the victims as “child” as contemplated under POCSO Act.

16. Taking into consideration the above observations that the facts have been proved i.e. the accused No.1 and 3 tried to kidnap the victims and when they were dragging the victims, they were outraging the modesty of the victims, it amounted to offence under

Section 354-A, 363, 511 read with 34 of the Indian Penal Code. As regards the attempt to kidnap is concerned, even the case has been proved against the accused No.2. When it was proved that the holding of hands was with intention of sexual harassment, ingredients of Section 8 of the POCSO Act are also proved. There could not have been any other intention than of sexual harassment behind holding hands and dragging. In view of the fact that the offence under Section 8 of the POCSO Act has been proved by the prosecution, the presumption under Section 29 would be attracted which is for the offence under Section 7 of the POCSO Act. The facts in *Mohan Ambadas Meshram v. State of Maharashtra (Supra)* were different, and therefore, facts of the said case are not applicable to the facts of this case.

17. Accused No.1 to 3 have been rightly convicted for the offence punishable under Section 363, 511 read with 34 of the Indian Penal Code. The learned Trial Judge has convicted accused No.1 and 3 for the offence punishable under Section 354-A of the Indian Penal Code as well as separately under Section 8 of the POCSO Act. Same facts constitute both the offence, and therefore, *Section 42* of the POCSO Act should be considered which runs thus ;

“42. Alternate punishment.-- Where an act or omission constitutes an offence punishable under this Act and also under sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, [376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB], 376-E, section 509 of the Indian penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

Section 354-A of Indian Penal Code is included, and therefore, the provision states that the punishment that can be awarded would be for the offence which is greater in degree. Therefore, the punishment that has been awarded to accused No.1 and 3 under Section 8 of the POCSO Act is only required to be upheld here. The learned Trial Judge ought not to have awarded a separate sentence for the offence punishable under Section 354-A of the Indian Penal Code in view of Section 42 of the POCSO Act. In view of this position and for the above said discussion the appeal deserves to be dismissed subject to the only modification regarding no separate sentence for Section 354-A of Indian Penal Code and whatever quantum of sentence has been awarded under that section is required to be set aside.

18. As aforesaid this Court does not find any error or illegality committed by the learned Special Judge in holding the accused persons guilty of committing the offences. The learned Advocates for the appellants have failed to point out perversity in the approach or reasoning in the Judgment by the learned Special Judge. In this connection reliance can be placed on the law explained by Hon'ble Supreme Court in *Govindaraju alias Govinda v. State by Srirampuram P.S. & Anr.*, reported in (2012) 4 SCC 722, as follows :-

“A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence.”

Though those observations are in respect of an appeal against acquittal, yet the basic principle is applicable here. Therefore, even if two views are possible from the facts of the case, under such circumstance the Appellate Court cannot interfere with the view taken by the learned Trial Judge unless there is perversity, therefore there is no merit in the present appeal.

19. Now turning towards the alternative prayer by both the appellants that the quantum of sentence be reduced to already undergone. It is stated that accused No.1 had undergone imprisonment for 107 days on the day when the submissions were made, accused No.3 undergone 96 days, and accused No.2 had surrendered on 01-07-2020 and since then they are in jail. It is to be noted that the offence that has been proved against the accused No.1 to 3 is under Section 363, 511 read with 34 of the Indian Penal Code. They had tried to kidnap the girls aged 16 and 14 respectively. When the offences against women are on rise, especially the kidnapping of girls and then in certain cases offence of rape are on rise, then such acts are required to be sternly dealt with. The provisions of POCSO Act are made especially to protect minors from any kind of sexual assault. Then the aggravation that is required to be considered should be considered at the time of imposing punishment. At this juncture the ratio laid down in *Sham Sunder v. Puran and Anr.*, reported in (1990) 4 SCC 731, should be considered; wherein the High Court had reduced the sentence for the offence under Section 304 Part-I to already undergone; the Hon'ble Supreme Court opined that the sentence needs to be enhanced being inadequate. It was observed that : -

“The Court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed, and the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence.”

Further in *State of M.P. v. Najab Khan*, reported in (2013) 9 SCC 509, the High Court while upholding conviction, had reduced the sentence of three years to already undergone which was only 14 days; the Apex Court restored the sentence awarded by the Trial Court. Further by referring the Judgments in *Zamil v. State of U.P.*, reported in (2010) 12 SCC 532 and *Guru Basavraj v. State of Karnatak*, (2012) 8 SCC 734, Hon'ble Supreme Court observed that : -

“In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the

crime but also the society at large while considering the imposition of appropriate punishment."

20. At the cost of repetition it can be said that the accused No.1 and 3 had tried to kidnap the young girls on broad day light, that too at a distance of about 200 meters away from their school, which was rather on that day busy in flag hoisting ceremony which was to commence. Further it can be seen that none of the accused have come with a case that there was any love angle between the girls and one of them. But the defence that has been raised regarding some rumour about love affair of the informant with third person is absolutely untrustworthy. Then the manner in which they wanted to execute the offence was definitely required to be considered. Accused No.2 wanted to help them as he was on the driving seat of the car from which the girls were to be kidnapped. Therefore, the sentence that has been imposed by the learned Trial Judge is adequate and proportionate to the crime that has been proved against the accused persons beyond reasonable doubt which does not require any kind of reduction.

For the above-said reasons, following order is passed.

ORDER

- 1) Appeals are hereby dismissed.
- 2) It is clarified that the finding of the learned Special Judge, Majalgaon in Special (Child) Case No.6 of 2016, dated 12-02-2020, holding accused No.1 and 3 guilty of committing offence punishable under Section 354-A of the Indian Penal Code is hereby upheld. However, in view of Section 42 of the Protection of Children from Sexual Offences Act, 2012, no separate sentence is required to be awarded when they are held guilty and punished for Section 8 of the POCSO Act. The quantum of sentence imposed under Section 354-A of Indian Penal Code against accused No.1 and 3 is hereby set aside. The fine amount paid under that section, if any, be refunded after the statutory period.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.