

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.538 OF 2017**

Ganesh Kisan Navale	]	
Age: 30,	]	
Occupation : Driver,	]	
Residing at Navlewadi, Pimpri	]	
Pendhar, Tal. Junnar, Dist. Pune.	]	Appellant (Org. Accused)

Versus

The State of Maharashtra	]	
(At the instance of Otur Police	]	
Police Station C.R. No.1/14)	]	Respondent

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Mr. Shailesh Kharat, for the Appellant.

Mr. A.A. Palkar, Additional Public Prosecutor-State.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 9TH JANUARY, 2020.

PRONOUNCED ON: 16TH JANUARY, 2020.

JUDGMENT:

Aggrieved with the impugned judgment of conviction rendered by the Special Judge under the provisions of the Protection of Children from the Sexual Offences Act, 2012 (for

short 'POCSO') at Khed, Rajguru Nagar, District. Pune on 25th April, 2017, the appellant has preferred this appeal amongst following facts and grounds.

2. It was the first day of the year 2014 when the prosecutrix who was admittedly aged about 11 years and studying in 5th standard had gone to attend the School at 9.30 a.m. Around 4.00 p.m, her teacher P.W.5 telephonically called mother of the prosecutrix. When mother of the prosecutrix i.e P.W.1 reached the School around 4.30 p.m, it was informed that the prosecutrix came late on that day. On being asked the reason as to why she was late, the prosecutrix stated that she was taken by the appellant to a place and committed sexual assault on her. He thereafter dropped her at the School. It is alleged that the appellant lured the prosecutrix under the pretext of giving her sweet and took her to a secluded place at Mangwada on his motorbike. He removed her clothes and thereafter moved his hand on her person. He inserted his finger in her vagina and then touched his penis to her vagina. As the prosecutrix shouted, the appellant asked her not to get scared and that he would drop her in the School. He asked her to put on the clothes. The appellant thereafter dropped the prosecutrix at her School. P.W.1-mother of the prosecutrix went to *Otur* Police

Station and lodged a report against the appellant. A crime bearing No.1 of 2014 came to be registered against the appellant.

3. P.W.7-Maruti Ghungurkar then P.S.I attached to *Otur* Police Station held investigation into the crime. He arrested the appellant. He referred the prosecutrix to Sassoon Hospital for medical treatment and examination. He seized the clothes of the appellant. He drew Panchanama in respect of seizure of clothes of the appellant.

4. On 3rd January, 2014, Investigating Officer seized clothes of the prosecutrix under a Panchanama. He visited the spot of occurrence of crime on 4th January, 2014 and drew a spot Panchanama in the presence of Pancha witnesses.

5. Pursuant to a statement voluntarily made by the appellant in the presence of Panchas, motorbike alleged to have been used in the commission of the offence came to be discovered at the instance of the appellant. The said motorbike was seized under a Panchanama. The Investigating Officer had collected medical certificate of the prosecutrix from Sassoon Hospital, Pune. He had also collected certificate from the School of the prosecutrix

regarding proof of her age. Statement of the prosecutrix under section 164 of the Code of Criminal procedure, 1973 (for short 'Cr. P.C') came to be recorded by J.M.F.C, Junnar. Seized Muddemal was sent for chemical analysis on 21st January, 2014. After investigation, he laid a charge-sheet against the appellant.

6. The appellant appeared before the Special Judge on 17th November, 2014. The learned Special Judge framed a charge in terms of **Exhibit 4** under section 376 of the Indian Penal Code as well as under sections 4,6,8 and 10 of the POCSO Act. It was read over and explained to the appellant in vernacular to which he pleaded not guilty and claimed a trial. The defence of the appellant as emerged from the line of cross-examination as well as from his statement under section 313 of the Cr. P.C is denial of commission of the offence alleged as well as false implication on account of a civil dispute, in the sense, despite request from father of the prosecutrix, the appellant refused to cultivate the land of the prosecutrix's father by means of his tractor. It is contended that the parents of the prosecutrix had a grudge against the appellant.

7. No defence evidence has been adduced on behalf of the appellant.

8. In order to substantiate the charge, prosecution examined as many as eight witnesses and tendered a few documents which have been duly proved and exhibited by the Court.

9. The learned Special Judge having considered the evidence of the prosecution and after hearing the respective sides, by the impugned judgment and order convicted and sentenced the appellant. The learned Special Judge accepted the testimony of the prosecutrix which has been duly corroborated from other circumstantial evidence on record coupled with the medical evidence adduced by the prosecution. The learned Special Judge disbelieved the defence of the appellant. After considering the evidence on record as well as case law pressed into service on behalf of the appellant, the learned Special Judge, by the impugned judgment and order convicted the appellant.

10. I heard Mr. Shailesh Kharat, learned Counsel for the appellant. With the assistance of the learned Counsel for the appellant, I have gone through the evidence of prosecution witnesses as well as the impugned judgment. It is submitted by the learned Counsel for the appellant that there is variance inasmuch as

the statement of the prosecutrix recorded under section 164 of the Cr. P.C and her testimony in the box is concerned. The learned Counsel for the appellant, while assailing the impugned judgment, vehemently argued that this is the case which is totally based on falsehood and there is absolutely no convincing evidence to place reliance upon the testimony of the prosecutrix as, according to the learned Counsel, if she had gone to the house of her friend, which she deposed in her examination-in-chief, then there is neither any statement nor her friend has been examined as a witness by the prosecution. Evidence of the prosecutrix that she had been to her friend's house is absolutely false. It is submitted that the appellant was shown to have been arrested on 2nd January, 2014 as per the version of P.W.7. If that being so, why he was not arrested when he had been to the Police Station along with prosecutrix and her mother-P.W.1? This according to the learned Counsel indicates the innocence of the appellant. Had he been guilty, he would have absconded from the Village. Learned Counsel has also questioned the alleged recovery of the motorbike, as according to him, the prosecution has failed to establish that the said bike in fact belongs to the appellant. There is no evidence of the Road Transport Department to establish the ownership of the said bike *qua* the appellant.

11. The learned Counsel has drawn my attention to the cross-examination of P.W.1 which indicates that the appellant refused cultivation of their land and, therefore, it can be safely inferred that due to such dispute, he had been falsely implicated.

12. On the aspect of injuries to the victim, the learned Counsel contends that if it is the case of forcible sexual assault by 30 years old male upon an eleven years old girl, there ought to have been serious injuries to the private part or to the other parts of her body. There is even absence of traces of semen on the private part of the prosecutrix. The learned Counsel drew my attention to the fact that there were no injuries over the labia majora and labia minora of the prosecutrix. Hymen was torn completely and old healed tears were present. Had there been a full-fledged sexual intercourse, there would have been stains of semen on the clothes or private parts of the prosecutrix and, therefore, in the absence of such evidence, it is doubtful whether there was any such act alleged to have been committed by the appellant.

13. Learned Counsel for the appellant questioned the veracity of the evidence of P.W.3-Jayasing Pote who acted as a Panch witness. It is contended that he is an interested witness for

the reasons that on the date of reporting the matter to the Police itself the Panchanama could have been drawn but it was delayed by four days.

14. As such, the learned Counsel has prayed for quashing the impugned judgment and order of conviction and acquitting the appellant of all the charges under which he came to be convicted.

15. Per contra, the learned Additional Public Prosecutor also took me through the evidence of the prosecutrix and other witnesses, more particularly, through the evidence of P.W.6-Dr. Uma Wankhde. It is submitted that P.W.6-Dr. Uma Wankhde being an independent witness has rightly opined that the hymen of prosecutrix was completely torn. There were old healed tears present. The final opinion of Dr. Saumya B.G was that there was evidence of penetrative vaginal sexual intercourse. The learned Additional Public Prosecutor has supported the impugned judgment.

16. P.W.1 is the mother of prosecutrix. She testified that on 1st January, 2014, the prosecutrix had gone to School at about 9.30 a.m. Around 4.00 p.m, P.W.1 received a call from P.W.5 who

is the prosecutrix's teacher. When P.W.1 visited the School around 4.30 p.m, she came to know about the incident from P.W.5 and the prosecutrix. The prosecutrix narrated the incident that around 3.00 p.m, the appellant took her on his motorbike under the pretext of offering her sweet. He took her to a sugarcane field at Mangwada. He made her lie on the ground. He removed his clothes as well as her clothes and raped her. Thereafter, the appellant left her near the School. P.W.1, therefore, immediately approached *Otur* Police Station along with P.W.5 and others and lodged a report against the appellant which is proved at **Exhibit 16**. The prosecutrix was referred to Sassoon Hospital, Pune for medical examination. P.W.1 had duly identified a shirt, frock-cum-slip and nicker of the prosecutrix which was shown to her during the trial as **Articles-1, 2 and 3**.

17. Nothing could be elicited in her cross-examination which would render her testimony unworthy of the credit. Undisputedly, the prosecutrix's father is a cousin of maternal uncle of the appellant. As such, the prosecutrix is appellant's cousin. It is also not in dispute that the appellant is a Tractor Driver who used to plough fields. It is sought to be suggested to P.W.1 that as the appellant refused to plough the field of the prosecutrix's father,

they were on cross terms which the witness has categorically denied. Merely because P.W.1 admits that the appellant refused to cultivate their field despite request of her husband, it cannot be inferred that they had wrath against the appellant. The defence, as already stated hereinabove, is of false implication due to the refusal on the part of the appellant to cultivate the land of the prosecutrix's father. I shall deal with the so-called defence of the appellant in the subsequent paragraphs.

18. Suffice it to say that even though the testimony of P.W.1 is hearsay, yet it is relevant in view of section 6 of the Indian Evidence Act, 1872 (for short 'Evidence Act').

19. The testimony of P.W.2-(prosecutrix) indicates that her date of birth is 19th February, 2013 and she was studying in 5th standard in a School-X. P.W.5 was her class teacher. The prosecutrix used to attend the School from 10.00 a.m to 5.00 p.m. There were recess between 2.00 p.m and 3.00 p.m. On the day of the incident, she testified that she went to the house of her friend. The appellant came near the temple of Muktabai on a motorbike and asked her to occupy pillion seat as he promised her to offer some sweet. He then took her in the field of sugarcane at

Mangwada and committed sexual assault upon her. Thereafter, she returned to School and narrated the incident to P.W.5. P.W.5 thereafter informed P.W.8-Headmaster of the School who immediately called the Police and her parents at the School. This is the evidence of the prosecutrix. She had identified her frock-cum-slip and nicker which are at **Article-1,2 and 3**, which were on her person at the time of the incident. She has also testified as regards recording her statement by the Judicial Magistrate First Class, Junnar in the month of March, 2014. She was examined at Sassoon Hospital, Pune.

20. A very searching cross-examination of the prosecutrix came to be conducted on behalf of the appellant. In the light of the fact that the appellant is the cousin of the prosecutrix, it was obvious that she would trust and would accompany him as he had promised her to offer some sweets. It is sought to be suggested that on the date of the incident at about 3.00 p.m, she had gone to the School without school bag with her classmate “P” (girl) to meet one Vaibhav Pote. One thing is clear that the prosecutrix was not at School after the recess and was outside. It is not the case of the defence that the prosecutrix was at the School from 10.00 a.m to 5.00 p.m. She has denied the suggestion that there was a quarrel

between the appellant and her father, four to five days prior to the incident on account of refusal by the appellant to cultivate their field. She had also denied the suggestion that spot panch-Jayasingh Pote assaulted the appellant at the Police Station. Her cross-examination reveals that when she returned to School, she was scolded by P.W.5 as she arrived late. This also substantiates the fact of her absence from the School after recess. The defence has tried to bring out on record certain omissions in respect of her statement recorded by the J.M.F.C under section 164 of the Cr. P.C, which, cannot, per say, be called as omissions.

21. Now, it would be essential to go through the evidence of P.W.5- the class teacher of the prosecutrix. Her evidence indicates that on 1st January, 2014, the prosecutrix had attended the School. There were recess at about 2.50 p.m. During recess, the students had left their classrooms. However, after recess, the prosecutrix was not found in the School. After recess, when another teacher was teaching Science subject to 'B' Division of 5th standard and P.W.5 was teaching Mathematics to 'A' Division of 5th standard, the prosecutrix came running to the School from outside. On being asked as to where she had been, she started crying. On hearing her cry, another lady teacher came to the

ground and asked the prosecutrix as to why she came late. However, the prosecutrix continued crying and then after some time, she told that she was lured by the appellant by saying that he will give her sweet. He took her to Mangwada on his motorbike and committed sexual assault upon her.

22. P.W.5 immediately took the prosecutrix to P.W.8- the Headmaster. The incident was narrated to the Headmaster also by the prosecutrix and thereafter P.W.8-Headmaster telephonically called the parents of the prosecutrix and also the appellant. All of them came to the School. It is important to note that the appellant had left his motorbike-Bajaj M-80 in the School and ran away. P.W.5 further testified that the appellant was frightened. The Headmaster, therefore, immediately called the Police on phone. The Police Personnel of *Otur* Police Station came to the School and inquired the prosecutrix. The Police took the prosecutrix and her parents to the Police Station. On the following day, statement of P.W.5 was recorded.

23. This is what is the evidence of P.W5 which corroborates the testimony of the prosecutrix in material particulars. The defence has made an unsuccessful attempt to rebut

the testimony of P.W.5. Interestingly, in the cross-examination, it has been surfaced that there were scratches on the hands of the prosecutrix and leaves of Tamarind tree were found on her hair which substantiates the fact to a considerable extent that during recess she had been to a place where there was a chance of getting scratches over her hand and also leaves of Tamarind tree which were found in her hair.

24. Astonishingly, the appellant very cleverly accompanied P.W.1 to the School as if to show that he is an innocent person, however, when the prosecutrix named him, he escaped from the School. The appellant, perhaps, had not expected that the prosecutrix would expose him before her mother and the School Authorities. This conduct on the part of the appellant, in the given circumstances, is quite relevant as per section 8 of the Evidence Act. Otherwise, there was no reason for him to escape by leaving his motorbike behind.

25. It is pertinent to note that when the appellant was asked a specific question i.e question No.25 in his statement under section 313 of the Cr.P.C that he left his Bajaj M-80 motorbike in the School premises and ran away as he was frightened, he

answered that it is false. Despite an opportunity to deny the ownership of the bike, the appellant failed to give any plausible explanation which is also a strong circumstance which can be pitted against him.

26. P.W.8 is the Headmaster of the School and had produced the original general register maintained by the School in order to prove the factum of date of birth of the prosecutrix as 19th February, 2013 which is proved at **Exhibit 50**.

27. The next important witness is P.W.6-Uma Wankhde, who was working as a Professor in Sassoon Hospital, Pune. She testified that post graduate students studying in B.J. Medical College used to examine the victims of rape and sexual assault cases under her supervision. Dr. Saumya was a student of the said College doing post graduation in Gynecology and was a student of Dr. Wankhde. Dr. B.G. Saumya examined the prosecutrix on 2nd January, 2014 at 10.00 p.m. The prosecutrix was accompanied with her mother. The prosecutrix's case history was that on 1st January, 2014 around 3.00 p.m, the appellant took her to a farm and attempted vaginal intercourse. Thereafter, her parents lodged a report. It reveals from the evidence of Dr. Uma Wankhde that on

examination of the prosecutrix by Dr. Saumya, it was noticed that the hymen was torn completely, old healed tears were present. The final opinion rendered by Dr. Saumya was that there was evidence of penetrative vaginal sexual intercourse. A medical certificate issued by the said Doctor is proved at **Exhibit 35**.

28. I have meticulously perused the medical certificate (**Exhibit 35**) which is signed by Dr. Saumya and is in her handwriting. It depicts the name of P.W.1 as well as her left hand thumb impression. It also bears left hand thumb impression of the prosecutrix. After narrating the history, as stated hereinabove, the certificate indicates that after taking her to the nearby farm, the appellant had removed his pant, removed her under garments, slept over her and licked her external genitals and attempted forceful vaginal sexual intercourse. When she cried for help, he forcibly covered her mouth and threatened her not to tell anyone. The certificate further reveals that the hymen was torn completely and old healed tears were present. The final opinion rendered by Dr. Saumya is that after taking into consideration history and medical examination, there was evidence of penetrative vaginal sexual intercourse. However, there was no evidence of any injury on any part of the body. It can thus be seen that since hymen was

completely torn and there were old healed tears, there was no question of any evidence of injury, nevertheless, it is quite clear that there was a penetrative vaginal sexual intercourse.

29. While cross-examining the expert, defence has elicited on record the precautions to be taken while examining a victim of rape about which there can be no dispute. Dr. Uma Wankhde has candidly admitted that it is necessary to mention the intercourse habits, vaginal discharge, infection, pregnancy, operation and menstruation history of the prosecutrix. Merely because there is no such mention in **Exhibit 35**, would not render the otherwise cogent and trustworthy evidence of this witness unbelievable. I fail to understand as to why defence has put a question as to whether during intercourse labia majora may touch with male organ which is quite obvious. It has further been substantiated that labia majora and labia minora of the victim were found healthy with no marks of injury about which I had already stated that since the hymen was already found torn with old healed tears, there was no question of injury marks or active bleeding.

30. The testimony of the prosecutrix is fully corroborated by the evidence of this witness which inspires confidence. There is

absolutely no reason to disbelieve the evidence of both the prosecutrix and the expert on the aspect of penetrative vaginal sexual intercourse with the prosecutrix. In view of section 114 (A) of the Evidence Act, there is no question of presumption of absence of consent. Nevertheless, in the case at hand, since the prosecutrix was a child within the meaning of section 2 (d) of the POCSO Act coupled with section 29 of the said Act, it has to be presumed that the appellant had committed or attempted to commit the offence of penetrative sexual assault upon her. In view of clause (a) of section 3, penetration of the penis to any extent into the vagina, mouth, urethra or anus of a child is sufficient to constitute an offence under the said section. Though the prosecutrix had not testified that the appellant licked her external genitalia while narrating the history to P.W.6-Dr. Uma Wankhde, she did state before the Doctor that the appellant licked her external genitalia, which otherwise would have attracted clause (d) of section 3 which contemplates that if a person applies his mouth to the penis/vagina/anus or urethra of the child or makes the child to do so then it also constitutes the offence of penetrative sexual assault. In the absence of specific evidence to that effect, it would not be proper to hold that the appellant had also committed an offence as contemplated in clause (d) of section 3. Be that as it may.

31. Another important witness is P.W.3-Jayasing Pote who acted as a Panch witness *qua* the spot Panchanama-**Exhibit 23** and the memorandum Panchnama under section 27 of the Evidence Act **Exhibit 24**. In substance, it is the evidence of this witness that on 4th January, 2014, he was called at *Otur* Police Station and, therefore, he had been to the Police Station around 12.30 p.m. Another Panch Rohidas Kute accompanied him. Some members of Dakshata Committee along with the prosecutrix and her mother were present. The prosecutrix had shown the spot which was in the sugarcane field. It was a vicinity of Matang Community. Accordingly, panchanama of the spot was drawn by the Police which is at **Exhibit 23**. P.W.3- Jayasingh Pote has identified his signature as well as contents thereof.

32. His evidence further reveals that on the same day around 3.00 p.m to 3.15 p.m, when he was present at the Police Station along with Rohit Kute, the appellant voluntarily made a statement that he would show the place where he had parked his motorbike. Accordingly, a memorandum was drawn which is proved at **Exhibit 24**. The appellant thereafter led the Police team and panch witness in a government vehicle to Village Pimprai-Pendhar on the playground of the School of the prosecutrix. They

alighted from the vehicle. The appellant had shown the red coloured motorbike. The said bike was duly seized under a panchanama by the Police and affixed signed labels thereon. The said Panchanama is at **Exhibit 25**. A futile attempt has been made in the cross by the defence. It has been reiterated that P.W.5-Jayasing Pote had learnt about incident on 1st January, 2014 itself. He denied a suggestion that he had slapped the accused at the Police Station on that day. Even if it is presumed for a moment that this witness knew about incident on the very day it occurred and that even he had slapped the appellant, it would not render his evidence unbelievable, for, he acted as a panch witness at the request of the Police and also in view of the fact that he was not related to the prosecutrix or her family. It has been categorically brought out that he was summoned at the Police Station by the Police through the Village Kotwal-Sunit Tapase.

33. Interestingly, the defence has not suggested either to this witness or to the Investigating Officer P.W.7 that the motorbike in question does not belong to the appellant. The voluntary statement of the appellant that he discovered the fact of **his** motorbike being parked at a particular place is relevant in the given circumstances. Indeed, the said fact as to where the motorbike was

kept was within the exclusive knowledge of the appellant as it has already been discussed that when his misdeed was exposed, he ran away from the School by leaving it behind. The prosecution has succeeded in connecting the motorbike discovered by the appellant, voluntarily, to the fact that it was used by him while enticing the prosecutrix under the pretext of offering sweet and then exploiting her sexually. Connection between the offence and the motorbike discovered is established by the evidence other than the discovery statement made by the appellant leading to the discovery of the said fact. The prosecution has succinctly established and proved the source of information which is related distinctly to the fact which was discovered at the instance of the appellant. It is not the suggestion of the defence that the statement of the appellant was obtained under compulsion, duress or some influence. Once the fact that the vehicle was used by the appellant in connection with the crime, it was incumbent on his part to discharge onus of showing that neither the said bike belongs to him nor was it used for carrying the prosecutrix to the spot of the incident.

34. The evidence as regards discovery of fact by the appellant has also been reiterated by P.W.7- Maruti Ghungurkar.

P.W.7 did not know whether there was any dispute between the appellant and the prosecutrix's father on account of cultivation of land. He had also denied a suggestion that there was an incident of quarrel between the appellant and father of the prosecutrix five to six days prior to the incident. Merely because this witness did not inquire with the Registration Authority about ownership of the motorbike (Bajaj M-80) bearing Registration No. MH-14/U/8715, it does not mean that no such vehicle was used by the appellant and seized by the Police. As a matter of fact, the Investigating Officer ought to have collected the documentary evidence from registration office *qua* ownership of the bike. This flaw in the investigation would not be a blessing in disguise to the appellant in view of what has been discussed hereinabove as regards discovery of fact at his instance.

35. Anand Bhimaji Vethekar has been examined as P.W..4 by the prosecution in whose presence the Police had seized underwear of the appellant and wrapped in a brown paper which he identified as **Article-4** during the trial. It's panchanama is proved at **Exhibit 27**. Similarly, he acted as a panch witness in so far as clothes of the prosecutrix are concerned which are at **Articles-1,2 and 3** and proved at **Exhibit 28**.

36. The report issued by Regional Forensic Science Laboratory Pune is at **Exhibit 41 to 43**. **Exhibit 41** pertains to a sealed envelope received intact by the laboratory containing blood and semen samples of the appellant. The result of the analysis is that the blood of the appellant in Exhibit 1 and 2 is haemolysed, hence was inconsiderable for grouping. The blood group in Exhibit 3 could not be determined as the results were inconclusive.

37. **Exhibit 42** is in respect of clothes of the prosecutrix. The chemical analyzer could notice neither semen nor blood over the clothes. **Exhibit 43** is in respect of examination of vaginal swab, nail clipping and the blood of the prosecutrix. No blood was detected on Exhibits 1 and 2 i.e vaginal swab and vaginal smear which is quite obvious in view of the fact that it is not the case of the prosecution or the evidence of the prosecutrix that while committing penetrative sexual assault, the appellant had discharged. It is quite clear from the evidence, more particularly from the evidence of P.W.6- Dr. Uma Wankhde that there was a penetrative vaginal sexual intercourse as the appellant had, to some extent, penetrated the penis.

38. It would be apposite to refer the judgment of the Supreme Court in the case of **Santosh Moolya Vs. State of Karnataka, 2010 (2) Bombay Criminal Cases 718 (SC)** wherein it is observed as under:

“Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for”.

Here, in the case at hand, not only the prosecutrix who came cried before the teachers, narrated about a horrific incident but it was also stated by her mother before the Police while lodging the report. The prosecutrix and P.W.1 had no reason to falsely implicate the appellant in this case.

39. The learned trial Judge has, therefore, placed reliance on a judgment of the Hon’ble Supreme Court in the case of **State of Maharashtra Vs. Chandraprakash Kewalchand Jain, 1990 (1) Supreme Court Cases 550** wherein the Supreme Court observed thus;

“A prosecutrix of a sex offence cannot be put on part with an accomplice. She is in fact a victim

of the crime. The evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same decree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged. The Court should ordinarily have no hesitation in accepting her evidence”.

40. Upon considering the evidence on record and the findings arrived at by the trial Court, I am of the view that the impugned judgment and order of conviction does not warrant interference in appeal except conviction of the appellant under section 376 (f) (i) of the Indian Penal Code by which he has been sentenced to undergo rigorous imprisonment for ten years and fine of Rs.1,000/-, in default, rigorous imprisonment for two months in view of section 42. Section 42 and 42-A of the POCSO Act read as follow;

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 (45 of 1860) or section 67-B of the Information Technology Act, 2000 (21 of 2000) 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”.

“42-A. Act not in derogation of any other law.- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency”.

The trial Court has convicted the appellant under section 3 of the POCSO Act punishable under section 4 of the said Act. The appellant has also been convicted and sentenced of an offence punishable under sections 6 and 10 of the said Act.

41. The punishment under the POCSO Act is not greater than what has been provided under section 376 but the sentence is of the same description i.e 10 years. The provisions of the said Act are in addition to and not in derogation of the provisions of any other law in case there is any inconsistency between the two Acts. Thus, the sentence awarded to the appellant under section 376 (f) (i) is set aside. The fine amount of Rs.1,000/- be refunded to the appellant, if already paid.

42. Consequently, the appeal is dismissed in the aforesaid terms. Order as regards disposal of Muddemal property is maintained.

[PRITHVIRAJ K. CHAVAN, J.]