

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.367 OF 2020

XYZ

Age: now 20 years, Occu.: Nil,
R/o. Changatpuri, Tq. Partur,
Dist. Jalna

... Appellant

Versus

1. The State of Maharashtra
Through Police Station Incharge,
Police Station Ashti,
Tq. Partur, Dist. Jalna.

2. Sumitra Prakash Gurav
Age: 27 years, Occu.: Household,
R/o. Changatpuri, Tq. Partur,
Dist. Jalna.

... Respondents

.....
Mr. R. V. Gore, Advocate for appellant
Mr. S. W. Munde for respondent No.1 – State.

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 08-01-2021

PRONOUNCED ON : 25-01-2021

JUDGMENT :

. Appellant is the original accused who faced trial in Special Case (Child) No.69 of 2018 before the learned Judge of the Special Court, under POCSO Act, Jalna. The appellant has been convicted for the offence punishable under Section 376(2)(i) read with 511 of the Indian Penal Code and for the

offence punishable under Section 6 read with Section 18 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act'). He has been sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.10,000/-, in default of payment of fine, to undergo rigorous imprisonment for two years for the offence punishable under Section 376(2)(i) read with Section 511 of the Indian Penal Code. Further, he has been sentenced to suffer rigorous imprisonment for a term of 10 years and to pay fine of Rs.10,000/-, in default of payment of fine, to undergo rigorous imprisonment for two years for the offence punishable under Section 6 read with Section 18 of the POCSO Act. Since the record of the case shows that the appellant was child-in-conflict with law, his name is concealed in the judgment; though he has attended majority during the pendency of trial itself.

2. Since the arguable points were raised, this Court has admitted the appeal on 03-07-2020 and with consent, taking into consideration the facts of the case, took the matter for final hearing.

3. Heard learned Advocate Mr. R. V. Gore for appellant and learned APP Mr. S. W. Munde for respondent No.1 – State.

4. Learned Advocate representing the appellant submitted that as per the prosecution story, the offence had taken place on 11-08-2017. The victim is stated to be 4½ years old girl at that time. It is stated that the appellant took

two daughters of the informant to his house under promise to give chocolates to them and ravished victim. Even as per the prosecution story, the appellant was child-in-conflict with law (aged 17 years old) at the time of the offence, however, as per the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short hereinafter referred to as the 'Juvenile Justice Act'), he was treated as adult after the psychiatry report was given by the panel. This point appears to have not been considered by the learned Special Judge while imposing sentence on the appellant. The sentence has been imposed as if the appellant was adult since beginning i.e. from the date of the offence itself.

5. Learned Advocate for the appellant has further submitted that though the informant, who is the mother of the victim, has stated in the FIR as well as in her testimony, that the incident had taken place at about 1.00 p.m on 11-08-2017, yet, she has lodged the report on 13-08-2017. She has not explained the delay caused in lodging the FIR. It creates doubt. Further, at the time of deposition, PW-8 who was the victim herself, was aged 6 years. She has not given details of the acts done with her by the child-in-conflict with law. Admittedly, as per the testimony of PW.1 – informant has not witnessed the incident and, therefore, what was done with the victim by the child-in-conflict with law ought to have been extracted from the victim. PW-3 is the father of the victim (husband of the informant), however, his testimony is hearsay, because he has specifically stated that after he came back to house from his work place, the

entire incident was told to him by P.W.-1. P.W.2 is the father of a boy of 4 years, he has stated that the child in conflict with law had taken his son in his house and had sexually assaulted the son of P.W.-2, about 8 months prior to the present incident but however, that matter was settled at the village level. In cross also, he has stated that he had not disclosed about the incident to anybody. Without any evidence, only on the basis of the statement of this witness, alleged criminal antecedents of the child-in-conflict with law cannot be considered at all. P.W.-4 is the panch witness to the seizure panchanama of the clothes of the child-in-conflict with law, however, if we peruse the Chemical Analyzer's report, it is not supporting the prosecution. The spot panchanama was admitted by the defence, so also, the medical report of the victim. Both these documents are at Exhibit-35 and 36. P.W.-5 is the medical officer, the psychiatrist, who had assessed the child-in-conflict with law and had given psychiatry report Exhibit-38. In his cross-examination, he has stated that he can opine about the mental illness of the child-in-conflict with law, particularly during his stay at hospital and under their observation. He was not able to state whether prior to the alleged incident, the child-in-conflict with law was suffering from any mental illness or not. P.W.-6 Dr. Bhiwate is also the medical officer who had examined the child-in- conflict with law and had taken the samples. The report has been given by P.W.-6 Dr. Bhiwate at Exhibit-41. P.W.-7 is again a medical officer, who had examined the victim. As regards the victim is concerned, though she has been examined as P.W.-8, her

statement under Section 161 of the Code of Criminal Procedure was not recorded. P.W.-7 Dr. Atul Raje, who had examined the victim medically, has not opined that there was penetrative sexual assault. P.W.-1, the informant has tried to say that it was penetrative sexual assault. The victim herself i.e. P.W.-8 has not given details and could not recollect as to what had happened with her. Under such circumstance, the learned trial Judge erred in holding the appellant guilty of committing offence under Section 6 read with Section 18 of the POCSO Act.

6. It has been further submitted on behalf of the appellant that the spot panchanama Exhibit-35 would show that the houses of the informant and the appellant are in crowded locality. Under such circumstance, the prosecution ought to have examined independent witness. The investigating officer has not given any cogent reason as to why he had not recorded the statement of the victim under Section 161 of the Code of Criminal Procedure. Whatever evidence that has been given by P.W.-8 the child witness, is unbelievable, as the prosecution has not ruled out the possibility of tutoring. It has been pointed out by the learned Advocate for the appellant that the inquiry under Section 14 of the Juvenile Justice Act, 2015 regarding the age and especially in view of sub section 5(f) of Section 14 of the said Act has not been held in the mandatory period of three months. Even now, the appellant can challenge the said order of the Juvenile Justice Board (for short hereinafter referred to as 'JJB') treating the appellant as an adult and then transferred the case for trial as per the law to the

Children's Court at Jalna. That order came to be passed on 25-10-2018. No proper tests were conducted and in view of cross-examination of P.W-5, he was not the proper person to state about whether the child-in-conflict with law was suffering from any mental illness prior to the incident. The opinion that was given by the panel was wrong. The alleged statements made by the appellant before the board, that he had already experienced sex with a female of 20 to 23 years of age in the past, has impressed on them to hold the present appellant as an adult is wrong. In fact, no intentional act has been done by the child-in-conflict with law and whatever evidence that was adduced by the prosecution was not sufficient to convict him.

7. In the alternative, learned Advocate for the appellant submitted that the sentence that has been imposed by the learned Special Judge is wrong in view of the fact that it was not a penetrative sexual assault. He prayed for reduction in the punishment and also submitted that the order that has been passed by the learned Special Judge is not under Section 19 of the Juvenile Justice Act 2015, which deals with powers of the Children's Court. Therefore, in the alternative, he prayed for conviction should be under Section 9(m) with Section 10 of the POCSO Act and since it was an attempt under Section 511 of the Indian Penal Code or Section 18 of POCSO Act, the quantum of punishment should be in consonance with those provisions. He relied on following authorities :-

- (i) *Sunil Soma Bhamble Vs. The State of Maharashtra, (2016 ALL MR (Cri.) 2950.*
- (ii) *Devendra s/o Pitambar Sahare Vs. The State of Maharashtra, (2009 (3) B Cr C 320).*
- (iii) *Kailash s/o Madhukar Sandase Vs. The State of Maharashtra, (2008 (4) B Cr C 136).*
- (iv) *Santosh Prasad @ Santosh Kumar Vs. The State of Bihar decided by the Hon'ble Apex Court in Criminal Appeal No.264 of 2020 (Arising out of SLP (Criminal) No.3780/2018) dated 14-02-2020.*
- (v) *Raju Jaishriram Telgote (Langda) Vs. State of Maharashtra decided by this Court Nagpur Bench in Criminal Appeal No.586 of 2017 on 30-07-2019.*
- (vi) *Sheikh Hafeez @ Bhurya @ Bhuru s/o Sheikh Hasan Vs. State of Maharashtra, (2018 DGLS (Bom.) 121).*

8. Per contra, the learned APP strongly opposed the appeal and he has supported the reasons given by the learned Special Judge. It has been stated that the psychiatry report and the order that was passed by the learned Principal Magistrate, Juvenile Justice Board, Jalna was never challenged by the present appellant and he has submitted himself to the jurisdiction of the Children's Court. The trial has taken place. Under such circumstance, he cannot now challenge the said order. It was further submitted that the child-in-conflict with law was found by the panel of the experts to be having sufficient understanding

capacity and especially, when the history was taken by the panel of experts, he himself has disclosed about his past sexual act. He has been treated as an adult. As regards the present case is concerned, the delay in lodging the FIR has been sufficiently explained by the informant. Naturally, with such incident, the family would be in shock and might not go to police immediately. It has not been brought on record in the cross examination of P.W.1 and P.W.3 that there was any kind of enmity between them and the family members of the appellant, so as to frame the appellant in such heinous crime. The mental condition of the mother can be understood that she had allowed the daughters to go with appellant with confidence under his promise that he would give them chocolates. The second daughter is still younger to the victim. After the child- in-conflict with law has done the heinous crime with the victim, when she shouted, the mother has gone there and under that circumstance, the second girl has been saved. Therefore, taking into consideration the seriousness of the offence, the sentence has been imposed and, therefore, it need not be modified. Learned APP, therefore, strongly canvassed for dismissal of the appeal.

9. At the first place, we are required to consider the admitted fact that the appellant (even as per the prosecution story) was 17 years of age, therefore, he was child-in-conflict with law. Therefore, initially the charge-sheet was filed before the JJB. Thereafter, as per the order passed by the learned Principal Magistrate on 17-03-2018, he was sent for the psychology test. Further, it

appears that, after the counseling was done, a detailed report was called in view of the order dated 19-05-2018. After the entire procedure was over, order was passed below Exhibit-01 on 25-10-2018 that taking into consideration the psychiatry report as well as SIR and report of counselor, the JJB has come to the conclusion that in view of Section 18(3) of the Juvenile Justice Act, the case should be transferred to Children's Court for trial. It appears that this order was not challenged by the appellant. That means, he has, thereafter, submitted to the jurisdiction of the Children's Court. Thereafter, the charge was framed on 04-04-2019 and the entire trial has been conducted. Now, after the trial is over and the child-in-conflict with law has been convicted, now at the appellate stage for the first time, it is canvassed that even at this stage, appellant i.e. child-in-conflict with law can challenge the said order passed by the JJB on 25-10-2018. This cannot be allowed. When the said order was passed regarding transfer of the case to the Children's Court in view of Section 18(3) of the Juvenile Justice Act, then the entire forum to try the child-in-conflict with law would have been changed. So also, he would have been governed under the provisions of Juvenile Justice Act 2015 and the JJB would have been the appropriate authority under the Juvenile Justice Act 2015. In the event, he would have been held to be the 'child' (Not as adult). Now, when he had submitted to the jurisdiction of the Children's Court, allowed the entire trial to be conducted and now, it is not demonstrated as to what prejudice has been caused to him, he cannot now

challenge the said order.

10. Independently or alternatively, if it is to be taken that the appellant can still challenge the said order passed by the JJB on 25-10-2018, yet, it is to be noted that the JJB had undertaken entire procedure that is contemplated under the Juvenile Justice Act 2015; as per Section 15 of the Juvenile Justice Act, to assess his mental and physical capacity, ability to understand the consequences of the offence and the circumstances in which he has allegedly committed the offence. It has been considered that the allegations against him are that he had committed rape on a minor girl of four years. Further, it was considered that the secondary sexual organs of the child-in-conflict with law are well developed. He was capable of doing sexual intercourse and in addition to that, the history was considered which was told by the appellant himself that he had already experienced sex with one female around 20 to 23 years of age. The JJB has also considered the report of the counselor and, therefore, it was opined that he is aware of the consequences of the commission of the offence by him. So, no fault can be found in the order passed by the JJB on 25-10-2018.

11. Now, turning towards the evidence that has been adduced against the child-in-conflict with law, it is to be seen that the prosecution has examined in all ten witnesses to support its case. PW.-1 is the mother of the victim and from her cross-examination taken on behalf of the appellant, it can be certainly

said that there is absolutely no dispute regarding the age of the victim. It has come in her cross-examination that the house of the appellant is at a distance of about ten feet from her house. That means, child-in-conflict with law was well aware about the age of the victim. PW-1 has stated that she has three daughters. Victim was four years, at that time. On the day of incident at about 1.00 to 1.15 p.m., she herself, victim and her another daughter (then aged 2 ½ years) were in front of their house. After about half an hour, the child-in-conflict with law came there and asked both her daughters to accompany him and he promised that he would give them chocolates. Accordingly, the victim and her another daughter went along with the child-in-conflict with law to his house and she came inside her house. After about 10 to 20 minutes, she heard cries of her another daughter. Therefore, she came out of the house and she again heard the voice of that daughter from the house of the child-in-conflict with law, which was closed. She, thereafter, went to the house of the child-in-conflict with law and knocked the door. The child-in-conflict with law opened it, at that time, she saw that the another daughter was crying and the victim was lying on the cot. She asked the child-in-conflict with law as to what he has done with her daughter and why another daughter is crying; at that time, the child-in-conflict with law pushed her and ran away from that place. The victim was frightened and was not able to walk. She found some sticky liquid on both thighs and private part of the victim. She also found that the knicker of the

victim was lying near the cot. Thereafter, the mother says that she came in her house along with her two daughters and had even brought that knicker along with her. Thereafter, she made enquiry with her daughter – victim and she told that the child-in-conflict with law tried to insert his private part into her private part. Victim also told her that the child-in-conflict with law had pressed her mouth, so that she should not raise shouts. The another daughter also gave the same version. The mother then says that as per the request of the victim, she gave her bath. PW-1 says that her husband arrived at about 4.00 to 5.00 p.m. and then she narrated the entire incident to him. According to her, her husband had gone to police station and then police came to her house on 13-08-2017 and then recorded her statement, which is the FIR Exhibit-18. In her cross-examination, she has stated that the distance between her house and Police Station, Ashti is about 15 Kms.. She has stated that after she had narrated the entire incident to her husband, she and her husband had gone to the house of the child-in-conflict with law. About 8 to 10 people had gathered. She has stated that it did not happen that the mother and sister of the child-in-conflict with law had given threat and asked her not to take any action against child-in-conflict with law. She has reiterated that her husband had gone to Police Station on 11-08-2017, but then she says that he came back immediately. She did not go along with her husband and other persons from village to Police Station on 12-08-2017. She has also stated that she had not gone to Police Station on 13-08-

2017. According to her, her husband has lodged FIR with the police on 13-08-2017. It can be seen that the informant being a rustic lady may not be understanding what is FIR, but then she has admitted her signature on Exhibit-18. Even if for the sake of argument we accept that there is delay in lodging the FIR, yet, it is absolutely not fatal, taking into consideration the fact that there was no direct dispute or quarrel between informant, her husband on one part and the child-in-conflict with law and his family on the other part. In her cross-examination, it has been tried to be suggested that Ramu Gurav, who is the brother of her husband and appellant had quarreled with each other on the count of Udid (Uard) Crop about 10 days prior to the incident. The said suggestion has been denied by her. She admitted that the agricultural land belonging to the child-in-conflict with law is situated in front of the land of Ramu Gurav. Further, she has denied that about 10 days prior to the incident, her husband and Ramu Gurav had stolen 5 gunny bags of Udid and, at that time, child-in-conflict with law had told that he would lodge a report against them. But, at that time, other people had intervened and, therefore, child-in-conflict with law had not lodged the report. It is also suggested to the informant that there was fear in the mind of the informant and her husband that still the child-in-conflict with law can lodge a report against the husband and, therefore, he has been falsely implicated. Important point to be noted is that the age of the child-in-conflict with law is 17 years even at that time, how much part he would

have been taking in the agricultural activities, is a question. If at all, there would have been some such incident, then he would have involved his father in the same and he would not have dared to say anything to the husband of the informant or his brother. A 17 year old boy will not do such activities. It is not his case that even at that age he was the only earning member of the family and was therefore looking after his lands. In his statement under Section 313 of the Code of Criminal Procedure, he has not given any such story. Thus, it can be seen that all these are the fishing questions and not based on any fact. Even for such incident of alleged theft, it is hard to imagine that the informant and her husband would have involved their daughter, who was then aged 4 years. Therefore, there is absolutely no substance in the said defence about false implication.

12. At this stage itself, the testimony of the victim is required to be noted. Her testimony was recorded on 05-12-2019, when she was 5-6 years old. She has only stated that on the day of incident, she was playing in front of her house. Child-in-conflict with law took the herself and her sister on the promise of giving chocolate to his house. She further says that the child-in-conflict with law removed her knicker and did something. She was not able to say what 'something' means and thereafter, she had shouted. It is to be noted that she was the innocent girl of 5-6 years and was deposing almost after two years. May be due to the environment of the Court, though precautions might have been taken

by the Special Court while recording her evidence, she could not have given proper answers. Her statement was not recorded under Section 161 of the Code of Criminal Procedure and the Investigating Officer has tried to give his own reasons for not recording it, but ultimately what the girl can convey to her mother immediately after the incident could not have been conveyed it to somebody else. The relationship of a mother and a daughter would always be of confidence and the mother would be having her own skill to extract about the things which have happened with her child. It will not be an exaggeration, if it can be observed that the mother has that divine power to understand the feelings like happiness or sorrows of the child and many times she understands it without being conveyed in words. She understands the mood of the child from his or her appearance and/ or actions also. She can understand the agony that the child undergoes and she would be the first person to offer security to the child. The child also after getting that security would open up and would convey what he or she want or went through. In the extreme childhood of any child, his or her mother would understand the language of the child even if he or she may not be talking properly. Mother of deaf-and-dumb or even mentally challenged child can understand his/her language and, therefore, in the present case, even if the child was not able to tell before the Court as to what had happened with her on the day of incident, yet, the other evidence that has been produced by the prosecution is required to be considered here by keeping aside the testimony of

the child. Before considering the other evidence once again, however, it is required to be observed that the child-in-conflict with law will not get any kind of advantage, when the victim in this case was not able to convey the happenings that had happened with her on the day of incident.

13. Informant was the only person, who could give as to what had happened on that day. The other daughter, who was with the victim on that day was still younger to the victim. As per the FIR, the age of another daughter was two years. We would expect least from that daughter. What the informant has stated that she went to the house of the child-in-conflict with law and knocked the door after she had heard the noise of her second daughter. Then she says that the child-in-conflict with law had opened the door. It will not be out of place to mention here itself that the learned APP conducting the matter has not tried to extract how much time, the child-in-conflict with law had taken to open the door and what were the clothes on the person of the child-in-conflict with law at that time, if she would have noticed. These questions or fact were important from the point of view as to guess which act could have been done inside the house by the child-in-conflict with law. But then, that fact has not been extracted and, therefore, it will now be required to be considered as to which offence could be made out against the child-in-conflict with law. The informant further says that she saw the another daughter crying, whereas the victim was lying on the cot. Though she had tried to ask the child-in-conflict with law and did ask him as to

what he has done with the daughter, the child-in- conflict with law had pushed her and ran away. Here it can be said that definitely he would have put on cloths before he ran away. The informant further says that the victim was in frightened condition and was not even able to walk. The mother could find out some sticky liquid on the thighs and private part of the victim. She found that the knicker of the victim was lying near the cot. As regards those events or facts which have been told by the informant, except denial in the cross, there is nothing. It will not be out of place to mention here that while making submissions, the learned Advocate for the appellant has stated that in the cross-examination of the informant it has come that the house of the child-in-conflict with law is consisting of only one room. Then the question arises and the prosecution has not clarified, where the family members of the child-in-conflict with law were at the relevant time. Important point to be noted is that this point appears to have been raised for the first time at the appellate stage. Perusal of the cross-examination would clearly show that the informant had stated that when she went inside the house of the child-in-conflict with law, nobody else was present. None of the family members of the child-in-conflict with law have been examined by the him in defence to state that they were inside the house at the relevant time. Therefore, it will have to be accepted that when the incident took place, child-in-conflict with law was the only person in his house.

14. PW-1 has further stated in her examination-in-chief that after she

had brought the victim to her house, upon enquiry, victim told her that the child-in-conflict with law had tried to insert his private part into her private part. The learned APP has not further got any clarification about this statement, because word “tried” has been used. Even if we consider the marathi deposition, the word that has been used is “प्रयत्न केला”, that means and it indicates that there was no penetration as required for the offence under Section 3(a) of the POCSO Act. In absence of details of happening inside the house, medical evidence also not clearing it and said statement by P.W.-1 that victim had told her that Child-in-conflict with law had “tried” to penetrate his penis, we will have to infer that there was no complete act of ‘penetration’, and therefore, it is “attempt”. Further, when Child-in-conflict with law had removed knicker of the victim and it appears from the testimony of P.W.-1 that there was discharge of semen; it can definitely be inferred that Child-in-conflict with law had intention to commit rape on victim. Therefore, the said act is definitely “sexual assault” defined under Section 7 of the POCSO Act. Section 3(a) of the POCSO Act i.e. the relevant part is reproduced here, which reads thus :-

“3. Penetrative Sexual Assault. -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or”

15. Thus, only after the penetration is complete, it would attract the said offence, which is then made punishable under Section 4 of the said Act.

Thus, it was the ‘attempt’ and, therefore, the learned Special Judge also invoked Section 511 of the Indian Penal Code i.e. the attempt, when it came to the conviction for the offences under Indian Penal Code and Section 18 of POCSO Act, when it came to the Sections in respect of the POCSO Act. Another fact which we will have to consider is that when learned Special Judge has held that the offence that has been proved by prosecution in this case is “attempt” to commit rape, and prosecution has not challenged this finding by filing an appeal; then the said finding by learned Trial Judge to the extent of act being “attempt” will have to be upheld. It will not be out of place to mention here itself that the learned Special Judge failed to consider the provisions of Section 42 of the POCSO Act, which reads 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 or section 509 of 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.”*

When this Section 42 of the POCSO Act covers Section 376 of Indian Penal Code in its entirety, then by virtue of this alternate punishment, the

child-in-conflict with law, after he has been found guilty of such offence, should have been either punished under POCSO Act or under Indian Penal Code, as provides for punishment, which is greater in degree. He has awarded punishment under both, which is wrong.

16. It is to be further noted that the child-in-conflict with law was acquitted of the offence under Section 3(a) punishable under Section 4 of the POCSO Act, however, the learned Special Judge has held him guilty under Section 6 of the POCSO Act. Section 6 of the POCSO Act provides for punishment for aggravated penetrative sexual assault. Learned Special Judge forgot to consider that Section 5 provides for aggravated penetrative sexual assault. If we peruse the observations in the impugned judgment, then it can be seen that he has not considered the facts of the case covering under Section 3(a) as well as Section 5(m) of the POCSO Act. The entire judgment is thereafter silent as to which offence has been made out against the child-in-conflict with law defined under Section 5 of the POCSO Act. Basically, when there was no penetrative sexual assault covered under Section 3(a) of the POCSO Act, there was no question of having the case covered under aggravated penetrative sexual assault, which is then made punishable under Section 6 of the POCSO Act. Therefore, it is now required to be seen as to under which provisions, the case has been made out. Again going back to the testimony of the informant, it can be seen that what was disclosed by the victim to her was that the child-in-conflict

with law had tried to insert his private part into her private part, that means it was an attempt. Section 7 of the POCSO Act, reads thus :-

“7. Sexual assault. - whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

17. Further, as regards Section 9 of the POCSO Act, which covers various types of aggravated sexual assaults, subsection (m) would be relevant, which reads thus :-

*“9. Aggravated sexual assault.-
(m) whoever commits sexual assault on a child below twelve years; or”*

18. Section 9(m) of the POCSO Act has been made punishable under Section 10 of the said Act, which reads thus :-

“10. Punishment for aggravated sexual assault. - Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

19. Therefore, the case would be governed under the POSCO Act under

that Section, however, as regards Section 376 of Indian Penal Code is concerned, the learned Special Judge has rightly held that offence under Section 376(2)(i) of Indian Penal Code has been made out. It will not be out of place to mention here that the offence was committed on 11-08-2017 and Section 376(2)(i) was omitted by Act of 22 of 2018 with effect from 21-04-2018. The said Section was as follows :-

“Section 376(2)

(i) commits rape on a women when she is under 16 years of age; or.”

Thus, the offence that is made out is Section 376 (2) (I) r/w. Section 511 of Indian Penal Code and Section 9 (m) punishable under Section 10 r/w. 18 of POCSO Act. The further effect of Section 18 and 42 of the POCSO Act would be considered later.

20. Now, turning towards the rest of the evidence that has been adduced by the prosecution, it can be seen that though by examining P.W.-2, the prosecution had tried to bring criminal antecedents of the child-in-conflict with law on record, yet, since the said witness had not lodged any report, it cannot be taken as criminal antecedents. P.W.-3, the father of the victim, has also stated about the entire incident, but as submitted by the learned Advocate for the appellant, his testimony is hearsay. The only fact that is required to be considered is that he says that he had gone to police station along with victim on

the day of the incident itself and had narrated the incident to Police Head Constable Nagargoje. But then according to him, some persons from his village and relatives had not allowed him to lodge the FIR and they had brought him back to village. In his cross-examination, he says that he has not lodged any report against those persons who had prevented him from lodging report. As aforesaid, though there appears to be delay in lodging the FIR, yet, that is not fatal. The testimony of the panch witness would only show the seizer the clothes of the child in conflict with law in his presence, but then since the case is made out for attempt, that evidence is not required to be considered further.

21. The testimony of P.W.-5 Dr. Nitin Pawar, who had assessed the child-in-conflict with law and had given psychiatry report Exhibit-38, was the opportunity for the child-in-conflict with law to bring many facts on record, however, if we consider the cross-examination conducted on behalf of the child-in-conflict with law, it is very cryptic. Whatever observations have been made and findings those have been arrived at, are on the basis of the observations made by the team between 22-12-2017 to 30-12-2017 as indoor patient. No doubt, the report says that as per the psychiatric examination and the history narrated by the mother of the child-in-conflict with law, the child-in-conflict with law had history of psychiatric illness of 8 months prior to the incident and the child-in-conflict with law had taken treatment from Shanti Nursing Home, Aurangabad for 10 days. The child-in-conflict with law had every opportunity to

produce those documents on record, but it has not been done. Further, in the report itself it is stated that after such narration by his mother, she has stated that the child-in-conflict with law was alright. Thereafter, there was no psychiatric complaints by him. Therefore, it has been stated that now the child-in-conflict with law has no complaint suggestive of psychosis, depression, mood disturbances, anxiety, sleep disturbances or substance used. Therefore, the testimony of the medical officer would support the findings arrived at by the JJB for taking action under Section 18(3) of the Juvenile Justice Act. P.W.-6 Dr. Bhiwate had examined the child-in-conflict with law and found that he is capable of doing sexual intercourse. There is no negative question in his cross. P.W.-7 Dr. Raje had examined the minor victim. The entire testimony and his report Exhibit-47 is not suggesting the complete act of rape. No doubt, the incident had taken place on 11-08-2017 and the victim was examined by him on 14-08-2017 and, therefore, it appears that he has stated that there were no external injuries, especially on the genital area. Again at the cost of repetition, it can be said that the case is of 'attempt' and, therefore, his testimony may not even be considered. P.W.9 and 10 are the police officers. So far as the ratio laid down in the aforesaid authorities relied by the learned Advocate for appellant are concerned, the facts in the aforesaid cases and the present case, are different.

22. Taking into consideration the entire evidence and for the reasons aforesaid, it can be seen that the prosecution has proved offence under Section

376(2)(i) read with Section 511 of Indian Penal Code as well as, as regards POCSO Act is concerned, the prosecution has proved offence under Section 9(m) punishable under Section 10 read with Section 18 of the POCSO Act against the appellant, beyond reasonable doubt. The punishment that can be awarded under Section 10 of the POCSO Act is not less than five years, but which may extend to seven years and shall also be liable to fine. Taking into consideration Section 18 of the POCSO Act, the said punishment would come to one-half of the longest term of imprisonment provided for that offence or with fine or with both. So, the longest punishment provided under Section 10 is seven years, and half of it will come to three and half years. The punishment that is provided under Section 376(2)(i) is the rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall be imprisonment for the remainder of that persons natural life.... Section 511 of India Penal Code also provides for half of the longest term of the imprisonment provided for that offence which is on the similar line of Section 18 of the POCSO Act. Now, as regards imposition of the punishment is concerned, as aforesaid, the learned Special Judge had totally ignored Section 42 of the POCSO Act. He could not have imposed punishment to the child-in-conflict with law under both the provisions. Further, it can also be seen that the provisions of Juvenile Justice Act were altogether not considered by the learned Special Judge, especially Section 19(3) of the Juvenile Justice Act, which reads thus :-

“19. Powers of Children’s Court.-

(3) The Children’s Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:”

Further beneficial provisions for the child have been provided under the said Act and then the Act also provides for what treatment is to be given to such child-in-conflict with law, after he attains the age of 21 years. Those are also not considered by the learned Special Judge. It will not be out of place to mention here that the said Court was not only the Special Court under the POCSO Act, but also was the Children’s Court under Juvenile Justice Act, 2015 and, therefore, proper consideration ought to have been given to all the Acts involved in the case and ultimate operative order ought to have been given. Since the learned Special Judge has failed to do that, being the first Appellate Court, it is required to be done by this Court. As per the papers, especially one of the order passed by the learned Principal Magistrate, JJB, Jalna on 09-11-2017, it can be seen that the school leaving certificate of the child-in-conflict with law was considered, which gives his birth date as 27-05-2000. Therefore, as on today he is aged 20 years 7 months 29 days and therefore, the provisions of Section 19(3) of the Juvenile Justice Act are required to be considered and the benefit of the same is required to be given. It is stated that at present the appellant has been lodged in regular jail which is against the provisions of Juvenile Justice Act. He

is required to be kept in a place of safety i.e. Pandit Jawaharlal Nehru Government Special Home at Yerwada, Pune (Yerwada Industrial School) and accordingly, further directions are required to be given to keep him there till he attains 21 years of age and thereafter, to shift him to the regular jail. Further, taking into consideration the provisions of Section 42 of the POCSO Act providing for alternate punishment and the punishments provided under Indian Penal Code and POCSO Act governing this case, as aforesaid punishment under Indian Penal Code is having greater degree. Though Section 376(2)(i) provides for the longest punishment of imprisonment for life, yet, taking into consideration the age of the child-in-conflict with law minimum punishment is, therefore, required to be imposed i.e. it shall not be less than ten years and when it is coupled with Section 511 of Indian Penal Code, half of it would be five years. Accordingly, the modification is required to be made and, therefore, appeal deserves to be partly allowed. Hence, the following order :-

ORDER

- 1) Appeal is hereby partly allowed.
- 2) The findings given by the learned Judge of the Special Court, Jalna in Special Case (Child) No.69 of 2018 dated 04-03-2020 holding the appellant / child-in-conflict with law guilty of committing offence under Section 6 read with Section 18 of the POCSO Act, is hereby set aside and the child-in-conflict with law stands acquitted of that offence.

3) The findings of the learned Special Judge holding the child-in-conflict with law guilty of committing offence punishable under Section 376(2)(i) read with Section 511 of the Indian Penal Code, is hereby confirmed. Further, the child-in-conflict with law is hereby held guilty of committing offence under Section 9(m) punishable under Section 10 read with Section 18 of the POCSO Act, however, in view of Section 42 of the POCSO Act, no separate sentence is awarded for the offence punishable under Section 9(m) punishable under Section 10 read with Section 18 of the POCSO Act.

4) The punishment awarded by the learned Special Judge to the appellant / child-in-conflict with law under Section 376(2)(i) read with Section 511 of Indian Penal Code is hereby set aside and modified as follows :-

“The child-in-conflict with law is sentenced to suffer rigorous imprisonment for five years and shall pay fine of Rs.10,000/-, in default of payment of fine, he shall suffer rigorous imprisonment for one year.”

5) The child-in-conflict with law is entitled for set off under Section 428 of the Criminal Procedure Code.

6) The order in respect of payment of compensation is hereby set aside and modified as follows :-

“The fine amount recovered be paid to the informant under Section 357(1) of the Code of Criminal Procedure after the appeal period is over.”

- 7) Today, the child-in-conflict with law is aged 20 years 7 months 29 days. He will complete the age of 21 years on 27-05-2021. Till completion of his 21 years of age, he be kept in a place of safety i.e. Pandit Jawaharlal Nehru Government Special Home at Yerwada, Pune (Yerwada Industrial School).
- 8) The Superintendent, Central Jail, Aurangabad to make immediate arrangements to shift the child-in-conflict with law to said Institution at Pune, under proper supervision.
- 9) The Superintendent of Pandit Jawaharlal Nehru Government Special Home at Yerwada, Pune (Yerwada Industrial School) is directed to admit the child-in-conflict with law in the Institution till he attains 21 years of his age.
- 10) The Superintendent of Pandit Jawaharlal Nehru Government Special Home at Yerwada, Pune (Yerwada Industrial School) is directed to keep away the child-in-conflict with law from other children in the Institution.
- 11) The Superintendent of Pandit Jawaharlal Nehru Government Special Home at Yerwada, Pune (Yerwada Industrial School) is directed to provide all re-formative services to the child-in-conflict with law, including educational services and skill development, etc.
- 12) The District Probation Officer, Pune is directed to send periodic follow-up report to Special Court, Jalna every month to evaluate the progress of the child-in-conflict with law till the attainment of age of 21 by him.
- 13) The Superintendent of Pandit Jawaharlal Nehru Government Special

Home at Yerwada, Pune (Yerwada Industrial School) is directed to transfer the child-in-conflict with law to the Central Jail, Aurangabad after the child-in-conflict with law attains 21 years of age.

14) The copy of this operative order be sent to the Superintendent of Pandit Jawaharlal Nehru Government Special Home at Yerwada, Pune (Yerwada Industrial School), the District Probation Officer, Pune, the Central Jail Aurangabad and Boys Observation Home, Parbhani.

15) It is clarified that there is no change in the order of disposal of muddemal property.

[SMT. VIBHA KANKANWADI, J.]

scm