

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 263 OF 2014

Shantaram S/o Arjun Gorase,
Age 31 years, Occ. Labour,
R/o Ranjangaon Deshmukh,
Taluka Kopargaon,
District Ahmednagar.

... Appellant
(Orig. Accused)

versus

State of Maharashtra,
Through P.I. Shirdi Police Station,
Taluka Rahata, District Ahmednagar.

... Respondent
(Orig. Complainant)

.....

Mr. B. A. Husale, Advocate for the Appellant.
Mr. S. P. Deshmukh, APP for the Respondent-State.

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**CORAM : V. K. JADHAV AND
S. G. DIGE, JJ.**

**RESERVED ON : 05.07.2021
PRONOUNCED ON : 16.07.2021**

JUDGMENT (PER V. K. JADHAV, J.) :-

1. This appeal is directed against the judgment and order of conviction passed by Additional Sessions Judge, Kopargaon dated 09.04.2014 in Sessions Case No. 36 of 2013.

2. Brief facts of the prosecution case are as follows:

a. The appellant-accused and the prosecution witnesses Namdeo Eknath Pawar and Annasaheb Eknath Pawar are cousins. Their residential houses are situated in the same locality of village Ranjangaon Deshmukh, Taluka Kopergaon, District Ahmednagar. The prosecutrix is the daughter of PW Namdeo. In the year 2013, she was studying in school at the same village in 8th standard. On 07.01.2013, the prosecutrix/victim attended the school but did not return home in the evening. It was revealed during search that since the intermission of the school she was not found in her class. PW Annasaheb Eknath Pawar (real brother of PW Namdeo Eknath Pawar) lodged a missing report at Shirdi Police Station. It was mentioned in the missing report that the appellant-accused was also not in his home.

b. On 14.01.2013, PW Namdeo Eknath Pawar (father of the victim) lodged a complaint in the concerned police station. On the basis of his complaint, crime no. 15 of 2013 came to be registered for the offence punishable under Section 363 of IPC. PSI Sudhir Patil (PW9) was entrusted with the investigation. During investigation, the prosecutrix was found with the accused residing

in a room near a brick-kiln situated at village Kalamb, Taluka Ambegaon, District Pune. Thus, both were brought to the Shirdi Police Station.

c. The appellant-accused was arrested in connection with the crime for the offence punishable under Sections 363, 366-A of IPC. After the statement of the prosecutrix was recorded, it revealed that offence under Section 376 of IPC has also been committed. Thus, the Investigating Officer prepared a panchanama of the scene of offence, recorded the statements of witnesses and also referred the prosecutrix for her medical examination. The appellant-accused was also sent for his medical examination. The cloths on the person of the appellant-accused as well as the prosecutrix were seized. The statement of the prosecutrix was also recorded under Section 164 of Cr.P.C. before the Magistrate. After completion of the investigation, the Investigating Officer submitted the charge sheet against the appellant-accused.

d. The learned Additional Sessions Judge, Kopergaon has framed charge against the accused (Exhibit 4) and the additional charge under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act"). The appellant-

accused pleaded not guilty to the charge. The defence of the appellant-accused, as gathered from the statement under Section 313 of Cr.P.C. is of total denial. The prosecution has examined in all 10 witnesses to substantiate the charges levelled against the accused.

e. Learned Additional Sessions Judge, Kopergaon, by the judgment and order dated 09.04.2014, convicted the appellant-accused as under:

1. The accused is convicted under Section 235 of Cr.P.C. for committing the offence under section 363, 366(A) and 376 of Indian Penal Code and under section 6 of the Protection of Children from Sexual Offences Act, 2012.
2. The accused is sentenced to undergo Rigorous Imprisonment for 3 years and to pay fine of Rs.2,000/-, in default to suffer Simple Imprisonment for one year for the offence under Section 363 of Indian Penal Code.
3. The accused is sentenced to suffer Rigorous Imprisonment for 5 years and to pay fine of Rs.3,000/- in default to suffer Simple Imprisonment for 18 months for the offence under Section 366(A) of Indian Penal Code.

4. The accused is sentenced to suffer Rigorous Imprisonment for 7 years and to pay fine of Rs.5,000/-, in default to suffer Simple Imprisonment for 2 years for the offence under Section 376 of Indian Penal Code.
 5. The accused is also sentenced to undergo imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer Simple Imprisonment for 2 years for the offence under Section 6 of the Protection of Children From Sexual Offences Act, 2012.
 6. All substantive sentence shall run concurrently.
 7. The accused is in custody since 18.01.2013, he is entitled for set off for the period already undergone in his substantive sentences under section 427 of Cr.P.C.
 8.
 9.
3. Hence this appeal.
4. Learned counsel for the appellant-accused submits that the evidence of PW 4 prosecutrix/victim is not reliable and trustworthy.

Though the prosecutrix has deposed about her age as 14 years and even though she was studying in 8th standard in one Jai Hanuman Vidyalaya in the village at the relevant time, the prosecution has failed to prove beyond doubt that she was minor or child as defined under the provisions of the POCSO Act at the time of the alleged incident. Learned counsel submits that the *bonafide* certificate issued by the Headmaster of the said school was not duly proved by the prosecution. Learned counsel submits that the learned Judge of the trial court has relied upon the said *bonafide* certificate merely on the basis of the say submitted by the defence counsel to the notice given by the prosecution under Section 294 of Cr.P.C. (Exhibit 6) admitting thereby the arrest panchanama and the *bonafide* certificate (Exhibit 8). Learned counsel for the appellant-accused submits that even the original school record was not produced to show the age of the prosecutrix. Learned counsel submits that the admissibility of the said *bonafide* certificate would be of no evidentiary value to prove the age of the prosecutrix in absence of the material on the basis of which the age was recorded. The date of birth mentioned in the *bonafide* certificate would have no evidentiary value unless the person, who made entry or who gave the date of birth, is examined. Thus, the entry in the *bonafide*

certificate without examining the Headmaster of the school who made the entry, cannot be relied upon to fix the age of the girl. Learned counsel submits that in a case under Sections 366 and 376 of IPC and particularly under the stringent penal provisions of the POCSO Act, the age of the prosecutrix is always of importance.

5. Learned counsel for the appellant submits that the prosecution has examined witness no.6 Dr. Supriya Shankarrao Jagtap. The prosecutrix was referred to the Civil Hospital, Ahmednagar by the Medical Officer, Rural Hospital, Rahata on 21.01.2013. PW Dr. Supriya Jagtap was on duty as Casualty Medical Officer and the prosecutrix was brought to her. Thus, PW 6 Dr. Supriya Jagtap has obtained radiological opinion, gynecological opinion and the opinion of the psychiatrist. As per the clinical finding, the secondary sexual characters of the prosecutrix were well developed. PW 6 Dr. Supriya Jagtap has deposed that the Radiologist has found the age of the prosecutrix between 14 to 17 years on ossification test. PW 6 Dr. Supriya Jagtap, by referring the radiological examination report, opined that ossification center for the head of radius fused and for distal end of radius partially fused and the epiphysis for iliac crest appears but not fused, indicates

that the age of the prosecutrix was less than 18 years. She has accordingly issued the certificate which is marked at Exhibit 29. Learned counsel submits that there is vast gap between the age as per the *bonafide* certificate Exhibit 8 and as per the medical certificate Exhibit 29. Learned counsel submits that considering the error of margin, it is doubtful as to whether the prosecutrix was minor or child as defined under the POCSO Act at the time of the alleged incident.

6. Learned counsel for the appellant-accused submits that the evidence of the prosecutrix does not inspire confidence. The prosecutrix has referred one incident occurred in the house one month prior to the actual incident and deposed that the appellant-accused entered in the house, caught hold of her hand and threatened her. The prosecutrix has further deposed that on the next day, the appellant-accused again entered in the house and committed forcible sexual intercourse with her. As per her evidence, on 07.01.2013, she went to school and during interval, she joined the company of the appellant-accused. According to her, she had joined the company of the appellant-accused for the reason that the appellant-accused had threatened her. She has further

deposed that the accused had come there on a bicycle and she climbed over his bicycle. The appellant-accused took her on his bicycle and they reached near village Pathare. Thereafter, they boarded one bus and went to Nasik. The appellant-accused purchased one dress for her and one jeans pant for himself. Thereafter, both of them went to Vani and waited at the S.T. stand. Thereafter, they went to village Manchar. The appellant-accused asked her to wait at the S.T. stand at Manchar with a promise to return after searching a job. The prosecutrix waited at the S.T. stand for more than one hour and the appellant-accused had returned after one hour and disclosed to her that he had found a job. The appellant-accused thereafter took her to the brick-kiln and they had stayed in a room at the said brick-kiln. Thereafter, police arrived and took them to the Manchar Police Station and then to the Shirdi Police Station.

7. Learned counsel for the appellant-accused submits that there are allegations about forcible intercourse in the house only once. Thereafter, there are no allegations against the appellant-accused for having committed forcible sexual intercourse with her. As per the evidence of PW 6 Dr. Supriya Jagtap and in terms of the

medical certificate Exhibit 29 issued by her, there was an old hymen tear and per vaginal examination admit two fingers easily. The said opinion is contrary to the allegations made by the prosecutrix. Learned counsel submits that the prosecutrix had opportunities to raise hue and cry, to refuse to join the company of the appellant-accused. She was alone waiting at the bus stand for a complete hour. However, she did not try to run away and instead waited for the arrival of the appellant-accused. Learned counsel submits that there is suppression of material facts. The prosecutrix is not only suppressing her age, may be under the pressure of her father and the uncle, however, she is also suppressing the actual incident. Learned counsel submits that the provisions of Section 366-A of IPC are not at all attracted. Even then the learned Judge of the trial court has recorded conviction under Section 366-A of IPC sentencing the appellant-accused to suffer Rigorous Imprisonment for five years. Learned counsel submits that the prosecution has failed to prove the case against the appellant-accused for the offence under Sections 363 and 376 of IPC and Section 6 of the POCSO Act. Learned counsel submits that it is not safe to rely on the uncorroborated testimony of the prosecutrix. The appellant-accused is a young person having no criminal history.

The appellant-accused is a poor person, a labour by occupation.

The appellant-accused is entitled for the benefit of doubt.

8. Learned counsel for the appellant-accused, in order to substantiate his contention, placed reliance on the following cases :

1. State of H.P. v. Jieu Nath, reported in 2014 Cr.L.J. 1536.
2. Alamelu and another v. State with other connected matters, reported in AIR 2011 SC 715.
3. Ram Murti v. State of Haryana, reported in AIR 1970 SC 1029.
4. Thakor Narsangji v. State of Gujarat, reported in 2014 Cr. L. J. 1252.
5. Domnic Misquita and etc v. State, reported in 1996 Cr.L.J. 2799.
6. Chidda Ram v. State, reported in 1992 Cr.L.J. 4073.
7. Milan Rai v. State of Sikkim, reported in 2016 Cr.L.J. 4591.
8. Ram Ishwar Rai v. State of Bihar, reported in 2017 All.M.R. (Cri) 5359.

9. Learned APP submits that the evidence of the prosecutrix is reliable, trustworthy and inspiring confidence. Her evidence is well corroborated by the medical evidence. The defence has admitted the *bonafide* certificate Exhibit 8 and therefore, the same can be read in evidence. The defence has not disputed the genuineness of the *bonafide* certificate Exhibit 8. Learned APP submits that as per the date of birth mentioned in the *bonafide* certificate Exhibit 8, the prosecutrix was 14 years of age at the time of the alleged incident. PW 9 – PSI Sudhir Patil i.e. the Investigating Officer has caught red handed the appellant-accused along with the prosecutrix in a brick-kiln at village Manchar. Learned APP submits that PW 6 Dr. Supriya Jagtap has given opinion based on the radiological examination of the prosecutrix and by considering the error of margin. Thus, she has mentioned the age of the prosecutrix between 14 to 17 years as on the date of the alleged incident. The medical examination report Exhibit 29 clearly demonstrates that the prosecutrix - victim, who was a child as defined under the provisions of the POCSO Act, was a minor girl and she has lost her virginity and thus, there is sufficient corroboration to the evidence of the prosecutrix. Learned APP fairly submits that in the given set of proved facts, it is difficult to say that the charge under Section

366-A is proved against the appellant-accused, however, the prosecution has proved the case against the appellant-accused beyond reasonable doubt for the offence under Sections 363 and 376 of IPC and Section 6 of the POCSO Act. The appeal is thus liable to be dismissed.

10. Learned APP, in order to substantiate his contention, placed reliance on the following two cases:

1. Anversinh v. State of Gujarat, reported in AIR 2021 SC 477.
2. Bishnudayal v. State of Bihar, reported in AIR 1981 SC 39.

11. We have carefully considered the submissions advanced by the learned counsel for the appellant-accused and the learned APP for the respondent-State. With their able assistance, we have perused the grounds taken in the appeal, annexures thereto, the record and proceedings and the case law cited by the respective parties.

12. In the instant case, the trial court has recorded the conviction of the appellant-accused on the sole evidence of the prosecutrix. We have to thus carefully examine as to whether the conviction so recorded does not suffer from any basic infirmities or improbabilities which render it unworthy of credence. Before we discuss about the evidence of the prosecutrix, we need to examine the proof of age of the prosecutrix. We are of the considered opinion that in cases under Section 366 and 376, and more specifically under the POCSO Act, age of the prosecutrix is always of importance.

13. In the instant case, the prosecution has strongly relied upon the *bonafide* certificate Exhibit 8 issued by the Headmaster of the Jai Hanuman Vidyalaya, Ranjangaon Deshmukh (private school). Admittedly, the prosecution has not examined the Headmaster of the said school to prove the contents of the *bonafide* certificate Exhibit 8 on the basis of the original record maintained by the school.

14. The prosecution has given notice in terms of the provisions of Section 294 of Cr.P.C. and called upon the defence to admit or deny

the genuineness of certain documents including the *bonafide* certificate Exhibit 8. The said notice issued under Section 294 Cr.P.C. is marked at Exhibit 6 and the *bonafide* certificate is shown in the description of the document at serial number 2. We have also carefully perused the endorsement of the defence counsel. The defence has admitted the documents at serial numbers 2 and 3 i.e. the arrest panchanama and the *bonafide* certificate. Thus, the learned Judge of the trial court has exhibited the *bonafide* certificate Exhibit 8 without any formal proof.

15. Section 294 of the Criminal Procedure Code reads as under:

“294. No formal proof of certain documents.

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed: Provided that the Court may, in its discretion, require such signature to be proved.”

16. In order to render a document admissible under Section 35 of the Evidence Act, three conditions must be satisfied. Firstly, the entry that is relied upon must be one in any public or other official book, register or record. Secondly, It must be an entry stating a fact in issue or relevant fact and thirdly, it must be made by a public servant in the discharge of his official duty or any other person in performance of a duty specially enjoined by law or under the directions of the person whose duty it is to make them at the time. We are aware that the duty is imposed upon a school Headmaster to ascertain and enter the age of all the pupils whom he admits in his register and such entries, therefore, are admissible in evidence to prove the age of the person concerned. In the instant case, a copy of the *bonafide* certificate has been placed on record.

17. In the case of *Alamelu and another v. State* (supra), relied upon by the learned counsel for the appellant, the Supreme Court

in para nos. 38 and 40 has made the following observations:

“38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr.Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl’s date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no

reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311, Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at the stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

39.....

40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl.”

18. In the case cited above, the transfer certificate was issued by the Government school duly signed by the Headmaster. However, as observed by the Supreme Court, the admissibility of such document would not be of much evidentiary value to prove the age of the girl in absence of the materials on the basis of which her age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made entry or who gave the date of birth is examined.

19. In the case of Ram Murti v. State of Haryana (supra), the Supreme Court in para no. 7, has made the following observations:

“7. It is clear that in the High Court also it was not appreciated that this un-proved and unexhibited school certificate could not be treated as evidence in the case. Nor was it noticed that according to this document Satnam Kaur’s date of birth was November 5, 1948. The question of age of the prosecutrix in cases under Sections 366 and 376, Indian Penal Code is always of importance. It was particularly so in this case because according to the medical evidence the prosecutrix was found to have been used to sexual intercourse and the rupture of the hymen was old.

The High Court having acquitted the appellant for an offence under Section 376, Indian Penal Code because the prosecutrix appeared to be a consenting party not only to the impugned acts of sexual intercourse in question but even on earlier occasions, it was, in our opinion, a fit case in which that Court should have examined the question of her age more closely. On the evidence on the record we are far from satisfied that there is any trustworthy evidence on the record on which the conclusion that Satnam Kaur, prosecutrix, was under 18 years of age in March, 1965 can safely be founded.”

20. In the case of ***State of H.P. v. Jieu Nath*** (supra), the Division Bench of Himachal Pradesh High Court, in the facts of the said case, has observed that the birth certificate issued on the basis of entry in pariwar register cannot be relied upon. The Division Bench of Himachal Pradesh High Court has further observed that even the original school leaving certificate was not produced to show the age of the prosecutrix and the medical report is showing the age of the prosecutrix above 16 years. The Division Bench of Himachal Pradesh High Court, in the facts of the said case, held that the prosecutrix had consensual intercourse with the accused and the accused is entitled to acquittal.

21. In the instant case, a copy of the *bonafide* certificate Exhibit 8 has been issued and the same is relied upon by the court on the basis of the admission given by the defence counsel in response to the notice under Section 294 of Cr.P.C. issued by the prosecution.

22. Though the prosecution has examined PW 3 Narayan Gadkar, who was serving as Headmaster of the said school, PW 3 Narayan Gadkar i.e. the Headmaster has deposed about missing of the prosecutrix from the school. According to him, original *bonafide* certificate was issued to the police and the copy which is on record of the court is the copy of the said original certificate. Exhibit 8 is the same *bonafide* certificate which bears his signature. Though he has admitted in his cross-examination that he has not brought the record of the school with him and the said certificate has been prepared by the clerk of the school and he put his signature on it, however, the defence has not disputed that the said entry about the date of birth recorded in the *bonafide* certificate Exhibit 8. It has been recorded by the Headmaster in performance of the duty specially enjoined by law to ascertain and enter the age of the pupils whom he admits in the register. The defence has even not

suggested that the date of birth is not correctly mentioned in the said *bonafide* certificate by the school.

23. The prosecution has examined PW 6 Dr. Supriya Jagtap. At present we will discuss her evidence to the extent of determination of the age of the prosecutrix. PW 6 Dr. Supriya Jagtap has referred the opinion expressed by the Radiologist about the age of the prosecution between 14 to 17 years on ossification test. She has explained that radiological examination ossification center for head of radius fused and for distal end of radius partially fused. Epiphysis for iliac crest appears but not fused. In her opinion, the age of the prosecutrix was between 14 to 17 years. The certificate so issued is marked at Exhibit 29.

24. Ossification of bones is helpful for determination of age. In ascertaining the age of young persons, radiograms of several main joints of the upper or lower extremity of one or both sides of the body are required to be taken and an opinion should be given based upon it. The determination of age is always considered as a complex exercise, where no fixed norms and abstract formula could be laid down. In the case of *Babloo Pasi v. State of Jharkhand*,

reported in **2008 (13) SCC 133**, the Supreme Court said that the court should remember that an opinion based on the radiological examination is a useful guiding factor for determining the age of a person but it is not incontrovertible. An ossification test, though not a sure test, is generally accepted as the best available test for determination of the age of the human beings.

25. PW 4 prosecutrix has deposed that before a month of the incident, during the days of Dipawali, the accused entered in her house and misbehaved with her. She has further deposed that on the next day, the accused again entered in her house when she was alone and committed forcible intercourse against her will. During cross-examination, the prosecutrix has stated that she had attended puberty before Dipawali. The defence has admitted the *bonafide* certificate Exhibit 8. Further, from the tenor of the cross-examination and since the victim - prosecutrix was never suggested by the defence that she has attended the age of majority, coupled with the evidence of Dr. Supriya Jagtap about the ascertainment of the age of the victim - prosecutrix on the basis of the radiological examination, we are of the opinion that the prosecution has proved beyond doubt that the prosecutrix was minor/“child” as defined

under the provisions of the POCSO Act.

26. We have carefully gone through the evidence of the prosecutrix (PW4). She has deposed that she is studying in 8th standard in Jay Hanuman Vidyalaya in the village and the appellant-accused was staying near their house. Before a month of the incident, during the days of Dipawali, the accused called her in his house. She has further deposed that the appellant-accused expressed that he is liking her and further asked her to meet him. However she did not respond due to fear. The prosecutrix has further explained that after two/three days of the said incident, the appellant-accused again accosted her on the way and asked her as to why she did not answer his question. However, the prosecutrix was frightened and rushed to the school. The prosecutrix has further deposed that during Dipawali holidays, she was alone in the house and other family members had gone for labour work. The accused had realized it. The accused then entered in the house, caught her hand, pulled her and tried to press her breasts and also hugged her. She has deposed that the accused threatened her that if she discloses the incident to anyone in the family, she would be defamed. Consequently, she had not disclosed the incident to

anybody in the family. The prosecutrix has further deposed that on the next day, the accused again entered in the house when she was alone. The accused compelled her to lay on the ground. She tried to shout, but the accused pressed her mouth and then committed forcible sexual intercourse with her. He then left the house. We find nothing in cross-examination to disbelieve the evidence of the prosecutrix. She was alone in the house. The accused had taken advantage of the same, entered in the house and committed rape on the prosecutrix. PW 6 Dr. Supriya Jagtap has deposed that the prosecutrix has old hymen tear and upon examination of PV, two fingers were easily admissible. We have carefully gone through her cross-examination. In para 2 of her cross-examination, the prosecutrix has stated that she did not shout because the accused pressed her mouth with his hand. The lace of her pant was broken. She had received injury to her private part. There was bleeding from her private part and the said bleeding continued for about one hour. Her nicker was stained with blood. The nicker stained with blood was given to the police. So far as the incident as narrated by the prosecutrix about commission of rape in her house itself, we find her evidence reliable and trustworthy. We are thus of the considered opinion that the prosecution has proved beyond

doubt that the prosecutrix, who is a “child” as defined under the provisions of the POCSO Act, subjected to penetrative sexual assault as defined under Section 3 of the POCSO Act. Further, the charge under Section 376 of IPC as levelled against the accused is also proved to the extent of commission of rape as alleged and proved by the prosecution.

27. The prosecutrix has deposed about one single act of forcible intercourse against her wish in her house itself. So far as the charge under Section 6 of the POCSO Act is concerned, we do not find any instances indicating aggravated penetrative sexual assault as defined under Section 5 of the POCSO Act. In view of the same and since Section 4 of the POCSO Act is lesser offence, we deem it appropriate to convert the conviction of the accused under Section 4 of the POCSO Act. The accused has undergone imprisonment pending decision of his appeal for more than eight years. Thus, considering the entire aspect of the case, it would be just and appropriate if the accused is convicted under Section 4 of the POCSO Act for the imprisonment which he has already undergone. In view of the same, we do not think it necessary to record separate sentence of conviction against the accused for the offence

punishable under Section 376 of IPC.

28. So far as the charge under section 363 is concerned, the prosecutrix has deposed that on 07.01.2013, as usual, she went to the school. In the interval when she went out of the school for purchasing vaseline, she saw that the accused was standing below a tree along with a bicycle. She was proceeding towards the village but the accused obstructed her and asked her to sit on his bicycle. He told her that they have to run from the village. The accused also expressed to her that he would marry her. The prosecutrix has deposed that she refused but the accused threatened her to disclose their physical relations and therefore she was frightened. She then climbed over his bicycle. They reached near village Pathare. Thereafter, one ST bus arrived there. Both of them boarded the said bus and went to Nasik. The prosecutrix has further deposed that the accused purchased a dress for her and also cloths for himself. Thereafter, both of them went to Vani, prayed before the deity and waited before the ST stand. Thereafter, they went to village Manchar. The accused asked her to wait at the ST stand with a promise to return after searching for labour work. She waited at the ST stand for about an hour. The accused then returned and

informed her that he has found a job. The accused took the prosecutrix to a brick-kiln where they stayed in a room. The accused had worked there for 5 days, but then police arrived and they were taken to Manchar Police Station.

29. The prosecutrix has stated in her cross-examination that the accused was standing at about 20 feet from the school. Because of the interval, near about 200 to 400 students had come out from the school. She has admitted that the accused did not lift her and compelled her to sit on the bar in front portion of the bicycle. According to her, she sat on the rear carrier. She has also explained that she walked up to the Hanuman Temple from the school and the accused followed her on the bicycle. He waited at the Hanuman Temple. She has also explained that the accused sat on the bicycle first and then she sat on the carrier. By a short cut they approached the Kopargaon road. She has explained that there are houses of the villagers to the other side of the road. According to her she did not shout because of the threats of the accused. She has also accepted that it was possible for her to jump from the bicycle and to reach home. They crossed the village before they reached village Pathare. She did not get down from the carrier till they reached village

Pathare. We need to repeat here that it has come in her examination-in-chief that both of them boarded ST bus and went to Nasik. During the journey, the prosecutrix had not complained to any one. Even accused had purchased clothes for her and also for himself. Thereafter, they went to village Manchar. She has also deposed in her examination-in-chief itself that the accused asked her to wait at the ST stand at Manchar and promised to return after searching a labour job for him. Thus, she alone waited at the ST stand for about one hour. It is not possible for us to infer that she was doing it under the threats given by the accused. Thereafter, she had joined the company of the accused for staying in a room near the brick-kiln where the accused had found work.

30. We are thus of the considered opinion that the prosecutrix has suppressed material facts to the extent of kidnapping as alleged by her.

31. In the case of *Anversinh v. State of Gujarat* (supra) relied upon by learned APP, the Supreme Court has dealt with the question as to whether consensual affair could be a defence against the charge of kidnapping a minor? In para nos. 14, 15 and 16, the Supreme Court has made the following observations:

“14. Behind all the chaff of legalese, the Appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age.

15. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for the purposes of Section 361 of Indian Penal Code. Indeed, as borne out through various other provisions in the Indian Penal Code and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent. Section 361 Indian Penal Code, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor’s physical safety upon his/her guardians. Therefore, a minor girl’s infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

16. Similarly, Section 366 of Indian Penal Code postulates that once the prosecution leads evidence to

show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted.”

In the facts of the instant case, we are of the opinion that the prosecution has failed to prove the ingredients of Section 361 of IPC. We are not on the point of consent of the minor prosecutrix which is immaterial for the purpose of Section 361 of IPC. However, we find it difficult to believe the testimony of the prosecutrix so far as the allegations about kidnapping are concerned. A bare perusal of Section 361 of IPC shows that there should be an act of enticing or taking. We do not find any evidence about taking or enticing the prosecutrix by the accused.

32. Similarly, Section 366-A of IPC is also not attracted in the facts of the present case. The prosecutrix has nowhere alleged that she was forced or seduced to illicit intercourse when she was kidnapped by the accused. Learned APP has also fairly accepted that in the facts of the present case, the charge under Section 366-A is not attracted.

33. In view of the above discussion, we proceed to pass the following order :

ORDER

- I. Criminal Appeal No. 263 of 2014 is hereby partly allowed.
- II. The impugned judgment and order of conviction dated 09.04.2014 passed by the Additional Sessions Judge cum Special Judge, Kopargaon in Session Case No. 36 of 2013, convicting thereby the appellant-accused Shantaram s/o Arjun Gorase for the offence punishable under Sections 363 and 366(A) of IPC and sentencing him to undergo Rigorous Imprisonment for 3 years and to pay fine of Rs.2,000/-, in default to suffer Simple Imprisonment for one year for the offence under Section 363 of IPC and to suffer Rigorous imprisonment for 5 years and to pay fine of Rs.3,000/- in default to suffer Simple Imprisonment for 18 months for the offence under Section 366-A of IPC, is hereby quashed and set aside.
- III. The fine amount if paid in connection with this conviction shall be refunded to the appellant-accused.
- IV. The judgment and order of conviction dated 09.04.2014

passed by the Additional Sessions Judge cum Special Judge, Kopargaon in Session Case No. 36 of 2013, convicting thereby the appellant-accused Shantaram s/o Arjun Gorase for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentencing thereby to undergo imprisonment for life and to pay fine of Rs.5,000/-, is hereby quashed and set aside and **instead**, the appellant-accused Shantaram s/o Arjun Gorase is hereby convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer imprisonment which the appellant-accused Shantaram s/o Arjun Gorase has already undergone, with fine amount of Rs.5,000/-, in default to suffer Simple Imprisonment for two months.

V. The judgment and order of conviction dated 09.04.2014 passed by the Additional Sessions Judge cum Special Judge, Kopargaon in Session Case No. 36 of 2013, convicting thereby the appellant-accused Shantaram s/o Arjun Gorase for the offence punishable under Section 376 of IPC stands confirmed. However, no separate sentence is passed since the appellant-accused is convicted under Section 4 of the Protection of Children from Sexual Offences Act, 2012 to the extent that he has undergone the

sentence so far which is more than eight years and some odd months.

VI. The appellant-accused Shantaram s/o Arjun Gorase shall be set at free forthwith, if not required in connection with any other case.

VII. The appellant-accused Shantaram s/o Arjun Gorase shall execute P.B. of Rs.15,000/- with one surety of the like amount to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bond shall remain in force for a period of six months from the date of its execution.

VIII. The Criminal Appeal is accordingly disposed off.

(S. G. DIGE, J.)

(V. K. JADHAV, J.)