

Criminal Application

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 186 of 2021

Manish Gupta

Appellant (in jail)

Versus

The State of West Bengal

For the appellant : Mr. Supratik Basu, Adv.

: Mr. Shuvam Shaw, Adv.

For the victim girl : Mr. Sumanta Ganguly, Adv.

For the State : Mr. P.K. Dutta, Adv.

: Mr. Santanu Deb Roy, Adv.

Hearing concluded

on : November 14, 2022

Judgment on : December 02, 2022

Md. Shabbar Rashidi, J.:

1. This appeal is directed against the judgment and order dated 13.04.2021 passed by Learned First Additional District and Sessions Judge, Sealdah in a special trial no. 1(11)2020 arising out of special case no. 31/2020 convicting the appellant under Section 363 of the Indian Penal Code together with section 6 of Prevention Of Children from Sexual Offences Act.

2. The fact giving rise to the instant case is that on 30.06.2020, one Sitaram Agarwal lodged a complaint with Ultodanga Police Station stating, inter alia, that his daughter i.e. the victim girl aged about seventeen years and eight months went missing. It was stated that at 5 a.m. in the morning, the complainant found the gate of his flat open and the victim was not there in the house. He made a search

in the nearby areas and at the house of his relatives but remained clueless. The complainant also came to know that Manish Gupta was also missing from his house. The complainant and his family had a doubt that the said Manish Gupta (appellant) again had misled his daughter and taken her from the house. Her personal belongings like own clothes, rings etc. were also missing.

3. On the basis of such written complaint, Ultodanga Police Station Case No. 131 dated 30.06.2020 under Section 363 I.P.C. was started against the accused Manish Gupta.

4. The police took up the investigation and on completion of investigation submitted charge-sheet under Section 363/366A/376(2)(n), 120(B) of the Indian Penal Code read with section 6 of POCSO Act.

5. Upon compliance of the provision under section 207 of the Code of Criminal Procedure, the

case was committed to the Court of Session. Considering the materials in the case diary, charges under Section 363/366A/376(2)(n)120(B) were framed against the complaint to which he pleaded not guilty and claimed to be tried.

6. In order to bring home the charges leveled against the accused, prosecution examined as many as sixteen witnesses.

7. The de facto complainant himself deposed as PW1. He stated that his youngest daughter went missing on 30.06.2020 in the morning and he lodged a missing diary with Ultodanga Police Station. He proved the missing diary (Exhibit 1). He further stated that Adhar Card and Birth Certificate of his daughter was seized by police under a Seizure List. PW1 proved his signature and that of his nephew on the Seizure List (Exhibit 2/1 and 2/2 respectively) and the Zimma Bond also, therefore, the said documents received by PW1 were marked as Exhibit

3. PW1 further stated that his daughter reported him that she was enticed away by the convict and raped also. In his cross-examination, PW1 stated that he accompanied his daughter, and her statement under Section 164 of the Code of Criminal Procedure was recorded. He kept waiting outside the room of the magistrate.

8. PW2 is the mother of the victim; she has stated that her youngest daughter i.e. the victim was seventeen years old at the time of incident. On 30.06.2020 at about 5 a.m., she could not find her daughter in her room. A search was made at the house of relatives and nearby places but her daughter could not be found for which GDE was lodged also by her husband. She further stated that she came to know that her daughter was enticed away by the convict Manish Gupta. He earlier also took away her daughter in the year 2018 to Delhi. PW2 also stated that her daughter, the victim was

recovered on 06.08.2020 from Dumdum who was, therefore, concealed by the other accused persons Kamal Gupta, Ramji Gupta and Hawaldar Dubey. Upon return of her daughter, she narrated the incident to PW2 and a complaint was lodged by her. She proved her signature on the written complaint (Exhibit 6/1). PW2 also stated that her daughter narrated to her that during the tenure of one month, the convict Manish Gupta forcefully committed rape upon her.

9. PW3 is the brother of the victim. He has stated that on 30.06.2020, his sister aged 17 years went missing. She was searched in the locality. Later on, it was also learnt that the convict Manish Gupta was also missing. A police complaint was lodged. PW3 has stated that in the year 2018 also, the convict Manish Gupta took away his victim sister to Delhi and she was recovered with the help of police. PW3 has proved his signature on the seizure list through

which birth Certificate of the victim was seized (Exhibit 2/1) and the Birth Certificate (Exhibit 4). The doctor attached to R. G. Kar Medical College and Hospital was examined as PW4. He has stated that on 10.08.2020, he examined the victim at R.G. Kar Medical College and Hospital and found the injuries noted in his report. He has proved the said report prepared by him (Exhibit 7). PW5 is the lady from whose house the victim was allegedly recovered. However, she did not support the case of the prosecution though she has proved her signature on the recovery memo (Exhibit 8/1). This witness was declared hostile by the prosecution.

10. The victim herself deposed as PW6. She stated that she left her house with Manish Gupta on 30.06.2020. Her father lodged a GDE in this regard; she also stated that earlier she had left her house with the said Manish Gupta i.e. the convict on 14.11.2018. She was subsequently rescued by the

police from a house at Dumdum, which, according to PW6, belongs to the accused Hawaldar Dubey. She further stated that Manish Gupta was also in that house and her marriage was not solemnized there. She deposed to the effect that she had physical relation with Manish Gupta in the said house. She was also enticed by the convict Manish Gupta to the accused Kamal Gupta and Ramji Gupta. She has proved her signature on her statement recorded under Section 164 Cr. PC (Exhibit 9/1 collectively). In her cross-examination also, PW6 stated that she had physical relation with Manish Gupta in the house at Dumdum.

11. Another doctor of R. G. Kar Medical College and Hospital has deposed as PW7. He has stated that on 06.08.2020, he examined the victim and prepared his report. He has proved the said report dated 06.08.2020 (Exhibit 10).

12. Brother-in-law of PW1 has deposed as PW8. He has stated that he accompanied Sitaram Agarwal (PW1) when he lodged a GDE in connection with missing of his daughter. PW8 later came to know that the victim was recovered from the house of Hawaldar Dubey by the police.

13. The doctor who conducted medical examination of the appellant/ accused deposed as PW9. He has stated on 10.08.2020, he examined Manish Gupta, the appellant, in connection with Ultadanga Police Station Case no. 131 dated 30.06.2020 and opined that Manish Gupta was potent and capable of doing sexual intercourse. PW9 prepared a report in this regard. He has proved the report (Exhibit-11).

14. PW10 is the sister of the victim. She has stated that on 30.06.2020 at about 5 a.m., she came to know that the victim was missing. There was a search at the house of relatives. It is also stated that

earlier her sister went with Manish Gupta to Delhi in November 2018 and stayed there for about one month. So, the PW10 has stated that she came to know that father of convict Manish Gupta told that the victim and Manish Gupta were residing at Dumdum. Later, she was rescued from Dumdum by the police. On her return, the victim stated before her mother PW10 that she was enticed away by Manish Gupta to a house at Dumdum where Manish Gupta had sexual intercourse with the victim several times in spite of her objections. PW11 has proved the requisition for call detail report including his signature (Exhibit 12/1 and 12/2 respectively). PW12 was also declared hostile and nothing fruitful could be obtained by the prosecution from his cross-examination.

15. PW13 is a lady Sub-inspector of police who recorded the statements of the victim under Section 161 Cr. PC and proved the same (Exhibit 13).

16. The learned Magistrate who recorded the statement of the victim under Section 164 Cr. PC deposed as PW14. He has proved the statement (Exhibit 9).

17. The nodal officer of Reliance Jio has been examined as PW15. He has proved the requisition to the letter of O.C. Ultodanga P.S. dated 25.08.2020 and the call detail reports (Exhibits 14, 14/1 and 17 respectively). He also proved the certificate under Section 65B of the Indian Evidence Act together with its covering letter (Exhibit 18, 18/1 respectively). PW16 is the investigating officer. He has stated that on 30.06.2020, he received written complaint and started Ultodanga Police Station FIR no. 131 dated 30.06.2020 under section 363 I.P.C. He also filled up the formal FIR (Exhibit 15). In course of investigation, PW16 posted the P.O., prepared rough sketch map with index of the places of occurrence (Exhibit 15), recorded statements of available witnesses under section 161 Cr. PC and

seized the Birth Certificate of the victim under Seizure List (Exhibit 2). He also prayed for addition of Section 366A IPC and arrested the accused Kamal Gupta. On the basis of the statement of the arrested accused, PW16 arrested the convict Manish Gupta and the victim girl was rescued from the house of accused Hawaldar Dubey under rescue memo (Exhibit 8). The witness also submitted prayers before the learned Court for adding Section 120B of the Indian Penal Code and 6/17 of the Prevention of Children from Sexual Offences Act. PW16 also stated that in course of investigation, he submitted requisition through D.C. (ESD) for collection of call detail and collected the same. On 10.08.2020, mother of the victim lodged a written complaint (Exhibit 6). Subsequently, on completion of investigation PW16 submitted the charge-sheet under Section 363/366A/367(2)(n)/212/120b IPC and Section 6/17 of POCSO Act against the accused persons. It is on the basis of this evidence upon trial, the learned Trial Court

convicted the accused which has been challenged in the present appeal.

18. The appellant has assailed the judgment and order of conviction and sentence on the ground that at the time of incident, the victim was aged seventeen years and eight months i.e. on the threshold of attaining maturity. Moreover, the appellant has relied upon the evidence adduced on behalf of the prosecution to the effect that the victim was in a relationship with the convict for a pretty long time. In fact, the victim had earlier eloped with the convict in the year 2018 as well. It has also been pointed out that the victim in her statement has stated that she left her house with the convict which connotes that the victim went with the convict with her consent and as such no offence punishable under Section 363 of the IPC of the Indian Penal Code as defined under section 361 of the said code is made out. In this connection, the appellant relied upon a decision reported in **AIR on line 19 KAR**

1362 (State of Karnataka versus Wasim Pasha @Abbu). Learned advocate pointed out the observations made in para 26 of the aforesaid decision to the effect that:

“First, we would like to consider the evidence of P.W. 3. According to her, she states that the accused came in a red colour Car and called P.W.4 and took her in the Car. In examination-in-chief, she did not tell anything that P.W. 4 was forcibly taken by the accused. Only in the cross-examination, she claims that while taking her in the Car, she screamed as ‘amma amma’. On perusal of evidence of P.W. 4, the victim, she claims that the accused called her. She went near the car thinking that he may be having work. The accused held her hand, made her to sit in the Car and thereafter, took her to hotel. She has not spoken

anything that she was subjected to threat. In the cross-examination, she says that when she was inside the car, she screamed once calling her sister's name. Both PWs 3 and 4 gave different version. It is pertinent to note that in the cross-examination, she categorically admits that accused used to speak with her which was not liked by her family members and they were scolding her. Further, she admits that she was having cell phone with her and she gave the cell phone to the accused. It is further important to note that she categorically states in the evidence that he took her to hotel, enquired with the receptionist and both of them went inside the hotel. The driver of the car dropped both of them near the hotel and left. They took half an hour to go to hotel. She did not make any phone

call to anybody. Hence, it is clear that there is no ingredient of Section 363 of the Indian Penal Code to come to the conclusion that she was kidnapped forcibly. The evidence of P.W. 4 also shows that she did not make any phone call when accused no. 1 was enquiring with the receptionist or while entering the room. Though it is the case of the prosecution that she was threatened, P.W. 4, who is the right person to speak about the same, did not tell anything. Hence, in the absence of any substantive piece of evidence to attract the penal provisions of Section 363 as well as Section 506 of the Indian Penal Code, we are of the opinion that the prosecution has utterly failed to prove the charges labeled against him for the offences

punishable under Sections 363 and 506 of the Indian Penal Code.”

19. The learned advocate for the appellant has elicited that in the instant case, the victim is alleged to have accompanied the convict with her belongings which included a cell phone. She also did not make any call and as such it has been stated that since the victim left her house with her own accord, no case under Section 363 of the Indian Penal Code was made out.

20. The appellant also relied upon decision of this Hon’ble Court in **Sachindranath Majumdar versus Bistupada Das and others reported in 1978 Criminal Law Journal (CrLJ)**. It has been stated that the evidence adduced on behalf of the prosecution does not contain element of any inducement or threat on the part of the convict in taking away the victim girl. On the self-same point, learned advocate for the appellant has also relied upon the case of **S. Varadarajan versus State of**

Madras reported in AIR 1965 SC 1942. In the aforesaid case, their lordships were placed to hold that:

“9 It must, however, be born in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves can the two be regarded as meaning the same thing for the purposes of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father’s protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused can be said to have taken her away from the keeping her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out

by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

21. The appellant has relied upon the aforementioned decisions in order to prove that in the facts and circumstances of the case, the evidence on record goes to show that the victim girl voluntarily left the guardianship of her parents out of love and affection with the appellant and as such the appellant cannot be blamed for enticing her away and therefore no case punishable under Section 363 of the Indian Penal Code is made out against the police.

22. However, I am afraid that the ratio laid down in the aforesaid judgments would not go to rescue the appellant. In the case of **Wasim Pasha (supra)**, it was held by the Hon’ble Court in para 27 to the effect that if the victim is below the age of 16 years, consent is immaterial. Section 375 of the Indian Penal Code

provides that if the victim below the age of 16 years consents, the same is not at all consent. If she is subjected to sexual act, it amounts to rape. The sex with or without consent when she is under 16 years of age amounts to rape.

23. In the instant case, the evidence establishes that victim was 17 years and 8 months as evident from the oral testimony of the parents and that of the brother of the victim as well as from the testimony of Exhibit 4 which is the Birth Certificate of the victim. Kidnapping from lawful guardianship as defined under Section 361 of the Indian Penal Code explicitly lays down that whoever takes or entices any minor under 16 years of age if a male, or 18 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is said to have such minor or person kidnapped from lawful guardianship.

24. Therefore, voluntariness or consensually eloping of the victim girl with the appellant cannot be taken to dilute the case of the prosecution. The consent of a minor is no consent at all.

25. On similar lines the appellant has also relied upon the judgment of **Zahoor Ali v State of UP reported in 1989 Cri L J 1177**, in the aforesaid judgment, it was observed that:

“8. The next point argued by the learned counsel for the appellant is that Zahoor Ali, appellant neither kidnapped Kumari Chhoti from lawful guardianship nor did he kidnap or abduct her with intent that she was to be forced or seduced to illicit intercourse. He further argued that his taking of Kumari Chhoti to T.T.C. Hospital Lucknow and getting her admitted there for medical treatment does not amount to offence under S. 363 or 366 IPC and he has been wrongly

convicted for these offences. There is much force in this contention also. There is solitary statement of Kumari Chhoti (P.W. 2) on this subject. She stated in examination-in-chief that when she asked for money from Zahoor Ali at Charbagh the latter said to her to accompany her to his house and promised to give her food there whereupon she went along with him to his house. She further states that Zahoor Ali kept her at his house for a few days and thereafter she was admitted in T.T.C. Hospital. In cross-examination she stated that she was ill when Zahoor Ali met her at Charbagh and he got her admitted on the same day in the Hospital on which he brought her from Charbagh. It has also been stated by her that on account of her illness he took her from Charbagh to the Hospital. This

statement is not consistent with her deposition in examination-in-chief. It shows that there was no inducement by Zahoor Ali in taking her from Charbagh to the Hospital. For the guardianship it is necessary that the minor should be taken or enticed away from lawful that in the present case it has not been proved that Kumari Chhoti was induced to leave Charbagh. From this it follows that she was not enticed away as required under S. 361 I.P.C. The point which remains to be seen is, if the appellant took away Kumari Chhoti within the meaning of S. 361 I.P.C. where 'taking' used in the section does not require the use of force. But it is significant to note that in the F.I.R. though words 'Pakar Kar' were used indicating use of force, this case was given up at the stage of evidence. It is

now well settled that the word ‘taking’ used in section 361 requires that the accused must have played an active role in the minor leaving her lawful guardian’s house or taking shelter in his house. Therefore, mere passive role in helping the girl in giving shelter in the house or accompanying her to Hospital for medical treatment cannot amount to taking within the meaning of S. 361 I.P.C.”

26. However, the facts of the said case are altogether different to that we are dealing. In the case relied by the appellant, the victim left her house being under some kind of distress. Her mother died, father was paralyzed and she was made to live at the house of her brother-in-law. Whereas, in the present case the victim was living at her father’s house. She left the house out of a relationship with the appellant which she did earlier too. The appellant was not providing shelter

to the victim. Circumstances do suggest that the victim left the shelter of her father's house with active assistance of the appellant. Therefore, the ratio laid down in Zahoor Ali's Case (Supra), in no way comes to the rescue of appellant.

27. The appellant has further cited the decision in the case of **Anish Rai v State of Sikkim reported in 2018 Cri L J 4193**. In the afore-cited decision, the High Court had acquitted the accused taking into consideration the acts of the victim akin to consensual relationship. However, in the said case, the prosecution failed to establish that the victim was a minor. On the contrary, in the instant case, it is settled on the basis of evidence on record that the victim was a minor and minor's consent is no consent.

28. The appellant also relied upon the case of **Deepesh Tamang v State of Sikkim reported in 2020 Cri L J 2346**. Learned Advocate has elicited that the Hon'ble High Court in the aforesaid decision held that,

“32. There is no ingredient of penetrative sexual assault in the evidence of PW 1. Evidence of PW 1 is that she had ‘physical relationship’ with the accused 5/6 times. What is meant by ‘physical relationship’ had not been explained. ‘Physical relationship’ may be in vary many ways .By a process of conjectures and surmises, ‘physical relationship’ cannot be construed to mean penetrative sexual assault within the meaning of Section 3 of the POCSO Act. PW 9 in her evidence had stated that PW 1 had given a history of sexual assault with consent several times. As such, it may be contended that PW 1 being a minor, ‘physical relationship’, comes within the ambit of sexual assault as defined under section 7 of the POCSO Act”.

29. In the case at hand, the victim (PW 6) has stated that she left her house with the appellant and

stayed at one house where the appellant also stayed and she was rescued by the police from that house. She has also stated that she had physical relations with the appellant. Not only that, she was also introduced by the appellant to the other accused persons. Such statement of the victim is qualified by her statement in just preceding sentence to the effect that her marriage was not solemnized in the said house. The two statements taken together are sufficient to indicate the kind of relationship which was meant by physical relations. Moreover, the victim was a minor then. Her medical examination corroborated the kind of physical relation she was talking, in her deposition. As such, the ratio laid down in the judgment of Deepesh Tamang may not hold anything good in the facts and circumstances of the present case.

30. Similarly, the appellant also relied upon the decision in the case of **Ganesh Orang v State of West Bengal reported in AIR Online 2022 Cal 187**. The

ratio laid down in the aforesaid judgment also may not be applicable in the instant case as in the said case, the prosecution was not able to prove that the victim was minor. In paragraph 19 of the said judgment, their Lordship held,

“19. In order to attract the statutory presumption under Section 29 of the POCSO Act the factual foundations with regard to the ingredients of the offence under Section 6 of the said Act require to be established in the first place. In the present case, nothing has been placed on record on behalf of the prosecution to show that victim was a minor at the time of occurrence. In her deposition PW 1 has not stated the age of the victim though the same is disclosed in the FIR. It is trite law that the FIR is not substantive evidence and may at its best be used to corroborate or contradict the maker. The

only piece of evidence which is relied upon by the prosecution with regard to age of the victim is that she is a student. However, neither birth certificate nor the school records endorsing the age of the victim has been proved in the present case. No ossification test was also conducted with regard to the age of the victim in order to establish that she is a minor. If it is presumed that the victim was a minor, the inherent weakness and/or patent contradictions in the prosecution itself render the statutory presumption inapplicable.”

- 31.** Similar is the case with the decision relied upon by the appellant in the case of **Sushanka Ghosh v State of West Bengal reported in AIR Online2021 Cal 734**. In this case also, the Hon’ble Court denied the benefit of the presumption of Section 29 of the

POCSO Act on the ground of non-ascertainment of age of the victim. But the facts of the instant case are altogether different. The age of the victim has been proved based on sufficient evidence.

32. In the case of **Deepak Gulati v State of Haryana** cited on behalf of the appellant (**AIR 2013 Supreme Court 2071**) rape and consensual sex were considered on the basis of relationship between the appellant and the victim. However, the victim was aged 19 years of age where there were sexual relations on the promise to marry. But in the instant case the victim was proved to be minor and minor's consent under whatever conditions, would help the appellant.

33. Similar is the case of **Dhruvaram Murlidhar Sonar v State of Maharashtra (AIR 2019 SC (Criminal)388)**. The case related to the offence of rape by a medical officer upon a co-employee i.e. assistant nurse. The victim was a major and the question of rape with or without consent was brought under

consideration. The ratio laid down in the case cannot be applicable in a case where the victim is minor as her consent for sexual relationship has no significance in the eyes of law.

34. The appellant has also relied on a decision reported in **2022 SCC Online Megh 393 Kwantar Khongsit v State of Meghalaya**. In the aforesaid proceeding under the provisions of POCSO Act was ordered to be quashed in consideration of the fact that the petitioner and minor victim were living together with the knowledge and consent of their family members and that such cohabitation was in accordance with the local customs and culture prevailing in that part of the country. However, in the case at hand, the parents of the victim never consented to such relationship of the victim with the appellant and there is no local custom in the locality of the appellant or the victim of cohabitation before marriage. Therefore, the ratio of aforesaid case cannot be applicable in the present case.

35. The appellant further cited the judgment reported in **Himat Popatlal Raval v State of Gujarat (AIR 1983 GLR 268)**. In the said case, the conviction of the appellant had not challenged his conviction for the offences punishable under sections 366 and 376 of the Indian Penal Code. Rather, the appeal was preferred challenging the quantum of sentence. The Hon'ble court laid down in the said case that the accused and victim, being in the same age groups, might have come nearer on account of natural physical attraction. In such cases, lenient view should be taken in awarding the sentence. The ratio is not applicable in the facts and circumstances of the present case.

36. The case of **Rajesh Patel v State of Jharkhand (2013 Cr L J 2062)** and the case of **Maheswar Tigga versus State of Jharkhand (AIR Online) 2020 SC 743** have also been relied upon by the appellant. In the aforesaid cases also, the convictions were under Section 376 of the Indian Penal Code and

the said convictions were set aside by the Hon'ble Supreme Court in consideration of the fact that the convict had previous acquaintance with the victim. Both of them were on meeting terms giving rise to a probability of consensual sex. However, in the instant case, we are considering an offence under Section 6 of the POCSO Act. There is evidence on record that the victim is aged below eighteen years and we have already come to a conclusion that the consent even by the victim below eighteen years is not at all consent in the eyes of law.

37. The appellant has also relied upon the judgment passed by Hon'ble Madras High Court in **Vijaylaxman versus State reported in the AIR Online 2021 MAD 5009**. In the aforesaid decision, the Hon'ble High Court considered the provisions of the POCSO Act and was pleased to quash the proceeding under section 482 of the Code of Criminal Procedure under POCSO Act taking into account the fact that the petitioner and the

respondent, who were in their early 20s eloped together at the request of the victim and married each-other. In the instant case, there are allegations that the victim was enticed away. There is no marriage between the parties, and the appellant has been convicted after full trial on the basis of the evidence adduced by the victim and others.

38. In the judgment of Hon'ble Madras High Court in **Sabari @ Sabarinathan versus inspector of police (AIR Online 2019) MAD 1364**, the convict was acquitted in a view of scanty evidence sufficient to prove the prosecution case. For that reason, the aforesaid decision may not be of any help to the appellant for the purpose of this case.

39. The appellant further relied upon the decision in the case of **Deelip Singh @ Dilip Kumar versus State of Bihar (AIR 2005 Supreme Court 203)**. The aforesaid case deals with an appeal in connection with a conviction under section 376 of the Indian Penal Code

upon a minor girl, and that too refers to a regime when the POCSO Act was not promulgated. In the aforesaid case, the Hon'ble Apex Court excluded the appellant therein from all the charges under Section 376 of Indian Penal Code in consideration of the alleged consent by the victim obtained on the promise to marry. However, the appellant was directed to pay compensation for breach of promise. The facts of the aforesaid case were different from that in the case before us.

40. On similar grounds, the ratio laid down by Hon'ble Bombay High Court in the case of **State of Maharashtra versus Lingaby Maroti Sahane (2018 (2)ABR (Cri) 187)** cannot be applied in the facts and circumstances of the case. In the said case, minority of the victim was not established; rather on the basis of the medical examination, it was held by the Hon'ble Court that the prosecution could not prove that on the date of occurrence of the incident, the victim was below the age of 16 years or below the age of 18 years. In the

instant case, however, it has been established by the prosecution that the victim is aged below 18 years.

41. The case of **Jogi Dan and others versus State of Rajasthan (2004) CRI (AJ) 1726** relied upon by the appellant also pertains to conviction under Section 376 of the Indian Penal Code. In the aforesaid case, it was held that

“14. if the victim is willing to yield to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body, it indicated that she offered resistance when she was subjected to sexual intercourse. The absence of injuries either on the accused or on the prosecutrix shows that

the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party.”

The ratio so laid down in the aforementioned judgment, I am afraid, goes against the contention of the appellant in instant appeal. Moreover, the same may not help the appellant in a case under the provision of POCSO Act where the consent, if at all given by the victim, is immaterial.

42. The appellant also relied upon the decision in **Ganesan versus State reported in AIR Online 2020 SC 777**. In the said case, it was held by the Hon’ble Supreme Court that as per the settled proposition of law even there can be a conviction based on the sole testimony of the victim; however, she must be found to be reliable and trustworthy.

43. In the instant case, however, the victim has been examined as PW6. She appears to have supported the

case of the prosecution. In fact, in her cross-examination also, the victim stood by her statement regarding her physical relations with the appellant. Nothing appears to have been extracted on the part of defense in her cross-examination to call the trustworthiness of PW6. Not only that, other witnesses have also supported the case made out by the prosecution and the defense appears to have miserably failed in shaking the credibility of such witnesses including PW6.

44. The story set out by the prosecution, discloses that the victim was enticed away by the appellant from the house of her parents without their consent. The appellant has tried to avail the shelter that the victim was in a relationship with him and that she left her house out of the aforesaid relationship, on her own volition.

45. We have discussed hereinbefore, that the appellant is charged with the offence of kidnapping from

the lawful guardianship. There are evidence on record to prove that at the relevant point of time the victim was below 18 years of age as contemplated under section 362 of the Indian Penal Code, the appellant cannot be extended with the benefit of minor leaving her house on own volition. The guardians of the victim were, surely not a consenting party. They promptly lodged a GDE regarding the incident and took all other legal steps, the guardian of a minor is expected to, in the circumstances. As such, on the basis of evidence on record, a case punishable under section 363 of the Indiana Penal Code appears to have been well established against the appellant.

46. As regards the offence punishable under section 6 of the POCSO Act, we have encountered evidence to the effect that the victim, after eloping, was living with the appellant in a house at Dumdum and was rescued from there with the intervention of police. The evidence also goes to show that the victim had physical relations

with the appellant in the said house. We have already discussed the scope of physical relations in the facts and circumstances of the case suggesting the acts of the appellant definitely came under the ambit of aggravated penetrative assault defined under section 5 of the POCSO Act punishable under section 6 of the said Act.

47. The evidence on record especially the oral testimony of PWs 2, 3, 4 and 6 coupled with Exhibit 4 sufficiently establishes that the victim was a child as defined in section 2 (1) (d) of the POCSO Act. For the aforesaid reasons, we are in total agreement with the observations of the learned trial court that the appellant has not been able to rebut the presumption appended to section 29 of the POCSO Act, so far as the present case is concerned.

48. Since, the provisions of the POCSO Act has been invoked, the victim being a child, no question of prosecution under section 376 (2)(n) of the Indian Penal Code, 1860 does arise. Besides, the evidence on record

does not suggest the commission of an offence punishable under section 366A of the Indian Penal Code, 1860, by the appellant.

49. In the result, thus, we do not find any reason to interfere with the impugned judgment of conviction and order of sentence dated 13.04.2021 passed by the learned 1st Additional District & Sessions Judge, Sealdeh, South 24 Parganas, in Special Trial No. 01 (11) of 2020 arising out of Special Case No. 31 of 2020 and the same is liable to be affirmed.

50. Accordingly, Conviction and sentence imposed upon the appellant are upheld.

51. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of section 428 of the Code of Criminal Procedure.

52. Appeal is accordingly dismissed.

53. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

54. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]

55. I agree.

[DEBANGSU BASAK, J.]