

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1015 OF 2019

Santosh Ravindra Dhepe, Age 26 years,
Occ.Labourer, R/o.Survey No.50, Vaishnavi
Nagar, Kalepadal, Hadapsar,
Pune (presently at Yerwada Central Jail).

Appellant

versus

1. The State of Maharashtra
2. Sana Kashimsaheb Naadaf

Respondents

Mr.Satyavrat Joshi i/by Mr.Sachin Tulshidas Zalte, Advocate for
appellant.

Mr.S.V.Gavand, APP, for State.

MsShraddha Sawant, Advocate for respondent no.2.

CORAM : PRAKASH D. NAIK, J.

DATE : 11th March 2022

JUDGMENT :

1. The appellant has preferred this appeal under Section 374 of Code of Criminal Procedure challenging judgment and order dated 13th June 2019 passed by Additional Sessions Judge, Pune in Special (POCSO) Sessions Case No.90 of 2016. The appellant has been convicted for the offence u/s.363 and 506 of Indian Penal Code ('IPC') and sentenced to suffer rigorous imprisonment for three years and two years respectively. He is further convicted for offences under Sections 6 and 4 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') and sentenced to suffer rigorous imprisonment for ten years and seven years respectively on each count.

2. The case of prosecution is as under :

(i) The victim is aged about 13 years and 9 months at the time of incident. Her date of birth is 24th March 2002;

(ii) On 12th December 2015 at about 9 am, the informant along with her daughter (victim) had visited Nirmal Township Society, Kalepadal, Hadapsar, Pune for household work. Both of them were at parking place of said society. The informant told the victim to stay in the parking space and went to wash room. On returning back she noticed that her daughter (victim) was not there. After due search she could not trace the victim. FIR was lodged under Section 363 of IPC vide CR No.676 of 2015 against unknown persons at Hadapsar Police Station;

(iii) On 18th December 2015 the sister of informant (PW-3) received a phone call of victim from cell phone, informing her that accused enticed her by giving threat to kill her mother and staying with accused at Karegaon. The accused committed repetitive sexual assault on her. PW-3 told her that they have already lodged complaint with police station and assured not to worry;

(iv) On 19th December 2015 the accused and victim were brought by Police Officer of Hadapsar Police Station from Ranjangaon. The accused was arrested. Investigation was conducted by PSI Hanumant Shinde (PW-5);

(v) Statement of victim was recorded. Clothes of accused and victim were seized. Victim and accused were referred for medical examination at Sasoon Hospital, Pune. Ossification test of the victim was conducted. Birth certificate of the victim, bona fide certificate from school as well as true copy of school leaving certificate were collected. Statements of witnesses were recorded. Motorcycle of the accused was seized vide seizure panchanama

which was used in commission of offence. Statement of victim was recorded u/s.164 of Cr.P.C. The offences punishable under Sections 376(1)(i), 506 of IPC and under Sections 3,4,6,8 of POCSO Act were added.

3. The offences under POCSO Act were triable by Special Court and hence the case was assigned to the Special Court. The charge was framed by order dated 31st December 2018 for offences under Sections 363, 376(1)(i), 506 of IPC and under Sections 3,4,6 and 8 of POCSO Act. The accused pleaded not guilty.

4. The prosecution had examined five witnesses. PW-1 Lalbi Nadaf is the mother of victim. PW-2 is the victim. PW-3 Noorhajan Nadaf is the sister of complainant. PW-4 Dr.Arun Ambadkar is medical officer who has examined the victim and the accused. PW-5 PSI Hanumant Shinde is the Investigating Officer. At the instance of accused, defence witness Husain Sayed (DW-1) was examined. Statement of accused was recorded u/s.313 of Cr.P.C. The defence of the accused is of total denial.

5. Accused filed his written statement (Exhibit-36) u/s.233 of the Cr.P.C stating that there was love affair between the victim and accused. In November 2014 she completed 18 years of her age. Her family members did not want to marry with him, as she belongs to Muslim Community. On that count, there was quarrel with the maternal uncle of victim. In the said quarrel one maternal uncle sustained fracture injury on hand and another uncle on leg. The said quarrel has been settled on the assurance to pay compensation of Rs.1 lakh to her maternal uncle and to leave the room from the said

locality. He paid Rs.25,000/- to the maternal uncle of victim. The amount of Rs.75,000/- was outstanding. However, the victim on her own continued to contact with the accused. He was unable to pay the outstanding amount of Rs.75,000/- due to which the family members of victim again started to quarrel with accused for money and love affair, due to which the accused told them that he will not pay Rs.75,000/- to them. Hence, the family members threatened the accused that, they will teach lesson to him. Therefore, he is falsely implicated in this case.

6. Learned advocate for appellant has urged that :

(i) The prosecution has failed to establish charges framed against appellant;

(ii) There is no cogent evidence on record to prove charges beyond doubt. The age of victim was not proved. It was not established that victim was minor at the time of incident;

(iii) The documents relating to the date of birth of the victim were not proved in evidence. The birth certificate was placed on record without establishing that said certificate was issued in respect to birth of applicant. The document was issued in a language which was not known to the accused or the victim. No other witness from the office of Registrar of Birth has been examined. The source of said document has not been disclosed;

(iv) The relationship between the victim and accused appears to be consensual;

(v) The source of birth certificate is not known;

(vi) The details about victim were filled up in Kannada language in Birth Certificate. It was necessary to prove its contents.

It was relevant to establish that the birth certificate is of victim;

(vii) Mere producing birth certificate would not amount to proof of age of victim unless it is established that birth certificate has been issued in respect of victim;

(viii) The police had sent victim for ossification test. However, the medical officer who conducted said test is not examined as witness;

(ix) The accused told the owner of room occupied by victim and accused that victim is his wife. The victim did not inform the witness that she is not the wife of accused;

(x) Medical evidence does not support case of prosecution;

(xi) No question was put to accused during his examination under Section 313 Cr.PC about birth certificate of victim.

7. Learned APP has submitted that there is sufficient evidence on record to show that victim was enticed by the accused. She was threatened. She was subjected to sexual assault repeatedly. It is established that victim was minor. The victim and her mother had disclosed the age of victim. It is proved that victim was born on 24th March 2002. At the time of incident victim was minor. The defense witness admits love affair. Victim was found with accused. Assuming that no question was put to accused regarding birth certificate while recording statement under Section 313 of Cr.PC, the evidence on record proves the date of birth. If the Court finds any error regarding proof of age of victim, the Court may exercise powers under Section 391 of Cr.PC for recording evidence of witness from office of Municipal authorities.

8. Learned advocate for respondent no.2 supported submissions

of learned APP. It is submitted that the prosecution has proved the charges against accused. PW-1 (mother of victim) has disclosed that victim child was born in 2002. The accused and victim had stayed together for six days. When she got opportunity, call was made to her aunt from cell phone of accused and she disclosed the information about her whereabouts and sexual assault by accused. There is no reason to disbelieve version of victim. She was minor. She was sexually assaulted by accused. The appeal may be dismissed and conviction be confirmed.

9. PW-1 Lalbi Nadaf is the mother of victim. According to her, on the date of incident she went to wash room and the victim was waiting in the parking space. When she returned to place where victim was waiting, she was not there. She lodged report at Police Station. She reported to police that some unknown person has kidnapped her daughter. She told police that her daughter was born in 2002. After seven days she received call from police station and it was disclosed that her daughter was found. She had come with accused. He brought her. Her daughter informed her that accused had threatened her by saying that he will kill her mother and father and forced her to go with him. Accused had committed sexual intercourse with her. Her supplementary statement was recorded by police on 19th December 2015. Custody of the victim was handed over to her. She identified the accused in Court. In the cross-examination she stated that she knows the accused as he was residing in their locality. There was quarrel between her family and the accused. Her family is not having cordial relations with the accused. In the quarrel the hand of her brother had fractured and leg of another brother was fractured. FIR was lodged regarding

assault on her brothers. The matter was settled at the police station between her brothers and accused. The accused was told to bear medical expenses of her brothers. Accused had given Rs.25,000/- towards medical expenditure of brothers. Nirmal Township has four buildings. In 2015 she was working as maid in the said township. Shops are situated in township. There is watchman at township who enquire about visitors. There are CCTV cameras. Her daughter took her mobile phone on the date of incident. She cannot say which year her daughter was born. She cannot say the date of her marriage. She cannot say in which year the victim was born. She cannot say the date of her marriage.

10. PW-2 is the victim. She stated that her birth date is 24th March 2002. She known the accused. Once the accused was abusing in front of her house. Her uncle asked him the reason for abuses. The accused pushed her uncle. Due to that her both uncles suffered fracture on leg and hand. On 12th December 2015 she had gone to Nirmal Township Society along with her mother. When her mother went to wash room she was standing in the parking place. Accused came on motorcycle. He was possessing knife with him. He threatened her. He told her to sit on is motorcycle or else he would kill her mother. She sat on motorcycle. The purse and cell phone of her mother was with her. The accused took mobile from her and switched it off and slapped her. The accused took the victim to Karegaon on motorcycle. He purchased Imitation Mangalsutra and asked her to wear it. He took the victim to a rented premises and told the owner that she is his wife. The accused committed forcible sexual intercourse with her against her will. On the sixth day she took the cell phone of accused while he had gone for bath and made

phone call to her aunt. Her aunt told her not to frighten and that they have given complaint to police who would come to assist her. The victim told her aunt that she is residing at Karegaon. During the period of six days the accused had committed sexual intercourse with her. The accused took her to police station. She was warned to tell police that she accompanied him as per her will. He threatened that he will kill her family members. They reached police station. Her family members were present at police station. She went to her huse with her mother. On the next day they went to another police station. Her statement was recorded. She was referred to Sasoon Hospital for medical examination. Her statement was recorded by Magistrate. She was again referred to Sasoon Hospital, Pune for age examination test. She gave history to medical officer. In the year 2014 she was residing at Hadapsar. In the year 2015 she was studying in 8th standard. She knows the accused. He was residing close to her house. The defense produced some letters written by victim to accused with Application (Exhibit-25) and list (Exhibit-26). Letters were shown to the witness with list. There were 13 pages. The victim stated that the handwriting is not of her. She denied her signature. She was shown her statement u/2.161 of Cr.PC and the signature appearing on letters. She stated that signature on letter is not her signature. It is different from signature appearing on Exhibit-17 (statement recorded u/s.161 of Cr.PC.). She was shown photograph. She admitted that she is in photograph with accused. She stated that she had not snapped any photograph with accused. She admitted that for the first time she is stating before Court that accused was possessing knife. She did not shout when the accused threatened her and told her to sit on the motorcycle. Since she was frightened she did not shout. She did not notice any people on

public road. Watchman was not present. She accompanied the accused on motorcycle and reached Karegaon. She saw signals at squares. The accused told owner of the room that she is his wife. She did not say anything to the room owner that she is not the wife of accused. She did not narrate the room owner within the span of 7-8 days that she is not the wife of accused. The accused purchased clothes for her. She did not state to police the number of mobile phone. When the accused was in the lock-up her mother, uncle were present. When her medical examination was conducted, her mother and parents had accompanied her. Police told her that her statement is recorded before Magistrate. It did not happen that before recording her statement she was called at police station. When she reached the Court for recording statement before Magistrate, her mother, uncle and police constable were with her. She was referred to Sasoon Hospital only once. Some amount was paid by the accused to her uncle towards compensation.

11. PW-3 Noorja Raju Nadaf is the sister of complainant. She stated that on 18th December 2016 she received phone call of victim. She told her to fetch her from custody of accused. She also told that accused has committed sexual intercourse with her forcibly. She pacified the victim and told her that they are coming to fetch her as they have already lodged report with police station. The victim told her that she is residing at Karegaon. On 19th December 2016 her brother received phone call from Hadapsar Police Station informing that victim had reached police station with accused. She was brought home. In the cross-examination she stated that on 18th December 2016 she learnt that victim was with accused at Karegaon. She did not inform police that she has received a phone call from

victim. She informed about it to mother of victim. She did not make an attempt to search victim. She had no occasion to see accused prior to incident.

12. PW-4 Dr.Arun Ambadkar is the medical officer. He was attached to Sasoon Hospital, Pune. On 21st December 2015 victim was brought by police for clinical examination. The victim gave medical history that she is aged about 13 years. The accused is her neighbour. Accused had fight with her uncle. Accused threatened her and took her to Karegaon on 12th December 2015. He took a room and had forceful vaginal intercourse with her on 12th December 2015. The accused had committed multiple times vaginal intercourse with her. There was no physical assault. There was no anal and oral intercourse. The last intercourse was on 18th December 2015. The victim was clinically examined by him and Dr.Kanika Sharma. He found that there was evidence of multiple penetrative vaginal penetrative intercourse with no fresh genital or external body surface injury. Exact age of hymenal tear cannot be opined. Medical examination report was written and signed by Dr.Kanika Sharma. He did not notice any external injury on the genital part and body part of victim. The hymen of the women can be torn by cycling, playing, sports etc. He has not mentioned the clock position of hymenal tear. The vaginal swab was taken. As per clinical examination he opinion that there is penetrative sexual vaginal intercourse. It may be or may not be.

13. PW-5 Hanumant Waman Shinde is Police Sub Inspector attached to Hadapsar Police Station. He conducted investigation. He recorded statement of victim and her relatives. He recorded

statement of brother-in-law of accused Anil Pawar. He disclosed that accused is residing with victim at Ranjangaon. The victim and accused were found at Ranjangaon. The victim and accused were brought at Hadapsar Police Station. He arrested the accused. API Smt.Mali recorded statement of victim. Clothes of victim and accused were seized. Victim and accused were referred for medical examination. He collected school leaving certificate of victim from her school. He seized motorcycle from the accused on which he took the victim at Ranjangaon. Ossification test was conducted for determination of age of victim. On completing investigation he filed charge sheet. He came to know that prior to the incident there was quarrel between accused and maternal uncle of victim and it was compromised. Shops are situated in Nirmal Township. Watchman is available at the society. He did not record statements of shop owners, watchman etc. He did not see the CCTV camera in the society. He did not make enquiry whether CCTV camera has been installed at the society.

14. The accused has examined DW-1 Ayub Husain Sayyed as defense witness. He deposed that in the year 2015 quarrel took place between accused and maternal uncle of victim. The said quarrel took place since maternal uncle came to know about love affair between accused and victim. He was present at the time of said quarrel. During scuffle one maternal uncle of victim sustained fracture to leg and another sustained fracture to hand. Both sides approached police station. The maternal uncle of victim told him that if they lodge complaint against accused, they will be defamed due to love affair between accused and victim. It was decided to settle the matter. It was decided that the accused would pay

Rs.1,00,000/- towards medical expenses for fracture suffered by maternal uncles of the victim. It was also agreed that love affair between the victim and accused should be put to an end. Accused was advised to leave the room from the locality. The accused paid Rs.25,000/- to the maternal uncle of the victim. The balance amount of Rs.75,000/- was to be paid by accused within two days to maternal uncle of victim. The victim used to make phone call to accused. The maternal uncle learnt about it. The maternal uncle demanded balance amount and also questioned him about contact with victim. Accused told them that victim used to call him. The accused got annoyed and told that he would not pay the balance amount and will marry victim girl. The maternal uncle of victim threatened accused that he will perform marriage with victim. In the cross-examination he stated that he do not know exactly when the accused resided in the locality. He do not know as to whether the accused was residing with his family. After settlement accused started residing at Survey no.50 of Keshav Nagar. He cannot say at which hospital his maternal uncle were hospitalized. He do not know that on 12th December 2015 the accused took the victim from lawful guardianship. He has no concern with the accused. The victim's family is not his relative. He came to know about quarrel after the incident took place from the maternal uncle of victim. He is not aware as to when the accused was arrested.

15. On scrutiny of the evidence it emerges that the case of first informant and victim is that both of them visited Nirmal Township on 12th December 2015. PW-1 had entered wash room. The victim was waiting outside. When PW-1 returned, the victim was found missing. According to complainant the victim was enticed by some unknown

person and kidnapped from her lawful guardianship. The FIR was registered against unknown persons. The complainant did not suspect that accused is involved in kidnapping her daughter. She did not make enquiry with any other person from the township. She did not approach watchman for enquiry. PW-1 has admitted that there was quarrel between her family and accused. Statement of any person from the vicinity of Nirmal Township Society was not recorded. PW-1 admitted that there are CCTV cameras in Nirmal Township. There are shops in township. The investigating officer failed to collect any evidence in the form of statements of witnesses or CCTV footages to corroborate version of PW-1 and PW-2 that victim was kidnapped by accused by forcing her to sit on motorcycle. Statement of watchman of the society was not recorded. PW-1 could not say in which year victim was born.

16. PW-2 has stated that she knows the accused. There was quarrel between accused and her maternal uncle. When her mother went to wash room the accused came on motorcycle. He was possessing knife with him. He threatened her with knife. He told her to sit on the motorcycle. She sat on the motorcycle. She had purse and mobile phone of her mother with her. She was taken to Karegaon. The incident of threatening her and forcing her to sit on motorcycle, is not corroborated by any other witness. It is difficult to believe that accused followed them and made the victim to sit on motorcycle forcibly when her mother went to wash room. It is difficult to accept that the victim sat on the motorcycle which proceeded from Nirmal Township Society to Karegaon without protest. She did not shout. She proceeded on a public road. The version of PW-2 that she was threatened with knife, is not reflected

in her statement. She has stated that accused had purchased imitation Mangalsutra and told her to wear it. Both of them proceeded towards a rented premises. She was introduced to the owner of room as his wife. Undisputedly she did not lodge any protest with the owner of room, although she stayed with accused in that premises for 6 days. She did not dispute her introduction to the room owner. On the sixth day she had made the alleged phone call to her aunt. She deposed that the accused took her to police station. She was not confronted with the birth certificate. PW-1 was also not confronted with the said document. Letters written by the victim to accused were exhibited as Exhibits-25 and 26. Photograph of victim and accused was exhibited. She admitted that it is her photograph. However, she stated that she did not snap the photograph with accused. She denied her handwriting and signatures appearing on letters. There is no recovery of knife from the accused. She admitted that she did not shout when the applicant threatened her to sit on motorcycle. The accused had left the premises twice for work but PW-2 did not tell owner that she has been forcibly brought to premises by accused. She did not make call to her mother or aunt, when accused was not at premises. The owner of room premises where the victim and accused stayed for 6 days has not been examined. There were signals on the road. All these circumstances speak volumes of doubt about the case of prosecution that the accused had forcefully enticed the victim girl to accompany him and forcefully subjected her to sexual intercourse.

17. The birth certificate was exhibited in evidence as Exhibit-24. It is purportedly issued by Chief Registrar of Births and Deaths of Government of Karnataka. The details about the person in respect of

whom the birth certificate was issued, are written in Kannada language. It is not established in any manner that name of the person to whom the birth certificate has been issued, is of the victim. It is also apparent that certificate was issued on 20th January 2016. The Investigating Officer has not disclosed from where he has brought this certificate. None from the office of Chief Registrar of Births and Deaths, Government of Karnataka has been examined by the prosecution. The victim and her mother are completely silent about the fact that birth of the victim was registered in the said office.

18. The evidence of PW-3 is full of doubts. Her version about kidnapping is hearsay. She deposed about call received by her from PW-2. The call was received on 18th December 2016. According to her from victim she learnt that she is with accused at Karegaon. Police recorded her statement on 19th December 2016. She was aware that accused had subjected victim to sexual assault. However, she did not inform about call received by her from victim to police. No attempts were made by her to search victim.

19. PW-4 has referred to medical history. The history provided by the victim indicates that there was physical relationship between her and accused. The accused is her neighbour. There was a fight between her uncle and accused. She was taken to Karegaon by accused. The room was hired and she was subjected to forceful vaginal intercourse. Medical officer has not noticed any injuries on the person of victim to suggest that victim was subjected to forceful sexual intercourse. He was questioned during his cross-examination whether he cannot confirm in the alleged case that there was sexual assault/rape on the victim ? He stated that as per clinical

examination he opinedl that there is penetrative sexual vaginal intercourse. He volunteered that it may be or may not be.

20. The evidence of Investigating Officer mentions that victim and accused were found at Ranjangaon. They were brought at Hadapsar Police Station. PW-2 has stated that accused took her to police station at Hadapsar. PW-5 stated that both were found at Rangangaon. The fact that accused took the victim to Police Station indicate that no force was applied against victim. It is not clear as to how the victim and accused were found at Ranjangaon. According to victim, she was at Karegaon. PW-5 has further stated that he has collected school leaving certificate of victim from her school. However, the said document was not adduced in evidence for the reasons best known to him. If the Investigating Officer was confident about the document relating to the date of birth of the victim and the said document was tallying with the date of birth certificate produced by him, there was no reason for him to suppress the school leaving certificate from bringing it in evidence. Statement of any witness from the school was not recorded. Contents of birth certificates were not proved. He also stated that the ossification test was conducted for determination of age of the victim. In the examination-in-chief he did not state the opinion reflected in the ossification test. The report of such test was not adduced in evidence. There is no explanation why the document was not part of charge sheet or not adduced as evidence. Thus, there are serious suspicious circumstances about the age of victim. The prosecution has not been able to establish that the victim was below the age of 18 years. The Trial Court has accepted the birth certificate without following the rules of evidence. Thus, assuming the case of

prosecution to be true that the victim was with accused and there was physical relation, there is room to believe that relationship was consensual and it has not been established that the victim was minor at the time of incident. It is also important to note that circumstance about the date of birth of the victim reflected in the birth certificate produced by Investigating Officer and adduced in evidence, is not put to the accused while recording his statement u/s.313 of Cr.PC. There is no reference to the said document in his statement u/s.313 of Cr.PC.

21. Learned counsel for appellant has relied upon following decisions :

- (i) **Sujit Biswas Vs. State of Assam¹**;
- (ii) **Kiran Ashok Jadhav Vs. State of Maharashtra²**;
- (iii) **Maheshwar Tigga Vs. State of Jharkhand³**;
- (iv) **Manish Rambhole Saket Vs. State of Maharashtra⁴**;
- (v) **Pramod Dattatraya Jadhav Vs. State of Maharashtra⁵**.

22. Learned APP has placed for consideration decision in the case of **Kundan Nanaji Pendor Vs. State of Maharashtra⁶**.

23. In the case of Sujit Biswas (supra), the Hon'ble Supreme Court has observed that principles of recording statement u/s.313 of Cr.PC is to meet requirement of principles of natural justice. This means that the accused may be asked to furnish some explanation as regards incriminating circumstances associated with him, and Court

1 (2013)12-SCC-406

2 2014-ALL M.R (Cri)-3850

3 (2020)10-SCC-108

4 Criminal Appeal No.266 of 2018

5 2019-ALL M.R (Cri)-1742

6 2017-ALL M.R (Cri)-1137

must take note of such explanation. It is the duty of the Court to examine accused and to seek his explanation as regards incriminating material that has surfaced against him. Circumstances which are not put to accused in his examination under Section 313 of Cr.PC, cannot be used against him and must be excluded from consideration.

24. The Division Bench of this Court in case of Kiran Ashok Jadhav (supra) has observed that chemical analyzer's report which was relied upon by the prosecution was not put to accused while recording his statement u/s.313 of Cr.PC. It was held that principles of natural justice were violated. Such report cannot be used against the accused and must be excluded from consideration.

25. In the case of Maheshwar Tigga (supra), it was observed that circumstances not put to accused u/s.313 of Cr.PC cannot be used against him and must be excluded from consideration. In criminal trial, the importance of questions put to accused are basic to principles of natural justice as it provides him opportunity not only to furnish his defence, but also to explain incriminating circumstances against him. A probable defence raised by accused is sufficient to rebut accusation without requirement of proof beyond reasonable doubt.

26. In Pramod Dattatraya Jadhav (supra) this Court had observed that in the absence of satisfactory evidence about the age of victim it cannot be held that the victim was below the age of 18 years at the time of incident in question.

27. In the case of Kundan Nanaji Pendor (supra), this Court had observed that victim had disclosed her date of birth and there was no cross-examination by the defense. Her statement has gone unchallenged and thus it is required to be accepted. The Court suggestion given to the Investigating Officer that prosecution had not collected birth certificate by itself cannot support the case of defense.

28. It is not disputed that question relating to the date of birth of victim reflected in the birth certificate adduced in evidence at the instance of Investigating Officer, was not put to accused during recording of his statement u/s.313 of Cr.P.C. The factual aspects of this case would indicate that Investigating Officer has produced birth certificate. The contents are not proved. The officer from the concerned office who has issued the said document are not examined. The victim and the mother of victim were not confronted with the said certificate. The victim has given her date of birth in evidence. The defense has cross examined the victim regarding her date of birth which would indicate that date of birth of the victim is under challenge. The prosecution has not explained as to why the school leaving certificate which was purportedly recovered by the Investigating Officer, was not produced in evidence. The report of ossification test conducted during the course of investigation was not placed for consideration. Adverse inference will have to be drawn for suppressing these documents which would have thrown light about the age of victim at the time of incident. The evidence of PW-1, PW-2, PW-3 about kidnapping by accused is doubtful. It is not proved that victim was forcibly subjected to sexual assault. In the light of these circumstances it is difficult to believe that victim was subjected to sexual intercourse under force or that she was minor at

the time of incident. The appeal must succeed. Hence, I pass following order :

ORDER

- (i) Criminal Appeal No.1015 of 2019 is allowed and disposed of;
- (ii) The impugned judgment and order dated 13th June 2019 passed by Additional Sessions Judge, Pune in Special (POCSO) Sessions Case No.90 of 2016 convicting the appellant is set aside and the appellant is acquitted;
- (iii) The appellant shall be released from jail immediately, unless he is not required in any other case.

(PRAKASH D. NAIK, J.)

MST