

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

CRIMINAL APPEAL NO.1430 OF 2018

Ramesh Tukaram Vavekar	]	
Age around 29 years, resident of	]	
room no.39, Ramko Chawl,	]	
Narli Agripada, 19 th road,	]	
Opp.Narendra Apartment,	]	
Khar(West), Mumbai.	]	
[presently lodged in Nashik	]	Appellant.
Road Central Prison, Nashik]	]	(Original accused)

Versus

1. State of Maharashtra	]	
(Through Senior Inspector of	]	
Police, Santacruz Police Station,	]	
Mumbai.	]	Respondent No.1.
2. Nalini Suresh Thakare	]	
r/a Shantabai chawl, Sanakar	]	Respondent No.2
Nagar, Virar (E), Dist-Thane	]	(Original Complainant)

....

Mr.Aashay Topiwala i/b Mrs. Anjali Patil, Advocate for Appellant.
Ms Priya Patil, appointed Advocate by Court for victim.
Ms S.V.Sonawane, APP for State.

....

**CORAM : SMT.SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.**

RESERVED ON : 27th JANUARY, 2022.

PRONOUNCED ON : 24th FEBRUARY, 2022.

JUDGMENT (PER SHRI PRITHVIRAJ K.CHAVAN,J.)

1. Challenge in this appeal is to the judgment and order of conviction and sentence rendered by the Special Judge, Greater Bombay under the

Chitra Sonawane

Protection of Children from Sexual Offences Act, 2012, (*for short 'POCSO Act'*) in POCSO Special Case No.8 of 2016 dated 26.09.2018 by which, the appellant has been convicted and sentenced as under;

- 1. Accused Ramesh Tukaram Vavekar is hereby convicted u/s 235 (2) of the Code of Criminal Procedure for the offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012. He is sentenced to suffer imprisonment for life and shall pay a fine of Rs.2,000/- (Rupees Two Thousand only), in default of payment of fine, he shall undergo simple imprisonment for one (1) month.*
- 2. Accused Ramesh Tukaram Vavekar is punished u/s 4 of the Protection of Children from Sexual Offences Act, 2012, there is no need to punish him separately for the offence punishable u/s 376 of the Indian Penal Code, 1860 as per the provisions u/s 42 of the Protection of Children from Sexual Offences Act, 2012.*
- 3. Set off of the period of detention already undergone by the accused be given to him as per Section 428 of the Code of Criminal Procedure.*
- 4. Copy of this judgment be provided to the accused free of cost as per Section 363(1) of Cr.P.C.*
- 5. White colour Gionee mobile @ battery (Article 1 colly.) and mobile of L.G.Company @ battery (Article 3 colly.) be sold in auction as is not*

claimed and sell proceeds be credited to Government.

6. Label of Article 1 colly. (Article 1 A) and Label of L.G. Mobile (Article 2) be destroyed after expiry of the appeal period.

7. Sealed and unmarked articles if any be destroyed after the expiry of appeal period.

8. Judgment pronounced in the open Court.

9. As the matter is disposed of by this Judgment, the record and proceedings be sent to the record department.

2. Complainant - PW 1 (for short PW 1), is a widow residing with her 3 daughters and one son at Santacruz (West) Mumbai-400 054. Her eldest daughter was married about 2 years before the incident. She was cohabiting with her husband at Khar. Her second daughter who was aged about 19 years and victim herein who was 17 years were residing with their mother. The victim was in 10th standard studying at a High School in Bandra (West), Mumbai.

3. PW 1 was a housemaid who used to leave her home at 11.00 a.m. everyday and used to return in the evening. Two months prior to the incident, she noticed that whenever the victim used to be at home, she always used to sleep. PW 1 had noticed the change in her behaviour and therefore, she asked her elder daughter to talk to her. At that time they realized that the victim was pregnant. The victim was, therefore, taken to the hospital of one Dr.Hikimani on 15.9.2015 at his clinic in Khar. After examination, the doctor confirmed that the victim was pregnant and

advised sonography. Victim was taken to the clinic of one Dr.Subodh Mehta on 16.9.2015. Result of sonography test revealed that she was in her 8th month of pregnancy and date of delivery was 11.10.2015. Complainant and the victim alongwith her sister returned home and alongwith son-in-law of the complainant enquired with the victim as to whether she has had any love affair and who was responsible for her pregnancy. However, the victim did not divulge anything. She even did not tell the name of the person who had impregnated her.

4. Before coming to reside at Santacruz (W),Mumbai, the complainant and her family were residing at Narli Agripada. Before that they were residing at Virar. Husband of the complainant had died 6 years ago.

5. On 8.10.2015, at about 3.00 a.m. the victim went to answer nature's call. When she returned, she experienced giddiness and therefore, complainant called her elder daughter from Khar. Since the victim was experiencing convulsions and unconsciousness she was given first aid at home. As the condition of the victim aggravated and she was intermittently becoming unconscious, she was taken to the hospital and even police was informed. With the help of the police, she was immediately admitted at Bhabha hospital where she delivered a male child. Physical condition of both, the foetus and the mother was serious and, therefore, as per the advise of the doctor, the victim was admitted in the Intensive Care Unit (I.C.U.) and the foetus was kept in a glass cabinet.

6. The victim did not gain consciousness and her health further deteriorated. The doctors advised to take her to K.E.M. hospital, immediately, and therefore, she was admitted for further treatment in

K.E.M. hospital on 08.10.2015, at 19.18 hours. However, she died during treatment on 10.10.2015 at 17.05 hours.

7. As per Autopsy Report, age of the victim was between 16-17 years and the cause of death, as opined by the panel of four doctors was '*cerebral oedema and hypoxic encephalopathy alongwith hepatic necrosis in a case of eclampsia in a postpartum female (natural).*'

8. It was alleged by PW 1 in her F.I.R. that some one had taken disadvantage of her minor daughter who was 17 years of age and committed penetrative sexual assault resulting into her pregnancy.

9. First Information Report (**Ex.10-A**) came to be registered with Santacruz police station bearing Crime No.503/2015 under Section 376(2) (i), 354 (a) of the Indian Penal Code and under Sections 4, 8 of The POCSO Act, on 9.10.2015 against an unknown person.

10. On 10.10.2015, **PW 14 Sanjay Sidheshwar Mali**, API attached to Santacruz police station registered an A.D.R. He drew Inquest Panchnama (**Exhibit 15**) on 11.10.2015 at the Mortuary of K.E.M. hospital in the presence of two witnesses. He issued a letter to the Medical Officer of KEM hospital to collect and preserve blood samples of the victim for D.N.A.test.

11. **PW 15 Ramchandra Dashrath Jadhav** held further investigation into the crime. He recorded statements of witnesses. During investigation, it revealed that the victim was acquainted with the appellant which was substantiated from the statements of witnesses as well as from the call details record (C.D.R.) of their respective mobile phones. Investigating

Officer had received reports from Forensic Science Laboratory. He had also collected School Leaving Certificate of the victim for confirmation of her date of birth. According to the Investigating Officer, date of birth of the victim was 27.09.2000. He had seized the mobile hand set of the appellant as well as the one which was used by the victim. The accused was arrested. Since there was sufficient material against the appellant, a charge-sheet came to be filed against him in the Special Court dealing with cases under POCSO Act for the offences enumerated hereinabove.

12. A Charge was framed against the appellant by the Special Judge on 22.11.2016 under Section 376 of the Indian Penal Code and under Section 4 of the POCSO Act. The appellant pleaded not guilty and claimed a trial. Defence of the appellant is of total denial and false application in the case by the police. The appellant had adduced defence evidence by examining 4 witnesses including one doctor.

13. Prosecution, however, examined as many as 16 witnesses coupled with documentary evidence in the form of Autopsy Reports and crucial evidence of DNA profile of the foetus. Learned Special Judge, having taken into consideration the evidence of the prosecution as well as defence held that the prosecution succeeded in proving the charge against the appellant beyond all reasonable doubts. The learned Special Judge led emphasis not only upon the call details record (C.D.R.) but also other circumstances and especially on the clinching evidence in the form of DNA report which confirmed that the victim and the appellant are the biological parents of the child. It has been held that the victim was a child when she was impregnated by the appellant. The learned Special Judge, therefore, convicted and sentenced the appellant as above.

14. We heard Mr.Aashay Topiwala, learned Counsel for the appellant and Mrs.S.V. Sonawane, learned APP at length.

15. With the assistance of learned Counsel for the appellant we have meticulously scanned the entire evidence of the prosecution and the defence.

16. The main thrust of the learned counsel for the appellant is that, the victim was major at the time of the alleged incident as it has come in the evidence that she was born in the month of January 1996, meaning thereby, she was 19 years old at the time of incident. The learned counsel would also argue that PW 2 brother of the victim and PW 4 sister of the victim have not supported the prosecution case. He also questioned credibility of the evidence of PW 1-complainant, the mother of the victim by contending that the report came to be lodged when the victim was 8 months pregnant for which there is no probable or acceptable explanation tendered by the prosecution. Even the statement was recorded 5 days after the death of the victim on 10.10.2015. Mr. Topiwala would argue that the mother herself did not know the exact date of birth of the victim but she testified that the victim was born somewhere in the year 1996. Even this witness was not aware about the contents of her First Information Report (F.I.R. for short). Learned Counsel drew our attention to the evidence of other important prosecution witnesses which were examined on the seizure panchnama of victim's mobile which, according to him, have not supported the prosecution case.

17. The learned Counsel has further tried to point out some infirmities and lacunae in the evidence of PW 6 Dr.Shreyas S.Patil, PW 7

Dr.Vinodkumar K.N. and PW 8 Dr.Vikrant Nandkishore Waghmare. Learned Counsel has therefore, prayed for setting aside the judgment of conviction and acquitting the appellant of the charges for which he had been convicted and sentenced by the Special Judge.

18. Per contra, Mrs.S.V. Sonawane, the learned APP has strenuously argued that looking to the nature of evidence which is so clinching, there is hardly any room for doubt as regards complicity of the appellant in committing penetrative aggravated sex with the victim by impregnating her and then ultimately resulting into her death. Learned APP would argue that this is not the case in which the appellant is entitled for any lenient view, in view of the fact that, most of the witnesses including real brother and sister of the victim were won over by the appellant. She would argue that strong message is required to be given that in the cases of this kind there should be no question of any lenient view.

19. The POCSO Act is enacted to address the issue of sexual offences against children which were not adequately addressed by the existing laws then. This Act now provides protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of children. Section (2)(1)(d) of the POCSO Act defines “child”. *“Child” means any person below the age of 18 years.*

20. The learned Counsel for the appellant strenuously argued that the victim was not a child in the year 2015 when the offence alleged to have been committed and that she was born in the month of January 1996 as deposed to by her mother PW 1, this case would not fall within the ambit

of provisions of POCSO Act. It would, therefore, be essential to scrutinize the evidence adduced by the prosecution to see as to whether it has proved that the victim was a child at the time of the alleged offence as well as whether the appellant is the biological father of the male child ?

21. PW 1 is the mother of the victim. The sum and substance of her evidence is that when the victim was in 10th standard, the witness noticed change in her behavior. In spite of asking her repeatedly, the victim did not disclose anything to her mother. Efforts made by PW 1 through her elder married daughter i.e. the elder sister of the victim (PW 4) who asked the victim as to why she always used to keep quiet, nothing could be ascertained by the family. It is testified by PW 1 that the victim was minor. In her **F.I.R.(Exh.10)** PW 1 had specifically informed the police that the victim was 17 years old at the relevant time when she was found pregnant and carrying a foetus of 8 months in her womb at the time of her examination by the doctor. Interestingly, during her cross examination, PW 1 had changed her earlier stand and testified that the victim was born 4 days prior to *Makar Sankrant* in the year 1996. According to her it was a month of January. She, however, could not give specific date of birth of the victim. This is a classic case of winning over the prosecution witnesses. PW 1, though is the real mother of the victim, who had died during the delivery of the child, feigned innocence as to who was responsible for impregnating her daughter (victim) and how she could not realize pregnancy of the victim till it reached 8th month. We shall deal with this aspect in the judgment afterwards.

22. At this stage, even the elder sister of the victim PW 4 has not supported the prosecution as she resiled from her statement recorded by

the police. PW 4 in her cross examination deposed that the date of birth of the victim was 10.4.1996. She did not say anything during her examination in chief as regards her age. It is surprising that the mother of the victim PW 1 does not know the date of birth who testified that she was borne in the month of January 1996, whereas PW 4 deposed that the victim was born on 10.4.1996. The prosecution has, however, conclusively established that the victim was a child at the time and around the period when the alleged offence of penetrative sexual assault was committed by the appellant.

23. **PW 16 Stany Manvel Dodti** who serves as a Clerk in a Convent High School, where the victim had studied, testified that the date of birth of the victim was 27.09.2000. He had produced original admission form, school leaving certificate book before the trial court. He candidly deposed that on the basis of original birth certificate, the date of birth of the victim has been mentioned in the admission form which was filled up by the parents in his presence. He had identified the signature of the victim's father as well as signature of the Principal of the School. This document is proved at **Exhibit 62**. The witnesses had also produced the school leaving certificate of the victim as she was promoted to 5th standard in the same school. School leaving certificate is shown at serial no.716 of the school leaving certificate book. Copy of school leaving certificate is at **Exhibit 65**.

24. A futile attempt has been made by the defence to rebut the testimony of PW 1. Certain suggestions were given in respect of contents of the school leaving certificate which indicated that progress of victim was not satisfactory and that she was repeated in 9th standard and was not good at studies. This cross examination is absolutely irrelevant in so far as charge

against appellant is concerned. Learned trial court has, therefore, rightly accepted and placed implicit reliance upon oral evidence of PW 16 and the documents corroborating his oral version conclusively establishing that the victim was a child and that her age was 15 years on or before 09.10.2015 which is the approximate time of incident. PW 1 though had mentioned victim's age as 17 years in F.I.R., nevertheless, on the strength of aforesaid documentary evidence, it has been conclusively proved that the victim was around 15 years of age at the time of the incident.

25. Indubitably, the victim was found to be pregnant of 8 months when she was examined by the doctor for the first time, meaning thereby, when the offence of penetrative sexual assault occurred she was about 14 years and some odd months old. The entry in the official register of the School is relevant as it was made in discharge of his official duty by PW 16 who was appointed for that purpose.

26. Turning to the charge under section 376 of the Indian Penal Code and Section 4 of the POCSO Act, the prosecution has mainly relied upon the evidence of PW 6 to PW 10 who are all doctors and medical experts coupled with the report of DNA examination conclusively establishing paternity of the foetus born to the victim. As already stated PW 1-mother of the victim, PW 2-younger brother of the victim who was then aged about 12 years and PW 4-elder sister of the victim have not supported the prosecution case for the reasons which needs no discussion as it is apparent that they have been won over by the defence.

27. It is testified by PW 1 that when she took the victim to one Dr.Hikemani, he found her pregnant and advised sonography. The victim

was taken to another doctor for sonography where it was confirmed that she was 8 months pregnant. It sounds unbelievable and incredible that despite repeatedly asking the victim, she did not spill the beans by naming appellant or for that matter any other person responsible for her pregnancy. When she was taken to the Bhabha hospital by PW 1 alongwith PW 4 and her husband, the police had asked this witness to lodge a report. Accordingly, PW 1 approached Santacruz Police Station and lodged report on 8.10.2015.

28. Evidence of PW 1 further indicates that the victim delivered a male child. The victim was unconscious when she delivered the child. She was, therefore, taken to K.E.M. hospital and was admitted in I.C.U. The victim died on the fourth day while she was in ICU. The evidence further reveals that the child of the victim was given to an Orphanage. It is surprising to note that PW 1 did not remember whether the body of the the victim was at KEM hospital when the police had arrived over there or that whether she had taken the dead body of her daughter. She also testified that since there was no one in her house to take care of the newly born child of the victim, and, therefore, he was sent to the orphanage.

29. Obviously, during her cross examination by the defence, as already stated, she has falsely deposed that the victim was born in the month of January 1996. It has been brought out during cross examination that the victim used to talk on her phone continuously and was not concentrating on her studies. She admits that when a woman becomes pregnant, there are changes in the body structure and that she did not notice change in the body of the victim. It is quite apparent from the evidence of this witness though she was aware of the facts, but had deliberately kept mum for the

reasons best known to her. Her admission that neither she nor other members of the family were aware of the love affair of the victim is something which no prudent man will believe. We, therefore, say that though she is the real mother of the victim, she did not disclose the name of the real culprit. The reason for suppressing a material fact is quite apparent as even a layman would infer what must have happened.

30. When her attention was specifically drawn to the fact that her husband had recorded the date of the birth of the victim as 27.09.2000, at the time of admitting her in the school, PW 1 answered that the victim was born in the year 1996 four days prior to *Makar Sankrant*. She had not specifically denied the date of birth of the victim as 27.09.2000.

31. Similarly, PW 4 who is the real elder sister of the victim did not support the prosecution case. She testified that the victim was in her 8th month of pregnancy when she was studying in 10th standard in the year 2015. When she was taken to Dr.Hikemani, after undergoing sonography, the fact of her pregnancy was confirmed. She specifically deposed that the doctor informed that the date of her pregnancy would be 10.11.2015. This witness too feigned innocence as to the person responsible for impregnating the victim. Normally, real sisters are like very good friends.

32. A daughter may not share everything with the mother but she would definitely share her real feelings and emotions to the sister. The conduct of PW 4 is also not free from doubt as she also did not want to disclose the truth for the reasons best known to her. When she resiled from her statement, learned APP had drawn her attention to the relevant portions of her statement which are marked as 'A', 'B' and 'C' and are proved through

the testimony of the Investigating Officer, **PW 15-Ramchandra Dashrath Jadhav** who was a senior Police Inspector attached to Khar police station at the relevant time. Those contradictions are proved at **Exhibit 14-A to 14-C.**

Portion marked 'A' which is proved as Exhibit 14-A reads thus;

"I found while checking Whatsapp on my mobile that the victim had made a call to Ramesh Vavekar (appellant) on 25.07.2015 and I told this fact to the police officer of Unit no. 9."

Portion marked B which is proved as Exhibit 14-B reads thus;

On 10.10.2015 when discussion was going on in context with my sister (victim) at that time my younger brother PW 2 aged 11 years told that prior to 6 months when there was no one at home he saw the victim talking with Ramesh Vavekar and he had seen him coming to our house for 4 to 5 times to meet the victim, so also prior to one year when PW 2 went to play with his friend in 'X' chawl at that time, the victim came to meet Ramesh in 'X' Chawl, Narli pada, at that time the mother of Ramesh (appellant) asked the victim to not to talk with Ramesh and on that count mother of Ramesh (appellant) had beaten the victim."

Portion marked C which is marked at Exhibit 14-C which reads thus,

Prior to 1 and ½ year, Ramesh was frequently calling me on my phone and expressed his wish to have friendship with me. At that time I replied him that I was not acquainted with him and why should I do friendship with him. At that time I

lodged report against him with the police. Then I suspected that the victim was having love affair with Ramesh and he had impregnated her.”

33. Cumulative effect of these proved contradictions would definitely indicate and are relevant that the appellant had been conversing with the victim and had also tried to befriend PW 4. In the given circumstances, it appears quite probable and believable that this witness had actually made such statement before the police.

34. PW 4 during her cross examination by the prosecution, though identified mobile handset of the victim which is at Article 1, refused to identify the appellant when he was shown to her by removing the curtain, obviously.

35. If PW 1 and PW 4 chose not to support the prosecution case then least said the better about a small boy of 12 years namely PW 2 who is the real brother of the victim. He testified that he was in 6th Standard in the year 2015. He named a few friends of the victim. However, when he was confronted with certain portions in his statement recorded by the police, he denied to have so stated. The material contradictions qua this witness have also been brought on record and proved through the evidence of **PW 15 Ramchandra Jadhav**. They are at **Exhibits 11-A to 11-B**. **Exhibits 11-A to 11-B** are extracted below.

Portion marked ‘A’ which is proved as Exhibit ‘11-A’ reads thus:

Question: *What time do you return after playing?*

Ans: *Some times I go to my house in between*

3.30 pm to 4.00 p.m. only if I feel hungry, otherwise I go by 6.00 p.m.

Question: *Who used to be there at home till you return after playing?*

Ans: *Victim used to be alone at home.*

Question: *What are the names of friends of your sister (victim) ?*

Ans: *A, B, C, D and E.*

Question: *How does your sister (the victim) know them?*

Ans: *While staying at 'X' chawl, Narli Agripada 4-5 years ago she got friendly with them.*

Question: *Did they use to come to meet your sister (the victim) ?*

Ans : *Some times.*

Question: *Who else used to come to meet your sister (the victim)?*

Ans: *Ramesh Vavekar.*

Question: *How do you know his name ?*

Ans: *He was a Disk Jockey player and used to stay behind our 'X' chawl.*

Question: *When did you see him ?*

Ans: *In February 2015, I saw him coming out of our house.*

Question: *At what time ?*

Ans: *In between 3.30 p.m. to 4.00 p.m.*

Question: *Where you had gone ?*

Ans: *I had gone to play but returned home as I*

was hungry.

Question: *When did you see him again?*

Ans: *After one week, I saw him coming out of my house again.*

Portion marked 'B' which is proved as Exhibit '11-B' reads thus:

Question: *What did you see behind the lane of 'X' chawl?*

Ans: *I saw Ramesh Vavekar and his mother were beating the victim.*

Question: *What were they talking there?*

Ans: *They were asking my sister (the victim) as to why she visits their lane (galli).*

Question: *What happened thereafter ?*

Ans: *My sister's friend's mother came to rescue my sister (the victim) and she stopped the quarrel.*

Question: *What happened thereafter ?*

Ans : *While she was passing through same lane, I called her inside Nishant's house.*

Question : *What happened thereafter?*

Ans: *I asked her why they were beating her.*

Question: *What did victim answer ?*

Ans: *She threatened me not to disclose anything about the incident at home.*

Question : *What happened thereafter?*

Ans: *My sister (the victim) went home.*

Question: *What you were doing?*

Ans: *After playing Carrom with Nishant I went home.*

Question: *What time the incident happened ?*

Ans : *At 8.30 p.m.*

Question: *Did you tell anything at home?*

Ans : *No.*

36. It is apparent that PW 2 had witnessed the appellant coming to their house whenever the victim used to be alone and this witness used to play with his friends. He denied of having noticed the appellant visiting the house when the victim used to be alone. However, as stated hereinbefore that he had deliberately given false evidence, perhaps at the instance of his mother and elder sister. It is a settled proposition of law that the evidence of a hostile witness should not be totally discarded as it can be accepted partially. It is well known that witnesses can not be a branded liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. We do not apply the maxim *falsus in uno, falsus in omnibus*. In view of proved contradictions, evidence of PW 2 and PW 3 can be accepted to the extent of their versions found to be dependable.

37. **PW 11 Ashwini Kadam** is the cousin of the appellant. She has also turned hostile. However, it has come in her evidence that she knew the victim by face. When it was suggested that she knew that the victim and the appellant were acquainted with each other and that she had witnessed the victim wandering near the house of the appellant, she denied. When she was confronted with her statement recorded by the police to contradict,

she denied to have so stated before the police. However, **PW 15 Ramchandra Jadhav** has proved the contradictions during his evidence. They are at **Exhibits 43-A to 43-C**. **Exhibits 43-A to 43-C** are extracted below.

Portion marked 'A' which is proved as Exhibit '43-A' reads thus:

The victim got acquainted with appellant Ramesh. Thereafter, I saw her wandering near his house of Ramesh. On that count, there was a quarrel between Ramesh's mother and victim's mother.

Portion marked 'B' which is proved as Exhibit '43-B' reads thus:

The victim and Ramesh developed good friendship before a year and I saw them chatting.

Portion marked 'C' which is proved as Exhibit '43-C' reads thus:

My statement was written in Marathi. I read the same and it is correct as per my say.

38. This witness has also been influenced by the defence and she would obviously support the appellant being his cousin.

39. Four defence witnesses have been examined on behalf of the appellant, however, he did not enter into witness box.

40. **DW 1 Sangita Shivbahadur Kori** deposed that the appellant is her maternal Aunt's son. She denied her signature over **Exhibit 36** which is an extract of MLC register. She has not deposed anything as to why the appellant was arrested by the police. It is difficult to understand as to why

this witness has been examined by the defence, as her evidence does not take the defence anywhere. This witness had produced a letter dated 20.12.2004 addressed to the Deputy Collector, Andheri, Bandra (E). It is not clear as to what are the contents of the said letter. Learned Advocate for the appellant submitted that contents of those letters (Exhibit 72 and 73) are not relevant.

41. Similarly, **DW 2 Vivek Tukaram Vavekar** who is the brother of the appellant deposed that the appellant was arrested because there were many opponents and competitors who had falsely implicated him in this case. He did not name any one.

42. **DW 3 Krushna Tanaji Vavekar** is the cousin of the appellant who testified that some persons were jealous of the appellant and therefore, a false report came to be lodged against him. He too, did not name any such person who was allegedly jealous of the appellant.

43. Last defence witness is **DW 4-Dr. Satishchandra Purushottam Kale** who is an Orthopaedic Surgeon at Cooper Hospital. He mainly deposed as to how sampling of DNA is to be carried out. Basically, he appears to be an Orthopaedic Surgeon and not an Expert to give opinion as to why and how DNA tests are conducted. Nevertheless, according to this witness, there are two types of DNA tests namely 16 STR and 32 STR. According to him, 32 STR is more accurate test than 16 STR. When DNA report - **Exhibit 26** was referred to him he testified that it was 16 STR. During the process of analysis of PCR, errors may be introduced by the process itself. He further testified that DNA can be similar to other in one of 7000 persons. Chain of custody of sample is of utmost importance. He testified that from the time

of collecting sample, sealing, storing, transporting, testing and returning the sample for further use is important. He nowhere deposed whether sampling, sealing, storing, transporting and testing and returning the sample in the instant case has not been scrupulously followed. When he was cross examined, he admits that if the blood samples are collected properly then, it may remain as it is for days together. He admits that 16 STR tests is also an accurate mode. Defence evidence is absolutely of no assistance to the appellant in substantiating his defence that he has been falsely implicated by the rivals in his profession as a Disc Jockey.

44. Evidence on record, if read conjointly and juxtaposed with the testimonies of **PW 6 Dr. Shreyas Patil**, **PW 10 Dr.Sandeep Garg** coupled with DNA report, as well as proof of age of the victim and other evidence in the form of continuous communication between the victim and the appellant establish that the victim was a child when she was subjected to not only aggravated penetrative sexual assault by the appellant but he had also impregnated her as a consequence of such sexual assault. The appellant had taken undue malefit of the tender age of the victim by seducing her for his amorous sexual lust resulting into not only impregnating by committing aggravate penetrative sexual assault but is also responsible for her untimely death and in addition to that permanently abandoned his own child at the mercy of an orphanage. It has been conclusively proved that he is the biological father of the male child ill-begotten to the victim. He, therefore, can not absolve himself from the said offence as well as the fact that it is he who is responsible for putting the life of not only the victim but also the newly born into jeopardy.

45. Now, turning to the important evidence of medical experts. **PW 6 Dr.Shreyas S. Patil** was attached to Bhabha Hospital, Bandra. He is M.S.Obstetrics & Gynecologist. He had dealt with 200 sexual assault cases. His evidence indicate that on 8.10.2015, he was on call from 8.00 a.m. to 8.00 a.m. of 9.10.2015. On 8.10.2015 at about 12.50 pm victim was brought by her mother to the labour room of the Hospital. The patient was brought on a stretcher. She was unconscious. History given by her mother was that, she was 17 years old, unmarried and carrying 9 months of pregnancy. She was in labour. She had one episode of convulsion at 3.30 a.m. on 8.10.2015. Thereafter she had 10-15 episodes of convulsion every 15 minutes. She had tongue bite. She was unregistered. She had no antenatal visit. No Tetanus injection or hematinics were taken. Her pulse was 146 per minute. Her blood pressure was 210/110. She was fully dilated and about to relieve. At 1.02 p.m. she delivered a male child weighing 2.2 kg. who did not cry immediately after birth and hence was admitted in NICU. She was given one blood transfusion. Post delivery, her blood pressure fell down. She was in in the hospital till 4.00 pm. She was shifted to KEM Hospital and the baby was in NICU. The reason for shifting was non availability of ICU expertise. She was intubated at 1.30 p.m. and she required ventilator support.

46. **PW 6- Dr.Shreyas Patil** has specifically deposed that he was the first person who examined the victim and delivered her. He proved the medical treatment papers which are in his hand writing at **Exhibit 20 collectively**. There is no much cross examination of this witness except the fact that it was full term delivery. He denied a suggestion that the patient was above 18 years of age. The victim died on 10.10.2015 at about 17.05 hours.

47. **PW 8- Dr.Vikrant Nandkishore Waghmare** was attached to K.E.M. Hospital. His qualification is M.D.in Forensic Medicine. On 11.10.2015 he was on post mortem duty at K.E.M. Hospital. After receiving a requisition alongwith Inquest Panchnama from Santacruz Police Station in ADR No.79/2015 under Section 174 of Cr.P.C., he conducted post mortem examination of victim's dead body, aged about 17 years, at 12.10 p.m. He was accompanied with the Assistant Professor Dr.Vikas Meshram and Co-resident Dr. Sunil Vidhate and Dr. Abhijeet Hosmani. His evidence reveals that X-ray of the body of the victim was taken for age determination. Blood samples were collected for DNA and medical analysis. Victim was referred from Bhabha hospital and was admitted to KEM hospital from 8.10.2015 till 10.10.2015.

48. Evidence of this witness further indicates that after post mortem they found that there were signs of recent delivery and, therefore, they kept their final opinion reserved for cause of death pending a report from chemical analysis and histopathological report. The witness further deposed that the viscera, blood sample was preserved for chemical analysis and DNA profiling alongwith upper canine tooth and piece of sternum bone for DNA profiling. Those samples were sealed, labeled and handed over to on duty Police Constable 060790 Shaikh of Santacruz police station. He received acknowledgment from the police constable. All correspondence and acknowledgment as well as forwarding letter is proved at **Exhibit 29**.

49. **PW 8-Dr.Waghmare** further testified that after receipt of chemical analysis report and histopathological examination report, final cause of death is given as "*cerebral oedema and hypoxic encephalopathy*"

alongwith hepatic necrosis in a case of eclampsia in a postpartum female.”

Accordingly, he prepared post-mortem notes alongwith final cause of death certificate. The certificate bears signatures of Dr.Vikas Meshram, Dr. Sunil Vidhate and Dr.Abhijeet Hosmani. It is proved at **Exhibit 30**. Final cause of death certificate is proved at **Exhibit 31** and the post mortem report is at **Exhibit 32**. PW 8 has specifically deposed that the deceased was 17 years old which again confirms the fact that the victim was a child.

50. There is no effective cross examination of this witness by the defence barring a few suggestions which are insignificant and immaterial in the given circumstances. The defence has not succeeded in making any dent in the evidence of the expert.

51. **PW 10- Dr.Sandeep Sarjuprasad Garg** was attached to Bhabha Hospital at the relevant time. His qualification is M.B.B.S., M.D., D.M.B.Fellowship. According to this witness, he had collected blood samples of a male child of the victim with the consent of victim's sister, PW 4. Samples were collected in connection with crime No.503/2015 of Santacruz Police station. He collected the samples in two EDTA bulbs of 1.5 ml each. He labeled, and sealed the samples as well as packed in presence of witnesses Ranjana Mendonsa, Dr.Akshay Kadam, and PW 4. Samples were packed and handed over to the police for sending the same for chemical analysis and DNA analysis. He had entered all the details of collecting samples in the Identification Form. He had produced original Casualty register. Corresponding entry of these forms were found at serial no.17095. This witness had proved the contents as well as his signature and signatures of Regina Mendonsa, Dr.Akshay Kadam, and PW 4. It is proved at **Exhibit 41**.

52. Nothing could be elicited from the mouth of this witness by the defence which would render his testimony unworthy of credit. As a matter of fact, none of the expert witnesses had any axe to grind against the appellant, for, they are all independent and expert witnesses in their respective fields.

53. Turning to the collection of biological samples of the appellant, the prosecution examined **PW 7 -Dr.Vinodkumar K.N.** who was attached to Sir J.J. hospital as a Resident Doctor in the Department of Forensic Medicine. He testified that on 15.10.2015, he was on duty when he received a call from Dr.Dilip Gawari who was a Casualty Medical Officer on duty that one Ramesh Tukaram Vavekar (appellant) was brought by Police Constable S.L. Patil, Buckle No.070801 of Santacruz police station in C.R. No.503/2015 u/s 354(a), 376 of Indian Penal Code read with Sections 4, 8 of POCSO Act, 2012. He further testified that he had taken consent of Ramesh Tukaram Vavekar for medical examination of genitals and examination of secondary characters. He also took his consent for collection of samples for medical and forensic examination. Ramesh had denied any history of sexual act or sexual intercourse with the victim. The patient was conscious, oriented and his vital parameters were within normal limits. The doctor noted adequate development of secondary sex characters. There were no signs of sexually transmitted infections or no signs of any injury in and around penis. He had collected six samples. He had collected blood for serology and for grouping, nail clippings, pubic hair, penal swab, urethral swab. After examination, he opined that there was nothing to suggest that Ramesh was not able to perform sexual intercourse. Samples collected by him were sent for medical analysis. He proved the report at **Exhibit 24.**

54. Samples were handed over to the Police Constable Buckle no.070801 of Santacruz Police station. **PW 7 Dr.Vinodkumar K.N.** had proved form of report used for forwarding samples of forensic medical examination of the accused. It is at **Exhibit 25.** **PW 7-Dr.Vinodkumar K.N.,** categorically deposed that the DNA report dated 23.10.2015 reveals that Ramesh and victim are concluded to be biological parents of the male child of the victim. DNA report is proved at **Exhibit 26.**

55. This witness has been extensively cross examined by the Counsel for the appellant. A futile attempt has been made to rebut the testimony by suggesting that samples were not collected personally by this witness and that after collecting the samples they were not properly preserved and handed over to the concerned police which has been categorically denied by PW 7. Certain aspects which surfaced during cross examination of this witness rather strengthens and substantiates the fact that due procedure had been followed by this witness and necessary care and precaution had been taken while collecting and sealing biological samples of the appellant.

56. **PW 9- Dr.Ritesh Subhash Khodake** had also examined the appellant Ramesh Vavekar on 1.10.2015. When he was attached to Bhabha hospital, appellant Ramesh Vavekar was brought by a Police Constable, Buckle No.12512, of Santacruz police station in crime no.503/2015 alongwith a forwarding letter. The Police Constable had brought with him EDTA bulb and identification form. **PW 9-Dr.Khodake** had delivered the samples duly sealed, packed and labelled alongwith identification form in the custody of the said Police Constable. The doctor had also confirmed the patient's photograph and signed on it. He had also obtained the consent of the patient for collection of blood samples for DNA. Section 53-A of the Code

of Criminal Procedure permits a Medical Practitioner employed in hospital run by the Government to examine a person accused of rape. He collected blood samples in the presence of witnesses viz. Regina Mendonsa, Dr.Akshay Kadam, and PW 4. He proved the entry at serial no.17095, OPD no.105019 dated 12.10.2015 at 2.40 pm. He had also proved the extract of MLC register at **Exhibit 36**. He had obtained left hand's thumb impression of the patient as an identification mark on MLC register at **Exhibit 36**. He obtained acknowledgment of the Police Constable. As regards handing over blood samples and identification form, the identification form is proved at **Exhibit 37**. He had also produced copy of letter which is at **Exhibit 38**. During his cross examination, it was revealed that around 2.40 p.m. he collected blood samples. It is not the case of the defence that no blood samples of the appellant was collected by **PW 9-Dr.Khodake**. Rest of the cross is insignificant and need no comments.

57. From the over all facts and evidence on record, it is apparent that the appellant could have been charged under Section 5(j)(ii) of POCSO Act, for, it provides that in the case of female child, the accused makes the child pregnant as a consequence of sexual assault, then the accused is said to have committed penetrative sexual assault on a child, which is indeed an aggravated penetrative sexual assault. Before amendment of Sections 4, 5 and 6 of POCSO Act 2012, the punishment for aggravated penetrative sexual assault was not less than 10 years but which may extend to imprisonment for life and shall also be liable to fine. After the amendment of Section 6 in 2019, punishment for aggravated penetrative sexual assault is with rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life which shall mean imprisonment for the remainder of natural life of that person and shall also

be liable to fine or with death. Such a stringent punishment has been provided for committing an offence under Section 5 of the POCSO Act. Be that as it may.

58. This takes us to the next aspect of discovery evidence under Section 27 of the Indian Evidence Act. **PW 5 Mukesh Damji Shah** was summoned at the police station on 15.10.2015 by **PW 15 Ramchandra Jadhav**. It is the case of the prosecution that the appellant had voluntarily made a statement while in police custody that he would show the place where he had kept the mobile and accordingly memorandum panchnama was drawn pursuant to which the appellant led the police team to his house and discovered a mobile handset of Voda- LG 0168 Company from the cupboard. Not only that, the prosecution alleges that in presence of PW 5, even PW 4 had produced a black coloured mobile handset with 8 GB memory card alleged to have been used by the victim for communicating with the appellant. However, this witness has turned hostile.

59. Cross examination by learned APP after declaring him hostile, yielded nothing. He denied all the suggestions given by the Prosecutor except his signature over recovery panchanama of the mobile handset produced by **PW 4** which is at **Exhibit 13-A** and signature beneath memorandum panchnama qua the appellant which is at **Exhibit 17** and subsequent recovery of mobile from the house of the appellant which is at **Exhibit 17-A**. **PW 15-Ramchandra Jadhav**, however, testified that pursuant to a voluntary statement made in presence of panchas by the appellant and after drawing Memorandum Panchanama which is at **Exhibit-16**, they proceeded to the house of the appellant at Narli Agripada. Mother of the appellant was at home. Appellant took out a mobile handset from his

house which was a make of L.G. Company. It was seized and Seizure Panchnama is at **Exhibit 16-A**.

60. **PW 12- Changdev Haribhau Godse** is a Nodal Officer of Vodafone. Pursuant to the communication, letter number 2399/DCP/Z-IX/R/2015 dated November 2015, from the office of Deputy Commissioner of Police, Zone IX, he produced call data record of Mobile Numbers 7045134333 and 9930537897 for the period commencing from 01.01.2015 to 09.10.2015 alongwith the name, address and documents in respect of same numbers. Letter which was received from the office of DCP is proved at **Exhibit 45** and forwarding letter is at **Exhibit 46**. He testified that pursuant to the said communication he had retrieved call details record from his Computer which was password protected. He took out the printouts of the same and issued a certificate u/s 65(b) of the Evidence Act. The police official viz. Satish Jyotiba Kapse (PC 01660) collected call details record on 7.12.2015. **PW 12- Changdev Godse** had duly identified his signature and seal of his Company over the certificate which is issued u/s 65(b) of the Evidence Act. It is at **Exhibit 47**. This witness had referred call details record of Mobile Numbers 7045134333 and 9930537897 for the period commencing from 01.01.2015 to 09.10.2015. The data pertains to the numbers which he had retrieved from his Computer. Each page of call details record has seal of his Company and is marked at **Exhibit 48 collectively**. Each page of call details record has a seal of the Company which are at page numbers 279 to 392 and collectively marked as **Exhibit 49**. He testified that the Computer was under his control and was in operation during the aforesaid period.

61. During cross examination by the defence he admits that it may happen that same card may be in the name of one person and it may be

used by other person. However, nothing has been brought out by the defence to show that the Sim Card of the appellant's mobile was being used by some one else. No prosecution witness has been so suggested nor any of the defence witnesses spoke or whispered about it. This witness also admits that KYC (know your customer) updation is some times done after a period of 4-5 years. In the given set of facts and circumstances, there is no question as to whether K.Y.C. was in some one else's name. The witness denied a suggestion that if Sim Card is issued in the name of one person then, the Company can hand over same SIM Card to another person on his behalf.

62. Call details record demonstrates continuous conversation between mobile Nos. 7045134333 and 9930537897 which was being used by the victim. Mobile Number 7045134333 is proved to be registered in the name of PW 1 i.e. the mother of the victim. Obviously, said mobile number was being used by the victim to communicate with the appellant. Mobile Number 9930537897 is proved to be registered in the name of the appellant which was active and the date of activation was 05.01.2013. No prosecution witness has been so suggested nor any of the defence witnesses spoke or whispered that the victim and the appellant were not communicating with each other through the aforesaid mobile numbers.

63. Prosecution has thus, proved beyond doubt that the victim was a child not only from the evidence in the form of her school record but also from the result of DNA analysis (**Exhibit 26**) which conclusively established that the appellant and the victim are the biological parents of the male child begotten to the victim. The prosecution has further succeeded in proving beyond doubt that the appellant had seduced the victim and

subjected her to rape and aggravated penetrative sexual assault resulting into her pregnancy. Evidence of the prosecution inspires confidence and there is no room for any doubt. The victim had not only been abandoned by the appellant but also by her real mother(PW 1). They did not stop there but had put the life of the newly born child into jeopardy by sending him in an Orphanage. In view of Section 2(w a) of the Code of Criminal Procedure, the “*victim*” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and expression “*victim*” includes his or her guardian or legal heir. The child born to the victim is indeed her legal heir and also a victim in view of the definition of “*victim*” and therefore, he must be adequately compensated for as it was the appellant who is responsible for bringing him in this world and then abandoning him at the mercy of an Orphanage.

64. **Rule 7(1)(3) of The Protection of Children from Sexual Offences Rules, 2012** (for short POCSO Rules) contemplates thus:

Compensation-(1) *The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report Such interim compensation paid to the child shall be adjusted against the final compensation, if any.*

(2)

(3) *Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections(2) and (3) of*

section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall taken into account all relevant factors relating to the loss or injury caused to the victim, including the following.

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

vii) Whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human

immunodeficiency virus (HIV) as a result of the offence.

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

65. Learned Counsel for the appellant urged to take a lenient view looking to the young age of the appellant and also conveyed willingness of the appellant and his family to provide adequate compensation to the child.

66. We have given our thoughtful consideration to the entire facts and circumstances of the case. No doubt, the victim is no more. However, now the welfare of the child born out of illicit relations between the victim girl and the appellant would be of paramount importance. As abundant caution as well as in view of public policy, law can not afford to allow such consequence befalling an innocent child only because he was abandoned by a father (appellant). The trial court though has convicted the appellant under Section 4 of the POCSO Act, did not award any compensation which ought to have been awarded by it. **Sub-rule 3 of Rule 7 of POCSO Rules** contemplates that though the Special Court is empowered to award compensation under Section 33(8) of the POCSO Act read with sub-sections (2) and (3) of section 357-A of the Code of Criminal Procedure to the victim by taking into account all relevant factors relating to the loss or injury caused to the victim, yet in view of sub- rule 4 of Rule 7 of the

POCSO Rules, the compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357-A of Code of Criminal Procedure.

67. Looking to the young age of the appellant and his future prospects in his profession as a Disk Jockey as well as the fact of his willingness to provide adequate compensation to the child, we are of the considered view that, no fruitful purpose would be served in detaining the appellant for his entire life, instead, if the amount of compensation to be awarded to the child, is adequate, it would serve the ends of justice. We are, therefore, inclined to reduce substantive sentence upto 10 years inter alia directing the appellant to pay an amount of Rs.2 lakhs towards compensation for the welfare of the child born out of relations between him and the victim girl (mother of the child). As such following order is expedient.

-O R D E R-

1. Conviction of the appellant of the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012, is hereby maintained, however, sentence of imprisonment for life is reduced to the extent of 10 years. The amount of fine is maintained.
2. Secretary, District Legal Services Authority, Mumbai is appointed as a guardian of the victim child (boy).

3. A joint account shall be opened in the name of the Secretary, District Legal Services Authority and the victim child (boy) in any Nationalized Bank.
4. The appellant shall deposit an amount of Rs.2 lakhs [Rupees Two Lakhs only] in this account within 4 months from the date of pronouncement of the Judgment.
5. Periodical interest drawn from the amount of Rs.2 lakhs invested in a Fixed Deposit in the said account, shall be utilized for the overall development and welfare of the child including his education, health and other necessary expenses.
6. The Secretary, District Legal Services Authority, Mumbai, shall visit the Orphanage after every 3 months and monitor whether the amount of interest is being properly utilized by the Orphanage for the welfare of the victim child (boy). If necessary, the Secretary shall maintain a Register to that effect.
7. Apart from the amount of compensation to be paid/deposited by the appellant, the Secretary, District Legal Services Authority, Mumbai, shall take necessary steps as per Rule 7 of the POCSO Rules, which shall be payable by the State Government from the victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims u/s 357-A of the Code of Criminal Procedure.

8. The victim child would be at liberty to withdraw the entire amount after attaining majority.

9. The appeal stands disposed of in the aforesaid terms.

[PRITHVIRAJ K.CHAVAN J.]

[SMT. SADHANA S. JADHAV, J.]