

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.26 OF 2018

Premkumar s/o Sukhdeo Bansode
Age 28 years, Occu. Service,
R/o Shahu Nagar, Osmanabad.
Tq. & District Osmanabad

... APPELLANT

VERSUS

1. The State of Maharashtra
(Copy to be served on P.P.,
High Court of Bombay,
Bench at Aurangabad)
2. X Y Z
Age major, Occu. Education,
R/o C/o Sonaji Shivling Sonwane,
Shahu nagar, Osmanabad,
Tq. & Dist. Osmanabad

... RESPONDENTS

.....
Mr. S.J. Salunke, Advocate for appellant
Mr. A.A. Jagatkar, A.P.P. for respondent No.1 - State
Mr. Y.P. Jadhav, Advocate for respondent No.2.

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CORAM : R.G. AVACHAT, J.

Date of reserving judgment : 4th May, 2023

Date of pronouncing judgment : 13th June, 2023

J U D G M E N T :

The challenge in this appeal to a judgment and
order of conviction and consequential sentence, dated

13/10/2017, passed by learned Special Judge, Osmanabad in Special Case (POCSO) No.33/2016. The order of conviction and consequential sentence reads as follows :-

- (1) The accused Premkumar Sukhadeo Bansode, R/o Shahu Nagar, Osmanabad is found guilty of the offence punishable under Sections 376, 376(2)(i), 376(2)(k), 354, 354-A(II), 506 of the Indian Penal Code and under Sections 4, 6, 8, 10 of the Protection of Children from Sexual Offences Act, 2012 vide Section 235(2) of the Code of Criminal Procedure.
- (2) The accused Premkumar Sukhadeo Bansode, is convicted for the offence punishable under Section 6 of the Protection of Children from Sexual offences Act, 2012 vide Section 235(2) of the Code of Criminal Procedure and sentenced to undergo rigorous imprisonment for 10 years (Ten years) and to pay a fine of Rs.1,00,000/- only (Rs. One Lac only). In default, he shall undergo rigorous imprisonment for six months.
- (3) The accused Premkumar Sukhadeo Bansode is convicted for the offence punishable under Section 506 of the Indian Penal Code vide Section 235(2) of the Code of Criminal Procedure and sentenced to undergo rigorous imprisonment for 1 year (one

year) and to pay a fine of Rs.5000/- only (Rs. Five thousand only). In default, he shall undergo rigorous imprisonment for one month.

- (4) Both the substantive sentences shall run concurrently.

2. A gist of the prosecution case is as follows :-

The appellant originally hailed from village Khanapur. He has his residence at Shahu Nagar, Osmanabad. He joined police service, as Sub-Inspector of Police. He was posted at Sangli, during the relevant time. The appellant had been to Osmanabad on leave during first week of August 2016. His house at Shahu Nagar was a two storeyed. Ground floor was occupied by the appellant and his parents. On the first floor, there were two tenants residing in two different premises. In one of the premises, the victim would reside along with her parents. There was one more room on the first floor. It was in the nature of a study room of the appellant. Upstairs of the first floor, there was terrace.

3. The victim had appeared for S.S.C. examinations. Her father (P.W.2) was serving as a mechanic with M.S.R.T.C. Her mother was a school teacher. Both the parents had left

the house in the early morning, mother for her school. P.W.2 was on leave. He left the house for Net-Cafe to check the results. The victim was stated to be 15 years of age. She was alone at home. It was about 11.30 a.m. She was reading a notebook on the terrace. The appellant went to her and requested to be his girl friend. She refused. He, therefore, requested her to become at least his friend. He further told her to have number of notebooks and insisted to come to his study room to see the notebooks. She, therefore, entered the study room. The appellant followed her. He latched the door of the study room from inside. He told the victim to have a gun with him. He then undressed her below the waist. Made her lie on the bed. The appellant then committed sexual intercourse with the victim. After a while, her father (P.W.2) arrived. He realised the victim to have been in the study room. He made the appellant to open the study room. On having seen her father, the victim broke down. She related him what the appellant did with her. Her mother (P.W.5 'N') was informed. She came home by 4.00 p.m. The victim also related her of the incident. All of them then went to the Anand Nagar Police Station. The victim lodged the First Information Report (F.I.R. - Exh.23). Crime vide C.R. No.101/2016 came to be registered.

4. The crime came to be investigated. Scene of offence panchanama was drawn. The victim was medically screened. The appellant came to be arrested. He too was medically examined. Blood samples of both of them were obtained for D.N.A. profiling. Clothes on their person at the relevant time also came to be seized. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant came to be proceeded against by filing a charge sheet.

5. The trial Court framed the Charge (Exh.3). The appellant pleaded not guilty. His defence was of false implication. According to him, both the victim and himself belong to one and the same community. Parents of the victim wanted to give her to the appellant in marriage. They had, therefore, met the appellant's father the previous day. There was little over 12 years age difference between the two. The parents of the appellant, therefore, turned down the proposal. The father of the victim was thereby annoyed. The appellant, therefore, came to be framed in a false case. It is also his case that, during investigation of the crime, the investigating officer (P.W.16) Dr. Deepali Ghatge (Additional S.P.,

Osmanabad) had obtained his semen. The appellant meant to say, semen was planted on certain clothes so as to fabricate false evidence.

6. The prosecution examined 16 witnesses and produced in evidence number of documents to establish the charge. The trial Court, on appreciation of the evidence, held the appellant guilty and, therefore, sentenced him as stated above.

7. Learned counsel for the appellant would submit that, the prosecution miserably failed to prove the victim to have been a child at the relevant time. According to him, there was delay of over 10 hours in lodging of the F.I.R. The father of the victim had deliberations with his friends over the alleged incident. The F.I.R. is thus an outcome of deliberations and discussion. The age of the victim determined on radiological examination, was afterall an opinion. The report by the Radiologist is inconsistent with the settled medical science as has been described in Modi's Medical Jurisprudence (a treatise). According to learned counsel, it might be a consensual relationship. No sexual intercourse did take place at the relevant time. Medical examination report of the victim

and the C.A. report rule out the same. Birth certificate and the school record of the victim did not make out her to be a child. The learned counsel brought to the notice of this Court inconsistency inter-se the evidence of the prosecution witness. According to him, the appellant's uniform did not have bearing on the offence in question. In support of his submissions, the learned counsel has relied on the following authorities to ultimately urge for allowing the appeal :-

- (1) Rahul Vs. State of Delhi, Ministry of Home Affairs & anr. [2023 CRI.L.J. 1]
- (2) Manoj alias Monu alias Vishal Chaudhary Vs. State of Haryana & anr. [AIR 2022 SC 1060]
- (3) Thulia Kali Vs. The State of T.N. [AIR 1973 SC 501]
- (4) Ravi Anandrao Gulpude Vs. State of Maharashtra [2017(3) Mh.L.J. (Cri.) 354]
- (5) Sunil Vasantrao Shinde Vs. The State of Maharashtra (Criminal Appeal No.666 of 2020)
- (6) Hemendrasingh Mehtabsingh Vs. State of Madhya Pradesh [2022 CRI.L.J.4361]

8. Learned A.P.P. and the learned counsel representing the respondent no.2 – victim would, on the other hand, submit that, the trial Court rightly convicted the appellant. According to them, the victim has specifically

deposed that she knew the appellant was in police service. The appellant had even told to have a gun with him. He also related her to have dealt with such cases while he was serving at Gadchiroli. According to learned counsel, the appellant misused his position as P.S.I. to compel the victim to submit to his sexual lust. The reasons given by the trial Court in support of the impugned judgment and order have been reiterated by the learned counsel to ultimately urge for dismissal of the appeal.

9. Considered the submissions advanced. Perused the entire evidence relied on. Let us advert thereto.

The appellant was admittedly serving as P.S.I. at Sangli. He had come to his native, Shahu Nagar at Osmanabad on leave. The victim along with her parents and sister would reside in a first floor premises of the appellant on rent. The appellant and his parents had occupied ground floor premises. There was one vacant room in the nature of a study room on the first floor. It was used by the appellant and his family members. The victim had admittedly appeared for S.S.C. examination. She had applied for an admission to Polytechnic. The incident is dated 5/8/2016. The mother of

the victim (P.W.5) had left the house early in the morning for school, as she was a Teacher. Her father (P.W.2) was a mechanic with M.S.R.T.C. at Osmanabad. He was on leave. He had, however, left the house for Net-Cafe as the list of candidates admitted to Polytechnic was to be declared on that day.

10. P.W.1 – victim testified that she was born on 5/9/2001. It was 11.30 a.m. on 5/8/2016. She was reading a notebook on the terrace of the house. The appellant came on the terrace. He asked her to show him the notebook. She refused. She started coming down the terrace. The appellant followed her. He expressed his love for her. He requested her to respond to his love the same way. She refused. He then requested her to become his friend at least. It is further in her evidence that the appellant then told her to have number of notebooks in his study room. He asked her to accompany him to the study room to see the notebooks. She, therefore, entered the study room. The appellant latched the entrance door from inside. He undressed her below the waist. Pushed her on the bed. The appellant then committed sexual intercourse with her. It was without her consent and against her wish. That time she was on. She tried to shout, no one

was, however, around. It is further in her evidence that the appellant threatened her with a gun, if she shouted. According to her, the appellant told her that while he was posted at Gadchiroli, he had handled number of such cases. According to her, she did not shout as the appellant had threatened her with a gun. Her evidence further discloses that, her father (P.W.2) gave her a call. The appellant then let her free. He wiped stains on the bed and shawl. Both of them then put on their clothes. He opened the door after a while. She went towards her father and narrated him the incident.

11. It is further in her evidence, while she was studying in 4th Standard, the appellant had behaved with her similar way. She, however, did not relate those incidents as the appellant had threatened her. It is further in her evidence that, her mother (P.W.5) returned home by 4.00 p.m. She related her the incident. She along with her parents then went to Anand Nagar Police Station late in the evening. A lady police officer recorded her statement (F.I.R. Exh.23). It is further in her evidence that, the clothes on her person were handed over to the police officer at the police station. Her father had brought her alternate clothes from the house. She was then medically screened. Her statement (Exh.24) was also

recorded by Judicial Magistrate. It is further in her evidence that once the appellant had made her watch pornographic clip on his cell phone. Her evidence further indicates that on her pointing out, the scene of offence panchanama was drawn. Her blood sample was obtained for D.N.A. profiling. During her medical examination, nail clippings, vaginal swab etc. were obtained for chemical analysis.

12. The victim was subjected to a searching cross-examination. In response to the questions put to her during cross-examination, the situation/ location of the first floor premises has come on record. The study room had an access through a gallery besides an entrance door. The study room adjoins the stair case. From the gallery of the first floor, surrounding of the house of the appellant was visible. Other room on the first floor was occupied by other tenant. Her evidence would further suggest that, she was in the know that the appellant was serving in Police Department. Before joining the service, the appellant was studying at Baramati. Her evidence would further indicate that she had participated in State Level Handball Competition while she was in 7th Standard. She continued to play the said game. She won number of prizes for being a best goal keeper. Her evidence

would further indicate that, her family members and she too would visit the appellant's house. Her parent's financial condition was good. The appellant was financially better. Both of them belong to the same caste. The appellant was unmarried. His parents were searching for a match for him. She used to talk with the appellant.

13. It is further in her evidence that, the appellant did not snatch the notebook from her nor did he stop her on the terrace. While she was coming down the stairs, the appellant followed her. When he stopped her, she did not raise alarm. She did not enter her house from terrace. The appellant did not follow her to her house. She even did not raise alarm when she entered the study room. She offered an explanation for the same, stating that the appellant simply requested her to be his friend and he asked him to come to the study room to see the notebooks. She admitted to have not raised alarm when the appellant latched the door of the study room from inside. According to her, she raised shouts when the appellant started removing clothes on her person. She did not respond to her father's call. According to her, the appellant had threatened her that time. Her mother came home past 4.00 p.m. All of them went to the police station little past 10.15 p.m.

She denied to have a unrequited love with the appellant. She denied that her father refused to give her to the appellant in marriage due to difference in age. Her evidence further suggests that, friends of her father, namely Keskar and Nitin Tavde had been to the police station when the F.I.R. was lodged. The questions in the nature of suggesting the appellant's defence have been answered in the negative.

14. P.W.2 'S' is father of the victim. His evidence indicates that, he was on leave on the given day. He had been to Net-Cafe to check the list of candidates admitted to Polytechnic. The list was to be published by 11.00 in the morning. It is further in his evidence, since publication of the list was delayed, he returned home. The victim was not around. He, therefore, searched for her around. He gave a loud call. The appellant came out of his study room. He enquired the appellant about the whereabouts of the victim. The appellant told him that she might have gone to a shop. It is further in his evidence that, he then went to the terrace to find victim was not there. While he was coming down the terrace, he noticed footwear of the victim near the door. He felt uneasy. He came to the gallery. The appellant was watching his movements. Suspicion, therefore, lurked in his mind. He,

therefore, asked the appellant to open the study room. He initially avoided. P.W.2, however, requested him to open the computer as he wanted to check admission list. The appellant, therefore, opened the door of the study room. He saw the victim hidden beneath a top of a sewing machine in the gallery. She was frightened. She started weeping. She initially did not disclose him anything. Then he asked his wife (P.W.5) to return home. She returned. The appellant told him that the victim was like his sister. The victim was taken into confidence. She related her parents what the appellant did with her. It is further in his evidence that, he was confused what to do. He left his house by 5.00 p.m. Met his friends, Keskar and Tavde. Informed them about the incident. Then he took the victim to the police station. The F.I.R. then came to be registered.

15. It has come on record during his cross-examination that, he was convicted way back in 1994 for abduction of one lady. He was confronted with his statement under Section 164 of the Code of Criminal Procedure, wherein it has been recorded that he reported on duty on the given day, did some work and then returned home. Questions suggesting the defence version were replied in the negative. He admitted to

have not stated to the police to have seen the victim hidden beneath a top of a sewing machine. He also did not state to the police of the victim to have told him the appellant latched the door from inside. According to him, the victim told him about the incident two hours before his wife returned home. Anand Nagar Police Station was at a distance of half Km. from his residence. His friend Ravi is a reporter of Daily "Sanchar". He along with his friend Nitin went to meet Ravi at the office of his Daily. He had discussion with them over the incident. He has, however, flatly denied that the report (F.I.R.) was the outcome of deliberation and discussion with Ravi and Nitin. It is further in his evidence that, he had discussion with his wife and the victim after he returned home post meeting his friends and then he approached the police station. His evidence further suggests that, he reached the police station by 9.30 p.m.

16. P.W.3 Sangita is a panch witness to the scene of offence panchanama (Exh.34). In her presence also the clothes of the victim came to be seized under panchanama (Exh.32). Her evidence suggests that, the clothes taken charge of were on the table at the police station before they came to be seized.

17. P.W.4 Akbar is a panch witness to the seizure of cell phone of the appellant. His evidence does not further the prosecution case since no data came to be recovered from the cell phone.

18. P.W.5 'N' is the mother of the victim. She testified consistent with the evidence of the victim and her father. It is in her evidence that, the victim was born on 5/9/2001. The victim was her younger daughter. She did not have a son. She has only two daughters. It is further in her evidence that her parental house was at Solapur and both the deliveries took place at Civil Hospital, Solapur. Her evidence suggests that the victim related her what the appellant did with her.

19. P.W.7 Dr. Santosh was a Medical Officer in Civil Hospital, Osmanabad. It is in his evidence that he examined the appellant to find him potent. His evidence further suggests that he obtained blood sample of the appellant for chemical analysis. His evidence has not been controverted.

20. P.W.8 Dr. Vasuda was a Medical Officer on duty at Civil Hospital on the intervening night of 5th and 6th August. It is in her evidence that, she examined the victim. Her examination

report indicates that there was no evidence of infection, staining and swelling on labia major, labia minora and clitoris. There was no injury to hymen and no evidence of parineal tear. No injury to Urethra. Menstrual bleeding was present. It is further in her evidence that, the victim gave a history of sexual assault by the appellant. In her opinion, penetrative sexual assault on the victim could not be ruled out. Her evidence indicates that, the victim was medically screened 18 hours after the incident. It has come on record during her cross-examination that, generally seminal sperm can be detected in the vaginal swab within 48 hours from the incident. She was, however, categorical to state that, during menstruation, it might not be detected. The evidence of Medical Officer further suggests that, the victim was subjected to radiological examination and ossification test as well. The report thereof indicate the victim was in the age group of 14 – 17 years, including of margin of error. The certificates issued by her are at Exhibits 53 and 54.

21. The witness admitted that, as per Modi's Medical Jurisprudence, margin of error is 3.6 years plus or minus. She gave opinion about the age of the victim only on the basis of opinion given by Dentist and Radiologist, but she did not follow

Modi's Jurisprudence while determining the age of the victim. The age of the victim mentioned in the medical certificate was based on the date of birth given by the victim.

22. P.W.13 Dr. Sanjay testified that, on 17/8/2016, he obtained blood sample of the appellant for D.N.A. profiling. The police had supplied him the D.N.A. kit. The blood sample was sealed and then handed over to the police for onward transmission.

23. P.W.9 Ashish and P.W.11 Mithun were the police constables. Their evidence indicates that they delivered Muddemal in sealed condition to Forensic Science Laboratory, Aurangabad and Forensic Science Laboratory, Kalina. While P.W.10 Vishwanath, a constable, testified that, he delivered D.N.A. kit on 18/10/2016 to Forensic Science Laboratory, Kalina. It was delivered to him by the investigating officer on the previous day. The office copy of the forwarding letter with acknowledgement receipt thereof was admitted in evidence vide Exh.63.

24. P.W.6 Rajendra is a panch witness to the seizure of a notebook. His evidence does not further the prosecution case.

25. P.W.12 Mahadeo was a Sub-Registrar of Birth and Death at Municipal Corporation, Solapur. It is in his evidence that, it was his duty to make entries of birth and death within the limits of Municipal Corporation, Solapur and issue its extracts. He placed on record original entry of birth. He referred to an entry at Sr.No.7192, dated 20/9/2001. As per the register, the entry was made on 20/9/2001 of the birth date 5/9/2001. According to him, the said entry was made on the basis of report received from Chhatrapati Shivaji Maharaj Sarvopchar Rugnalaya, Solapur. The said birth information report was numbered as 8070. The name of the mother of the new born correspond with the name of P.W.5 'N'. The name of the father of the girl child matches with the name of P.W.2 'S'. It is further in his evidence that, the history of birth was given by one Girijabai Chitare. The Birth Certificate is at Exh.68.

26. From the cross-examination of this witness, it has come on record that, name of the girl child mentioned in the register is 'Sanjana' (different name than the victim). He denied that the name of the victim was recorded in the register afterwards. He admitted to have not made the entry No.7192 nor it was taken in his presence. The witness was subjected to

re-examination, during which it has come on record that parents prefer application for recording of name of a child in the register. No such application is preferred by the parents of the victim was in the record.

27. P.W.14 Sanjay was a Lecturer with Dr. Vaishampayan Memorial Government Medical College, Solapur. It is in his evidence that, Civil Hospital, Solapur was attached to the Government Medical College. One Shri Bennishirur was a Lecturer in Government Medical College. He was senior to him. He was Incharge of the Medical Record Section of the Civil Hospital. In his absence, P.W.14 Sanjay was Incharge of the said Section. Since Shri Bennishirur went to Mumbai for official work, he appeared before the Court to produce original documents. It is in his evidence that, entry of birth of a child is maintained in the register at Civil Hospital. The register is known, "Janan Varta". (Janan– Birth and Varta– Report). He placed on record original Janan Varta of September 2001, as per entry in the said register, a girl child was born by 12.20 noon on 5/9/2001 to P.W.2 and P.W.5. It was a second issue of the couple. Accordingly, entry was made in the Janan Varta at Sr.No.68 in the register. He identified signature of Shri Bennishirur appearing therein. A

certified copy of the entry is at Exh.79.

28. It is further in his evidence that, on birth of a child in Civil Hospital, Solapur, the same is intimated to Municipal Corporation as Janan Varta. The report is made in triplicate. One copy is supplied to Municipal Corporation. Next one is given to the parents of the child and third one is retained with the Hospital. In the given case, the birth of a girl child was reported on 17/9/2001 vide Sr.No.8070. According to him, original medical record could not be produced since it was stolen. The witness placed on record a copy of the F.I.R. lodged in that regard with Sadar Bazar Police Station, Solapur. He also identified signature of Dr. Bennishirur appearing on Janan Varta.

29. He was subjected to a searching cross-examination. He admitted that entries in the original register were not in his handwriting and all those were made in his presence, no medical case paper of a lady who gave birth in the hospital was produced before the Court. He admitted that, he himself and Dr. Lohar were not serving in the hospital same time. Dr. Lohar did not sign any document in his presence. He simply identified the signature of Dr. Lohar as the same has

been mentioned in the Janan Varta.

30. P.W.15 Motiram and P.W.16 Dr. Deepali are the police officials who did the investigation of the crime.

31. On appreciation of the aforesaid evidence, it is evident that, for little over 7 – 8 years the victim along with her family had been residing as a tenant in a premises owned by the father of the appellant. The family members of the victim used to visit the residence of the appellant. Both the appellant and the victim were on talking terms. At the relevant time on the given day, the parents of the victim were not home. The victim was reading a notebook on the terrace. The appellant took her to the study room under the pretext of showing her number of notebooks. He bolted the entrance door of the study room from inside. Undressed the victim below the waist. He too removed his pant and underwear as well. The victim was menstruating. She related the same to the appellant. He still had a sexual intercourse with her. After a while, the father of the victim (P.W.2) gave her a call. She did not respond. The evidence would further indicate that the victim had an opportunity to raise alarm while the appellant bolted the door from inside. She allowed the appellant to remove clothes on

her person. The same suggests the victim was a consenting party. The victim's evidence that the appellant had threatened her with a gun cannot be relied on. More so, when according to victim herself the appellant had once showed her a pornographic clip. It was also her case that the appellant had sexual intercourse with her many a time while she was in 3rd and 4th Standard. Although there is some variance between the evidence of victim and her father as to how she came out of the room, the evidence undoubtedly indicate that on arrival of the father of the victim, the appellant had to open the door of the study room. P.W.2 noticed the victim to have hidden herself beneath a top of a sewing machine. The same speaks in volumes of the victim to have been a consenting party.

32. It is true that there is delay of little over 10 hours in lodging of the F.I.R. it is also true that, P.W.2 (father of the victim) went out of his house. He met two of his close friends. One of them was a Press Reporter. He related them of the incident. He then returned home to take the victim and her mother to the police station. There is also evidence to indicate that both the friends of the father of the victim were present at the police station. The fact that victim's father has related the incident to his friends is borne out from the examination-in-

chief of the father himself. It is in his evidence that, he was confused to decide what is to be done. Although evidence indicates that there is some delay in lodging of the F.I.R. and the father of the victim to have shared the said incident with his friends, the conduct on the part of the members of the family of the victim happens to be natural. By no stretch of imagination it could be observed that, because of delay in lodging of the F.I.R., a false and embellished version of the alleged incident has been reported to the police. There can be no two views over the observations of the Apex Court in case of Thulia Kali's case (supra) that delay in lodging the F.I.R. results in embellishment, a creation of afterthought. Needless to mention, each case has to be decided on its peculiar facts and circumstances.

33. The defence of the appellant that it was a case of unrequited love on the part of the victim could not be accepted. The defence of the appellant that false F.I.R. has been lodged only with a view to take vengeance on account of his parents to have turned down a proposal moved by the parents of the victim to give her (victim) to the appellant in marriage, does not appeal. This Court is of the view that no person would put reputation of his unmarried minor girl at stake for such a

reason. There may be other ways and means to take a revenge.

34. During investigation of the crime, a bed sheet and a shawl came to be seized from the crime scene within hours of the incident. On arrest of the appellant, his blood sample was obtained, besides other things. Blood sample of the victim besides vaginal swab were also obtained. All the seized articles were submitted to Forensic Science Laboratory, Kalina and Aurangabad for analysis and report. There is evidence to indicate the investigating officer to have had fetched D.N.A. kit. Blood sample of the appellant was specifically obtained for D.N.A. profiling. The same was submitted to C.F.S.L., Kalina, Mumbai immediately. The D.N.A. report (Exh.105) indicates stains on the shawl and the bed sheets were that of appellant's semen. True, the C.A. report as regards vaginal swab does not further the prosecution case. The medical officer who examined the victim was categorical to depose that during the menstruation period, there is least possibility of detection of a semen on a vaginal swab. True, the medical examination report did not suggest any evidence of forcible intercourse. This Court has already observed that it was a consensual relationship.

35. Both the parents of the victim have reiterated in their evidence what was told to them by the victim. The same reinforces the victim's case of sexual intercourse between her and the appellant. Only with a view to show that the victim was not a consenting party, evidence that the appellant had threatened her has been introduced.

36. The question is, as to whether the consensual sexual intercourse between the appellant and the victim is an offence of rape in view of the victim to have been a child, below 18 years of age. The evidence of the victim that she was born on 5/9/2001 is inadmissible, being hear-say. P.W.5 'N', mother of the victim gave the victim's date of birth as 5/9/2001. Her father also testified that the victim was 15 years of age at the relevant time. On the issue of age of a particular person, the best evidence would be that of his parents. Here, the mother of the victim was specific to depose to have no male issue. It is further in her evidence that she has only two daughters. The victim was younger one. There is no challenge to this piece of evidence, in the cross-examination of the mother of the victim.

37. There is also evidence of the parents of the victim

to show that the parental home of the victim's mother was at Solapur. Both of her deliveries took place at Solapur. P.W.12 Mahadeo was a Sub-Registrar of Birth and Death, serving with Municipal Corporation, Solapur. He produced in evidence birth certificate of the victim (Exh.68). Close reading of the said certificate would indicate names of the parents of the child correspond with the parents of the victim herein. Registration of the birth took place on 15th day of the birth. No name of the new born has been recorded in the birth certificate. It is true that the name "Sanjana" is appearing in the birth register at Sr.No.7192 in the birth register. The witness was, however, categorical to state that there was no evidence to indicate at whose instance the said name came to be recorded. Parents of the victim were neither confronted with this fact nor they were sought to be summoned for further cross-examination after the birth certificate of the victim came to be admitted in evidence.

38. P.W.14 Sanjay was a Medical Officer serving with the Medical College, Solapur. His evidence would indicate that births of children born in the Medical College Hospital were reported to the Municipal Corporation. Such report was known as Janan- Varta. An extract from the register of Janan Varta

was produced in evidence (Exh.79). At Sr.No.68 therein, there is entry of birth of a female child to the mother of the victim. The date of delivery is stated to be 5th September 2001. Exh.80 is a Janan Varta. Close reading thereof would indicate that a girl child was born to P.W.2 and P.W.5 on 5/9/2001. It was a second delivery. Even if we consider that the said Janan Varta pertain to the elder sister of the victim, the same would also make out a case of the victim to have been a child necessarily born at least a year after 5/9/2001. These observations have been made only to address submissions made on behalf of the appellant that in some other record the date of birth is recorded as 5/9/2000. Although these two witnesses were not there while these documents came into being, this Court proposes to rely on these documents since those have come from proper custody. Those are public documents carrying presumption, since have come into existence in the official course of business.

39. It is reiterated that the mother of the victim is an educated lady. She was serving as a school teacher. She has specifically stated the date of birth of the victim. The evidence of the mother of the victim as to the victim's date of birth being the best evidence, needs to be relied on. He oral evidence

gets reinforced by the documentary evidence in the nature of Janan Varta and the birth certificate of the victim. Those are distinguishable on facts.

40. Again it is reiterated that, there can be no two views over the submissions made by learned counsel for the appellant that unless and until the victim was below 18 years of age at the relevant time, the prosecution could not be said to have made out its case. The authorities relied on by learned counsel for the appellant have been closely perused. These are distinguishable facts.

41. It is true that, in the medical examination report of the victim, the date of birth has been recorded as 5/9/2000. The Medical Officer deposed to have recorded the date of birth as it was reported to her by the victim. The victim was however, not confronted with the said fact during her cross-examination. Had it been done, the victim would have an opportunity to explain as to why year 2000 appears instead of 2001 in her medical examination report Exh.53.

42. It is also true that Exh.107 is a photo copy of the school leaving certificate of the victim. It was referred to by the appellant during cross-examination of the investigating officer.

The investigating officer Dr. Deepali (P.W.16) admitted in her evidence that the said copy of the school leaving certificate was placed along with the Remand Yadi before the Remand Court. In the said school leaving certificate, the date of birth of the victim is stated to be 5/9/2000. This document was relied on only with a view to make out a variance in the prosecution case. Needless to mention, neither the victim nor her parents were confronted with the school leaving certificate (Exh.107). This Court finds that there is overwhelming evidence to indicate the victim to have been born on 5/9/2001, wherever year 2000 appears by mistake. It is reiterated that, there is undisputed evidence to indicate the victim to have only one sister, elder one. Considering this fact, close reading of the evidence regarding date of birth would undoubtedly indicate the victim to have been below 18 years of age when the incident took place. This Court do not propose to rely on age of the victim ascertained on her dental and radiological examination.

43. As such, the evidence referred to hereinabove leads this Court to conclude the appellant to have committed sexual intercourse with the victim on the day, when she was below 18 years of age, consent thereto was therefore

immaterial. The act of the appellant thus constitutes an offence of rape, punishable under the Indian Penal Code and an offence of penetrative sexual intercourse, punishable under the Protection of Children from Sexual Offences Act (POCSO Act).

44. The trial Court has convicted the appellant for the offence of aggravated penetrative sexual intercourse, punishable under Section 6 of the POCSO Act. According to trial Court, the appellant being a police officer, committed penetrative sexual assault on the victim and, therefore, it constituted aggravated penetrative sexual assault within the meaning of Section 5 of the POCSO Act. For better appreciation, Section 5 of the POCSO Act is reproduced below:

“5. Aggravated penetrative sexual assault :-

- (a) Whoever, being a police officer, commits penetrative sexual assault on a child –
 - (i) within the limits of the police station or premises at which he is appointed; or
 - (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
 - (iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b)

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is said to commit aggravated penetrative sexual assault.”

45. True, the victim knew the appellant to have been a police officer. The appellant has served as a Police Sub Inspector for about four years next before the incident. His service place was at Sangli. He had come to his native on leave. It has already been observed while appreciating the evidence that it was a case of consensual sexual intercourse. Had the victim not been below 18 years of age, the appellant would have been acquitted. The appellant’s uniform has no slightest bearing in the offence in question. When the statute makes a distinction and defines two offences separately, namely penetrative sexual assault and aggravated penetrative sexual assault, providing more severe punishment for later one namely, aggravated penetrative sexual assault, case must have been made out. In view of this Court, for convicting for the offence of aggravated penetrative sexual assault, by a

police officer, there has to be some nexus between his position as a police officer and offence of sexual assault. Since the present one, being a case of consensual sexual intercourse, which came to light only because of the father of the victim to have returned home, this Court is not in agreement with the trial Court convicting the appellant for aggravated penetrative sexual assault. It is reiterated that, the incident of sexual intercourse between the appellant and the victim might have gone unreported, but for return of the victim's father home. Since it was a consensual relationship, the trial Court erred in convicting the appellant for the offences punishable under Sections 354, 354-A-(II), 506 of the Indian Penal Code. To this extent, interference with the impugned order of conviction is warranted.

46. In the result, the appeal partly succeeds. Hence the order :-

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) The order of conviction of the appellant for the offences under Sections 376, 376(2)(i), 376(2)(k), 354, 354-A(II), 506 of

the Indian Penal Code and under Sections 4, 6, 8, 10 of the Protection of Children from Sexual Offences Act, 2012 passed by learned Special Judge, Osmanabad in Special Case (POCSO) No.33/2016, dated 13/10/2017 is hereby set aside. The appellant is acquitted thereof.

(iii) The appellant is, however, hereby convicted for the offence of penetrative sexual assault, punishable under Section 4 of the Protection of Children from Sexual Offences Act and, therefore, sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,00,000/- (Rupees One Lakh). The amount of fine has already been deposited by the appellant. The same be adjusted.

(iv) The appellant was in jail for little over Seven years. He, therefore, need not surrender.

(R.G. AVACHAT, J.)

fmp/-