

Jose

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.29 OF 2021

WITH

CRIMINAL APPEAL NO.4 OF 2022

CRIMINAL APPEAL NO.29 OF 2021

STATE OF GOA

Through Police Inspector,

Old Goa Police Station

Old-Goa, Goa.

... Appellant.

Versus

MR. MOTILAL LAMANI,

s/o Chandappa Lamani,

aged 28 years, Occupation Driver,

r/o Bamanbhat, Mercedes,

Tiswadi-Goa,

n/o Beladhandi Tande,

Taluka Gadag, Karnataka

... Respondent/
Accused.

WITH

CRIMINAL APPEAL NO.4 OF 2022

MR. MOTILAL LAMANI,

s/o Chandappa Lamani,

aged 28 years, Occupation Driver,

r/o Bamanbhat, Mercedes, Tiswadi-Goa,

n/o Beladhandi Tande,

Taluka Gadag, Karnataka

... Appellant.

Versus

STATE OF GOA

(through)

1. THE POLICE INSPECTOR

Officer In-charge

(Old Goa Police Station)

2. THE PUBLIC PROSECUTOR

High Court of Bombay at Goa,
High Court Building
Porvorim, Bardez Goa.

... Respondent.

Shri Pravin Faldessai, Additional Public Prosecutor *for the State.*

Shri Rohan Desai, Advocate *for the Accused.*

CORAM:	M.S. SONAK & BHARAT P. DESHPANDE, JJ.
RESERVED ON:	02 January, 2023
PRONOUNCED ON:	05 January, 2023

JUDGMENT: *(Per Bharat P. Deshpande, J.)*

Since both these appeals are arising out of the Judgment passed by the Trial Court in Sessions Case No. 38/2016 dated 01.09.2020/14.09.2020, they are taken up together.

2. CRIA 29/2021 is filed by the State through Police Inspector, Old Goa Police Station, thereby challenging only the portion of awarding sentence below the prescribed minimum provided under the Act.

3. The Accused filed CRIA 4/2022, thereby challenging his conviction under Section 376 of IPC and Section 4 of The Protection of Children from Sexual Offences Act, 2012 (POCSO), amongst the grounds raised in the memo of appeal.

4. We have heard the learned Counsel Shri Rohan Desai appearing for the Accused, and Shri Pravin Faldessai, learned

Additional Public Prosecutor for the State, in both the appeals at length.

5. Initially, the Accused was charge-sheeted for the offences punishable under Sections 363, 376 of IPC, Section 8(2) of Goa Children's Act 2003, Sections 4 and 8 of POCSO Act 2012 on the allegations that on 07.04.2012, the Accused kidnapped a minor daughter of the Complainant from lawful guardianship and took her away to an unknown destination. The accused then sexually assaulted the victim on three occasions, due to which she became pregnant.

6. Charge-sheet was filed before the Children's Court for State of Goa in view of the application under Section 8(2) of Goa Children's Act. It was registered as Special Case No. 139/2015. Vide order dated 08.06.2016, the President of Children's Court discharged the Accused for the offences punishable under Section 363 of IPC and Section 8(2) of Goa Children's Act 2003 on the premise that on the day when alleged kidnapping took place, victim was above 16 years old. Similarly, it was observed that the victim went along with the Accused voluntarily. However, since the learned President of Children's Court observed that prima facie offence under Section 376 of IPC and Sections 4 and 8 of POCSO Act are made out, transferred the said matter to the Sessions Court at Panaji to be tried by the competent jurisdictional Court.

7. Accordingly, the matter was allotted to Additional Sessions Judge, North Goa, Mapusa, who vide order below Exhibit 5 dated 04.01.2017, framed the charge against Accused for the offence

punishable under Section 376 of IPC and Sections 4 and 8 of POCSO Act on the allegations that the Accused on 14.01.2014 in a room at Parra had sexual intercourse with the victim who, at the relevant time was 17 years and 3 months old and thereafter took her on two more occasions to the same place at Parra and had sexual intercourse with her resulting in the victim becoming pregnant.

8. Prosecution examined in all 13 witnesses to prove the charge levelled against the Accused. The learned Additional Sessions Judge, Mapusa, after considering entire material on record, observed/held that Prosecution succeeded in proving the charge levelled against the Accused for the offence punishable under Section 376 of IPC and Section 4 of POCSO Act. Accordingly, Accused was found guilty for the said charge. However, after hearing the Accused on point of sentence, the learned Additional Sessions Judge inflicted punishment on the Accused to undergo sentence of rigorous imprisonment for a period of one year and to pay fine of ₹15,000/- and in default to undergo further rigorous imprisonment for a period of three months.

9. The State through Police Inspector, Old Goa Police Station, challenged the sentence awarded by the learned Trial Court which is below the bare minimum provided under Section 376 of IPC and Section 4 of POCSO Act.

10. The Accused challenged his conviction and sentence on the grounds as mentioned in the memo of appeal.

11. Shri Rohan Desai, the learned Counsel appearing for the Accused strongly contended that first of all, Prosecution has miserably failed to prove that the Accused committed such offence,

beyond all reasonable doubt. The victim though deposed before the Court, her statement is not inspiring confidence so as to convict the Accused solely on her testimony. There is no corroboration from any other witness to the testimony of victim. The mother of the victim did not support the case of Prosecution. The DNA report is also not supporting the case of Prosecution. The possibility of the victim being sexually assaulted by any other person has not been ruled out. He, thus, contended that Accused is entitled for benefit of doubt.

12. Shri Faldessai appearing for the State would submit that testimony of the victim is inspiring confidence and at the relevant time, she was below 18 years old. Thus, the question of consent of the victim is of no relevance. The Accused being the in-charge of the boys hostel, took away the victim and thereafter, he took undue advantage while committing sexual assault on her. The DNA report is inconclusive as the investigating agency failed to forward the relevant material. Thus, such report is neither supporting nor destroying case of the Prosecution in any way. Even otherwise, statement of the victim is itself sufficient to confirm the findings of the learned Trial Court.

13. Shri Faldessai would then submit that grave error has been committed by the learned Trial Court while inflicting punishment below the minimum as once it is found that the Accused is guilty for the offence punishable under Section 376 of IPC, at the relevant time, the minimum sentence ought to have been awarded. There is no discretion available to reduce the minimum sentence as provided under the said provision. Similarly, Section 4 of POCSO Act does not

give any discretion to award a sentence below the minimum prescribed. The learned Trial Court wrongly considered the ratio laid down in the case of *Pushpanjali Sahu vs. State of Orissa and Another*¹, and came to a wrong conclusion.

14. Shri Desai, in support of his contention, placed reliance on the below decisions:-

- i. *Abbas Ahmad Choudhary vs. State of Assam*,²
- ii. *Sudhansu Sekhar Sahoo vs. State of Orissa*,³
- iii. *Raju and Others vs. State of Madhya Pradesh*⁴.

15. Shri Faldessai placed reliance on the following decisions in support of the appeal filed by the State:-

- i. *State of Madhya Pradesh vs. Pappu alias Ajay*⁵,
- ii. *State of M.P. vs. Babbu Barkare alias Dalap Singh*⁶,
- iii. *State of Madhya Pradesh vs. Ghanshyam Singh*⁷,
- iv. *Satish Kumar Jayantilal Dabgar vs. State of Gujarat*⁸,
- v. *Sumer Singh vs. Surajbhan Singh*⁹,
- vi. *State of Madhya Pradesh vs. Vikram Das*¹⁰,
- vii. *M/s. Aero Traders Pvt. Ltd. vs. Ravinder Kumar Suri*¹¹,

1 (2012) 9 SCC 705

2 (2010) 12 SCC 115

3 (2002) 10 SCC 743

4 (2008) 15 SCC 133

5 (2008) 16 SCC 758

6 (2005) 5 SCC 413

7 2003 (4) Crimes (SC) 6

8 (2015) 7 SCC 359

9 (2014) 7 SCC 323

10 (2019) 4 SCC 125

11 (2004) 8 SCC 307

- viii. *Phool Singh vs. State of Madhya Pradesh*¹²,
- ix. *State of Rajasthan vs. Vinod Kumar*¹³, and
- x. *Narinder Singh vs. State of Punjab*¹⁴.

16. The rival contentions fall for our consideration.

17. The points for determination are as under:-

- 1. Whether the Prosecution succeeded in proving that Accused committed sexual assault on the victim?
- 2. Whether the learned Additional Sessions Court erred in imposing a sentence below the minimum prescribed?

Point No.1

18. It is now well settled that even the sole testimony of a victim of a sexual offence could be the basis for conviction, provided that such testimony is reliable, cogent and worthy of acceptance. It is the duty of the Court while appreciating evidence of victim of sexual assault to carefully examine all the aspects including the truthfulness, genuineness of the victim and whether it is safe for the Court to believe.

19. In the case of *Sham Singh vs. State of Haryana*¹⁵, the Supreme Court held in para Nos. 6 and 7 as follows:-

"6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of

12 (2022) 2 SCC 74

13 (2012) 6 SCC 770

14 (2014) 6 SCC 466

15 (2018) 18 SCC 34

rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. (see State of Punjab vs. Gurmit Singh, (1996) 2 SCC 384 (para21)).

7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking

corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (see Ranjit Hazarika vs. State of Assam, (1998) 8 SCC 635)."

20. In the case of ***Krishan Lal vs. State of Haryana***¹⁶, the Supreme Court observed in para No.4 as under:-

"We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other children in the open will come by blood on her garments and injury in her private parts unless she has been subjected to the torture of rape. And if rape has been committed, as counsel more or less conceded, why, of all persons in the world, should the victim hunt up the petitioner and point at him the accusing finger? To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice commonsense in favour of an artificial concoction called 'Judicial' probability. Indeed, the court loses its credibility if it rebels against realism. The law court is not an unnatural world."

21. In the case of ***State of Maharashtra vs. Chandraprakash Kewal Chand Jain***¹⁷, the girl eloped with a 25 years old young man.

¹⁶ (1980) 3 SCC 159

¹⁷ (1990) 1 SCC 550

They went to Bombay and got married. Thereafter, they came to a place near Nagpur and checked into a lodge. The local police came to know that the couple was staying in the lodge and took them to the police station where the husband was beaten up and the wife was threatened. A case was registered against the husband alleging that he was found misbehaving on a public street. The girl was left in the hotel. It was alleged that the Sub-Inspector then visited the girl's room and committed rape on her. In such circumstances, the Apex Court considered the question whether conviction can be based on the sole testimony of the victim of sexual offence and held:-

"Is it essential that the evidence of prosecutrix should be corroborated in material particulars before the Court basis a conviction on her testimony? Does the rule of prudence demand that in all cases save the rarest of rare the Court should look for corroboration before acting on the evidence of the prosecutrix?"

A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must be attached in the evaluation of her evidence as in the case of any injured complainant or witness and no more.

What is more necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of charge levelled by her.

If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no

rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

22. In the case of ***State of Rajasthan vs. N.K.***¹⁸, the Apex Court held in para No.11 thus:-

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for

18 (2000) 5 SCC 30

evidence, direct or circumstantial, which would lend assurance to her testimony."

23. In the case of *Raju and Others* (supra), while referring to the case of ***State of Punjab vs. Gurmit Singh***¹⁹, the Supreme Court held in para Nos.10 and 11 as under:-

"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

24. In the case of *Phool Singh* (supra), the Supreme Court while relying upon the cases of *Gurmit Singh* (supra) and *State of Rajasthan vs. N.K.* (supra), reiterated and confirmed that the

¹⁹ 1996 (2) SCC 384

testimony of victim/prosecutrix if found reliable, convincing and trustworthy, could be basis for conviction.

25. Keeping in mind above settled propositions of law, we are required to evaluate, re-appreciate evidence of the victim together with other evidence led by the Prosecution so as to answer whether the learned Trial Court is justified in holding the Accused guilty for the offence of rape.

26. PW1/victim deposed that she was studying in XIIth Standard in Purushottam Walawalkar Higher Secondary School at Mapusa and she was staying in the boarding school Light House at Tivim, Bardez. This boarding school was run by the outsiders/foreigners namely Graham and Trisha. Her date of birth is 24.09.1996 which is established on the basis of birth certificate produced at Exh.11. At the time of alleged incident, i.e. somewhere in the month of January 2014, she was 17 years and 3 months old.

27. Section 375 (sixthly) reads thus:-

"375. Rape. – A man is said to commit "rape" if he-

Sixthly.- With or without her consent, when she is under eighteen years of age."

28. Section 375 of IPC was amended by Amendment Act No.13 of 2013 which came into effect from 03.02.2013. Section 2(d) of POCSO Act, 2012 defines "child" which means any person below the age of 18 years.

29. Thus, PW1/victim, as on the date of alleged sexual assault was admittedly below 18 years of age and thus is considered as a child. In

these circumstances, the so-called submissions of consent of the victim for sexual intercourse cannot be taken into account.

30. In the case of *Satish Kumar* (supra), the Supreme Court has observed in paras 14 and 15 as under:-

"14) First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 of the IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

"375. Rape-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

XX XX XX

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

15) The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called

consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual Act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the Act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance."

31. Though at the relevant time the age of the victim is referred as 16, the same was enhanced to 18 years by the Amendment Act of 13/2013 which came into effect from 03.02.2013. Hence on the day of the alleged incident in the present matter, the victim was a minor and thus, above observations are applicable to the matter in hand.

32. PW1/victim further deposed that she knows the Accused as he was working in boarding school as in-charge of the boys section in the year 2013. The Accused is a married person having one son and his wife was also working in the same boarding school.

33. PW1/victim then deposed that on 14.01.2014, she along with the Accused decided to meet outside the boarding and accordingly, she left the school at 9:00 a.m. and came to Mapusa. Accused met her at Mapusa bus-stand. Then they went on his motorcycle to Parra at his relative's place. At the said place of the relative of the Accused, he had sexual intercourse with the victim for the first time. She then deposed that thereafter, Accused took her on two more occasions at the same place at Parra and on both occasions had sexual intercourse with her. Subsequently, and after about two months thereafter, victim realized that she is pregnant. She then informed her elder sister and her mother somewhere in first week of April, 2014.

34. PW1/victim then deposed that her mother decided to consult a doctor at Marcel and when they were going to meet the doctor, the victim left half-way in between and boarded a bus from Marcel to go to Panaji. She called the Accused at Panjim bus-stand and narrated to him about the intention of her mother to abort the child. Initially, Accused told her to go home but when she refused, they proceeded to relative of the Accused. Thereafter, they went to Margao and further to Hubli. On the next day, they went to Gadag at the native place of the Accused and stayed there for five days. Then the Accused told the victim that they should return to Goa and meet the police. Accordingly, both returned and went to Old Goa Police Station wherein her statement was recorded in the presence of NGO and then she was referred for medical examination. Her statement under Section 164 Cr.P.C. was also recorded before the Magistrate at Panaji which she admitted at Exh.15.

35. Though the victim was cross examined at length, the tenor of such cross examination is only to project the consent of the victim towards such sexual intercourse. It is found recorded in the cross examination on page 8 as under:-

"I say that on 14th January, 2014 I was not seen by anybody while going with the accused. I say that I was having friends in the boarding school. I did not inform any of my friends that I was going with the accused and that I liked him. I say that prior to 14th January I have never been to Parra area. I say that on 14th January, 2014 I did not know that the area where I was taken by the accused was Parra area. I say that I did not tell the accused that I am not coming with him. I say that prior to the incident I did not see condoms and I did not know the use of condoms. It is true that I

have stated that the accused did not use any condoms while having sex with me is without knowing the use of condoms. I say that I voluntarily made the statement to the police. It is not true to suggest that I was informed by the police and told by my mother to State that the place where I was taken is at Parra. It is not true to suggest that the Accused never took me to Parra on his motorcycle at any point of time and had sex with me."

36. Prosecution then examined PW2 who is the mother of victim and who lodged the missing complaint. Her testimony is in fact supporting the deposition of the victim on all other aspects except the incident dated 14.01.2014 and thereafter on two occasions in connection with sexual intercourse. The victim clearly stated that she did not disclose about such sexual intercourse with the Accused to her mother initially. The circumstances which were faced by the mother of the victim are peculiar and her reaction in such circumstances is but natural. The so-called discrepancy and contradiction which the learned Counsel for the Accused tried to point out are not going to distract her testimony and that of the victim on the aspect of sexual intercourse.

37. PW3/Prasad Kini was the pancha witness in respect of two panchanamas in which one is scene of offence panchanama dated 17.04.2014 and the second one is regarding the attachment of the vehicle/bike used by the Accused. Both these panchanamas are procedural aspects and since nothing was found and recovered from the scene of offence, deposition of PW3 and both the panchanamas are only corroborating in support of case of Prosecution.

38. PW4/Antonio Aguiar is another pancha witness with regard to the panchanama dated 17.04.2014 and at that time the scene of offence i.e. the room wherein alleged sexual intercourse took place between the victim and the Accused was identified.

39. PW5/Mani Gawandar is a pancha witness who did not support the case of Prosecution with regard to attachment of the motorcycle.

40. PW6/Dr. Girish Kamat conducted medical examination of the Accused at the request of Old Goa Police Station and opined that there is nothing to suggest that the Accused is incapable of performing sexual intercourse.

41. PW7/Dr. Pannag Kumar examined the victim at the request of Old Goa Police Station and after obtaining her consent, he opined that there is evidence of previous vaginal penetration having occurred at any instance(s) before ten days prior to the examination. There is evidence of pregnancy of 10.5 weeks period of gestation. Similarly, he received a request to collect blood samples of the victim girl and the Accused for DNA typing to determine whether the Accused was the biological father of the products of conception which had been removed by Medical Termination of Pregnancy (MTP) at the Department of Obstetrics and Gynaecology Goa Medical College. Accordingly, he took the sample of the victim and also that of the Accused and handed over to the investigating officer for forwarding it to the laboratory.

42. The Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad forwarded the report which is at Exh. 51 colly produced through PW13 which shows the conclusion as under:-

"Since, the DNA profile from the source of exhibit A (mass of tissue said to be product of conception of Miss. xxxxxxxxx xxxxxx) is essential for comparison with the DNA profiles of the sources of exhibit B (Miss. xxxxxxxxx xxxxxx) and exhibit C (Mr. Motilal Lamani). Therefore, no opinion is herewith furnished."

43. The learned Counsel Shri Rohan Desai would submit that since the DNA report is not supporting case of the Prosecution, the charge levelled against Accused is not established beyond all reasonable doubt. We are unable to accept that only because the DNA report is not supporting the case of Prosecution, reason being quoted above, the case of Prosecution cannot be doubted as report of DNA profile is the opinion of an expert which is always considered to be corroborative piece of evidence. Such corroborative piece of evidence is neither helping the Accused nor the Prosecution for the reasons disclosed in the conclusion. We are surprised to note that the investigating agency failed to forward mass tissue of conception of Ms. xxxxxxxxx for the purpose of comparison with the DNA profiles of the source of Exh. 'B' and Exh. 'C'. In normal circumstances, investigating agency is duty-bound to forward the relevant material for the purpose of proper testing and the result. Only because the investigating agency failed to forward the mass tissue of the conception along with Exh. 'B' and Exh. 'C', which is, to our mind, is an irregularity while conducting investigation, cannot come to the help of the Accused.

44. Other witnesses including the investigating officer support the case of the Prosecution on material particulars.

45. The victim very firmly deposed that Accused took her to a room at Parra on three occasions and they had sexual intercourse. No doubt the victim nowhere discloses either in the examination in chief or during cross examination that the Accused forced himself upon her. The question of consent of the victim in this matter is irrelevant as she was minor at the relevant time i.e. below the age of 18 years. Thus, the Accused is not entitled to claim the benefit of the so-called consent of the victim for such sexual intercourse. The victim being minor in age, is not capable of giving any consent in accordance with law and therefore, her so-called consent to the sexual intercourse with the Accused cannot be a ground of defence.

46. Admittedly, the Accused is a married person with a son. Therefore, it is expected that Accused must show restraint and that he was knowing that the victim is minor, he should have restrained himself.

47. The testimony of the victim is cogent, convincing, reliable and trustworthy as far as the action of the Accused to have sexual intercourse with her on three occasions. The fact remains that the victim became pregnant and subsequently her pregnancy was terminated in Goa Medical College speaks volumes, together with her testimony on oath. There is no material to show as to why victim falsely implicated the Accused in the present matter though she admitted that she was in love with the Accused.

48. The observations/findings of the learned Trial Court with regard to the sexual offence therefore need no interference. We are convinced that material produced by the Prosecution is cogent and

convincing to prove the charge levelled against the Accused. We, therefore, are not inclined to interfere with the findings of the learned Trial Court thereby holding Accused guilty for the offence punishable under Section 376 of IPC and Section 4 of POCSO Act.

49. It, therefore, brings us to the challenge raised by the State on the limited ground of awarding sentence which is below the minimum provided by the Act.

Point No.2

50. The learned Additional Sessions Judge after hearing the Accused on the point of sentence observed in para 22 that Section 376 of IPC provides that if a person is convicted for the offence of rape, the Court can pass a sentence of imprisonment for not less than seven years, which may extend to life. However, placing reliance in the case of *Pushpanjali Sahu* (supra), which refers to the proviso giving power to the Court to reduce the sentence by giving appropriate reasons, which could be less than the minimum prescribed sentence, considered the fact that the victim willingly went with the accused as she was in love with him and had sexual intercourse. The victim thereafter ran away from her house on her own, met accused and went to Karnataka. These facts were considered as mitigating circumstances in favour of the accused for reducing the sentence below the minimum prescribed.

51. Shri Faldessai has rightly pointed out that while doing so, the learned Additional Sessions Judge completely missed out/ignored the fact that the proviso to Section 376 of IPC was removed from the statute book in the year 2013 itself. The said proviso reads thus:-

"Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

52. The Criminal Law (Amendment) Act, 2013 was brought into force on 03.02.2013 wherein Section 375 and Section 376-A to 376-D was amended. The proviso appended to Section 376 of IPC was deleted.

53. Subsequently, by Amendment Act 22/2018, the minimum punishment which was earlier found in Section 376 of IPC as seven years was amended thereby inserting "shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine". This amendment came into effect from 21.04.2018.

54. The offence in the present matter is dated 14.01.2014. Thus, the proviso to Section 376 of IPC as quoted earlier, was not on the statute book as on the date of commission of the offence since it was deleted in the year 2013 itself. Relying on such deleted proviso and reducing the sentence below minimum prescribed, is therefore patently illegal and that learned Trial Court erred in exercising jurisdiction which was not vested in it.

55. In the case of *Pushpanjali Sahu* (supra), the incident took place prior to 1995 and therefore, reliance was placed on the proviso for the purpose of reducing sentence below the minimum prescribed by the High Court though it was not accepted by the Supreme Court for the reasons assigned. These observations are found in para 8 of the said decision. Thus, the learned Trial Court committed serious error

in relying upon the said decision which is not applicable to the matter in hand for the simple reason that proviso to Section 376 of IPC under which discretion was given to the Court to reduce sentence below the minimum prescribed, was deleted in the year 2013 itself.

56. The Accused is also found guilty for the offence punishable under Section 4 of POCSO Act 2012 wherein the punishment provided reads thus:-

"Section 4. Punishment for penetrative sexual assault.- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

57. Subsequently in the year 2019 and in view of the amendment to Section 376 of IPC, Section 4 of POCSO Act was amended thereby deleting the words "seven years" and inserting the words "ten years" with regard to minimum sentence.

58. Thus, Section 4 of POCSO Act nowhere gives any discretion to reduce the minimum sentence provided under the said provision.

59. In the case of *State of Madhya Pradesh vs. Vikram Das* (supra), the Supreme Court was dealing with the offence under Section 3(i) (xi) of the SCST (Prevention of Atrocities) Act, 1989 and more specifically the sentence awarded by the Madhya Pradesh High Court, reducing it to the sentence already undergone and enhancing the fine. After considering the provisions of Section 3 of the Act of 1989, the Supreme Court refused to exercise its powers under Article

142 of the Constitution to thereby reduce the sentence below the minimum prescribed.

60. In the case of *Mohd Hashim vs State Of UP and Others*²⁰, was considered wherein it is observed in para 19 as under:-

"19. Learned counsel would submit that the legislature has stipulated for imposition of sentence of imprisonment for a term which shall not be less than six months and the proviso only states that sentence can be reduced for a term of less than six months and, therefore, it has to be construed as minimum sentence. The said submission does not impress us in view of the authorities in Arvind Mohan Sinha; (1974) 4 SCC 222 and Ratan Lal Arora; (2004) 4 SCC 590. We may further elaborate that when the legislature has prescribed minimum sentence without discretion, the same cannot be reduced by the Courts. In such cases, imposition of minimum sentence, be it imprisonment or fine, is mandatory and leaves no discretion to the court. However, sometimes the legislation prescribes a minimum sentence but grants discretion and the courts, for reasons to be recorded in writing, may award a lower sentence or not award a sentence of imprisonment. Such discretion includes the discretion not to send the accused to prison. Minimum sentence means a sentence which must be imposed without leaving any discretion to the court. It means a quantum of punishment which cannot be reduced below the period fixed. If the sentence can be reduced to nil, then the statute does not prescribe a minimum sentence. A provision that gives discretion to the court not to award minimum sentence cannot be equated with a provision which prescribes minimum sentence. The two provisions, therefore, are not identical and have different implications, which should be recognized and accepted for the PO Act."

20 (2017) 2 SCC 198

61. Having said so, reduction of sentence below the minimum prescribed in this case is considered to be without jurisdiction and relying upon the proviso which was deleted in the year 2013 is serious error. Since there is no discretion left to reduce the sentence below the minimum prescribed, the order of awarding sentence of only one year therefore, needs interference. Thus, the appeal filed by the State needs to be allowed thereby quashing a portion of the Judgment of the learned Trial Court wherein the sentence is awarded only to undergo imprisonment for a period of one year. Thus, we quash and set aside the sentence awarded by the learned Trial Court to the Accused.

62. Since Accused is found guilty for the offence punishable under Section 376 of IPC and at the relevant time, the minimum sentence which the Court was required to award was seven years, we direct the Accused to undergo rigorous imprisonment for a period of seven years for the offence punishable under Section 376 of IPC. The fine amount awarded by the Trial Court is however maintained along with the default sentence except with the modification that in default of payment of fine, Accused shall undergo simple imprisonment for a period of three months.

63. We observe that though Accused was found guilty for the offence punishable under Section 4 of POCSO Act, 2012 along with Section 376 of IPC, no separate sentence has been awarded by the learned Trial Court for such offence punishable under Section 4 of POCSO Act. It is necessary to award sentence against each offence though it is same or similar under two different Acts.

64. We, therefore, direct that the Accused shall also undergo rigorous imprisonment for a period of seven years for the offence punishable under Section 4 of POCSO Act and to pay fine of ₹15,000/- and in default to undergo three months simple imprisonment. If the amount of fine is paid, the same shall be paid to the victim as compensation.

65. We direct that both the sentences shall run concurrently. The period during which Accused was in custody, shall be set off against substantive sentences awarded above.

66. Accused shall surrender before the learned Trial Court within a period of 15 days from the date of passing of this order. If the Accused fails to surrender within the above period, the learned Trial Court is directed to take necessary steps in accord with law.

67. Criminal Appeal No.29/2021 is therefore allowed in above terms. Criminal Appeal No.4/2022 filed by the Accused is hereby dismissed.

BHARAT P. DESHPANDE, J.

M.S. SONAK, J.

JOSE
FRANCISCO
DSOUZA

Digitally signed by JOSE
FRANCISCO DSOUZA
Date: 2023.01.05
14:45:42 +05'30'